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THE INTERNATIONAL CRIMINAL COURT AND THE EVOLUTION OF THE IDEA OF COMBATING IMPUNITY:
AN ASSESSMENT 15 YEARS AFTER THE ROME CONFERENCE

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Abstract
This article evaluates the International Criminal Court’s first years of operation, taking stock of the institution’s activity. It describes and analyzes the main challenges which confronts this institution, namely: a) universality, complementarity and cooperation; and b) peace and justice. In the specific case of Kenya, the President and Vice-President of the Republic are suspected of committing crimes against humanity. Considering the positions taken by the African Union, the debate is whether the introduction of immunity from criminal jurisdiction, albeit temporary, to Heads of State and Government while in Office may, or may not, come to represent a step backwards for the idea of combating impunity for the most serious international crimes.

Keywords:
International Criminal Court; International Criminal Justice; Impunity; Immunity; African Union

How to cite this article

Article received on April, 21 2014 and accepted for publication on October, 9 2014

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1 Article is elaborated in the context of the research project "International Criminal Justice: a Dialog between Two Cultures", in progress in the Observatory of Foreign Relations – Observare/UAL, coordinated by Mateus Kowalski and Patricia Galvão Teles.
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Introduction

The signing of the Statute of the International Criminal Court (ICC)\(^2\) took place in Rome on 17 July 1998 and it entered into force on 1 July 2002. There are now 122 States part of this Statute, which corresponds to approximately two-thirds of the members of the international community. Specifically, there are 34 States from Africa, 27 from Latin America and the Caribbean, 25 from Western Europe and Others Group, 18 from Eastern Europe and 18 from Asia.

The International Criminal Court is currently adjudicating approximately twenty cases in eight different countries: Uganda, Democratic Republic of Congo, Sudan/Darfur, Central African Republic, Kenya, Libya, Ivory Coast and Mali. The Democratic Republic of Congo, Uganda, Central African Republic and Mali situations were submitted by the respective States. The UN Security Council has submitted two: Darfur and Libya. The final two were the result of the powers of the Prosecutor to investigate *proprio motu*: Kenya and the Ivory Coast.

The ICC is the first permanent international criminal court with jurisdiction to try those responsible for the most serious principal international crimes: aggression\(^3\), genocide, crimes against humanity and war crimes. Today, it is the main forum for international criminal justice, although *ad hoc* tribunals and the universal jurisdiction remain in existence.

The Statute of the ICC is, without a doubt, one of the principal treaties of the post-cold war period. International law received popular support at the time of the Statute, which was at the center of the political discourse, particularly in response to the most serious atrocities since World War II, such as Rwanda and the Former Yugoslavia, celebrating now the 20th anniversary since these cases justified the creation of *ad hoc* tribunals.

During the genesis and early years of the ICC, fighting impunity was a constant challenge, regarding the prevention of atrocities and their repression. Yet, how has the idea of fighting impunity evolved over the last 15 years and what are the main challenges facing the ICC today?

\(^2\) For detailed information on the ICC, its cases, organs, etc., see: [www.icc-cpi.int](http://www.icc-cpi.int)

\(^3\) Despite the amendments adopted at the Review Conference in Kampala in 2010, the definition of the crime of aggression and the conditions for the exercise of jurisdiction have not yet entered into force.
If the creation of the ICC was an enormous (and for some an unexpected) success, international criminal justice is currently under pressure. Expectations were high and thus generating high expectations which may explain the frustration with the fact that the Court, disposing of a substantial budget⁴, has taken ten years for the first conviction⁵, especially at a time of global economic crisis and austerity measures.

Nevertheless, the major challenges, besides the delay of justice or the financial burden of the institution, are political in nature. The fact that the ICC focuses mainly on cases involving African states arouses criticism of selectivity. Moreover, in the absence of full international ratification there are always "double standards" in the struggle against impunity, even though this can be remedied – but only in part - by the UN Security Council since the "P5" will always be "safe", given their power of veto).

Likewise, the lack of adoption of national legislation criminalizing international crimes undermines the ICC system, which is based on the principle of complementarity. Non-cooperation and lack of Court custody of many of the defendants, particularly from Uganda and Sudan, weaken the reputation and credibility of the Court.

On the other hand, the fact that the Court is called to exercise its jurisdiction in some cases pending conflict resolution, and that Heads of State in office are the subject to criminal proceedings, invigorates the debate on "peace" and "justice", and which of these objectives should be promoted and achieved first.

Therefore, we can group two main challenges around the following themes: a) Universality, Complementarity and Cooperation; and b) Peace vs. Justice or Peace and Justice.

The Kenyan case and recent issues raised by the African Union, climaxing during the last Assembly of States Parties in the autumn of 2013, also calls for reflection. Still unresolved, these tensions may leave a mark in the fight against impunity.

**Current challenges facing the ICC**

**a) Universality, Complementarity and Cooperation**

**Universality**⁶

Although based on classical international law, an international treaty like the Rome Statute, whose ratification or accession is a sovereign and voluntary decision of states, is not akin to other multilateral agreements. Like the Charter of the United Nations or major treaties on human rights and international humanitarian law, the Statute aspires to universality. To this end, a campaign for universal ratification is consistently promoted (on the part of some member States, the European Union and NGOs). This is likewise echoed in resolutions adopted annually by the Assembly of States Parties (ASP) of the ICC⁷, the political body where the State Parties convene, as well as

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⁴ Approximately 120 million Euros per year.

⁵ Conviction, in 2012, of Thomas Lubanga Dyilo, sentenced to 14 yrs. of prison for recruitment of child soldiers during the Democratic Republic of Congo conflict. The second sentence of the ICC relates to the same crime, in the case of Germain Katanga. The conviction of March of 2014 is still subject of appeal.

⁶ See, e.g., X. Philippe, "The principles of Universal Jurisdiction and Complementarity: How do the two principles intermesh?"

⁷ See the most recent Resolution ICC/12/Res. 8, November 27, 2013.
observer States. The ASP meets at least once annually and is responsible for ICC management and legislation.

Ideally, the ICC would have jurisdiction to try the most serious crimes committed in each country, but during the first decade, attention was directed toward conflicts in African countries. This is explained by three facts: atrocities were committed in several States that are not party to the Statute (still approximately a third of the international community), referral according to the action of the Security Council (which refereed only the cases of Sudan\(^8\) and Libya\(^9\)), and that half of the cases were submitted by States themselves, by coincidence African States.

However, preliminary investigations have started in several other cases, such as Afghanistan, Colombia, Georgia, Equatorial Guinea, Honduras, North Korea, and Nigeria. Nevertheless, for the moment, such investigations have not yielded results.

On the other hand, Commissions of Inquiry, mandated by the UN Human Rights Council on atrocities committed in Syria and North Korea, recommended the submission of such cases to the ICC in 2013 and 2014.\(^{10}\) In the first case, Syria is not a State Party to the ICC and there was a decision against sending the case to the ICC\(^{11}\), despite the favorable position of some of the UN Security Council members. In the case of North Korea, which is not part of the ICC either, the outcome is pending.

As Navi Navanethem Pillay, the Un High Commissioner for Human Rights stated,

"broadening the reach of the ICC is necessary so as to turn the ICC into a universal court and close the loopholes of accountability at the international level"\(^{12}\).

While the ICC is not a truly universal court - and one wonders if some day it may be - its "partial" or "incomplete" jurisdiction will always be a challenge, as long as "loopholes of accountability" remain open.

**Complementarity**

The ICC was designed as a Court of last resort, as each State has the primary duty to protect its population from the most serious international crimes and to prevent and repress the offences definted in the Rome Statutein accordance with national criminal systems.

The Statute states clearly, in the preamble, that the ICC is intended to judge the crimes of greater severity and, in particular, Article 17 establishes the principle of complementarity, whereby the ICC only has jurisdiction to try crimes when the State

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\(^{8}\) Resolution 1593 (2008).
\(^{10}\) It was also the case in relation to Darfur and to Libya, whose reports of the UN Commissions of Inquiry led the Security Council to refer these cases to the ICC in 2005 and 2011.
\(^{11}\) Cf. Resolution 2118 (2013).
having jurisdiction over the same crime is "unwilling" or "unable" to exercise that jurisdiction.

To this extent, the appropriate legislation and the capacity for effective investigation and judicial procedures are necessary at the national level. This is encouraged and supported by the ICC and the ASP (cf. Resolution ICC-ASP/12/Res. 4) in order to avoid the so-called "impunity gap", i.e. criminal cases that are not judged at the national or international level.

However, not all of the 122 States Parties to the Rome Statute have the appropriate legislation or competent judiciary to prosecute crimes within their jurisdiction. A thorough analysis of national legislation, to ensure its appropriateness, remains to be done and technical assistance can be provided to help these State Parties improve and adopt the necessary domestic legislation.

On the other hand, it is not always evident how to determine the situations in which a member State, in accordance with Article 17 (1) of the Statute, refuses or lacks the capacity to carry out the national jurisdiction over crimes. Only in the case of a negative assessment, can the Court declare the case inadmissible. As of yet, consolidated case law determining with certainty if the State "does not want" or "does not have the capacity" is lacking. Nor is it the practice of States on when to invoke such an objection of inadmissibility or of the Prosecutor for not pursuing investigations.

Are there other ways to avoid the "impunity gap"?

**Cooperation**

Non-cooperation with the Court is a phenomenon that strongly affects the credibility of the ICC. The States Parties are under an obligation to cooperate in accordance with Part IX of the Statute, specifically, in the implementation of the decisions of the Court and execution of the arrest warrants. In the event of cases referred by the Security Council under Chapter VII of the Charter, it would be fair to say that even the States not party shall be obliged to cooperate with the Court, in accordance with, at least, the aspects referred to in the resolution.

The most serious case of non-cooperation is, of course, the non-compliance with arrest warrants or requests for delivery. Arrest warrants or requests for delivery of more than half of the defendants have gone unheeded, as is outlined in the Resolution ICC-ASP/12/Res.3. Considering that all the members of the international community are under obligation to cooperate, arrest, or surrender those under warrant to the Court, it is striking that the the accused in situations submitted by the Security Council under Chapter VII (Darfur, President Bashir, and Libya) or in the first case, initiated in 2005 by Uganda, none of the suspects are in Court custody.

Pursuant to Article 63 of the Statute, the accused shall be present during the trial. Since there is no provision for trials in absentia, the Court’s role diminishes, as a case cannot proceed to trial by reason of non-presence of the accused.

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14 See G. P. Barnes, “The International Criminal Court’s Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir".
b) Peace vs. Justice or Peace and Justice

The idea of peace and justice, whether conflicting or complementary, is a relatively new issue, coming to light by the creation of the ICC. Previously, instances of establishment of international criminal tribunals took place at the end of the conflict as a consequence of crimes committed. The cases of the military court in Nuremberg or the ad hoc tribunals for the Former Yugoslavia and Rwanda demonstrate this point.

In the ICC’s case, jurisdiction can be triggered during any stage of the conflict, provided that there is suspicion that crimes, in accordance with the Statute, have been committed and that the situation will be referred by the State in whose territory the crimes are committed, by the Security Council, or in accordance with the powers proprio motu by the Prosecutor of the Court.

Likewise, being that the majority of current conflicts are intrastate or civil wars, their resolution will depend on a process of negotiated internal peace, where it is often necessary to gather all the conflicting parties to the negotiating table. It is frequently the case that some of these parties - government or rebels - have committed crimes, i.e., war crimes or crimes against humanity.

In the case of such peace negotiations, some argue that it is necessary to carry out the peace process first and, subsequently, commence the fight against impunity and for justice through a process called "sequencing". This is illustrated by the example of Uganda, where the case was brought to the Court by the government in an attempt to weaken the rebels of the "Lord’s Resistance Army". However, the warring parties would only accept negotiations if the peace agreement gave them immunity from ICC indictments.

The Rome Statute and general international law seem incompatible with granting amnesty for the most serious international crimes. Yet, the Rome Statute recognizes the importance of suspending investigations or trials in cases of the maintenance of international peace and security (Article 16), when the crimes are subject to processes at the national level (Article 17), or when the Prosecutor believes that suspension best serves the interests of justice (Article 53).

For the ICC and the ASP, these concepts are complementary: "There can be no lasting peace without justice and (...) peace and justice are thus complementary requirements" (Resolution ICC-ASP/12/Res. 8). Moreover, it is the only way to enhance the effect of deterrence regarding the commission of the most serious

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15 For a brief interesting summary of this debate, its history and different positions, see Draft Moderator Summary, "Stocktaking of international criminal justice - Peace and Justice", Review Conference of the Rome Statute, Kampala, 31 May-11 June 2010. See also the "Nuremberg Declaration on Peace and Justice", Annex to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General (A/62/885).

16 See the opinion of the African political figure, Thabo Mbeki, co-author of an article in the New York Times, published in February 5, 2014, with the provocative title of "Courts can't end civil wars."


18 See also the article of the Prosecutor of the ICC, Fatou Bensouda, the New York Times, 19 March 2013, entitled "International Justice and Diplomacy."

19 K. Cronin-Furman, "Managing expectations: International criminal trials and the prospects for deterrence of mass atrocity".
international crimes, which was the initial rationale for the creation of the first permanent international criminal court.

The ICC, the case of Kenya, the African Union (AU) and the future of the idea of combating impunity

In the autumn of 2013, the African Union raised concerns directed toward the ICC, especially concerning the case of Kenya, hitting its climax in the Assembly of State Parties. Still ongoing, these tensions continue to challenge the idea of combating impunity.

The African Union has taken several tough positions on the question of universal jurisdiction, the fight against impunity, and the International Criminal Court, specifically with the cases of Sudan and Kenya.

Regarding Kenya, the case was not referred to the ICC by the State directly, although it is a party to the Rome Statute, but triggered by a Prosecutor investigation proprio motu. The referral occurred after the discovery that crimes against humanity were committed in the wake of the 2007 national elections. Specifically, murder, rape, forms of sexual violence, deportation, forced transfer of populations, and other inhumane acts were reported. The Prosecutor’s findings led to the 2010 indictment for crimes against humanity of three suspects, two of whom were elected in 2013, President Uhuru Kenyatta (trial postponed) and Vice President William Ruto (trial started in 2013) of the Kenyan Republic.

During the 21st Session of the Assembly of the African Union in May 2013, the African Union, by resolution (Assembly /AU/13 (XXI), reiterated its,

"strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts at promoting lasting peace" and the "AU's concern with the misuse of indictments against African leaders."

As a result of this decision, a letter was addressed on 10 September, coinciding with the start of the trial of Vice-President Ruto, to the President of the ICC referring to the need of the creation of a national mechanism to investigate and prosecute crimes

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21 On this theme see "The AU-EU Expert Report on the Principal of Universal (AHJ) (Council of the European Union 8672 1/09, 16 April 2009). The theme of universal jurisdiction and the International Criminal Court has caused wide friction between the African Union and the European Union, which gave rise to the above-mentioned report. The Declaration of the most recent EU-Africa Summit, which took place in Brussels on 2 and April 3, 2014, with total absence of reference to the ICC, states in paragraph 10: "We confirm our rejection of, and reiterate our commitment to, fight impunity at the national and international level. We undertake to enhance political dialogue on international criminal justice, including the issue of universal jurisdiction, in the agreed fora between the parties."

committed in the context of the post-electoral violence in Kenya in 2007. The same letter stated that the Court proceedings affect the ability of Kenyan leaders to lead, who - despite possible liability for the crisis of 2007 -, are democratically elected and must remain in the country to fulfill their constitutional responsibilities. Furthermore, the trial period requiring the physical presence of the President and the Vice-President at The Hague would not be feasible, since the Constitution of Kenya states that when the President is abroad, the Vice-President cannot be also, and vice versa.

In response, the ICC denied any procedural statute to that letter or the May decision since it fell outside the scope of the process and was not sent the request of the parties or the Security Council, and responded negatively to the pretense of suspending the process.

In October 2013, a Special Session of the Assembly of the AU adopted a new resolution, this time entitled: "Decision on Africa's relationship with the International Criminal Court" (cf. Ext /Assembly/AU/Dec .1 (Oct. 2013)). This resolution reiterated the concern with the politicization and misuse of accusations against African leaders by the ICC. Regarding the question of Kenya, the resolution stated that the indictment prompts a serious and unprecedented situation in which both the President and Vice President in Office of a country are the target of an international criminal process, affecting the sovereignty, stability and peace in that country, as well as the national reconciliation and the normal functioning of constitutional institutions. The resolution decided, *inter alia*, the following:

- For the safeguarding of constitutional order, stability, and integrity of the Member States, no prosecution can be initiated or continued by any international tribunal against any head of State or Government in Office or someone who acts or with the right to act in that capacity during his tenure;

- That the trials of the Chairman Uhuru Kenyatta and the Vice-president William Samoei Ruto, who are the current leaders in Office of the Republic of Kenya, must be suspended until their terms are completed;

- Creation of a Contact Group of the Executive Board, to be headed by the President of the Council, which shall consist of five members (one per region) to conduct consultations with the members of the UN Security Council (UNSC), specifically, the five Permanent Members, with a view to collaborate with the UNSC in all concerns of the AU on their relationship with the ICC, including the postponement of the cases against Kenya and the Sudan, in order to obtain the answer before the beginning of the trial, the 12 November 2013;

- Accelerate the extension process of the African Court on Human and Peoples' Rights (TADHP) mandate to judge international crimes, such as genocide, crimes against humanity, and war crimes;

- The African States Parties to the Rome Statute to propose relevant amendments to the Rome Statute, in accordance with Article 121 of the Statute;

- Ask the African States Parties to the Rome Statute of the ICC, in particular the members of the Bureau of the Assembly of States Parties, to include in the Agenda of the next session of the ASP the question of the prosecution of a Head of State and

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of Government in Africa in Office by the ICC, and its consequences for the peace, stability, and reconciliation in the Member States of the African Union.

- That any member State of the AU wishing to refer a case to the ICC should inform and obtain the approval from the African Union;

- That Kenya should send a letter to the Security Council of the United Nations, requesting postponement of the case against the President and the Vice President of Kenya, in accordance with Article 16 of the Rome Statute, which is supported by all African States Parties;

- In accordance with this Decision, ask the Court to postpone the trial of President Uhuru Kenyatta, marked for November 12, 2013 and to suspend the procedure against the Vice-president William Samoei Ruto up to the moment in which the UN Security Council considers the request of Kenya for deferral, supported by the AU.

- That the President Uhuru Kenyatta not be required to appear before the ICC until the moment that the concerns raised by the AU and its Member States have been duly considered by the Security Council of the United Nations and the ICC.

On November 15, 2013 the Security Council rejected, though extremely divided (7 votes in favor and 8 abstentions) a draft Resolution (doc. S/2013/660) which sought, pursuant to Article 16 of the Rome Statute and Chapter VII of the Charter, to defer the investigation and trial of the President and Vice-President of Kenyan, for a period of one year. Voted in favor Azerbaijan, China, Morocco, Pakistan, Russia, Rwanda and Togo. Abstained Argentina, Australia, France, Guatemala, Luxembourg, the Republic of Korea, United Kingdom and USA (for individual explanations of vote see S/PV. 7060).

Nevertheless, the 12th session of the ASP included, at the request of the African Union, a special segment entitled, "Indictment of Sitting Heads of State and Government and its consequences on peace and stability and reconciliation."

During the November 2013 intervention on behalf of the AU in the ASP, it was stated;

"... I would like to turn now to the situation in Kenya and to highlight the inescapable link between peace and justice. We at the AU would like to see an intelligent interaction between justice and peace because it is only in this way that we can succeed in promoting democratic governance with strong institutions, the rule of law and constitutionalism. The African Union believes that if Kenya does not qualify for use of Article 16 of the Rome Statute and subsequently the principle of complementarity then no other State Party will. If this turns out to be the case, then not only Article 16 would be deemed to be redundant for the United Nations Security Council to legitimately and constructively resort to it, but the irresistible conclusion will also be that the ICC, whose establishment Africa and the Organization of African Unity strongly
According to the proposal submitted by the African States - adopted by consensus - substantial amendments to the Rules of Procedure and Evidence of the ICC - namely Rule 134 – were drafted, specifically allowing the justification of absence or that of physical presence in the trial to be replaced by participation via video technology. In accordance with the Resolution ICC-ASP/12/Res. 7, the following was inserted after Rule 134 of the Rules of Procedure:

“Rule 134bis

Presence through the use of video technology

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be allowed to be present through the use of video technology during part or parts of his or her trial.

2. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question.

Rule 134ter

Excusal from presence at trial

1. An accused subject to a summons to appear may submit a written request to the Trial Chamber to be excused and to be represented by counsel only during part or parts of his or her trial.

2. The Trial Chamber shall only grant the request if it is satisfied that:

   (a) exceptional circumstances exist to justify such an absence;

   (b) alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate;

   (c) the accused has explicitly waived his or her right to be present at the trial; and

   (d) the rights of the accused will be fully ensured in his or her absence.

3. The Trial Chamber shall rule on the request on a case-by-case basis, with due regard to the subject matter of the specific hearings in question. Any absence must be limited to what is strictly necessary and must not become the rule.

Rule 134 quarter

Excusal from presence at trial due to extraordinary public duties

1. An accused subject to a summons to appear who is mandated to fulfill extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel
only; the request must specify that the accused explicitly waives the right to be present at the trial.

2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.”

There will be those who question the compatibility of these amendments with Article 27 of the Rome Statute and the principle of equal treatment. The Court, in a decision from November 26 2013 on the Kenyan process, contended that the absence of the accused should only occur in exceptional circumstances and be limited to what is strictly necessary. Although the trials in absentia were allowed in the Nuremberg trials, they were excluded, as a general rule, in the Tribunals for the former Yugoslavia, Rwanda and by the Statute of the ICC.

Article 27 of the ICC Statute confirms, in addition, that the official capacity of a defendant is irrelevant for the purposes of a trial before this Court, providing that immunities or special procedural rules that may be inherent to the official duties of a person, according to national or international law, does not prevent the Court from exercising its jurisdiction over such a person. In addition, Article 98 of the Statute does not refer to the personal immunities of Heads of State, Government, or Ministers of Foreign Affairs in absolute terms, but rather to the diplomatic immunities between Member States and the possible need to obtain consent prior to the delivery of a suspect to Court.

The proposals made during the ASP for amendment to the Rules of Procedure, its acceptance policy and strategy of containement, did not prevent, however, the Government of Kenya from notifying, on November 22, 2013, the Secretary-General of the United Nations, as depositary of the Rome Statute, the following proposed changes to the Statute in accordance with Article 121 (1), in particular with regard to Articles 63 (Trial in the Presence of the accused), 27 (Irrelevance of official capacity) and to the paragraph of the Preamble on complementarity:

**Article 63 (2) - the Presence of the accused at trial**

"Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.

(2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.

(3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured

in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial."

**Article 27 (3) - Irrelevance of official capacity**

"Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions"

**Introductory Paragraph on Complementarity**

"Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions."

If the proposed amendment to Article 63 - the new rules introduced in ASP 2013 are to some extent already accepted - represents a 60 year step backwards to the trials in absentia of the Nuremberg Tribunal, the proposed amendment to Article 27 goes against a fundamental "sacrosanct" principle upheld since Nuremberg and incorporated in the Statute of all criminal courts: international criminal law applies to everyone, regardless of official capacity. Article 7 of the Charter of the International Military Tribunal stated "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."

The proposal for the amendment of Article 27, supported by the African States and proposed for discussion in an extraordinary ASP, would alter a fundamental principle of the Statute and customary international criminal law, recognized by ICJ in the Case Arrest Warrant of 2000. It would be "a shameful retreat in the global fight against immunity". Additionally, according to the same author, this Amendment to Art. 27 could even be a stronger incentive for taking power (by democratic means or not) in order to avoid a trial in The Hague. The proposal, likewise, contradicts the principle of speedy justice for the victims, because the Court would be prevented from exercising jurisdiction with regard to persons that occupy high political positions.

In our view, and as mentioned above, the appropriate safeguards for complex cases, such as the case of Kenya are already incorporated in the Rome Statute, therefore, no change to the aforementioned articles is required. However, the safeguards in Articles 17 (Complementarity and Admissibility), 53 (Powers of the Prosecutor) and 61 and 63r (Presence of the accused at trial), could be readdressed to improved consistent and continuity. In any case, in extreme circumstances, the power to appeal will remain, and in cases in which peace is seriously threatened, the Security Council, pursuant to Article 16 of the Statute, may suspend, for periods of 12 months, the proceedings before the ICC. The fact that that body has not accepted the use of this prerogative in Sudan’s

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case, where it did not formally take a decision, or Kenya, where the request was denied by a narrow margin, does not mean that this safeguard is ineffectual.27

Conclusions

Due to the challenges of the current cases, some perceive the idea of combating impunity and international criminal justice as declining. Others view this as a process of stabilization developing in the ICC; which after a revolutionary achievement, despite maturing over many decades, materialized in a relatively short period.

However, the African attempt to introduce immunity from criminal jurisdiction for current Heads of State for the most serious international crimes - even if temporarily - is a severe setback to the idea of fighting impunity.

The future credibility of the ICC’s role, pursuant on how and when these challenges and ideas are approached, awaits judgment. The proposal for a separate International Criminal Court for Africa (suggested by the African Union and the proposed amendment to the Statute of Rome from Kenya) and the possible withdrawal from the ICC Statute (authorized but with limited effects on current cases) by Article 127 (2) by some African states has yet to materialize.

Kofi Annan succinctly clarified the issue when he stated,

"it is the culture of impunity and individuals who are on trial at the ICC, not Africa"28.

It is our hope that the entire international community will understand these words of wisdom and that the struggle against "impunity" will not lose its "p" and become, in fact, for some, “immunity" from crimes against humanity.

References


THE INTERNATIONAL CRIMINAL COURT
AND THE CONSTRUCTION OF INTERNATIONAL PUBLIC ORDER

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Abstract
Envisioning an international public order means envisioning an order sustained by a legal and institutional framework that ensures effective collective action with a view to defending fundamental values of the international community and to solving common global problems, in line with the universalist vision of international law. Envisioning the construction of an international public order means considering that this framework, which embraces and promotes the respect for human rights focused particularly on human dignity, is consolidating and evolving based on the International Criminal Court (ICC). The establishment of the ICC added an international punitive perennial facet to international humanitarian law and international human rights law and linked justice to peace, to security and to the well-being of the world, reaffirming the principles and objectives of the Charter of the United Nations (UN). Nevertheless, the affirmation process of an international criminal justice by punishing those responsible for the most serious crimes of concern to the international community as a whole, faces numerous obstacles of political and normative character. This article identifies the central merits of the Rome Statute and ICC’s practice and indicates its limitations caused by underlying legal-political tensions and interpretive questions relating to the crime of aggression and crimes against humanity. Finally, the article argues for the indispensability of rethinking the jurisdiction of the ICC, defending the categorization of terrorism as an international crime, and of articulating its mission with the “responsibility to protect”, which may contribute to the consolidation of the ICC and of international criminal law and reinforce its role in the construction of an effective international public order.

Key Words:
International Criminal Court; International Public Order; The Rome Statute; International Criminal Law; International Crimes; Terrorism; Responsibility to Protect

How to cite this article

Article received on September 24, 2014 and accepted for publication on October 29, 2014
THE INTERNATIONAL CRIMINAL COURT 
AND THE CONSTRUCTION OF INTERNATIONAL PUBLIC ORDER

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The ICC will not be a panacea for all the ills of humankind. It will not eliminate conflicts, nor return victims to life, nor restore survivors to their prior conditions of well-being and it will not bring all perpetrators of major crimes to justice. But it can help avoid some conflicts, prevent some victimisation and bring to justice some of the perpetrators of these crimes. In doing so, the ICC will strengthen world order and contribute to world peace and security.


... justice is a fundamental building block of sustainable peace

Kampala Declaration, 11 June 2010.

1. Introduction

Envisioning an international public order means envisioning an order sustained by a legal and institutional framework that ensures effective collective action with a view to defending fundamental values of the international community and to solving common global problems, in line with the universalist vision of international law. Such an international order implies institutions, procedures and international instruments that enable the achievement of common objectives (Bogdandy; Delavalle, 2008: 1-2).

Envisioning the construction of an international public order means considering that this framework which embraces and promotes the respect for human rights focused particularly on human dignity, aiming to safeguard peace, security and well-being of the world, is consolidating and evolving based on a permanent and independent court, the International Criminal Court (ICC).

The preludes of an international criminal court as a protector and as a driving force of a public order date back to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 under the auspices of the United Nations (UN)¹. Indeed, the

General Assembly, taking into account the question raised during the discussion on the punishment of crimes of genocide and the increasing need for a competent body for the trial of certain crimes under international law in a developing international community invited the International Law Commission to study the desirability and possibility of its establishment\(^2\). The positive response of the Commission\(^3\) resulted in a draft statute, elaborated over several decades and submitted to the General Assembly in 1994 that advocated the importance of the creation of an international criminal court\(^4\). In this sense, the Assembly established a preparatory committee in 1996 with the aim of producing a draft text, which served as the basis for negotiations at the Rome Conference in 1998, culminating in the signature of the Statute.

Armin von Bogdandy and Sergio Dellavalle stress that the progress of an international public order and effective international law largely depends on the fate of international criminal law and on the success of the Statute’s regulatory project (2008: 2). However, how is this dependence manifested? How could the regulatory project and, more specifically, the ICC be more successful and influence this construction in a more effective manner?

This article examines the merits of the Rome Statute and ICC’s practice and then explicates its limitations. Lastly, it argues for the indispensability of a process of acquiring new dimensions and of deepening existing facets, formulating some proposals.

2. The Rome Statute and the recent praxis of the ICC: key considerations

The Rome Statute of 1998 reaffirmed the relevance of the UN Charter objectives and principles\(^5\) and recognized the existence of common values such as peace, security and well-being of the world which should be safeguarded by the court.

The Statute established the notion of "most serious crimes" of concern to the international community as whole and which are enumerated in Article 5: crime of genocide, war crimes, crimes against humanity and the crime of aggression. In this context, the statute added a punitive facet to international human rights law and to international humanitarian law, since until then the punishment of its violation depended solely on national criminal jurisdictions.


\(^5\) See Articles 1 and 2 of the UN Charter.
Specifically, regarding International Human Rights Law, the Statute incorporated, in Article 6, the definition of the crime of genocide as stated in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Hence, genocide means any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: homicide, causing serious bodily or mental harm to members, deliberately inflicting conditions of life designed to bring about its physical destruction in whole or in part, imposing measures intended to prevent births, and the forced transfer of children to another group.

The punitive facet of international humanitarian law was embodied in Article 8 related to the war crimes prescribed in the Geneva Conventions of 1949. The Court has jurisdiction over these crimes “when committed as part of a plan or policy or as part of a large-scale commission of such crimes”. This article covers grave breaches of these conventions, i.e., acts against persons or property and serious violations of the laws and customs applicable in international armed conflict under international law. In the case of non-international armed conflicts, war crimes refer to violations contained in Article 3, common to the Geneva Conventions. That is, acts committed against individuals taking no active part in the hostilities, including members of armed forces who have laid down their arms or were placed hors of combat: acts of violence to life and person, outrages upon personal dignity, hostage-taking, the passing of sentences and the carrying out of executions, without previous trial by a regularly constituted court, which affords all indispensable judicial guarantees as well as other serious violations of the laws and customs applicable to such conflicts under the international law framework.

Under the Statute, crimes against humanity are any act committed as part of a widespread or systematic attack against a civilian population with knowledge of the attack, such as murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of fundamental rules of international law, torture, rape, sexual slavery, persecution against an identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender grounds or on other universally accepted criteria, crimes against humanity, forced disappearance of persons, the crime of apartheid, and other inhumane acts of a similar nature intentionally causing considerable suffering, serious injury or affect mental or physical health (Article 7).

In contrast to the crimes of genocide and war crimes, the crimes against humanity are not codified in an international convention and the analysis of the jurisprudence of the international ad hoc criminal tribunals reveals different understandings. The systematization contained in the Statute encompasses acts that had not been specified previously as crimes against humanity, being therefore the most comprehensive listing on this matter.

The merits of the Statute are not solely limited to codifying the most serious crimes, except the crime of aggression whose definition and conditions for the exercise of the ICC’s jurisdiction were procrastinated to a review Conference (Article 5, paragraph 2). By prescribing the application of the general principles of criminal law (Part III), the principles of the presumption of innocence (Article 66) and of the prohibition of double jeopardy - ne bis in idem (Article 20) by the Court, the Statute contributes significantly to the consolidation and development of international criminal law (Stein; von Buttlar 2012: 438).
This punitive system is based on the complementarity principle (Article 1), that even though constraining the ICC’s power, enables the Court to exercise influence over the states’ sphere of authority. It forms part of a gradual erosion process of the Westphalian view of the sacrosanctity of state sovereignty and internal affairs. As Miguel de Serpa Soares argues:

“any form of international justice always represents a means of limiting national sovereignty. In the case of International Criminal Law this limitation is even more evident by compromising elements essential to the classic paradigm of International Law, as for example the punitive monopoly of States or the concept of a quasi-absolute State sovereignty” (Soares, 2014: 9).

In effect, the Court is competent to determine a state’s unwillingness to carry out the investigation or prosecution: situations where the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility within the Court’s jurisdiction, existence of an unjustified delay in the proceedings or the proceedings were or are not being conducted independently or impartially, and they are or were being carried out in a manner that is inconsistent with an intent to bring the person concerned to justice (Article 17, paragraph 2).

In addition, the Statute imposes upon the States Parties the obligation to cooperate with the Court in the investigation and prosecution of crimes within its jurisdiction (Article 86) and to adopt procedures under national law for all of the forms of international cooperation and judicial assistance specified under Part IX (Article 88).

The praxis evidences an increasing activity of the Court, demonstrating its commitment to ending impunity.

In 2012, Thomas Lubanga Dyilo was sentenced to 14 years in prison for war crimes. He was found guilty of enlisting and conscripting of children under 15 years of age to actively participate in a non-international armed conflict in the Democratic Republic of the Congo from 1 September 2002 to 13 August 2003. In 2014, Germain Katanga was found guilty and sentenced to 12 years in prison for one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) committed on 24 February 2003 during the attack on the village of Bogoro in the Democratic Republic of the Congo.

Presently, the Office of the Prosecutor is investigating several situations by state party referral – Uganda (2004), Democratic Republic of Congo (2004), Mali (2012), The Union of the Comoros (2013) and Central African Republic (2005 and 2014) – by proprio motu action of the Prosecutor: Kenya (request submitted in 2009, authorization of the Pre-Trial Chamber in 2010), Ivory Coast (request submitted and authorization of

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6 See ICC-01/04-01/06-2901, Trial Chamber I, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, 10.07.2012.

7 See ICC-01/04-01/07-3484, the Trial Chamber II, Situation in the Democratic Republic of the Congo, The Prosecutor v. Germain Katanga, Decision on the sentence (Article 76 of the Statute), 23.05.2014.
the Pre-Trial Chamber in 2011) – and conducting preliminary examinations concerning several states, namely Ukraine, a non-state party which accepted the jurisdiction of the Court (2014). Even more important is the referral of the situations in the Darfur region, in Sudan (2005) and in Libya (2011) by the UN Security Council due to the existence of evidence of international crimes. It can be considered that these referrals are in line with the argument of universalism that this competence of the Council allows the extension of the Court’s jurisdiction to non-States Parties and thus constitutes an "evolution in shaping the international order" (Kowalski, 2011: 124).

3. Limitations of the ICC and implications for the applicability of International Criminal Law

The limitations of the ICC result, firstly, from legal and political tensions arising from its relationship with the Security Council and the complementary character of its jurisdiction and, secondly, from the ambiguity of certain formulations contained in the provisions concerning the “crime of aggression” and “crimes against humanity”, raising interpretive problems which the law applicable by the Court under Article 21 of the Statute does not clarify categorically.

3.1. Legal-political tensions and the problem of decision implementation

Article 13, paragraph b) of the Statute provides for the possibility of the Security Council to refer a situation to the Prosecutor under Chapter VII. This means that the consent from the state in which the acts were committed or of the nationality of the person alleged to have committed international crimes is not required. The Security Council’s referrals of the situations in Darfur, Sudan, in 2005 and in Libya in 2011 were considered historic. However, in the first case, the Security Council has not actively supported the ICC with respect to detention and to the states’ duty to cooperate with the Court. In the second case, despite the swift reaction of the Council, the resolution, as the Darfur referral decision, was flawed, as it, for instance, excluded the Court’s jurisdiction over nationals of non-states parties (Stahn 2012: 328).

But it is mainly Article 16, according to which an investigation or a prosecution may not be initiated or proceeded with for a period of 12 months if the Council has requested the Court to that effect in a resolution adopted under Chapter VII, with the possibility

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8 Resolution 1593 (2005) which refers the situation in Darfur (since July 1, 2002) to the ICC does not specify possible international crimes committed in the region. However, the Security Council took note of the report of the International Commission of Inquiry on Darfur – this Commission was established by former UN Secretary General, Kofi Annan, on the basis of resolution 1564 (2004) with a mandate to investigate reports of violations of international human rights law and international humanitarian law in the region - which considered that the crimes committed may amount to war crimes and crimes against humanity (UN Doc. S/2005/60). Resolution 1970 (2011) which refers the situation in Libya to the Court mentions that the widespread and systematic attacks taking place against the Libyan civilian population could constitute crimes against humanity.

9 According to Article 21, paragraphs 1 and 2, the Court must in the first place, apply the Statute, the Elements of Crimes and the Rules of Procedure and Evidence, and in the second place, where appropriate, applicable treaties and the principles and rules of international law including the established principles of the international law of armed conflict. Failing that, general principles of law derived by the Court from different national legal systems and principles and rules of law as interpreted by the Court in previous decisions.
of renewal, that raises sharper criticism based on the argument that this action undermines the independence of the Court\textsuperscript{10}. Jorge Bacelar Gouveia qualifies this mechanism as "whimsy" and underlines that:

\begin{quote}
It is very difficult to accept the interference of a political organ in the heart of the exercise of public power of a body that should be jurisdictional, whose intervention, above all, can not only happen at any time in the proceedings, but also repeat itself, though it has in its favor the temporality and the astringent context of Chapter VII of the UNC\textsuperscript{13} (2013: 792-793).
\end{quote}

The Court's complementary nature to national criminal jurisdictions means that, as Judge Philippe Kirsch noted, the Statute is a two-pillar system: a judicial pillar represented by the Court and an enforcement pillar represented by the States\textsuperscript{11}. Yet, the absence of a permanent mechanism that ensures compliance with the court’s decisions hampers the implementation of this pillar and, therefore, the fight against impunity.

In fact, the execution process of the warrants of arrest has been to a certain extent troubled. Therefore, it cannot be considered a coincidence that the first words of the declaration of the first Review Conference of the Statute - the Declaration of Kampala of 2010 – focus on a renewed spirit of cooperation and solidarity, emphasizing the States Parties' commitment to fight impunity and ensure lasting respect for the enforcement of international criminal justice.

The case of Sudanese President Omar al-Bashir is representative of this problem. The origins of this case date back to 2005 when the Security Council referred the Darfur situation to the Court in resolution 1593. The former ICC Prosecutor, Luis Moreno-Ocampo, initiated an investigation later that year and in 2008 requested the Pre-Trial Chamber to issue a warrant of arrest against the Sudanese President (first warrant issued on 4\textsuperscript{th} March 2009 and the second warrant issued 12\textsuperscript{th} July 2010, accused of indirect responsibility for war crimes, crimes against humanity and genocide)\textsuperscript{12}. This was the first case in which an arrest warrant was issued against a head of state in office. Subsequently, the African Union (AU) submitted a request, pursuant to Article 16 of the Statute, to the Council to adopt a resolution under Chapter VII to defer the decision, which was declined by the Security Council. As a result, the AU appealed repeatedly to Member States not to cooperate with the ICC in the arrest of Omar al-

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\textsuperscript{10} The definition of the crime of aggression involved the establishment of procedures that emphasize this dependence in the case of a state party referral or \textit{proprio motu} action by the Prosecutor, although paragraph 9 of Article 15 \textit{bis} underlines that such determination by an external body is not binding on the Court. According to paragraphs 6 and 8 of this Article respectively, when the Prosecutor concludes that there is a reasonable basis to proceed with the investigation, he/she must first ascertain whether the Security Council made a determination of such an act committed by the State concerned and notify the United Nations Secretary-General of the situation before the Court; if no determination is made within six months after the date of notification, the Prosecutor may continue the investigation as long as the Pre-Trial Chamber has authorized the initiation of the investigation and the Security Council has not decided otherwise under Article 16.
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\textsuperscript{11} ICC, Philippe Kirsch, Opening remarks at the fifth session of the Assembly of State Parties, 23.11.2006.
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Bashir. As David Luban stated, the Court’s weakness, namely, the gap between the aspiration for criminal justice and its accomplishment, became evident when most African and Arab states gathered to support the Sudanese President against the ICC’s decision (2013: 508).

On several occasions, the ICC urged, unsuccessfully, the States Parties and non-States Parties to execute the arrest warrants issued against al-Bashir during his presence on their territory. In April 2014, the Pre-Trial Chamber determined that the Democratic Republic of the Congo failed to comply with its obligations to arrest and surrender Omar al-Bashir during his visit to the country. Consequently, in accordance with Article 87, paragraph 7, the Pre-Trial Chamber informed the Assembly of State Parties and the Security Council. As David Luban stated, the Court’s weakness, namely, the gap between the aspiration for criminal justice and its accomplishment, became evident when most African and Arab states gathered to support the Sudanese President against the ICC’s decision (2013: 508).

Another relevant case regards the current President of Kenya, Uhuru Muigai Kenyatta, accused of being criminally responsible as an indirect co-perpetrator for crimes against humanity. This case concerns the violence that occurred in Kenya following the 2007 presidential elections that caused numerous victims. In 2009, Luis Moreno-Ocampo submitted a request to the Pre-Trial Chamber for authorization of an investigation, which culminated, at request of the Prosecutor, with the issuance of an arrest warrant against six Kenyan officials, the so-called “Ocampo six”, by the Pre-Trial Chamber in 2011. That year, the AU endorsed the Kenyan government’s request to the Security Council to adopt a resolution, requesting the ICC to defer the proceedings against the Kenyan president and the vice president, William Ruto, pursuant to Article 16. The AU renewed the request in 2013, which was once again declined by the Security Council.

In June 2014, the AU adopted an amendment to the protocol of the Statute of the future African Court of Justice and Human Rights, with jurisdiction over international crimes, that grants immunity from prosecution to heads of state and senior government officials, in opposition to Article 27 of the Rome Statute, which allows for the prospect of the persistence of legal and political tensions between the AU and the ICC.


16 Article 27, paragraph 1 determines that “this Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence”. Article 27, paragraph 2 states that “immunities or special procedural rules may attach to the official capacity of a person under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”. 

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3.2. Weaknesses in the interpretation of the Rome Statute

3.2.1. "Crime of Aggression" and "Act of Aggression"

The failure to reach an agreement on a definition of "crime of aggression" and respective elements at the Rome Conference resulted in the inclusion in the Statute of an additional clause to the incorporation of this crime as a “core crime”. This clause provided for the exercise of jurisdiction once a provision was adopted in a Review Conference, in accordance with Articles 121 and 123, defining this crime and setting out the conditions for that purpose (Article 5, paragraph 2). In this sense, resolution F in Annex I of the Final Act of the Rome Conference established a preparatory commission with various tasks including the preparation of proposals for a provision on this crime\(^{17}\); this task was subsequently attributed to the Special Working Group on the Crime of Aggression.

The definition of the crime of aggression adopted at the Kampala Conference represents a significant development in international criminal law\(^{18}\). It is undeniable that the exercise of jurisdiction over the crime of aggression will constitute an evolution, since it will be the first time that a permanent criminal justice system imposes criminal liability for the illegal use of force. However, it is subjected to formal and material constraints, the latter giving rise to interpretive issues that may hinder the determination of the existence of such a crime.

Regarding the formal constraints, the Court will only have jurisdiction over crimes committed one year after acceptance or ratification by a minimum of thirty states\(^{19}\) and after a decision to be taken only after 1 January 2017 in the Assembly of States Parties to activate the Court’s jurisdiction (Articles 15\(^{bis}\) and 15\(^{ter}\), paragraphs 2 and 3). These limitations garner criticism by some authors as Mary Ellen O’Connell and Mirakmal Niyazmatov, who qualify this process as “byzantine” (2012: 191).

As for the material constraints, the new Article 8\(^{bis}\), paragraph 1, defines the crime of aggression as:

> “Planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”.


\(^{19}\) Currently, 15 states accepted the amendments concerning the crime of aggression: Andorra, Austria, Belgium, Botswana, Croatia, Cyprus, Estonia, Germany, Liechtenstein, Luxembourg, Samoa, Slovakia, Slovenia, Trinidad and Tobago and Uruguay.
Criminal liability is solely applicable to individuals in a position effectively to exercise control over or to direct a state’s political or military action. In other words, the leadership position is a determining factor.

Paragraph 2 refines the notion of "act of aggression". It means the use of armed force by a State against the sovereignty, territorial integrity, political independence of another State or in other manner inconsistent with the principles of the UN Charter. This provision absorbed Article 1 of the Definition of Aggression of the UN General Assembly - resolution 3314 (XXIX) of 1974. Simultaneously, it listed several acts that may qualify as an act of aggression, as mentioned in Article 3 of the Definition of Aggression, such as invasion, military occupation and bombardment by the armed forces of a State against another State’s territory. It is also important to note that the act of aggression must be considered in the context of its “character”, “scale”, and “gravity”. This means that a determination of the existence of a crime of aggression presupposes an act of aggression constituting a manifest violation of the Charter. Thus, although the act of aggression can only be perpetrated by a State, the responsibility for such unlawful acts lies on the individual who is responsible for the state’s action.

Articles 15\textsuperscript{bis} and 15\textsuperscript{ter} establish the procedures under which the Court may exercise jurisdiction. The first article concerns the possibility to open an investigation pursuant to a state referral or a \textit{proprio motu} action by the Prosecutor. Article 15\textsuperscript{ter} prescribes the possibility of a Security Council referral, which means that in this case the Court will also be competent for the investigation and prosecution of crimes of aggression regardless of the acceptance of the Court’s jurisdiction by the concerned States.

The Kampala Conference defined the crime of aggression and its elements which serve the purpose of clarifying and assisting the Court in the interpretation and application of the amendments to the Statute. However, the enunciated provisions and clarifications contain some ambiguities.

As far as "act of aggression" is concerned, while the criteria of "gravity" and "scale" were included to avoid overloading the Court with minor cases, the criterion of "character" aimed to exclude controversial cases involving the use of force (Mancini, 2012: 236). However, the criteria of "character," "gravity" and "scale" used to assess whether an act constitutes a manifest violation of the Charter lack definition. The latter two undefined criteria are also used in the determination of an armed attack in Article 51 of the UN Charter and this lack of clarity could be problematic, particularly given the existing divergences regarding the lawful use of force in self-defence or in the case of humanitarian intervention (Santos, 2012). The elements of crimes refer that the determination of a "manifest" violation of the Charter is objective, but this process within the UN is not peaceful.

At the same time, the remission of paragraph 2 of Article 8 to resolution 3314 of the General Assembly with the purpose of clarifying the term “act of aggression” raises some questions. Firstly, some formulations in the resolution are vague and the enunciated list is not exhaustive, which may lead to controversial situations. Secondly, the article does not provide clarification whether and to what extent other articles of the resolution were applicable or relevant to the Court (Surendran Koran: 252).

In addition to the political character of the Definition of Aggression – the General Assembly can only make recommendations, devoid of any binding effect –, paragraphs 6, 7 and 8 of Article 15\textsuperscript{bis} confirm the power of the Security Council. In fact, Article 39
of the Charter stipulates the exclusive power of the Council to determine the existence of an act of aggression and it may refer to cases which are not mentioned in the Definition of Aggression. The practice, however, is not uniform, and, repeatedly, in its Chapter VII decisions the Security Council uses different wording.

Other aspects have been criticized such as the complete exclusion of acts committed by nationals of non-states parties – unlike the procedures relating to the "most serious crimes" – and the “retrograde opt-out clause” (Alam, 2010: 179-180) that provides for the possibility of voluntary exclusion from the Court's jurisdiction (Article 15 bis, paragraph 4). Other critics consider the resolution as a political guidance in determinations of state responsibility and, therefore, it did not contemplate its application to individual liability (Alam, 2010: 170).

But, an essential criticism can be pointed to the fact that the definition of aggression adopted in Kampala did not contemplate a possible aggression by non-state actors. The terrorist attacks of 11 September 2001 demonstrated the likelihood of such an act being committed by non-state actors as well as the magnitude, comparable to an action perpetrated by a State.

In fact, this solution reveals problems that cannot be underestimated otherwise it could hamper the proper functioning of the ICC. However, the pessimistic view of some more critical authors like Mary Ellen O’Connell and Mirakmal Niyazmatov who argue that “the substantive provision leaves experts unclear to what the prosecutable crime even is” cannot be corroborated. These authors doubt the feasibility of criminal proceedings and regret that the solution presented is different from the definition of crime of aggression under international law, affirming that this prohibition of aggression must not be undermined by the political compromise reached at Kampala (O’Connell; Niyazmatov 2012: 191, 207).

3.2.2. "Crimes against Humanity"

Some formulations of Article 7 reveal a certain ambiguity. Several authors highlight interpretive difficulties and their consequences.

Jordan J. Paust considers the formulations too restrictive and unclear: “Article 7 contains a limiting definition of ‘attack’ that is lacking in common sense. Instead of recognizing that one attack can constitute an ‘attack’, Article 7 (2)(a) requires that an ‘attack’ involves ‘a course of conduct involving the multiple commission of acts’” (2010: 691). The author also argues that the use of the word “attack” instead of, for example, act(s) committed (against) is problematic, since this may result in the impossibility to include certain situations linked to crimes of this type and that are included in the listing. Moreover, according to the author, the phrases "course of conduct" and "multiple commission of acts" are debatable, since they do not include acts of torture, rape, persecution among others (ibid.: 692-693).

Further criticism can be pointed to the expression “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”, since it leaves open the following question: Which is the threshold of “widespread or systematic“?
Another interpretive problem relates to the understanding of the formulation “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental and physical health” (paragraph 1, subparagraph k). This interpretation became relevant for the first time in the joint indictment of Germain Katanga and Mathieu Ngudjolo Chui in 2008. The Office of the Prosecutor accused both of perpetrating such acts and in its decision confirming the charges, the Pre-Trial Chamber decided that the wording should be interpreted strictly. However, several authors like Bernhard Kuschnik support a broad interpretation (2010: 524-530).

According to Cameron Russell, one of the interpretive problems relates to the notion of “civilian”. The author advocates that the parameters are not clear, which is partly a result of the decoupling of these crimes from the requirement of the existence of an armed conflict. This concept was employed to differentiate civilians from "combatants", but the fact that these crimes can be committed in times of peace generates interpretive problems (2011: 60-61). In addition, an “attack directed against any civilian population” implies a conduct “pursuant to or in furtherance of a State or organizational policy to commit such attack” (Paragraph 2, subparagraph a), since the term "organizational" is imprecise, which also results from the dissociation with the existence of an armed conflict. Thus, it becomes necessary to define "organization" to distinguish it from the entity of the state (Ibid.: 63). In the author's opinion, the requirement of "policy" seems to create some inconsistency within the Statute (Ibid.: 70). Leila Nadya Sadat notes that the Pre-Trial Chambers have been demonstrating different positions on the interpretation of Article 7, especially, regarding the phrase "State or organizational policy" (2013: 335). This element for the prosecution for these crimes remains controversial (ibid.: 352) and should be interpreted broadly otherwise it could result in the fragmentation of international criminal law (ibid.: 375). The dissenting opinion of Hans-Peter Kaul, following the request of the Prosecutor to the Pre-Trial Chamber to open an investigation into the post-election violence in Kenya, showed an opposite understanding. According to the judge, only states or organizations with similar characteristics to a State following criminal policies may perpetrate crimes against humanity. This position has gathered support in the doctrine and within the Court (Sadat, 2013: 336).

It is also important to refer the minority opinion of Christine Van den Wyngaert of March 2014 concerning the case of Germain Katanga, since it illustrates this problematic and it can have repercussions in future trials. The judge disagreed with Germain Katanga’s conviction for lack of evidence of his criminal responsibility to intentionally contribute to the perpetration of crimes by a group of persons with knowledge that this group had such purpose (Article 25, paragraph 3, subparagraph d, vii) and the interpretation of the evidence could have been made in a different and more convincing manner. As for the accusation of crimes against humanity, the judge argued numerous points. Firstly, the number of victims was insufficient to qualify the acts as crimes against humanity and, therefore, there was no multiple commission of acts; secondly, the intent of targeting the civilian population was not proved in an incontestable manner; thirdly, the existence of a policy and of an organization was not proved incontestably and, finally, the attack could not be considered systematic20.

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20 ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Christine Van den Wyngaert, 07.03.2014.
In this context, the decision of the International Law Commission to add the topic "crimes against humanity" to its program in June 2013 - following the recommendation of the Working Group on the Long-term Programme of Work based on the proposal prepared by a working group member, Sean Murphy – is to be welcomed. As the author of the proposal notes:

“For example, the mass murder of civilians perpetrated as part of an international armed conflict would fall within the grave breaches regime of the 1949 Geneva Conventions, but the same conduct arising as part of an internal armed conflict (as well as internal action below the threshold of armed conflict) would not (...). A global convention on crimes against humanity appears to be a key missing piece in the current framework of international humanitarian law, international criminal law, and international human rights law.”

Sean Murphy stressed the importance of the elaboration of an international convention on the prevention and punishment of such acts. The author mentioned aspects that should be taken into account by the Commission for the purposes of the Convention such as defining the offense of "crimes against humanity" as expressed in Article 7.

As for the articulation between the Convention and the ICC, Sean Murphy claims that the Convention would benefit substantially from the language of the Statute and related instruments as well as jurisprudence. In turn, the adoption of the Convention could address aspects that were not covered by the Statute and it could support the ICC's mission. In particular because, among other aspects mentioned by the author, the Statute regulates relations between States Parties and the Court, but not among States Parties themselves and between State Parties and non-States Parties. Part IX, headed “International Cooperation and Judicial Assistance” implicitly recognizes that inter-state cooperation on crimes under the jurisdiction of the Court may occur outside the Rome Statute. The Convention could help to promote inter-state cooperation in relation to the investigation, detention, prosecution and punishment of individuals who commit such crimes, which would be consistent with the object and purpose of the Statute. The Convention would require the enactment of national legislation prohibiting and punishing these crimes, which in the author's opinion has not been made by several Member States yet, helping to fill a gap and, thus, encouraging all States to ratify or accede to the Statute. In the case of States that have adopted legislation in this regard, frequently it only authorizes the prosecution of crimes committed by nationals of that State or in its territory. The Convention would require the State Party to broaden its legislation to cover other individuals who are in their territory - nationals of other States who commit an offense in the territory of another State Party to the Convention. In the event that a State Party receives a surrender request from the Court and at the same time, an extradition request from another State in accordance with the Convention, Sean Murphy proposes that the Convention should be designed to

22 Ibid., §§8, §§9, pp. 142 and f.
ensure that States which are party to the Statute and to the Convention can continue to follow the procedure outlined in Article 90 of the Statute on competing requests.23

4. Multifaceting the ICC

Certain challenges such as terrorism in all its forms and manifestations, the profusion of intrastate conflicts with different nuances and complexities and the phenomenon of fragile states, failed or collapsed demonstrate the increasing number of distinct and intricate situations in which a state is unwilling or unable to conduct an investigation or prosecution or is incapable of protecting its population from international crimes. Thus, these challenges justify the indispensability of rethinking the ICC through a process of adding new facets and deepening facets foreseen in the Statute. More specifically, rethinking the competence of this body to expand its jurisdiction to the crime of international terrorism – i.e. large-scale terrorist acts, which "threaten the peace, security and well-being of the world", acts of atrocities "that deeply shock the conscience of humanity" and of concern "to the international community as a whole", paraphrasing the preamble, similarly to what occurs with the most serious crimes under the jurisdiction of the Court – and rethinking the action of the ICC with a view of protecting populations from those crimes which should be implemented in articulation with the "responsibility to protect" concept.

4.1. Categorization of terrorism as an “international crime”

Terrorist acts, methods and practices can take many forms and manifestations and aim the destruction of human rights and fundamental freedoms24. The dissemination of a new type of terrorism of transnational nature and the proliferation of terrorist groups in different parts of the globe, including the territories of States Parties to the Statute, groups that could include nationals of those States, imply to revisit the question of the possibility of ICC jurisdiction over this matter.

The idea of including terrorism as one of the most serious crimes of concern to the international community dates back to the Draft Statute for an International Criminal Court of the International Law Commission of 1994. The Commission’s proposal contained an article - Article 20 - which contemplated - along with the crimes of genocide, aggression, serious violations of the laws and customs applicable to armed conflict and crimes against humanity - a specific subparagraph, subparagraph e), regarding the “treaty crimes” which included terrorism: "Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern."25

23 Ibid., §10 and §12. See Article 90 of the Rome Statute.
Similarly, the Preparatory Committee on the Establishment of an International Criminal Court created by the UN General Assembly in 1996 – with the purpose of preparing a widely accepted consolidated text, serving as a basis for negotiation for the establishment of an international criminal court - suggested the inclusion of the crimes of terrorism among others (Article 5, subparagraph e)) as an offense covered by the conventions mentioned in the Commission's draft statute (paragraph 2), but it went further by specifying these crimes as follows:

“Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them” (paragraph 1).

“An offense involving use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations or serious damage to property” (paragraph 3).

The dissent among States at the Rome Conference prevented the incorporation of the crime of terrorism in the Statute, but States in resolution E of Annex I to the Conference Final Act recognized that "terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community". At the same time, the States, deeply apprehensive about the persistence of this serious threat to international peace and security, recommended that a Review Conference pursuant to Article 123 of the Statute should consider the crimes of terrorism to achieve a consensual definition and their inclusion in the list of the most serious crimes. However, this topic was not discussed at the Kampala Review Conference of 2010. Undoubtedly, the main difficulty lies in the absence of an universal legal and political definition enshrined in a


27 Article 123, paragraph 1 provides that "seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in Article 5."

comprehensive convention on international terrorism, prescribing that large-scale terrorist acts constitute an international crime.

Several authors stress that acts of international terrorism as the 11 September 2001 attacks could qualify as crimes against humanity under Article 7 of the Statute and be tried by the ICC. Mireille Delmas-Marty argues that paragraph 2 of this article which establishes the notion of an attack directed against a civilian population as an element of crimes against humanity could have been applied to these terrorist acts (2013: 561). In this regard, Vincent-Joël Proux adds: "other acts of international terrorism, which do not compare in magnitude to the events of September 11th, yet still constitute an affront to the principles of humanity, should be prosecuted under this mechanism" (2004: 1085). Lucy Martinez contemplates the possibility of individual acts of international terrorism falling under crimes against humanity or war crimes, under the condition of the existence of an armed conflict (2002: 50). In turn, Surendra Kumar although arguing that crimes with the magnitude of 11 September attacks could be considered crimes against humanity, minor terrorist acts may not reach the threshold and, therefore, not fall under the jurisdiction of the ICC. Moreover, the author sustains that while some terrorist acts, to some extent, can be perceived as a crime of genocide – the conviction for such acts will always depend on whether the evidence is sufficient to meet the elements of the crime of genocide - or as a war crime - when committed in armed conflicts, terrorist acts may not always hold these characteristics (2008: 200-202). In this sense, Surendra Kumar proposes an amendment to the Statute, "the need of the hour is that crimes of terrorism, inducing suicide terrorism should be incorporated as a separate category and deserves separate contemplation and prosecution” (2008: 202).

The arguments put forward in favor of including the crime of terrorism within the jurisdiction of the Court relate to the limitations of national judiciary systems and to the fact that such acts possess features which are common to the most serious crimes under the Statute.

The Netherlands proposed an amendment to the list of such crimes in 2009 and explained the problematic as follows:

"We have all committed ourselves to cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle of extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe haven. Yet, at the same time, there is all too often impunity for acts of terrorism in cases where states appear unwilling or unable to investigate and prosecute such crimes. (...) In the light of the absence of a generally acceptable definition of terrorism, the Netherlands proposes to use the same approach as has been accepted for the crime of
aggression, i.e. the inclusion of the crime of terrorism in the list of crimes laid down in article 5, paragraph 1, of the Statute (...)

According to this proposal, the crime of terrorism would be integrated in a new subparagraph (subparagraph e) of Article 5, paragraph 1. Furthermore, this article would include a third paragraph that would reproduce *ipsis verbis* the content of the second paragraph concerning the crime of aggression in the Statute:

“The Court shall exercise jurisdiction over the crime of terrorism once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations” (Article 5, paragraph 3).

The proposal also provided for the establishment of an informal working group on the crime of terrorism at the Kampala Conference tasked to assess to what extent the Statute would require changes as a consequence of the introduction of the crime of terrorism within the jurisdiction of the Court as well as other relevant questions linked to the extension of its jurisdiction.

If the attacks of 11 September 2001 relaunched the question on whether large-scale terrorist acts could constitute “international crimes” and fall within the jurisdiction of the ICC, presently several arguments can be enunciated that support the inclusion of terrorism as a crime within the jurisdiction of the Court.

The Security Council referred to these attacks as a threat to international peace and security (resolution 1368 (2001)). In several resolutions, this organ reaffirmed that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security. The UN Global Counter-Terrorism Strategy of 2006 referred to this phenomenon in the same terms.

The seriousness of this threat is accentuated by its different and multiple forms and manifestations, being also perpetrated by non-state actors, groups resorting to different methods and with different motivations.

It is important to underline that terrorism can not and should not be associated with any religion, nationality, civilization or ethnic group - as mentioned by the Security Council in Chapter VII decisions and by the General Assembly in the above-mentioned Strategy - currently, the actions of several extremist groups, most of them considered terrorist groups, in which nationals of States Parties may be participating and whose acts may occur in the territories of these states is an argument in this sense.

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It is undoubtedly significant that the ICC Prosecutor, Fatou Bensouda, has initiated an investigation (January 2013) due to the existence of evidence indicating that war crimes had been committed since January 2012. These acts are mainly attributed to the National Movement for the Liberation of Azawad (MNLA), the Defenders of the Faith group (Ansar Dine), the Organization of Al-Qaida in the Islamic Maghreb (AQIM) and the Movement for Unity and Jihad in West Africa (MUJAO). The last three terrorist groups are ideologically inspired and linked to al-Qaida. Likewise, it is significant that the Prosecutor conducts a preliminary examination concerning the activities of the jihadist group Boko Haram, a terrorist group linked to al-Qaida, which according to the report could have committed crimes against humanity since July 2009. Nevertheless, if the Prosecutor decides to prosecute, formulating an accusation, it is for the Pre-Trial Chamber and, eventually, the Trial Chamber to corroborate these assessments.

The acts committed by the jihadist group “Islamic State”, a splinter group of al-Qaida, against Iraqi security forces and civilians were condemned by the Security Council. This organ, and several State Parties, qualified these acts as terrorist attacks/acts. The proclamation of a transnational caliphate by this group – comprising northern Syria and eastern Iraq, with expansionist tendencies, threatening neighbouring countries including Jordan, a State Party to the Statute – could increase the perpetration and the magnitude of terrorist acts and diversify the characteristics of such acts.

In this regard, it is important to mention resolution 2170 (2014), in which the Security Council:

“Deplores and condemns in the strongest terms the terrorist acts of ISIL and its violent extremist ideology, and its continued gross, systematic and widespread abuses of human rights and violations of international humanitarian law”.

“Recalls that widespread or systematic attacks directed against any civilian populations because of their ethnic or political background, religion or belief may constitute a crime against humanity, emphasizes the need to ensure that ISIL, ANF [Al Nusra Front] and all other individuals, groups, undertakings and entities...”

32 ICC, The Office of the Prosecutor, Situation in Mali, Article 53 (1) Report, 16.01.2013, pp. 13-28. This investigation follows a preliminary examination based on the Mali government’s referral dated of 13 July 2012 in accordance with Article 14 given the impossibility of pursuing or prosecuting those responsible for crimes against humanity and war crimes especially in the northern part of the territory. See Referral Letter, Republique du Mali, Ministère de la Justice, 13.07.2012.

33 The Security Council linked the Ansar Dine group on 20 March 2013 and the MUJAO on 5 December 2012 to al-Qaida. The AQIM had originally been associated with the name Salafist Group for Preaching and Combat on 6 October 2001.

34 On 22 May 2014, the Security Council placed Boko Haram in the list of entities associated with Al-Qaida.


36 Since June, the designation replaced the previous self-designation of the group of “Islamic State of Iraq and the Levant”, also known by the acronym ISIS (Islamic State of Iraq and Syria) or ISIL (Islamic State of Iraq and the Levant).

It is also relevant that the Security Council alludes to the possibility of certain acts constitute crimes against humanity and, at the same time, to the existence of other types of international crimes, while reaffirming, however, that the acts of ISIL can not and should not be associated with any religion, nationality or civilization.

However, not all terrorist acts can be covered by the provisions and respective elements relating to the most serious crimes of international concern.

Whilst the qualification as a war crime implies the existence of an armed conflict, the crime of genocide - although alluding to the "intent to destroy", which is also a characteristic of terrorist acts - requires that this intent aims to destroy in part or in whole a national, ethnical, racial or religious group as stated in Article 6, which might not be the purpose of certain terrorist acts or it might not be unequivocally proven. With regard to crimes against humanity, the Statute's definition states that the attack must be widespread or systematic and this prevents a large-scale attack that does not possess these characteristics from being subsumed under this article. In addition, the definition states that an attack against any civilian population means a course of conduct pursuant to or in furtherance of a State or organizational policy. But it may be difficult to establish a link between the conduct and a policy of a State or an organization, since terrorist acts can be perpetrated by isolated individuals. The crime of aggression can only be committed by a person in a leadership position of an act of aggression; as it requires an act of aggression by a State it would not apply to non-state entities.

Besides, the principle *nullum crimen sine lege* provides that a person shall not be criminally responsible for a conduct unless it constitutes, at the moment it takes place, a crime within the jurisdiction of the Court (Article 22), this could mean that the perpetrators of terrorist acts, shielded by this principle, would go unpunished.

The underlying ideas of terrorism are the creation of feelings of terror, fear and insecurity in individuals and the perpetration of indiscriminate violence involving the use of different types of weapons. Hence, the proposal of the Preparatory Committee appears the most appropriate solution, but the definition enshrined in paragraph 1 should be further broadened to include non-state entities. Terrorist acts such as the use of a conventional explosive combined with radioactive material in order to disperse it over a wide area, exposing victims to radiation (the so-called "dirty bomb") or the intentional release of pathogenic microorganisms could be covered by paragraph 3 of the Committee's proposal. At the same time, in line with the Commission and the Committee, the insertion of the reference to treaties on terrorism could circumvent the existing gap concerning a comprehensive international convention on terrorism and a binding and consensual definition. Also a procedure that would enable the inclusion of future conventions, which is justified by the increase in the number of conventions on this matter in recent years, should be incorporated.

Alternatively, although the amendment proposal submitted by the Netherlands did not gather sufficient support for its consideration at the Kampala Conference and it was withdrawn in June 2013, within the *Working Group on Amendments* established by the
Assembly of States Parties as a mechanism for discussing amendment proposals\textsuperscript{38}, the proposal could be an intermediate solution to resolve this impasse, similarly to what happened with the crime of aggression.

### 4.2. The ICC and the Responsibility to Protect

The rethinking of ICC's action with a view of protecting populations from international crimes should be implemented in articulation with a "responsibility to protect" of the international community.

Similarly to the ICC, this responsibility focuses on the crimes of genocide, ethnic cleansing, crimes against humanity and war crimes. This concept was developed by the "International Commission on Intervention and State Sovereignty" (ICISS) and presented in the report "The Responsibility to Protect" of 2001. Its relevance was acknowledged by the UN Member States in the final document of the 2005 World Summit, which incorporated its general features: the responsibility to protect resides primarily at the State level and encompasses the prevention of such crimes, including its incitement through appropriate and necessary means. When appropriate, the international community should encourage and assist a State so that it can exercise this responsibility; if national authorities are unwilling or are unable to protect its population, the international community should take appropriate collective measures to protect it from genocide, war crimes, ethnic cleansing and crimes against humanity in a timely and decisive manner under Chapters VI, VII and VIII of the UN Charter\textsuperscript{39}.

The UN Secretary-General, Ban Ki-moon, has clarified the responsibility to protect concept and, as the Prosecutor of the ICC, Fatou Bensouda, has defended this articulation. The Secretary-General affirmed, in the report "Implementing the Responsibility to Protect" of 2009, that an important measure under the pillar on the protection responsibilities of a State - which include the prevention of such crimes and their incitement – concerns first of all the accession to the Statute as well as to relevant international instruments and the incorporation of international standards in national legislation to ensure that the crimes and their incitement are criminalized under national law and practice\textsuperscript{40}. Ban Ki-moon stressed that the threat of referrals to ICC may have a preventive effect\textsuperscript{41}.

The deepening of the foreseen preventive facet by the Court is essential, making the most of its permanent character – unlike the international ad hoc criminal tribunals, implementing, thus, a preventive justice system, also through the encouragement and provision of assistance to States Parties in order to build capacity to protect their populations, when such need exists.

In other words, "prevention" should be regarded as a dissuasive and as a deterrent measure. As Ban Ki-moon underlines:

\textsuperscript{40} U.N. Doc. A/63/677, Implementing the responsibility to protect, Report of the Secretary-General, 12.01.2009, §17.
“by seeking to end impunity, the International Criminal Court and the United Nations-assisted tribunal have added an essential tool for implementing the responsibility to protect, one that is already reinforcing efforts at dissuasion and deterrence”\textsuperscript{42}.

In the same vein, Phakiso Mochochoko, Director of the Jurisdiction, Complementarity and Cooperation Division of the ICC, affirms:

“Prevention is key to all our efforts. For the Office, this preventive role is foreseen in the Rome Statute Preamble and reinforced in the Office’s prosecutorial strategies. In fact, the Preamble makes clear that prevention is a shared responsibility in writing that State Parties are ‘determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’. The Office of the Prosecutor will make public statements referring to its mandate when violence escalates in situations under its jurisdiction; it will visit situation countries to remind leaders of the Court’s jurisdiction; it will also use its preliminary examinations activities to encourage genuine national proceedings and thereby attempt to prevent the recurrence of violence. Given that the commission of massive crimes can threaten international peace and security, the Security Council can complement the OTP’s [Office of the Prosecutor’s] preventive efforts”\textsuperscript{43}.

In this context, the Prosecutor could play a significant role in the preventive efforts since he/she may initiate an investigation \textit{proprio motu} based on information on crimes (Article 15). The Office of the Prosecutor, as a separate and independent organ, is “responsible for receiving referrals and any substantiated information (...), for examining them and for conducting investigations and prosecutions before the Court” (Article 42, paragraph 1). It is important to note, however, that a greater celerity and agility on the part of these entities is needed in order to prevent violence, i.e., in the pre-violence stage or when it is unfolding, to prevent further occurrence of crimes, restraining it within a short period of time.

The establishment of the \textit{Scientific Advisory Board} on June 25, 2014 by the Office of the Prosecutor represents a major change. This board will meet annually and make recommendations to the Prosecutor about the most recent technological developments as well as new scientific methods and procedures that can reinforce the Office's capabilities in the collection, management and examination of scientific evidence

\textsuperscript{42} U.N. Doc. A/63/677, Implementing the responsibility to protect, Report of the Secretary-General, 12.01.2009, §18.

\textsuperscript{43} ICC, The Office of the Prosecutor, Phakiso Mochochoko, Address on behalf of the Prosecutor, Open Debate of the United Nations Security Council on “Peace and Justice, with a special focus on the role of the International Criminal Court”, 17.10.2012.
relating to an investigation and prosecution\textsuperscript{44}. But the creation of an early warning and situation evaluation capability that could materialize in the establishment of a specific organ by the Prosecutor or by the Assembly of States Parties, with competence to establish subsidiary bodies, would be indispensable. This organ would pay particular attention, but not exclusive, to the phenomenon of fragile, failed or collapsed states that are unable to meet their international commitments. This organ could assist in the detection, bringing to the attention of the Prosecutor and of the Office relevant situations and support and assist the Court in the determination whether the State, due to a total or substantial collapse of the national judicial system or its unavailability, is unable to conduct an investigation or prosecution (Article 17, paragraph 3).

A joint study conducted by experts from Oxford University and the Australian Government suggests that the Court's preventive dimension should be implemented through encouraging the Statute's ratification, namely among non-signatories, strengthening capacities at the national level, raising awareness activities to inform populations on crimes under the jurisdiction of the Court, developing clear and more objective criteria for Security Council referrals and guaranteeing a more consolidated alignment between preventive instruments as non-military coercive measures and mediation and criminal justice mechanisms\textsuperscript{45}. These measures could be implemented in the articulation process of the ICC with the responsibility to protect.

As for the materialization of this interconnection, the Security Council referral\textsuperscript{46} of the situation in Libya in 2011 took on a paradigmatic significance for two reasons. Firstly, resolution 1970 linked the Court's role to the responsibility to protect and, secondly, the resolution was unanimously adopted, despite the reluctance of the United States, the Russian Federation and China regarding the ICC’s mission, permanent members of the Council, which seems to indicate a change in the perception of the Court.

Although the resolution does not explicitly allude to a responsibility to protect by the international community, it refers in the Preamble "recalling the Libyan authorities' responsibility to protect its population". This decision imposed an obligation on the Libyan authorities to cooperate and provide the necessary support to the Court and the Prosecutor. In resolution 1973 (2011), the Council reiterated the authorities’ responsibility to protect the Libyan population. In addition, it authorized coercive military measures and recalled the decision to refer the situation to the ICC, emphasizing that those responsible for or complicit in attacks against the civilian population, including aerial and naval attacks, must be held accountable.

Carsten Stahn (2011) affirmed regarding resolution 1970 that:

\begin{quote}
"This resolution marked the first incident in which the ICC was expressly recognized in Council practice as a core element of preventing and adjudicating atrocities in line with the 'R2P' [responsibility to protect] concept (...) With the Security Council
\end{quote}

\textsuperscript{44} ICC, Press Release, The Office of the Prosecutor of the International Criminal Court Establishes a Scientific Advisory Board, 27.06.2014.


\textsuperscript{46} The importance of the "responsibility to protect" was highlighted for the first time in resolution 1674 (2006).
referral, international justice has become one of the primary means of constraining violence and securing accountability, not only in the context of hostilities, but also in ensuring justice after conflict”.

Nevertheless, the author warned that the Libyan case became a test for the management of the idea of "shared responsibility", after the detention of Saif Al-Islam Gaddafi by the Libyan authorities (Stahn, 2012), who is still not under the custody of the Court, despite several unsuccessful attempts to challenge its jurisdiction.

The articulation between the ICC and the responsibility to protect, more specifically, the role of this jurisdictional organ will inevitably be conditioned by the Security Council, i.e., by its decision to refer situations relating to non-states parties under Chapter VII if one or more crimes under ICC jurisdiction appear to have been committed, after its determination of the existence of a threat to peace under Article 39 of the Charter. The lack of a Security Council decision with respect to failed states and the divergences among permanent members on the interpretation of “threat to peace” will certainly hinder the referral of certain situations to the ICC.

In fact, the Security Council lacks objective binding criteria to determine a threat to peace and is held hostage to political discretion. The establishment of criteria in this regard and the introduction of changes concerning the right of veto (Santos, 2012: 560-561) would avoid situations in which the Council is unable to refer the case to the ICC due to the threat or use of the veto, as in the case of Syria. Even recently, in May 2014, the Russian and Chinese vetoes prevented the adoption of a resolution in this regard.

The process should, therefore, be allied to an uniform application to similar situations by permanent members and to previous changes to the veto system to avoid such situations. It is important to note that the ICISS in its report “The Responsibility to Protect” declared:

“(…) the Commission supports the proposal put to us in an exploratory way by a senior representative of one of the Permanent Five countries, that there be agreed by the Permanent Five a “code of conduct” for the use of the veto with respect to actions that are needed to stop or avert a significant humanitarian crisis. The idea essentially is that a permanent member, in matters where its vital national interests were not claimed to be involved, would not use its veto to obstruct the passage of what would otherwise be a majority resolution. The expression “constructive abstention” has been used in this context in the past (…)”47.

Among the Security Council reform proposals it should be referred the introduction of a voluntary conduct limiting the exercise of the veto right in situations of genocide, war

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crimes, crimes against humanity or ethnic cleansing or the elimination of this right, which appears infeasible, or the need of current and eventual new permanent members to justify this action.

This articulation is justified by the observation of common denominators, at the beginning of a timid practice – which should be explored and deepened – and by the possibility of contributing to the consolidation and enabling a broader exploration of the Court’s role and to increased human rights protection.

This jurisdictional organ could be relevant in the prevention prior to the occurrence of violence or when it is unfolding as a reaction mechanism - which could occur alongside an intervention with use of force by the international community. The objective is to end violence through its intervention by putting those responsible under its custody. This action is justified by the fact that a State’s judicial system may be unable to function in times of conflict or even in the reconstruction phase, after the international intervention with use of force, i.e., in the reconciliation and criminal retribution process. Regarding justice and reconciliation, the ICISS warned of the possibility that in many situations the state in whose territory a military intervention took place may have never had a non-corrupt or properly functioning judicial system48.

The effects of the "responsibility to protect" and the mission of the ICC will have a greater impact if this concept acquires the status of an international norm (Santos 2012: 562). Although the relationship between the ICC and the Security Council is viewed with scepticism and concern, which is to some extent justifiable due to the Security Council’s political nature, a tripartite cooperation in this context may be beneficial.

5. Conclusions

An effective international public order is desirable. The sustainability of an order with such features, however, requires a permanent construction process in order to meet adequately the increasing and different challenges and to overcome emerging vulnerabilities. International criminal law embodied in the ICC will be crucial to achieve this aspiration.

By resorting to “a graphical representation” it can be concluded “that the substantive law that the ICC applies is a smaller concentric circle within a larger circle, which represents the total international criminal law” (Bacelar Gouveia, 2013: 784) and important limitations can be pointed out to the ICC such as the possibility of its activity be constrained by the Security Council, tensions deriving from the complementary nature of its jurisdiction and interpretive questions raised by certain provisions of the Statute, but focusing only on those facts entails the risk of obtaining a reductive assessment of the merits and potential of the ICC.

The Statute’s regulatory project and, specifically, the Court may be more successful and influence the construction of an international public order in a more effective manner if the process of permanent construction of this body takes into account the need to fill gaps and the challenges of the contemporary world.

48 Ibid., §5.13, p. 41.
In this sense, there should be clarification of ambiguous aspects by the Court relating to the crime of aggression and crimes against humanity, as underestimating these aspects could hamper the efficient and expeditious delivery of justice. In the case of the crime of aggression the evolutive process cannot be oblivious to the Security Council’s determinations. In the case of crimes against humanity, the Court shall specify the content of Article 7, a task that would be facilitated by the entry into force of a future international convention on the prevention and punishment of such crimes.

The Court should also explore new facets and deepen those foreseen in the Statute, making the most of its independent and permanent character, which allowed its detachment from a “victor’s justice” connotation attributed to the international ad hoc criminal tribunals.

The distinct and intricate situations of passivity, inaction or impunity on the part of States that require the protection of the human dignity, which result from new challenges, imply a greater involvement of the ICC. Thus, a rethinking of its jurisdiction, extending its scope to the crime of terrorism, subjecting the perpetrators of terrorist acts to international justice is necessary. This inclusion is justified by the increasing dissemination of terrorism at the global level and by the fact that its different forms and manifestations may not be covered by the provisions and elements of crimes prescribed in the Statute. Simultaneously, this article proposes an articulation of the ICC’s mission with the “responsibility to protect” of the international community which should be expressed in the different dimensions of this responsibility: prevention, reaction and rebuilding a lasting peace.

Although the jurisprudence is still scarce, namely concerning convictions, it cannot be ignored that the threshold of the first decade of the 21st century marks a turning point in the activity of the ICC. The gradual confluence around the Court by States Parties, by non-party States and by the Security Council demonstrates the growing recognition of the Court’s relevance by the international community as well as the application of the system envisioned in the Statute.

These reasons and the potential of the ICC allow for the prospect of a passage from the present adolescence (Soares, 2014: 10) to adulthood characterized by increasingly confident steps, a maturing process leading to a consolidated and more effective criminal justice system.

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Abstract

"It is not a coincidence that the century of war coincided with the century of central banking," wrote Ron Paul, the libertarian candidate "sensation" for the presidential elections in 2008 and 2012, in the book End the Fed. This discussion explores in short, the powerful pamphlet by Major General Smedley Butler, "War is a Racket", demonstrating, specifically, who profited economically and who, in turn, bore the weight and violence of WW1, assuming that a war is never fought with the acquiescence of the population. However, this monograph goes further, looking for a reinterpretation of the official American history of the First World War through the lens of libertarian discourse. The aim is thus to understand, from another perspective, the fundamental cause of the paradigm shift from nonintervention to intervention taking place during this war, linking it to the project which led to the creation of the League of Nations and the growing importance of the US in the world. Finally, a fundamental connection will be established, exploring the theories argued in the book A Foreign Policy of Freedom, between the policies of Woodrow Wilson and the foreign policy of the United States throughout the 20th century and the beginning of the 21st.

Key Words:
Ron Paul; First World War; Woodrow Wilson; Libertarianism; Foreign Policy

How to cite this article

Article received on July 14, 2014 and accepted for publication on October 15, 2014
“WAR IS A RACKET!”
THE EMERGENCE OF THE LIBERTARIAN DISCOURSE ABOUT WORLD WAR I IN THE UNITED STATES

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“Possibly a war can be fought for democracy; it cannot be fought democratically”
Walter Lippmann

On the centenary of the beginning of WW1, many nations and organizations have prepared initiatives and commemorations with the intention to remember (or not to forget) the horrors of this war. Few, however, seek to reconsider the foundations of the war. Ron Paul, former Congressman and libertarian Republican candidate for the US presidency (2008 and 2012), is one politician that brings into question the discourse, more or less official, of the war, regarded as the "war to end all wars" (Butler, 1935: 13; Paul, 2007: 367).

Interestingly, in 1935, General Smedley Butler, who had participated in the WWI - among many other campaigns - published a small pamphlet "War is a Racket". Besides describing the artillery armament compositions that, later, would be used in World War II (1935: 2-3), Butler makes one of the first significant objections to the "military industrial complex", accusing those who "for 33 years deceived him in order to serve the interests of US corporations' profiting(eering) with the business of war (Paul, 2011: 82; Fleming, 2003: 42; Keene, 2010: 513).

Far from seeking to classify General Butler as a libertarian, the objective of this text is to identify and comprehend a libertarian discourse about WW1. In a first part, the intellectual influences of Ron Paul are considered, confronting these with his public positions, domestically and abroad: a policy based on a restrictive reading of the Constitution, a minimalist government, the rejection of any market manipulation, and defense of a "sound currency".

In the second part, the discourse of Paul (2007: 267, 347) on WWI will be analyzed, as well as the reasons why he argues that Wilson was the first "neo-conservative"

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1 The general participated in many military actions. He fought in Cuba during the Spanish-American War, in the Philippines during the Philippine-American War, in China during the Boxer Rebellion, the Banana Wars in Central America (Honduras and Nicaragua), the taking of Veracruz in Mexico (where he earned his first Medal of Honor, the highest American medal awarded to a military member, by the President of the United States in the name of the U.S. Congress), and the occupation of Haiti, earning his second Medal of Honor. He also participated in the First World War and, again, in China.

2 It is interesting to compare this charge of Butler, with the French "Indignados", for whom "c'est la dette du racket" was attributed. Both charges could quickly be read as "populist"; however, they should be considered the seeds of concern in the important discussion of "democracy".
American president. According to Paul (2011: 50; 2007: 75), WWI was the first American intervention that “derailed” the country from the traditional non-interventionist course, in accordance with the “Founding Fathers” vision, to the role of "global police force".

For the former congressman and presidential candidate, the truth is that, since this moment (WWI), no substantial distinctions exist between the Republican and the Democratic Party in US foreign policy. Perhaps because of intellectual honesty and resilience (or stubbornness), but expressly for foreign policy, Paul, as a presidential candidate, received more political support and funding from American military personnel than the other candidates during both campaigns (Egan, 2011). Notwithstanding some of his other "radical" positions, the arguments about US foreign policy deserve attention and pose pertinent questions about the "democratic" mechanisms that led the country to war.

The Intellectual Influences of Ron Paul

The former congressman is regularly branded as a founder or inspiration of the controversial "Tea Party" political movement (Botelho, 2010: 107). The reality is, however, far more complex and, despite some common ideas, there are certain positions of Paul that diverge fundamentally from this movement. One of them is, unquestionably, his vision of US foreign policy (Ibid.:108; Mead, 2011: 6, 7; Benton, 2012; Paul, 2011: 49).

Paul is, first and foremost, a "rare animal" in American politics, maintaining independence from the Republican Party "establishment". He has even voted against the party line on key issues such as the so-called "Patriot Act" and the wars in Iraq and Afghanistan (Botelho, 2011: 108). Why?

To understand this independence, it is useful to appreciate the intellectual and political ideas influencing the senator's outlook. Ron Paul, in the book, End the Fed, outlines a precise description of how his intellectual journey, readings and moments, shaped his worldview, in which, contrary to liberal doctrine, economics and policies are absolutely inseparable.

Specifically, the Austrian School of economics, of which von Mises and Hayek are the greatest exponents, is the political school of intellectuals who provided "the answers for which he longed". Incidentally, Paul admits, "even the experts took literally centuries to understand the nature of money" (2009: 37).

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3 Although, it must be pointed out after the First World War, the United States reverted to traditional isolationism. Among the factors were the depression of 1930, "the memory of tragic loss the First War", the investigation of senator Nye, the publication of the book Merchants of Death, and the said "War Is a Racket" (Fleming, 2003:488). Thus, Paul’s position is not entirely accurate, since "Wilsonianism" did not arise from Wilson, who witnessed the League of Nations rejected by public opinion (Fleming, 2003: 477-9; Bagby, 1955: 575; Keene, 2010: 520). Only after the Second World War, the USA assumed, in full, a new role in the world and became increasing bi-partisanship in the foreign policy.

4 Paul is even known as "Dr. No" for voting against all bills that are not explicitly authorized by the Constitution, but also by maintaining an incredible consistency of positions for more than three decades in Congress (Botelho, 2010: 108).

5 Despite his son, Rand Paul, Senator for Kentucky, being touted as the current central figure of the Tea Party.
When the US left the gold-dollar standard and officially dismantled the Bretton Woods system, for Paul, understanding the nature of money and the economy turned out to be more important than ever.

Another inspiration for Paul is the late economist Murray Rothbard, author of several books on the US Federal Reserve, the role of government in the devaluation of the dollar, the cause of the Great Depression, and economic bubbles (Paul, 2009: 47). Ultimately, the rejection of any kind of government intervention is the major issue that unites economists, like Mises, who believes that "Socialism always fails because of the absence of a free market to structure the price of goods" (Ibid.: 42).

Likewise, Paul, like the Austrian economists, rejects government intervention at a political level. The key, says Rothbard (2011: 11), is the "right to be free from aggression... and not be robbed by taxes and government regulations". Alternately, as Paul explicates, the only political and economic philosophy worth expounding is the proper defense of "individual liberty, private property and sound money" (Ibid.: 49).

**Paul's Foreign Policy**

Many libertarian theories seem problematic. For example, arguing that the state is always the "bad guy" negates centuries of social contract tradition, the basis for the hegemonic model of understanding the contemporary relationship between state and citizens.

That being said; this discussion will not, in this context, undertake a critical analysis of Libertarianism. Consistency exists between Paul's discourses on domestic and foreign policy and is, therefore, mentioned. H. Rockwell notes in the foreword of *Foreign Policy of Freedom*, written by the former congressman (including his Congressional speeches), that Ron Paul "binds the national and international issues from the libertarian point of view".

Furthermore, according to the Paul (2008: 28), this was also the view of the "Founding Fathers" who "recognized that the government is no more honest or competent in foreign policy than in domestic policy" because, "in both instances they are same people operating with the same incentives". Nonetheless, reducing Paul's suspicion to the government, nor with politics, or with any other institution that deserves mistrust might not be fair.

The fundamental point the former congressman's argument is this: The rejection of the state’s right to do what its citizens cannot do (Paul, 2013). This idea essentially implies a rejection of what Max Weber called "the legitimate monopoly of violence" - violence to tax or confiscate property, to print money, to physically assault or to start wars (Ibid.).

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6 According to his autobiography, this event led him to run for Congress (Paul, 2009: 38).

7 However, unlike the current majority consensus around the functioning of the so-called "free market", Paul (2007: 275) criticizes the deep "lip service ... Given to the free market and free trade, [while] the entire economy is run by special-interest legislation favoring big business, big labor and, especially, big money".

8 Paul was known to have a poster in his office, that read, "Do not steal. The government hates competition".
According to Paul, the rejection of the state's right is how the libertarian philosophy converges, economically and as a policy, at the international and domestic political level (Paul, 2012). Furthermore, Ron Paul's follows a strict interpretation of the US Constitution, which he claims has been disregarded throughout most of the twentieth century and continues today, principally to declarations of war:

"Instead of seeking congressional approval of the use of the US Armed Forces in service of the UN, presidents from Truman to Clinton have used the UNSC as a substitute for congressional authorization of the deployment of...armed forces” (Paul, 2007: 145).

"Citing NATO agreements or UN resolutions as authority for moving troops into war zones should alert us...to the degree to which the rule of law has been undermined. The president has no war power; only the Congress has...When one person can initiate war, by its definition, a republic no longer exists” (Ibid.: 117).

The non-interventionist crusade against "world government"

Quid so what about the democratic process? Paul has been described as an "isolationist" (Botelho, 2010: 108; Mead, 2011: 6) who rejects all multilateral institutions in which the US participates and seeks to "avoid contact with the world" (Mead 2011:6). Paul confirms the rejection of these institutions (2007:126). However, the charge of avoiding contact with the world is unsubstantiated.

Paul reiterates that the "Founding Fathers" wanted "peace, commerce and honest friendship with all nations, alliances with none". Resurrecting a warning of Adams: "she [America] does not go looking for monsters to destroy. She will command... by sympathy her example" (Paul, 2008: 15). Likewise, he concludes, "I favor the total opposite of isolationism: diplomacy, free trade, and freedom of travel" (Ibid.: 14).

Paul is an "exemplar" (Edwards, 2011: 255) that believes the exceptional mission of the United States is not - unlike many politicians - a willingness to go to war. He rejects, specifically, the transfer of national sovereignty of what Robert Cox dubbed "nébuleuse" and what he refers to as the "One-World Government" (Paul, 2007: 222). After all, if Paul rejects, in principle, the government, he certainly rejects "the biggest government of all, the United Nations, which constantly threatens our freedoms and the sovereignty of the USA?" (Ibid.: 210).

The Ron Paul opposition to world government is not only confined to the United Nations. He disputes all institutions that "threaten the national independence of the
United States" and whose support always comes from the "elites and never from ordinary citizens" ultimately for the benefit of "well-connected international corporations and bankers" (Paul, 2007: 143, 155, 302). Expatiating the warnings of the Founding Fathers, Paul opposes all complex alliances "with the United Nations, IMF, World Bank and WTO" (Ibid.: 222).

Additionally, the transfer of sovereignty and involvement in economic, political or military alliances, for Paul, is contrary to the letter of the Constitution, although, this is not his only objection to American foreign policy. The problem is that the US, while participating in the formation of the said "World Government", concurrently pursues a policy of unilateral imperialism, with presence in "140 countries and 900 bases" (Paul, 2012) and "dictating...to the other sovereign nations who they should have as a leader ... and what form of government they should establish" (Paul, 2007: 124):

"Unilateralism within a globalist approach to government is the worst of all choices. It ignores national sovereignty, dignifies one-world government, and places us in the position of demanding dictatorial powers over the world community... An announced policy of support for globalist government, assuming the...role of world policeman, maintaining an American world empire, while flaunting unilateralism, is a recipe for disaster" (Ibid.: 241).

Paul labels this policy "military Keynesianism" (Ibid.: 81) which is a justification for the continued presence in other countries under the pretense of "nation building" and preventive war. However, as the former congressman states, "fabricating and exploding bombs and missiles can not raise the standard of living for American citizens" (Ibid.: 81). Although war increases GDP - besides all the moral reasons to oppose it - this "imperial" policy creates a type of tax on all American citizens, and war becomes ubiquitous, restricting the "possibility of living in a free society "(Paul, 2011: 49).

"The enemy within" - The Federal Reserve and the Military-Industrial Complex

Who ultimately benefits from this policy? Why and how could the US invade and establish a presence in so many countries during greater part of the 20th century and early 21st century? Leaving aside political justifications, called hypocrisy by the former Congressman, what "logistics" or power allowed construction of an "Empire"? Those "guilty", for Paul, are easy to find: the Federal Reserve and the "military-industrial complex" (Paul 2007:58, 157, 261).

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11 A similar criticism is pointed at foreign aid. Paul states that behind the noble ideals and objectives are "foreign dictators, international bankers and industrialists who enrich some Americans" (2007: 47). Likewise, and in accordance with libertarian principles, to "help those who seek to be free to expropriate funds from innocent Americans is unjustifiable" (Ibid.: 57).
12 For Paul the results of this policy are that: "Innocent people die, property is destroyed, and the world is made a more dangerous place" (2007: 82).
13 And the world as demonstrated later in the discussion.
a) The Federal Reserve

The Federal Reserve was created in 1913, with the "Federal Reserve Act" signed by President Woodrow Wilson. According to Paul, "after the creation of the Federal Reserve, the government... found other uses for the elastic money supply\(^\text{14}\)... (which) would prove useful to finance the war" (2009: 52). Having the ability to "print money... tax limits were removed for war" (Ibid.), i.e., the choice of classical economic theory, between producing guns or butter was, "no longer necessary" (Ibid.: 55; Lewis, 2014).

Without fear or responsibility of bankruptcy or fiscal ruin and with the possibility of expanding the existing money through inflation and debt creation, "each special interest has the possibility to get what it wants". As discussed later, Paul identifies President Wilson as the man responsible for this change and the creation of a "welfare-warfare state" (2007: 103). However, there is another juggernaut that feeds this power to create money from nothing.

b) The military-industrial complex

As stated earlier, it was Gen. Butler that identified the "military-industrial complex" (1935: 1-5). For Paul, however, the link between foreign policy, bipartisan support (2007: 13; Cox, 2000: 220; Anderson, 2008: 4) and actual industry, is much stronger. As he affirms, instead of rejecting the "search for monsters abroad", "every week, the US must find an infidel to assassinate... and (that) keep the military-industrial complex humming" (Ibid.: 92; Eland, 2007: 3).

Like external alliances and the Federal Reserve, the military industry "enjoys a better standard of living at taxpayer expense due to the interventionist policy and constant preparation for war "(Ibid.: 225). It is ordinary citizens who lose, the libertarian believes. Similarly, it is an industry in which even Hollywood is engaged in order "show the good side of the army" with public money (Paul, 2007: 155; Wolf, 2012; Giambrone, 2013).

If war, as Joseph Goebbels declared, is not waged with the people's consent, the question that Paul seeks to answer is why, and, especially, when the policy recommended by the "Founding Fathers" is altered to allow "corporate and banking influence over foreign policy to replace the wisdom of Washington and Jefferson" (Paul, 2007: 217). This moment was, for America, the First World War and the presidency of Woodrow Wilson.

And everything Wilson changed?

In the book, *A Century of War*, Denson states that, "revisionism is necessary because the truth is often the first casualty of war" (2006: 11). In commemoration of the

\(^{14}\) "Money supply", is the amount of money available in the economy. With the creation of the Federal Reserve, the ability to decide how much money could be made available to the economy, either by shortening or increasing the money supply, without being subject to any form of "ballast" was established, hence, its "elasticity".
centenary of WW1, what is the importance of looking for another explanation for the first "total war"? What changed with the Wilson presidency and the participation of America? Ultimately, who was president Wilson? Moreover, what were the reasons for US entry into the war?

Through the libertarian lens, the challenge is to understand why Ron Paul accuses Wilson of being the first interventionist president and "neo-conservative". Furthermore, and contrary to conventional belief, why is Wilson not considered a naive idealist and why were the American military exploits directed for economic interests rather than moral principles? For the Libertarian, it was Wilson, by certain fundamental decisions, which restricted the freedoms of Americans and allowed the state to grow to unbearable levels.

In actuality, until 1917, the American public opposed entry into the war (Keene, 2010: 509; Fleming, 2003: 33). Since the Monroe Doctrine, the American policy was to avoid intervention in European conflicts. President Wilson, who won the 1916 reelection with the slogan "keep the country out of war," hesitated at length before leading the US into a distant conflict (Keene, 2010: 508; Cooper, 2011: 420-2).

Officially, the reason for going to war was the sinking of the Lusitania in 1915 and the subsequent decision, in 1917, of indiscriminate German submarine warfare against belligerent and neutral ships; the last straw finally exhausting Wilson's patience. However, is this the whole story? How can a libertarian interpretation illuminate the black holes of WWI?

**Wilson – idealistic interests or self-serving idealism?**

Kissinger, in the book, *Diplomacy*, challenges the "neo-Wilsonian" impulse to shape American foreign policy more by values than interests (Ikenberry, 1999: 56). Though, for Paul, there is nothing "neo" in this impulse, as American foreign policy (intervention) has never been dominated by "values" or morals (Paul 2007: 218). Indeed, President Wilson is, in Paul's view, far more pragmatic than he might initially appear (*Ibid.*: 250, 339; Cox, 2000: 235-6).

For the libertarian, Wilson's vision was clear: "orchestrating US entry into WW1 ... to implement a strategy of world government under the League of Nations" (Paul, 2007: 283; Cox, 2000: 237; Anderson 2008: 4). Paul rejects the historical narrative, according to which there was something moral in Wilson's conduct. The very "mission" to spread democracy around the world - by force, if necessary - is classified, at least, as hypocritical (*Ibid.*: 339; Denson, 2006: 24-5).

Incidentally, before the Great War, it was the president who had "broken through Latin America", invaded Haiti, Mexico, Dominican Republic, the Philippines, and supported the Spanish-American War (Eland, 2007: 14; Hallward, 2004: 27; Paul, 1987: 50; Butler 1935: 3; Fleming 2003: 22, 469). Can all these incursions be truly justified by

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15 Maintaining, however, a "paternal supervision" of Latin America (Gilderhus, 2006: 6).
16 There are, however, different interpretations, even libertarian, of Wilson's character. Take, for example, Anderson (2008: 3) and Denson (2006: 25).
17 Belgium, for example, as Fleming states, "was as democratic as Germany, [it] had a parliament that... attributed to three votes to the wealthy... a similar system to that of Prussia" (2003: 60). On the other hand, the same Fleming (*Ibid.*: 58) notes that in view of the colonized countries like the Congo, Belgium (and other colonial powers), in the face of atrocities committed, would hardly seem democratic.
idealism? Were there were other interests "far less idealistic" (Cox, 2000: 222) that shaped Wilson's US foreign policy?

Furthermore, was Wilson, seen as an ardent democrat, internationalist, and exponent of international liberalism, in fact, an elitist aristocrat with racist positions against the national determination of certain people (Cooper 2011: 433, 474; Fleming, 2003: 74)? This question, amplified by his biographer, Michael Cox (2000: 235-7), considers certain views of the American president:

"We should... not forget that Wilson did nothing for the Irish or the Chinese at Versailles; that 20 years earlier he had endorsed the brutal American takeover of the Philippines; and that he was not in favor of independence for all peoples, especially if they were brown or black".

"Wilson had far more in common with the patrician views of... Hamilton and... Madison - neither of whom could... be regarded as genuine democrats - than he did with the populist Jefferson... If Wilson had a restricted concept of democracy... he had forthright views about race".

The war economy

What finally motivated Wilson in his crusade, after being re-elected and promising not to enter WW1? The response of the General Butler is definite: "money". Corroborated by other authors (Fleming 2003: 80-1, 84; Cooper, 2011: 421, 426; Keene, 2010: 510), Denson also explicates that when the "allies refused to pay their debt [of war], the US would be on the brink of economic disaster" (2006: 25). This theory is, likewise, confirmed during episode related by Butler, in the pamphlet "War is a Racket":

"The President summoned a group of advisers. The head of the commission spoke. Stripped of its diplomatic language... he told the President and his group:

'There is no use kidding ourselves any longer. The cause of the allies is lost. We now owe you (American bankers, American munitions makers, American manufacturers, American speculators, American exporters) five or six billion dollars. If we lose (and without the help of the United States we must lose) we, England, France and Italy, cannot pay back this money... and Germany won't" (1935: 13).

Was this a war to save democracy or the financiers? But financial interests were not the only priority during the Great War. CJ Anderson (2006: 1) and Fleming (2003: 53-4) argue that, "Britain became involved in the war for economic reasons and the navy" since "German industry had overtaken the English, and the German navy constituted a
real threat to the Royal Navy, the last hope of the country for world domination" (2003: 53-4).

Ron Paul also traces the American "obsession" for oil to the First World War. He believes that the US, from WWI onward, began the "gradual involvement in the international arena with the objective of controlling global economic interests, with a special emphasis on oil" (2007: 218).

Furthermore, the former congressman believes that, the "chaos" that exists in the "Middle East has a lot to do with securing the oil fields for the benefit of Western nations" (Ibid.: 325). Ironically, when Britain seized the oil fields, declaring themselves "liberators", "jihad was declared against them, forcing them to leave" (Ibid.: 334).

**The first propaganda war?**

How was it possible to convince citizens and, in particular, young Americans to fight a war in Europe, away from national shores? How was a war fought for economic interests that, in the end, benefited only big industrialists and bankers, "sold" to Americans? What threats or events were used to beat the "drums of war" even harder?

The First World War was perhaps the first war entirely promoted by propaganda, in which agents such as Lippman and Bernay, hired by Wilson, proved crucial in persuading the public of the "German danger" (Redfern, 2004: 3; Anse Patrick and Thrall, 2004: 2; Keene, 2010: 510; Fleming, 2003: 55, 90). Others also identify the emerging mass media as responsible for the creation of the fear campaign and the "necessity" of the United States going to war (Anderson, 2008: 2).

However, the sinking of the British cruise ship Lusitania by a German U-boat persuaded the unconvinced. This was the "special" event, without which it would be more difficult to sell a policy of preventive war where members of 'our' army would be killed." Such incidents, "served to promote a war that our leaders wanted" (Paul, 2007: 274).

Moreover, if there was anyone still in doubt, "Beautiful ideals were painted for our boys sent to die. This was 'the war to end all wars' "(1935: 9). Butler also mentions the war ribbons - nonexistent until the Spanish-American War - "that facilitated recruitment". (Ibid.) If perhaps all this were not enough, young men were compelled to "feel ashamed if they did not enlist in the army" (Ibid.).

In this way, conscription was introduced for the first time as "patriotic duty" (Paul 2011: 34; Paul, 2007: 285). A service that is, in the eyes of Paul, intolerable and one of the greatest examples of what former congressman called "Wilson's devastating attack" (Ibid.: 30) on individual liberties of Americans.

**The war, "big government" and the erosion of liberties - chapter 1**

Paul, like other libertarians (Eland, 2007: 5-6, 8; Denson 2006: 25, 99; Anderson, 2008: 4), consider Wilson's presidency and, in particular, World War I, the first moment of extensive government growth in the United States. This war was the first chapter of what libertarians regard as the "advent of permanent 'big government'" and its intrusion into the lives of American citizens.
Likewise, this war, though fought abroad, led to a significant concentration of power in the hands of Wilson and the government, that controlled "almost all production of war" and "assumed new powers... to control dissent" (Eland, 2007: 8; Keene, 2010: 508; Cooper, 2011: 451-2, 459-62). Moreover, the same author adds that war "strengthened his presidency", and that as a general rule, "any war centralizes power". This considered, Denson (2006: 30) recalls Tocqueville's warning about the costs of war:

"No protracted war can fail to endanger the freedom of a democratic country... War does not always give over democratic communities to military government, but it must invariably and immeasurably increase the powers of civil government".

Consider now how many "non-military wars" the US conducts against terrorism, drugs, and poverty. This is not counting military incursions, the preparation for constant war and the climate of fear, fostered by the government and media. As Paul (1987: 51) says, "in times of war, individual freedoms are threatened at home".

Although the term "individual freedoms" can be considered vague, the libertarian discourse has a fundamental importance. By clearly recognizing the first stage - of what could culminate in drone wars, massive surveillance programs, military alliances and "Empire" America - advocating a instinctive distrust of government is not only a reminder of the price of security but also the price of what citizens consider as "freedoms".

The challenge of libertarianism

This article argues that two distinct phenomena are interconnected in the figure of Dr. Ron Paul - his candidacy for US President in 2008 and 2012 and the immense campaign - culminating in the emergence of libertarianism as a moving and meaningful discourse in American politics.

In the first part of this article, the theoretical lines that guide "Paulist" action and discourse were defined. In the second part, the libertarian narrative on Wilson's policies, with special attention to the First World War, identified as the moment when "the Republic became an Empire" and the "wise" policies of the Founding Fathers were ignored and rebuffed, was assessed.

If the libertarian rhetoric against the Federal Reserve (and the bankers) is dismissed as populist, selfish, or even cynical, for undervaluing foreign aid and the problems of other nations (or conversely, even something as naïve as imagining that the disappearance of the state would imply a "dilution" of power and therefore greater "freedom"), it does have its merits, particularly in civil rights and to foreign policy concerns.

Surprisingly, even though the libertarian movement in the US is identified with "the Right", in foreign policy, it unites with "the Left" by rejecting the role of the United States as the world police force (Edwards, 2011: 266). While not necessarily agreeing with what the US role in the world should be (and vice versa), both (the Left and
Libertarians) agree that the current US mission is unacceptable and undermines not only American citizens, but also everyone else.

Finally, for the global anti-war movement, the biggest lesson from Ron Paul should be considered. In his own words (2007: 326-7),

"(those) who want to limit the costs of war and militarism... have to study the monetary system, through which government... finance their adventures abroad without the responsibility of informing the public of their costs or to collect the funds needed to finance this effort".

If, for many, it is now easier to understand the links between the banks, the government and the war - and the financial crisis - a small share of the credit is due to Ron Paul and the libertarian movement.

The liberals, likewise, help to expose the "vicious circle" of the dollar as the world reserve currency, which is trusted mainly due to confidence in US military power. At the same time, the dollar serves to amplify that military power, manipulated by the Federal Reserve, and jeopardizing the vast majority of citizens, creating a "tax" through inflation (Paul 2007: 328), but especially removing any decision-making power over key decisions in everyone's life.

Although Paul rejects the democratic model preferring the Republic, and even rejecting the cosmopolitanism of a world government, his advice can be understood as a call for a more transparent policy, built on ideas and coherence - a model that the ex-congressman and former presidential candidate always follows. In short, a system that is more "democratic", in the fullest sense of the word.

References


WAR AS A CONTINUATION OF POLITICS BY OTHER MEANS ... UNMANNED

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Abstract
The growth of US combat capability due to the operational introduction of drones is the most significant of any weapon system in recent decades. Under this new operating model, the drones are proliferating a myriad of essential activities in the battle space, while relieving the pilot of the risk of monotonous or dangerous missions, who operates thousands of miles away in an air-conditioned cubicle, executing the attack on a high-definition monitor.

By analyzing the current situation, from the standpoint of the conduct the United States of America (USA), indications reveal change in the nature of the political debate influenced by the widespread employment of drones. Namely, judging specifically how drones affect the strategic culture of states by the use of coercive force to achieve political objectives and, in particular, the almost irresistible political temptation to employ air power as a principal military response. In this context, the issue at stake is whether Remote Control Air War strengthens the capacity of deterrence and compulsion of future opponents, or if, on the other hand, lowers the bar for the use of force, making hostile conflict more likely.

The focus of this discussion is on the argument that drones provide the ability to employ military capabilities in a conflict, without the need to build a broad political or public consensus. Likewise, while making the political decision-making process easier and spontaneous in order to use force, the planning and execution of military strategy is made more difficult, the result of the complexity and uncertainty of “boomerang” effects.

Keywords:
War, Drones, Remote Control Air War, Selective Executions, Air Power

How to cite this article:
Vicente, João Paulo (2014). "War as a continuation of politics by other means... unmanned". JANUS.NET e-journal of International Relations, Vol. 5, N.o 2, november 2014-april 2015. Consulted [online] on date of last visit, observare.ual.pt/janus.net/pt_vol5_n2_art4

Article received on July 29, 2014 and accepted for publication on October 9, 2014
WAR AS A CONTINUATION OF POLITICS BY OTHER MEANS ... UNMANNED

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1. Introduction

In November of 2001, somewhere in the desert of Afghanistan, the world witnessed the birth of a new and overwhelming chapter in the history of air power. Muhammad Atef became the first target from an unmanned American aircraft; a drone designated “The Predator”. From that moment a new technology and concept of operations flourished, producing impressive and disproportionate effects, prompting an almost irreversible temptation by politicians to the nascent resource of Remote Control Air War.

The growth of US combat capability due to the operational introduction of drones is the most significant of any weapon system in recent decades. Namely, the ability to remain airborne with a predetermined objective for more than 24 hours while executing constant surveillance and carrying precision weaponry, over a ton, ready to be dropped on targets of opportunity. Under this new operating model, the drones are proliferating a myriad of essential activities in the battle space, while relieving the pilot of the risk of monotonous or dangerous missions, who operates thousands of miles away in an air-conditioned cubicle, executing the attack on a high-definition monitor.

To the extent this operational indispensability is increasing, a three-dimensional profusion of Remote Control Air War is developing. Specifically, in the diversity of shapes and sizes, the broadening the spectrum of missions and user base, and the increasing levels of autonomy on par with the prospect of weaponization. It is exactly the irresistibility of this surgical non-apocalyptic approach, and the reduced costs, that may make this propagation permanent with destabilizing effects for international relations.

By analyzing the current situation, from the standpoint of the conduct the United States of America (USA), indications reveal change in the nature of the political debate influenced by the widespread employment of drones. Namely, judging specifically how drones affect the strategic culture of states by the use of coercive force to achieve political objectives and, in particular, the almost irresistible political temptation to employ air power as a principal military response. In this context, the issue at stake is whether Remote Control Air War strengthens the capacity of deterrence and compulsion of future opponents, or if, on the other hand, lowers the bar for the use of force, making hostile conflict more likely. It is also important to consider while removing the human cost to the offender; the employed application of armed drones becomes a sufficient expression of the political will to wage war.
The focus of this discussion is on the argument that drones provide the ability to employ military capabilities in a conflict, without the need to build a broad political or public consensus, making the political decision-making process easier and spontaneous in order to use force. However, a strategic analysis of the campaign of "selective executions" will assist in identifying aspects of the "boomerang effect" that threatens the operational effectiveness of Remote Control Air War, prospectively making the future security environment, by its very nature complex and adverse nature, increasing hostile and dangerous.

2. The Political Temptation For Remote Control Air War

American politicians have always admired the military capability to find and destroy targets from a distance (Zenko, 2010a). However, the American policy trend toward limiting the military footprint whenever confronted with challenges that threaten national interests is taken to the extreme with recourse to drone attacks. The fact that these systems are a low-cost option, always available, and with high operational efficiency is not distinct from this trend.

From this standpoint, the Predator is a technological evolution for the Obama Administration analogous to what the cruise missile was to President Clinton in the 1990s: a form of flexing foreign policy muscle without the inherent costs of employing ground forces. This political objective is one of the catalysts for the preeminence of future use of drones and, above all, to advance development of more capable systems, particularly in terms of reach, persistence and autonomy.

The relevance of the political preference for Remote Control Air War can be verified by noting that at the end of 2011 the USA employed drone attacks, simultaneously and continuously, in six different theaters, in addition to surveillance missions in at least a dozen countries, including the domestic level. In this context, operations in permissive air environments, where the threat to the drones is minimal and in some cases with tacit or explicit local government support, maximizes the persistent capability to collect intelligence and identify emergent targets.

The employment of drones translates into a smaller military "footprint" that may be politically attractive. The concept of remote operations and the characteristics associated with these systems to perform long-range attacks allow a reduction in the need for forward operating locations for power projection. Without the need for this strategic requirement international interference, the obligation to gather consensus, and build coalitions that support the use of force is reduced. Likewise, consulting Congress to obtain political legitimacy to carry out actions of Remote Control Air War is bypassed.

In addition, this technology is extremely enticing, both politically and militarily, in so far as it conveys a false impression that a war is no longer costly. The decision to wage war always had serious consequences. However, it is now possible to start a conflict without having to deal with some of the more severe implications, like sending ground troops. One of the factors of war deterrence assumes high costs translated into "blood and treasure". To reduce the shedding of "blood", war is made less harsh, less demanding and more socially acceptable, limiting the onus just to "treasure". Thus, Remote Control Air War fits into a long Western tradition of finding relatively safe
methods to employ lethal force, such as artillery and aerial bombing, leading to the belief that avoiding military casualties is more valued than casualties among the opposing civilian population (Olsthoorn et al., 2011).

On par with the reduction of the individual requirement of the combatants, warfare at a distance requires less societal acceptance, making it a primary policy option. The use of cruise missiles on Somalia and Sudan during the Clinton presidency proves this observation. Also, American terrestrial intervention in Kosovo only occurred when the "guarantees of impunity" were pooled. (Ignatieff, 2000: 179) Thus, to remove the danger of loss of life, the employment of drones maximizes this concept of operation with impunity.

The perception of a war without costs, as pointed out by Andrew Callam (2010), may be due, firstly, to the fact that it is a conflict fought covertly, away from the view of society. In spite of the information age, it is difficult to gain access to remote areas or obtain images about the attacks, which helps to insulate the public from the damage, preventing a transparent and impartial assessment of such conduct, in particular the target typology and damage caused to the civil population. Secondly, the elimination of human risk for the USA makes war more acceptable, decreasing the general objections to its occurrence and prolongation.

On the other hand, the political-military interaction that precedes the war may also be affected. Up to this point, this collaboration sought to establish the most appropriate strategy for political objectives in such a way as to minimize the cost in "blood and treasure." While the military is looking for the human resources needed to achieve the established goals, politicians try to minimize the impact associated with massive armies. However, removing the human variable from the equation transforms the political-military calculation, a judgment each time more rational and less subjective. This change in the nature of political debate, the calculation of human risk to the economic cost of the intervention, may relegate the need for military consultation prior to the decision of the use of force to the background.

By virtue of providing a real-time common operating picture to decision-makers, it is possible that the decisions are ethically more consensual (Cummings, 2010). The greater granularity of information will mean greater accuracy, thus increasing understanding of the operational environment. This faculty, resulting from the application of automated analytical tools, allows a faster evaluation of operational risk and mission strategy, particularly in the process of target selection, facilitating the political decision for the use of force. The proclivity for Remote Control Air War can, however, affect the consistency of air policy. The Kosovo conflict reflects this typical moral conditioning imposed on air strategy, extreme discrimination and proportionality, to justify a fight with reduced risk. However, conducting attacks above 15,000 feet, outside the envelope of antiaircraft threats, reveals a greater concern for the safety of the pilots than for the judgment of the bombardment.

On the other hand, the ability to "humanize" the error will decrease even as the collateral damage will continue to exist. Conceptually, it is easier to accept collateral damage caused by a manned aircraft, whose pilot makes decisions in a fraction of a second while subject to the rigors and threats of fighting, than admit errors caused by the use of drones. The extreme concern to limit the collateral damage leads to the establishment of complex protocols for selection and executing attacks on targets.
However, the inherent precision of *drones* associated with a typology of ever smaller and more diffuse targets, causes greater risk taking, especially for attacks in urban areas, contributing to a higher probability of unwanted effects. Thus, the reality presented in question will contribute to increasingly isolating society from military actions by reducing the supervision of political action. This erosion of verification and accountability of political action, essential pillars of waging war in a democratic society, can foster willingness for lethal force.

An indication of the slow-down of political control on the consent and authority for the use of force was demonstrated in the conflict of Libya in 2011, when Obama argued that authorization was not required from Congress to employ U.S. forces in conflict. One of the instruments available to ensure a greater political consideration in the use of force between the President and the US Congress is the "War Powers Resolution" of 1973, which requires the Administration to consult the Congress prior to employment of American armed forces in hostilities. There are, however, situations in which the President may employ military force without the prior approval of the Congress. For example, when the country has been or is in the process of being attacked, when an treaty obliges the defense of an ally, in cases of extraction of citizens at risk, in isolated punitive attacks, or in operations where the surprise prevents a wider public debate (Lugar, 2011: 5).

During the initial phase of the operation in Libya (Operation Odyssey Dawn), the actions of American forces were significantly more intensive, sustained and dangerous than in the later phase, Operation Unified Protector, commanded by NATO, in which the United States played a supporting role. During this stage, according to the perspective of the Obama Administration, American participation was limited by three factors: military means employed, the nature of the mission, and the risk of escalation. In statements to Congress, Harold Koh (2011) defended the Administration's position on why the operation in Libya did not qualify as "hostilities" under the "War Powers Resolution." Firstly, it was a mission with limited objectives. Secondly, because the exposure of U.S. forces was limited, risk for casualties was minimized. Thirdly, the risk of escalation was reduced since land forces would not be used. Finally, the employment of military resources was limited to the suppression of enemy air defenses to ensure the flight exclusion zone and the *Predator* attacks on targets in support of the mission of protecting civilians.

From this perspective, the use of *drones* supported two of these positions; the limited exposure of the forces and the minimized risk of conflict escalation. However, the scope to employ force is substantially and dangerously extended by facilitating the frequency of Remote Control Air War. The recently introduced resolution about the "introduction of American forces in hostilities" can be reductive in the case of the use of *drones*, to the extent that it eliminates the concern of human losses. Although forces are exempt from physical risk, the number and nature of *drone* attacks can contribute significantly to increasing the stakes of hostilities.

The political calculation about definition of hostilities has focused mainly on the probability of occurrence of low levels of American forces, minimizing other relevant considerations for use of force (Lugar, 2011: 6). From this prospect, the conflict of Libya does not constitute any of the exceptions mentioned, being that American aircraft participated in the attacks and the American support to NATO forces was crucial, specifically at the level of logistics, command and control, and support for deficient
operational areas such as information, surveillance, airborne refueling, or space capabilities.

As instruments of coercive diplomacy, in the context of deterrence and compulsion, the employment of unmanned drones to fight in order to reduce the potential costs of the threat and use of force, can have major implications (Nolin, 2012: 13). Chiefly, in situations of added significant asymmetry between the actors in dispute and whereas the personnel costs are virtually zero, the credibility of such threats will be strengthened, since the use of force will occur with greater ease, and without the time-consuming political and public scrutiny associated with the use of force by traditional means. Similarly, it is expected that possessors of combat drones will become more daring and increasingly use Remote Control Air War, in a preventive manner and as the primary instrument of conflict resolution. To simultaneously fight in six different locations on the planet, without any direct risk to its forces, the US seems to validate the hypothesis that aerial warfare has become more productive with the emergence of drones, confirming a greater inclination to employ this military instrument to achieve limited national objectives.

In this sense, the drones provide politicians an increase of control that extends to three levels (Dawkins, 2005: 21-24): the control of opportunity and pace of operations to the extent that minimize external interference, the control over the political debate regarding the use of force, and the perception of precise control from the strategic level to the tactical employment of forces, greatly diminishing the considerable interference in all details of the conduct of war. Therefore, the exclusive use of this form of air power becomes a political solution, increasingly prominent, less demanding, easily justified, and acceptable. By limiting casualties and eliminating the possibility of prisoners of war, the drones allow the missions to be planned and executed in remote areas in a more subtle way. The possibility of performing an operation to attack without the prior media exploitation also maximizes the operational surprise.

To assess in greater detail the temptation for the employment policy of Remote Control Air War, the particular case study of the American counterterrorist campaign will be examined.

3. A new concept of operations: "The only game in town"

On November 3, 2002, in the wilderness of Yemen, a Predator controlled by the Central Intelligence Agency (CIA) followed a car with six passengers. One of the occupants, Qaed Salim Sinan al-Harethi, deemed responsible for the attack on the USS Cole, was on the President’s Al-Qaeda most sought after hit list. In an uninhabited area, a Hellfire missile was fired on the vehicle killing the six occupants; the first action of targeted killing ("selective execution") in history by the use of drones. In August 2009, a leading Pakistani Taliban, Baitullah Mehsud, was resting on the terrace of a dwelling, together with his wife. Without advance notice, a missile launched from a Predator destroyed the house killing the terrorist, wife, and bodyguard. The execution in September 30, 2011 of Anwar al-Awlaki in Yemen, one of the most influential operational members of Al-Qaeda, has raised the bar of this modality, since it was the first intentional killing of an American citizen.

These three examples, from more than four hundred attacks carried out by the USA
since 2002 outside of theaters of operation such as Pakistan, Yemen, and Somalia, mainly by CIA-operated drones, mirror the geographical spread, the frequency of attacks, and demonstrate the emerging status of the prime modality of "selective executions" in the use of Remote Control Air War. Since June 2004, the Bush Administration authorized 45 attacks in northwest Pakistan. During the first term of the Obama Administration this number increased fivefold, in attempt to preserve political capital from the risk and cost associated with alternative military strategies based on massive employment of land forces.

The need for the US to be "agile and accurate" in the use of military power is achieved with the use of drones and by Special Forces (Obama, 2009). From the viewpoint of the Administration, the selective attacks are strategically sensible. Specifically, the drones provide an unbeatable ubiquity and persistence, together with precision weapons; afford leverage and a window of opportunity to act. Compared with other military options, the elimination of risk to American forces makes these capabilities especially desirable. Additionally, drones reduce the danger to civilians in comparison with traditional bombing alternatives, since an improved visualization of the target allows better decisions, with pinpoint accuracy.

It could be argued that this offensive counterterrorism strategy has delivered immediate results in the elimination of terrorists. The continuous pressure on terrorist havens, unpunished until recently, makes an action, movement, and contacts with allies difficult, forcing the terrorists to devote more resources to survival. Also, the psychological effect on the terrorist caused by the uncertainty of the next attack and survival, constrains operations. Empirically, the operational results arising from the employment of unmanned drones indicate that obtaining the same results by alternative means would require a large scale military force with associated political, economic, and social drawbacks. In this way, the strategic consequences that derive from the use of force are smaller than those resulting from the projection of armies, which are usually perceived as foreign occupation. In addition, wars of occupation tend to be expensive and to ignite the resentment against the United States.

Similarly, it is argued that drones reduce the escalation of the conflict, making the platform an essential tool in counterterrorism strategy (Anderson, 2010). The logic is simple: decimating the principal leadership with the most experience in the network degrades the command and control ability of Al-Qaeda. The zenith of this program occurred with the death of Osama Bin Laden, with recourse to an action of "selective enforcement", in which Special Forces were used to ensure positive identification of the target and its extraction.

The attrition of Al-Qaeda leadership hinders the reconstitution of the organization and reduces operational efficiency. For example, of the 30 primary members of Al-Qaeda in Afghanistan and Pakistan, drones have killed 20 since 2010 (Nolin, 2011: 19). Contrary to popular belief, the number of trained terrorists is quite limited (Byman, 2006). When an experienced terrorist is eliminated there is a direct impact on operations as it takes several months to train a replacement with sufficient experience to be effective. Regardless, the organization continues to recruit terrorists but they lack the requisite experience and leadership to constitute a significant threat.

Other academics, citing testimonies of Al-Qaeda operatives, go further by proposing the hypothesis that there would be a greater threat to the world of nuclear terrorism.
without the use of this modality (Zenko, 2010b). From this standpoint, the drone attacks are an essential tool for killing terrorists who provide operational support to international terrorism, this option considered morally justified to prevent future terrorist attacks. Everyone seems to agree that killing the insurgents does not automatically lead to victory, but as Steven Metz (2000: 55) emphasizes, "a resolution of the root causes is easier with the insurgent leaders outside of the scene."

4. The "boomerang" effects from the "selective executions" campaign

These optimistic propositions view the use of drones as the most effective and necessary way to use military force against insurgents. However, the official American support for the conduct of this operation mode is somewhat paradoxical. Firstly, an expansive interpretation of the legal framework is transmitted while simultaneously maintaining limited criteria. Secondly, a modality of action is legally justified while taking place covertly. Finally, factual details about the decision-making process and the conduct of the intelligence services are limited to the public while an image of transparency is advocated.

Bergen et al. (2011) have questioned whether the drone campaign, although useful in the short term, may undermine American efforts to stabilize the region, creating a long-term gain for Al-Qaeda. Peter Singer (2009: 312) asks whether or not this mode of warfare contributes to an increase of revolt and membership in the terrorist cause, while Jane Mayer (2009) argues that the global employment of drone attacks will make retaliation inevitable.

The public debate on the effectiveness of the employment of unmanned drones in lethal attacks on terrorists has not yet been proved an unequivocal strategic success. In the same way, it is not clear what the achieved outcomes, with the attrition imposed on terrorist leadership beyond the impact that civilian casualties, have on the recruitment of new terrorists, as well as the escalation of attacks that destabilize Pakistan. In the case of lethal offensive actions, circumscribed to limited areas, with access to real-time images of the results of the attacks, the direct effects are measurable. However, these attacks have costs psychological and physical, direct and indirect, and cumulative and interrelated. These consequences will be felt at multiple levels (tactical, operational and strategic) and in multiple dimensions (political, economic, civil and military). Because military interventions should not be considered an ephemeral moment, it will be very difficult to foresee a conflict in which there is no need for contact on the ground between the parties in opposition. For this reason, the unique aspect of Remote Control Air War in irregular conflict intensifies difficulties regarding the stabilization and reconstruction efforts, to the extent that it does not allow the establishment of trust through direct contact with the populations.

The lack of a comprehensive strategy to deal with a conflict makes limited use of military force more attractive, at the expense of lengthy and other seemingly ineffective instruments of national power. The use of the military instrument, quickly launched with high readiness, deflects the need to develop other instruments of power and provide them with sufficient resources to implement a long-term plan to address the fundamental causes of the conflict. As pointed out by Robert Gates (2007), one of the most important lessons of the wars in Afghanistan and Iraq is that successful military action is not enough to win. The perception is that the military instrument is
suitable to defeat states, particularly for regime change, but inadequate to combat ideas.

For some analysts, the primary recourse for drones is an inconstant way of dealing with the problem of terrorism (Thiessen, 2010). The problem lies in the fact that the drone attacks are used as a substitute for other operations to capture terrorists alive. The information obtained by interrogation of more than a hundred terrorists captured after the September 11, prevented, according to CIA sources, numerous terrorist attacks. Still, the nature of the target’s remote location makes capture difficult without risking heavy American or host nation casualties, and this must be considered.

On the other hand, attacking the tribal areas in Pakistan strengthens the same forces that the United States is trying to defeat, by alienating "hearts and minds" in an unstable Muslim state with nuclear weapons. Unsurprisingly, the insurgents exploit the resentment of the population reaffirming themselves as a resistance force against the injustice of a Remote Control Air War campaign, which, at the same time, increases the power of attraction for new recruits. It is this balance between the neutralization of insurgent groups and the cost of encouraging more insurgents, which must be found.

Concurrently, reports grow about the increase of anti-American opposition between the Afghan population and Pakistani and European immigrants in the West, as well as between the members of elite Pakistan security services (Gerges, 2010). Political objectives are harmed because of the negative image that emerges in the stricken areas, and that image expands globally. This trend can be worrisome since for some countries, especially those affected, as the American image is irretrievably linked to Remote Control Air War. The fact that the Predator has become for many Muslims the epitome of the arrogance of American power may, in the long term, obfuscate the operational effectiveness of this combat mode.

The indicators presented as a whole seem to support a phenomenon of a loss of moral authority of those conducting Remote Control Air War, particularly in a campaign to win the "hearts and minds" of the local population. This perception than may be much greater than actual civilian casualties. In this way, without the need for direct contact with the people, the air attacks can only surgically remove insurgents. Thus, a state that seeks to impose its will on the opponent, without risking the lives of soldiers, will lose the strategic value of gained moral superiority (moral high ground). This argument leads William Arkin (2008) to agree with the possibility of drones posing a long-term risk: the perception of air power and the user as inhuman.

The strategic consequences arising from direct combat between human beings and Remote Control Air War are disparate. The employment of manned aircraft exposes human resources to the rigors of combat and transmits a perception of greater political determination and willingness to accept the risk of casualties. Despite the impunity with which manned aircraft conduct attacks, resulting from air superiority, the operational risk to personnel in Afghanistan and Iraq is still substantial. The number of shot down aircraft, the possibility of capture, and the insecurity experienced on air bases, which were the target of several deadly attacks, confirm this threat. This risky interaction between combatants contributes to the enemy focusing efforts in the area of direct conflict (McGrath, 2010: 15). However, the extensive use of Remote Control Air War, seen in absolutist perspective, seems to indicate that while
one side sees the war as a tool, a means to an end, the other regards it from a metaphysical perspective, represented in the exaltation of the act of dying for a cause. For this reason, the perception of a lack of political determination to risk the lives of its citizens in combat can also contribute to strengthening the opponent´s resistance, developing a media information campaign to attract new members to the cause.

Other critics synthesize this imbalance between the costs and benefits of the attacks (Kilcullen et al., 2009). Firstly, the drones create a siege mentality among civilians. Second, the outrage is not only located in tribal areas and but extends throughout Pakistan and in the international community. Finally, using technology to replace a strategy, without a concerted information campaign addressed to Pakistani public is problematic. Thus, the decision to escalate the attacks may generate a greater number of terrorist actions in the face of dissatisfaction giving reason to the argument to those who advocate a possible "boomerang effect" in which attacks can create more terrorists than those who are killed.

In this sense, the attacks cause an increase in the number and the radicalism of Pakistanis supporting extremism, decreasing the strategic objective of making Pakistan a more cooperative and capable regional ally. Thus, the collateral damage and the perception of the constant violation of sovereignty also contributes to an increase in feelings of anger that unites the population around extremists and causes the spread of attacks in other areas of the country and the globe. (Kilcullen, 2009)

In this framework, it is difficult to find unanimity about the effectiveness of this mode of warfare. Recent studies show that the number of terrorist attacks in Pakistan have decreased to the extent that there is an escalation in the program of "selective executions" (Qazi et al., 2012), looking for a way to defend a negative correlation between the attacks of drones and the increase of militant violence (Johnston et al., 2013). Although there is difficulty gathering consensus about the cause for anti-American attitudes, it can be seen that these explanations are based on the assumption that individuals form their opinion about the USA primarily as a reaction to what the USA is and does (Blaydes et al., 2010). However, these authors advocate that the level of anti-Americanism among Muslim populations is not an organic result in response to acts of the USA. Rather, the level is mainly dependent on the intensity of anti-American messages disseminated by prominent elites of a given country. Namely, the anti-American rhetoric works as a political instrument to obtain the support of sections of the population, made more pronounced where there is political competition between secular and Islamic factions.

The "selective executions" campaign is politically attractive because the reduced costs favor domestic support while at the same time demonstrating political will. However, the unwanted effects only appear in the long-term. In addition to the indispensable military value, the truth is that Remote Control Air War is a provocative symbol of American power, without constraints to respecting the sovereignty of states and eliminating the collateral damage. This conduct may offer to other actors in the international system incentive to imitate such behavior. However, what is at stake is not the weapon system, but the actual operational employment of that system. To the extent that the employment of Remote Control Air War is presented as a product of
American “exceptionalism” stating it as wise, legal, ethically correct, and with surgical precision, doubts arise about the impact of this conduct on other international actors. In other words, being that the United States is an example of world leadership, can it pledge that the submitted legal, moral, and political justifications will be equally applicable to other countries, when they resort to Remote Control Air War to confront threats to their safety? Additionally, to what extent will the US be morally able to condemn such conduct?

A recently published study by the Stimson Center (2014) summarizes these concerns and recommends several steps to ensure greater transparency and accountability on the conduct of "selective executions". Among them is the need to perform a cost-benefit analysis about the function of lethal drone attacks in selective counter-terrorist actions; the importance of explaining the legal basis for the conduct of the attacks, as well as the approximate number, location and affiliation of the targets of the attacks; the identities of civilians killed and the number of attacks carried out by military forces and the CIA. In addition, the United States must make a commitment to the development of international standards for the use of lethal force outside the theaters of traditional operations. In this way, it will be possible to establish precedents that may be accepted by the international community, to regulate the future employment of Remote Control Air War.

5. Conclusion

Considering war as the continuation of political relations, the preeminence of Remote Control Air War can contribute to altering strategic culture if states use this type of coercive power to advance political goals.

In reality, the political irresistibility, resulting from the associated cost reduction for the use of force, is expressed by the increasing intensity on the level of discrimination for individual targets. It is, similarly, conveyed by the increased frequency of attacks and the greater geographical range for selective employment of deadly force. Nevertheless, this tempting policy causes “boomerang” effects, signifying that to democratize and civilize means more war. These effects threaten to transform the way states, non-state organizations, and the individual face the conflict by constantly changing the threshold, frequency, actors, and effects of the conflict. This makes the future security environment, by its very nature complex and adverse, increasingly hostile and dangerous.

While war was once reserved for the achievement of vital state interests, Remotely Control Air War promotes enlargement of state interests by favoring the military response option to achieve peripheral interests while decreasing the political constraints, both military and civilian. In this way, and regarding the costs of political action, it is assessed that this method streamlines the political decision-making process, or bypasses it, since it is possible to employ military capabilities in a conflict without the need to build a broad political consensus and endure public scrutiny.

These remotely operated systems offer strategic alternatives and flexibility to employ assets without the burden of positioning forces in hostile territory, therefore, increasing the freedom of political maneuver. Decreasing the need of forward operating bases to support military detachments reduces the strategic requirement of building regional
partnerships. Thus, the strategic and moral incentives to make this modality increasingly precise and remotely operated are increasing as large-scale wars decrease in number and intensity. Furthermore, the cost reduction of political action that can provide preventive military action, in areas of strategic interest, puts into perspective an increase of regional conflict and with it greater civil damage.

Due to operational and political benefits, the drones will constitute an essential capacity to increase the situational awareness in the battle space, while, simultaneously, provide for the application of lethal force in a discreet way. This capability may create change in regional power dynamics providing small and medium-sized powers an affordable capability, associated with the projection of power, putting an adversary’s Center of Gravity at risk without traditionally prohibitive costs. Thus, an upturn in an offensive posture is expected, although to some extent preventive, by virtue of the reduced employment cost of these capabilities. Instead of deterring potential aggressors, it seems more likely, the prospect of an arms race in search of leveling the asymmetry, increasing the proliferation of drones with potentially more damaging forms of employment. In this case, the adverse effects of persistent surveillance and precision create a presumption of infallibility that can motivate risky political decision making, like attacks in urban areas.

With regard to the strategic effectiveness of the Remote Control Air War on non-state actors, it is dependent, like other military instruments, on the amplitude of the actor's objectives. The American escapade in Iraq and Afghanistan discouraged any interest to invade or occupy tribal regions in Pakistan or countries like Somalia, Yemen, or Libya. However, the need to replace the conventional option for a political and publicly acceptable solution, catapulted the use of drones to an urgent operational requirement.

In this looming strategic synthesis, the modality of "selective executions" induces a panoply of "boomerang" effects, which translates to a higher possibility of terrorist retaliation. Specifically, these effects are expressed in the recruitment of new insurgents, a greater complexity of the political relationship in regards to American strategy in the geographical areas of the attacks, and the greater regional destabilization in countries such as Pakistan or Yemen. Regardless of the ability to establish a direct causal relationship, an erosion of American credibility in the region is anticipated, which will gradually spread throughout the world.

The spread of this capability to new theaters and the range of tactical-level targets can accelerate the local, national, and international opposition, contributing to the destabilization of domestic governments in whose territory attacks occur. Therefore, the willingness and ability of these governments to take effective action may be reduced against the insurgents. On this view, the focus of the campaign on the targets of strategic interest, rather than the widespread removal of operational targets, will offer lower unwanted effects. Similarly, the transfer of the program by the CIA to the armed forces can provide the much-needed transparency and accountability to this one embodiment still shrouded in secrecy.

Additionally, the weaponization of drones, as a consequence of technological proliferation, may be readily available to smaller powers in the medium term. Given the number of countries, and organizations that have drones with range and payload capacity to carry substantial conventional or mass destruction weapons, it is possible to anticipate the spread of this threat at a global level. A natural extension of the user
base for terrorist groups, criminal organizations and even to individuals, can spread the
danger of threats facing the United States.

Unlike nuclear weapons, which by its consequences discourage use, the cost of utilizing
Remote Control Air War is relatively low, encouraging developed nations to coerce and
impose their will on other nations with increasingly limited risk. The circumlocution of
interventions in remote areas of the globe, confirm a foreshadowing, in embryonic
form, of future air strategy, forcing a reconsideration of the relationship between war
and peace in democratic societies. Therefore, the unusual combination of
characteristics such as the distance between combatants, combat asymmetry,
autonomy in the use of force, and minimization of political and personnel risk, affirm
the modality of Remote Control Air War as politically enticing. That said, Remote
Control Air War is not an end in itself, but primarily, a fundamental tool to achieve
certain political ends. Moreover, this mode is not a magical solution to the political goal
determining the objectives for the use of military power.

As the aircraft was one of technological solutions that made it possible to balance the
asymmetry created by the increase in firepower and entrenchment characteristic of the
First World War, the drones have emerged as a possible solution to the contemporary
tactical problems generated by location, identity and reduced signature of targets in
remote global locations. Hence, to expect that these systems become the strategic
solution for current and future wars, will certainly be a misjudgment. Moreover,
profound consequences will accrue to accentuate the erosion of the sovereignty of
states and the consequent increase of instability in international relations.

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FROM WAR TO PEACE. THE CONTRIBUTION OF MILITARY CORPS WITH POLICE FUNCTIONS: THE GNR IN IRAQ

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Abstract

The nature of conflict is changing. The occurrences of formal international intervention, in a complex theater of operations with operational requirements, necessitate the engagement of international forces with military and civilian capabilities, namely a distinctive type of police force. Since the end of the last century, the Portuguese Republican National Guard (GNR) has deployed to stabilize various conflicts throughout the world. The GNR contributed when UN resolutions mandated constabulary requirements, but this participation was never framed within a multinational force of NATO. However, the GNR works under the same NATO doctrine for force employment constituted on the basis of military units with police functions, called the Multinational Specialized Units.

The Guard is a military organization with the expertise to contribute to peace. This unique competence stems from capabilities over the entire spectrum of police functions within unstable environments, including a unique ability to overcome the Security Gap. Likewise, by concurrently deploying with the military forces, the GNR demonstrates the ability to use force in a legal manner by fostering a comprehensive approach within the security and judiciary system.

This holistic capacity goes beyond a purely institutional approach. By executing police functions in unstable environments the GNR contributes to the pursuit of credible Portuguese foreign policy interests in Peace-Enforcement Operations..

Key Words: Military, Police, Unstable Environment, Peace, Security Gap

How to cite this article


Article received on August 6, 2014 and accepted for publication on October 2, 2014
FROM WAR TO PEACE. THE CONTRIBUTION OF MILITARY CORPS WITH POLICE FUNCTIONS: THE GNR IN IRAQ

Pedro Miguel Duarte da Graça

Introduction

In 2003, with the advent of war in Iraq, Portugal established a political position in the future of conflict by deploying supporting forces for Operation Iraqi Freedom. The ad-hoc military coalition was formed outside of NATO article invocation but based on Alliance doctrine. Within the Portuguese foreign policy framework, the choice of a constituted force fell on the Republican National Guard (GNR).

Much has been written and said regarding the sending of this military corps to Iraq, allegedly to the detriment of the armed forces (FFAA). If the reasoning of this institutional analysis argument is illogical, then there must be a better reason, functional, envisioning a comprehensive approach (NATO, 2010b: 2-11). This method is specifically oriented to state-building and the creation of a jus post bellum required of modern conflicts, while safeguarding these processes in an unstable environment. (Kaldor, 2006: 6)

Ten years have passed since GNR involvement in the Iraqi conflict. However, the present discussion is of singular scientific relevance because it goes beyond the institution regarding the role of police in unstable international environments and the Guard's contribution to the pursuit of Portuguese foreign policy (Guedes A. M. & Elias L., 2010).

I. Peace Studies

The Norwegian Johan Galtung, considered the creator of the mid 20th century Peace Studies, adopted, conceptually, a dual vision of peace: negative peace "(...) absence of war (...)" and positive peace "(...) integration of human society (...)." (1964: 2) The objective of Peace Studies is to understand violence and non-violence, beyond studies of war (Galtung, 1969: 168-174; Boulding, 1990: 4-5).

Later, the author designed another model, the Violence Triangle, coinciding with the earlier Peace Triangle. Each vertex indicates a type of violence: direct, structural (1969) and cultural (1990), which opposes a form of peace. To summarize, direct violence (personal) is an act of intentional aggression, structural violence (indirect) is a reflection of the social structure, and cultural violence (symbolic) inculcates the legitimization of direct and structural violence (Galtung, 1996: 2).
The socially productive field of Peace Studies confirmed the theoretical underpinnings for the UN on the issue of peace as a practical framework commensurate with institutional suppositions. This basis resulted in the document, "An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping." (UN, 1992) incorporating the concepts of peacebuilding and peace enforcement, reflecting Galtung’s theory, "Three Approaches to Peace: Peacekeeping, Peacemaking, and Peacebuilding." (Galtung, 1975)

Illustration 1 – Triangle of Peace

Visible
Direct Violence
- Negative Peace

Invisible
Cultural Violence
- Cultural Peace

Structural Violence
- Structural Peace

Source: Galtung (1990) – adapted

Kofi Annan’s approach to security builds on Galtung’s concepts; to focus the same security theory on the State, including the individual, designated as human security (UN, 2000). In this context, Galtung identifies military training as essential to deal with violence and police training for the maintenance of public order. He argues in a conflict:

"[m]ilitary training is indispensable: to contain violence. Knowledge of the means of violence and the mentality behind their use is needed. But, for ‘crowd control’ police training may be better, more based on a show of authority and minimum use of violence (...) come active nonviolence training, also training to train the local population, and training in conflict mediation techniques (...)" (Galtung, 1996: 270).

The UN welcomed the concept of Galtung’s positive peace. Given the need to achieve security and to ensure peace - acknowledging the current threats - begs the question: how can peace enforcement operations be designed in response to an unstable environment, and how are operations outlined and enforced by NATO (or were, at the time)?
II. Peace Enforcement - The Unstable Environment

1. Security Threats

The emergence of "new wars" (Kaldor 2006), more than the originality thereof, identifies the risk associated with the decline of the State, based on latent threats from the Cold War, finally confirmed. (Rasmussen, 1999: 43)

Currently, the UN defines the threats (UN, 2004: 12) and identifies a serious concern with six types:

(i) War between states;
(ii) Violence within states like civil wars, massive human rights violations, and genocide;
(iii) Economic and social threats such as poverty, infective contagious diseases, and environmental degradation;
(iv) Nuclear, radiological, chemical and biological weapons;
(v) Terrorism;
(vi) Transnational organized crime. (Idem: 32)

These "new threats", are a mixture of

"(...) war, crime and human rights violations (...)" (Idem: 12), require an approach between the mission of the soldiers and the police, the context in which "[the] army and the police seem to be changing roles (...)" (L'Heuillet, 2004: 199).

Within unstable and unpredictable environments, the growing number of transnational risks and consequent challenges seem to justify the emergence of a third approach. This role must have the capacity to act on internal state security, while being prepared to deal with threats and external influence internally, such as the transnational organized crime, drug trafficking or terrorism. (Lutterbeck, 2004) These forces are, in essence, the product of the 19th and 20th century struggles between the internal Westphalian and international orders. They evolved maintaining law and order on a domestic level as a primary objective yet able to act in external conflicts. Descendants of the French Gendarmerie, these forces, organized militarily with police functions, prove to be an excellent instrument for effective post-conflict intervention.

As Richard H. Solomon identifies, particularly in the Iraq conflict, the specific problem is that:

"(...) military peacekeepers are able to stop conflict by separating
The basic principle of conquering, the main task of the armed forces, is not enough to establish order. Another force must uphold order while respecting civic freedom. This requires a holistic, comprehensive and integrated approach rather than an exclusively military response. In post-conflict, the Gendarmeries emerge, demonstrating a unique aptitude to betake minimum force in situations of maximum violence (Zimmermann, 2005), ensuring public order through the rule of law.

Military organizations with police functions "(...) can serves as a bridge between the military and civil police and can handle tasks that do not clearly fall within either camp" (Perito, 2004: 5). This link, of an institutional and functional character, can and should be maintained in different phases of the conflict, especially in situations where the Western world needs a new approach to the use of forces in post-conflict operations (Field & Perito, 2002-03).

2. Peace Enforcement, Unstable Environment - an approximation

The national legal system, by Decree 87/99, of December 30, 1998, defines the counties whose classification allows identification of operating environment permissiveness. This classification is graded "A" to "C", the latter being more complex and unstable. The peace enforcement operations fall under the class "C":

"The countries or territories in a state of war, armed conflict or internal widespread insecurity and even those where serious health conditions"12.

Within peace operations, including peace enforcement, forces encounter the condition of the Security Gap.

III. Security Gap

Current conflicts increasingly require an approach that, among others, integrates the military instrument and the police, "(...) between soldiering and policing" (Kaldor, 2006: 133). Peace operations are the preferred method supported by the international community in recent years and "(...) have increasingly required the participation of both military personnel and civilian police" (Oakley, Dziedzic, Goldberg, 1998: 6).

The Security Gap is the inability to perform the most basic functions of the State to protect its citizens. The multinational forces’ responsibility - to restore law and order, and the law with justice - objectively encounters three facets of the Security Gap: The Deployment Gap, the Enforcement Gap, and the Institutional Gap (Idem: 8-16).

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1 Article 1, part c of Port#5, n° 87/99, December 30th.
2 Serious health conditions - Article 2 and 3 of Port#9, n° 87/99, December 30th.
Order, law, and justice are necessary for ensuring peace. (i) Order draws the direct level violence - physical aggression, verbal or psychological - away from rapid and dramatic effects. (ii) Law and justice deal with the level of structural violence (indirect), aiding in the consolidation of a fair social structure by diminishing the asymmetry between the real and the potential. (iii) Law and justice also act at the level of cultural violence, promoting values, norms and behaviors that delegitimize the direct and structural violence.

An international force with military capability is required to restore order. Subsequently, order obliges the law as the essential foundation of police functions. The time lag between the two capacities is called deployment gap, and can be reduced, if possible by the integration of these forces.

In the next phase, it is necessary to carry out functions that are not purely performed by either the military or police instrument. In this case it is essential to ensure a functional and institutional continuity in unstable environments, surmounting the enforcement gap.

The third stage emphasizes the rebuilding of local structures. To this end, the institutions with expertise in the required field should be involved in each area, corresponding to its core business. For this, it is necessary to fill the institutional gap, by using forces for missions that meet daily in their home countries, utilizing a comprehensive approach in order to create the conditions for the development of a sustainable and secure peace.

Bridging security gaps requires forces with military unit capacity and police functionality. They might be designed in unstable environments with the military
instrument performing police functions, fulfilling the ground work permanently linked to the legal system, in the promotion and construction of the security system. A military corps with police functions is known as Gendarmerie, Carabinieri, Guardia or Constabulary. (Jayamaha et al., 2010: 148; Oakley, Dziedzic, Goldberg, 1998: 519-520, 330; Perito, 2004: 5).

The security gap is also filled by basic police services, although with less efficiency in more polarized cases (Elias, 2006). In both situations, what is in question is state-building backed by an emerging jus post bellum (Guedes, 2011).

IV. Military Corps With Police Functions

The origin of police institutions dates back to the fourteenth century French Maréchaussée during the Hundred Years War. These marshal troops had a dual function, maintaining order and judicial procedure. Today these functions reflect juridical-policing.

Over time, these troops earned an actual military status and designation - Gendarmerie. This original model gave rise to similar institutions in several countries, such as the Royal Guard of Police in Portugal, the Carabinieri in the Kingdom of Sardinia, the Marechaussee in Holland and the Guardia Civil in Spain. As common characteristics, the military and the police functions are identified, in both cases avant la lettre.

The Anglo-Saxon countries, often cited, have a different description: Constabulary. As the American Robert Perito states,

"[t]he ambiguous and conflicting definitions of a constabulary can be clarified by looking at the specific organizations and functions of constabulary forces in democratic countries [, like] France, Italy, the Netherlands, Spain (...)" (Perito, 2004: 37).

These definitions differ from terms such as paramilitary, militarized or military police, the latter as police responsible for discipline within the armed forces (Scobell & Hammitt, 1998).

1. Military

The "military corps" classification denotes a unit of professional soldiers, with an institutional culture subject to political power. The corps centers on three elements: duties, by statutory approach; constraints, with regard to the restriction of rights; ethics, through principles.

2. Police Functions

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3 In the former USSR, these forces were dubbed "Troops of the Interior Ministry."
According to the doctrine, police functions are categorized as judicial and administrative. The latter police function subdivides into "general" and "special" administration (Correia, 1994: 407).

Repression of illicit criminal activities falls under the judicial function. Carrying out criminal investigations requires an adept criminal police organization (OPC), exercising functionally under Judicial Authority.

General police responsibilities cover necessary safeguards to public order and security. Special police exercises authority in relation to a particular branch of the law (Castro, 2003: 97).

The Republican National Guard, as a military body, implements the aforementioned police functions. The GNR possess the

"(...) ability to adapt to different scenarios and different situations. In short, they have a versatility incomparably greater, in the classical sense, than either the armed forces or the civilian police" (Branco, 2010: 37).

3. Continuity, Proximity, Duality

A military corps with police functions is characterized by a military nature and operational versatility, both military and policing. The Gendarmeries, the model for Republican National Guard, is still characterized by three principles: continuity, proximity, and duality (Branco, 2013). The first two refer to the functional genesis of Gendarmeries while duality is consequential.

Continuity presupposes: (i) an established standing, by the permanent connection between the military and civil institutions; (ii) the versatility to transition between the military and police functions; (iii) the ability to manage performance in unstable environments.

Proximity results from force dispersion throughout the national territory like a spatial network. The features of this employment, like a "power grid", are the effective knowledge of the terrain, the people, and the infrastructure. Likewise, proximity

"(...) which, combined with the continuing availability that characterizes the ‘gendarme’ and in conjunction with the principle of the barracks, creates a closeness to the public" (Idem: 207).

Duality is a consequence of the military bodies with police functions sharing power with constabularies. This principle comes from the decentralization of institutional police power while conversely strengthening the judiciary in exercising control of police activity and of penal action, the latter, by OPC's choice of those specifically considered competent for criminal investigation.
V. Multinational Specialized Unit (MSU)

The complexity of theaters of operations and concurrent demands demonstrate that the occurrences of formal international control require the commitment of international forces with military and civilian capabilities.

From the experience of the Stabilization Force in Bósnia (1998), NATO identified the need to fill the gap that existed between the military and non-military, between the activities of military forces and the civilian police, who were unarmed and unable to enforce the law, perpetuating the Security Gap (Paris: 2004).

The proposed course of action advocated the use of military units with police functions (Gendarmeries or Carabinieri type). The Italians, already developing the Multinational Specialized Units model (Carabinieri: 2003; Paris: 2004), immediately accepted the idea. Generally, the concept integrated: (i) Unit - groups formed on a temporary basis, to fulfill a mission as part of a military force, and to act within the framework for a peace operation; (ii) Multinational - based by virtue of the composition of a military corps with police functions from several countries; (iii) Specialized - as a specialized capability of the military instrument allowing the Joint Force Commander (JFC) to act before the Security Gap occurs.

NATO, through the MSU, integrates an expertise that actuates redirection of negative peace to a positive peace, through the distinctive competence of military units with police functions.

VI. The GNR In Operation Iraqi Freedom

1. Situation

After combat phase completion in May 2003, the United Nations, through resolution no. 1438, and later, resolution no. 1511 created a peace enforcement mission to Iraq. The purpose of this mission was for the development of security conditions and stability to allow humanitarian aid and reconstruction of the country. The Portuguese Government decided to participate in the mission, but faced a difficult problem, since the president as Supreme Commander of the Armed Forces, refused to approve these operations in Iraq. The solution was simple. The government, after the Lajes Summit, was keen to join the US-led coalition and agreed to support the effort by sending the GNR, since this organization depended organically (as presently) on Ministry of Internal Administration (MAI) and not the presidency.

On 15 July 2003, the Portuguese government, by Port.ª n.º 1164, decided to "(...) provide support to coalition forces in the maintenance of peace and order in Iraq (...).", setting the duration for six months, with the possibility of an extension for the same period. The order described Iraq as a type "C" country. A force was constituted for this purpose, called the Sub-group ALPHA, composed of a maximum of 140 military personnel.

The Republican National Guard remained in Iraq through four rotations in the period between November 12, 2003 and February 10, 2005.
2. Operational Area (OA)

The GNR area of responsibility (AOR) encompassed the entire province of Dhi Qar covering approximately 200 km by 140 km with 1.8 million inhabitants. The principal cities were Ash Shatrah, Suq Ash Shuyukh, and the capital, An Nassiriya.

3. The Capabilities of the GNR MSU company

Analyzing the ability of the GNR MSU Company, the following are noted:

Doctrine

The GNR used NATO doctrine, employment of a military force with police functions. (Carabinieri, 2003: 3-4; annex A; NATO, 2001: 4-10, 4-11; 2010a: 3-9; 2010b: 2-8)

Organization

Sub-group ALPHA consisted of the following composition: a commander and deputy commander, four platoons (a support and three intervening), a Section of Special Operations (SOE), a team of Inactivation of Improvised Explosive Devices (EIEEI), and a team of instructors.

Training

In addition to standard vocational training, the GNR received additional operational and tactical military training. The standardization of military doctrine was necessary for mission accomplishment and crucial for ensuring, particularly, "force protection" before any attack.

Equipment

The equipment was functionally identical to the Italian kit, both military and the police. Both contingents possessed non-lethal /less lethal weapons. The system of transmissions/communications was a decisive capability (GNR, 2010: 36).

Leadership

The Portuguese contingent fell under the US chain of command, with the Secretary of Defense of the United States (SECDEF) on top, followed by the commander of Central Command (CENTCOM), and the commander of the Combined Joint Task Force (COMCJTF). Operational control was exercised over the MSU regiment by the Multinational Division on South-East (MND), through the Italian brigade. Operational command was exercised within the Portuguese chain of command. Because of prior

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4 "(...) Set of elements that are articulated in a harmonious and complementary manner and contribute to the realization of a set of operational tasks or effect that is necessary to reach, encompassing parts of doctrine, organization, training, materiel, leadership, personnel, infrastructures, interoperability, among others." (MDN, 2011: 4), (DOTMLPI).
experience, the GNR seamlessly integrated into the different forms of military and police authority.

**Staff**

Recruitment was carried out on a voluntary basis. After the expansion of auxiliary diagnostic tests, the appointment proposals ensued. *(GNR, 2010: 14)* All chosen personnel were dedicated professional military soldiers, grouped hierarchically into officers, sergeants and guards/regulars. Additionally, one physician deployed during the first, second and third contingent. Finally, this staff was experienced. As Portuguese police officers, all personnel held an extensive background in law enforcement, authority, and criminal investigation.

<table>
<thead>
<tr>
<th>Contingent</th>
<th>Date</th>
<th>Active</th>
<th>Officers</th>
<th>Sergeants</th>
<th>Regulars</th>
<th>Civilian</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>NOV03-MAR04</td>
<td>6</td>
<td>12</td>
<td>110</td>
<td>1</td>
<td>129</td>
<td></td>
</tr>
<tr>
<td>Second</td>
<td>MAR04-JUL04</td>
<td>5</td>
<td>14</td>
<td>121</td>
<td>1</td>
<td>121</td>
<td></td>
</tr>
<tr>
<td>Third</td>
<td>JUL04-NOV04</td>
<td>5</td>
<td>13</td>
<td>109</td>
<td>1</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>Fourth</td>
<td>NOV04-FEV05</td>
<td>5</td>
<td>13</td>
<td>109</td>
<td>3</td>
<td>127</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>21</strong></td>
<td><strong>52</strong></td>
<td><strong>449</strong></td>
<td><strong>3</strong></td>
<td><strong>505</strong></td>
<td></td>
</tr>
</tbody>
</table>

Source: GNR (2010)

In terms of morale and welfare, the unit generated a "Committee on Monitoring and Support for Families of Military serving in Iraq".

**Infrastructure**

Sub-group ALPHA deployed initially to Libecchio Base in An Nassiriya, and subsequently to barracks at Camp Mittica, in Tallil, the former Iraqi Air Force base. Regarding barracks, the Portuguese contingent received five brick accommodations, formally belonging to Iraqi Air Force officers, five kilometers from the province capital *(Cruz, 2010: 346)*.

**Interoperability**

Interoperability depended on the following factors:

(I) Force employment of the same type, military units with police functions;

(II) Standardization and normalization of NATO military doctrine, allowing the interoperability of operational and logistical tactics, techniques and procedures;

(III) A modular and flexible organization (MSU), based on the organic type common to NATO countries;

(IV) Identical military and police training;
(V) Previous joint training with the Italian forces reinforced during missions;

(VI) Functionally identical equipment, the light infantry security force utilized less non-lethal / less lethal weapons and armored vehicles of the same make and model;

(VII) Clear delegation of authority: Operational Command, Operational Control and Tactical Control;

(VIII) Force constitution with military personnel integrating the respective national military corps, with daily experience in employing police functions, a comprehensive approach to the police and judiciary system;

(IX) The presence of Portuguese liaison officers connected at different levels and sharing information.

(X) The interoperability of Portuguese communications systems with communications centers common to the Italian and Romanian forces allowing enhanced command and control (C2) and information sharing.

4. Operational Activity Established in Iraq

During the mission, Sub-Group ALPHA was assigned the following operations/policing tasks (Cross, 2010: 347-349; Silverio, 2004: 3-5):

Guards

In addition to other missions, the police ensured 24-hour force protection, guarding the GNR work and living installations, first in Libeccio and later, Tallil Base, Camp Mittica.

Radio On Call (ROC)/ Quick Reaction Force (QRF)

The force appointed for this service consisted of a reserve prepared to operate statically or dynamically. The first task consisted in maintaining a prevention unit at Camp Mittica and Tallil Base ready to respond to unexpected situations, typically related to a serious disruption of public order. The QRF strengthened or replaced the local police. Likewise, the unit remained ready to provide support to a force on an external mission. The second task was support, in the vicinity of the unit tasked with a mission (GNR, 2004).

Re-establishment and maintenance of the public order

These operations attempted to reestablish law and order to guarantee the state social stability (GNR 2004). The GNR succeeded during several interventions.

Check-points / Road blocks

This task implemented the monitoring and supervision of cars, individuals, and transported materials, related to serious crimes (GNR, 2004), specifically, arms trafficking and works of art.
Escorts

These missions safeguard the movement of personnel outside the unit, namely: Portuguese dignitaries visiting the Portuguese contingent, the commander, MSU instructors, Italian army leadership, detainees, and others.

Physical Security

Service conducted to guarantee "(...) security, locations, areas, itineraries, facilities or entities (...)" (GNR, 1996b: IX-106) during the local and national electoral processes predominantly occurring in the province of Dhi Qar.

Inactivation of Unidentified Explosive Devices (UXO)/ Explosive Ordnance Disposal (EOD)

The Portuguese and the Italian EOD developed a strong link by the interoperable nature of this function. The teams executed the destruction of explosive substances seized in police operations, inactivated explosive devices, implemented preventive recognition of explosives, and expanded technical advice related to the work. The most relevant example occurred on November 10, 2004 when the team neutralized a car bomb filled with 65Kg of explosives.

High-risk operations (Search and Seizure)

High-risk police operations aim to impede violent criminal activities. Performed by the Special Operations Section, these tasks consisted of searching for objects related to crime, seizing possible evidence, and detaining suspects (GNR, 1996b: IX-37-59). These missions included high-risk entry into residences with considerable security to comply with judicial mandates.

Female inspections

In regards to contact between men and women, well-defined social standards in Arabic culture require consideration. Without ostracizing the force and simultaneously transmitting modern police values, the creation of a female inspection team composed of three military females was established (the only women in the MSU regiment). The mission of this team required the search of Iraqi women whenever necessary. Essentially, there were two situations: daily inspection of self-employed Iraqi women who worked in Tallil and support of police operations throughout the MSU regiment.

Service Auto GRILL

Ensuring a regular supply of fuel to the population required the stemming of price inflation and smuggling. This operation verified compliance by checking the amount of fuel remaining in the tanks, compared to the amount recorded as output with the sale receipt, the selling price, and the arrangement (GNR, 1996b: I-5 - I-12).
Patrons

These duties included standing and vehicle patrols, as a means of proximity policing. The patrols protected the local population and property by ensuring compliance with the legal mandate, encouraging the normal societal functions. Essentially preventive in character, patrolling constituted an excellent way of obtaining information (GNR, 1996b: I-13). The two main objectives of patrolling included: monitoring and advising the Iraqi police regarding the police roles and providing security to the same, as well as the province and city.

Security Sector Reform

In the Dhi Qar province, the local and traffic police lacked technical training and respect from the population. The Coalition Provisional Authority guided and defined a program in which the reorganization, training, and monitoring of the police fell under the responsibility of the MSU. The GNR participated and helped develop Security System Reform in three areas: creating instructional materials and physical conditions for the performance of police functions, concomitant with the training and mentoring.

Formation / Training

The Portuguese and Italian police administered the training. The Portuguese team consisted of three instructors, a sergeant and two guards, which commuted daily to the traffic police and the training premises in An Nassiriya. The program contents were: human rights, prisoners’ rights, police ethics, and technical police work, and other subjects.

After the classroom training, the Iraqi police returned to regular police duty. In the first phase, the trainers, and subsequently MSU patrols, accompanied the Iraqi police, verifying an increase in the quality of the work and respect for the police. The Portuguese cooperated actively in Iraqi police training, instructing over 1800 police officers in less than a year.

Mentoring

This duty verified work conditions, analyzed needs, and identified manpower requirements per squadron. Likewise, mentors conferred and monitored the delivery of identity cards, uniforms, and weapons, particularly, to the police stations in the localities of Al Islah, Sayyid Dakhil, Al Fuhood, Al Fudlija and Al Tar. After providing the real conditions for the performance of the functional police training, the second phase of training focused on police ethos and the respective procedures. The GNR’s comprehensive approach to police work and the judicial system ensured the successful development of this mission.

Military Missions

The GNR was not in Iraq to "execute military tasks", due to domestic political pressures adduced. However, based on military training, the GNR exercised force protection,
when attacked, on the basis of the military techniques, tactics, and procedures or when assigned a mission critical to force protection\(^5\)\(^6\). They fulfilled:

Surveillance missions and linkages between fixed or mobile forces - anti mortar patrols: Following the incidents of 14, 15 and May 16, 2004, anti mortar patrols commenced to prevent mortar attacks. The teams accomplished this duty in vehicle patrols, within a five-mile radius around the outer perimeter of the *Tallill* base. The Portuguese patrols discovered at least two positions used for launching mortars and rockets.

Special operations missions: During the incidents on May 14-16, 2004 and, the SOE supported the exfiltration of units subject to enemy fire.

"Under constant fire by 100 militiamen, Carabinieri parachutists and Portuguese gendarmes arrived at the Libeccio base in a column of 16 military vehicles and two Centauros to facilitate evacuation" (Cappelli, 2005: 60).

This type of mission occurred again on August 5-6, and 29, 2004.

Missions securing rear areas: Assessing the incidents from April 6, May 14-16, and August 5-6, the taxonomy below correlates the operations/ policing tasks performed by the GNR in Iraq with the respective apex of the *Violence Triangle* and corresponding *Security Gap*.

<table>
<thead>
<tr>
<th>Operation/ Tasks</th>
<th>Violence</th>
<th>Security Gap</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Direct</td>
<td>Structural</td>
</tr>
<tr>
<td>Guard duty</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Radio On Call</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Reestablishment and maintenance of public order</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Check-point/ Road Blocks</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Escort</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Physical Security</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Explosive Ordinance Disposal (EOD)</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>High risk operations</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Female Inspection</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Auto GRILL</td>
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<td>X</td>
</tr>
<tr>
<td>Patrol duty</td>
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<td>X</td>
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<td>X</td>
</tr>
<tr>
<td>Mentoring</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

\(^5\) Article 150 of the RGSGNR, Order No. 10393 of the GNR Commander-General of 05 May 2010, DR, 2nd series - number 119 - June 22, 2010

\(^6\) It may be worthwhile in this context to compare the missions of the GNR in Iraq, with the Portuguese Special Forces in Afghanistan (Pires, 2011).
An analysis of the overall mission concludes that the GNR tasks correlated to the areas of the Violence Triangle, specifically, in the vertices of structural and direct violence. Despite accomplishing fewer specific tasks related to cultural violence, the “seeds” of new cultural awareness should minimize future violence across the spectrum.

Regarding the Security Gap, the activity of the GNR contributed to eradicating the institutional gap and the enforcement gap. This observation is due to two factors: (i) the GNR aiding in the consolidation of the social structure, based on daily experience from Portugal, by using a comprehensive approach to the security and legal system; (ii) the continuity of the Guard’s versatile implementation derived from the ability to transition between the military and police duties, and institutional positioning by permanent connection between the military and civil institutions. Although not tasked to fill the deployment gap, the GNR remained prepared.

Sub-group ALPHA operated as a rapid intervention motorized unit, always available to respond to operational requirements and proficiently handle threats to peace, in the context of assigned missions (Silverio, 2004: 5).

The Portuguese contingent, throughout the period in Iraq, maintained a high level of readiness and availability, while surviving several attacks with zero casualties. Due the successful deployment, the GNR received public praise from several international and national organizations, honoring the country and the Guard organization. The unit was awarded the first Portuguese Gold Medal for Distinguished Service with a Palm leaf for action in support of peace missions. As stated by the former Prime Minister, Pedro Santana Lopes,

"We are proud of the role that GNR Sub-group Alpha performed in this process (...) Portugal demonstrated, once again, that it is an important contributor to the maintenance of international peace and security (etc.)".

VII. Conclusion

In recent years, the Republican National Guard intervened in various conflicts around the world. This participation was always after a mandated resolution, but never framed in a multinational Force of NATO. However, the GNR worked under doctrine for the employment of trained forces, on the basis of military organizations with police functions, called the Multinational Specialized Units.

The Guard, as an operational military and police capability with continuity, can integrate with an enabled international organization to use force. The permanent connection between the military and civil institutions ensures this continuity by the smooth transition between the military and police tasks, and the performance of the latter in an unstable environment.

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7 Diário da República, December 16, 2005, Notice No. 11435 (2nd series).
8 Public elections in Iraq, January 30, 2005.
The training guarantees the integration of military doctrine in conjunction with the armed forces. This preparation for permanent military and international joint missions, where only the territorial scope of activity may change, applies the comprehensive approach to the security and judiciary system.

As a military unit, the GNR provides a continually committed capability in a diverse range of conflicts. The Guard works to achieve peace; the regular functioning of democratic institutions, including peace enforcement operations in countries classified as “C”, in compliance with police functions.

The GNR demonstrates a unique capacity to cope, across the entire spectrum of police functions, with direct, structural and cultural violence, within an unstable environment. This capability is derived from military training, giving it a distinctive competence. Paradoxically, the refusal of the President of the Republic to consider Iraq in what he considered to be an illegal intrusion, gave the GNR the opportunity to show their value in the military field, as well as police work.

The Guard can assist other institutions, including the courts, the military, and the police in the strict and narrow sense, to better fill the Security Gap. The GNR helps to eradicate violence, contributing to peace: (1) by the ability to act in conjunction with the military instrument in the first phase of the conflict (deployment gap); (2) The capability to ensure the institutional continuity between the functional military / civilian police, in an unstable environment without breakdowns or setbacks, with recourse to force in a legal manner (enforcement gap); (3) capacity arising from daily tasks in the performance of police duties, in the framework of its mission in the security system, with the permanent connection to the judicial system, with different levels of authority, allowing a comprehensive approach in the promotion and construction of the secure system (institutional gap).

The NATO doctrine used to fill the Security Gap is the Multinational Specialized Units. The Republican National Guard has all the characteristics necessary to constitute or integrate into an MSU. It is a military organization performing the police role, with the capacity to act in an peace enforcement operation overcoming the Security Gap with practical experience working under MSU doctrine.

The GNR is a credible instrument in support of Portuguese foreign policy in peace-enforcement operations, oriented to state-building by the creation of a jus post bellum. (Silverio, 2014) This contribution is genetic; a military body with police functions. In the case of Iraq, intervening in a devastating post conflict scenario at the international level, the Guard provided the necessary support. The GNR fulfilled the police functions demanded of it, successfully defending against several surprise attacks while planning missions to deal with high levels of violence, with zero casualties; a truly remarkable achievement.

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ON THE DUAL AND PARADOXICAL ROLE OF MEDIA:
CONVEYORS OF THE DOMINANT IDEOLOGY
AND VEHICLES OF DISRUPTIVE SPEECH

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Abstract
This article aims to evaluate the dual function exercised by traditional media - TV, radio and press – as a place of ideological production, assuming the power of communication as a method of naturalization, and as a place of confrontation, giving voice to alternative projects. First, the function of ideological production, in regards to the national and international media coverage of the financial crisis in Portugal, warrants consideration. Furthermore, the role of media confrontation is illuminated by the coverage of protests in Portugal and Brazil. Concluding, if traditional media convey dominant norms and hierarchies, notwithstanding the pressure on social networks, this mode indicates a deviation, thus contributing, even if indirectly, to a redefinition of people and culture.

Keywords: Naturalization, power/anti-power, dissent, crisis, Cultural Studies

How to cite this article:

Article received on September 28, 2014 and accepted for publication on October 24, 2014
ON THE DUAL AND PARADOXICAL ROLE OF MEDIA:
CONVEYORS OF THE DOMINANT IDEOLOGY
AND VEHICLES OF DISRUPTIVE SPEECH

José Rebelo

1. Introduction

On December 16, 2001, António Guterres presented his resignation as prime minister of Portugal, on the pretext that the country "was in a quagmire." Durão Barroso, his successor, wasted no time in drawing the public's attention to the difficulties of the country that according to him was "on the rocks."

The crisis with national boundaries, therefore, requires a national solution. Later, Prime Minister José Sócrates, implemented a solution for the development of significant public works capable of invigorating, upstream and downstream, a productive Portuguese structure. Except, suddenly, the Lehman-Brothers group went bankrupt, the North American financial system tottered and, rapidly, the storm reached Europe.

At this moment, a remarkable reversal of discourse occurred: great entrepreneurs, businessmen, bankers, the heralds of an unbridled liberalism - who preached the virtues of the market and vehemently resisted (revolted against) state control - considered an obstacle to development - demanded, immediately, state intervention.

"The cohort of the mighty," wrote Alain Badiou in Le Monde on October 17, 2008, “the firemen of the monetary blaze, Sarkozy, Paulson, Merkel, Brown and Trichet plunge into the central pit of billions to implore: ‘Save the banks’.“ Moreover, Badiou ironically resumed, "This noble humanist and democratic cry gushed from the chests of all politicians and media outlets."

In Portugal, the politicians quickly embraced the hypothesis of the international origin of the crisis and followed the same path: save the banks and revive the economy by accelerating public investment. Billions of euros flowed into the empty Portuguese Bank of Business (BPN) coffers. In an extreme application of old Keynesian theory, projects of transport networks modernization multiplied: the motorways rending deserted fields; vital implementation of the high-speed train (TGV); construction of the new airport that can no longer be postponed.

The euphoria, however, did not last more than two years. It remained only for the moment in which, in European forums, the apparent lack of revenue followed: the external State debt continuously increased and family indebtedness exceeded acceptable limits.
Also changes of direction: a ruthless recession replaced the unbridled expansion that affected, in particular, the weaker economies of southern Europe.

In Portugal, the "Stability and Growth Programs" emerged: the PEC 1, PEC2, PEC3, and the PEC4 signifying sacrifices and more sacrifices; taxes and more taxes, cuts and more cuts. This program befell on the public witnessing the plundering of their meager savings and, likewise, before a political class that, taking advantage of unpopular measures, revealed the possibility of returning to power.

The PSD/CDS returned, in June 2011, in the form of a center-right coalition. The change of government left policies unchanged. Contrary to the promise, the austerity remained and increased. The new leaders declared that knowledge of the dossiers indicated that the crisis in the country was even worse than they thought. Why was the crisis worse?

Was this due to the global crisis?

No, it was not.

The international origin subtly replaced by a national reason. The fault no longer resided abroad but on the errors that the previous government and the Portuguese people living beyond their means for decades. Not a single reference to the earlier voracious advertising campaigns that offered next day credit.

No, it is not.

The Portuguese have been enticed by consumerism and, now, the time had come to pay the bill. It was a heavy bill, and as confirmation, came the announcements of more taxes, more cuts, and more unemployment.

In April 2013, the figures relating to the budget implementation revealed government discouragement. Despite the exacerbation of austerity measures, all the predictions failed regarding the public debt, the budget deficit, the gross domestic product (GDP) growth, and others.

The dance continued and the pundits reverted blame, again, to the international crisis arguing that the sluggish Portuguese economy resulted from the European crisis, which prevented the absorption of Portuguese exports...

The months passed and, behold, as if by magic, "signs of improvement" appeared: a slight reduction in the unemployment rate, an increase in exports, and the descent of GDP slowing. The official discourse revealed the "signs", adding, however that the indications should be interpreted with caution. Prudence faded as the elections for the European Parliament approached.

By March 2014, precautions were no longer necessary. Officially, the "crisis" becomes ascribed to the past. However, do the Portuguese live worse? Does it matter? What is certain is that, according to the government sources, the country “was saved from bankruptcy.” The message that the country is better off ignores the problem that the Portuguese people are worse off. Some voices abroad, salute “the tremendous effort of the Portuguese population" and the "remarkable results" thus obtained. With the emergence of spring, the sound of drums and trumpets proclaim the end of the "protectorate” regime. Portugal must be the master of its destiny, affirmed in spheres of power.
Rapidly recalling some facts that marked the political, economic, and financial history in Portugal in recent years, allows:

1. The introduction of fundamental concepts, such as public problem and occurrence.
2. Measure the role of the media in the relationship between public issues and episode as well as the responsibility held by the processes of massification, the institutionalization of public problems and events.

### 2. The media as a place of ideological production

According to Gusfield, cited by Louis Quéreé during a prominent conference at Porto in February 1999 and published in a special issue of the magazine *Speech - Language, Culture and Society*, from the Open University (Quere, 2001: 97-113), the verification of a public problem implies:

1. That it is assumed as a problem, by society as a whole.
2. That it arouses a contradictory and conflicting debate.
3. That it is linked to a public action aimed at resolution.

Nevertheless, the public contribution to the definition of the problem is much smaller than assumed. In other words, the institution of an issue as a problem is, mainly, external for most. Often, the strategies supporting collective assumptions for the purpose of placing them at the center of debates are exterior to society, as are the public actions, or the simulation of actions, which are proposed for resolution.

Ordinary life consists of endless twisting or a zigzagging between problems. Societal problems of unemployment, insecurity, lack of housing, and crisis loom large. However, not all problems are societal problems. "Societal problems" exist to the extent they affect the public directly, the true entities. They are not "societal problems" to the extent that the origin is external. These are assumed problems that follow a process of naturalization. It is precisely this naturalization process that causes a loss of the idea of externality, which makes the public unaware of the agenda that, if not imposed is at least insinuated. This unawareness creates, following Pierre Bourdieu, a kind of complicity between dominant and dominated, establishing by means of which the dominated, neglecting the dominated condition, "forgets and ignores himself, submitting to (the dominant) in the same way that contributes, recognizes, and incorporates it" (Bourdieu, 1982: 119).

The media outlets - newspapers, radio stations, and television - are at the core of this naturalization processes by manufacturing accessions or forging consensus. This process is not the Kantian “common consensus,” but hidden strategies that Antonio Gramsci considers "hegemonic." Consensus, or citing Jacques Ranciere, pseudo-consensus, from the March 2010 conference at the University of Lille titled “Y a-t-il des crises politiques?”, means imposed agreements, monopolies of meaning exercised by oligarchies of specialists.

Imperceptibly, the main media outlets convert a fragmented history, according to interests and opportunities, sometimes monstrously, like an incessant continuity of disguised mutations. This conversion creates a specious "indivisible unity", using the
concept of Edmund Husserl, which occurs without interruptions, without gaps. There is a form of consented unity with a sense between “what has happened” and “what will happen” (Rebelo, 2006: 20).

In the beginning, the crisis was Portuguese, later, international. Subsequently, the crisis became Portuguese again and then, again, international. To, finally, delve into the realm of things past, and resolved.

Who will believe such variation?

It is the shuttle of news and commentaries, or the supposed news and the alleged commentaries. Today, the pages of the newspapers, the radio shows, and television broadcasts abound in a version, insatiably repeated, presented as indisputable, and unquestionable. Tomorrow, this same version begins to languish until disappearing and replaced by another, equally incontestable and equally indisputable, all without outcome. Without the passage, the moment of qualitative change, or the Kairos moment as stated by Louis Marin, during the seminar about Semantique des Systemes Representatifs at the Ecole des Hautes Etudes en Sciences Sociales, Paris, in the academic year 1990/1991, is captured by the reader, the listener, or by the viewer.

It seems like the media narrative never ends, because, regardless of the version, the interpretation will invest systematically, as Jean-Pierre Esquenazi (2002: 78) underlines, in a triple scheme:

- A device of institutionalization that is reflected in the operations of classification, ordering, and typification of experiences that loses, thus, originality in order to dissolve within paradigms exterior to the subject.
- A device of rationalizing an explanation, linked to a normative vision, in an attempt to impose a particular social order, to the reproduction of existing hierarchies.
- A device of repetition. “Through repetition”, notes Pierre Moscovici, "the idea disassociates from its author; transforms into evidence regardless of the time, the place and the person; ceases to be the expression of the originator and becomes the expression of the thing that speaks." (1981: 198-199)

Each media outlet, by its scenographic space, (Goffman, 1991: 134) builds, thus, a discursive identity, generating, in turn, a social fantasy that it hopes to convey to the mass of recipients.

In 2013, Irina Fresco Veríssimo presented her Master's thesis in Intercultural Relations, at the Universidade Aberta (Lisbon, Portugal), with the title “Representation of the Portuguese in the European media discourse: the news about the financial crisis”. This argument analyzed the way in which some European newspapers identified the crisis in Portugal. The assessed corpus, composed of 25 articles published in El País, Le Figaro, The Times, Irish Independent, and in the Gazeta Wyborcza from Poland, from March 23rd to July 10th, 2011, occurred, specifically, between the resignation of Prime Minister José Sócrates and the presentation of the "budgetary adjustment" by the then Minister of Finance, Vítor Gaspar.

“Uncompetitive Labor Market,” “Mismanagement of Public Bodies,” “Inadequate Real Estate Market.”

Veríssimo noted that the categories were rarely paired to a particular case. The statements were based, rather, on general considerations, in boldness that dispenses reasoning. In other words, something to the effect: It is said, and, because it is said, it is true. Additionally, the author identified that, "on the assumption that Portuguese people are melancholy, journalists continually employed expressions such as ‘drama’, ‘unhappy fate’, ‘agony’, or ‘without hope’." However, in only two of the analyzed articles, the Portuguese people were provided an opportunity to express their feelings about the situation. “The remaining portrayals of the mood of the Portuguese population" Veríssimo continues, “are made from the very perception of journalists.” For example, in Le Figaro on 25 March:

“All eyes are now turning to Lisbon, where the drama continues to unfold.”

The same can be said for “Laziness,” a characteristic that, in four of the analyzed articles, lacked a justifiable socio-economic indicator. In this regard, the following portion from the Polish daily, Gazeta Wyborcza on April 16th opined:

“The Greeks who demonstrate in the streets or the members of the opposition in the Portuguese parliament are fully aware of the fact that without EU membership their lives would be even worse. The anger behind these protests was caused by a deterioration of the situation due to the fact that the European funding will cease to flow freely, at a time when young people are being called on to work more and pay for the laziness of their parents’ generation, which ignored the need to save for a better future.”

The despondent and lethargic Portuguese people, who do not try to change, became entangled in a web of consumerism. These liabilities are the main reason for the crisis according to El País on April 24th:

“Debt is the word that best fits the enigma of a socio-economic country. More than 2.4 million Portuguese owe approximately €120 billion in mortgage loans, as a result of the social model promoted in recent years aspiring to: a new house, new car, cheap credit, and late modernization. The crisis abruptly ended the mirage (...).”

A point of view, such as this, is not easy to eradicate. Boggled, the Times on June 5th stated that, in spite of the crisis and austerity measures, people still “go to the cinema, eat breakfast in town, go to the theater.”
How can Portugal abate the crisis? There is only one way, the international rescue. However, the Portuguese Prime Minister hesitated. Peremptorily, Le Figaro lectured on March 25th:

“Two days of EU summit meetings in Brussels, under constant market pressure, was not sufficient to convince the Prime Minister José Sócrates to seek official aid from the EU and the IMF. (...) The money is there to help Portugal, the political will too, but for now, Europe can only watch, arms crossed, the Portuguese descent into hell, threatened with bankruptcy, if they fail to appeal for the international rescue.”

This hesitation before the inexorability of redemption, however, was of little value. In fact, and as pointed out by the Gazeta Wyborcza on April 11:

“(...) the creditors had to fight for a long time with the Portuguese government of José Socrates to accept the extended hand.”

The image is strange: creditors extended a hand to help and the political leader of the indebted country hesitant to accept the aid. It is no wonder, therefore, that the prime minister received the epithet “stubborn.”

The conclusion of the process appeared in The Times on April 7th:

“Portugal, land of melancholic songs of fado, accepted its unfortunate destiny last night: they will have to swallow their pride and accept an aid package. There is no alternative.”

Are public bodies so badly managed? Is justice ineffective? Still, the Times, on June 5th, anticipated the solution: “A center-right government will be well received by investors, who have lost faith in Portugal.” For the Times, a new government is the solution to the lack of labor market competitiveness such as the inadequacy of the real estate market.

Likewise, the overwhelming majority of the articles, and especially when the opinions came from newspapers published in countries less affected by the crisis, like England and France, presented the Portuguese, Irish, Greek and Spanish situation indiscriminately. There were plenty of expressions, even pejorative acronyms - the "PIGS" - used to classify southern European countries, which, in Angela Merkel’s opinion, according to the Gazeta Wyborcza on June 2nd, deserved no assistance as
long as they enjoy "a lot of holidays" or never stop "passing the time."

Naturally, each of the countries included in the constructed amalgam, sought distance from the other. The resolution appeared simpler when demonstrating that the origins of the crisis were different in nature and exhibited diverse levels of severity. An almost fratricidal strategy of denouncing commenced, where states in a worse condition received condemnation from the others. On March 25, the Irish Independent, the most widely read newspaper in Ireland, speculated:

"Portugal has significant problems - high levels of indebtedness, anemic growth and a challenge of immediate liquidity."

Three weeks later, the same newspaper unloaded, now in a more explicit manner, associating Portugal and Greece:

"(...) that wasted millions of dollars on cronies’ projects and local electoral promises."

Nonetheless, the explanatory framework that permeates the evoked international coverage conjugates, in large measure, the discourse that, at the same time with the same theme, dominated the Portuguese press with the uppermost expression. The Portuguese media replicated many of stereotypes used in the international press. Regarding the root causes of the crisis, the Portuguese media often referred to a collective entity - a “we” - as ultimately responsible for the debt. The Portuguese media also generated attempts of demarcation, especially in relation to the Greeks. The destabilization of Greek society by new and increased debilitating austerity programs became a consistent theme, supported by images of street violence, bank robberies, and looted supermarkets in the main Greek cities. In contrast, the Portuguese population was presented as calm and understanding, committed to overcoming a period viewed as provisional.

The official discourse, amplified by the media, not sparing efforts to press this transitory idea, indicated the widespread desire to correct mistakes of the past. Hence, a considerable investment was made in the creation of euphemisms hiding drastic measures directed against broad and the poorest sectors of the population. Indeed, terms and expressions, loaded with ideology, were insistently repeated in Portuguese media, a kind of media litany or rhetorical chorus (Derrida, 2004: 134). Subject to the process of naturalization, these terms and expressions crept up gradually, in the

1 In an article published in Le Monde, on November 12, 2012, Ulrich Beck refers to Angela Merkel in this way: “There are many who see the German Chancellor as the queen without a crown of Europe. When it is a matter of knowing where the power comes from, it is referred to one of the characteristics that best defines a Machiavellian ability.” The sociologist and German philosopher continues: “Merkel prefers - and here lies the whole Machiavellian irony of her posture - the provision of Germany to grant credit depends on the acceptance, by indebted countries, of the imposed conditions of German stability policy. It is the first principle of Machiavelli: when it comes to helping indebted countries with German money, the Angela Merkel ´s position is neither an honest yes nor a categorical no, but a 'yeno' between the two".
language of everyday life, instilling Orwellian newspeak.

Examples:
- Lead the Constitutional Court (which, in practice, corresponds to overburdening the Constitutional Court with the consequences of the decision regarding the clearly unconstitutional government qualifications);
- Return to the markets (given as an example of the success of government policy in the financial sector);
- Adjustments (signifying civil servant wage cuts and, in general, expenditure reductions in education, health, and social assistance).
- Convergence measures (which translates into professional status realignment in the public and private sector, always in the direction of lower status);
- Oversized state (designating the alleged unjustified or overspending in operating the state apparatus, officially attributed to the previous government, obviously the other political party);
- Extraordinary Contribution to Solidarity and sustainability rate (reductions in pensions);
- User fees (which affects access to emergency services in public hospitals);
- Professional requalification (removal of a job and dismissal of the worker);
- Impairments (referring to fraud committed by particularly significant financial groups);
- Flexibility (amendments to labor laws that facilitate redundancies and respect term contracts);
- Untruths (misrepresentation);
- Budgetary Consolidation (tax increases).

From November 2007 to September 2009, the word "crisis" appeared on 1252 news programs from Portuguese public television channels (Andringa, 2009: 81-88). The continual statements - the "CRISIS" this and the "CRISIS" that - in all its anaphoric dimensions, avoided questions about the genesis and consequences of the crisis. This is a "CRISIS" that the public embodies and uses to explicate everything that surrounds society. The "CRISIS" which, Jacques Ranciere argues, "functions, in the media space, as an interpretative mechanism that is part of the dominant discourse."

It is the duty of critical sociology, in the Habermasian sense of the term, to deconstruct this fusion of media versions that seamlessly succeed one another, each time imposing a "truth"; the "truth." Its purpose is to dismantle this palimpsest. Denounce assumed evidence. Oppose apparently neutral logic, according to which the event updates the public problem (the closure of a factory, for example, strengthens the idea of the crisis) and, conversely, the public problem is the explanatory framework of the event (it is because of the crisis that the factory closed).

3. The media as a place of confrontation

To deconstruct, to disassemble, to denounce, and to counter: all objectives of the proposed model of critical sociology. The model of critical sociology, applied to the media, can go further, reflecting profoundly on the media´s role in structuring public opinion.
That is if the media constitute a central device for the naturalization/socialization of the ideas and projects of a hegemonic inclination, as advocated. Likewise, the media also represent a decisive factor for the spread of ideas and projects against hegemons.

On the basis of Cultural Studies initiated at Birmingham, England in the 1980s by social scientists like Hoggart and Stuart Hall; evidently the media field sometimes lacks coherence, harmony, and perfect articulation. More than the expression of a dominant class, the media reflect short-term alliances between class factions that can neutralize or open gaps, divisions.

Conversely, the media are not just mere technological expedients for the transmission of events: firstly, because the occurrence does not exist de per si (in isolation), and secondly because the media are, simultaneously, subject and object of their environmental surroundings.

Let us consider in detail the fundamental importance of each aspect of the sociology of the media.

1. An event occurrence is situated at the focal point of its perception. This perception depends on the journalist's view, his Lebenswelt, to quote Habermas, as well as the editorial strategies of the requisite media organization, with which the journalist tends to develop mimetic mechanisms. Protagonist of a double relationship - the culture in which he is part and the collective work he has a part in - the journalist, thus, plays a Gatekeeping function, as named by David White in his famous work from 1950, by filtering the events to mediate and defining criteria which emphasize or minimize via its pagination / alignment.

2. While it is true that the media contribute to the ranking of discussion topics in the public space, the fact remains that the same media are, likewise, influenced and penetrated by this public space. A kind of symbiotic relationship exists between the media agenda and the public agenda in which each contaminates and, at the same time, is contaminated by the other without being able to determine precisely who contaminated whom.

Hence, in the media field, contradictory strategies sometimes erupt, whether claiming decision autonomy, infiltrating subcultures, echoing the voice of minorities or guaranteeing the cry of dissent is heard.

Organizations such as "Anonymous," "Hacktivism," "Indignados" or "Occupy Wall Street" know how to capture critical media attention on a national and transnational scale. Their efforts are renown worldwide.

Such movements, favor discursive strategies and demonstrative actions that violate the norm, and deliberately provoke the targeted individual or social / political group.

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2 Translated as "life-world" or "experience of the world," this concept, largely addressed by the German philosopher in Théorie de l'act communicationnel, is associated with that deep level of a community where root languages, standards and behaviors exist.
3 If you do not tell us how to think show us what to think, as underlined by Bernard Cohen in The Press and Foreign Policy, pp. 120/121.
4 At this point, we turn away from authors such as Becker, McCombs and McLeod who attribute the prevalence to the media agenda: "There is a relationship between the agenda of the media and the public agenda, the first one that starts the process" (Becker, McCombs and McLeod, "The Development of Political Cognitions," in Political Communication Issues and Strategies for Research, Sage Annual Reviews of Communication Research, Vol 4, p 38; apud Enric Saperas, The Cognitive Effects of Mass Communication, p 56.).
Reject the polemic but gamble on satire.

The movements reject the polemic because accepting it implies legitimate recognition of the opponent, which solicits debate. On the contrary, these movements gamble on satire, assuming the devaluation of the opponent by relegating it to a lower level and, therefore, preventing a response. It is not important to overcome the opponent by argument, only to overwhelm him with ridicule.

There are the major media outlets, newspapers, radio stations, TV channels, ceding spaces and / or broadcasting times for extraordinary accounts - the unexpected, the publicity of caricature, the misshapen, and the grotesque.

Portugal experienced such situations. The draconian Economic Assistance Program, between Portugal the European Union, the incursions of the European Central Bank and International Monetary Fund triggered protests and flash mobs against the so-called “troika.”

The challenge began with small groups associated under a self-designated platform, “Screw The Troika.” By diffused contours, politically situated left but difficult to classify, such a platform breathed its first breath on 15 September 2012. Through social networks, petitions circulated calling for public meetings in Lisbon and other cities. The appeal spread like an oil slick, and at scheduled times, hundreds of thousands appeared to affirm indignation. To everyone’s amazement, particularly the promoters, more than half a million demonstrators concentrated in the Portuguese capital. Many young and old, right and left, stripped of political label, demonstrated for the first time with one common trait: railing against government decisions, accused of reducing wages, pensions or retirement, and from creating more unemployed people. Never seen, improvised posters and loose slogans appeared spontaneously. Each protester arrived carrying handmade placards with well-prepared slogans, disavowing the national situation and ridiculing those responsible.

Even though the mobilization process started initially on the Internet, it never would have reached such a dimension without significant media support. For days on end, the event was announced providing details for the venue and predictions made about the eventual success of the initiative. Eventually, the contestation became naturalized. Thus, to naturalize it, is to eventually institutionalize it, by removing the burden of risk likely to distract those unaccustomed.

Then an uninterrupted series of mini confrontations commenced.

Many members of the government were harassed by groups of young people singing “Grândola Vila Morena” during official ceremonies. The object could not have been clearer: confront government officials with the music of José Afonso symbolizing the April revolution. The practice even earned the moniker, “grandolar.” More so, the reproduction, by newspapers, television channels and radio stations in countless texts and images, of the constant and disturbing “grandolar”, contributed to the initiative’s success.

Similarly, the Finance Minister Vitor Gaspar became a laughing stock; roars of laughter by half a dozen supporters underscored each pause during a book presentation speech he delivered. The screens of different television channels, instantly captured the event, the face of a stunned, lost minister, not knowing what to say or where to look.
Examples of these types of instances, triggered spontaneously via the net, conquer vast spaces and times in the main traditional media, and there is no shortage around the globe.

The affirmation of social networks as a mobilizing force verified, already, in February 2003, when millions of people around the world suddenly took to the streets. This act was due not to traditional partisan convocations, but the messages, appeals and petitions against US intervention in Iraq that swarmed the web, a hallmark and structuring of new social movements.

The 3rd-generation mobile phones, which appeared on the market in the late nineties, accentuated the trend. These devices undoubtedly constituted the catalyst for the Arab Spring captured by many news reports. The movement was followed by the "Indignant" in Madrid, the movement "Occupy Wall Street" in New York, and "Furious June" in Brazil.

Let us take a detailed look at the latter case whose size, so extraordinary and amazing, is not unrelated to the importance that the main Brazilian media outlets gave it.

It all started on June 3, 2013 when, responding to a call made through social networks, a few hundred people gathered in the cities of Sao Paulo and Rio de Janeiro. The immediate reason for the protest: The expected increase in the price of public transport. The profound reason: The malaise caused by the vast sums spent by the government preparing for the 2014 World Cup. Two weeks later, on June 20, the number grew to 100,000 demonstrators, concentrated on Avenida Rio Branco and in Rio de Janeiro, and as many on Avenida Paulista in São Paulo.

However, 24 journalists were injured or detained by the police forces of São Paulo. One of the injured was a reporter for the influential newspaper Folha de São Paulo. The image of the bloodied face of the reporter became the top story on Brazilian television, and this led the newspapers to reverse judgment of the demonstrations immediately. Indeed, the same media organ that, days earlier, urged the police to stop the violence in the streets, now, accused that same of instigating gratuitous violence. To make matters worse, another image, no less impressive, of a young demonstrator hit with pepper spray, was stamped on the front page of the New York Times.

As stressed by Eduardo Santos, professor of International Relations at the Federal Fluminense University, in an article published in the Journal Liinc on “Political representation crisis in Brazil and the protests of June 2013”, in addition to newspapers, radio and television information, “(...) various groups, in a diffuse manner, as it were, from the first demonstrations spread information, some in real time, and without investigating the situation in the streets, utilized tools like YouTube internet videos, or social networks like Twitter and Facebook. Anyone interested reported and continued to report, with an amazing collection of photos, texts and updated images available on mobile devices” (2014: 86-95).

The excitement caused by media coverage of police intervention did the rest. As recognized by Eduardo Santos, in less than a month “there were demonstrations in 438 cities in the country, with an estimated share of two million people and extensive media coverage.”

The last example of the dual and paradoxical role of media, marked by the current competition between traditional media and new media, and as simultaneous voice of
power and counter-power, was the execution ceremony of Saddam Hussein. On December 31, 2006, the standard TV channels broadcasted the official images with the greatest dignity, as it was believed to have happened. In absolute silence, the executioners, modest to the extreme, even put a scarf around the neck of the condemned so the looped rope would not hurt him.

Except some, in the group of executioners, recorded the whole execution, making use of discreet phone recordings. Only hours after the execution, the illegal version circulated on YouTube. The televised version had been completely sanitized. Hussein and his executioners had exchanged insults and chanted revenge songs. The day after the same stations that had spread the official version did not refrain from circulating the "illegal" version.

Decidedly, like society, the media are fighting for ground. It is a place of confrontation with different projects and various strategies, conveying the dominant norm. Nevertheless, the media, too, by underscoring diversions, eventually contribute, even if indirectly, to a redefinition of people and ways of life that, peripherally, invades the center of symbolic origination.

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On the dual and paradoxical role of media: conveyors of the dominant ideology and vehicles of disruptive speech

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Notes and Reflections

CITIES AND REGIONS: PARADIPLOMACY IN PORTUGAL

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1. An Ongoing Research Project

The research unit, OBSERVARE, has formulated a working group for the research project designated Cities and Regions: paradiplomacy in Portugal. This project is linked to one of the three major lines of inquiry by the Scientific Council of OBSERVARE entitled Peoples and States: Constructs and Interactions, envisioning a contribution to understanding the role of international actors seen in its genesis, dynamic and evolutionary dimension, and manifold relationships.

From the outset, the concept of "paradiplomacy" refers to the study of the relationship of external social actors on international relations distinctive from the central powers of national states. The contemporary global setting facilitates the emergence of numerous agents of internationalization. The monopoly of central governments over foreign policy or "foreign affairs" has abated while the world observes a dispersion or dissemination of this activity by centers endowed with relative autonomy. It is a phenomenon with reasonably innovative contours, deserving attention in the scientific area of international relations, enabling improvement in the interpretation of the facts and a deepening comprehension of the mechanisms created by these new practices.

This study highlights the role of cities, specifically, noting the intensity of the urbanization process in modern societies. Likewise, cities are growing increasingly important as the "we" in the web of globalization. Today, they are the fundamental site of internationalization and a relevant agent of the new non-state "diplomacy", or more precisely, paradiplomacy. In the domains of transport and communications networks, or socio-cultural spheres on the economic terrain, and in action already properly termed "politics", the interactions between the large conurbations constitute a topology with impact on international life. Hence, the interest in ascertaining the respective strategies, the internationalized forms of action, as well as understanding those institutional environments where the referred interactions are structured.

Besides the cities, regions also play important roles today as agents of internationalization. It is true that the term "region" embodies different meanings, and these are used to designate portions or fractions of traditional national territory. It can signify subsets of states or redefinitions of new spaces that are organized independently of national borders as in the institutionalized case, euroregion or non-institutional informal macro-regions that are multiplying in geopolitics and geoeconomics globally. In any event, the regions also conduct paradiplomacy, meriting specific analysis.

Thus, this study recognizes the utility of these processes for the scientific advancement of international relations. The multiplicity of protagonist social actors of internationalization is emphasized, surpassing the supposed state monopoly of external action. New agents of paradiplomacy trying to discover the strategies and the institutional holders at the local or regional level are identified. New ways emerge for understanding the networked systems that progressively structure the international setting.

This research project - Cities and regions: paradiplomacy in Portugal - originates with these observations and conjectures, logically focusing on the Portuguese
experience and favoring empirical studies and measurable data that capture transnational local and regional dynamics.

2. Objectives

The overall project objective focuses on the analysis and evaluation of the role of non-state actors in networks of internationalization, including Portuguese cities and regions, taking into account the adopted intervention methodologies, instruments of internalization, active partnerships and the resulting products in order to pursue the following specific aims:

- To deepen the theoretical framework concerning the concept of paradiplomacy
- To study the level of internationalization of the Portuguese public-private actors, with the exception of the central powers;
- Investigate the roles of some urban municipalities and autonomous regions as actors in international relations;
- Identify levels of actor intervention with international partners based on the identification of pursued methodologies: town twinning, initiatives of subnational "foreign policy", signing protocols for sectorial collaboration, developmental cooperation, attracting investment and tourism, socio-cultural projection, etc.
- Identify the institutional instruments of paradiplomacy: foreign relation offices, institutional visits, organizing events, among others.

3. Project Justification

The present study falls within the field, relatively recent in international relations, of paradiplomacy, which is identified as the capacity held by non-state actors to establish international cooperation agreements, from exclusive interests, regardless of state actions.

It is a growing discipline, since the logic of economic globalization and the need to enhance the competitiveness and dynamism of the processes of cultural globalization leads to the proliferation of international partnerships and the spread of networks.

It is within this context that three lead actors emerge, whose performance is driven by specific objectives, resulting in structured practices: municipalities, the Euroregions, and Eurocities. The first appears on the global scene as conventional cooperation, intervening through protocols and establishing partnerships with counterparts. The Euroregions and the Eurocities, resulting from cooperation agreements between local governments of cross-border territorial areas, seek to intervene geographically in sectorial areas, and are potentially confluent in promoting development and diminishing socio-spatial disparities. Given that these zones are characterized by independence in relation to central governments, following principles of territorial identity, they are of particular interest for the study.

In this sense, the purpose of this research team is to analyze networks and partnerships in relation to specific situations, shared strategies, and expected results. Given the thematic scope of analysis, a comparative approach is applied between two
Euroregions, a set of Eurocities, a sample of urban municipalities, and two autonomous regions, according to the systematization that is specified below.

**A. Euroregions** are cross-border cooperation structures that result from agreements between local governments of adjacent areas:

A.1. Euroregions AAA (Algarve-Alentejo-Andalucia);
A.2. Atlantic Axis (Galicia and Northern Portugal).

**B. Eurocities** are new models of relationship and international cooperation:

B.1. Chaves and Verin;
B.2. Valença and Tui;
B.3. Elvas and Badajoz;

**C. Municipalities**, in the role of decentralized cooperation entities of the State, acquiring increasing importance, are large urban centers and the intermediate urban centers according to the criterion of role recognition in this context:

C.1. Lisbon, a capital city;
C.2. Porto, north central axis;
C.3. Guimarães, European capital of culture and sport;
C.4. Braga, European youth capital;
C.5. Aveiro, for investment in network technology development, based largely on the "Aveiro Digital City" concept.

**D. Autonomous regions**, which are geographically separated in relation to continental territory and central power, adopting differentiated strategies and cooperation models:

D.1. The autonomous region of Madeira;
D.2. The autonomous region of the Azores.

The networks and international partnerships of cities allow deeper concurrent methodologies and experience sharing with the aim of sustainable development. Networks of cities, since the 1980's, have assumed various settings and feature a greater global or regional character. They also vary as to goals. *The International Association of Educating Cities* associative movement numbering more than 400 local organizations and *the Organization of World Heritage Cities*, exclusive to cities included on the UNESCO World Heritage List, highlights this trend. In these cases, the networks are aimed at the optimization of territorial management, in a world where the boundaries between territories become increasingly fluid while exhibiting a transnational character (Simões (2010)).

**4. Theoretical foundation**
The present work assumes paradiplomacy as a multidimensional phenomenon, the aim being to identify and analyze methods of paradiplomatic cooperation, taking into account various axes and identified dimensions.

The diplomatic paradigm in the international relations underwent a gradual but significant shift, conceivably as early as the end of World War I. Beginning in the 1970's, and notably after the fall of the Berlin wall (1989) and the disintegration of the Soviet Empire (1991), instruments of diplomatic power transformed significantly.

“In the post-cold war world, for the first time in history, global politics has become multipolar and multicivilizational” (Huntington, 1996: 21).

Nowadays, diplomacy no longer refers to the pursuit of national interests and to the practice of persuasion alone, but also to the management of global issues. Thinking on a planetary scale creates new needs, additional requirements of geographical differentiation, and drives local expertise. Likewise, the relevant actors are not only states, but also cities and strategic regions with specific foreign policies, in which increasingly relevant actors operate and face challenges that relate to changes experienced by the people in these areas. In this regard, classical diplomacy is no longer adequate to respond to the challenges of the present time (Burt, 1998: 25).

Thus, in contemporary society, the concept of "paradiplomacy" arises from globalization where networks constitute a central element of competitiveness. In this context, non-state actors emerge on the world stage with a growing importance, largely by the ability to form transnational networks and partnerships in order to enhance their action through the identification of common interests and potential synergies. In this sense, Santos Neves (2010: 28) explicates:

“Paradiplomacy demonstrates that external action will be increasingly a multidimensional process with several actors, where the public and private sectors, as well as the third sector, have to participate and coordinate their different skills in the context of long-lasting partnerships. The existence of knowledge networks involving the coordination and collaboration between governments, companies, NGOs, universities and trade unions is, therefore, an essential factor for ensuring effective external action, not only for the purposes of implementation as planned.”

Also, Aldecoa et al., (1999) point out two fundamental factors for the increasing importance of this phenomenon: the rise of NGOs and the increase in international activities of non-state actors, which are, among others, cities and regions.

Additionally, the sub-national paradiplomacy allows different public and private actors to participate in the increasingly sophisticated multi-dimensional dynamics of external action. This dynamic of networks – global, multidimensional, and interdependent systems of economic liberalism or capitalism – also generates specific localization
phenomena and micro centrifugal processes of decentralization where multinational companies participate, and, correspondingly, cities and global regions.

“The explicit inclusion of cities in international relations through networks or direct negotiations with multilateral and regional organizations, transnational corporations and other cities or regions is generating significant transformations under the point of view of economic and political autonomy of localities. This phenomenon of international action of cities has created reticular spaces of cooperation that transcend the classic landforms of political-administrative division and territorial continuity” (Senhoras, Moreira and Vitte, 2008: 5).

In the European Union (EU), a regional bloc that is passing through a stage of advanced integration between countries, subnational paradiplomacy assumes a prominent role, developing direct negotiations of maximum strategic interest with multinational companies. In this context, cross-border regions and cities further a special relationship between the two countries, particularly between neighboring peoples. Based on proximity, the potential mutual benefit from common interest and the tangible need of interaction spurs paradiplomacy. The founders of the European project identified this tendency early on.

“Currently, the borders of the European Union assumed, fortunately, a permeable space between the markets, realizing an old ambition of the founding fathers of the European project” (Mendonça e Moura, 2010: 9).

Based on profound change evidenced in relations between Portugal and Spain after accession to the European regional bloc (both in 1986), neighboring markets opened their doors to trade flows never before realized and the cross-border regions (Galicia, Castile/Leon, Andalusia, and Extremadura) gained special importance for Portugal. In fact,

“(...) cross-border regions of Portugal and Spain (our main trading partner), assume major importance as a natural market for both countries, particularly as platforms for the development of their regional and international business” (Horta, 2010: 4).

As a result, broadening the relationships between the principle locations (district capitals, towns, and villages) along the border, promoted the interactions between national companies who welcomed the opportunity to expand their businesses.
5. Methodologies

The project envisions establishing privileged partnerships with other research centers and embedding into reputable national or international universities with scientific studies in the area of international relations. Likewise, integrating with associations and other entities motivated by common interest in the study of paradiplomatic networks is planned.

The following methodology is framed by empirical studies using primary data collection, through surveys and interviews with identified actors, in particular, representatives of the identified Euroregions, Eurocities, municipalities, and the Madeira and the Azores autonomous regions.

Complementarily, and following a systematic principle, documentary analysis and assessment of online resources, such as organizational web pages and established networks will be conducted. In order to better understand the whole process of globalization led by non-state actors, further research will be derived from sources that enable a theoretical and conceptual foundation of the problem under study. To carry out the activities inherent to the fieldwork, a team of Bachelor and Master's assistant researchers will be recruited and trained.

6. Expected results

In terms of expected results, with the development of this project, the following deliverables are highlighted:

- Publication of scientific articles and dissemination, estimating twelve articles following the research period; six scientific and six for propagation, with a biennial of four articles;
- Creating a project page on the internet of interactive character, which allows viewing through cartography, other appropriate info graphics (charts, photographs), and data analysis of the main, intermediate, and final results of the investigation;
- Participation in twelve national and international conferences, one every six months;
- Organization of two workshops at intermediate stages of the development of the activities planned in conjunction with international partners;
- Book publication, in Portuguese, English or French, according to the geographical location of stakeholder participation in the project;
- International conference organization in the project’s final phase with dissemination of results and a public presentation of the book, which provides for the participation of the different types of actors studied;
- Production of annual activity reports, five in the interim and a final.
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How to cite this article: