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POWERS

Erasmus+ Jean Monnet Network
Peace, War and the World in European Security Challenges

INTERCONNECTED AND MULTIFACETED SECURITY
PILLARS, DRIVERS AND REGIONAL CHALLENGES

Edited by Paolo Bargiacchi

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The volume comes from the International Spring School on *International Security, Human Security and the EU Global Strategy*, held at Kore University of Enna (Italy) on 26-29 April 2022 (see the Final Agenda of the International Spring School at pp. 253-258)

The International Spring School brought together, in person or online, more than 30 speakers and 170 participants from Italian and foreign Universities. Notably, most speakers were young researchers, Ph.D. students and master students

The International Spring School was one of the major events of the 2018-2022 **POWERS project** (Project Number: 599962-EPP-1-2018-1-RU-EPPJMO-NETWORK; Grant agreement No. 2017–3334/023-001), Erasmus+ Jean Monnet Network (***Peace, War and the World in European Security Challenges***): http://powers-network.vsu.ru/en/home/

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PREFACE

In a globalized world, security has become a multifaceted concept which is interconnected with a myriad of different variables, fields and developments and whose conceptual and operative borders are difficult to draw. Today, the hyper-complex society is hungry for security at every level (global, international, regional, sub-regional, local) and every international actor searches and defends its own security (States, international organizations, non-state actors, multinationals, civil society, NGOs, individuals, etc.). The volume, divided in four sections and nineteen chapters, aims to shed light on some aspects of the overall political and normative framework on security, obviously without claiming to be exhaustive.

Rule of law, democracy promotion, responsibility to protect and human security are the *pillars* of the multilevel security system, at least for many States and some international organizations. Accordingly, *Section I* focuses on the concept of the rule of law (Corso) and the promotion of democracy worldwide by the EU (Finizio) but also on the expansion of authoritarianism and decline in global freedon (Aknur) and on the lacking implementation of the responsibility to protect in the Ukrainian armed conflict (Marquéz Carrasco).

Being a multifaceted and interconnected concept, the greater or lesser degree of security ends up depending on multiple variables or *drivers*: some increase the degree, others decrease it, still others have positive or negative effects depending on the use made by international actors (i.e., food security can be used as a stabilizer or, in contrast, a weapon in international relations). Therefore, *Section II* deals with some drivers: *a*) increasing the overall degree of the security system, such as women (Iachetta), justice (Cassarà) and international humanitarian law (Garay Gómez); *b*) strengthening or instead affecting the security system depending on their use, such as food (Finocchiaro) and antitrust (and economic and financial) policies (Samperi); *c*) decreasing the overall degree of the security system, such as piracy (Bruno & Persio), human trafficking and transnational organized crime (Paladino and Silvia Jelo di Lentini).

Migration is a core issue in security studies as well as in the conduct of States and non-state actors at global level. Accordingly, *Section III* analyses migration as a case study on security: *a*) exploring the concept of securitization (Saraykina), even as implemented in France by the National Front Party (Kayar); *b*) reviewing the ECJ decisions against the Visegrad States in the time of the migration crisis (Çilingir); and *c*) suggesting sustainable investments in Northern Africa to mitigate the impact of migration on the EU (Macca & Pochi).

Finally, *Section IV* devotes its attention to three regional challenges to security whose unintended and/or long-term effects have however crossborder and transnational consequences, such as: *a*) the abolition of the death penalty in South Africa and Botswana (Kizilkoca & Ünalp Çepel); *b*) the coltan and cobalt mining industry in the Democratic Republic of Congo (Federico Jelo di Lentini); *c*) the Turkish foreign policy towards the Kurdistan Regional Government (Nuri).

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This volume comes from the International Spring School on *International Security, Human Security and the EU Global Strategy*, held at Kore University of Enna (Italy) on April 2022, whose Final Agenda can be read at pp. 253-258. The International Spring School was one of the major events of the 2018-2022 POWERS project, an Erasmus+ Jean Monnet Network (*Peace, War and the World in European Security Challenges*) involving nine Higher Education Institutions from France, Germany, Italy, Jordan, Russia, Spain and Turkey (http://powers-network.vsu.ru/en/home/). The International Spring School brought together, in person or online, more than 30 speakers and 170 participants from Italian (Kore, Turin, Catania, G. Marconi of Rome) and foreign Universities (Dokuz Eylül, Seville, Georg-August-Universität Göttingen, Sciences Po Bordeaux, Miami School of Law, Charmo). Notably, most speakers were young researchers, Ph.D. students and master students.

Strictly speaking, however, *Interconnected and Multifaceted Security. Pillars, Drivers and Regional Challenges* cannot be considered as the proceedings of the International Spring School because some speakers could not submit a chapter due to study or research commitments (the process of editing and publishing the book had very tight time) while all the authors revised and expanded their original papers, briefly presented at the Spring School, to submit more coherent, accurate and comprehensive chapters. It is noteworthy that, out of nineteen chapters, only five are authored by Professors while all remaining chapters are authored by young researchers, Ph.D. students and master students.

As Editor of the volume and Convenor of the Spring School, my sincere and hearty thanks go to all the Italian and foreign Colleagues, young researchers, Ph.D. students and master students who supported, attended and participated the POWERS events and to my Colleague and friend Anna Lucia Valvo, Editor-in-Chief of *KorEuropa* – the Online Law Journal of Kore University's European Documentation Centre that publishes this volume as its Special Issue (July 2022) – and former member of the POWERS research unit of Kore University.

Paolo Bargiacchi

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ABBREVIATIONS

AC – Appeals Chamber of the International Criminal Court
ACP – African, Caribbean and Pacific countries
ACtJHR – African Court of Justice and Human Rights
AFSJ – Area of Freedom, Security and Justice
AJS – American Journal of Sociology
Am. J. Comp. L. – American Journal of Comparative Law
Am. J. Int'l L. – American Journal of International Law
Am. J. Public Health – American Journal of Public Health
Am. U. J. Int'l L. & Pol'y – American University Journal of International Law and Policy
Antitrust L. J. – Antitrust Law Journal
APRM – African Peer Review Mechanism
ASEAN – Association of South-East Asian Nations
ATAD – Akademik Tarih ve Araştırmalar Dergisi
AU – African Union
B.C. L. Rev. – Boston College Law Review
Brit. J. Pol. Sc. – British Journal of Political Science
Brown J. World Aff. – Brown Journal of World Affairs
CAR – Central African Republic
Cardozo L. Rev. – Cardozo Law Review
Cass. pen. – Cassazione penale
CEAS - Common European Asylum System
CESCR – Committee on Economic, Social and Cultural Rights
CFSP – EU Common Foreign and Security Policy
Chi.-Kent L. Rev. – Chicago-Kent Law Review
Cornell Int'l L. J. – Cornell International Law Journal
Cornell L. Rev. – Cornell Law Review
CSDF – EU Common Security and Defence Policy
CSO – Chief sustainability officer
DoS – Denial of Service
DRC – Democratic Republic of Congo
DRF – Democracy, rule of law, and fundamental rights
E. Eur. Const. Rev. – East European Constitutional Review
ECCAS – Economic Community of Central African States
ECHR – European Convention on Human Rights (Rome, 1950)

ECJ – European Court of Justice
ECOSOC – UN Economic and Social Council
ECtHR – European Court of Human Rights
EEA – European Economic Area
EEC – European Economic Community
EJIL – European Journal of International Law
EJIR – European Journal of International Relations
EJLS – European Journal of Legal Studies
ESF – European Social Fund
EU – European Union
EUNAVFOR – EU Naval Force in Somalia (Operation Atalanta)
Fordham L. Rev. – Fordham Law Review
For. aff. – Foreign Affairs
FTC – US Federal Trade Commission
GDP – Gross Domestic Product
Geneva Convention – Convention Relating to the Status of Refugees
Geo. L. J. – Georgetown Law Journal
Hous. J. Int'l L. – Houston Journal of International Law
HSBC – The Hong Kong and Shanghai Banking Corporation
Hum. Rights Rev. – Human Rights Review
ICC – International Criminal Court
ICC IMB – International Chamber of Commerce's International Maritime Bureau
ICESCR - International Covenant on Economic, Social and Cultural Rights (New York, 1966)
ICISS – International Commission on Intervention and State Sovereignty
ICJ – International Court of Justice
I.C.J. Reports – International Court of Justice Reports of Judgments, Advisory Opinions and Orders
ICRC – International Committee of the Red Cross
IHL – International Humanitarian Law
IHRL – International Human Rights Law
ILC – International Law Commission
ILO – International Labor Organization
IMO – International Maritime Organization
Int. Arch. Occup. Environ. Health – International Archives Occupational and Environmental Health
Int'l Migration Rev. – International Migration Review
Int'l Org. L. Rev. – International Organizations Law Review
Int'l Rev. Red Cross – International Review of the Red Cross
INTERPOL – International Criminal Police Organization
IOM – International Organization for Migration

IRL – International Refugee Law
ISQ – International Studies Quarterly
ISWA – International Solid Waste Association
ITU – International Telecommunication Union
J. Common Mkt. Stud. – Journal of Common Market Studies
J. Conflict & Sec. L. – Journal of Conflict and Security Law
J. Int'l Crim. Just. – Journal of International Criminal Justice
J. L. & Econ. – Journal of Law and Economics
J. Radiol. Prot. – Journal of Radiological Protection
JAES – Joint EU-Africa Strategy
JECLAP – Journal of European Competition Law & Practice
JEP – Journal of Economic Perspectives
JET – Just Ecological Transition
JHA – Justice and Home Affairs
JIT – Joint Investigation Team
JPE – Journal of Political Economy
JSAS – Journal of Southern African Studies
JSPP – Journal of Social and Political Psychology
KRG – Kurdistan Regional Government
KRI – Kurdistan Region of Iraq
LCP – Law and Contemporary Problems
Leiden J. of Int'l L. – Leiden Journal of International Law
LNG – Liquefied natural gas
Melb. J. Int'l L. – Melbourne Journal of International Law
MDG – Millennium Development Goals
MENA – Middle East and Northern Africa
MERIA Journal – Middle East Review of International Affairs
MERCOSUR – Mercado Común del Sur
MFA – Ministry of Foreign Affairs
Mich. J. Int'l L. – Michigan Journal of International Law
Mich. L. Rev. – Michigan Law Review
MJES – Marmara Journal of European Studies
MLR – Modern Law Review
Nat. Sustain. – Nature Sustainability
NBER – National Bureau of Economic Research
Neb. L. Rev. – Nebraska Law Review
NEPAD – New Partnership for Africa's Development
NGO – Non-governmental organization
OAU – Organization of African Unity
OECD – Organisation for Economic Co-operation and Development
OJ – Official Journal of the European Union
OPDSC – Organ on Politics, Defence and Security Co-operation

OTP – Office of the Prosecutor of the International Criminal Court
PAP – Pan-African Parliament
Persp. L. Pub. Admin. – Perspectives of Law and Public Administration
PKK – Partîya Karkerén Kurdîstan (Kurdistan Workers' Party)
Psychol. Bull. – Psychological Bulletin
PTC – Pre-Trial Chamber of the International Criminal Court
PYD – Kurdish Democratic Union Party
QJE – *The Quarterly Journal of Economics*
R2P – Responsibility to Protect
Regulation Dublin III – Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013
RES – Resolution
Riv. coop. giur. int. – Rivista della Cooperazione Giuridica Internazionale
Riv. dir. int. – Rivista di diritto internazionale
Rome Statute – Statute of the International Criminal Court (Rome, 1998)
S. Afr. J. Int'l Aff. – South African Journal of International Affairs
SAARC – South Asian Association for Regional Cooperation
SADC – Southern African Development Community
SADCC – Southern African Development Coordination Conference
SAR – Search and rescue operation
SDG – Sustainable Development Goals
SGEI – Services of general economic interest
SME – Small and medium-sized enterprises
STEM – Science, Technology, Engineering and Mathematics
TCN – Third-Country National
TEU – Treaty on European Union
TFEU – Treaty on the Functioning of the European Union
TFG – Transitional Federal Government of Somalia
THB – Trafficking in human beings
TOC – Transnational organized crime
UK – United Kingdom of Great Britain and Northern Ireland
UN – United Nations
UNCLOS – UN Convention on the Law of the Sea (Montego Bay, 1982)
UNDP – United Nations Development Programme
UNGA – United Nations General Assembly
UNGAR – United Nations General Assembly resolution
UNHCR – United Nations High Commissioner for Refugees
UNODC – United Nations Office on Drugs and Crime
UNSC – United Nations Security Council
UNSCR – United Nations Security Council resolution
UNSG – United Nations Secretary-General
UNU – United Nations University

US – United States of America
USSC – United States Supreme Court
U. Chi. L. Rev. – University of Chicago Law Review
U. Pa. L. Rev. – University of Pennsylvania Law Review
Va. J. Int'l L. – Virginia Journal of International Law
Wis. Int'l L. J. – Wisconsin International Law Journal
V4 – The Visegrad Group (Hungary, Poland, Slovakia, Czech Republic)
VET – Vocational and Educational Training
WHO – World Health Organization
WPS – Women, Peace, and Security Agenda
WTO – World Trade Organization
WWI – First World War
WWII – Second World War
Y. ILC. – Yearbook of the International Law Commission
Yale L. J. – Yale Law Journal

SECTION I

PILLARS OF SECURITY

RULE OF LAW, DEMOCRACY AND RESPONSIBILITY TO PROTECT

SOME REFLECTIONS ON THE INTERNATIONAL RULE OF LAW

Lucia Corso

ABSTRACT: The article proposes a distinction between anatomical and teleological accounts of the rule of law conceptions, and attempts to apply the implications of this distinction to the concept of an international rule of law. The two central arguments recite that *a*) the rule of law cannot be understood independent of some sociological conditions, including the attitude of the practitioners, and *b*) that in order detect the elements of the international rule of law, a possible delimitation of the analyses to specific areas can be useful.

KEYWORDS: teleology; international rule of law; arbitrariness; limited cosmopolitanism.

CONTENTS: 1. *Against the anatomical approach to the rule of law*. – 2. *Teleological approaches to the rule of law*. – 3. *International rule of law*. – 4. *Teleology in the international affairs?*

1. *Against the anatomical approach to the rule of law*

The concept of an international rule of law (IROL) may refer to two distinct bundle of issues. In a first sense, the IROL is the rule of law (ROL) of the international legal order, which might be intended either as the cosmopolitan idea of a rule based international order[1], finding its highest expression in the auspice for a world constitution[2], and grounded on a

[1] WALDRON, *Are Sovereigns Entitled to the Benefit of the International Rule of Law*, in 22 *EJIL* 2 (2011), 315–343; the idea can be traced back to KANT, *The Idea for a Universal History with a Cosmopolitan Purpose*, in REISS (ed.), *Kant: Political Writings*, 2nd ed., Cambridge: Cambridge University Press 1991, 41-53.

[2] FERRAJOLI, *Per una costituzione della terra. L'umanità al bivio*, Milano: Feltrinelli Editore, 2022. For the debate among international lawyers, see for example KLABBERS, *Constitutionalism Lite?*, in 1 *Int'l Org. L. Rev.* 1 (2004), at 31; MACDONALD-JOHNSTON (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community*, Leiden: Brill 2005. For the suggestion to develop the International Court of Justice into a 'constitutional court of the world community', see VICUNA, *International Dispute Settlement in an Evolving Global Society. Constitutionalization, Accessibility, Privatization*, Cambridge: Cambridge University Press 2004, 18-28.

strong anti-sovereignty ethos[3], or as a law of coordination among contracting parties, States above all, resembling the laws of contracts.

In a second sense, the IROL refers to a more generic and various set of issues, such as the ROL in a globalizing world, or ROL promotion in its widest sense, which is in turn associated with vigorous international bureaucratic organizations vested with the task of dealing with the *export* of the ROL commodity around the world.

Most of international legal documents containing reference to the ROL assume indistinctively the two senses and, more importantly, make an explicit connection between these two.

During the 2005 UN World Summit, Member States unanimously recognized the need for "universal adherence to and implementation of the rule of law at both the national and international levels" and reaffirmed their commitment to "an international order based on the rule of law and international law"[4]. The Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels of 2012[5] expressly acknowledges the link between the two senses of the ROL by making a connection between the task of the international organizations to promote the ROL both at an international and at a state level and a peaceful world order based on the ROL. The ROL is identified as one of the key elements of conflict prevention, peacekeeping, conflict resolution and peacebuilding[6]; and is also associated with different set of values and goals such as, among others, economic development[7], equity and inclusiveness[8], women and children rights protection[9], fight against corruption.

These two distinct approaches, the ROL as an international legal order and the ROL as a system to be promoted in all societies adhering to the United Nations, are both grounded on two very basic and yet contradictory ideas of human affairs, applicable also to international affairs. One idea can be identified with the liberal impulse to escape politics to

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[3] KOSKENNIEMI, *The Gentle Civiliser of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge: Cambridge University Press 2002; ID., *The Fate of Public International Law: Between Technique and Politics*, in 70 *MLR* 1 (2007), 1-30.

[4] UNGA, *60/1. 2005 World Summit Outcome*, A/RES/60/1, 24.10.2005, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

[5] UNGA, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67.1, 30.11.2012, available at https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf. (hereinafter 'A/RES/67.1').

[6] A/RES/67.1, I, 18.

[7] *Ibidem*, I, 7-8.

[8] *Ibidem*, I, 8.

[9] *Ibidem*, I, 16-17.

achieve peace[10]. Intended as an impulse, the path towards a cosmopolitan world governed by impartial rules is often deemed to be natural, and thus, to a certain extent unavoidable. Koskenniemi argues that while such an idea has characterized the international legal doctrine from its inception at the end of nineteenth century, it has been fortified after 1989, the year in which even the representative of the Soviet Union at the same session of the General Assembly explained that there was the need to "arrive at a comprehensive international strategy for establishing the primacy of law in relations between states"[11]. The second idea has to do with the *managerial turn* in the international law, whereby to achieve international rules' objectivity, lawmaking has been assigned to specialized institutions whose legitimacy rests on their expertise and competence[12]. The natural path assumed by the first idea has been replaced by the managerialism of the second.

The combination of the two approaches to the IROL, the one intended as a formalist cosmopolitan order governed under the law and, the other as a goal to be promoted around the world, has both theoretical and practical implications.

At a theoretical level, it has entrenched the opinion of the *apolitical* and therefore *asocial* nature of the ROL and, at a practical level, it has resulted in the funneling of billions of dollars to commissions and subcommissions to draw lists of indicators of the ROL. For example, since 2011 the Venice Commission has adopted series of Reports on the Rule of Law (the first: CDL-AD(2011)003rev), which provided a checklist to evaluate the State of the Rule of Law in single States. These core elements which have been identified are: (1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty;

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[10] KOSKENNIEMI, *The Politics of International Law*, in 1 *EJIL* 4 (1990), at 6.

[11] Memorandum: *On Enhancing the Role of International Law*, UN Doc. A1441585 (2 October 1989), quoted in KOSKENNIEMI, *supra* footnote 10, 6.

[12] "The old international law project aimed to replace sovereignty by an international system of rights presumed as authentic, pre-political and coterminous with each other. No struggle was needed. The rights would realise themselves as soon as the obstacle of sovereignty to 'freedom' was lifted. Yet, this did not happen. Instead, the international was occupied by an enormous number of policies with a plethora of institutions in which every claimed benefit parades as a 'right' of this or that group. Priorities and choices must be made in the absence of political institutions, however, the choices will be made by experts and advisors, economists, technicians, scientists and lawyers, all having recourse to the technical vocabularies of ad hoc accommodation, co-ordination and optimal effect. Utilitarianism is the political constitution of a de-politicised world. But if functional systems are as indeterminate as law, religion, or nationalism, the question is not so much which regime should rule us, but whose understanding of it should be authoritative, or more concretely, which experts should possess jurisdiction" (KOSKENNIEMI, *The Fate*, *supra* footnote 3, at 27-28).

(3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Nondiscrimination and equality before the law.

For each core feature, the Commission has provided some indicators to determine whether the requirements are met. For example, to verify legality the Report suggests to ascertain whether supremacy of law be grounded on some parameters such as the existence of a written constitution, conformity of legislation to the constitution, conformity of government regulations to laws enacted by the parliament, an independent judicial review where to appeal in case of lack of compliance, and so forth[13].

Similarly, at the United Nations level, following the publication of 'Rule of Law Indicators' in 2011, the UN General Assembly adopted in 2012 the Resolution cited above.

While the ROL promotion has resulted in institutional – mostly judicial – reforms, the ROL has more and more been identified with some *anatomical features,* which however neglected the social dimension. No wonder then that most of the projects to export the ROL around the world have not been satisfying. Martin Krygier, who is one of the main detractor of the anatomical approach to the ROL, has highlighted that most of the promoters and observers of these efforts have begun to issue crestfallen reports[14] and that "in developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity"[15].

When the enactment of a civil code in Russia does not promote a reliable form of capitalism and when the revision of the criminal code in Afghanistan does not prevent warlords from creating havoc, where the studying in America of Chinese professors does not result in the suppression of the practice of killing or arresting political dissidents, where people who count in a given community keep ignoring the law, despite the laws have been enacted following Western models, when all of these

[13] European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, adopted on 11-12 March 2016.

[14] See JENSEN-HELLER (eds.), *Beyond Common Knowledge. Empirical Approaches to the Rule of Law*, Stanford: Stanford University Press 2003; and CAROTHERS (ed.), *Promoting the Rule of Law Abroad. In Search of Knowledge*, Washington: Carnegie Endowment for International Peace 2006, both quoted in KRYGIER, *The Rule of Law: Legality, Teleology, Sociology*, in PALOMBELLA-WALKER (eds.), *Re-locating the Rule of Law*, Oxford: Oxford University Press 2009, 45-70.

[15] *Ibidem*, 58.

events occur, the theorists of the ROL cannot simply allege a discrepancy between their wish list and the brutal reality, but have to do more.

In other words, the focus on institutional building, and on judicial reform above all, not solely might shade light on the widening gap between theory and practice, but might, more correctly, be an incentive to change the theoretical approach to the ROL, by switching from an anatomical approach to a teleological. Rather than enquiring what should be the features of a ROL system we might more correctly ask: what is the internal goal of the ROL? How could it be reached? Solely after, we might address the issue of an IROL.

2. *Teleological approaches to the rule of law*

The most basic understanding of the ROL is the idea that governing through rules – holding certain features – such as generality, perspectivenss, and so forth – is better than leaving the government to men and politics. Such a principle is held to be true even where wise governors are available. Aristotle for example, who on this account was objecting the ideas laid down in Plato's Republic, argued that the government of rules is preferable even to the government of the wisest men[16].

One of the first account of the ROL might be found in the Book of Esther. There, the Babylonian King, Ahasuerus, is convinced by a treacherous advisor (Haman) to persecute the Jewish people. The King thus issues a decree, wich the Hebrew text refers to as *DAT*, whereby all Jewish people shall be exterminated. After acknowledging his mistake, the King is unable to annul his formal decree, because the DAT, once issued has achieved an autonomous life, which is independent of its author. He is therefore forced to issue another DAT which contrasts the effect of the first, and which concedes to the Jewish community the right to the resist to the acts of persecution. In this first primitive sense, the ROL occurs where the rule issued becomes independent of its author and thus irrevocable.

More recent accounts have a less primitive outlook, although full agreement is far from having being reached[17]. Albert Dicey famously argued in favor of three cores: the principle of legality in criminal matters; equality before the law, and rights to be assessed by an independent

[16] ARISTOTLE, *Politics*, 1310a, 14-17.
[17] WALDRON, *Is the Rule of Law an Essentially Contested Concept (in Florida)?* in 21 *Law and Philosophy* 137 (2002).

judiciary. Property rights had a prominent position[18]. Hayek defined the ROL system as a system of simplified legal rules, where economic investments and liberties could flourish[19].

Analytical philosophers, such as Lon Fuller[20] and Joseph Raz[21], have suggested to focus on the features laws shall have for a ROL system to persist and indicated eight (sometime more) characteristics, such as clarity, perspectiveness, practicability and so forth. Others have provided thicker versions of the rule of law[22], stressing the importance of more substantial values such as human rights and democracy[23].

The teleological approach to the ROL starts with a different enquire.

Rather than focusing on the features laws and legal institutions shall have for a ROL system to exist, it enquires on the internal goals of the ROL. Francesco Viola, for example, argues that the purpose of the ROL is not to establish the just law, but to set those conditions upon which a society is governed by law and not by the whims of men. It is true that it requires autonomy of human beings, but not as a central political value – otherwise the rule of law would only be valid for liberal societies[24]. Thus, the ROL not solely requires that citizens are to a certain extent free and capable to understand the rules and the reasons behind them, but also implies that the actors of the ROL system be involved in some kind of co-operation, so that the ROL be seen as a cooperative enterprise among legislator, officials and citizens, in which each one has a specific role: to dictate general and practicable rules, to interpret them and apply them in a suitable way, and take them as a guide for his or her own behaviour[25].

Gerald Postema claims that the law rules when it provides protection and recourse against the arbitrary exercise of power through the distinctive instrumentalities, powers and capacities of law[26], while Martin

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[18] DICEY, *Introduction to the Study of the Law of the Constitution*, 10th ed., London: Macmillan 1961, 202.

[19] HAYEK, *The Road to Serfdom*, London: Routledge 1944, 54; ID., *The Political Idea of the Rule of Law*, Cairo: National Bank of Egypt 1955, 34.

[20] FULLER, *The Morality of Law*, New Haven: Yale University Press 1964.

[21] RAZ, *The Rule of Law and its Virtue*, in RAZ, *The Authority of Law: Essays on Law and Morality*, Oxford: Oxford University Press 1979, 210.

[22] CRAIG, *Formal and Substantive Conception of the Rule of Law: An Analytical Framework*, in *Public Law*, 1997, 467-487, at 473.

[23] LORD BINGHAM, *The Rule of Law*, New York-London: Penguin 2011.

[24] VIOLA, *Law and Legal Cultures in the 21st Century*, in GIZBERT STUDNICKI-STELMACH (eds.), *Unity and Diversity*, Alphen aan den Rijn: Wolters Kluwer 2007, 105-131, at 105.

[25] *Ibidem*, 106.

[26] POSTEMA, *Trust, Distrust, and the Rule of Law*, in MILLER-HARDING (eds.), *Fiduciaries and Trust: Ethics, Politics, Economics and Law*, Cambridge: Cambridge University Press 2019.

Krygier assigns to the ROL mainly two goals: taming arbitrary power and enabling social cooperation[27]. All three authors make several additional claims, some of which play the most relevant role in our discussion. First, that many institutional designs might be compatible with the ROL. In the vein of Aristotle, all three authors seem to reject the idea of a unique institutional setting which allegedly shall be identified with the prototypical ROL system. Second, all authors emphasize the need of a peculiar attitude in the main actors of the ROL practice. Postema claims that law can rule in a political community only when its members, official and lay members alike, take responsibility for holding each other accountable under the law. This means that an ethos of fidelity is fundamental to the vitality of the rule of law and that accountability is a key component of trust-supporting moral and social relationships. The ROL cannot be understood but by assuming an internal point of view of the actors of the practice[28]. Martin Krygier urges to look into the sociological components of the ROL to detect when and where the law really counts[29]. If law is not taken seriously, lawyers can do very little.

3. *International rule of law*

The difference between the anatomical and teleological approaches has repercussions on the discussion on the IROL[30]. While the anatomical concept has mostly led to the checklist approach discussed under § 1 and intended the ROL promotion mostly as a series of institutional reforms, the teleological approach may bring to a more pronounced varieties of outcomes. For example, Ian Hurdy has discarded the two most common readings of the IROL, such as ROL based on compliance and ROL based on the domestic analogy and has advanced the proposal of reading the IROL as the ubiquitous practice of states using international law to justify their policies. In such a view, the IROL is mainly the justification used by legal actors – not solely states but NGOs, and private actors – in the

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[27] KRYGIER, *Four Puzzles about the Rule of Law: Why, What, Where? And Who Cares?*, in FLEMING (ed.), *Getting to the Rule of Law*, New York: Nomos 2011, 64-104.
[28] VIOLA, *supra* footnote 24, 115.
[29] KRYGIER, *The Rule of Law after the Short Twentieth Century: Launching a Global Career*, in NOBLES-SCHIFF (eds.), *Law, Society and Community: Essays in Honour of Roger Cotterrell*, Farnham: Ashgate Publishing 2014, 327-346.
[30] BEAULAC, *The Rule of Law in International Law Today*, in PALOMBELLA-WALKER, *supra* footnote 14, 197-223. See also, KUMM, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, in 44 *Va. J. Int'l L.* 19 (2003-2004).

international legal arena[31]. Isabel Trujillo has provided a more articulate account of the IROL where the legal interpretation plays a central role[32]. Starting from the commonly agreed assumption of the existence of a massive international legal material[33], Trujillo proposes to seek for the ROL not in the institutional setting provided by the international legal documents but in the interpretative practice of the relevant actors. International jurists, the author argues, cannot be act as apologetic of power and interests or as utopians carrying out values and preferences. On the contrary they shall commit to the formalism required by the ROL, while at the same time attempting to fulfil some of the internal aims of the international legal material. The internal morality of international law, that is the IROL, cannot be detected but from inside the legal practice. It is not something *out there* but implies interpretation, argumentation and reflexivity, for example, on the history of international law doctrine[34], on some internal trends of the international legal rules, such as the fostering of democratization proceedings whereby non institutional actors can participate in[35], the balance between liberty and equality[36], and especially the taming of states and private actors' imperial desires[37].

Koskenniemi goes even farther and assigns to international jurists the task of reviving the "project of universal justice [..] as a horizon in the intersection of a public realm of states regulated by international law and the civil society reaching beyond sectarian interests"[38].

The author frames such a task in emphatic words which is worth recalling: "If for Kant (and for Kelsen) the transition from the realm of nature (or from raw desire and violence) to the realm of freedom in a 'kingdom of ends' takes place through law, this transition depends less on the inner force of (external) legislation than on the moral rectitude of those whose task is to apply it. As is well known, Kant's view of law is embedded in his philosophy of history. Progress towards increasing freedom

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[31] HURD, *What is the International Rule of Law?*, in SOLANA & SAZ-CARRANZA (eds.), *The Global Context: How Politics, Investment, and Institutions Impact European Businesses*, Barcelona-Madrid: ESADE 2015, 148-157.

[32] TRUJILLO, *Interpretazione del diritto internazionale e rule of law*, in 1 *Ars Interpretandi* 35 (2020).

[33] S. CASSESE, *Una furiosa espansione della legge? Spazio giuridico globale e rule of law*, in 1 *Rivista di filosofia del diritto* 109 (2014), 114, quoted in TRUJILLO, *supra* footnote 32, at 47.

[34] KOSKENNIEMI, *What Should International Lawyers Learn from Karl Marx?*, in 17 *Leiden J. Int'l L.* 229 (2004), 246.

[35] See also CASSESE, *supra* footonote 33, quoted in TRUJILLO, *supra* footnote 32, at 47.

[36] *Ibidem*, 45-46.

[37] *Ibidem*, 41.

[38] KOSKENNIEMI, *supra* footnote 34, 246.

becomes possible only if the experiences of the complex, obstacle-laden learning process that is history are integrated into the practice of judgment. In this perception, jurists rather than positive rules become law's nucleus, as educators and enlighteners, a conclusion that Savigny, soon after Kant, drew from the historicity of law"[39].

Koskenniemi draws some conclusions on the concept of ROL. First, the ROL cannot mean 'legalism' in the form of fidelity to any particular meaning of the law as text or practice. Second, it cannot mean 'instrumentalism' either, defined as the systemic effort to look beyond legal rules to their assumed objectives.

Instead, the author argues that the ROL in this Kantian image relates to the way the law applier (administrator, public official, lawyer) approaches the task of judging with the spirit, or better, the mindset, of the legal profession[40].

4. *Teleology in the international affairs?*

The teleological accounts of the ROL urge to focus on the internal goals that the ROL wishes to achieve rather than the means. This however might result in partially different elements of the ROL depending on the practice we refer to.

For example, when dealing with the business of ROL promotion, ROL scholars cannot abstain from imagining the peculiar social, economic and cultural conditions which allow the ROL to flourish. As Stephen Holmes wrote few years ago, lawyers are trained to solve routine problems within routine procedures. They are not trained to reflect creatively on the emergence and stabilization of the complex institutions that lawyering silently presupposes. Ordinary legal training, therefore, is not adequate to the extraordinary problems faced by the manager of a legal development project in Russia[41].

ROL cannot be identified with legalism and thus with sole compliance with legal rules[42]. This is even truer for the IROL, intended as the international order governed by legal rules. The rule of law is based on the assumption of a reiterated social practice which legal rules play the function of equalizing and stabilizing. The ROL demands that similar

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[39] KOSKENNIEMI, *International Law: Constitutionalism, Managerialism and the Ethos of Legal Education*, in 1 *EJLS* 8 (2007), 18.
[40] *Ibidem*, 18.
[41] HOLMES, *Can Foreign Aid Promote the Rule of Law?*, in 4 *E. Eur. Const. Rev.* 68 (1999).
[42] For such a view, SCALIA, *The Rule of Law as the Law of Rules*, in 56 *U. Chi. L. Rev.* 1175 (1989).

cases are treated equally; that criminal procedural guarantees are respected; that due process is widely used; that imperialist drives are tempered.

What if this practice is difficult to detect or lacks peculiar features to make it fit for the ROL, or, as in the case of international affairs, is characterized by massive instability and fragmentation?

These questions may lead to two final remarks, which here can only be briefly sketched.

First, the international legal practice is characterized by a high degree of legal pluralism. We cannot address the IROL unless accepting that it be compatible with a state of affairs where the plurality of normative sources and the competition between distinct legal systems are very common. In order to identify and determine the legal rule to be applied to the particular case, it is necessary to take into account a double level of "internal point of view": one proper to the "juridical space", that is to the delimitation of the plurality of legal orders involved, and one proper to the particular legal order, that is to the "place" in which the law is concretized and is applied to the particular case[43].

Second, international affairs demand, more than internal affairs, that political choices, such as diplomacy, and extralegal factors (even wars, sometimes) play a central role in the task of tampering arbitrariness and allowing cooperation between the relevant actors. Intuitively, we sense the inadequacy of a legalist approach to address dramatic situations such abrupt acts of military aggression, genocide, or even the use of nuclear weapons. Relying on the UN Charter to prevent mass crimes or on the rule of the ICC to avoid the spread of bloody dictatorships might seem naïve and even misplaced. High is thus the temptation to conclude with the skeptical remark of the limited scope of the IROL. Yet, we might embark into a different path. By focusing on the goals the IROL wishes to achieve, not solely allowing cooperation between actors living in very distant part of the globe, but also making more civil the relations between actors holding extensive powers and actors lacking any real power[44], theorists of the ROL shall make the effort to reflect on the political and sociological conditions which can be useful in the struggle of humanity for a world less arbitrary, cruel and anarchic. Such a path might require that rather than thinking in terms of a world constitution, we start by delimiting the relevant practices of the ROL to more limited areas, such as Europe, the Mediterranean, the South East Asia, and so forth.

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[43] VIOLA, *supra* footnote 24, 115.

[44] KOSKENNIEMI, *supra* footnote 3.

THE EU'S INTERREGIONAL RELATIONS AND THE PROMOTION OF DEMOCRACY: THE CASE OF ZIMBABWE (2002-2013)

Giovanni Finizio

ABSTRACT: The development of interregional relations and the promotion of democracy are two pillars of the EU's external identity. The aim of this article is to assess whether the EU has been able to use its interregional relations with the Southern African Development Community (SADC) and the African Union (AU) to democratize partner organizations and their member countries. In particular, the role of the normative interaction with the EU occasioned by the breach of democratic principles in Zimbabwe between 2002 and 2013 is analyzed, focusing on three key factors: the normative gap between the EU and the partner organizations; the internal cohesion and external coherence of the EU; and the role of South Africa as regional leader in incorporating and applying liberal democracy throughout the region.

KEYWORDS: EU; democracy promotion; SADC; AU; interregionalism.

CONTENTS: 1. *Introduction: Democracy and interregionalism, pillars of the European Union's international identity*. – 2. *Democracy in the AU's and SADC's normative framework*. – 3. *The EU, democracy and the normative interaction with SADC and AU: the case of Zimbabwe*. – 4. *EU cohesion and consistency*. – 5. *Regional leaders as EU's allies in democracy-building? The case of South Africa*. – 6. *Conclusions*

1. *Introduction: Democracy and interregionalism, pillars of the EU's international identity*

In 1993, under the Treaty of Maastricht (TEU), the EU included explicitly and for the first time the promotion of democracy as one of its fundamental foreign policy objectives (Art. 11), something that no other international actor had ever done before. Democracy lies at the very foundation of the European integration project. Although it was not mentioned in the Treaties of Rome as an essential element of the European Economic Community (EEC), the United States supported European integration after the Second World War as a means to ensure a 'democratic' peace on

the continent, i.e. supported by the gradual transfer of sovereignty to a supranational authority and by the sharing of principles and values inherent to the Western bloc, of which democracy was an essential part. In 1973 the then nine EEC member countries declared that democracy was integral part of its identity[1], and, together with the accession of Greece to the Community in 1981, they established that a democratic regime was a fundamental precondition for EU membership. In 1993 this concept was formally established in the Copenhagen criteria, which made joining the EU subject to compliance with the principles of free market (democratic principle), respect for democracy, human rights, and rule of law (political principle), and the transposition of the *acquis communautaire*. Therefore, EU Member states and supranational institutions share a democratic identity, and the EU believes its own legitimacy as well as its effectiveness in promoting democracy elsewhere are derived from this: "The EU and its Member States act in support of democracy drawing on strong parliamentary traditions, based on the role of national Parliaments and regional and local assemblies in Member States and that of the European Parliament"[2].

While the EU is not alone in promoting democracy outside its borders, its willingness to build interregional relations is one of the EU's distinctive features, making it unique in international relations. No other actor makes the regional organizations which it promotes privileged partners, or no other actor does it to the same extent[3].

Through interregional relations the EU promotes the development of regional integration experiences on other continents somehow trying to export its model because "it can be considered as the only successful example of regional integration so far"[4]. In the EU's view, the promotion of "regionalism through interregionalism"[5] helps create the conditions for development and stability in other regions, can pave the way to the construction of a post-Westphalian order based on the overcoming of the anarchical structure of international relations[6] and, ultimately, contributes

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[1] Declaration on European Identity, Copenhagen, 14 December 1973.

[2] COUNCIL OF THE EU, *Council Conclusions on Democracy Support in the EU's External Relations. Towards Increased Coherence and Effectiveness*, 16081/09, Brussels, 17 November 2009.

[3] FINIZIO, *L'Unione Europea e la promozione del regionalismo: principi, strumenti e prospettive*, in FINIZIO-MORELLI (a cura di), *L'Unione Europea nelle relazioni internazionali*, Roma: Carocci 2015, 131-156.

[4] EUROPEAN COMMISSION, *European Community support for regional economic integration efforts among developing countries*, 16 June 1995, COM(95) 219, 8.

[5] DOIDGE, *The European Union and Interregionalism. Patterns of Engagement*, Farnham: Ashgate Publishing 2011, 50.

[6] TELÒ, *Europe: A Civilian Power? European Union, Global Governance, World Order*, London: Palgrave Macmillan 2006, 227-228.

to the affirmation and legitimation of its own role as civilian power and international actor[7].

In the 1990s both interregionalism and the promotion of democracy became two distinctive features of the "globalization of EU foreign policy" and of the evolving identity of an up-and-coming international actor. Above all, it was natural for the gradual mainstreaming of democracy and human rights in EU foreign policy to also involve interregionalism, and for the latter to ideally become a vector of the EU's "proactive cosmopolitanism", i.e. of its "deliberate attempt to create a consensus about values and behaviour - a cosmopolitan community - among diverse communities [and to push] the civil and political values of Western liberal states in other parts of the world"[8].

The promotion of democracy through interregional relations is linked to the EU's ability to use bi-regional relations to democratize the member states of its partner organization. This requires a normative interaction between the two organizations and the EU's ability to bring the regional partner group closer to democracy, transforming its political identity.

According to the constructivist approach to international relations, the fundamental structures of international relations are social constructions which contribute to forging the identities as well as the interests of the actors involved[9]. Therefore, identities and interests are continuously being constructed and deconstructed because they are the products of intersubjective interaction within shared structures of collective meaning. Regional organizations are international structures resulting from interactions and practices that express their existence, and they themselves contribute to building a collective identity. Therefore, the ability and willingness of a regional organization to promote democracy among its member states greatly depends on the extent to which a democratic regional identity exists, i.e. the extent to which the organization has internalized democratic values and there is a relative homogeneity of democratic states[10]. However, at the same time the identity of regional organizations is constructed and deconstructed through their relationship with external actors. The institutionalized relations with the EU – for instance the interregional

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[7] SÖDERBAUM *et al.*, *The EU as a Global Actor and the Dynamics of Interregionalism: A Comparative Analysis*, in 27(3) *European Integration* 365 (2005).

[8] TAYLOR, *The United Nations in the 1990s: Proactive Cosmopolitanism and the Issue of Sovereignty*, in 47(3) *Political Studies* 535 (1999), 540.

[9] WENDT, *Constructing International Politics*, in 20(1) *International Security* 71 (1995).

[10] VAN DER VLEUTEN, *Contrasting Cases: Explaining Interventions by SADC and ASEAN*, in RIBEIRO HOFFMANN-VAN DER VLEUTEN (eds.), *Closing or Widening the Gap? Legitimacy and Democracy in Regional Integration Organizations*, Farnham: Ashgate Publishing 2007, 156-157.

political dialogue – are the *locus* for regular contact among regional actors and for socialization, through which the EU contributes to the construction and quality of this regional identity. It is a process of identity-building that takes place through the interactions of three different levels – the EU, the regional organization and the member states. In this process, some specific cases of a breach of democratic values by a member state have at times been crucial.

This paper focuses on interregional relations between the EU and two regional organizations with which it has been attempting to establish co-operation on democracy-building in Africa: the Southern African Development Community (SADC) and the African Union (AU). Its objective is to assess whether the EU has been able to make interregional relations a tool for the ideational diffusion[11] of democratic principles at the level of member states as well as an instrument of concrete cooperation in favour of democracy-building[12]. More specifically, the EU has been engaged in a normative interaction with these organizations as a result of a case of breach of democratic principles by a member state, i.e. Zimbabwe. In particular, this article considers the period between March 2002 (when President Robert Mugabe, in power since 1980, was re-elected as a consequence of major election irregularities leading the EU to sanction the country and Mugabe's regime for the first time) and the first half of 2013 (when the EU eased sanctions and carried out a controversial re-engagement with Harare). This case has been chosen because, more than others, it has affected the life of both regional organizations, has been at the heart of the political dialogue between them and the EU, and has drawn the attention of the international community, leading to strong pressure from the West in particular.

Three premises are presented here that explain the EU's ability to promote democracy throughout the regional partner organization and its member states, in cooperation with it:

a) the greater the normative gap between the two organizations, the weaker the EU's influence in the field of democratization, especially if the Union's attitude is confrontational. When the partner organization does not share the EU's democratic identity, it is evidently less inclined to put pressure on or penalize its own member states in order to foster democratization and accommodate European pressure in this direction.

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[11] GRUGEL, *Democratization and Ideational Diffusion: Europe, Mercosur and Social Citizenship*, in 45 *J. Common Mkt. Stud.* 43 (2007).

[12] We consider here both SADC and AU since both – one at the sub-regional level and the other at the continental level – deal with the promotion of democracy, they are supposed to work in partnership and both have developed a partnership and a political dialogue with the EU in the field of democracy and human rights.

However, the normative gap is not invariable, but rather changes precisely through dialogue and confrontation with the EU. *Ceteris paribus*, the normative gap will restrict the EU's influence to a greater extent if there is a less asymmetrical power relationship between the EU and its partner region. In our case, the asymmetry between the EU and SADC/AU is bigger than, for instance, between the EU and ASEAN in Southeast Asia or MERCOSUR in Latin America;

b) secondly, the internal cohesion of the EU should be assessed with respect to the action to be taken in the specific case. Although the promotion of democracy and human rights is a goal shared by all Union members, there is constant debate and tension in the EU between countries which are traditionally more pragmatic, dialoguing and careful to reconcile ideals and national interests and countries which are more intransigent and in favour of intervening to respect these principles[13]. On the other hand, in these delicate situations even when the treaties allow for the use of the principle of majority, it is virtually impossible to proceed if a member country is firmly opposed to it. In general, the result is a tendency by the EU to formulate inconsistent policies dictated by the lowest common denominator, or even to deny its positions with artifices of various types;

c) equally important is the presence of one actor with leadership ambitions in the region, its own democratic identity, its own normative gap with respect to the EU, its propensity to incorporate the EU's democratic principles and model and its willingness and ability to apply them throughout the region. In other words, the aim is to investigate whether these regional leaders have contributed to what Amitav Acharya calls "constitutive localization" of the norms promoted by the EU[14].

In the SADC and the AU, this actor is South Africa.

2. *Democracy in the AU's and SADC's normative framework*

Both SADC and AU originated (in 1992 and 2001, respectively) from two pre-existing organizations, namely the Southern African Development Coordination Conference (SADCC) and the Organization of

[13] SMITH, *The Limits of Proactive Cosmopolitanism. The EU and Burma, Cuba and Zimbabwe*, in ELGSTRÖM-SMITH (eds.), *The European Union's role in International Politics. Concepts and Analysis*, London: Routledge 2006, 155-171, at 162.

[14] "Constitutive localization [is] a process in which external ideas are adapted to meet local practices […] the active construction of foreign ideas by the local actors, which results in the latter developing significant congruence with local beliefs and practices": ACHARYA, *Whose Ideas Matter? Agency and Power in Asian Regionalism*, Ithaca: Cornell University Press 2009, at 19 and 15.

African Unity (OAU). Since both – the former at sub-regional, the second at continental level – shared the objective of decolonization and economic and political liberation of the continent from external powers, it is no wonder that democracy was not mentioned among their principles and objectives, and that non-interference, respect for and protection of sovereignty and solidarity among member states, necessary for the emancipation of the continent from any oppression, were highly significant.

In the 1990s the liberal paradigm was incorporated by and adapted to the African context by a new generation of Pan-Africanist leaders who shared the idea of an *African Renaissance* advocated by Nelson Mandela, namely the vision of a more dynamic, united, democratic, stable and prosperous Africa[15]. SADCC and OAU, inadequate to fulfil these new principles and clearly ineffective, were thus replaced by the new organizations, which were more open to the free market and, at least rhetorically, to democratic principles. The promotion of democracy is one of SADC's objectives and it has equipped itself with a set of tools to fulfil this. The main relevant institution is the Organ on Politics, Defence and Security Co-operation (OPDSC), whose objectives include promoting the development of democratic institutions and practices in the region and encouraging the observance of universal human rights. Similarly, the AU's Constitutive Act acknowledges the promotion of democratic principles and institutions as well as popular participation and good governance among its objectives (Art. 3 *g*). Both organizations have adopted principles and guidelines governing democratic elections (in 2004 and 2002 respectively)[16] and both are often called to monitor elections in member states and have codified guidelines in this regard. In the AU framework, the New Partnership for Africa's Development (NEPAD) was created in 2001 to build a true partnership between African countries and international donors based on a pact that the powers of the North would ensure financial assistance and support to African peace-building and democracy-building capacities if Africans committed themselves to conflict resolution and the promotion of democracy and human rights[17].

Therefore, the normative gap between SADC and AU and the EU is apparently smaller compared to other organizazions such as ASEAN or SAARC, but the documents adopted are generally not binding, giving the

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[15] MATHEWS, *Renaissance of Pan-africanism: The AU and the New Pan-africanists*, in AKOKPARI *et al.* (eds.) *The African Union and Its Institutions*, Cape Town: Jacana Media 2008, 30.

[16] African states have also adopted the Charter on Democracy and Elections which entered into force in February 2012.

[17] LANDSBERG, *The Birth and Evolution of NEPAD*, in AKOKPARI et al., *supra* footnote 15, 211-212.

states great freedom in how they are implemented[18], and the observance of the principles contained therein is entrusted to peer review instruments, which are not very effective especially in the presence of non-democratic countries[19]. The result is that the commitment to democratization is often rhetorical, and some have questioned whether such instruments are only a mirage to satisfy (or deceive) international donors[20].

3. *The EU, democracy and the normative interaction with SADC and AU: the case of Zimbabwe*

In 1994 SADC and EU launched the so-called 'Berlin Initiative' to build a comprehensive, regular and increasingly institutionalized interregional dialogue. In its constitutional document the parties claimed to share universal values that find their expression in the respect for human dignity[21], and pledged to undertake a regular exchange of views on general matters of foreign policy in order to promote peace and stability in the Southern African region[22] and to support democracy and the rule of law, respect for human rights and the protection of minorities, the promotion of social justice and good governance[23]. However, the normative interaction between SADC and the EU on democratic setbacks in Zimbabwe has shown how this normative convergence is rhetorical rather than real, and how attempts by Brussels to bring the group closer to liberal democracy has in practice yielded mixed results.

Since the country's independence in 1980, the Mugabe regime has been responsible for an increase in corruption, human rights violations against its opponents and intolerance of dissent. One of the worst moments occurred with the March 2002 presidential election in which Mugabe was re-elected and serious irregularities and a boycott of the opposition led Brussels to suspend financial aid and shortly after to impose an arms embargo along with a visa ban and to freeze the assets of individuals who had been "included in one of the longest blacklists the EU had ever produced"[24].

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[18] GODSÄTER, *Southern African Development Community*, and KINGAH, *African Union*, in LEVI *et al.* (eds.) *The Democratization of International Institution. First International Democracy Report*, London: Routledge 2014, respectively 252-253 and 184.
[19] TAYLOR, *NEPAD. Towards Africa's Development or Another False Start?*, Boulder (Co.): Lynne Rienner 2005, 154.
[20] KINGAH, *supra* footnote 18, 184.
[21] EU-SADC Ministerial Conference, *Berlin Declaration*, 5-6 September 1994, § 1.
[22] *Ibidem*, § 4.
[23] *Ibidem*, § 2.
[24] PORTELA, *European Union Sanctions and Foreign Policy. When and Why Do They*

Through political dialogue, the EU sought SADC's support in these measures which, however, never came. Since 2000 divergent positions on the issue of Zimbabwe have instead emerged in the interregional meetings which have prevented an agreement from being reached on the subject[25]. In line with its principles of solidarity and non-interference, SADC preferred constructive engagement and quiet diplomacy rather offering its support in the search for solutions to improve the situation[26]. Above all, it has always rejected pressure and criticism from the EU, calling it an inappropriate intervention in African affairs[27], and supported Harare both politically and through the supply of energy[28].

Difficulties in normative interaction have compromised EU-SADC political dialogue in favour of other interregional contexts such as EU-Africa. However, even in this context, which involves the AU as a whole, European pressure has not been welcomed. Thanks to his past role asleader of the SADCC, Mugabe has been able to exploit EU sanctions to wave the flag of anti-imperialism and the defence of the sovereignty of the developing countries, thus ensuring the solidarity of many African countries. The leaders themselves of Nigeria and South Africa, Olesugun Obasanjo and Thabo Mbeki, at the forefront in promoting NEPAD and its principles, supported the view that criticism of Mugabe was part of a malevolent white racist conspiracy to recolonize Zimbabwe[29]. Mbeki regularly sided with Mugabe, stating that "we will never criticize Zimbabwe"[30], while Nigeria often helped block resolutions on the issue of Zimbabwe tabled by the EU within the UN Commission on Human Rights[31]. Furthermore, the EU-Africa Summit in 2003 was postponed several times due to the opposition of many African leaders to the EU's refusal to admit Mugabe.

The 2008 elections marked a turning point in SADC-EU cooperation on the issue of Zimbabwe. There were so serious irregularities and violence that even the SADC and the AU observers deemed the elections neither free nor fair. SADC undertook mediation that facilitated the conclusion in September 2008 of the so-called Global Political Agreement between Mugabe and the opposition, the formation of a national unity

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Work?, London: Routledge 2010, 140.

[25] EU-SADC Ministerial Meeting, *Final Communiqué*, 7-8 November 2002 (Maputo), 3.

[26] *Ibidem*, 4.

[27] SÖDERBAUM, *The Political Economy of Regionalism. The Case of Southern Africa*, London: Palgrave Macmillan 2004, 99.

[28] PORTELA, *supra* footnote 24, 44.

[29] TAYLOR, *supra* footnote 19, 105.

[30] *Ibidem*, 111.

[31] SMITH, *supra* footnote 13, 167.

government and the adoption of a new constitution (2013) which represented an improvement in democratic terms.

These developments have encouraged the emergence of a consensus between SADC and the EU on the need to support Zimbabwe on its electoral path[32] and for a gradual lifting of sanctions by the EU, with the exception of those on Mugabe and his family. Whether or not EU sanctions have been effective is a controversial issue[33] but the decision to ease them and to carry out a "hurried and unprincipled re-engagement"[34] with Harare has raised much criticism because progress in the country is modest and controversial[35]. The July 2013 elections, with a surprising victory for Mugabe, were not defined free and fair either by the opposition or by the EU itself[36]. The European choice has therefore been driven by self-regarding interests (e.g. the need to beat China in the rush for resources and markets and the interests of Belgium, the centre of global diamond trading) rather than by concrete improvements in the country. SADC and AU have instead expressed a positive opinion on the electoral process ("free, peaceful and generally credible" for SADC and "peaceful" for AU), demonstrating that their priority is not democratization but the stabilization of the country, which cannot be separated from solidarity against external threats to state sovereignty and the perceived Western arrogance[37].

Therefore, the post-2008 SADC-EU consensus does not seem to reflect an effective normative convergence, but a rhetoric-reality gap covering up realist considerations (economic and commercial interests for the EU and the need to attract Western aid and assistance on the African side). Additional confirmations are offered by NEPAD/APRM and the 2007 Joint EU-Africa Strategy (JAES).

NEPAD/APRM (African Peer Review Mechanism), one of the contexts of greater cooperation between Africa and the EU in the area of democracy and human rights, so far has not yielded the hoped-for results, if considering that as of 2014 at the end of the period under consideration here and a decade after APRM was established, out of 54 AU members

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[32] SADC-EU Ministerial Political Dialogue, *Communiqué*, 20 March 2013 (Maputo).
[33] GREBE, *And They Are Still Targeting: Assessing the Effectiveness of Targeted Sanctions against Zimbabwe*, in 45(1) *Africa Spectrum* 3 (2010); PORTELA, *supra* footnote 24.
[34] GWEDE, *What guides Zimbabwe-European Union re-engagement?*, in *The Standard* (20 July 2014), available at http://www.thestandard.co.zw/2014/07/20/guides-zimbabwe-european-union-re-engagement/.
[35] BELL, *Zimbabwe: EU slammed for 'forsaking' democratic hopes of Zimbabweans*, in *AllAfrica.com* (28 February 2014), at http://allafrica.com/stories/201403010003.html.
[36] RAFTOPOULOS, *The 2013 Elections in Zimbabwe: The End of an Era*, in 39 *JSAS* 971 (2013), 978.
[37] *Ibidem*, 988.

over 20 (including Zimbabwe) had not subjected themselves to APRM, and those which have done so in many cases had failed to comply with NEPAD objectives[38].

The partnership on democratic governance and human rights launched by JAES, has so far been implemented in a poor and disappointing way. This is mainly due to the lack of will on the African side[39], but the EU has tolerated it, proving that "there is little evidence thus far of serious intent on either the European or African side to develop an active and meaningful thematic partnership in this area"[40].

4. *EU cohesion and consistency*

In the case of Zimbabwe, tensions between pragmatist and normative countries have undermined both the effectiveness of the action for the promotion of democracy and interregional relations.

In Africa the traditionally different levels of sensitivity to human rights and democracy between the countries of the North and of the South have been superimposed by the interests and ambitions on the continent of France and UK. The decision to impose sanctions on Zimbabwe and the EU's intransigence towards the country in interregional relations are the result of the Europeanization of a campaign launched by Tony Blair's New Labour. The pressure exerted by Blair had a normative basis and was part of a broader project, the aim of which was the political and economic transformation of the continent, linking development, democracy, human rights and good governance[41]. However, it was also caused by the agrarian reform undertaken by Mugabe, which had turned into the forced confiscation of land without any compensation at the expense of white Zimbabweans, many of whom were English-speaking descendants of British settlers.

The UK's normative approach has gained support from countries such as Sweden, Denmark and the Netherlands, receiving however more

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[38] MANGU, *The African Union and the Promotion of Democracy and Good Political Governance under the African Peer Review Mechanism: 10 Years On*, in 6 *Africa Review* 59 (2014), 65-66.

[39] Suffice it to say that the AU Implementation Team was chaired by Mubarak's Egypt and was composed of 13 countries including Algeria, Nigeria and Zimbabwe itself, which do not stand out for their democratic qualities. CRAWFORD, *EU Human Rights and Democracy Promotion in Africa: Normative Power or Realist Interests?*, in CARBONE (ed.), *The European Union in Africa: Incoheremt Policies, Asymmetrical Partnership, Declining Relevance?*, Manchester: Manchester University Press 2013, 155.

[40] *Ibidem*, 156.

[41] TENDI, *The Origins and Functions of Demonisation Discourses in Britain-Zimbabwe Relations (2000-)*, in 40 *JSAS* 1251 (2014).

sceptical reactions from countries such as Italy, France and Belgium. Especially after 2004, France has supported the UK's positions within the EU (obtaining in return its support on the Ivory Coast) but the limits of this cooperation soon came to the surface. Travel bans, in particular, have been restrictively applied by London, but systematically disregarded or violated by Paris, which several times has allowed Mugabe and his regime's members, who had been put on the sanction list, to transit through its territory or attend interregional meetings or other international events held in France[42]. Paris' forcing the issue was motivated by an attempt to increase its influence in Africa[43], but to a lesser extent Italy and Belgium as well have maintained bilateral relations with the regime or some of its members[44]. Divisions within the EU on the issue of Zimbabwe have yet to be resolved. The lifting of most of the sanctions after the 2013 elections has indeed caused severe tension, for example between Belgium, which was in favour of the lifting for economic reasons, and the UK, whose intransigence, although diminished with David Cameron, has not ceased to exist.

Different views on the approach towards Zimbabwe have caused uncertainty about the targets of the sanctions and the slowness in implementing them[45]. In addition, the systematic violation of sanctions has undermined the EU's credibility with respect to Zimbabwe, which has been thus able to mitigate its isolation, and to interregional partners (SADC and AU), which had long been asking the EU to lift the sanctions[46].

5. *Regional leaders as EU's allies in democracy-building? The case of South Africa*

SADC has not followed the EU model either in terms of democracy or of supranationalism. Although its structure (e.g. the Secretariat) has been strengthened thanks to some institutional reforms, it is still strictly intergovernmental and relatively closed to participation and democratic control, given that it has no institutionalized mechanisms for civil society involvement and that the SADC Parliamentary Forum is a mere advisory body, external to SADC's structure[47].

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[42] GREBE, *supra* footnote 33, 15-16.
[43] SMITH, *supra* footnote 13.
[44] ERIKSSON, *Targeting Peace: Understanding UN and EU Targeted Sanctions*, Farnham: Ashgate Publishing 2011, 227.
[45] GREBE, *supra* footnote 33, 13.
[46] ERIKSSON, *supra* footnote 44, 210.
[47] GODSÄTER, *supra* footnote 18.

On the contrary, AU has borrowed a number of significant features from the EU template and presents some principles of international democracy.

The explanation is linked to the role of South Africa in the sub-regional and continental context. South Africa has one of the most representative political systems on the continent and, after the launch of the *African Renaissance* by Mandela, has played a central role in the opening up of the two organizations to democratic principles. However, its influence on their normative development has been far greater at the continental level than at the sub-regional level. In fact, South Africa is not a founding country of SADC whereas it was one of the leading countries in the establishment of AU.

Furthermore, when in 1999 Mbeki came to power, Pretoria's leadership aspirations were launched further than Southern Africa and came to affect the continent as a whole[48]. Mandela adopted the neoliberal strategy of "Growth, Employment and Redistribution" (GEAR) with the aim of making South Africa a destination for foreign investment and a competitive global trading state. To implement this project, Mbeki understood that it would be necessary to improve the image and attractiveness of the entire African continent, making it more peaceful and consistent with the liberal paradigm. Pretoria would therefore have to 'get its hands dirty' by getting involved in attempts at conflict resolution, political transformation and socio-economic development on the continent, playing a role that transcended the Southern African region[49]. On the other hand, South Africa had difficulty in exercising leadership at the sub-regional level because of the persistent suspicion of its neighbours and the resistance of countries such as Angola and Zimbabwe, which considered themselves potential regional hegemons[50]. At continental level, however, Pretoria found the alliance with Obasanjo's Nigeria (among others) which has been central to OAU's necessary transformation into a new organization that would preserve peace and promote democracy, human rights and good governance on the continent[51]. Moreover, it would develop elements of normative supranationalism[52], effectiveness and democracy, in line

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[48] SCHOEMAN, *South Africa in Africa: Behemoth, Hegemon, Partner, or 'just another kid on the block'?*, in ADEDEJI-LANDSBERG (eds.), *South Africa in Africa: The Post-Apartheid Era*, Pietermaritzburg: University of KwaZulu-Natal Press 2007, 96.

[49] *Ibidem*, 96-97.

[50] ADEBAJO, *The Curse of Berlin. Africa after the Cold War*, London: Hurst 2010, 158.

[51] TIEKU, *Explaining the Clash and Accomodations of Interests of Major Actors in the Creation of the African Union*, in 103 *African Affairs* 249 (2004), 253-255.

[52] FAGBAYIBO, *Looking Back, Thinking Forward: Understanding the Feasibility of Normative Supranationalism in the African Union*, in 20 *S. Afr. J. Int'l Aff.* 411 (2013).

with the liberal paradigm and pressure from Western donors. Pretoria has been among the main supporters of the Pan-African Parliament (PAP), a Parliamentary Assembly clearly inspired by the European Parliament.

The normative convergence with Nigeria has led to: the establishment of the Economic, Social and Cultural Council (ECOSOCC), the main instrument of civil society involvement in AU history; the binding powers of the African Court of Justice and Human Rights (ACtJHR) on issues relating to the interpretation of the Constitutive Act, disputes between states, acts or functions of AU bodies; adoption of the principle of Responsibility to Protect (strongly supported by the EU) in Article 4 (h) of the AU Constitutive Act, which implies the AU's right to intervene in the internal affairs of a member state in the event of war crimes, genocide, crimes against humanity and "a serious threat to legitimate order".

As in the case of NEPAD, these principles and institutions have proven so far ineffective, confirming the rhetoric-reality gap that distinguishes African regionalism. Institutions such as the PAP or the ACtJHR still have limited power or are not operational due to member states' unwillingness to transfer the necessary powers[53]. This is the result of African leaders' inclination to fuel the creation of regional institutions with the main of obtaining legitimacy for themselves and their stay in power *(regime-boosting regionalism*)[54], without expressing much concern about their effectiveness. However, this is also due to South Africa's difficulty in asserting its leadership, hence its principles and norms. Pretoria still lacks indeed the legitimacy to play a leading role on the continent[55]. A deep distrust of Pretoria is still present in many African countries, fuelled by memories of South African imperialism during apartheid, but also by what they perceive to be South Africa's protectionist trade and xenophobic immigration policies[56]. Post-apartheid South Africa is still struggling to shake off the identity of the Western Trojan horse in Africa, and this prevents it from fully promoting Western and European norms, principles and institutional structures, especially to the extent that these put pressure on the principles of sovereignty and non-interference, which are still very popular in Africa. Pretoria's foreign policy is thus wavering and ambiguous because it is not always clear what principles it gives priority to.

Therefore, the role of Mandela and Mbeki has been essential to introduce the objective of promoting democracy as well as elements of

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[53] *Ibidem*, 415.

[54] SÖDERBAUM, *African Regionalism and EU-African Interregionalism*, in TELÒ (ed.) *European Union and New Regionalism. Regional Actors and Global Governance in a Post-hegemonic Era*, 2nd ed., Farnham: Ashgate Publishing 2007, 192-195.

[55] ADEBAJO, *supra* footnote 50, 144.

[56] *Ibidem*.

supranationalism and international democracy inspired by the EU into the AU. However, given the strength of the principles of sovereignty and non-interference which Pretoria's excessively weak leadership cannot overcome, the localization process of international democracy principles has currently produced more rhetoric than concrete effects.

6. *Conclusions*

The objective of this chapter has been to assess whether the EU is able to use its interregional relations to democratize partner organizations and their member countries, changing their normative identities. Therefore, two regional organizations, the SADC and the AU, have been examined to explore whether normative interaction with the EU has contributed to localizing liberal democracy in their relations with their member states. A hypothesis that has been advanced is that these dynamics are influenced by three variables: 1) the normative gap between the organizations and the EU, combined with political and economic asymmetry between the two regions. In the case of EU-SADC/AU relations, the normative gap is relatively lower than in other cases such as EU-ASEAN and EU-Mercosur. The analysis of the normative interaction caused by the crisis in Zimbabwe has shown that the centrality of the principle of sovereignty and non-interference in the history of the two organizations has prevented them from supporting the EU's uncompromising attitude and accepting its direct normative pressure. However they have partially incorporated the paradigm of liberal democracy, especially rhetorically, to satisfy Western donors, amongst which the EU plays a leading role; 2) the internal cohesion and external coherence of the EU. In the case of Zimbabwe, interregional relations and the EU's credibility have been undermined by its internal divisions and its lowest common denominator policy. Above all, the EU or some of its members have surreptitiously bypassed the common normative requirements to pursue particular national interests, thus hindering the common goals of promoting democracy; 3) the role of leading regional powers. South Africa has made an attempt to promote the localization of democratic principles and the European model of regional integration in its organizations. However, due to the weakness of its leadership, it hasn't succeded yet to effectively change principles rooted for decades. The 'democratizing' influence of South Africa was higher at the AU level, and has played a central role in moving it closer to the EU model and the principles of international democracy, but has not yet managed to promote principles and institutions that are effective enough.

IMPACT OF COVID-19 ON THE MOVE TOWARDS AUTHORITARIANISM AND ITS IMPLICATIONS ON SECURITY

Muge Aknur

ABSTRACT: According to the Freedom House Report 2022, there has been a 16 years of consecutive decline in freedoms in the world. Such a decline in fact, is a sign of a move from a democratic or hybrid type of regime towards authoritarianism. Particularly, starting with the outbreak of COVID-19, this move towards authoritarianism gained a momentum and a serious democratic backsliding crisis, leading to significant domestic and international security problems showed up. Semi-democratic governments started to respond the pandemic by engaging in abuses of power, curtailing rule of law, putting restrictions on political rights and civil liberties, silencing their critics and weakening or bypassing significant institutions such as the parliaments and the judiciary. The article will examine this assault on democracy that increased with the outbreak with COVID-19 by focusing on its impact on domestic and international security.

KEYWORDS: Democratic backsliding; COVID-19; authoritarianism; rule of law; human rights.

CONTENTS: 1. *Introduction*. – 2. *Democracy, democratization and democratic consolidation*. – 3. *Democratic backsliding during COVID-19 and its implications*. – 4. *Five case studies of democratic backsliding during COVID-19*. – 5. *Concluding remarks.*

1. *Introduction*

In the recent two decades as stated by Freedom House Report 2022, there has been "a global expansion of authoritarianism" in the world. Freedom House Report 2022 states that the current threat to democracy is the result of 16 consecutive years of decline in global freedom[1]. In other words, in the last consecutive 16 years there has been a deterioration in

[1] REPUCCI-SLIPOWITS, *Freedom in the World 2022. The Global Expansion of Authoritarian Rule*, Freedom House's annual report on political rights and civil liberties, February 2022 (aka Freedom House Report 2022).

freedoms in the world. Such a deterioration in fact, is a sign of a move from a democratic or hybrid type of regime towards authoritarianism. While such a move towards authoritarianism had already been in process, the outbreak of COVID-19 further accelerated this ongoing decline.

Starting with the outbreak of COVID-19, this move towards authoritarianism tremendously increased, thus a serious crisis of a move towards authoritarianism has showed up all over the world. At the same time, this move led to significant domestic and international security problems. Semi-democratic governments and their abusive leaders were eager to respond to the pandemic by engaging in abuses of power by curtailing rule of law, putting restrictions on political rights and civil liberties, banning their critics and weakening or bypassing the significant institutions such as the parliaments and the judiciary. Even in the consolidated democracies of Europe, authorities exploited the deficiencies of their systems and attempted to promote hatred, violence and unrestrained power.

The article will examine this attack on democracy that gained a momentum with the outbreak with COVID-19 as well as its impact on both domestic and international security. In an attempt to do so, paragraph 2 of the article will start by analyzing the concepts of democracy, democratization, and democratic consolidation as well as the waves and the reversal of democratization in the world. It will particularly examine the necessary conditions for a consolidated democracy. Paragraph 3 will then concentrate on the classification of democratic backsliding during COVID-19 as pointed out by Repucci and Slipowitz (*supra*, footnote 1) according to whom these democratic backsliding issues include the abuse of power, marginalization of people, transparency and anti-corruption, media and expression and elections[2]. Paragraph 4 will enrich this analysis of the move towards authoritarianism caused by COVID-19, by giving examples of abuse of power, marginalization of people, transparency and anti-corruption, media and expression and elections in different countries. Finally, the concluding remarks will examine the impact of this move towards authoritarianism on human security threats including personal security, community security as well as political security.

2. *Democracy, democratization and democratic consolidation*

The word democracy means "rule by common people". It is consisted of two words: "*demos*" which means common people and "*kratia*" that means power or rule. According to this definition people may rule directly

[2] REPUCCI-SLIPOWITZ, *Democracy under Lockdown. The Impact of COVID-19 on the Global Struggle for Freedom*, Freedom House, October 2020.

or indirectly but the power resides by the people. On democracies, exercise of power takes three forms. While the first form "participation" includes voting and elections, the second form "competition" takes place between parties. Finally, the third form "liberties" includes freedoms such as freedom of speech or assembly.

The minimal definition of democracy includes free, fair, competitive and regular elections. In this definition, every single adult is qualified to vote and become a candidate. However, for a comprehensive democracy, freedoms such as freedom of speech, opposition, association and press must exist. If they do not exist, then fair elections cannot take place[3]. Transition to democracy is the shifting of countries from an authoritarian rule to democracy. Huntington defines waves of democratization as "a group of transitions from non-democratic to democratic regimes that occur within a specified period of time"[4]. Huntington points out that there were three waves of democratization starting by the late 19th century. After each wave he also argues that there was a reversal wave. Huntıngton's third wave of democratization starts in 1974 with the end of the authoritarian regime in Portugal. This third wave of democratization was followed by Spain and Greece. Fall of Communism in the 1990s also led many Communist countries in Eastern Europe to move towards relatively more democratic systems. The decline in global freedoms as well as the global expansion of authoritarian regimes in the last 16 years may well be defined as another "reversal wave of democratization". We may even call this move towards authoritarianism as "reversal of third wave of democratization". In this context, COVID-19 had seemed to be helping the increase from democratic regimes to authoritarian regimes.

While the transition to democracy from an authoritarian regime can take place in a short time, the strengthening of this democracy, in other words consolidation of democracy may take place for generations. In fact, every transition to democracy does not end up with a consolidated democracy. According to Freedom House Report 2022, 56 countries out of 195, that is 29% of the countries in the world, today are partly free[5]. This number shows us the number of illiberal countries or, in other words, hybrid democracies. For the consolidation of democracy to be accomplished, democracy must have a permanent existence. Przeworski defines democratic consolidation as "the only game in town". He argues that "if

[3] DAHL, *Polyarchy, Participation and Opposition*, New Haven: Yale University Press 1972.

[4] HUNTINGTON, *The Third Wave of Democratization in the late 20th Century*, Norman: University of Oklahoma Press 1991, 13-27.

[5] Freedom House Report 2022, *supra* footnote 1.

the majority of the political actors including political parties, significant societal groups do not think of any other regime besides democracy and if they have the habit of resolving conflicts in the context of constitutional norms – then the democracy is consolidated"[6].

In his attempt to analyze the consolidation of democracies, which he calls "Embedded Democracies", Merkel talks about five conditions. The first one is "electoral regime" which includes free, fair, competitive and regular elections. The second and third are "political liberties" and "civil rights". Political liberties comprise all kinds of freedoms including freedom of speech, press, demonstration, association, religion and academia. Civil rights are consisted of protection of life, freedom, property as well as protection against illegitimate arrest, exile, terror, torture, intervention into personal life. They also include equal access to the law and equal treatment by the law. The fourth factor Merkel points out is the "horizontal accountability" that comprises system of checks and balances between legislative, executive and judiciary. The fifth and the last factor is the "effective power to govern" which draws attention to the factor that no outside or inside power besides the popularly elected government would intervene into the government's affairs[7].

3. *Democratic backsliding during COVID-19 and its implications*

While a serious move from democratic or hybrid regimes to authoritarian regimes has been underway in the last two decades, the outbreak of COVID-19 all over the world by late 2019 and early 2020 gained a momentum to this move. COVID-19 outbreak presented a series of new challenges to democracy and human rights. Hybrid regimes had all reacted to the pandemic in repressive ways that would serve their political interests at the expense of civil rights and political liberties. In fact, even the countries that are be considered as consolidated democracies were forced to accept the restrictions which perhaps helped them to fight the pandemic crisis, but had a lasting negative impact on liberties and freedoms.

In their 2020 Freedom House research, Repucci and Slipowitz (*supra*, footnote 2), based on a survey of 398 journalists, civil society workers, activists, and other experts in various countries around the world, wrote a report on the condition of democracy during the pandemic. They stated that the condition of democracy and human rights had grown worse in 80

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[6] PRZEWORSKI, *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge: Cambridge University Press 1991.
[7] MERKEL, *Embedded and Defective Democracies*, in 11(5) *Democratization* 33 (2004).

countries and pointed out that governments had responded to the pandemic by abusing their own power, suppressing their critics, and weakening important institutions. In their report they described five aspects of accountability that have been weakened: "Checks against abuses of power, protection of vulnerable groups, transparency and anticorruption, free media and expression, and credible elections"[8].

When we examine these five aspects of weakened accountability in the context of democratic consolidation, particularly in the framework of Merkel's embedded democracies, we observe that significant factors that promote democratic consolidation have been eroded as a result of these policies. While abuses of power by the incumbent leaders and marginalization of people lead to violation of civil rights and political liberties, transparency and anti-corruption creates problems with both freedom of speech and horizontal accountability of the government. In addition, suppression of free media and expression lead to problems with the freedom of speech, expression and press which are all part of political liberties. Most importantly, problems with credible elections undermine the very core value of democracy, free, fair, competitive and regular elections.

Moreover, all of these violations of democracy in the long run pose a serious threat to human security. According to the report "What is Human Security?", published on the website of the Inter-American Institute of Human Rights, there are a number of possible types of human security threats. These include economic security, food security, health security, environmental security, personal security, community security and political security. While economic security is involved with persistent poverty and unemployment, food security deals with hunger and poverty. Health security as we have experienced with COVID-19 pandemic is endangered with deadly infectious diseases, unsafe food, malnutrition and lack of access to basic healthcare. Environmental security is related to environmental degradation, resources depletion, natural disasters and pollution. The last three security problems are very well connected with the security problems that are created as result of the weakening of a democracy. Personal security comprises physical violence, crime, terrorism, domestic violence and child labor. Abuse of power by the incumbent leaders and the marginalization of the vulnerable groups may lead to physical violence and crime and can create serious threats to personal security. Marginalization of the vulnerable groups can pose a threat to community leading to inter-ethnic, religious and other identity-based violence. Last but not the least, lack of transparency, free media and expression as well as lack of

[8] REPUCCI-SLIPOWITZ, *supra* footnote 2.

credible elections can pose a threat to political security that includes political repression and human rights abuses.

4. *Five case studies of democratic backsliding during COVID-19*

In this paragraph, the interventions into democracy or hybrid democracies or in other words, the policies towards more authoritarian rule under the classification of abuse of power, marginalization of people, transparency and anti-corruption, media and expression and elections will be analyzed:

1) *abuse of power* was the most common method of violation of a democratic system during the COVID-19 outbreak. It mainly took place in hybrid democracies where democracy was not totally consolidated or embedded into the system. Governments that were already following some kind of hybrid democracies – neither a fully consolidated democracy nor a fully authoritarian democracy – were more keen to adopt more abusive policies. As Repucci and Slipowitz argued, both government officials and security services executed violence against civilians and detained people by exceeding their legal authority. While doing this they did not feel the need to justify themselves. A number of governments used pandemic as a justification to grant themselves special powers that are more than required to protect public health. They used pandemic as an excuse to put restrictions on their political opponents. Pandemic gave them the opportunity to challenge the significant legislative functions.

Countries already authoritarian became even more authoritarian and repressive. According to Covid-19 Digital Rights Tracker[9] and Civic Freedom Tracker[10], a total of 32 countries had used militaries to enforce rules, which led to casualties. For example, in Angola police shot and killed several citizens while imposing a lockdown. Other countries used

[9] COVID-19 Digital Rights Tracker is "a live tracker documenting new initiatives introduced in response to COVID-19 that pose a risk to digital rights around the world". First published on March 2020, the research is conducted under the aegis of Top10VPN.com, founded in 2016 "by technology entrepeneur Antonio Argiolas [whose] mission is "to make digital privacy simple for everyone". The COVID-19 Digital Rights Tracker is available at https://www.top10vpn.com/research/covid-19-digital-rights-tracker/.

[10] Civic Freedom Tracker is a tracker monitoring "government responses to the pandemic that affect civic freedoms and human rights, focusing on emergency laws". It is "a collaborative effort by the ICNL [International Center for Not-For-Profit Law], ECNL [European Center for Not-For-Profit Law], and our global network of partners", including the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. Civic Freedom Tracker is available at https://www.icnl.org/covid19tracker/?location=&issue=25&date=&type=.

technology to increase government oversight[11]. In countries that are considered authoritarian and partly free such as Liberia, Zimbabwe, the Philippines, Singapore, Kazakhstan and Azerbaijan abuse of power was widespread by enforcement of curfew orders, surveillance and all types of human rights violations and by silencing the opposition[12].

As stated in the Report of Carnegie Endowment for International Peace, Egyptian government treated "the pandemic as a regime security risk rather than a public health crisis". Security forces of Egypt started to control civilian institutions and showed zero tolerance to dissent[13].

In the hybrid democracies that declined more to the authoritarian direction rather than democratic direction, the repressive policies were more obvious. For example, in Hungary in March 2020, Prime Minister Viktor Orban forced his country's parliament to provide him extraordinary emergency authority. This authority included "an indefinite suspension of the legislature, the freedom to govern with one-man rule, and the ability to impose prison time on individuals violating quarantine or spreading anything the government deems fake news"[14].

Interestingly enough even in the countries that are considered fully consolidated democracy such as the US, the American Congress had historically authorized executive action in response to financial, national security and health crises. It is not clear whether these disaster-time measures will be withdrawn when the crisis is over. This executive action in fact, gave the then President Trump the chance to use 136 different statutory powers to deal with coronavirus[15];

2) *marginalization of vulnerable groups* such as the minorities was another violation of the democratic norms during the pandemic. In some countries new or increased restrictions on ethnic and religious minorities had been implemented. Most of the time, these groups suffered disproportionately due to their position. In some countries pandemic was used as an excuse to implement crackdowns on those minority groups who had already been a target before the pandemic. Sometimes the minority

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[11] KEMP, *The 'Stomp Reflex': When governments abuse emergency powers*, 28 April 2021, https://www.bbc.com/future/article/20210427-the-stomp-reflex-when-governments-abuse-emergency-powers.

[12] REPUCCI-SLIPOWITZ, *supra* footnote 2.

[13] MANDOUR, *Repression and Coronavirus Response in Egypt*, Carnegie Endowment for International Peace, July 15, 2020. Cf https://carnegieendowment.org/sada/82304.

[14] Protect Democracy, *Abuses of Power Amid Coronavirus*, 19 October 2020. See at https://protectdemocracy.org/project/abuses-of-power-amid-coronavirus/.

[15] *Coronavirus versus democracy: 5 countries where emergency powers risk abuse*, 6 April 2020, available at https://theconversation.com/coronavirus-versus-democracy-5-countries-where-emergency-powers-risk-abuse-135278.

groups were accused as being the spreaders of the violence. A good example of this was the treatment of the Muslims in India[16]. In Serbia too immigrants were accused of spreading the virus. The authorities also restricted their movements[17].

In authoritarian regimes such as Kuwait non-citizens suffered more from the restrictions compared to citizens. At the beginning of 2021, Kuwait imposed a round of restrictions such as a two-week entry ban on non-citizens, as part of its attempt to control the spread of the coronavirus[18]. In a hybrid democracy such as Bulgaria, it was the Roman neighborhoods that suffered from the restrictions of movement. In the city of Sliven, authorities set up police checkpoints around Roma neighborhoods to slow the spread of the coronavirus[19]. Similarly Montenegrin government accused the religious protest gatherings by the Serbian Orthodox Church as attempts to spread the virus[20]. Even in consolidated democracies such as the UK, it was reported that Asian and Black people were arrested disproportionately under coronavirus laws particularly in London[21]. In the US, President Trump took advantage of the COVID-19 crisis to fuel xenophobia and hostility against immigrants. He even called the COVID-19 virus as "Chinese virus"[22];

3) *lack of transparency and involvement in corruption* was another significant violation of democracy concerning the pandemic. Both authoritarian leaders and democratic leaders were not transparent about the number of people who lost their life due to the virus. As a result of misinformation, people lost their trust to their governments. In the early stages, some governments such as Nicaragua and Turkmenistan even denied the existence of the virus or downplayed the harms of COVID-19. Brazilian and Tanzanian governments promoted unproven treatments.

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[16] GHARIB, *Report: The Pandemic Is Not Good for Freedom and Democracy. But there are exceptions*, 10 November 2020, at https://www.npr.org/sections/goatsandsoda/2020/11/10/930464419/report-the-pandemic-is-not-good-for-freedom-and-democracy-but-there-are-exceptions.

[17] STOJANOVIC, *Serbia Restricts Movement for Migrants, Asylum-Seekers*, in *Balkan Insight*, 17 March 2020, available at https://balkaninsight.com/2020/03/17/serbia-restricts-movement-for-migrants-asylum-seekers/.

[18] Al Jazeera, *Kuwait bans non-citizen entry for two weeks amid COVID spike*, 4.02.2021.

[19] KRASIMIROV-TSOLOVA, *Bulgaria's Roma say some coronavirus measures are discriminatory*, 24 March 2020, https://www.reuters.com/article/uk-health-coronavirus-bulgaria-roma-idUKKBN21B32P.

[20] ARBUTINA, *Montenegro: Coronavirus ban feeds clash between state and Serbian Orthodox Church*, 17 May 2020, at https://www.dw.com/en/montenegro-coronavirus-ban-feeds-clash-between-state-and-serbian-orthodox-church/a-53469982.

[21] The Independent, *Police fining and arresting black and Asian people disproportionately under coronavirus laws in London*, 3 June 2020.

[22] *Supra* footnote 15.

Government-led media was also good at feeding the people with wrong information. Hiding and obstructing information, giving wrong information were common practices[23]. Lack of transparency led to corruption. In a number of countries, funds reserved for the fight against coronavirus were used elsewhere by the governing elites. Corruption concerning masks, ventilation machines and vaccines were also quite common all over the world;

4) *lack of freedom of expression and press*. During the outbreak almost half of the countries in the world in one way or another implemented some kind of restriction on news media. Freedom of expression deteriorated tremendously. By restricting and controlling the media – the only way that people can get information – governments spread false information to their people. When the journalists attempted to find the truth in Nigeria, Tanzania, Rwanda or Singapore, they were harassed, intimidated and arrested. In Tanzania media was barred from covering the pandemic. In Nigeria journalist were detained for covering up the pandemic news. In Rwanda journalists attempting to broadcasting via YouTube channels were arrested. In countries such as Kyrgyzstan and Bangladesh the medical workers were forced not to tell about their problems and the true number of the cases to the public[24]. The Trump administration was also criticized for using a number of tactics to pass wrong information to the public. These included scapegoating, bringing unproven cure to the agenda and downplaying the seriousness of the crisis;

5) *problems with elections*. Particularly throughout the 2020, national elections and numerous local elections were not held or postponed in a number of countries due to the severity of the pandemic. Most of these postponements were necessary due to the risks they posed to the voters. However, these deferrals lasted for a long time and new elections were not scheduled promptly. Sometimes incumbents set new dates without giving chance to the opposition to get prepared for the elections. In fact, incumbents used the pandemic as an excuse to either change the elections rules in their favor or postpone the elections and set the new dates according to their own preparation.

Elections were delayed in Ethiopia and Bolivia. In Sri Lanka, President Gotabaya Rajapaksa dissolved the opposition-controlled parliament in March 2020 and postponed the elections that would take place in April to August. Meanwhile, he strengthened his position and won the elections in August 2020 and consolidated his authoritarian power. Foreign observers were not able to observe Burundi's problematic elections. In Belarus'

[23] REPUCCI-SLIPOWITZ, *supra* footnote 2.
[24] GHARIB, *supra* footnote 16; REPUCCI-SLIPOWITZ, *supra* footnote 2.

fraudulent election, the authorities used the pandemic as an excuse to limit the rights of citizens during the election campaign and ban the observers to join the elections[25].

5. *Concluding remarks*

COVID-19 accelerated the move towards authoritarianism that has already been on the way in the last 16 years. It gave the perfect excuse to the leaders to continue their authoritative and repressive policies. Even in the countries that are considered democratic, the ruling elite by following different methods violated the rules of democracy. Abuse of power by the incumbent leaders by making use of the police or the military to silence the critics and the opposition was a serious threat to personal and political security. The ruling elite by taking advantage of the pandemic situation resorted to physical violence, political repression and human rights violations, thus putting both personal and political security in danger.

Along the same way, marginalization of minorities, immigrants and/or non-citizens led to violation of political liberties such as freedom of movement and expression as well as civil rights such as protection of life, freedom and property. Moreover, marginalization of vulnerable people could create a danger to the community security. In fact, it could promote a potential inter-ethnic or religious or identity based violence.

Lack of transparency and implementation of corruption created problems with the horizontal accountability. The ruling elites put themselves above the executive and judiciary powers. They could act independent from both the executive and judiciary. Lack of transparency at the same time put the freedom of expression and press in danger. While the lack of freedom of expression and media was a serious danger to civil rights, the problems with the free, fair, competitive and regular elections had been a significant danger to the heart of democracy. Therefore, it is now time to reverse this democratic backsliding that has been part of world politics in the last two decades.

[25] REPUCCI-SLIPOWITZ, *supra* footnote 2.

"WE WON'T EXCHANGE HUMAN RIGHTS FOR GAS" WHERE IS R2P IN UKRAINE? BETWEEN POLITICAL LIMITS AND LEGAL JUSTIFICATIONS

Carmen Márquez Carrasco

ABSTRACT: The article deals with the problems that the R2P doctrine is encountering on the grounds of the war in Ukraine. The analysis departs from the concept and evolution of the R2P doctrine to reflect on the lack of implementation in the armed conflicts in Syria and Libya. The article points to the current situation in Ukraine as the scenario where the R2P seems to have reached its political limits.

KEYWORDS: Armed conflict in Ukraine; R2P; human rights; russian gas

CONTENTS: 1. *Introduction*. – 2. *The doctrine of the Responsibility to Protect*. – 3. *The implementation of the R2P doctrine*. – 4. *How can R2P be applied to the situation in Ukraine?* – 5. *Conclusions*.

1. *Introduction*

Soon after the Russian invasion of Ukraine, the High Representative of the European Union for Foreign Affairs and Security Policy (HR/VP) asserted: "We – the EU – will not abandon the defence of human rights and freedom because we are dependent on Russian gas"[1]. During the debate at the European Parliament on the Russian invasion, Josep Borrell did not explicitly cite the Responsibility to Protect (R2P). Nonetheless, his sentence could be interpreted as an expression of the superiority of human rights principles and values above state interests and the interests of the EU. Puzzling enough, on 23 February 2022, the President of Russia, Vladimir Putin, attempted to justify the Russian invasion of Ukraine on the grounds that he was responding to the on-going genocide perpetrated by the Kyiv regime in Donbass. This formed part of a broader

[1] Cf https://www.eeas.europa.eu/eeas/future-europe-being-defined-now-0_en.

historical narrative that Putin has argued to justify the need to prevent the threat posed by Ukranian fascists.

These claims were rightly rejected. As Alexander Hinton has put it: "although the violence between pro-Ukrainian and pro-Russian forces is 'concerning', it doesn't remotely resemble genocide"[2]. Putin was, as many have done before, politicising the term genocide. Since then, Ukraine filed a law suit at the ICJ rejecting the idea that genocide is taking place in Donbass. Although Russian representatives did not explicitly cite the R2P, as it was done prior to the 2008 invasion of Georgia[3], the reference to genocide is relevant in the pre-intervention context (the post-intervention period is a different debate) concerning the military attack of Russia against Ukraine.

Concerning the post intervention period, exhausted faces of people fleeing bombardment and death have dominated global news. From Mariupol to Irpin, it is reported that Russian artillery attacked on Ukrainian civilians. As evidence of these facts, we may quote the report by the OSCE Office for Democratic Institutions and Human Rights released on 12 April 2022 that affirms as follows: "A detailed assessment of most allegations of international humanitarian law (IHL) violations and the identification of war crimes concerning particular incidents has not been possible. Nevertheless, the mission found clear patterns of IHL violations by the Russian forces in their conduct of hostilities. If they had respected their IHL obligations in terms of distinction, proportionality and precautions in attack and concerning specially protected objects such as hospitals, the number of civilians killed or injured would have remained much lower. Similarly, considerably fewer houses, hospitals, cultural properties, schools, multi-story residential buildings, water stations and electricity systems would have been damaged or destroyed. Furthermore, much of the conduct of Russian forces displayed in the parts of Ukraine it occupied before and after 24 February 2022, including through its proxies, the self-proclaimed 'republics' of Donetsk and Luhansk, violates IHL of military occupation"[4].

Since the aggression started, the Ukrainian president, Volodymyr Zelensky, has daily plead for help, including military support and a no-fly zone against Russian aggression[5]. The first question is: what has

[2] Cf https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unprecedented-177511.

[3] See https://www.theglobeandmail.com/opinion/does-russia-have-a-responsibility-to-protect-ukraine-dont-buy-it/article17271450/.

[4] See https://www.osce.org/files/f/documents/f/a/515868.pdf.

[5] See https://www.washingtonpost.com/business/2022/03/05/zelensky-call-senators/.

happened to the UN R2P doctrine[6]? This question raises another two questions: do the Russian allegations of genocide fit within the R2P? What was the international response?

2. *The doctrine of the Responsibility to Protect*

The experience of Kosovo (1998-1999) was a turning point that resulted in extensive debate about international military intervention to protect human rights. In response to the legal deficiencies exposed by the Kosovo case and NATO's justification of humanitarian intervention, on the initiative of Canada, the International Commission on Intervention and State Sovereignty (ICISS) published in 2001 its seminal report "The Responsibility to Protect"[7]. It aims at finding some new common ground on issues on how to prevent and respond to atrocity crimes, including a reflection upon humanitarian intervention. The report states that while the R2P first and foremost resides with the State whose people are directly affected, a "residual responsibility" lies with the broader community of States. Such residual responsibility is "activated when a particular State is clearly either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator of crimes or atrocities".

Humanitarian intervention and the R2P share the conviction that sovereignty is not absolute. However, the R2P doctrine shifts away from State-centred motivations towards the interests of victims by focusing not on the right of States to intervene but on a responsibility to protect populations at risk. In addition, it introduces a new way of looking at the essence of sovereignty, moving away from issues of "control" and emphasising "responsibility" to one's own citizens and the wider international community[8].

Another contribution of R2P is to extend the intervention beyond a purely military intervention and to encompass a whole continuum of obligations: 1) *the responsibility to prevent*: addressing root causes of internal conflict (the ICISS considered this to be the most important obligation); 2) *the responsibility to react*: responding to situations of compelling human need with appropriate measures that could include sanctions, prosecutions or military intervention; 3) *the responsibility to rebuild*: providing full assistance with recovery, reconstruction and reconciliation[9].

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[6] See https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml.
[7] ICISS, *The Responsibility to Protect*, Ottawa: International Development Research Centre 2001.
[8] EVANS, *From humanitarian intervention to the responsibility to protect*, in 24 *Wis. Int'l L. J.* 703 (2006-2007).
[9] ICISS, *supra* footnote 7, at 19-27, 29-37 and 39-45.

In the ICISS report, R2P is referred to as an "emerging guiding principle" which has yet to achieve the status of a new principle of customary international law[10]. The UN High-Level Panel on Threats, Challenges, and Change endorsed R2P as an "emerging norm" in its 2004 report[11]. As an "emerging norm", the R2P was also confirmed by the UN Secretary-General's 2005 report which centered on the idea that threats facing humanity can only be solved through collective action. At the same time, however, the idea acknowledged the sensitivities involved in R2P[12].

In 2005, the concept of R2P was incorporated into the outcome document of the high-level UN World Summit meeting. All UN Member States recognised the responsibility of each individual State to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as a corresponding responsibility of the international community to help States to exercise this responsibility through peaceful means or through collective action, should peaceful means prove inadequate. The 2005 World Summit Outcome was adopted by the UN General Assembly in its Resolution 60/1 as of 16 September 2005[13].

In the section entitled "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity" of the World Summit Outcome, paragraph 138 affirms that "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability" (emphasis added).

In the same section, then, paragraph 139 affirms that "The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in

[10] *Ibidem*, 15.
[11] *A more secure world: our shared responsibility*, Report of High-level Panel on Threats, Challenges and Change, UNGA A/59/565, 2 December 2004.
[12] *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UNGA A/59/2005/Add.3, 26 May 2005.
[13] UNGA, *2005 World Summit Outcome*, A/RES/60/1, 16 September 2005.

cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out" (emphasis added).

Since then, members of the UN have confirmed their commitment to *prevent and remove mass atrocity acts*. From 2005 onwards, the R2P principle has been further developed and was endorsed in a series of reports by the UNSG[14]. As a matter of last resort, it also entails enforcement by military means. In 2021, it was confirmed by the UNGA Plenary Meeting on the Responsibility to Protect and by the UNGA Resolution 75/277 entitled "The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity" which mandates continued annual reporting by the UNSG[15].

The scope of R2P entails genocide, war crimes, ethnic cleansing an crimes against humanity. In particular, war crimes include targeting civilians and intentional use of starvation. While the primary obligations under the R2P belong to each individual state, secondary (subsidiary) obligations are attributed to the international community. This subsidiary responsibility is activated when a state is either unwilling or unable to fulfil its responsibility to protect. As a result, under the R2P principle Ukraine is entitled to obtain full and effective support from the international community in addressing the effects on the population, caused by the Russian military attack of February 24, 2022.

The principle of R2P entails a political obligation of the international community which is grounded on a broad normative fabric. While R2P is accepted as a political principle, it is considered an emerging international norm, although there is ample discussion about its implementation in practice. Obligations of the international community under R2P do not only apply when a government is unwilling to protect its population but also when a government is unable to do so. The 2001 ICISS Report

[14] See at https://www.un.org/en/genocideprevention/key-documents.shtml.
[15] UNGA, *The responsibility to protect and the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity*, adopted on 18 May 2021, A/RES/75/277.

explicitly mentions as a ground for military intervention the case of "large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation" (see § 4.19).

R2P has mainly focused on internal strife as this was the cause for R2P in recent decades. Open land war and attack have not been at the forefront, but are not excluded from the scope of its application. War crimes are explicitly included and not limited to civil wars.

The doctrine of the R2P is conditioned by important political factors. In principle, R2P depends upon collective measures taken under Chapter VII of the UN Charter and thus by the Security Council decisions. The 2011 NATO-led intervention in Libya was based on the UNSC resolution 1973 adopted with Brazil, Germany, India, China and Russia abstaining. Such authorization is required if R2P measures are taken without the consent of the country concerned. However, as Ukraine calls for R2P and consents, the issue of authorization by the Security Council does not arise.

To the extent that the Russian Federation challenges R2P measures by taking recourse to the Security Council and seeks to stop R2P operations, the use of the veto power amounts to a key political limitation[16]. While the UN Charter does not formally oblige a permanent member to abstain in matters concerning itself, the configuration gives way to exceptional decisions of the UNGA under the so-called "Uniting for Peace" resolution 377(V) of 3 November 1950.

The UNGA condemned the armed attack on March 2, 2022, and called for unconditional withdrawal by a majority of 141 States with 35 abstentions and only 5 States opposing (Belarus, North Korea, Eritrea, Russia and Syria)[17]. It reached the 2/3 majority required. It may equally do so to remove objections to R2P by the Russian Federation in calling for, and endorsing, R2P operations of the international community in Ukraine.

3. *The implementation of the R2P doctrine*

Unlike treaties, UNGA resolutions are not binding under international law but are solely recommendatory. Nonetheless, it has been argued that the 2005 World Summit Outcome document has particularly high political and moral significance since its commitments were

[16] For some scholars it amounts to an abuse of right; for others, the use of the veto power is the tool to reconcile law and geopolitical power in international relations.
[17] Cf https://news.un.org/en/story/2022/03/1113152.

undertaken by world leaders[18]. In addition, it addresses fundamental issues involving the obligation to provide protection from genocide, war crimes and crimes against humanity. These obligations reflect well-established norms and principles of IHL and IHRL treaties and customary international law. Additionally, it has been emphasized that the R2P doctrine rests on an established obligation under international law: the prevention and punishment of genocide as stipulated in the Genocide Convention[19].

Alongside uncertainty over the legal force of R2P, there are various other challenges involved with its implementation. It has been held that the inclusion of R2P in the 2005 World Summit Outcome document was derived in part from a concession whereby the notion of legitimate intervention without UNSC approval (which was integral to the original ICISS proposal) was dropped in favour of Security Council authorisation[20]. As such, the original notion of R2P, in its adoption by the UNGA, has lost a core aspect.

In addition, the concept of complementarity, whereby the primary responsibility to protect lies with the territorial State and the subsidiary responsibility with the international community, can result in an additional threshold for collective security action. Domestic authorities may invoke their primary responsibility to argue against any exercise of protection by international actors, which may be accepted by the international community. Such was the case in Darfur, where Security Council members claimed that it was premature to impose sanctions against Sudan, since the crisis had not yet reached the stage where the domestic government had demonstrated a clear failure to exercise its R2P[21]. Moreover, none of the key documents endorsing R2P provide meaningful guidance on how to deal with violations of the R2P by States and the international community.

An additional challenge is raised by the context of disasters. The devastating effects of cyclone Nargis in Burma and the refusal by the government to allow access to affected populations resulted in arguments to extend the concept of R2P to disaster situations. Some members of the

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[18] GIERYCZ, *The Responsibility to Protect: A Legal and Rights-based Perspective*, in 2(3) *Global Responsibility to Protect* 250 (2010). From an international law perspective it could be considered as an authentic interpretation of the UN Charter.

[19] *Ibidem*.

[20] See, for instance, BELLAMY, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, in 20(2) *Ethics & International Affairs* 143 (2006).

[21] STAHN, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, in 101 *Am. J. Int'l L.* 99 (2007).

ICISS argued that R2P was not meant to protect people from the impact of natural disasters; whereas others argued that R2P could be invoked if a government's failure to respond, in the face of immense need and the threat of large-scale loss of life, amounted to a crime against humanity. Collective action was ultimately not adopted in the case of Burma, nor the UNGA endorsed such an expansion in the coverage of R2P[22].

Finally, in response to the rapidly deteriorating situation in Libya in 2011[23], the UNSC adopted resolution 1970 in Februart 2011 which deplored the gross and systemic human rights violations in the country, called for an end to hostilities and for the observance of human rights, and set in place a number of coercive measures. The following resolution 1973, adopted in March 2011, reiterated the responsibility of the Libyan government to protect the Libyan population and authorised coercive military intervention, without the consent of the Libyan government.

Two days after this resolution, a military coalition under the umbrella of NATO began bombing Libyan government positions, with the aim of protecting the civilian population against gross human rights abuses. With ensuing concerns of a stalemate between the government and rebels, the goal of the intervention shifted to one of regime change. The subsequent military victory of the NATO coalition was seen as sufficient to conclude that the R2P operation was a success. The intervention was also seen by some to have advanced the cause of R2P: opposing Security Council countries had refrained from using a veto, and swift action had been taken. The intervention has been severely criticised, particularly by the UNSC members who had abstained from the vote on resolution 1973, for 'mission creep'. Had regime change been specified as a goal from the outset, it is unlikely that UNSC endorsement would have materialised. Residual concerns over 'mission creep' have been used to explain to some extent why the UNSC has failed to act in the case of Syria, despite reports of violations of a scale going beyond those experienced in Libya[24].

Since affirming the R2P in 2005, the UN has failed to prevent atrocities in Afghanistan, Syria, Libya, Yemen, Somalia, Myanmar and elsewhere. Now it is failing to protect civilians in Ukraine. After all the

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[22] BARBER, *The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study*, in 14 *J. Conflict & Sec. L.* 3 (2009).

[23] BARGIACCHI, *Did the European Union Implement the Human Security Concept in the Libyan War in 2011? A Case Study*, in ĐORĐEVIĆ *et al.* (eds.), *Twenty Years of Human Security: Theoretical Foundations and Practical Applications*, Belgrade: University of Belgrade (Faculty of Security Studies) & Institut Français de Géopolitique (Université Paris 8) 2015, 435-446.

[24] ZIFCAK, *The Responsibility to Protect after Libya and Syria*, in 13 *Melb. J. Int'l L.* 59 (2012).

optimistic talk in 2005, there had been little progress in implementing R2P by 2009. The then UN Secretary-General, at a certain point reported that the UN and member states were "underprepared to meet their most fundamental prevention and protection responsibilities"[25].

The problem is then: was the R2P set up to fail? At the heart of the principle, particularly in what refers to the use of military force, exists an unresolvable geopolitical tension. There are five permanent members of the UNSC (US, Russia, China, UK and France) and each of them can veto UN military or R2P action. Everyone protects their allies and their own interests, so one could say that 'the track record is damning'.

By 2018, fighting in Syria had been underway for eight years, and the International Commission of Enquiry reported that the conflict had led to 400.000 dead, almost 6 million of refugees and 6.6 million of internally displaced persons[26]. Yet Russia and China still refuse to invoke R2P and also vetoed the UN attempts to refer Syria and the perpetrators of war crimes to the ICC[27].

4. *How can R2P be applied to the situation in Ukraine?*

At this very moment Ukraine is entitled to invoke the principle of R2P and seek immediate protection of its population within its territory. Ukraine repeatedly calls upon the international community for support, including the enforcement of a no-flight zone over Ukraine by the international community and by NATO in particular. The Ukrainian President has repeatedly invited such action. Thus, Ukraine's sovereignty is not an obstacle to take measures under the principle of R2P. At any rate, considering that R2P suggests that state sovereignty implies the responsibility of states to protect the life and security of those under their control as a prerequisite for exercising sovereignty, usual objections and restrictions to R2P and humanitarian intervention from the point of sovereignty do not apply in the case of Ukraine. The country is willing but unable to provide protection on its own.

By order of March 16, 2022, the ICJ adopted provisional measures in the case *Ukraine v. Russian Federation* based on the Convention on the Prevention and Punishment of the Crime of Genocide[28]. The Court ordered the Russian Federation to suspend military operations commenced

[25] See at https://www.un.org/ruleoflaw/files/SG_reportA_63_677_en.pdf.
[26] See at https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/about-co-i.
[27] See at www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7180.pdf.
[28] See https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf.

February 24, 2022, and to ensure that any military and irregular armed units take no further steps in military operations. The Russian Federation refuses to accept the notion of open warfare and depicts the aggression in terms of "a special military operation", allegedly with an understanding that it takes place within its own sphere of influence.

The threat of recourse to atomic weapons by the Russian Federation and the risk of World War III are – according to the US and NATO – the main objections to taking action and implement a comprehensive no-flight zone over Ukraine, essential to defend its territory and to protect its civil population. However, R2P calls for, and justifies, *more limited measures for protecting civil population against war crimes*. These measures clearly differ from measures supporting military efforts to support Ukrainian defence forces[29] and influence the balance of power on the battlefield. They cannot reasonably induce any recourse to offensive warfare and weapons of mass destruction as a matter of last resort.

Among these limited measures, civil population of Ukraine under R2P must immediately benefit from supplies of water, food and medicines. Civilians, in particular women and children, must be allowed to leave cities under siege in protected corridors. R2P forms the basis for protected corridors through which supplies and exodus can take place. These corridors should urgently be negotiated and their safety must be guaranteed by all parties. In case of failure to rapidly achieve agreement with the Russian Federation, the corridors should be defined by Ukraine upon consultation with the international community. It should be enforced by the international community in support of Ukraine under R2P. Supplies and transports should be organised by Ukraine and other nations obliged to act under the principle of R2P. These corridors should be open to all humanitarian actors, in particular the ICRC whose flag should mark all vehicles and airplanes involved. Switzerland, in particular, could be called upon as a neutral country and depository state of the Geneva Conventions to assume appropriate responsibilities in facilitating and supporting these operations, jointly with the ICRC. NATO, or a coalition of the willing, or individual states can use armed forces to escort and enforce these corridors. They can make available air cover and protect convoys from air, artillery, armored and infantry attacks. No-fly zone would be limited to the protection of the corridors. They would be strictly limited to the purpose of R2P. They would be communicated accordingly.

This sort of mission responds to the principle of proportionality. It does not exceed what is necessary to achieving the goals of R2P: the

[29] The EU, the NATO, the UN and countless UN member states have stepped up financially, economically, politically and militarily in defence of Ukraine.

protection of civil population of Ukraine and the response to the proliferation of war crimes by random shelling of houses, cities and villages. The effort is strictly humanitarian and does not alter the balance of power, unlike measures otherwise taken under collective self-defence in support of the Ukrainian army, yet short of involving military personnel within the jurisdiction of Ukraine.

Finally, R2P also applies outside the borders of Ukraine in supporting neighbouring countries, in particular Poland, Romania, Moldova and Hungary in receiving refugees and in providing for allocation to other countries by means of transportation, shelter and employment until return of refugees to Ukraine will be possible. Efforts must also be made to support Ukrainian refugees in Russia. All these measures are equally placed under the principle of R2P and form part of the overall humanitarian engagement.

Considering Russian's allegations, if the President of Russia wanted to stop genocide there is a process in place, and the fact he did not follow this process undermines his claims that he was acting to prevent genocide. If Putin wanted to stop a genocide in Donbass he needed to make his case at the UNSC in order to gain the necessary authorisation to use military force under Chapter VII of the UN Charter as laid out in paragraph 139 of the World Summit Outcome Document[30].

Even if Russia would have sought to prevent genocide under the 1948 UN Genocide Convention, rather than the 2005 R2P, they would still need to make their case at the UN as set out under Article VIII of the Genocide Convention[31]. Again, the fact that Russia did not do this undermines the claims made in the name of genocide prevention. The fact that 141 states voted against Russia's invasion in the UNGA on 2 March 2022[32], suggests that the vast majority of the world has not bought into Russia's justification. The President of Russia could have presented evidence to the UN in order to make the case for humanitarian intervention[33]. The problem with the humanitarian intervention approach, however, is that there

[30] See *supra* footnote 13.

[31] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), in United Nations, *Treaty Series*, vol. 78, p. 277. Article VIII: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III".

[32] See *supra* footnote 17.

[33]See at https://theconversation.com/putins-claims-that-ukraine-is-committing-genocide-are-baseless-but-not-unprecedented-177511.

is no shared international consensus over what 'humanitarian intervention' is, when it should be implemented, or how it should be done.

5. *Conclusions*

The Russian Federation's own rationale for its invasion of Ukraine provides no basis for a lawful objection on the ground that R2P does not apply to this theatre of international conflict. In fact, the allegation of genocide in the Russian controlled areas of Donetsk and Luhansk as the main motivation put forward by the Russian Federation for the aggression in terms of a "special peacekeeping operation" itself confirms the basic existence and application of the principle of R2P. Upon invitation by Ukraine, R2P offers the political and legal foundations of limited intervention and protection of the civil population. It can be reasonably balanced against the risk of enlarging the war beyond the boundaries of Ukraine.

Historically, realists have opposed the idea of humanitarian intervention because they fear it can act as a trojan horse for ulterior motives. Yet, this is precisely why the R2P is important and, as Bellamy and others have argued for the case of Ukraine, is so needed. One important aspect that emerged from this analysis is that those that defend the idea do not hold onto it because it may help reduce mass atrocity crimes, but because it can help delegitimise the wrong type of action taken under the name of mass atrocity prevention. Therefore, although as rightly asseserted, R2P is complex and controversial, it is very important because, as Doyle explains, "it acts as both a 'licence' and a 'leash against forcible intervention'". Unfortunately, as this author puts it, too much of the criticism directed towards the R2P has focused on its "[in]ability to stir action (the licence) rather than how it can delegitimise the wrong type of action (the leash)"[34]. Regarding the latter, some authors argue that "when norms such as the R2P are invoked by a state but no one else buys into it, it exposes the 'disingenuous and geopolitical' motives at play"[35]. This is not to suggest that a norm such as the R2P can stop an invasion but that norms are important because they can help *delegitimise* the action in question.

Finally, it should be noted that the call of the R2P does not specify whether or not a particular thing should be done. As Welsh explains, "what type of action follows from its invocation will depend on a host of

[34] DOYLE, *The politics of global humanitarianism: The responsibility to protect before and after Libya*, in 53(1) *International Politics* 14 (2016), 14-15.
[35] BADESCU-WEISS, *Misrepresenting R2P and Advancing Norms: An Alternative Spiral?*, in 11(4) *International Studies Perspectives* 354 (2010).

factors". It should be accepted that the R2P norm, like any other norm, is part of an ongoing contestation process. Doyle's understanding of the role that it can play as both a "licence" and a "leash" is an integral part of this. Scholars and policy makers should consider the potential to limit military interventions in international society, rather than merely the shadow dimensions of the doctrines of the responsibility to protect.

SECTION II

KEY DRIVERS OF (IN)SECURITY AT GLOBAL LEVEL

THE UN WOMEN, PEACE AND SECURITY AGENDA: PILLARS, INCLUSION AND THE UNYIELDING ROLE OF WOMEN

Chiara Iachetta

ABSTRACT: The aim of this article is to illustrate the acknowledgment of the role of women by UNSC Resolution 1325 and the WPS Agenda. The structure and implementation of these international instruments is explained accordingly. There is also a focus on scientific studies and statistical analyses that demonstrate the impact of women on peace processes. The article reviews some concrete examples of the efforts of women in conflict-affected countries and it ends with a description of the current positions of Member States on the implementation and maintenance of the Agenda.

KEYWORDS: inclusion, gender perspective, international tools, peace processes

CONTENTS: 1. *The UNSC Resolution 1325 (2000) and its implementation*. – 2. *Almost two decades of subsequent Security Council resolutions*. – 3. *The need for an inclusive approach and the "Broadening Participation Project"*. – 4. *Quantitative analysis of women's participation in peace processes and some examples of the role of women at local level*. – 5. *The 2017 G7 Roadmap for a gender-responsive economic environment*. – 6. *The WPS Agenda towards the future, the Italian contribution and the EU strategic approach*.

1. *The UNSC Resolution 1325 (2000) and its implementation*

For the first time, the unbalanced impact of armed conflicts on women and girls was acknowledged through the UNSCR 1325 (2000) on Women and peace and security, adopted on 31 October 2000. The UNSC formally required parties to a conflict to prevent violations of women's rights; to support women's participation in peace negotiations and in post-conflict reconstruction and to protect women and girls from wartime sexual violence.

In the course of time, resolution 1325 (2000) became a framework for the Women, Peace, and Security Agenda (WPS) which focuses on advancing the components of UNSCR 1325. To this end, the UNSC with its resolution 1889 (2009) called on the UNSG to develop a strategy for

increasing the number of women participating in peace talks and to set global indicators to track and measure the implementation of resolution 1325 (2000) by the UN system and its Member States. A set of 26 indicators have now been developed to track and account for implementation and they are organised into four pillars: prevention; participation; protection; relief and recovery.

The first pillar (*prevention*) includes the incorporation of a gender perspective and the participation of women in preventing the emergence, spread, and re-emergence of violent conflict as well as addressing root causes including the need for disarmament. It also addresses the continuum of violence and adopts a holistic perspective of peace based on equality, human rights and human security for all, including the most marginalised, applied both domestically and internationally[1].

The second pillar (*participation*) calls for increased participation of women at all levels of decision-making, including in national, regional, and international institutions; in mechanisms for the prevention, management and resolution of conflict; in peace negotiations; in peace operations, as soldiers, police, and civilians; and as Special Representatives of the UNSG[2].

The third pillar (*protection*) calls for the protection of women and girls from sexual and gender-based violence, including in emergency and humanitarian situations, such as in refugees camps. It also requires the domestic implementation of regional and international laws and conventions.

The last pillar (*relief and recovery*) requires the access to health services and trauma counselling, including for survivors of sexual and gender-based violence[3].

First paragraphs of the resolution 1325 (2000) address the issue of participation of women in decision-making regarding to preventing, managing and resolving conflict and in peacekeeping operations. Following paragraphs are devoted to recalling various international legal instruments on the protection of women, namely norms of IHL and IHRL, in particular the CEDAW (Convention on the Elimination of All Forms of Discrimination against Women), the provisions protecting refugees

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[1] CHINKIN, *Women, Peace and Security: shifting from rhetoric to practice*, in *Nato Review*, 8 March 2017, at https://www.nato.int/docu/review/articles/2017/03/08/women-peace-and-security-shifting-from-rhetoric-to-practice/index.html.

[2] United States Institute of Peace, *What is UNSCR 1325? An Explanation of the Landmark Resolution on Women, Peace and Security*, available at https://www.usip.org/gender_peacebuilding/about_UNSCR_1325#:~:text=UNSCR%201325%20affirms%20that%20peace,the%20forging%20of%20lasting%20peace.

[3] CHINKIN, *supra* footnote 1.

(precisely in view of the fact that before, during and after conflicts about 80 per cent of displaced persons and refugees are women and children) and the Statute of the ICC, which is fundamental to the repression of crimes of a sexual nature. Paragraphs 12-15 go into tools and measures of intervention in areas such as: disarmament, demobilisation and reintegration of combatants (among whom we now increasingly find women and girls), assistance to refugees and reducing the impact of sanctions adopted by international bodies against parties to the conflict on the civilian population. Finally, the concluding part of resolution 1325 (2000) provides useful guidance aimed at making possible the monitoring and implementation of the resolution within the UN system.

As for the aspect of women's participation in the different stages of transition, in post-conflict peace building and in the reconstruction of institutions, resolution 1325 (2000) found States to be the main actors for achieving this goal. The most innovative provision is paragraph 8 which explicitly indicates the decision-making fora relevant to the promotion of women's involvement in the peace processes, namely the negotiating tables. Ad hoc reference is also made to local women's peace initiatives and indigenous conflict resolution processes.

The sensitive issue of gender-based violence is then addressed in paragraphs 9-11 of resolution 1325 (2000). In particular, after a reminder of all international instruments to protect women and girls involved in armed conflicts, in paragraph 10 the UNSC "calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict" while, in paragraph 11, the UNSC "emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions".

Therefore, all parties to armed conflict must take special measures to prevent the commission of rape and other sexual violence and States are required to actively act to end impunity and bring to trial those guilty of genocide, crimes against humanity, and war crimes perpetrated against women and girls.

2. *Almost two decades of subsequent Security Council resolutions*

For years, resolution 1325 (2000) remained the only instrument specifically dedicated to the issue of the role of women with respect to issues pertaining to peace and security. Subsequently, however, other

resolutions on the same subject have helped to enrich the normative and institutional framework on the subject, supplementing it with detailed provisions on specific aspects.

From the adoption of the UNSCR 1325 (2000), many other documents were adopted. Some of the most relevant are listed below:

1) one of the most important is UNSCR 1820 (2008), adopted unanimously on 9 June 2008, which is expressly dedicated to sexual violence in conflict areas and enshrines gender-based violence as an autonomous area. The most prominent aspect is the need to address the causes of sexual violence by countering the subculture that is at the root of gender-based violence. Also, the text does not rule out the use of sanctions by the Security Council to crack down on the phenomenon of sexual violence and contemplates the total exclusion of amnesty for these kind of crimes. Other important aspects on which the document dwells are: the need to specifically train UN practitioners on sexual violence; the development of effective mechanisms for the protection of women in refugee camps, involving women themselves in this activity; the indication of concrete measures to improve assistance to victims;

2) the UNSCR 1888 (2009) calls for leadership to address conflict-related sexual violence, deployment of teams (military and gender experts) to critical conflict areas, and improved monitoring and reporting on conflict trends and perpetrators;

3) the UNSCR 1960 (2010) calls for an end to sexual violence in armed conflict, particularly against women and girls, and provides measures aimed at ending impunity for perpetrators of sexual violence, including through sanctions and reporting measures. This resolution maintains the framework of the previous ones with respect to the need to continue to enhance and strengthen women's participation in the processes of peace-making. An innovative aspect is the explicit request to the UNSG to report parties "credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda" (para. 3). Accordingly, in his report of January 13, 2012, the Secretary-General explicitly pointed out the parties accused of committing these terrible crimes in the CAR, Côte d'Ivoire, the DRC and South Sudan. The report also provides information on states in which "conflict-related sexual violence in post-conflict situations" happens, namely the CAR, Chad, Nepal, Nepal, Sri Lanka, Bosnia-Herzegovina, Liberia, Sierra Leone, and East Timor. Finally, situation in countries where there is "sexual violence in the context of elections, political strife and civil unrest" such as Egypt, Guinea, Kenya and Syria is analysed;

3) the UNSCR 2106 (2013), adopted unanimously, is specifically focused on the issue of sexual violence in situations of armed conflict. The document adds further operational details to previous resolutions on the topic and reiterates the need for more intensive efforts by all actors, not only the UNSC and the parties to an armed conflict, but all member states and UN bodies, for the implementation of the mandates and for the fight against impunity for these crimes;

4) the UNSCR 2122 (2013) strengthens measures that enable women to participate in the various stages of conflict prevention and resolution, as well as the recovery of the country concerned, placing on member states, regional organisations and the UN, the obligation to reserve seats for women at peace tables. It also recognizes the need for timely information and analysis of the impact of armed conflicts on women and girls. The resolution then calls on the Heads of the UN peacekeeping missions to conduct assessments of human rights violations and abuses of women in armed conflicts and post-conflict situations, and requires the peacekeeping missions to respond to threats to women's security in conflict and post-conflict situations; encourages countries contributing to missions to increase the percentage of deployed women in the armed forces and police forces; stresses the need to continue efforts to eliminate obstacles that prevent women's access to justice in conflict or post-conflict situations;

5) the UNSCR 2242 (2015) marked the 15th anniversary and reaffirms commitment to resolution 1325 (2000) highlighting the role of women in countering violent extremism and addressing the differential impact of terrorism on the human rights of women and girls;

6) the UNSCR 2467 (2019) recognizes that sexual violence occurs on a continuum of violence against women and girls and stresses the responsibility of addressing root causes of sexual violence, specifically structural gender inequality and discrimination.

All these resolutions constitute the UN Agenda for Women, Peace and Security and guide the work of the international community to promote gender equality and strengthen women's participation, protection and rights throughout the cycle of conflicts, from conflict prevention to post-conflict reconstruction.

3. *The need for an inclusive approach and the "Broadening Participation Project"*

Talking about the role of women in conflict and post-conflict environments is not talking about general references to gender equality but practical and concrete facts and actions. For the international community, the adoption of a gender perspective emerges from the operational need

to be able to analyse the operational environment from a broader and more inclusive perspective, in order to plan and act in the right direction to build lasting stability.

The adoption of an inclusive approach to analysis is useful to understand identities and motivations of individual actions, as well as to better protect the rights that each person holds as a human being, which are guaranteed by international law to lay a solid foundation for long-term stability. In fact, understanding the specific needs in terms of security, economic development and government protection is a key factor for the success of the operation. Everything has to do with the concept of "security" which implies a careful analysis of the perceptions of the measures to be taken. The main consideration is that men and women play different roles within society and, as a consequence, are exposed to different types of threats. For a man, for example, it can be "dangerous" to be recruited by irregular armed gangs. On the other hand, a woman is much more exposed to attacks aimed at sexual abuse, which can take place during the most mundane daily activities. Being able to consider threats in a differentiated way is therefore crucial both to prevent them and to initiate peace processes in order to meet the real needs of all.

In addition to the functional need for an inclusive approach, research from a variety of fields shows that women are more likely to be perceived by fellow citizens as members of society that can be trusted; they are more likely to serve as caregivers and place more emphasis on social and civic responsibilities compared to men. While these characteristics stem from socially constructed gender roles and are not essential to all women's identities, such attributes and perceptions make women logical contenders for leadership roles in peace-making, with complementary skills and approaches to their male counterparts[4].

Scientific papers and statistical analyses have also been published showing the positive impact of women on peace negotiations and, more in general, during peace processes, peace building and peacekeeping phases. In particular, the "Broadening Participation Project" is a research project conducted at the Graduate Institute of International and Development Studies of Geneva led by Thania Paffenholz which "has sought to better understand how inclusion works in reality and what the impact of inclusion is on the quality and sustainability of political agreements"[5].

According to the project, "quality" is understood as the way in which causes and effects of conflicts are taken into account in the final

[4] O'REILLY-SÚILLEABHÁIN-PAFFENHOLZ, *Reimagining Peacemaking: Women's Roles in Peace Processes*, New York: International Peace Institute June 2015, 9-10.
[5] *Ibidem*, 10.

agreement; "sustainability" is instead defined as the way in which the provisions of the agreement are actually implemented. The project analysed forty case-studies concerning peace negotiations and political transitions as well as their implementation. The participation of different actors such as political parties, armed groups and religious groups has been considered. A specific focus is dedicated to women's electoral groups, formed by networks or coalitions, and to their impact during the participation in peace negotiations. Analysing the data collected, it emerges that women's groups are more likely to raise issues not directly related to the priorities of the belligerents, nor specifically relevant to women. The participation of women's groups takes very different forms: both official and unofficial roles at negotiating tables and post-agreement consultations and commissions have been considered and the research demonstrates the direct proportionality between the groups of women considered, the influence they are able to exert and the positive outcomes of the peace processes.

The level of influence was measured on the basis of specific topics addressed by the actors involved in the negotiations, whether these topics were integrated into the agreement and to what extent the actors were pushing for negotiations or agreement. The level of influence was then compared to the agreements actually signed and implemented. When the influence of women's groups was strong, a peace agreement was almost always reached. Even where the influence of women's groups was moderate, agreement was reached in most cases. On the contrary, in cases where the influence has been weak or where the groups have not been involved at all, the possibility of reaching an agreement has been considerably lower. Certainly the involvement of women is not the only factor influencing the outcome of the negotiations, and in any case peace agreements have been reached even without the participation of women's groups. However, the results show that the inclusion of women increases the chances of reaching an agreement. The most significant result for women's groups was to push for the start or finalisation of negotiations at deadlocks. The women involved also supported measures to prevent the use of violence, as well as specific provisions to address gender equality. The case of Burundi, where women have worked to include provisions on freedom of marriage in the peace agreement, is quite clear.

The results outlined here demonstrate that the inclusion of women is not simply a normative issue. When women participate and are able to exercise influence, there are positive effects for the likelihood of reaching a peace agreement, the text of the agreement that is produced, and the implementation that follows.

4. *Quantitative analysis of women's participation in peace processes and some examples of the role of women at local level*

Statistical analysis suggests that women's participation has also a positive impact on the durability of peace agreements. By measuring the presence of women as negotiators, mediators, witnesses, and signatories to 182 signed peace agreements between 1989 and 2011, and the length of time that a peace agreement lasted, the analysis concluded that women's participation had a statistically significant, positive impact on the duration of peace[6].

In fact, statistics show that the inclusion of women during negotiations and peace processes has a positive effect on the duration of the agreements reached. It turns out in fact that there is 20% more probability that an agreement lasts at least two years and 35% more probability to last in the long term, up to 15 years. Including women does not automatically mean dealing with gender-related issues, and women themselves can play a much greater role in the negotiations than women's rights issues alone. Despite this, women's groups participating in peace processes tend to push for the inclusion of gender provisions.

The statistical analysis reveals that "the presence of women was not the only significant predictor. Democracy also demonstrated a positive impact, with an average of 23 percent probability of a peace agreement lasting fifteen years. Democracy and women's participation are often linked, so this could partially explain the result. It also suggests that societal equality and good governance together encourage a lasting peace. Therefore, causality could move in either direction: democracy could aid gender equality in a conflict-affected country or the presence of a woman could facilitate the inclusion of democratic principles in the agreement"[7].

In a speech delivered before the UNSC during the 2012 Open Debate on Women, Peace, and Security, Bineta Diop (founder and president of Femmes Africa Solidarité, then appointed the first Special Envoy for Women, Peace and Security of the AU Chairperson) highlighted the essential role that women are already playing at a local level, for their land and their communities during and after conflicts. She underlined that "women are not absent because they lack negotiating skills or because they cannot make vital contributions to peace processes. In Colombia,

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[6] STONE, *Quantitative Analysis of Women's Participation in Peace Processes*, in O'REILLY *et al.*, *supra* footnote 4, Annex II, at 32.

[7] STONE, *supra* footnote 7, 32. See also CAPRIOLI, *Primed for Violence: The Role of Gender Inequality in Predicting Internal Conflict*, in 49(2) *International Studies Quarterly* 161 (2005).

women's groups have united to create Women for Peace, a new movement offering concrete recommendations and proposals for the nascent peace process. Malian women […] have been active for months over the crisis in Mali, asserting their right to engage in the efforts to bring about a political solution to the crisis, and reminding all actors that women have been specifically targeted in the violence, especially in northern Mali"[8].

By focusing only on formal, national level processes, the international community shapes what is seen as relevant and decisive in peace processes, without sufficiently recognizing that investment at the local and sub-national level (the so-called "track 2"), where many women are already brokering peace or shoring up the resilience of communities against the spread of conflict, is just as important. A narrow focus on national and international formal peace processes prevents full consideration of multiple actors busy with track 2 processes, such as building peace and security ceasefires in conflict-affected communities. Sub-national and local mediation initiatives, where women usually have a prominent role, receive inadequate recognition and support[9].

In Syria, women negotiated an end to hostilities and access to humanitarian aid at local level but remained excluded from formal attempts to rebuild the crisis. In South Sudan, women are active in mobilising for the promotion of peaceful dialogue between the different parties involved in the conflict but have not yet managed to influence the formal negotiations. In Colombia, women's participation in community peace processes have proved essential to sustaining track 1 processes.

Analysing these examples, we realise how important is an active role of women for their communities during conflicts. In a way, this makes the WPS Agenda less innovative than we think because it is 'only' a tool that indeed recognizes at international level what already happens in a natural way at local level. However, given the difficulty of women in accessing formal negotiations and official platforms related to peace processes, the WPS Agenda is still an essential tool to give international relevance to an issue that is troubling our days: gender inequality.

[8] Statement by Ms. Bineta Diop, Security Council Open Debate on Women, Peace and Security, 30 November 2012, available at http://www.peacewomen.org/sites/default/files/bineta_diop_0.pdf.

[9] UN Women, *Preventing Conflict Transforming Justice Securing the Peace - A Global Study on the Implementation of United Nations Security Council resolution 1325*, New York 2015, 54, available at http://wps.unwomen.org/en.

5. *The 2017 G7 Roadmap for a gender-responsive economic environment*

The sixty-first session of the Commission on the Status of Women was held in New York in March 2017 and was attended by representatives of member states, policymakers, researchers, women's rights advocates, NGOs with consultative status at ECOSOC. The 2017 session focused on two aspects: economic empowerment of women in a changing world and opportunities and goals achieved by women and girls in the implementation of the Millennium Development Goals (MDG).

Economic empowerment of women was also addressed by the G7 held, under the Italian presidency, in Taormina in May 2017, and the final outcome was the adoption of an important document, the "G7 Roadmap for a gender-responsive economic environment", in which 3 macro-objectives and related sub-objectives were set:

1) increasing women's participation and promotion of equal opportunities and fair selection processes for positions of leadership at all levels of decision-making, with the further sub-goals of promoting women's participation in the social, economic and political life (1a) and of promoting women's entrepreneurship (1b);

2) strengthening women's access to decent and skilled jobs, setting the following sub goals: increasing the female labour force and improvement of employment quality (2a); recognizing and valuing unpaid care and domestic work (2b); increased investment in social infrastructure to support households' care for children and other dependents (2c); investing in health, well-being and nutrition to promote women's and girl's full economic empowerment (2d); developing a new gender-sensitive and multidimensional analysis of poverty (2e) and a comprehensive work-life balance and equal pay policies and measures (2f); promoting participantion in STEMM (Science, Technology, Engineering, Mathematics, and Medicine);

3) eliminating violence against women and girls throughout their lives by promoting and reinforcing appropriate measures to stop violence against women and girls in the public and private spheres through preventive actions, protection and initiation of legal measures.

What emerges from this albeit important and commendable Roadmap is that we often seek remedies rather than real solutions. In particular, macro-objective no. 3 calls for funding strategies to prevent domestic violence, implementing and monitoring ad hoc policies and laws, collecting and analyzing data, and funding information and awareness raising. Yet, only some of these measures are directed at the roots of the problem. Most of them is focused on *ex post* intervention measures that leave out the

main problem: education to and for non-discrimination, sociality and the management of non-violent conflict.

6. *The WPS Agenda towards the future, the Italian contribution and the EU strategic approach*

Unfortunately in recent years the adoption of resolutions further developing and implementing the WPS Agenda has met with resistance from some Permanent Members of the UNSC. In fact, since 2019 Russia, China, and the US have been arguing that the attempts to further develop the WPS Agenda is an unjustified expansion of the Council's responsibilities and a violation of the competences of other bodies of the UN system.

Similar resistances first surfaced on the adoption of resolution 2493 (2019) when the US did not accept references in the draft resolution to sexual and reproductive health because of its national position on the issue and therefore did not support the implementation of the Agenda. The situation continued to be tense when resolution 2538 (2020) was adopted: some members, including China, warned against language too prescriptive with regard to Member States' actions to be implemented at national level. It is clear that the present climate of friction within the UNS makes it difficult to find a balance between implementation and maintenance itself of the WPS Agenda. On 30 October 2020, the friction culminated in the failure to adopt the annual resolution on WPS Agenda.

Despite these problems and failures, we must remember that recognising the fundamental role of women in achieving and maintaining peace, their essential presence before and during negotiations, and the adoption of a gender perspective in conflict prevention, management and resolution, is an important step on the path of achieving gender equality. Overthrowing the cultural barriers behind gender discrimination and breaking down resistances of States is a long journey but the WPS Agenda is a milestone.

Some concluding remarks on Italy's role may also be useful. Italy always reaffirms its on-going commitment to the promotion of women's empowerment and gender equality and has actively supported resolution 1325 (2000) since its adoption. More than twenty years later, the resolution retains intact its relevance and pioneering character: it encouraged a profound change of approach in viewing the role of women in conflicts, emphasising that they are not only the main victims, but above all the protagonists in prevention of crises, peace-making processes and post-conflict reconstruction as it was widely documented and demonstrated.

Italy devotes significant efforts and resources to the promotion of women's participation in peace processes and international mediation, placing itself at the forefront of the international community in the implementation of the WPS Agenda. For instance, Italy has paid special attention to the nexus between WPS Agenda and mediation. Starting in 2017, the established Mediterranean Women Mediators Network – consisting of some 50 women of different backgrounds and ages, from more than 20 countries bordering the Mediterranean, with experience or knowledge in mediation, conflict resolution conflict, civil and political rights – has grown over the years in terms of participation and expertise and has gradually consolidated at the local level.

Given the broad mandate of resolution 1325 (2000) and the lack of preceptive guidance regarding the implementation of its provisions, with the Presidential Statement of October 28, 2004, the UNSC allowed member states to pursue the implementation of the WPS Agenda through the adoption of National Action Plans. In December 2010, Italy adopted the first National Action Plan on Women, Peace and Security (2010-2013); in November 2014 the second National Action Plan covered the period 2014-2016 while the third Plan saw the light in December 2016 covering the period 2017-2019. More recently, the Interministerial Committee on Human Rights of the Italian Ministry of Foreign Affairs and International Cooperation approved the fourth National Action Plan on Women, Peace and Security (2020-2024) on the occasion of the 25th anniversary of the World Conference on Women in Beijing (1995) and the 20th anniversary of resolution 1325 (2000). In line with the 2030 Agenda for Sustainable Development, the new plan pursues four goals aimed at promoting and strengthening: the role of women in peace processes and decision-making processes; the gender perspective in peace operations; the empowerment of women, gender equality and protection of the human rights of women and girls in conflict and post-conflict areas; communication, advocacy and training activities at all levels on the WPS Agenda, while increasing synergies with civil society. It is noteworthy that Italy ranks among the very few States to have allocated public funding for the implementation of its National Action Plans.

With the fourth Action Plan, in particular, Italy aims for a further qualitative leap in the efforts made by institutions and civil society in achieving the goals set by the WPS Agenda, updating and refining the available tools. In this perspective, Italian authorities will strengthen their coordination in multiple initiatives that will be carried out to prevent and respond to incidents of violence in crisis contexts; promote women's empowerment and gender equality; increase the participation of women in all spheres of economic and social life. The Italian Plan has been designed

as a "living document", capable of adapting to changing needs and obstacles that still stand in the way of women's full realisation. It is therefore essential to give continuity to the holistic, inclusive and integrated approachfollowed by Italy, which finds its effective and unmistakable trait in the breadth of involvement of third sector, NGOs, academia, private sector and labour organisations.

As regard the EU, in 2018 it was adopted a particularly advanced policy on the subject ("Strategic Approach on WPS") that is innovative and free from false rhetoric. It promotes an "equitable and meaningful" participation, covers not only women but also men and girls from different backgrounds (economic, social, geographic, ethnic, religious) in a vision that integrates gender and intersectionality. Even where women are specifically mentioned, the EU strategic approach specifies what circumstances may determine their added value (i.e., performing the role of caregiver, engaging in land cultivation, education). In the area of protection where victimizing and stereotypical views prevail more frequently, a victim-centered approach is taken, violence survivors are mentioned, and it is emphasized that men are also victims of conflict violence, whether of specific violence including sexual violence or of killing and forced recruitment. This is an approach favoured by peace-building organizations that prefer gender-sensitive conflict analysis to the more traditional binary approach that pits women and men against each other, identifying the former as the object of discrimination and violence and the bearers of peace.

However, the outlined framework does not hold up to comparison with reality: not only individual measures but the overall vision advanced by the WPS Agenda seem to be belied by a practice that confines to the margins the approach "peace by peaceful means" which should be instead the priority. Women and peace policies thus represent a still largely unexpressed resource waiting to unfold its full potential. The commitment of all active components to the promotion, development and implementation of WPS Agenda, including those States that adopted dedicated action plans, could still make the difference, ensuring not only security and defence, but also specific support for peace processes based on criteria of inclusiveness, effectiveness, sustainability.

Women and all people who support peace policies have been calling for this for a long time, and now that the time is that of emergency, they demand it strongly and urgently.

PURSUING JUSTICE OR PEACE AND SECURITY? THE LEGAL POLITICS OF ARTICLE 16 OF THE ROME STATUTE

Anna Maria Cassarà

ABSTRACT: The paper examines article 16 of the Rome Statute that confers to the UNSC the so-called "deferral power", that is the power to request the ICCourt to temporarily suspend its judicial activities. Through the study of the drafting and subsequent implementation of the provision, the analysis pursues the goal of bringing to light the most problematic aspects, which are inherent in the relationship between the international values of justice, on one hand, and peace and security, on the other.

KEYWORDS: Article 16; Rome Statute; ICC; deferral power; UNSC

CONTENT: 1. *Introduction*. – 2. *The drafting history of Article 16 of the Rome Statute*. – 3. *The UNSC deferral's power under Article 16*. – 4. *The implementation practice of Article 16: the 'peacekeeping cases', Lybia, Sudan, and Kenya*. – 5. *Legal issues concerning Head of State's immunity, States not party to the Rome Statute, and obligation of deferral request for the ICC*. – 6. *Conclusions*.

1. *Introduction*

Along the challenging pathway for the maintenance or restoration of international peace and security, the 'political power' of the UNSC, the UN body having primary responsibility pursuant to Article 24(1) of the UN Charter "for the maintenance of international peace and security", and the 'judicial power' of the ICC, whose Statute recognizes in the Preamble that crimes falling within its jurisdiction "threaten the peace, security and well-being of the world" and "must not go unpunished"[1], may sometimes meet and encroach each other, so raising the question of what is the best approach to achieve peace and security at international level.

[1] Rome Statute of the International Criminal Court (Rome, 17 July 1998), in United Nations, *Treaty Series*, vol. 2187, p. 3. Under Article 5 of the Rome Statute, crimes within the jurisdiction of the Court are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

To this regard, Article 16 of the ICC Statute is particularly relevant. In fact, this provision coordinates the action of the UNSC and the ICC in the pursuit of their respective goals by providing that, in certain circumstances, priority may be given to the political approach rather than to the judicial approach[2]. Article 16 therefore presupposes that the two types of approach are sometimes alternative, so that implementing one may exclude implementing the other. The main consequence of this 'primacy' – the suspension of any judicial activity in spite of the principle that 'justice must run its course' – is very difficult to understand, if not accept, in light of the principles of criminal law underlying the domestic systems of democratic States which respond to additional and different logics than those pertaining to the international criminal law system.

These premises raise several issues and questions: how can it be conceivable that political reasons may prevail over justice; what these reasons are; whether Article 16 is 'right' or not. The answers transcend Article 16 of the Rome Statute and concern the role and tasks that the international community has entrusted to the UNSC and the ICC[3]. At the same time, it is clear that answers are also reflected in the reasons why such a rule was provided for. Accordingly, the analysis of the drafting history of Article 16, and its subsequent application, may shed some light on this complex matter.

2. *The drafting history of Article 16 of the Rome Statute*

The current wording of Article 16 does not match the original one.

In the Draft Statute for an International Criminal Court, adopted by the International Law Commission at its forty-sixth session in 1994, the provision was contained in the third and last paragraph of Article 23, aimed at regulating relationships between the ICC and the UNSC. It stated that until a situation would have been "dealt with by the UN Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter", no prosecution could be commenced under the ICC's Statute unless otherwise decided by the UNSC[4].

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[2] Article 16 (Deferral of investigation or prosecution): "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

[3] BARGIACCHI, *La Corte penale internazionale: singolarità giuridiche e ostilità politiche*, in 65 *Riv. coop. giur. int.* 48 (2020).

[4] Article 23(3): "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the

As a coordinating rule between the UNSC and the ICC, the balance leaned in favour of the former: the Court could not exercise its functions on situations with respect to which action under Chapter VII was actually being taken by the UNSC until when the action had terminated or the UNSC had decided otherwise. In a subsequent document adopted by the *Ad Hoc Committee on the Establishment of an International Criminal Court* in 1995[5], national delegations in favour of this provision considered that it was "necessary to prevent the risk of interference in the Security Council's fulfilment of its primary responsibility for the maintenance of international peace and security under Article 24 of the Charter, with attention being drawn to the priority given to the Council in this regard under Article 12 of the Charter"; other delegations, on the other hand, expressed concern about paragraph 3, arguing that the judicial functions would have been subjected to the political decision of a political organ[6], thus clashing with the principle of impartiality and independence of judicial bodies. The final text of the provision, namely the current wording of Article 16, represented an acceptable compromise between these opposing points of view for all parties concerned.

3. *The UNSC deferral's power under Article 16*

Article 16 confers an unquestionably peculiar prerogative to the UNSC known under the name of "deferral power". In fact, the UN political organ *par excellence*, adopting a resolution under Chapter VII of the UN Charter, may request to the ICC to not commence or proceed with investigation or prosecution concerning the situation at issue in the

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peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides". Cf. ILC, *Draft Statute for the International Criminal Court, with commentaries*, Doc. A/49/10, in *Y. ILC. 1994*, vol. II (Part Two), §§ 42-91.

[5] UNGA, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, Supplement No. 22 (A/50/22), §§ 124-125, at 28.

[6] *Ibidem*, § 125, at 28: "Other delegations expressed serious reservations concerning paragraph 3 in relation to the prerogative conferred on the Security Council by article 23 of the draft statute as regards the activation of the court, bearing in mind the political character of the organ in question. It was observed in particular that the judicial functions of the court should not be subordinated to the action of a political body. Concern was also voiced that the court could be prevented from performing its functions through the mere placing of an item on the Council's agenda and could remain paralysed for lengthy periods while the Security Council was actively dealing with a particular situation or retained the item on its agenda for possible future consideration. The necessity of the provision was also questioned on the ground that no similar priority was given to the Security Council under Article 12 of the Charter with respect to judicial decisions on legal questions to be rendered by the International Court of Justice".

resolution for a period of twelve months (that may be renewed under the same conditions).

In the final text of the Article 16, the prevailing action of the UNSC is delimited both from a temporal and qualitative point of view. In the Draft Statute, in fact, the activity of the ICC would have been blocked *ab origine* by the mere fact that a situation constituting a threat to international peace and security had been put on the agenda of the UNSC. In Article 16 of the Rome Statute, instead, only the adoption of a resolution (the so-called 'deferral resolution') can temporarily suspend ICC's investigation or prosecution. In the Draft Statute the general performance on behalf of the UNSC of its function under the UN Charter was sufficient to prevent the ICC from performing its ows functions; in Article 16, instead, the UNSC is required to take specific and positive action (the deferral resolution) to suspend the activity of the ICC. Furthermore, the temporary nature of the suspension ensures that the political priorities of the moment do not result in a permanent or too long waiver or a shield from the prosecution of alleged crimes. Once the suspension period is expired and if the UNSC does not renew the deferral's request, in fact, the ICC will be able to proceed.

The deferral resolution must be adopted under Chapter VII of the UN Charter and, accordingly, certain legal and procedural requirements must be met. First of all, the UNSC must ascertain that a given situation constitutes a threat or a breach of the peace, or an act of aggression under Article 39 of the UN Charter. Then, the UNSC must make an assessment about the need of the deferral's request, namely if the continuation of the judicial activity of the ICC may adversely influence the maintaining or restoration of international and peace security. Finally, the non-procedural nature of this matter under Article 27(3) of the UN Charter requires nine affirmative votes for the adoption of a deferral resolution, including the concurring votes of the five Permanent Members[7]. This means that the veto cast by only one Permanent Member would prevent the adoption of the deferral resolution and would not delay the judicial activities of the ICC[8].

[7] According to state practice within the UNSC, the abstention of a Permanent Member does not impede the adoption of a deferral resolution.

[8] About the harmful effects of delayed justice, it is noteworthy to quote the statement of former ICC Prosecutor, Fatou Bensouda, delivered to the UNSC on 14 December 2018: "Justice delayed is justice denied" (OTP, *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)*, 14 December 2018, available at https://www.icc-cpi.int/news/statement-united-nations-security-council-situation-darfur-pursuant-unscr-1593-2005-6).

In spite of these guarantees placed to garrison the exercise of the deferral power of the UNSC, however, the question whether Article 16 constitutes an *obstacle* to the timely and effective prosecution of international crimes or a *tool* at the disposal of the UNSC to maintain or restore international peace and security remains still unsettled. Moreover, the implementation practice of Article 16 has not been very helpful to answer the question.

4. *The implementation practice of Article 16: the 'peacekeeping cases', Lybia, Sudan, and Kenya*

The first deferral resolution was the UNSCR 1422 (2002), adopted on 12 July 2002, and it was highly controversial[9]. It contained a request of *immunity* from the Court's prosecution for current or former officials and personnel from a contributing State not a Party to the Rome Statute assigned to UN peacekeeping operations or authorized by it. In other words, it was a sort of *preventive* request of immunity in the event that they were subject to judicial proceedings.

Resolution 1422 (2002) offers several points of reflection. Its adoption was strongly pushed for by the US which were not (and still are not) a Party to the ICC Statute whose personnel engaged in peacekeeping operations would nevertheless have been subject to the Court's jurisdiction if the alleged crime had been committed in the territory of a State Party to the Statute or has accepted the ICC's jurisdiction[10]. The immunity request removed such an eventuality *before* the OTP opened an investigation and identified those responsible. In other words, resolution 1422 (2002) anticipated the moment when a deferral may be requested pursuant to the clear text of Article 16. On the other hand, if a proceeding has not yet been initiated, it is difficult to think that it can be deferred.

As anticipated by the second operational paragraph of resolution 1422 (2002) expressing the intention to renew the request "for as long as

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[9] See MOKHTAR, *The fine art of arm-twisting: The US, Resolution 1422 and Security Council deferral power under the Rome Statute*, in 3(4) *International Criminal Law Review* 295 (2003); ZAPPALÀ, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, in 1 *J. Int'l Crim. Just.* 114 (2003).

[10] See AKANDE, *The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits*, in 1 *J. Int'l Crim. Just.* 618 (2003): the ICC may exercise its jurisdiction over nationals of a State not a Party to the Rome Statute in other two ways. Pursuant to art. 13, lett. b, if a situation is referred to the OTP by the UNSC acting under Chapter VII of the UN Charter, even if the alleged crime is committed by a national or in the territory of a State not a Party, or if a State not a Party has accepted the jurisdiction of the Court over its nationals in relation to a specific crime.

may be necessary", the deferral request was renewed for further twelve months by the UNSCR 1487 adopted on 12 June 2003. However, the adoption of a third deferral request for peacekeeper personnel failed because there was no broad consensus within the UNSC.

In two other subsequent cases (the situation in Lybia and in Darfur, a Sudan's region), the deferral power was only mentioned in the preambular paragraphs of the two resolutions adopted by the UNSC to refer the situations to the OTP pursuant to Article 13, lett. b (the so-called '*referral power*' allowing the UNSC to activate the jurisdiction of the ICC "acting under Chapter VII of the UN Charter" whenever it considers a situation as a threat or a breach of international peace and security)[11]. By simply mentioning Article 16 in its resolutions, it seems as if the Security Council wanted to point out that referring a situation to the OTP would not prevent it from exercising the deferral power at a later stage (in these two cases, however, the deferral power has not yet been exercised).

In the situation in Darfur, and in the case of ICC's proceedings initiated *motu proprio* by the OTP against current President Kenyatta and Deputy President Ruto of Kenya, the application of Article 16 was however invoked loudly but in vain by suspects and accused persons.

As anticipated, on 31 March 2005, by virtue of resolution 1593 (2005), the UNSC, acting under Chapter VII of the UN Charter, referred to the Court the situation in Darfur where a non-international armed conflict was underway and crimes under the Court's jurisdiction appeared to have been committed by all the parties (Government armed forces and rebels). A few months later, in June, the OTP opened an investigation and, in July, the OTP filed an application for a warrant of arrest against Sudanese President Omar Hassan Al-Bashir. One week after, the AU requested the UN Security Council to take action pursuant to Article 16 and to defer the proceeding initiated before the ICC, complaining about the fact that the warrant of arrest would put at risk all the efforts made by the Sudan's government for restoring peace in Darfur and that the Sudanese judicial system had the primary right, under the principle of complementarity enshrined in the Rome Statute, to bring to justice the perpetrators of violations committed in Darfur[12].

Within the UNSC, however, member States had different positions on the issue and, while still noting "the African Union's concerns and

[11] UNSCR 1593 (2005), adopted on 31 March 2005, on the situation in Darfur, Sudan; and UNSCR 1970 (2011), adopted on 26 February 2011, on the situation in Libya.

[12] See the AU Peace and Security Council communiqué attached to the letter, dated 21 July 2008, from the Permanent Observer of the AU to the United Nations addressed to the President of the Security Council in relation to the application made on 14 July 2008 by the ICC's Prosecutor (UN Doc. S/2008/481).

those of several Council members [like Russia] regarding potential developments following the application by the Prosecutor of the ICC for an arrest warrant against the Sudanese President", no deferral request was adopted[13].

Relating to the situation in Kenya, on 31 March 2010, the ICC's Prosecutor was authorized by the Pre-Trial Chamber to open an investigation *proprio motu* for crimes against humanity committed in the context of post-election violence in Kenya in 2007/2008. On March 2011, the Pre-Trial Chamber issues summons to appear for six suspects, including the then Deputy Prime Minister, and current President, of Kenya, Uhuru Muigai Kenyatta, and the then Minister, and current Deputy President, of Kenya, William Samoei Ruto.

Before the ICC, the Government of Kenya argued that the 2010 constitutional reform aimed at strengthening the domestic criminal judicial system, although not yet completed, allowed Kenya to investigate on post-election violence in accordance with the principle of complementarity. Moreover, on October 2013, Kenya also forwarded to the UNSC a request for deferral under Article 16 of the Rome Statute. The request was being made "in view of the threat to the peace, breach of the peace or act of aggression likely to arise in the light of the prevailing and continuing terrorist threat existing in the Horn of Africa and East Africa [and] in order to provide time during the term of the deferral, for Kenya, in consultation with the Court and Assembly of States Parties to the Rome Statute, to consider how best to respond to the threat to international peace and security in the context of the Kenyan situation"[14]. The UNSC did not however implement the Kenyan request under Article 16.

5. *Legal issues concerning Head of State's immunity, States not party to the Rome Statute, and obligation of deferral request for the ICC*

Sudan and Kenya attempted to bar the ICC jurisdiction also by raising certain legal issues, such as the status of Sudan as a State not party to the

[13] UNSC, Press release SC/9412, 31 July 2008, at https://reliefweb.int/report/chad/sudan-un-sc-decides-extend-mandate-unamid-14-votes-favour-1-abstention-resolution-1828. Two arrest warrants against the Sudanese President Al-Bashir will be then issued for crimes against humanity and war crimes, on March 2009, and for genocide on July 2010. To date, the arrest warrants have not yet been executed and the case at the ICC still remains in the Pre-Trial stage until the former President Al-Bashir will be surrendered to the Court by the Sudanese authorities.

[14] UNSC, Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General and the President of the Security Council, S/2013/624, 22 October 2013.

Rome Statute and the Head of State's immunity under customary international law[15]. The AU strongly supported both the deferral requests of both States and the reasons for barring the ICC jurisdiction: in a decision on the relationship with the ICC, the AU affirmed that "national laws and international customary law granted immunities to the sitting Heads of State and other senior state officials during their office"[16].

But the ICC was of different opinion on both issues. Its Pre-Trial Chamber noted that the Republic of Sudan is "a Member State of the United Nations, as such, in accordance with article 25 of the UN Charter, is obliged to accept and carry out decisions of the UN Security Council". By virtue of the referral resolution 1593 (2005), the ICC is empowered to exercise its jurisdiction over the Sudan, even if it is a State not party to the Rome Statute.

The ICC also addressed the issue of the alleged immunity of Heads of State and other senior state officials during their office from international criminal proceedings. In the appeal judgment on the Jordan referral, its Appeals Chamber argued that Article 27(2) of the Rome Statute, establishing the irrelevance of "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law", shall not bar the ICC from exercising its adjudicatory jurisdiction over the person[17]. In particular, official capacity as a Head of State does not bar the ICC jurisdiction because "there is neither State practice nor opinio juris that would support the existence of Head of State immunity under customary international law vis-à-vis an international court. To the contrary, such immunity has never been recognised in international law as a bar to the jurisdiction of an international court"[18].

On these premises, in June 2014, the AU adopted the so-called 'Malabo Protocol' to the the Statute of the future ACtJHR, whose Article 46A bis provides that "no charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state

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[15] SINAGRA-BARGIACCHI, *Lezioni di diritto internazionale pubblico*, 3rd ed., Milano: Giuffrè Francis Lefebvre 2019, 493-497.

[16] AU, *Decision on Africa's Relationship with the ICC*, Ext/Assembly/AU/Dec.1, 12 October 2013 (Extraordinary Session of the Assembly of the AU, Addis Ababa), 3-5.

[17] As a State Party to the Rome Statute, the Pre-Trial Chamber II found Jordan in breach of Article 87(7) statutory obligation to cooperate with the Court and comply with its request for arrest and surrender of President Al-Bashir when he was in Jordan on 29 March 2017 for the summit of the Arab League. On Article 27, see SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford: Oxford University Press 2016, 594-605.

[18] ICC (AC), *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09 OA2, § I.1, at 5.

officials based on their functions, during their tenure of office". Bearing in mind the principle of complementarity, the immunity provision in the Malabo Protocol could hinder the purpose of the Rome Statute to put an end to impunity for the perpetrators of international crimes without any distinction based on official capacity.

Finally, it is important to briefly analyze a further legal issue concerning Article 16: does a deferral request of the UNSC oblige the ICC to suspend an ongoing investigation or prosecution? Legal scholars in general believe that the Court cannot disregard a deferral resolution but some argue that several arguments are against this conclusion, such as: *a*) the ICC was established by an international treaty, not under the UN Charter, and it is neither an organ nor an agency of the UN system; *b*) Article 1 of the Rome Statute states that "the jurisdiction and functioning of the Court shall be governed [only] by the provisions of this Statute"; *c*) Article 16 of the Rome Statute states that "no investigation or prosecution *may* be commenced or proceeded" (emphasis added) and therefore there is no order or prohibition in the word 'may'; *d*) Article 103 of the UN Charter provides for the primacy of obligations under the Charter over those deriving from any other international agreement but it is addressed only to the UN Member States; *e*) the ICC is an independent judicial body with its own legal personality.

6. *Conclusions*

The UNSC and the ICC have a common assumption: crimes under the Court's jurisdiction constitute a threat to the international peace, security and well-being of the world. The ICC pursues the aim of preventing such crimes from going unpunished by bringing perpetrators to justice. The UNSC has got the deferral power under Article 16 as a further means of maintaining or restoring the international peace and security. By allowing a temporary renewable suspension of the Court's judicial activity, Article 16 might somehow affect the course of justice even if the procedural requirement of nine affirmative votes, including those of the Permanent Members, to adopt a deferral resolution should guarantee a proper application of this provision. The suspension under Article 16 could buy useful time to restart the domestic judicial system of the State having jurisdiction on the situation and allow the prosecution of international crimes before its own domestic criminal courts. If Article 16 were applied for this righteous purpose, then it would be really possible to have peace and justice going 'hand in hand' and the political and legal compromise underlying the adoption and application of Article 16 would be more acceptable for the international community.

THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO CYBER OPERATIONS

Laura Garay Gómez

ABSTRACT: The world is rapidly evolving and so are armed conflicts. With the last developments in technology, new methods of warfare, not previously foreseen by international law, are emerging. Cyber operations occupy in recent years an indispensable page on the international security agenda due to its highly damaging and harm potential. There is a general consensus on the applicability of international law to these operations within the international community but some questions still remain unanswered. The article examines how international law, in particular international humanitarian law, can accommodate this new reality and the challenges and issues it poses.

KEYWORDS: IHL, Cyber operations and attacks, Armed attac, Tallinn Manual

CONTENTS: 1. *The concept of cyber operations and historical background*. – 2. *Legal framework of cyber operations*. – 3. *Can cyber operations constitute armed attacks?* – 4. *Issues on the applicability of IHL to cyber operations*. – 5. *Final remarks.*

1. *The concept of cyber operations and historical background*

Although there is not an official legal definition of cyber attacks[1], we could depart from the definition contained in the Tallinn Manual 2.0 crafted as a result of consensus among experts on the matter. Cyber attacks are defined in the manual as a "cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects"[2]. The ICRC defines cyber operations as "operations against a computer system or network, or another connected device, through a data stream, when used as means or method

[1] GUTIÉRREZ ESPADA, *La responsabilidad internacional por el uso de la fuerza en el ciberespacio*, Pamplona: Editorial Aranzadi 2020.

[2] SCHMITT (ed.), *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations*, 2nd ed., Cambridge: Cambridge University Press 2017.

of warfare in the context of an armed conflict"[3]. These definitions are only oriented to the most serious means of cyber operations, i.e. those of significant harmful potential. On a daily basis, however, many cyber attacks take place without involving any of the earlier, being simply directed to sabotage administrative websites without having a clear objective or purpose. Those methods of cyber warfare will not however be worthy of the attention of IHL rules.

The first documented cyber operation took place in the context of the Kosovo war. As a response to the American attacks on Belgrade, a group of Serbian computing experts gathered into a series of organised attacks against NATO internet infrastructure: NATO services were shot down as well as the White House's official website[4]. Other significant cyber attacks reported over the last few years include the attacks during the Russian-Georgian conflict in July and August 2008[5]; the attacks against Estonian ministries and banks in 2007[6]; the attacks against the Iranian uranium enrichment programme in 2010. So far, these cyber operations conducted against States have not caused any injury or death to civilians. None of them has constituted a breach of IHL. However, there is no doubt about the harm potential of cyber operations and the significant damage they can cause to civilians[7].

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[3] ICRC, *International Humanitarian Law and Cyber Operations during Armed Conflicts*, Position paper submitted to the Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security and the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security, November 2019.

[4] GEERS, *Cyberspace and the Changing Nature of Warfare*, NATO Cooperative Cyber Defence Centre of Excellence (Talinn, Estonia), Keynote Speech (IST-076/RSY-017), at https://ccdcoe.org/uploads/2018/10/Geers2008_CyberspaceAndTheChangingNatureOf Warfare.pdf IST-076/RSY-017.

[5] Georgian governmental websites were taken down, including the website of the President, the Parliament, the Ministry of Foreign Affairs and the Ministry of Defence. The method used was Denial of Service (DoS) attacks: websites were displaying different content than the one they were meant to display.

[6] Cyber attacks were conducted through DoS attacks. The responsibility could not be fully attributed to Russia. A pro-Kremlin youth movement in Moldova and Transnistria claimed the authorship of attacks. It was difficult for Interpol to undertake a comprehensive investigation of the attacks: Transnistria is not recognised and it is not part of Interpol which cannot therefore conduct its work effectively. After these attacks, NATO concerns about future attacks against its Member States rose and it was decided to establish the NATO Cooperative Cyber Defence Centre of Excellence, headquartered in Tallinn, and aimed at providing Member States with expertise in the field of cyber defence, technology and law.

[7] GISEL-OLEJNIK, *The potential human cost of cyber operations*, Outcome report of the ICRC Expert Meeting, 14-16 November 2018, Geneva.

2. *Legal framework of cyber operations*

Cyber operations are not specifically regulated by any norm of international law. However, there is general consensus within the international community on accepting the applicability of international law to cyber operations[8]. The first edition of the Tallinn Manual was elaborated by experts to answer the question of how *jus ad bellum* and *jus in bello* rules are applicable to cyber operations[9]. When it comes to *ius ad bellum*, there is no doubt that cyber operations are subject to the prohibition on the use of force established by Article 2(4) of the UN Charter[10]; cyber operations might also constitute aggression under chapter VII of the Charter and it is undoubtful that certain cyber operations can indeed pose a threat to the territorial integrity or political independence of a State. In order to examine questions such as whether the right of self-defence is triggered by a cyber attack or the causes that would exclude the responsibility of a State for a cyber attack, the provisions of the UN Charter must therefore be regarded.

Inevitably, many issues emerge when it comes to applicability of the *ius ad bellum* to cyber operations due to its very own characteristics and idiosyncrasy. One of the most noted issues is the attribution of responsibility. Firstly, in most cyber operations the perpetrators of the attack preserve their anonymity and their identity is difficult to be traced. Secondly, many cyber attacks are conducted by non-state actors, whose connection with a State is difficult to prove.

Another recurring issue is to determine whether a cyber attack can trigger the right of self-defence or if a cyber attack can be conducted in self-defence. In relation to the second question, there should be no doubt, as far as the self-defence cyber attack meets the parameters of proportionality, necessity and immediacy. When it comes to the first question, most States and the Tallinn Manual state that serious uses of force, killing or injuring people and causing physical damage or destroying property in a significant way, trigger the right of self-defence.

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[8] HOLLIS, *A Brief Primer on International Law and Cyberspace*, Carnegie Endowment for International Peace, June 2021.

[9] The first edition of the Tallinn Manual was published in 2013 as a response to the 2007 cyber attacks against Estonia. The Manual is a result of the consensus of a group of approximately 20 internationally recognised experts on international law. It does not have binding effect.

[10] Article 2: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations".

When it comes to *ius in bello*, there is also a general agreement on the applicability of IHL to cyber operations whenever in the context of an already existing armed conflict. As ICRC has highlighted multiple times, this general agreement cannot in any way be understood as a legitimisation of those attacks[11]. The legitimisation (or lack of it) of the attack will be assessed pursuant to other rules than IHL rules: it will be, in fact, governed by *ius ad bellum* rules.

The applicability of IHL to cyber operations would be backed by analogy under the ICJ Advisory Opinion on the legality of the threat or use of nuclear weapons[12], which established that IHL rules are applicable to all forms of warfare and all kinds of weapons in an armed conflict. It is of great importance that cyber operations are restrained by IHL because IHL explicitly prohibits conducts as terrorising civilian population; destroying crops, water supplies, medical facilities, housing and non-military transport; attacking those wounded and sick; attacking cultural property. All these prohibited actions, with the new improvements in technology and artificial intelligence, can be easily undertaken through cyber attacks.

3. *Can cyber operations constitute armed attacks?*

While it is relatively easy to understand that IHL applies to any cyber operation taking place in an already existing armed conflict, many questions arise when it comes to determine whether a cyber operation can constitute an armed attack and amount to an armed conflict. Additional Protocol I to the Geneva Conventions defines attacks as "acts of violence against the adversary, whether in offence or in defence". Depending on the cyber operation, it will be easier or not to frame it under the definition of attack. This will be largely determined by the effects of the operation in question. Some experts consider that a cyber operation would be considered as an attack if it produces an interference with functionality and if it is necessary to replace physical components in order to restore such functionality[13].

Some countries and organisations have answered this question. Under the ICRC criteria, attacks that can produce similar consequences of

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[11] GISEL-RODENHÄUSER-DÖRMANN, *Twenty years on: International humanitarian law and the protection of civilians against the effects of cyber operations during armed conflicts*, in 102 *Int'l Rev. Red Cross* 287 (2020).

[12] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, in *I.C.J. Reports 1996*, 226.

[13] ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva 2019.

those conducted through conventional warfare methods, such as the destruction of civilian or military assets or the death or injury of civilians or military, can amount to an armed conflict. According to the ICRC, this could also include foreseeable direct and indirect effects of the attack[14]. The Tallinn Manual 2.0 states that certain cyber operations can potentially cross the threshold of an international armed conflict under IHL and cyber attacks that injure people, cause physical damage or destroy property in a significant way must be understood as an armed attack[15].

4. *Issues on the applicability of IHL to cyber operations*

Once accepted the applicability of IHL to cyber operations, one of the main questions is how and to which extent it applies. The issue stems from the fact that it is difficult at times to distinguish between civilian and military cyberspace infrastructure. In fact, in some cases, they may actually work together or even be the same. This is of great importance because IHL and principles of distinction, proportionality and precaution protect civilian infrastructure from attacks. However, in those situations when the attack is conducted against a website or infrastructure that it is both of civilian and military use, or it is of military use but has a direct impact on other civilian critical infrastructure, it remains unclear how to proceed and whether the attack is prohibited or not.

Another debated topic concerns civilian data: whether if they should be qualified as an object under IHL. Some countries, such as France, have concluded that data would constitute an object under IHL and, accordingly, a cyber operation against the processing of data will be deemed as an attack depending on the effect it has on associated systems. Other countries, such as Denmark, consider that data do not constitute an object while Israel considers that only tangible things may constitute objects[16].

5. *Final remarks*

Despite of the fact that there is a general consensus among States on the applicability of IHL to cyber operations and that IHL itself can encompass without too much difficulty those operations, it is necessary that further discussions are maintained at international level on this topic.

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[14] GISEL *et al*., *supra* footnote 11.

[15] The Tallinn Manual 2.0 was published in 2017 and extended the previous version with the study of cyber operations that States face on a daily basis but which fall under the threshold of the use of force or armed conflict.

[16] SCHMITT, *Israel's Cautious Perspective on International Law in Cyberspace: Part II (jus ad bellum and jus in bello)*, in *EJIL: Talk!*, December 17, 2020.

States should move forward to try to resolve the questions that still remain unanswered in relation to its applicability. Most likely, cyber operations will evolve in the next years. Most recent developments in areas interconnected to it, such as artificial intelligence or even biological weapons and international law, must foresee in some way those possible scenarios.

After explaining the risks that cyber operations can entitle to civilians and their remarkable destruction potential, we can also conclude that the use of cyber operations might be in some cases be desirable to prevent a larger number of casualties. A cyber operation can actually be more suitable whenever it substitutes a conventional warfare method, that will most likely have a bigger harm potential, in order to achieve the same purpose. Also, such an operation will much easily pass the proportionality test and will cause a lighter economic and destruction impact on both the country undertaking the attack and the country receiving it. An example would be shutting down, through a cyber attack, the electricity supply of a military operations command centre of the enemy in order to hamper and paralyse the activities of the enemy: in essence, to weaken the enemy. Such an operation in the past would necessarily have to be conducted through kinetic forces and would have cost some lives and produced many damages as a result. Now, through cyber operations the same objectives can be achieved with less effort and damage. However, this cannot in any way be understood as a legitimisation of cyber operations and it is necessary to bear in mind the significant risk that certain cyber operations pose on civilians in armed conflict.

To protect civilians and guarantee adequate safeguard of critical infrastructure and cultural heritage, the existing loopholes in international law in relation to cyber operations, as well as unanswered questions, must be resolved. Only this could prevent those breaches of IHL that may be just one click away.

PROMOTING AND PROTECTING HUMAN RIGHTS AND DIGNITY THROUGH FOOD SECURITY: THE CASE OF MOROCCO

Antonino Finocchiaro

ABSTRACT: The Universal Declaration on Human Rights, several others international legal instruments, and many national Constitutions (including the Moroccan Constitution) recognize the right to food as a fundamental human right, among. Main features of the right to food are availability, adequacy, accessibility and, accordingly, States must ensure that every human being would have economic, cultural, traditional and also religious access to adequate food. Further, the right to food may also become an instrument to promote and protect several other human rights and fundamental liberties.

KEYWORDS: right to food, human rights, Morocco Constitution, adequate food

CONTENTS: 1. *The right to food: definition and content*. – 2. *Tackling the issue of the right to food: the case of Morocco*. – 3. *Religious rules and the right to food: the Guerrab*.

1. *The right to food: definition and content*

Over the last years, food has been increasingly recognized as a human right: the right of all human beings to live in dignity, free from hunger, food insecurity and malnutrition. The right to food is not about charity: it is about ensuring that all people have the ability to feed themselves in dignity. The right to food is protected under IHRL and IHL and the correlative obligations are well established under international law. The right to food is recognized in Article 25 of the 1948 Universal Declaration on Human Right and Article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as in several other legal instruments, including some national Constitutions (Brazil, Colombia, Cuba, Guatemala, South Africa, Mexico, Panama, Paraguay, Honduras, etc.).

The most important definition of the right to food is provided by the UN Committee (CESCR) monitoring the ICESCR in its General

Comment No. 12 of 1999: "the right to adequate food is realized when every man, woman and child, alone and in community with others, has physical and economic access at all times to adequate food or means for its procurement"[1].

The definition was further elaborated by the Special Rapporteur Jean Ziegler who considered the right to food as "the right to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear"[2].

Right to food necessarily implies a distinction between food and other kinds of goods. In fact, food is a value, namely it is something full of meanings, rituals, traditions. Food is primarily nourishment for man and an indispensable activity for his existence. As a result, food is a necessary commodity. Biologically, man needs to feed himself, that is to find his own nourishment from plants and animals: in fact, he belongs to that group of so-called "heterotrophic" living beings which synthesize nourishment indirectly from organic matter, differentiating for example from plants[3]. For human beings, therefore, eating results in a satisfactory hierarchy of human needs, positioned at the top, because it is a biologically primary value compared to others. Yet, at the same time, when a man eats, he does not just carry out a biological activity, aimed at satisfying merely 'bodily' needs but he also conforms himself to culture, traditions and rituals. Not surprisingly, eating has been defined as one of the "anthropologically densest gestures"[4]. Belonging to a community or a territory or a religion: all these things are intertwined with food.

According to CESCR General comment No. 12, main features of the right to food are:

1) *availability*: food production must be enough for both present and future generations. This implies that States must consider sustainability, understood as long-term availability, and protection of the environment;

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[1] CESCR, *The right to adequate food (Art. 11)*, General Comments 12, 12 May 1999, E/C.12/1999/5, § 6.

[2] UN Commission on Human Rights, *Economic, Social and Cultural Rights. The right to food*, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10, 7 February 2001, E/CN.4/2001/53, § 14. Cf ZIEGLER, *Dalla parte dei deboli. Il diritto all'alimentazione*, Milano: Marco Tropea Edizioni 2004.

[3] GIULIANI, *La produzione di energia*, in *Basi chimiche, molecolari e biologiche della medicina*, Torino: UTET 1997.

[4] RICCA, *Pantheon. Agenda della laicità interculturale*, Palermo: Torri del Vento 2012, 387.

2) *adequacy*: individual needs of food must be fulfilled not only for what concerns quantity but quality as well. Quality is granted if healthy food can be provided. It is also crucial to consider non-nutritional issues that are connected to food, such as those related to the traditions and religion of a people. Offering non-halal food, for example, is forbidden by Islamic religious rules and such an offer would appear to a Muslim as an injury to personal dignity;

3) *accessibility*: States must, with positive action, ensure that every human being has economic access to adequate food.

The right to food also entails specific obligations for States:

1) obligation to respect the right to food. States must refrain from any behaviour that may limit the exercise of the right to access healthy and sufficient food. It is a negative duty whose respect presupposes that each State would recognize the need to consider food as a value and, therefore, as something different from other goods;

2) duty to protect food. States have to intervene when single citizens complain about the infringement of their right or the impossibility to act on it;

3) obligation to fully satisfy or in any case to make the right to food effective. Each State has to ensure with positive actions that everyone has access to food which is not only healthy and sufficient but also suitable for culture, traditions, religion and citizens' sensibility. This obligation is also dependent on financial resources of a State and therefore on its economic and social policies[5].

2. *Tackling the issue of the right to food: the case of Morocco*

Each State should be able to decide, relying on its specific needs, which feature of the right to food is to be undertaken with a specific protection program. In order to achieve lasting and tangible results, a progressive and complete protection of the right to food must be pursued. Starting from formal acknowledgment of this right and considering the specific needs of the population, this kind of protection should develop through comprehensive and progressive legal and political reforms.

The research period spent by this Author in the Kingdom of Morocco allowed to study how Morocco was able to tackle the issue of the right to food and to develop reforms which have yielded great results, not only in

[5] ZIEGLER *et al.*, *The Fight for the Right to Food: Lessons Learned*, London: Palgrave Macmillan 2011, 18-22; GOLAY, *Droit à l'alimentation et accès à la justice*, Brussels: Bruylant 2011; DE SHUTTER, *International Human Rights Law. Cases, Materials, Commentary*, 3rd ed., Cambridge: Cambridge University Press 2019.

economic terms but also in social and cultural terms[6]. Research was focused, on one hand, on the provisions put forward in the Constitution of the Kingdom of Morocco aimed at ensuring the avaibility of food as a human right and, on the other, on the main international agreement concluded by Morocco to pursue the right to food.

As regards the promotion and the protection of human rights and dignity through food security, in Morocco the right to food has been upheld as a constitutional right. Starting with the recognition of the right to water and the right to have a healthy environment, Morocco was also able to protect food security. The 2011 Constitution represented the commitment of King Mohamed VI to reshape the nature of his Kingdom and adopt new values on protection of human rights and fundamental liberties without growing apart from the Muslim traditions of the country. For example, Article 20 of the Constitution establishes the right to life which also include the right to have healthy and sufficient food, while Article 32 establishes that the State works to ensure "access to water and healthy enviroment". Access to water and health point towards a relationship between general well-being and the safeguard of the environment, which also includes progress towards qualitative and sustainable food production. Thanks to those 'pillars', Morocco launched a series of reforms and adopted new legal rules that has allowed it to obtain outstanding results.

Reforms are grounded on the requirement to protect the needs of the population, such as food security and economic accessibility to food, but they have also become an instrument to ensure not only economic development but also social and cultural development.

Morocco is a country that has made agriculture one of the fundamental elements of its economic growth. In ten years, the 2008 reform called "Plan du Maroc Verd" has reduced the rate of malnutrition by 50%, improved hygienic conditions of food and lifestyle of citizens of rural areas. The reform also resulted in an export increase of 117%, in per capita income, and in a cultural change of the whole society[7]. The Plan du Maroc Verd also focused citizens' attention on values such as respect for the environment and food hygiene. These two issues are now the main target of the latest reform called "Generation Green" and adopted in 2020[8].

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[6] The Author is a Ph.D. student in Business, Economics, and Legal Sciences at Kore University of Enna. The topic of his Ph.D. thesis concerns law, food and religious freedom and analyzes the topic from different perspectives such as constitutional law, ecclesiastical law, and international law. He was recently a visiting researcher at Mohamed V University of Rabat in Morocco.

[7] See https://www.ada.gov.ma/fr/principales-realisations-du-plan-maroc-vert.

[8] See https://www.maroc.ma/fr/actualites/generation-green-2020-2030-une-strategie-consacrant-la-vision-royale-dun-secteur-agricole.

At the same time, the National Human Development Initiative was approved by King Mohamed VI in 2005 to promote social development and fight against poverty in rural and urban areas and it was dubbed as a 'continuous work in progress for the Kingdom'. It features a transition from a system of government, which presupposes a central role of public actors on public policies, to a system of governance which presupposes instead the growth of interaction, negotiation and partnership between a multitude of public and private actors. The importance of civil society allows to emphasise the role of local territories and population and to sketch solutions. All these reforms can be seen as a true act of economic, political, and social reform which has caused major effects such as improvement of the effective safeguard of food safety and food security.

3. *Religious rules and the right to food: the Guerrab*

Morocco is a confessional country and Islam is the state religion. Accordingly, all the laws and regulations must have a foundation in Islam, since this religion regulates all aspects of the life of believers, including those concerning what and how to eat. Morocco, which for decades has pursued a model of moderate Islam, has however managed to reduce the rigidity of religious rules also in food matters. In fact, within the religious rules, we can indeed identify values and needs that can be 'universalized' such as, for instance, protection of human health, wholesomeness of food, duty to ensure water and food for everyone, respect for animals and nature, a market free from excessive disparities. By identifying these values as universal, Morocco was able to positivize a right to food undermining the rigidity of religious rules and to provide guarantees valid for everyone and not only for believers. The ability of the Kingdom of Morocco in adapting religious principles to the needs of every citizen has induced most citizens, regardless of their religion, to recognize the fundamental role of the State, even overcoming the role of religious institutions.

Among numerous examples, we might recall the Guerrab.

The Guerrab is a water vendor and peddler. Water is considered one of the most profound elements in Islam. Water is not also important for the life but it is also necessary for cleaning home and personal effects as well as for general hygiene and ablutions of the faithful.

As underlined by some scholars, "it cannot be denied that all human beings rely on water for life and good health, but for Muslim, water is first and foremost, a social good in Islam. It is also regarded as a blessing

from Allah that gives and sustains all life in this world. Furthermore, the word "water" appears sixty-three times in the Quran"[9].

For centuries, the Guerrab has been selling water to citizens for a few pennies, as it was the norm to drink from the same bowl. In 1956 there was a serious intoxication in Morocco due to a noxious oil from Meknes, which caused thousands of deaths. This tragic event induced Morocco, by relying on Quranic principles, to protect believers' life and prepare rules aimed at protecting food security[10]. Legislation eventually enacted to avoid hygienically incorrect practices and promote awareness among citizens changed social behavior, including the custom of drinking from the bowls of the Guerrab. Today, the Guerrab is a folklore figure for tourists who give some coins, attracted by the bright colours of his clothes, but very few Moroccans drink from his bowl. This is just an example of how Morocco managed to change traditions and customs founded on religion.

The Moroccan experience demonstrates that Islam can cooperate with the establishment of universal rights and values aimed at fulfilling human needs such as health, food safety, access to food, respect for nature and animals. The acknowledgment of these principles has driven Morocco to positivize the right to food security and extend it to the non-Muslim population as well. An additional benefit is that food becomes a tool for cultural integration within the Moroccan community. This is best exemplified by the absence of a ban on eating pork purchased in all the slaughterhouses which respect rules on food hygiene. In this way, the right of non-Muslims living in Morocco to prepare their own typical food, including pork meat, is recognized, promoted, and respected as well is respected the right of Jewish butchers to prepare kosher meat. The Moroccan experience also shows that the right to food must be mainstreamed not only in national agricultural policy but also in social, legal, and economic policy, because it might be also an instrument to protect many other rights, including religious freedom.

[9] ZAHARUDDIN-SABRI, *Islamic Water Law*, in *Water Encyclopedia*, Hoboken (NJ): Wiley 2005.

[10] The event of the harmful oil affected social sentiment so much that the Legislator of the time issued a law, the dahir of 29.10.1959, aimed at punishing crimes against the health of the Nation, providing for an express derogation from the principle of non-retroactivity of sanctions.

ANTITRUST, DEMOCRACY AND THE ROLE OF THE EU IN A GLOBALIZED WORLD

Riccardo Samperi

ABSTRACT: The paper analyses origin and development of competition policies in the United States and the European Union, the aims of antitrust legislation, the relationships between competition and democracy and the role played by the EU in this field as a global promoter of democratic values and the rule of law.

KEYWORDS: competition policy; antitrust; democracy; EU; US; China

CONTENTS: 1. *Origin and development of antitrust policy in the United States*. – 2. *Origin and development of antitrust policy in the European Union*. – 3. *The goals of competition policies*. – 4. *The symbiotic but asymmetric relationship between antitrust and democracy*. – 5. *The potential role of the EU as 'global democratizer regulator'*.

1. *Origin and development of antitrust policy in the United States*

Generally speaking, competition is the situation in which more competitors aim at achieving the same goal[1]. In economics, the notion of "competition" is inextricably linked to the notion of "market", i.e. the real or virtual place where exchange of goods and services takes place. Competition in the market is therefore competition between economic agents (in a nutshell: businesses and consumers) who intend to achieve a certain utility. For example, companies will compete with each other by offering goods and services to consumers in order to make profits[2]. The need to compete stems from the scarcity of available resources which is one of the main problems of economic sciences[3].

[1] VICKERS, *Concepts of Competition*, in 47(1) *Oxford Economic Papers* 1 (1995).
[2] SLOMAN-WRIDE-GARRATT, *Economics*, 9th ed., London: Pearson Publishing 2015.
[3] BACKHOUSE-MEDEMA, *Retrospectives: On the Definition of Economics*, in 23 *JEP* 221 (2009).

Antitrust policies play a fundamental role in promoting economic freedom and, although in the past this additional aspect has often been underestimated or neglected, also contribute, together with other public policies, to the safeguarding of civil liberties and fundamental rights as well as the protection of Rule of Law (ROL) and democratic holding of national legal systems.

The historical origin of competition policies date back to the late nineteenth century when the first two anti-concentration laws were enacted in North America, respectively by Canada in 1889 and the US in 1890[4], because improvements in infrastructures, communications and transport had determined the integration of the economies of federated states and the unification of their own markets, with the intensification of competition, often characterized by real price wars[5]. This factor had prompted some companies to establish forms of cooperation aimed at reducing mutual competition in order to maintain high prices to the detriment of consumers. These agreements were not legally formalized through real company mergers, but were born through spontaneous and informal collaborations between presidents and managing directors of the companies involved, to whom shareholders conferred the power of representation in exchange for a "certificate of trust" with which they acquired the right to participate in the profits made by the company. Subsequently, the term "trust" was used, also and above all, to refer metaphorically to collusive agreements entered into by companies to distort competition[6].

The US Sherman Act was enacted to address this problem. In particular, Section 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several federal states, or with foreign nations, also establishing criminal sanctions[7]; Section 2, then, punishes attempts to monopolize the market. At first, however, no provision were introduced in the matter of mergers, which were legal even when producing anti-competitive effects, except for the hypothesis in which they were carried out in order to achieve a

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[4] ROSS, *Introduction: The Evolution of Competition Law in Canada*, in 13 *Review of Industrial Organization* 1 (1998); MOTTA, *Competition Policy: Theory and Practice*, Cambridge: Cambridge University Press 2004.

[5] CHANDLER, *Scale and Scope: The Dynamics of Industrial Capitalism*, 1st ed., Cambridge (Ma.): Harvard University Press 1990, 71.

[6] MOTTA, *supra* footnote 4, 9-10.

[7] All antitrust laws attribute criminal relevance to related offenses. On the formally administrative but substantially criminal nature of the sanctions imposed by the Italian Competition and Market Authority, see ARBIA, *Autorità Garante della Concorrenza e del Mercato. Modello di bilanciamento nel procedimento sanzionatorio: efficienza e tutela dei diritti*, in *Giustizia Insieme*, Europa e Corti internazionali - 10 luglio (2020) n. 1227.

monopoly position: in fact, an indirect consequence of the Sherman Act was precisely the growth in cases of company mergers[8].

To fill this regulatory gap, in 1914 the Clayton Act extended anti-monopoly discipline to company mergers while the Federal Trade Commission Act established the Federal Trade Commission (FTC), the government agency which has also competence and functions in the field of antitrust enforcement[9]. At the beginning, the application of the Sherman Act was not particularly rigorous, while after the first decade the case-law of the USSC gradually became more and more incisive, up to the point of establishing an absolute presumption of illegality of some anticompetitive behaviors, such as agreements price (so-called 'per se rule of illegality' or 'per se prohibition'). During WWI and in the period between the two World Wars, the application of antitrust rules in the US was less rigid, also to better fight against the severe economic crisis of 1929 and subsequent war efforts.

The most emblematic example of this change of approach is represented by the 1933 *Appalachian Coal* case. The USSC, taking into account the exceptional conditions of the Great Depression, admitted one rare exception to the 'per se rule of illegality' of price agreements, to support business and maintain the level of employment. The USSC had been called upon to rule on the legitimacy of an agreement in which 137 coal producers operating in the Appalachian region had agreed on production quantities and sales prices of the coal to limit losses deriving from decrease in demand. In the opinion of the USSC, the agreement was a "reasonable" response to the economic crisis, also in light of the limited anticompetitive effects it produced, since many producers in the area had remained extraneous to the agreement and had continued to operate independently, thus allowing the maintenance of an acceptable, albeit lower, level of competition in the local coal market.

On the contrary, with the *Socony-Vacuum Oil* judgment of 1940, when the US had already emerged from the Great Depression despite the

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[8] BITTLINGMAYER, *Did Antitrust Policy Cause the Great Merger Wave?*, in 28 *J. L. & Econ.* 77 (1985).

[9] US antitrust regulations were subsequently amended, enriched and integrated by various regulatory provisions, such as: the Robinson-Patman Act of 1936, which modified the provisions on price discrimination enshrined in the Clayton Act; the Celler-Kefauver Act of 1950, which extended the prohibition on exchanges of shares between rival companies, already contained in the Clayton Act, extending from shares to other types of assets; the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which amended the Clayton Act on mergers and conferred to the Department of Justice (applying antitrust legislation in criminal law cases) and the FTC the power to assess mergers between companies whose size would exceed a minimum threshold. See MOTTA, *supra* foonote 4, 14.

outbreak of WWII, the USSC reaffirmed the absolute presumption of the 'per se rule of illegality' of price agreements concluded by some refiners for the purpose of selling gasoline below cost[10]. The *Appalachian Coal* and *Socony-Vacuum Oil* cases require a joint analysis and show that understanding competition policies always presupposes the correct understanding of historical, social, and economic context.

The period between the *Socony-Vacuum Oil* case and the mid-1970s was characterized by the intensification of antitrust enforcement activities by the USSC, whose interpretation of the legislation protecting competition was particularly rigorous, aimed at limiting the economic power of large companies and sometimes also neglected the defensive arguments according to which certain conducts could have brought efficiency gains[11]. During the 1970s, the Chicago School economists criticized the attitude of the USSC as "excessively interventionist", also in light of the loss of competitiveness suffered by American companies, and argued that it was necessary and appropriate attach greater importance to possible efficiencies resulting from mergers[12].

This approach was endorsed both by the USSC (in the *GTE-Sylvania* case of 1977, it took into account the principle of reasonableness in assessing the legality of vertical non-price restraints) and the Reagan administration, which adopted an approach based on 'laissez faire laissez

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[10] *Ibidem*, 15.

[11] In the *Philadelphia National Bank* case of 1963 the USSC prohibited the merger between two banks of Philadelphia on the belief that the merger would have led to excessive concentration in the market. The main issue of the dispute concerned the determination of the territorial extension of the relevant market and the USSC was asked to establish whether the latter only coincided with the area of Philadelphia or if also included the district of New York. The outcome of the judgment depended on the choice of one or other hermeneutic option. If relevant market had coincided with the area of Philadelphia alone, the merger would have resulted in an excessive concentration of economic power; instead, if the district of New York had also been included, the merger would not have entailed dangers to competition given the large number of banking institutions in the New York district. The USSC adopted the first option, prohibited the merger amd rejected the argument that the merger, far from constituting a danger, would have increased the level of competition, since it would have allowed the new banking institution to compete with large banks. For the USSC, in fact, the anticompetitive effects produced in one market could not be justified by the pro-competitive effects in another. Cf MUELLER, *Lessons from the United States Antitrust History*, in 14 *International Journal of Industrial Organization* 415 (1996); KOVACIC-SHAPIRO, *Antitrust Policy: A Century of Economic and Legal Thinking*, in 14 *Journal of Economic Perspectives* 43 (2000).

[12] BORK, *The Antitrust Paradox: A Policy at War with Itself*, 1st ed., New York: Free Press 1978, 50.

passer' in order to leave market forces with the possibility to operate freely and maximize the efficiency of production processes[13].

In the following decades until present days, there has been a decrease in antitrust enforcement activity, especially as regards monopolization attempts and civil actions involving transactions other than mergers promoted by the Department of Justice. The American Courts have in fact progressively raised the probative standard for demonstrating the anticompetitive nature of the conduct. The belief, supported by the Chicago School, is that economic disadvantages deriving from an excessively rigorous interpretation of the antitrust rules would have a greater negative impact on the economy than those produced by the opposite approach because market forces would still be able to self-regulate in such a way as to achieve economic equilibrium and, even if they were not to reach it, they would still have more economically efficient conduct than those imposed centrally by the State[14].

The decrease in antitrust enforcement activities in the US concerned not only the quantitative profile, but also the qualitative one: in particular, the FTC activity focused on markets characterized by the greater concentration. In 2008-2011, for example, 75% of the merger cases handled concerned agreements which, if authorized, would have left at least two competitors in business, while the remaining 25% concerned merger proposals that would have determined the presence of at least four competitors. On the other hand, no action to protect competition was adopted in cases where the merger plans would have left five or more competitors in business[15], and in fact recent empirical studies have shown that the most anti-competitive effects occurred precisely in small markets, in which there is no obligation to notify the Department of Justice and the FTC in advance of the proposed merger[16].

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[13] MOTTA, *supra* footnote 4, 16.

[14] Yale School of Management, *Antitrust Enforcement Data. Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects*, 19 January 2022, at https://som.yale.edu/centers/thurman-arnold-project-at-yale/modern-antitrust-enforcement. Where the burden of proof lies with the company (i.e., mergers in markets characterized by a high degree of concentration in which "the burden is on the parties to provide evidence clearly showing the merger is not likely to have such anticompetitive effects": the relative presumption known as 'structural, or market-share presumption'), the Courts show a more accommodating attitude. See SALOP, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, in 80 *Antitrust L. J.* 269 (2015-2016); BECKER, *Competition and Democracy*, in 1 *J. L. & Econ.* 105 (1958).

[15] KWOKA, *U.S. antitrust and competition policy amid the new merger wave*, Washington: Washington Center for Equitable Growth July 2017, 11.

[16] SHAPIRO, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, in 33 *Journal of Economic Perspectives* 69 (2019); ASHENFELTER-

Moreover, in 2022, the minimum value threshold of the transaction necessary for the fulfillment of the notification obligation by the companies concerned was increased by 8.9%, from 92 million dollars to the current 101[17]. Although this increase is the result of an automatic adjustment of the minimum notification thresholds to the growth of the GDP of the US, it will determine a further relaxation of antitrust enforcement policies, at least in reference to cases of small and medium-sized mergers.

In recent years, therefore, FTC's approach has actually come very close to the proposal made by Judge Bork, one of the leading exponents of the Chicago School, who supported the advisability of introducing a relative legal presumption, under which mergers that had left alive at least four competitors in the reference market should have been considered lawful, unless anti-competitive demonstration by government agencies, with the related burden of proof on the latter[18].

Another important factor that, especially over the last twenty years, has increasingly influenced the application practice of US antitrust enforcement is the affirmation of major technology companies in digital markets. According to recent studies, the rise of the digital economy has brought with it a growth in the quality and quantity of the services offered, together with a reduction in the price[19], which would have been impossible if the Big Tech had exercised a monopoly or oligopolistic power[20] analogous to that of the nineteenth-century trusts in the refining of crude oil and production of iron and steel.

Due to theoretical and empirical difficulties encountered in bringing companies operating in digital markets back into the traditional conceptual categories of monopoly and oligopoly, the need to adopt new methodological approaches has emerged to consider that "second and third firms compete vigorously against the incumbent"[21], especially in the digital services market. In fact, large technological companies today operate

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HOSKEN-WEINBERG, *Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers*, in 57 *J. L. & Econ.* 67 (2014); ID., *The Price Effects of a Large Merger of Manufacturers: A Case Study of Maytag-Whirlpool*, in 5(1) *American Economic Journal: Economic Policy* 239 (2013).

[17] FTC, *HSR threshold adjustments and reportability for 2022*, available at https://www.ftc.gov/enforcement/competition-matters/2022/02/hsr-threshold-adjustments-reportability-2022.

[18] BORK, *supra* footnote 12, 221.

[19] BYRNE-CORRADO, *Accounting for Innovation in Consumer Digital Services: IT Still Matters*, Cambridge (Ma.): NBER Working Paper Series, Working Paper 26010 (2020).

[20] TEACHOUT, *The Problem of Monopolies & Corporate Public Corruption*, in 147 *Daedalus* 111 (2018); KHAN, *Amazon's Antitrust Paradox*, in 126 *Yale L. J.* 710 (2016-2017).

[21] The Economist, *The rules of the tech game are changing*, 27 February 2021.

in various and diversified sectors, often in a regime of reciprocal and cross competition[22]. Today, a scientific analysis of antitrust policies in digital markets cannot ignore a careful consideration of long-term technological development. It would be therefore desirable greater caution and more in-depth technical reflections on this issue, which should lead to refrain from supporting unconditional legislative interventionism based sometimes on ideological and political reasons[23], rather than on the real need to protect competition[24].

Also the Covid-19 pandemic had a strong impact on antitrust enforcement activities in the US. A joint declaration of the Antitrust Division of the Department of Justice and the FTC recognized that the adoption of measures to combat the spread of the infection "will require unprecedented cooperation between federal, state, and local governments and among private businesses to protect Americans' health and safety", with the consequence that some anticompetitive conducts, provided that "limited in duration and necessary to assist patients, consumers, and communities affected by COVID-19", have been permitted as "a necessary

[22] It is impossible to provide a complete overview of competition in the high tech industry, not even with reference to the so-called GAFAM (Google, Amazon, Facebook, Apple, Microsoft) which compete in sectors such as operating systems for computers and smartphones, online shopping services, authentication apps, cloud storage, e-mail services and instant messaging, search engines, browsers, maps, video conferencing and file viewing apps, software and application stores and payment systems. See PETIT-TEECE, *Innovating Big Tech Firms and Competition Policy: Favoring Dynamic over Static Competition*, in 30 *Industrial and Corporate Change* 1168 (2021).

[23] JENNY, *Competition law enforcement and regulation for digital ecosystems: Understanding the issues, facing the challenges and moving forward*, in 3 *Concurrences* 38 (2021).

[24] The Proposal for a EU regulation on fair and contestable markets in the digital sector is aimed at containing and regulating the activity of large technology companies (the so-called 'gatekeepers'), i.e. those service providers that have a significant impact on the internal market; operate a basic platform service that is an important access point for commercial users to reach end users; hold a consolidated and lasting position in the market or are expected to acquire it in the near future. The proposed regulation would provide for a relative presumption that, reaching certain minimum economic thresholds, the company is a 'gatekeeper', unless it demonstrates that defining requirements are not actually met. The proposed regulation would also establish obligations and prohibitions which constitute an absolute presumption of the illegality of certain conduct, such as combining personal data obtained from a basic platform service with personal data from any other service offered by the gatekeeper. Similarly, in the US, following the 2020 Report *Investigation of Competition in Digital Markets* (Subcommittee on Antitrust, Commercial and Administrative Law, House of Representatives), in 2021 five legislative proposals we introduced «to subject Big Tech firms to severe obligations including an M&A ban, data portability and interoperability requirements, and line of business restrictions».

response to exigent circumstances that provide Americans with products or services that might not be available otherwise"[25].

2. *Origin and development of antitrust policy in the European Union*

EU competition law has a double regulatory level: European and domestic. This peculiarity derives from the legal nature of the EU which, unlike the US, is not a sovereign state but an international or supranational organization. EU primary law on competition is contained in the TFEU (Articles 101-109) and Protocol No. 27 on the internal market and competition. Each EU Member State has also its own national antitrust legislation, however the latter usually only transposes European legislation.

Unlike the American competition policies, introduced and modified to protect the interests of specific categories of economic operators and therefore expression of their will, the EU antitrust legislation has been influenced by political relations among the European States after the end of WWII. The sharing of coal and steel production and the creation of a single market were, in fact, aimed at eliminating the age-old friction between France and Germany and preventing new conflicts.

Article 101 of the TFEU prohibits agreements between companies, even unwritten or otherwise formalized, which may affect trade between EU Member States and have the object or effect of preventing, restricting or distorting competition within the internal market (par. 1). Such agreements are fully void (par. 2), unless they contribute to improving the production or distribution of products or promoting technical or economic progress, while reserving users a fair share of the resulting profit, and avoiding: a) imposing restrictions on the undertakings concerned which are not indispensable for achieving these objectives; b) give these companies the possibility of eliminating competition for a substantial part of the products in question (par. 3).

Although Article 101 refers to horizontal and vertical agreements, the two cases differ considerably as to the effects on competition. Horizontal agreements are concluded by companies directly competing with each other to eliminate or reduce competition and maximize profits to the detriment of consumers, other companies and social well-being as a whole.

[25] See *Joint Antitrust Statement Regarding COVID-19* (2020), available at https://www.justice.gov/atr/joint-antitrust-statement-regarding-covid-19. The Statement mainly refers to agreements between companies operating in the health sector and producing drugs, personal protective equipment, and other medical instruments. For instance, the business review procedures, to assess compatibility with antitrust legislation of proposals and projects for corporate and commercial transactions, have been simplified and streamlined.

The vertical agreements concern subjects who operate on different levels of the production chain, not in direct competition with each other, and therefore generally have pro-competitive effects, as they determine increases in efficiency[26].

To this regard, the European Commission has issued an *ad hoc* discipline for each case, exempting from the prohibition ex article 101, par. 1, by virtue of the application of derogations referred to in par. 3, certain categories of vertical agreements and concerted practices (see Commission Regulation No. 330/2010); certain categories of research and development agreements and some types of specialization agreements (see, respectively, Commission Regulations Nos. 1217 and 1218/2010, both expiring on December 31, 2022)[27].

The rationale behind the exclusion of vertical agreements from those prohibited lies in the fact that some agreements can lead to efficiencies in production and distribution process with the consequent reduction of costs, of transaction and distribution. The exemption in the field of research and development and specializations is, however, motivated by the desire to encourage technical progress. All these rules are currently under review by the European Commission to verify whether these competition policy instruments are still adequate.

Article 102 of the TFEU prohibits the abusive exploitation of a dominant position, insofar as it could be detrimental to trade between Member States. Dominant position consists of a situation of economic power thanks to which the dominant company is able to hinder the persistence of effective competition in the market and can behave independetly from competitors and consumers[28]. Of course, companies have the right to achieve a dominant position thanks to their own merits, as well as to exploit the competitive advantage deriving from this. However, they also have the specific responsibility of ensuring that their behavior does not impede effective competition in the common market. Currently, the definition of "dominant market" is under review by the Commission to verify whether it is still adequate or not.

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[26] An agreement between companies offering the same good or service is certainly "horizontal", while an agreement between a manufacturer and a retailer can be qualified as "vertical". Cf. MOTTA, *supra* footnote 4, 21-24.

[27] Application of Article 101, par. 1, is excluded if agreements have a negligible impact on trade between Member States or on competition. Finally, agreements in certain economic sectors (for example, agriculture, transport and defense) are governed by an autonomous discipline which excludes or modifies, in whole or in part, the application of Article 101.

[28] ECJ, *United Brands Company and United Brands Continentaal BV v. Commission*, Judgment 14 February 1978, Case 27/76, ECLI:EU:C:1978:22.

EU Treaties do not contain specific provisions regarding concentrations. The EU legislator has therefore intervened with *ad hoc* regulations: initially the Council Regulation No. 4064/1989, then recast into Council Regulation No. 139/2004. Current legislation is based on the principles of attribution, subsidiarity, and proportionality. Control over merger transactions is the responsibility of antitrust authorities of the EU Member States, except in cases where the concentration has "a community dimension" according to Regulation No. 139/2004: in this case, the competence rests with the European Commission.

This mechanism achieves a two-fold purpose: as a matter of law, it safeguards prerogatives and sovereignty of EU Member States; as a matter of economics, it benefits companies which do not have the burden of interacting with antitrust authorities of the several EU Member States in which they operate, but only with the European Commission (so-called "one-stop shop" principle). Further, the European Commission is able to optimize its own antitrust enforcement resources only for larger operations.

In general, concentrations are considered compatible with the common market and permitted, unless they significantly impede effective competition within the market or a substantial part of it, in particular by creating or strengthening a dominant position. Concentration takes place when there is a lasting change in the control of one or more companies following mergers or acquisitions. The control envisaged by Council Regulation No. 139/2004 has a preventive nature. For instance, in case the concentration has a community dimension, proposals and plans for mergers or acquisitions must be notified to the Commission "before their implementation and after the conclusion of the agreement, the communication of the purchase or exchange offer or the acquisition of a controlling interest" (Article 4). The Commission carries out a prognostic assessment of the likely impact of the concentration on competition in the concerned market, upon which it will grant its approval or not, also subject to conditions and obligations that may be imposed on companies to make the concentration compatible with the market (Article 8).

EU competition law is complemented by the general prohibition of those state aid "that distort or threaten to distort competition" (Article 107 TFUE). However, state aid intended for achieving strategic objectives, such as those for damages caused by natural disasters or other exceptional events (i.e., aid granted after the 2008 financial crisis and the outbreak of Covid-19 pandemic), are allowed. EU Member States are obliged to notify the European Commission of any state aid they intend to grant, except for those falling within the block exemption regulations or having a value of less than € 200,000 paid to a single company over three financial years

(so-called "de minimis" aid governed by Commission Regulation No. 1407/2013). State aid can only be granted with the prior approval of the Commission.

Finally, legislation concerning public services of general economic interest (SGEI) derogates from EU competition rules. According to Article 106, par. 2, of TFEU, companies entrusted with the management of SGEI or having a fiscal monopoly character are subject to the competition rules only if their application does not hinder the fulfillment, as a matter of law and fact, of the specific mission entrusted to them. In some EU Member States, including Italy, in fact, certain goods and services are still provided by the State or public enterprises or are controlled by public authorities. Behind this type of public intervention, there are not only reasons of economic nature (i.e., the need to remedy situations of market failure) but also of social nature, in accordance with Article 36 of the EU Charter of Fundamental Rights, which recognizes the right to access to SGEI as governed by national laws and practices in order to promote social cohesion and territorial within the EU.

By reviewing the US and the EU competition policies, it is clear that origin and development of these policies are strictly connected to the goals that States set out to pursue through their antitrust enforcement. This topic is the subject of the following paragraph 3.

3. *The goals of competition policies*

All public policies, including competition policy, are the result of the surrounding social, economic, and political context and aim at achieving goals identified by States after a careful evaluation and balancing of economic and legal interests of its citizens. Public policies have been grouped by Richard Musgrave within three categories: efficient allocation of resources, through competition policy; equity in the distribution of wealth, generally through fiscal policy; stabilization of the economic system, through monetary policy[29]. We will focus on the allocative function, typical of antitrust policy.

The analysis of interests involved and the objective of public intervention assumes fundamental importance for understanding "if" and "how" the State should intervene in the economy and in the field of competition. One goal of competition policies is the maximization of social

[29] MUSGRAVE, *Voluntary Exchange Theory of Public Economy*, in 53 *QJE* 213 (1939).

welfare or "total surplus", given by the sum of the surplus of all economic operators or of businesses and consumers[30].

Another fundamental objective of competition policies is the achievement of efficiency in the allocation of resources. Allocation efficiency has a static nature: it concerns the allocation of resources among economic operators. For example, a form of freely competitive market will determine a tendential reduction in prices in favor of consumers and a simultaneous reduction in the profits of companies, thus stimulating the latter to reduce production costs, optimize production processes and invest in innovation and development. Cartels and other oligopolistic collusion among producers lead to a loss of efficiency as companies, being no longer subject to competitive pressures of rivals, can set higher prices without providing consumers with any new or additional utility, i.e. without real and appreciable economic reasons.

Allocative efficiency is achieved when production factors are remunerated in proportion to their actual productivity. In this way, all goods and services are sold and purchased on the market at prices that reflect the relative costs of production. Perfect competition thus eliminates rents and extra-profits and creates a price system that reflects the marginal costs of production of the former and the productivity of the latter.

In the long term, however, such a situation of perfect competition would be neither desirable nor sustainable for any company. By reducing revenues to the extent strictly necessary for the mere survival and permanence in the market, the possibility of investing in research and development would inevitably be jeopardized and, in the long-term, social welfare would be lower than that obtained by guaranteeing companies a greater profit[31].

The concept of allocative efficiency is therefore static because it does not take into account technological development and innovation, but only the distribution of resources among economic operators in a specific moment. On the other hand, development and innovation are part of the concept of dynamic efficiency of production processes and economic systems which is achieved when technological innovation is encouraged and stimulated. In the long run, allocative efficiency and innovation can conflict if competition is so intense that companies are forced to sell goods and services at a price equal to marginal cost. In this case, companies would

[30] For a more accurate quantification of total surplus, it would also be necessary to take into account the indirect effects of the conduct of economic agents (i.e., positive and negative externalities) as well as the interaction of these operators with the State and other public bodies (i.e., paying taxes, receiving services or subsidies, etc.). MOTTA, *supra* footnote 4, 29.

[31] *Ibidem*, 30-31.

not be able to withstand such a high level of competition and, in the long term, they would not only fail to innovate, but would even risk going out of the market.

In the economic literature there is no consensus about the effect of competition on innovation and the development of new technologies. Essentially, it is possible to identify two schools, respectively headed by John Hicks and Joseph Schumpeter.

According to Hicks, competition is an incentive for technological development because companies are stimulated to find new technologies to increase competitiveness in the market, reduce production costs and face competition[32]. This thesis takes up the arguments of the classical economic school in favor of competition whose leading exponent was Adam Smith, the 'father' of the doctrine of *laissez faire laissez passer* (a free competitive market guarantees efficient allocation of resources and full use of factors of production). According to Smith, the pursuit of selfish interests by individuals benefits society as a whole, thanks to the so-called 'invisible hand'. In fact, companies wishing to remain in the market are forced to minimize production costs through the efficiency of production processes (including the specialization of work) and, as a result, consumers can buy goods and services at lower prices. This approach reveals the static and, in some sense, optimistic view that classical economists had of the competitive mechanism.

According to Schumpeter, a pragmatist, "perfect" competition is instead a purely ideal model, completely abstract and concretely impracticable for at least two reasons: 1) classical economists assume the existence of a totally cooperative society, failing to consider the intersubjective conflicts (like class struggle) which make society itself an often 'competitive' environment (personal utility does not always and necessarily overlap with social utility); 2) efficiency of classic competitive markets depends on the full use of all the production factors and immediate availability of all the consumers to purchase all goods produced. The balance therefore derives from the perfect coincidence between the quantity produced and the quantity purchased. If so, however, no one would be able to set aside financial resources, because any savings would translate into inventories of unsold products an in a proportional loss of well-being on the part of the companies that produce them[33]. Furthermore, a perfect level of competition would constitute a brake on development and

[32] GIGLIOBIANCO-TONIOLO (a cura di), *Concorrenza, mercato e crescita in Italia: il lungo periodo*, Venezia: Marsilio Editori 2017; HICKS, *Annual Survey of Economic Theory: The Theory of Monopoly*, in 3 *Econometrica* 1 (1935).

[33] SCHUMPETER, *History of Economic Analysis*, 1st ed., London: Routledge 1954, 225.

technological innovation and, therefore, a reason for inefficiency from a dynamic point of view, as it would force companies to keep prices low and to 'settle' a marginal revenue equal to or close to the marginal cost, in order to remain (competitive) within the market. Lowering prices, in fact, would increase the well-being of consumers but it would also prevent companies from having enough capital to invest in technological development, with the consequent paralysis of innovation and loss of overall well-being in the long term.

It should also be considered that, in the long term, it would not be sustainable for companies to charge prices close to marginal cost, as this would most likely lead them to exit the market[34], as underlined by Clark who recognizes that perfect competition does not exist (nor can it exist) and that all economic theories based on or presupposing such assumption do not constitute a reliable guide for antitrust policy making[35]. Clark proposes the model of "workable competition", occurring when there is a limited but sufficient number of companies to ensure consumers the power to freely choose from whom to purchase goods[36].

Summing up, according to Schumpeter's approach, a high level of competition would force companies to keep prices so low as to barely allow them to remain within the market and, at the same time, hindering innovation. Imperfectly competitive market forms, established by using *ad hoc* legal tools, such as trademarks and patents, would have instead a positive impact on technological innovation for two reasons:

1) the increase in prices resulting from the reduction of competition would guarantee companies profit margins to start investment projects in development of new technologies. It could be however objected that the absence of rivals would risk to deresponsibilize the company, which

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[34] SWEDBERG, *Introduction to J. A. Schumpeter. Capitalism, Socialism and Democracy*, London: Routledge 1994, XVII.

[35] CLARK, *Toward a Concept of Workable Competition*, in 30 *American Economic Review* 243 (1940).

[36] The only truly viable form of competition is the imperfect one. Clark identified ten features a market must possess in order to have a viable competition: (1) degree of standardization of the product; (2) number and size of producers; (3) methodologies followed for formulating the sale price; (4) methodology adopted for the sale, which can take place indirectly (independent resellers with exclusive or generic agents) or directly (its own salesmen); (5) characteristics of information available to consumer; (6) geographical distribution of consumption and production; (7) current degree of production control based on various parameters; (8) variation in costs as the size of the plants varies; (9) change in costs as the volume of production varies in the short term; (10) flexibility of production capacity, the increase of which can be easy and rapid or difficult and slow. See PARAMITHIOTTI, *L'evoluzione del concetto di concorrenza nella scienza economica*, in LIX *Il Politico* 1 (1994), 45-46.

would have no interest or incentive to invest in innovation, with the risk of an inefficient allocation of resources;

2) as patents have limited duration in time, upon expiration goods and services, formerly supplied under a monopoly or oligopoly regime, would become freely marketable by other subjects, and this would push the monopoly firm to innovate in order to keep the position of advantage over competitors[37].

Still today, there is no consensus in the economic literature on effects of competion on technological development. According to Schumpeter's approach, followed by Hotelling and Romer[38], competition reduces the profit margin of companies and, as a result, prevents them from setting aside capital to invest in innovation and technical progress[39]. According to Hicks' approach, competition is instead a stimulus to innovation while Stephen Nickell undelines that deregulation of product markets determines the growth of total productivity of production factors (capital and work) and, at the same time, the reduction of market power of single firms[40]. Competition would therefore lead to efficiency of production processes and 'natural selection' of companies, with the consequence that only the most efficient would remain on the market (Darwinian effect)[41]. Finally, according to the intermediate thesis of Blundell, Griffith and Van Reenen, competition stimulates innovation, even if larger companies with market power usually innovate more than other companies[42].

In conclusion, economists basically agree that a free competitive market is able to ensure an efficient static allocation of resources but the relationship between competition and innovation, or the 'dynamic' efficiency of the market in the long run, is still a contentious issue among them, especially in the field of digital services where it is practically impossible to establish *a priori* what is the optimal and socially desirable level of competition[43].

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[37] LAINO, *Innovation and monopoly: The position of Schumpeter*, in *MPRA Paper 35321* (University Library of Munich, Germany), 2011.
[38] HOTELLING, *Stability in Competition*, in 39 *The Economic Journal* 41 (1939); ROMER, *Endogenous Technological Change*, in 98 *Journal of Political Economy* 71 (1990).
[39] GIGLIOBIANCO-TONIOLO, *supra* footnote 32, 5.
[40] NICKELL, *Competition and Corporate Performance*, in *Journal of Political Economy*, n. 104 (1996), pp. 724-746
[41] GIGLIOBIANCO-TONIOLO, *supra* footnote 32, 6.
[42] BLUNDELL-GRIFFITH-VAN REENEN, *Market Share, Market Value and Innovation in a Panel of British Manufacturing Firms*, in 66 *Review of Economic Studies* 529 (1999).
[43] PETIT-TEECE, *Innovating Big Tech firms and competition policy: favoring dynamic over static competition*, in 30(5) *Industrial and Corporate Change* 1168 (2021).

4. *The symbiotic but asymmetric relationship between antitrust and democracy*

Antitrust policies also contribute to safeguarding civil liberties which, in democratic systems, are inextricably linked with economic ones. In the course of history, concentration of economic power within few dominant industries has often facilitated the rise or maintenance of power by dictatorial regimes[44]. It is therefore crucial to examine the relationship between antitrust and democracy and to assess the potentional role of the EU as a global promoter of democracy, along with international, social, and human security.

There is a close "symbiotic" relationship between competition policies and democracy[45], because antitrust systems pursue two main goals: directly promoting economic goals such as economic freedom, production efficiency, technological progress, and consumer welfare[46]; indirectly helping domestic legal systems to strengthen civil rights and democratize society[47]. There is a positive correlation between antitrust policy and quality of democracy, even if it seems that there is no direct positive effect of democracy on competition[48]. In other words, democratic

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[44] CRANE, *Fascism and Monopoly*, in 118 *Mich. L. Rev.* 1315 (2019-2020).

[45] FOX, *The Symbiosis of Democracy and Markets*, OECD Global Forum on Competition (7-8 December 2017), April 2018.

[46] AGHION-VAN REENEN-ZINGALES, *Innovation and Institutional Ownership*, in 103(1) *American Economic Review* 277 (2013); AGHION *et al*., *Competition and Innovation: An Inverted-U Relationship*, in 120 *The Quarterly Journal of Economics* 701 (2005); BLUNDELL *et al*., *Market Share, Market Value and Innovation in a Panel of British Manufacturing Firms*, in 66 *Review of Economic Studies* 529 (1999); NICKELL, *Competition and Corporate Performance*, in 104 *JPE* 724 (1996); ROMER, *Endogenous Technological Change*, in 98 *JPE* 71 (1990).

[47] TEACHOUT, *Antitrust Law, Freedom, and human development*, in 41 *Cardozo L. Rev.* 1081 (2019); RAHMAN, *Democracy against Domination*, Oxford: Oxford University Press 2017, 116-139; LYNN, *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?*, Hearing before the Subcommittee on Antitrust, Competition, and Consumer Rights of the Senate Committee on the Judiciary, 13 December 2017; BAKER-SALOP, *Antitrust, Competition Policy, and Inequality*, in 104 *Geo. L. J.* 1 (2015); VAHEESAN, *The Evolving Populism of Antitrust*, in 93 *Neb. L. Rev.* 371 (2014-2015); STUCKE, *Should Competition Policy Promote Happiness?*, in 81 *Fordham L. Rev.* 2575 (2013); ID., *Reconsidering Antitrust's Goals*, in 53 *B.C. L. Rev.* 551 (2012); ORBACH, *How Antitrust Lost Its Goal*, in 81 *Fordham L. Rev.* 2253 (2012-2013); BEN-ASHER, *What's the Connection? Vietnam, The Rule of Law; Human Rights and Antitrust*, in 21 *Hous. J. Int'l L.* 427 (1998-1999); FOX, *Modernization of Antitrust: A New Equilibrium*, in 66 *Cornell L. Rev.* 1140 (1980-1981); ELZINGA, *Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, in 125 *U. Pa. L. Rev.* 1191 (1976-1977).

[48] TISHCHENKO, *The Relationship between Competition and Democracy: Comparative Analysis*, Doctoral dissertation, Central European University, 2019, 29-30.

forms of government need pro-competition market-oriented economic structures, but competition policy systems also exist in non-fully democratic countries (e.g., the People's Republic of China).

In countries where quality of democracy is high and there is vigorous antitrust enforcement, several factors have been observed: production efficiency, technological progress, economic growth, integration of national economy into global market, international trade exchanges, transparency of public administration's action, strong public control over legality of corporations' behavior, strengthening of the right to a fair trial[49]. These factors, in turn, influence and strengthen democracy itself, in what we could here define as a 'virtuous circle'. Conversely, when competition policy and antitrust enforcement are strong, the incidence of phenomena that negatively impact democracy, such as market concentration and corruption, is lower. Moreover, excessive concentration of economic power can bring to antidemocratic political pressures on lawmakers and governments[50]. Political power can use economy to restrict civil and economic freedom, to control life of citizens and build up or strengthen authoritarian regimes.

This is what happened in Germany after the end of WWI. Since the end of the 19th century, indeed, the German economy has had a high level of concentration; market power was held by a few large corporations operating under monopoly or oligopoly regime[51]. The level of concentration of the German internal market reached its peak with the strong public intervention in the economy which featured the Nazi regime since 1933 to 1945. Some big German corporations played an important role in Hitler's rise to power, in the rearmament of Germany and even in the Holocaust: IG Farben (a large German chemical corporation) patented and produced the poisonous Zyklon B Gas used in concentration camps' gas chambers[52]; Topf & Söhne (a powerful German engineering company)

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[49] TELEKI, *Due Process and Fair Trial in EU Competition Law. The Impact of Article 6 of the European Convention on Human Rights*, Leiden: Brill Publishing 2021, 277-349; LAMBERTI, *Rules on Private Antitrust Enforcement and the Value of the Competition Authority's Decisions: New Limits for Judicial Review?*, in 5 *The Italian Law Journal* 527 (2019).

[50] PITOFSKY, *The Political Content of Antitrust*, in 127 *U. Pa. L. Rev.* 1051 (1978-1979).

[51] CRANE, *supra* footnote 44.

[52] LUSTIG, *Veiled Power. International Law and the Private Corporation 1886-1981*, Oxford: Oxford University Press 2020, 75-76; JEFFREYS, *Hell's Cartel: IG Farben and the Making of Hitler's War Machine*, New York: Henry Holt Publishing 2010, 143-211; LINDNER, *Inside IG Farben: Hoechst during the Third Reich*, Cambridge: Cambridge University Press 2008, 65; FERENCZ, *Less Than Slaves: Jewish Forced Labor and the Quest for Compensation*, Bloomington: Indiana University Press 2002; HAYES, *Industry and Ideology: I. G. Farben in the Nazi Era*, 2nd ed., Cambridge: Cambridge University

built gas chambers and crematorium ovens used in concentration camps[53]. Both used enslaved prisoners as forced labor.

The symbiotic link between antitrust and democracy can also be observed in the political and economic process which involved Poland and other countries of central and eastern Europe at the end of last century[54].

In totalitarian political systems with centralized economy, there is no place for real competition, and it is only possible to talk about monopolies. From a political point of view, the dissolution of the Soviet Union led to the birth of new States which abandoned totalitarian forms of communist government in favor of new democratic frameworks. From an economic perspective, the former Soviet Republics abandoned central planning and control of the economy and adopted economic systems more oriented towards the free market[55].

Until the fall of Communism, the economy of Poland was one large state legally 'institutionalized' monopoly. Even if there had been sporadic, sectorial and not incisive legislative interventions, Polish competition law began to really develop only with the progressive decline of the communist regime in 1990. Since then, economic and political conditions in Poland have substantially changed. The establishment of a free-market economy and the admission into the EU have brought to the adoption of a new modern antimonopoly legislation in 2000).

Poland has been a EU Member State since 2004 and its current antitrust law has been in force since 2007, in line with the democratic, economic and free-market oriented principles and values of the EU[56].

Press, 2001, 361-363; JAMES, *The Deutsche Bank and the Nazi Economic War Against the Jews. The Expropriation of Jewish-Owned Property*, Cambridge: Cambridge University Press 2001; BORKIN, *The Crime and Punishment of I.G. Farben*, New York: Free Press Publishing 1978.

[53] BARTLETT, *Architects of Death: The Family Who Engineered the Holocaust*, London: Biteback Publishing 2018, 6-12.

[54] BREZEZINSKI, *Competition and Antitrust Law in Central Europe: Poland, the Czech Republic, Slovakia, and Hungary*, in 15 *Mich. J. Int'l L.* 1129 (1993-1994); KOVACIC, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, in 77 *Chi.-Kent L. Rev.* 265 (2001-2002).

[55] VARADY, *The Emergence of Competition Law in (Former) Socialist Countries*, in 47 *Am. J. Comp. L.* 229 (1999); KOVACIC, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, in 11 *Am. U. J. Int'l L. & Pol'y* 437 (1995-1996); RUBIN, *Growing a Legal System in the Post-Communist Economies*, in 27 *Cornell Int'l L. J.* 1 (1994).

[56] BŁACHUCKI, *Polish Competition Law. Commentary, Case Law and Texts*, Polish Office of Competition and Consumer Protection, Piaseczno: Brothers Printing Grodzickis 2013, 8-22.

Other post-communist countries which have enacted antitrust law are Hungary[57], Czech Republic[58], Slovak Republic, Slovenia, Croatia, Albania, Romania[59], Bulgaria[60], Ukraine[61], most of them EU Member States or applicants for the accession.

5. *The potential role of the EU as 'global democratizer regulator'*

Despite its internal divisions and the lack of a common policy on important issues (such as energy supply, common defence and fiscality), the EU exercises *de facto*, and often far from the media hype, a strong influence on politics and lawmaking of other countries in many fields, including competition policy and antitrust enforcement.

The alignment of economic and antitrust policies of former communist States of central and eastern Europe – some of which are not yet members, but candidates for the admission as Albania[62] – with economic and democratic standards of EU law is a clear example of this influence, defined "Brussels effect" by Bradford[63]. In fact, the political and economic power of the EU makes not convenient for those States having commercial and political relations with the EU Member States to adopt legislation that does not comply with the standards of EU law.

This is the reason why, for example, foreign companies operating in the EU have changed their privacy policy in accordance with the EU's General Data Protection Regulation No. 2016/679 and other countries

[57] MAICAN, *Legal Regime of Competition in Hungary*, in 9 *Persp. L. Pub. Admin.* 284 (2020).
[58] HAJN, *The Law Against Unfair Competition in the Czech Republic*, in HILTY & HENNING-BODEWIG (eds.), *Law Against Unfair Competition. Towards a New Paradigm in Europe?*, New York: Springer Publishing 2007, 205-209.
[59] MAKS-WITTE, *Romanian Competition Policy: Taking over the European Model?*, in 39 *Intereconomics* 314 (2004).
[60] HOEKMAN-DJANKOV, *Competition Law in Post-Central-Planning Bulgaria*, in 45 *The Antitrust Bulletin* 227 (2000).
[61] SMYRNOVA-FOKINA, *The 'Europeanization' of Competition Law of Ukraine*, in 71 *GRUR International Journal of European and International IP Law* 1 (1/2022); SMYRNOVA, *Europeanization of Competition Law: Principles and Values of Fair Competition in Free Market Economy in the EU and Association Agreements with Ukraine, Moldova, and Georgia*, in LORENZMEIER-PETROV-VEDDER (eds.), *EU External Relations Law*, New York: Springer Publishing 2021, 163-176.
[62] SKARA, *The Transposition of the Antitrust Damages Directive in Albania as an EU Candidate Country*, in 12 *JECLAP* 326 (2021); MOGA-ALEXEEV, *Post-Soviet States Between Russia and the EU: Reviving Geopolitical Competition? A Dual Perspective*, in 13 *Connections: The Quarterly Journal* 41 (2013).
[63] BRADFORD, *The Brussels Effect. How the European Union Rules the World*, Oxford: Oxford University Press, 2020.

have adapted their privacy legislation. Regarding antitrust legislation, the European Commission has the task of ensuring compliance with EU competition law by companies operating in the EU single market. In this field, the Commission is very authoritative at international level.

In the merger case General Electric/Honeywell, the Commission did not hesitate to block the merger, disregarding the opposite decision of the US Federal Trade Commission, which instead had previously authorized the operation. General Electric, a US leading company in aircraft engines, wanted to acquire Honeywell, another US corporation specialized in mechanical and electronic components for engines. The FTC had authorized the merger pursuant to the Sherman Act, but the European Commission believed the merger would have brought to an excessive risk of rising transport prices for European consumers, and did not authorize the merger[64]. Two powerful US corporations had to renounce an economic merger operation, previously authorized by 'their' FTC, because the impossibility of operating in the European market made the merger uneconomical for them. This is an example of the "Brussels effect" in which the EU acts like a *de facto* global unilateral regulatory power.

As anticipated, many features of competition-oriented free markets are common with democratic forms of government (protection of individual rights and private property, freedom to compete, freedom of choosing goods and services). Therefore, antitrust policy ensures the economic democracy of free markets. Yet, if democracy necessarily requires free markets, markets do not necessarily require democracy[65].

China is a clear example. China has been described as a "socialist consultative democracy for the people"[66]. After developing a socialism "with Chinese characteristics", China claims to have developed a sort of democracy "with Chinese characteristic".

This self-styled form of "new democracy" would be "dedicated to promoting consultation among political parties, people's congresses, governments, people's political consultative conferences, other people's organizations, and community-level and social organizations in a coordinated manner. In China, State organs, non-communist parties, people's organizations, enterprises, public institutions, social organizations and

[64] European Commission, Commission Decision of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement, Case COMP/M.2220 – General Electric/Honeywell, 2004/134/EC.
[65] FOX, *supra* footnote 45.
[66] JIAYI, *The Qualities and Strengths of Consultative Democracy Practiced Through the Chinese People's Political Consultative Conference*, in *Qiushi Journal* (official bimonthly theoretical journal of the Chinese Communist Party), 18 January 2022, at http://en.qstheory.cn/2022-01/18/c_699097.htm.

think-tanks conduct consultations in an orderly manner under the Party's leadership, promoting the coordinated advancement of multiple consultation channels in China"[67].

Although some civil and economic rights are recognized in China, among which the property right, enshrined in Article 13 of the Chinese constitution[68], and even if Chinese citizens can participate in the country's public life, this is not enough to qualify the government of China as fully "democratic". In fact, true democracy presupposes that citizens have full and unconditional freedom to choose their own lawmakers, while in China the eligibility of candidates for public political offices is limited, being reserved to members of the socialist one-party which does not admit political rivals[69].

Despite it all, in 2008 China introduced an anti-monopoly bill whose Article 1 aims at "preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of socialist market economy". Market-oriented economic environment can therefore coexist with and within a not fully democratic political system. Democracy and antitrust are not always convergent and this is the reason for which the symbiotic relationship between democracy and competition policy is sometimes "asymmetric".

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[67] PENG, *Consultative democracy for the people*, in *China Daily*, 2 March 2022.

[68] Article 13: "1. Citizens' lawful private property is inviolable. 2. The State shall protect the right of citizens to own and inherit private property in accordance with the provisions of law. 3. The State may, in order to meet the demands of the public interest and in accordance with the provisions of law, expropriate or requisite citizens' private property and furnish compensation".

[69] GEDDES-WRIGHT-FRANTZ, *How Dictatorships Work*, Cambridge: Cambridge University Press 2018, 140-141; MANION, *"Good Types" in Authoritarian Elections: The Selectoral Connection in Chinese Local Congresses*, in 50 *Comparative Political Studies* 362 (2017); WALLACE, *Juking the Stats? Authoritarian Information Problems in China*, in 46 *Brit. J. Pol. Sc.* 11 (2016); LEE-ZHANG, *The Power of Instability: Unraveling the Microfoundations of Bargained Authoritarianism in China*, in 118 *AJS* 1475 (2013); LANDRY *et al*., *Elections in Rural China: Competition Without Parties*, in 43 *Comparative Political Studies* 763 (2010).

China is not an isolated case. Other not fully democratic States have adopted a competition-oriented market structure economy[70], as Iran[71], Kazakhstan[72], Turkey, Saudi Arabia[73] and Russia.

Democratic countries usually adopt free market economic structures to protect economic and civil freedoms, while authoritarian governments mainly pursue economic goals like efficiency gains in production processes and technological progress. In any case, competition legislations contribute significantly, although not decisively, to make States without democracy at least 'less undemocratic'. Antitrust policy has therefore an indirect 'democratizing effect' on the society which may consist, depending on the case, in strengthening existing democracies or laying the foundations to allow the birth and development of new ones.

The EU competition law, along with the US one, is the most modern, accurate and effective antitrust law at global level, and many States take it as a model. The EU could use its influence as *de facto* global unilateral regulator in matter of competition (but also in other fields, like environmental and food security) to 'export' its democratic political model based on respect for human rights and the rule of law, in addition to its economic model founded on a competition-oriented free market. However, for the EU to truly play a leading role at global level, like the US and China, European citizens must abandon nationalisms in favor of a greater integration between EU Member States, through the adoption of common policies in key matters, such as defense and energy supply, currently left to the exclusive competence of the Member States.

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[70] ALLEN-SCHEVE, *Sustaining Capitalism and Democracy: Lessons from Global Competition Policy*, in 24 *International Studies Review* 1 (2022); AYDIN-BÜTHE, *Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits*, in 79 *LCP* 1 (2016); PETERSEN, *Antitrust Law and the Promotion of Democracy and Economic Growth*, in *Preprints of the Max Planck Institute for Research on Collective Goods*, Bonn 2011/3 (January 2011).

[71] HOSSEINI, *An Introduction to Iranian Competition Law and Policy*, in 1 *Competition Policy International Antitrust Chronicle* 1 (2015).

[72] LOMBARDI, *Competition Law Objectives in Kazakhstan*, in ECLID Research Paper Series 1/2020.

[73] AGIL, *A Comparative Study on Competition Laws and Practices between Saudi Arabia and the United States*, in 5 *Al Ain University Journal of Business and Law* 3 (2021).

PIRACY: A THREAT TO SEA SECURITY AND WORLD MARITIME TRADE

Francesca Bruno & Riccardo Persio*

ABSTRACT: The article analyzes the phenomenon of piracy from a legal and an economic perspective. From the legal point of view, the main issues concerning piracy are analyzed by examining the situation off the coast of Somalia, and the current developments in the Gulf of Guinea. From the economic point of view, instead, the article provides an insight into the global distribution of piracy, focusing on the distinction between direct and indirect costs arising from piracy.

KEYWORDS: Piracy; sea security; world maritime trade; UNCLOS;

CONTENTS: 1. *Introductory remarks*. – 2. *The definition of piracy contained in the UNCLOS*. – 3. *The action of the UNSC against piracy around the Horn of Africa*. – 4. *Some problems of the prosecution in case of piracy*. – 5. *New challenges in the fight against piracy: the Gulf of Guinea*. – 6. *Piracy as a global, evolving and adapting threat to international trade*. – 7. *Two case studies: Somalia and Gulf of Guinea*. – 8. *The estimated economic costs of piracy*.

1. *Introductory remarks*

Piracy constitutes one of the oldest phenomena regulated by international law. Pirates, considered 'hostis humani generis' (enemy of mankind)[1], commit offences that undermine the freedom of navigation, the safety of maritime routes and the conduct of trade in areas not subject to the sovereignty of any Atate. Several historical periods have been marked by piracy to the extent that we may consider piracy as a true historical constant. Of course, acts of piracy have been growing in proportion to the increase in maritime traffic at global level: 80% of world trade travels by sea, especially the trade on energy resources such as oil and gas, half of which is transported by sea. The political crisis caused by the armed

* Francesca Bruno authored paragraphs 1-5; Riccardo Persio authored paragraphs 6-8.

[1] CICERO, *De Officis*, III, 107.

conflict in Ukraine and the further expansion of international markets will necessarily have to be followed by a drastic change in the mode of transport: from a market based on trade and transport between short distances to a market mainly based on sea traffic, transport between long distances and the evolution of liquefied natural gas[2]. For all these reasons, in times of intense trade, especially in certain areas, actions of pirates are resurfacing with a strong charge of violence.

2. *The definition of piracy contained in the UNCLOS*

Over time and with regard to piracy, customary international law has weakened the principle that the flag State has exclusive jurisdiction over ships on the high seas and, in parallel, has also established a legal regime for combating and repressing piracy based on universal jurisdiction. It was first codified in the 1958 Geneva Convention on the High Seas and then in the 1982 UN Convention on the Law of the Sea (UNCLOS or Montego Bay Convention). As a result, a pirate ship on the high seas can be stopped, visited and seized by "warships […] or other ships […] clearly marked and identifiable as being on government service and authorized to that effect" (Article 107 of UNCLOS). Further, every State may "arrest the persons and seize the property on board [and] the courts of the State which carried out the seizure may decide upon the penalties to be imposed" regardless of the flag of the pirate ship and the nationality of pirates (Article 105 of UNCLOS)[3].

Provisions of the Montego Bay Convention do not clarify the precise criteria for determining which States are competent to exercise jurisdiction over pirates. In fact, Article 105 of UNCLOS would leave 'carte blanche' to the State to choose whether or not to prosecute acts of piracy committed on the high seas and, also, to decide penalties and measures to be taken with regard to the ship and its crew. In addition, the widespread occurrence of acts of armed robbery at sea has highlighted some loopholes in the rules of the UNCLOS.

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[2] ALIMONTI, *Trasporto di gas naturale via mare*, in *Treccani. Enciclopedia degli idrocarburi*, vol. I (Esplorazione, produzione e trasporto), 855-878.

[3] Article 110 of UNCLOS regulates the "right of visit" and provides that "a warship which encounters on the high seas a foreign ship […] is not justified in boarding it unless there a reasonable ground for suspecting that: (a) the ship is engaged in piracy […] the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration".

Armed robbery against ships happens within a State's internal waters, archipelagic waters and territorial sea; accordingly, it is not possible to bring repressive actions against piracy within an area under the sovereigny of the coastal State and it will be up only to the latter to exercise coercion. In fact, it is a well-established opinion among legal scholars that Article 101 of the UNCLOS is only applicable when the pirate ship is in the high seas[4]. However, it should also be recalled a different view according to which the notion of piracy contained in the 1982 UNCLOS would be static, outdated and unsuitable to also include acts committed in the territorial waters of a coastal State[5]. In fact, it has been observed that in the last 20 years the majority of attacks by marauders of the seas have occurred within the territorial sea due to different circumstances such as the serious lack, in some regions, of proper coastal patrol or even its lack of everything as in the Caribbean, South-East Asia and Nigeria, and the inadequacy, failure and/or persistent inertia of local governments as in Somalia and Nigeria. It is not therefore surprising that pirates prefer operating within the territorial waters of certain coastal States, where the right of visit is not allowed and the mainland can easily become a place of refuge and shelter. Moreover, local criminal groups actively contribute or participate to these operations by offering logistical support and securing both kidnappers and kidnapped persons.

In order to tackle this challenging phenomenon, a feasible solution would be to modernise the definition of piracy and adopt an ad *hoc* Protocol to the UNCLOS with the aim of including crimes committed within territorial waters into the new definition of piracy[6].

3. *The action of the UNSC against piracy around the Horn of Africa*

In addition to the provisions of the Montego Bay Convention, resolutions adopted by the UNSC also constitute a valid international response to piracy, with particular reference to piracy around the Horn of Africa.

Due to the high number of criminal acts committed against vessels since 2000 in the territorial waters of Somalia and the high sea off the coast of Somalia, the UNSC has adopted a series of resolutions on piracy. UNSCR 1816 (2008) was an important turning point in combating modern piracy because the UNSC, upon consent of the Transitional Federal

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[4] MUNARI, *La "nuova" pirateria e il diritto internazionale. Spunti per una riflessione*, in 92(2) *Riv. dir. int.* 325 (2009).

[5] TANCREDI, *Di pirati e "Stati falliti". Il Consiglio di Sicurezza autorizza il ricorso alla forza nelle acque territoriali della Somalia*, in 91(4) *Riv. dir. int.* 937 (2008).

[6] GRAZIANI, *Il contrasto alla pirateria marittima nel diritto internazionale*, Napoli: Editoriale Scientifica 2010, 93-94.

Government (TFG) of Somalia, decided in paragraph 7 of the resolution that "States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia […] may: (a) enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law, and (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery". The UNSC therefore authorized States cooperating with the TFG to enter territorial waters of Somalia and exercise therein all those powers permitted under international law only on the high seas[7].

A few months later, then, the UNSCR 1851 (2008) further extended the mandate by allowing, in paragraph 6 of the resolution, "all States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia [to] undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery". In other words, the UNSC allowed States and regional organizations to suppress acts of piracy and armed robbery also on the land of Somalia with the main purpose of destroying the logistical bases of pirates and promote actions of capture and release of hostages.

After the adoption of the UNSC resolutions, international organisations and individual States have launched military operations around the Horn of Africa. Some have been organized and led by the US (operation 'Combined Task Force 151'), the NATO (operation 'Ocean Shield'), and the EU whose first naval military operation within its CSDP was named 'Operation Atalanta' or EUNAVFOR Somalia (EU Naval Force Somalia)[8]. It should be pointed out that relevant UNSC resolutions and decisions adopted by the EU for establishing and extending the mandate of its naval force in Somalia have not attributed, to States intervening around the Horn of Africa, additional powers over and above those already granted by international and domestic legislation. In fact, provisions concerning repression of piracy and related powers of warships and government ships are already contained in some national and international rules against which the UNSC and the EU do not possess legislative functions. Accordingly, EU decisions and joint actions expressly refer to the

[7] PICONE, *Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale generale*, in 88(1) *Riv. dir. int.* 5 (2005).
[8] MARINI, *Pirateria marittima e diritto internazionale*, Torino: Giappichelli Editore 2016, 102-103.

UNCLOS and domestic legislation of EU Member States as well as UNSC resolution 1816 (2008) is limited to requiring States to cooperate and take action "in a manner consistent with action permitted […] with respect to piracy under relevant international law"[9].

4. *Some problems of the prosecution in case of piracy*

The vagueness of the UNCLOS and UNSC resolutions left wide discretion to States in choosing whether to exercise jurisdiction or hand over offenders to competent authorities. An example of this discretion was provided by Article 12 (now deleted by Council Decision 2020/2188 of 22 December 2020) of the Council Joint Action 2008/851/CFSP where it provided that "On the basis of Somalia's acceptance of the exercise of jurisdiction by Member States or third States, on the one hand, and of Article 105 of the UNCLOS, on the other hand, persons suspected of intending, within the meaning of Articles 101 and 103 of the UNCLOS commit, who commit or have committed acts of piracy or armed robbery in Somali territorial or internal waters or on the high seas, arrested and detained for the purpose of prosecution, and property used to carry out such acts, shall be transferred – to the competent authorities of the Member State or of the third State participating in the operation of which the vessel which carried out the capture is flying the flag, or – if that State cannot or does not wish to exercise its jurisdiction, to a Member State or to any third State which wishes to exercise its jurisdiction over such persons and property"[10].

Subsequent practice was that the majority of suspects were released without any trial, also because competent jurisdictions and related judicial systems were sometimes non-existent or, however, unfit to try and detain pirates in a manner consistent with relevant international law, including international law on human rights. Another problem in prosecuting pirates was, and still is, due to the geographical distance separating the place of capture and the courts of the flag State of the vessel which took pirates captive.

To avoid impunity, therefore, the UNSC invited States in paragraph 3 of resolution 1851 (2008) "to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark

[9] DI PIETRO, *Nuove misure per combattere la pirateria: l'istituzione di corti antipirateria somale*, in 77(2) *Il Politico* 144 (2012).

[10] Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, OJ L 301 12.11.2008, 33.

law enforcement officials ('shipriders') from the latter countries […] to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia". The UNSC also urged States to identify among Somalia's neighbouring States those willing to detain and try pirates[11].

Shiprider bilateral agreements were stipulated with Djibouti, Seychelles, Mauritius, Kenya and Tanzania, but it should be underlined that these agreements reveal certain peculiarities. For instance, in the agreement signed with Kenya, the African country had to accept the transfer of pirates captured in the context of Operation Atalanta for prosecuting them. In addition, Kenya had to comply with relevant international law, notably international law on human rights so as to guarantee fair trial for suspects, humane conditions of detention, and moratorium on the death penalty. Despite these guarantees, there was no solution for overcrowded prisons and free legal aid only granted to murder suspects. With regard instead to the agreements with Tanzania and Mauritius, they were annulled by the ECJ because the EP had not been involved in the decision-making process leading to their formation[12].

Another issue that arose during NATO and EUNAVFOR operations was related to the failure to prosecute marauders of the sea. Despite numerous political and economic committments made by the international community, the fight against piracy is risking to be in vain due to the spread of the practice known as 'catch and release', which would consist of releasing captured pirates without taking any coercive measures or even prosecuting them[13]. This practice is put in place by the States of the capturing ships for fear of not being able to face the numerous and costly trials against the pirates, as well as the risks linked to the status attributed to them and the possible entrenchment within the jurisdiction of the State which captured and detained them[14].

According to Eurojust, from 2008 to 2012 (when Somali piracy reached its peak), only 20% of captured pirates were prosecuted[15], and

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[11] DI PIETRO, *supra* footnote 9, 149.

[12] For the agreement with Tanzania, see ECJ (Grand Chamber), *European Parliament v. Council*, Judgment of 14 June 2016, Case C-263/14, ECLI:EU:C:2016:435; for the agreement with Mauritius, see ECJ (Grand Chamber), *European Parliament v. Council*, Judgment 24 June 2014, Case C-658/11, ECLI:EU:C:2014:2025.

[13] Ships involved in operations have been found to have adopted the habit of releasing suspects once they have foiled boardings against their vessels, simply disarming them and often landing them directly on Somali shores.

[14] MARINI, *supra* footnote 8, 145.

[15] Eurojust, *Maritime Piracy Judicial Monitor*, September 2013.

85% of these few cases were managed by third countries with which the EU had signed bilateral agreements[16]. One of the reasons behind the EU's approach is related to the risk that suspects might seek political asylum from vessels involved in the operations. In fact, the 1951 Geneva Refugee Convention, the EU Charter of Fundamental Rights, and the ECHR impose a prohibition against refusing asylum to an asylum seeker who risks even a potential threat to life, liberty or security in the country of origin.

5. *New challenges in the fight against piracy: the Gulf of Guinea*

With regard to the new challenges and critical issues that States will soon have to face in the fight against piracy, it should be noted that pirates have been forced to change scope and location of their criminal operations due to the presence or absence of foreign and international anti-piracy naval forces. To date, the situation in the Gulf of Guinea, and in the bordering coastal States such as Nigeria, is of great concern.

According to the annual piracy report of the International Chamber of Commerce's International Maritime Bureau[17], piracy is on the rise globally with 195 incidents recorded in 2020 compared to 162 incidents recorded in 2019. Moreover, the new energy crisis is forcing Europe to negotiate with third countries such as Nigeria, one of the leading producers of LNG. Transportation of LNG takes place by sea and the progressive exploitation of the Niger delta by oil and gas companies has not only led to its impoverishment and maked the region one of the most polluted in the world, but also led local populations to take up arms and engage in brigandage in their own territorial waters. In other words, poverty, unemployment, environmental degradation and deprivation related, directly or indirectly, to oil exploitation have led to piracy also in Nigeria.

Taking into account the soaring demand for energy sources in this region, it is likely that piracy in this area of West Africa may once again resurface with greater ferocity than in the past. Since 2008, despite the latest positive data[18], piracy has always been underestimated and

[16] DEL CHICCA, *La pirateria marittima. Evoluzione di un crimine antico*, Torino: Giappichelli Editore 2016, 181.

[17] https://www.icc-ccs.org/index.php/1301-gulf-of-guinea-records-highest-ever-number-of-crew-kidnapped-in-2020-according-to-imb-s-annual-piracy-report.

[18] Perhaps the decline in the number of criminal acts could be due to the effects of measures introduced by Nigeria to prevent the spread of the pandemic. See ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships – First Quarter 2022*, Report for the period 1 January-31 March 2022 (April 2022). See also ANELE, *A Critical Analysis of the Implications of COVID-19 on Piracy Off the Nigerian Coast*, 18(2) *Revista de Direito Internacional. Brazilian Journal of International Law* 108 (2021).

characterized by a shifting of responsibilities between the various coastal States and international organizations. Specifically, the UNSC in its resolution 2039 (2012) urged States of the region of the Gulf of Guinea "to take prompt action [and] develop and implement national maritime security strategies, including for the establishment of a legal framework for the prevention, and repression of piracy and armed robbery at sea as well as prosecution of persons engaging in those crimes, and punishment of those convicted of those crimes" (paragraph 5). Similarly, the EU has its own Maritime security strategy with the aim of coordinating Member States' actions and information sharing. To date, the hard socio-economic conditions of the countries in the area, exacerbated by the pandemic, strongly condition the actions taken at international and regional level. Moreover, existing environmental and employment problems favor the recruitment of criminal groups. Therefore, international support is now more significant than ever, both in terms of military capabilities and coordination among States concerned, because curbing and countering piracy is of paramount importance for the economic relations and development between coastal countries and international partners.

6. *Piracy as a global, evolving and adapting threat to international trade*

The exponential growth of international trade occurred since the end of the last century with the thrust of globalization has had a decisively positive effect on maritime trade. On the one hand, the numerous free trade treaties signed between States or under the aegis of the World Trade Organization (WTO) favoured the exploitation of all channels, mainly the maritime ones, for transporting goods and commodities in the global market. On the other, the sudden expansion of global value chains, which involved more and more companies from different countries in the production chains, made it possible to create complex products with components from various parts of the globe. In this context, characterized by the presence of numerous large merchant ships, piracy has become a threat of global dimensions. Following paragraphs of the article will provide insight into numerical and economic dimensions of piracy from 1984 to today, analyze two case studies and estimate the economic impact of maritime piracy.

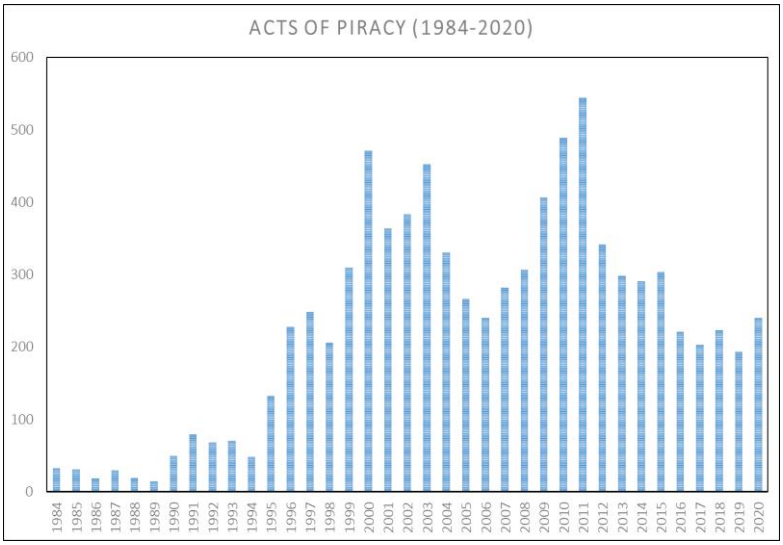
Piracy, as a global phenomenon affecting international trade, cause huge, direct and indirect, economic damages to many companies and reputational damage to many States[19]. Modern pirates act in a different way

[19] BOWDEN, *The Economic Cost of Maritime Piracy*, One Earth Future Working Paper, December 2010.

compared to those of the past, taking large merchant ships full of goods or raw materials hostage and demanding ransoms from the multinationals that own them. In two cases of oil tankers with several hundred million barrels of oil bound for Western markets seized in 2010 in Somalia, it took record amounts of 9.5 and 7 million dollars to release Samho Dream and MV Maran Centaurus[20]. As a result, piracy started to grow again with the notable increase in international trade, hitting trade more effectively.

Data collected by the IMO, in Figure 1[21], clearly show the exponential growth in the number of piracy occurred with the further expansion of globalization. In detail, the average number of piracy acts went from 32 in 1984 to 542 in 2011, with a growth of 1,653%.

Figure 1



However, the strong commitment of States and international organizations mitigated the growth of piracy and regressed the values recorded in the last twenty years. In particular, the UN played a vital role in mitigating the impact of piracy, as shown in previous paragraphs.

[20] BALDAUF, *Somali pirates fight over record ransom*, January 18, 2010, in The Christian Science Monitor; KRASKA, *Freakonomics of Maritime Piracy*, in 16(2) *Brown J. World Aff.* 109 (2009-2010).

[21] Data collected and shown in Figures 1-5 are drawn by IMO Annual Reports for 2018, 2019, and 2020, on acts of piracy and armed robbery against ships.

As anticipated, piracy is a global threat constantly evolving. There is however a further distinguishing feature, that is to say that piracy adapts both to changes in the international context and to transformations of commercial routes, shifting the attack sides according to the influx of merchant ships and international trade. Looking at the percentage distribution of acts of piracy according to the territorial areas affected in Figure 2, it is quite clear the adaptability of piracy at global level.

Figure 2

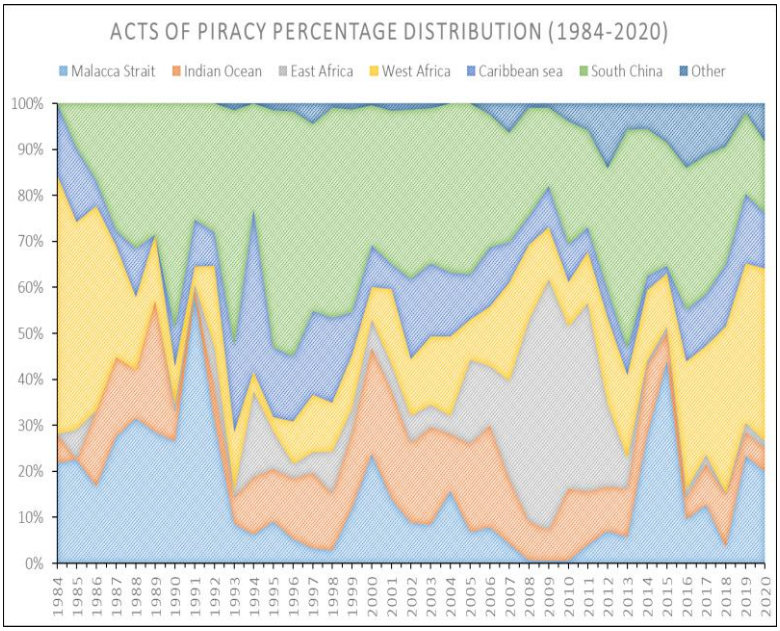
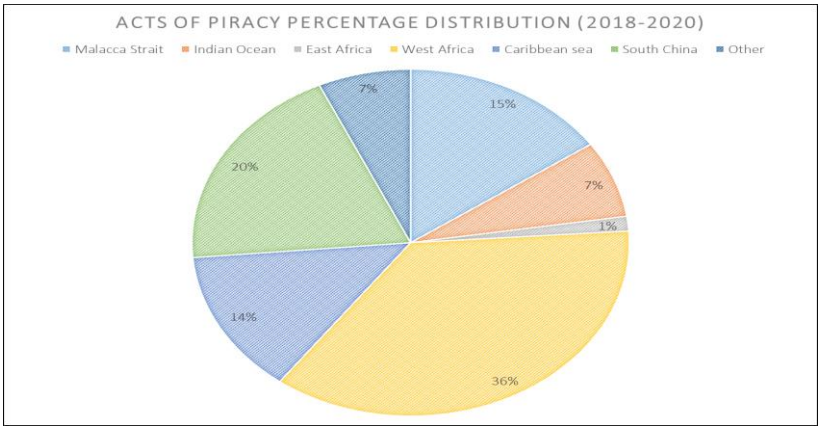


Figure 2 shows how piracy is a dynamic phenomenon, very susceptible to the influence of the factors already mentioned. Until the 1990s, piracy affected three main areas: *a*) the western part of Africa, specifically the Gulf of Guinea; *b*) the Strait of Malacca, the watercourse of the Indian Ocean dividing the Indonesian island of Sumatra from the west coast of the Malay peninsula, through which most of the Asian goods transit; *c*) the South China Sea. With expansion of international trade and the creation of new maritime routes, at the beginning of the new millennium, piracy progressively moved to other areas, such as off the coast of Somalia and the Indian Ocean. Finally, once severely hit by repressive international interventions, piracy started moving again, concentrating mainly in the Gulf of Guinea, where 36% of acts of piracy in the world occurred in

2018-2020 period. Data in Figure 3 therefore demonstrate the close link between piracy and international trade dynamics as well as the two cases briefly outlined in § 7 show the importance of the international community's response to effectively tackling piracy.

Figure 3

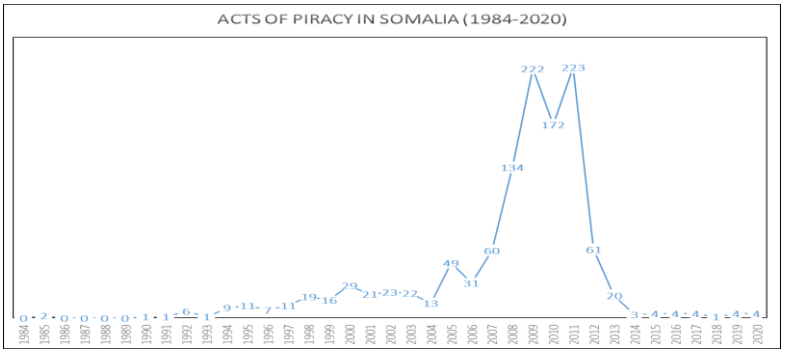


7. *Two case studies: Somalia and the Gulf of Guinea*

Piracy in Somalia is emblematic of its rapid evolution in the world and of its huge negative impact for global trade. Since 2005, acts of piracy and armed robbery in the waters north of Mogadishu have rapidly increased from 10 cases per year to 222 only in 2009[22]. Constantly attacking and endangering the access to the crucial area of the Suez Canal, pirates had therefore to be stopped. After long and heated discussions, the UNSC unanimously adopted resolution 1816 (2008) (*supra*, § 3) and authorized States to use any necessary means in order to prevent and repress piracy off the coast of Somalia, including within the territorial waters of Somalia. In this way, the "right to pursue" was authorized by the UNSC and consented by the TFG of Somalia to be continued also within the territorial waters of the coastal State. Effects of UNSCR 1816 (2008) were almost immediate. Due to the substantial investments of multinationals in private security, the number of attacks rapidly plummeted to zero in less than a decade as clearly showed in Figure 4 by the initial exponential growth and the subsequent collapse of piracy attacks.

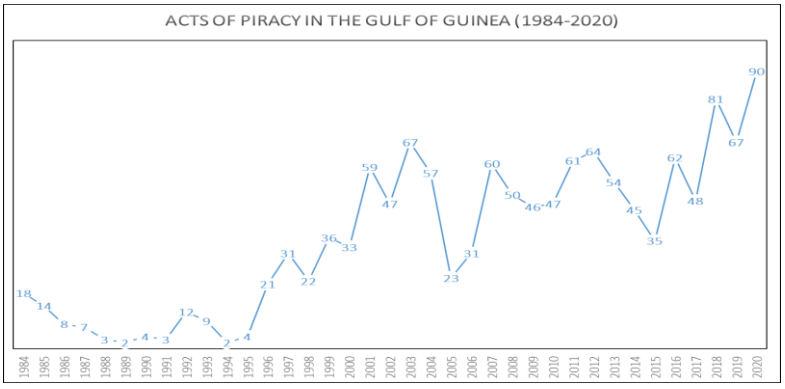
[22] BILOSLAVO-QUERCIA, *Il tesoro dei pirati: sequestri, ricatti, riciclaggio. La dimensione economica della pirateria somala*, in *Rivista marittima*, Marzo 2013 (Supplemento).

Figure 4



The case of Somalia highlights the positive effects of a massive international intervention against piracy. The case of the Gulf of Guinea is instead an example of an on-going unresolved piracy threat. In recent years, for various reasons including piracy off the coast of Somalia, trade routes of many shipping companies have changed and the Gulf of Guinea has become strategically important for at least two reasons: 1) the significant increase in international trade on natural gas; 2) the transfer of several criminal groups previously operating in the Gulf of Aden in this area[23]. As shown in Figure 5, about 1.200 merchant ships cross the area every day, and the number of attacks, kidnappings and ransom demands is steadily increasing.

Figure 5



[23] PAVIA, *The Maritime Security in the Gulf of Guinea, the Energy Security of Europe and the Potential Role of NATO and Portugal*, Lisbon: Universidade Lusíada Editore 2016.

After the threshold of 100 cases per year was crossed, upon the international pressure of some large multinationals and States (in particular Norway), on 31 May 2022, the UNSC unanimously adopted resolution 2634 (2022) to intensify the fight against piracy in the Gulf of Guinea. Paragraph 5 of the resolution 2634 (2022) urges States "in the region of the Gulf of Guinea to take prompt action, at national and regional levels, with the support of the international community, when requested by the State concerned, and in accordance with international law, to develop and implement national maritime security strategies" and encourage these States "to structure their operations to address illicit maritime activities and develop their capacities to protect their maritime domains". Paragraph 1 also "strongly condemns piracy and armed robbery at sea, including acts of murders, kidnappings and hostage-taking", so underlining the political and economic importance of combating piracy which contributes to further inequalities within the coastal States of the affected area.

8. *The estimated economic costs of piracy*

Estimated economic costs of piracy amount approximately to 12 billion of dollars every year. As shown in Table 1[24], it is essential to distinguish the direct costs of piracy from indirect or macroeconomic costs and consequences.

Table 1

Primary and Macroeconomic costs of piracy *(estimate value on 2009-10 data)*	
Cost Factor	Value (Billion of Dollars)
Ransoms	0,18
Insurance premiums	3,20
Re-routing ships	3,00
Deterrent security equipment	2,50
Naval forces	2,00
Piracy prosecutions	0,03
Piracy deterrent organizzations	0,02
Impact on regional trade	1,25
Total estimated cost	**12,18**

[24] Data shown in Table 1 are drawn by BOWDEN, *supra* footnote 19.

Direct costs may be summarized in the following categories: *a*) ransoms (costs to free ships hijacked by pirates); *b*) insurance premiums (insurance payments aimed at protecting and reimbursing commercial enterprises affected by piracy); *c*) re-routing of ships (costs associated with the reprogramming of maritime routes); *d*) security equipment and deterrent naval forces (costs incurred in using State and private naval forces); *e*) organizations of persecution and deterrence against piracy (costs associated with judicial and cultural interventions against piracy). It should be noted that costs sub *b*) and *c*) account for about the 50% of total costs and that, in general, these costs, also falling on the price of the final product, are borne by the whole international community.

With regard to indirect or macroeconomic costs, the impact on international trade in some areas is estimated to be around 1.25 billion of dollars per year. Data collected clearly therefore demonstrate that piracy is a social phenomenon which mainly affects the economically most disadvantaged regions of the world and directly impacts on their development, further deepening the social gap between industrialized countries and the rest of the world.

THE EUROPEAN STRUGGLE AGAINST HUMAN TRAFFICKING

Vincenza Paladino

ABSTRACT: Human trafficking is a serious crime and a threat for the international community and the EU. Europol and Eurojust are two important instruments at disposal of the EU for fighting against this crime which affects the very integrity of the victims and, in particular, of women and children sexually exploited. Covid-19 have had and still has a huge impact on the crime of human trafficking because it has facilitated certain methods of recruitment and further limited victims' access to justice.

KEYWORDS: Human trafficking; EU Strategy 2021-2025; Europol; Eurojust; secondary victimization.

CONTENTS: 1. *The 2021-2025 EU Strategy on combatting human trafficking*. – 2. *Europol and Eurojust's contribution in the fight against THB*. – 3. *Examples of Europol and Eurojust's activities*. – 4. *Gender inequalities and THB: is there a connection?*

1. *The 2021-2025 EU Strategy on combatting human trafficking*

According to the UN Office on Drugs and Crime, human trafficking or trafficking in human beings (THB) is the recruitment, transportation, transfer, harbouring or receipt of people through force, fraud or deception, with the aim of exploiting them for profit. Men, women and children of all ages and backgrounds can become victims of this crime which occurs in every region of the world. Traffickers often use violence, fraudulent employment agencies, and fake promises of education and job opportunities to trick and coerce their victims. Traffickers pursue multiple criminal goals, including in particular those aimed at sexually exploiting women and children. Human trafficking is almost always organised and managed by organised criminal groups, which often operate across borders in two or more States, making human trafficking also a transnational crime. Preventing and combatting THB is not only a commitment of the international community as a whole, especially within the UN system, but also of the EU.

Human trafficking is a complex phenomenon and requires a global and multilevel response. To this regard, legislation is one of the most powerful tools.The EU Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011, on preventing and combatting trafficking in human beings and protecting its victims (the so-called 'Anti-Trafficking Directive') is the backbone of the EU's efforts to combat THB.

Moreover, on April 2021, the EU has also adopted the 2021-2025 strategy for the prevention and suppression of this crime[1]. To this regard, the European Commission has envisaged several actions such as among the others: *a*) supporting EU Member States in the implementation of the Anti-Trafficking Directive, including through funding; *b*) ensuring the effective implementation of the Anti-Trafficking Directive using the powers conferred by the Treaties; *c*) evaluating the applicability and efficacy of the Anti-Trafficking Directive and, on the basis of the assessment, considering its review and recast; *d*) ensuring adequate funding to combat human trafficking within and outside the EU.

In the EU the majority of victims of trafficking are women and girls. Almost always the purpose of trafficking in these cases is sexual exploitation: almost one in four is a minor and almost three quarters of the criminals are men. For this reason, the EU Strategy focuses on the need to reduce the demand for sexual services that promotes trafficking. In particular, the EU Strategy provides for the possibility of establishing minimum standards at EU level (to be transposed into national law by the Member States) to criminalise users who benefit from the sexual services of victims. In this regard, the EU Strategy aims at strengthening and further developing information campaigns already in place to raise public awareness and, in particular, to inform users of sexual services on the crime of human trafficking.

Moreover, in the long-term, the EU Strategy is committed to breaking the traffickers' business model which also employs more and more online tools in order to recruit future victims. Accordingly, the European Commission is strongly committed to foster and develop a dialogue with IT companies and providers to reduce, prevent and hamper the use of online platforms for the recruitment and exploitation of victims. Finally, the European Commission is also committed to protecting, supporting and empowering victims with a particular focus on women and children. To this regard, promoting international cooperation between States, EU Member States and third countries, the EU and the UN agencies is crucial because,

[1] European Commission, *Communication on the EU Strategy on Combatting Trafficking in Human Beings 2021-2025*, Brussels, 14.4.2021, COM(2021) 171 final.

within the EU territory, half of the victims are third-country nationals which are often recruited due to their social and economic vulnerability and to social inequalities.

2. *Europol and Eurojust's contribution in the fight against THB*

Europol and Eurojust, two Agencies of the EU, are the most important operational instruments for combatting transnational crimes within the EU, including THB.

Europol is the European Union Agency for Law Enforcement Cooperation whose main goal is to achieve a safer europe for the benefit of the EU citizens because "large-scale criminal and terrorist networks pose a significant threat to the internal security of the Union and to the safety and livelihood of its citizens"[2].

Europol supports the EU Member States in their transnational fight against terrorism, cybercrime and other serious and organised forms of crime. As anticipated, THB is one of EU and Europol's priorities. Since 2012, the EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 of the European Commission identified five key ways or priorities to achieve this goal: *a*) identifying, protecting and assisting victims of trafficking; *b*) stepping up the prevention of trafficking activities; *c*) increasing prosecution of traffickers, also establishing national, multidisciplinary law-enforcement units on human trafficking; *d*) enhancing coordination and cooperation among key actors and policy coherence; *e*) increasing knowledge of and effective response to changing trends in this area of transnational crime, also researching on recruitment over the internet and through social networks.

Europol mainly focuses on forms of sexual exploitation of women and children, including prostitution, and on the exploitation of children at work. Europol's report on human trafficking for the period 2022-2025, adopted in February 2022, underlines that the facilitation of trafficking in human beings continues to be one of the most serious criminal threats.

THB is also a priority crime for Eurojust, namely the European Union Agency for Cooperation in Criminal Justice[3]. Eurojust works with national authorities to combat a wide range of serious and complex cross-

[2] Headquartered in The Hague, Europol is currently regulated by Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 which has replaced and repealed, among the others, the founding Council Decision 2009/371/JHA. The quote in the text refers to recital (4) of Regulation 2016/794.

[3] Headquartered in The Hague, Eurojust is currently regulated by Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 which has replaced and repealed the founding Council Decision 2002/187/JHA.

border crimes involving two or more countries. Eurojust can support national authorities in the fight against human trafficking by effectively coordinating parallel investigations in EU Member States where victims are recruited, exploited and transported or moved.

THB is a serious and rapidly growing crime affecting millions of people worldwide and involving serious violations of fundamental human rights. Human traffickers control and exploit vulnerable victims and make use of threats, force, fraud, deception or kidnapping. In particular, traffickers exploit sexual and labour activities and often target individuals with limited education or financial means.

The trafficking of children is one of the forms of trafficking that has increased most in recent years. At a global level almost a third of reported victims of trafficking are minors according to the UNODC. Eurojust plays an active role in this area and has identified a specific response consisting of the appointment of national Eurojust members as contact points for the protection of minors. National contact points advise and support the use of tools and measures, such as the INTERPOL database on missing children, and through the Missing Children Europe Project also work to reduce the re-trafficking of unaccompanied migrant minors.

The Eurojust report of February 2021 on THB is of particular interest[4]. It is divided into two main parts: coordination of investigations and rights of victims. It is based on practical experience gained in the trafficking investigations conducted between 2017 and 2020 and contains 18 recommendations addressed mainly to prosecutors, judges and law enforcement authorities in order to extinguish THB.

Among the most relevant recommendations one should recall: *a*) the need for early cooperation and coordination between all countries and stakeholders involved, as a part of the obligation to respect the rights of all victims (recommendation No. 1); *b*) before submitting a case of THB to Eurojust, information should be first exchanged at the police level in order to identify links with other countries and initiate criminal proceedings whenever it is needed, as well as identify suspects, victims and their location (recommendation No. 2); *c*) "whenever national authorities share relevant information with Europol, the support from Europol should go hand in hand with the involvement of Eurojust […] As soon as Europol receives information on a THB case, Eurojust can help to initiate judicial procedure, which represent the best 'umbrella' from a legal point of view

[4] Eurojust Report on Trafficking in Human Beings – Best practice and issues in judicial cooperation, 23 February 2021, Publication ID: 2021/00091, available at https://www.eurojust.europa.eu/sites/default/files/assets/2021_02_16_thb_casework_report.pdf.

under which to also begin protection procedures" (recommendation No. 3); *d*) following the identification of a criminal group, all countries involved should actively react and contribute to collecting evidence and dismantling of the criminal group, preferably by conducting investigations in each jurisdiction in order to detect crimes and suspects in each country (recommendation No. 5); *e*) cases of THB having links with third countries (i.e., non EU Member States) should be referred to Eurojust for assistance (recommendation No. 12); *f*) interests and protection of victims should be given particular importance in deciding the jurisdiction of prosecution (recommendation No. 14); *g*) maximum use of Eurojust's coordination centres should be made in order to benefit THB prosecutions from the coordination of joint actions in different countries such as arrests and seizures (recommendation No. 15); *h*) to better identify victims, both Europol and Eurojust should be involved at an early stage of investigations, adult websites should be actively monitored, and information about money flows should be required to identify names and locations of victims (recommendation No. 17).

3. *Examples of Europol and Eurojust's activities*

Some practical cases of Europol and Eurojust's activities in the fight against human trafficking clearly demonstrate the importance of international cooperation and of the effective and frequent involvement of the two EU Agencies in this field.

In a first case managed and coordinated by Eurojust, five members of a Slovak organized criminal group were sentenced in the UK to long prison sentences for the exploitation of compatriots in a case of modern slavery and money laundering. Between 2008 and 2017, the victims were forced to work under appalling circumstances in British restaurant kitchens and car wash facilities, receiving about 25 euros per week but working up to 80 hours per week. Victims were forced to work up to 14 hours a day, six days a week, receiving very little compensation and living in poor sanitary conditions. In a second case, also coordinated by Eurojust, the authorities of France and Romania took action against a criminal network exploiting female victims for sexual purposes in France and other EU Member States using the so-called 'loverboy method'[5]. Victims were

[5] "The victims (including minors) were seduced by the offenders with false promises of sentimental partnerships, and a future luxury lifestyle. In reality, the victims were instead lured into prostitution and sexually exploited". See Eurojust, *Romania and UK judicial authorities jointly dismantle 'loverboy' criminal network specialized in trafficking and sexually exploiting young girls*, Press Release, 18 September 2020, available at

transported from city to city, in pairs, and were prostituted in private residences. Customers were found through advertisements on specialized websites. Joint action and cooperation allowed to issue and execute five european arrest warrants in Romania and two in France.

Eurojust provided timely and decisive support for the establishment and funding of a joint investigation team (JIT). JITs are an important instrument of international cooperation established from time to time by an agreement between the competent judicial and police authorities of the two or more States concerned by the criminal investigation and prosecution. JITs are established for a limited period of time and are functional to pursue the specific purpose of conducting a transnational police and judicial operation. JITs are of particular importance in the fight against transnational crime, including THB, because they allow not only to directly collect and exchange information and evidence but also to plan and decide measures to be taken in each participating jurisdiction without the need to use traditional and time-consuming channels of legal assistance between States. Accordingly, JITs are a very effective and efficient tool that facilitates the coordination of investigations and prosecutions carried out in parallel in more than one State.

Finally, it is also important to underline that although the pandemic has led to unprecedented restrictions on movement (and therefore travel), criminal networks have shown a high degree of adaptability thanks to new technologies and new modus operandi. In particular, the pandemic encouraged the recruitment of future victims of human trafficking by using more the web in order to recruit and exploit victims, thus making it more difficult to contrast THB. Moreover, the pandemic has also hindered victims' access to justice, assistance and support.

4. *Gender inequalities and THB: is there a connection?*

Case-law on THB shows how this crime causes considerable suffering and permanent harm to victims. It also shows that human trafficking for the purpose of sexual exploitation is a form of violence centred on gender inequalities and fuelled by vulnerability of women and girls due to multiple factors such as poverty, social exclusion and discrimination also on ethnic grounds. EU data confirm that human trafficking benefits from gender inequalities: 72% of victims in the EU, and 92% of victims of sexual exploitation, in fact, are women and girl, a quarter of whom are also children. Rapid detection of victims is therefore crucial to ensure

https://www.eurojust.europa.eu/news/romania-and-uk-judicial-authorities-jointly-dismantle-loverboy-criminal-network-specialized.

their assistance and protection. Yet, providing assistance, support and protection to victims of THB remains a complex challenge. In most cases, victims find it difficult to assert their rights and these difficulties are often due to their gender and age and to the fact that national authorities do not take adequate account of their situation, histories and suffering. In this regard, the victim of human trafficking runs the risk of suffering even the so-called 'secondary victimization'.

A case dealt and judged by the ECtHR in May 2021 clearly demonstrates this further risk of secondary victimization. The case (*J.L. v. Italy*) concerned a situation of gang rape and acknowledged the secondary victimisation of the victim "on account of comments in the reasoning of the [Italian] judgment that were guilt-inducing, moralising and conveyed sexist stereotypes"[6]. In the course of the criminal proceedings before the national authorities, the protection of the victim's right to privacy and personal integrity was not guaranteed and, therefore, the victim invoked the violation against Italy of Articles 8 and 14 of the ECHR, concerning respectively the right to respect for private and family life and the prohibition of discrimination. The ECtHR decided that numerous references to the personal and intimate life of the applicant, recalled during the hearings and then inserted in the judgment of the Court of Appeal of Florence, have damaged the right guaranteed by Article 8 and also undermined the confidence of the victim in the judicial system and in its ability to effectively protect the victims of sexual-related crimes. The ECtHR also pointed out that the seventh report on Italy of the UN Committee for the Elimination of Discrimination against Women and the report of the GREVIO (Group of Experts on Violence against Women) underline the persistence in the Italian society of stereotypes regarding the role of women and a sort of resistance to the full and integral achievement of effective gender equality.

[6] ECtHR, *J.L. v. Italy*, Judgment of 27 May 2021, Application No. 5671/16, Information Note on the Court's case-law 251 (May 2021).

HUMAN TRAFFICKING AND TRANSNATIONAL ORGANIZED CRIME

Silvia Jelo di Lentini

ABSTRACT: Transnational organized crime (TOC) is a phenomenon of global interest, which threatens national and international security, public safety and our democratic institutions. A historical analysis shows that criminal networks are not only expanding beyond national borders, but have also the capacity to diversify their activities, resulting in a convergence of threats to public safety. Control of migratory flows by transnational criminal associations provides an opportunity for an ontological review of the categories of criminal responsibility in the field. The observation of organized crime's territorial expansion dynamics reveals the central role played by interpersonal relations. The paper investigates the essential elements of the criminally relevant contribution made by an individual, in relation to a collective unlawful conduct at transnational level, with specific regard to the functional relationship linking the former to the latter. To this end, it is necessary to consider the dynamics of different contributions of those who favor or belong to a transnational criminal organization. The aim of the paper is to broaden the study and future development of methods, notions and criteria that better respond to the ever-changing nature of transnational organized crime, in order to combat it, both in terms of prevention and repression.

KEYWORDS: transnational organized crime; migrant smuggling; trafficking in human beings; international security; international cooperation.

CONTENTS: 1. *Introductory remarks*. – 2. *Criminal liability in associative crimes: the criterion of functionality*. – 3. *Searching for new models of analysis of TOC*. – 4. *Sociological analysis of the phenomenon*.

1. *Introductory remarks*

The issue of transnational organized crime (TOC) is at the heart of current national, regional, and global tensions surrounding international security, economic stability and the rule of law. It is a crosscutting concern that plays a central role in the corruption and dysfunction of

governments, distrust towards our democratic institutions and global threats[1]. The intended purpose is to provide guidance to national and international policymakers and law enforcement bodies in developing strategies for fighting organized crime.

The current phenomenon of the control of migratory flows by transnational criminal associations provides an opportunity for an ontological review of the categories of criminal liability. In fact, organized crime has evolved considerably in recent years. Its traditional main features were the regional basis of purposes and hierarchical structure. Whereas at present it is mainly cross-border and fluid in structure, illicit purposes and the markets it penetrates. In addition, a historical analysis of this phenomenon shows that criminal networks are not only expanding beyond national borders, but have also the capacity to diversify their activities, leading to a convergence of threats to public safety. TOC networks insinuate themselves into the political process, infiltrating financial and security sectors through corruption and coercion.

The transnational dimension of organized crime poses an even greater threat than the traditional, regional criminal organizations because, over time, transnational criminal associations are able to consolidate new ties with cross-border economies through political connections and corruption cycles. The ability of criminal networks to expand and diversify their activities results in a dangerous convergence of threats to human security across the globe. TOC directly threatens national and international security, public safety, public health, democratic institutions, economic stability and the rule of law. Moreover, considering that TOC's key activities are migrant smuggling and trafficking in human beings (THB), the main target of criminal networks is the trafficked person, who becomes an object of criminal exploitation, often for labor or sexual exploitation purposes. The seriousness of the THB is also revealed by the figures provided by NGOs on the number of women trafficked in order to enter the forced prostitution market and children coerced into forced labour and sexual exploitation, while also reporting the existence of concrete systems of child trafficking led by transnational criminal organizations. The most alarming fact is that criminal organizations do not merely have international connections, they are in transnational evolution.

[1] ALLUM-GILMOUR (eds.), *Routledge Handbook of Transnational Organized Crime*, 2nd edition, New York: Routledge 2022.

2. *Criminal liability in associative crimes: the criterion of functionality*

Human trafficking and migrant smuggling have multiple dimensions of harmfulness. Through such illicit activities, criminal organizations undermine the sovereignty of nations and endanger the lives of humans being smuggled. In addition, the smuggling of migrants and human trafficking at sea are subject to different legal frameworks. The nature and characteristics of TOC raise significant challenges both with regard to the prevention of its criminal activities and the applicable legal framework.

Article 3 of the 'Palermo Convention' defines the crime of trafficking in persons including all the activities involved when one person holds another person in compelled service, such as slavery, debt bondage, and forced labor[2]. Moreover, trafficking is not limited to the crossing of national borders, as it also includes moving and selling victims to other trafficking organizations within the same country.

The attributes mentioned here above serve as a starting point in considering future research directions. This raises definitional and evidentiary issues, which are attributable to the lack of definitiveness characterizing the notion of criminal liability in associative crimes[3]. The contribution of an actor, even if not autonomously criminal, embedded in a stable organizational dimension becomes criminally relevant. In this regard, the most complex factor for academics and lawmakers is the measurement of the culpability of the individual actor in terms of the mental state during the conduct. Despite the fact that standardization of liability for aiding and abetting as well as an abstract and general definition of the threshold of such liability are widely considered necessary among scholars, these notions are currently lacking in our legal system. Nevertheless, they are in practice overridden by the 'criterion of functionality'.

Starting from an examination of the current rules on the relevance of the concurring contribution, the 1930 legislature decided to abandon the technique of the Zanardelli Code, which provided for a description of the various concurring figures to which corresponded different penalty

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[2] The 'Palermo Convention' is the Convention against Transnational Organized Crime (New York, 15 November 2000), in United Nations, *Treaty Series*, vol. 2225, p. 209. Article 3 states: "*Trafficking in persons* shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation".

[3] ALEO, *Delitti associativi e criminalità organizzata. I contributi della teoria dell'organizzazione*, in *Rassegna penitenziaria e criminologica*, vol. XV, fasc. 3 (2012), 7-41.

treatments, and to adopt instead a causal criterion. In the light of the broad criterion introduced by the 1930 legislature, the majority orientation in jurisprudence maintains that the conduct that significantly contributes to the commission of the crime by reinforcing the criminal intent or facilitating the work of other participants is also punishable. Thus, it is sufficient that each participant, by virtue of their conduct, which facilitates the execution of the collective offence, increases the possibility of producing the event, because in an associative crime all participants' conducts are connected. Thus, the margin of liability has been widened to include those conducts that are not strictly causal in relation to the conduct of others or to the criminal result, but merely "increase the risk of the production of the event" (so-called 'facilitating cause theory').

The authoritative criticism levelled at this "very broad criterion" by the Grosso Commission highlights the need to draw up a more stringent criterion that attributes criminal relevance only to "certainly causal" conduct, advancing the need for a detailed description of typical conduct[4]. Although it is true that the Grosso Commission's report highlights critical points, which are for the most part acceptable, both from a conceptual and a methodological point of view, the conclusions it reaches would nevertheless lead to an unsatisfactory result which is substantially not in line with the principles of reasonableness. Indeed, it is noted that the aforementioned notion of criminally relevant contribution affirmed by the Supreme Court of Cassation leads to unacceptable consequences in terms of the arbitrariness of the tribunals that, in light of such an indeterminate and vague definition, perhaps has too much discretion, to the detriment of the certainty of the law.

In addition, the Commission's understanding of relevant causal contributions, specifically in the sense of attributing contributory liability to "anyone who participated in or instigated the commission of the crime or reinforced the intent of another participant or facilitated the commission of the crime by providing aid or assistance", does not allow for a sufficient determination.

Indeed, from the codictic experience of the past (i.e., the Napoleonic Penal Code of 1810 and the Zanardelli Code of 1889), an important conclusion can be drawn: no precise list is capable of predicting all the conduct that can be considered relevant in terms of contribution to the crime.

In fact, in a multiple collective dimension, such as that of TOC, the relevance of the individual contribution cannot be defined in terms of

[4] The Grosso Commission was the Ministerial Commission for the Reform of the Criminal Code established in 1998 by the Italian Ministry of Justice. The Preliminary Draft Reform of the Penal Code (General Part) was adopted by the Commission in September 2000.

causality, which is typical of binary logic. Applying the facilitating cause theory would lead to individual conducts escaping criminal responsibility every time they are not in terms of efficient causation in relation to the final illegal outcome. In a collective transnational dimension, the relevance of the individual contribution cannot be defined in terms of causality which, as anticipated, is typical of binary logic.

The criterion of functionality responds more precisely to such requirements, since the contribution must be assessed in relation to the other conduct and in general to the other elements that make up the collective model[5]. Moreover, causality is one of the various possible expressions of the functional relationship. Causality is included in functionality, because a functional relationship can manifest itself in different forms, including a causal relationship, but the reverse is not true: causality has a specific and restricted scope, whereas functionalist analysis is broader, covering a greater margin in which relationships of different types are included.

In the perspective of a collective conduct, the relevance of the contribution of an individual shall be defined by means of abstract and general notions and criteria, regardless of the concrete relation between this contribution and the collective conduct of other participants. In order to assess the relevance of the individual contribution, it is necessary to observe it in connection with the other elements that constitute the collective criminal act: it is in this concrete relationship with the conduct of the other actors that the relevance of the personal contribution to a collective conduct emerges.

The contribution to a complex criminal activity is relevant as long as it is functional to the activity itself. The criminal relevance of the contribution of a single actor, as well as its weight in concrete terms within a collective conduct depends on the context in which it is placed, on the use that is made of it. Therefore, it would be misleading to provide a threshold based on deductive criteria.

In fact, a contribution of minimal entity can, however, have an important role in the realization of an event of significant entity throughout a collective conduct. The *sine qua non* or 'but-for' test is not as efficient as a functional test. While the causal criterion requires the actor's conduct to be necessary to the final harmful event, a flexible structured functional criterion would fit the new dynamics of TOC in light of the layering of participants and activities that characterizes the actual phenomenon.

The criterion of functionality expresses the concrete utility of a conduct in the realization of the offense: "functionality" is the utility of the

[5] ALEO, *Causalità complessità e funzione penale. Per un'analisi funzionalistica dei problemi della responsabilità penale*, Milano: Giuffrè Editore 2009, 113 ff.

individual conduct to the collective one. In mathematics, the function (*f*) univocally defines the law that associates to each element of a set A one and only one element of a set B, so we can say that the function is the triple (A, B, *f*)[6]. In the context of a universal language, the so-called 'dictatorship of mathematics' imposes that a precise element *a* (i.e., a precise contribution to a collective behavior) of the set A is univocally associated with a precise element *b* which belongs to the set B.

The cause-effect link is unambiguous, leaving no room for multiple interpretations. Human conducts, instead, are 'fluid', they escape from such rigid schemes and are not regulated by functions but rather, if we want to keep a mathematical language, by 'multifunctions'[7]. In multifunctions, an element *a* of a starting set can be associated with more than one element in the ending set: conduct *a*, considered *a priori*, may have greater or lesser weight *ex post*, or may even vary from being irrelevant to being criminally relevant in the realization of a fact, depending on the multifactorial context in which it is inserted.

3. *Searching for new models of analysis of TOC*

One of the fundamental principles of criminal law in the Italian legal system, recognized by Article 27 of the Italian Constituion, is the principle of individuality: criminal responsibility is personal. Compliance with such constitutional principle is closely linked to the voluntariness of the criminal act. In this sense, the psychological coefficient of the perpetrator's participation in the act is widely discussed in doctrine and jurisprudence[8]. Criminal liability thus depends on the existence of a psychological nexus on the part of the offender, such that his conduct is an expression of a conscious opposition to criminal precepts.

In associative crimes, this may be described also as the awareness of contributing to the criminal activity, purposes and the very existence of the association. In addition to such psychological factor, the contribution to a complex criminal activity is relevant as long as it is functional to the activity itself.

Observing the complex criminal strategies developed by transnational organizations for the control of illegal immigration markets, it emerges the need of searching for new models of analysis compared to

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[6] EMMANUELE, *Analisi Matematica (vol. 1)*, Bologna: Pitagora Editrice 2003, 36.

[7] KLEIN-THOMPSON, *Theory of Correspondences: Including Applications to Mathematical Economics*, Hoboken (NJ): Wiley 1984, 65.

[8] ALESSANDRI, *Commento all'art. 27, comma 1, Costituzione*, in BRANCA-PIZZORUSSO (a cura di), *Commentario della Costituzione. Rapporti civili*, Bologna: Zanichelli 1991, 1 ff..

those used in our criminal system, which are structured to combat traditional regional organized crime. A first element that distinguishes this phenomenon is the extraterritoriality of the illicit objectives pursued, which prevents the use of traditional tools made available by the Italian criminal code. A further limitation of the traditional causal model concerns the ascertainment of the responsibility of a single actor. This one, affiliated or contiguous to the criminal association, operates with other participants, also affiliated or contiguous, in an extra-national territorial context, moved by the will to contribute to the realization of the illicit goals of the criminal association, but not necessarily aware of the other actors' operational spaces[9]. It is, therefore, a very complex criminal activity organized in detail in a transnational dimension.

To provide for specific associative criminal offenses, distinguished by the type of activity carried out by the criminal organization concerned, in the sense of the activity that can be considered the core business of a given organization, appears to be a fallacious technique. In fact, it would result in the creation of a large number of criminal offenses (i.e. human trafficking, sexual exploitation, trafficking in weapons and explosives: activities known to be run by criminal organizations) and it would still fail to achieve its intended goals. Rather, the approach that takes criminal organization as a reference point on the basis of general organizational theory and links it with common crimes seems preferable.

Transnational criminal associations have equipped themselves with a large number of associates, in a position of affiliation or external participation, in order to control the mentioned illicit markets. This layering of activities of the various actors, which is typical of the illicit migration market, requires the use of procedural artifice to establish the criminal liability of a person involved at various levels in the collective conduct, on the logical assumption that he is as much involved in the criminal event as it is proven that without his active contribution the criminal event would not have taken place.

Salvatore Aleo affirms: "the organization is constituted by the effectiveness of functional relations"[10], the assurance being not contingent on the existence of a formal agreement between the actors contributing to the organization, as it is shown by the mere repetition and reinforcement of conduct. An individual who contributes to an organization guarantees his performance, thus creating in the other actors an expectation of it based

[9] CENTONZE, *Criminalità organizzata transnazionale e flussi migratori illegali: le illusioni giurisprudenziali perdute e gli equivoci dogmatici*, in *Cass. pen.*, vol. 59, fasc. 7, 2019, 2793-2810.
[10] ALEO, *supra* footnote 5, 139.

on the consolidation of conduct and relations. Each actor is therefore a guarantor of their own conduct and the others rely on it. In this way, a guarantee-expectation of performance binomial is realized on which the effectiveness of functional relationships rests.

As anticipated, observing the complex illegal strategies elaborated by transnational criminal organizations for the management of the illegal immigration market, we should search for new models of analysis compared to those used in our penal system. The main elements that prevent the use of the legal instruments made available by the Italian penal code include the extraterritoriality of the illicit objectives pursued, together with the limits in the ascertainment of the responsibility of a single actor, who is not necessarily aware of what the operational spaces of the subjects with whom he interacts are.

A solution could be to consider in concrete terms the different contributions of those who favor or belong to a criminal organization in view of the functional relationship between the two conducts, the individual and the collective ones. The contribution made by an individual actor shall be assessed based on its functionality in relation to the collective conduct. The criterion of functionality responds precisely to the dynamics of TOC, as the contribution shall be evaluated in relation to the other participants' conducts and in general with the other elements that make up the collective model. An individual's contribution to a complex criminal activity is criminally relevant insofar as it is functional to the activity itself.

4. *Sociological analysis of the phenomenon*

TOC networks consist of a complex criminal activity organized in detail in a transnational dimension. In fact, transnational criminal organizations have a large number of associates who work in positions of affiliation or external participation to control illicit markets. As anticipated, such layering of activities of the various actors, which characterizes in particular the market of illegal migration flows, complicates the assessment of criminal responsibility for individuals involved at various levels in the criminal organization through the traditional tools offered by the current Italian penal code. It is therefore necessary to abandon the traditional causal model of liability assessment.

The observation of organized crime's territorial expansion dynamics reveal the central role played by interpersonal relations. Interpersonal relations are the pillar on which criminal organizations are built, as those represent a resource, an opportunity, which criminal groups exploit to expand the territorial reach of their operations. Some scholars, observing

the dynamics of the territorial expansion of organized crime, confirm the central role played by interpersonal relations and state that "Having a dense network of contacts is an opportunity structure that can be leveraged by criminal groups pursuing a strategy of extending the territorial scope of their operations"[11]. Interpersonal relations are the pillar on which criminal organizations rest: they are, in fact, their source of survival and a resource, an opportunity, which criminal groups exploit to extend the territorial scope of their operations.

Since these are relationships between individuals, it is worth analyzing some of the sociological aspects that have contributed to the creation of fertile ground for the establishment of organized crime in various illicit markets, including the aforementioned trafficking of migrants. Criminal organizations are a phenomenon of global interest. It has different connotations and acts for different illicit purposes depending on the interests, needs and peculiarities of the place: in this sense, criminal organizations respond to the needs that the society in which they operate manifests. Thus, they are able to position themselves as alternate providers of services. Scholars have also enhanced the organizations' role as suppliers of protection, inasmuch as the State fails to provide security and trust[12]. The result is the primacy of organized crime.

Becchi mentions the prohibition laws adopted in the United States in the 1920s and 1930s as a phenomenon that provided an opportunity for criminal organizations in America to establish themselves in the illicit alcohol market[13]. At the time, the term "organization" was used to emphasize the intensity of the relationships between the members of the gangs. Criminal organizations typically find a source of profit in the production of goods and the provision of services that are demanded by a wide range of people but prohibited by law. On this point, Becchi adds: "To say this is obviously not to presuppose a precise intentionality in the pursuit of the result on the part of some authority […] But neither does it mean that the processes that led to this result had a random development"[14].

In other words, the result was the outcome of some of the forms of social control that were adopted, even if the outcome itself was probably not the intended purpose. This observation would not be complete,

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[11] SCIARRONE-STORTI, *The territorial expansion of mafia-type organized crime. The case of the Italian mafia in Germany*, in 61(1) *Crime Law and Social Change* 37 (2014).
[12] GAMBETTA, *The Sicilian Mafia*, Cambridge (Ma.): Harvard University Press 1993; VARESE, *The Russian Mafia: Private Protection in a New Market Economy*, Oxford: Oxford University Press 2001.
[13] BECCHI, *Criminalità organizzata. Paradigmi e scenari delle organizzazioni mafiose in Italia*, Roma: Donzelli Editore 2000.
[14] *Ibidem*, 11.

however, without noting that, even after the abolition of the prohibitionist laws (which decision was not dictated by the intention of fighting the phenomenon of alcohol smuggling, but rather by ideological and economic factors, among which the Great Depression in America in the 1930's played a decisive role), the problem of the criminal organizations was not contained. These have easily found other channels and other equally lucrative illicit markets. Moreover, globalization has played a central role in the widening of the criminal organizations landscape.

In this regard, scholars noted: "Market globalisation and the subsequent abolishing of borders, together with the advantages offered by technological innovations, have created opportunities for new profits for existing and emerging criminal groups which have adapted themselves to the new needs of the market […] criminal groups have learned to exploit the loopholes and legislative discrepancies present in some geographical areas[15]". This shows a capacity of organized crime to adapt, recycle itself and respond to the needs expressed at a given time by a given group of individuals. Criminal organizations detect changes in the environment, adjust, and prepare its 'response' accordingly. They follow the principles governing legal markets to maintain and extend their own illicit market share, responding to the demand of their consumers. Scholars have defined it "the Enterprise model"[16], as criminal organizations tend to follow the lines of legitimate business enterprises while controlling illicit markets. In the last twenty years, various academics have identified an element which seems to characterize the mafia phenomenon in particular, and which, on closer inspection, can be found in criminal organizations in general: the mafia phenomenon is in perpetual movement, it is "liquid"[17].

"Liquid" describes the main elements of the actual dynamics of TOC, as it refers to the natural suitability of criminal associations to adapt to economic and social changes occurring in a given context, and expresses their extraordinary ability to expand into new territories. In the early

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[15] ADAMOLI *et al.*, *Organised Crime Around the World*, Helsinki: European Institute for Crime Prevention and Control 1998, Publication Series No. 31.

[16] WALL, *Understanding Transnational Organised Crime: An Academic Research Synthesis*, Leeds: Centre for Criminal Justice Studies, University of Leeds 2018.

[17] FIANDACA-COSTANTINO-BARATTA, *La mafia, le mafie: tra vecchi e nuovi paradigmi*, Bari: Laterza 1994, 95 ff. See also VARESE, *Mafie in movimento. Come il crimine organizzato conquista nuovi territori*, Torino: Giulio Einaudi Editore 2011; Unioncamere Veneto, *Le mafie liquide in Veneto. Forme e metamorfosi della criminalità organizzata nell'economia regionale*, Quaderni di ricerca, No. 23, maggio 2016; CAMPANA, *Assessing the movement of criminal groups: some analytical remarks*, in 12(3) *Global Crime* 207 (2011).

1970s, Leonardo Sciascia was already predicting the progressive expansion of the southern Mafia into northern Italy, with the famous metaphor of the line of palm trees: "Perhaps the whole of Italy is becoming Sicily […] A fantasy came to me when I read in the newspapers about the scandals of that regional government: scientists say that the palm line, that is, the climate that is favorable to the vegetation of the palm tree, goes up, towards the north, five hundred meters, I think, every year […] The palm line... I say: the line of restricted coffee, of concentrated coffee... And it goes up like the mercury needle of a thermometer, this line of the palm, of strong coffee, of scandals: up and up through Italy, and it is already beyond Rome"[18]. With these words, Sciascia expressed his mistrust regarding the possibility of curbing the Mafia phenomenon, and indeed predicted its spread towards northern Italy. This system, which is based on relations between individuals, on networks of contacts, is now found at international and transnational level in criminal organizations in general.

In light of these considerations regarding the evolution in the *modus operandi*, objectives and territorial extension (now transnational) of organized crime, there is a growing need to develop criminal law tools that have the same 'flexibility'. The fluid structure and dynamics of transnational organized crime impose flexible legal tools and criteria with the aim of conducting research for law enforcement. Therefore, it is important to deepen the study and future development of methods, notions and criteria that better respond to the ever-changing nature of TOC to combat it in terms of prevention and repression. To provide effective tools of repression it is necessary to rethink the categories of criminal liability for the crimes of affiliation and external participation in a criminal association. Furthermore, in light of the cross-border nature of those criminal organizations, significant progress in the fight shall be achieved only through international cooperation. In fact, the control of migratory flows by TOC raises questions about multilateral cooperation and the definition of jurisdiction by coastal States and States from which transits depart, as well as the migrants' States of origin. Thus, international cooperation between police, prosecutors and judicial authorities from any State involved is of primary importance, particularly in relation to evidence collection, intelligence and information sharing, as well as law implementation, enforcement and prosecution.

[18] SCIASCIA, *Il giorno della civetta*, Milano: Adelphi 2002, 57.

SECTION III

A CASE STUDY ON SECURITY: MIGRATION

MIGRATION AS A THREAT: THE CONCEPT OF SECURITIZATION AND ITS APPLICATION TO THE ISSUE OF MIGRATION

Yaroslavna Saraykina

ABSTRACT: The theory of securitization aims at the study of "security", which is formed through the mechanisms of discourse, through the representation of threat and danger. This theory can be applied to migration. Migration raises a number of questions related to cultural and religious identity, the social order and the social system of a host country. The association of migration and terrorism, debates about multiculturalism and concerns about the loss of identity of European states have contributed to the securitization of migration.

KEYWORDS: migration, security, integration, fear, clash of civilisations

CONTENTS: 1. *The theory of securitization*. – 2. *The securitization of migration*. – 3. *The European Union as a multicultural project*. – 4. *Migration as a threat*.

1. *The theory of securitization*

Since the 1980s, the growing flow of immigrants has taken place in European political debate starting the securitization of migration. Immigrants became increasingly presented as a destabilizing factor for a host country that needed to be controlled. Control was supposed to extend both to the borders of the State, preventing the arrival of illegal immigrants, and to the lives of immigrants, including the degree of their integration into European society.

Securitization is a concept, introduced by the Copenhagen School of Security Studies, which relies on study of new security aspects, displacing traditional military and political aspects. For Buzan and Wæver, the process of securitization begins with a phenomenon that does not represent a threat in itself, but displeases a securitization agent. The agent of securitization performs an act of securitization, exposing the phenomenon as a

threat to the survival of the reference object[1]. For the Copenhagen School of Security Studies that stick to the discursive approach to security, the act of securitization is a speech act[2].

The context surrounding the audience could either increase or decrease its sensibility to the discourse of securitization: all in all, public paranoia is a common issue, as the society can see a threat where there is none[3]. Many researchers devote their work to specific elements of the concept of securitization. For example, Balzacq highlights the importance of the audience in the process as it legitimizes the action of the agent of securitization. For him, the act of securitization is strategic and pragmatic: the securitization agent uses a variety of metaphors, emotionally vivid expressions, stereotypes, stigmatization in such a speech act, in the name of the pursued goal[4].

Security is just a 'label' expressed linguistically: no phenomenon is inherently a security problem, and insecurity in turn is not an objective condition or state of affairs. The discourse of security for Balzacq is nothing more than methods that allow the agent to stimulate the adherence of public opinion to the discourse submitted for his consent. Thus, the theory of securitization relies primarily on subjective speech acts; the most important issue in this process is perception.

2. *The securitization of migration*

The theory of securitization can be easily applied to migration as it has been represented as a threat since the end of the last century. Alarmists describe a State with cultural, religious and even racial unity threatened by cultural decline or even a war of cultures due to migration – the enemy of such a State. Multiculturalism, or the coexistence of several cultures within one country, becomes the primary cause of the fragmentation of society.

The most obvious example of such research is Huntington's *Clash of Civilizations*. As for him, it is no longer political, ideological or economic issues that cause a split between the citizens of one State, but the cultural ones. Conflicts are inevitable "between nations and groups of different

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[1] BUZAN-WÆVER-DE WILDE, *Security: A New Framework for Analysis*, Boulder: Lynne Rienner Publishers 1998, 1-2.

[2] WÆVER, *Security the Speech Act: Analysing the Politics of a Word*, Copenhagen: Centre for Peace and Conflict Research, Working Paper no. 1989/19, 6.

[3] Buzan discusses the concept of security in a series of five videos from Foreign Affairs and International Trade Canada, at https://www.youtube.com/watch?v=dqdzRjSlz34.

[4] BALZACQ, *The Three Faces of Securitization: Political Agency, Audience and Context*, in 11(2) *EJIR* 172 (2005).

civilizations"[5], and in view of the gradual revival of religion, religious differences will become the most important cause of conflict. Along with the representation of identity in terms of ethnicity or religion, the gap between 'us' and 'others' will widen, as 'we' have to confront 'the others' in order to recreate an ideal State that would be ethnically, culturally, and religiously homogeneous.

Huysmans notes that in such situation, the political community seems to have to make a choice; the choice in favour of migration can lead the political community to its collapse[6]. Some alarmists see 'coloured' migration as a threat to the economy of Western countries, their cultural security and political stability. Weiner also notes the "potential" of the country in terms of integration of immigrants, which is not unlimited[7].

3. *The European Union as a multicultural project*

The EU itself is a project of multiculturalism that reunites Member States of diverse ethnic, national and cultural composition for their mutual development and prosperity. The fear of the past haunts European leaders trying to avoid the recovery of an extreme form of nationalism, and they tried to denounce racist, xenophobic and far-right nationalist sentiments in society.

In the second half of the XX century, due to the decolonization and increased migration flows in Western countries, new concerns arose caused by the clash of racial, ethnic and cultural identities of the host country and immigrants arriving in European countries. Inspired by the ideas of cultural coexisting, many European Member States did not impose any strict requirement on immigrants, as to abandon culture and religion and assimilate into the host cultural, social and religious (or secular) space. The long debate over advantages and disadvantages of multiculturalism finally came to an end in the 2010s, when one by one, the European leaders announced its "failure"[8].

The multiculturalism, fed on anti-racist ideas, eventually led to a new form of "exception": Chebel d'Appollonia highlights the emergence of "cultural racism", prejudices about ethnic or cultural stereotypes, leading

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[5] HUNTINGTON, *The Clash of Civilizations*, in 72(3) *For. Aff.* 22 (1993).

[6] HUYSMANS, *The European Union and the Securitization of Migration*, in 38(5) *J. Common Mkt. Stud.* 751 (2000).

[7] ZHARKOV *et al*., *The Phenomenon of Global Migration: Political and Economic Aspect*, Working Papers 16611, Russian Presidential Academy of National Economy and Public Administration.

[8] The Guardian, *Angela Merkel: German multiculturalism has 'utterly failed'*, 17 October 2010.

to a so-called loss of identity of multi-ethnic and multicultural societies. It is no longer a threat to the survival of the "receiving" culture, but also the desire of minorities to maintain their own identities, is observed in modern European societies[9].

4. *Migration as a threat*

The failure of multiculturalism in Europe is primarily associated with Muslim immigrants, who due to the specificity of their identity can find it difficult to coexist with the European liberal secular/religious society. At the same time, it is often assumed that Muslims who share the conservative values of their religion cannot be assimilated into European society. Many articles are dedicated to the phenomenon of separate closed communities that threaten the national identity of the host country. In such communities, the immigrants live without accepting European democratic and legal norms. In connection with the expansion of such communities in certain areas, researchers talk about the creation of a "state within a state" or "a nation within a nation"[10].

The line between migration and public disorder and terrorism became a serious test faced by immigrants, mostly Muslim immigrants. The 9/11, Islamic terrorist attacks, riots in countries with a significant Muslim diaspora, all this contributed to the transfer of migration into security area. Certain Islamic terrorists who carried out attacks in France and Germany in 2015-2016 were immigrants who had already received a residence permit and even citizenship of a European State, or refugees who had a connection with terrorist groups. This fact clearly complicates the current situation.

Access to social and economic rights and benefits can also cause the representation of migration as a threat to public welfare. There is a so-called "welfare chauvinism", the idea of the superiority of rightful citizens over immigrants in access to social benefits. The term introduced by Goul Andersen and Bjørklund at the end of the XX century describes the idea of reviving of a "welfare state" excluding national and ethnic minorities from access to social benefits, which are seen as a "magnet"

[9] CHEBEL D'APPOLLONIA, *Les frontières du racisme. Identités, ethnicité, citoyenneté*, 2e éd., Paris: Presses de Sciences Po 2011, 15-38.
[10] TROPHIMOVA, *Muslims and Islam in Western Europe*, in 10 *World Economics and International Relations* 52 (2009).

attracting more and more immigrants. The cultural dimension of the welfare State idea is strong[11].

Political elites, national governments, the EU, all of them can act as agents in the process of securitization of migration. Often media and journalists, positioning themselves as independent sources of information, contribute to the securitization of migration.

Far-right nationalist parties have a special place in the process: it is in their rhetoric that migration is being presented as a threat to national security, economic stability and national identity. Political debate on the threat to cultural identity from immigrants has helped them rise to prominence in the political arena and increase their electorate. Parties skilfully manipulate the nationalist, xenophobic and racist feelings that arise from the political construction of the image of the enemy in the face of an immigrant. It is also in the discourse of right-wing parties that "welfare chauvinism" often manifests itself.

The theory of securitization forced researchers to take a fresh look at the relationship between migration and security at social level. Expanding the range of security issues, the Copenhagen School proposed other elements, in addition to the State, as reference objects: the individual, the society, and the environment. The reference object can be anything whose survival is threatened, which justifies exceptional measures for its protection. Immigrants allegedly violate the national homogeneity and the ethnic identity of the State. More important is that migration has become increasingly associated with the issue of cultural security and national security. Migration flows increased at the end of the XX century, and it pushed a need for a political response to the challenges of the internal stability of the State. This political response was the use of the language of security in discussions of the migration issue.

For Chebel d'Appollonia, European migration policy is an immediate act of securitization: the tightening of migration policy casts immigrants in a negative light due to the potential threat to the country's political and social stability. Under these conditions, the anti-racist and anti-xenophobic practices of the EU risk to lose their legitimacy in the eyes of European citizens[12].

The introduction of the European citizenship at the end of the previous century as part of the creation of a European identity can be seen as an act of securitization. Citizens of EU Member States were now

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[11] KROS-COENDERS, *Explaining Differences in Welfare Chauvinism Between and Within Individuals Over Time: The Role of Subjective and Objective Economic Risk, Economic Egalitarianism, and Ethnic Threat*, in 35(6) *European Sociological Review* 860 (2019).
[12] CHEBEL D'APPOLLONIA, *supra* footnote 9, 95-100.

considered as "desirable" immigrants. The new internal borders excluded citizens of non-European origin, undermined the image of a truly multicultural Europe, limiting this multiculturalism only to Europeans. Thus, the division of immigrants into "desirable" and "unwanted" ones contributed to the development of the process of securitization of migration[13].

National migration policies also securitize migration. After the rejection of the policy of multiculturalism in many EU Member States, instead of a multicultural approach to integrating immigrants, national governments turned again to assimilation policies[14]. The melting pot policy can also be seen as a securitizing act. Emphasizing the need for assimilation of immigrants and the creation of a culturally homogeneous society, it also emphasizes the 'foreign' position of immigrants in Europe.

Differences in the way of life and culture of the immigrant are portrayed as potentially destabilizing. To the need to know the language of a host country is added the need of knowledge of its history, its traditions, the adherence to its secular democratic norms, the agreement to follow its values. However, this does not guarantee a solution to the problems of discrimination against immigrants, for example when hiring or renting housing; it does not ensure the full socio-cultural and economic integration of the immigrant into the society of the host country. Any lack of assimilation, in turn, can be perceived as a potential threat.

Emotions play an important role. We can talk about the discourse of fear as a tool to securitize migration. Metaphors such as "invasion" raise the level of fear among the population. In the political and social environment, there is a categorization that extends to immigrants: "risk groups", "internal enemy". This imagery is especially dangerous for countries with large numbers of immigrants belonging to different ethnic and racial groups[15].

The attitude of society towards immigrants depends on many factors: cultural level, susceptibility of society to stereotypes and prejudices against immigrants, their ethnic identity and religion. According to public opinion polls, there is often a negative attitude towards immigrants among the population; it believes that immigrants do not contribute to the prosperity of the host country, often abuse social benefits, increase unemployment in the country, taking job away from the population.

The negative attitude of society towards Islam is fuelled by the media. Charlie Hebdo's infamous cartoons of the Prophet Mohammed and the

[13] HUYSMANS, *supra* footnote 6, 766.
[14] BIGO, *Sécurité et immigration: vers une gouvernementalité par l'inquiétude?*, in 31-32 *Cultures & Conflicts* 20 (1998).
[15] CHEBEL D'APPOLLONIA, *supra* footnote 9, 85-93.

murder of a French teacher in 2020 are not the only time that the depiction of the Prophet has angered Muslims. Back in 2005-2006, a scandal over cartoons broke out in Europe because of the Danish publishing house which, demonstrating the Western cultural tradition of freedom of speech, published an article with 12 cartoons of the Prophet Muhammad, thereby showing disrespect for Muslims. The scandal spread throughout Europe, causing riots in Muslim countries, where local Christians became victims[16].

All in all, in European political discourse, immigrants are presented as a challenge to the welfare State, a threat to its cultural and national composition and often its ethnic identity, which are reference objects in the process of securitization of migration. The use of metaphors by securitization agents to define migration as "invasion" or "occupation" is aimed primarily at intimidating the audience, since fear is one of the most effective technologies for managing society. Migration discourse and political decisions in the field of migration policy often contribute to the securitization of migration, which in recent times can often be perceived as the securitization of Islam and Muslim immigrants. Today, in many European countries, there is an increase in nationalism, xenophobia and anti-immigrant practices, as well as the popularity of right-wing parties and movements, whose ideas were previously considered extremist.

[16] The Guardian, *Nigeria cartoon riots kill 16*, 19 February 2006.

SUSTAINABLE AND ETHICAL INVESTMENTS IN NORTHERN AFRICA AS A WAY TO MITIGATE THE IMPACT OF MIGRATIONS ON ITALY AND THE EU

Giuseppe Macca & Tommaso Pochi

ABSTRACT: The paper suggests an upgrade in the procedures of training of migrants, aimed at reintegrating them in their countries of origin, through an intensive system of sustainable and green investments. Many procedures of this kind are already underway, while many others have been planned. This approach needs to be improved through technical and specific intervention, which do not mean a compulsory and massive injection of funds to the countries of origin and transit of migrants. Investing in training and contributing to the foundation of new sustainable and green projects/industries/poles could secure these areas and mitigate the impact of migratory flows towards Europe. The Sahara Region has been identified as a potential target region for testing this proposal, considering the EU plan of investment for Africa. Investments could be a leverage to foster collateral development in the region by focusing on professional skills concerning sustainable economics. Importing talents from abroad might be a new form of colonialism, while utilizing the VET programs within the EU Member States in a synergic way could be a way of promoting development in the area, thanks to a systemic approach to human capital generation.

KEYWORDS: migratory flows; human capital; green investments; procedures of training; Sahara region.

CONTENTS: 1. *Introduction*. – 2. *The legal status of refugees under international law*. – 2.1. *Some remarks on the concept of migrant at international level*. – 2.2. *The EU legal framework on economic migrants*. – 2.3. *Migration flows from Africa: routes and data*. – 3. *Lack of a European common regime on reception and integration: consequences for migrants and host societies*. – 3.1. *The vocational and educational training programs of the EU*. – 3.2. *Forced repatriations or voluntary returns: is there another way?*. – 4. *Investing in ethical and sustainable economy in Africa. Why choosing Northern Africa?* – 4.1 *Advantages and feasibility of an ethical and sustainable approach in Northern Africa*. – 5. *Concluding remarks on the impact of an ethical and sustainable approach in Northern Africa.*

1. *Introduction*

The purpose of this article is to briefly analyze the current situation of migratory fluxes from Africa towards the EU, especially Italy, and suggest a qualitative and quantitative upgrade in the procedures of training, aimed at reintegrating migrants in their countries of origin, through an intensive system of sustainable and green investments. Many procedures of this kind are already underway, while many others have been planned. As the current situation suggests, this approach needs to be improved through technical and specific intervention, which does not mean a compulsory and massive injection of funds to the countries of origin and transit of migrants. Investing in training and, at the same time, contributing to the foundation of new projects/industries/poles which could be both sustainable and part of a green economy still too underdeveloped in the African continent could strongly contribute to securing these areas and, at the same time, mitigating of the impact of migratory flows to Europe.

The Sahara region has been identified as a target region for the creation of a sustainable energetic pole to power up the production of hydrogen to boost into the European continent via Sicily and other Mediterranean frontiers. Nevertheless, due to the vastness of the African continent and the constellation of political, economic and cultural backgrounds, it is impossible to streamline and theorize an intervention which could fit each country. For this reason, a good starting point could be refer to closest countries of transit or of origin – even if to a lesser extent – in North Africa. The investment could be leverage to foster collateral development in the region and required skills and professionals would clearly be focused on new sustainable economics. Importing talents from abroad (expats) might be a new form of colonialism. Rather, this could be an opportunity to train and reskill economic migrants and allow them jobs in countries of origin, so guaranteeing development and also mitigating effects of migration to Europe.

In general, North African countries have an industrial and technical substrate more developed than the sub-Saharan countries' and, therefore, represent a better choice for a first prototype. The idea of reskilling and training the migrant population so as to reintegrate it into the economic systems of the countries of origin might be eventually expanded to sub-Saharan countries, that are not poor in natural resources and opportunities either.

In order to develop this project, it will be necessary first to analyze the most relevant aspects of contemporary migrations from Africa to the EU, making use of the most updated statistics and data. An in-depth

analysis of current status of reception, hospitality and integration systems in the EU is also necessary to assess the effective presence and impact of training procedures addressed to migrants or refugees. In fact, training is at least as much important as investments in the countries of origin or transit.

First part of the article (§§ 2-2.3) will briefly analyze the African migratory phenomenon from a juridical, economic and political point of view. Second part (§§ 3-3.2) will examine the EU and Italian reception system and outline the framework for integration, training and forced or spontaneous repatriations of migrants. Third part (§§ 4-4.1) will address the main issue of this article by outlining the feasibility of the type of investments doable in the region, the required potential job skills, and the characteristic of professional requirements. The final paragraph will be dedicated to the structuring of the system of monitoring and impact evaluation of the initiative, defining where further research in the field could go to shape a functioning predictive model of this kind of action.

2. *The legal status of refugees under international law*

Migration is one of the most relevant constants in the history of humanity. Migrating could be considered an essential impulse of the human being, as since prehistoric and ancient time large segments of world population were characterized by nomadism. Nevertheless, the motivations of these displacements have been always different, even if the article will only focus on the contemporary era. First of all, it is fundamental to explain, as a matter of law, the distinction between refugees and migrants.

The legal status of refugees and persons who otherwise need international protection is widely regulated by national, supranational and international sources, even if with several contradictions.

The origins of the concept of "refugee" can be found in classic and biblical sources like the order given by God to Moses to build cities aimed to welcome strangers[1], or the Roman definition of refugee given by the myth of the foundation of Rome narrated by Cato in the *Origines* and Titus Livius[2]. The concept evolved in the Arab world and in the canon law of the medieval age. Some 'political' definitions of refugee were given by the French Revolution's legislators and by the 1936 USSR Constitution[3]. A concrete codification and systematization of the refugee law

[1] The Bible (Old Testament), Numbers, 35: 9-29.
[2] TITUS LIVIUS, *Ab urbe condita*, vol. I, 8.
[3] "La Republique donne asile aux étrangers bannis de leur patrie pour la cause de la liberté" (French Constitution, 24 June 1793).

at international law was however given, under the aegis of the UN, after WWII with the 1951 Convention Relating to the Status of Refugees ('Geneva Convention').

The definition of "refugees", provided by Article 1A of the Geneva Convention, is today considered very restrictive because it only referes to persons displaced "as a result of events occurring before 1 January 1951", i.e. events related to WWII in Europe. The 1967 Protocol partly amended the 1951 Convention by establishing a broader interpretation of the scope of Article 1A so as to cover the "new refugee situations […] arisen since the Convention was adopted". Nevertheless, even this broadened interpretation could be considered today obsolete or, at least, 'old fashioned', as it is still linked to the post-decolonization world.

Even if the International Refugee Law (IRL) based on the 1951 Convention and the 1967 Protocol is still the primary and most accurate direct source, there are other 'indirect' sources in international law which are more modern and effective. The most important is probably the 1950 ECHR. Even if its text does not directly refer to refugees, the application of its provisions may be more effective, up-to-date, and useful to grant protection. In fact, Article 2 of the ECHR protects the right to life while, more importantly, Article 3 provides a strong form of protection against persecution by granting protection against torture and inhuman or degrading treatment or punishment. Moreover, the already wider and evolutionary safeguarding of refugees under the ECHR is further advanced by the active, prolific and innovative jurisprudence of the ECtHR, especially with regard to the *par ricochet* protection. Several judgments of the ECtHR have established this principle, to begin with the 1989 historical judgment *Soering v. UK*[4], concerning the application of Article 2.

Even if the legal status of refugees, and related rights, is not directly addressed by the ECHR, further legal guarantees are provided by subsequent Protocols to the Convention such as, for instance, Article 4 of the 1963 Additional Protocol no. 4, prohibiting collective expulsion of aliens. Such prohibition has been firmly uphold by the ECtHR in some recent cases such as *Hirsi Jamaa v. Italy*, *Khlaifia v. Italy*, and *W. A. v. Italy*[5]. Other cases addresses the 'pushbacks by proxy' as those implemented by the Libyan Coast Guard in furtherance of the Memorandum of

[4] ECtHR (Plenary), *Soering v. the United Kingdom*, Judgment of 7 July 1989, Application no. 14308/88.

[5] ECtHR (Grand Chamber), *Hirsi Jamaa and Others v. Italy*, Judgment of 23 February 2012, Application no. 27765/09; ECtHR (Grand Chamber), *Khlaifia and Others v. Italy*, Judgment of 15 December 2016, Application no. 16483/12; ECtHR, *W.A. and Others v. Italy*, Judgment of 24 November 2017, Application no. 18787/17.

Understanding signed with Italy in 2017[6]. Also Article 1 of Protocol 7 to the ECHR is particularly important because it guarantees procedural safeguards relating to expulsion of aliens by prohibiting the expulsion of an alien lawfully resident in the territory of a State unless "in pursuance of a decision reached in accordance with law". This principle has been enforced by the ECthR as in the case *Ljatifi v. Macedonia*[7]. Summing up, the ECHR and its Court grant a stricter and more 'sophisticated' protection than the 1951 Geneva Convention, despite the latter specifically addresses the legal status of refugee in international law.

2.1 *Some remarks on the concept of migrant at international level*

Before focusing on economic migrants, the main issue of our article and research, we should refer to the general and common concept of "migrants". The generality and 'abstractness' of this concept represents a *vulnus* from a legal point of view, especially as regards the system of protection. Migrants may be considered as the vast majority of migrating people which are not included within asylum seekers or persons who otherwise need international protection, notwithstanding many of them often try to obtain international protection in the country of destination.

In the UN system, the migrant is generally defined as "someone who changes his/her country of usual residence, irrespective of the reason for migration or legal status"[8]. While refugees are mainly the responsibility of the UNHCR, migrants are mainly the responsibility of the IOM. Yet, effective international legislation on migrants is still lacking due to the very weak and fragmentary legal framework made of many treaties, documents and commitments dealing with specific aspects of the migratory phenomenon. The IOM is the main actor, but it is important to stress that it essentially performs monitoring and research functions, aimed at promoting 'regulated' and human rights-oriented migration, rather than supervisory or judicial functions. However, a more specific normative framework relates to migrants working in the destination countries and it is mainly based on conventions and treaties stipulated under the aegis of the ILO[9]. Yet, even these international legal instruments have proved to

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[6] HELLER-PEZZANI, *Mare Clausum. Italy and the EU's undeclared operation to stem migration across the Mediterranean*, Report by Forensic Oceanography, May 2018.

[7] ECtHR, *Ljatifi v. the Former Yugoslav Republic of Macedonia*, Judgement of 17 May 2018, Application no. 19017/16.

[8] https://refugeesmigrants.un.org/definitions#:~:text=While%20there%20is%20no%20formal,for%20migration%20or%20legal%20status.

[9] See, for instance, the 1949 Migration for Employment Convention (Revised) and the 1975 Convention (No. 143) concerning migrations in abusive conditions and the

be sometimes weak for several reasons, such as that they generally bind countries of origin but not also countries of destination of migrants and that they do not establish judicial and/or monitoring bodies.

For the purpose of better qualify the general, if not generic, category of 'migrants' (for example, by identifying the more specific category of 'migrant workers'), these international legal instruments do not really help and the legal qualification of the categories of migrants remains blurred. To this end, it would be meaningful to analyze the large range of aspects and facets determining the need or the will to migrate because understanding the 'reasons' for migrating is essential to build a theoretical framework for assessing the phenomenon. Like asylum-seekers who are distinguished according to the kind of persecution (race, religion, sexual orientation, etc.), even migrants may have several and different reasons to migrate. Among the most relevant we have family reunifications, climate change, and economic needs, often overlapping each other.

The legal status of 'climate migrants' is discussed for a long time within the international community and, under specific conditions, they are sometimes considered as a particular kind of refugees ('climate or enivironmental refugees'). The number of climate refugees is strongly rising and their legal qualification is quite difficult. Are climate refugees only those who are displaced due to natural disasters (i.e., floods, earthquakes, etc.) or also those who are forced to leave their countries due to famine, job losses, or food and agricultural shortages related to environmental disasters, degradation and/or climate change? According to the UNHCR, some 18 millions of persons in the last years had to leave their country or region of origin due to these factors and none of them has been qualified as a "refugee" because the 1951 Geneva Convention does not mention them.

Within this blurred and fragmentated international framework, the EU legislation provides instead an overall and coherent regulation (except for some gaps and inconsistencies which will be addressed later) on migrants and external border management. Implementing the free movements of persons within the Schengen area is one of the 'pillars' of the EU process of integration as well as determining the EU Member State responsible for examining applications for international protection lodged in one of the EU Member States by a third-country national or a stateless person. To this latter end, the main legal instrument currently in force is the Regulation (EU) No. 604/2013 of the European Parliament and of the

promotion of equality of opportunity and treatment of migrant workers. See also the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Council of 26 June 2013 (the so-called 'Dublin Regulation III') whose scope and content is however undergoing a complex, uncertain and heated process of reform having it proved largely inefficient and inadequate in dealing with the huge migratory pressure of the last years[10].

2.2. *The EU legal framework on economic migrants*

As anticipated, economic migrants are the main focus of our article and research. In general, they are not enough regulated or taken into account by the international legal instruments, except for the EU which set several conditions and requirements for third-country nationals (TCN) to enter its external borders and work and live legally therein. Conditions and requirements are quite restrictive and may also depend on nationality.

The level of specialization and education, and the potential contribution to the economic and social European fabric, is also quite relevant. As highlighted by the European Commission[11], one of the most important piece of legislation is the Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of TCNs for the purposes of highly qualified employment (the so-called 'EU Blue Card'), together with the Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for TCNs to reside and work in the territory of a EU Member State and on a common set of rights for third-country workers legally residing in a Member State (the so-called 'Single permit directive')[12].

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 refers to TCNs "who reside outside the territory of the Member States and who apply to be admitted, or who have been admitted under the terms of this Directive, to the territory of a Member State for the purpose of employment as seasonal workers". Furthermore, it is useful to also recall Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of TCNs in the framework of an intra-corporate transfer: it is addressed, in fact, to TCNs "who reside outside the territory of the Member States at the time of application and apply to be admitted or who have

[10] CHERUBINI, *Asylum Law in the European Union*, London: Routledge 2015.

[11] European Commission, *Analytical report on the legal situation of third-country workers in the EU as compared to EU mobile workers*, December 2018 (Directorate-General for Employment Social Affairs and Inclusion).

[12] Directive 2011/98/EU also applies to TCNs "who have been admitted to a Member State for purposes other than work in accordance with Union or national law, who are allowed to work and who hold a residence permit in accordance with Regulation (EC) No 1030/2002" (Article 3, par. 1, lett. *b*).

been admitted to the territory of a Member State under the terms of this Directive, in the framework of an intra-corporate transfer as managers, specialists or trainee employees". Even TCNs students or those holding similar positions and status could also be part of the macro-area of economic migrants. They are regulated by Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016.

Pursuant to Article 5 of the Directive 2009/50/EC, among the criteria for admission into the EU TCNs, *inter alia*, "shall present a valid work contract or, as provided in national law, a binding job offer for highly qualified employment, of at least one year", evidence of having a sickness insurance, documents attesting professional qualifications and conditions, and a gross annual salary not inferior to a relevant salary threshold defined by the Member State which "shall be at least 1,5 times the average gross annual salary in the Member State concerned" (for professions which are in particular need of TCNs, the salary threshold may be at least 1,2 times the average gross annual salary).

Further additional and detailed criteria are provided by pertinent EU legislation and it is evident that the overall framework may be very restrictive, in particular for TCNs coming from certain regions and/or having certain backgrounds. It is possible to argue that the EU legislative framework essentially grants the access to TCNs coming from western and developed countries, but for some exceptions. As most economic migrants are not from developed countries, we should carefully consider this latter point. It is clear that the EU and its Member States are unable to indiscriminately welcome every jobseeker coming from third countries. Migratory flows are massive, put under pressure the EU external borders and the abovementioned legislation could not be applied to the majority of TCNs. A large number of TCNs is hence considered as irregular migrants and are subjected to forced repatriation, provided that EU Member States have however the responsibility to assess each single position in a careful and individual way and must refrain from collective expulsions. This is the reason why the majority of jobseekers in the EU are irregular workers or apply for international protection in order to remain in the EU. The consequence is a widespread increase in illegal or undeclared work and the exploitation of labor of these TCNs, especially those coming from Africa.

2.3 *Migration flows from Africa: routes and data*

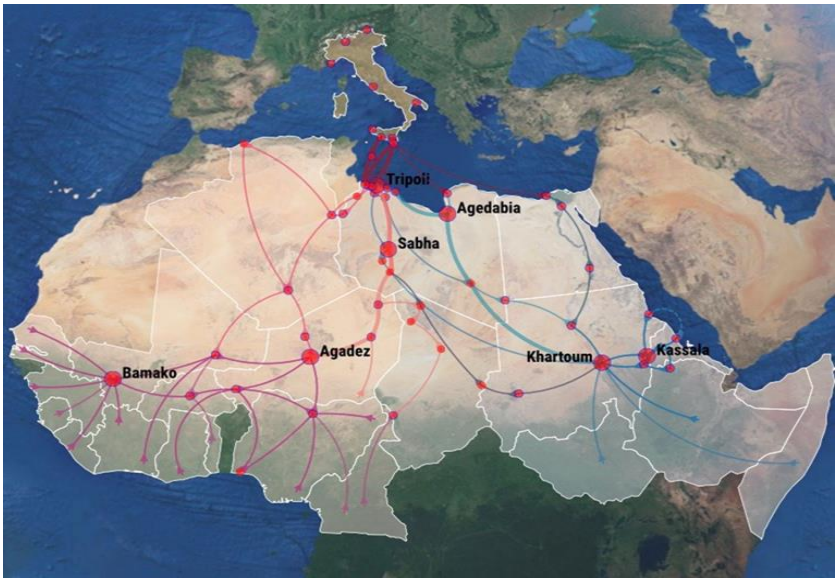
A brief analysis on migration from Africa towards the EU shows that flows from Africa have different natures and many origins and motivations. It is also essential to understand that migratory routes and push-

factors are not only the most commonly considered: they constantly vary from country to country and/or from region to region. Personal motivations to migrate are also highly relevant for the analysis.

Most relevant routes from Africa cross the western and the central Mediterranean Sea. Starting from sub-Saharan Africa, including countries in East, Central and West Africa, these routes pass through the Sahel's transit countries and arrive in North Africa in order to attempt the crossing of the Mediterranean Sea. North African countries involved are Libya, Algeria, the Spanish territories of Ceuta and Melilla, Tunisia and Morocco. In general, sub-Saharan countries are the place of origin of refugees, economic migrants, climate migrants, and persons looking for family reunification in Europe. The economic, political, financial and social situation in sub-Saharan countries, in fact, is generally less developed than in North Africa's countries. Despite this, according to statistics, a large percentage of migrants arriving in the EU comes from North Africa (EU Commission statistics, 2020), largely due to the geographical proximity, cultural and linguistic links with European States[13].

Figure 1 below shows main migratory routes from and through sub-Saharan Africa and Sahel to Southern Europe.

Figure 1



[13] See the statistics on migration to Europe at https://ec.europa.eu/info/strategy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_en.

From a set of interesting data (recent but probably to be updated after the crises in Afghanistan and Ukraine in 2021-2022) it is possible to undeline that: *a*) the vast majority of migratory fluxes by African countries remains within the African continent (about 26.3 million people in 2019 according to IOM data)[14]; *b*) some 2.7 million people migrated to the EU in 2019-2020; *c*) only 9.100 people in need of international protection were resettled from non-EU countries to EU Member States (59% less than in 2019; about 55% of them were Syrians); *d*) about 125.000 out of the total number of migrants were irregular and 86.000 of them were from Africa; *e*) in 2021 the Eastern Mediterranean route decreased (-15%) while Western and Central routes sharply increased (respectively + 30% and + 95%): North African countries (like Morocco, Algeria, Tunisia and Libya) were the starting point[15].

From these data the quantitative impact of migratory flows from Africa to the EU clearly emerges and it is therefore useful to analyze the European response.

3. Lack of a European common regime on reception and integration: consequences for migrants and host societes

The EU asylum system is articulated in several phases which could be summarized as follows: SAR operations; welcoming and identification; placement in reception facilities. In every stage of the procedure human rights and other international obligations have to be always respected. Next step is the examination of the individual situation of the migrant. As anticipated, the large majority of migrants, especially those travelling along the main migratory routes of the Mediterranean Sea, lodges an application for international protection as a way to obtain the authorization to remain in the European territory, regardless of the true reasons that pushed them to leave their country. For this reason, according both to the Geneva Convention and the EU legislation, the host country is required to carry out a formal and detailed examination of the application.

The EU Common European Asylum System (CEAS) sets minimum criteria for treatment of asylum-seekers and examination of applications for international protection in all the EU Member States. Yet, there is still not a really uniform and common system and, therefore, each Member State has its own system, more or less different than the others. For example, Italy has implemented a first reception system (made of hotspots

[14] Cf https://worldmigrationreport.iom.int/wmr-2022-interactive/.
[15] Cf https://worldmigrationreport.iom.int/wmr-2022-interactive/.

for short-stay and of first reception centers) and a second reception system which was constituted by SPRAR (for asylum-seekers and refugees) from 2002 to 2018 and, then, by SIPROIMI (for holders of international protection and unaccompanied children). The present Italian system has been enhanced by the reform of Minister Lamorgese in 2020 which established the new reception and integration system (SAI). The reform implements the special protection regime and the new residence permit, also focussing on the improvement of the integration system. Circulation and transfer of migrants, refugees and other persons to other EU States is regulated by the EU Schengen regime and other applicable rules.

Lack of a European common regime on reception and integration is a fundamental *vulnus* for EU Member States and for the EU as a whole. Indeed, reception and evaluation of applications is still a slow and cumbersome process, and the integration system has not achieved the desired results. Lack of integration is one of the main reasons of the negative consequences of migration in Europe, determining social instability and widespread resentment in local people and aliens. It is however important to stress that there are no evidence of direct correlation between migration and crime rate. Nevertheless, constant, poorly controlled migratory flows extensively increased social instability and uncertainty of many EU Member States. In fact, the massive presence of migrants has also high costs for welfare and other public administration sectors, as also shown by EU data[16]. Yet, also those migrants legally residing into EU Members States but not well integrated in the social and economic fabric are a direct or indirect cause of instability and resentment among local people, particularly in the more degraded and vulnerable areas where migrants usually settle due to the lower cost of housing and living (i.e., the outskirts of many big cities all around Europe and the *banlieues* in France and Belgium). This situation is mainly due to a diffused status of poverty and unemployment which, in turn, is caused by widespread discrimination and lack of specialization and education for the majority of migrants. An extreme consequence of this situation might also be the diffusion of religious radicalization, sometimes resulting in terroristic attacks in several EU Member States mainly perpetrated by first- or second-generation migrants with a low grade of integration in the host societies.

This brief general overview of the current situation, with no value judgements, cannot be further deepened here. In the next paragraphs of the article, a more specific analysis of the positive, empirical achievements in the integration system, which could inspire future, deeper and more effective reforms, will be conducted.

[16] https://www.europarl.europa.eu/doceo/document/E-8-2018-002227_IT.html.

3.1 *The vocational and educational training programs of the EU*

Hosting countries generally deploy policies to operate effective resettlement processes and allow the integration of migrants within the host societies[17]. Yet, empirical studies show that, despite the efforts, there are still "persistent integration problems" and the situation has not improved during the years[18]. A topic of particular interest is the one concerning the occupation and facilitation of the integration of migrants into the labor market. Some studies demonstrated that "the value of an occupational perspective in addressing issues of forced migration, in particular resettlement in a new country, is instrumental in facilitating successful occupational transitions for newly-arrived individuals"[19].

It is clear that, in times of economic crisis, the capability of employment integration by the hosting countries is harder than in growth times. Scholars have described the potential of migrants, discussing how vocational and educational training (VET) is important to actually employ migrants within the hosting economies in an efficient and productive way along with economic benefits for the beneficiaries of the VET programs[20]. At European level, the initiative to promote VET programs for migrants lies in the single hosting countries, each of them tackling the issue according to its own policies and resources.

Still, VET is at the center of the EU development strategy as reported by the European Commission in several documents such as:

1) the European Skills Agenda for sustainable competitiveness, social fairness and resilience (July 2020). In this Communication, the Commission puts forward 12 actions at EU level aiming to support partnerships for skills, upskilling and reskilling and empowering lifelong learning;

2) the Pact for Skills launched in November 2020 aimed at mobilizing various stakeholders to upskill and reskill people of working age and, if relevant, through partnerships;

3) the proposal, submitted on July 2020, for a Council Recommendation on vocational education and training for sustainable competitiveness,

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[17] HANNAH, *The Role of Education and Training in the Empowerment and Inclusion of Migrants and Refugees*, in ZAJDA-DAVIES-MAJHANOVIC (eds.), *Comparative and Global Pedagogies. Globalisation, Comparative Education and Policy Research*, vol. 2, Dordrecht: Springer Publishing 2008, 33-48.

[18] OECD, *Trends in International Migration: SOPEMI – 2004 Edition*, Paris: OECD Publishing 2005.

[19] SULEMAN-WHITEFORD, *Understanding Occupation Transitions in Forced Migration: The Importance of Life Skills in Early Refugee Resettlement*, in 20(2) *Journal of Occupational Science* 201 (2013).

[20] JEON, *Unlocking the Potential of Migrants: Cross-country Analysis*, in *OECD Reviews of Vocational Education and Training*, September 2019.

social fairness and resilience, then adopted by the Council on 24 November 2020. The Council Recommendation seeks to ensure that VET would equip the workforce with the skills to support the COVID-19 recovery and the green and digital transitions in a socially equitable way. The Council Recommendation also defines key principles for ensuring that VET adapts swiftly to labor market needs and provides quality learning opportunities for young people and adults alike. It places a strong focus on the increased flexibility of VET, reinforced opportunities for work-based learning, apprenticeships and improved quality assurance. This Council Recommendation also replaces the former EQAVET (European Quality Assurance in Vocational Education and Training) recommendation and provides an updated EQAVET framework with quality indicators and descriptors.

To implement these reforms, the European Commission supports the Centres of Vocational Excellence (CoVEs) which "bring together local partners to develop 'skills ecosystems'. Skills ecosystems will contribute to regional, economic and social development, innovation and smart specialization strategies"[21].

Furthermore, EU Member States and other stakeholders stated their commitment to develop European training areas and program to boost post-Covid recovery signing the Osnabrück Declaration 2020[22]. It is interesting that the word "migration" is used only once in the Declaration of 12 pages when it is said that "migration is a challenge for everyone". Rather, the focus of the Osnabrück Declaration 2020 is on internal mobility and beneficiaries of the Erasmus+ funds already used for VET programs[23].

What is lacking, however, is a common strategy to employ VET plans and resources in migration policies. Already in 2009, scholars had highlighted the importance of VET plans funded by the ESF for the integration of migrant workers in Northern Italy, also explaining how some of the training could take place out of the EU and be a discrimination in the

[21] https://education.ec.europa.eu/eu-policy-in-the-field-of-vocational-education-and-training

[22] Osnabrück Declaration 2020 on vocational education and training as an enabler of recovery and just transitions to digital and green economies, 30 November 2020, Declaration of the Ministers in charge of vocation education and training of the Member States, the EU Candidate Countries and the EEA countries, the European social partners and the European Commission.

[23] The EU deploys funds for VET plans: 3 billion Euros through Erasmus+ and nearly 15 billion Euros through the European Social Fund for 2014-2020. The new programme's budget for 2021-2027 is more than 26 billion Euros, almost doubling up. Cf https://www.xarxafp.org/erasmus-2021-2027-vocational-education-training/.

application for residence permit by economic migrants[24]. Scholars also demonstrated that young migrants in Germany who attend VET plans are much more likely to find a job and well integrate into the labour market compared to those who do not pursue this training path. Moreover, by attending the so-called 'dual system' (training in-firm plus in vocational schools), migrants are as competitive in the labour market as Germans that follow the same programme[25]. In the UK, on the other side, scholars criticized how the government was leaving the integration of migrants in the economy to the *laissez fair* of the market, and how was instead advisable to develop a targeted plan to offer a model practice for local institutions[26].

This brief overview of the training resources in the EU shows how the efforts of the hosting States and of the EU are devoted to mitigate the externalities of migration flows through integration in the hosting economies. The goal of this article is to offer a possible long-term alternative to this practice that, to date, has not completely fulfilled results because it has been a run to minimization of the issue rather than to a sustainable solution. The proposed alternative would be that of training migrant workers through VET plans in order to facilitate their return and contribution to the country of origin, after the completion of the training process. This proposed alternative would also constitute a 'third way alternative' to voluntary returns and forced repatriation as explained in § 3.2.

3.2 *Forced repatriations or voluntary returns: is there another way?*

Data and studies show the actual impact that returning migrants have on the economy of their countries of origin and how their contribution is different from that of those who have never left its own country.

For instance, Mexicans spending time abroad (mostly in the US) are more likely to pursuit self-employment ventures because "migrants acquire not only financial capital, but also human capital, which expands their opportunities upon return"[27]. Learning skills and competences is fundamental for migrants in nurturing a natural knowledge transfer

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[24] MAGNANI, *Adult vocational training for migrants in North-East Italy*, in 53(3) *International Migration* 150 (2009).

[25] BURKERT-SEIBERT, *Labour market outcomes after vocational training in Germany: Equal opportunities for migrants and natives?*, IAB-Discussion Paper, No. 31/2007, Institut für Arbeitsmarkt- und Berufsforschung (IAB), Nürnberg.

[26] PHILLIMORE-GOODSON, *New Migrants in the UK: Education, Training and Employment*, Stoke-on-Trent: Trentham Books 2008.

[27] HAGAN-WASSINK, *New Skills, New Jobs: Return Migration, Skill Transfers, and Business Formation in Mexico*, in 63(4) *Social Problems* 513 (2016).

towards their country of origin, contributing in terms of social development rather than of charity and financial aid. Also in Egypt return migrants enjoy premium wages upon return, also controlling the biases variables[28], and a similar result has been observed for returning migrants to Uganda: "returning migrants with university degrees and vocational credentials are more likely to be employed than their nonmigrant and immigrant counterparts. However, this employment advantage was not observed among returning migrants with secondary schooling or below"[29].

Here the focus is on the level of education and training upon return, highlighting the importance of higher education. A specific mention is indeed for vocational training, analyzed in § 3.1 and pivotal for the analysis. Spending time abroad is not *per se* a sufficient condition for having a better economic situation upon return. In fact, returning migrants must acquire competences that are scarce in their countries of origin to have better conditions and contribute to development. Scholars have shown how the model of knowledge transfer should put at the center education rather than capital accumulation, productivity improvement, and access to international markets as it has been done in the past[30].

The build up of permanent human social capital is what can really foster development in low-income economies and part of this process can be allocated upon returning migrants. In addition, there are not significant negative collateral effects in the reintroduction of skilled returning migrants within their countries of origin, especially if considering spatial inequalities[31].

This is confirmed by the case-study of Albanians. Their arrival in Italy started in 1991 when the communist regime collapsed (to date, they are over 433.000). After the Euro crisis of 2008, hitting in particular Greece and Italy, 133.544 of them returned to Albania after having spent more than a decade in Greece or Italy on average (23% of the total returned from Italy). The huge number of returns makes this case an important case study of 'nation re-building', also because most returns were voluntary. Studies of the effects on economy and society of these returns

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[28] WAHBA, *Selection, selection, selection: the impact of return migration*, in 28(3) *Journal of Population Economics* 535 (2015).

[29] THOMAS, *Return Migration in Africa and the Relationship between Educational Attainment and Labor Market Success: Evidence from Uganda*, in 42(3) *Int'l Migration Rev.* 652 (2000).

[30] MARTIN, *Knowledge transfer models and poverty alleviation in developing countries: critical approaches and foresight*, in 40(7) *Third World Quarterly* 1209 (2019).

[31] LABRIANIDIS-KAZAKI, *Albanian Return-migrants from Greece and Italy: Their Impact upon Spatial Disparities within Albania*, in 13(1) *European Urban and Regional Studies* 59 (2006).

confirm the above mentioned conclusions about contribution and better economic conditions for returnees and, further, it has been demonstrated that those who were better off, once back to Albania, were the ones that were better integrated in the hosting country[32]. In other words, a higher degree of integration corresponds to a higher degree of human capital development, namely an added value once back to the country of origin.

Scholars have also underlined the importance of the 'quality' of returning migrants, pointing out how aged returning population does not bring back significant added value to the country of origin, because they usually do not invest and inject into the economy innovation and/or new competences[33]. This is another way to show the importance of training returning migrants to have a positive development-related impact on the economy of the country of origin.

The Albanian case-study shows another important collateral factor. Being most returns voluntary, it is common practice for returning migrants to keep a foot into the hosting economy, in order not to lose welfare benefits, residence permits, and acquired status in the hosting country, making them creating "families across borders"[34]. If this could be beneficial for a constant transfer, also at economic level, across borders, however, it may also affect the actual integration and complete knowledge transfer into the country of origin. Therefore, as already demonstrated with regard to returning migration flows in the East Caribbean, the process of return must be governed by institutions in order to maximize its efficacy and effectiveness from a social and economic perspective[35].

The link with national and, above all, international institutions or organizations (like the EU) is pivotal and must be reviewed to be effective. Criticism have been addressed to the EU Member States because they would indeed have protected their own national security and economy, avoiding real cooperation among themselves and preventing the creation

[32] LABRIANIDIS-LYBERAKI, *Back and forth and in between: returning albanian migrants from Greece and Italy*, in 5 *Int. Migration & Integration* 77 (2004).
[33] CELA, *Migration and return migration in later life to Albania*, in VATHI-KING (eds.), *Return Migration and Psychosocial Wellbeing. Discourses, Policy-Making and Outcomes for Migrants and Their Families*, London: Routledge 2017.
[34] PALADINI, *Circular migration and new forms of citizenship. The Albanian community's redefinition of social inclusion patterns*, in 2(6) *European Journal of Research on Education* 109 (2004).
[35] BYRON, *Return Migration to the Eastern Caribbean: Comparative Experiences and Policy Implications*, in 49(4) *Social and Economic Studies* 155 (2000).

of a real common border with coordinated plans of prevention, welcoming, integration and collaboration with African countries[36].

In the next paragraphs, the article will suggest one solution (the so-called 'third way') to be deployed by the EU in order to have a win-win effect for EU Member States and countries of origin and/or transit of migration. The suggested 'third way' is a program of VET in the EU for economic migrants (average waiting time for residence permit is 2 years) coordinated with a set of investments in African countries of origin in line with competences transferred within the VET. The goal of the 'third way' is to foster a subsequent planned, voluntary, and oriented return of skilled workers able to contribute to social and economical development of their countries through the injection of valuable human capital into the target ecosystem. According to data in next paragraphs, the area of investments and VET should be the one of sustainability, mainly the energetic sector.

4. *Investing in ethical and sustainable economy in Africa. Why choosing Northern Africa?*

Africa has an entire constellation of national cultures which can be further divided into a galaxy of local, tribal, ethnic or clans entities. The exact number of languages spoken in the African continent is still debated, but it should be around several thousands, also considering dialects. Ethnic ground is not too dissimilar. Nevertheless, one should consider some basic schemes, and the most important for the purpose of the article is the division between Northern Africa (including the Saharan Africa or 'Arab' Africa context) and the rest of the continent, namely sub-Saharan Africa, including Eastern, Central, Western and Southern Africa.

Northern African States are countries of origin but also countries of transit for migratory flows. These States are culturally and linguistically part of the Middle East and Northern Africa area (MENA) and are generally identifiable (with some relevant exceptions) with the Arab world, even if 'declined' in the Saharan and African 'way of life'. Northern African States are considered more developed in comparison with sub-Saharan countries as demonstrated by their GDP, financial and debt stability, and industrial and cultural indicators which are higher than the average of the rest of the continent. Despite many criticalities and inefficiencies (widespread poverty and corruption, low democracy index, etc.), this

[36] GIORDANO, *La frontiera mediterranea tra mobilità umana e (in)sostenibilità del sistema confinario europeo*, in LUCIA-DUGLIO-LAZZARINI (a cura di), *Verso un'economia della sostenibilità. Lo scenario e le sfide*, Milano: Franco Angeli Editore 2018, 328-247.

kind of development involves education, technical and scientific background, and industrial, economic, financial and welfare areas.

As regards the political development of Northern African States, with the relevant exception of Libya, these countries are generally more stable and affordable than most of the sub-Saharan countries. In general, governments and political systems possess a high degree of stability: even if governments change, the turnover does not usually cause systemic upsets. Troubles occurred with the 'Arab Springs' have caused several changes to the overall political framework: in some cases, they brought democratic improvements like in Tunisia or, on the contrary, persistent instability like in Libya; in other cases, the political system emerged *de facto* almost unchanged.

A wide series of factors have affected this situation and outcome but one should not neglect geographic proximity and cultural contiguity with the European continent, and above all the legal and constitutional systems of the Northern African States, advanced and equipped with check and balance systems that although not comparable with the European ones are still better than the more 'rudimental' systems of the majority of sub-Saharan countries where a "culture of constitutionalism is often missing"[37].

Relying upon the positive factors that characterize the Northern African States, one should enhance this trend in order to make the whole region attractive also for those migrants coming from other African regions which consider Northern African countries only as transit States towards the EU. In this way, Northern African transit countries should be considered an opportunity for job and education, rather than dangerous places of persecution, as witnessed by the infamous 'detention camps' in Libya.

4.1 *Advantages and feasibility of an ethical and sustainable approach in Northern Africa*

To assess the potential of this region, we will first provide a general overview of its economic trends and job market; then, an analysis of the related trends regarding the green economy; finally, an assessment of opportunities and related degree of exploitation by African countries.

The COP26 meeting and the EU's new policy lines (EU Green Deal and Next Generation EU) clearly outline how green transition is a building block for our society of the future. Companies will be directly involved, facing important obligations to comply with new sustainability

[37] HULS, *African constitutions*, web dossier on African constitutions compiled by the African Studies Centre Leiden, at https://www.ascleiden.nl/content/webdossiers/african-constitutions#introduction (updated 2020).

regulations and meeting the challenges of a market increasingly sensitive to issues about climate change, ethical and social development. In the near future, industry feels the need to acquire personnel with skills in line with requirements of EU policy and able to guide and support companies in the green and digital transition.

According to the report "Jobs of the Future" of the World Economic Forum[38], 50% of workers need to upgrade their skills in the next 5 years, having to adjust as much as 40% of their skills while maintaining the job they currently hold. Main trends highlighted in the report concern artificial intelligence and digitization, but demand growth in the 'green' and 'care' jobs, thus related to environmental and social sustainability, is also reported. Eurostat confirms that job vacancies in the renewable energy and energy efficiency STEM sector have already increased from 0.6 million in 2000 to 1.7 million in 2019 in the EU, showing continuous upward trend.

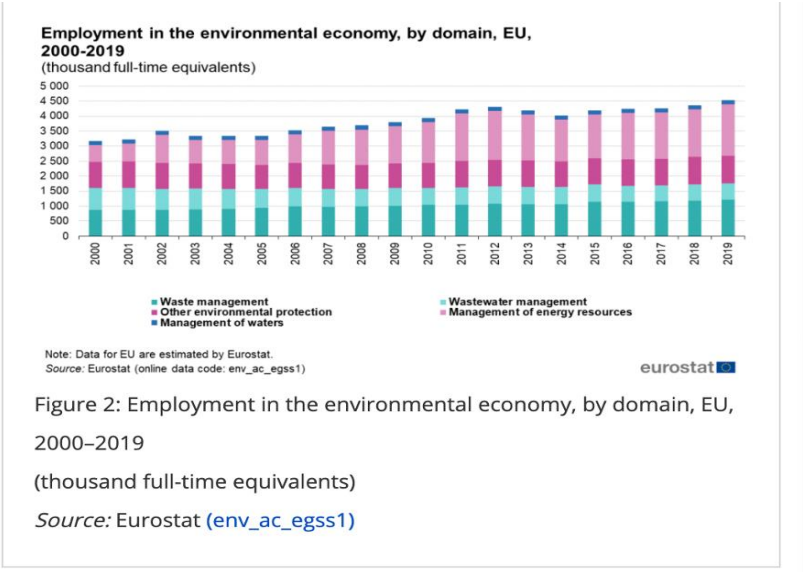


Figure 2: Employment in the environmental economy, by domain, EU, 2000–2019

(thousand full-time equivalents)

Source: Eurostat (env_ac_egss1)

Also the value added produced in the EU by green economy increased from 129 billion of euro in 2000 to 326 billion of euro in 2019 (+ 252%).

[38] World Economic Forum, *The Future of Jobs Report 2020*, October 2020, available at https://www3.weforum.org/docs/WEF_Future_of_Jobs_2020.pdf.

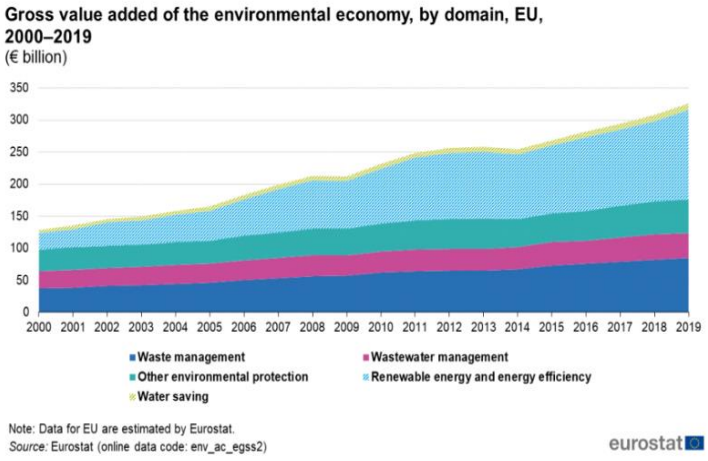


Figure 4: Gross value added of the environmental economy, by domain, EU, 2000–2019, (€ billion)

Source: Eurostat (env_ac_egss2)

Jobs related to ecological transition are not only technological-engineering jobs. They are also related to ancillary services (19% value added generated) and belong to all sectors, including agriculture. For example, according to a McKinsey report[39], between 400.000 and 650.000 jobs will be generated at global level in wildlife management (preservation of natural ecosystems and management of natural heritage), thus going beyond the industrial application of green jobs. Furthermore, assuming a rebound in tourism flows to pre-COVID 19 levels, + 30 million jobs in sustainable tourism and fisheries are estimated. In 2015 it was predicted a 4.5 trillion of dollars in output by 2030 in the US from the circular economy, considering the ability to generate growth while limiting resource use through more sustainable strategies. In 2016 in the US, the increase in green jobs was already much higher than in traditional sectors such as oil & gas and mining, with 769.000 green jobs generated compared to just 187.000 and 68.000 generated in the other two sectors. But, as anticipated, the green revolution is not limited to the energy sector and also involves universities: for instance, the Exeter University allocated 80 million of dollars in

[39] https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Sustainability/Our%20Insights/Valuing%20nature%20conservation/Valuing-nature-conservation.pdf

the creation of five new curricula related to green transition, thereby hiring academics and researchers.

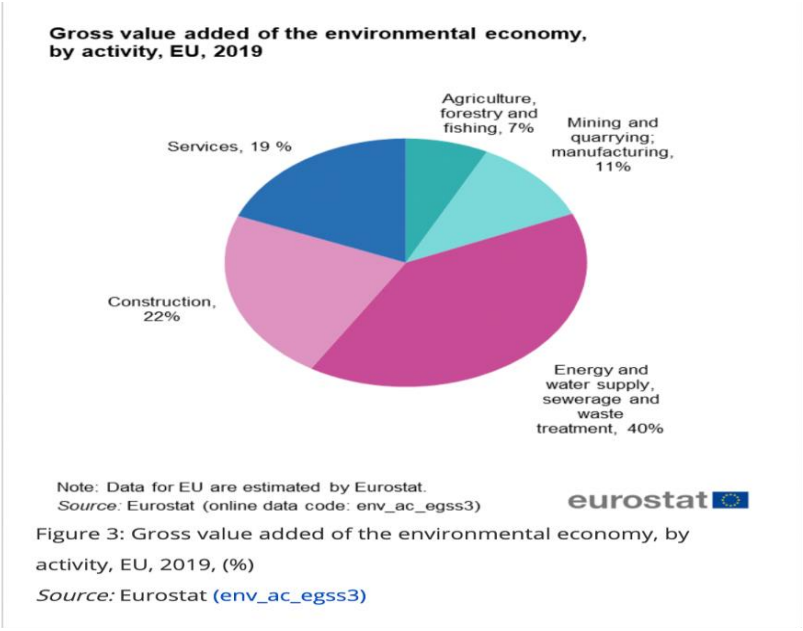


Figure 3: Gross value added of the environmental economy, by activity, EU, 2019, (%)

Source: Eurostat (env_ac_egss3)

Analyzing the report "The State of Consumer Spending: Gen Z Shoppers Demand Sustainable Retail"[40], Forbes reports that 62% of Generation Z shoppers, as well as millennials, prefer to make their purchases from sustainable companies. In addition, 54% of Generation Z and 50% of millennials are likely to spend an additional 10% on sustainable products rather than non-sustainable alike products, compared with 34% of Generation X shoppers and 23% of Boomers. As generations advance, awareness for sustainable and responsible purchases grows stronger, touching majority levels in the younger generations.

To confirm this survey-based research, there are also corporate performance data demonstrating a correlation between better performance of companies and the inclusion in management of a chief sustainability officer (CSO), who is responsible for structuring and implementing sustainability policies within the company. Another correlation may seem trivial but it is often underestimated by companies: improved company performance is higher when the CSO has actual training in the field, at the

[40] https://www.firstinsight.com/white-papers-posts/gen-z-shoppers-demand-sustainability

expense of those who are 'recycled' into the industry and are forced to train in the field.

Based on these data, it seems that companies are following the trend of adjusting their policies with a view to sustainability. Yet, this is not quite the case: according to Forbes[41], 90% of senior managers consider sustainability important but only 60% of companies have an effective sustainability strategy. If we consider Italian SMEs, only 38% invest in sustainability strategies. One of the reasons for these data is probably the lack of awareness and/or skills within companies. A research conducted in 2020 by Standard Chartered shows that only 20% of companies actually know what are the SDGs[42]; the annual HSBC navigator (a survey including more than 10.000 companies from 39 countries, including 200 Italian companies) explains that many companies are willing to invest in sustainability strategies but they fail due to lack of skills[43].

The opportunities for sustainable development in Africa have been clearly reported by scholars: "Africa is endowed with abundant renewable energies. The continent has the world's richest solar resources due to its high irradiation. It also benefits from crucial wind potential – especially in North and East Africa – and hydropower, which currently make up two of its main renewable sources due to its major river basins. Moreover, geothermal resources can be found throughout Africa, although the bulk of the potential is concentrated in the East Africa Rift System". The natural resources of the African continent and especially of the Sahara region regarding solar energy are not a surprise: yet, "so far, African states have only installed 5 gigawatts (GW) of solar PV, amounting to less than 1% of the world's total solar PVs, despite the continent's extensive solar potential. Other renewable energy sources have experienced similar slow developments"[44].

There is a clear asymmetry between opportunities and actual benefits taken out of sustainable investments. The main barriers to sustainable development highlighted by scholars are: *a*) policy uncertainties; *b*) inadequate infrastructure and grids; *c*) unstable financial situations; *d*) limited access to private and foreign financing. Having already addressed issues under *a*), *b*), and *c*) in the previous paragraphs, we will focus now on the

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41 https://www.forbes.com/sites/forbesbusinesscouncil/2021/02/10/why-corporate-strategies-should-be-focused-on-sustainability/?sh=5d2720837e9f.

42 https://www.sc.com/en/insights/50-trillion-question/.

43 https://www.business.hsbc.com/navigator/report/nav/report.

44 RAIMONDI, *Renewable Energies and Development in Africa: Limits and Challenges*, 25 June 2021, available at https://www.ispionline.it/en/pubblicazione/renewable-energies-and-development-africa-limits-and-challenges-30958.

barrier of limited access to private and foreign financing, especially wondering if there are investments already planned by the EU in this field.

The answer is positive because the EU is actively involved in the development of the African continent and has already deployed 150 billion of Euros to foster a strong, inclusive, green and digital recovery and transformation by: accelerating the green and digital transition; accelerating sustainable growth and decent job creation; strengthening health systems; improving education and training. This package goes under the name of "The Global Gateway Africa – Europe Investment Package"[45].

The project has the ambition of increasing the green energetic production by 300 GW by 2030 and including clean hydrogen in the mix. Related to green transition, the other 2030 goals are: *a*) improve the livelihood of 65 million people, capturing carbon, stabilizing 3 million km² of land and ensuring water security; *b*) accelerate sustainable transformations of African food systems in support of Africa's agriculture, fisheries and food development agenda; *c*) enhance the capacity of partner countries to adapt to climate change and substantially reduce disaster risk. Along with green, digital and health transition investments, a substantial share of investments is dedicated to education and business training, demonstrating the importance of generating added value through human capital. The Europe Investment Package also includes a section dedicated to sustainable finance. The EU will provide technical support and build networks with private investors to build up green bonds. In order to issue green bonds, there must be a sustainable economy and, therefore, sustainable companies and employees with right skills and competencies to lead enterprises throughout the green transition.

5. *Concluding remarks on the impact of an ethical and sustainable approach in Northern Africa*

The solution here suggested might mitigate the externalities of migration towards Europe. No econometric model has been structured to make projections on the actual amount of value that could be generated by this plan. Rather, the point of modeling and forecast is indeed the starting point for a deeper and further study on the matter. In fact, the article only presented the theoretical feasibility of the suggested solution based on scholars' writings and general macroeconomic, political and legal trends and framework.

[45] https://ec.europa.eu/info/strategy/priorities-2019-2024/stronger-europe-world/global-gateway/eu-africa-global-gateway-investment-package_en.

Considering data and studies on returning migrants, it is possible to assume that migratory pressure from Africa could decrease in an unprecedented voluntary way, so avoiding enforcement actions based on bilateral agreements and arrangements with countries of transit according to a 'catch and control' strategy. Reduction in migratory flows would have strong financial consequences for the EU and its Member States. It is difficult to estimate this positive impact but it is possible to list several positive factors. Reduction of arrivals would have great effects on the first reception system, which would be relieved by infrastructural and logistic costs. In parallel, the second reception system would also benefit not only in terms of infrastructural and logistic impact but also of bureaucracy: in fact, the system is flooded with applications for international protection lodged by almost the totality of migrants, regardless of their effective entitlement to a kind of legal protection.

The suggested solution would not solve an age-old problem forever, but it would 'mitigate' its impact on European and non-European countries. It is possible to assume a decrease in infrastructural, logistic and bureaucratic costs between 10% and 20% and a decrease in the overall insecurity rate, at least as perceived by the population of the EU Member States, with positive consequences for public spending in the public security sector. Real security situation would probably remain unchanged, but the suggested solution could help to reduce social tensions due to the positive impact both for migrants and hosting communities. Apart from direct financial advantages given by savings, there would also be other positive cascade effects. Voluntary returns due to VET programs would be well interpreted by the EU public, potentially changing (at least in part) some negative clichés on migrants. Moreover, a new generation of specialized and educated migrants would encourage renewed interchanges and technical cooperation with the EU and its Member States.

Finally, as regards the impact of returning migrants in their countries of origin, it could be assumed that returns could generate positive outcomes due to the new skills combined with planned investments. Allocation of workers undergoing VET programs should be carefully studied according to geographical and sociological schemes to avoid cultural clashes and unintended negative externalities. Even if the suggested solution requires further investigation, having been here explained only in brief and preliminary terms, it is possible to imagine a globally positive effect, both in savings and reinvestments for the EU and in development for the African countries, depending on the dimension, the structuring, the technical details and the overall amount of the investments.

THE MIGRATION CRISIS AS A FAULT LINE IN THE EU: THE ECJ DECISIONS REGARDING THE VISEGRAD COUNTRIES*

Sevgi Çilingir

ABSTRACT: Attitudes towards the migration crisis turned the Visegrad Group into a new bloc within the EU. Their disputes with other EU Member States and EU institutions were forwarded to the judiciary, via annulment and infringement cases. The article analyses the tension between the V4 and the EU institutions during the migration crisis, through three cases related the the Common European Asylum System. Political and legal features of these cases are evaluated in conjunction with the position of the V4 within the EU.

KEYWORDS: Visegrad group; migration crisis; CEAS; EU case law; ECJ

CONTENTS: 1. *Introduction*. – 2. *The political framework*. – 3. *The legal framework*. – 4. *The cases on the relocation mechanism*. – 5. *The case on the rights of the asylum seekers*. – 6. *Conclusion*.

1. *Introduction*

The EU project has been interrupted by the recent crises. The financial crisis of 2008-2009 and the 2015 migration crisis weakened the EU's capacity to bring common solutions to common problems. In this period, when EU skepticism is on the rise, the crises in which the EU Member States took positions according to their national interests made the supranational powers of the EU, and its effectiveness as an organization, questionable.

The migration crisis created various pressures on all EU Member States and was tried to be resolved within the scope of the Common European Asylum System (CEAS). The adequacy of the measures and the extent to which they are implemented by the EU Member States are controversial. However, especially the so-called 'Visegrad Group' (V4), composed by Czech Republic, Hungary, Poland and Slovakia, displayed

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a strong resistance to some decisions taken at EU level. This situation raises the question of whether a new front is forming within the EU.

Disputes between the V4 and the EU institutions have also been passed on to the ECJ. The aim of the article is analyzing the tension between the V4 and the EU institutions in the context of the migration crisis and the related ECJ decisions. The article begins by explaining the political framework in order to reveal the changing positions of the Visegrad Group within the EU and their attitudes towards the migration crisis. Then, the CEAS legal framework is explained. After the review of the cases, the effects of the judgments on the relations between EU Member States and EU institutions and on EU case-law in the Area of Freedom, Security and Justice (AFSJ) will be discussed.

2. *The political framework*

The Visegrad Group emerged with the change of axis in Central Europe after the Cold War. The Group was established with the 1991 Visegrad Declaration aimed to democratize, adopt a free market economy, and ensure "full participation in the European political and economic system, security and legislative system" of Czech Republic, Slovakia, Hungary and Poland in mutual cooperation[1]. These countries wanted to create a "new Central Europe" by moving away from Russia's influence in domestic and foreign politics and getting closer to each other and to European institutions such as the EU and the NATO[2]. They signed association agreements with the EU in the early 1990s and became EU Member States in the 2004 enlargement.

Initially, EU membership had a normative and identity meaning beyond international cooperation for these countries that were in the process of transition to liberal democracy and free market economy. During the candidacy period, the view of the political elite and public opinion towards the EU was shaped by an idealist approach expressed by the narrative of "return to Europe"[3].

However, the European ideal and attitudes towards the EU as an institution eventually began to be differentiated, and EU skepticism emerged[4]. Once members of the EU, in fact, the utilitarian approach has

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[1] https://www.visegradgroup.eu/documents/visegrad-declarations/visegrad-declaration-110412-2.

[2] NIĆ, *The Visegrád Group in the EU: 2016 as a turning-point?*, in 15 *European View* 281 (2016), 283.

[3] SAMUR, *Polonya: İdealist Avrupalılıktan pragmatist Avrupa Birliği üyeliğine*, in 11 *Uluslararası Hukuk ve Politika* 37 (2015), 39.

[4] *Ibidem*, 51-52.

gradually overtaken the idealist approach, ethnocentrism increased and a tendency to retreat from democratization emerged[5]. EU membership has become supported to the extent that it benefits national interests in areas such as economy and security[6].

Since the beginning of the migration crisis, EU skeptic or anti-EU parties have taken part in the governments of the V4. In the meantime, securitized and restrictive approach towards migration has become prevalent throughout the EU. Although various initiatives taken at EU level, Member States were reluctant to accept large numbers of asylum seekers. Security concerns, such as illegal entry and the fight against terrorism, have been at the forefront[7].

The Visegrad Group's States were transit countries during the migration crisis. The greater pressure was on Hungary, which was also a first country of entry since it shares borders with Serbia. In the V4, where host societies are not very familiar with migrants and asylum seekers from different ethnic and religious backgrounds, the crisis was approached in terms of security rather than of humanitarian dimension[8]. Visegrad countries adopted a common stance on the migration crisis and decided to implement the measures determined at EU level only to the extent that they saw fit. According to them, in fact, the crisis posed a threat to the internal security of the EU and, therefore, they prioritized border protection, externalization and facilitating returns. While pledging full support for EU-level security measures, the V4 opposed the relocation mechanism that required EU Member States to admit asylum seekers from Italy and Greece, and argued that solidarity within the EU should be voluntary[9]. The relocation mechanism brought the V4 countries and the EU institutions face to face before the ECJ[10]. Hungary's violation of the rights of

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[5] *Ibidem*, 53-63. Cf MARUŠIAK, *Visegrad Group: an unstable periphery of the European Union?*, in MARUŠIAK-GONĚC-ŠKVRNDA (eds.), *Internal Cohesion of the Visegrad Group*, Bratislava: VEDA, Publishing House of the Slovak Academy of Sciences 2013, 122-159.

[6] In Poland and Hungary, the main factors behind continued public support for the EU after membership were free movement and EU funds.

[7] IOV-BOGDAN, *Securitization of migration in the European Union: Between discourse and practical action*, in 1(13) *Research and Science Today* 12 (2017).

[8] PODGÓRZAŃSKA, *The Migration Crisis from the East-Central European Perspective: Challenges for Regional Security*, in 46(2) *Polish Political Science Yearbook* 87 (2017).

[9] Visegrad Group, *Joint statement on the migration crisis response mechanism*, 21 November 2016, at http://www.visegradgroup.eu/calendar/2016/joint-statement-of-v4.

[10] ECJ, *Slovak Republic and Hungary v Council of the European Union*, Judgment 6 September 2017, joined cases C-643/15 and C-647/15, in EU:C:2017:631; ECJ, *European Commission v Republic of Poland, Commission v Hungary, Commission v Czech Republic*, Judgment 2 April 2020, joined cases C-715/17, C-718/17 and C-719/17, in EU:C:2020:257.

asylum seekers, protected by CEAS legislation, was also brought to the ECJ[11].

However, the Visegrad Group's opposition to EU obligations in the field of CEAS was not limited to participation in crisis measures and compliance with CEAS rules. Their policy throughout the crisis was shaped against the fundamental values of the EU. For instance, Hungary erected a fence along its border with Serbia, reminiscent of the 'Iron Curtain' period. Its Prime Minister, Viktor Orban, said that Muslim refugees would harm the country's "Christian identity and culture"[12]. Slovakia declared that it would only host Christian families from Syria[13]. In addition to xenophobic and Islamophobic views expressly declared by the V4 governments, there have been also extensive violations of the rule of law and human rights in Hungary and Poland, highlighted by international human rights organizations[14]. Accordingly, the European Commission initiated the process for suspending Poland and Hungary's membership rights due to a serious violation of the rule of law enshrined in Article 2 of the TEU. However, the unanimity required within the Council to adopt the decision could not be attained. The Commission's proposal for suspending the EU budget payments to Member States that violate the rule of law, also reached a dead end[15]. The Commission also started infringement cases against Hungary and Poland and the ECJ confirmed the rule of law infringements on behalf of the two States[16].

3. *The legal framework*

In EU primary law, asylum policy is regulated by Title V of the TFEU on the AFSJ. In this field, competence is shared between the EU and its Member States and, therefore, EU legislation must conform to the principles of subsidiarity and proportionality, enshrined in Article 5, par. 3, of the TEU.

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[11] ECJ, *European Commission v Hungary*, Judgment 17 December 2020, C-808/18, in EU:C:2020:1029.

[12] GOŹDZIAK, *Using Fear of the "Other", Orbán Reshapes Migration Policy in a Hungary Built on Cultural Diversity*, in *Migration Policy Institute*, October 10, 2019.

[13] BBC News, *Migrants crisis: Slovakia 'will only accept Christians'*, 19 August 2015.

[14] Amnesty International, *Human Rights in Europe: Review of 2019*, EUR 01/2098/2020, 38-40 and 59-61, at https://www.amnesty.org/en/documents/eur01/2098/2020/en/.

[15] ZALAN, *EU leaders unblock budget in deal with Hungary and Poland*, EU Observer, 11 December 2020.

[16] ECJ, *European Commission v Republic of Poland*, Judgment 24 June 2019, C-619/18, EU:C:2019:531; ECJ, *European Commission v Republic of Poland*, Judgment 5 November 2019, C-192/18, EU:C:2019:924.

Pursuant to Article 72 of the TFEU, therefore, EU rules and practices "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". The CEAS must also be in line with the Geneva Convention of 28 July 1951 relating to the status of refugee, including compliance with the principle of *non-refoulement* (Article 78, par. 1, TFEU). Even if the European Parliament and the Council adopt measures for the CEAS in accordance with the ordinary legislative procedure (Article 78, par. 2), however, "in the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned" (Article 78, par. 3). The principle of solidarity between Member States is included in the general provisions regarding the AFSJ (Article 67, par. 2) and it is further specified as a characteristic of EU policies on border checks, asylum and immigration, which "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States [tasking the EU] to give effect to this principle" (Article 80).

As it will be demonstrated below, the political debate regarding the tension between Member States' security and the requirement of solidarity was brought before the ECJ with three cases involving the Visegrad countries (analyzed in the next paragraphs of the article) in which there were diverging interpretations about the primary law of the EU, especially Articles 72 and 80 of the TFEU.

4. *The cases on the relocation mechanism*

The relocation mechanism was an emergency measure, adopted in response to the 2015 migration crisis and based on Articles 78, par. 3, and 80 of the TFEU. Both articles, in fact, were used for the first time as the legal basis of CEAS legal instruments. The relocation mechanism consisted of two Council decisions to help Italy and Greece, overburdened by asylum applications as the main countries of entry.

As temporary exception to the Dublin Regulation[17], Council Decision (EU) 2015/1523 of 14 September 2015 enacted 40.000 relocations of third-country nationals or stateless persons who had made an application

[17] Regulation (EU) No 604/2013 of the European Parliament and of the Council, of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

for international protection in Italy or Greece; the following Council Decision (EU) 2015/1601 of 22 September 2015 enacted further 120.000 relocations for the same applicants[18]. Slovakia and Hungary filed an annulment case against Council Decision 2015/1601, which specified the number of persons allocated to each Member State for relocation.

In *Slovak Republic and Hungary v Council of the European Union* (*supra*, footnote 10), the case involved more actors than the parties before the ECJ. In fact, the action for annulment was supported by Poland while the Council was supported by seven EU Members States, plus the Commission[19]. Plaintiffs made both procedural and substantive allegations for the annulment of the Council Decision 2015/1601.

As regards the procedure, Slovakia and Hungary objected to Article 78, par. 3, as a proper legal basis for the Decision because the massive inflow of persons to Italy and Greece should not be considered an "emergency situation" as required by the provision. They also opposed the non-legislative procedure adopted for taking the Decision since this measure had the effect to amend a number of legislative acts of EU law, and also for a period much longer than what would be considered as temporary[20]. Examining the circumstances, the procedure and the scope of the Council Decision, the ECJ regarded these arguments as unfounded[21].

As regards the substance, Slovakia and Hungary argued that Council Decision 2015/1601 was in breach of the principle of proportionality, since they regarded the compulsory hosting of relocated persons as too much of a burden that limits their own sovereignty, while solving too little of the problem, which required other solutions than relocation[22]. The ECJ found these allegations unfounded, since the mechanism was complementary to other precautions and Article 80 required a kind of solidarity from all EU Member States which, according to the ECJ, could not be considered as voluntary[23].

Moreover, in support of Hungary, Poland alleged that relocation would create an unfair burden on the host State by referring to "cultural and linguistic" difference of asylum seekers, and potential risks for the

[18] Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[19] Belgium, Germany, France, Luxembourg and Sweden supported the Council, in addition to Greece and Italy, namely the beneficiaries of Council Decision 2015/1601.

[20] ECJ, *Slovakia and Hungary v Council*, *supra*, footnote 10, §§ 47-55 and 85-87.

[21] *Ibidem*, §§ 57-84, 89-103 and 113-128.

[22] *Ibidem*, §§ 210-233 and 262-281.

[23] *Ibidem*, §§ 251-260, 293 and 329.

host State "maintenance of law and order and internal security", which was against Article 72 of the TFEU. The ECJ rejected these arguments as well and dismissed all the actions for annulment[24].

In *European Commission v Republic of Poland, Hungary and Czech Republic* (*supra*, footnote 10), the issue was that during the cases on the relocation mechanism before the ECJ the Visegrad States, except for Slovakia, had not fulfilled their obligations under the relocation mechanism. The European Commission started therefore the infringement procedure and, short after the ECJ judgment of September 2017, the Commission took the three Visegrad States before the ECJ for the infringement of Article 5 of Council Decisions 2015/1523 and 2015/1601, requiring national pledges and actual relocations.

Poland, Hungary and the Czech Republic objected the admissibility of the case because the period of implementation was over and the Council Decisions were no longer in force. The ECJ found instead the case as admissible[25]. Poland and Hungary also complained about unequal treatment since there were other EU Member States which have not fulfilled their relocation obligations in full. The ECJ acknowledged the Commission's discretionary power in bringing these cases to the Court and rejected the argument[26].

As regards the substance, the pleas were based on the duty of EU Member States to protect national security, law and order, enshrined in Article 4, par. 2, of the TEU and Article 72 of the TFEU. For the defendants, the relocation mechanism was creating a danger to their internal security: the identification of persons to be relocated was not properly managed by Italy and Greece and this would create a risk of extremist terrorists entering their borders[27]. Based on its previous case-law regarding Article 72, the ECJ proposed a narrower interpretation of what enables the suspension of membership obligations in case of threats to security and maintenance of law and order. According to the ECJ, such derogations were only possible on a case by case basis and could not be grounds for rejecting the entire mechanism. In fact, the "binding nature of EU law and its uniform application" did not allow unilateral actions by Member States based on generalized perceptions, without the control of EU institutions[28]. As a result, the ECJ judged in favor of the European Commission.

[24] *Ibidem*, §§ 302-306.
[25] ECJ, *Commission v Poland, Hungary, Czech Republic*, *supra*, footnote 10, §§ 47-71.
[26] *Ibidem*, §§ 72-82.
[27] *Ibidem*, §§ 134-138.
[28] *Ibidem*, §§ 143-160.

5. *The case on the rights of the asylum seekers*

In *European Commission v Hungary* (*supra*, footnote 11), the case involved the infringement of various provisions of the Asylum Procedures Directive, the Reception Conditions Directive and the Return Directive, aimed at guaranteeing minimum standards for the human rights of the asylum seekers, due to several legislative amendments and practices adopted by Hungary in response to the migration crisis.

According to the Commission, the reception conditions in "transit zones" (the only places where Hungary processed asylum claims of persons arriving from Serbia) constituted a violation of the right to asylum, due to the limited number of admissions that prevented access to asylum procedures. Moreover, the material conditions and waiting periods at the facilities in the transit zones created *de facto* a state of detention which was unlawful[29]. Hungary plead that the transit zones were reception centers and underlined the difficulties related to the exceptional circumstances and the risk of hosting all the asylum seekers within the borders, drawing upon Article 72 of the TFEU. The ECJ concurred with the Commission and adopted a narrow interpretation of derogations permitted under Article 72, similar to that already adopted in *European Commission v Republic of Poland, Hungary and Czech Republic* (see *supra*, § 4)[30].

Removals of applicants from Hungarian border were also considered by the Commission as infringements of the principle of *non-refoulement*, included in the Return Directive. Hungary's pleas were based on Article 4, par. 2, of the TEU and Article 72 of the TFEU but, once again, they were rejected by the ECJ[31]. The Commission also argued that the Hungarian legislative amendments prevented the right to an effective remedy, provided by the Asylum Procedures Directive, and allowed the removal of asylum seekers during their appeal: the ECJ concurred with the Commission[32].

6. *Conclusion*

The migration crisis led to a separation between the EU Member States. While the Visegrad States got closer to each other by adopting a common position, they also distanced themselves from other EU Member State and came face to face with EU institutions. This tension was also

[29] ECJ, *Commission v Hungary*, *supra* footnote 11, §§ 71-77 and 128-147.
[30] *Ibidem*, §§ 138-141, 148-154 and 212-226.
[31] *Ibidem*, §§ 227-254 and 261-265.
[32] *Ibidem*, §§ 267-274 and 282-302.

brought before the ECJ with annulment and infringement cases where the Visegrad States discussed the meaning and the requirements of the EU membership as a matter of politics and law.

The pleas of the Visegrad States before the ECJ show that these countries oppose not only their legal obligations in the context of the migration crisis, but also the supranational characteristic of the EU. Moreover, they failed to fulfil their legal obligations in the field of asylum at the expense of the fundamental values of the EU. In other words, Visegrad States aimed to create a 'new Central Europe' for the second time, by moving away from their initial understanding, namely the one adopted when they were candidates for the EU membership[33]. This 'new Central Europe' is a platform where EU Member States have full authority without any obstacles to their national priorities and implement policies that are discriminatory and not in compliance with fundamental rights[34]. In this respect, the ECJ's judgments and interpretations in the examined cases are very important since they set a precedent for other EU Member States with similar tendencies.

In the cases concerning the relocation mechanism, the ECJ evaluated Articles 78, par. 3, and 80 of the TFEU for the first time. The Court considered these provisions together and confirmed the mandatory nature of the Council Decisions. In its interpretation, the ECJ gave priority to the Council's discretion and allowed flexibility. In the infringement case, the ECJ determined that the Commission used its discretionary power correctly, accepting the majority of its claims as valid.

In all these cases, the Visegrad States claimed that they could suspend obligations arising from CEAS legislation relying on security derogations upon Article 4, par. 2, of the TEU and Article 72 of the TFEU. However, the ECJ declared these claims as unfounded and interpreted narrowly these two Articles, also stating that EU Member States have the burden of proof on a case-by-case basis, and derogations cannot be operated with unilateral and generalized claims. While this interpretation is not completely new in the ECJ's case law, it is however an important warning that EU Member States cannot ignore the binding nature of EU law and the requirement of its uniform application. In this way, the reaction that, at political level, was lacking in the face of Visegrad States' violations of EU principles and rules throughout the migration crisis, was made possible by the ECJ.

[33] NIĆ, *supra*, footnote 2, 283.
[34] SAMUR, *supra* footnote 3, 37-63; MARUŠIAK, *supra* footnote 5, 122-146.

SECURITIZATION OF MIGRATION IN FRANCE FROM THE PERSPECTIVE OF SOCIAL CONSTRUCTIVISM: AN EXAMINATION OF THE NATIONAL FRONT PARTY (2011-2022)

Samet Kayar

ABSTRACT: The paper critically analyzes Marine Le Pen's anti-immigrant policies, following her occupation of the anti-immigrant security agenda in today's EU politics, and tries to shed light on how immigration is brought to the security agenda in France. In this article, in which social constructivist theoretical perspective and qualitative research methods were used, case analysis design was used and EU official documents, conceptual and theoretical sources, newspaper news, discourses, party policies were scanned with content analysis technique. The main argument is that the process of securitization of migration in France is linked to national, regional and global dynamics, and intertwined connections have a triggering capacity on Marine Le Pen's anti-immigrant identity.

KEYWORDS: migration; security; identity; National Front; Marine Le Pen

CONTENTS: 1. *Introduction*. – 2. *The conceptual and theoretical framework: social constructivism and securitization, populism, and extreme right parties*. – 3. *The empirical framework: the National Front Party and the securitization of migration in France (2011-2022)*. – 4. *The National Front: securitizing migration from theory to practice*. – 5. *Conclusion*.

1. *Introduction*

The EU bases its ontological foundations on values such as democracy, human rights, the rule of law, peace, freedom, free market economy, unity in diversity. The EU has recently turned into a Union where the aforementioned values are questioned with the increasing immigration phenomenon. One of the EU Member States that stands out the most with its anti-immigrant rhetoric and practices is France, where the National Front party is located. In fact, the leader of the National Front party, Marine Le Pen, has described a securitizing approach to reference objects such as economy, culture and identity while addressing the masses in anti-immigration campaigns. In this article, the policies of Marine Le Pen are

briefly examined as well as concepts used and analogies made. The analysis of how the migration phenomenon has been brought to the security agenda is also conducted here.

Marine Le Pen took over the leadership of the National Front party from her father, Marie Le Pen, in 2011 and preferred to make a series of changes in the image of the party. She tried to renew the bad image inherited from his father. Removing anti-Semitic, racist and homophobic elements from the party's image, Marine Le Pen built her discourse and actions (words-actions) on anti-Islam and anti-immigration. In line with information obtained as a result of this research, certain factors have been observed in the securitization of migration in France: identity, internal dynamics, external dynamics, and the global structure as an umbrella concept.

Structures in which inter-subjective meanings are given have been shaping on identity, and the shaped and reproduced identities have caused the redefinition of interest in the context of migration. In addition, the developments in French domestic policy were also effective in bringing immigration to the national security agenda. Although Marine Le Pen's policies towards immigration are not transferred to other parties' policies as a whole, it is seen that Le Pen has a significant impact on immigration policies. In exhibiting anti-immigrant approaches, it is necessary to pay attention to the extension of global and regional conjuncture as well as the ideological structure. The economic crisis of 2008 causing the shrinkage of national economies, the increasing anti-Islamism after the 9/11 attack, the internal conflicts in the Middle East and Africa after the Arab Springs, the terrorist attacks in Paris, Berlin, Brussels and Nice have been facilitating factors that feed Le Pen's anti-immigrant sentiment.

As a result, by successfully using reference objects such as economy, identity, culture, and nation-state in her discourses, Marine Le Pen was able to shift the phenomenon of migration towards the political sphere, and by playing the role of securitizing actor she frequently called for urgent measures to be taken for the security of the aforementioned themes. In addition, by constantly using the concepts of "us" and "others" or "French" and "Islam", she has significantly contributed to the construction of identities such as xenophobia in the social arena. Migration metaphors used in this way have been prominent elements in order to convince the audience.

2. *The conceptual and theoretical framework: social constructivism and securitization, populism, and extreme right parties*

The "social constructivism" approach challenges the given thought patterns in explaining the international system after the Cold War and increased its popularity in the post-Cold War period. Social constructivism generally focuses on identities, values, norms, discourses, intellectual ideas, social interactions between actors in international relations through a holistic approach. Social constructivists defend the argument that concepts of identity and interest are related to each other and emphasize how these concepts are formed. In a seminal article published in 1988, Ruggie opposed the neo-realist approach to accepting the concepts of identity and interest as given and argued that it should be focused on how these concepts are formed[1]. In this context, the social constructivist approach claims that interests cannot be separated from identity and identity is defined as "the determinant of interests"[2]. Accordingly, an actor defines first who he/she is and eventually shapes her/his wishes and interests. Thus, identity, which is a social concept, can change due to social interactions and social environment and it shapes interests in this direction.

Another important expansion of the social constructivist approach in the international relations community is the theory of securitization. To make good sense of this theory, it is necessary to draw attention to the different expansions of security in the concept. Security has been a concept focused on state-centered and military issues for long time in the international relations literature. The transformation of this concept into a multidimensional and multi-sectoral structure started with the work of the Copenhagen School which redefined the concept in environmental, political, military, social, and economic contexts by adding a new dimension to security[3]. While economic security is essentially related to State's welfare level and available financial resources, identity security is sociologically related to the preservation of language, culture, and traditions[4].

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[1] RUGGIE, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, in 52(4) *International Organization* 855 (1998).

[2] WENDT, *Social Theory of International Politics*, Cambridge: Cambridge University Press 1999.

[3] BUZAN-WÆVER-DE WILDE, *Security: A New Framework for Analysis*, Boulder: Lynne Rienner Publisher 1998.

[4] BUZAN, *İnsanlar, Devletler & Korku*, İstanbul: Röle Akademik Yayıncılık 2015.

The theory of securitization was first introduced by Wæver of the Copenhagen School, symbolizing a process in which issues are politically and socially expressed and threats to issues are pointed out[5].

Buzan adopts similar thought patterns and he also defends the Copenhagen School's securitization theory. Buzan focuses on how the threat is socially and politically constructed through speech acts or discourses, rather than what it is in the definition of securitization. In this context, it does not matter whether the threat is real or not because it is important the process of presenting the subject as an existential threat with various rhetoric[6]. The importance of language is also emphasized in the aforementioned representation process. Because language is the basis for the legitimacy of emergency measures that can be taken, it is possible to turn security problems into existential threats through language[7]. Discourses created by the language actually include the action element and security problems are constructed through speech acts. When the securitization theory is analyzed, therefore, the comprehensive definition can be shown as a discursive process in which issues against any reference object (society, State, religion, etc.) are presented as existential threats and urgent measures are taken against these threats by providing legitimacy in the masses[8].

Looking at the theory from another perspective, it can be interpreted as shifting the issue from non-political to political and including it in the process of securitization[9]. As a result, components such as reference object, existential threat, emergency measures, public opinion are the main subjects of the securitization process. Therefore, the meaning given to a lived phenomenon is also intersubjective and meanings have a transformative effect on identity[10]. The security dimension is thus viewed from a broader perspective in the economic, political, social, military, and environmental framework. However, it is important to underline that in order for the securitization process to be successful, the audience must accept

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[5] FLOYD, *Can securitization theory be used in normative analysis? Towards a just securitization theory*, in 42(4/5) *Security Dialogue* 427 (2011).
[6] BUZAN, *supra* footnote 4.
[7] MCDONALD, *Securitization and the Construction of Security*, in 14(4) *EJIR* 563 (2008).
[8] BUZAN-WÆVER, *Regions and Powers. The Structure of International Security*, Cambridge: Cambridge University Press 2003, 491.
[9] NYMAN, *Securitisation Theory*, in SHEPHERD (ed.), *Critical Approaches to Security. An Introduction to Theories and Methods*, London: Routledge 2013, 54.
[10] CHECKEL, *Review: The Constructivist Turn in International Relations Theory*, in 50(2) *World Politics* 324 (1998).

the issue as a security problem and consent to extraordinary actions to be taken towards this security problem[11].

Populism is another concept that has been recently used a lot in EU and international relations studies. As a political communication strategy, populism "considers society to be ultimately separated into two homogenous and antagonistic groups: 'the pure people' and 'the corrupt elite'", and politics should be an expression of the general will (*volonté générale*) of the people[12]. It is a social fact that there are populist practices whose effects have increased in recent years throughout the world, and these practices have made the image of radical right parties even more visible. Radical parties exist in many countries from the US to the United Kindgom, from Germany to France, from Hungary to Sweden, from Turkey to Venezuela. In particular, since the beginning of this century, populist parties, although not so popular before, have been seriously influential in policy making processes.

Radical right parties share a core ideology made of nativism, authoritarianism and populism[13]. Nativism is a sort of combination of nationalism and xenophobia with the ideology of basing the State on the indigenous group. In this context, non-native elements, ideas and values threaten the homogeneous nation-state structures[14]. In the narrative of nativism, there are meanings such as "exclusive", "ethno-nationalist", "his/her own people first"[15].

Considering these factors, immigrants are stigmatized by radical parties as a cultural, national and economic threat. In this context, as an example of securitizing actors, political party leaders bring immigration into the political arena with their discourse and speech acts and use the phenomenon to shape the security perceptions of the masses, regardless of whether it is real or not. As emphasized by scholars, populist parties often see themselves as defenders of national and social security and present immigrant groups as a threat to the cultural identity of the society[16].

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[11] BUZAN-WÆVER-DE WILDE, *supra* footnote 3.

[12] MUDDE, *The Populist Radical Right: A Pathological Normalcy*, in 33(6) *West European Politics* 1167 (2010).

[13] MUDDE, *The Relationship Between Immigration and Nativism in Europe and North America*, Washington, DC: Migration Policy Institute 2012.

[14] MUDDE, *Populist Radical Right Parties in Europe*, Cambridge: Cambridge University Press 2007, 9.

[15] MUIS-IMMERZEEL, *Radical right populism*, in *Sociopedia.isa*, 2016.

[16] KARYOTIS, *The Fallacy of Securitizing Migration: Elite Rationality and Unintended Consequences*, in LAZARIDIS (ed.), *Security, Insecurity and Migration in Europe*, Farnham: Ashgate Publishing 2011, 13-30.

Finally, it should abe emphasized that populism is not a cause but a result in these States and in the global system. Benefiting from the fragility of the neo-liberal system, populist groups claim to represent the general voice of the people by separating the society.

3. *The empirical framework: the National Front Party and the securitization of migration in France (2011-2022)*

The discourses of Marine Le Pen, the leader of the National Front Party, will be now discussed. Although the study is not methodologically critical discourse analysis, some concepts and metaphors will be underlined because discourses are important in the process of securitization of migration. Only the 2011-2021 period, when the popularity of the party founded in 1972 increased, is analyzed due to the limitation and scope of this article. Developments since Marie Le Pen's founding of the party will not be therefore examined, but the process through which her daughter Marine Le Pen took over the leadership of the party (2011-present) will be discussed.

Important figures of the party initially were François Duprat, François Brigneau and Jean Marie Le Pen. When established and in the following period, the party exhibited an anti-Semitic, homophobic, anti-foreign and anti-immigrant approach. Since taking the lead of the party in 2011, Marine Le Pen has always tried to move away from the extremist image associated with her father and reconstruct the party's stance through conventional values. It is extremely important to approach the events at global, regional and national level to understand how immigration has been securitized in the process since Marine Le Pen took over the chair of the party until the present day, in order to give a meaningful perspective to the study.

The 2008 economic crisis made its effects felt dramatically all over the world and became a crisis leading to economic stagnation in most countries. The crisis had a facilitating effect on the growth of radical right parties and populist right parties defined themselves as the losers of the globalization process. Thus, the right-wing parties defined immigrants as the exploiters of the country's welfare system and stigmatized them as the cause of the current economic recession or unemployment, or in other words, as scapegoats.

9/11 terrorist attacks were another development with a transformative capacity on how immigration is defined. After it was clear that Al-Qaeda was responsible for the attack, anti-Muslim sentiment has become a growing concept all over the world. Islamophobic discourses and practices have begun to increase in international and inter-communal contexts, and

immigrants, seen as a threat, are positioned by securitizing actors against the concept of "us" with their "other" identity. Immigrants, economically marginalized in host countries until the 9/11 attacks, were eventually exposed to cultural exclusion and the reasons for their marginalization became intertwined[17]. In this context, President Bush's War on Terror rhetoric is noteworthy:

> "The attack took place on American soil, but it was an attack on the heart and soul of the civilized world. And the world has come together for a new and different war, the first and hopefully the only war of the 21st century. A war against those who try to export terrorism, and a war against governments that support or host them"[18]

The fact that international politics became more polarized with the effect of President Bush's discourses was also felt in the European geography and immigrants began to be seen as a threat. Terrorist attacks in Madrid (2004) and London (2005) carried out by some immigrants caused an unsafe environment against all immigrants[19]. In addition, the fact that terrorist attacks had a domino effect and occurred also in other countries has further exacerbated negative perspectives on immigration. Attacks at the train station in Brussels, against Charlie Hebdo in Paris, Copenhagen and Berlin are some examples. Attacks by the terrorist organization ISIS became yet another facilitator for the anti-immigrant policies of the right-wing parties in the EU, and produced their discourse on the concepts of Islamophobia.

Considering developments after the Arab Springs in the atmosphere created by terrorist attacks, the phenomenon of migration has become more complex. The uprisings against governments started in the Middle East and African countries in the 2010s increased the atmosphere of chaos and instability and many demonstrations were organized. However, the domino effect of the Arab Spring did not result in a change in power in Syria: on the contrary, it led to the outbreak of the civil war. Thus, many Syrians had to migrate to places where they could be safe and reach better living standards[20]. Most demanded destination countries were Germany,

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[17] AKDEMIR, *11 Eylül 2001, 11 Mart 2004 ve 7 Temmuz 2005 Terörist Saldırılarının Ardından İslam'ın Avrupa'da Algılanışı*, in 8(1) *Ankara Review of European Studies* 1 (2009).

[18] Cf https://2001-2009.state.gov/s/ct/rls/wh/6947.htm.

[19] YILMAZ ELMAS-KUTLAY, *Avrupa'yı Bekleyen Tehlike: Aşırı Sağın Yükselişi*, in 11 *International Strategic Research Organization* 3 (2011).

[20] BALCI-GÖCEN, *Legal and Political Situation of Syrian Immigrants in Turkey*, in 3(5) *International Journal of Afro-Eurasian Research* 1 (2018).

Sweden, Italy, France and Hungary. The massive and rapid migration facilitated the right-wing parties of these destination countires to produce new discourses on Islamophobic narratives, and these parties begun to gain more and more votes. The EU mobilized the EU financial resources to meet the basic humanitarian needs of immigrants but this fact was criticized by the radical right parties, rhetorically arguing that these funds should have been used to the benefit of EU citizens. This kind of rhetoric has been an element that has intensified xenophobia in those EU countries with active right-wing parties[21].

After having outlined this overall global, regional, and national framework, the process of securitization of immigration in France would fit into a more analytical framework. The eurosceptic identity of Marine Le Pen, similar to that of her father, has deepened the negative perception towards immigrants. In order to manage the immigration problem after the Arab Springs, the EU has tried to find international and supranational solutions: one of these solutions has been the quota system according to which immigrants are expected to be relocated among the EU Member States. The French duty, as a Member State, to comply with EU immigration policy deeply worried Marine Le Pen and she accused the EU of violating French sovereignty. In a speech delivered to the European Parliament, she criticized the EU:

> "The EU has announced that three million migrants will arrive in Europe next year. Of course, we do not equate all immigrants with terrorists. But what I denounced in this parliament in September is the infiltration of jihadists amid this wave of migrants"[22]

It should be emphasized that the evolution of the anti-immigrant identity into a more rigid structure is also related to the supranational policies and practices of the EU which triggered Marine Le Pen's approaches to strengthen nationalist identity and national sovereignty. These approaches have also found support in the eyes of the public, and the votes of the National Front Party have tended to increase, especially in the period from 2011 to the present.

As explained, Marine Le Pen has developed various discourses on reference objects such as identity, culture, national sovereignty, and economy since she became the leader of the party. Now we will better analyze her discourses within the framework of national security, identity security

[21] *Ibidem*.
[22] BBC News, *Marine Le Pen: Brexit 'most important event since the fall of the Berlin Wall'*, 20 October 2016.

and economic security and will also examine the securitization process with the social constructivist approach.

At the core of national security is the autonomy of the State over its borders and sovereignty. When national security themes in Marine Le Pen's discourse are examined, anti-immigration is combined with anti-EU opposition on the axis of French sovereignty. After the Charlie Hebdo attacks in 2015, she made the following statement in a speech given at the Oxford Union:

> "We must reinvent control of our borders. The dogma of free movement of people and goods is so strongly entrenched in the minds of European Union leaders that even the idea of national border control is considered a heresy. But borders are our first form of protection against jihadists. 95 percent of the world's countries have borders to protect themselves, control and decide who can enter their territory. No borders, no state, no security, no sovereignty, no independence, no freedom!"

When Marine Le Pen's anti-immigrant discourse focuses on national security themes, immigration is presented as a threat to national security. Le Pen uses factors such as low border controls and insecurity in the French public order to shape threat perceptions of the people because she wants to provide legitimacy to the crisis environment. These elements are therefore seen as a speech act in themselves, and concepts, such as terrorism that may arouse negative fear in the public, are used.

In addition to the national security theme, another reference object that stands out in Marine Le Pen's discourse is the identity security or social security. By bringing the ethnic composition, identity, culture and traditions of the French society into the political arena, she presents the immigrants as a security threat to the French society. Le Pen stated that multiculturalism can cause social fragmentation in the society and that the fragmentation will undermine the sociological characteristics of the society and harm public safety.

In a speech to the BBC in 2016, she made the following statement:

> "For many years we advocated the same principles: the independence of the nation. Principles in our Constitution: France is an indivisible Republic. We are fighting against congregationalism. We fight multiculturalism because we believe it brings multiple conflicts. We are fighting for a secular, democratic and social Republic in France that we no longer have"

Marine Le Pen wants to draw attention to national identity and French culture in her discourse, and she presents immigrants as a threat within the framework of "us" and "other" elements. By positioning republican

and democratic values around the identity of "us", she states that immigrants pose a threat to their social or identity security.

Another securitized reference object in Marine Le Pen's discourse is the economy. In this context, she acted in line with welfare chauvinism and defined immigrants as the exploiters of the welfare system. In fact, immigrants are portrayed as beneficiaries of the welfare system through the media, bringing additional financial burden to the country. Moreover, socio-economic problems of the country were thrown on the immigrant groups, and the principle of "national priority" was adopted to the benefit of French citizens. In the Presidential debate that took place on March 20, 2017, the theme of economic security is clearly raised in Marine Le Pen's discourses:

> "To say 'We can no longer welcome you' is to cut off all the pumps of immigration: government medical care, access to social housing, and more. We understand that they want to come. Sometimes they earn five or ten times more than they earn in their home country without working in France"[23]

It is clear that immigrants were presented as a threat to the welfare system and the subject of financial burden. In addition, the principle of national priority, based on the privilege of French citizens, is constructed through speech acts.

4. *The National Front: securitizing migration from theory to practice*

As underlined in the theoretical part of this article, extraordinary measures must be accepted by the public for the securitization process to be successful. In this context, it is observed that the issue of migration has moved from the non-political area to the political area, and it has been evaluated in the context of security issues. Marine Le Pen had an influence on the election campaigns of elected Presidents such as Sarkozy and Hollande. As a matter of fact, Hollande, who did not develop rhetoric about anti-immigration in his election campaign, took a more restrictive approach to immigration after Marine Le Pen's success in the first round in the election[24]. This result makes us think once again about the role of

[23] Wall Street Journal, *French Elections: Le Pen and Macron Spar in First TV Debate*, 20 March 2017.

[24] CARVALHO, *The Front National's Influence on Immigration During President Francois Hollande's Term*, in BIARD-BERNHARD-BETZ (eds.), *Do they Make a Difference? The Policy Influence of Radical Right Populist Parties in Western Europe*, Washington, DC: Rowman & Littlefield Publishers 2018, 1-21.

securitizing actor on the voting behavior and Marine Le Pen's capacity to influence French politics.

It is also necessary to underline the perceptions and feelings towards immigrants in French society. The results of a study on anti-immigration in France are that about a third of people think that: immigrants contribute to increasing crime rate; French religious beliefs and practices are undermined; immigrants tend to benefit from the country's welfare system and cause a bad effect on national economy. In addition, one in four thinks that the cultural life of France has been adversely affected by immigrants. About 22 percent of people believe that French workers lost their jobs to immigrants[25].

On the other hand, the enormous increase in the votes of Marine Le Pen, especially in 2011, shows that the policies of the National Front have been adopted. The anti-immigrant discourse and speech acts developed by Le Pen contributed to the reshaping of identity structures in France. Metaphors such as "terrorism", "invasion", "influx", "flood of migration", "mass migration" have become important concepts in the action dimension of speech acts and in shaping perceptions. Because the meaning attributed to migration is inter-subjective and considering the idea that settled immigrants constitute a significant part of the population, it can be deduced that anti-immigrant and xenophobic rhetoric is met by the public. As a matter of fact, the 53% increase in attacks against Muslims in France from 2019 to 2020 is a data that supports this response.

Another reason for anti-immigration in France is the actor-structure interaction. The supranational structure and practices of the EU in the context of migration have further increased the nationalist feelings of Marine Le Pen, and the increasing anti-EU opposition has been intertwined with the immigration problem. Moreover, the effectiveness of the National Front as an actor in France is also related to the global structure whose developments (such as the 2008 Economic Crisis, the 9/11 attacks, and the Arab Springs) offered opportunities.

On the basis of Islamophobia, immigrants were expressed as the "other" while the economic crisis of the neoliberal system was used by the populist parties: in fact, they claim to be the voice of marginalized and isolated groups from the neoliberal system and present themselves as the losers of the globalization. When all these factors are evaluated together, identities have changed and transformed with intersubjective meanings and Marine Le Pen's anti-immigrant, nationalist and conservative identity has become the determinant of her own interests. Thus, the meanings

[25] ANDREESCU, *A Multilevel Analysis of Anti-Immigrant Sentiments in France*, in 11(1) *Journal of Identity and Migration Studies* 65 (2017).

attributed to migration have undergone changes and transformations: the definition of immigrants, which was seen as a complement to the cheap labor market in the past, has been reproduced and constructed as the subjects of fear, terrorism, threat and security problems.

5. *Conclusion*

This article has made a critical analysis of the immigration policies of Marine Le Pen, the leader of the National Front party, by taking into account national, regional and global developments. As a result, the anti-immigration opposition in France has been analyzed in the axis of the basic questions of the Copenhagen School, which is one of the most important theoretical extensions of social constructivism. In fact, the article examined how the phenomenon of immigration in France was constructed as a threat to reference objects such as identity, culture, economy and sovereignty, starting from the question of "security of what and whose". In this context, French identities and belongings, French sovereignty and borders, and French economy have been moved to the political arena by the speech acts of Marine Le Pen, and the securitization process has begun to include the mentioned reference objects.

Migration, which should be regarded as a "crisis of responsibility-sharing and burden-sharing" at international and global level, has been identified with concepts such as "mass arrival", "flood of migration", "influx of immigration", "migration problem", "terrorism", "invasion". In order to take urgent measures against immigration, an attempt has been made to establish a legitimate ground in the perceptions of public opinion. As a result, public opinion polls pointed to an increase in anti-immigrant sentiment, and Marine Le Pen's voting capacity tended to increase. These are some of the data pointing to the legitimacy of the urgent measures taken or to be taken for immigration in France. As a consequence, the securitization process of the politicized migration phenomenon gained momentum and the social, political and economic distinction between "us" and the "others" gained depth.

SECTION IV

REGIONAL CHALLENGES TO SECURITY

THE EFFICACY OF INTERNATIONAL ACTORS ON THE ABOLITION OF THE DEATH PENALTY IN SOUTH AFRICA AND BOTSWANA

Damla Kızılkoca & Zühal Ünalp Çepel

ABSTRACT: As the death penalty poses a serious threat to human security, the regional actors such as EU in addition to civil society organizations like Amnesty International, have been campaigning on its abolition. This article focuses on the reasons why anti-death penalty campaigns have different outcomes in South Africa and Botswana. The article argues that different characteristics of democratic institutions affect the capabilities of regional actors, improvement of civil society and anti-death penalty campaigns.

KEYWORDS: Abolition of death penalty; EU; Amnesty International; South Africa; Botswana.

CONTENTS: 1. *Introduction*. – 2. *A review of the literature and the theoretical framework on the abolition of the death penalty*. – 3. *International actors on the abolition of the death penalty in South Africa and Botswana: the European Union*. – 3.1. *International actors on the abolition of the death penalty in South Africa and Botswana: Amnesty International*. – 4. *Findings and conclusions*.

1. *Introduction*

The phenomenon of abolishing the death penalty dates back to the aftermath of the Second World War when the United Nations was formed and eight States decided to abandon using the death penalty as a means of punishing criminals. From then on, there has been an increase in the number of abolitionist countries at a slower pace. In late-1970s, however, the number of abolitionist countries started to increase dramatically. Since then, in fact, the number of abolitionist countries increased from 16 to 144, which makes two-thirds of the world free from death penalty. However, there are still 55 retentionist States where the death penalty is

used as a legal punishment[1]. Therefore, questioning the reasons why some countries resist this growing global trend towards the abolition of the death penalty has gained prominence.

This article, however, focuses on the differentiated approaches of democracies towards the use of the death penalty. Although democratic countries are expected to be abolitionists because of the nature of democracy in terms of respecting human rights, there are several democracies that continue to use the death penalty.

In order to understand why some democracies are abolitionist and some are not, one critical factor will be analyzed, which is the efficacy of international actors. Although there can be other factors affecting attitudes of States on the use of the death penalty such as the international community, public opinion, culture and so on, international actors have been pioneered for the protection and promotion of human rights. Indeed, the dramatic increase in the number of abolitionist countries and the start of Amnesty International's campaign against the death penalty occurred in the same period. Specifically, the influence of NGOs towards the abolition of the death penalty will be analyzed, but the involvement of regional actors such as the EU will also be taken into consideration. As the death penalty poses a serious threat to human security by breaching one of the most fundamental human rights, that is the right to life, NGOs and regional actors have been actively working towards its abolishment. In particular, Amnesty International has been fighting against the death penalty since the 1970s through publishing annual reports, name and shame campaigns, country-specific campaigns, etc. Although Amnesty International's anti-death penalty campaigns succeed in influencing policymakers to abolish or, at least, declare a moratorium on the death penalty, as they created pressure on States, some of them have not been influenced.

This article aims to answer the question of why the campaigns of international actors against the death penalty have different results in South Africa and Botswana. To do so, a qualitative research method is used to understand the reasons behind this difference. A comparative case study is applied by comparing the cases of South Africa and Botswana, where the anti-death penalty campaigns showed different results. Cases are selected based upon the most similar cases method as these two neighboring States share historical and political similarities but differ in their approaches towards the use of the death penalty.

The main argument of this article is as follows: differentiated democratic institutional backgrounds, historical processes and the structure of

[1] Amnesty International, *Amnesty International Global Report Death Sentences and Executions*, April 2021, at https://www.amnesty.org/en/documents/act50/3760/2021/en/.

civil society have influenced campaigns against the death penalty with different results in South Africa and Botswana.

2. *A review of the literature and the theoretical framework on the abolition of the death penalty*

In the literature, the abolition of the death penalty has been generally associated with the concepts of democracy and democratization[2]. As democracies tend to respect human rights compared to autocratic regimes, it is expected of democracies to become abolitionists. In addition, when a non-democratic country transits to democracy, there are usually new regulations to protect and improve human rights. As scholars argued, democratization is a process that increases the likelihood of the abolition of the death penalty[3].

However, not all democracies are abolitionist. Thus, some scholars came up with an argument that certain types of democracies are more likely to abolish the death penalty. Furthermore, they specified that democracies with proportional representation systems are more prone to become abolitionist compared to democracies with first-past-the-post systemsbecause the former create a more deliberative environment in which opposition parties and NGOs can act freely, whereas the latter mostly create a more plebiscitarian environment[4]. Thus, in democracies with a first-past-the-post system, it is usually the ruling party that shapes the political agenda, so that the abolition of the death penalty cannot be discussed if it is not on the party's agenda.

Aside from the discussion on the abolition of the death penalty in the perspective of democracy, the effect of NGOs on the abolition or retention of the death penalty has not received sufficient attention. However, there have been still important studies that focus on the role of NGOs in influencing the decisions of policy-makers on the use of the death penalty. For example, scholars found out that there has been a positive correlation between NGOs and the abolition of the death penalty as they have framed the issue as the most serious threat to human security to the global

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[2] NEUMAYER, *Death Penalty: The Political Foundations of the Global Trend Towards Abolition*, in 9(2) *Hum. Rights Rev.* 241 (2008); MCGANN-SANDHOLTZ, *Patterns of Death Penalty Abolition, 1960–2005: Domestic and International factors*, in 56(2) *ISQ* 275 (2012); SUH, *Democracy and the making of contentious policy: The role of democracy in the abolition of the death penalty, 1950–2010*, in 56(5) *International Journal of Comparative Sociology* 314 (2015).

[3] MCGANN-SANDHOLTZ, *supra* footnote 2.

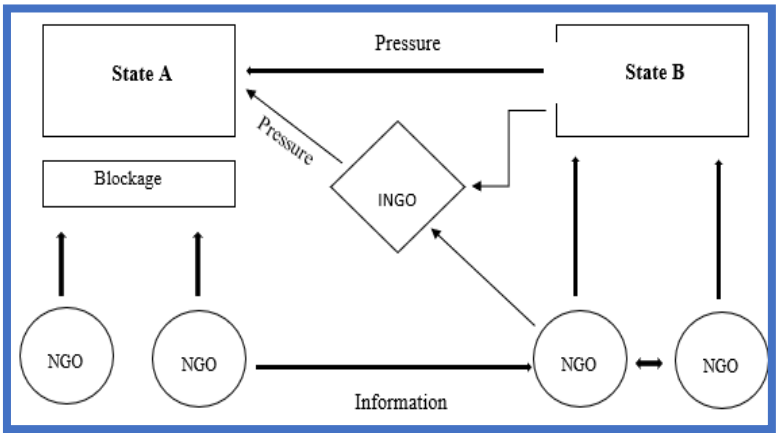
[4] *Ibidem*.

audience[5]. Furthermore, it has been highlighted the effectiveness of anti-death penalty campaigns by human rights NGOs as they created pressure on retentionist States.

Even though there have been some studies related to the influence of NGOs on the abolition of the death penalty, generally the literature is weak due to the small number of studies. Therefore, this article aims to contribute to the literature by examining the efficacy of the international actors in the abolition of the death penalty through comparing the cases of South Africa and Botswana. As the effect of international actors on the different approaches of South Africa and Botswana regarding the use of the death penalty has never been studied before, this article will be the first example that aims to fill this gap in the literature.

The 'boomerang pattern model' through which scholars explained the global human rights activism, is used as a theoretical framework to explain the engagement of international actors in terms of affecting South Africa's and Botswana's approach towards the abolition of the death penalty. The model is useful to explain the interaction between global and local NGOs to cooperate against a human rights violating State[6].

Figure 1: Boomerang Pattern Model



As shown by Figure 1, State A (a human rights violator State) blocks local NGOs so that they cannot fight against it. Therefore, local NGOs reach out to like-minded NGOs in another State (State B) to create

[5] KIM, *International non-governmental organizations and the abolition of the death penalty*, in 22(3) *EJIR* 596 (2016).
[6] KECK-SIKKINK, *Activists beyond borders*, Ithaca: Cornell University Press 1998, 13.

pressure on the State A that would make the policymakers change their attitudes. As the NGOs in State B share the information with State authorities and international NGOs (INGO), the issue will be shared with the global audience. Thus, cooperation between local and international NGOs through exchanging information would stop the abusive actions of the violator State.

In this article, the boomerang pattern model is used in order to explain the cooperation between Amnesty International and local advocacy groups in South Africa and Botswana in terms of abolishing the death penalty. Scholars who have developed the 'boomerang pattern model' explained the transnational advocacy networks through four tactics: information, symbolic, leverage and accountability[7]. It can be seen that Amnesty International has also used these tactics in its fight against the death penalty. Through these tactics, Amnesty International gathers credible and usable information from local NGOs and uses it in its reports, name and shame campaigns, social media accounts; shares the stories of people sentenced to death by using symbols; uses its leverage to keep States accountable to their commitments. Anti-death penalty campaigns of Amnesty International have influenced policymakers in several States, but for some of them, it could not bring a change. As anticipated, the involvement of Amnesty International in the abolition of the death penalty process in South Africa has been successful, whereas it has not been effective in Botswana.

3. *International actors on the abolition of the death penalty in South Africa and Botswana: the European Union*

With the aim of analyzing the efficacy of international actors in the abolition of the death penalty, it will be first discussed the EU's influence on the approaches of South Africa and Botswana towards the use of the death penalty. Secondly, it will be analyzed the lobbying activities of Amnesty International in South Africa and Botswana through the anti-death penalty campaigns.

The EU has a considerable impact over African States in several fields such as development, migration and human rights promotion. The European impact over Africa goes back to the colonial period when many European States oppressed the development process of African States because of the exploitation of human beings and raw materials[8]. The EU has

[7] *Ibidem*.
[8] OKERERE-KISESI, *The Death Penalty Isn't Africa. It's a Legacy of Colonialism*, in *Foreign Policy*, 11 November 2021.

given a special priority to human security in Africa. From the EU's point of view, the human security concept deals with prevention of gunfights, promotion of economic development and human empowerment[9].

Therefore, the EU aims to prevent conflicts and prioritizes the development of Africa at local level[10]. Yet, to promote human security it is necessary to cope with humanitarian crises, support economic development and promote peace and security as well as strong participation of civil society to decision-making mechanisms[11].

To promote African development, in 1997 the European Commission published a "Green Paper on Relations between the EU and the African, Caribbean and Pacific countries" with stressing on the "end of colonialism and post-colonialism". The EU announced that Europeans would start to construct a new relationship with African countries. In 2000 the Cotonou Agreement was accordingly signed between the EU and the ACP countries to promote peace and stability, transition and consolidation of democracy. The EU supported the argument that if democratic culture had been promoted, then any migration influx would be unnecessary. Since then the EU has been providing financial aids to African countries for development and fight against poverty[12]. The EU also cooperates with the AU on problematic issues such as migration, poverty, and under-development. The parties have agreed to create and implement a *2050 Africa Integrated Maritime Strategy* in addition to international and regional cooperation efforts[13].

As anticipated, the EU's efforts are centered upon development aids: the EU provided 141 billion euro between 2007 and 2013 and Africa has been the region where the EU directed the highest amount of development aid[14]. However, the development-centered relationship is currently aimed to be transformed into a "continent-continent relationship" between the EU and Africa. In the background of the necessity to transform this relationship, negative perceptions of African peoples in European States, which were originated in the era of colonialism, have had a great role.

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[9] *A Human Security Doctrine for Europe. The Barcelona Report of the Study Group on Europe's Security Capabilities*, presented to EU High Representative for Common Foreign and Security Policy, Barcelona, 15 September 2004.

[10] DE WAAL-IBRECK, *A Human Security Strategy for the European Union in the Horn of Africa*, London: Security in Transition 2016, SiT/WP/07/16, 3.

[11] *Ibidem*, 5; KALDOR-MARTIN-SELCHOW, *Human security: a new strategic narrative for Europe*, in 83(2) *International Affairs* 273 (2007).

[12] *Ibidem*.

[13] ARSLAN, *21. Yüzyılda Afrika-Avrupa Birliği İlişkileri: İki Birlik Tek Vizyon*, in 23(1) *MJES* 116 (2015).

[14] Council of the EU, *The South Africa-European Union Strategic Partnership Joint Action Plan*, Brussels, 15 May 2007, 9650/07 (Presse 105).

The EU has acted as a soft power in the African region through the development projects, trade relations and democracy promotion efforts. On the other hand, the EU does not want to leave the opportunities in the African region such as underground sources, mines and raw materials[15].

In respect to the comparative case study of this article, the scope of EU-South Africa and EU-Botswana relations has a special meaning. EU-South Africa relations have had a special dimension since the parties have named each other as strategic partners. Relations have been promoted with democratic transition in South Africa in 1994. The strategic partners have common standpoints on under-development, fight against racism and xenophobia, equal distribution of opportunities. Moreover, the parties have adopted concepts such as equality, freedom, democracy, human rights, good governance, tolerance and the rule of law as their common values. Both parties have then supported multilateralism, UN policies, regional cooperation, and market economy[16].

With regard to Botswana, instead, it has not been constructed a close partnership with the EU notwithstanding the EU has tried to influence and persuade Bostwana to abolish the death penalty. In the 2020 Human Rights Report, the EU stated that there were three areas in Botswana which had been monitored: death penalty, LGBTI rights, gender equality. The parties started a political dialogue in February 2020 and the EU has funded projects in Botswana under the European Instrument for Democracy and Human Rights[17]. However, these initiatives regarding the abolition of the death penalty did not have results to date.

The EU aims to abolish death penalty and prioritize human security in the African continent. However, African experts argue that death penalty has been a European heritage from the colonial years until recently. European colonizers such as the United Kingdom, France, Belgium and Germany used death penalty as instruments to shape African politics during centuries. In South Africa, between 1961 and 1989, approximately 134 political prisoners were sentenced to death penalty by the apartheid regime: today, death penalty is forbidden[18]. Yet, several African States, including Botswana, did not abandon this method of punishment. Even though there are development aids and democracy promotion policies, death penalty has not been regarded as a "homegrown phenomenon": for this reason, the EU has to construct a new understanding in the region to end the death penalty practices.

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[15] OKERERE-KISESI, *supra* footnote 8; ARSLAN, *supra* footnote 13, 130-131.
[16] Council of the EU, *supra* foonote 14.
[17] Weekend Post, *Botswana, EU clash over human rights issues*, 13 October 2021.
[18] OKERERE-KISESI, *supra* footnote 8.

3.1. *International actors on the abolition of the death penalty in South Africa and Botswana: Amnesty International*

Amnesty International is one of the leading international NGOs struggling for protection and promotion of human rights around the world. Accordingly, it is actively fighting against the death penalty and opposes the use of the death penalty in any circumstance without any exception, as it is considered the "ultimate cruel and barbaric punishment"[19]. Accordingly, Amnesty International claims that the nature of the crime, the accused person and the method of execution do not matter as the death penalty is never acceptable and for this reason it has been fighting for a death penalty-free world since the late-1970s.

Amnesty has devoted itself to pressuring retentionist States to abolish or declare a moratorium on the death penalty through its campaigns, annual reports, name and shame campaigns, social media accounts, and so on. Amnesty advocates for national, regional, and international abolitionist efforts and collaborates with local NGOs, INGOs, and international organizations. When in 2007 the UN General Assembly adopted the resolution 62/149 on the death penalty moratorium, Amnesty was considered as the main NGO that had an impact at UN level. Thus, Amnesty International is an important partner to collaborate with to pressure retentionist States to change their attitudes towards the use of the death penalty. One of the most successful case was that of a Yemeni who was saved twice from the execution due to Amnesty's campaign. However, anti-death penalty campaigns do not always end with successful results. As the cases of South Africa and Botswana differ in terms of the efficacy of Amnesty's anti-death penalty campaigns, reasons behind this difference will be analyzed.

In order to pressure the governments of South Africa and Botswana to abolish the death penalty, Amnesty International published several annual reports in which it discussed the issue and shared relevant data. Also, Amnesty published reports on specific cases in which it encouraged people all around the world to send letters to the authoritative bodies in these two countries. In addition, Amnesty cooperated with local NGOs and advocacy groups by exchanging information to spread the issue at global level. Thus, the cooperation between local and international NGOs creates pressure on the retentionist States to change their attitudes towards the use of the death penalty.

According to the 'boomerang pattern model', Amnesty International gathers relevant information from local NGOs and uses this information

[19] Amnesty International, *Death Penalty*, 1 June 2021.

in its reports, name and shame campaigns and social media accounts with the aim of creating international pressure on retentionist States by spreading the issue to the global audience. For instance, in South Africa, Amnesty cooperated with local NGOs such as "Lawyers for Human Rights" while in Botswana it cooperated with the local NGO "Ditshwanelo".

Between 1991 and 1993, South Africa was the object of several annual and specific Amnesty reports regarding the use of the death penalty[20]. Furthermore, Amnesty encouraged and mobilized people around the world to send telegrams, faxes and letters to the President of South Africa to take action for abolishing the death penalty. In other words, Amnesty acted as a guide for the South African government on its way to becoming an abolitionist State.

In the case of Botswana, Amnesty has been pressuring the government to abolish or at least declare a moratorium on the death penalty through its name and shame campaigns. Similar to its anti-death penalty strategy towards South Africa, Amnesty gathers information from the local NGO "Ditshwanelo" and shares the stories of those sentenced to death with the global audience. Furthermore, the government of Botswana has been advised by Amnesty International to improve its judicial system so that those sentenced to death do not suffer from prolonged and unfair trials, which increase the level of human rights violations[21].

Despite Amnesty made similar efforts to persuade the governments of South Africa and Botswana to abolish the death penalty, the results have been completely different to date. While Amnesty's efforts ended up being successful in South Africa, which abolished the death penalty following its democratization, Botswana continues to use the death penalty as a legal punishment today.

4. *Findings and conclusions*

After the comparison of South Africa and Botswana regarding the efficacy of international actors on the abolition of the death penalty, the following findings may be drawn. Despite the genuine link between democracy and the abolition of the death penalty, Botswana shows that not all democracies are abolitionists. Therefore, democratic institutions and the structure of civil society in South Africa and Botswana are effective

[20] WARREN, *Out of the Dark: Civil Society in the Campaign to Abolish the Death Penalty*, 3 September 2020, available at https://www.e-ir.info/2020/09/03/out-of-the-dark-civil-society-in-the-campaign-to-abolish-the-death-penalty/.

[21] Amnesty International, *Botswana: Executions of two people show contempt for right to life under President Masisi's government*, February 9, 2021.

factors regarding the ability of international actors to influence the attitudes of policy-makers towards the death penalty.

On the one hand, South Africa with a proportional representative system provides a more deliberative environment for opposition parties and civil society actors to engage in politics. On the other hand, Botswana is more of a plebiscitarian democracy due to its first-past-the-post system that gives the whole authority to the ruling party. Therefore, the civil society is considerably weak in Botswana compared to South Africa and opposition parties have no role in shaping the political agenda of the government. So, it is up to the ruling party to abolish or even discussing about the abolition of the death penalty but, to date, this issue has never been on the agenda of the ruling party. The NGOs were able to pursue their advocacy for the abolition of the death penalty in South Africa in a more flexible and freer environment than in Botswana. Democratic institutions in South Africa enabled civil society to become stronger compared to Botswana so that they could engage in human rights issues.

This article aimed to analyze the efficacy of international actors on the abolition of the death penalty through examining the reasons behind different results of anti-death penalty campaigns in South Africa and Botswana. Although there can be several factors that affect a country's decision to abolish or retain the death penalty, such as the international community, culture, public opinion and so on, this article specifically focused on the impact of NGOs.

Despite being referred as the most successful democracies in the sub-Saharan African region, South Africa and Botswana's approaches towards the use of the death penalty are completeley different. Only one year after its democratization, South Africa abolished the death penalty in 1995. However, Botswana continues to use death penalty despite being the oldest democracy in the region (it completed its transition to democracy in the 1960s). Indeed, Botswana is the only sub-Saharan African country that still retains the death penalty and, therefore, general expectation of democracies to become abolitionist is not valid for Botswana. As all democracies are not the same, their attitudes towards the death penalty or human rights in general are not the same as well. Accordingly, this article argues that the structure of democracies affects the impact of anti-death penalty campaigning by NGOs.

As South Africa adopted a proportional representation system it has a more deliberative democracy that allowed opposition parties to engage in politics and agenda setting. However, Botswana adopted a first-past-the-post system in which all power is given to the ruling party. These different democratic structures created a freer environment for opposition groups and NGOs to take action for the development in human rights and,

therefore, the anti-death penalty campaigns of international actors are more effective in South Africa than in Botswana.

In conclusion, the interactive relationship between South Africa and actors such as the EU, Amnesty International, local NGOs and advocacy groups contributed to the decision to abolish the death penalty. Instead, Botswana has had limited communication with the EU and Amnesty International as it has suffered from a weak civil society due to its democratic structure. However, both international and local NGOs continue to press the government of Botswana to abolish or at least declare a moratorium on the death penalty. Therefore, Botswana might become an abolitionist country in the future and make the sub-Saharan African region death penalty-free.

MULTIPLE DIMENSIONS OF SECURITY: IMPACT ANALYSIS OF COLTAN AND COBALT MINING INDUSTRY IN THE DEMOCRATIC REPUBLIC OF CONGO THROUGH THE LENS OF THE JUST ECOLOGICAL TRANSITION

Federico Maria Jelo di Lentini

ABSTRACT: This article investigates the dynamics through which coltan and cobalt mining in the DRC compromises security in its different facets. After illustrating the reality of the coltan and cobalt mining industry in South Kivu and Eastern Katanga, the article intends describing the role that this industry has in the real economy of the semiconductor and electric vehicle markets. Mining activities in the East and South-East of DRC affects the concept of security declined in three different dimensions: *a*) human security of workers, employed in inhuman and degrading conditions often characterized by forms of child labor; *b*) environmental security of the polluted places where such activity is carried out; *c*) international security because mining activities produce large-scale social consequences which contribute to the destabilization of the Great Lakes region and to the increase of migration movements. Before tackling the analysis of possible considerations to solve the complex problems discussed, the article will proceed to analyze the case study examined through the conceptual lens of Just Ecological Transition. The analysis shall lead to criticize the green-washing logic that pushes the ecological transition in the direction of strengthening that form of green energy that necessarily requires a massive supply of coltan and cobalt, neglecting the local social and environmental costs that such extraction requires.

KEYWORDS: security; DRC; just transition; coltan mining; cobalt mining.

CONTENTS: 1. *General information about the Democratic Republic of Congo*. – 2. *Coltan ore: description, mining locations, market*. – 3. *Cobalt ore: description, mining locations, market*. – 4. *Three dimensions of security affected by coltan and cobalt mining industry in the DRC: human security*. – 4.1. *Environmental security*. – 4.2. *International security*. – 5. *Impact analysis of coltan and cobalt mining industry in the DRC through the lens of the Just Ecological Transition*. – 6. *Four actions to fight against the illegal exploitation of coltan and cobalt ores*.

1. *General information about the Democratic Republic of Congo*

With a land area of more than 23 million square kilometers, the Democratic Republic of Congo (hereinafter: DRC) is the second largest country in Africa, situated on the Equator and bordering nine other States. It has 37 km of Atlantic coast at the mouth of the Congo River and a geographic size roughly equivalent to that of mainland Western Europe. The DRC has massive mineral and natural resource wealth with the Congo Basin supporting the richest species diversity in tropical Africa.

In 2020 the DRC was the 16th most populous country in the world, with more than 89.5 million people, divided into over 100 different ethnic groups and it was ranked 175th on the Human Development index (score: 0.480), made by the United Nations Development Programme (UNDP). The score is unfortunately sinking lower every year because the DRC lacks many of the basic services found in developed countries: only 26% of population has access to clean drinking water; only 18% of population has completed the secondary level school; only 6% of population has access to electricity.

The DRC has one of the highest infant/child and maternal mortality rates, one of the highest rates of malaria, and one of the highest rates of HIV/AIDS, with about 10% of the sexually active population impacted[1]. The annual average income is 110 dollars with 63% of Congolese citizens living below the national poverty line (less than 1 dollar per day). The DRC also appears to be lacking in the transparency of its institutions: in 2021 it was ranked 169/180 (scoring 19/100) on the Corruption Perception Index[2].

Despite this, the Congo Basin supports the richest species diversity in tropical Africa and the DRC has massive mineral and natural resource wealth.

2. *Coltan ore: description, mining locations, market*

Coltan is a short term for "columbite-tantalite", a black mineral vastly found in the East of DRC. Once the properties of coltan are refined, they are employed in a vast amount of electronic devices (coltan mineral refined, for example, is used to make heat-resistant capacitors). Coltan is

[1] SOVACOOL, *The precarious political economy of cobalt: Balancing prosperity, poverty, and brutality in artisanal and industrial mining in the Democratic Republic of the Congo*, in 6(3) *The Extractive Industries and Society* 915 (2019).

[2] Transparency International, *Corruption Perception Index Report 2021*, available at https://www.transparency.org/en/cpi/2021/index/cod.

used to make the hi-tech devices' processors and it is also an ingredient in making lenses with high refractive index such as LCD screens. Most of the modern electric devices made of coltan are essential in contemporary society (laptops, computers, mobile phones, cameras, x-ray films, and others) and, therefore, coltan is a fundamental mineral for hi-tech industry[3].

The amount of coltan exploited in the DRC has changed: the organization "Friends of the Congo" assures that the DRC possesses 64% of the worlds' coltan reserve, but things have changed since the last twenty years[4]. At the end of the 20th century Australia was the largest coltan producer in the world, closely followed by Canada and Brazil[5]. In 2006 these three countries had an 80% share of total coltan produced, but their production went downhill following environmental regulations and, further, the global coltan market has changed. In 2019, 40% of the global coltan supply was produced in the DRC, mined in Kivu region (North and South Kivu) and the global coltan market was valued at 1,504.81 million of dollars[6]. It is expected to reach 1,933.92 million of dollars by the end of 2026, growing at a rate of 5.58% a year between 2021 and 2026. About 95.000 tons of cobalt were produced in the DRC in 2020, compared to 6.300 tons in Russia, the next largest producer.

In 2021, the DRC's coltan production amounted to an estimated 700 tonnes, making the country the world's largest coltan producer by far[7]. More was sneaked into Rwanda and exported from there[8] and more than 90% of the DRC's cobalt exports in recent years has gone to China[9]. Between 2007 and 2017 Chinese companies invested 7.5 billion of dollars in the DRC (almost 4 billion in the mining sector)[10]. Usually, with this type of investment contracts, foreign investors commit to building

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[3] OJEWALE, *Child miners: the dark side of the DRC's coltan wealth*, 18 October 2021, at https://issafrica.org/iss-today/child-miners-the-dark-side-of-the-drcs-coltan-wealth.

[4] TAKA, *Coltan mining and conflict in the eastern Democratic Republic of Congo*, in MCINTOSH-HUNTER (eds.), *New Perspectives on Human Security*, Abingdon-on-Thames: Taylor & Francis 2010, 159-173.

[5] HAYES-BURGE, *Coltan Mining in the Democratic Republic of Congo: How tantalum-using industries can commit to the reconstruction of the DRC*, Cambridge: Fauna & Flora International 2003.

[6] The Conversation, *What coltan mining in the DRC costs people and the environment*, 29 May 2022.

[7] TAKA, *supra* footnote 4.

[8] The Economist, *Why it's hard for Congo's coltan miners to abide by the law*, 21.01.2021.

[9] The Globe and Mail, *China wants to dominate the global electric vehicle market – and it's using Congolese minerals to do it,* 1 November 2021.

[10] Reuters, *Congo's $6 bln China mining deal 'unconscionable', says draft report*, 8 October 2021.

infrastructures on site: however, contracts on mining investments are often highly opaque, so it is difficult to track whether promised infrastructure investments actually pan out. How much of the money flowing to the mining sector actually makes it down to the Congolese public remains a key question because the corruption, related to lack of transparency in these investments' contracts, is a big issue in the DRC.

3. *Cobalt ore: description, mining locations, market*

Cobalt is an essential element for cathodes of lithium-ion batteries required by electric battery vehicles, because it delivers unparalleled power, performance, and safety and it also prevents batteries from overheating and exploding. Digital and electronic devices in modern society caused the growth of the cobalt demand. Indeed at the end of 2017, almost half of the world population have access to high-speed internet; the world counts 7.7 billion mobile cellular subscriptions; 48% of all global households have a computer and the value of global electronic commerce surpassed 22 trillion of dollars[11]. Phones and computers as well as other technologies such as electric vehicles, wind turbines, automobiles, lighting, solar panels, and even fuel cells and nuclear reactors, all depend on a "mineral foundation" of raw materials such as cobalt[12]. Indeed, ERG estimates that due to the Paris Agreement, a 50-fold increase in electric vehicle adoption needs to occur between 2016 and 2030, reaching 100 million electric vehicles by 2030[13]. Accordingly, the cobalt demand in electric vehicle batteries is expected to grow by 500% by 2025, when the battery market is expected to be worth 100 billion of dollars[14].

For these reasons, scholars have stated in 2019 that "cobalt is the modern-day 'oil' of a low-carbon economy"[15]. In fact, global cobalt demand jumped from 65.000 tons in 2010 to more than 90.000 tons per year in 2015. The DRC was the largest producer, responsible for roughly 60% of global supply, with no other country producing more than 6%[16]. More than 50% of the world's cobalt goes directly into batteries for phones,

[11] BALDÉ *et al*., *The Global E-waste Monitor 2017. Quantities, Flows, and Resources*, UNU, ITU & ISWA, Bonn/Geneva/Vienna, 2017.
[12] BAZILIAN, *The mineral foundation of the energy transition*, in 5(1) *The Extractive Industries and Society* 93 (2018).
[13] ERG, *ERG's Clean Cobalt Framework Report*, 2018.
[14] SOVACOOL, *supra* footnote 1.
[15] LINDBERG-ANDERSSON, *Blood Batteries*, https://special.aftonbladet.se/blodsbatterier/.
[16] AL BARAZI *et al*., *Cobalt from the DR Congo – Potential, risks and significance for the global cobalt market*, Commodity Top News, Hannover: Bundesanstalt fuer Geowissenschaften 2017.

computers, and electric vehicles, leading analysts to declare it the "hottest commodity" of 2017[17]. Industry experts expect to see in 2020 the demand reaching 120.000 tons of cobalt production per year. In February 2018 cobalt prices were more than 150% higher than the previous year[18]. It is similarly expected that cobalt demand will jump from 144.000 tons in 2023 to 218.400 tons by 2028[19].

Consumption of critical minerals and metals such as cobalt has expanded dramatically in response to decarbonization efforts and the growing prevalence of digital technologies and electric battery vehicles[20]. Over the course of the last decade alone, global demand for cobalt has tripled, and is set to double again by 2035. The 51% of global cobalt reserves are in the DRC (about 3.6 million tons according to the US Geological Survey) and the 20% of cobalt exported from the DRC comes from artisanal miners in the southern part of the country, the Katanga[21].

There are approximately 110.000/150.000 artisanal miners in this region according to a report of Amnesty International published in 2016. The global increase in demand of cobalt has led to a boom in artisanal mining of cobalt in Katanga. More than 90% of the DRC's cobalt export is destined for smelters and refiners located in China, where it gets turned into a variety of chemical products used in the manufacture of rechargeable batteries. China is the world's largest electric vehicles market with more than 1.1 million vehicles sold in the first half of 2021. Since 2015, when the government launched its "Made In China 2025" initiative and called the country to become a dominant force in the global industry of electric vehicles (EV), around 19.4 billion of dollars has been invested in EV manufacturers and related companies[22].

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[17] BANZA LUBABA NKULU *et al*., *Sustainability of artisanal mining of cobalt in DR Congo*, in 1(9) *Nat. Sustain.* 495 (2018).

[18] Washington Post, *Demand for Congo's cobalt is on the rise. So is the scrutiny of mining practices*, 21 February 2019.

[19] MOORES, *A Global Battery Revolution: How EVs & Utilities Can Shape a New Era in Critical Minerals & Metals Demand*, London: Benchmark Mineral Intelligence 2018.

[20] CALVÃO-MCDONALD-BOLAY, *Cobalt mining and the corporate outsourcing of responsibility in the Democratic Republic of Congo*, in 8(4) The Extractive Industries and Society 1 (2021).

[21] The Faraday Institution, *Lithium, Cobalt and Nickel: The Gold Rush of the 21st Century*, Faraday Insights – Issues 6 (December 2020).

[22] Amnesty International, *Democratic Republic of the Congo: Time to recharge: Corporate action and inaction to tackle abuses in the cobalt supply chain*, 15 November 2017, ADR 62/7395/2017.

4. *Three dimensions of security affected by coltan and cobalt mining industry in the DRC: human security*

In this article "security" is defined as the absence of threats. It can be an absolute condition (threats exist or not) or, as it is more usual, a relative condition (there are varying degrees of security). It is important to analyze how the mining activity in the East and Southeast of the DRC affects security declined in three different dimensions: human security, environmental security (see § 4.1), and international security (see § 4.2).

As regards human security, it is a wide people-centered concept, assessing how people live in a society and how freely they exercise their many choices. It has two main aspects, related to: *a*) safety from chronic threats (hunger, diseases, etc.); *b*) protection from sudden and harmful disruptions in the patterns of daily life at work, at home or in the community[23].

Artisanal mining became a common source of livelihood when the largest State-owned mining company collapsed in the 1990s. Working in artisanal mines is dangerous because minerals are extracted through a fairly primitive process:

> "Artisanal miners work in mines which they dig themselves. Hand-dug mines can extend for tens of metres underground, often without any support to hold them up, and are poorly ventilated. There is no official data available on the number of fatalities that occur, but miners said accidents are common, as unsupported tunnels collapse frequently"[24].

The 2002 DRC Mining Code and 2003 Regulations provides no guidance on safety equipment or how to handle substances which may be dangerous to human health and researchers have found that

> "the vast majority of miners, who spend long hours every day working with cobalt, do not have the most basic of protective equipment, such as gloves, work clothes or facemasks […] Chronic exposure to dust containing cobalt can result in a potentially fatal lung disease, called 'hard metal lung disease'"[25].

In the mining areas, social problems of drinking, drugs, crime, prostitution, sexual abuse, HIV/AIDS and other sexually transmitted diseases

[23] UNDP, *Human Development Report 1994. New Dimensions of Human Security*, New York: Oxford University Press 1994.
[24] Amnesty International, *This is what we die for. Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt*, 2016, AFR 62/3183/2016, at 6.
[25] *Ibidem*, 5.

have increased. People involved in artisanal cobalt mining are exposed to a number of different health risks. Exposure to high levels of cobalt can have short and long-term negative health effects, while "inhalation of cobalt particles can also cause 'respiratory sensitization, asthma, shortness of breath, and decreased pulmonary function', and sustained skin contact with cobalt can lead to dermatitis"[26].

The same kind of health risks are associated with coltan mining labor:

> "Over thousands artisanal workers are exposed to coltan in the mines. However, very little is known about its human toxicity. Some researchers have described the radioactive risk suffered by the inhabitants of villages near Goma, in North Kivu, who are daily exposed to coltan extracted in artisanal mines nearby"[27].

A research conducted in one informal coltan mine in the rural district of Malemba-Nkulu (Kivu) showed concentrations of PM2.5 (Particulate Matter) in miners lungs that were 7-8 times higher than the limit recommended by the WHO[28]. PM2.5 are inhalable particles that penetrate deeply into the lungs and cause irritation of the alveoli, decrease in lungs functions andincreased prevalence of respiratory complaints[29].

One of the hottest spots of informal mining in the DRC is Kasulo, a residential neighborhood of Kolwezi (Katanga). In 2014, residents discovered that a rich seam of different minerals runs under their homes. Soon the mayor of Kolwezi outlawed mining in Kasulo as it is not an officially designated artisanal mining zone. Yet, since the discovery, residents and thousands of miners who joined from the neighborhoods have dug hundreds of mines. Today, Kasulo is a densely populated area, with mining happening alongside and often inside people's homes. In some places tunnels are extremely narrow and not held up by supports so that miners have to crawl. Miners do not have gloves, boots, helmets, or face masks to prevent them from breathing cobalt dust[30].

One of the worst ways in which informal mining activities impact human security involves child labor. Under Article 3 of the 1967 DRC Labor Code, the employment of children under the age of 14 is prohibited

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[26] *Ibidem*, 5.

[27] MUSTAPHA-MBUZUKONGIRA-MANGALA, *Occupational radiation exposures of artisans mining columbite-tantalite in the eastern Democratic Republic of Congo*, in 27(2) *J. Radiol. Prot.* 187 (2007).

[28] DE MARIE KATOTO, *Environmental threats and respiratory health*, PhD thesis (2022), CEGEMI: Centre d'Expertise en Gestion Minière.

[29] LEON-KABAMBA *et al*., *Respiratory health of dust-exposed Congolese coltan miners*, in 91(7) *Int. Arch. Occup. Environ. Health* 859 (2018).

[30] Amnesty International, *supra* footnote 24.

while children aged between 14 and 16 can only perform light work. Further, Article 108 states that no child aged between 14 and 16 can be employed for a period exceeding four hours a day, and no child between 16 and 18 may work more than eight hours a day.

The DRC is a State Party to the 1999 ILO Worst Forms of Child Labour Convention which requires State parties to "take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency" (Article 1). The term "child" applies to all persons under the age of 18 (Article 2) and "the worst forms of child labour" comprise, *inter alia*, the "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children" (Article 3, *d*)[31].

ILO Recommendation No. 190, whose provisions supplement those of the Convention, in determining the types of work referred to under Article 3 (*d*), gives particular consideration, *inter alia*, to "work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperature, noise levels, or vibrations damaging to their health"[32]. The ILO also noted that "evidence from research studies demonstrates that mining is by far the most hazardous sector for children with respect to fatal injuries, the strenuous work, the unstable underground structures, the heavy tools and equipment, the exposure to toxic or chemical dusts"[33].

In 2014 UNICEF estimated that approximately 40.000 boys and girls were working in mines across DRC, many of them involved in cobalt and coltan mining. Amnesty International and Afrewatch conducted researches in artisanal mining areas in southern DRC in April-May 2015, visiting five mine sites, and found out that almost 20% of artisanal miners were under 18, namely "children". Children interviewed said that they worked for up to 12 hours a day in the mines, carrying heavy loads and most indicated that they earned between 1-2 dollars per day. Those children who collected, washed, crushed and transported minerals were paid per sack of minerals by the traders.

The same situation happens in coltan mining artisanal sites: "Child labor in the mining sector is a common phenomenon in DRC. The manager of one coltan mine openly admitted that he accepted children over

[31] ILO, Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No. 182/1999.
[32] ILO, R190 – Worst Forms of Child Labour Recommendation, 1999 (No. 190), Section II (Hazardous work), § 3 (d).
[33] CATALETA, *Human rights violations against children in the Democratic Republic of Congo, the international trade in minerals*, in 13(18) *Revista Misión Jurídica* 217 (2020).

the age of twelve"[34]. Much of the country's coltan is extracted using the work of over 40.000 child and teenage miners every year. Coming from remote villages in Kivu, they either drop out of school or have never had the opportunity to attend. The informality of the extractive sector provides attractive job opportunities for vulnerable children who serve as a pool of cheap labor[35]. Children work as washers and diggers in dangerous conditions, but they also engage in smuggling, selling coltan in towns along the borders with Burundi, Rwanda and Uganda. Doing adults' work in a hazardous environment, many child miners face harassment, abuse and ill health.

4.1. *Environmental security*

The environmental security is the absence of threats for the ecosystems which are directly or indirectly caused by human actions[36]. In the eastern part of the DRC, artisanal coltan mining is also conducted in rivers, open cast or underground of old river beds. Indiscriminate exploitation of coltan is dramatically affecting environmental biodiversity and disrupting ecosystems around mining sites. According to data of the Global Forest Watch[37], the DRC has lost 8.6% of its tree cover since 2000 and one of the major causes of deforestation is mining[38].

The first impact of artisan mining activities is when miners remove vegetation and topsoil, which increases the rate of erosion. This process includes removing vegetation and surface, digging out coltan stones and rocks, crushing stones and washing them in water to remove impurities[39]. Most of the artisanal miners work on sites where there is no governmental control and they take as much coltan as they can without any regulation. For instance, while the Ministry of Mining recommends that miners should dig no deeper than 30 metres below the surface, they sometimes dig as deep as 200 metres[40]. The visible effects of coltan mining are: air

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[34] NEST, *Coltan*, Cambridge: Polity Press 2011.
[35] MORAN *et al*., *Global Supply Chains of Coltan. A Hybrid Life Cycle Assessment Study Using a Social Indicator*, in 19(3) *Journal of Industrial Ecology* 357 (2014).
[36] BARNETT, *Environmental Security*, in BURGESS (ed.), *The Routledge Handbook of New Security Studies*, London: Routledge 2010, 123-131.
[37] Data available at https://www.globalforestwatch.org/.
[38] Mongabay, *Results of mining tax for reforestation in the DRC leave more questions than answers*, 19 May 2022.
[39] LEVIN, *Environmental issues related to artisanal mining in the Kivus*, Finnwatch Helsinki Seminar, 21.01.08, at https://www.slideshare.net/estellelevin/environment-asm.
[40] OJEWALE, *Mining and illicit trading of coltan in the Democratic Republic of Congo*, Research Paper 29, March 2022, ENACT (Enhancing Africa's response to transnational organized crime).

pollution, food insecurity (crop damage), soil contamination/consumption, deforestation and loss of vegetation cover, pollution/decreasing water quality, soil consumption and landslides, decrease the carbon stock, disrupt the photosynthesis process, biodiversity loss (wildlife, agro-diversity)[41]. Since the process of mineral separation, sieving and sorting is done manually through washing at streams and rivers, the chemicals used are polluting water bodies and are harmful to aquatic creatures. Chemicals are also known to produce radioactive substances that are detrimental to human health[42]. Coltan mining has also adversely affected the rainforests in Kivu, the natural habitat of the Eastern Lowland Gorillas which caused their near extinction (from about 17.000 in 1998 to 5.000 in a decade)[43].

Similar environmental impacts are involved with cobalt mining activities because they cause the pollution of rivers and soil and even of the people. In fact, there are multiple pollution streams (vegetables, farms, air, etc.) and high levels of cobalt are usually found in the urine and blood of mining workers and mining communities[44].

4.2. *International security*

International security is a condition that "implies a situation in which things which happen in one part of the world do not threaten people who live in another part. This means, for instance, safety from the threat of war between states, of terrorists crossing international boundaries, of conflicts in certain areas restricting international trade or curbing the flow of necessary resources such as oil, or of oppressive government, environmental disasters, or some other problem causing massive flows of refugees across borders"[45].

Artisanal mining activities in the East and South-East of the DRC affect international security in two different ways with the same final consequence, namely regional instability:

1) many artisanal mining activities are controlled by militias that illegally extract natural resources such as gold, coltan, cobalt and diamond. These militias are financed by the illegal extraction of minerals. The high value of coltan and cobalt has therefore become a source of revenue for

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[41] LEVIN, *supra* footnote 39.
[42] DE MARIE KATOTO, *supra* footnote 28.
[43] NELLEMANN-REDMOND-REFISCH (eds.), *The Last Stand of the Gorilla – Environmental Crime and Conflict in the Congo Basin. A Rapid Response Assessment*, UNEP-GRID-Arendal 2010.
[44] SOVACOOL, *supra* footnote 1.
[45] ROBINSON, *Dictionary of International Security*, Cambridge: Polity Press 2018, 1-2.

these illegal armed groups. A network of intermediaries, including multinational companies, neighboring countries and corrupt officials, are involved in the transportation and procurement of resources which come from the areas controlled by militias, or for which no legal exploitation permission exists;

2) specific and trackable migration flows to Central Africa are triggered by several factors: environmental questions, economic motivations, demographic factors, political or inter-ethnic conflicts[46]. Many migrants are just passing through central African States to reach the Maghreb, namely the main transit corridor towards the EU. Many others leave instead their own countries, heading to the DRC as their final destination (citizens from Sudan, Mali and Senegal are highly represented in the artisanal mining sector of the DRC)[47] and leading to drastic overpopulation of the region. If this trend should continue, population will double in 25 years with destabilizing consequences[48]. Further, the overpopulation also worsens the existing tensions in the Great Lakes Region between "indigenous" and "foreigner" people[49].

5. *Impact analysis of coltan and cobalt mining industry in the DRC through the lens of the Just Ecological Transition*

"The road to a clean energy future runs through the DRC […] The world will need our country's resources to save itself from the impacts of climate change": these are the words of Jeanine Lioko, President of the DRC's National Assembly during a plenary session of the Parliament. It is now useful to examine this policy statement through the analytical framework of the theoretical concept of "Just Ecological Transition" (hereinafter: JET)[50].

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[46] LUTUTALA, *Les Migrations en Afrique Centrale: caractéristiques, enjeux et rôles dans l'intégration et le développement des pays de la region*, International Migration Institute (Conference paper), 18 September 2007; BOLZMAN-GABUKA-GUISSÉ (coord.), *Migrations des jeunes d'Afrique subsaharienne. Quels défis pour l'avenir?*, Paris: L'Harmattan 2011.

[47] SCHAPENDONK, *Turbulent trajectories: Sub-Saharan African migrants heading north*, Dissertation thesis at Radboud Universiteit Nijmegen, 2011.

[48] CARLING & HERNANDEZ-CARRETERO, *Kamikaze Migrants? Understanding and Tackling High-Risk Migration from Africa*, Paper presented at *Narratives of Migration Management and Cooperation with Countries of Origin and Transit*, Sussex Centre for Migration Research, University of Sussex, 18-19 September 2008.

[49] BREDELOUP, *La migration africaine: de nouvelles routes, de nouvelles figures*, in Revue Quart Monde 2009/4 No. 212.

[50] MORENA-KRAUSE-STEVIS (eds.), *Just Transitions. Social Justice in the Shift Towards a Low-Carbon World*, London: Pluto Press 2020.

The US Labor Unions firstly proposed the term in the 1970s. Since then the "just transition" concept has evolved and spread globally[51]. "Just transition" refers to the fair transition from a fossil fuel-based economy to a low-carbon or decarbonized world. The term can be associated with a variety of worldviews and strategies. One of the crucial knots in the ecological transition challenge is the fear that efforts to achieve climate goals are incompatible with protecting the work[52].

The concept of JET seeks to overcome the trade-off between work and environment and its theoretical concept has two goals: *a*) a "transition" to a low-carbon society should occur through necessary changes in energy, environmental, and climate[53]; *b*) these changes must be "socially just", namely they have to reduce existing inequalities and must not create new ones. JET implies the idea that justice and equity should be integrated into the transition to a low-carbon world. The focal point related to the "just transition" concept is to choose and analyze which are the transitional approaches and initiatives that are actually "just".

According to major literature, within the green energy market the risk of a transition to a green economy not so "just" is rising and its critical points are: 1) the procurement of raw minerals; 2) the additional demand for electrical energy; 3) the disposal/recycling of the e-waste; 4) the cross-sectorial shift of emissions. According to the current European legal framework, in fact, electric cars can only be described as locally emissions-free: but what about their downstream?; 5) the maximum load factor of today's consumption electric networks[54].

The transition from traditional to renewable energy sources cannot fail to take into account the effects that transition might have on workers that are involved in the supply chain of minerals needed for the transition to a green energy market[55]. The otherwise risk related to a transitional approach not "just" would probably lead to a greenwashing policy. Italy, as most of the EU Member States, is investing in the ecological transition. The National Recovery and Resilience Plan (NRRP) includes a package of investments divided into six missions. Overall, investments planned amount to 222.1 billion euros and 1.25 billion euros will be used to sustain

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[51] MORENA *et al*., *Mapping Just Transition(s) to a Low-Carbon World*, New York: UN Research Institute for Social Development 2018.
[52] *Ibidem.*
[53] MCCAULEY-HEFFRON, *Just transition: Integrating climate, energy and environmental justice,* in 119 *Energy Policy* 1 (2018).
[54] RUGIERO, *Decarbonisation in the Italian energy sector: the role of social dialogue in achieving a just transition – the case of Enel*, in Galgóczi (ed.), *Towards a just transition: coal, cars and the world of work*, Brussels: ETUI. 2019, 109-133.
[55] *Ibidem*.

investments in the main sectors of the ecological transition. From this amount, 1 billion euros has been dedicated to the investments in renewable energy and batteries sector. This investment aims to develop industrial supply chains in the photovoltaic, wind and battery sectors through 3 main lines of action: 1) the creation of a Giga-factory for the construction of innovative high-efficiency photovoltaic panels; 2) the construction of an industrial site for the production of flexible panels for wind energy; 3) the construction of an "ultra-modern" (4.0) Giga-factory in the battery sector.

Further research is needed to see what Italian policy makers will choose about these investments: especially, it would be important to supervise and control where the minerals needed to create these photovoltaic panels or batteries will be sourced. That would be a crucial question to define if the Italian policy will be an effective "just" one, or if it would be only the occasion for a big "greenwashing" movement.

6. *Four actions to fight against the illegal exploitation of coltan and cobalt ores*

In this last paragraph four different actions that might be useful to tackle the phenomenon of the illegal exploitation of coltan and cobalt ore, and lighten the weight of this trade on human, environmental and international security, will be explained.

The *first action* would require multinational companies to apply the "naming and shaming approach", namely the decision of companies to publicly disclosure their supply chain concerning conflict minerals[56]. This approach would raise the awareness of consumers and it would be a deterrent preventing hi-tech companies from purchasing conflict minerals from the DRC. Some companies have already applied this action. In its first "Conflict minerals report 2021", for instance, Apple Inc. stated that:

> "Apple's Board of Directors has adopted a human rights policy that governs how we treat people at every level of our supply chain. Apple works to protect the environment and to safeguard the well-being of the millions of people touched by our supply chain, from the mining level to the facilities where products are assembled […] As we make progress towards these ambitious goals, we continue to source 3TG (tin, tantalum, tungsten, and gold) and other minerals, such as cobalt, responsibly, while working to improve conditions in and around mining communities, including in the DRC […] Since 2009, Apple has directed

[56] PRUCE-BUDABIN, *Beyond naming and shaming: New modalities of information politics in human rights*, in 15(3) *Journal of Human Rights* 408 (2016).

the removal of 163 3TG smelters and refiners from its supply chain (9 of tantalum). In 2021, we removed 12 smelters and refiners from our supply chain"[57].

The *second action* would require the legislative intervention of the States to which importers of conflict minerals belong. Governments should impose a mandatory public disclosure about importers' supply chain and financial data regarding what mining corporations pay to States where they operate. It will promote transparency and therefore mitigate corruption. EU and US have already tried something like this.

The EU regulation 2017/821 imposes to EU importers of 3TG minerals potentially originating in conflict or high-risk areas to clearly communicate the information regarding the supply chain strategy. Further, regulation 2017/821 requires importers to make their supply chain traceable by disclosing, for instance, the area of origin of the minerals, the mining quantity and quality, the date of extraction, etc.[58]. In addition, regulation 2017/821 establishes that importers may be subject to inspections, controls and fines (2.000-20.000 euros) if they fail to comply with requests or do not allow inspections. Additional fines (5.000-20.000 euros) are established in case the importer fails to follow the requested corrective measures. In the US, sections 404 and 406 of the Dodd-Franck Wall Street and Consumer Protection Act of July 2010 impose the same disclosure/supply chain tracking obligations to the mining corporations listed in the US exchanges. However, there are some potential or actual weaknesses related to this kind of action. As regard the EU regulation 2017/821, for instance, potential weaknesses are due to the fact that: *a*) it only applies to importers into the EU whose annual import volumes exceed some thresholds set by the EU regulation; *b*) it imposes due diligence obligations only for those companies directly importing certain minerals and, therefore, it does not apply to companies involved in subsequent stages (manufacturing, assembly, or end use); *c*) it concerns the coltan (as one of the 3TG mineral) but not also the cobalt; *d*) the fines are too small.

As regards the Dodd-Franck Act, in force since 2010, some American scholars have already highlighted some actual weak point[59], such as: *a*) it ended up in a *de facto* embargo on minerals coming from potentially conflict regions which caused massive unemployment among miners in

[57] Apple Inc., *Conflict Minerals Report 2021*, 9 February 2022, Exhibit 1.01, at 5.
[58] Regulation (EU) 2017/821 of the European Parliament and of the Council, of 17 May 2017, establishing supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold, originating in conflict or high-risk areas.
[59] SEAY, *What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy*, CGD Working Paper 284 (January 2012), Washington, D.C.: Center for Global Development.

Eastern DRC[60]; *b*) trade in conflict minerals diminished but militia leaders and corrupt military commanders keep on smuggling minerals across borders and security has not yet improved for local populations; *c*) the largest part of conflict minerals sourced in the DRC is going to China rather than to EU or US.

The *third action* would involve the intervention of international judicial institutions, following the example of the ICJ that has recently condemned Uganda to compensate the DRC for its role in the armed conflict started in the late 1990s when the Ugandan army invaded the DRC twice, working with local militias to take control of the Ituri region, rich in resources[61]. The armed conflict lasted until 2003. In February 2022 the ICJ ruled that Uganda violated international law by occupying the region of Ituri and looting, plundering and exploiting the DRC's natural resources (including gold, diamonds and coltan). Global sum awarded for damage to the DRC is 325 million dollars (to be paid in annual instalments of 65 million dollaris) and it includes: *a*) 225 million for damage to persons (approximately 10.000/15.000 civilian deaths); *b*) 40 million dollars for damage to property; *c*) 60 million dollars for damage related to natural resources, including looting of minerals, coffee and timber and damage to fauna.

Finally, the *fourth action* would involve regional and continental cooperation among States involved in illegal trade in order to allow them to better face up to sustainable development challenges. Strengthening cooperation would contribute to prevent situations of illegal triangulations and smuggling of conflict minerals from the DRC. Also the solidarity between bordering territories must be strengthened to establish a framework of more solid and better integrated policies. The Economic Community of Central African States (ECCAS), established in 1983 and formally designed in 1999 as one of the eight pillars of the AU, is the sub-regional organization in this region and includes 11 Member States[62].

Over the past few years there were institutional contrasts between the ECCAS and the AU on which organization would have the upper hand

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[60] CURRIE-ALDER *et al*., *International Development: Ideas, Experience, and Prospects*, Oxford: Oxford University Press 2014.

[61] ICJ, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment of 9 February 2022, General List No. 116, Year 2022.

[62] The aims of the ECCAS are indicated in Article 4, par. 1. *Inter alia*, ECCAS has the aim "to promote and strengthen harmonious cooperation and balanced and self-sustained development in all fields of economic and social activity, particularly in the fields of industry, transport and communications, energy, agriculture, natural resources, trade […] in order to achieve collective self-reliance, raise the standards of living of its peoples, increase and maintain economic stability, foster close and peaceful relations between Member States and contribute to the progress and development of the African continent".

on preventing and management conflicts in the region. Clearer guidelines are needed to ensure reliable and effective handoffs between the two organizations as well as the States involved must consider issues linked to the illegal natural resources exploitation as a common central African region issue.

In conclusions, the analysis of the illegal exploitation of coltan and cobalt ore in the DRC, and its impacts on three different dimensions of security, has highlighted and criticized the dangerously green-washing logic that pushes the ecological transition towards strengthening that form of green energy that necessarily requires massive supply of coltan and cobalt but, however, neglects social and environmental local costs that such extraction produces. This problem must be explored through more detailed studies to grasp its full complexity. Accordingly, it will be interesting to investigate whether and how national and international political strategies in the field of ecological transition will be able to achieve the set climate goals in a socially equitable, fair and just manner for everyone without incurring greenwashing rhetoric and narratives.

TURKEY'S FOREIGN POLICY TOWARDS THE KURDISTAN REGIONAL GOVERNMENT: UPS AND DOWNS (2003-2017)

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ABSTRACT: The Kurdish question and the Kurdistan Region of Iraq (KRI) have always been the threat factor that Turkish decision-makers should be concerned about. Since the establishment of the Republic of Turkey, the protection of national security has dominated Turkish foreign policy. Keeping a distance between Turkey and national security threats has constantly been the top priority of policymakers in the country. Turkey has looked at the KRI through the lens of security because Turkey has its Kurdish population that might be encouraged by the Kurdish population in Iraq to demand more rights and autonomy. The Iraqi Kurdish region is also the closest neighbour to Turkey that might create a threat to Turkey at any time. The article aims to illustrate the Turkish foreign policy towards the KRI and the Kurdistan Regional Government (KRG) from a security perspective and it is a necessary step to explain the relationships between Turkey and KRI/KRG as its non-state neighbour.

KEYWORDS: Turkish foreign policy, security, KRI, referendum, KRG.

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1. *Introduction*

Turkey has always perceived the Kurdish autonomy in Northern Iraq with security lenses and, accordingly, the Kurdistan region has always been at the top of the list of Turkish security concerns. An independent and autonomous Kurdistan region is considered as one of the threats to Turkey's national security. It is not wrong to say that Turkey might be afraid that the Iraqi Kurdish experience would encourage either the Kurds in Turkey to make similar demands towards autonomy or, at least, the

Turkish political leaders to use the Kurdish region as a threat. Steps taken towards a referendum in the Kurdish region of Northern Iraq was a good example that increased concerns of the Turkish government. For Turks, this security threat has even increased after the Arab Springs and with the armed conflict in Syria since Turkey shares a border with the Syrian Kurds.

However, Turkey has employed different methods to deal with the Kurdistan Region of Iraq (hereinafter: KRI) in different periods. From the mid-2000s onwards, Turkish foreign policy towards Iraqi Kurds has dramatically improved and the improvement was mostly driven by economic growth in Turkey. In the attempt to search for a market to export products and provide energy sources, the Turkish government transformed its foreign policy into a flexible policy towards the Kurdish Region. However, despite this economic cooperation, dealing with the *Partîya Karkerén Kurdîstan* (hereinafter: PKK) and the Kurdish question and using the Kurdistan Regional Government (hereinafter: KRG) to end insurgency in the Qandil Mountains has remained the key priority of Turkey.

Turkey also deals with the KRG since it does not get security guarantees from Baghdad whose government is under the growing Iranian influence. The Iraqi government is almost being ruled by Iran and currently there are many pro-Iranian militias in the country. Thus, the Shia threats in Iraq are not much less than the Kurdish threat for Turkey. In terms of religious closeness, Kurds are much closer to Turks than Iranian Shiites. Turkey's new foreign policy, which is closer to Middle East and Islamic countries, is also clashing with the Iranian role in the region due to Turkey's attempt to play its own regional role.

This article will analyze the Turkish foreign policy towards the KRI through three different theories: 1) neo-realist theory, focusing on security, interest, and hegemony dimension; 2) economic interdependent theory, focusing on energy sources and finding new markets to sell goods; 3) social constructivism theory, emphasizing cultural and religious ties between Turkey and the KRI.

However, despite the social significance of the constructivist approach, the article attempts to prove that Turkey's foreign policy has been surrounded by security concerns in dealing with the KRG. The referendum in the Kurdish region, held on 25 September 2017, can explain this security dimension in Turkey's foreign policy.

The essential research question of this article is how security concerns impacted the Turkey's foreign policy towards the KRI and, as a matter of methodology, the article will perform a qualitative study of Turkish foreign policy in the KRI. The rationale for using the qualitative method is that it focuses on interpreting qualitative data from different sources, not

limiting to a dispassionate presentation of statistical data. Empirical data are collected from primary and secondary sources: the former include reports and speeches; the latter include books, journal articles, and internet resources.

2. *The historical background*

For four centuries, until the collapse of the Ottoman Empire, the mountainous areas of Mosul province (now known as Iraq's Kurdistan region) were nominally ruled by the Ottoman Empire because the Kurdish Emirates of Soran and Baban were governed by the Kurdish rulers until the first half of the Nineteenth century[1]. However, with the creation of Iraq in 1920, the region became part of the newly born State and even its nominal links with the Turkish rule were fragmented due to the emergence of a Turkish national identity and the idea of a Turkish nation state.

In the early years after the creation of Iraq, Turkey demonstrated its concerns about Kurds and the security of the Iraqi-Turkey border. This concern was expressed through Baghdad alone[2]. Once the Iraqi Kurdish rebellion in the early 1960s turned into an insurgency, Turkish policymakers considered it as a threat to their country's national security and supported the Iraqi regimes in the suppression of Kurdish rebellions. Since both countries faced Kurdish uprisings, the problem turned to be a natural area of cooperation[3]. The Turkish government's discomfort about the Iraqi northern movement further increased when the PKK started its armed struggle against Turkey in the early 1980s. Policymakers in Turkey perceived the Kurdish area in the northern part of Iraq as an area where PKK could maneuver to operate against Turkey and they also believed that the Iraqi Kurds could provide help to PKK fighters.

Security concerns throughout the 1980s brought Iraqi and Turkish governments to work together closely against any Kurdish nationalist movement. Cooperation also led to cross-border military operations by the Turkish side[4]. Iraq and Turkey signed in 1983 the "Frontier Security and Cooperation Agreement", allowing both parties' armed forces to

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[1] EPPEL, *The Demise of the Kurdish Emirates: The Impact of Ottoman Reforms and International Relations on Kurdistan during the First Half of the Nineteenth Century*, in 44(2) *Middle Eastern Studies* 237 (2008).

[2] International Crisis Group, *Turkey and Iraqi Kurds: Conflict or Cooperation?*, Middle East Report N°81, 13 November 2008.

[3] AYDIN-ÖZCAN-KAPTANOĞLU, *Riskler ve fırsatlar kavşağında. Irak'ın geleceği ve Türkiye*, Ankara: Tepav 2007, 73.

[4] PUSANE, *Turkey's Changing Relations with the Iraqi Kurdish Regional Government*, in 20(2) *MERIA Journal* 20 (2016).

cross each other border to carry out military operations against any threat or armed group in the other's territory. However, the Iraqi-Turkish assistance was ruined because of the first Gulf War. During the crisis, in fact, Ankara backed the international coalition established to take out the Iraqi forces from Kuwait[5].

The Gulf War also became a turning point in the history of the Kurdish population in Iraq due to the UN Security Council resolution 688 (1991) that established a "no-fly zone" in Northern Iraq to protect Kurdish civilians from atrocities committed by the Iraqi government. The safe haven for the Kurdish paved the way for creating a *de facto* Kurdish autonomy in the north of the country. During this period, Turkey worked with Iraqi-Kurdish leaders in the struggle against the PKK until the death of President Turgut Özal[6]. After his death in 1993, in fact, the warm ties with the Kurdish parties shifted and Turkey started workingclosely with Iraq, Syria and Iran to contain Kurdish ambitions. Achieving this goal became easier when in 1994 the Patriotic Union of Kurdistan and the Kurdistan Democratic Party began fighting against each other because this fight increased Ankara's influence in the region. After the end of this bloody civil war among the two main Kurdish political parties, with the help of the US in the late 1990s, the Turkish military deployed a small group of troops inside the Kurdistan region, allowing the Turkish government to gather intelligence against the PKK and contain the political ambitions of Iraqi Kurds[7]. This situation continued until the end of Saddam's regime in 2003.

3. *The theoretical framework for analyzing the case study: the realistic approach*

Realism, especially the neo-realist argument and the security dimension, will be the main theoretical background applied in this article to analyze the case. Liberalism and economic interdependence is another approach that will be briefly examined in § 3.1 while the theory of social constructivism will be finally analyzed in § 3.2. It is important to note that the main argument in this article is the security threat and security concern which will be explained through the neo-realist argument. However, the other two theories are supporting theories to defend the priority of the security concerns in the Turkish foreign policy towards the KRI. The purpose of using three theories is to better explain the connections

[5] International Crisis Group, *supra* footnote 2.
[6] PUSANE, *supra* footnote 4.
[7] International Crisis Group, *supra* footnote 2.

between the two entities interacting in various areas, and the dependance of one actor (KRI) on another (Turkey). However, in this unbalanced relation security concerns determine duration and quality of connections between the two actors.

Theories of realism clearly explain war and peace and therefore they are a useful tool to analyze foreign policy of States and non-state actors. All groups of realist scholars focus on the issue of war and peace and their main arguments are shaped from this perspective. As anticipated, the realist school can offer a clear understanding in studying foreign policy because foreign policy deals with decision-making processes of a State towards other States. Yet, States are the main actors of the international system whose ordering principle is anarchy. Realism tries to illuminate how the world work and one of its fundamental assumptions is that self-interest drives the political behavior of human beings and, therefore, also of States as biggest entities in the international system[8].

According to structural realism, the State is a security maximizer rather than a power maximizer. The main aim of the State is to prevent others from taking over or having too much influence. Moreover, aggressive acts by all the States happen because of the anarchical structure of the international system. According to neo-realists, instead, States must shape their policy in the light of an anarchical system, and the main concern for policymakers should be the interest of the State. According to Henry Kissinger, a realist scholar and the US Secretary of State during the Presidency of Nixon, national survival is the first and ultimate leader's responsibility that should not be compromised and cannot put into the risk[9]. Another prominent realist scholar, Kenneth Waltz, argues that States have security as their principal interest and only seek the required amount of power to protect themselves and survive. Based on this understanding, States do not seek to gain more power and are defensive actors since it jeopardizes State's security[10].

According to this assumption, therefore, the aim of the State must be security when dealing with other actors rather than superiority within the international system. Barry Posen applied the security dilemma game to explain the political dynamics in the security dimension of relationships among different groups and argued that it is natural to expect that security is the main priority when groups find themselves responsible for their

[8] WOHLFORTH, *Realism and Foreign Policy*, in SMITH-HADFIELD-DUNNE (eds.), *Foreign Policy: Theories, Actors, Cases*, Oxford: Oxford University Press 2016 (3rd ed.), 32.
[9] BAYLIS-SMITH-OWENS, *The Globalization of World Politics. An Introduction to International Relations*, Oxford: Oxford University Press 2019 (8th ed.), 95.
[10] *Ibidem*, 94.

own security. In the case of a State, a group attempts to improve its security and this enhancement of security on behalf of one group might create uncertainty in the mind of another group[11].

Although these arguments focus more on relationships at inter-state level, they may explain State's behaviour, concerns and interests even when States deal with other entities other than sovereign States because in the anarchical international system the main concern of policymakers should be protecting the interest and security of the State in whatever way they can[12]. Furthermore, according to Mearsheimer, an offensive realist, the structure of the international system requires States to increase their relative power. States' decisive goal is to achieve a high position in order to be a hegemon in the international system or in a regional context as well. Some States try to maneuver in the regional arena because exerting strong regional influence is the best chance for some middle powers since they cannot achieve a hegemonic position at world level. Finally, it should be underlined that, even if the neo-realist approach deals with sovereign States as units of analysis, the article will also consider the fact that the KRI is acting as a *de facto* sovereign unit in its relations with the rest of the world

3.1 *Liberalism and economic interdependence approach*

For liberals, the primary character of international relations is the distribution of economic wealth that affects the foreign policy of the State. According to the liberal argument, States have become more interdependent due to the growth of global trade and technological advances in financial relationships. Mutual benefits encourage States to cooperate[13].

A radical American democrat, Thomas Pain, stated that "if the commerce were permitted to act to the universal extent it is capable, it would extirpate the system of war". According to this view, the commercial manufacturing society attempts to move away from war because it gets nothing from war[14].

Liberalism indicates that States cooperate because they find cooperation in line with their interests. Due to economic interdependence, States

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[11] *Ibidem*, 88.

[12] KAARBO-LANTIS-BEASLEY, *The Analysis of Foreign Policy in Comparative Perspective*, in BEASLEY *et al.* (eds.), *Foreign Policy in Comparative Perspective. Domestic and International Influences on State Behaviour*, Washington, D.C.: CQ Press 2012 (2nd ed.), 8.

[13] *Ibidem*, 10.

[14] DOYLE, *Liberalism and Foreign Policy*, in SMITH-HADFIELD-DUNNE (eds.), *supra* footnote 8, 60.

are controlled in their foreign policy behavior because the fortune of a State is linked to the fortune of another State. When a State harms another, it harms itself as well. Hence States do not have the will to harm themselves by destroying their trading partners, and the markets in which to sell their goods[15].

As a result, States must consider the significance of economic interdependence when they make their foreign policy. Based on the liberal interdependence, some States are more dependent in their relationships with other States, while poor States are constrained in their foreign policy because their economic existence depends on relationships with stronger economic powers and they are enforced to obey the foreign policy wishes of their benefactors[16]. Finally, one of the main characters of a world with a high degree of complex interdependence is the role of non-state actors besides the role of the State as the main actor[17].

3.2 *The social constructivism*

Social constructivism came to criticize realist and liberal arguments due to their focus on material power. Constructivism encounters them by highlighting how ideas, norms, and rules define and transform world politics and influence or shape identities and interests of States[18]. Constructivists see the world around us as socially constructed, which means that social values are more important than material values in world politics[19]. Thus, the interest of a State can be interpreted through social rather than material explanation. Furthermore, for constructivists the world is constructed through interaction processes among individuals, State and non-state actors, on the one hand, and the structure of their broader environment, on the other. Not only States as unitary actors but also NGOs and multinational corporations affect leaders when they make their foreign policy decisions.

Scholars argues that "core values and national identity are connected to society's political culture […] values, norms, and traditions that are widely shared by its people and are relatively enduring over time. These enduring cultural features may also set parameters for foreign policy".

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[15] KAARBO-LANTIS-BEASLEY, *supra* footonote 12, 11.
[16] *Ibidem*.
[17] BAYLIS-SMITH-OWENS, *supra* footnote 9, 121.
[18] *Ibidem*.
[19] CHECKEL, *Constructivism and Foreign Policy*, in SMITH-HADFIELD-DUNNE (eds.), *supra* footnote 8, 72.

Accordingly, a culture that gives a high position to morality over the practicality passes moral judgment over foreign policy behavior[20].

4. *The Turkish foreign policy towards the KRI: case study and analysis*

The Turkish government's policy towards the KRI is a cycle from security to economic and cultural relationships and then reverse to the security dimension. This cycle will be analyzed in this and in the following paragraphs.

After the Iraqi invasion in 2003 and the refusal of Turkey to allow the transit of the US troops through its territory, Turkey stayed aside and watched the progress in the Kurdish involvement with the help of the US. Two years after the invasion, Iraq was transformed from a unitary State to a federal State and the Iraqi Kurdish region became the only federal region within the federal state of Iraq. The region has kept its partial autonomy from Baghdad[21]. This transformation can be seen as the first sign of a security threat to Turkey and, accordingly, Turkey had to deal with the Iraqi federal government of which the Kurdistan region is a part.

It was very difficult for Turkey to accept any region under the name of Kurdistan since Turkish governments have been always scared of the establishment of any entity or independent Kurdish State in the Middle East. The Iraqi Kurdistan region was considered a real threat for Turkey's national security because it could move from a federal system to an independent Kurdish statehood[22]. For some analysts, the creation of Kurdistan would not only enhance the maneuver capability of the regional government but it might also strengthen the PKK[23]. Moreover, this threat was sometimes used by the incumbent party to mobilize Turkish nationalists and stay on power while negotiating with the Kurdish[24]. Strategists in Ankara were worried that the US could have had a hidden plan to establish an independent State for the Kurdish people in Iraq[25].

According to structural realism's argument, national survival is the first and ultimate responsibility of a political leader and it can never be compromised or put at risk: the independence of the Kurds will always

[20] KAARBO-LANTIS-BEASLEY, *supra* footonote 12, 14.
[21] International Crisis Group, *supra* footnote 2.
[22] BRYZA, *Turkey's Dramatic Shift toward Iraqi Kurdistan: Politics before Peace Pipelines*, in 11(2) *Turkish Policy Quarterly* 53 (2012).
[23] AYDIN-ÖZCAN-KAPTANOĞLU, *supra* footonote 3, 76.
[24] IHSAN-SHIPOLI, *Use of past collective traumas, fear and conspiracy theories for securitization of the opposition and authoritarianisation: the Turkish case*, in 29(2) *Democratization* 320 (2021).
[25] BRYZA, *supra* footnote 22.

be considered a risk for Turkish national and territorial security. Furthermore, the Kurdish region is close to the Turkish borders and, for Turkish policymakers, it could be a source of instability for Turkey as Turkey had been fighting with the PKK for a long time. The region might be an opening gate for the PKK fighters to move into and use their brothers to launch terrorist attacks against Turkey.

According to structural realism's argument, States have security as their own main interest and seek only the needed amount of power to protect themselves and survive: in fact, State is a security maximizer rather than a power maximizer. In Turkey's view, the US pays no attention to Turkey's top security concern because Turkish officials believed that PKK terrorist acts originated from Washington's controlled territory in the northern part of Iraq. Turkey asserted that this contradicts the Bush doctrine's premise according to which "those who provide safe haven to terrorists are as guilty as the terrorists"[26]. The fear of Turkish policymakers about a move of the federal system in Iraq towards an independent Kurdistan was not baseless when, twelwe years after the creation of the federal Kurdistan region, the Kurdish leaders held a referendum in 2017 as a step on the road of independence. However, the brotherhood between the Kurdish in Northern Iraq and the PKK has not become an actual threat for Turkey since the KRG has not given any help to the PKK, to date. In any case, the Kurds might support the PKK in the event that Kurds' existence in Iraq should be under a wipe threat by Turkey and the Kurdish leaders might also encourage the Kurds in Turkey to take action for their rights.

In the post-Saddam system, another main concern for Turkey was the maintenance of Iraq's unity. Accordingly, the Turkish government aimed at preventing the Iranian influence over Iraq, especially in order to avoid that pro-Iranian Shia militias might take over Iraq and the Sunni and Turkmens' areas. Unity of Iraq would prevent the Kurdish movement to separate from Iraq and avoid the risk that the Kurds in Turkey might ask for autonomy or a federal system along the lines of the one in Iraq. An autonomous Kurdistan region, the PKK and the Iranian influence in Iraq were all security risks for Turkey and, accordingly, Turkey has tried to manage these risks by using different methods and trying to become a regional hegemon. According to Mearsheimer's argument, the structure of the international system requires a State to increase its relative power position and its fundamental goal is to achieve a position that makes it a hegemon in the international system. Some States try to maneuver their role in the regional arena by also using smaller powers and groups to exert

[26] *Ibidem*.

their influence. This is particularly true for Turkey and it explains why Turkey uses the KRG to contain the Iranian regional influence.

At the beginning of a new era in Iraq, Turkey was working with the Iraqi government and every step towards the KRG was perceived as a major threat. During the AK party rule in Turkey the securitization policy has been used not only in Iraq but even within Turkey itself. Some scholars have underlined that Turkish foreign policy makers securitized the secular elite, Islamism, Alavis, and the Kurds loyalties, in order to achieve their political goals. Especially during the elections, the AK party used this method to gain more votes[27]. This is true as regards the Turkish policy towards the KRI. Any attack launched by the PKK gave a reason to Turkish policymakers to accuse the KRG and present the region as a security threat for Turkey. For example, when the PKK renewed its insurgency in 2004, Ankara often criticized the KRG for not taking up enough steps to prevent the PKK from operating within its territory[28]. Even though Turkey was aware of the fact that the KRG was not powerful enough to remove the PKK from Qandil Mountains, Turkey continued to blame the KRG. In the 1990s, both ruling parties (PUK and KDP) in the region fought against the PKK but, after losing many fighters, they failed to wipe out the PKK from the region.

When the Prime Minister al-Maliki was in power, Turkey had been working with him to achieve its own security goal. Turkey believed in the feasibility of al-Maliki's goal to maintain a strong united Iraq, also able to provide help in dealing with the PKK. Since 2006 Iraqi-Turkish relationship was in a very high status: in 2007 a protocol was signed in which Iraq promised to help Turkey against terrorism and al-Maliki expressed "good will" to deal actively with issues on behalf of Turkey[29].

Another security dimension was related to the security of Turkmens in Iraq, especially those in Kirkuk. For Turkey, the safety of Turkmens is as important as the safety of Turks in Turkey and any violence against them is considered a security concern for Turkey to the extent that Turkey has claimed to be ready to enter Iraq in case of violence against Turkmens[30]. According to Iraqi Constitution, the Kirkuk issue should be settled via Article 140, providing for "a referendum in Kirkuk and other disputed territories to determine the will of their citizens" and, in case, for Kirkuk to be part of the Kurdistan region in Northern Iraq. Yet, Turkey

[27] IHSAN-SHIPOLI, *supra* footnote 24, 10.
[28] KAVÁLEK, *Ups and Downs of Turkish Relationship with Erbil and Baghdad in the post-2003 Era*, in MAREŠ-ŠMÍD (eds.), *Regional Security Interdependence*, Brno: MUNI Press 2015, 11-40.
[29] *Ibidem*.
[30] The New Arab, *Turkey's long-term interest in Kirkuk and Mosul*, 12 May 2017.

believed that the referendum would lead to conflict between ethnic and religious groups in the region and that Kirkuk is not only a Turkmen but also a Turkish city[31]. In the 2005 election, Turkey-backed Turkmens got the second-rank status in Kirkuk but in the following elections Turkmens suffered a further setback because they could only gather far fewer votes than Turkey has expected. Scholars have also suggested that the claim of protecting Turkmens might also be a securitization claim to be mainly used in Turkish domestic policy.

In this period, Kurds was the threat to Turkmens in Kirkuk because there was not yet the Iranian influence. The city was mostly controlled by Kurdish security forces and governed by Kurdish people[32]. The most important evidence was the protest of Turkmens against the return to Kirkurk of the Kurdish forces after that Iraqi forces had driven the Peshmerga out of these areas in 2017[33]. Turkey proposed power-sharing between ethnic groups in Kirkuk to solve the problem but the proposal was rejected by the Kurds[34]. In the scale of Turkey's security interests, therefore, Turkmens come first and Sunni Arabs follow. Yet, if Turkey's regional hegemony is threatened by Iran and Shia forces, then Kurds are included in the Turkish security and policy cicle in order to use again the Iranian expansionism their cultural and religious coldness. Only the social constructivism approach can explain the importance of the security of Turkmens and Sunni Arabs for Turkey. It is also important to note that anytime there are tensions or conflicts in Iraq, however, Turkey securitizes the issue in order to expose the evilness of the opposing party and support the other one: this is the strategy, for instance, of the AK party[35].

4.1 *The shift in Turkish foreign policy from security to economic interdependence dimension*

Despite security concern and troubled relationship between Turkey and Iraqi Kurds, there has been a gradual change in Turkish foreign policy of Turkey towards the KRI. A few years after the collapse of the Iraqi regime in 2003, the Kurdish region turned to be an economic partner of Turkey, at least in the perspective of KRG policy makers. Even though this economic relationship, officially started in 2007, cannot be separated

[31] Daily News, *Kirkuk, Mosul, Arbil are Turkmen cities: MHP leader*, 3 October 2017.
[32] Reuters, *Turkey extends troop deployment mandate, pressures Iraqi Kurds on vote*, 23 September 2017.
[33] Rudaw, *Turkmen front concerned over move to return Peshmerga officers to Kirkuk base*, 24 May 2021.
[34] International Crisis Group, *supra* footnote 2.
[35] IHSAN-SHIPOLI, *supra* footnote 24, 10.

from the security dimension, it might not be wrong to say that the détente period between the two States was especially focused on energy and economic relations[36].

Until the 2017 Kurdish referendum, the nature of the relationship can be considered in the context of the economic setting. The Turkish National Security Council officially approved Turkey's relationship with the KRG in March 2007 and this allowed high-level meetings with KRG officials (for instance, the Minister of Foreign Affairs Davutoğlu visited Erbil in October 2008)[37]. KRI fear and trauma in the securitization process has turned into a bilateral partnership[38]. One of the major factors for improving the relationship was the increasing need and reliance of the Kurds on Turkish economy. After the collapse of the Ba'ath Party's regime, the only relatively stable area in Iraq has been the northern region, and the Kurdish leaders happily opened the gate for Turkish companies to flow in and help them to build up their isolated economy.

As anticipated, commercial manufacturing societies attempt to move away from war because they get nothing from the war. Turkey followed a similar path and started using economic soft power rather than hard power. In 2009-2013 period, the number of Turkish companies operating in the KRI increased from 485 to 1.500 (consumer of goods, construction projects, shopping centers, etc.) and this growth has been continuing until now. With the beginning of the Peace Process, the PKK eventually announced a ceasefire and these developments turned energy into the main agenda of the Ankara-Erbil relations[39]. However, the 2017 Kurdish referendum made Turkish policymakers hesitating in giving more opportunities to the KRG[40].

In 2012, the Turkish Consul General in Erbil said that:

"There are about five Turkish banks, 17 Turkish schools, 600 Turkish construction companies, and 17.000 Turkish citizens permanent residents in Erbil. Direct flights are also operating daily between the KRG and Turkey, a fact which has boosted tourism while the overall trade volume between Turkey and Iraq is about 12 billion dollars and more than 70% is with the KRG, let alone that more than half of the foreign companies registered in the KR are Turkish. Turkey

[36] DAĞDEVIREN, *Türkiye İle Irak Kürdistan Bölgesel Yönetimi Arasında Siyasi İlişkiler; Devlet Hükümet İlişkileri*, in 3(2) *ATAD* 151 (2020).
[37] KAVÁLEK, *supra* footnote 28.
[38] IHSAN-SHIPOLI, *supra* footnote 24.
[39] BALCI, *Enerji'sine Kavuşan Komşuluk: Türkiye-Kürdistan Bölgesel Yönetimi İlişkileri*, Istanbul: SETA 2014.
[40] PUSANE, *supra* footnote 4, 21.

enjoys massive economic benefits from closer economic cooperation with the KRG"[41].

By the end of 2013, the KRI became the third-largest export market for Turkey with 5.1 billion dollars exports. Due to these important economic ties, it is hard to believe that Turkey was planning to follow a hostile foreign policy against an economic partner. As anticipated, the economic interdependence argument can explain why Turkey would not be harming the KRI unless Turkey's security interest is in danger, because States are not going to damage themselves by destroying trading partners and markets. Furthermore, Turkey considers the KRI as a source of energy and an alternative source of natural gas and oil for Turkish demand which in 2013 intensified by 6 to 8%. Turkey attempted to secure the sources of its energy which are otherwise provided by Russia and Iran. For Turkey, Kurdish natural resources are easier to get for their lower prices and because the KRG is not as strong as Russia and Iran. In late 2013, an energy deal was reached between Turkey and the KRG and the KRG's shipping of oil began from Turkish port of Ceyhan in May 2014. Turkey has therefore been playing a crucial role in transferring Kurdistan's oil to international markets[42].

A new 'independent' Kurdish pipeline started operating at the beginning of 2014, currently sending around 300.000 barrels a day of Kurdish oil to Turkey. Turkey's demand for KRI oil and gas became more indispensable when relationships between Turkey and Russia deteriorated after Turkish military forces shot down a Russian jet in November 2015 in response to the violation of Turkish airspace over the Turkish-Syrian border. Further, in late 2015 the Minister of Natural Resources of KRG, Ashti Hawrami, announced that the KRG planned to export nearly 10 billion cubic meters of natural gas to Turkey in the following two years. According to Turkish officials, the national gas company (Botas Petroleum Pipeline Corporation) will open a tender to build a 185 km pipeline towards the Turkish-Iraqi border with the further possibility of exporting the KRI's natural gas to the Trans-Anatolian Pipeline in the future[43].

According to liberal argument, States must consider the significance of economic interdependence when making the foreign policy and accordingly, being the KRI a source of energy for Turkey, it is an important part of its foreign policy decisions.

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[41] CHAROUNTAKI, *Turkish Foreign Policy and the Kurdistan Regional Government*, in 17(4) *Perceptions: Journal of International Affairs* 185 (2012), 194-195.
[42] PUSANE, *supra* footnote 4, 21-22.
[43] KAVÁLEK, *supra* footnote 28, 23.

Nonetheless, Turkey's economic relationship with the KRG has not left out security concerns. During this period, Turkey worked closely with the KRG to handle the PKK issue. Notwithstanding promises of the new Iraqi government to help Turkey with the PKK, the PKK attacks on Turkey soil got high, especially in 2007-2008. Therefore, in Turkey's eyes Baghdad was no longer a viable partner for security matters and since 2008 Turkey turned to the KRG to solve the Kurdish issue and constraint the PKK activities[44].

To deal with PKK, Turkey attempted to use the Özalian strategy which focuses on outside actors. In this case, Turkey considered the Iraqi Kurds as the most proper actor both to have PKK withdrawn from Turkey and to affect PKK operations in the Qandil Mountains. As a result, since 2008, the Kurdistan region become a friend for Turkey (several high-level meeting were held) while the trust in Baghdad reduced. In late 2012, with the help of the Kurdish in Iraq, the Turkish government initiated a peace process with PKK leader Abdullah Ocalan and the ceasefire was declared in March 2013, with PKK fighters starting to leave Turkey and heading to their bases in Northern Iraq[45].

Moreover, after the beginning of the armed conflict in Syria, Turkey allied with the KRG officials against the movements of Syrian Kurds in the Syrian conflict[46]. This was a turning point for the Turkish government's perspective towards the Kurds in Iraq because, for decades, Turkey has been worrying about the Kurds threat as an existential threat for Turkish security[47]. In late 2012, when the Syrian military forces withdrew from the northern part of Syria, the Kurdish Democratic Union Party (PYD) occupied most Kurdish areas and developed its autonomous rule. Policymakers in Turkey perceived the PYD control in Northern Syria as a threat to national security, mainly because the controlled area was linked and connected to the KRI. For Turkish officials, this region would become a second autonomous Kurdistan region in the immediate neighborhood of Turkey[48]. Furthermore, the PYD has close connections to the PKK. Accordingly, Turkey used its relations with the KRG (especially with Barzani's party, the KDP) to reduce the PYD power in Syria. In order to weaken the PYD forces, the Barzani's party established its Syrian branch and trained its military forces in the KRI[49].

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[44] *Ibidem*, 19.
[45] PUSANE, *supra* footnote 4, 23.
[46] *Ibidem*, 21.
[47] IHSAN-SHIPOLI, *supra* footnote 24, 10-11.
[48] PUSANE, *supra* footnote 4, 24.
[49] ACUN-KESKIN, *The PKK's Branch in Northern Syria. PYD-YPG*, Istanbul: SETA 2017, 13 and 26.

Another security issue for Turkey is the Iranian influence in Iraq and the threat of Shia militias for Sunni ethnics in Iraq. The role of Iran threatens Turkey's regional power and its attempt to play the role of a new Ottoman Empire in the Muslim regions. Since over 90% of Turkish citizens are Sunnis, Turkish government plays the moderate Islamist card in foreign policy. Indeed, using Sunni Islam is only applicable in Iraqi Kurdistan and in the Sunni parts of Iraq because the government of Baghdad is currently dominated by Shia[50]. In the post-Assad's political setting, the KRI might become the only stable Sunni neighboring ally for Turkey against the Iranian influence in Iraq and Syria[51]. Moreover, Iran has been backing several armed militias in Iraq under different names. After a part of Iraq fell under the control of ISIS (the "Islamic State in Iraq and Syria"), Iran was free to maneuver in the country, help the Popular Mobilization Forces (Al-Hashd Al-Shaabi) and threaten Sunni and Turkmen ethnic groups in Iraq. Sectarian disputes in Baghdad and other Sunni areas between Shia and Sunni opposition since 2010 onwards has proved that Shia cannot be a friendly partner for Sunnis in the whole region[52]. Being most of the Kurdish Sunni except for their nationality, they are therefore close to Turkey and can act friendly towards Turkey.

4.2. *The KRG referendum for independence as a watershed for Turkish foreign policy towards the KRI*

Turkey's relationship with Iraqi Kurds has not been without problems. After the dramatic changes in 2007, Turkey began dealing with the KRG and the two entities became good partners. Even though the AKP government's policy towards the KRG is much more enhanced than in the past, this openness does not mean that Turkey is less concerned about its security issues. The conflict in Syria increased the sentiments of Kurdish nationalists to have an opportunity for greater autonomy in the KRI and Syria[53]. Further, the KRG held a referendum for independence from Iraq on 25 September 2017. Before the referendum, Turkey put pressure on the Kurdish leaders to cancel the referendum and warned that the referendum could have increased the instability of an already destabilized region.

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[50] KAVÁLEK, *supra* footnote 23, 17

[51] CHAROUNTAKI, *supra* footnote 41, 197.

[52] ÇAĞAPTAY-EVANS, *Turkey's Changing Relations with Iraq: Kurdistan Up, Baghdad Down*, The Washington Institute for Near East Policy, Policy Focus 122, October 2012.

[53] Al Jazeera, *Why the Turkey-KRG alliance works, for now*, 8 November 2016.

Turkey was against any referendum to divide Iraq, especially if organized by the KRG. For Turkey any declaration of independence within Iraq or any referendum aimed at this purpose would threaten Iraq's territorial integrity and Turkey does not want it to happen[54]. Yet, Kurdish officials did not take Turkey's warning seriously, not even when on 9 June 2017 the Turkish Foreign Ministry stated:

"We have been conveying for some time Turkey's concerns about the independence referendum to the government of Iraq and the KRG, as well as to the leading members of the international community. In this regard, we have been stressing that, at a time when critical developments are unfolding in the region, such a move would benefit neither the KRG nor Iraq and that it would have negative consequences which will cause further instability […] We see the KRG's decision to hold the independence referendum on September 25, which runs counter to our advice and warnings, within the above-stated context and consider that it will be a grave mistake"[55].

Kurdish officials assumed that Turkey would not be against the process and Prime Minister, Nechirvan Barzani, stated that:

"I believe from what we have seen so far, the reactions of various countries are very normal, and there is nothing in the Turkish statements that could cause concerns"[56].

Kurdish officials, and also many academics close to Barzani's party, did not expect harsh reactions from Turkey and were confident that the economic ties with the KRG would have prevented Turkey to take any action against the Kurdish referendum because Turkey needed the KRG to export its goods and import energy. According to these view, any negative comment by the Turkish side were therefore supposed to be for the benefit of Turkey's domestic political scene.

Nonetheless, Kurdish officials should have understood that the Turkish warnings were serious since the issue was related to Turkish national security, especially after the Turkish President, Recep Tayyip Erdoğan, clearly said that the referendum was not the right step to take. Moreover, President Erdoğan used the word "local administration" in Northern Iraq instead of referring to the KRG and added that the "local administration"

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[54] ÜSTÜN-DUDDEN, *Turkey–KRG Relationship. Mutual interests, geopolitical challanges*, September 2017, Analysis No: 31, Istanbul: SETA 2017.
[55] Al-Monitor, *KRG not concerned by Turkey's reactions to independence vote*, 4 August 2017.
[56] *Ibidem*.

would regret this action. Only two days before the referendum, a final warning was sent to the KRG by the Turkey's National Security Council to drop the plan for the referendum. Once again, Turkey warned that the referendum was a direct threat to its own national security and stated that "the decision made by the regional administration of the North of Iraq can be implemented neither *de jure* nor *de facto* and such an initiative is a grave mistake which would bear undesirable consequences"[57]. Thus, despite the strong relationship gradually established between Ankara and Erbil, particularly since 2009, not many expected the Turkish authorities to endorse or acquiesce the referendum on Kurdistan's independence.

In the days before and after the referendum, Turkish military forces conducted tank drills near the Habur (Ibrahim Khalil) border between Turkey and the KRI. Joint military exercises between Turkey and Iraq were also held after the referendum[58]. On 4 October, President Erdoğan visited Iran together with his military Chief of the General Staff, General Hulusi Akar, who met the Iranian military Chief, Mohammed Hussein (it was the first-ever visit of a top Turkish military official in Iran since the Islamic Revolution in 1979). Both military officials condemned the referendum in the KRI as unconstitutional while the Turkish President was holding decisive talks with his Iranian counterpart on the referendum and other regional security issues[59]. Soon after, Iraq with Turkey and Iran started the embargo against the KRI.

Before the presidential visit to Tehran, the Turkish foreign minister had already declared that Turkey would prefer the Iraqi government controlling the Iraq-Turkey border. Even the Turkish officials underlined that the closing of the border with the KRG was one of the options to implement with Iraq and Iran, if needed. The referendum in the KRI pushed Iran and Turkey to set their differences aside for the time being in order to work together against the KRG. Based on the realistic argument that the main concern of policymakers should be protecting its own country's interest and security in any way, Turkey can accordingly work with Iran, the Syrian regime and the Iraqi government ruled by Shia to contain the threat of the Kurdish nationalist movement. Although the referendum took place and several threatening warnings were sent by Turkish officials to the KRG on any necessary step to be taken, however, Turkey actually did less than claimed for by government officials.

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[57] *Ibidem*.

[58] Bloomberg, *Turkey Says Kurd Independence Vote Is Direct Security Threat*, 22 September 2017.

[59] Al Jazeera, *Kurdish secession tops Erdogan's agenda in Iran visit,* 4 October 2017.

Several reasons should be taken into consideration for this behavior. Turkey had already ended the Kurdish peace process in Turkey and had been already fighting against the PYD forces in Syria. Another conflict with the Iraqi Kurds would inevitably lead to further destabilization of Turkey's southeast and would also enforce the resentment of all of Turkish Kurds. Turkey was and still is willing to play a significant regional role in the Middle East and Africa, and it has to confront with the Iranian regional role and influence, especially after the Iranian involvement in Syria, Yemen, and other Middle Eastern countries with Shia populations. Turkey would not get many benefits by destroying the KRG and reducing its economic and political relations. Shia forces, especially pro-Iranian militias in Iraq, cannot be trusted in dealing with Sunni and Turkmens. Moreover, Turkey is also anxious about the PKK's threat on Turkmens in Kirkuk and, therefore, Turkey needs to act very carefully with threats coming from the Kurdistan region and the Iranian and Shia influence in Iraq and the whole region. For Kurds, Turkey is still the only reliable ally in the region, especially after they can no longer count on the US engagement in the area. Having good relations with Turkey might be the best option for the KRI.

5. *Conclusion*

Turkey's foreign policy towards the KRG has had ups and downs and it is based on Turkey's national interest whatever the form and dimension (economy, politics, religion, culture or security). In its relations, Turkey emphasized on security dimension but this does not mean that the other dimensions have not been important as well. For Turkey, the KRG is a good economic partner as long as national security is not in danger. The help from the KRG is also necessary to deal with the PKK's threat because Baghdad cannot do so much about it. However, the independence of Kurdistan is the red line for Turkey's national security. The economic, religious, and cultural ties with Kurdish people are implemented as long as there is no security concern for Turkey, otherwise all means must serve to protect Turkish security and the other dimensions must be sacrificed. The article examined the Turkish foreign policy towards the KRI and its findings should be tried in different contexts with other theories and different case studies. The article also examined different theories to verify the security cycle of Turkey's foreign policy before certain events of change such as the 1991 international intervention in Iraq, the death of Turgut Özal in 1993, the US intervention in Iraq in 2003, and the 2017 KRG referendum.

Final Agenda of the POWERS International Spring School held at Kore University of Enna (April 26-29, 2022)





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Peace, War and the World in European Security Challenges

International Spring School

International Security, Human Security, and the EU Global Strategy: Regional Strategies and Different Perspectives from Europe, Middle East, and Russia

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Enna
April 26-29, 2022

Wednesday, April 27
Venue: Faculty of Law and Economics, Auditorium N. Colajanni

8.30	**Registration of participants**
9.00	**INTRODUCTORY REMARKS** **Prof. Giovanni Puglisi**, Rector of Kore University **Prof. Raffaele Scuderi**, Dean of the Faculty of Law and Economics **Prof. Paolo Bargiacchi**, Academic coordinator of Kore Research Unit of the POWERS Network and Convenor of the International Spring School
9.45	**OPENING SESSION** *The EU in the wider world: regionalisms, strategies, confrontations* **Chair**: Prof. Paolo Bargiacchi – Kore University ***The EU and the promotion of democracy through inter-regional relations*** Giovanni Finizio, Assistant Professor, University of Turin ***How to reduce the trend to Islamism? Some Muslim voices for an alternative to estrangements between Muslim migrants and the German culture*** Martin Tamcke, Professor, Georg-August-Universität Göttingen
11.15	**Coffee-Break**
11.45	**FIRST SESSION** *Rule of law, democracy, and authoritarianism* **Chair**: Prof. Paolo Bargiacchi – Kore University ***Is there an international rule of law?*** Lucia Corso, Associate Professor, Kore University

	An EU mechanism on democracy, the rule of law and fundamental rights Antonella Galletti, Teacher of EU Law, Kore University ***Impact of COVID-19 on the move towards authoritarianism and its implications on security*** Muge Aknur, Associate Professor, Dokuz Eylül University
13.00	**Lunchtime**
14.30	**SECOND SESSION** *Armed conflicts, legal rules, and political confrontations* **Chair:** Prof. Paolo Bargiacchi – Kore University ***'We won't exchange human rights for gas': Where is R2P in Ukraine? Between political limits and legal justifications*** Carmen Márquez Carrasco, Professor University of Seville ***Cyber warfare and applicability of international humanitarian law*** Laura Garay Gómez, Ph.D. student, University of Seville
15.45	**Coffee-Break**
16.15	**THIRD SESSION** *Security issues on energy, migration, and food* **Chair:** Prof. Lucia Corso – Kore University ***Energy Security in the Middle East: the view from Turkey*** Gul Kurtoglu Eskisar, Professor, Dokuz Eylül University ***Migration as a threat: the concept of securitization*** Yaroslavna Saraykina, Ph.D. student, Sciences Po Bordeaux ***Promoting human rights and dignity through food security in Morocco*** Antonino Finocchiaro, Ph.D. student, Kore University
17.30	**Closure of the day**

Thursday, April 28
Venue: Faculty of Law and Economics, Auditorium N. Colajanni

9.30	**FIRST SESSION** *Women and international justice as drivers of security* ***The UN Women, Peace and Security agenda: pillars, inclusion and the unyielding role of women*** Chiara Iachetta Single cycle degree in Law student, Kore University ***Fostering women's rights in Afghanistan: is there a credible way forward?*** Roberta Carcò Single cycle degree in Law student, Kore University ***Pursuing justice or peace and security at the International Criminal Court? The legal politics of the Article 16 of the Rome Statute*** Anna Maria Cassarà Single cycle degree in Law student, Kore University
10.45	**Coffee-Break**
11.15	**SECOND SESSION** *Mass atrocity crimes and human trafficking as drivers of insecurity* ***Providing security by preventing mass atrocity crimes: the UN Office on Genocide Prevention and the Responsibility to protect*** Chiara Di Blanca Bonasera & Sofia La Mendola Single cycle degree in Law students, Kore University ***Providing security by preventing mass atrocity crimes: the European 'Genocide Network'*** Aurelia Altamore & Gabriella Miraglia & Miriam Piscopo Single cycle degree in Law students, Kore University ***Fighting against human trafficking at EU level*** Vincenza Paladino Single cycle degree in Law student, Kore University

	Human trafficking and transnational organized crime Silvia Jelo di Lentini University of Miami School of Law Alumna
13.00	**Lunchtime**
14.30	**THIRD SESSION** *Trade, security, and justice* **Chair**: Prof. Paolo Bargiacchi – Kore University ***Piracy: a threat to sea security and world maritime trade*** Francesca Bruno & Riccardo Persio Ph.D. students, Kore University ***Antitrust and democracy*** Riccardo Samperi, Ph.D. student, Kore University ***The European Warrant of Arrest and the principle 'nullum crimen, nulla poena sine lege'*** Vincenzo Telaro, Ph.D. student, University of Catania
15.45	**Coffee-Break**
16.15	**FOURTH SESSION** *Security issues in Africa and Middle East* **Chair**: Prof. Paolo Bargiacchi – Kore University ***The efficacy of international actors on the abolition of the death penalty in South Africa and Botswana*** Zühal Ünalp Çepel (Assistant Professor, Dokuz Eylül University) & Damla Kizilkoca (Master's degree in International Relations student, Dokuz Eylül University) ***Multiple dimensions of security: impact analysis of coltan and cobalt mining industry in the DRC through the lens of the Just Ecological Transition*** Federico Jelo di Lentini Ph.D. student, University of Catania ***Turkey's foreign policy towards the Kurdistan Regional Government: ups and downs (2003-2017)*** Zyad Muhammad Nuri Assistant Lecturer, University of Charmo
17.30	**Closure of the day**

Friday, April 29
Venue: Faculty of Law and Economics, Auditorium CLIK

9.15	**FINAL SESSION** *Migration between securitization and integration* **Chair:** Prof. Paolo Bargiacchi & Prof. María José Prados Velasco, University of Seville ***The migration crisis as a fault line in the EU: the EU Court of Justice decisions regarding the Visegrad States*** Sevgi Çilingir Associate Professor, Dokuz Eylül University ***Sustainable and ethical investments in Northern Africa as a way to mitigate the impact of migrations on Italy and the European Union*** Giuseppe Macca (Ph.D. student, Kore University) & Tommaso Pochi (Teaching assistant, LUISS University) ***Securitization of migration in France from the perspective of social constructivism: an evaluation of the National Front Party*** Samet Kayar, Master's degree in European Union student, Dokuz Eylül University
10.45	**Coffee-Break**
11.15	**'CONFERENCE ON THE FUTURE OF AFGHANISTAN'** *A diplomacy simulation* Kore University students present the outcome of the diplomacy simulation on the future of Afghanistan held in parallel during the International Spring School
12.15	**CLOSING REMARKS OF THE SPRING SCHOOL**
12.30	**Closure of the International Spring School**





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