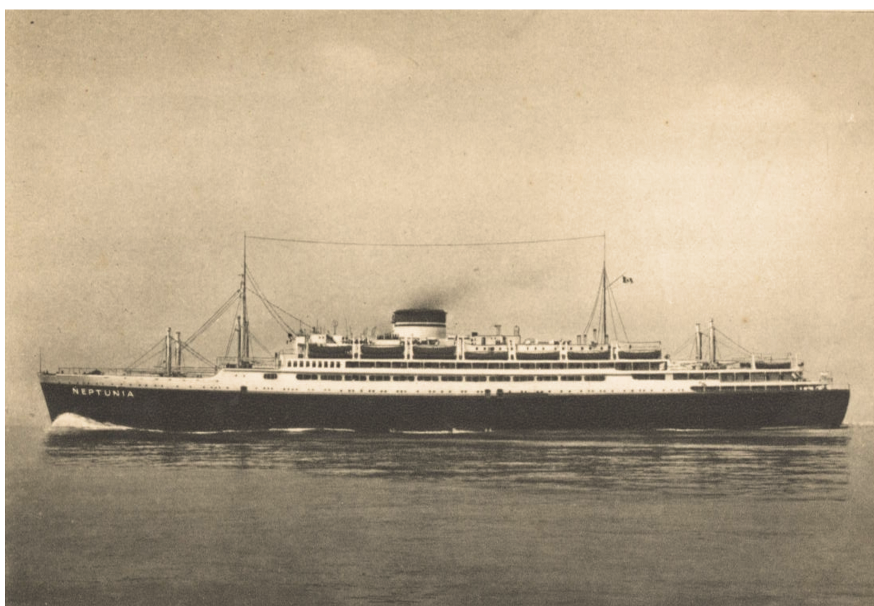
# PAIX ET SÉCURITÉ INTERNATIONALES

07

2019




## JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

ISSN 2341-0868

DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7

**Directores-Directeurs:**

RACHID EL HOUDAÏGUI (Directeur-Fondateur)
*Université Abdelmalek Essaâdi (Tanger-Tétouan)*

ALEJANDRO DEL VALLE GÁLVEZ
*Universidad de Cádiz*

**Dirección Ejecutiva - Redacteurs en Chef:**

MIGUEL ACOSTA SÁNCHEZ
*Universidad de Cádiz*

ANASS GOUYEZ BEN ALLAL
Universidad Abdelmalek Essaâdi, Tánger-Tetuán

**Secretario - Secrétaire**

JUAN DOMINGO TORREJÓN RODRÍGUEZ
*Univerisad de Cádiz*

**Consejo Asesor - Conseil Scientifique**

MERCEDES MOYA ESCUDERO
*Universidad de Granada*

ZAKARIA ABOUDAHAB
*Universidad Mohammed V de Rabat*

MIGUEL ANGEL CEPILLO GALVIN
*Universidad de Cádiz*

CARLOS ECHEVERRÍA JESÚS
*Universidad Nacional de Educación a Distancia*

MED. ABDELLOUAHED EL ASRI
*Universidad Abdelmalek Essaâdi, Tanger-Tetuán*

GONZALO ESCRIBANO
*Real Instituto Elcano*

INMACULADA GONZÁLEZ GARCÍA
*Universidad de Cádiz*

MIGUEL HERNANDO DE LARRAMENDI
*Universidad de Castilla La Mancha*

PANAGIOTIS GRIGORIOU
*Universidad del Egeo*

BOUTAINA ISMAILI IDRISSI
*Universidad Mohammed V de Rabat*

SAID MOUFTI
*Real Instituto de Estudios Estratégicos de Rabat*

SAID SADDIKI
*Universidad Sidi Mohamed Ben Abdellah, Fés*

NORA SEDDIKI
*Universidad Abdelmalek Essaâdi, Tanger-Tetuán*

HAMMAD ZOUITNI
*Universidad Sidi Mohamed Ben Abdellah, Fés*

JESUS VERDÚ BAEZA
*Universidad de Cádiz*

LEONARDO PASQUALI
*Universitá degli Studi di Pisa*

SARRA SEFRIUI
*Universidad Abdelmalek Essaâdi, Tanger-Tetuán*

**Comité De Redacción - Comité de Rédaction**

YOUSSEF EL HAMDOUNI
Universidad Abdelmalek Essaâdi, Tánger-Tetuán

MICHEL REMI NJIKI
Universidad de Cádiz

CARMEN RUIZ SUTIL
Universidad de Granada

SIHAM ZEBDA
Universidad de Cádiz

# PAIX ET SÉCURITÉ INTERNATIONALES


JOURNAL OF INTERNATIONAL LAW
AND INTERNATIONAL RELATIONS

07

janvier/décembre
2019

CÁTEDRA JEAN MONNET «INMIGRACIÓN Y FRONTERAS»
DE DERECHO DE LA UNIÓN EUROPEA
Serie Estudios Internationales y Europeos de Cádiz

CÁDIZ-TANGER

La correspondance con la Revue PAIX ET SÉCURITÉ INTERNATIONALES peut être adressée au Directeur Exécutif de la Revue:

La Correspondencia con la Revista PAIX ET SÉCURITÉ INTERNATIONALES puede dirigirse al Director Ejecutivo de la Revista:

The correspondence with the Journal PAIX ET SÉCURITÉ INTERNATIONALES may be adressed to the Executive Director of the Journal:

MIGUEL ACOSTA SÁNCHEZ - Área de Derecho Internacional Público, Facultad de Derecho, Universidad de Cádiz, Avda. de la Universidad, s/n, 11405 JEREZ-CÁDIZ.

**DOI** http://dx.doi.org/10.25267/Paix_secur_int
**web:** https://revistas.uca.es/index.php/paetsei/index
**E-mail:** paixetsecurite@uca.es

ISSN: 2341-0868
Dêpot Legal du Maroc 2003/0091

Diseño de Cubiertas: *CADIGRAFÍA Publicidad y Comunicación SL* - Ronda de Vigilancia s/n, Edificio Tartessos, 11011, Cádiz

# SOMMAIRE

## ÉTUDES

Mar Campins Eritja

*Water Resources Management in Central Asia and its Role in the Emergence of Conflicts Affecting Regional Stability* .......... 13

*La gestión de los recursos hídricos en Asia Central y su incidencia en la emergencia de conflictos susceptibles de afectar la estabilidad regional*

*La gestion des ressources en eau en Asie centrale et son impact sur l'émergence de conflits susceptibles d'affecter la stabilité régionale*

Eric Tremolada Álvarez

*The Recent Land and Maritime Delimitation of the Court of The Hague in the Affairs of Costa Rica v. Nicaragua, in Light of their Proposals* .......... 47

*La reciente delimitación terrestre y marítima de la Corte de La Haya en los asuntos de Costa Rica contra Nicaragua a la luz de sus planteamientos*

*La récente délimitation terrestre et maritime de la Cour de La Haye dans les affaires du Costa Rica contre le Nicaragua à la lumière de ses approches*

Kourouma Omar

*Mutualisation des puissances et securite en Afrique : pour une approche neopragmatiste du role du Droit* .......... 85

*Mutualización de los poderes y seguridad en África: Por un enfoque neopragmático del papel del Derecho*

*Mutualization of Powers and Aecurity in Africa: for a Neopragmatist Approach to the Role of Law*

Alejandro Del Valle Gálvez

*Refugee Crisis and Migrations at the Gates of Europe: Deterritoriality, Extraterritoriality and Externalization of Border Controls* .......... 117

*Crisis de refugiados y migraciones en las puertas de Europa: Deterritorialidad, extraterritorialidad y externalización de controles fronterizos*

*Crise des réfugiés et migrations aux portes de l'Europe: déterritorialité, extraterritorialité et externalisation des contrôles des frontières*

María NAGORE CASAS
*The Instruments of Pre-Border Control in the EU: A New Source of Vulnerability for Asylum Seekers?* ........ 161
*Los instrumentos de pre-control fronterizo en la UE: ¿una nueva fuente de vulnerabilidad para los solicitantes de asilo?*
*Les instruments de pré-contrôle frontalier dans l'UE: ¿une nouvelle cause de vulnerabilité pour le solicitant d'asile?*

## NOTES

Inmaculada GONZÁLEZ GARCÍA
*Immigration In Spain: Migratory Routes, Cooperation With Third Countries And Human Rights In Return Procedures* ........ 201
*La inmigración en España: rutas migratorias, cooperación con terceros países y derechos humanos en los procedimientos de devolución*
*Immigration en Espagne: routes migratoires, coopération avec les pays tiers et droits de l'homme dans les procédures de retour*

Mohamed RIDA NOUR
*Geopolitique de l'intelligence artificielle : Les enjeux de la rivalite sino-americaine* .......... 231
*La geopolítica de la inteligencia artificial: los desafíos de la rivalidad sino-americana*
*The geopolitics of artificial intelligence: the challenges of sino-american rivalry*

Diego BOZA, Dévika PEREZ
*New Migrant Detention Strategies in Spain: Short-Term Assistance Centres and Internment Centres for Foreign Nationals* ........ 261
*Nuevas Estrategias en la detención de migrantes en España: los Centros de Atención Temporal de Extranjeros (CATE) y los Centros de Internamiento de Extranjeros (CIE)*
*Nouvelles Stratégies en matière de détention des migrants en Espagne: les Centres Temporaires et les Centres d'Internement pour Étrangers*

Ahmed IRAQI
*L'investissement direct étranger en tant que gacteur géopolitique du soft power Marocain en Afrique : Réflexion interprétative* ........ 279

*La inversión extranjera directa como factor geopolítico del poder suave Marroquí en África: Reflexión interpretativa*

*Foreign Direct Investment as a Geopolitical Factor of Moroccan Soft Power in Africa: Interpretive Reflection*

Ángeles JIMÉNEZ GARCÍA-CARRIAZO
*Small Island, Big Issue: Malta and its Search and Rescue Region – SAR* ........ 299

*Una pequeña isla, un gran problema: Malta y su zona de búsqueda y salvamento - SAR*

*Petite île, gros problème : Malte et sa région de recherche et de sauvetage - SAR*

Javier BORDÓN
*The European Union and the Egyptian Neighbour: Assessing the Characterization of Resilience as an External Action Priority* ........ 323

*La Unión Europea y el Vecino Egipcio: evaluando la caracterización de la resiliencia como prioridad de acción exterior*

*L'Union Européenne et le Voisin Égyptien: évaluer la caractérisation de la résilience en tant que priorité de l'action extérieure*

## ÁGORA

Claudia JIMÉNEZ CORTÉS, Montserrat PI LLORENS
*Diffusion Of Research Results Of Public International Law And International Relations: 'Research Projects On Immigration And Human Rights: CIMCETT PROJECT'* ...... 351

Luis ROMERO BARTUMEUS
*¿Sobrevivirá el Plan Mares al Plan Integral de Seguridad Marítima? La falta de doctrina estratégica española hacia el área del Estrecho de Gibraltar* ........ 361

*Will Strait Plan Survive Maritime Security Integral Plan? The Lack of Spanish Strategic Doctrine towards the Area of the Strait of Gibraltar*

*Le plan MARES survivra-t-il du Plan Intégral de Sécurité Maritime? l'absence de doctrine stratégique espagnole à l'égard du secteur du détroit de Gibraltar*

## DOCUMENTATION

Lorena CALVO MARISCAL
*Relación de Tratados, Acuerdos no Normativos, Memorandos de Entendimiento y comunicados conjuntos España-Marruecos, 2018-2019* .......... 385

## BIBLIOGRAPHIE CRITIQUE

DIAZ PERALTA, E., *El matrimonio infantil y forzado en el Derecho Internacional. Un enfoque de género y derechos humanos*, ed. Tirant Lo Blanch, Valencia, 2019, por Marta REINA GRAU .......... 393

OANTA, G.A. (coord.), *El Derecho del mar y las personas y grupos vulnerables*, Bosch Editor, Barcelona, 2018, por Annina BÜRGIN .......... 399

## TABLEAU D'EQUIVALENCE DES POSTES UNIVERSITAIRES

*Tableau d'equivalence des postes Universitaires – Tabla de equivalencias de cargos academicos – Academic Ranks* .......... 405

# ÉTUDES

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

**Citation**: CAMPINS ERITJA, M., «Transboundary Water Resources Management in Central Asia and its Role in the Emergence of Conflicts Affecting Regional Stability», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 13-46

**Received**: 17 July 2018
**Accepted:** 15 October 2018

# TRANSBOUNDARY WATER RESOURCES MANAGEMENT IN CENTRAL ASIA AND ITS ROLE IN THE EMERGENCE OF CONFLICTS AFFECTING REGIONAL STABILITY[1]

Mar CAMPINS ERITJA[2]

I. -INTRODUCTORY REMARKS. II. -THE MANAGEMENT OF WATER RESOURCES: A PRIORITY FOR CENTRAL ASIAN COUNTRIES. III. -AN UNSATISFACTORY REGULATION AND A WEAKENED INSTITUTIONAL FRAMEWORK CHALLENGING THE SUSTAINABLE MANAGEMENT OF SHARED WATER RESOURCES. IV. -FINAL REMARKS

**ABSTRACT:** This paper draws from the situation of imbalance in the use of water resources among the Central Asian States, in a context marked by a deep dichotomy between two competing uses of water -irrigation and the production of hydroelectric energy. From the perspective of water resources management, the hydrographic and geopolitical complexity of the region is unquestionable and has been found in the cause of several interstate conflicts, which are frequently aggravated by important environmental challenges.

From there, this paper discusses the adequacy of the international regulatory framework to guarantee the sustainable governance of water resources in the region. The impact of multilateral conventions in the region is analysed, as well as the development of a series of bilateral agreements that have actually maintained the *status quo*. This situation has worsened due to the low consistency and effectiveness of the regional institutions created by these same agreements. From a regional perspective, the situation in the countries of Central Asia offers an exceptional case for analysis. It is an area with significant security risks due to the widespread lack of governance over the use of water resources, which are unevenly distributed between the Central Asian States, and have undergone alarming environmental degradation in recent years. Although this situation could represent a major opportunity for the development of interstate cooperation, the upshot will depend to a large extent on the capacity of political institutions in the region to manage these resources in a way that is both environmentally and politically sustainable.
**KEY WORDS:** Central Asia, international waters, international security, energy

---

[1] A previous version of this paper was published in Spanish, in BADIA MARTÍ, A. (Dir.), *Agua, recurso natural limitado. Entre el desarrollo sostenible y la seguridad internacional*, Marcial Pons, Barcelona, 2017, pp. 199-227. The updated English version has been carried out within the framework of the BIODINT project (DER2017-85406-P) and within the activities of the Jean Monnet Chair on EU Environmental Law (587220-EPP-1-2017-1-EN-EPPJMO-CHAIR).

[2] Full Professor (Catedrática) of International Public Law, Universitat de Barcelona.

## LA GESTIÓN DE LOS RECURSOS HÍDRICOS EN ASIA CENTRAL Y SU INCIDENCIA EN LA EMERGENCIA DE CONFLICTOS SUSCEPTIBLES DE AFECTAR LA ESTABILIDAD REGIONAL

**RESUMEN:** Este trabajo parte de la situación de desequilibrio en el uso de los recursos hídricos entre los Estados de Asia Central, en un contexto marcado por una profunda dicotomía entre dos usos competitivos del agua: el riego y la producción de energía hidroeléctrica. Desde la perspectiva de la gestión de los recursos hídricos, la complejidad hidrográfica y geopolítica de la región es incuestionable y constituye de hecho, la causa de varios conflictos interestatales que, con frecuencia, se ven agravados por importantes desafíos ambientales. A partir de ahí, el trabajo analiza la idoneidad del marco jurídico internacional para garantizar la gobernanza sostenible de los recursos hídricos en la región. Se analiza el impacto de los convenios multilaterales en la región, así como el desarrollo de una serie de acuerdos bilaterales que, en esencia, se han limitado a mantener el *status quo*. Esta situación se agudiza debido a la poca consolidación y efectividad de las instituciones regionales creadas por estos mismos acuerdos. Desde una perspectiva regional, la situación en los países de Asia Central ofrece un caso excepcional para el análisis. Es un área con importantes riesgos securitarios debido a la debilidad generalizada de los mecanismos de gobernanza sobre el uso de los recursos hídricos, distribuidos de manera desigual entre los Estados de Asia Central y sujetos a un proceso de degradación ambiental alarmante en los últimos años. Si bien esta situación podría presentar una gran oportunidad para el desarrollo de la cooperación interestatal, el resultado dependerá en gran medida de la capacidad de las instituciones políticas de la región para administrar estos recursos de una manera ambiental y políticamente sostenible.
**PALABRAS CLAVE:** Asia central, aguas internacionales, seguridad internacional, energía.

## LA GESTION DES RESSOURCES EN EAU EN ASIE CENTRALE ET SON IMPACT SUR L'ÉMERGENCE DE CONFLITS SUSCEPTIBLES D'AFFECTER LA STABILITÉ RÉGIONALE

**RESUMÉ :** Cette recherche part de la situation de déséquilibre dans l'utilisation des ressources en eau entre les États d'Asie centrale, dans un contexte caractérisé par une profonde dichotomie entre deux usages de l'eau en concurrence dans la région, l'irrigation et la production d'énergie hydroélectrique. Du point de vue de la gestion des ressources en eau, la complexité hydrographique et géopolitique de la région est indiscutable, et s'est révélée être à l'origine de plusieurs conflits entre États, souvent aggravés par d'importants défis environnementaux. À partir de là, ce travail examine l'adéquation du cadre juridique international pour garantir la gouvernance durable des ressources en eau dans la région. Il analyse l'impact des accords multilatéraux dans la région, ainsi que l'élaboration d'une série d'accords bilatéraux qui ont en réalité maintenu le *statu quo*. Cette situation s'est aggravée en raison de la faible cohérence et efficacité des institutions régionales créées par ces mêmes accords. D'un point de vue régional, la situation dans les pays d'Asie centrale offre un cas d'analyse exceptionnel. C'est un domaine qui présente des risques importants pour la sécurité en raison de la faiblesse généralisée des mécanismes de gouvernance en ce qui concerne l'utilisation des ressources en eau, inégalement réparties entre les États de la région et qui ont subi une dégradation environnementale alarmante ces dernières années. Même si cette situation pourrait représenter une opportunité majeure pour le développement de la coopération entre États, le résultat dépendra dans une large mesure de la capacité des institutions politiques à gérer ces ressources de manière durable tant sur le plan environnemental que politique.
**MOTS CLES:** Asie centrale, eaux internationales, sécurité internationale, énergie


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

## I. INTRODUCTORY REMARKS

The management of transboundary river basins is an area that has traditionally underlined the link between situations of environmental stress and the emergence of new threats to international peace and security.[3] This relationship, already noted in the Bruntland Commission's 1987 report[4] and brought under the broader scope of human security a few years later by the United Nations Development Programme,[5] is illustrated by the Central Asian countries commonly known as the "five Stans": Kazakhstan, Turkmenistan, Uzbekistan, Tajikistan and Kyrgyzstan.

From a regional perspective, the situation in the countries of Central Asia offers an exceptional case for analysis. It is an area with significant security risks[6] due to (among other factors) the widespread lack of governance over the use of a series of natural resources, which are unevenly distributed between the States in question, and have undergone alarming environmental degradation in recent years. At the same time, this situation could represent a major opportunity for the development of interstate cooperation. The upshot will depend to a large extent on the capacity of political institutions to

[3] See Homer, Th., "On the Threshold: Environmental Changes as Causes of Conflict", International Security, Vol. 16, nº 2, 1991, pp. 76-116; Baechler, G.- Spillman, K., *Environment and Conflict Project: International project on Violence and Conflicts Caused by Environmental Degradation and Peaceful Conflict Resolution*, Center for Security Studies, 1995, pp. 1-185; Dinar, S. "Scarcity and Cooperation Along International Rivers", *Global Environmental Politics*, Vol. 9, nº 1, 2009, pp. 109-135. See, also, Izquierdo, F., "El agua como factor de hostilidad y de cooperación en el ámbito internacional" and Scovazzi, T., "L'acqua come causa di controversei internazionale", in Gutiérrez Espada, C.- Riquelme Cortado, R. - Orihuela Calatayud, E.- Sánchez Jiménez, M.A.- Cervell Hortal, M.J.- Rubio Fernández, E.M., (Coord.), *El Agua como factor de cooperación y de conflicto en las relaciones internacionales contemporáneas*, Instituto Euromediterráneo del Agua, Murcia, 2009, pp. 139-170 and 305-316.

[4] Bruntland Commission, Our Common Future, Report of the World Commission on Environmental and Development, 1987, Doc. A/42/427.

[5] PNUD, *Informe sobre el desarrollo humano*, PNUD-Fondo de Cultura Económica, 1994, p. 25 et seq.

[6] Wolf, A., Yoffe, S.- Giordano, M., "International waters: Identifying basins at risk", Water Policy, Vol. 5, 2003, pp. 29-60, p. 42 available online at <http://www.environmental-expert.com/Files%5C5302%5Carticles%5C5877%5C2.pdf>; Campins Eritja, M.- Mañé Estrada, A., (Ed.), *Building a Regional Framework in Central Asia: Between Cooperation and Conflict*, ICIP Research 02, Institut Català Internacional per la Pau, 2014.

manage these resources in a way that is both environmentally and politically sustainable.

## II. THE MANAGEMENT OF WATER RESOURCES: A PRIORITY FOR CENTRAL ASIAN COUNTRIES

In contrast to other regions of the planet, the disagreements between the five countries of Central Asia are not the result of the scarcity or unavailability of shared water resources. Rather, they revolve around how to ensure the necessary balance for sustainable use between the easternmost part of the region (the upstream countries of Kyrgyzstan and Tajikistan), which produces 75% of the resource, and the area of the alluvial plains (the downstream countries of Uzbekistan, Turkmenistan and Kazakhstan), which consumes almost the same amount. The situation also reflects a common problem in many parts of the planet, that is, the growing demand for water to satisfy different competing uses: in this case, agriculture, energy and food security. Those uses of water are interrelated and, in the absence of any coordination, these sectors compete fiercely with each other over access to the resource. This competition is exacerbated by the phenomenon of climate change. In this context, the transboundary basins of this region are extremely complex systems, in which economic, social, environmental and political aspects intersect and to a large extent define the relationship between the Central Asian States.

From an ecological point of view, the geographical situation of Central Asia is extremely complex. The local water system is unusual, since most of its rivers end in closed drainage basins and only the two main rivers, the Amu Darya and the Syr Darya, terminate in the Aral Sea. The Zeravshan and the Murghab rivers disappear in the deserts of Karakum and Kyzylkum, while the Ili drains into Lake Balkhash. From the environmental perspective, the region is highly sensitive to the water infrastructures along the Amu Darya and the Syr Darya, mainly located in Kyrgyzstan and Tajikistan. The complex renewable groundwater resources in the Aral Sea Basin also need to be taken into account. There are at least four primary aquifers and about 340 local


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

aquifers, with total reserves of 43.5 km$^3$, highly affected by intensive extraction and salinization.[7]

Kyrgyzstan, Uzbekistan, Tajikistan and Kazakhstan share the Syr Darya river basin. This river is 3,019 km long, with a basin of 219,000 km$^2$ and an annual flow of 37.2 km$^3$. Throughout its basin, where there are five large reservoirs, 80% of the territory is still irrigated land.[8] The irrigation system covers 300,000 ha in Tajikistan,[9] 1,021,000 ha in Kyrgyzstan,[10] 1,350,000 ha in Kazakhstan[11] (but the government plans to increase the irrigated land area to 3,500,000 ha),[12] and 1,900,000 ha in Uzbekistan.[13] Along with Afghanistan and Iran, Tajikistan, Turkmenistan, Uzbekistan, Kazakhstan and Kyrgyzstan also share the Amu Darya basin, which has more than 35 artificial reservoirs along its course. The Amu Darya is 2,540 km long, with a basin of 309,000

---

[7] Granit, J. et al.,, "Regional Water Intelligence, Report Central Asia" UNDP, March 2010, p. 16, available online at <http://www.watergovernance.org/documents/WGF/Reports/Paper-15_RWIR_Aral_Sea.pdf>

[8] UNECE, *Our Waters: Joining Hands Across Borders. First Assessment of Transboundary Rivers, Lakes and Groundwaters*, 2007, pp. 76-82, available online at <https://www.unece.org/env/water/publications/pub76.html>; Sievers, E.W., "Water, Conflict and Regional Security in Central Asia", *New York University Environmental Law Journal*, Vol. 10, 2002, pp 356-40, p. 371.

[9] UNECE, *Environmental Performance Reviews, Tajikistan. Third Review*, ECE/CEP/180, 2017, p. 174, available online at https://www.unece.org/index.php?id=46564

[10] UNECE, *Environmental Performance Reviews, Kyrgyzstan. Second Review*, ECE/CEP/153, 2009, pp. 103-104, available online at <https://www.unece.org/index.php?id=14802>; FAO-Aquastat, *Irrigation in Central Asia in Figures-AquaStat Survey*, 2012, p. 10, available online at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2a-hUKEwiq8uLBjOrkAhVMZ8AKHRoyDssQFjAAegQIARAC&url=http%3A%2F%2F-www.fao.org%2Fnr%2Fwater%2Faquastat%2Fcountries_regions%2FKGZ%2FKGZ-CP_eng.pdf&usg=AOvVaw0T52nhH0tETiPhPha_6KMJ>.

[11] UNECE, *Environmental Performance Reviews, Kazakhstan. Third Review*, ECE/CEP/185, 2019, p. 304, available online at <https://www.unece.org/index.php?id=51819>; FAO-Aquastat, *Irrigation in Central Asia in Figures-AquaStat Survey... cit.*, pp. 12-13.

[12] Satubaldina, A, "Kazakh government to increase irrigated land area to 3.5 million hectares", *The Astana Times*, 3.1.2019, available online at <https://astanatimes.com/2019/01/kazakh-government-to-increase-irrigated-land-area-to-3-5-million-hectares/>.

[13] UNECE, *Environmental Performance Reviews, Uzbekistan, Second Review*, ECE/CEP/156, 2010, p. 92, available online at <http://www.unece.org/publications/environment/epr/epr_uzbekistan.html>.

km$^2$ and an annual flow of 73.6 km$^3$.[14] The irrigation system in the Amu Darya basin covers 469,000 ha in Tajikistan,[15] 2,000,000 ha in Turkmenistan[16] and 2,321,000 ha in Uzbekistan.[17]

In total figures,[18], of about 770,000 ha of irrigated land in Tajikistan, approximately 400,000 ha are served by gravity irrigation,[19] while there are about 384 pumping stations.[20] In Uzbekistan, the irrigation system covers 4,300,000 ha with 1,600 pumping stations and 140,000 km of collectors, the use of water in the agricultural sector counting for around 90% of total consumption.[21] In Kazakhstan agriculture is still the largest user of water resources (70% to 100% depending on the year),[22] with around 1,283 pumping stations. In Turkmenistan almost 90% of water resources are used for the irrigation of arable lands, with 16 reservoirs for irrigation purposes alone.[23] Water is still crucial in Kyrgyzstan for irrigation purposes for about 1,020,000 ha, which consume 93% of the water used.[24] As a result, both basins today present major ecological deterioration and have already suffered reductions in water availability of 30% and 40% respectively. The situation is especially serious in the Ferghana Valley, whose waters and land Kyrgyz and Uzbeks dispute.

---

[14] UNECE, *Our Waters: Joining Hands Across Borders. First Assessment of Transboundary Rivers, Lakes and Groundwaters... cit.*, pp.71-75; see Sievers, E.W., "Water, Conflict and Regional Security in Central Asia"... *cit.*, p. 368.

[15] UNECE, *Environmental Performance Reviews, Tajikistan... cit.*, p. 174.

[16] UNECE, *Environmental Performance Reviews, Turkmenistan. First Review*, ECE/CEP 165, 2012, p. 93, available online at <https://www.unece.org/index.php?id=31562>.

[17] UNECE, *Environmental Performance Reviews, Uzbekistan... cit.*, p. 92.

[18] On the assessment of water resources in each of those countries, see the data base AQUASTAT (FAO) and Global Security, available online at <http://www.fao.org/nr/water/aquastat/water_res/indexesp.stm> and <http://www.globalsecurity.org/military/world/centralasia/>.

[19] UNECE, *Environmental Performance Reviews, Tajikistan... cit.*, p. 174.

[20] Ibid., p. 117.

[21] UNECE, *Environmental Performance Reviews, Uzbekistan... cit.*, p. 75 and 91.

[22] UNECE, *Environmental Performance Reviews, Kazakhstan... cit*, p. 188 and 304.

[23] UNECE, *Environmental Performance Reviews, Turkmenistan... cit.*, p. 93.

[24] UNECE, *Environmental Performance Reviews, Kyrgyzstan... cit.*, p. 103.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

In the 1960s, the indiscriminate consumption of water for agriculture and above all for cotton production and cereal crops in Uzbekistan and Turkmenistan through large-scale irrigation systems caused the drying of the Aral Sea, one of the essential elements for the maintenance and regulation of the natural and climatic balance of the region. This situation, added to the absence of crop rotation and the inadequate maintenance of the channel systems, eventually led to a major alteration of the water balance, which culminated in the 1990s with the transformation of 95% of the wetlands into desert. Since then, the Aral Sea has been biologically dead; more than 40,000 km$^2$ of its bed is uncovered, forming vast plains of salts contaminated by pesticides, which the wind can transport over distances of up to 250 km. This has caused an irreversible loss of biodiversity and has ultimately led to the desertification of more than half of the region, a process which only adds to the other dramatic environmental challenges in the area such as waste management, the abandonment of old nuclear sites and uranium mines, and air pollution[25].

## 1. HYDROGRAPHY AND GEOPOLITICS IN CENTRAL ASIA. THE EMERGENCE OF INTERSTATE CONFLICTS OVER SHARED WATER RESOURCES

From the perspective of the management of water resources, the hydrographic and geopolitical complexity of the area is evident.[26] The three

[25] UNECE, *Our Waters: Joining Hands Across Borders. First Assessment of Transboundary Rivers, Lakes and Groundwaters... cit.*, p. 83. and UNECE, *Reconciling resource uses in transboundary basins assessment of the water-food-energy-ecosystems nexus in the Syr Darya River Basin*, 2017, p. 6 et seq.., Doc. ECE/MP.WAT/NONE/2, available online at <http://www.unece.org/index.php?id=45042>. Also see Micklin, Ph., "Water in the Aral Sea Basin of Central Asia: Cause of Conflict or Cooperation?", *Eurasian Geography and Economics*, Vol. 43, n. 7, 2002, pp. 505-528; for another viewpoint, see also Vea Rodriguez, L., "La opción hidráulica en Asia Central ex soviética: Perspectiva histórica y situación actual", *Revista CIDOB d'Afers Internacionals*, n. 70-71, 2005, pp. 143-167

[26] For a global approach, see, Sievers, E.W., "Water, Conflict and Regional Security in Central Asia", op. cit.; Rasizade, A., "Entering the Old "Great Game" in Central Asia", *Orbis*, Vol. 47, 2003, pp. 41-58, available online at <http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6W5V-479VGG4-2&_user=145085&_coverDate=03%2F31%2F2003&_alid=1246340288&_rdoc=41&_fmt=high&_orig=mlkt&_cdi=6580&_sort=v&_st=17&_docanchor=&view=c&_ct=1951&_acct=C000012098&_version=1&_urlVersion=0&_userid=145085&md5=b3312fec6a6942d7a1e7f01115a3f63b>; Mañé, A., "Territorios ricos en hidrocarburos de Asia Central ¿Países productores, enclaves exportadores o países de tránsito?", *Revista CIDOB d'Afers Internacionals*, Vol. 70-71, 2005, pp. 87-113; Sandole, D.J.D., "Central Asia: Managing the delicate balance between the "discourse of danger," the "Great


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

downstream States have large reserves of gas, oil and uranium, but are in dire need of water because they consume large quantities in crop irrigation.[27] By contrast, the two upstream States, Kyrgyzstan and Tajikistan, in addition to being extremely poor, have no gas or oil and suffer a major energy deficit; however, they have significant water reserves and a high capacity for the production of hydroelectric energy.[28]

During the Soviet period, the management of the region's water resources was traditionally regarded as a purely technical problem, and its complex political consequences were not discussed. The hydraulic infrastructures built in this period were historically conditioned to the sole objective of irrigating as much land in the region as possible. Under the framework of centralized management from Moscow, this distribution was carried out in the 1980s through a series of protocols that allocated the flows of the Amu Darya and the Syr Darya to the five Soviet States.[29]

The dams and reservoirs located upstream were used to meet the demand for water in Kazakhstan, Uzbekistan and Turkmenistan, which were expected to provide raw materials to the old USSR. Today, Kyrgyzstan and Tajikistan consider that the current system of allocation of water resources is inequitable and harmful because it does not allow them to develop an irrigation

Game," and regional problem solving", *Communist and Post-Communist Studies*, Vol. 40, 2007, pp. 257-267, available online at <http://www.elsevier.com/locate/postcomstud>; Sainz, N., et al., *Gobierno, regionalismo y recursos estratégicos en las repúblicas de Asia Central, Observatorio Asia Central-Fundació CIDOB, Ponencias del Curso de verano Eurasia emergente: ¿Un nuevo 'gran juego' en torno a Asia Central?*, Universidad Internacional Menendez y Pelayo, Barcelona, 9 y 10 de julio de 2007, Doc_AC_CUIMPB_des08.pdf; Campaner, N.-Yenikeyeff, Sh., "The Kashagan Field: A Test Case for Kazakhstan's Governance of Its Oil and Gas Sector", *IFRI Papers*, 2008, available online at <http://www.ifri.org>; González, A.- Claudín, C., Asia Central y la seguridad energética global. Nuevos actores y dinámicas en Eurasia, Fundació CIDOB, Barcelona 2008.

[27] UNECE, *Environmental Performance Reviews*, Uzbekistan, op. cit,; UNECE, *Environmental Performance Reviews, Kazakhstan... cit.*; UNECE, *Environmental Performance Reviews, Turkmenistan... cit.*

[28] UNECE, *Environmental Performance Reviews, Kyrgyzstan... cit.*; UNECE, *Environmental Performance Reviews, Tajikistan... cit.*

[29] Protocol 566: *Improvement of the Scheme on Complex Use and Protection of Amu-Darya Water Resources by Scientific & Technical Council*, Ministry of Land Reclamation and Water Management of the USSR, September 10, 1987; Protocol 413: *Improvement of Scheme of Complex Use and Protection of Water Resources of Syr-Darya Basin*, February 7, 1984; in Wegerich, K., "Hydro-hegemony in the Amu Darya basin", *Water Policy*, Vol. 10 Supplement 2, 2008, pp. 71-88.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

system inside their territory capable of guaranteeing food security, or to use the hydroelectric infrastructures in an optimal manner for energy production.

Although markedly asymmetrical, this allocation remains in place thirty years later[30] and has become a source of major tensions between the five Central Asian States. The situation is aggravated by the persistence of dominant political and economic clans and widespread corruption at the various levels of decision-making in a group of countries which rank 124th (Kazakhstan), 132nd (Kyrgyzstan), 152nd (Tajikistan), 161st (Turkmenistan) and 158th (Uzbekistan) in the list of 180 States included in the 2018 Corruption Perceptions Index.[31]

The main risk today remains the conflict of interests between downstream and upstream countries with respect to the use of water resources and the allocation of flows. The upstream countries need water during the winter to produce electricity, while the downstream countries need it to irrigate croplands during the summer. In practice, the downstream States' need for water for irrigation during the summer months is not met, because the upstream States have less need for energy and so release minimal flows from the reservoirs. During the winter, the downstream countries have very little need for water, but they often suffer from floods and other adverse events caused by the release of large amounts of water from the reservoirs in the upstream States, which need this water to satisfy their high energy demand at this time of year. Historically this situation has generated a series of conflicts[32] that

---

[30] In the Syr Darya's basin, 1.7% for Kyrgyzstan, 9.2% for Tajikistan, 38.1% for Kazakhstan and 51.0% for Uzbekistan; in the Amu Darya basin, 0.4% for Kyrgyzstan, 13.6% for Tajikistan, 43.0% for Turkmenistan and 43.0% for Uzbekistan. See., UNECE, *Environmental Performance Reviews, Uzbekistan... cit.*, pp. 57 et se.; UNECE, *Environmental Performance Reviews, Tajikistan, op. cit.*, pp. 107 *et seq.*; UNECE, *Environmental Performance Reviews, Kazakhstan, op. cit.*, pp. 141 *et seq.*; UNECE, *Environmental Performance Reviews, Kyrgyzstan... cit.*, pp. 101. See, also, Wegerich, K., "The New Great Game: water allocation in post-Soviet Central Asia", *Georgetown Journal of International Affairs, Vol. 10, nº 2, 2009, pp. 117-123.*

[31] Available online at <https://www.transparency.org/cpi2018>.

[32] Usually, those conflicts are not widely covered in the international media and only are echoed by the local media, See, Hogan, B., "Decreased Water Flow Threatens Cotton Crop, Peace in Region" (1 August 2000), *Eurasia News* available online at <http://www.eurasianet.org/departments/environment/articles/eav080200.shtml>; Lillis, J., J., "Central Asia: Water Woes Stoke Economic Worries" (27 April 2008), *Eurasia News*, available online at <http://www.eurasianet.org/departments/insight/articles/eav042808.shtml>; Parshin,

remain unresolved today and have a clear impact on the balance of power among the countries of Central Asia.[33]

In general, tensions have run high among the populations of the Ferghana Valley, which, in addition to Uzbekistan, extends to Kyrgyzstan and Tajikistan. The valley is the meeting point of the three countries and the most densely populated region of Central Asia, where claims about land rights and water resources generate frequent border incidents. The ethnic conflicts between the two States, which date back to 1990, are constant, particularly at the Uzbek enclaves of Shon and Shohimardon, located in Kyrgyzstan, and at the Kyrgyz enclave of Barack located in Uzbekistan; they reached their climax in June 2010, when more than 400 people were killed in the city of Osh in violent clashes between Uzbeks and Kyrgyz.[34]

The Toktogul dam, which is located in Kyrgyzstan and provides almost 90% of the country's electricity, has been a major flashpoint. Kyrgyzstan's management of the dam has led to clashes with Uzbekistan on several occasions, the last in March 2016 with the stationing of Uzbek troops along its border with Kyrgyzstan. The construction of the Kambarata-3 hydroelectric plant on the River Naryn, a tributary of the Syr Darya in Kyrgyzstan, has added fuel to the fire, as it will give Kyrgyzstan a significant advantage in its

---

K. , "Tajikistan: Dushanbe may Stop Water Flow as Uzbekistan Pulls Plug on Power" (29 November 2009), *Eurasia News*, available online at <http://www.eurasianet.org/departments/insight/articles/eav113009.shtml>.

[33] For general information about those conflicts, see International Crisis Group, *Central Asia: Water and Conflict.* Asia Report num. 34, 2002; UNDP, *Executive Summary: Central Asian Regional Risk Assessment*, UNDP Regional Bureau for Europe and the CIS, 2008, available online at <http://www.unece.org/env/water/meetings/Almaty_conference.htm>; Daly, J. C. K. "Central Asian Water and Russia", *Eurasia Daily Monitor*, Vol. 5, nº113, 13/6/2008, available online at <http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=33718&tx_ttnews%5BbackPid%5D=166&no_cache=1>; Kemelova, D.-Zhalkubaev, G., "Water, Conflict, and Regional Security in Central Asia Revisited", *New York University Environmental Law Journal*, Vol. 11, 2003, pp. 479-502; *Khamzayeva, A., "Water resources management in Central Asia: Security implications and prospects for regional cooperation", Documentos CIDOB. Asia*, Vol. 25, 2009, pp. 9-32, p. 19.

[34] Megoran, N., "The critical geopolitics of the Uzbekistan–Kyrgyzstan Ferghana Valley boundary dispute, 1999–2000", *Political Geography*, Vol. 23, 2004, pp. 731-764; Borthakur, A., "An Analysis of the Conflict in the Ferghana Valley", *Journal of Asian Affairs*, Vol.48, 2017, pp. 334-350; Hanks, R., "Crisis in Kyrgyzstan: conundrums of ethnic conflict, national identity and state cohesion", *Journal of Balkan and Near Eastern Studies*, Vol. 13, 2011, pp. 177-187.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

dealings with Uzbekistan; the Uzbeks are strongly opposed to this project because it will limit the flow of water that is essential for the irrigation of their cotton fields.[35]

Another site where the management of the water resources is a particularly delicate issue is the Rogun dam on the River Vakhsh in Tajikistan. The construction of the dam began in 1982 but, with the collapse of the USSR and the civil war in Tajikistan, it was suspended in 1991. Construction plans were resumed in 2004 following President Putin's visit to Dushanbe, but were cancelled once again in 2007 due to lack of funds and the strained relations with Uzbekistan until the death of Uzbek President Karimov in 2016. The dam currently produces 40% of Tajikistan's electricity and accounts for almost half of the country's foreign exchange earnings. When it is fully operational, Tajikistan will be able to control the flow of water to Uzbekistan, but Uzbekistan will continue to control almost all the transport and energy networks connected to Tajikistan. In response to the reactivation of the project, Uzbekistan, which continues to be Tajikistan's main gas supplier, periodically suspends gas distribution to its neighbour.[36]

Among the downstream countries, relations between Turkmenistan and Uzbekistan remain particularly fraught because of the Karakum Canal, built in the 1950s by the Soviets, and the opening of the "Golden Age" reservoir in 2009, both of them on Turkmen soil. In addition to the environmental risk posed by the evaporation of water on a vast scale in an extremely arid climate, for years Uzbekistan has protested about the action of the Turkmen government in diverting and pumping water from the Amu Darya to these hydraulic infrastructures, accusing it of repeatedly failing to comply with the regulations for the distribution and allocation of water in the area.[37]

[35] Mosello, B., "Water in Central Asia: A Prospect of Conflict or Cooperation?", *Journal of Public and International Affairs*, Vol. 19, 2008, pp. 151-174; Wooden, A., "Kyrgyzstan's dark ages: framing and the 2010 hydroelectric revolution", *Central Asian Survey*, Vol. 33 2014, pp. 463-481.

[36] Eshchanov, B. *et al.*, "Rogun Dam. Path to Energy Independence or Security Threat?", *Sustainability*, Vol. 3, pp. 1573-1592; Menga, F., "Building a nation through a dam: the case of Rogun in Tajikistan", *Nationalities Papers*, Vol. 43, 2015, pp. 479-494.

[37] O'Hara, S.- Hannan, T., "Irrigation and Water Management in Turkmenistan: Past Systems, Present Problems and Future Scenarios.", *Europe-Asia Studies*, Vol. 15, 1999, pp. 21-41; Baker, E., "The hydrosocial empire: The Karakum River and the Soviet conquest of Central Asia in the 20th century", *Journal of Anthropological*, Vol. 52, 2018, pp. 123-136.

Situations of potential conflict are not limited to these five States. Often, neighbouring countries are involved.[38] Following the sale of energy by Uzbekistan to Afghanistan in 2009, Tajikistan and Kyrgyzstan began to suffer chronic gas cuts that left their populations without gas supplies in the face of winter frosts and also slowed down the country's economic output. In response, Tajikistan and Kyrgyzstan decided to devote more water to the production of electricity for the winter, reducing the water supply available for irrigation in Kazakhstan and Uzbekistan. To the west, there have also been conflicts in the Caspian Sea basin, which Kazakhstan and Turkmenistan border along with Azerbaijan, Iran and the Russian Federation. Until the 1990s, the former USSR exerted tight control over what it traditionally considered its "Turkestan". Since then, this region has become a kind of no-man's-land in which the Russian Federation continues to control the logistical network of roads, railways, and oil and gas pipelines (as well as military installations) and maintains the region's countries to a large extent as dependent States. To complete this picture, Kazakhstan, Kyrgyzstan and Tajikistan also share a border to the east with China, a country that in turn is home to a large part of the ethnic population of these three countries. China is capitalizing on its geostrategic advantage in the region to further the construction of the Silk Road Economic Belt (SREB) and has made significant investments in large-scale civil infrastructure projects in exchange for a share of the Central Asian energy market. One of the main sources of tension is now on its border with Kazakhstan, which has repeatedly contested Chinese projects to divert the flow of two rivers, the Irtysh (an essential source of drinking water for Astana, the Kazakh capital) and the Ili (which feeds Lake Balkhash) in order to supply water for its province of Xinjiang.[39]

[38] Nagheeby, M.- Piri D., M.- Faure, M., "The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin", *Transnational Environmental Law*, Vol. 8, 2019, pp. 247–278.

[39] Sievers, E.W., "Water, Conflict and Regional Security in Central Asia", *...cit.,* pp. 374; Sievers, E.W., "The Caspian, Regional Seas, and the Case for a Cultural Study of Law"*, Georgetown International Environmental Law Review,* Vol. 13, nº 2, 2001, pp. 361-415; Sievers, E.W., "Transboundary Jurisdiction and Watercourse Law: China, Kazakhstan, and the Irtysh", *Texas International Law Journal,* Vol. 37, nº 1, 2002, pp. 1-42; Peyrouse, S., "The Hydroelectric Sector in Central Asia and the Growing Role of China", *China and Eurasia Forum Quarterly*, Vol. 5, n. 2, 2007, pp. 131-148, p. 133.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

## 2. THE MAIN ENVIRONMENTAL CHALLENGES IN THE MANAGEMENT OF SHARED WATER RESOURCES IN CENTRAL ASIA

The Central Asian region faces several essential environmental challenges in terms of water resources management. On the one hand, the agricultural sector accounts for a significant segment of the GDP of these countries and employs a large number of people. In Kazakhstan, with a population of 18.27 million inhabitants, agriculture accounts only for 4.3% of GDP despite huge agricultural potential and employs 15.13% of the population.[40] Uzbekistan is the most populous state in the region, with around 32.95 million inhabitants. It obtains 28.79% of its GDP from agriculture (mainly cotton production) which employs 33.36% of the population.[41] In Turkmenistan, with less than 6 million inhabitants, 80% of the territory is now desert; even so, 9.3% of its GDP continues to be derived directly from agriculture, which employs 22.76% of the population.[42] Tajikistan has around 9.10 million inhabitants, of whom more than 51% live in rural areas and work in agriculture, and obtains the 21.21% of its GDP from agriculture.[43] In Kyrgyzstan, with a

[40] UNECE, *Environmental Performance Reviews, Kazakhstan, op. cit.* pp. 1, 4 and 299; World Bank Data, *Employment in Agriculture*, available online at <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=KZ>.

[41] UNECE, *Environmental Performance Reviews, Uzbekistan, op. cit.* p. 101 (agriculture employment in 2007: 30.7%); World Bank Data, *Employment in Agriculture* available online at <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=UZ>; World Bank Data, *Agriculture, Forestry and Fishing, value added-Uzbekistan*, available online at >https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=UZ>.

[42] UNECE, *Environmental Performance Reviews, Turkmenistan... cit.*, pp. 3 and 102 (agriculture employment in 2009: 11.5%); World Bank Data, *Employment in Agriculture* available online at <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=TM>; World Bank Data, *Agriculture, Forestry and Fishing, value added-Uzbekistan*, available online at <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=TM>.

[43] UNECE, *Environmental Performance Reviews, Tajikistan... cit.,* p. xxxiii (agriculture employment in 2014: 25%); World Bank Data, *Employment in Agriculture*, available online at <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=TJ>, World Bank Data, *Agriculture, Forestry and Fishing, value added*, available online at <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=TJ>.

population of 6 million inhabitants, 26.51% of the population is engaged in agriculture, which accounts for 11.64% of its GDP.[44]

However, downstream countries depend on the water policies of their upstream neighbours and have a water dependency high ratio (Kazakhstan: 31%, Uzbekistan: 77% and Turkmenistan: 97%) and consumption in irrigation and demand for water either for direct consumption or for food production is increasing rapidly, especially in the areas downstream of the Amu Darya due to population growth.[45] At the same time, the states of Central Asia have a ratio of water use per capita that is much less efficient than other countries with the same level of human development.[46] This waste of water at all levels of usage can be explained not only by the deterioration and technological shortcomings of the supply systems, but also in part by the low cost of water.[47] All this means that the water-energy nexus is crucial in the region and influences decisions regarding the value of water and the adaptation of the region to climate change, thus affecting national security, regional stability and economic growth at one and the same time.

Although the nature and the extent of exposure to climate change varies according to country, the phenomenon poses a significant threat to the region as a whole. With a projected rise in temperature of + 1.6º to + 2.6º by the middle of the century, with fewer days of frost and more heat waves, the melting of glaciers in Kyrgyzstan and Tajikistan (which currently contribute

---

[44] UNECE, *Environmental Performance Reviews, Kyrgyzstan, op. cit.*, pp. 9 and 11 (agriculture employment in 2007: 55%); World Bank Data, *Employment in Agriculture*, available online at <https://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=KG>; World Bank Data, *Agriculture, Forestry and Fishing, value added*, available online at available at <https://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=KG>.

[45] World Bank, *Central Asia Energy-Water Development Program,* CAEWPD, *Annual Report*, 2016, p. 12.

[46] Stockholm International Water Institute (SIWI), "Regional Water Intelligence Report Central Asia" (March 2010), available online at <http://www.worldwaterweek.org/documents/WGF/Reports/Paper-15_RWIR_Aral_Sea.pdf>.

[47] Sakeiv, B., "Land and Water Management Patterns in Ferghana Valley" in Khamzayeva, A. *et al*, *Water Resources Management in Central Asia: Regional and International Issues at Stake* (Barcelona: CIDOB ASIA, 2009), p. 77; Varis, O.- Rahaman, M.M., "The Aral Sea Keeps Drying out bit is Central Asia Short of Water?" in Rahaman, M.M.- Varis, O. (Eds.), *Central Asian Waters: Social, Economic, Environmental and Governance Puzzle* (Helsinki: Water & Development Publications, 2008), pp. 3-10


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

between 10% and 20% of the runoff of the region's rivers, and up to 70% during the dry season) is bound to intensify.[48] In parallel, the increase in temperature is likely to raise the demand for irrigation and electricity, in a region whose energy production is still based on the large reserves of coal, gas and oil in Kazakhstan, Turkmenistan and Uzbekistan. To make matters worse, Central Asia is also extremely vulnerable to natural disasters, which will also increase as a consequence of climate change – and for which the governments of the Central Asian countries are notably underprepared.

The environmental effects of this situation should not be underestimated. The unsustainable water management in the recent past has contributed to the disappearance of the Aral Sea; what was once the fourth largest lake in the world now holds some 27,216 $km^2$ of water, down from 68,042 $km^2$ a few decades ago. Of the 178 species that originally inhabited the Aral region, fewer than forty survive today. The increase in temperatures will worsen this situation since salinization, fertilizers, agrochemicals and uranium residues seriously affect the quality of its waters. In addition, the Amu Darya and the Syr Darya accumulate agricultural runoff such as pesticides, fertilizers, industrial waste and other pollutants that can cause serious health problems for the population downstream, along with the untreated waste from the populations along its course. The presence of low-level radioactive contamination caused by uranium mining and waste in Kyrgyzstan, Tajikistan and Uzbekistan, abandoned after the breakup of the former USSR, poses another grave problem.[49]

[48] World Bank, Central Asia Energy-Water Development Program (CAEWDP), *Strengthening analysis for integrated water resources management in Central Asia: a road map for action (Vol. 2): Annexes*, 2013 available online at <http://documents.worldbank.org/curated/en/226411467993190553/pdf/91651-v2-WP-P123804-PUBLIC-Box393182B.pdf>.

[49] Gadaev, A.-Yasakov, Z. "An Overview of the Aral Sea Disaster", in Edelstein, M.-Cerny, A.-Gadaev, A. (Ed.) *Disaster by Design: The Aral Sea and its Lessons for Sustainability*, Emerald, 2012, pp. 5-15; World Bank, Central Asia Energy-Water Development Program (CAEWDP), *Strengthening Analysis for Integrated Water Resources Management in Central Asia: A Road Map for Action*, *Final Report*, 2013, available online at <http://documents.worldbank.org/curated/en/426561468236366856/text/91651-REVISED-v1-WP-ADD-P123804-MAKE-PUBLIC-Box393182B.txt>.

## III. AN UNSTATISFACTORY REGULATION AND A WEAKENED INSTITUTIONAL FRAMEWORK CHALLENGING THE SUSTAINABLE MANAGEMENT OF SHARED WATER RESOURCES

Contemporary international law has developed and codified the obligations of States that share international watercourses, and imposes on them the duty to cooperate with each other via the drawing up of international agreements.

The basin of the Aral Sea comprises mainly the hydrographic basins of the Sir Darya and the Amu Darya. These watersheds, with all their tributaries, extend for more than 500,000 km$^2$ throughout the five States of the region, though some tributaries and part of the Amu Darya basin are located in Afghanistan and Iran. The demise of the former USSR introduced an international dimension that had not previously existed and has obliged the Central Asian States to resort to international cooperation in order to manage and decide on the different uses of shared water resources. In this regard, the principles that underpin the main international standards in the field of international watercourses must also be the basis for action and cooperation among these countries.

However, the shift from a strictly national regulatory framework to a multilateral one does not seem to have aided the adoption of sustainable management measures; nor has it helped to reduce interstate tensions.[50] The lack of political will on the part of these States to create an effective cooperation framework, the scarce economic and financial resources, the limited technical capacities for resource management and the low participation of the citizenry are additional challenges. The present circumstances have reduced the possibilities of a joint approach to water management, at least in the short term, and the geopolitical and economic interests of each of the five States continue to prevail in terms of the priorities they set for its exploitation. In addition, the absence of an effective legal framework on which to base interstate cooperation, which is absolutely necessary for the future, only highlights the

[50] Sievers, E.W., "Water, Conflict and Regional Security in Central Asia".... *cit.*, p. 382; Mirimanova, N., "Water and Energy Disputes of Central Asia: In search of regional solutions?"*, EUCAM-EU Central Asia Monitoring,* February 2009, available online at <http://www.eucentralasia.eu>; Khamzayeva, A., "Water resources management in Central Asia: security implications and prospects for regional cooperation"...*cit.,* p. 24.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

inability of the political authorities to effectively integrate the management of transboundary water resources at the regional level.

## 1. THE APPLICATION OF UNIVERSAL CONVENTIONS TO CENTRAL ASIA AND THE ADOPTION OF REGIONAL OR BILATERAL AGREEMENTS BETWEEN CENTRAL ASIAN STATES

At an international level, the frame of reference for the management of shared watercourses in Central Asia should be the two main conventions that cover the matter, that is, the Convention on the Protection and Use of Watercourses, Transboundary and International Lakes adopted on 17 March 1992 by the United Nations Economic Commission for Europe (UNECE), in force since 1996, [51] and the Convention on the Law of Non-Navigational Uses of International Watercourses adopted in New York on 21 May 1997, in force since 2014. [52] Both texts define the rights and obligations of downstream and upstream States[53] and should provide an answer to the issues raised by the joint management of the Aral Sea basin and its main tributary rivers, the Amu Darya and the Syr Darya.

[51] UN *Treaty Series* , Vol. 1936, p. 269. See, Tanzi, A., "Regional contributions to international water cooperation: The UNECE contribution", in Boisson de Chazournes, L.- Leb, Ch.-Tignio, M., *International Law and Freswater. The Multiple Changes*, Edward Elgar, 2013, pp. 155-178; McCaffrey, S., *The Law of International Watercourses*, 3rd ed., Oxford University Press, 2019, pp. 414-421; Torres Cazorla, M.I., "Otra vuelta de tuerca del Derecho Internacional para regular los cursos de agua internacionales: el Convenio de Helsinki de 17 de marzo de 1992", *Anuario Español de Derecho Internacional*, Vol. 16, 2000, pp. 225-262.

[52] Resolution of the UN General Assembly, Doc. A/51/229, 21 May 1997. See, Chazournez de Boisson, L.-Mbengue, M.- Tignino, M.- Sangbana, R. (Eds.), *The UN Convention on the Law of the Non Navigational Uses of International Watercourses. A Commentary*, Oxford University Press, 2018; McCaffrey, S., *The Law of International Watercourses... cit.*, pp. 409-441; Movilla Pateiro, L., "La entrada en vigor de la Convención sobre el derecho de los usos de los cursos de agua internacionales para fines distintos de la navegación", *Revista Española de Derecho Internacional*, Vol. 66, 2014, pp. 312-316; Ponte Iglesias, M.T., "La convención sobre el derecho de los usos de los cursos de agua internacionales para fines distintos de la navegación" in Aura, A.M (Coord.), *La politica comunitaria de aguas: marco de la acción estatal y autonómica : I Jornadas sobre el agua en España, cuestiones jurídicas y económicas*, 2012, pp. 217-234.

[53] For a comparative analyisis, Rieu-Clarke, A.- Kinna, R., "Can two global UN water conventions effectively co-exist: Making the case for package approach to support institutional coordination", *Review of European, Comparative International Environmental Law*, Vol. 23, 2014, pp. 15-31.

On the one hand, the first of these treaties is designed to facilitate cross-border cooperation through the establishment of a suitable legal basis and an active institutional framework in the region[54]. By virtue of the amendment in 2003 (in force since 2013) it extended its scope to all UN member States,[55] although this expansion did not become effective until 2018 with the ratifications of the treaty by Chad and Senegal.[56] Its priority objective is to protect and guarantee the quantity, quality and sustainable use of transboundary water resources, facilitating international cooperation through the implementation of principles of prevention and the reasonable and equitable use of water. Particularly relevant in the context of the Central Asian region are the general obligations of the prevention, control and reduction of transboundary impacts; ensuring that transboundary waters are reasonably and equitably used; and cooperation through the establishment of agreements and joint institutions. Also important are the references that the Convention makes to the obligation of the exchange of information and consultation, as well as to monitor and jointly assess the state of the waters, and the obligation to conclude specific agreements and establish joint cooperation units. On the other hand, the 1997 United Nations Convention is based on three pillars: the principle of prevention, the principle of the reasonable and equitable use of water resources, and the principle of cooperation. In particular, in addition to establishing the obligation of States to protect and preserve the ecosystems of international watercourses and in order to prevent, reduce and control pollution and to avoid significant damage to the territory of other States, the Convention defines the parameters that constitute this fair and reasonable use of international water courses: geographical, hydrographic, climatic, and ecological conditions; socioeconomic conditions; the population; the effects of the use of the watercourse in one State on other States; and the conser-

---

[54] Torres Cazorla, M.I., "Otra vuelta de tuerca del Derecho Internacional para regular los cursos de agua internacionales"...*cit.*, pp. 233 *et seq.*

[55] Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Decision III/1, Amendment to the Water Convention, Doc. ECE/MP.WAT/14.

[56] See Statuts if Ratifications at <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&clang=_en>.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

vation, protection and economy of use of the resource.[57] It is a model for later agreements both in general and specifically for agreements concluded by watercourse States, and provides a universal framework for negotiation.

However, Kazakhstan, Turkmenistan, Uzbekistan, Tajikistan and Kyrgyzstan have shown little commitment to the development of these environmental regimes, and their reluctance is a clear indicator of the length of the road ahead. Although these States responded promptly and positively regarding their participation in some of the main environmental treaties,[58] they have been much more reticent in relation to international instruments for the protection of water resources, which undoubtedly shows how political concerns shape and influence the position of the parties as far as water management is concerned.[59]. For example, the 1992 Convention was only ratified by Kazakhstan on 11 January 2001, by Uzbekistan on 4 September 2007 and by Turkmenistan on 22 August 2012.[60] No State in the region has signed or ratified any of its protocols or the 2004 amendment, and only Uz-

[57] McCaffrey, S., *The Law of International Watercourses*, op.cit., pp. 444-524; Drnas de Clément, Z., "Principios generales aplicables a los cursos de agua y acuíferos internacionales", in Hinojosa, M.-Peláez, J.M. (Coord.), *Liber Amicorum profesor José Manuel Peláez Marón: Derecho Internacional y Derecho de la Unión Europea*, 2012, pp. 297-320; Ziganshina, D., "International water law in Central Asia: The nature of substantive norms and what flows from it", *Asian Journal of International Law*, Vol. 2, 2012, pp.169-192, pp. 176-181.

[58] For example, the five States of Central Asia between 1995 and 1997 ratified the United Nations Convention to Combat Desertification 1994 <http://www.unccd.int/convention/ratif/doeif.php>; all of them ratified the 1992 Convention on Biological Diversity between 1994 and 1997 <http://www.cbd.int/convention/parties/list/>, and between 1993 and 2000 the Framework Convention on Climate Change 1992 <http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc_ratification_20091016.pdf>, between 1999 and 2009 the Kyoto Protocol 1997 <http://unfccc.int/files/kyoto_protocol/status_of_ratification/application/pdf/kp_ratification_20091203.pdf>. Turkmenistan and Kazakhstan ratified the Paris Agreement in 2016 on October 20 and December 6, respectively, while Tajikistan did so on March 22, 2017 and Uzbekistan on November 9, 2018 <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en>.

[59] Lim, M., "Is water different from biodiversity: Governance criteria for the effective management of transboundary resources", *Review of European, Comparative International Environmental Law*, Vol. 23, 2014, pp. 96-110, p. 100.

[60] Available online at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&lang=en>.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

bekistan has ratified the 2003 amendment. With respect to the 1997 Convention, only Uzbekistan ratified it, on 4 September 2007,[61] in what seems to be more an internal promotion strategy than the expression of a genuine desire to cooperate in solving the water problems of the area. Another significant international treaty in this area, the Espoo Convention on the assessment of the transboundary environmental impact of 1997, was ratified only by Kazakhstan and Kyrgyzstan, on 11 January and 1 May 2001 respectively.[62]

All Central Asian countries are participating in an increasing number of regional and bilateral agreements on the regulation of the use and protection of transboundary waters.[63] In practice, however, the legal framework offered by these agreements maintains the validity of the principles and the continuity of allocation quotas of the water flows established in the former Soviet model, which the five Central Asian States expressly confirmed through the Joint Declaration of 12 October 1991[64] and which has been reproduced in the various regional and bilateral agreements signed until now.

In that context, on 18 February 1992, in Almaty, the five States signed an Agreement for the joint management of the use and protection of interstate water resources,[65] applicable to the basins of the Syr Darya, the Amu Darya[66]

[61] Available online at <http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.htm>.l

[62] UN *Treaty Series* , vol. 1989, p. 309, available online at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-4&chapter=27&lang=en>.

[63] Vid., EU-UNDP, *Overview of Regional Transboundary Water Agreements, Institutions and Relevant Legal/Policy Activities in Central Asia*, EU-UNDP, 2011; Janusz-Pawletta, B., "Current legal challenges to institutional governance of transboundary water resources in Central Asia and joint management arrangements", Environmental, Earth, Science, Vol. 73, 2015, pp. 887-896; Rahaman, M., "Principles of Transboundary Water Resources Management and Water-related Agreements in Central Asia: An Analysis", *International Journal of Water Resources Development*, Vol. 28, 2012, pp. 475-49.

[64] The English version can be found on the ICWC website*, Statement of heads of water economy organizations of Central Asian Republics and Kazakhstan adopted on 10-12 October 1991 meeting in Tashkent*, available online at <http://www.icwc-aral.uz/statute2.htm>.

[65] The English version can be found at ICWC website, *Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan on co-operation in interstate sources' water resources use and protection common management*, available online at <http://www.icwc-aral.uz/statute1.htm>.

[66] The same year, the five States also signed two complementary agreements, on April 6, 1992 in Ashgabat, concerning the legal status of the Amu Darya and Syr Darya bodies for


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

as well as to the Aral Sea. The Agreement created the Interstate Committee for Water Coordination (ICWC) to regulate the management of these water resources. Under this Agreement, the States undertook to refrain from carrying out any activity in their territory that might entail a deviation from the distribution of agreed quotas or produce an increase in water pollution that might affect the interests of, or cause damage to, the other States. This prevents, for example, upstream States from unilaterally cutting off the flow of water to the downstream States in the winter periods, an obligation that has been systematically breached. The Agreement pays special attention to, but does not solve, the situations in which the availability of the resource varies according to the season or climate, since the only provision it includes establishes that, in extremely dry years, measures may be taken regarding the supply of water to the regions particularly affected by drought.

In 1993, another Agreement was signed in order to find a joint response to the Aral Sea crisis.[67] It established various measures for the conservation of the basin's limited water and land resources, among them the guarantee of a sufficient volume of water in the Aral Sea to preserve environmentally acceptable levels and to restore the balance of the ecosystem in the region. The Agreement also created the Interstate Council for the Aral Sea (ICAS, later the IFAS) and the Interstate Commission for Sustainable Development (ICSD), in accordance with principle 2 of the Declaration of Almaty of 1992.

At regional level, the Agreement of 17 March 1998 on the use of water and energy resources of the Syr Darya basin,[68] signed by Kazakhstan, Uzbekistan and Kyrgyzstan, is particularly interesting. The Agreement regulates decision-making regarding the supply of water for irrigation, discharges from

---

the joint management of the waters. The English version can be found at ICWC website, *Statute of the Basin Water Association "Amudarya"*, available online at <http://www.icwc-aral.uz/statute9.htm>; *Statute of the Basin Water Association "Syrdarya"*, available online at <http://www.icwc-aral.uz/statute10.htm>.

[67] The English version can be found on the CAWATER website, *Agreement on joint activities in addressing the Aral Sea and the zone around the Sea crisis, improving the environment, and ensuring the social and economic development of the Aral Sea region*, 1993, available online at <http://www.cawater-info.net/library/eng/l/kzyl-orda_agreement.pdf>.

[68] The English version can be found on the CAWATER website, *Agreement Between the Governments of the Republic of Kazakhstan, the Kyrgyz Republic, and the Republic of Uzbekistan on the Use of Water and Energy Resources of the Syr Darya Basin*, available online at <http://www.cawater-info.net/library/eng/l/syrdarya_water_energy.pdf>.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

reservoirs, energy generation and transport, and compensation in case of energy losses. First, it prohibits parties from taking measures that disrupt the agreed regime on the allocation of water and energy production. Next, it establishes mechanisms for the redistribution of the energy generated by Kyrgyzstan and sent to Kazakhstan and Uzbekistan, and the compensation mechanisms. It specifies the transfer to both States from Kyrgyzstan of the extra electricity generated during the seasons in which the river floods, and the compensation in terms of gas and oil equivalent to this additional energy bonus. It is illustrative to see how Article 4 of the Agreement provides compensation for water from the Toktogul dam in the summer period:

> The Naryn-Syr Darya excess power emanating from the release mode utilized on the Naryn-Syr Darya during the growing season, and the Toktogul multi-year regulated flows that exceed the needs of the Kyrgyz Republic, will be transferred to the republics of Kazakhstan and Uzbekistan in equal portions. Compensation shall be made in equivalent amounts of energy resources, such as coal, gas, electricity and fuel oil, and the rendering of other types of products (labour, services), or in monetary terms as agreed upon, for annual and multi-year water irrigation storage in the reservoirs.

However, the success of the Agreement has been limited; it has not served to alleviate the tension regarding the use of water, since it does not provide any mechanisms that guarantee its application. The hydrographic conditions, and in particular the changes in the rain regimes, have also prevented 100% compliance with the water transfers initially planned and, consequently, have affected oil and gas transfers because the Agreement does not include mechanisms to compensate the parties in especially dry or especially rainy years. In the years of increased rainfall, downstream States have asked for reductions in the water they receive during the summer season, which in turn would enable them to reduce the supply of gas and oil to Kyrgyzstan during the winter months. On the other hand, in the dry years, the downstream States have claimed a larger volume of water during the summer than originally planned, and are thus obliged to make additional transfers of gas and oil during the winter months to Kyrgyzstan. In short, this framework agreement did not achieve one of its key objectives: namely, the sustainable exploitation of hydroelectric power plants along the course of the Naryn-Syr Darya in a way that is in the interests of all participating countries. Although


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

it has helped to provide a structure for water-energy exchanges between the countries of the Syr Darya basin, its implementation has amply demonstrated the limitations of these mechanisms.

A wide range of bilateral agreements have also been signed by the countries in the region. For the most part, these are agreements between upstream and downstream countries: examples are the Agreement of 16 March 2000 between Uzbekistan and Kyrgyzstan,[69] or the Agreement between Kazakhstan and Kyrgyzstan of 23 May 2000,[70] both related to the use of water and energy resources of the hydroelectric stations of the River Naryn, in the Syr Darya basin. Also, on 14 January 2000 Uzbekistan and Tajikistan signed another bilateral Agreement prohibiting both governments from adopting unilateral measures that might prevent the normal operation of industrial activity, hydraulic infrastructures, or transport and communication infrastructures.[71]

Agreements of this type have also been signed between the States of the alluvial plains. For example, in Chartzjou on 16 January 1996, Turkmenistan and Uzbekistan signed a specific Agreement for the management of the waters of the Amu Darya basin, [72] under which Uzbekistan made a rental payment to Turkmenistan in an attempt to resolve the differences regarding the use of the pumping facilities and the Tujamujun reservoir, which is located in Turkmenistan but which irrigates Uzbek territory.

---

[69] The English version can be found on the CAWATER website, *Intergovernmental Protocol Between the Government of the Kyrgyz Republic and the Government of the Republic of Uzbekistan on Use of the Naryn-Syr Darya Water and Energy Resources*, available online at <http://www.cawater-info.net/bk/water_law/pdf/annual-uzkg-00.pdf>.

[70] The English version can be found on the CAWATER website, *Agreement Between The Government of the Republic of Kazakhstan And The Government of the Kyrgyz Republic On the Use of Water and Energy Resources of the Naryn – Syr Darya Cascade of Reservoirs*, available online at <http://www.cawater-info.net/bk/water_law/pdf/annual-kzkg-00.pdf>

[71] The English version can be found on the CAWATER website, *Agreement Between the Government of the Republic of Uzbekistan and the Government of the Republic of Tajikistan on Cooperation in the Area of Rational Water and Energy Uses*, available at <http://www.cawater-info.net/bk/water_law/pdf/kayrakum-00.pdf>.

[72] The English version can be found on the CAWATER website, *Agreement between the Government of the Republic of Uzbekistan and the Government of Turkmenistan Concerning Cooperation on Water Management Issues*, available online <http://www.cawater-info.net/bk/water_law/pdf/annual-kzkg-00.pdf>, <http://www.undp.kz/library_of_publications/files/1524-25897.pdf>.

One of the few agreements that has turned out to be an example of successful bilateral cooperation in the region is the Agreement signed in Astana on 21 January 2000 between Kyrgyzstan and Kazakhstan on the use of hydraulic facilities for the use of the waters of the River Chu and the River Talas.[73]. In this Agreement, both States recognize that the exploitation of water resources and the maintenance of water infrastructures destined for interstate use should pursue mutual benefit on an equitable and reasonable basis, and for this reason they undertake to create several joint commissions "*to determine the working regimes and the range of necessary expenses for exploitation and maintenance*" and to carry out joint activities "*to protect water management facilities of intergovernmental status and adjacent territories from adverse effects of floods, mudflows and other natural disasters*".[74] The Agreement obliges both States to share the cost of maintenance operations of the cross-border facilities, and established the joint management (and the participation of Kazakhstan) in the maintenance costs of the numerous water infrastructures in Kyrgyzstan. The Agreement highlights the creation of the joint Chu-Talas Commission, which is mentioned in the following section as a sample of good practice at institutional level.[75]

In general, however, the current management model for these resources in Kazakhstan, Uzbekistan, Turkmenistan, Tajikistan and Kyrgyzstan continues to be based on an asymmetrical and inequitable design dating from the former Soviet era, adapted slightly to the priorities of the new States, which has failed to promote a coordinated and cooperative approach. The model intensifies the extreme dichotomy between the two main competing uses of water in the region, irrigation and the production of hydroelectric energy, and continues to ignore the population's most immediate needs – namely,

---

[73] The English version can be found on the CAWATER website, *Agreement between the Government of the Republic of Kazakhstan and the Government of the Kyrgyz Republic on the Use of Water Management Facilities of Intergovernmental Status on the Rivers Chu and Talas*, available online at <http://www.cawater-info.net/library/eng/chu_talas_e.pdf>.

[74] Ibid., arts. 1, 5 and 7.

[75] WEGERICH, K., "Passing Over the Conflict. The Chu Talas Basin Agreement as a Model for Central Asia?", in Rahaman, M.M. & Varis, O. (Eds.), *Central Asian Waters*, Helsinki University of Technology, pp. 117-131, 2008, p. 126.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

the availability of drinking water and control of its quality, which are hardly mentioned at all in the debate.[76]

The sustainable management of water and energy resources in the countries of Central Asia requires greater coordination and the implementation of multi-sectoral strategies through the action of regional organizations. For now, however, there is no comprehensive approach that takes into account all the technical, economic, legal and social aspects and avoids an excessive focus on specific uses of water. In this regard, the agreements adopted by the Central Asian States have not included measures to guarantee their application, but more importantly have been unable to propose new answers involving more than just the exchange of water for energy, and have limited their plans for resolving the problems of water supply to the use of ever larger infrastructures.

## 2. THE RELATIVE EFFECTIVENESS OF THE INTERSTATE INSTITUTIONS IN CENTRAL ASIA

Several specialized interstate bodies in the Central Asian region[77] have focused on the management of shared water resources. However, their action has been characterized by the lack of definition and duplication of objectives, the systematic failure to comply with their decisions, and the prioritization

[76] On the implementation of these Agreements, See, Vid., Ziganghina, D., "International Water Law in Central Asia: Commitments, Compliance and Beyond"... *cit.*, pp. 96-107; Janusz-Pawletta, B., Gubaidullina, M., "Transboundary Water Management in Central Asia", *Cahiers de l'Asie Centrale*, Vol. 25, 2015, pp. 195-215; Bernauer, T.; Siegfried, T. (2008), "Compliance and performance in international water agreements: The case of the Naryn/Syr Darya basin", *Global Governance,* Vol. 14, 2008, pp. 479-502.

[77] At the level of the international organizations, one of the most important actions, for the resources and capacities that it includes, is the ENVESEC (Environment & Security) initiative, developed since 2003 in the framework of the UNECE, together with the United Nations Environment Programme (UNEP), the United Nations Development Program (UNDP), the Organization for Security and Cooperation in Europe (OSCE) and the North Atlantic Treaty Organization (NATO). More indirectly, other international organizations created after the dissolution of the USSR have dealt with issues related to the management of water resources in this region, such as the Economic Community of Central Asia (ECCA), created in 1998 and since 2006 integrated in the Eurasian Economic Community (EURASEC) or the Shanghai Cooperation Organization (SCO), created in 2001 under the leadership of China with the objective of stabilizing Central Asia through the development of political, economic and scientific cooperation and constituting currently one of the most significant multilateral initiatives from the point of view of regional security.

of national interests in order to maintain particular balances of power to the detriment of broader regional interests.

The Agreement signed in Almaty in 1992 created the Interstate Committee for Water Coordination (ICWC) to promote the rational use, protection and control of transboundary waters, although its operating regulations could not be approved until 2008.[78] The ICWC was one of the first regional institutions of the post-Soviet period, but although its main aim was to replace the system inherited from the former USSR, it kept the old regime's structures in place. The main task of the ICWC today consists in the development and coordination of the use and exploitation of water resources in the Syr Darya and the Amu Darya basins; it distributes the annual allocation of water flows between the five States and supervises the operation and maintenance of the infrastructures controlled by the associations of the two river basins.

However, in common with other organizations in the region, the ICWC presents a number of significant contradictions that greatly limit its capacity, and have prevented the only entity with a truly regional scope from effectively controlling the vitally important structures of the basins. [79] On the one hand, in spite of its interstate status, it seems that its operation is largely controlled by Uzbekistan, the country where it is based and the only one that has in fact begun to transfer the national structures of transboundary water management. On the other hand, it lacks the competences to force States to comply with agreements, and the implementation of its decisions often suffers due to the absence of a solid legal basis and the lack of mechanisms to guarantee the exchange of information. In addition, its operation is overly sectorial, as it focuses on exchanges of water for energy and merely guarantees the management principles and exchange structures established in the Soviet era.

[78] The English version can be found at ICWC website, *Statute of the Interstate Commission for Water Coordination of Central Asia*, available online at <http://www.icwc-aral.uz/statute4.htm>.

[79] See Khamzayeva, A., "Water resources management in Central Asia: security implications and prospects for regional cooperation"... *cit.*, pp. 24; Kuzmits, B., "Cross-bordering Water Management in Central Asia", *Conflict Constellations and Ways to a Sustainable Resource Use",* ZEF Workig Paper series, Amu Darya Series Paper No 2, April 2006; Khamidov, M.K., "Characteristic features of integrated water resources management in the Syrdarya River Bassin", in Wouters, P.-Duchovny,V.-Allan, A. (Ed.), *Implementing Integrated Water Resources in Central Asia*, Springer, Dordrecht, 2007, pp. 25-34.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

For its part, the International Fund for the Aral Sea (IFAS) is formally the only sub-regional organization where all the States in the region created after the breakup of the former USSR are represented. With an observer status at the UN since January 2009,[80] it has the specific objective of managing the regional system of improvement, monitoring and supervision of the Aral Sea basin and its tributary rivers. The origin of this organization is found in the agreements signed by the five Central Asian States on 4 January 1993 and 26 March 1993, cited above, by which the Interstate Council for the Aral Sea (ICAS) was established as an advisory body, together with an executive committee and a secretariat to manage regional programmes. Subsequently, on 20 September 1995 the Nuku Declaration on the sustainable development of the Aral Sea[81] adopted a programme of specific action for the recovery of the Aral Sea and created IFAS, whose scope was initially limited to financing ICAS activities and programmes. Two years later, IFAS and ICAS merged under the Agreements signed on 27 February 1997, 20 March 1997 and 30 May 1997,[82] and IFAS was granted international legal status.

However, as in the above case, IFAS also suffers from significant operational problems and from its limited capacity for action. This is due partly to a lack of funding, and partly to the absence of a clear mandate to supervise the multiple dimensions of a genuinely regional strategy for the management of water resources because of the overlapping of its competencies with those of the ICWC. This is reflected in their limited success in negotiating regional agreements on water and energy, and in the difficulties they encounter in forcing States to comply with the agreements in force.

Although these organizations have played an important role in water management in the region, their involvement has not brought about significant changes in the positions of the national governments. They have not managed to capitalize on the political dialogue generated so far, and they have not become consolidated as regional institutions. In practice, the current role

---

[80] Resolution of the UN General Assembly 63/133, *Observer status for the International Fund for Saving the Aral Sea in the General Assembly*, Doc. NU. A/RES/63/133, de 15 January 2009.

[81] The English version can be found on the CAWATER website; *Nukus Declaration*, available online at <http://www.cawater-info.net/library/eng/nukus_declaration.pdf>.

[82] The English version can be found on the CAWATER website, *The Agreement about the status of IFAS and its organizations*, available online at <http://www.cawater-info.net/library/eng/ifas_e_1.pdf>.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

of IFAS seems to be restricted to developing programmes aimed to achieve minimally acceptable conditions for the maintenance of life around the Aral Sea region.

In comparison with other regional initiatives, the role of the Chu-Talas Commission[83] in the promotion of bilateral cooperation for the management of water resources is one of the few successful examples of collaboration in the region. Created in 2006 as part of the 2000 agreement between Kyrgyzstan and Kazakhstan (under the aegis of the UNECE) on the use of hydraulic facilities for the use of the waters of the Chu and Talas rivers,[84] the Commission holds meetings at least twice a year, alternating between the two countries. The Commission oversees the administrative and organizational management, the preparation of annual reports and the coordination of functions such as the activities of the sub-working groups. In February 2018, the establishment of this coordination structure as well as the effort of the parties and their Joint Commission allowed the first developments towards the future adoption of a Strategic Action Programme for the Chu and Talas river basins.

Its success is probably due to the large-scale involvement of international organizations since its early days, especially the UNECE, the United Nations Development Programme (UNDP) and the Organization for Security and Cooperation in Europe (OSCE).[85] These organizations, together with some

[83] The English version can be found on the CEPE website, *Statute of the Commission of the Republic of Kazakhstan and the Kyrgyz Republic on the Use of Water Management Facilities of Intergovernmental Status on the Rivers Chu and Talas*, available online at <https://www.unece.org/fileadmin/DAM/env/water/Chu-Talas/Statute_ChuTalas_Comission_ENG.pdf>.

[84] UNECE/UNESCAP/OSCE, "Support for the Creation of a Transboundary Water Commission on the Chu and Talas Rivers between Kazakhstan and Kyrgyzstan" (Chu-Talas I, 2003-2006).

[85] See UNECE/UNESCAP/OSCE, "Support for the Creation of a Transboundary Water Commission on the Chu and Talas Rivers between Kazakhstan and Kyrgyzstan" (Chu-Talas I, 2003-2006); UNECE/OSCE, "Developing cooperation on the Chu and Talas Rivers" (Chu-Talas II, 2009-2011); "Promoting Cooperation to Adapt to Climate Change in the Chu and Talas Transboundary Basin" (2010-2014); UNECE/UNDP, "Enabling Transboundary Cooperation and Integrated Water Resources Management in the Chu and Talas River Basin" (2014-2017); UNECE/UNESCAP/OSCE, "Enhancing climate resilience and adaptive capacity in the transboundary Chu-Talas basin" (2015-2018). In general, on the UNECE action on cross-border cooperation on water resources in Central Asia, see its website at <https://www.unece.org/env/water/centralasia.html>.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

European countries, have supported their activities through the execution of multiple projects related to cross-border cooperation, comprehensive watershed management and the establishment of good practices in the face of water-related disasters and climate change. This has allowed the Commission to implement its plans, in particular the allocation of the water resources from the basins of the two rivers between Kazakhstan and Kyrgyzstan, the introduction of measures for the maintenance of water facilities for interstate use, and the establishment of a financing mechanism.

## IV. FINAL REMARKS

The management model of water resources in Central Asian states still harks back to the Soviet era. It is asymmetrical and unbalanced, favouring the unilateral priorities of the new states while hindering the establishment of a regional focus for co-ordination. The model fosters an extreme dichotomy between the two competing uses of water in the region—irrigation and the production of hydroelectric energy—and ignores the most urgent needs of the population, such as food security, the availability of safe drinking water, and health issues. The malfunctioning of the exchanges of gas and oil for water aggravated the mistrust among the states in the region.

Thus far, the cooperation between the five countries of Central Asia has been insufficient to ensure the environmentally sustainable management of the water resources they share. Clearly the political fragmentation of the region has had an extremely negative impact on the management of such a highly integrated ecological system. The difficulty has been compounded by the weakness of the existing international legal instruments for supporting an authentic regional policy of shared resource management and by the problems of duplication, fragmentation and inefficiency that seem endemic in the region's institutions.

What is more, the legal-institutional framework for managing the urgently needed changes in the river basins shared by these States is still insufficient and the balance of powers in the region is precarious. Unlike what happened in other regions—the Danube, the Rhine, the Mekong, or the Nile basins—the lack of leadership and political will, and the fact that water management is considered a highly sensitive domestic issue have resulted in poor water

governance which is hardly compatible with a model of equitable and reasonable use of water resources widely promoted by international agreements.

In Central Asia there is as yet no effective framework for institutional cooperation in the areas of the environment and energy resources, based on the concept of a shared watershed that considers all these issues in a multi-sectoral and comprehensive manner. For now, the creation of such a framework seems to depend on the channelling of the political will of the States towards the concerted management of the river basins that they share.

## BIBLIOGRAPHICAL REFERENCES

– BAECHLER, G.- SPILLMAN, K., *Environment and Conflict Project: International project on Violence and Conflicts Caused by Environmental Degradation and Peaceful Conflict Resolution*, Center for Security Studies, 1995, pp. 1-185.

– BAKER, E., "The hydrosocial empire: The Karakum River and the Soviet conquest of Central Asia in the 20th century", *Journal of Anthropological*, Vol. 52, 2018, pp. 123-136.

– BERNAUER, T.; SIEGFRIED, T. (2008), "Compliance and performance in international water agreements: The case of the Naryn/Syr Darya basin", *Global Governance,* Vol. 14, 2008, pp. 479-502.

– BORTHAKUR, A., "An Analysis of the Conflict in the Ferghana Valley", *Journal of Asian Affairs*, Vol.48, 2017, pp. 334-350.

– CAMPANER, N.-YENIKEYEFF, SH., "The Kashagan Field: A Test Case for Kazakhstan's Governance of Its Oil and Gas Sector", *IFRI Papers*, 2008, available online at http://www.ifri.org.

– CAMPINS ERITJA, M. and MAÑÉ ESTRADA, A., (Ed.), *Building a Regional Framework in Central Asia: Between Cooperation and Conflict*, ICIP Research 02, Institut Català Internacional per la Pau, 2014.

– CHAZOURNEZ DE BOISSON, L., MBENGUE, M., TIGNINO, M. and SANGBANA, R. (Eds.), *The UN Convention on the Law of the Non Navigational Uses of International Watercourses. A Commentary*, Oxford University Press, 2018.

– DALY, J. C. K. "Central Asian Water and Russia", *Eurasia Daily Monitor*, Vol. 5, nº113, 13/6/2008, available online at http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=33718&tx_ttnews%5BbackPid%5D=166&no_cache=1.

– DINAR, S. "Scarcity and Cooperation Along International Rivers", *Global Environmental Politics,* Vol. 9, nº 1, 2009, pp. 109-135.

– DRNAS DE CLÉMENT, Z., "Principios generales aplicables a los cursos de agua y acuíferos internacionales", in Hinojosa, M. and Peláez, J.M. (Coord.), *Liber Amicorum profesor José Manuel Peláez Marón: Derecho Internacional y Derecho de la Unión Europea*, 2012, pp. 297-320.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

– ESHCHANOV, B. *et al.*, "Rogun Dam. Path to Energy Independence or Security Threat?", *Sustainability*, Vol. 3, pp. 1573-1592.

– GADAEV, A. and YASAKOV, Z. "An Overview of the Aral Sea Disaster", in Edelstein, M.- Cerny, A.-Gadaev, A. (Ed.) *Disaster by Design: The Aral Sea and its Lessons for Sustainability*, Emerald, 2012, pp. 5-15.

– GONZÁLEZ, A.- CLAUDÍN, C., *Asia Central y la seguridad energética global. Nuevos actores y dinámicas en Eurasia*, Fundació CIDOB, Barcelona 2008.

– HANKS, R., "Crisis in Kyrgyzstan: conundrums of ethnic conflict, national identity and state cohesion", *Journal of Balkan and Near Eastern Studies*, Vol. 13, 2011, pp. 177-187.

– HOMER, TH., "On the Threshold: Environmental Changes as Causes of Conflict", *International Security*, Vol. 16, nº 2, 1991, pp. 76-116.

– IZQUIERDO, F., "El agua como factor de hostilidad y de cooperación en el ámbito internacional" in Gutiérrez Espada, C.- Riquelme Cortado, R. - Orihuela Calatayud, E.- Sánchez Jiménez, M.A.- Cervell Hortal, M.J.- Rubio Fernández, E.M., (Coord.), *El Agua como factor de cooperación y de conflicto en las relaciones internacionales contemporáneas*, Instituto Euromediterráneo del Agua, Murcia, 2009, pp. 139-170.

– JANUSZ-PAWLETTA, B., "Current legal challenges to institutional governance of transboundary water resources in Central Asia and joint management arrangements", Environmental, Earth, Science, Vol. 73, 2015, pp. 887-896.

– JANUSZ-PAWLETTA, B., GUBAIDULLINA, M., "Transboundary Water Management in Central Asia", *Cahiers de l'Asie Centrale*, Vol. 25, 2015, pp. 195-215.

– KEMELOVA, D. and ZHALKUBAEV, G., "Water, Conflict, and Regional Security in Central Asia Revisited", *New York University Environmental Law Journal*, Vol. 11, 2003, pp. 479-502.

– KHAMIDOV, M.K., "Characteristic features of integrated water resources management in the Syrdarya River Bassin", in Wouters, P.-Duchovny,V.-Allan, A. (Ed.), *Implementing Integrated Water Resources in Central Asia*, Springer, Dordrecht, 2007, pp. 25-34.

– *KHAMZAYEVA, A., "Water resources management in Central Asia: Security implications and prospects for regional cooperation", Documentos CIDOB. Asia, Vol. 25, 2009, pp. 9-32*, p. 19.

– KUZMITS, B., "Cross-bordering Water Management in Central Asia", *Conflict Constellations and Ways to a Sustainable Resource Use",* ZEF Workig Paper series, Amu Darya Series Paper No 2, April 2006.

– LIM, M., "Is water different from biodiversity: Governance criteria for the effective management of transboundary resources", *Review of European, Comparative International Environmental Law*, Vol. 23, 2014, pp. 96-110.

– MAÑÉ, A., "Territorios ricos en hidrocarburos de Asia Central ¿Países productores, enclaves exportadores o países de tránsito?", *Revista CIDOB d'Afers Internacionals*, Vol. 70-71, 2005, pp. 87-113.

– MCCAFFREY, S., *The Law of International Watercourses*, 3rd ed., Oxford University Press, 2019, pp. 414-421.

– MEGORAN, N., "The critical geopolitics of the Uzbekistan–Kyrgyzstan Ferghana Valley boundary dispute, 1999–2000", *Political Geography*, Vol. 23, 2004, pp. 731-764.

– MENGA, F., "Building a nation through a dam: the case of Rogun in Tajikistan", *Nationalities Papers*, Vol. 43, 2015, pp. 479-494.

– MICKLIN, PH., "Water in the Aral Sea Basin of Central Asia: Cause of Conflict or Cooperation?", *Eurasian Geography and Economics*, Vol. 43, n. 7, 2002, pp. 505-528.

– MIRIMANOVA, N., "Water and Energy Disputes of Central Asia: In search of regional solutions?", *EUCAM-EU Central Asia Monitoring,* February 2009, available online at http://www.eucentralasia.eu.

– MOSELLO, B., "Water in Central Asia: A Prospect of Conflict or Cooperation?", *Journal of Public and International Affairs*, Vol. 19, 2008, pp. 151-174.

– MOVILLA PATEIRO, L., "La entrada en vigor de la Convención sobre el derecho de los usos de los cursos de agua internacionales para fines distintos de la navegación", *Revista Española de Derecho Internacional*, Vol. 66, 2014, pp. 312-316.

– NAGHEEBY, M.- PIRI D., M.- FAURE, M., "The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin", *Transnational Environmental Law*, Vol. 8, 2019, pp. 247–278.

– O'HARA, S. and HANNAN, T., "Irrigation and Water Management in Turkmenistan: Past Systems, Present Problems and Future Scenarios.", *Europe-Asia Studies*, Vol. 15, 1999, pp. 21-41.

– PEYROUSE, S., "The Hydroelectric Sector in Central Asia and the Growing Role of China", China and Eurasia Forum Quarterly, Vol. 5, n. 2, 2007, pp. 131-148, p. 133.

– PONTE IGLESIAS, M.T., "La convención sobre el derecho de los usos de los cursos de agua internacionales para fines distintos de la navegación" in AURA, A.M (Coord.), *La politica comunitaria de aguas: marco de la acción estatal y autonómica: I Jornadas sobre el agua en España, cuestiones jurídicas y económicas*, 2012, pp. 217-234.

– RAHAMAN, M., "Principles of Transboundary Water Resources Management and Water-related Agreements in Central Asia: An Analysis", *International Journal of Water Resources Development*, Vol. 28, 2012, pp. 475-49.

– RASIZADE, A., "Entering the Old "Great Game" in Central Asia", *Orbis*, Vol. 47, 2003, pp. 41-58, available online at http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6W5V-479VGG4-2&_user=145085&_coverDate=03%2F31%2F2003&_alid=1246340288&_rdoc=41&_fmt=high&_orig=mlkt&_cdi=6580&_sort=v&_st=17&_docanchor=&view=c&_ct=1951&_acct=C000012098&_version=1&_urlVersion=0&_userid=145085&md5=b3312fec6a6942d7a1e7f01115a3f63b.

– RIEU-CLARKE, A. and KINNA, R., "Can two global UN water conventions effectively co-exist: Making the case for package approach to support institutional coordination", *Review of European, Comparative International Environmental Law*, Vol. 23, 2014, pp. 15-31.

– SAINZ, N., *et al.*, *Gobierno, regionalismo y recursos estratégicos en las repúblicas de Asia Central*, Observatorio Asia Central-Fundació CIDOB, Ponencias del Curso de verano *Eurasia emergente: ¿Un*

*nuevo 'gran juego' en torno a Asia Central?*, Universidad Internacional Menendez y Pelayo, Barcelona, 9 y 10 de julio de 2007, Doc_AC_CUIMPB_des08.pdf;

– SAKEIV, B., "Land and Water Management Patterns in Ferghana Valley" in Khamzayeva, A. *et al*, *Water Resources Management in Central Asia: Regional and International Issues at Stake* (Barcelona: CIDOB ASIA, 2009), p. 77.

– SANDOLE, D.J.D., "Central Asia: Managing the delicate balance between the "discourse of danger," the "Great Game," and regional problem solving", *Communist and Post-Communist Studies*, Vol. 40, 2007, pp. 257-267, http://www.elsevier.com/locate/postcomstud.

– SCOVAZZI, T., "L'acqua come causa di controversei internazionale", in Gutiérrez Espada, C.- Riquelme Cortado, R. - Orihuela Calatayud, E.- Sánchez Jiménez, M.A.- Cervell Hortal, M.J.- Rubio Fernández, E.M., (Coord.), *El Agua como factor de cooperación y de conflicto en las relaciones internacionales contemporáneas*, Instituto Euromediterráneo del Agua, Murcia, 2009, pp. 305-316.

– SIEVERS, E.W., "The Caspian, Regional Seas, and the Case for a Cultural Study of Law", *Georgetown International Environmental Law Review,* Vol. 13, nº 2, 2001, pp. 361-415.

– SIEVERS, E.W., "Transboundary Jurisdiction and Watercourse Law: China, Kazakhstan, and the Irtysh", *Texas International Law Journal,* Vol. 37, nº 1, 2002, pp. 1-42.

– SIEVERS, E.W., "Water, Conflict and Regional Security in Central Asia", *New York University Environmental Law Journal*, Vol. 10, 2002, pp 356-40.

– TANZI, A., "Regional contributions to international water cooperation: The UNECE contribution", in Boisson de Chazournes, L., Leb, Ch. And Tignio, M., *International Law and Freswater. The Multiple Changes*, Edward Elgar, 2013, pp. 155-178.

– TORRES CAZORLA, M.I., "Otra vuelta de tuerca del Derecho Internacional para regular los cursos de agua internacionales: el Convenio de Helsinki de 17 de marzo de 1992", *Anuario Español de Derecho Internacional*, Vol. 16, 2000, pp. 225-262.

– VARIS, O. and RAHAMAN, M.M., "The Aral Sea Keeps Drying out bit is Central Asia Short of Water?" in Rahaman, M.M.- Varis, O. (Eds.), *Central Asian Waters: Social, Economic, Environmental and Governance Puzzle* (Helsinki: Water & Development Publications, 2008), pp. 3-10.

– VEA RODRIGUEZ, L., "La opción hidráulica en Asia Central ex soviética: Perspectiva histórica y situación actual", *Revista CIDOB d'Afers Internacionals*, n. 70-71, 2005, pp. 143-167.

– WEGERICH, K., "Hydro-hegemony in the Amu Darya basin", *Water Policy*, Vol. 10 Supplement 2, 2008, pp. 71-88.

– WEGERICH, K., "Passing Over the Conflict. The Chu Talas Basin Agreement as a Model for Central Asia?", in Rahaman, M.M. & Varis, O. (Eds.), *Central Asian Waters*, Helsinki University of Technology, pp. 117-131, 2008, p. 126.

– WEGERICH, K., "The New Great Game: water allocation in post-Soviet Central Asia", *Georgetown Journal of International Affairs, Vol. 10, nº 2, 2009, pp. 117-123.*

– WOLF, A., YOFFE, S. and GIORDANO, M., "International waters: Identifying basins at risk", *Water Policy*, Vol. 5, 2003, pp. 29-60, http://www.environmental-expert.com/Files%5C5302%5Carticles%5C5877%5C2.pdf.

– WOODEN, A., "Kyrgyzstan's dark ages: framing and the 2010 hydroelectric revolution", *Central Asian Survey*, Vol. 33 2014, pp. 463-481.

– ZIGANSHINA, D., "International water law in Central Asia: The nature of substantive norms and what flows from it", *Asian Journal of International Law*, Vol. 2, 2012, pp.169-192, pp. 176-181.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 13-46
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.01

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

**Citation**: TREMOLADA ALVAREZ, E., «The Land and Maritime Delimitation of the Court of The Hague in the Affairs of Costa Rica v. Nicaragua, in Light of Their Proposals (February 2, 2018)», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 47-84

**Received**: 11 June 2019
**Accepted:** 14 October 2019

# THE LAND AND MARITIME DELIMITATION OF THE COURT OF THE HAGUE IN THE AFFAIRS OF COSTA RICA V. NICARAGUA, IN LIGHT OF THEIR PROPOSALS (FEBRUARY 2, 2018)

Eric TREMOLADA ALVAREZ[1]

I.-INTRODUCTION. II.-THE PROCESS. III.-RELEVANT GEOGRAPHY. IV.-RELEVANT HISTORY. V.-THE LEGAL APPROACHES OF THE PARTIES. VI.-THE COURT'S PRONOUNCEMENTS.VII.-CONCLUSIONS.

**ABSTRACT:** Costa Rica and Nicaragua, that rarely reach direct agreements, had not delimited the maritime areas in the Caribbean Sea and the Pacific Ocean, nor the land boundary in the northern part of Isla Portillos. Thus, Costa Rica first initiated an action in the International Court of Justice in 2014 regarding the maritime issue, and later, in 2017, requested the definition of the land boundary of that area in Isla Portillos and that it be noted that Nicaragua had set up a new military camp on its beach.

This text – in view of the parties' proposals - will analyze the recent judgment of the Court in the joined procedures, studying the proceedings followed, the relevant geography and history, the theses of the Parties and the reasoning of the Court.
**KEY WORDS:** International Court of Justice, res judicata, territorial and maritime delimitation, methodologies to delimit territorial sea, exclusive economic zone and continental shelf.

## LA RECIENTE DELIMITACIÓN TERRESTRE Y MARÍTIMA DE LA CORTE DE LA HAYA (2 DE FEBRERO DE 2018) EN LOS ASUNTOS DE COSTA RICA CONTRA NICARAGUA A LA LUZ DE SUS PLANTEAMIENTOS

**RESUMEN:** Costa Rica y Nicaragua, que difícilmente llegan a arreglos directos, no habían delimitado los espacios marítimos en el mar Caribe y en el océano Pacífico, como tampoco el límite de tierra en la parte norte de Isla Portillos. Así, Costa Rica inició primero un procedimiento ante la Corte Internacional de Justicia en 2014 por el asunto marítimo, y más tarde, en 2017, solicitó la definición del límite terrestre de esa área de Isla Portillos y que se constate que Nicaragua había establecido un nuevo campamento militar en su playa.

Este escrito –a la luz de los planteamientos de las Partes– analizará la reciente sentencia de la Corte que resolvió unidos los dos procedimientos, estudiando el trámite seguido, la geografía e historia relevantes, las tesis de las Partes y el razonamiento de la Corte.
**PALABRAS CLAVES:** Corte Internacional de Justicia, cosa juzgada, delimitación territorial y marítima, metodologías para delimitar mar territorial, zona económica exclusiva y plataforma continental.

[1] Full Professor & Researcher of Public International Law and Jean Monnet Chair Holder of European and Latinoamerican Law; Externado of Colombia University.

**L'ARRÊT DE LA COUR INTERNATIONALE DE JUSTICE DANS LES AFFAIRES DE DÉLIMITATION MARITIME ET TERRESTRE (COSTA RICA C. NICARAGUA), À LA LUMIÈRE DE LEURS PROPOSITIONS RESPECTIVES (2 FÉVRIER 2018)**

**RÉSUMÉ:** Le Costa Rica et le Nicaragua, qui difficilement arrivent à des accords directs, n'ont pas délimité les espaces maritimes de la mer des Caraïbes et de l'océan Pacifique, ni la frontière terrestre dans la partie nord d'Isla Portillos. Ainsi, le Costa Rica a d'abord engagé une procédure en matière maritime devant la Cour internationale de justice en 2014, puis en 2017, a demandé la définition de la frontière terrestre de cette zone d'Isla Portillos et qu'il soit établi que le Nicaragua avait établi un nouveau Camp militaire sur sa plage.

Ce document - à la lumière des approches des parties - analysera le récent arrêt de la Cour qui a résolu les deux procédures ensemble, étudiera la procédure suivie, la géographie et l'histoire pertinentes, les thèses des parties et le raisonnement de la Cour.
**MOT CLÉ:** Cour internationale de Justice, autorité de la chose jugée, délimitation territoriale et maritime, méthodes de délimitation de la mer territoriale, zone économique exclusive et plateau continental.

## I. INTRODUCTION

Direct agreements have never been the norm between Costa Rica and Nicaragua, which is why they have appeared before the International Court of Justice on six different occasions. Her lack of will to find solutions is transferred to the International Court of Justice as the principal judicial organ of the United Nations[2]. The first proceedings date back to 1986, when Nicaragua sued Costa Rica and Honduras, alleging various violations of international law, for which both States were internationally responsible, as they favored, from their own territory, certain military activities directed against the Nicaraguan authorities by the opposition. In 1992, the parties had reached an out-of-court agreement, so the Court issued an order registering the suspension of the proceedings and ordering the case be wiped from the general list[3].

Costa Rica, in turn, sued Nicaragua in 2005, due to a dispute regarding shipping and related rights on a section of the San Juan river, whose southern

[2] See: Mariño Menéndez, F., "Sobre la función de los tribunales internacionales y en particular del Tribunal Internacional de Justicia en el actual sistema jurídico internacional", *Las Naciones Unidas desde España. 70 aniversario de las Naciones Unidas. 60 aniversario del ingreso de España en las Naciones Unidas* , (X. Pons Rafols dir.), Asociación para las Naciones Unidas en España, Imprenta de la OID, Madrid, 2015, pp. 433-447; and Amr, M. S. M., *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* , Kluwer, La Haya, 2003.

[3] International Court of Justice. Border and Transborder Armed Actions (Nicaragua v. Costa Rica). Overview of the Case. Available in: <http://www. icj-cij.org/en/case/73>.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

bank forms the boundary limit between the two States in accordance with a bilateral treaty from 1858. In its request, Costa Rica stated that Nicaragua had imposed, since the 1990s, several restrictions on Costa Rican ships and their passengers sailing along the San Juan river, violating article VI of the 1858 Treaty. The Court, in 2009, concluded that Nicaragua was not acting in accordance with the obligations set out in the 1858 Treaty[4], when they demanded that those travelling along the San Juan river aboard Costa Rican ships must have a visa or buy Nicaraguan tourist passes; or when they demanded that the shipping operators who exercised the right to free shipping in Costa Rica pay the price for exit certificates[5].

In 2010, Costa Rica began new proceedings against Nicaragua, for supposed incursions and occupations by their army in Costa Rican territory, as well as for violating several international agreements[6]. Costa Rica stated that Nicaragua had occupied, on two different occasions, Costa Rican territory, through the construction of a channel along Costa Rican territory, from the San Juan river to the Los Portillos (or Harbor Head Lagoon), and by carrying out dredging works along this river. The Court, in 2015, determined that Costa Rica had sovereignty over the disputed territory in the northern part of Isla Portillos, and considered that the activities carried out by Nicaragua since 2010 in the disputed territory, including the excavation of three channels and the establishment of a military presence in parts of this territory, constituted a violation of Costa Rican territorial sovereignty, and that Nicaragua must therefore repair the damage caused by its illicit activities in Costa Rican territory. The sentence established that Nicaragua must compensate Costa Rica

[4] Instituto de Historia de Nicaragua y Centroamérica. (s.f.). *Tratado de Límites entre Nicaragua y Costa Rica: Jerez – Cañas – Negrete, 1858*. Obtenido de Memoria Centroamericana Ihnca. Disponible en: <http://memoriacentroamericana.ihnca.edu.ni/uploads/media/Tratado_de_limites_entre_Nicaragua_y_Costa_Rica_Jerez.pdf>.

[5] Quesada Q., M. "Disputa fronteriza y valor geoestratégico del río San Juan: Nicaragua y Costa Rica", *Cuadernos de Geografía: Revista Colombiana de Geografía*, v. 23, n. 2, p. 69-83, jul. 2014.

[6] Campos, A.; Oconitrillo, K. D.; Pons, L. & Rivera, I. *El conflicto jurídico ambiental entre Costa Rica y Nicaragua, Relativo a determinadas actividades llegadas a cabo en la zona fronteriza en el año 2010*. Universidad de Costa Rica, December 2012. Retrieved from <http://iij.ucr.ac.cr/sites/default/files/documentos/t12-el_conflicto_jurídico_ambiental_entre_costa_rica_y_nicaragua.pdf>.

for the material damage caused by its illegal activities[7]; and in the case that an agreement was not reached between the parties within the 12 following months, the Court would resolve the issue in later proceedings[8].

In 2017, Costa Rica requested that the Court resolve the issue of the damages owed to them for Nicaragua's illicit activities. The Court resolved this issue on the 2nd of February 2018, establishing that the damage to the environment, and the consequential deterioration or loss of capacity of the environment to provide goods and services, was cause for compensation, and determined the sum for the restoration of the damaged surroundings, as well as the loss or deterioration of environmental goods and services, as 378,890.59 US dollars[9].

In 2011, Nicaragua began proceedings against Costa Rica for violations of Nicaraguan sovereignty and great environmental damage in its territory. Nicaragua stated that Costa Rica was carrying out extensive road construction along the majority of the borderlands between the two countries, with serious environmental consequences. The Court, in 2013, in accordance with the principle of good administration of justice, and needing to economize on proceedings, considered it appropriate to link this case with the related issue of certain activities carried out by Nicaragua in the borderlands. In its sentence in 2015, the Court concluded that the construction of the road by Costa Rica led to the risk of sensitive trans-border damage; it therefore determined that Costa Rica had not fulfilled its obligation under general international law to carry out an environmental impact evaluation (EIE). The Court concluded

[7] QUINTANA, J. J. "Cuestiones de procedimiento en los casos *Costa Rica c. Nicaragua* y *Nicaragua c. Costa Rica* ante la Corte Internacional de Justicia", *Anuario Colombiano de Derecho Internacional (*ACDI*),* 2017, 10, pp. 117-159.

[8] International Court of Justice. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. *Reports* 2015.

[9] On 22nd March 2018, Nicaragua informed the Court Registry that on 8th March 2018, it had transferred the total amount of the compensation awarded, to Costa Rica. See: International Court of Justice. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica Judgment, I.C.J. *Reports* 2018.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

that a declaration of illicit conduct regarding Costa Rica's violation of the obligation to carry out an EIE was an adequate measure of satisfaction[10].

All of this led Costa Rica to seek the definitive definition of the border with Nicaragua: in maritime terms, regarding the Caribbean Sea and the Pacific Ocean; and on land, in the northern sector of Isla Portillos. Hence, this paper deals with two disputes that Costa Rica brought before the International Court of Justice against Nicaragua. The first one on February 25th , 2014, which referred to the establishment of single maritime limits between the two States in the Caribbean Sea and the Pacific Ocean, respectively. It sought to define the borders of all maritime areas that belonged to each of them, in accordance with applicable regulation and the principles of international law. The second proceeding was filed with the Court three years later, on January 16th, 2017, and was related to a dispute over the precise definition of the boundary of the area of Los Portillos - Harbor Head Lagoon, and the establishment of a new Nicaraguan military camp on the beaches of Isla Portillos.

The Court, taking into account the assertions made by Costa Rica in the case regarding the land border in the northern part of Isla Portillos, and considering the tight link between these claims and certain aspects of the dispute in the case regarding the maritime delimitation in the Caribbean Sea and Pacific Ocean, joined the two proceedings by an order on February 2nd, 2017.

## II. THE PROCESS

Costa Rica, having stated that diplomatic means had been exhausted to resolve their disputes over maritime boundaries with Nicaragua, requested that the Court determine the complete layout of a single maritime boundary between all maritime areas belonging to the two States. Thus, considering that its coasts generate rights superimposed on the areas on both sides of the isthmus, it initiated the proceeding before the Court on February 25th, 2014, requesting the maritime delimitation in the Caribbean Sea and the Pacific Ocean, based on international law.

[10] International Court of Justice. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. *Reports* 2015


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

On May 31st, 2016, in order to resolve the conflict, the Court requested an expert opinion to help establish pertinent factual issues. By order of June 16th, 2016, Eric Fouache and Francisco Gutiérrez were appointed as independent experts, whose task was to determine the state of the coast between the point suggested by Costa Rica and the point suggested by Nicaragua in their allegations, as the starting point of the maritime boundary in the Caribbean Sea.

On January 16th, 2017, Costa Rica filed another lawsuit against Nicaragua, to specify the definition of the boundary in the area of Los Portillos - Harbor Head Lagoon, and it was found that Nicaragua had established a new military camp on the beach of Isla Portillos.

Thus, in view of the assertions made by Costa Rica in the case concerning the land border in the northern part of Isla Portillos, and the close link between these claims and certain aspects of the dispute in the case concerning the maritime delimitation in the Caribbean Sea and the Pacific Ocean, the Court - as mentioned - joined the two procedures on February 2nd, 2017.

In the latter case, Costa Rica argued the jurisdiction of the Court, citing its statement on February 20th, 1973 and the statement made by Nicaragua on September 24th, 1929. Declarations that, based on the Statutes of the International Court of Justice and the Permanent Court of International Justice, mentioned the acceptance of compulsory jurisdiction. Costa Rica also noted that the Court has jurisdiction "in accordance with the provisions of Article 36, paragraph 1, of its Statute, by virtue of the application of the American Treaty on Settlement of Disputes in the Pacific ('Tratado Americano de Solución de Controversias en el Pacífico') ... Article XXXI".

The Court held hearings on the background of the joined cases from July 3rd to 13th, 2017, and issued a ruling for the two cases on February 2nd, 2018. Within this ruling, it determined the course of the single maritime borders between Costa Rica and Nicaragua in the Caribbean Sea and the Pacific Ocean[11].

[11] The Court decided that the maritime boundary between the two States in the Caribbean Sea would follow the course established in paragraphs 106 and 158 of the Judgment, and in the Pacific Ocean, it would follow the course set forth in paragraphs 175 and 201 of the same. See: International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, Reports 2018.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

It was also made clear that Costa Rica has sovereignty over the entire northern part of Portillo Island, including its coastline to the point where the right bank of the San Juan River reaches the low-water line of the coast of the Caribbean Sea, with the exception of Harbor Head Lagoon and the sandbar that separates it from the Caribbean Sea; in these spaces, sovereignty belongs to Nicaragua[12].

Finally, it found that Nicaragua had established and maintained a military camp in Costa Rican territory, thus violating the sovereignty of the Republic of Costa Rica and that, Nicaragua must therefore withdraw its military camp from that territory.

## III. RELEVANT GEOGRAPHY

Costa Rica and Nicaragua, located in Central America, share a land boundary that spans the Central American isthmus from the Caribbean Sea to the Pacific Ocean. To the north of that limit, we find Nicaragua and to the south of it, Costa Rica. Once contextualizied the location of both, it is important to note that Costa Rica shares a border with Panama in the south and Nicaragua with Honduras in the north.

Isla Portillos, whose northern part was the subject of the dispute over land boundaries, is an approximate area of 17 square kilometers, which is bordered to the west by the San Juan River and to the north by the Caribbean Sea. At its northwestern end, there is a sandy beach of varying length, that diverts the final course of the San Juan River, displacing its mouth to the west. On the coast of Isla Portillos, approximately 3.6 kilometers east of the mouth of the San Juan River, there is a lagoon, called Laguna Los Portillos by Costa Rica and Laguna Harbor Head by Nicaragua. This lagoon is separated from the Caribbean Sea by a sand bank.

The Caribbean Sea is located in the western part of the Atlantic Ocean. This Sea is partially enclosed to the north and east by the Caribbean islands, and borders South and West with South and Central America, respectively. In the Caribbean, off the coast of Nicaragua, there are several islands and cays, of which the Corn Islands are the most prominent, located 26 nautical miles from its coast, and which have an area, respectively, of 9.6 square kilometers (Great Corn Island) and 3 square kilometers (Little Corn Island). The Corn

[12] This, within the limits defined in paragraph 73 of the Judgment. Ibid.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

Islands have a population of close to 7,400 inhabitants. Other small features found off the Nicaraguan coast include Paxaro Bovo, the Palmenta Cays, Pearl Cays, Tyra Rock, Man of War Cays, Ned Thomas Cay, Miskitos Cays, Dead Cay and Edinburgh Reef. Costa Rica also has two small islands - Isla Pájaros and Isla Uvita - less than half a nautical mile from its coast, near the city of Limón.

On the Pacific side, the coast of Nicaragua is relatively straight and generally follows a northwest to southeast direction. The Costa Rican coast is more sinuous and includes the peninsulas of Santa Elena (near the land limit), Nicoya and Osa (International Court of Justice, 2018b).

In this section, it is important to mention the delimitations previously made. In the Caribbean Sea, Costa Rica concluded, on February 2nd, 1980, a treaty with Panama that delimited a maritime boundary; this treaty came into force on February 11th, 1982. This country also negotiated and signed a maritime delimitation treaty with Colombia in 1977, but it was never ratified.

In this same sea, the maritime borders of Nicaragua with Honduras - to the north - and Colombia - to the east - were established by Court judgments in 2007[13] and 2012[14], respectively. Colombia and Panama also concluded a maritime delimitation treaty that established their boundary in the Caribbean Sea on November 20th, 1976, which came into force on November 30th, 1977[15].

Regarding the Pacific Ocean, it should be noted that the aforementioned treaty signed by Costa Rica and Panama in 1980 also delimited its maritime border in this ocean. Nicaragua, in the Pacific, has not concluded any treaty that establishes a maritime boundary.

---

[13] International Court of Justice. Case concerning Territorial and Maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras). Judgment, I.C.J., 8 of October 2007, *Reports* 2007 (II).

[14] International Court of Justice. Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II).

[15] Cfr. United Nations, *Treaty Series* (UNTS), vol. 1074, p. 221.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

## IV. RELEVANT HISTORY

The Court recalled that in the Costa Rican case against Nicaragua, regarding certain activities carried out by Nicaragua in the border area[16], it had been established that the parties' disputes dated back to a historical context in the 1850s. After hostilities between the two States in 1857, the governments of Costa Rica and Nicaragua signed a Treaty of Limits on April 15th, 1858, that was ratified by Costa Rica on April 16th, 1858 and by Nicaragua on April 26th, 1858[17].

The Treaty of 1858 fixed the course of the land border between Costa Rica and Nicaragua, from the Pacific Ocean to the Caribbean Sea[18]. According to Article II of the aforementioned Treaty, the boundary between the two States runs along the right (Costa Rica) shore of the San Juan River from a point three English miles below Castillo Viejo, a small town in Nicaragua, to the end of Punta de Castilla, at the mouth of the San Juan on the Caribbean coast[19].

Nicaragua challenged the validity of the Treaty of 1858 on several occasions, hence both States signed another document on December 24th, 1886, by which they agreed to submit the validity of the 1858 Treaty to the President of the United States of America, Grover Cleveland, to arbitration. They also agreed that if it was determined that the 1858 Treaty were valid, President Cleveland should also decide *"on all other points of doubtful interpretation that either Party may find in the Treaty."* Thus, on June 22nd, 1887, Nicaragua informed Costa Rica of 11 points of doubtful interpretation, which were then presented to President Cleveland for resolution. Cleveland's 1888 award confirmed, in paragraph 1, the validity of the Treaty of 1858 and determi-

[16] International Court of Justice. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. *Reports* 2015*,* page 665

[17] Cfr. United Nations, *Treaty Series* (UNTS), vol. 118, p. 439.

[18] Tijerino, F. K. "Conflictos limítrofes y discurso nacionalista. La frontera Nicaragua-Costa Rica (1824-1858)", *Las fronteras del Istmo. Fronteras y sociedades entre el sur de Mexico y America Central* (P. Bovin dir.), Centro de Estudios Mexicanos y Centroamericanos. México, 2005, pp. 97-107.

[19] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraph 51.

ned, in paragraph 3, that the border between the two States on the Atlantic side began "at the end of Punta de Castilla in the mouth of the San Juan de Nicaragua River"[20].

After the Cleveland Award, the Parties agreed on a Convention on border demarcation that they signed in San Salvador on March 27th, 1896[21]. In it, they established two national demarcation commissions, each composed of two members. Said agreement also stated that the commissions would include an engineer, appointed by the President of the United States of America, who "will have broad powers to decide any type of differences that may arise in the course of any operation and whose decision would be final". As a consequence, the General of the United States, Edward Porter Alexander, was appointed and during the demarcation process, which began in 1897 and ended in 1900, he issued five awards.

In the first of these, from September 30th, 1897, General Alexander determined the initial segment of the land border near the Caribbean Sea, in light of the geomorphological changes that had taken place since 1858. He defined this segment as starting from "the extreme northwest that appears to be the mainland, on the east side of Harbor Head Lagoon" and then ran across the sandbar, from the Caribbean Sea to the waters of Harbor Head Lagoon. From there, he determined that the limit "would follow the water's edge around the port until it reached the river by the first channel". However, as the Court pointed out in the 2015 judgment, what the arbitrator considered to be the "first channel" was a branch of the San Juan River that then flowed into the Harbor Head Lagoon[22].

Since the time of the Alexander's awards and the work of the demarcation commissions, the northern part of Isla Portillos has undergone significant geomorphological changes. In 2010, a dispute arose between Costa Rica and Nicaragua, regarding certain activities carried out by Nicaragua in that area. In its 2015 judgment, the Court considered the impact of some of these changes on the issue of territorial sovereignty, declaring "that the

[20] Cfr. United Nations, *Treaty Series* (UNTS), vol. 118, p. 439, paragraph 52.

[21] Cfr. Naciones Unidas. *Informes de Laudos Arbitrales Internacionales*, RIAA, 2007, vol. XXVIII, p. 211.

[22] International Court of Justice. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. *Reports* 2015, page 699, paragraph 73.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

territory under Costa Rica's sovereignty extends to the right bank of the San Juan Inferior River up to its mouth in the Caribbean Sea"[23]. Thus, Costa Rica had sovereignty over an area of 3 km2 in the northern part of Isla Portillos, although the Court pointed out in its description of this area that it does not specifically refer to the stretch of coastline bordering the Caribbean Sea that is between the Harbor Head Lagoon and the mouth of the San Juan river, which, according to both Parties, is Nicaraguan[24]. The land boundaries in this stretch of coast is one of the issues that was disputed between the Parties in the joined cases.

In relation to the maritime zones, the two Parties established, in May 1997, a Bilateral Subcommittee on Limits and Cartography to carry out preliminary technical studies on possible maritime delimitations in the Pacific Ocean and the Caribbean Sea. In 2002, the deputy foreign ministers of both countries instructed the Bilateral Subcommittee to begin negotiations. The Subcommittee held five meetings between 2002 and 2005. Several technical meetings were also held between the National Geographic Institute of Costa Rica and the Nicaraguan Institute of Territorial Studies, during the same period. After these initial meetings, negotiations on maritime delimitations between the two States stalled[25]. Sovereignty exacerbated, based on the state territory[26].

## V. THE LEGAL APPROACHES OF THE PARTIES

The land border in the northern part of Isla Portillos poses questions of territorial sovereignty that had to be examined first due to its possible implications for maritime delimitation in the Caribbean. In this issue, the Parties express dissenting opinions on the interpretation of the 2015 judgment, and present contradictory allegations on certain issues related to sovereignty over the coast of the northern part of Isla Portillos.

[23] *Ibid.*, page 702, paragraph 92.

[24] *Ibid.*, pages 696-697, paragraphs 69-70 and page 740, paragraphs 229.

[25] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 53-56.

[26] Barberis, J., "El territorio del Estado", CEBDI , vol. IV, 2000, pp. 223-323.

According to Costa Rica's reading of that judgment, it was established that the beach of Isla Portillos belongs to Costa Rica, a decision that has the force of res judicata. For them, only the issue regarding the precise location of the boundary at each end of the Harbor Head Lagoon sand bar remained unsettled.

In Costa Rica's view, in accordance with Article II of the 1858 Treaty, the continental boundary extends along the right bank of the Lower San Juan River to its mouth in the Caribbean Sea and the land boundary is found on the right bank of the San Juan River at its mouth. Thus, and to their knowledge, the only Nicaraguan territory in the area of Isla Portillos is the enclave of the Los Portillos - Harbor Head lagoon and the sandbar that separates the lagoon from the Caribbean Sea[27].

On the other hand, Nicaragua argued that the 2015 judgment did not set the limits of the territory in dispute, since the case of "certain activities" referred to the responsibility of the State for unlawful acts and did not refer to the delimitation. In that case, the Court was not required to adopt a position with regard to sovereignty over the relevant stretch of coastline or its precise limits, so in their opinion, the sovereignty over the beach of Isla Portillos had not been determined.

Regarding the Treaty of 1858 and subsequent Cleveland and Alexander's awards, Nicaragua understood that they described a fixed point in Punta de Castilla as being the point of departure of the border, and not at the mouth of the San Juan River. It emphasized that President Cleveland established the starting point of the land limit "at the end of Punta de Castilla at the mouth of the San Juan River of Nicaragua, since both existed on April 15th, 1858." A binding ruling for the Parties, which had made the starting point clear as an "immobile fixed point" whose location would not change after changes in river flow. Therefore, the first Alexander's award made "great efforts to find where Punta de Castilla was, because that was the fixed starting point for the border."

Nicaragua, in its Counter-Memorial, argued that the San Juan River channel, which emptied into Harbor Head Lagoon and marked the land boundary at the time of the first Alexander's award, continues to flow into the lagoon.

[27] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs. 61 & 62.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

Hence, it understood that the beach of Isla Portillos and the sandbar between the Harbor Head lagoon and the Caribbean Sea make up the remainder of the barrier that separated the lagoon from the Caribbean Sea, considering it as an independent element, separate from the continent.

Thus, in Nicaragua's view, the land boundary between the Parties began at the northeast corner of the sandbar that separates the Harbor Head lagoon from the Caribbean Sea, cuts through that sandbar and follows the water's edge around the lagoon until it joins the canal that connects the Harbor Head lagoon with San Juan Inferior. The border then follows the outline of Isla Portillos to lower San Juan. Consequently, it argued that the stretch of coastline between the Harbor Head Lagoon and the mouth of the San Juan River was under Nicaraguan sovereignty.

In spoken allegations, Nicaragua tried to reinforce its arguments with a certain tone of fatality, making the Court see that if it accepted the position of Costa Rica and decided that the coast was not under its sovereignty, "the entire structure, carefully created by the Treaty of 1858, and the awards would be dismantled" and the border would have to be revised.

Finally, in this regard, Nicaragua acknowledged in the hearings that in recent years, the channel that connected Harbor Head Lagoon with the San Juan River had "partially disappeared", and that as the rules of accretion and erosion do not apply to the current situation, consequently, "the limit should continue to be defined by the approximate location of the previous channel, so that the boundary that now separates the beach from the wetland behind it corresponds to the vegetation line"[28].

In relation to the alleged violations of the sovereignty of Costa Rica, this country stated that, "in establishing and maintaining a new military camp on the beach of Isla Portillos, Nicaragua has violated the sovereignty and territorial integrity of Costa Rica" and, in addition, it violated the December 2015 judgment. Costa Rica was referring to a military camp that was placed in August 2016 "*n*orthwest of the lagoon's sand bank and installed on the beach of the northern part of Isla Portillos", and requested that the Court order that "Nicaragua must withdraw its military camp".

Nicaragua, on the other hand, stated, firstly, that the camp was located on the "sand bank that separates Laguna de la Cabeza del Puerto from the

[28] *Ibid.*, paragraphs 63-66.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

Caribbean Sea". Later, in its allegations, Nicaragua did not contest that the camp was on the beach outside the boundaries of the sandbar that separates the lagoon from the Caribbean Sea; however, it argued that "the entire coast belongs to Nicaragua." The Nicaraguan defense argued that the Court, at that time, had not issued any decision with res judicata effect regarding the beach where the camp was located. As an alternative argument, Nicaragua argued that, even if the Court determined that the entire coastline is under Costa Rican sovereignty, the camp was still positioned on a part of the beach that belongs to Nicaragua, due to the presence of a water channel that runs behind the camp and connects with Harbor Head Lagoon[29].

In the case, divergent opinions of the Parties regarding the starting point of the land boundary were evident, when they explained the starting point of the maritime delimitation in the Caribbean Sea. For Costa Rica, the maritime delimitation should begin at the mouth of the San Juan River; however, aware of the instability of the coast and, in particular, the characteristics near the point where the San Juan River flows into the Caribbean Sea, it suggested that the starting point of the maritime delimitation not be located at the western end of the mouth of the river where the sand accumulates, but on "the solid ground of Isla Portillos"[30].

Nicaragua, on the other hand, maintained that, according to the Treaty of 1858 and the Cleveland's award, the land border line began "at the end of Punta de Castilla at the mouth of the San Juan River in Nicaragua, since both existed on April 15th, 1858", and that this point should be used for the maritime delimitation in the Caribbean, even if it had been submerged by the sea[31].

Costa Rica maintained that, in terms of the enclave under the sovereignty of Nicaragua, a starting point could not be established for the maritime delimitation on the sandbank that separates the Harbor Head lagoon from the Caribbean Sea, due to the general characteristics of the sandbank and, in particular, its instability. Nicaragua addressed the issue of the starting points of the maritime delimitation related to the enclave only as an alternative, in the event that the Court did not accept its main argument that the starting

[29] *Ibid.*, paragraphs 74-76.

[30] *Ibid.*, paragraphs 79-80.

[31] *Ibid.*, paragraph 81.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

point of the maritime delimitation is the same point identified by General Alexander as the starting point for the land boundary[32].

Costa Rica argued that the Court should first delimit the boundaries of the Parties in the territorial sea, and then -using another method- that of the exclusive economic zone and the continental shelf. It understood the delimitation of the territorial sea in accordance with Article 15 of the United Nations Convention on the Law of the Sea (UNCLOS) and the delimitation of the exclusive economic zone and the continental shelf under the parameters of Articles 74 and 83 of the same Convention.

Nicaragua, on the other hand, argued that Article 15 of the United Nations Convention on the Law of the Sea does not stipulate how delimitation should be effected, but only how States should act in the event of an agreement not being reached on delimitation. It also emphasized that there was no practical difference between the delimitation regime of the territorial sea and the regime applicable to the delimitation of the exclusive economic zone and the continental shelf, described respectively in Articles 15, 74 and 83 of the UNCLOS. In their opinion, "the approaches to the delimitation of the different maritime zones are convergent" and all the relevant provisions of the UNCLOS should be read together and in context.

Regardless of the above, the Parties - in accordance with the jurisprudence of the Court - agreed that, for the delimitation of the territorial sea, it was first necessary to establish the equidistance line. They then proceeded to discuss it by drawing a provisional equidistant line, and subsequently argue whether special circumstances existed that would justify the adjustment of the same[33]. The agreement of the parties on the solution criteria applied in the jurisprudence favors the resolution of the conflict[34].

Both Costa Rica and Nicaragua requested that the Court draw a single delimitation line for their exclusive economic zones and continental shelves.

---

[32] *Ibid.*, paragraphs 87-88.

[33] *Ibid.*, paragraphs 91-94.

[34] See: López Martín, A. G., "La labor de la Corte Internacional de Justicia en el arreglo de las controversias territoriales. Una aproximación a los criterios de solución aplicados en su jurisprudencia", El Derecho internacional en el mundo multipolar del siglo XXI. Obra Homenaje al profesor Luis Ignacio Sánchez Rodríguez (S. Torres Bernárdez, J.C. Fernández Rozas, C. Fernández de Casadevante Romaní, J. Quel López, A.G. López Martín coords.), Iprolex, Madrid, 2013, pp. 513-533.

They also recognized the need to identify the relevant coasts that could generate projections that overlap between their coasts, but, as would be expected, they do so with different approaches. Nicaragua argued that a coastline segment can be considered relevant only if its frontal projection "overlaps with the projection to the sea from the coast of the other Party". Costa Rica maintained that, with some exceptions, the relevant coasts are determined through the establishment of coasts that generate overlapping rights using radial projections[35].

Although the Parties differed in their methods, they reached almost identical approaches with respect to the relevant coasts in the Caribbean Sea. Nicaragua maintained that "its relevant coast includes the coast up to Coconut Point", while the entire Costa Rican coast was relevant. Costa Rica adopted the same position with respect to its own coast, but considered that "only the coast of Nicaragua that ends at or near Punta de Perlas is relevant"[36].

However, depending on the configuration of the relevant coasts in the general geographical context, the relevant area may include certain maritime spaces and exclude others that are not related to the case in question[37]. Therefore, the concept of the relevant area or area should be taken into account as part of the maritime delimitation methodology[38].

The Parties agree that the relevant area or zone should not include the spaces attributed to Colombia based on the 2012 judgment and those attributed to Panama by the 1980 bilateral treaty with Costa Rica[39]. In this sense, they were consistent with what the Court declared in the Territorial and Maritime Dispute of Nicaragua against Colombia:

[35] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 107-109.

[36] *Ibid.*, paragraph 110.

[37] International Court of Justice. Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II), paragraph 157.

[38] International Court of Justice. Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. *Reports* 2009, page 99, paragraph 110.

[39] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraph 117).


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

> The Court recalls that the relevant area cannot be extended beyond the area in which the rights of both Parties overlap. Consequently, if one of the Parties has no right in a particular area, either by an agreement with a third State or because that area is outside a judicially determined limit between that Party and a third State, that area cannot be treated as part of the relevant area for the present purposes[40].

In the north, to determine the relevant area, Nicaragua argued that a line should be drawn perpendicular to the general direction of the coast, starting from Punta Coco, until it reaches the border with Colombia. Costa Rica, on the other hand, argued that the relevant zone should also include the waters that fall "within the radial projection of other parts of the coast that are relevant".

In terms of the south, in order to define the relevant area, Costa Rica adopts a theoretical line that continues in the direction of its maritime boundary with Panama, as established in its 1980 bilateral treaty. Nicaragua's position on the relevant zone is that it must be limited to the south by the lines drawn in the 1980 Treaty between Costa Rica and Panama and in the 1977 Treaty between Costa Rica and Colombia. However, it argued that if the Court adopted the position of Costa Rica on the 1977 Treaty and extended this area beyond the established limits, its limit would be the line established in the 1976 Treaty between Panama and Colombia[41].

The Parties, aware that the Court would delimit the exclusive economic zone and the continental shelf according to its three-step methodology -as it did in the case of maritime delimitation in the Black Sea-, first drawing, provisionally, an equidistant line using the most appropriate base points on the relevant coasts; then considering whether there were relevant circumstances that could have justified an adjustment of the equidistance line drawn; and finally, evaluating the global equity of the border resulting from the first two stages, verifying if there is a marked disproportionality between the length of the relevant coasts and the maritime areas therein; - agree with regard to the selection of base points, except in two issues:

[40] International Court of Justice. Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II), paragraph 163).

[41] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 118-119.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

First, that Costa Rica, while acknowledging that in the territorial and maritime dispute between Nicaragua and Colombia, the Corn Islands had full effect on the delimitation, argued that in this case, the delimitation was different, because it referred to "the opposite coasts of opposite islands" and not adjacent coasts, thus opposing the placement of base points on them. Nicaragua, on the other hand, argued that, considering the proximity of Corn Islands to the continent, "to ignore them as base points" would have meant erasing an integral component of the coast of Nicaragua from the map, since these islands were capable of generating an exclusive economic zone and a continental shelf[42].

Second, Costa Rica argued that the base points should not be located in the small insular features located along the coast, such as Paxaro Bovo and Palmenta Cays, and stressed that the islets, cays and rocks do not generate rights to an exclusive economic area or continental shelf. On the contrary, Nicaragua argued that these maritime features can provide baselines for the construction of the provisional equidistance line, because they are "fringe islands" that "form an integral part of the Nicaraguan coast"[43].

Both Parties believed that an adjustment of the provisional equidistance line was necessary for the delimitation of the exclusive economic zone and the continental shelf, but supported their claim on different circumstances. Nicaragua argued that it would suffer a cutting effect caused by "the convex and northern-oriented nature of the coast of Costa Rica in Punta Castilla, immediately adjacent to the concave coast of Nicaragua", hence the need to adjust the line to achieve an equitable result. Costa Rica contested Nicaragua's argument, because the convexity and concavity invoked could not be characterized as "marked" and, although it was inevitable, it did not consider it unfair[44].

With regard to the starting point of the maritime delimitation in the Pacific Ocean, Costa Rica and Nicaragua agreed that it was the midpoint of the closure line of Salinas Bay, and that the closure line was the one taken

[42] *Ibid.*, paragraphs 138-139.

[43] *Ibid.*, paragraph 141.

[44] *Ibid.*, paragraphs 147-149.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

between Punta Zacate, in Costa Rican territory, and Punta Arranca Barba, in Nicaraguan territory[45].

However, in order to establish the mid-line in the territorial sea, Costa Rica selected a series of base points on some islets just off Punta Zacate and Punta Descartes, as well as two other points located on a protrusion towards the sea on the peninsula of Santa Elena, called Punta Blanca. Nicaragua argued that the configuration of the coast, in the vicinity of Salinas Bay, was a special circumstance that requires the Court to adjust the equidistance line in the territorial sea. It understood that the peninsula of Santa Elena had a distortion effect on the line of equidistance, since it began at the first turning point, controlled by the base points on Punta Blanca, which notably cuts Nicaraguan coastal projections in the territorial sea. Consequently, Nicaragua requested that the Court adjust the equidistance line by deducting the base points on the Santa Elena Peninsula that would cause the boundary to be diverted to the coast of Nicaragua[46].

The Parties also disagreed as to whether the configuration of the coast constitutes a special circumstance in terms of Article 15 of the UNCLOS, which would justify an adjustment of the provisional middle line in the territorial sea. The problem is whether the location of base points on the Santa Elena Peninsula has a significant distorting effect on the provisional median line, which would result in a cut-off of the coastal projections of Nicaragua within the territorial sea[47].

For the purpose of delimiting the maritime boundary for the exclusive economic zone and the continental shelf in the Pacific Ocean, and aware of the methodology established by the Court, each Party elaborated its arguments regarding the relevant coasts and the relevant area or zone. Costa Rica argued that the entire Nicaraguan coast, from Punta Arranca Barba to Punta Cosigüina, is relevant for the purposes of delimitation in the Pacific Ocean. It also argued that its own relevant coastline was divided into two parts. That which extended from Punta Zacate to Cabo Blanco in the Nicoya Peninsula, and from Punta Herradura to Punta Salsipuedes.

[45] *Ibid.*, paragraph 169.

[46] *Ibid.*, paragraphs 170-171.

[47] *Ibid.*, paragraph 174.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

Nicaragua argued that its relevant coast in the Pacific Ocean goes from Punta La Flor in Salinas Bay, to Corinto Point. With regard to the relevant coast of Costa Rica, Nicaragua maintains that it includes only the coast from Punta Zacate in the Bay of Salinas to Punta Guiones in the Nicoya Peninsula[48].

Regarding the relevant area, Costa Rica argued that maritime areas should be considered relevant for the purposes of delimitation only if both Parties have a potential right over them. Similarly, it argued that while the identification of the relevant area does not need to be exact, it identified the relevant area with the use of radial projections. In this case, a relevant area enclosed within a 200-nautical-mile radius envelope of arcs was produced, which identifies the area of potential rights superimposed between the Parties, and borders to the north on a straight line that begins at Punta Cosigüina and perpendicular to the direction of the Nicaraguan coast[49].

Nicaragua agreed with Costa Rica that the relevant area is identified by reference to the areas in which the possible maritime rights of the Parties overlap. However, it argued that the relevant area should be identified through the use of frontal coastal projections. Consequently, Nicaragua suggests that the relevant area should be bounded by the 200 nautical mile limits of the exclusive economic zones of the Parties in the west, by a line perpendicular to the general direction of the Costa Rica coast between Cabo Velas and Punta Scripts and starting at Punta Guiones in the south, and by a line perpendicular to the general direction of the coast of Nicaragua starting from the point of Corinth in the north[50].

To draw the provisional equidistance line in the exclusive economic zone and on the continental shelf, Costa Rica identified on its own coast a series of base points in the peninsula of Santa Elena, located in the characteristics named Punta Blanca and Punta Santa Elena. In addition, Costa Rica indicated a base point on the Nicoya Peninsula, located at Cabo Velas, which controls the provisional equidistance line, beginning at a point approximately 120 nautical miles from the Parties coast. On the coast of Nicaragua, Costa Rica identifies a series of base points in the vicinity of Punta Sucia, Punta Pie

[48] *Ibid.*, paragraphs 176-178.

[49] *Ibid.*, paragraph 182.

[50] *Ibid.*, paragraph 183.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

del Gigante and Punta Masachapa. In this way, Costa Rica maintains that its provisional equidistant line and the provisional equidistant line in Nicaragua are not materially different[51].

Nicaragua agreed that the base points selected by Costa Rica on the Nicaraguan coast faithfully reflect the macro-geography of the area. However, Nicaragua points out that, were it not for the existence of the Nicoya Peninsula, the provisional equidistance line would be essentially perpendicular to the general direction of the Parties' coast. However, the provisional equidistance line of Nicaragua did not differ from that suggested by Costa Rica[52].

Costa Rica maintained that there is no relevant circumstance that could justify an adjustment of the provisional equidistance line in the Pacific Ocean. It argued that although the Santa Elena Peninsula and the Nicoya Peninsula are significant geographical features, they were not capable of producing an unequal effect by distorting the provisional equidistance line to the detriment of Nicaragua. Likewise, it argued that the disparity between the length of the relevant coasts of the Parties was not sufficiently marked to require the adjustment of the provisional equidistance line, and that there was no coastal concavity that unequally disrupted the coastal projections of Nicaragua[53].

Conversely, Nicaragua argued that the provisional equidistance line in the Pacific Ocean produced a marked and unjustified cut of its coastal projections, since the direction of the coasts of the peninsula of Santa Elena and the Nicoya peninsula does not correspond to the general direction of the coast of Costa Rica. Nicaragua considered that the placement of base points in these characteristics led to a provisional equidistance line that deviated to the north, thus cutting its coastal projections and excessively distorting the provisional equidistance line if it were not adjusted. Hence, Nicaragua argued that an equitable solution with respect to the exclusive economic zone and the continental shelf could be achieved by giving effect to half of both the Santa Elena peninsula and the Nicoya peninsula[54].

---

[51] *Ibid.*, paragraph 186.

[52] *Ibid.*, paragraph 187.

[53] *Ibid.*, paragraph 190.

[54] *Ibid.*, paragraph 191.

## VI. THE COURT'S PRONOUNCEMENTS

In the first place, the Court emphasized that "the principle of res judicata, as reflected in articles 59 and 60 of its Statute, is a general principle of law that protects, at the same time, the judicial function of a court or tribunal court and the Parties in a case that has resulted in a final judgment without appeal[55]." However, for the res judicata to be applied in a specific case, the Court, as it pronounced in the cases of the delimitation of the continental shelf between Nicaragua and Colombia, beyond 200 nautical miles from the Nicaraguan coast[56], and in the case concerning the application of the Convention for the Prevention and Punishment of the Crime of Genocide, "must determine whether the first claim has been definitively resolved yet", since, if this has not actually been determined, neither expressly nor by necessary implication, no force of res judicata can be applied[57].

Similarly, the Court recalls that the operative part of its 2015 judgment established that Costa Rica had sovereignty over the territory in dispute, as defined in paragraphs 69-70 of that Judgment[58]. The term "disputed territory" was described in those paragraphs as "*t*he northern part of Isla Portillos, that is, the wetland area of about 3 square kilometers between the right bank of the disputed channel, the right bank of the San Juan River up to its mouth in the Caribbean Sea and the Harbor Head Lagoon". However, the Court noted that the territory in dispute "does not refer specifically to the

---

[55] Tremolada, E. "La cosa juzgada en las sentencias de la Corte Internacional de Justicia, en las disputas de Nicaragua contra Colombia y de Perú contra Chile", *La arquitectura del ordenamiento internacional y su desarrollo en materia económica* (E. Tremolada editor), Universidad Externado de Colombia, Bogotá, 2015 pp. 83-102.

[56] Corte Internacional de Justicia. Cuestión de la delimitación de la plataforma continental entre Nicaragua y Colombia más allá de 200 millas náuticas de la costa nicaragüense (Nicaragua, Colombia), Excepciones preliminares, Sentencia, ICJ *Reports* 2016, pages 125-126, paragraphs 58-60.

[57] Corte Internacional de Justicia. Asunto relativo a la aplicación de la Convención para la Prevención y la Sanción del Delito de Genocidio (Bosnia y Herzegovina v. Serbia y Montenegro), Sentencia, ICJ *Reports* 2007 (I), page 95, paragraph 126.

[58] International Court of Justice. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. *Reports* 2015*,* pages 697 & 740, paragraphs 69 & 229.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

stretch of coastline bordering the Caribbean Sea between the Harbor Head Lagoon, which both Parties consider to be Nicaraguan, and the mouth of the San Juan River"[59].

The Court also recalled that the Parties on that occasion "did not address the issue of the precise location of the mouth of the river, nor did they provide detailed information on the coast. Neither of the Parties requested that the Court define the limit with greater precision with respect to this coast. As a consequence, the Court will abstain from doing so"[60]. Thus, making it clear that no decision had been made in its 2015 judgment on the question of sovereignty over the coast of the northern part of Portillo Island, since it had been expressly excluded, so it was not possible that the sovereignty issue regarding that part of the coast were res judicata.

Similarly, in its 2015 judgment, the Court interpreted that the Treaty of 1858 stipulated that "*t*he territory under Costa Rica's sovereignty extends to the right bank of the San Juan Inferior river until it reaches the Caribbean Sea"[61]. However, the absence of "detailed information", which had been observed in the 2015 judgment, had left the geographical situation of the area in question unclear with respect to the configuration of the coast of Isla Portillos, in particular with respect to the existence of characteristics on the coast and the presence of a channel that separates the wetland from the coast.

Hence, the need for an evaluation carried out by the experts appointed by the Court and that was not contested by the Parties, dispelling any uncertainty about the current configuration of the coast and the existence of a channel that connects the San Juan River with the Lagoon Harbor Head. Experts stated, among other things, that there was no longer a water channel connecting the San Juan River with Harbor Head Lagoon. As there was no channel, there could be no limit running along it, dismissing Nicaragua's claim that "the limit should continue to be defined by the approximate location of the previous channel", since it ignored the fact that the channel in question, as it existed at the time of the Alexander awards, was to the north of the current beach and, as the experts pointed out, had been submerged by the sea, due to coastal recession. Therefore, the Court determined that Costa Rica has

[59] *Ibid.*, paragraph 70.

[60] *Ibid.*

[61] *Ibid.*, page 703 paragraph 92.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

sovereignty over all of Portillos Island, up to the point where the river reaches the Caribbean Sea. It added that this and the 2015 trial showed that the starting point of the land limit was the point where the right bank of the San Juan River reaches the low-water line of the Caribbean coast. A point that is currently at the end of the sandy area that constitutes the right bank of the San Juan River at its mouth[62].

However, as indicated in the 2015 trial, the Parties agreed that Nicaragua had sovereignty over Harbor Head Lagoon[63], which is why Costa Rica requested that the Court determine the precise location of the land limit that separates both ends of the sandbank, and in doing so, also determine that the only Nicaraguan territory existing today in the area of Isla Portillos is limited to the Los Portillos - Harbor Head Lagoon enclave.

In relation to the sandbar that separates the lagoon from the Caribbean Sea, the experts established that although there are temporary channels in the barrier, it is above the water level, even at high tide. This expertise was not contested by the Parties and helped the Court to understand that the Parties agreed that both Harbor Head Lagoon and the sandbank that separates it from the Caribbean Sea are under the sovereignty of Nicaragua[64].

On the alleged violations of Costa Rica's sovereignty, the Court noted that the experts have established that the edge of the northwestern end of the Harbor Head lagoon is located to the east of the site of the military camp. Thus, the Court concludes that the military camp was placed by Nicaragua on the beach near the sandbar, but not on it. The installation of the camp thus violated the territorial sovereignty of Costa Rica, hence its withdrawal. However, it was specified that Nicaragua did not breach the 2015 judgment because, as noted above, the limit with respect to the coast had not been defined on that occasion. Therefore, the Court considered that the declaration

[62] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraph 71

[63] International Court of Justice. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. *Reports* 2015, page 697, paragraph 70.

[64] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 72-73.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

of a violation of the sovereignty of Costa Rica and the order addressed to Nicaragua to withdraw its camp from the territory constituted an adequate reparation[65].

The Court recalled that the point of departure of the land boundary is normally used to determine the starting point of maritime delimitation. However, given that the point of departure of the land border in this case is currently at the end of the sandy area bordering the San Juan River where the river reaches the Caribbean Sea and -in accordance with the designated experts' indication- the great instability of the coastline in the area of the mouth of the San Juan River, prevented the identification in the sandbox of a fixed point that was suitable as a starting point for the maritime delimitation, the Court preferred to select a fixed point at sea and connect it to the starting point on the coast using a mobile line. Taking into account the fact that the phenomenon that characterizes the coast at the mouth of the San Juan River is the recession caused by the erosion of the sea, it was considered appropriate to place a fixed point in the sea at a distance of 2 nautical miles from the coast in the middle line[66].

The Court, in accordance with the agreement of the Parties and its jurisprudence in matters of maritime delimitation and territorial issues between Qatar and Bahrain[67] and territorial and maritime dispute between Nicaragua and Honduras[68], proceeded in two stages for the delimitation of the territorial sea. First, it established a provisional middle line; and second, it considered whether there were special circumstances that justified the adjustment of said line.

The Court constructed the provisional middle line to delimit the territorial sea only on the basis of points located on the natural coast, which may include points located on islands or rocks. The points used were landmarks

[65] *Ibid.*, paragraphs77-78.

[66] *Ibid.*, paragraph 86.

[67] Corte Internacional de Justicia. Delimitación marítima y cuestiones territoriales entre Qatar y Bahrein (Qatar v. Bahrein), Fondo, Sentencia, ICJ *Reports* 2001, page 94, paragraph 176.

[68] International Court of Justice. Case concerning Territorial and Maritime dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras). Judgment, I.C.J., 8 of October 2007, *Reports* 2007 (II), page 740, paragraph 268.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

located on solid ground and therefore have a relatively higher stability than the points placed on the sandy features.[69]

Regarding whether there were special circumstances that justified the adjustment of said line, the Court considered two special circumstances: first one, the high instability and narrowness of the sandy area near the mouth of the San Juan River, which constitutes a barrier between the Caribbean Sea and important territory belonging to Nicaragua, which did not allow it to select a base point in that part of the Costa Rican territory. For this reason, it opted for a fixed point at sea, in the middle line, connected by a mobile line to whichever point on the mainland of the Costa Rican coast that is closest to the mouth of the river. A point that, by the way, had been identified by the designated experts and recognized as the situation of the coast at that time[70].

The second special circumstance considered by the Court for the delimitation of the territorial sea was the instability of the sandbar that separates the Harbor Head lagoon from the Caribbean Sea and its situation as a small enclave within the territory of Costa Rica. Reflecting on this, it concluded that if territorial waters were attributed to the enclave, they would be of little use for Nicaragua, while breaking the continuity of the territorial sea of Costa Rica. This consideration was decisive in the delimitation in the territorial sea, since it did not take into account any right that could result from the enclave[71].

Regarding the delimitation of the exclusive economic zone and the continental shelf, the Court considered the entire continental coast of Costa Rica relevant - coinciding with the Parties - and the continental coast of Nicaragua to Punta Gorda in the north, where the coast shows a significant inflection. At the same time, it rejected the inclusion of the coasts of the Corn Islands and the Pearl Cays as relevant, because of the way in which the former are projected and the absence of evidence of human habitability with respect to the latter.

Thus, and given that the relevant coasts of Nicaragua and Costa Rica are not characterized by sinuosity, the length of the relevant coasts was measured

[69] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraph 100.

[70] *Ibid.*, paragraph 104.

[71] *Ibid.*, paragraph 105.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

on the basis of their natural configuration, resulting in a total length of the coasts of 228.8 km for Costa Rica and 465.8 km for Nicaragua, that is, a ratio of 1: 2.04 in favor of Nicaragua[72].

In relation to the relevant areas or zones, the Court considered that, with the exception of the space allocated to Colombia in the 2012 judgment, the area where there are overlapping projections in the north includes all maritime space located at a distance of 200 nautical miles from the coast of Costa Rica. On the other hand, in the south, the situation was more complicated, due to the presence of claims from third States, regarding which the Court could not pronounce:

> When the areas are included solely for the purpose of roughly identifying the overlapping rights of the Parties in the case, which may be considered to constitute the relevant area - and which will eventually participate in the final stage of tests of disproportionality -, the rights of third parties cannot be affected[73].

As indicated in the territorial and maritime dispute of Nicaragua versus Colombia, the Judgment of the Court could only address the maritime boundary between the Parties, "*w*ithout prejudice to any claim by a third State or any claim that any of the Parties may have against a third State"[74]. In other words, the ruling could refer to those claims, but could not determine whether they are well founded[75].

Based on the above, the Court observed that the 1976 Treaty between Panama and Colombia involved third States and could not be considered relevant for the delimitation between the Parties. Similarly, with respect to the 1977 Treaty between Costa Rica and Colombia - not ratified - the Court specified that there was no evidence of a Costa Rican waiver of its maritime

[72] *Ibid*., paragraphs 111-114.

[73] Corte Internacional de Justicia. Delimitación marítima en el mar Negro (Rumania c. Ucrania). Sentencia, I.C.J. *Reports* 2009, page 100, paragraph 114.

[74] International Court of Justice. Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II), paragraph 228.

[75] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 120-123.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

rights, and if it had ever occurred, it would certainly not have intended to be effective with respect to a State other than Colombia[76].

In order to define the single maritime boundary relative to the exclusive economic zone and the continental shelf, the Court was to "achieve an equitable solution" in accordance with Articles 74 and 83 of the UNCLOS. Once again, it used its established three-step methodology. It provisionally drew an equidistant line, using the most appropriate base points, then considered whether there were relevant circumstances that justified an adjustment of the equidistance line drawn, and finally evaluated the overall equity of the frontier resulting from the first two stages, verifying whether there was a marked disproportionality between the length of the relevant coasts and the maritime areas that were in them[77].

This required a previous clarification from the Court, with respect to the most appropriate base points. The conclusion was that they could be placed in the Corn Islands, to construct a line of provisional equidistance, given that these islands have a significant number of inhabitants and maintain economic life, largely satisfying the requirements set forth in article 121 of the UNCLOS[78].

*Palmenta Cays*, a group of marginal islands bordering the Nicaraguan coast, and *Paxaro Bovo,* a rock located 3 nautical miles off the south coast of Punta del Mono, were considered appropriate by the Court to place baselines in both features and construct the provisional equidistance line[79]. The Court reached this conclusión, recalling the relevance it also gave to a group of

[76] *Ibid.*, paragraph 134.

[77] Corte Internacional de Justicia. Delimitación marítima en el mar Negro (Rumania c. Ucrania). Sentencia, I.C.J. *Reports* 2009, pages 101-103, paragraphs 115-122. International Court of Justice. (2012). Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II), pages 695-696, paragraphs 190 -193. Corte Internacional de Justicia. (2014). Disputa marítima (Perú c. Chile), Sentencia, ICJ *Reports* 2014., page 65, paragraph 180.

[78] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraph 140.

[79] *Ibid.*, paragraph 142.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

marginal islands in the maritime delimitation in the Black Sea, where such formations could be assimilated to the coast[80].

The Court, for the adjustment or displacement of the equidistance line, fundamentally considered the effect that should be given to the Corn Islands in the determination of the maritime boundary. It concluded that, although they have the right to generate an exclusive economic zone and a continental shelf, they are located at approximately 26 nautical miles from the continental coast and their impact on the provisional equidistance line is disproportionate to their limited size[81]. Thus, based on indications from the International Tribunal for the Law of the Sea in the delimitation of the maritime boundary in the Bay of Bengal:

> The effect that will be given to an island in the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf depends on the geographical realities and circumstances of each specific case. There is no general rule in this regard. Each case is unique and requires specific treatment; the ultimate goal is to reach a solution that is fair[82].

It resolved that, given its limited size and significant distance from the continental coast, the Corn Islands would only enjoy half of the effect, producing an adjustment of the equidistance line in favor of Costa Rica[83].

The Court dismissed Nicaragua's alleged combination of a convex coast of Costa Rica near Punta de Castilla and its own concave coast, since it had a limited effect on the border line, not being significant enough to justify an adjustment of the line. In the same way, the general concavity of the Costa

[80] Corte Internacional de Justicia. Delimitación marítima en el mar Negro (Rumania c. Ucrania). Sentencia, I.C.J. *Reports* 2009, page 109, paragraph 149.

[81] Quindimil, J. "Fronteras marítimas y tribunales internacionales: la delimitación marítima a la luz de la jurisprudencia del Tribunal Internacional del Derecho del Mar", *Gobernanza, cooperación internacional y valores democráticos comunes* (E. Tremolada editor), Universidad Externado de Colombia, Bogotá, 2019, pp. 105-123

[82] Tribunal Internacional para el Derecho del Mar. Delimitación de la frontera marítima en la bahía de Bengala (Bangladesh / Myanmar). Sentencia, ITLOS *Reports* 2012, page 86, paragraph 317.

[83] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 153-154.

Rican coast and its relations with Panama could not justify an adjustment of the equidistance line in its relations with Nicaragua[84].

Finally, regarding the third stage, the Court had to verify whether there was a significant disproportionality. This aspect was linked to the Court's assessment that it should rule in terms of the general geography of the area: "this continues in each case to be a question of the Court's appreciation; it will rule in reference to the general geography of the area"[85].

In addition, the Court - as evidenced by the issues of maritime delimitation in the Black Sea and the territorial and maritime dispute between Nicaragua and Colombia – has no intention of making precise calculations, bearing in mind that what it seeks is an equitable delimitation: "The calculations of the relevant area are not intended to be precise, but rather merely approximate and the purpose of delimitation is to achieve a delimitation that is equitable, not an equitable distribution of maritime areas"[86].

Thus, the tendency of the Court is not to apply a principle of strict proportionality. The maritime delimitation is not designed to produce a correlation between the lengths of the relevant coasts of the Parties and their respective quotas of the relevant area. What the judges seek is to verify a significant disproportionality[87]. Hence, for this case and at this stage of delimitation, the Court endeavored to ensure that there is no disproportion so serious as to corrupt the result in such a way that it would become inequitable[88].

Based on the above, the Court estimated the relevant area by dividing the maritime boundary of 73,968 square kilometers of Nicaragua among the 30,873 square kilometers of Costa Rica, resulting in a ratio of 1: 2.4 in favor of Nicaragua. It did not consider this relation of coastal lengths to show any

[84] *Ibid.*, paragraphs 155-156.

[85] Corte Internacional de Justicia. Delimitación marítima en el mar Negro (Rumania c. Ucrania). Sentencia, I.C.J. *Reports* 2009, page 129, paragraph 213.

[86] *Ibid.*, paragraphs page 100, paragraph 111 and International Court of Justice. Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II), paragraph 158.

[87] Pastor Ridruejo, J. A., "El Derecho internacional del Mar y su evolución incesante" *La cooperación internacional en la ordenación de los mares y océanos* (J. Pueyo Losa, J. Jorge Urbina coords.), Iustel, Madrid, 2008, pp. 25-40.

[88] Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II), paragraphs 240-242.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

"marked disproportion". Thus, it resolved that the delimitation regarding the exclusive economic zone and the continental shelf between the Parties in the Caribbean Sea would follow the line of equidistance as it was adjusted, given that the result was not inequitable[89].

As mentioned, and based on the agreement between the Parties, the Court determines that the maritime boundary between Costa Rica and Nicaragua in the Pacific Ocean will begin at the midpoint of the Salinas Bay closure line.

The Court, in accordance with its established jurisprudence, applied Article 15 of the UNCLOS, first drawing a provisional median line and then examining whether there were special circumstances that justified its adjustment. For the construction of the provisional middle line in the case of Costa Rica and Nicaragua, they selected the same base points, which are found in certain outstanding features on their coasts and saw no reason to move away from them. Therefore, for the purpose of tracing the provisional median line in the territorial sea, the Court located basic points on certain characteristics in the vicinity of Punta Zacate, Punta Descartes and Punta Blanca on the Costa Rican coast, and on certain features in the vicinity of Punta Arranca Barba, Punta La Flor, Frailes Rocks and Punta Sucia of the coast of Nicaragua[90].

Meanwhile, as the Court had pointed out in the matters of maritime delimitation and territorial issues between Qatar and Bahrain, the continental shelf of the Libyan Arab Jamahiriya and Malta and that of the continental shelf of the North Sea "islets, rocks and coastal projections" may have a disproportionate effect on the midline. Such an effect may require an adjustment of the provisional midline in the territorial sea. However, in the vicinity of Salinas Bay, the Santa Elena peninsula cannot be considered a minor coastal projection that has a disproportionate effect on the boundary line. The coast of the peninsula of Santa Elena represents a large part of the Costa Rican coast in the area in which the Court has been requested to delimit the territorial sea. In addition, the adjustment proposed by Nicaragua in the territorial

[89] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 165-166.

[90] *Ibid.*, paragraph 172.

sea would push the boundary near the Costa Rican coast, which would significantly reduce Costa Rica's coastal projections within the territorial sea[91].

Based on the above, the Court concluded that the territorial sea in the Pacific Ocean would be delimited between the Parties by means of a median line, beginning at the midpoint of the Salinas Bay closure line.

The Court recalled that to consider a coastline relevant for delimitation purposes, it must generate projections that overlap with the projections of the other party's coastline. Since in the Pacific Ocean, the coast of Costa Rica is characterized by a certain degree of sinuosity, while the coast of Nicaragua runs largely along a straight line, the Court considered it appropriate to identify the corresponding coasts of both Parties by means of straight lines and noted that the positions of the Parties do not differ significantly with respect to the identification of the relevant coast of Nicaragua. Thus, it considered that the entire Nicaraguan coast, from Punta Arranca Barba to Punta Cosigüina, generates potential maritime rights that overlap with those of Costa Rica. In the geographical circumstances of the present case, this conclusion does not change if the potential maritime rights are generated by the radial projection method or by the frontal projections method. The length of the relevant coast of Nicaragua, identified and measured, is 292.7 kilometres long[92].

As the parties' arguments regarding Costa Rica's relevant coastline differed significantly, the Court considered that Costa Rica's coastline between Punta Guiones and Cabo Blanco, as well as between Punta Herradura and Punta Salsipuedes, generates potential overlapping maritime rights with those of the corresponding coast of Nicaragua. It also considered it was appropriate to include certain parts of the Costa Rican coast south of Punta Guiones within the relevant coast. It also observed that the coasts of the Gulf of

[91] Corte Internacional de Justicia. Delimitación marítima y cuestiones territoriales entre Qatar y Bahrein (Qatar v. Bahrein), Fondo, Sentencia, ICJ *Reports* 200, page 114, paragraph 246. Corte Internacional de Justicia. Plataforma continental (Jamahiriya Árabe Libia / Malta), Sentencia, ICJ *Reports* 1985, page 48, paragraph 64. Corte Internacional de Justicia. Plataforma continental del mar del Norte (República Federal de Alemania / Dinamarca, República Federal de Alemania / Países Bajos), Sentencia, ICJ *Reports* 1969, page 36, paragraph 57.

[92] International Court of Justice. Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica V. Nicaragua) and Land Boundary in the northern part of Isla Portillos (Costa Rica V. Nicaragua). Judgment, I.C.J., 2 February, *Reports* 2018, paragraphs 179-180.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

Nicoya face one another and consider that they are not relevant for delimitation purposes. The Court concludes that the first segment of the relevant coast of Costa Rica runs along the straight lines that connect Punta Zacate, Punta Santa Elena, Cabo Velas, Punta Guiones and Cabo Blanco. The second segment of the relevant coast of Costa Rica extends along the straight lines that connect Punta Herradura, the Osa Peninsula, Punta Llorona and Punta Salsipuedes, resulting in a corresponding coast of Costa Rica, along straight lines, with a length of 416.4 kilometres[93].

The Court recalled that the relevant area, whose identification is part of the established maritime delimitation methodology, includes the maritime spaces in which the potential rights generated by the Parties' coasts are superimposed. In the case, the Court considered that both the potential maritime rights generated by the north coast of Costa Rica, and the possible maritime rights generated by the southern coast of Costa Rica, overlap with the possible maritime rights generated by the corresponding coast of Nicaragua. Thus, the Court considered that the relevant zone borders the north with a line that begins at Punta Cosigüina and that is perpendicular to the straight line that approaches the general direction of the coast of Nicaragua. In the west and in the south, the relevant area is limited by the envelope of arcs that marks the boundaries of the area in which the potential maritime rights of the Parties overlap. It specified that the coast that extends from Cabo Blanco in the northeast to the Gulf of Nicoya and up to Punta Herradura does not generate potential maritime rights that overlap with those generated by the coast of Nicaragua. Therefore, the Court considers that the maritime area toward land, of the line between Cabo Blanco and Punta Herradura and that corresponds approximately to the waters of the Gulf of Nicoya is not part of the relevant area for the purposes of delimitation. The relevant area that it identified measures approximately 164,500 square kilometers[94].

The Court agreed that the base points selected by the Parties are appropriate for drawing a provisional equidistant line in the Pacific Ocean. Thus, a provisional equidistance line for the exclusive economic zone and the conti-

[93] *Ibid.*, paragraph 181.

[94] *Ibid.*, paragraphs 184-185.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

nental shelf will begin at the end of the border in the territorial sea, and from there will follow a series of geodesic lines joining the points[95].

The Court emphasized that the arguments of the Parties regarding the adjustment of the provisional equidistance line related to two different issues: first, whether the existence of the Santa Elena peninsula results in an inequitable cut in the coastal projections of Nicaragua; second, if the existence of the Nicoya Peninsula similarly creates an inequitable cut of Nicaragua's coastal projections. Thus, it concludes that the Santa Elena peninsula is a protrusion that is close to the point of departure of the maritime border between the Parties and that as it had verified, the effect it produces within the territorial sea does not justify an adjustment of the provisional median line within the 12 nautical miles. However, it stated that the situation was different for the exclusive economic zone and the continental shelf, whose base points located on the Santa Elena peninsula controlled the course of the provisional equidistance line from the 12 nautical mile limit of the territorial sea to a point located approximately 120 nautical miles from the coasts of the Parties, considering that such base points have a disproportionate effect in the direction of the provisional equidistance line. The Court also considers that, beyond the territorial sea, the effect of the Santa Elena peninsula on the provisional equidistance line results in a significant cutoff of the coastal projections of Nicaragua; a court effect that was not equitable[96].

For these reasons, the Court considered it appropriate to adjust the provisional equidistance line for the exclusive economic zone and the continental shelf, specifying - as it did in the territorial and maritime dispute of Nicaragua against Colombia - that any adjustment made to remedy an inequitable cut to Nicaragua's detriment should not create an inequitable cut to the detriment of Costa Rica (International Court of Justice, 2012, paragraph 216). As an appropriate method to achieve an equitable solution and to reduce the limit of coastal projections created by the presence of the Santa Elena Peninsula, it welcomed Nicaragua's argument giving half of its effect to that peninsula[97].

Regarding the Nicoya peninsula - a large landmass, which corresponds to one seventh of the territory of Costa Rica, and a large population – , it is a

[95] *Ibid.*, paragraphs 188-189.

[96] Ibid., paragraphs 192-193.

[97] *Ibid.*, paragraph 194.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

prominent part of the continent of Costa Rica, which the Court understood could not be given any less than a total effect, when delimiting the boundary in the exclusive economic zone and on the continental shelf[98].

Finally, regarding the test of disproportionality, the Court reminded us that the corresponding coast of Costa Rica in the Pacific Ocean has a length of 416.4 kilometers and the corresponding coast of Nicaragua in the Pacific Ocean has a length of 292.7 kilometers. Thus, the two relevant coasts are in a ratio of 1: 1.42 in favor of Costa Rica. Additionally, the Court considered that the maritime boundary established between the Parties in the Pacific Ocean divides the relevant area in such a way that approximately 93,000 square kilometers of that area correspond to Costa Rica and 71,500 square kilometers of that area belongs to Nicaragua. The relation between the maritime areas found for the Parties is 1: 1.30 in favor of Costa Rica[99].

## VII. CONCLUSIONS

This resolution - in principle - should be the epilogue to the multiple controversies that have arisen between Costa Rica and Nicaragua, which ends up clarifying any doubts that may have remained regarding territorial sovereignty and limits between them. However, good faith is a principle of international relations that is not always practiced. From a legal perspective, and in light of the proposals of the Parties, the statements of the International Court of Justice establish and ratify precedents in the matter of territorial and maritime disputes[100], as follows:

First, regarding the application of res judicata, specifying - as it already had in the case of Nicaragua against Colombia over the extended continental shelf – that it must be determined whether in the first proceeding everything that was debated was definitively resolved, since, if this has not actually been determined, neither expressly nor by necessary implication, no force of res judicata can be applied.

[98] *Ibid.*, paragraphs 195-196.

[99] *Ibid.*, paragraph 202.

[100] Sobrino Heredia, J. M., "La mar, un escenario abierto", *Mares y Océanos en un mundo en cambio: Tendencias jurídicas, actores y factores* (J. M. Sobrino Heredia coord.), Tirant lo Blanch, Valencia, 2007, pp. 23-37.

Second, in relation to the violation of the Costa Rica's sovereignty by installing a Nicaraguan military camp, it was determined that this did exist, its withdrawal was ordered, but it was made clear that the 2015 judgment was not ignored, precisely because the limit with respect to the coast had not been defined (judged) on that occasion. Hence, the withdrawal order addressed to Nicaragua was to be considered an adequate reparation.

Third, the two-stage method for delimitation of the territorial sea was reiterated by establishing a provisional middle line and then verifying whether there were special circumstances that justified the adjustment of the aforementioned line, as had been established in the matters of maritime delimitation and issues between Qatar and Bahrain and in the territorial and maritime dispute between Nicaragua and Honduras.

Fourth, regarding the delimitation of the exclusive economic zone and the continental shelf, the Court recalls the need to identify the relevant coasts to determine the length and the resulting relationship between them. The Court also reiterated, in accordance with the provisions of the maritime delimitation issue in the Black Sea[101], the need to establish the relevant areas or zones in order to approximately identify the overlapping rights of the Parties -which will be taken into account in the disproportionality test- and the rights of third parties that cannot be affected; the latter in accordance with that stated in the territorial and maritime dispute of Nicaragua v. Colombia in 2012.

Fifth, in order to define the single maritime boundary relative to the exclusive economic zone and the continental shelf, both in the Caribbean Sea and in the Pacific Ocean, the Court was to "achieve an equitable solution" in accordance with articles 74 and 83 of the UNCLOS, as had happened in the cases of the maritime delimitation in the Black Sea[102], of the territorial and maritime dispute of Nicaragua v. Colombia[103] and in the maritime dispute of Peru v. Chile[104]. Thus, once again, the Court used the three-stage methodology: Provisionally drew an equidistant line using the most appropriate

[101] Corte Internacional de Justicia. Delimitación marítima en el mar Negro (Rumania c. Ucrania). Sentencia, I.C.J. *Reports* 2009.

[102] *Ibid.*

[103] International Court of Justice. Territorial and Maritime Dispute (Nicaragua v. Colombia): Judgment, I.C.J., 19 November, *Reports* 2012 (II).

[104] Corte Internacional de Justicia. Disputa marítima (Perú c. Chile), Sentencia, ICJ *Reports* 2014.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

base points, considered if there were relevant circumstances that justified an adjustment of the equidistance line drawn and evaluated the overall equity of the resulting boundary of the first two stages, checking if there was a marked disproportionality between the length of the relevant coasts and the maritime areas that were in them.

Sixth, based on the ruling regarding the delimitation of the maritime boundary in the Bay of Bengal, issued by the International Tribunal for the Law of the Sea, the Court specified that the effect that an island would have on the delimitation of the maritime boundary in the exclusive economic zone and the continental shelf would depend on the geographical realities and the circumstances of the specific case. It made it clear that there is no general rule in this respect; each case is unique and requires specific treatment, since the final objective is to reach a fair solution.

Seventh and last, regarding the verification of the existence of a significant disproportionality, the Court - as it did in the cases of maritime delimitation in the Black Sea and the territorial and maritime dispute of Nicaragua v. Colombia in 2012 - makes it clear that it does not intend to make precise calculations, bearing in mind that what it seeks is an equitable delimitation. In other words, the maritime delimitation is not designed to produce a correlation between the relevant coast lengths of the Parties and their respective quotas of the relevant area; the Court's effort is focused on guaranteeing that there is not a disproportion so serious as to corrupt the result in such a way that it would become inequitable[105].

## BIBLIOGRAPHICAL REFERENCES

-AMR, M. S. M., *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* , Kluwer, La Haya, 2003.

-BARBERIS, J., "El territorio del Estado", CEBDI , vol. IV, 2000.

-CAMPOS, A.; OCONITRILLO, K. D.; PONS, L. & RIVERA, I. *El conflicto jurídico ambiental entre Costa Rica y Nicaragua, relativo a determinadas actividades llegadas a cabo en la zona fronteriza en el año 2010.* Universidad de Costa Rica, December 2012. Retrieved from http://iij.ucr.ac.cr/sites/default/files/documentos/t12-el_conflicto_jurídico_ambiental_entre_costa_rica_y_nicaragua.pdf

[105] Tremolada, E. "A Judgment under International Law: Nicaragua's dispute versus Colombia of 2012", *Desafíos del multilateralismo y de la Paz* (E. Tremolada editor), Universidad Externado de Colombia, Bogotá, 2017, pp. 157-177.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

-LÓPEZ MARTÍN, A. G., "La labor de la Corte Internacional de Justicia en el arreglo de las controversias territoriales. Una aproximación a los criterios de solución aplicados en su jurisprudencia", El Derecho internacional en el mundo multipolar del siglo XXI. Obra Homenaje al profesor Luis Ignacio Sánchez Rodríguez (S. Torres Bernárdez, J.C. Fernández Rozas, C. Fernández de Casadevante Romaní, J. Quel López, A.G. López Martín coords.), Iprolex, Madrid, 2013.

-MARIÑO MENÉNDEZ, F., "Sobre la función de los tribunales internacionales y en particular del Tribunal Internacional de Justicia en el actual sistema jurídico internacional", *Las Naciones Unidas desde España. 70 aniversario de las Naciones Unidas. 60 aniversario del ingreso de España en las Naciones Unidas* , (X. Pons Rafols dir.), Asociación para las Naciones Unidas en España, Imprenta de la OID, Madrid, 2015, pp. 433-447.

-PASTOR RIDRUEJO, J. A., "El Derecho internacional del Mar y su evolución incesante" *La cooperación internacional en la ordenación de los mares y océanos* (J. Pueyo Losa, J. Jorge Urbina coords.), Iustel, Madrid, 2008, pp. 25-40.

-QUESADA Q., M. "Disputa fronteriza y valor geoestratégico del río San Juan: Nicaragua y Costa Rica", *Cuadernos de Geografía: Revista Colombiana de Geografía*, v. 23, n. 2, p. 69-83, jul. 2014.

-QUINDIMIL, J. "Fronteras marítimas y tribunales internacionales: la delimitación marítima a la luz de la jurisprudencia del Tribunal Internacional del Derecho del Mar", *Gobernanza, cooperación internacional y valores democráticos comunes* (E. Tremolada editor), Universidad Externado de Colombia, Bogotá, 2019, pp. 105-123

-QUINTANA, J. J. "Cuestiones de procedimiento en los casos *Costa Rica c. Nicaragua* y *Nicaragua c. Costa Rica* ante la Corte Internacional de Justicia", *Anuario Colombiano de Derecho Internacional (*ACDI*),* 2017, 10, pp. 117-159.

-SOBRINO HEREDIA, J. M., "La mar, un escenario abierto", *Mares y Océanos en un mundo en cambio: Tendencias jurídicas, actores y factores* (J. M. Sobrino Heredia coord.), Tirant lo Blanch, Valencia, 2007, pp. 23-37.

-TIJERINO, F. K. "Conflictos limítrofes y discurso nacionalista. La frontera Nicaragua-Costa Rica (1824-1858)", *Las fronteras del Istmo. Fronteras y sociedades entre el sur de Mexico y America Central* (P. Bovin dir.), Centro de Estudios Mexicanos y Centroamericanos. México, 2005, pp. 97-107

-TREMOLADA, E. "A Judgment under International Law: Nicaragua's dispute versus Colombia of 2012", *Desafíos del multilateralismo y de la Paz* (E. Tremolada editor), Universidad Externado de Colombia, Bogotá, 2017, pp. 157-177.

-TREMOLADA, E. "La cosa juzgada en las sentencias de la Corte Internacional de Justicia, en las disputas de Nicaragua contra Colombia y de Perú contra Chile", *La arquitectura del ordenamiento internacional y su desarrollo en materia económica* (E. Tremolada editor), Universidad Externado de Colombia, Bogotá, 2015, pp. 83-102.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 47-84
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.02

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

**Citation**: KOUROUMA, O., «Mutualisation des puissances et sécurité en Afrique : pour un approche neopragmatiste dur rôle du Droit», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 85-116

**Received**: 18 December 2018
**Accepted:** 20 October 2019

# MUTUALISATION DES PUISSANCES ET SECURITE EN AFRIQUE : POUR UNE APPROCHE NEOPRAGMATISTE DU ROLE DU DROIT

Oumar KOUROUMA[1]

I.- INTRODUCTION. II.- LA PUISSANCE DES UNS AU SERVICE DE TOUS A TRAVERS LE DROIT : UN IDEALISME. III.- L'INSTRUMENTALISATION DES MECANISMES JURIDICO-INSTITUTIONNELS DE SECURITE COLLECTIVE PAR LES PUISSANCES AFRICAINES. IV.- POUR UNE UTILISATION PRAGMATIQUE DU DROIT AU SERVICE DE LA SECURITE COLLECTIVE EN AFRIQUE : FONDEMENT ET ARTICULATION. V- CONCLUSION

**RESUME :** Le droit est, depuis la seconde moitié du XXème siècle, l'instrument principal à travers lequel s'opèrent les intégrations régionales, notamment en matière sécuritaire. En Afrique, la question de la sécurité collective est une préoccupation essentielle présente dès l'avènement des Etats postcoloniaux qui ont tenté d'apporter des réponses. Mais depuis la création de l'Union africaine, ces réponses ont pris une forme nouvelle caractérisée par deux traits : l'usage du droit pour mettre la puissance des Etats-leaders au service de l'action collective en matière sécuritaire ; et l'instrumentalisation par ces Etats des mécanismes juridico-institutionnels collectifs au service de leur propre influence.

C'est cette double utilisation contradictoire du droit international dans la construction de la sécurité collective en Afrique que la présente contribution entend analyser. A cet égard, elle mettra en lumière les manifestations de ce phénomène et ses impacts sur le processus de construction de la sécurité collective en Afrique. Elle tentera de montrer qu'une telle utilisation contradictoire du droit dénote de sa nature indéterminée. A partir de ce constat, l'étude soulignera la nécessité de dépasser les impacts de cette double utilisation du droit à travers l'adoption d'une approche néopragmatiste de l'utilisation du droit international en Afrique.
**MOTS CLES :** Union Africaine - Conseil de Paix et de Sécurité – Utilisation - Droit international africain – Néopragmatiste

[1] Kourouma Oumar est Doctorant – Chercheur à la Faculté de Droit de Tanger. Lauréat des bourses de l'Académie de Droit international de la Haye et du Séminaire de Droit international de la Commission de Droit international des Nations-Unies. Ses travaux concernent les domaines de la Théorie, l'Histoire et la Sociologie du Droit international et des Relations internationales et la Géopolitique de l'Afrique. Il est également Consultant et chargé de Cours de Théorie des Organisations internationales à la Faculté de Tanger. <kouroumaoum@gmail.com>. L'auteur tient à remercier le Comité de rédaction de la revue.

**MUTUALIZACIÓN DE LOS PODERES Y SEGURIDAD EN ÁFRICA: POR UN ENFOQUE NEOPRAGMÁTICO DEL PAPEL DEL DERECHO**

**RESUMEN:** Desde la segunda mitad del siglo XX, el Derecho ha sido el principal instrumento a través del cual se lleva a cabo la integración regional, particularmente en el área de seguridad. En África, el tema de la seguridad colectiva es una preocupación esencial desde el advenimiento de los estados poscoloniales que han intentado dar respuestas. Pero desde la creación de la Unión Africana, estas respuestas han adquirido una nueva forma, que presenta dos características: el uso del Derecho para poner el poder de los principales estados al servicio de la acción colectiva en el campo de la seguridad; y la instrumentalización por parte de estos estados de mecanismos jurídicos-institucionales colectivos al servicio de su propia influencia. Es este doble uso contradictorio del Derecho Internacional en la construcción de la seguridad colectiva en África lo que esta contribución pretende analizar. En este sentido, destacará las manifestaciones de este fenómeno y su impacto en el proceso de construcción de la seguridad colectiva en África. Intentará demostrar que ese uso contradictorio del Derecho denota su naturaleza indeterminada. Con base en esta observación, el estudio resaltará la necesidad de superar los impactos de este doble uso del Derecho a través de la adopción de un enfoque Neopragmatista para el uso del Derecho Internacional en África.
**PALABRAS CLAVE**: Palabras clave: Unión Africana - Consejo de Paz y Seguridad - Uso - Derecho Internacional Africano – Neopragmatismo

**MUTUALIZATION OF POWERS AND SECURITY IN AFRICA: FOR A NEOPRAGMATIST APPROACH TO THE ROLE OF LAW**

**ABSTRACT :** Since the second half of the 20th century, the law has been the main instrument through which regional integration takes place, particularly in the area of security. In Africa, the issue of collective security is an essential preoccupation since the advent of postcolonial states that have attempted to provide answers. But since the creation of the African Union, these responses have taken on a new form characterized by two features: the use of the law to put the power of the leading states at the service of collective action in the field of security; and the instrumentalization by these states of collective juridical and institutional mechanisms in the service of their own influence.

It is this contradictory dual use of international law in the construction of collective security in Africa that this contribution intends to analyze. In this regard, it will highlight the manifestations of this phenomenon and its impact on the process of building collective security in Africa. It will attempt to show that such contradictory use of the law denotes its indeterminate nature. Based on this observation, the study will highlight the need to overcome the impacts of this dual use of the law through the adoption of a Neopragmatist approach to the use of international law in Africa.
**KEY WORDS:** African Union - Peace and Security Council - Use - African International Law - Neopragmatist

## I. INTRODUCTION

Outil de coopération internationale, le droit est, depuis la seconde moitié du XXème siècle, l'instrument principal à travers lequel s'opèrent les processus d'intégration[2]. Ces intégrations se réalisent dans plusieurs domaines dont

[2] Weiler J. H., «Une révolution tranquille. La Cour de justice des communautés européennes et ses interlocuteurs», *Politix*. , 1995, Vol. 8, N°32, pp. 119-138


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

celui de la sécurité, à la lumière du chapitre VIII de la charte des Nations Unies[3].

En Afrique, la question de la sécurité collective est une préoccupation essentielle présente dès l'avènement des Etats africains postcoloniaux[4]. Déjà en 1967 le politologue kenyan Ali Mazrui posait le problème de la Pax Africana comme « [the Peace] that is protected and maintained by Africa herself »[5]. Il s'agit concrètement de la question de l'« Africa's capacity of self-pacification »[6] qu'il articulera en ces termes: « Now that the imperial order is coming to an end, who is to keep the peace in Africa? I took the view that self-government implied, above all, self-policing»[7].

Cette question demeure encore très pertinente aujourd'hui car, si depuis la deuxième des années 90 l'Afrique connaît une diminution considérable des formes traditionnelles d'insécurité que sont les conflits d'indépendance, les longues guerres civiles et conflits inter-étatiques[8], il convient de noter tout de

[3] En effet, le §1 de l'article 52 de la charte des Nations Unies autorise négativement en disposant qu' :« Aucune disposition de la présente Charte ne s'oppose à l'existence d'accords ou d'organismes régionaux destinés à régler les affaires qui, touchant au maintien de la paix et de la sécurité internationales, se prêtent à une action de caractère régional, pourvu que ces accords ou ces organismes et leur activité soient compatibles avec les buts et les principes des Nations Unies ». Et au §1 de l'article 54 d'ajouter : « Le Conseil de sécurité utilise, s'il y a lieu, les accords ou organismes régionaux pour l'application des mesures coercitives prises sous son autorité. […] ». (Voir Organisation des Nations Unies, Charte des Nations Unies, [En ligne], consulté le 05/10/2019, <https://www.un.org/fr/sections/un-charter/chapter-viii/index.html>.

[4] Benot Y., *Les idéologies des indépendances africaines*, Paris, F. Maspero, Coll. : Cahiers libres, 1969, pp.139-140

[5] « Une paix qui est établie, protégée et entretenue par l'Afrique elle-même » (Traduction de l'auteur, *Towards a Pax Africana : A study of ideology and ambition*, Chicago, University of Chicago Press, 1967, p. 203)

[6] « La Capacité de l'Afrique d'assurer en son sein la Paix ou la Capacité d'Auto-pacification de l'Afrique ». (Traduction de l'auteur) (Voir Mazrui, A., "The African Conditions : Insearch of Pax Africana", BBC (radio), 12 décembre 1979. [En ligne], consulté le 04/02/2017. <http://downloads.bbc.co.uk/rmhttp/radio4/transcripts/1979_reith6.pdf>.

[7] « Maintenant que l'ordre impérial tend à sa fin, qui pour maintenir la Paix en Afrique ? Je pense que l'autogouvernement implique, avant tout, l'Auto-régulation » (Traduction de l'auteur) (Voir Mazrui Ali, "The African Conditions : Insearch of Pax Africana", opt. cit.)

[8] Yabi, G. O., Peace and Security in Africa. Italian Institute for International Political Studies, (2016) ISPI Background Paper n. 4., p.4, [En ligne], consulté le 04/02/2017. <https://www.

même que l'insécurité sur le continent a pris des formes nouvelles et diverses. Celles-ci se manifestent à travers les problèmes de sécurité individuelles liés aux crises de gouvernance politique et économique, à l'exacerbation des questions identitaires religieuses (islamisme politique violent par exemple), aux bouleversements environnementaux ; ainsi qu'aux conflits à l'extérieur du continent notamment au Moyen Orient. Ces métamorphoses des défis sécuritaires s'opèrent pourtant dans un contexte international dont le point de départ (la fin de la guerre froide et l'effondrement du mur de Berlin en 1989) a été marqué par le constat d'un désengagement des acteurs extérieurs vis à vis des problématiques sécuritaires africaines[9].

Face à cette donne, l'Afrique a cherché à mobiliser l'outil juridico-institutionnel, c'est-à-dire ses mécanismes juridiques et institutionnels d'intégration. Ainsi, avec l'avènement de l'Union Africaine (2002), les dirigeants du continent ont manifesté une nouvelle posture. Celle-ci a consisté à se tourner vers une « auto-responsabilisation du continent », en exprimant leur « détermination de remédier au fléau des conflits en Afrique, de façon collective, globale et décisive »[10], adoptant une politique commune en matière de sécurité et de défense[11], créant une Architecture de Paix et de Sécurité (APSA) avec à sa tête le Conseil de paix et de sécurité[12]. A travers cette structure, ils ont intégré la puissance comme un facteur clé dans la concrétisation de leurs actions[13]. Cette mise en avant de la puissance dans la construction de l'APSA a constitué un tournant dans le processus d'intégration africaine. C'est cette nouvelle

ispionline.it/DOC/PEACE_AND_SECURITY_AFRICA.pdf>.

[9] Harsch, E., *L'Afrique de forces de maintien de la paix. Face au désengagement des grandes puissances, l'Afrique renforce ses capacités*, in Revue Afrique relance, Vol. 17, N°3, Octobre 2003 (publié dans la revue « L'arbre à Palabre N°15, Mai 2004), [En ligne], consulté le 04/02/2017. <http://www.revues-plurielles.org/_uploads/pdf/13_15_9.pdf>.

[10] Harsch, E., *op. cit.*, p. 113.

[11] Union Africaine, *Déclaration solennelle Politique de défense commune. Deuxième session extraordinaire de la conférence de l'Union africaine*, 27-28 février 2004 Syrte (Libye) Ext/Assembly/AU/3/(II), <http://www.peaceau.org/uploads/declaration-cadsp-fr.pdf>.

[12] Lecoutre D., «Les enjeux du Conseil de paix et de sécurité». *Le Monde Diplomatique*, (septembre de 2009), [En ligne], consulté le 04/02/2017, <https://www.monde-diplomatique.fr/2009/09/LECOUTRE/18163>.

[13] Chouala Y. A., *Puissance, résolution des conflits et sécurité collective à l'ère de l'Union africaine. Théorie et pratique*, AFRI 2005, volume VI. Disponible sur <http:// www.afri-ct.org/IMG/pdf/afri2005_chouala.pdf>.


Paix et Securité Internationales
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

dynamique que nous avons appelé « Stratégie de Mutualisation juridico-institutionnelle des puissances »[14].

Mais de telle puissance collective, comme il sera montré dans ce travail, est surtout celle des Etats membres de l'UA les plus importants, de facto et de jure.

Delà, il apparait une double utilisation contradictoire des outils juridico-institutionnels : d'une part l'utilisation de ces outils laisse croire que la puissance collective mis en place est celle de tous les membres de l'UA et au service de tous ; d'autre part, l'analyse des textes et de la pratique révèle que cette puissance est celle des grands Etats membres de l'organisation panafricaine.

C'est donc cette double utilisation contradictoire du droit international africain que la présente étude entend analyser. Elle voudrait s'intéresser également aux impacts d'une telle utilisation contradictoire du droit sur la construction de la sécurité collective sur le continent, notamment ceux ayant trait au ralentissement ou au blocage de cette construction. Enfin, cette étude mettra aussi et surtout l'accent sur la quête d'une perspective de dépassement de ces impacts négatifs d'une utilisation réaliste du droit.

Pour ce faire, l'étude va s'inscrire dans le cadre des disciplines de la Sociologie du droit international et de la Philosophie du droit international. Ceci s'explique par le fait qu'elle traitera des pratiques internationales des Etats africains sur le continent où les facteurs juridiques et politiques se côtoient. C'est aussi le fait qu'elle cherchera à proposer une nouvelle perspective théorique en matière d'utilisation du droit international africain.

Sur le plan théorique, l'intérêt accordé à la contradiction, à l'indéterminisme du droit appelle à la mobilisation des courants critiques du droit international, notamment celles inspirés des travaux de l'école de Reims et ceux de Martti Koskenniemi. Quant à la démarche méthodologique, le travail reste au carrefour d'une approche réaliste et prospective du droit dans la mesure où il accorde une importance capitale aux faits qui entourent les textes, qui déterminent leur contenu, ainsi que les possibilités de dépassement des limites aux utilisations de ces textes dans une perspective d'évolution.

Partant, trois axes principaux seront développés dans la présente réflexion : le premier portera sur l'utilisation idéaliste du droit dans le proces-

[14] Kourouma, O., «La mutualización de las potencias: una estrategia africana de cooperación Sur-Sur», *Revista d'Afers internattionals*, N°114, 2016, pp. 133-156

sus de construction de la sécurité collective en Afrique (II), alors que le second traitera de l'utilisation réaliste (III). Enfin, l'analyse va proposer la voie Néopragmatiste de l'utilisation du droit international comme troisième voie permettant de dépasser les limites de l'idéalisme et du réalisme en matière d'utilisation du droit (IV).

## II. LA PUISSANCE DES UNS AU SERVICE DE TOUS A TRAVERS LE DROIT : UN IDEALISME

L'idéalisme peut être défini comme une « attitude, [le] caractère d'une personne qui aspire à un idéal élevé, souvent utopique »[15]. Mais cet utopisme est parfois fondé sur une analyse lucide de la réalité[16]. C'est dans ce sens que les Etats africains, en pleine période de rupture stratégique dans le processus d'intégration africaine, font un usage idéaliste du droit dans la construction de leur système de sécurité collective, en cherchant à mettre la puissance de quelques Etats au service d'eux tous. Cette dynamique, appelée Mutualisation juridico-institutionnelle des puissances sera l'objet d'étude de ce premier axe à travers : son concept (1) et sa mise en œuvre (2).

### 1. LE CONCEPT DE MUTUALISATION JURIDICO-INSTITUTIONNEL DES PUISSANCES

La Mutualisation des puissances est le processus à travers lequel les Etats africains entendent mettre la Puissance de certains d'entre eux au service d'eux tous, à l'aide d'outils juridico-institutionnels. En tant que stratégie, elle est « un proceso de reconocimiento jurídico-institucional de las facultades de actuación y de influencia de los estados lideres africanos como instrumento de defensa y de afirmación eficaz del continente [...] »[17]. Il s'agit d'une dimension de la « continentalisation administrative »[18] de l'Afrique qui se déploie à travers l'institutionnalisation et l'harmonisation progressive des grandes

[15] Déf. 2. Le petit Larousse, Dictionnaire, 2009, p. 517. En relations internationales, malgré les critiques, l'idéalisme n'est pas

[16] BATTISTELLA D., Dictionnaire des relations internationales. Approches, Concepts, Doctrines, Paris, Dalloz, 2012, pp. 270-274

[17] « Un processus de reconnaissance juridico-institutionnelle de la faculté d'action et d'influence des Etats-leaders africains comme instrument de défense et d'affirmation efficace du continent [...]» (Traduction de l'auteur).

[18] Blaise TCHIKAYA, 2014. *Le droit de l'Union africaine*. Paris. Berger-Levrault, 2014, pp. 16-17.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

orientations stratégiques des Etats africains dans divers domaines fondamentaux comme celui de la sécurité. Elle intègre la puissance comme un facteur clé du processus d'intégration africaine[19], notamment celle de certains Etats africains au sujet desquels Alpha Omar Konaré (ancien président de la commission de l'UA) déclarait : « nous devons reconnaître que, dans toute entreprise commune, il y a une locomotive et des wagons ; il nous faut admettre qu'il y a des pays leaders dont la part dans la répartition des responsabilités devrait être plus grande que celle des autres. Ceci est une réalité. Nous devons [...] traduire [cette vision] en comportement pour avancer vers la réalisation de nos objectifs majeurs »[20]. C'est dans la même perspective que Cillier, Schünemann et Moyer parlent des « *Big Five* » que sont le Nigéria, l'Afrique du Sud, l'Egypte, l'Algérie et l'Ethiopie "[whom] *will inevitably shape the future of the continent because […] their historical role as regional leaders*"[21]. A ces Etats, s'ajoutent le Maroc, le Kenya (et le Sénégal en tant que puissance essentiellement symbolique) du fait de la croissance de leur influence dans les relations internationales africaines. Ce sont ces Etats que nous qualifions de puissances africaines moyennes émergentes[22] ou Puissances tricéphales[23] (Voir figure 1),

[19] Contrairement à la tradition théorique et pratique européenne en la matière qui, bâtit sur le plan théorique en réaction à la théorie réaliste et sur le plan pratique contre l'histoire européenne de la première moitié du XXème siècle, a exclu le Facteur Puissance dans les processus d'intégration (voir Vennesson, P. et Sindjoun, L., *Unipolarité et intégration régionale : l'Afrique du Sud et la « renaissance africaine »*. In : Revue française de science politique, 50e année, n°6, 2000. pp. 915-940. doi : 10.3406/rfsp.2000.395524 ; pp. 918-920 ;

[20] Lecoutre, D., Le Conseil de paix et de sécurité de l'Union africaine, clef d'une nouvelle architecture de stabilité en Afrique ?, Afrique contemporaine, 2004/4 n° 212 | pages 131 à 162 ISSN 0002-0478 URL : <https://www.cairn.info/revue-afrique-contemporaine-2004-4-page-131.htm>.

[21] «[Qui] façonnera inévitablement l'avenir du continent en raison [...] de leur rôle historique en tant que (Etats) leaders régionaux» (Traduction de l'auteur). Cilliers, J. et al., *Power and influence in Africa: Algeria, Egypt, Ethiopia, Nigeria and South Africa,* African Futures paper 14, March 2015, p. 1, [En ligne], consulté le 4/07/2017, <https://www.issafrica.org/uploads/AfricanFuturesNo14-V2.pdf>.

[22] Marque, Barbara, «Nouveau paradigme stratégique des puissances moyennes». *Chaire In Bev Baillet-Latour, programme « Union européenne-Chine.* Note d'Analyse 16 Mars 2011. [En ligne], consulté le 28/02/2017, <https://www.uclouvain.be/cps/ucl/doc/pols/documents/NA16-INBEV-ALL.pdf>.

[23] Le modèle de la Puissance tricéphale africain est un outil que nous avons proposé pour l'analyse du comportement des puissances africaines. Il part de l'observation de la configu-

en raison des trois types différenciés de comportements qu'ils adoptent dans le système international africain[24].

Depuis l'avènement de l'UA, ces Etats jouent un rôle de premier plan dans la construction d'une « Pax africana »[25], un « nouvel ordre sécuritaire » à travers la mise en place d'instruments juridico-institutionnels, notamment ceux de l'Architecture de Paix et de Sécurité en Afrique (APSA) qui, en rupture avec la tradition souverainiste et égalitariste de l'Organisation de l'Unité Africaine (OUA), reconnaissent et légitimisent leurs Puissances comme outil d'action collective[26]. Cette architecture sécuritaire s'appuie sur la structure même du système international africain (voir figure 2) formée de sous-régions portées chacune par un nombre restreint d'Etats-leaders qui y exercent une certaine « hégémonie bénigne[27]».

ration du système international africain qui est composé de trois niveau à savoir : le niveau sous-régional, régional et l'environnement global. Dans chacun de ces niveaux, les puissances africaines adoptent un comportement propre. Ainsi sur le plan sous-régional des pays comme l'Afrique du Sud et le Nigéria assure une hégémonie bénigne en s'appuyant sur les cadres institutionnels, sur le plan régional ou continental ils sont des puissances relativement plus importantes que les autres Etats mais sans hégémonie, alors que dans sur le plan global, ce sont des puissances moyennes émergentes. La situation du Maghreb et de l'Afrique de l'Est reste caractérisée par un éclatement de la puissance avec l'absence d'Etat prédominant, plusieurs Etats cherchant par contre à se projeter directement sur la scène continentale. Quant à l'Afrique centrale, elle est peu représentative sur l'échiquier de la répartition de la puissance sur le continent, car aucun Etat de cette sous-région n'a une stratégie de domination sous régionale visible. Le cas du Tchad demande qu'il s'inscrive dans une durée observable (Voir Kourouma, O., «Du concept de puissance dans le contexte africain : Quelle opérationnalité ?» in Guennouni, N. et al., *Tendances internationales et internes de l'évolution du droit. Mélanges offerts en l'honneur du Doyen Mohamed Bennani*, Tome I, Casablanca, Najah Al Jadida, pp.447-467)

[24] Kourouma, O., «L'Afrique du sud et le Nigéria dans la géopolitique africaine : Des puissances moyennes émergentes africaines, au-delà des débats et contre-débats», In El Houdaigui R., *La façade atlantique de l'Afrique : un espace géopolitique en construction*, Rabat, OCP Policy Center, 2016, pages. 104-131

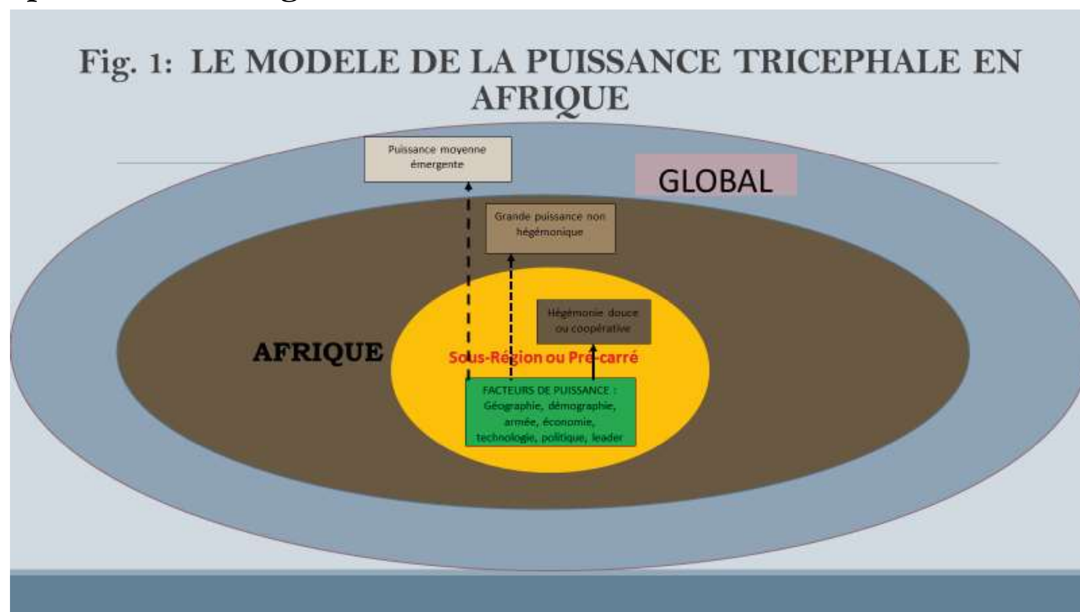
[25] Mazrui A., *Towards a Pax Africana: A study of ideology and ambition*... cit.

[26] Choua la Y. A., «Puissance, résolution des conflits et sécurité collective à l'ère de l'Union africaine. Théorie et pratique... *cit.*»

[27] A noter ici que cette construction de la Pax africana sur la base des subdivisions sous-régionales portée par des Etats-leaders fait penser à l'idée de « Begnin colonization » d'Ali Mazrui selon laquelle les Etats faillis en Afrique devraient être administrés (de façon bénigne) par les Etats-Pivots, puissances leaders de leurs sous-régions (Mazrui A., « Pour une colonisation légère des régions d'Afrique en désintégration », *Bulletin du Codesria*, N°2, 1995, p.25). (Voir

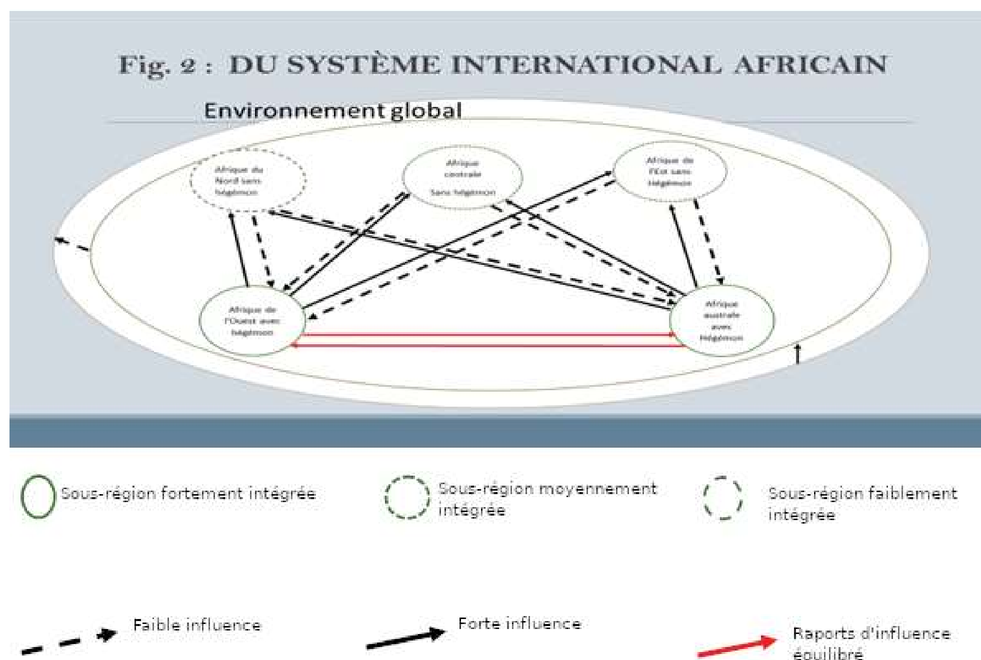

Paix et Securité Internationales
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

**FIGURE 1 : Modèle de la puissance tricéphale (outil d’étude du comportement des puissances émergentes africaines**




Source : l’auteur.

**FIGURE 2 : Le système international africain et la distribution de la puissance (cette configuration pourrait connaître une métamorphose avec l’intégration effective du Maroc dans la CEDEAO) NOTE RETIRÉE PAR LA RÉDACTION DE LA RQDI**




Source : l’auteur.

Le principal outil institutionnel de cette construction est le Conseil de Paix et de Sécurité de l'UA (CPS) qui, bien que bâti sur et au nom des idéaux panafricanistes de solidarité, de sécurité et de défense commune[28] et dans la continuité institutionnelle du mécanisme pour la prévention, la gestion et le règlement des conflits de l'OUA[29], s'inscrit dans un nouveau paradigme de résolution des conflits en Afrique. Ce paradigme, tout en accordant une place importante à l'anticipation et à la prévention des conflits par l'emploi de moyen pacifique comme le Conseil des Sage (article2 §2, Article 3-b et Article 4-a du Protocole relatif à la création du CPS, 2002), inaugure un temps nouveau dans l'intégration africaine fondé sur une approche réaliste de la résolution des conflits qui intègre la Force, et donc la Puissance, comme un outil incontournable[30]. Mais la Puissance collective ainsi instituée est avant tout celle des Etats-membres de l'UA à même de répondre aux critères d'admission au sein du CPS que sont : la capacité, leur engagement continu dans les opérations de maintien de la paix, leurs expériences, leur contribution financière (article 5 §2 du Protocole relatif à la création du CPS, 2002). Aussi, si formellement on ne peut pas parler de membre permanent du CPS, une analyse des textes de cette institution nous conduit à reconnaître l'existence de fait de tel membre dans la mesure où le protocole sur la création du CPS prévoit l'élection de cinq (5) membres pour trois ans (article 5 §1-b du Protocole relatif à la création du CPS, 2002), avec une possibilité de réélection automatique, sans limite

aussi Kupchan C. A., « After Pax Americana : Benign Power, Regional Integration, and the Sources of a Stable Multipolarity », *International Security*, Vol. 23, No. 2 (Autumn, 1998), pp. 40-79, <http://www.jstor.org/stable/2539379> Accessed : 04/02/2017 ; Luntumbue M., *Le Nigéria dans la géopolitique ouest-africaine : atouts et défis d'une puissance émergente*, Note d'Analyse du GRIP, 18 juillet 2013, Bruxelles. <http://www.grip.org/fr/node/941>; Luc Sindjoun, «Unipolarité et intégration régionale : l'Afrique du Sud et la « renaissance africaine... cit.», pp. 153-156).

[28] Kouvibidila, G-J., *Histoire de la construction de l'Afrique*, Paris, Harmattan, 201, p. 74 ; Tchikaya B., *Le droit de l'Union africaine*, Paris. Berger-Levrault, 2014, p. 94

[29] Union Africaine, *Protocole relatif à la création du Conseil de paix et de sécurité de l'Union africaine du 9 juillet 2002*, [En ligne], consulté le 07/10/2019, <http://www.peaceau.org/uploads/psc-protocol-fr.pdf>. (Sur le mécanisme lui-même voir : Cyr Djiena Wembon M., *Le mécanisme de l'OUA pour la prévention, la gestion et le règlement des conflits*, African Yearbook of International Law Online / Annuaire Africain de droit international Online, 2(1), 1994, 71-91. DOI <https://doi.org/10.1163/221161794X00043>.

[30] Chouala, Y. A., «Puissance, résolution des conflits et sécurité collective à l'ère de l'Union africaine. Théorie et pratique... *cit.*», p. 288.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

définie, «en vue d'assurer la continuité» (article 5 §3-b du Protocole relatif à la création du CPS, 2002).

Cette place accordée à la Puissance dans la construction juridico-institutionnelle de la sécurité collective en Afrique se traduit aussi par l'établissement du droit d'intervention de l'UA ou le droit de ses Etats membres de demander une telle intervention (Article 4 (j et k) du protocole sur la création du CPS, article 4 (h et J) de l'acte constitutif de l'UA). En tant qu' « [...] usage de la force armée destinée à imposer la volonté de celui qui intervient contre un adversaire refusant de s'y soumettre»[31], l'intervention est sans doute l'un des moments les plus importants de la pratique de cette puissance collective en institutionnalisation, opérant ainsi un dépassement de certains principes traditionnels de l'ordre international africain que sont la non-ingérence dans les affaires intérieures d'un Etat, le respect de la souveraineté, en dépit de leur « fétichisation »[32] continue.

Ces principaux instruments juridico-institutionnels sont ainsi les outils du déploiement des capacités politico-militaires des puissances africaines mises au service de la sécurité collective au nom des principes panafricanistes contenus dans les textes fondamentaux de l'UA (solidarité, unité, africanité, l'auto-dépendance).

## 2. LA MISE EN ŒUVRE DE LA STRATEGIE DE MUTUALISATION DES PUISSANCES

A travers les actions de maintien de la paix et de la sécurité des différents Etats-leaders africains sur les plans sous-régional et continental, on peut analyser la concrétisation de la mutualisation des puissances.

En premier, le Nigéria, qui est l'acteur ouest africain majeur (par rapport aux autres Etats ouest-africains) dans la stabilisation de la sous-région au point que certains auteurs comme Luntumbue parle de « pax nigeriana » en Afrique de l'Ouest[33] ou du Nigéria comme « patron ou gendarme » de l'Afrique de

[31] Amstutz, Mark R., *International Conflict and Cooperation. An Introduction to World Politics*, Brown and Benchmark, Chicago, 1995, p. 242.

[32] A propos du concept de « fétichisme » voir Marx, K., *Le Capital*, Livre I. [en ligne], consulté le 16 août 2018, <http://www.communisme-bolchevisme.net/download/autres/Marx_Le_Capital_Livre_I.pdf>, pp. 21 ; Tombazos, S., *Critique du livre d'Antoine Artous, Le fétichisme chez Marx. Le marxisme comme théorie critique,* Editions Syllepse, Paris, 2006, - 2007, [En ligne] consulté le 16/08/2018, <actuelmarx.parisnanterre.fr/cm5/com/M15_Philo_capital_Tombazos.doc>.

[33] Luntumbue, M., « Le Nigéria dans la géopolitique ouest-africaine... cit. », p. 13.

l'Ouest[34]. Cela s'explique en effet par l'important rôle joué par ce pays dans la stabilisation de la sous-région d'Afrique de l'Ouest après la guerre froide, notamment, à travers ses interventions militaires dans les conflits du Libéria, de la Sierra Léone, dans le cadre institutionnel de l'Economic Community of West African States Cease-fire Monitoring Group (ECOMOG), bras armé de la Communauté Economique Des Etats d'Afrique de l'Ouest (CEDEAO). Il dépensera plus de 8milliards de dollars US dans les opérations menées dans ces deux pays[35]. Il en est de même des conflits ivoirien et malien où le Nigéria s'est hissé au premier plan en dépit des critiques[36].

La pression diplomatico-militaire exercée sur le président gambien, Yahya Djamé, réaffirme cette prédominance nigériane qui est restée, avec le Sénégal, les fers de lance de la résolution du conflit post-électoral[37]. L'action du Nigéria en faveur de la paix et la sécurité s'étend à tout le continent notamment dans le cadre des opérations diplomatico-militaires de l'UA et l'ONU[38] ou encore dans la lutte des Etats de la Commission du Bassin du Lac Tchad contre Boko Haram où il assure le commandement. C'est à ce titre que très

[34] Veron, J-B., « L'Afrique du Sud et le Nigeria : du maintien de la paix à la recherche d'un positionnement stratégique sur le continent africain », *Afrique contemporaine,* 2006/3 (n° 219), pp. 163 – 172, <https://www.cairn.info/revue-afrique-contemporaine-2006-3-page-163.htm>.

[35] Osuntokun, J., «Hegemon in a peripheral region: Future of Nigeria's foreign policy», *The Nation*, 18 avril 2013, <http://thenationonlineng.net/new/jide-osuntokun/hegemon-in-a-peripheral-region-future-of-nigerias-foreign-policy-3/>.

[36] Luntumbue, M., « Le Nigéria dans la géopolitique ouest-africaine... cit. », ; Vincent Darracq, « Jeux de puissance en Afrique : le Nigeria et l'Afrique du Sud face à la crise ivoirienne », *Politique étrangère*, 2/2011 (Eté), p. 361-374, <http://www.cairn.info/revue-politique-etrangere-2011-2-page-361.htm>, DOI : 10.3917/pe.112.0361.

[37] En ce lieu, nous pensons que la réussite de l'action diplomatique Guinéo-mauritanienne pour un règlement pacifique du conflit doit être essentiellement liée à la pression militaire exercée par le Sénégal, le Nigéria etc… (Voir Centre d'Etudes Strategiques de l'Afrique, *Les leçons de la Gambie sur l'efficacité de la coopération en matière de sécurité régionale*, 25 avril 2017, [En ligne], consulté le 08/10/2019, <https://africacenter.org/fr/spotlight/les-lecons-de-la-gambie-sur-lefficacite-de-la-cooperation-en-matiere-de-securite-regionale/>.

[38] Tamekamta, A. Z., *L'engagement des états Africains en Matière de Sécurité en Afrique Centrale : Contraintes et enjeux de la coopération UA-CEEAC*, Août 2016, pp. 53-54, [En ligne], Consulté le 15/06/2017, <http://www.ipss-addis.org/y-filestore/AfSol_Journal/afsol_journal_vol_1_issue_1_alphonse_zozime_tamekamta.pdf>. Voir aussi Veron, J-B., «L'Afrique du Sud et le Nigeria... cit.» *Ou* Luntumbue, M., « Le Nigéria dans la géopolitique ouest-africaine... cit. ».


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

tôt Daniel Bach parlait d'une pax nigeriana africaine[39]. Toutefois, il est important de noter les limites institutionnelles et organisationnelles du Nigéria qui affectent l'affirmation véritable de son leadership au regard de ses immenses potentialités[40].

D'autres Etats comme l'Afrique du Sud, l'Ethiopie, l'Algérie, le Kenya peuvent être également mentionnés.

Pour l'Afrique du Sud, la fin de l'apartheid dans les années 1990 a en même temps sonné le retour du pays sur la scène internationale, continentale et sous régionale (dont la principale organisation d'intégration est la *Southern african developpement Community* (SADC), comme une puissance tricéphale africaine à l'instar du Nigéria.

Dans cette lancée, le pays faisant figure d'une puissance unipolaire, largement prédominante sur les plans économique, politique, militaire, dans sa sous-région, s'est vite positionné en acteur important de dynamisation des institutions d'intégration de sa sous-région et sur le continent[41]. Dans le cadre du maintien de la paix et de la sécurité, les actions sud-africaines sont d'abord essentiellement diplomatiques et souvent inscrites dans le cadre des organisations internationales africaines sous régionales et continentales. C'est ainsi que sous différentes présidences, depuis Nelson Mandela, le pays joue un rôle important dans la résolution de plusieurs conflits sur le continent notamment en République démocratique du Congo (2002), en Côte d'Ivoire, aux Comores, Soudan, Éthiopie/Érythrée, Sierra Leone, Liberia[42]. L'activation de l'outil militaire ne tardera pas. Elle s'opère en premier à travers une intervention armée au Lesotho et sur le reste du continent sous parapluie onusienne, notamment au Congo et au Burundi.

Si l'on ne peut comparer l'Ethiopie et le Kenya aux deux premiers pays, du fait que leur champ d'action reste essentiellement limité à leur sous-région

---

[39] Bach, D. C., « Nigeria : Paradoxe de l'abondance et démocratisation en trompe-l'œil », *Afrique contemporaine,* 2006/3 - n° 219, pp. 119-135, <http://www.cairn.info/revue-afrique-contemporaine-2006-3-page-119.htm>.

[40] Cilliers, J. et al*., ²Power and influence in Africa... cit. ;* Bach, D. C., « Nigeria : Paradoxe de l'abondance et démocratisation en trompe-l'œil... cit.».

[41] Vennesson, P. et Sindjoun, L., *Unipolarité et intégration régionale : l'Afrique du Sud et la « renaissance africaine...* cit.

[42] Veron, J-B., *« L'Afrique du Sud et le Nigeria... cit».* Daniel C. Bach., « Nigeria : Paradoxe de l'abondance et démocratisation en trompe-l'œil... cit.».


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

est-africaine, il convient de noter le rôle qu'ils jouent dans la stabilisation de cette dernière, particulièrement en Somalie ou dans la lutte contre la « violence de mouvements de l'islam politique somaliens », (à travers la Combined Joint Task Force -Horn of Africa) ou encore dans le processus de mis en place de la composante est-africaine de la force africaine en attente, tous dans le cadre de l'Inter-Governmental Authority on Developpement (IGAD), qui est l'organisation d'intégration la plus avancée d'Afrique de l'Est en matière sécuritaire[43]. De son côté, bien que très présente sur le continent, l'Algérie n'a pas un encrage institutionnel sous-régional véritablement fonctionnel, notamment l'Union du Maghreb Arabe. Le pays ne s'est pas encore engagé jusque-là dans une intervention militaire à l'étranger, fut-ce dans un cadre institutionnel multinational, par envoi de troupe. Ce choix est opéré au nom du principe de non-ingérence dans les affaires intérieures des autres Etats[44]. Cela ne l'empêche cependant pas de participer à de nombreux mécanismes sécuritaires en méditerranée et en Afrique où elle s'érige en actrice clé. Il en des domaines de la lutte contre « l'islamisme politique violent », ou de la fourniture de logistique et de moyens financiers. C'est sur cette base que le pays se positionne au cœur du fonctionnement du Conseil de Paix et Sécurité de l'Union Africaine à travers le Commissaire à la Paix et à la Sécurité M. Ismaïl Chergui[45] (qui a été nommé en janvier 2017 pour un nouveau mandat de quatre ans).

---

[43] Elowson C. et De Albuquerque, A. L., *Challenges to Peace and Security in Eastern Africa : The role of IGAD, EAC and EASF.* FOI Memo 5634, Studies in African Security, Project number: A16104, February 2016. [En ligne], consulté le 23/02/2017, <https://www.foi.se/download/18.2bc30cfb157f5e989c31188/1477416021009/FOI+Memo+5634.pdf>.

[44] Ammour, L. A., « L'Algérie et les crises régionales : entre velléités hégémoniques et repli sur soi», *JFC Conseil, la Méditerranée en partage.* Avril 2013. [En ligne], consulté le 24/02/2017, <http://www.jfcconseilmed.fr/files/13-04---Ammour--L-Algerie-et-les-crises-regionales.pd> ; Berkani, M., « Force militaire arabe: le cas algérien », *Géopolis.* Le 30/03/2015. [En ligne], consulté le 24/02/2017, <http://geopolis.francetvinfo.fr/force-militaire-arabe-le-cas-algerien-57475>.

[45] En effet, même si le CPS dispose d'une présidence (Article 8 § 6 du Protocole relatif au CPS), celui-ci n'est désigné que pour un mois. Donc dans les faits l'essentiel du travail du CPS est effectué par la Commission de l'UA et précisément par le Commissaire à la Paix et à la Sécurité. Il est le principal responsable de la Paix et de la sécurité (Article 10 §4 du Protocole relatif au CPS).



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

Cette première partie de la réflexion met ainsi en exergue le rôle central du droit international dans la construction d'une stratégie de sécurité collective en Afrique. Cette utilisation du droit international, bien qu'expression d'une mutation collective réaliste, reste tout de même ancrée dans un idéalisme qui entend mettre la puissance de quelques Etats au service de tous les autres, de la sécurité collective. Ce qui camoufle sans doute le comportement instrumentaliste stratégique de ces Etats vis-à-vis du droit international en Afrique. C'est à dire l'utilisation des mécanismes juridico-institutionnels collectifs au service de leur propre rayonnement.

## III. L'INSTRUMENTALISATION DES MECANISMES JURIDICO-INSTITUTIONNELS DE SECURITE COLLECTIVE PAR LES PUISSANCES AFRICAINES

Que se cache-t-il derrière les discours et les actions des Etats-leaders africains quand ils prétendent agir au nom des institutions continentales ou sous-régionales et conformément à leurs règles juridiques ? Telle est la question à laquelle la présente partie s'attellera à répondre (2), mais bien avant, il conviendra de savoir quelle est la place particulière qu'occupent le droit et les institutions dans la stratégie de ces Etats-leaders en raison de leur nature (1).

### 1. PUISSANCES MOYENNES EMERGENTES, DROIT ET INSTITUTIONS

Dans leurs actions internationales, les puissances moyennes émergentes accordent une importante capitale au droit et aux institutions. Le politologue Detlef Nolte du German Institute for Global and Areas Studies (GIGA) et de l'australienne Marques Barbara ont consacré des études à cette question.

Selon le premier, « les politiques d'alliances et d'institutionnalisation régionales font partie des ressources stratégiques des puissances moyennes, désireuses de sécuriser leur espace politique, et constituent un moyen de contenir l'influence d'autres États plus puissants ou concurrents »[46]. Allant dans le même sens, Marque Barbara présente d'abord les caractéristiques des puissances moyennes en général. Elle note à ce titre l'activisme de ces Etats au sein des organisations internationales, leur pratique de l'institutionnalis-

[46] Detlef N., «*How to compare regional powers: analytical concepts and research topics*», Review of International Studies, Hamburg, 2010, pp. 894 - 895, <https://www.giga-hamburg.de/sites/default/files/publications/how_to_compare.pdf>.

me stratégique et de la « *Niche diplomacy* »[47] (voir Figures 3). Et plus loin, elle met en exergue les traits qui distinguent les puissances moyennes émergentes (dont certains Etats-leaders africains[48]) des puissances moyennes traditionnelles. Il s'agit notamment de la tendance de ces nouvelles puissances à dominer, diriger et participer activement aux dynamiques d'intégration dans leur région[49].

Il apparait donc que même si ces comportements s'inscrivent dans un cadre d'interdépendance, cette dernière ne les empêche absolument pas d'être l'expression d'une affirmation de la puissance des Etats moins vulnérables par rapport aux autres[50]; l'affirmation de politique profondément réaliste, « sous couvert d'objectifs moraux à des fins humanitaires, pacifistes ou économiques »[51].

Cette structure des rapports inter-africains nous invite à relativiser toute idée d'une utilisation neutre (formaliste) du droit international dans la construction d'une stratégie de sécurité collective en Afrique et uniquement au service de tous. Car, « [...]le formalisme juridique [n'est-il pas cet] état du droit international marqué par la primauté des apparences sur les réalités, la détermination des règles [ou leur utilisation] sans considérations des conditions concrètes [telles]que la structure des Etats et des relations internationales [...]. Il est un mélange de cynisme et d'illusionnisme »[52].

Si ces propos du juriste français, Charles Chaumont, concernent avant tout le droit international classique, on peut bien se demander si le droit international tel que pratiqué dans les relations inter-africaines n'a pas déjà épousé une telle forme, notamment dans le domaine de la sécurité collective ?

---

[47] Marque B., « Nouveau paradigme stratégique des puissances moyennes,... cit.»

[48] Kourouma, O., « L'Afrique du sud et le Nigéria dans la géopolitique africaine... cit. ».

[49] Ibid., pp. 11-.35

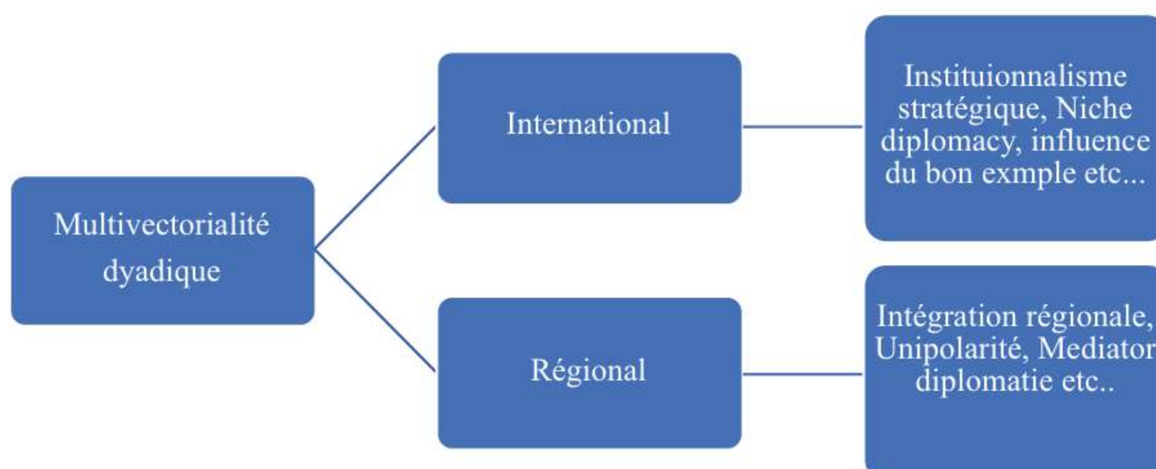
[50] Hassner, P., Intégration et coopération ou inégalité et dépendance ? In: Revue française de science politique, 24eme année, n°6, 1974. pp. 1249-1267. [En ligne], consulté le 2/02/2017. URL : doi : 10.3406/rfsp.1974.418760, <http://www.persee.fr/doc/rfsp_0035-2950_1974_num_24_6_418760>.

[51] Struye De Swielande, T., « La Chine et le «Soft power» : une manière douce de défendre l'intérêt national ? », in *Notes d'analyse de la Chaire Inbev Baillet - Latour sur les relations Union européenne - Chine (Université catholique de Louvain)*, numéro 2, mars 2009.

[52] Chaumont C., *Cours général de Droit international, Académie de Droit International. Recueil des Cours*, Vol. 1 - 1970, A.W. Sijhoff, pp. 344-345.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

**FIGURE 3. Les caractéristiques des puissances moyennes selon le Paradigme de la Multivectorialité dyadique de Marque Barbara**




Pour répondre à cette question, il conviendra de procéder à l'analyse de certains cas.

## 2. DES INSTITUTIONS ET DES REGLES AU SERVICE DE LA POLITIQUE DES ETATS

Un regard critique porté sur le processus de création du Conseil de Paix et de sécurité, sur son organisation et son fonctionnement, permet de voir en cette institution l'un des moyens de camouflage des prétentions politique et de prestige de nombreux Etats-leaders africains.

Introduite, en effet, en 2004, le CPS s'inscrit dans une période (des années 90 à 2000) caractérisée par un regain d'intérêt considérable des dirigeants africains pour les institutions continentales, cherchant à les redynamiser[53]. Mais cette dynamique est avant tout portée par un groupe restreint d'Etats dont la Libye, l'Afrique du Sud, l'Algérie, le Sénégal, l'Ethiopie, le Nigéria. Ce qui n'est pas sans répercussions sur les instruments juridiques qui se conten-

[53] Kouvibidila G-J., *op. cit.* pp.199-263.

teront de reconnaître et de légitimer la puissance de ces Etats-leaders[54]. C'est dans ce sens qu'il faut lire et comprendre les articles (susmentionnés) sur les critères d'éligibilité des Etats membres de l'UA au Conseil de paix et de sécurité, bien qu'on puisse y voir a priori l'affirmation d'un pragmatisme ou d'une rupture avec le vieil ordre souverainiste et égalitariste de l'OUA.

Cette reconnaissance-légitimation se traduit, sur le plan fonctionnel, par une emprise croissante de ces Etats sur l'institution dans la défense de leurs propres intérêts. Ainsi on peut citer entre autres l'exemple algérien à la tête du CPS depuis sa création en 2004 jusqu'aujourd'hui[55]. En effet, en se maintenant à la direction de cette institution, l'Algérie cherche avant tout à occuper un organe décisionnel hautement stratégique pour sa politique d'influence africaine, comme dans les disputes intermaghrébines. Cette instrumentalisation de l'organe par l'Algérie et d'autres puissances africaines s'opère sous couvert d'une affirmation des positions de l'UA dans certain conflit (comme celui du Sahara) ou d'une application des textes fondateurs de cette institution.

L'analyse du rapport N°81 de juin 2016 de l'Institut d'études de sécurité (ISS) révèle une lutte acharnée entre le Maroc et ses soutiens (dont la France, les Etats Unis ou le Sénégal à titre de membre non permanent du Conseil de sécurité) d'une part et d'autre part, l'Algérie et ses soutiens, lors de la 10ème réunion consultative annuelle en mai 2016 à New York entre el CPS et le Conseil de sécurité de l'Organisation des Nations Unies (ONU). L'Algérie et ses soutiens souhaitaient, en effet, une discussion de la question du Sahara au cours de cette réunion afin d'y réaffirmer ce qu'ils entendent par «la position de l'UA », à savoir l'Indépendance de ce territoire. Mais l'ordre du jour de cette 10ème réunion consultative annuelle ne fera pas mention de la question. Ce qui conduit le président du CPS, M.P.J. Molefe du Botswana à déclarer dans un communiqué du 23 mai 2016 que « [l]e CPS de l'UA a souligné la nécessité pour les deux Conseils d'entamer une discussion commune sur les questions

[54] Tchikaya, B., *op. cit.*, p.103

[55] Malgré la tentative des autres Etats-leaders comme le Nigéria de l'en évincer, le pays a su se maintenir grâce à un déploiement diplomatique conséquent. Ce qui démontre son intérêt fort de continuer à contrôler cet organe qui apparait fort utile dans sa stratégie dans sa stratégie d'influence africaine.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

qui demeurent taboues, y compris la situation au Sahara […], laquelle est fondamentalement, pour l'Afrique, une question de décolonisation »[56].

Dans le même esprit, le CPS insiste à ce que les Etats africains admis au Conseil de sécurité défendent les positions communes de l'organisation sur les principaux dossiers qui concernent l'Afrique ce, conformément à leurs engagements vis à vis de l'UA. Il fonde sa position sur l'article 3-d de l'Acte constitutif de l'UA mais aussi sur la décision de l'Assemblée générale de l'UA dans laquelle celle-ci: «[...] réitér[ait] que les États membres du Conseil de sécurité de l'ONU [avai]ent pour responsabilité particulière de veiller à ce que les décisions du CPS se reflètent bien dans le processus décisionnel [du Conseil de sécurité de l'ONU] sur les questions préoccupantes de paix et de sécurité en Afrique »[57]. La décision du 23 avril 2016 du CPS sur le rôle des Etats africains membres non permanents de l'ONU visait à confirmer cette obligation, demandant aux trois Etats africains de lui rendre compte de la façon dont ils défendent ses décisions au sein de l'ONU, et pour aller loin, il envisage la mise en place d'un « mécanisme juridique de responsabilisation des trois Etats et des critères d'approbation des candidatures africaines à l'ONU »[58]. La question reviendra suite aux votes séparés des membres africains non permanents du Conseil de sécurité (Angola, Egypte et Sénégal) en Avril 2016[59]. Si cette question s'avère hautement importante et stratégique en Afrique et notamment sur le plan sécuritaire, en mettant en jeu la crédibilité de l'UA, ici, elle révèle plutôt l'utilisation stratégique des institutions par les Etats qui voudraient user de ces institutions continentales et les règles établies pour la mise en œuvre de leur propre puissance. Il s'agit notamment de l'Algérie et autres soutiens du Polisario qui cherchent à obliger les Etats ne

---

[56] Institut D'etudes De Securite, *Rapport sur le conseil de paix et de sécurité*, N°81, Juin 2016, p. 20, <https://reliefweb.int/sites/reliefweb.int/files/resources/Rapport%20sur%20le%20Conseil%20de%20paix%20et%20de%20s%C3%A9curit%C3%A9%2080.pdf>.

[57] Ibid., p.8

[58] Ibid. p. 9.

[59] L'Egypte et le Sénégal ont, en effet, voté en faveur de la résolution portant renouvellement du Mandat de la Mission des Nations Unies au Sahara. Une prise de position en faveur du Maroc. Alors que l'Angola s'est abstenu (Rapport ISS; 2016: 20).

partageant pas leurs démarches à y obéir, au nom des instruments juridiques continentaux[60].

Mais on peut observer le même instrumentalisme dans la nouvelle stratégie marocaine vis-à-vis de l'Union africaine, avec pour enjeu principal l'intégrité territoriale du pays, c'est-à-dire l'épineuse question du Sahara. L'analyse des travaux de Think Tank gouvernemental comme l'« Institut Royal des Etudes Stratégiques (IRES) », ou proche des décideurs marocains (palais royal et gouvernement) comme l'Institut Amadeus montrent bien cette réalité. En effet, dès 2015, le premier (IRES) recommandait : « L'Afrique du Sud exerce sa politique africaine par le biais de la SADEC et l'UA. La présence du Maroc aux sommets de l'UA permet des rencontres bilatérales menées en marge des sommets. Ces rencontres sont l'occasion de montrer aux pays de l'Afrique Australe et de l'Est notamment que le Maroc reste un acteur continental. La chaise vide dérange souvent les amis du Maroc. Cette approche de présence marocaine dans les activités de l'UA peut être une carte efficace pour réaliser les objectifs politiques et stratégiques du Maroc »[61]. Comme cela peut bien être observé, cette recommandation est fondée sur le constat de l'utilisation stratégique de l'institution continentale par les Etats et de l'impact que génère l'absence d'un Etat (Maroc ici) au sein de cette enceinte.

L'institut Amadeus s'inscrit dans la même lignée. En effet, Après avoir fait le constat que l'utilisation à distance de l'UA par le Maroc (à travers ses « Etats amis ») devient de plus en plus peu productif[62], et noté surtout l'importance croissante de l'institution panafricaine sur la scène internationale sur les questions africaines (dans sa tendance à parler d'une seule voix et à être l'interlocuteur privilégié des acteurs internationaux non africains), il appelle

[60] Institut d'études de sécurité, *Rapport sur le Conseil de Paix et de Sécurité...* cit., p. 10.

[61] El Ajlaoui, M. E., « Quelles perspectives de développement des relations du Maroc avec l'Afrique australe et l'Afrique de l'Est ? », *Institut Royal d'Etudes Stratégiques*, 2015. [En ligne], consulté le 12/10/2019, p. 115, <http://www.ires.ma/wp-content/uploads/2016/12/Rapport-Global-Afrique-Est-et-Australe_Mai_2015.pdf>.

[62] Analysant certaines décisions, Rapports et Actions du Conseil exécutif de l'UA, du CPS et de la Commission de l'UA, l'institut Amadeus détaille sa lecture de l'instrumentalisation du droit international africain et des institutions africaines, notamment l'UA, contre la position marocaine sur le Sahara (Voir Fihri, B. F. (dir.), *Le Maroc en Afrique. La voie royale*, Rabat, Institut Amadeus, 2015, pp. 32-37. [En ligne], consulté le 12/10/2019, <https://www.medays.org/wp-content/uploads/2018/09/Etude%20Maroc%20Afrique%202015%20Final.pdf>.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

le pays à réintégrer l'organisation dans la mesure où « il est […] plus aisé de « combattre » la présence de la [République Arabe Saharaouie Démocratique] au cœur de la structure qu'à l'extérieur des instances africaines »[63]. Ces différents appels vont déboucher sur le retour effectif du Royaume dans l'UA dès 2017.

Depuis lors, le pays est engagé dans une véritable bataille (d'interprétation des instruments juridiques de l'UA et des Nations Unies) avec certaines instances africaines pour leurs décisions relatives au Sahara. C'est le cas par exemple des relations du Maroc avec la Commission africaine des Droits de l'homme et des peuples à laquelle l'Etat marocain a réitéré son refus de la voir conduire une « Mission d'établissement des faits au Sahara » au motif qu'il n'est pas Etat-partie à la Charte africaine des Droits de l'homme et des peuples, mais surtout en raison de « la partialité des instances africaines » (selon le ministère marocain des affaires étrangères) lors de la prise de décision relative à cette mission[64].

La crise post-électorale en Gambie est aussi fortement illustrative. En effet, ce fut l'occasion pour certains des Etats-leaders de la sous-région ouest-africaine que sont le Sénégal et le Nigéria de brandir la menace du recours à la force armée en vue de la « Restauration de la démocratie (Restore Democracy) ». Cette menace sera brandie au nom des textes fondamentaux des Nations Unies[65], l'UA[66] et de la CEDEAO[67] en matière de démocratie et

---

[63] Fihri, B. F., (dir.), *Maroc et l'Afrique. Pour une Mobilisation nationale d'envergure* », Rabat, Institut Amadeus, 2014, p. 24-25. [En ligne], consulté le 12/10/2019, <www.africaportal.org/documents/12198/EtudeCollectorLight.pdf>.

[64] Commission africaine des Droits de l'Homme et des Peuples, Morocco Observation on 46th Activity Report of ACHP, le 02 juillet 2019. [En ligne], consulté le 12/10/2019. <https://www.achpr.org/public/Document/file/Any/Morocco%20Observation%20on%2046th%20Activity%20Report%20of%20ACHPR_FRE.pdf>.

65 La charte des Nations Unies, les textes fondamentaux sur les droits de l'homme que sont la déclaration universelle des droits de l'homme de 1948, les protocoles sur les droits politiques et civiles et sur les droits économiques, sociaux et culturels. Mais plus précisément la résolution 2337 du 19 janvier 2017 du Conseil de sécurité.

66 La Charte africaine de la démocratie, des élections et de la gouvernance du 30 janvier 2007 et la Charte Africaine des Droits de l'Homme et des Peuples du 11 juillet 1990.

[67] Protocole relatif au mécanisme de prévention, de gestion, de règlement des conflits, de maintien de la paix et de la sécurité, signé à Lomé, le 10 décembre 1999 et Protocole a/sp1/12/01 sur la démocratie et la bonne gouvernance additionnel au protocole relatif au

de bonne gouvernance, de droits de l'homme et de paix et sécurité[68], et particulièrement à la suite de la Résolution 2337 du 19 janvier 2017 du Conseil de sécurité des Nations Unies. Mais, comme le souligneront de nombreux analystes comme Mouhammed-Awali Ibouraima[69] ou Djiby Sow[70], si cette action militaire peut être considérée comme légitime au nom de la démocratie, elle reste juridiquement contestable surtout à la lumière de la résolution 2337 du conseil de sécurité.

En effet, à la lecture de cette résolution, il n'apparait nulle part une autorisation « expresse » de l'usage de la force, mais plutôt un appel « à la retenue » et à privilégier « le dialogue, une transition pacifique » du pouvoir[71]. Mais, l'empressement du Sénégal et du Nigéria à invoquer le recours à la force à pousser à s'interroger sur les considérations qui sous-tendent leur démarche. Il pourrait bien s'agir de prétentions géopolitiques du premier (le Sénégal) qui aurait pu voir en cette crise une occasion de se défaire d'un dirigeant voisin (Yahya Djamé, ancien président gambien) trop longtemps encombrant[72] ; et pour le second, l'acte de réaffirmation de son rôle de premier « gendarme » de la sous-région.

Ainsi l'idéal d'une sécurité collective se trouve pris en otage par le réalisme politique des Etats, camouflés derrière le droit et les institutions. Ceci a des impacts sur la construction de la sécurité collective en Afrique. Des conséquences qui appelle à trouver une nouvelle approche au rôle du droit.

## IV. POUR UNE UTILISATION PRAGMATIQUE DU DROIT AU SERVICE DE LA SECURITE COLLECTIVE EN AFRIQUE : FONDEMENT ET ARTICULATION

Dans cette dernière partie du travail, il importera de mettre en exergue les fondements de cette nouvelle perspective théorique et pratique du droit international africain. Il s'agit des conséquences néfastes de la double utilisation du droit en matière de sécurité collective en Afrique, et de la nature indéterminée du droit que révèle cette double utilisation (1). C'est sur ces éléments que la nouvelle approche sera articulée (2).

### 1. DES FONDEMENTS D'UNE UTILISATION NEOPRAGMATISTE DU DROIT INTERNATIONAL EN AFRIQUE : LA NECESSITE DE DEPASSER LA DOUBLE UTILISATION CONTRADICTOIRE DU DROIT

mécanisme de prévention, de gestion, de règlement des conflits, de maintien de la paix et de la sécurité



Paix et Securité Internationales
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

Les utilisations stratégiques du droit et institutions de sécurité internationale en Afrique par les Etats développées ci-dessus ont des répercussions souvent néfastes sur le processus de construction de la stratégie de sécurité collective africaine. Ainsi, l'instrumentalisation du CPS par l'Algérie et autres Etats comme le Maroc, le Nigéria, l'Afrique du Sud, réduit voire bloque les possibilités d'un règlement du différend sur le Sahara dans un cadre africain. Les récentes manœuvres diplomatiques du Maroc en la matière sont illustratives. En effet, l'admission du Royaume du Maroc au sein du CPS et l'arrivée du pays à la présidence de l'organe n'ont pas manqué de révéler l'importance de cette institution dans la lutte d'influence des Etats-leaders africains, mais surtout l'impact d'une telle lutte sur l'évolution de l'institution. Le premier problème soulevé avec la présence marocaine a été la méfiance entre les Etats, celle-ci s'étant manifesté lors des votes où 16 Etats-membres de l'UA se sont abstenus au motif que « Morocco is […] expected to resist any mention in AU documents of the 'legitimate struggle for independence by the Sahrawi people »[73]. Mais plus clairement, l'action marocaine au sein de cette entité vise surtout à contrôler son agenda afin de l'orienter dans le sens de la nouvelle stratégie du Royaume sur le Sahara. Cette stratégie consiste à placer la question du Sahara sous la seule houlette des Nations Unies, avec une faible implication de l'Union africaine ou dans tous les cas assurer la primauté de l'agenda onusien sur celui de l'UA. C'est dans ce sens qu'il convient de comprendre le contenu du discours tenu par Mohcine Jazouli, Ministre délégué marocain à la Coopération africaine lors de la 12ème retraite du CPS, à Rabat, du 24 au 26 juin 2019. Dans son allocution, le ministre a d'abord souligné les divergences idéologiques, positions ambiguës au sein de l'institution et leurs impacts sur le fonctionnement de l'institution, particulièrement sur la question du Sahara. A la fin de son discours, il mettra l'accent sur la primauté de l'agenda onusien sur celui des organisations régionales quand il est question de certaines ques-

[73] Louw-Vaudran, L., *Morocco prepares to make its mark on security in Africa. Expect a power play as Morocco joins the Peace and Security Council shortly after returning to the AU*., 2018 [En ligne], Consulté le 19/10/2019, <https://issafrica.org/amp/iss-today/morocco-prepares-to-make-its-mark-on-security-in-africa> ( Voir également le dossier consacré par l'auteur au retour du Maroc au sein de l'UA : Louw-Vaudran, L, *The meaning of Morocco's return to the African Union,* North Africa Report (Institut for Security Studies), 01/2018, pp. 12-15. [En ligne], consulté le 19/10/2019., <https://issafrica.s3.amazonaws.com/site/uploads/nar-1.pdf>.

tions chaudes[74]. Un tel discours n'est pas sans provoquer la réaction d'autres Etats comme l'Afrique du Sud, la Namibie et autres soutiens du Polisario qui considèrent que la présence d'un agenda africain sur la question du Sahara est indispensable ; et que « the solution to the question of Western Sahara should be based on the principle of self-determination and decolonization »[75]. Cette lutte au sein de l'institution africaine pose ainsi le problème crucial de sa crédibilité aux yeux de ses membres eux-mêmes, et pour le reste de l'Afrique la question peut être posée de savoir en quoi la démarche des Etats converge avec le discours de la « Solution africaine aux affaires africaines » ?

Mais au-delà, c'est une divergence qui impacte également les perspectives de développement d'une coopération véritable entre les acteurs des espaces maghrébin et sahélien en matière sécuritaire notamment[76].

Pour le cas de l'Afrique de l'Ouest, il faut noter que si l'engament du Sénégal et du Nigéria sous la bannière de la CEDEAO a joué un rôle déterminant dans le départ du président Djamé, il a aussi créé un climat de méfiance dans la sous-région vis à vis du Sénégal et des institutions sous-régionales, en ce sens qu'une nouvelle guerre allait être provoquée alors que la solution politique restait ouverte.

Par ailleurs, il faut dire qu'au-delà de ces impacts, la double utilisation contradictoire du droit révèle que ce dernier est foncièrement indéterminé, et qu'à ce titre il peut faire l'objet d'une utilisation qui soit plus attentive aux défis actuels et futurs du continent.

En effet, l'indétermination du droit que révèle sa double utilisation dans les relations internationales africaines signifie que cette utilisation est avant tout orientée par des considérations politiques propres aux acteurs Etatiques. Il s'agit de reconnaitre donc que les décisions juridiques sont en premier lieu des choix politiques. Comme le note bien Koskenniemi « [...] il n'y a pas de critère qui soit indépendant de ce que les Etats acceptent comme tel. [...] Le

---

[74] Koundouno T. F., *Morocco Urges AU Peace and Security Council to Uphold UN-AU Agenda on Western Sahara,*26 juin 2019.[En ligne], consulté le 19/10/2019. URL : <https://www.moroccoworldnews.com/2019/06/276784/morocco-au-peace-security-council-un-agenda-sahara/>.

[75] Ibid.

[76] Baghzouz, A., « Le Maghreb et l'Europe face à la crise du Sahel : Coopération ou rivalités ? », *L'Année du Maghreb* [En ligne], IX | 2013, consulté le 19/10/2019, <http://journals.openedition.org/anneemaghreb/1898>; DOI : 10.4000/anneemaghreb.1898


Paix et Securité Internationales
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

choix reste ouvert et peut être fait seulement par le biais d'une décision indéterminée en droit, c'est à dire une décision que les prémisses mêmes du droit qualifient de subjective, politique »[77].

Toutefois, ce décisionnisme de Martti Koskenniemi ne conduit pas l'auteur « [à] récuse[r] l'idée qu'il puisse y avoir un usage sérieux, intentionnel et réussi du droit international. [Bien que] cet usage [soit] nécessairement politique et contingent ». Dans ce sens, Koskenniemi s'approche d'un décisionnisme Wébérien en ce sens que son décisionnisme se fonde sur l'Ethique de la Responsabilité[78].

Cette posture amène l'internationaliste finlandais au constat que c'est par la technique de l'équilibre des intérêts, le recours à l'équité ou à un sens différencié de la justice, que l'on peut parvenir à une solution dans les conflits dits juridiques[79].

Ainsi, à travers sa démarche critique et déconstructiviste, l'auteur semble ouvrir une perspective des possibles, une voie pragmatique dans laquelle la sagesse politique prend sens dans l'utilisation du droit international.

C'est par là qu'il nous paraît important de s'orienter pour un usage nouveau, pragmatique, du droit international africain au service de la sécurité collective.

## 2. ARTICULATION DE L'APPROCHE NEOPRAGMATISTE DE L'UTILISATION DU DROIT INTERNATIONAL AFRICAIN

D'entrée, il convient de noter qu'être pragmatique, au sens courant du terme, « [...] c'est choisir en fonction de l'efficacité de ses actions plutôt que du respect absolu des principes. [C'est être] plus soucieux des résultats concrets que de la doctrine. En philosophie, le pragmatisme est un courant de pensée typiquement américain. Il envisage la connaissance sous l'angle de son efficacité et non de sa vérité absolue »[80].

---

[77] Koskenniemi, M., *La politique du droit international*, Paris. A. Pedone,2007, p. 74

[78] Ibíd., p. 34.

[79] Ibíd., pp. 74-75.

[80] Dortier, J-F, (dir.), *Le Dictionnaire des Sciences humaines*, Paris-Beyrouth-Delta, éd. Sciences humaines, 2007, p. 666

En droit international, la doctrine américaine se caractérise par l'importance accordée à la recherche de l'efficacité, par son éclectisme, sa prise en compte de la réalité, sa démystification des formes[81].

Mais il ne s'agit pas ici de s'inscrire dans une approche américaine du droit international, celle-ci ayant montré ses limites[82].

Le pragmatisme dans l'utilisation du droit international africain tel que nous l'envisageons se fonde sur la « prise de conscience africaine » à l'origine de la transformation de l'OUA en UA, une dynamique nouvelle marquée par la détermination des africains à faire face aux défis du continent. C'est au nom de cette « conscience africaine renaissante » que l'on a jugé nécessaire de reconnaître le caractère de locomotive à certains Etats africains (qui font preuve de dynamisme dans les affaires communes), d'institutionnaliser et légitimer leur puissance pour l'efficacité de l'action collective africaine, reconnaître un droit d'intervention à l'UA.

Cette mutation se fait dans la perspective d'un dépassement, ou au moins d'une désacralisation des principes traditionnels classiques de l'ordre international africain que sont l'égalité souveraine des Etats, l'intangibilité des frontière, la non-ingérence.

Ainsi, si ces principes ne sont pas expressément remis en cause, ils ne peuvent continuer d'être conçus et interprétés comme au tout début des années 1960. Ils sont nécessairement lus au regard des exigences actuelles, des transformations de la réalité africaine, des défis nouveaux ou pressants de développement économique, d'intégration de sécurité et d'affirmation de l'Afrique sur la scène internationale.

Dans cette nouvelle perspective pragmatiste, ni le formalisme ou l'anti-formalisme ne saurait être primé, mais la recherche d'une solution efficace, des « solutions d'équilibre d'intérêts » susceptible de favoriser un règlement pacifique des différends, de permettre la mise en place d'outils juridico-institutionnels de projection stratégique, par dépassement des principes traditionnels.

A ce titre, il faut citer les comportements des Etats ouest-africains de la CEDEAO vis-à-vis de la demande d'adhésion du Maroc ; ou les actions du

[81] Delabie, L., *Approches américaines du droit international. Entre Unité et Diversité*, Paris. A. Pedone, 2011, 505 p.

[82] Ibid. pp.265-267.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

Royaume tendant à devenir membre de cette institution. Dans les deux cas, le cadre juridique actuel (notamment la Résolution CMlRES.464 (XXVI) du Conseil des Ministres de l'OUA de 1976 reprise par le Traité révisé de la CEDEAO de 1993)[83] est appelé à se réadapter. Ceci est illustratif de cette perception du droit comme un instrument de réalisation des grands objectifs stratégiques et non comme un élément établi à jamais, dans des termes et significations figés.

En outre, ce nouveau moment du droit international africain est un « Moment de la Critique ». Elle implique, en effet, une « démarche critique » inspirée par la « Philosophie Reveniste » de Grégoire Biyogo, elle-même inspirée du « Néo-pragmatisme » de Richard Rorty et de la « Déconstruction » de Jacques Derrida. Pour le philosophe gabonais, le revenir comme philosophie Néo-pragmatiste et Déconstructiviste, appelle à « l'abandon de deux illusions tenaces : celle de la stabilité et celle de la transparence des énoncés [ici on peut parler des principes et règles sacralisés du droit international, une sacralisation qui vise à satisfaire les intérêts stratégiques des Etats, à justifier des logiques de domination], *qui sont autant de croyances superstitieuses* »[84]. Le revenir est, sur le plan politique, une invitation « *à abandonner ce qui est jugé non variable, […], non performant, en vue d'accroitre les usages de la discussion critique […]* »[85].

Dans le domaine de l'analyse de la pratique africaine du droit, ce moment critique entend révéler les tentatives continues de confiscation des stratégies collectives au profit d'un ou de quelques Etats africains ou d'acteurs extérieurs. Elle met en lumière les excès ou risques d'excès résultant d'un usage instrumentaliste du droit dans les relations internationales africaines ; et par là, nous permet de prévenir les échecs futurs des initiatives collectives en construction à travers l'outil juridico-institutionnel. Tout ceci ne peut réussir

[83] A travers cette résolution, les Etats africains ont décidé : « [...] *qu'il y aura cinq régions de l'OUA, à savoir, les régions Nord, Ouest, Centre, Est et Sud* ». Et la région d'Afrique de l'Ouest a été définie comme l'espace comprenant les seize (16) Etats ci-après : « Bénin, Burkina Faso, Cape Vert, Cote d'Ivoire, Gambie, Ghana, Guinée, Guinée Bissau, Libéria (doyen), Mali, Mauritanie, Niger, Nigeria, Sénégal, Sierra Leone et Togo ». Cette division a été repris par la CEDEAO dès l'article 1 de son Traité révisé de 1993. De là, le droit ne saurait être considéré comme la cause d'un blocage ou ralentissement éventuel de ce processus.

[84] Biyogo, G., H*istoire de la Philosophie africaine : Entre la postmodernité et le néo-pragmatisme*, Paris, Harmattan. Volume IV, 2006, p. 203

[85] Ibid. p. 204


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

qu'en restant appuyé sur une démarche de relecture critique de l'histoire du droit international en Afrique, car l'adoption d'une épistémologie reveniste est aussi un « refus de toute occultation ou relégation du processus historique de formation et d'utilisation du droit international en Afrique ».

A travers l'analyse effectuée dans les deux premières parties de cette étude, nous avons pu voir comment la pratique du droit sans une critique rigoureuse conduit à la production de schémas de domination susceptible de compromettre la construction d'une stratégie de sécurité collective. Partant, la voie Néo-pragmatiste du droit international, en tant que démarche critique, annonce, pour la pratique du droit international en Afrique, la sortie de cet « *oubli de soi* » vers sa « *propre réinvention* »[86].

Cela signifie qu'en matière de construction juridico-institutionnelle de la sécurité collective, de partir de la déconstruction des dogmatismes juridiques (celui de la souveraineté, de l'intangibilité des frontières, du principe d'autodétermination en tant que principe à sens unique) vers l'élaboration de nouveaux horizons normatifs plus attentifs aux défis actuels du continent, comme celui de la lutte contre des menaces asymétriques, transnationales et transrégionales (sur terre, sur mer et dans le cyberespace), la mise en place d'un système de défense commune.

Ce droit, dé-fétichisé, devient l'outil qui matérialise la prise de conscience profonde des Etats de l'inséparabilité de leurs défis sécuritaires, de leur existence dans un « complexe de sécurité »[87]. Ceci devant les obliger à avancer vers la construction « d'un ensemble intégré dont les membres sont convaincus que la résolution de leurs différends communs ne peut et ne doit se faire que par les voies pacifiques et institutionnelles sans recours à la force physique »[88], c'est-à-dire dans le cadre d'une « communauté de sécurité »[89].

Mais, cette dynamique étant inscrite dans le processus de mutualisation des puissances, telle que définie plus haut, devra dépasser le cadre de la communauté de sécurité deutchienne pour aboutir à une « Communauté de pro-

[86] BIYOGO, G., *Histoire de la Philosophie africaine : Entre la postmodernité et le néo-pragmatisme*, Paris, Harmattan. Volume V, 2006, p.206 ; BIYOGO, G., *Histoire de la Philosophie africaine : Introduction à la philosophie moderne et contemporaine*, Paris, Harmattan. Volume II, 2006, p. 206

[87] BUZAN B., *People, States and Fear*, 1983, Cochester, ECPR Press, 2007 [3e éd.], p.190

[88] BATTISTELLA D., *Théories des relations internationales*, Paris, Presses de Sciences Po, 2015, p. 502

[89] DEUTSH, K. et al., *Political community and the North Atlantic Area*, Princeton (N.J), Princeton University Press, 1998, p. 3



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

jection stratégique ». Cette dernière étant entendue comme « un ensemble fortement intégré et largement pacifié, agissant comme un outil d'affirmation internationale et de défense des intérêts collectifs de ses membres ».

## V. CONCLUSION

Dans cette étude non exhaustive, il a été question de mettre en lumière, selon une démarche critique et prospective[90], le rôle central du droit international dans la construction de la sécurité collective en Afrique, notamment dans le cadre de la « stratégie de mutualisation des puissances ».

Ainsi, d'un point de vue critique, nous avons démontré que le droit international joue un double rôle contradictoire (idéaliste et réaliste) dans ce processus. En ce sens que si, d'une part, il sert à mettre la puissance des Etats-leaders au service de la sécurité collective au nom des principes de solidarité, de panafricanisme, d'efficacité ; d'autre part, c'est à travers lui que ces mêmes Etats essaient de mettre en œuvre leur puissance, défendre leurs propres intérêts et même exercer de l'influence sur d'autres Etats du continent, sous couvert d'agir conformément au droit et au nom des institutions collectives. Cette utilisation révèle un droit essentiellement indéterminé.

Cette indétermination du droit et son usage instrumental entrainent, dans certaines situations, un ralentissement voire un blocage de l'approfondissement de la stratégie de mutualisation des puissances dans le domaine de la sécurité. D'où la nécessité d'une voie nouvelle d'analyse critique et d'utilisation du droit international ; une voie attentive aux défis sécuritaires (et autres) actuels et futurs de l'Afrique.

---

[90] Cette démarche s'inspire également des conclusions des travaux de l'internationaliste critique belge Vincent Chapeau, qui a proposé au Québec une nouvelle approche méthodologique aux théoriciens critiques. Celle-ci a trois dimensions dont celle d'un rapport schizophrénique au droit. Cela qui consiste à faire de la critique et en même temps faire de l'action, tout en assumant cette contradiction. Il s'agit donc de sortir de l'opposition radicale entre anti-formalisme et formalisme ou entre Critique et Positivisme, en usant des apports des deux courants théoriques : le moment critique étant le moment de la Conscience (dans l'utilisation du droit) et le moment positiviste offrant l'opportunité d'agir par le droit, le moment de l'action. (Chapeau V., *le droit international francophone est-il en retard ou ne veut-il tout simplement pas venir ?* in Bachand, Rémi - *« L'état des théories critiques dans le monde francophone. Trajectoires comparées : Relations internationales et droit international* », 2011, [En ligne] Consulté le 12 novembre 2017, <http://www.ieim.uqam.ca/IMG/mp3/01_chapaux.mp3>.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

Fondée sur le principe de la supériorité du politique sur le juridique (observée à partir de l'indétermination du droit) et sur l'éthique de responsabilité, cette voie entend faire du droit l'outil de la quête de « solution d'équilibre des intérêts ou d'intérêts partagés ». Elle désigne un usage néo-pragmatiste de l'outil juridique au service de la sécurité collective. Ce moment néo-pragmatiste devant s'entendre comme le temps d'une dé-dogmatisation des principes classiques du droit international en Afrique, d'une utilisation efficace et contextualisée du droit, matérialisant la prise de conscience des Etats de l'inséparabilité de leurs défis sécuritaires et de la nécessité d'évoluer vers une « communauté de sécurité » et surtout une « communauté de projection stratégique », du fait de la Mutualisation des puissances qui sous-tend le processus d'intégration africaine.

## REFERENCES BIBLIOGRAPHIQUES

– AMMOUR L. A., *L'Algérie et les crises régionales : entre velléités hégémoniques et repli sur soi*. JFC Conseil, la Méditerranée en partage. Avril 2013

– AMSTUTZ Mark R., *International Conflict and Cooperation. An Introduction to World Politics*, Brown and Benchmark, Chicago, 1995

– BACH D. C., NIGERIA : Paradoxe de l'abondance et démocratisation en trompe-l'œil, *Afrique contemporaine,* n° 219, 2006/3

– BAGHZOUZ A., « Le Maghreb et l'Europe face à la crise du Sahel : Coopération ou rivalités ? », *L'Année du Maghreb* [En ligne], IX, 2013, consulté le 19/10/2019. URL : http://journals.openedition.org/anneemaghreb/1898 ; DOI : 10.4000/anneemaghreb.1898

– BARBARA, M., *Nouveau paradigme stratégique des puissances moyennes*. Chaire In Bev Baillet-Latour, programme « Union européenne-Chine ». Note d'Analyse 16 Mars 2011

– BATTISTELLA D., *Dictionnaire des relations internationales. Approches, Concepts, Doctrines*, Paris, Dalloz, 2012.

– BATTISTELLA D., *Théories des relations internationales*, Paris, Presses de Sciences Po, 2015.

– BENOT Y., *Les idéologies des indépendances africaines*, Paris, F. Maspero, Coll. : Cahiers libres, 1969

– BIYOGO G., *Histoire de la Philosophie africaine : Entre la postmodernité et le néo-pragmatisme*, Paris, Harmattan. Volume V, 2006

– BIYOGO G., *Histoire de la Philosophie africaine : Entre la postmodernité et le néo-pragmatisme*, Paris, Harmattan. Volume IV, 2006

– BIYOGO G., *Histoire de la Philosophie africaine : Introduction à la philosophie moderne et contemporaine*, Paris, Harmattan. Volume II, 2006

– BUZAN B., *People, States and Fear*, 1983, Cochester, ECPR Press, 3e éd., 2007

– CENTRE D'ETUDES STRATEGIQUES DE L'AFRIQUE, *Les leçons de la Gambie sur l'efficacité de la coopération en matière de sécurité régionale*, 25 avril 2017



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

– CHAUMONT C., Cours général de Droit international, Académie de Droit International, « Recueil des Cours », Vol. 1 – 1970

– CHOUALA Y. A., *Puissance, résolution des conflits et sécurité collective à l'ère de l'Union africaine. Théorie et pratique*, AFRI 2005

– CILLIERS J. et al*., Power and influence in Africa: Algeria, Egypt, Ethiopia, Nigeria and South Africa,* African Futures paper 14, March 2015

– CYR DJIENA WEMBON M., *Le mécanisme de l'OUA pour la prévention, la gestion et le règlement des conflits*, African Yearbook of International Law Online / Annuaire Africain de droit international Online, 2(1), 1994

– DELABIE L., *Approches américaines du droit international. Entre Unité et Diversité*, Paris. A. Pedone, 2011

– DETLEF N., "How to compare regional powers: analytical concepts and research topics", *Review of International Studies*, Hamburg, 2010

– DEUTSH K. et al., *Political community and the North Atlantic Area*, Princeton (N.J), Princeton University Press, 1998

– DORTIER J-F, (dir.), *Le Dictionnaire des Sciences humaines*, Paris-Beyrouth-Delta, éd. Sciences humaines, 2007

– EL AJLAOUI M. E., «Quelles perspectives de développement des relations du Maroc avec l'Afrique australe et l'Afrique de l'Est ? « Rabat, *IRES*, 2015

– ELOWSON C. et DE ALBUQUERQUE A. L., *Challenges to Peace and Security in Eastern Africa : The role of IGAD, EAC and EASF.* FOI Memo 5634, Studies in African Security, Project number: A16104, February 2016

– FABRICIUS P., "The Gambian crisis is set to dominate AU Summit discussions and challenge Africa's determination to enforce democracy", *Institute Of Security Studies (ISS).* 19 January 2017

– FIHRI B. F., «Le Maroc en Afrique. La voie royale», Rabat, *Institut Amadeus*, 2015

– FIHRI B. F., (dir.), «Maroc et l'Afrique. Pour une Mobilisation nationale d'envergure «, Rabat, *Institut Amadeus*, 2014

– HARSCH E., *L'Afrique de forces de maintien de la paix. Face au désengagement des grandes puissances, l'Afrique renforce ses capacités*, in Revue Afrique relance, Vol. 17, N°3, Octobre 2003

–HASSNER P., Intégration et coopération ou inégalité et dépendance ? In: Revue française de science politique, 24ᵉᵐᵉ année, n°6, 1974

– INSTITUT D'ETUDES DE SECURITE, *Rapport sur le conseil de paix et de sécurité*, N°81, Juin 2016

– KOSKENNIEMI M., *La politique du droit international*, Paris. A. Pedone,2007

– KOUROUMA O., Du concept de puissance dans le contexte africain : Quelle opérationnalité ? in GUENNOUNI N. et al., *Tendances internationales et internes de l'évolution du droit. Mélanges offerts en l'honneur du Doyen Mohamed Bennani*, Tome I, Casablanca, Najah Al Jadida

– KOUROUMA O., *La mutualización de las potencias: una estrategia africana de cooperación Sur-Sur*, *Revista d'Afers internattionals*, N°114, Décembre 2016.

– KOUROUMA, O., « L'Afrique du sud et le Nigéria dans la géopolitique africaine: Des puissances moyennes émergentes africaines, au-delà des débats et contre-débats», In El Houdaigui R., *La façade atlantique de l'Afrique : un espace géopolitique en construction*, Rabat, OCP Policy Center, 2016.

– KOUVIBIDILA G-J., *Histoire de la construction de l'Afrique*, Paris, Harmattan, 2011

– KUPCHAN C. A., *After Pax Americana : Benign Power, Regional Integration, and the Sources of a Stable Multi-polarity, International Security*, Vol. 23, No. 2, Autumn, 1998.

– LECOUTRE D., Le Conseil de paix et de sécurité de l'Union africaine, clef d'une nouvelle architecture de stabilité en Afrique ?, *Afrique contemporaine,* n° 212, 4/2004.

– LOUW-VAUDRAN L., "The meaning of Morocco's return to the African Union", North Africa Report, *Institut for Security Studies*, 01/2018.

– LUNTUMBUE M., *Le Nigéria dans la géopolitique ouest-africaine : atouts et défis d'une puissance émergente*, Note d'Analyse du GRIP, Bruxelles, 18 juillet 2013.

– LUNTUMBUE M., *Le Nigéria dans la géopolitique ouest-africaine : atouts et défis d'une puissance émergente*, Article cité ; Vincent Darracq, « Jeux de puissance en Afrique : le Nigeria et l'Afrique du Sud face à la crise ivoirienne », Politique étrangère, Été, 2/2011.

– MAZRUI A., « *Pour une colonisation légère des régions d'Afrique en désintégration* », Bulletin du Codesria, N°2, 1995.

– MAZRUI, A, «Une paix qui est établie, protégée et entretenue par l'Afrique elle-même» (Traduction de l'auteur, *Towards a Pax Africana : A study of ideology and ambition*, Chicago, University of Chicago Press, 1967.

– OSUNTOKUN J., «Hegemon in a peripheral region: Future of Nigeria's foreign policy», *The Nation*, 18 avril 2013.

– STRUYE DE SWIELANDE T., « *La Chine et le «Soft power» : une manière douce de défendre l'intérêt national* ? », in Notes d'analyse de la Chaire Inbev Baillet - Latour sur les relations Union européenne - Chine (Université catholique de Louvain), numéro 2, mars 2009.

– TAMEKAMTA A. Z., *L'engagement des états Africains en Matière de Sécurité en Afrique Centrale : Contraintes et enjeux de la coopération UA-CEEAC*, Août 2016.

– TCHIKAYA, B., *Le droit de l'Union africaine*, Paris. Berger-Levrault, 2014

– TOMBAZOS, S., Critique du livre d'Antoine Artous, *Le fétichisme chez Marx. Le marxisme comme théorie critique,* Editions Syllepse, Paris, 2006, - 2007

– VENNESSON P. et SINDJOUN L., « Unipolarité et intégration régionale : l'Afrique du Sud et la 'renaissance africaine' ». *Revue française de science politique*, 50e année, n°6, 2000.

– VERON J-B., *L'Afrique du Sud et le Nigeria : du maintien de la paix à la recherche d'un positionnement stratégique sur le continent africain,* Afrique contemporaine, n° 219, 2006/3

– WEILER J. H., *Une révolution tranquille. La Cour de justice des communautés européennes et ses interlocuteurs* In : Politix. Vol. 8, N°32. Quatrième trimestre,1995

– YABI G. O., «Peace and Security in Africa. Italian Institute for International Political Studies», *ISPI Background Paper* n. 4, 2016.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 85-116
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.03

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

**Citation**: VALLE GÁLVEZ, A. del, «Refugee Crisis and Migrations at the Gates of Europe: Deterritoriality, Extraterritoriality and Externalization of Border Controls», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 117-160

**Received**: 11 October 2019
**Accepted:** 15 November 2019

# REFUGEE CRISIS AND MIGRATIONS AT THE GATES OF EUROPE: DETERRITORIALITY, EXTRATERRITORIALITY AND EXTERNALIZATION OF BORDER CONTROLS

Alejandro DEL VALLE-GÁLVEZ[1]

I. - INTRODUCTION. II. - THE BORDERS AND GATES OF EUROPE. III. - VULNERABILITY OF THE EUROPEAN BORDERS? IV.- 'EXTERNALIZATION', 'EXTRATERRITORIALITY' AND 'DETERRITORIALITY' OF MIGRATION CONTROL. V. - CONCLUSIONS

**ABSTRACT:** The refugee crisis has shaped a new perception of the migration reality in Europe. The ramifications of its impact on European integration are visible and enduring. The EU's response has included a certain strategic perspective, albeit weighed down by an excess of eurocentrism and a security perception that does not take third countries' interests into balanced account. The major economic effort being made supports a far-reaching strategy, only now beginning to be outlined, to promote economic development in the countries of origin and transit of migrants. Additionally, issues such as the monitoring of respect for migrants' human rights have not yet been suitably globally defined in this strategy.

Although the behaviour and response capacity of the EU and its Member States can be assessed in different ways, the truth is that the migration debate has decisively swayed a block of countries that are openly reluctant to engage in intra-European solidarity and accept the new realities and responsibilities entailed by the refugees already present and yet to come to Europe. This position is very negative in the medium and long term, since, as noted, the crisis has also underscored the permanence of migration trends and flows and the consolidation of the routes or *gates of entry* to Europe.

This contribution considers the vulnerability of the European borders designed and in operation in the Schengen Area. The internal borders were the most affected at the start of the migration crisis and are likely to be marked by current regulatory changes, which tend to allow exceptionality as a relatively common occurrence in the European 'federal' area of free movement. Nevertheless, the resilience of this system of the absence of internal border controls in the 'federal' area of free movement is undeniable.

[1] Full Professor (Catedrático) of Public International Law, holder of the Jean Monnet Chair on Migration and Borders in EU Law, University of Cádiz. Director of the 'Migration and Human Rights in Europe's External Borders' Centre of Excellence. Article written within the framework of the R&D project *España, seguridad y fronteras exteriores europeas en el área del Estrecho* [Spain, security and European external borders in the area of the Strait], DER2015-68174-R (PIs: A. del Valle and I. González), funded by the Spanish Ministry of Economy and Competitiveness and the ERDF.

The impact on the EU's external borders has been even greater, as it has shown once and for all that, more than fragile or vulnerable, some border controls, such as the sea border ones, are not practicable, especially those on Europe's southern sea borders.

It is precisely this infeasibility of border control in marine areas that leads to the accentuation of certain trends on Europe's external borders, such as the *externalization* of migration controls. New regulatory and strategic planning developments confirm this trend, as well as the current concern for deploying an integrated external border management system.

With regard to the phenomenon known as the 'externalization' of migration controls, the literature considers it to refer to EU actions aimed at reducing, sorting and controlling migration flows with the consent of third states in relations that are, by definition, asymmetrical. This article has addressed the different situations that arise, highlighting the advisability of differentiating between *externalizing* migration policy, on the one hand, and *extraterritorial* action concerning migration control, on the other.

In search of greater conceptual accuracy, the term 'deterritoriality' has been used, as it is more neutral than the other terms mentioned insofar as it evokes the idea of positioning outside the territory certain border control and migration policy functions, to be carried out by other states or by the state itself. Since these are situations and actions linked to migration and border control, they should be conceptually situated outside the territory; the *deterritoriality* option hypothetically makes it possible to encompass both the *externalization* and the *extraterritoriality* of border control functions concerning migration.

To this end, this article has focused on the various notions and activities that might be discussed in relation to the 'externalization' and the 'extraterritoriality' of migration controls and border functions, terms that, in sum, refer to migration control and management activities outside the territory, carried out by public officials of the EU states or by third states.

On the one hand, *externalization* is considered to refer to the management and control of migration flows, the activities of adopting agreements, programmes, action plans and measures to encourage third states to monitor their own borders and migration flows in order to control, restrict or impede physical access to the territory of the EU states, accepting the placement in their territory, or the rejection, of refugees and migrants from other states. It does not involve the presence of or direct exercise of control activities by public officials of the EU Member States. In fact, outside European territory it is highly debatable that states are strictly performing border control functions, as it is an area that may more accurately fall within the more generic field of *migration flow control* linked to migration policy and European external action.

On the other hand, *extraterritorialization* is understood to entail the performance of border control functions by states themselves outside their own territory. This case should involve the presence of or exercise by Member State public officials of some (effective) border control activities or functions in areas without state jurisdiction or in the territory of third states, with their consent.

We are witnessing a change in the very concept of border in this post-globalization era, in which certain functions are offshored and systematically placed outside a state's territory and checkpoints. However, territorial and extraterritorial actions must be differentiated from those occurring as part of external actions in or with third states for the purposes of migration policy and the control of migration flows.

The reality is that a new border space south and east of the Mediterranean has been configured for migratory flows, which needs a new policy of external borders for these areas. Therefore, we must reflect on new frontier spaces, with new concepts and approaches to the border that provide other parameters of action towards migratory flows and external controls.

Today, the Union needs new instruments and concepts for these new realities, especially so as not


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

to lose sight of the fact that, when it comes to tackling crises such as those related to migration and the rights of foreigners approaching or entering its territory and jurisdiction, Europe is a rational construct entailing a project for civilizational progress. As such, it must permanently incorporate its values and respect for human rights in all its policies, regulatory measures and actions with foreigners and third states, both on its own external borders and beyond them. This is essential for the identity and objectives of the European integration, and for the projection of the EU security, solidarity and values in accordance with the International and European Human Rights Law.

**KEYWORDS:** European Union, immigration, refugees, asylum, European values, border controls, immigration controls, migration policy, borders, internal borders, external borders, Frontex, maritime immigration, externalization, extraterritoriality, deterritoriality, human rights

**CRISIS DE REFUGIADOS Y MIGRACIONES EN LAS PUERTAS DE EUROPA: DESTERRITORIALIDAD, EXTRATERRITORIALIDAD Y EXTERNALIZACIÓN DE CONTROLES FRONTERIZOS**

**RESUMEN:** La crisis de los refugiados ha conformado en Europa una nueva percepción de la realidad migratoria. Las ramificaciones de sus impactos en la construcción europea son visibles y duraderas. La reacción de la UE ha tenido cierta perspectiva estratégica, aunque lastrada por un exceso de eurocentrismo y de percepción securitaria, que no tiene en cuenta equilibradamente los intereses de los países terceros. El gran esfuerzo económico que se está realizando sostiene una estrategia de largo alcance que sólo ahora empieza a esbozarse, para fomentar el desarrollo económico en los países de origen y tránsito de la emigración. Por otra parte, cuestiones como las de vigilancia del respeto de derechos humanos de los inmigrantes aún están por perfilarse adecuadamente de manera global en esta estrategia.

Aunque podemos hacer diferentes valoraciones del comportamiento y capacidad de reacción de la UE y sus Estados, lo cierto es que el debate migratorio ha decantado decididamente un bloque de países abiertamente reacios a la solidaridad intraeuropea, y a asumir las nuevas realidades y cargas que suponen los refugiados presentes y por venir a Europa. Esta perspectiva es muy negativa a medio y largo plazo, ya que, como hemos visto, la crisis también revela la permanencia de las corrientes y flujos migratorios, y la consolidación de los vías o *Puertas de entrada* a Europa.

Hemos considerado en el trabajo la vulnerabilidad de las fronteras europeas diseñadas y en funcionamiento en el Área Schengen. Las fronteras interiores fueron las más impactadas al comienzo de la crisis migratoria, y probablemente van a quedar marcadas por los cambios normativos en curso, que tienden a admitir la excepcionalidad como hecho relativamente común en el espacio 'federal' de libre circulación europeo. Pese a todo, la capacidad de resiliencia de este sistema de ausencia de controles fronterizos interiores en el espacio 'federal' de libre circulación, es incontestable.

El impacto en las fronteras europeas exteriores ha sido aún mayor, ya que se ha puesto de relieve en nuestra opinión definitivamente que, más que frágiles o vulnerables, ciertos controles fronterizos como los marítimos son impracticables, en particular los de las fronteras marítimas meridionales europeas.

Precisamente esta inviabilidad del control fronterizo en espacios marítimos es lo que lleva en nuestra opinión a acentuar ciertas tendencias en las fronteras exteriores europeas, como las de *externalización* de controles migratorios. Los nuevos desarrollos normativos y de planificación estratégica confirman esta tendencia, así como la preocupación actual por desplegar un sistema integrado de gestión de fronteras exteriores.

Respecto al fenómeno conocido como de 'Externalización' de controles migratorios, la doctrina ha venido considerándolo como actuaciones de la UE que buscan reducir, ordenar y controlar los

flujos migratorios en anuencia con Estados terceros, en relaciones por definición asimétricas. En nuestro trabajo hemos abordado las diferentes situaciones que se plantean, poniendo de relieve la conveniencia de diferenciar entre *Externalizar* las políticas migratorias, por una parte, de la actuación *Extraterritorial* de control migratorio, por otra parte.

Buscando una mayor precisión conceptual, preferimos utilizar el termino Desterritorialidad, que es más neutro que los referidos, al evocar la idea de ubicar fuera del territorio determinadas funciones de control fronterizo y de políticas migratorias, a desarrollar por otros Estados o por el propio Estado. Al tratarse de situaciones y actuaciones vinculadas a las migraciones y a los controles fronterizos, debemos conceptualmente situarnos fuera del territorio; por lo que esta opción de *Desterritorialidad*, permite hipotéticamente abarcar las dos situaciones de *Externalización* y de *Extraterritorialidad* de las funciones de control fronterizo respecto a las migraciones. Para ello nos centramos en las diferentes nociones y actividades que podrían debatirse respecto a la 'Externalización', 'Extraterritorialidad' de controles migratorios y funciones fronterizas, expresiones que, en suma, hacen referencia a actividades de gestión y control migratorio fuera del territorio, llevados a cabo por agentes públicos de los Estados UE, o por terceros Estados.

Por una parte, consideramos constituyen *Externalización* de la gestión y control de flujos migratorios, las actividades de adopción de Acuerdos, Programa, Planes y medidas que pretenden que Estados terceros vigilen sus propias fronteras y flujos migratorios, para controlar, restringir o impedir el acceso físico al territorio de los Estados UE, asumiendo la localización en su territorio, o el rechazo, de refugiados e inmigrantes de otros Estados. Esto no implicaría presencia ni ejercicio directo de actividades de control por agentes públicos de los Estados Miembros de la UE. En realidad, fuera del territorio europeo es muy discutible que los Estados estén realizando estrictamente funciones de control fronterizo, ya que se trata de un ámbito que se encuentra tal vez en el más genérico terreno del *control de flujos migratorios* y vinculado a la política migratoria y a la acción exterior europea.

Por otra parte, entendemos que la actuación *Extraterritorialidad* supone llevar a cabo funciones de control fronterizo por los Estados fuera de su territorio. Aquí debe existir en nuestra opinión presencia o ejercicio por agentes públicos de los Estados miembros de ciertas actividades o funciones de control (efectivo) fronterizo, en espacios sin jurisdicción estatal, o en el territorio de Estados terceros, con su acuerdo.

Estamos ante un cambio en la concepción misma de la frontera en esta era pos-globalización, donde determinadas funciones se deslocalizan y se sitúan sistemáticamente fuera del territorio y los puestos fronterizos de los Estados. Sin embargo, las actuaciones territoriales y extraterritoriales deben diferenciarse de las que se producen en actividades de acción exterior en o con terceros Estados a fines de política de inmigración y control de flujos migratorios. La realidad es que se ha configurado para los flujos migratorios un nuevo espacio fronterizo al sur y este del mediterráneo, que necesita una nueva política de fronteras exteriores para este área. Por ello debemos reflexionar sobre nuevos espacios e imaginarios fronterizos, con nuevos conceptos y enfoques de la frontera que aporten otros parámetros de actuación hacia los flujos migratorios y los controles exteriores.

La Unión necesita hoy instrumentos y conceptos nuevos para estas nuevas realidades, y sobre todo para no perder de vista que, a la hora de afrontar crisis como las migratorias y de derechos de los extranjeros que se acercan o entran en nuestro territorio y jurisdicción, Europa es una construcción racional que supone un Proyecto de progreso civilizatorio, y que como tal debe incorporar permanentemente sus valores y el respeto de derechos humanos en todas sus políticas, medidas normativas y actuaciones con extranjeros y Estados terceros, en sus propias fronteras exteriores y más allá de las mismas. Esto es esencial para la identidad y objetivos de la integración, y para la proyección de la seguridad, solidaridad y valores de la UE conforme al Derecho internacional y europeo de los Derechos Humanos.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

**PALABRAS CLAVE:** Unión Europea, inmigración, refugiados, asilo, valores de Europa, controles fronterizos, controles migratorios, política migratoria, fronteras, fronteras interiores, fronteras exteriores, Frontex, inmigración marítima, externalización, extraterritorialidad, desterritorialidad, derechos humanos

**CRISE DES RÉFUGIÉS ET MIGRATIONS AUX PORTES DE L'EUROPE: DÉTERRITORIALITÉ, EXTRATERRITORIALITÉ ET EXTERNALISATION DES CONTRÔLES DES FRONTIÈRES**

**RÉSUMÉ :** La crise des réfugiés a forgé une nouvelle perception de la réalité de la migration en Europe. Les conséquences de ses impacts sur la construction européenne sont visibles et durables. La réaction de l'UE a eu une certaine perspective stratégique, bien que pénalisée par un excès de perception de l'eurocentrisme et de la sécurité, qui ne tienne pas compte des intérêts des pays tiers. Le grand effort économique en cours appuie une stratégie à long terme qui commence seulement à être esquissée pour promouvoir le développement économique dans les pays d'origine et de transit de l'émigration. D'autre part, des questions telles que la surveillance du respect des droits humains des immigrés doivent encore être correctement établies de manière globale dans cette stratégie.

Bien que nous puissions évaluer différemment le comportement et la capacité de réaction de l'UE et de ses États, le débat sur l'immigration a décidément décliné en bloc un groupe de pays ouvertement réticents à la solidarité intra-européenne et à assumer les nouvelles réalités et les responsabilités que posent les réfugiés. Cette perspective est très négative à moyen et long terme car, comme on l'a vu, la crise révèle également la permanence des courants et des flux migratoires, ainsi que la consolidation des routes ou portes d'entrée en Europe.

Nous avons examiné à l'œuvre la vulnérabilité des frontières européennes en fonctionnement dans l'espace Schengen. Les frontières intérieures ont été les plus touchées au début de la crise migratoire et devraient être modifiées par les propositions réglementaires en cours, qui tendent à admettre que l'exceptionnalité est un phénomène relativement courant dans l'espace «fédéral» de la libre circulation européenne. Malgré tout, la résilience de ce système d'absence de contrôle aux frontières intérieures dans l'espace «fédéral» de libre circulation est incontestable.

L'impact sur les frontières extérieures de l'Europe a été encore plus grand, car il a été clairement souligné à notre avis que, plutôt que fragiles ou vulnérables, certains contrôles frontaliers tels que les contrôles maritimes sont irréalisables, notamment ceux des frontières maritimes du sud de l'Europe.

C'est précisément cette impossibilité de contrôler les frontières dans les espaces maritimes qui conduit, à notre avis, à accentuer certaines tendances aux frontières extérieures européennes, telles que celles de l'externalisation des contrôles migratoires. Les nouveaux développements réglementaires et stratégiques en matière de planification confirment cette tendance, ainsi que la détermination actuelle de déployer un système intégré de gestion des frontières extérieures.

En ce qui concerne le phénomène appelé «externalisation» des contrôles de l'immigration, la doctrine l'a considéré comme une action de l'UE visant à réduire, ordonner et contrôler les flux migratoires en accord avec les États tiers, dans des relations asymétriques par définition. Dans notre travail, nous avons abordé les différentes situations qui se présentent, en soulignant l'opportunité de différencier les politiques migratoires d'externalisation, d'une part, de l'action extraterritoriale de contrôle de l'immigration, d'autre part.

À la recherche d'une plus grande précision conceptuelle, nous préférons utiliser le terme Disterritorialité, qui est plus neutre que ceux auxquels il est fait référence, lorsqu'il évoque l'idée de localiser certaines fonctions de contrôle des frontières et certaines politiques de migration en dehors du territoire, à développer par d'autres États ou par l'État lui-même. Lorsque nous traitons des si-

tuations et des actions liées à la migration et aux contrôles aux frontières, nous devons nous placer conceptuellement en dehors du territoire; par conséquent, cette option de déterritorialité permet, de manière hypothétique, de couvrir les deux situations d'externalisation et d'extraterritorialité des fonctions de contrôle des frontières en matière de migration. Pour cela, nous nous concentrons sur les différentes notions et activités pouvant être discutées concernant «l'externalisation», «l'extraterritorialité» des contrôles migratoires et des fonctions des frontières, expressions qui, en bref, désignent des activités de gestion et de contrôle des migrations hors du territoire prises par des agents publics des États de l'UE ou par des États tiers.

D'une part, nous considérons que l'externalisation de la gestion et du contrôle des flux migratoires constitue une activité d'adoption d'accords, de programmes, de plans et de mesures visant à garantir que les États tiers surveillent leurs propres frontières et flux migratoires, afin de contrôler, restreindre ou empêcher l'accès physique sur le territoire des États membres de l'UE, en supposant que le réfugié et l'immigré en provenance d'autres États sont situés sur leur territoire. Cela n'impliquerait pas la présence ou l'exercice direct d'activités de contrôle par des agents publics des États membres de l'UE. En fait, hors du territoire européen, il est très discutable que les États exercent strictement des fonctions de contrôle des frontières, car il s'agit peut-être d'un domaine qui est peut-être le domaine le plus générique du contrôle des flux migratoires, plutôt lié à la politique migratoire et à l'action exterieure européenne.

D'autre part, nous comprenons que l'action Extraterritorialité implique que les États situés à l'extérieur de leur territoire exercent des fonctions de contrôle des frontières. À notre avis, il doit exister une présence ou un exercice par des agents publics des États membres de certaines activités ou fonctions de contrôle des frontières dans les espaces en dehors de la juridiction de l'État ou sur le territoire d'États tiers, avec l'accord de ces derniers.

Nous sommes confrontés à un changement dans la conception même de la frontière en cette ère de post-globalisation, où certaines fonctions sont délocalisées et systématiquement situées en dehors du territoire et des postes frontières des États. Toutefois, les actions territoriales et extraterritoriales doivent être distinguées de celles qui se produisent lors d'activités d'action extérieure dans ou avec des États tiers à des fins de politique d'immigration et de contrôle des flux migratoires. La réalité est qu'un nouvel espace-frontière au sud et à l'est de la Méditerranée a été configuré pour les flux migratoires, ce qui nécessite une nouvelle politique de frontières extérieures pour cette zone. Par conséquent, nous devons réfléchir sur de nouveaux espaces frontières, avec de nouveaux concepts et approches de la frontière qui fournissent d'autres paramètres d'action en matière de flux migratoires et de contrôles externes.

Aujourd'hui, l'Union a besoin de nouveaux instruments et concepts pour ces nouvelles réalités, et, surtout, pour ne pas perdre de vue le fait que face aux crises telles que les migrations et les droits des étrangers qui s'approchent de notre territoire ou y entrent, l'Europe est une construction rationnelle qui implique un projet de progrès civilisationnel. En tant que tel, l'Europe doit intégrer de manière permanente ses valeurs et le respect des droits de l'homme dans toutes ses politiques, mesures réglementaires et actions auprès des étrangers et des États tiers, à ses frontières extérieures et au-delà. Cela est essentiel pour l'identité et les objectifs de l'intégration, ainsi que pour la projection de la sécurité, de la solidarité et des valeurs de l'UE conformément au droit international et européen des droits de l'homme.

**MOTS-CLÉ:** Union européenne, immigration, réfugiés, asile, valeurs européennes, contrôles aux frontières, contrôles migratoires, politique d'immigration, frontières, frontières intérieures, frontières extérieures, Frontex, immigration maritime, externalisation, extraterritorialité, déterritorialité, droits de l'homme

## I. INTRODUCTION

The so-called refugee crisis of 2015 has muddled many aspects of European integration. It is not just a matter of migration policy or the reception of asylum seekers, but of numerous aspects linked to the very essence and nature of the Union and of European integration. European values themselves are at stake when it comes to tackling the challenges posed by current and future migratory pressure towards Europe.[2]

This article will assess the impact of the 2015 refugee crisis on the European system of internal and external borders and the new aspects of migration control at the external borders, which go beyond the areas under state sovereignty or jurisdiction.

To this end, it will analyse (II) the structure of the European 'federal' area of free movement of persons and its border system, in force since 1995. The analysis of the crisis, its effects and the EU's response will show that this specific crisis falls within a framework of migration flows and migratory pressure whose access routes to Europe are well known and are determined by the migration paths referred to here as the *gates of Europe* with the neighbouring states of Turkey, Morocco and Libya.

It will also examine the situation of the internal and external borders following the crisis and present and future migration challenges (III). Specifically, it will analyse the obstacles to free movement and the status of the external borders as migration control evolves. In this regard, it will assess the problems of migration by sea and the current concern to implement and develop an Integrated External Border Management System.

Part IV will focus on the externalization of migration policy and controls. It will review the various situations and propose classifying the set of experiences, norms and practices carried out beyond state jurisdiction and the EU's external action as 'deterritorialization'. The author will share his view regarding the advisability of differentiating between externalizing migration policies to third states and extraterritorial action for border migration control. The conclusions (V) will recap the main takeaways.

[2] For a previous analysis of these issues, Del Valle Gálvez, A. "Unión Europea, crisis de refugiados y *limes imperii*", *Revista General de Derecho Europeo* 38, 2016, and "Los refugiados, las fronteras exteriores y la evolución del concepto de frontera internacional", *Revista de Derecho Comunitario Europeo,* Year No. 20, 55, 2016, p. 759.

## II. THE BORDERS AND GATES OF EUROPE

### 1. SCHENGEN, INTERNAL BORDERS AND EXTERNAL BORDERS

The function of borders as a place for the control of goods and persons plays a decisive role in the process of European integration as it determines both the movement of goods and the mobility of people. Historically, this function of controlling people has been fulfilled at the border itself or at points near the dividing line. However, the European integration process has wrought significant changes in this border control function, primarily due to the progress made on economic and political integration. The creation of a unified economic area in the continental territories of the EU Member States has given rise to the need for functional simplification of the rules governing the internal movement of goods and people of any nationality in this common economic area.

This economic vector of functional unification of the territories of the states participating in the integration was amongst the powerful factors leading to the Schengen Agreements of 1985 and 1990 and responsible for the entry into force, in 1995, of the Schengen Implementing Convention — subsequently integrated into EU law by the Treaty of Amsterdam in 1997 — establishing homogeneous systems for controlling movement into and out of the 'federal' internal territory. It is undeniably a new historical experience of territorial coexistence for European states and an authentic evolution of the classical international border concept and models, resulting in the introduction of a distinction between 'internal borders' and 'external borders' in European states.[3]

In short, it consolidated the reality of what has come to be known as the *border-free Europe* : "*Europe without borders*" a term that actually refers to a territory with *no controls* at the land, sea and airport borders between Member States and thus elides the term *control*. Indeed, legally speaking, a more accurate term would be a *Europe free of internal border controls*. The achievement of Europe's new internal border model, implemented in 1997, had a solid legal foundation:

[3] See our Studies "La refundación de la libre circulación de personas, Tercer Pilar y Schengen: el espacio europeo de libertad, seguridad y justicia", 3 *Revista de Derecho Comunitario Europeo* , nº 3, 1998, pp. 41-ss; "Las fronteras de la Unión - El *modelo europeo* de fronteras", 12 *Revista de Derecho Comunitario Europeo,* 12, 2002, p. 299; "Control de Fronteras y Unión Europea", 7 *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* 7, 2003, p. 67, at 72 *et seq*.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

the definition of the single market itself since 1986 as an "*area without internal frontiers in which the free movement of goods, persons, services and capital is ensured*"(today, Article 26 TFEU)

The TEU and TFEU currently in force include a provision that enshrines in primary law the functionalist need for regulation of the free movement of persons in the area or unified economic territory, clearly differentiating between internal and external borders.

Under the TFEU, the European internal border system has the clear and powerful aim of eliminating controls and, therefore, establishing free movement in a 'federalized' territory free of border control. Article 77 TFEU, in the Chapter on Policies on Border Checks, Asylum and Immigration of the Title on the Area of Freedom, Security and Justice, provides:

> 1. The Union shall develop a policy with a view to:
> (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders'.

This provision was drafted with the explicit aim of encompassing all internal border-control situations ('ensuring', 'absence of any', 'whatever their nationality'), establishing a clear mandate with no room for divergent interpretations regarding the obligatoriness for states of not implementing border controls for people.

This system is complemented by the external border system, with the necessary controls due to the elimination of all types of controls at the internal borders between states. Article 77 TFEU further provides:

> 1. The Union shall develop a policy with a view to:
> (b) carrying out checks on persons and efficient monitoring of the crossing of external borders.

Thus, the Treaty regulates external border crossings with less detail than internal border crossings: it is necessary to carry out checks on persons and, also, monitor external border crossing; moreover, this monitoring must be efficient. However, the term 'efficient' is difficult to pin down legally and, thus, calls for subsequent assessment, probably of a political nature.

However, parallel to the elimination of the internal border controls, the Treaty clearly establishes the need to maintain the checks at Europe's external borders. Hence, the permanent nature of the institutional and legal construction of Europe's external borders and of the ensuing need for integrated ma-

nagement (Article 77(1)(c)), which will inevitably lead to the gradual reinforcement and development of the European border model.

These primary law objectives and regulation endow the Union's external borders with very special characteristics and properties and make them an evolving and fundamental construct inherent to European integration.

One of the most impressive achievements of European integration is precisely the development of its own border *model*, whereby the function of border control has been adapted to the reality of integration and the Schengen Area through the peculiar reorganization of the public power functions of monitoring and controlling the borders between Member States. Thus, through its regulation under the Treaty of Amsterdam, in force since 1999, the *European border model* already transformed the traditional concept of border by eliminating internal border controls, with the correlative security measures, and undertaking innovations in international law, such as the generalization of 'hot' pursuit on land.[4]

In this context, the analogy of the EU as a political entity with some attributes similar to those of a state ideally requires the international integration organization to have the elements of a state, namely: nationals (European citizens); a common immigration law (its own set of rules regulating access to, stays in and exit from EU territory); and a territory delimited by borders where its main powers are exercised. At the same time, the nascent political entity must have a border policy for common control and relations with neighbouring countries.

## 2. THE 2015 REFUGEE CRISIS AND MIGRATION TO EUROPE

During the years 2015 and 2016, millions of people came to Europe as part of a phenomenon mainly caused by the civil war in Syria. It came to be known as the *refugee crisis*, and it overwhelmed all of Europe's external border control systems.

In principle, the crisis was caused by the historical confluence of various factors, including the consequences of the Arab springs in countries such as Tunisia, the effects of the intervention and war in Libya, and the Syrian civil war.

However, in a context of a progressive increase in the arrival of migrants to Europe's borders, the crisis decisively exposed the reality of migration to

[4] These ideas are discussed in 'Las fronteras de la Unión…', *supra* note 3, *Ibid.*



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

Europe as a structural component of its existence from here on out. In this order of ideas, the Commission considers that migratory pressure is, and will continue to be, the new normal for the EU[5] in the medium and long term. This refers to the **highly likely continued existence of migratory pressure** or the massive arrival of displaced persons, who, due to crises, conflicts and environmental problems, amongst other reasons, may reach European territories.

In addition to its enormous media impact, this particular crisis has had profound consequences for public opinion and European integration itself, with all kinds of repercussions in the European Union and its Member States. Of course, many aspects that now seem to be a consequence of the crisis were already present or in an embryonic state prior to it. With the crisis, they have emerged or been called into question and thus need to be discussed and addressed legally, politically and institutionally.

A brief overview of some of the issues that, in the author's view, are the main effects of the refugee crisis could be instructive.[6]

First, there is a terminological problem related to the use of varied terms, which the media often treat as synonyms: immigrants, refugees, asylum seekers, people who have 'fled', displaced persons, etc. Indeed, the crisis has exposed the conceptual confusion surrounding migration, as witnessed by the interchangeable use of the terms '**refugee/migrant**', which, in turn, are confused with the term 'asylum seekers'. The migratory reality has led to the loss of the specific reference of refugees as defined under the Geneva Convention. This traditional conceptual category, well regulated under international law and in the Member State's respective legal systems, is today dealt with diffusely, as a large variety of situations, ranging from economic or environmental refugees to subsidiary protection, asylum seekers or mass displacements of populations, have been cast as humanitarian conditions.

In this context, the European regulatory system for the asylum and refugee procedure, known as the Dublin system, has been strongly questioned, as it places the main responsibility on the applicants' state of entry into the EU, which invariably places a larger economic and procedural burden on external

[5] *External migratory pressure is the "new normal" both for the EU and for partner countries*, COM(2016) 385 final, 7 June 2016, at 6.

[6] See the author's aforementioned articles, "Unión Europea, crisis…" and "Los refugiados…", *supra* note 2.

border states (Italy, Greece and Spain). The Commission has proposed adapting the Dublin asylum claim-processing system with a corrective distribution key, amongst other measures.[7]

At the same time, the system devised for the immediate reception and hosting during the refugee crisis, known as 'hotspots', does not seem to have been acceptably implemented. The **hotspots**, or immigrant identification centres in Greece and Italy, have been widely criticized for their tenuous respect for the human rights of the foreigners at the centres. Their management shows that the systems for reception and registration upon arrival deployed at the hotspots in both Greece and Italy have been clearly insufficient[8] and require better coordination of agencies and appropriate regulation.[9]

Of course, more careful consideration of the concepts and classification of the situations of foreigners arriving in Europe is certainly needed, as the concepts are linked to and determine specific legal statuses, which, in turn, determine the different rights and obligations of people in European territories.

Additionally, one key aspect for the European experience of integration by means of the EU is the free movement of goods and persons in the 'federal' area of free movement that the Schengen Area establishes between 22 EU states and 4 non-EU states (Norway, Switzerland, Iceland and Liechtenstein). With the refugee crisis, the essential issues linked to the EU's internal market, with its **free movement, Schengen Area and internal and external borders**, have been subject to considerable debate and a troubling political questioning, with numerous requests to re-establish control at some internal borders. Indeed, as a result of the arrival in Central European countries of more than two million people in 2015 alone, the controls at the EU's internal borders in Germany, Denmark and Austria were reactivated (in accordance

[7] Communication from the Commission to the European Parliament and the Council *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, Com(2016) 197 final, 6 April 2016. See

[8] Billing F., "The ECtHR on Disembarkation of Rescued Refugees and Migrants at Greek Hotspots", at *EJILTALK.org, 25 Octiber* 2019; European Council on Refugees and Exiles (ECRE)*, The Implementation of the Hotspots in Italy and Greece – A Study*, December 2016; PRIETO, B. "Los hotspots, un eslabón débil en la gestión de la crisis de los refugiados", *Análisis del Real Instituto Elcano*, ARI 25/2016, 4 March 2016.

[9] These are the proposals Fernández Rojo makes in "Los *hotspots:* expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol", 61 *Revista de Derecho Comunitario Europeo,* nº 61, 2018, p. 1013.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

with the planned procedures). Thus, the survival of one of the pillars of integration, namely, free movement in the Schengen Area, was threatened at peak moments of the crisis.

Therein lies an unresolved substantive issue, namely, the legal status of displaced persons within the Schengen Area seeking international protection. In this crisis, displaced persons have overwhelmingly applied for refugee status, in the hope of obtaining humanitarian protection from the host state, or 'subsidiary protection' status, one of EU law's contributions to international refugee law.

Additionally, as will be seen below, the dramatic crisis has shown that control of the external Mediterranean Sea borders is an outstanding problem, as all the measures put into place by the states and coordinated by Frontex so far have been counterproductive or ineffective and have sparked major internal controversy, especially in states with external sea borders (Spain, Italy and Greece).

It is likewise worth noting that the crisis has highlighted the **method of EU advancement**, as, historically, it is the periodic crises that rock Europe that have ultimately led it to take small steps forwards in the integration of Europeans. In this regard, the transformation of Frontex into the **European Border and Coast Guard Agency**[10] with an increase in staff and expanded mandate, including new powers to conduct search-and-rescue operations, may be illustrative.[11]

However, the migration crisis has opened deep cracks in the political te-

[10] See Acosta Sánchez M., "La nueva Guardia Europea de Fronteras y Costas, una necesaria evolución de FRONTEX", *Boletín IEEE,* Nº 4, 2016, p. 466; De Bruycker, PH., "The European border and coast guard: a new model built on an old logic", *European Papers*, Vol. 1, Nº. 2, 2016, p. 559; Santos Vara, J., "La transformación de Frontex en la Agencia Europea de la Guardia de Fronteras y Costas: ¿hacia una centralización en la gestión de las fronteras?" *Revista de Derecho Comunitario Europeo*, Nº 59, 2018, p. 143.

[11] See, for example, Esteve García, "The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) Regarding the Surveillance of External Maritime Borders", *Paix et sécurité internationales*, nº 5, 2017, p. 93, <https://revistas.uca.es/index.php/paetsei/article/view/4654>. A revised Regulation was adopted by the Council the 8th November 2019,<https://www.consilium.europa.eu/en/press/press-releases/2019/11/08/european-border-and-coast-guard-council-adopts-revised-regulation/>, see Fernández Rojo, D. "The Umpteenth Reinforcement of Frontex's Operational Tasks: Third Time Lucky?", *EU Law Analysis*, 04.06.2019.

rrain and the legitimacy of integration. There is evidence of **serious consequences for the EU's political integration**, due to the direct economic and demographic impacts of the massive influx of people in search of protection, which involve the presence (at least in the medium term) on European soil of hundreds of thousands of people requiring aid and services from public authorities.

Unfortunately, some EU states have shown a rampant lack of solidarity: following the 2015 decisions to take in 160,000 refugees, a referendum was called in Hungary to question the refugee redistribution decisions and some states have even rejected refugee quotas. This led to a severe internal crisis in the EU. However, in the author's opinion, the repercussions of these internal attitudes and policies for the essence, values and identity that the Union embodies and protects are of an even greater scale insofar as they call into question the legitimacy and narrative of the European integration project itself.

The lack of internal agreement and solidarity of the Member States is largely what has overshadowed the adoption of structural and temporary measures by the EU, preventing an effective institutional, legal and political response to the crisis. Of course, the EU had not anticipated a critical migration situation such as the one it experienced, and its institutional and decision-taking mechanisms are complicated and poorly suited to enable a rapid response equal to the task.

The 2016 deal with Turkey is perhaps a clear example of this lack of foresight and poor coordination of legal-institutional responses, notwithstanding some short-term successes in terms of halting the massive arrival of refugees and displaced persons mainly from Syria,[12] the main burden for which conti-

[12] The overall deal with Turkey, which played a key role in the 2015-2016 migration crisis, was reached in October 2015. It provides for both moving forwards on chapters of the accession negotiations, opened in 2005, and a commitment by Turkey to visa liberalization and greater control of border crossings from Turkish territory into Greece, with generous European aid to this end. The agreement (Statement) with Turkey on the readmission of refugees and relations with bordering countries was formally adopted on 18 March 2016 (Agreement or Statement contained in Press Release 144/16 of the Council, available at <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>; Lisa, P. 'The EU-Turkey Agreement: a turning point in the EU's policy approach to the refugee crisis but with the devil lurking in the detail', *Real Instituto Elcano* Expert Comment 15/2016, 8 April 2016).

The nature of the agreement was subject to considerable legal debate. See, for example,



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

nues to be assumed by Turkey.[13]

However, the Commission's overall approach, via its **European Agenda on Migration** of May 2015, has given rise to extremely important operational, legal and economic measures[14] and has a very valuable strategic profile. In addition, other measures taken, such as the *New Partnership Framework*[15] are quite far-reaching and can construct a foreign policy of their own to address the major problems of any kind caused by migratory pressure towards Europe.

---

SANTOS VARA, J. "La declaración Unión Europea-Turquía de 18 de marzo de 2016: ¿un tratado disfrazado?" in *Retos para la acción exterior de la Unión Europea* , 2017, p. 289; and URIA GAVILAN, "La declaración Unión Europea-Turquía: la externalización de la seguridad en detrimento de la protección de los derechos humanos", in E. J. MARTÍNEZ PÉREZ, C. MARTÍNEZ CAPDEVILA, M. ABAD CASTELOS and R. CASADO RAIGÓN (eds), *Las amenazas a la seguridad internacional hoy*, 2017, p. 89. This is because its legal status as a treaty or a simple political statement has significant consequences in terms of monitoring its implementation and its enforcement by EU and state powers. In its decision on the case from February 2017, the European Court of Justice indicated that it was not a treaty signed by any EU institution, but rather, where applicable, by the Member States (Orders of the General Court of 28 February 2017 in Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council, in which the General Court of the EU declares that it lacks jurisdiction to hear and determine the actions brought by three asylum seekers against the EU-Turkey statement which seeks to resolve the migration crisis, ECLI:EU:T:2017:128, 129 and 130).

[13] For more information on the current situation and additional mobilization of funds for, for example, schools and access to healthcare for Syrian child refugees, see the overview provided in the Communication *EU Facility for Refugees in Turkey: the Commission proposes to mobilise additional funds for Syrian refugees*, 14 March 2018, IP/18/1723, and the factsheet 'EU-Turkey Statement – Two years on', April 2018, available at <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_eu-turkey-two-years-on_en.pdf>.

[14] The *European Agenda on Migration*, in COM(2015) 240 final, 13 May 2015. For information on progress on the Agenda's implementation, see the Communications of the Commission of 10 February 2016, available at <https://europa.eu/rapid/press-release_IP-16-271_en.htm>, and of 28 September 2016, available at <https://europa.eu/rapid/press-release_IP-16-3183_en.htm>. More recently, Progress report on the Implementation of the European Agenda on Migration, COM(2019) 126 final, 6.3.2019 <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20190306_com-2019-126-report_en.pdf>; and the *Progress report on the Implementation of the European Agenda on Migration* of 16.10.2019, COM(2019)481 final.

[15] COM(2016) 385 final 07.06.2016, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on *establishing a new Partnership Framework with third countries under the European Agenda on Migration.*

Overall, the EU's actions to address and regulate migration, refugee and asylum issues have been impressive in recent years.[16] However, the set of measures and policies is strongly hindered by a Euro-centric vision based on security issues and the formula of development cooperation in exchange for control of borders and migration flows in the states of origin and transit. This vision does not place African, Middle Eastern and Central Asian countries' interests and approaches on an equal footing with Europe's medium- and long-term interests in these complex migration issues.

In this context, the *European Agenda on Migration* continues to be implemented.[17] The Commission believes that the situation is still fragile[18] and aims to strengthen the EU's Asylum Agency[19] by shifting the emphasis to the regulations for the return of migrants[20] and to strengthening the European Border and Coast Guard Agency.[21] However, possible avenues of legal access to Member States, such as access to international protection through the European Humanitarian Visa, have not yet been clearly defined.[22] The formulas proposed to date (new Blue Card, new resettlement scheme, strengthening of cooperation with third states with pilot projects)[23] ostensibly seem insufficient as a strategic response.

## 3. THE GATES OF EUROPE: TURKEY, MOROCCO AND LIBYA

There is already a certain well-established perspective regarding the routes of entry into Europe. Although the European federal area of free move-

---

[16] For an overview, see *EU Asylum, Borders and External Cooperation on Migration – Recent developments*, European Parliament PE621.878, EPRS May 2018.

[17] See the Commission Communication '*European Agenda on Migration: Continuous efforts needed to sustain progress'*, 14 March 2018, IP/18/1763, setting out the next steps and objectives to be pursued in the framework of the Agenda.

[18] Communication '*European Agenda on Migration: Still fragile situation gives no cause for complacency'*, 16 May 2018 IP/18/3743.

[19] MEMO/18/5714 of 12 September 2018.

[20] MEMO/18/5713 of 12 September 2018.

[21] MEMO/18/5715 of 12 September 2018.

[22] See SÁNCHEZ LEGIDO, A. "El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el Visado Humanitario europeo", *Revista de Derecho Comunitario Europeo* ,nº 57, 2017, p. 433.

[23] IP/18/5712 of 12 September 2018.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

ment was effectively created in spring 1995, it was not until the creation of the Frontex Agency, in 2004, that there began to be a global EU approach, with data and verification of the points of entry, external border crossings and migration trends.

It was thus verified that the main routes of entry for irregular immigration are not, as was once feared, via the external borders of Eastern Europe, but rather the external Mediterranean borders of the southern European countries. Specifically, most of the arrivals take place in Italy, Greece and Spain, although these countries are not usually the final destinations of the people who irregularly or illegally cross their external borders.

Various aspects of this finding should be highlighted:

— There is an obvious physical proximity factor, determined by geography, that facilitates irregular access. In the case of Spain, access occurs in two areas: the area of the Strait of Gibraltar and the cities of Ceuta and Melilla, and the Canary Islands area. In the case of Italy, it occurs through the Italian islands off the Tunisian coast, such as Lampedusa. In the case of Greece, it occurs through both the European land border with Turkey delimited by the River Evros (or Maritsa) and through the Aegean Sea route, to the islands under Greek sovereignty closest to the Turkish coast.

— All three European countries are accessed from neighbouring states in the southern Mediterranean that are countries of transit or origin of migration: from Morocco to Spain, from Tunisia and Libya to Italy, and from Turkey to Greece.

— These areas of transit are home to territorial claims or disputes between countries on the northern and southern shore of the Mediterranean: between Spain and Morocco over the Spanish cities, islands and rocks on the African coast[24]; and between Turkey and Greece over the Aegean Islands under Greek sovereignty.

— These neighbouring and bordering states, in turn, are located in or border with regions, continents and countries that produce, and will continue

[24] The link between migrations and territorial claims in Gonzalez Garcia, I., "Rechazo en las fronteras exteriores europeas con Marruecos: inmigración y derechos humanos en las vallas de Ceuta y Melilla, 2005-2017", *Revista General de Derecho Europeo*, Nº. 43, 2017; "The Spanish-Moroccan Cooperation on Immigration: The Summary Returns Cases of Isla de Tierra-Alhucemas (2012) and Ceuta and Melilla (2014)", *Spanish yearbook of international law*, Nº 19, 2015, 349.

to give rise to, migration flows from North Africa, sub-Saharan Africa, the Middle East, West Asia and Central Asia.

— In all cases, the migration takes place across sea borders, although in the cases of Greece and Spain, it also takes place across external land borders. Nevertheless, since 2005, the largest number of migrants to reach or attempt to reach Europe has come by sea.

— There are EU agreements with these southern Mediterranean countries, and even bilateral agreements (Spain-Morocco, Italy-Libya), that have restricted access by means of short-term solutions that fail to address the structural issues underlying irregular migration to Europe. It is worth noting in this regard that the approach pursued to date has not been the formal one consisting of the conclusion of mixed Treaties, Agreements by the EU or bilateral Agreements by its Member States. For instance, it is argued that the EU-Turkey deal of 2016 should not be maintained as such, due to its significant shortcomings, including its very nature as a dubiously legal instrument questionably regulated by Public International Law.[25]

Additionally, bilateral agreements between EU states and third states have become a necessary complementary instrument for issues of migration flows to the EU. Particular attention should be called to the 'agreement' between Italy and Libya,[26] also criticized for the legal format used, i.e., a Memorandum of Understanding (MOU), and the direct and indirect negative consequences it has had regarding respect for the basic fundamental rights of migrants in Libyan territory[27].

— The EU considers the Eastern, Central and Western Mediterranean to be routes or gates of access. Frontex data show that the closure of or increa-

[25] For the agreement with Turkey, see PEERS, S. 'The final EU/Turkey refugee deal: a legal assessment'*, EU Law Analysis* 18 March 2016; DEN HEIJER and SPIJKERBOER, 'Is the EU-Turkey refugee and migration deal a treaty?', *EU Law Analysis*, 7 April 2016; and TOYGÜR and BENVENUTI, 'One year on: an assessment of the EU-Turkey statement on refugees', *Análisis del Real Instituto Elcano*, ARI 21/2017, 21 March 2017.

[26] PALM, "The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?", *EU Immigration and Asylum Law and Policy*, <https://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/>*,* 2 October 2017. The Italy-Libya MOU is available at <http://eumigrationlawblog.eu/wp-content/uploads/2017/10/MEMORANDUM_translation_finalversion.doc.pdf>.

[27] "Italy to renew anti-migration deal with Libya". *The Guardian* 31.10.2019.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

sed border control along one route leads to the reactivation of one of the other two, such that the routes alternate across different periods, due to crises or diversions of the access routes to Mediterranean Europe.

All these considerations suggest that these arrival routes through what is graphically referred to as the *Gates of Europe* are quite likely to be permanent in the near to medium- and long-term future.

## III. VULNERABILITY OF EUROPE'S EXTERNAL BORDERS?

External border control in the EU dates back more than 24 years, and identified problems, such as external airport borders, which no longer pose a structural problem, or land borders, have been addressed. Important measures have been taken, such as the introduction of biometric identifiers on visas.[28] The trend of strengthening access control at external borders has been confirmed in the wake of jihadist terrorism attacks. For instance, measures have been taken to reinforce checks at the borders of the Schengen Area, expanding them to include EU citizens in general[29] through the amendment of the Schengen Borders Code.[30]

However, the inbound migration of recent years has posed a serious problem of vulnerability of the EU's external borders [31], both on land and at airports.

[28] See, for example, Art. 13 of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), *OJ* L 243, 15 September 2009, p. 1-58.

[29] Proposal for a Regulation of the European Parliament and of the Council amending Regulation No 562/2006 (EC) as regards the reinforcement of checks against relevant databases at external borders, COM(2015) 670 final, 15 December 2015.

[30] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* L 105, 13 April 2006, p. 1.

[31] See the Conclusions of the European Council of 20.06.2019, and the *New Strategic Agenda 2019-2024:* "We must ensure the integrity of our territory". The migration policy issues of this Strategic Agenda are referred in the chapter "Protecting citizens and freedoms", cfr. <https://www.consilium.europa.eu/media/39922/20-21-euco-final-conclusions-en.pdf>.

## 1. INTERNAL BORDERS AND RESILIENCE OF THE SCHENGEN AREA

The logic of the Schengen common area of free movement entails establishing common external border control so as to enable the free movement of any person of any nationality within the area referred to here as 'federal' for the purposes of free movement. This has an important consequence, namely, it makes it possible to determine which people are entering or leaving through the common external border; in contrast, once they have entered the federal common area, they cannot be tracked, as there are no mechanisms for doing so. As the Frontex Agency itself has noted, "There is no EU system capable of tracing people's movements within the EU following illegal border-crossing".[32]

The fact is that the massive inflows to Greece, mainly with a view to reaching Germany and Sweden, led to overflowing movements known as 'secondary displacements'. These people were forced by geography to follow land routes mostly through the Balkans to reach the Schengen territory via Slovenia or Austria. These sudden arrivals of hundreds of thousands of people led to the establishment along internal borders of fences, barriers and strong access control against the backdrop of an initially receptive Germany. This, in turn, led some countries to reintroduce certain intra-European controls. Additionally, the brutal jihadist terrorist attacks in Paris (November 2015) and Nice (July 2016) prompted France to declare a state of emergency and to re-establish systematic control at its borders.

The problem with the reintroduction of internal border controls is that they could potentially become permanent and that these types of events could be prolonged, making them the norm, rather than the exception, as provided for by law. Additionally, Member State notifications of the temporary reintroduction of control in accordance with Article 25 of the Schengen Borders Code have increased sharply since 2015, with references in recent years to threats due to the existence of 'significant secondary movements'.[33]

In the author's view, this very appreciable impact on the Schengen system of free movement has caused serious, albeit reparable, damage. Indeed, as

[32] FRONTEX, *General Report 2015*, at 2.1, p. 10. Frontex - *Risk Analysis for 2016*, p. 6

[33] See the list of Notifications 2006-2018 at <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/docs/ms_notifications_-_reintroduction_of_border_control_en.pdf>.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

argued elsewhere,[34] several powerful legal and practical arguments confirm the reversibility of the measures taken by the Member States at some of their internal borders:

- Primary law: As seen above, Article 77(1)(a) TFEU has a legal force that leaves no room for doubt regarding the agreed attribution of powers and the practical objective to be achieved, i.e. non-control of any internal land, sea or airport border between Schengen Area states.
- The short-term nature of the internal controls in the 'federal' Schengen Area implemented as a result of the refugee crisis. Control is restored in accordance with pre-established procedures, namely, notification of the temporary reintroduction of border control, in accordance with a specific regulation, Regulation 1053/2013, which is being applied.[35] This regulation provides for regular situation reviews and Council authorizations to prolong control at certain points or sectors due to the existence of a threat to the overall functioning of the Schengen Area.[36]
- The highly partial geographical nature of the temporary reintroduction of control, which is not carried out along the entire land, air or port border of some states, but solely at certain border crossings on sections determined in advance to be problematic. Only in the case of France was notification given of the reintroduction of control on all borders, due to the state of emergency declared following the attacks in Paris and Nice, as well as for events such as the Tour de France.

These reasons are complemented with planning, from the start, by the Commission for the gradual reinstatement of complete freedom of move-

[34] Del Valle Galvez, 'Los refugiados, las fronteras exteriores…', *supra* note 2, at 762-765.

[35] Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis* and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, *OJ* L 295 of 6 November 2013, p. 27 *et seq*.

[36] Council Implementing Decision (EU) 2016/894 of 12 May 2016 setting out a recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, *OJ* L 15 of 18 June 2016, at 8 *et seq*.

ment.[37] Overall, whilst in the early years the refugee crisis did lead to a visible repeal of the non-control of persons at certain internal border points in the Schengen Area, the general system of free movement of persons tends to be progressively restored, although not with the speed initially envisaged for the return to normal movement without control in the Schengen Area.

In fact, a proposal for a Regulation amending the framework for the temporary reintroduction of border control at internal borders is currently making its way through the legislative process.[38] The Commission intends to allow an increase in the time limit for this type of control, although with greater safeguards and procedural and evaluation requirements, in accordance with its conviction that it must always be approached as an exceptional measure of last resort.[39] As noted, it is ultimately a question of imposing order on these state initiatives that could involve an attempt to renationalize responses to threats to the public order and internal security, placing special emphasis on the exceptional nature of any limitation that may arise in relation to the free movement of persons.[40]

A separate question is the related issue, not adequately addressed by the EU or its Member States, of displaced persons seeking refuge and moving within the EU until they reach their destination, without identification and in

[37] *Back to Schengen - A Roadmap*, Communication of 4 March 2016, COM(2016) 120 final, since the Commission adopted a plan to return to a situation of normality in March 2016.

[38] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders, COM(2017) 571 final - 2017/0245 (COD), 27 September 2017. See European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 as regards the rules applicable to the temporary reintroduction of border control at internal borders (COM(2017)0571 – C8-0326/2017 – 2017/0245(COD)).

[39] Communication on preserving and strengthening Schengen, COM(2017) 570 final, 27 September 2017; State of the Union 2017 - Preserving and strengthening Schengen to improve security and safeguard Europe's freedoms, 27 September 2017, IP/17/3407, <http://europa.eu/rapid/press-release_IP-17-3407_en.htm>.

[40] Janer Torrens, "El restablecimiento temporal de controles en las fronteras interiores de la Unión Europea como respuesta a las amenazas al orden público y a la seguridad interior: entre la excepcionalidad y la normalidad", *Revista de Derecho Comunitario Europeo*, Nº 61, 2018, p. 899, at 931.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

a situation of clear vulnerability.[41] This is also a consequence of the Member States' option of not creating macro-camps in EU territory for the reception, registration, identification and processing of refugees' asylum claims, as Frontex once proposed.

In any case, whilst the common European response to the migration challenge may have fallen short of a 'collective epic',[42] the case of the refugee crisis has shown that the Schengen Area is reasonably robust and resilient in unexpected serious situations. In the 24 years since it came into force in 1995, this historical experience has followed a course that has evidenced fragility, but also, at essence, a great capacity to withstand and overcome challenges in tricky or delicate situations. In the author's view, this has to do with many factors, the very strong soundness of the unified economic area being one of the most important.

Since the agreement between the EU states and Turkey of March 2016 stopped the inflow of refugees, the asylum claims of the millions of people who arrived in 2015-2016 have begun to be studied or they have been placed under the protection of the different states. Therefore, the problem today is not one of internal borders and the guarantee of free movement, but of massive access to and reception at the EU's external borders, where controlled management of the crossings and registration and hosting of this huge influx of arrivals proved impossible, a situation that could happen again in the short, medium or long term.

## 2. EXTERNAL BORDERS AND THE NON-VIABILITY OF SEA BORDER CONTROL

The Union's external borders have very special characteristics, as they were created by the Schengen Agreements according to a model that was later inherited and assumed by the EU from 1997 onwards. Sharing the same control systems for entry into and exit from the 'federal' internal territory of free movement is, as noted, an historical experience and evolution of the

---

[41] Naïr proposes the massive concession of ID cards entitling the bearer to travel freely, a transit passport based on the 'Nansen passport' model (*Refugiados*, Barcelona, 2016, Chapter 13).

[42] The term 'collective epic' (*épica colectiva*) was coined by Janer Torrens ('El restablecimiento temporal…', *supra* note 40, at 930) in his overview of the reintroduction of internal border control following the refugee crisis.

European states' borders.[43] Additionally, as a political entity *in statu nascendi*, the Union needs to maintain a well-defined territory in which entry and exit across external borders is well controlled. The cumulative experience since 1995 — including under the international-law Schengen system prior to its absorption into EU law — means that the EU already has more than 20 years of experience with external border control.[44] The model's evolution has allowed it to reasonably assume control at land, airport and even seaport borders.

However, there are significant obstacles to carrying out border control at the external sea borders. By their very nature, these borders are very difficult to manage, especially given the continuous mass arrivals of migrants over the years via the Mediterranean. No single state, nor even the EU without the co-involvement of its Member States, can tackle these problems of emigration in the Mediterranean Sea and of the sudden mass arrivals or avalanches of dozens or hundreds of thousands of people alone.

In fact, the system has not proven to work well when the control tasks are carried out in marine areas beyond state jurisdiction, i.e. beyond the 12 miles of territorial sea. Indeed, the definition of external border has gradually been adapted to the need to push some border control functions beyond the port, into the high seas or even the marine areas of third states from which immigrants depart, as in the case of Senegal and the *cayuco* boat crisis of 2006 in the Canary Islands (Frontex Joint Operation Hera).

Hence, the seemingly unsolvable issue of the Mediterranean Sea borders, as the control of external borders originally designed for the Schengen Area is poorly suited to this environment. Therefore, the European marine areas and borders pose certain specific challenges that make ensuring *effective* surveillance quite difficult: the marine environment itself, the existence of large areas of the high seas, and the existence of differentiated SAR rescue areas, all in a conflict-ridden context of third states from the southern coast of the Mediterranean with diverse but highly complex problems. Furthermore, with regard to the rescue of immigrants on the high seas, wide-open questions continue to surround the SAR regions in the Mediterranean and states' obli-

[43] See, 'Las fronteras de la Unión…', *supra* note 3.

[44] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), *OJ* L 105, 13 April 2006, p. 1.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

gations in these regions, especially concerning the disembarkation of rescued persons.[45]

Nothing tried to date to halt or prevent sea immigration has offered good prospects of becoming a sustainable, reasonable and permanent solution to the problems, which include the fight against human trafficking. An original body of law has been adopted to address issues affected by gaps in international law, ranging from the regulation creating Frontex to that creating the Border and Coast Guard Agency, by way of the rapid border intervention teams (RABITs) regulation[46] or the regulation establishing rules for the surveillance of external sea borders in the context of joint operations. There have even been moments of flirtation with the idea of a military response, in some cases fortunately averted by the UN itself and, in others, undertaken within the context of NATO or EUNAVFOR MED/Operation Sophia.[47]

The extraordinary fragility and insecurity of Europe's Mediterranean borders make maritime surveillance insufficient and give rise to myriad new problems. These problems include issues such as the extraterritorial processing of asylum claims, the human rights of migrants in different marine areas, or the disembarkation of migrants in third states.[48] The most widely reported

[45] Another sensitive issue is the applicable regulation and obligation for merchant boats to proceed to the rescue and disembarkation of immigrants. See Smith, "Uncertainty, Alert and Distress: The Precarious Position of NGO Search and Rescue Operations in the Central Mediterranean", *Paix et sécurité internationales* nº 5, 2017, 29, <https://revistas.uca.es/index.php/paetsei/article/view/4652>.

[46] Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, *OJ* L 199 of 31 July 2007, p. 30-39.

[47] See Carli, E., "Operation eunavfor med sophia in the framework of the european agenda on migration: Practical aspects and questions of international law", *Freedom, Security & Justice: European Legal Studies*, Nº. 2, 2018, p. 135; Acosta Sánchez, M. "Sobre el ámbito competencial de las operaciones de paz: El enfoque integral de la operación militar Sophia de la UE ante la crisis migratoria", *Revista del Instituto Español de Estudios Estratégicos*, nº 12, 2019, p. 15.

[48] See Marinai, S. "The interception and rescue at sea of asylum seekers in the light of the new EU legal framework". *Revista de Derecho Comunitario Europeo*, 55, 2016, at 901. In 2015, no actions were taken to disembark migrants rescued in the Mediterranean by joint operations in third countries, cfr. *Frontex' Annual Report on the implementation on the EU Regulation 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders,* 2016.

cases of NGO or merchant vessels carrying migrants rescued in the territorial waters of Libya or on the high seas being denied access to port (as in the case of the *Aquarius*, in 2018, or the *Open Arms* case in 2019)[49] fall into this category.

In fact, the barrage of legal problems posed to international and European law by irregular migration and migration in the Mediterranean in terms of the different practical control and rescue actions carried out by states and the EU is simply overwhelming.[50] This is especially true with regard to issues of respect and protection of the human rights of migrants[51] found at sea with the intention of reaching Europe. In this context one finds the morally devastating fact that the maritime migration routes account for the brunt of the horrifying objective data on massive daily deaths of migrants trying to reach Europe by sea, migrants pushed mainly by human trafficking rings into terrifying situations of danger and death at sea.[52]

[49] In this regard, see the lucid analysis by Papastavridis, 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?', at *EJILTALK.org,* 27 June 2018.

[50] Amongst others, see: Di Filippo, M., "Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea"*, Paix et Sécurité Internationales* (2013), nº 1, 53; FRA-European Union Agency for Fundamental Rights, *Fundamental Rights at Europe's southern sea borders*, Luxembourg, 2013; Marinai, S., "The Action of Greece and Spain against Irregular Migration by Sea", in A. Del Vecchio (ed.), *International Law of the Sea – Current Trends and Controversial Issues* (The Hague, 2014) 29; Moreno-Lax V. – Papastavridis, E. *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach- Integrating Maritime Security with Human Rights, Brill, 2016;* Rijpma, J., "The Patrolling of the European Union's External Maritime Border: Preventing the Rule of Law from Getting Lost at Sea", in *International Law of the Sea – Current Trends…, cit.*, at 77; and Sobrino J. M. and Oanta, G., "Control y vigilancia de las fronteras en los diferentes espacios maritimos", 14 *Anuario de la Facultad de Derecho de la Universidad de La Coruña*, nº 14, 2010, p. 759. The Commission Staff Working Document *Study on the international law instruments in relation to illegal immigration by sea,* SEC(2007)691, 15 May 2007, likewise remains of interest.

[51] See the author's examination of external border issues from a human rights perspective in Del Valle Gálvez, 'La fragilidad de los derechos humanos en las fronteras exteriores europeas, y la externalización/extraterritorialidad de los controles migratorios', in J. Soroeta Liceras and N. Alonso Moreda (eds), *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*, Volume XVIII-2018, Tirant lo Blanch, Valencia 2019, p. 25. See Sanchez Legido, A. "Externalización de controles migratorios versus Derechos Humanos" *REEI*, 37, 2019.

[52] See, for example, Amnesty International, *Lives Adrift: Refugees and Migrants in Peril in the Central Mediterranean*, 2014.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

In this context, the EU's aim of coordinating its sea border control in the Mediterranean and on the southern external sea borders is not viable. Migratory pressure will continue in the short, medium and long term along the channels of arrival by sea to Europe (Eastern, Central and Western Mediterranean) and may even be occasionally accentuated in critical periods due to the changing and unstable situation of the African and Middle Eastern neighbourhood. Experience shows that the EU has, in the past, been overwhelmed and thrown into crisis by the sudden arrival by sea of a few thousands of people (as in the case of the *cayuco* boats in the Canary Islands in 2006[53] or the frequent arrivals to the Italian islands off the coast of Tunisia in the Central Mediterranean). Consequently, the internal conflicts of third states could relatively easily call the EU's entire system of reception and free movement within its internal territory into question once again.

In the author's opinion, it is thus the EU's sea borders that will require it to undertake a new border policy. Indeed, the circumstances and problems discussed here confirm that new approaches to migration flows and external border control must be organized, subject to a more integrated management.

## 3. ACTIVATING THE INTEGRATED EXTERNAL BORDER MANAGEMENT SYSTEM

The refugee crisis in Europe in recent years also seems to have led to the consolidation of the aspect of the border control policy known as the integrated border management system.

What the TFEU calls the 'integrated management system for external borders' (currently referred to as *European Integrated Border Management*) is provided for under the decisive Article 77 TFEU:

> '1. The Union shall develop a policy with a view to:
> (c) the gradual introduction of an integrated management system for external borders.'

The title of the relevant chapter of the TFEU (Policies on Border Checks, Asylum and Immigration) points to three main areas, but the subsequent provisions seem to describe a gradually descending level of EU border activity: very powerful with regard to internal borders, likewise significant with regard to external control, but less farsighted with regard to the regulation of

[53] See Acosta Sánchez and Del Valle Gálvez, "La crisis de los cayucos. La Agencia Europea de Fronteras – FRONTEX y el control marítimo de la inmigración clandestina", *Tiempo de Paz*, nº 83, 2006, p. 19.

the external border management system.

In fact, no specific article is devoted to the integrated border management system, unlike asylum (Article 78) and immigration (Article 79), suggesting a lower level of intensity in terms of EU regulation and powers. Indeed, insofar as it is an objective of the common policy (Article 77(1)), the treaty only provides for the subsequent adoption of legal acts. Specifically, Article 77(2)(d) provides:

> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:
> (d) any measure necessary for the gradual establishment of an integrated management system for external borders;

Following the migration crisis, however, the time for its activation seems to have come. In this regard, attention should be called to the *Plan to develop an Integrated External Border Management Strategy*, adopted on March 2018, whose main elements are: greater cooperation and shared information, with the Border and Coast Guard playing a key role; enhanced harmonization of the common rules and standards applied under the Schengen Borders Code; and risk analysis, providing for contingency plans and rapid response capabilities. The stated need to integrate other policies, such as the Security Policy and the fight against cross-border crime, and to cooperate with third states, especially on returns, should likewise be highlighted. Finally, the need to improve the funding and technical and human resources of the Integrated Border Management System is also underscored.[54]

The main element of this integrated management strategy is undoubtedly the Border and Coast Guard. To this end, in September 2018, the Commission approved the proposal for a new Regulation of the European Border and Coast Guard, which includes EUROSUR; this Regulation was finally adopted in November 2019.[55]

---

[54] *The main elements for developing the European Integrated Border Management Strategy* - Annex 6 of the Communication 'Progress report on the Implementation of the European Agenda on Migration' COM(2018) 250 final of 14 March 2018.

[55] See supra note 11, and the 23.10.2019 last Proposal at <https://data.consilium.europa.eu/doc/document/PE-33-2019-INIT/en/pdf>. Other documents: Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Council Joint Action n°98/700/JHA, Regulation (EU) n° 1052/2013 of the European Parliament and of the Council and Regulation (EU) n° 2016/1624 of the Euro-


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

## IV. 'EXTERNALIZATION', 'EXTRATERRITORIALITY' AND 'DETERRITORIALITY' OF MIGRATION CONTROL

In a context of widespread *perception*, in public opinion and amongst European governments, of vulnerability of the southern external border, references to the so-called 'externalization' of border control are increasingly common.[56]

Border action by EU Member States outside of European territory seems to be an inevitable trend in Europe, with various manifestations of new and complex border control functions that are problematic in several ways, with control instruments extending not only beyond borderlines, but into various places and areas of Europe's bordering territories and those of other neighbouring states. Several manifestations of this trend can be found, all referring to extraterritorial problems related to the performance of border functions, in the margins of or outside EU territory, with European pre-border control instruments.[57]

The following sections will look at various aspects of this recent external border dimension.

### 1. THE DETERRITORIALIZATION OF MIGRATION CONTROL AND BORDER FUNCTIONS

An initial issue has to do with the concepts and terms used to refer to these topics. In the author's view, there are shortcomings in how they are used both in the literature and in the media in reference to migration realities.

The terms are quite varied, since the practices have been given different names. Nagore Casas and Abrisketa Uriarte refer, for example, to an extensi-

---

pean Parliament and of the Council; European Parliament legislative resolution of 17 April 2019 (COM(2018)0631 – C8-0406/2018 – 2018/0330A(COD)) TA/2019/0415. See also *Report from the Commission to the European parliament and the council on the evaluation of the European Border Surveillance System (EUROSUR)* A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018, COM (2018/632), 12.09.2018.

[56] See Rijpma J. and Cremona, M. "The Extra-Territorialisation of EU Migration Policies and the Rule of Law", *EUI Working Papers* - Law 2007/1; Del Valle Gálvez, A., "Refugiados y crisis migratorias: fronteras y desterritorialidad en las puertas de Europa", Chapter in Ripol Carulla S., *Derecho, Inmigración y Empresa*, Barcelona, 2019, p. 89.

[57] Casas, N., "The instruments of pre-border control in the EU: A new source of vulnerability for asylum-seekers?", in European Commission – *FRAME*, 31 May 2016, 30.

ve catalogue of academic terms used to refer to this reality.[58] Of course, one can also find terms such as 'border displacement', the 'delegation' or 'remote control' of migration, 'off-shore asylum', and 'policing at a distance',[59] as well as those that can be summed up in the term *policies of non-entrée*.[60]

Most of these terms seek to reflect border realities that, whilst different or novel, nevertheless affect the will of the EU and the Member States to distance or prevent the arrival of migrants at their external borders through a twofold series of measures leading to the apparent displacement or sharing of border control functions with third states:

– First, with measures such as programmes, action plans or international agreements to encourage third states (of origin or transit) to monitor their borders and migration flows in order to prevent them from physically accessing EU Member State territory, accepting the positioning in their territory, or the rejection, of refugees and migrants in general who come from other states but aim to reach European states as their final destination.

– Second, through the carrying out of border control functions by the Member States themselves outside their sovereignty and/or territorial jurisdiction (land and sea).

In general, the terms *externalization* or *extraterritorialization* of borders and their control are frequently used, often as synonyms.[61]

[58] 'In addition to "politics of non-entrée", several terms have been used by scholars to refer to this phenomenon, which is subject to increasing attention by literature and media: "outsourcing, externalisation, offshoring or extraterritorialisation of migration management; external migration governance; remote migration policing"; "de-territorialisation of border control"; "politics of extraterritorial processing"; "neo-refoulement"; or "limes imperii". All of these terms refer to the various types of interception measures used by states against asylum-seekers and refugees, measures which are usually developed by the wealthiest states, notably the United States, Australia, Canada and EU Member States', Casas, N. writes (*Ibid.*, at 31-32). See also the terms cited in Abrisketa Uriarte, "La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del *non-refoulement*", *Revista de Derecho Comunitario Europeo* , nº 56, 2017, p. 119, at 125-126.

[59] See, for example, Guild E. and Bigo, D., "Policing at a distance: Schengen Visa policies" in *Controlling Frontiers - Free Movement Into and Within Europe,* London, 2005, p. 203.

[60] See Sánchez Legido, A., 'El arriesgado acceso…', *supra* note 22, at 439 *et seq*.

[61] See, for example, Moreno-Lax, V. and Lemberg-Pedersen, M. "Border induced displacement: The ethical and legal implications of distance-creation through externalization", *QIL*,. *Zoom-in*, 56, 2019, at 5; Gabrielli, L. 'La externalización europea del control migratorio. ¿La acción española como modelo?', *Anuario CIDOB de la inmigración* (2017) 127; and Zapata


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

However, these concepts should be used with greater accuracy, in order to determine the consequences and legal scope of the related terms. These terms are sometimes figurative (e.g. to create a 'buffer zone' or 'buffer states' around Europe) and are intended to reflect the reality of the systematic outsourcing of certain border and migration control functions beyond the borderline and the land, seaport and airport checkpoints and border crossings. The terms or definitions used by authors are sometimes stark.[62] However, there is some awareness of encompassing a variety of situations that should be differentiated.[63]

In short, these are situations that place certain functions that states have traditionally performed at the border or at checkpoints, as well as certain measures and actions related to immigration and migration flows, outside their land, air and sea territory. Accordingly, for the purposes of the present article, this set of situations will be referred to as the *deterritorialization* of migration control, as the various scenarios and realities all take place outside EU territory.

Therefore, in keeping with this effort to achieve greater conceptual accuracy, a more useful term might be **deterritoriality**, which is more neutral than

---

BARRERO R. and ZARAGOZA CRISTIANI, 'Externalización de las políticas de inmigración en España ¿giro de orientación política en la gestión de fronteras y flujos migratorios?', 8 *Panorama social*, nº 8, 2008.

[62] For example, FANJUL points to 'la lógica de "externalizacion" que ha seguido la política migratoria europea desde la crisis de los cayucos de 2005-2006: comprar o forzar la colaboración de semidemocracias en el trabajo sucio' [the logic of "externalization" that European migration policy has followed since the *cayuco* boat crisis of 2005-2006: paying or forcing semi-democracies to cooperate on the dirty work] [translated from the Spanish]; whilst PINYOL writes of 'colaborar con países vecinos para delegarles el control de sus fronteras, en un intento de reducir la presión migratoria (habitualmente sobreestimada) y no responsabilizarse de la protección de derechos de las personas migrantes' [cooperating with neighbouring countries to delegate control of their borders to them, in an attempt to reduce (routinely overestimated) migratory pressure and avoid the responsibility for protecting the rights of migrants], [translated from the Spanish], in *Agenda Exterior* sobre Inmigración y Refugio, 28 June 2018.

[63] See ABRISKETA URIARTE, 'La dimensión externa…', *supra* note 58, at 157. In 'Member State Responsibility for Migration Control within Third States: Externalisation Revisited", *European Journal of Migration and Law,* 2013, p. 319, MCNAMARA differentiates between 'externalisation' and 'external dimension', using the latter in situations in which state control is weaker and indirect.

those mentioned above, as it evokes the positioning of certain border control and migration policy functions outside the territory, to be carried out by third states or by the state itself. The Dictionary of the Royal Spanish Academy defines 'territorial' as 'of or relating to a territory'. As these are situations or actions linked to migration and to border control, they should conceptually be situated outside the territory; therefore, the *deterritoriality* option hypothetically makes it possible to encompass the situations of both the *externalization* and *extraterritoriality* of border control functions.[64]

## 2. EXTERNALIZATION OF THE MANAGEMENT AND CONTROL OF MIGRATION FLOWS VS EXTRATERRITORIALITY OF BORDER CONTROLS

The literature often notes that some EU and EU Member State border control functions are performed by third states using imprecise legal notions, such as the 'delegation', 'attribution' or 'remote control' of the 'containment of migratory flows' or directly referring to the outsourcing by the EU of part of its border control outside its territory.[65] Usually, the legal link between the Member States/EU and the performance of these border migration control practices by third states is not clear in these analyses.

However, it is very difficult to consider, from a legal perspective, that the European states or the EU itself exercise direct or indirect control over the third states' actions. It is a very hard conclusion to reach based solely on the political and legal agreements entered into to date (including the paradigmatic case of the 2016 EU-Turkey deal) or the secondary regulations adopted by the EU. Apart from the difficulty of proving it, from an international law perspective, this does not seem to be a case of international responsibility of the European states or the EU itself for a third state's migration management

[64] Rijpma and Cremona use the term 'extra-territorialisation' with a similar content to that used here ('The extra-territorialisation…', *supra* note 58). Reyes Tovar uses it in a different context, linked identities in migration, in 'La Desterritorialización como forma de abordar el concepto de frontera y la identidad en la migración', *Revista Geográfica de América Central* (2011), at 2. Naranjo Giraldo conceives of the deterritorialization of a border as the performance of certain border controls outside a state's territory. See 'Desterritorialización de fronteras y externalización de políticas migratorias. Flujos migratorios irregulares y control de las fronteras exteriores en la frontera España-Marruecos', *Estudios Políticos* 45, 2014, p. 13.

[65] See, for example, D'Humières, 'La cooperation Union Européenne/Afrique: l'externalisation des politiques migratoires européennes', *Fondation Robert Schuman Policy Paper* No. 472, 20 April 2018, at 1.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

conduct (e.g. border control by Tunisia or the return or regularization of migrants by Morocco). Thus, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Part 1, Chapter II, Articles 4-11, 'Attribution of Conduct to a State')[66] do not seem to apply. Nevertheless, the idea that the EU has transferred its responsibility by contracting migration controls out to third states is common in the literature and in analyses by organizations and NGOs.[67] This is inaccurate and does not reflect the international legal reality.

Given this lack of definition in the analyses, it might be reasonable to differentiate between the concepts of 'externalization' and 'extraterritorialization'. Indeed, according to the Dictionary of the Royal Academy, they are clearly distinct situations. Whilst the sole definition of *extraterritorial* is 'to be or be considered outside the territory of jurisdiction', the first definition of *externalizar* (externalize, outsource), a term taken from economics, is 'said of a company or public institution: to entrust the performance of internal tasks or services to another company'.

First, the *externalization* of border control is understood as those situations in which there is neither the presence nor direct exercise of control activities by public officials of the Member States. The third states perform certain border control and migration policy functions (surveillance of their borders, detention and return of migrants, regularization processes and residence permits for migrants) as a direct or indirect consequence of agreements with the EU or with EU Member States, or according to programmes and action plans agreed with the EU or its Member States.

Indeed, it seems more appropriate to classify externalization of migration control activities as generic *migration flow management or control* activities, because they have components, activities and purposes that are not strictly those of controlling the entry of foreigners into the territory through border control at checkpoints or borders. This more generic line would encompass

---

[66] *Draft articles on Responsibility of States for Internationally Wrongful Acts*, text adopted by the International Law Commission in 2001. See the analysis of international rules in the various scenarios they propose in GAMMELTOFT-HANSEN and HATHAWAY, 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia Journal of Transnational Law* , 53 (2), 2015, p. 235.

[67] See, for example, RODIER, 'Externalisation of migration controls', in *Shifting Borders – Externalising migrant vulnerabilities and rights?* Red Cross EU Office, 2013, at 7.

references to the 'externalization of protection responsibilities'.[68]

It should be recalled that 'efficient management of migration flows' is a component of the common immigration policy (Article 79(1) TFEU), not of the border control policy (Article 77 TFEU). In any case, these activities or situations aim to keep migrants and refugees in general far from the territory of EU states (even if they have not been identified and classified as such by any agency or European or third-state authority). Therefore, the bias the EU has given thus far to the content of migration flow management consists of actions by and in third states to deter and prevent the arrival to EU territory[69] of certain categories of foreigners.

Second, it is necessary to differentiate the foregoing from situations involving the *extraterritoriality* of border control functions, restricting this latter category to those situations involving the presence of or performance of certain control activities or functions by public officials of the EU Member States in the territory of third states, with their agreement. In other words, extraterritoriality refers to situations involving the direct or indirect exercise of state jurisdiction, applying EU law or the internal law of an EU state.

The presence of the public official acting on behalf of the EU state or of the EU itself may be the decisive, differential factor for this conceptual difference. This presence takes place in a context of *control* by the Member State of the migration situation in question, as can be deduced from the ECtHR case *Hirsi Jamaa*.[70] In any case, the problems arise with regard to the rights of

[68] See *The EU-Turkey Statement and the Greek Hotspots – A Failed European Pilot Project in Refugee Policy*, The Greens/European Free Alliance – European Parliament, June 2018.

[69] The notion of preventing entry into the jurisdictions of EU Member States is central in some definitions of the generic concept of externalization of migration controls. See Frelick, Kysel and Podkuul, 'The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal of Migration and Human* Security 4(4), (2016, p. 190, at 193.

[70] Judgment of the European Court of Human Rights (ECtHR) (Grand Chamber) *Hirsi Jamaa and Others v. Italy,* No. 27765/09, 23 February 2012. On the issue of the requirement for 'effective control' according to ECtHR case law, see McNamara, 'Member State Responsibility…', *supra* note 63. On the consequences and unlikely practical application of this judgment in situations of migration control at sea, see Moreno Lax, *'Hirsi Jamaa and Others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?', 12(3) *Human Rights Law Review* (2012) 574.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

migrants and refugees in situations outside the territory.[71]

Other options for establishing criteria for attributing state responsibility seem less robust, such as determining whether or not EU law or an EU Member State's law is being applied in the territory of third states or whether, by means of international responsibility, there exists consent or third-state agencies have been placed at the service of the EU state or the EU itself.

---

The proof that this is an issue that must be explored with resolve from a legal perspective can be found in the theoretical confirmation by the EU of new models of extraterritorial border control. The European Council accepted the disembarkation of migrants in third countries as a formula under study at its meeting in July 2018.

This idea of centres in third states for internment and for the processing of asylum claims is a recurring proposal, like that of creating a centre in North Africa.[72] It refers to the creation of short-term reception centres or places, with the aim of hosting asylum seekers whilst their claims are being processed in Europe. It is a possibility that has always been considered to lack the minimum European or international legal cover to warrant a feasibility assessment, although every so often it is suggested anew in relation to the successive migration crises.[73] The multipurpose centre in Niger was created as a pilot experience for the prospects of such centres for advising migrants and processing any asylum claims that might arise[74].

[71] See Abrisketa Uriarte, 'La dimensión externa…', *supra* note 58, on the scope of the principle of *non-refoulement*. Sanchez Legido, A. "Externalización de controles migratorios…" *supra* note 51.

[72] Naïr notes that the creation of 'transit processing centres', essentially offshore holding camps in regional protection areas in EU border or neighbouring countries, was proposed as early as 2003 (*op. cit.*, at 51-52).

[73] See, for example, "Macron wants asylum claims to start in Africa", *Euobserver.com*, 29 august 2017.

[74] See Parliamentary question E-008909-15 of 02.06.2015; or the question E-003065-16 of 26.04.2016, "State of play of the pilot multi-purpose centre in Niger", Answer given by Mr Avramopoulos on behalf of the Commission 26.07.2016, <https://www.europarl.europa.eu/doceo/document//E-8-2016-003065_EN.html>.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

In any case, the question was already posed openly in 2017, following the migration and refugee crisis of 2015-2016, and, at its meeting in June 2018, the European Council[75] formally adopted the proposal to create *Regional Disembarkation Platforms* in third countries, in collaboration with the UNHCR and the International Organization for Migration,[76] and *Controlled Centres* in the territory of EU states[77] (the initial term of 'closed reception centres" was modified).

The feasibility of these platforms and centres is currently under study.[78] Numerous points need to be clarified regarding fundamental rights, the domestic or international legal status of these centres and the EU's responsibi-

[75] See González Enríquez, 'The European Council and migration;: any progress? *Análisis del Real Instituto Elcano,* ARI 112/2018, 9 October 2018.

[76] Conclusions of the European Council meeting in Brussels, 28 June 2018, Doc. EUCO 9/18, Point 5: 'In that context, the European Council calls on the Council and the Commission to swiftly explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and IOM. Such platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor.' <https://www.consilium.europa.eu/es/meetings/european-council/2018/06/28-29/>. Parliamentary Question E-002505-19 of 01.08.2019, about the Regional Disembarkation platforms.

[77] Point 6: 'On EU territory, those who are saved, according to international law, should be taken charge of, on the basis of a shared effort, through the transfer in controlled centres set up in Member States, only on a voluntary basis, where rapid and secure processing would allow, with full EU support, to distinguish between irregular migrants, who will be returned, and those in need of international protection, for whom the principle of solidarity would apply. All the measures in the context of these controlled centres, including relocation and resettlement, will be on a voluntary basis, without prejudice to the Dublin reform.'

[78] See the Non-papers and Follow-ups to the European Council Conclusions of 28 June 2018 'Non-paper on "controlled centres" in the EU', 'Non-paper on regional disembarkation arrangements', 'Factsheet on "controlled centres" in the EU' and 'Factsheet on regional disembarkation arrangements' in *Managing migration: Commission expands on disembarkation and controlled centre concepts*, 24 July 2018, IP/18/4629, available at <http://europa.eu/rapid/press-release_IP-18-4629_en.htm>. More recently, European *Council Working Document on Guidelines on temporary arrangements for disembarkation*, WK 7219/2019 INIT, 12.06.2019.

See the analysis of Carrera S. – Cortinovis R. "Search and Rescue, disembarkation and relocation arrangements in the Mediterranean- Sailing away from Responsibility?" *CEPS Paper* nº 2019-10, June 2019; and Künnecke, A. "Legal challenges and the practicability of disembarkation centres for illegal migrants outside the EU", *Análisis del Real Instituto Elcano* ARI 53/2019, 16.05.2019.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

lity at them in light of the involvement of public officials from the Member States, of civil servants and public officials of the EU, or of civil servants of other international organizations.

## V. CONCLUSIONS

The refugee crisis has shaped a new perception of the migration reality in Europe. The ramifications of its impact on European integration are visible and enduring.

The EU's response has included a certain strategic perspective, albeit weighed down by an excess of eurocentrism and a security perception that does not take third countries' interests into balanced account. The major economic effort being made supports a far-reaching strategy, only now beginning to be outlined, to promote economic development in the countries of origin and transit of migrants. Additionally, issues such as the monitoring of respect for migrants' human rights have not yet been suitably globally defined in this strategy.

Although the behaviour and response capacity of the EU and its Member States can be assessed in different ways, the truth is that the migration debate has decisively swayed a block of countries that are openly reluctant to engage in intra-European solidarity and accept the new realities and burdens entailed by the refugees already present and yet to come to Europe. This position is very negative in the medium and long term, since, as noted, the crisis has also underscored the permanence of migration trends and flows and the consolidation of the routes or *gates of entry* to Europe.

This article has considered the vulnerability of the European borders designed and in operation in the Schengen Area. The internal borders were the most affected at the start of the migration crisis and are likely to be marked by current regulatory changes, which tend to allow exceptionality as a relatively common occurrence in the European 'federal' area of free movement. Nevertheless, the resilience of this system of the absence of internal border controls in the 'federal' area of free movement is undeniable.

The impact on the EU's external borders has been even greater, as, in the author's view, it has shown once and for all that, more than fragile or vulnerable, some border controls, such as the sea border ones, are not practicable, especially those on Europe's southern sea borders.

It is precisely this infeasibility of border control in marine areas that, in the author's view, leads to the accentuation of certain trends on Europe's external borders, such as the *externalization* of migration controls. New regulatory and strategic planning developments confirm this trend, as well as the current concern for deploying an integrated external border management system[79].

With regard to the phenomenon known as the 'externalization' of migration controls, the literature considers it to refer to EU actions aimed at reducing, sorting and controlling migration flows with the consent of third states in relations that are, by definition, asymmetrical.[80] This article has addressed the different situations that arise, highlighting the advisability of differentiating between *externalizing* migration policy, on the one hand, and *extraterritorial* action concerning migration control, on the other.

In search of greater conceptual accuracy, the term *deterritoriality* has been used, as it is more neutral than the other terms mentioned insofar as it evokes the idea of positioning outside the territory certain border control and migration policy functions, to be carried out by other states or by the EU state itself. Since these are situations and actions linked to migration and border control, they should be conceptually situated outside the territory; the *deterritoriality* option hypothetically makes it possible to encompass both the *externalization* and the *extraterritoriality* of border control functions concerning migration.

To this end, this article has focused on the various notions and activities that might be discussed in relation to the 'externalization' and the 'extraterritoriality' of migration controls and border functions, terms that, in sum, refer to migration control and management activities outside the territory, carried out by public officials of the EU states or by third states.

On the one hand, *externalization* is considered to refer to the management and control of migration flows, the activities of adopting agreements, programmes, action plans and measures to encourage third states to monitor their own borders and migration flows in order to control, restrict or impede

[79] See Campesi G., "Crisis, migration and the consolidation of the EU border control regime", *International Journal of Migration and Border Studies*, vol. 4, nº 3, 2018, at 196.

[80] Zapata-Barrero, 'La dimensión exterior de las políticas migratorias en el área mediterránea: premisas para un debate normativo', *Revista del Instituto Español de Estudios Estratégicos* nº 2, 2013, at 32 and 9.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

physical access to the territory of the EU states, accepting the placement in their territory, or the rejection, of refugees and migrants from other states. It does not involve the presence of or direct exercise of control activities by public officials of the EU Member States. In fact, outside European territory it is highly debatable that states are strictly performing border control functions, as it is an area that may more accurately fall within the more generic field of *migration flow control* linked to migration policy and European external action.

On the other hand, *extraterritorialization* is understood to entail the performance of border control functions by states themselves outside their own territory. In the author's view, this case should involve the presence of or exercise by Member State public officials of some (effective) border control activities or functions in areas without state jurisdiction or in the territory of third states, with their consent.

We are witnessing a change in the very concept of border in this post-globalization era, in which certain functions are offshored and systematically placed outside a state's territory and checkpoints. However, territorial and extraterritorial actions must be differentiated from those occurring as part of external actions in or with third states for the purposes of migration policy and the control of migration flows.

The reality is that a new border space south and east of the Mediterranean has been configured for migratory flows, which needs a new policy of external borders for these areas. Therefore, we must reflect on new frontier spaces, with new concepts and approaches to the border that provide other parameters of action towards migratory flows and external controls. The treatment of migrations in the Mediterranean actually refers to large and medium-term strategies (as shown in the European Agenda on Migration and the 'New Partnership Framework'). So any adaptation or new model of borders towards the Mediterranean-Sahel area must include internal measures to the EU (integrated management system of external borders; a common asylum, refugees and temporary protection policy with major reforms in the Dublin system[81]); but also external measures, with a migration policy and a management of migratory flows that integrates third States in the adapted

[81] See Di Filippo, M. "The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns", *Revista de Derecho Comunitario Europeo*, 59, 2018, 41-95.

new model of borders. Naturally, such a model demands a close connection to the CFSP, but also to the development of the legal statutes of Citizens and Aliens in the Union, and to the capital issue of creating a stable system of legal routes of immigration to Europe.

Today, the Union needs new instruments and concepts for these new realities, especially so as not to lose sight of the fact that, when it comes to tackling crises such as those related to migration and the rights of foreigners approaching or entering its territory and jurisdiction, Europe is a rational construct entailing a project for civilizational progress. As such, it must permanently incorporate its values and respect for human rights in all its policies, regulatory measures and actions with foreigners and third states, both on its own external borders and beyond them. This is essential for the identity and objectives of the European integration, and for the projection of the EU security, solidarity and values in accordance with the International and European Human Rights Law.

## BIBLIOGRAPHICAL REFERENCES

– ABRISKETA URIARTE, J. 'La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del non-refoulement', *Revista de Derecho Comunitario Europeo*, nº 56, 2017, pp. 119-158.

– ACOSTA SÁNCHEZ M., 'La nueva Guardia Europea de Fronteras y Costas, una necesaria evolución de FRONTEX', *Boletín I.E.E.E.* Nº 4 , 2016.

– ACOSTA SÁNCHEZ, M. 'Sobre el ámbito competencial de las operaciones de paz: El enfoque integral de la operación militar Sophia de la UE ante la crisis migratoria', *Revista del Instituto Español de Estudios Estratégicos*, nº 12, 2019, pp. 15-48.

– ACOSTA SÁNCHEZ, M. and DEL VALLE GÁLVEZ, A., 'La crisis de los cayucos. La Agencia Europea de Fronteras – FRONTEX y el control marítimo de la inmigración clandestina', *Tiempo de Paz*, nº 83, 2006, pp. 19-30.

– BILLING, F., "The ECtHR on Disembarkation of Rescued Refugees and Migrants at Greek Hotspots", at *EJILTALK.org*, 25 October 2019.

– CAMPESI, G., "Crisis, migration and the consolidation of the EU border control regime", *International Journal of Migration and Border Studies*, vol. 4, nº 3, 2018, 196-221.

– CARLI, E., "Operation EUNAVFOR MED SOPHIA in the framework of the european agenda on migration: Practical aspects and questions of international law", *Freedom, Security & Justice: European Legal Studies*, Nº. 2, 2018, pp. 135-151.

– CARRERA S. – CORTINOVIS R. "Search and Rescue, disembarkation and relocation ar-



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

rangements in the Mediterranean- Sailing away from Responsibility?" *CEPS Paper* nº 2019-10, June 2019.

– CASAS, N. 'The instruments of pre-border control in the EU: A new source of vulnerability for asylum-seekers?', in *European Commission – FRAME*, 31 May 2016, pp. 30-59.

– D'HUMIÈRES, 'La cooperation Union Européenne/Afrique: l'externalisation des politiques migratoires européennes', *Fondation Robert Schuman Policy Paper* No. 472, 20 April 2018.

– DE BRUYCKER. PH., "The European border and coast guard: a new model built on an old logic", *European Papers*, Vol. 1, Nº. 2, 2016, p. 559-569.

– DEL VALLE GÁLVEZ, 'La fragilidad de los derechos humanos en las fronteras exteriores europeas, y la externalización/extraterritorialidad de los controles migratorios', in J. Soroeta Liceras and N. Alonso Moreda (eds), *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*, Volume XVIII-2018, Ed Tirant lo Blanch, Valencia 2019, pp. 25-58.

– DEL VALLE GÁLVEZ, A., "Los refugiados, las fronteras exteriores y la evolución del concepto de frontera internacional", *Revista de Derecho Comunitario Europeo*, Year No. 20, 55, 2016, pp. 759-777.

– DEL VALLE GÁLVEZ, A., "Unión Europea, crisis de refugiados y limes imperii", *Revista General de Derecho Europeo* 38, 2016.

– DEL VALLE, A., "Refugiados y crisis migratorias: fronteras y desterritorialidad en las puertas de Europa", in Ripol Carulla S., *Derecho, Inmigración y Empresa*, Barcelona, 2019, pp. 85-112.

– DEN HEIJER and SPIJKERBOER, 'Is the EU-Turkey refugee and migration deal a treaty?', *EU Law Analysis*, 7 April 2016.

– DI FILIPPO, M. 'Irregular Migration Across the Mediterranean Sea: Problematic Issues Concerning the International Rules on Safeguard of Life at Sea', 1 *Paix et Sécurité Internationales* (2013), pp. 53-76.

– DI FILIPPO, M. "The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns", *Revista de Derecho Comunitario Europeo*, 59, 2018, 41-95.

– ESTEVE GARCÍA, F, "The Search and Rescue Tasks Coordinated by the European Border and Coast Guard Agency (Frontex) Regarding the Surveillance of External Maritime Borders', *Paix et sécurité internationales*, nº 5, 2017, p. 93, https://revistas.uca.es/index.php/paetsei/article/view/4654, 93-116.

– FANJUL, *Agenda Exterior sobre Inmigración y Refugio*, 28 June 2018

– FERNANDEZ ROJO D. "The Umpteenth Reinforcement of Frontex's Operational Tasks: Third Time Lucky?" *EU Law Analysis*, 04.06.2019.

– FERNÁNDEZ ROJO, D. 'Los hotspots: expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol', *Revista de Derecho Comunitario Europeo*, nº 61, 2018, pp. 1013-1056.

– FRA-EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, *Fundamental Rights at Europe's southern sea borders*, Luxembourg, 2013.

– FRELICK, KYSEL and PODKUUL, 'The Impact of Externalisation of Migration Controls on the Rights of Asylum Seekers and Other Migrants', *Journal of Migration and Human Security* 4(4), (2016), pp. 190-220.

– GABRIELLI, L. 'La externalización europea del control migratorio. ¿La acción española como modelo?', *Anuario CIDOB de la inmigración* (2017), pp. 127-152.

– GAMMELTOFT-HANSEN and HATHAWAY, 'Non-Refoulement in a World of Cooperative Deterrence', *Columbia Journal of Transnational Law*, 53 (2), 2015, pp. 235-284.

– GONZÁLEZ ENRÍQUEZ, 'The European Council and migration: any progress? *Análisis del Real Instituto Elcano*, ARI 112/2018, 9 October 2018.

– GONZALEZ GARCIA I., "Rechazo en las fronteras exteriores europeas con Marruecos: inmigración y derechos humanos en las vallas de Ceuta y Melilla, 2005-2017", *Revista General de Derecho Europeo*, Nº. 43, 2017.

– GONZALEZ GARCIA I., "The Spanish-Moroccan Cooperation on Immigration: The Summary Returns Cases of Isla de Tierra-Alhucemas (2012) and Ceuta and Melilla (2014)" S*panish yearbook of international law,* Nº 19, 2015, pp. 349-356.

– GUILD E. and BIGO, D. 'Policing at a distance: Schengen Visa policies' in *Controlling Frontiers - Free Movement Into and Within Europe*, London, 2005, pp. 203-207.

– JANER TORRENS, J. D., 'El restablecimiento temporal de controles en las fronteras interiores de la Unión Europea como respuesta a las amenazas al orden público y a la seguridad interior: entre la excepcionalidad y la normalidad', *Revista de Derecho Comunitario Europeo*, Nº 61, 2018, p. 899-932.

– KÜNNECKE, A. "Legal challenges and the practicability of disembarkation centres for illegal migrants outside the EU" Análisis del Real Instituto Elcano ARI 53/2019, 16.05.2019.

– MARINAI, S. "The interception and rescue at sea of asylum seekers in the light of the new EU legal framework". *Revista de Derecho Comunitario Europeo*, 55, 2016, pp. 901-939.

– MARINAI, S. 'The Action of Greece and Spain against Irregular Migration by Sea', in A. Del Vecchio (ed.), *International Law of the Sea – Current Trends and Controversial Issues* (The Hague, 2014), pp. 29-58.

– MCNAMARA, 'Member State Responsibility for Migration Control within Third States: Externalisation Revisited", *European Journal of Migration and Law*, 2013, p. 319-335.

– MORENO LAX, 'Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?', 12(3) *Human Rights Law Review* (2012) 574-598.

– MORENO-LAX V. – PAPASTAVRIDIS, E. *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach- Integrating Maritime Security with Human Rights*, Brill, 2016.

– MORENO-LAX, V. and LEMBERG-PEDERSEN, M. "Border induced displacement: The ethical and legal implications of distance-creation through externalization", *QIL, Zoom-in*, 56, 2019, pp. 5-33.

– NAÏR, S., *Refugiados*, Barcelona, 2016.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

– NARANJO GIRALDO, G. E., 'Desterritorialización de fronteras y externalización de políticas migratorias. Flujos migratorios irregulares y control de las fronteras exteriores en la frontera España-Marruecos', 45 *Estudios Políticos*, 2014, pp. 13-32.

– PALM, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?', *EU Immigration and Asylum Law and Policy, Eumigrationblog.eu*, 2 October 2017.

– PAPASTAVRIDIS, E., 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?', at *EJILTALK.org*, 27 June 2018.

– PEERS, S. 'The final EU/Turkey refugee deal: a legal assessment', *EU Law Analysis* 18 March 2016.

– PINYOL, *Agenda Exterior sobre Inmigración y Refugio*, 28 June 2018.

– PRIETO, B. "Los hotspots, un eslabón débil en la gestión de la crisis de los refugiados', *Análisis del Real Instituto Elcano, ARI* 25/2016, 4 March 2016.

– REYES TOVAR 'La Desterritorialización como forma de abordar el concepto de frontera y la identidad en la migración', *Revista Geográfica de América Central* (2011), pp. 1-13.

– RIJPMA J. and CREMONA, M. 'The Extra-Territorialisation of EU Migration Policies and the Rule of Law', *EUI Working Papers - Law* 2007/1.

– RIJPMA, J. 'The Patrolling of the European Union's External Maritime Border: Preventing the Rule of Law from Getting Lost at Sea', in *International Law of the Sea – Current Trends and Controversial Issues*, The Hague, 2014., pp. 77-99.

– RODIER, 'Externalisation of migration controls', in Shifting Borders – Externalising migrant vulnerabilities and rights? *Red Cross EU Office*, 2013, pp. 7-9.

– SÁNCHEZ LEGIDO, A. 'El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el Visado Humanitario europeo', *Revista de Derecho Comunitario Europeo*, nº 57, 2017, pp. 433-472.

– SANCHEZ LEGIDO, A. "Externalización de controles migratorios versus Derechos Humanos" *REEI*, 37, 2019.

– SANTOS VARA, J. "La transformación de Frontex en la Agencia Europea de la Guardia de Fronteras y Costas: ¿hacia una centralización en la gestión de las fronteras?" *Revista de Derecho Comunitario Europeo*, Nº 59, 2018, pp. 143-186.

– SANTOS VARA, J. 'La declaración Unión Europea-Turquía de 18 de marzo de 2016: ¿un tratado disfrazado?' in *Retos para la acción exterior de la Unión Europea*, 2017, pp. 289-300.

– SMITH, A., 'Uncertainty, Alert and Distress: The Precarious Position of NGO Search and Rescue Operations in the Central Mediterranean', *Paix et sécurité internationales* nº 5, 2017, pp. 29-70, https://revistas.uca.es/index.php/paetsei/article/view/4652.

– SOBRINO J. M. and OANTA, G. 'Control y vigilancia de las fronteras en los diferentes espacios maritimos', 14 A*nuario de la Facultad de Derecho de la Universidad de La Coruña* (2010), pp. 759-788.

– TOYGÜR and BENVENUTI, 'One year on: an assessment of the EU-Turkey statement on refugees', *Análisis del Real Instituto Elcano, ARI* 21/2017, 21 March 2017.

– URÍA GAVILÁN, E., 'La declaración Unión Europea-Turquía: la externalización de la seguridad en detrimento de la protección de los derechos humanos', in E. J. Martínez Pérez, C. Martínez Capdevila, M. Abad Castelos and R. Casado Raigón (eds), *Las amenazas a la seguridad internacional hoy*, 2017, pp. 89-101.

– ZAPATA BARRERO, R. and ZARAGOZA CRISTIANI, 'Externalización de las políticas de inmigración en España ¿giro de orientación política en la gestión de fronteras y flujos migratorios?', 8 *Panorama social* (2008).

– ZAPATA-BARRERO, R.,'La dimensión exterior de las políticas migratorias en el área mediterránea: premisas para un debate normativo', *Revista del Instituto Español de Estudios Estratégicos* nº 2, 2013.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 117-160
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.04

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

**Citation**: NAGORE CASAS, M., «The Instruments of Pre-border Control in the EU: A New Source of Vulnerability for Asylum Seekers?», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 161-198.

**Received**: 03 October 2019
**Accepted:** 08 November 2019

# THE INSTRUMENTS OF PRE-BORDER CONTROL IN THE EU: A NEW SOURCE OF VULNERABILITY FOR ASYLUM SEEKERS?

Maria NAGORE CASAS[1]

I.- INTRODUCTION: SECURITIZATION OF BORDERS AND VULNERABILITY OF ASYLUM SEEKERS. II.- THE MAIN EU AND MEMBER STATES' INSTRUMENTS OF PRE-BORDER CONTROL. III.- COMPATIBILITY OF THE INSTRUMENTS OF PRE-BORDER CONTROL WITH THE INTERNATIONAL PROTECTION OF REFUGEES AND THE PRINCIPLE OF *NON-REFOULEMENT*. IV.- CONCLUSION.

**ABSTRACT**: This article explores the system of pre-border control instruments that have been implemented by the EU and Member States in order to prevent asylum seekers from accessing the EU territory. The main argument is that these instruments constitute a new source of vulnerability for asylum-seekers and refugees. The article analyses some of the main passive and active measures of interception of refugees (EU Visa Regime, carrier sanctions, Immigration Liaison Officers and interception at sea) and the main legal problems regarding their compatibility with the international legal framework for the protection of refugees, notably with the principle of *non-refoulement.*

**KEY WORDS**: pre-border control, refugees' vulnerability, EU Visa Regime, carrier sanctions, Immigration Liaison Officers, interception of refugees at sea.

**LOS INSTRUMENTOS DE PRE-CONTROL FRONTERIZO EN LA UE: ¿UNA NUEVA FUENTE DE VULNERABILIDAD PARA LOS SOLICITANTES DE ASILO?**

**RESUMEN:** Este artículo explora el sistema de instrumentos de pre-control fronterizo que han sido implementados por la UE y sus Estados Miembros con el fin de evitar el acceso de los solicitantes de asilo al territorio de la UE. El principal argumento es que estos instrumentos constituyen una nueva fuente de vulnerabilidad para los refugiados y solicitantes de asilo. El artículo analiza algunas de las principales medidas activas y pasivas de interceptación de refugiados (Régimen Europeo de Visados, sanciones a los transportistas, Oficiales de Enlace de Inmigración e interceptación en el mar) y los principales problemas que plantean respecto de su compatibilidad con el marco jurídico internacional de protección de los refugiados, en especial, con el principio de *non-refoulement*.

**PALABRAS CLAVE:** pre-controles fronterizos, vulnerabilidad de los refugiados, Régimen Euro-

---

[1] Lecturer (Profesora Doctora Encargada) in International Law and International Organizations, University of Deusto. The research leading to these results has received funding from the European Commission's Seventh Framework Programme (FP7/2007-2013) under the Grant Agreement FRAME (project n° 320000). This article draws from *The protection of vulnerable individuals in the context of EU policies on border checks, asylum and immigration*, FRAME Deliverable No. 11.3 available at <http://www.fp7-frame.eu/reports/>.

peo de Visados, sanciones a los transportistas, Oficiales de Enlace de Inmigración, interceptación de refugiados en el mar.

**LES INSTRUMENTS DE PRÉ-CONTRÔLE FRONTALIER DANS L'UE: UNE NOUVELLE CAUSE DE VULNERABILITÉ POUR LE SOLICITANT D'ASILE?**

**RÉSUMÉ:** Cet article examine le système d'instruments de pré-contrôle frontalier mis en place par l'UE et ses États membres avec la finalité d'éviter l'accès des solicitants d'asile au territoire de l'UE. L'argument principal développé dans cet article est que ces instruments consituent un nouveau cause de vulnerabilité pour les réfugiés et solicitants d'asile. L'article analyse quelques des principales mesures actives et passives d'interceptation des réfugiés (Régime Européen des Visas, sanctions contre les trasporteurs, officiers de liason d'immigration et interception des réfugiés en mer) et les problémes que posent en relation avec son compatibilité avec le cadre juridique international de protection des réfugiés, en particulier, le principe de non-refoulement.

**MOT CLÉ:** pré-contrôle frontalier, vulnerabilité des réfugiés, Régime Européen des Visas, sanctions contre les trasporteurs, officiers de liason d'immigration, interception des réfugiés en mer.

## I. INTRODUCTION: SECURITIZATION OF BORDERS AND VULNERABILITY OF ASYLUM SEEKERS

One of the most controversial issues regarding the legal protection of refugees is the determination of the exact scope of States' obligations towards them, in particular, towards those who have not yet crossed the State of destination's borders. Governments, international organisations, scholars and policy-makers' views on the territorial scope of these obligations differ due, among other reasons, to the lack of clarity regarding paramount elements of the legal framework to be applied, such as the status of individuals under international law, the way in which international treaties should be interpreted or under which circumstances the obligations of States vis-à-vis individuals are engaged.[2] States tend to consider that their obligations to protect do not arise until the refugee has crossed their frontiers, while at the same time their involvement in extraterritorial activities aimed at preventing refugees from reaching their territories has increased significantly.

There are many cases in practice which illustrate the tension between States' obligations to protect and their deterrence activities. To cite but a few examples in case law, according to the UK government, the posting of immigration officers in a foreign airport in order to refuse leave to enter into

[2] Gil Bazo, M. T.: "The Practice of Mediterranean States in the context of the European Union"s Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited", *International Journal of Refugee Law*, Nº 18(2–3), 2006, pp. 571, 571–572.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

the UK to undesired passengers was not contrary to the 1951 Refugee Convention.[3] In *Hirsi Jamaa and Others v. Italy*, the Italian government argued that systematic "push-backs" of Libyan migrants in foreign territorial waters were lawful under the bilateral agreements signed between Italy and Libya between 2007 and 2009.[4] In *J.H.A. v. Spain***,** the Spanish government argued that the interception of a boat in the territorial waters of a third country did not amount to an exercise of jurisdiction.[5] These are just a few examples of the externalisation of border control activities by States, as well as their attempt to consider these activities lawful and respectful of their legal obligations under the international regime of protection of refugees, in particular regarding the principle of *non-refoulement*.[6]

Despite this attempt by States to pretend to be in compliance with international refugee law, many commentators postulate that the increasing extraterritorial activity of States has the intention of precisely avoiding their obligations of protection once the individuals manage to cross their frontiers.[7] States have developed a complex system of deterrence measures, which in practice impede any contact by refugees with the territory of the receiving State. It is thereby often argued by NGOs and scholars that there is a huge

[3] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55.

[4] European Court of Human Rights, Grand Chamber, *Hirsi Jamaa and Others v. Italy* App no 27765/09 (ECtHR (GC) 23 February 2012) para 92.

[5] Committee against Torture, *J.H.A. v Spain*, Communication no 323/2007, CAT/C/41/D323/2007, para 6.1.

[6] This principle is laid down in Article 33.1 of the Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 (Refugee Convention).

[7] Gammeltoft-Hansen, T. and Hathaway, J.C., "Non-Refoulement in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law*, nº 53, 2015, p. 235; Goodwin-Gill, G.S. and Mcadam, J., *The Refugee in International Law*, Oxford University Press, 3rd edn, 2007, pp. 369–371; Guild, E. and Bigo, D., "The transformation of European Border Controls" in Ryan, B. and Mitsilegas. V. (eds.) *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, 2010, p. 257; Den Heijer, M., *Europe and Extraterritorial Asylum*, Hart Publishing, 2012, p. 166; Moreno Lax, V., "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", *International Journal of Refugee Law,* nº 23(2), 2011, p. 174;


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

gap between the rhetoric of States and their attitudes in practice.[8] On the one hand, States are pledging their commitment to refugee law, but on the other, they are not keen to assume obligations in practice. This "schizophrenic attitude" of States towards international refugee law has given rise, in the words of Gammeltoft-Hansen and Hathaway, to the "politics of non-entrée" aimed at "ensuring that refugees shall not be allowed to arrive."[9]

In addition to "politics of non-entrée", several terms have been used by scholars to refer to this phenomenon, which is subject to increasing attention by literature and media: "outsourcing, externalisation, offshoring or extra-territorialisation of migration management; external migration governance; remote migration policing";[10] "de-territorialization of border control";[11] "politics of extraterritorial processing";[12] "neo-refoulement";[13] or "limes imperii".[14] All of these terms refer to the various types of interception measures used by States against asylum-seekers and refugees, measures which are usually developed by the wealthiest States, notably the United States, Australia, Canada and EU Member States.

Many factors explain State engagement in extraterritorial activities. Among them, one which has to be mentioned in order to frame the discussion is that in the post-9/11 context asylum is increasingly categorised as a

---

[8] Gammeltoft-Hansen, T. and Hathaway, J.C., *op. cit.*; Goodwin-Gill, G.S. and Mcadam, J., op. cit.; Doctors Without Borders, *Migrants, Refugees and Asylum Seekers: Vulnerable People at Europe"s Doorstep*, MSF, 2009; CEAR (Comisión de Ayuda al Refugiado) Euskadi, *The Externalization of Borders: Migration Control and the Right to Asylum: A Framework for Advocacy*", CEAR, 2012.

[9] Gammeltoft-Hansen, T. and Hathaway, J.C., *op. cit.*, p. 241.

[10] These terms are listed by Den Heijer, M., *op. cit.*, p. 3. See also Mcnamara, F., "Member State Responsibility for Migration Control within Third States — Externalisation revisited", *European Journal of Migration and Law*, nº 15, 2013, p. 326.

[11] Trevisanut, S., "The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea", *Leiden Journal of International Law,* nº 27, 2014, p. 661.

[12] Afeef, K.F., "The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific", *Refugee Studies Centre Working Paper*, nº 36, 2006, p. 2.

[13] Hyndman, J., and Mountz, A., "Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe", *Government and Opposition*, nº 43(2), 2008, p. 249.

[14] Del Valle Gálvez, A.,"Unión Europea, Crisis de Refugiados y Limes Imperii", *Revista General de Derecho Europeo*, nº 38, 2016, p. 1.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

"security issue", including by the EU Member States. This has caused a shift from legal discourses based on the protection of refugees to "more geopolitical projects based on security."[15] The legal dimension of refugee protection based on the guarantees provided by international instruments has given way to a political dimension where the priority is the management of migrant flows in regions of origin and preventing asylum seekers from reaching the territories of states.[16] This "securitization of asylum" has always been present in the EU Schengen Acquis. A recent example is found in European Council Conclusions of 20 June 2019 where the European Council establishes a "New Strategic Agenda 2019 – 2024." One of the four main priorities for the EU in this period is "protecting citizens and freedoms" which implies ensuring the integrity of EU's territory. According to the European Council: "We need to know and be the ones to decide who enters the EU. Effective control of the external borders is an absolute prerequisite for guaranteeing security, upholding law and order, and ensuring properly functioning EU policies, in line with our principles and values."[17]

The "near-obsession"[18] of States with migration control contrasts with the human needs and vulnerability of asylum seekers. The main argument of this article is that the "politics of non-entrée" constitutes in itself another source of vulnerability for asylum-seekers. In addition to the causes of persecution in their own countries and the "contextual" and "compounded" vulnerability they face,[19] asylum seekers' vulnerability is exacerbated by some of the pre-border control instruments that will be analysed here. One alarming example is the direct relationship between migration control and hu-

[15] Hyndman, J., and Mountz, A., *op. cit,* pp. 249 and 251.

[16] Hyndman, J., and Mountz, A., *op. cit.*, pp. 250–252; Del Valle Gálvez, A., *op. cit.*, p. 13; and Valsamis, M., "Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens and Strengthening the State", *Indiana Journal of Global Legal Studies*, nº 19(1), 2012, pp. 3 and 45–59.

[17] European Council meeting (20 June 2019), EUCO 9/19, Annex "A New Strategic Agenda 2019 – 2024", pp. 6 – 7.

[18] Gammeltoft-Hansen, T. and Hathaway, J.C., *op. cit.*, 235- 236.

[19] Mustaniemi-Laakso, M., "Vulnerability in EU policies on asylum and irregular migration" in FRAME Deliverable 11.3, *The protection of vulnerable individuals in the context of EU policies on* border *checks, asylum and immigration*, 11-24, <http://www.fp7-frame.eu/reports/>.

man smuggling, which has been denounced by several authors and NGOs.[20] This phenomenon has been described as "a never-ending race between border authorities and ever more inventive human smugglers," which in practical terms implies that for each loophole closed by border authorities two new modes of unauthorised entry come up.[21] In addition, the urgency of some EU Member States to combat irregular migration has exposed refugees to serious risks by giving rise to episodes of non-rescue, disputes over responsibility towards refugees and diversion of ships to third countries' ports.[22] This has unfortunately been the central dynamic regarding the rescue operations in the Mediterranean Sea during this summer.[23]

According to the Red Cross some EU migration policy choices expose refugees to great vulnerabilities along their way to the EU and Schengen area, notably violence and human-trafficking and dangerous journeys to reach the EU's external borders[24] The use by migrants of dangerous routes to Europe in the absence of regular and safer migration opportunities has been indeed considered a violation of the right to life.[25] The Commissioner for Human Rights of the Council of Europe identified the journey of migrants to Europe as one of the points in the migration cycle where vulnerability is greatest and alerted that one of the drivers of vulnerability is the "excessive use of force by law enforcement officials charged with border control."[26]

Furthermore, it must be stressed that the most urgent need of refugees is to secure entry into a territory where they can find safety from the circum-

---

[20] CEAR, *op. cit.*, 9.

[21] Gammeltoft-Hansen, T. and Hathaway, J.C., *op. cit.*, pp. 235 and 237.

[22] Moreno Lax, V., *op. cit.,* p. 174.

[23] BBC News Mundo, "Es infame el silencio de Europa: Open Arms y Ocean Viking, los barcos que deambulan por el Mediterráneo llenos de migrantes (y la respuesta de los países involucrados)", 13 August 2019; RTVE noticias, "El Open Arms atraca en el puerto de Lampedusa con 83 migrantes a bordo tras 19 días de incertidumbre", 20 August 2019.

[24] Red Cross EU Office, "Addressing the Vulnerabilities linked to Migratory Routes to the European Union" RCEU 12/2015-002 Position Paper 1.

[25] European Parliament, Directorate-General for External Policies, Migrants in the Mediterranean: Protecting human rights (Study by Cogolati, S., Verlinden, N., and Schmitt, P.), 2015, EP/EXPO/B/DROI/2015/01, p. 30.

[26] Council of Europe, Commissioner for Human Rights, "The Human Rights of irregular migrants in Europe", CommDH/IssuePaper Nº 1, 2007, pp. 3 and 8-9.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

stances that led them to flee. Restrictions to this basic need may have serious consequences for refugees' protection: refugees denied entry into a country are likely to be returned to the risk of persecution in their countries of origin or to be condemned to "perpetual orbit" in search of a State which allows them to enter.[27]

In spite of the increasing contextual and compounded vulnerabilities of asylum seekers, these State practices pose a variety of legal issues as they challenge not only the international legal framework for the protection of refugees, notably the principle of *non-refoulement*, but also well-established human rights such as the right to freedom of movement[28] and the right to leave any country, including one's own country.[29] States that through these measures obstruct access to asylum procedures or impose barriers on the individual's right to leave any country may breach their obligations under the Refugee Convention and the human rights treaties to which they are party. In addition, it is necessary to recall that all EU Member States are parties to the ECHR and consenquently they are bound by the jurisprudence of the ECtHR regarding vulnerability of asylum-seekers. According to the ECtHR their vulnerability is "inherent in his situation of asylum seeker."[30] This involves that every asylum-seeker must be deemed to be vulnerable, regardless their particular circumstances. They are vulnerable because of their belonging to this groupand States should consider this inherent vulnerability when implementing their policies.[31]

The aim of this article is to analyse some of these instruments of pre-border control implemented within the EU in order to assess to what extent they

[27] James C. Hathaway, J.C., *The Rights of Refugees under International Law,* Cambridge University Press, 2005, p. 279.

[28] *Universal Declaration of Human Rights* (UDHR), adopted by resolution 217 A (III) of the UN General Assembly in Paris on 10 December 1948, art 13(1).

[29] International Convenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, art 12(2) and UDHR, art 13(2).

[30] M.S.S v. Belgium and Greece App no 30696/09 (ECtHR 21 January 2011).

[31] Brandl, U. and Czech, P., "General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?" in Ippolito, F. and Iglesias Sánchez, S., *Protecting Vulnerable Groups. The European Human Rights Framework*, Hart Publishing, 2015, pp. 249-251.

generate or increase refugees' vulnerabilities and to discuss some of the legal problems regarding their compatibility with the international legal framework for the protection of refugees, notably with the principle of *non-refoulement* set forth in the 1951 Refugee Convention and some of the main human rights law instruments. These problems will be addressed in section III below, whilst section II will provide an overview of some of the main instruments of pre-border control carried out by the EU and the Member States. Finally, section IV will provide some conclusions.

## II. THE MAIN EU AND MEMBER STATES' INSTRUMENTS OF PRE-BORDER CONTROL

At the EU level, extraterritorial practices to control borders have to be historically framed in the process of European integration and the abolition of internal borders to facilitate the freedom of movement of persons, capital and goods. Once an internal space without borders was created, the protection of this space against the entrance of undesired categories of persons, capital and goods became a clear priority within the EU.[32] As the Preamble of the 2006 Schengen Borders Code (SBC) stated, "the creation of an area in which persons may move freely is to be flanked by other measures" and "the common policy on the crossing of external borders, as provided for by Article 62(2) of the Treaty, is such a measure."[33]

The need to control the external borders of the EU appeared at the very beginning of the shaping of the EU immigration and asylum policy. In particular, some authors situate the origins of the externalisation of immigration policies by the EU in the concept of "preventive protection" introduced in 1993 by the then-UN High Commissioner for Refugees, Sadako Ogata, which was promptly adopted by the EU institutions. Ogata emphasized the "right to remain in one's home country" over the traditional dominant discourse of the "right to leave". This concept served as a basis for the creation of an

[32] Gil Bazo, M.T., *loc. cit.*, pp. 571 - 572.

[33] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2006] OJ L105 (consolidated version 2013), preamble para 2, repealed by Regulation 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) OJ L77/1.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

"incremental and invisible policy wall around the EU".[34] In the 1994 Communication on Immigration and Asylum Policies the European Commission identified three main elements of these policies: "Taking action on migration pressure, "Controlling migration flows" and "strengthening integration policies for the benefit of legal immigrants."[35] The protection of refugees and other persons in need of international protection were addressed within the second area (controlling migration flows) along with admission policies and measures to fight against illegal migration. This threefold distinction between "legal immigration", "illegal immigration" and "asylum" has characterised this area of European policy since its very beginning. Border control and other migration enforcement measures reflected this distinction.[36] However, one of the main flaws in the European immigration and asylum policy is precisely the lack of an effective distinction between these different categories in the context of the current mixed flows of migrants.[37]

The 1994 immigration and asylum policy proposal relied on strong cooperation with the countries of origin of refugees. This external dimension of the policy has since been present in all the EU's policy formulation documents: the Tampere European Council of October 1999,[38] the 2004 Hague Programme,[39] the 2005 Global Approach to Migration,[40] the 2008 European

[34] Hyndman, J., and Mountz, A., pp. 249, 252 and 262.

[35] Commission of the European Communities, Communication form the Commission to the Council and the European Parliament on Immigration and Asylum Policies [1994] COM(94) 23 final.

[36] According to COM(994) 23 final, para 70: "The first task in controlling migration is to formulate basic principles in order to reflect the distinction between migration pressure and other forms of migration. Admission policies will necessarily represent this distinction: they cannot be purely restrictive as they should respect international obligations and humanitarian traditions in general. Hence, controlling migration does not necessarily imply bringing it to an end: it means migration management."

[37] den heijer, M., *op. cit.*, pp.165–166.

[38] Council, Tampere European Council 15 and 16 October 1999. Presidency Conclusions.

[39] Council of the EU, The Hague Programme: strengthening freedom, security and justice in the European Union [2004] 16054/04 JAI 559.

[40] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "The Global Approach to Migration and Mobility" [2011] COM(2011) 743 final.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

Pact on Immigration and Asylum,[41] the 2010 Stockholm Programme,[42] and the 2015 European Agenda on Migration.[43] An important feature of the EU's immigration and asylum policy is precisely the distinction between the internal and the external dimensions of this policy. In parallel to the system of rules which sets forth entry conditions into the EU, admissibility criteria and enforcement measures, laid down mainly in the SBC and the Common European Asylum System, the EU has developed an external dimension of this policy which comprises, on the one hand, a set of instruments based on the remote control of the EU's external borders ("Integrated management of the external borders") and, on the other hand, those measures aimed at enhancing the capacity in third countries to "handle migratory flows and protracted refugee situations" (External Asylum Policy).[44]

The instruments which will be discussed in this section respond to the concept of "Integrated Management of the External Borders". This concept was first established by the European Commission in its 2002 Communication entitled "Towards Integrated Management of the External Borders of the Member States of the European Union",[45] and subsequently adopted by the Justice and Home Affairs Council in its "Plan for the management of the external borders of the Member States of the European Union".[46] The concept refers to the establishment of a "framework of an integrated strategy which takes progressively into account the multiplicity of aspects to the management of the external borders" of the EU.[47] Three specific compo-

---

[41] Council of the EU, European Pact on Immigration and Asylum [2008] 13440/08 ASIM 72.

[42] European Council, The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/1.

[43] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration [2015] COM(2015) 240 final.

[44] European Council, The Stockholm Programme, op. cit., para 6.2.3.

[45] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament "Towards Integrated Management of the External Borders of the Member States of the European Union" [2002] COM(2002) 233 final.

[46] Council of the European Union, "Plan for the management of the external borders of the Member States of the European Union" [2002] 10019/02.

[47] COM(2002) 233 final, para 6.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

nents can be identified in this strategy: (i) a common corpus of legislation, in particular the SBC; (ii) operational cooperation between EU Member States, including cooperation implemented through Frontex, and (iii) solidarity between Member States by means of the establishment of an External Borders Fund.[48] This strategy is strongly focused on ensuring security at external borders and is based on the idea that border controls are more effective if they are implemented across the various stages of an immigrant's travel towards the EU.[49]

On 15 December 2015 the European Commission adopted a new set of measures to manage Europe's external borders, including the creation of a European Border and Coast Guard[50] and a European travel document for the return of illegally staying third-country nationals.[51] In addition, on 6 April 2016, the Commission adopted its Communication entitled "towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe."[52] In this Communication, one of the most controversial "new generation measure", that is, the signing of a Joint Action Plan with Turkey in October 2015 in the current context of the Syrian refugee crisis in

48 Council of the European Union, Council Conclusions on Integrated Border Management, 2768th Justice and Home Affairs Council meeting Brussels, 4–5 December 2006, p. 1.

49 Den Heijer, M., *op. cit.*, p. 172; Acosta Sánchez, M.A. and González García, I., "Tribunal de Justicia de la Unión Europea - TJUE - Sentencia de 05.09.2012, Parlamento c. Consejo C-355/10, 'Código de fronteras Schengen - Decisión 2010/252/UE - Vigilancia de las fronteras marítimas exteriores - Normas adicionales sobre la vigilancia de fronteras - Competencias de ejecución de la Comisión - Alcance'. Vigilancia de fronteras marítimas y elementos esenciales en los actos de ejecución", *Revista de Derecho Comunitario Europeo*, nº 47, 2014, pp. 270 - 271.

50 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) No 2007/2004, Regulation (EC) No 863/2007 and Council Decision 2005/267/EC [2015] COM(2015) 671 final, 2015/0310 (COD). The European Border and Coast Guard Agency (Frontex) was finally established by Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard.

51 European Commission, Proposal for a Regulation of the European Parliament and of the Council on a European travel document for the return of illegally staying third-country nationals [2015] COM(2015) 668 final, 2015/0306 (COD).

52 European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final.

Europe, was deemed as a "legal channel of resettlement" and a "mechanism to substitute irregular and dangerous migrant crossing from Turkey to the Greek islands".[53] The EU-Turkey Joint Action Plan[54] was highly criticised because it ignored the conditions of poverty suffered by the over 2 million refugees that Turkey had already received, as well as Turkey's poor human rights record and its inadequate asylum system. In fact, by the end of 2015 forced returns by Turkey of refugees and asylum-seekers to Syria and Iraq were reported.[55]

Despite criticism, this Plan was confirmed on 16 March 2016 by means of the controversial "EU - Turkey Statement" which included eight new lines of action, among them, the return to Turkey of all new irregular migrants crossing form Turkey into Greek Islands and the resettlement form Turkey to the EU of one Syrian for every Syrian being returned to Turkey from Greek Islands, taking into account the UN Vulnerability Criteria.[56] The implementation of the EU -Turkey Statement has been deemed by the EU as a success. According to the European Commission, in March 2019 irregular arrivals remain 97% lower than the period before the Statement became operational.[57] This Statement has implied a significant shift in the external dimension of the EU's migration policy which is increasingly oriented towards the conclusion of agreements with the States of origin. Indeed, in the Malta Declaration of the European Council of 3 February 2017, the key measure is the intensification of cooperation with countries of origin or transit, in order

[53] European Commission, Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe [2016] COM(2016) 197 final, 14-15.

[54] European Commission, "EU-Turkey joint action plan" [2015] MEMO/15/5860, 1–2.

[55] Amnesty International, *Amnesty International Report 2015/16: The State of the World"s Human Rights* (Amnesty International 2016), 43. See also CEAR, *Lesbos, "zona cero" del derecho de asilo*, CEAR, 2016, 33 and Red Cross, "The EU-Turkey migration deal: a lack of empathy and humanity – Opinion of 23 Red Cross National Societies", 2016.

[56] European Council, EU-Turkey statement, 18 March 2016, Press Release 144/16.

[57] European Commission, "EU – Turkey Statement. Three years on", March 2019.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

to "contain (in these countries) illegal flows to the EU."[58] In particular, the focus is now on strengthening relations with Libya.[59]

## 1. PASSIVE AND ACTIVE INTERCEPTION

Although there is not an internationally accepted definition of "interception", the Executive Committee of the High Commissioner's Programme in 2000 proposed one, which is often referred to by scholars.[60] According to the proposed definition, interception comprises "all measures applied by a State, *outside its national territory*, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination."[61] This definition, which highlights the extraterritorial character of the interception measures, encompasses both "physical or active measures" of interception, such as interception of boats at sea, and "passive or administrative measures", such as the deployment of immigration control officers in foreign countries, visa requirements, carrier sanctions or financial and other assistance to origin or transit countries. The structure of this section will follow this distinction between *passive* and *active* measures of interception.

### A. PASSIVE MEASURES OF INTERCEPTION

#### a. The EU Visa Regime

The EU has established a common visa policy for stays in the territories of the Member States not exceeding three months in any six-month period.[62]

[58] European Council, Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route, 3 February 2017, para 2.

[59] Malta Declaration, para 5 – 6.

[60] Moreno Lax, V., "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers" Sanctions with EU Member States" Obligations to Provide International Protection to Refugees", *European Journal of Migration and Law,* nº 10, 2008, pp. 315, 322 and 323; Goodwin-Gill, G.S. and Mcadam, J., *op. cit.*, 371-372.

[61] Executive Committee of the High Commissioner"s Programme, Standing Committee, "Interception of Asylum Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach" [2000] EC/50/SC/CRP.17, para 10, emphasis added.

[62] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] L 243/1, art 1.1 ("Visa Code").

The Visa requirements were first established in the Convention Implementing the Schengen Agreement (CISA),[63] and subsequently governed by Article 5 of the 2006 SBC which stated the general entry conditions which must be fulfilled by third-country nationals to be allowed entry into the Schengen area.[64] Regulation 2018/1806 (Visa Requirement Regulation) lists the non-EU countries whose nationals must be in possession of a visa when crossing the external borders of the EU. This is the so-called "black list" of Annex I of the Visa Requirement Regulation, whereas Annex II lists the countries whose nationals are exempt from requesting a visa ("white list").[65] A considerable number of "refugee-producing" countries are included in the black list, for example, Afghanistan, Iraq, Somalia, Sudan and Syria.

Regulation 2018/1806 does not include any reference to refugees or asylum seekers. Only, with respect to "recognized refugees", it is established that they will be required to obtain a visa or be exempt from it, depending on whether the third country in which they reside and that have issued their travel documents is included in the black list or the white one.[66] That is, even refugees who have been formally recognized as such by a third State are required to have the mandatory visa if they come from a blacklisted country. Regarding refugees not formally recognized, the regulation is silent.

In addition to the lists, certain procedures and conditions for issuing short-stay visas, transit visas through the territory of the Member States and transit visas through the international areas of airports have been also harmonized in EU law. This harmonization has been carried out mainly through the 2009

[63] The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of Benelux Economic Union, the Federal Republic of Germany and French republic on the gradual abolition of checks at their common borders, [2000] OJ L239/19. Article 5, which states the general requirements for aliens to be granted entry into the Schengen area was repealed by Article 39.1 of the Schengen Borders Code.

[64] Regulation (EC) No 562/2006, art. 5, repealed by Regulation (EU) 2016/399, which states these conditions in article 6.

[65] Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) [2018] OJ L303/39.

[66] Regulation (EU) 2018/1806, Preamble (8) and art. 3.2.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

Visa Code.[67] This Code does not recognize refugees a special status neither. It is applicable to those nationals subject to the obligation to obtain a visa in accordance with the list of countries provided by Regulation 2018/1806.[68] Therefore, refugees are granted in this Code the same treatment as nationals of the State in which they reside, regardless of their recognition as refugees. It does not include any reference to refugees who have not been yet formally recognized. Likewise, the Schengen Borders Code also requires holding a visa to nationals of any country that is blacklisted.[69] The first conclusion thus far is that visas are required to refugees under the same conditions as any other third-country national. The question is then what is the applicable regime to those refugees not holding a visa who manage to reach the border of the country of destination. In these cases, according to the SBC and the Visa Code, States may authorise refugees to enter their territory, "if a visa is issued at the border." [70] However, since the fulfilment of the requirements to obtain a visa pose serious difficulties for refugees, SBC states that refusal to entry "shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection."[71]

The key issue is whether this provision exempt refugees from the need to obtain a visa: on the one hand, it seems that the visa requirement is mandatory for refugees, since no exception is established for them in the rules that specifically regulate the visa requirement in the EU. On the other hand, however, the refusal to enter shall respect the right of asylum and internacional protection. Thus, although the Visa Code does not grant favourable treatment to asylum seekers or refugees, implying that in principle they are to comply with the requirements on the same footing as any national of a blacklisted State, they are exempt from the visa requirement according to the SBC. The paradox then is that refugees are not exempt from holding a visa until the very moment when this requirement is enforced, that is, when it is

[67] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] L 243/1, art 1.1 ("Visa Code").

[68] Visa Code, art 1.2.

[69] Regulation (EU) 2016/399, art. 6.1.b.

[70] SBC, art. 6.5.b; Visa Code, art. 35 and 36.

[71] SBC, art 14.1.

checked whether the person complies with the entry conditions established in the SBC.[72]

In the view of some scholars,[73] it should be understood that refugees are exempted from the obligation to obtain a visa, since this is what is most consistent with other applicable rules, including art. 5 of the CISA[74] and art. 4 of the SBC.[75] This interpretation is also consistent with national norms, among them, Spanish rules on foreigners, which provide that entry requirements are not applicable to foreigners who apply for the right to asylum at the moment of entry in the Spanish territory.[76]

Nevertheless, even if we accept this interpretacion, difficulties in accessing international protection remain for refugees. Firstly, they are not exempted from the visa until the very moment they are ready to cross the external borders of the Union, that is, when entry conditions established in the SBC and the internal laws of the States are triggered. In sum, if the legal consequence of the joint reading of the previous rules is that refugees do not have to obtain a visa, it is difficult to understand why the Visa Code does not establish an explicit exception in that regard.

Secondly, this must be examined in the light of the practices of Member States and the instruments they use to implement entry conditions. What state practice shows is that the standard procedure for carriers and officials deployed in foreign airports and borders is checking that individuals hold a visa, without any consideration of the rights of asylum seekers or refugees. Thus, standard procedures could be highly problematic if the checks are not accompanied by proper guarantees for refugees.[77] Moreover, the SBC requires other entry conditions that refugees are unlikely to fulfil, notably documents in which they have to justify the purpose and conditions of the stay and that

[72] Den Heijer, M., *op. cit*, 173–174.

[73] *Ibid*; Moreno Lax, V., *op. cit.* (2008), 327-328.

[74] CISA, art. 5.2: " These rules shall not preclude the application of special provisions concerning the right of asylum."

[75] SBC, art. 4: "in the application of this Regulation, the Member States shall act in full respect of the (…) applicable international law, including the Convention on the Status of Refugees made in Geneva on July 28, 1951; of the obligations related to access to international protection, especially the principle of non-refoulement, and of fundamental rights".

[76] Ley orgánica 4/2000, de 11 de enero, de extranjería, art 25.3.

[77] Den Heijer, *op. cit.*, 173–174.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

they have sufficient means of subsistence for the duration of the stay and for the return to their country of origin.[78]

Finally, Member States are free to create more favourable conditions for asylum-seekers through the issuing of visas with limited territorial validity based on humanitarian grounds, national interest or because of international obligations[79] and the regulation of long stay visas subject to their domestic procedures and rules. The interpretation of "international obligations" was a key issue in the request for a preliminary ruling submitted to the Court of Justice of the EU by the Belgium Conseil du Contentieux des 'Etrangers in the case *X and X vs. Belgium* but the Court, against the opinion of the Advocate General, refused to address this question on the grounds that the visa application submitted by a Syrian family was outside of the scope of the Visa Code.[80]

b. Carrier sanctions

As explained above, the mere fact of not holding a visa does not in itself prevent access to the EU. Asylum-seekers could present themselves at the EU external borders and make an asylum claim that has to be examined by national authorities of the Member States, which are subject to the obligation of *non-refoulement*. However, the visa requirement has to be analysed in close connection to the EU's carrier sanction system, which has transformed the visa requirement into a "precondition" which precludes individuals from even leaving their country of origin.[81]

Article 26 of the CISA lays down the duty of Member States to incorporate into their national laws three kinds of obligations for carriers which bring third country nationals by air, sea or land to the external borders of the EU: (i) the obligation to assume responsibility for aliens who are refused entry into the territory of one of the Member States and to return them to the third State from which they were transported or which issued their travel documents or any other third State "to which they are certain to be

[78] SBC, art 5.1.c.

[79] Visa Code, art. 25.

[80] Judgment of the Court (Grand Chamber) of 7 March 2017, X and X v État belge, C-638/16 PPU, C:2017:173.

[81] Gammeltoft-Hansen, T. and Gammeltoft-Hansen, H., "The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU", *European Journal of Migration and Law*, nº 10, 2008, pp. 439, 450–451.

admitted",[82] (ii) the obligation to check that aliens are in possession of the travel documents required for entry into the territory of the Member States, and (iii) the obligation to pay financial penalties in case they fail to meet their control obligations.

Article 26 CISA and the Preamble of Directive 2001/51/EC, which complements Article 26, set forth that the application of these provisions is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees.[83] Thus, as a matter of principle, carrier sanctions regimes shall respect international refugee obligations. Notwithstanding this, some problems have to be underlined in practice.[84] First, the regime depends on the assessment by private carriers of whether passengers who claim asylum have a founded claim. The issue is that frequently they lack proper expertise and training. Second, limitations of time and the expedient nature of boarding procedures make it unlikely that private carriers undertake assessments seriously. Third, in order to avoid fines and return obligations, private carriers tend to rely exclusively on the examination of travel documents, without any consideration of asylum claims. Fourth, if carrier sanctions regime should not prejudice asylum seekers and refugee rights, one possible interpretation is to consider that asylum seekers fall outside the scope of the regime. Thus, carriers would be allowed to board individuals without travel documents provided that they file an asylum claim when arriving at the EU's external border. However, it is argued that such an interpretation would make the carrier regime prone to abuses if every undocumented migrant claims asylum. Fifth, there is not uniformity in the implementation of sanctions by Member States. Some Member States impose sanctions on carriers regardless of the involvement of refugees, some release carriers from the

[82] Article 26.3 establishes some exceptions in cases of land border traffic.

[83] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 [2001] OJ L187/45, Preamble, para 3.

[84] Moreno Lax, *op. cit.*, pp. 326–327; Den Heijer, op. cit., pp. 174–177; Gammeltoft-Hansen, T. and Gammeltoft-Hansen, H., *op. cit.*, pp. 439 and 451. See also Scholten, S. and Minderhoud, P., "Regulating Immigration Control: Carrier Sanctions in the Netherlands", *European Journal of Migration and Law*, nº 10, 2008 and Basaran, E., "Evaluation of the Carriers' Liability Regimen as Part of the EU Asylum Policy under Public International Law", *Uluslararas Hukuk ve Politika*, nº 15, 2008.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

sanctions if individuals are admitted to asylum procedures, and others release them only if asylum seekers are granted refugee status.

Along with this potentiality of the EU's carrier sanctions systems to preclude asylum seekers from accessing EU territory, another problematic issue is that this measure implies a "privatisation of migration control" where state functions are assumed by private companies which are not directly bound by international human rights standards and usually act on economic grounds which prompt private carriers to be cautious and reject any doubtful passenger.[85]

c. Immigration Liaison Officers (ILOs) in third countries

A third mechanism that plays an important role in preventing asylum seekers from entering the EU is the deployment of officials of the destination country in the country of origin or transit, usually at their airports or consulates. What is most remarkable of this mechanism in the EU context is the multiplicity of bodies and networks established. First, Council Regulation 377/2004 created a network of "Immigration Liaisons Officers" (ILOs) in order to coordinate the activities of the EU Member States' officers posted in non-EU States.[86] Second, on 27 May 2005 seven EU Member States signed a Convention aimed at the stepping up of cross-border cooperation (the Prüm Convention), which envisaged, in compliance with the ILO Regulation, the secondment of "document advisers" to States deemed as origin or transit countries for illegal immigration.[87] Third, Regulation 1168/2011 authorised Frontex to send liaison officers to third States which were integrated into

[85] Gammeltoft-Hansen, T. and Gammeltoft-Hansen, H., *op. cit.*, pp. 439 and 451.

[86] Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an Immigration Liaison Officers Network L 64/1, OJ L64/1 (ILO Regulation), amended by Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011 amending Council Regulation (EC) No 377/2004 on the Creation of an Immigration Liaison Officers Network, [2004] OJ L141/13, repealed by Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast), OJ L 198/88 (ILO Regulation).

[87] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed in Prüm on 27 May 2005, Arts 20 and 21. Bulgaria, Estonia, Finland, Hungary, Romania, Slovakia and Slovenia are also parties to this Convention which was incorporated into EU law by

local or regional ILOs networks. [88] The role of Frontex Liaison Officers was reinforced in the reform of the agency in 2016 that allowed Frontex to assign these officers also in the Member States, in order to "supervise the management of external borders".[89] Finally, in response to the tragic situation in the Mediterranean Sea the European Council decided in 2015 to deploy "European Migration Liaison Officers" (EMLOs) in certain key countries.[90] This decision was subsequently confirmed by the European Migration Agenda and the EU Plan of Action against Migrant Smuggling adopted by the Commission in 2015.[91] By January 2017, the European Union already had thirteen European Liaison Officers deployed in "priority third countries"[92].

Considering the challenge of coordinating the activities of these bodies of liaison officers deployed by different competent authorities and of avoiding overlaps of mandates and tasks, the EU has recently approved a new Regulation establishing a network of "European Immigration Liaison Officers" (ILO Regulation).[93] The new Regulation 2019/1240 establishes a formal governance mechanism (Steering Board) composed of representatives of Member States, the Commission and EU Agencies (Frontex, Europol and EASO) in order to enhance coordination and to optimise utilisation of ILOs.[94]

---

Council Decision 2008/615/JHA of 23 June 2008 on the Stepping up of Cross-Border Cooperation, particularly in Combating Terrorism and Cross-Border Crime, [2008] OJ L 210/1.

[88] Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L349/1, amended by Regulation 1168/2911, OJ L3014/1, art. 14.3.

[89] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L251/1, art. 8.1.c) and 12.

[90] Special meeting of the European Council, 23 April 2015 – statement. Press release.

[91] COM(2015) 285 final, pp. 6-7.

[92] European Commission, "DG HOME hosts European Migration Liaison Officers (EMLOs)" (Press Release), 18 de enero de 2017.

[93] Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast).

[94] Regulation 2019/1240, art. 7.2.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

The main concern for the protection of refugees presented by this mechanism is the lack of clarity regarding the tasks the officials are entrusted with. The new ILO Regulation essentially mantains the same task scheme than Regulation 377/2014: (i) to establish and maintain contacts with the competent authorities and relevant organizations operating within the third country; (ii) collecting information in certain "concern issues" such as composition of migratory flows and migrants' intended destionation, routes used by migratory flows to reach the territories of the Member States, the existence, activities and modus operandi of criminal organisations involved in the smuggling of migrants; (iii) coordinating among themselves and with relevant stakeholders regarding the provision of their capacity-building activities to the local authorities; (iv) rendering assistance in establishing the identity of the different type of migrants and sharing information within networks of ILOs and with Member States' authorities in order to prevent and detect illegal immigration and combat smuggling of migrants and trafficking in human beings.[95]

Although according to these tasks ILOs should not influence the sovereign tasks of the host countries, in practice they impede individuals from exiting the country, either directly or through advice or recommendation to carriers or authorities in the country of origin or transit.[96] Among the functions listed in article 3 there is no mention of their role regarding international carriers' activities. However, article 5.1.d) of Regulation 2019/1240 states that they shall "coordinate positions (among ILOs networks and with officials deployed by third States) to be adopted in contacts with commercial carriers." The nature of the "contacts" with carriers is controversial since they are receiving the advice from an official of a State that is entitled to fine them if they fail to check whether individuals hold the required documentation to enter into the EU.[97] In addition, the lack of transparency regarding the activities of these officials has been denounced, since no public information is provided in connection with them. The 2004 ILO Regulation envisaged

[95] Regulation 2019/1240, art 3.3 – 3.6.

[96] Gammeltoft-Hansen, T. and Gammeltoft-Hansen, H., *op. cit.*, pp. 439 and 452; Weinzierl, R, and Lisson, U., *Border Management and Human Rights. A study of EU Law and the Law of the Sea*, German Institute for Human Rights, 2007, pp. 27-28; Gammeltoft-Hansen, T. and Hathaway, J.C., op. cit, pp. 235 and 253.

[97] McNamara, F., *op. cit.*, pp. 319 and 330.

biannual reports to the Council and the Commission but these reports were classified. Indeed they have been removed from new Regulation 2019/1240.

Finally, one of the main issues regarding the protection of asylum seakers, namely the total disconnection of Regulation 377/2014 from refugee rights and from the need to comply with the relevant EU law on border control and visas, has been partially addressed in the new ILO Regulation. According to article 3.6.b) ILOs "may" render assistance in "confirming the identity of persons in need of international protection for the purposes of facilitating their resettlement in the Union, including by providing them, where possible, with adequate pre-departure information and support." Although this is a positive improvement it is surprising that this is the only task that Regulation 2019/1240 has established on a discretionary basis. Moreover, we must wait to see how this provision is implemented in practice.

Lastly, a brief mention to the controversial judgement of the UK's House of Lords in *Roma Rights* has to be made, since it is a good example to show how ILOs can affect refugees'rights in practice. The issue under appeal was the lawfulness of the procedures adopted by British immigration officers temporarily stationed at Prague Airport. The appellants, six Czech nationals of Romani ethnic origin, intended to leave the Czech Republic and enter into the UK but were refused permission to leave the country by the British immigration officers. This judgement is one of the most controversial in connection with the territorial scope of the Geneva Convention relating to the Status of Refugees, since the House of Lords argued that the duty of *non-refoulement* was applicable exclusively to those refugees who had managed to enter the territory of the State. Consequently, according to the House of Lords the Geneva Convention contracting States do not have legal duties towards refugees who find themselves outside their territories or at their frontiers.[98]

### B. ACTIVE INTERCEPTION: INTERCEPTION AT SEA AND THE ROLE OF FRONTEX

A traditional form of non-arrival policy is the interdiction of migrants on the high seas or in the territorial waters of third countries. This is the paradigmatic example of active interception. Not only have the EU Member

[98] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, 14–16.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

States been engaged in these types of practices, so has the EU itself as well, through joint operations coordinated by Frontex.

There are three main categories of extraterritorial strategies deployed by the EU and the EU Member States to intercept refugees and migrants by sea: joint operations in territorial waters of third countries, based on agreements (usually under the "shiprider model") that allow EU Member States to participate in border patrols in the territorial waters of third countries of origin of refugees and migrants;[99] "push-backs" or interdiction and summary returns of migrants to third countries;[100] and rescue operations followed by disembarkation in a third country. The main issue regarding rescue operations is the identification of the place of disembarkation of the rescued passengers, especially in those cases where, as we have witnessed recently, coastal states do not accept such disembarkation in their ports and the dispute among States results in long negotiations during which the most basic needs of the refugees and migrants are not provided for.

Frontex is currently running three permanent operations in the EU Member States where the migratory pressure is higher (Greece, Italy and Spain). Approximately, 1,500 border guards are deployed in these operations, along with vessels, planes, helicopters, patrol cars and other equipment.[101] The participation of Frontex in operations of interception of refugees at sea raises also a variety of complex legal issues. One of the main concerns is the protection of human rights in these operations. There is a lack of clarity in connection with how the protection guarantees set out by the EU and international legal framework can be applied to these operations and how compliance with these standards can be monitored. Besides, there have been reported violations of human rights in areas covered by Frontex joint ope-

[99] This model involves the boarding by third countries" officials in EU Member States" vessels with the exclusive competences to decide on the boarding of vessels and the arrest of individuals on them. For example, Frontex operation Hera III, hosted by Spain, envisaged the placement of Senegalese and Mauritanian agents on EU Member States" vessels with similar competencies.

[100] The prominent example is the Italian push-backs of migrants to Libya and Algeria. See the Memorandum of understanding of 2 February 2017 on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic.

[101] Operations *Indalo* (Western Mediterranean), *Themis* (Central Mediterranean) and *Poseidon* (Easter Mediterranean). See FRONTEX, *2018 in Brief*, Frontex, 2018, pp- 8-9.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

rations, for example, in connection with the practices of Greece, Italy, Spain and Cyprus.[102] Moreover, Border control operations coordinated by Frontex at sea might push refugees to choose more risky routes in their travel to Europe's shores. A study by the Spanish Commission for Refugee Assistance (CEAR) showed that Frontex operations off the coast of the Greek island of Lesbos blocked the northern route from Turkey to this island (9 km) and as a consequence, refugees were diverted to a more dangerous and longer route (21 km), which exposed them to great vulnerabilities.[103]

Another issue is the attribution of responsibilities and the identification of the real role of Frontex in the interception of refugees. This lack of clarity in Frontex mandate was one of the objectives to be addressed by the reform of the Agency in 2016. Regulation 2016/1624 considerably increases the number of tasks attributed to Frontex on the grounds of a very extensive notion of "European integrated border management."[104] Besides, whereas previous Regulation 2007/2004 stated that only the States were responsible for the control and surveillance of external borders,[105] article 5 of the new Regulation lays down that this is a "shared responsibility of the Agency and of national authorities responsible for border management." In Frontex words, for the first time, the Agency acts as an "operational arm of the EU" and as "an even closer partner for the Member States."[106] However, despite the expectations generated the new Regulation has not definitively clarified the issue. Indeed, after including the notion of shared responsibility, article 5 establishes that "Member States shall retain primary responsibility for the management of their sections of the external borders" and "shall ensure

[102] Human Rights Watch, *The EU"s Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece*, Human Rights Watch, 2011; Cogolati, S., Verlinden, N., and Schmitt, P, *op. cit.*, 31. See also Baldaccini, A., "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea" in Ryan, B. and Mitsilegas. V., *op. cit.*, pp. 243–244; and Moreno Lax, V., *op. cit.* (2011), pp. 174, 184.

[103] CEAR, *Lesbos, "zona cero" del derecho de asilo*, CEAR, 2016), p. 9. Williams, K. y Mountz, A., "Rising tide. Analyzing the relationship between externalización and migrant deaths and boat losses", in Zaiotti, R., (ed.), *Externalizing Migration Management. Europe, Noth America and the spread of «remote control» practices*, Routledge, 2016, pp. 31-49.

[104] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.

[105] Regulation 2007/2004, art. 1.2.

[106] FRONTEX, *Annual Activity Report 2017*, Frontex, 2018, p. 7.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

the management of their external borders" while Frontex "shall support the application of Union measures relating to the management of the external borders by reinforcing, assessing and coordinating the actions of Member States." We may question what is then the meaning of shared responsibility since States are the "primary" responsible and the Agency's role is limited to "supporting, reinforcing and coordinating" its actions. In sum, this provision perpetuates the old distribution of responsibilities between the agency and the States. Therefore, one of the main criticism of the new *European Border and Coast Guard* established by Regulation 2016/1624 is that "it is only a name." [107] In sum, the absence of clarity in connection to the exact scope of Frontex's mandate makes it extremely difficult to establish which authority should be held responsible for the protection of the individuals intercepted.

## III. COMPATIBILITY OF THE INSTRUMENTS OF PRE-BORDER CONTROL WITH THE INTERNATIONAL PROTECTION OF REFUGEES AND THE PRINCIPLE OF NON-REFOULEMENT

As explained, the EU Member States, individually or under the umbrella of the EU's strategy on integrated border management, are increasingly undertaking interception measures, both passive and active, outside their territories and territorial seas, with the purpose of forcing refugees back to their places of origin or the territory or territorial waters of other states. These strategies result in refugees being denied any direct contact with the receiving state and, as a consequence, protection of their rights.[108] In the light of international standards for the protection of refugees, these measures might imply an unjustified restriction on the "right to seek asylum" as well as an infringement of the principle of *non-refoulement* laid down in Article 33 of the 1951 Refugee Convention. The key question then is to determine the territorial scope of states' obligations toward refugees, namely whether the duty of *non-refoulement* is extraterritorially applicable.

[107] Carrera, S. and Den Hertog, L., "A European Border and Coast Guard: What's in a name?", *CEPS Paper in Liberty and Security in Europe*, nº 88, 2016, pp. 1-19.

[108] Hathaway, J., *op. cit.*, p. 279.

## 1. EXTRATERRITORIAL APPLICABILITY OF NON-REFOULEMENT PRINCIPLE

The duty of *non-refoulement* is the cornerstone or centrepiece of the international refugee protection regime.[109] Since the Refugee Convention does not guarantee a right to "obtain" asylum, the *non-refoulement* principle constitutes the 'strongest commitment that the international community of States has been willing to make to those who are no longer able to avail themselves of the protection of their own government".[110]

Unlike other articles of the Refugee Convention, which require refugees to be inside the territory of the receiving state in order to grant them the rights set out in the Convention,[111] Article 33 does not contain any spatial or territorial limitation. However, nor does the Refugee Convention contain a duty of States to protect refugees' rights in the world at large.[112] This apparent ambiguity in the determination of the territorial scope of the duty of *non-refoulement* has led some States to deny its extraterritorial applicability. One of the most prominent cases of denial of the extraterritorial applicability of the duty of *non-refoulement* is the US Supreme Court's decision in the case *Sale v Haitian Centers Council* where the Court argued that the Geneva Convention could not impose "uncontemplated" extraterritorial obligations on those who ratify it through "no more than its general humanitarian intent."[113]

In the same vein, the UK's House of Lords denied in *Roma Rights* the application of the duty of *non-refoulement* towards those refugees who 'seek entrance into the territory" but have not yet managed to enter into the territory.[114] The particularity of this case was that, like other passive measures

[109] Gammeltoft-Hansen, T., *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011, p. 44.

[110] Ibid, 44. See also UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (2007), para 5 and Wouters, K., *International Legal Standards for the Protection from Refoulement*, Intersetia, 2009, p. 33.

[111] For example, arts 17-19 on gainful employment, 21 on housing and 24 on labour legislation and social security.

[112] Gammeltoft-Hansen, T. and Hathaway, J.C., *op. cit.*, p. 258.

[113] United States Supreme Court, *Sale, acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.* (1993) 509 U.S. 155 (1993), 183.

[114] *Regina v Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, para 17 (*Roma Rights*).



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

previously examined (for example, carrier sanctions and visa regimes), the claimants were intercepted before leaving the country, so they failed to meet one of the requirements for the Refugee Convention to be applicable, that is, to be "outside the country of his nationality [...] or the country of his former habitual residence."[115] The House of Lords did not accept a "purposive interpretation" of the Convention based on its humanitarian objects and denied the extraterritorial application of Article 33.[116]

Despite this restrictive understanding of the territorial scope of the Refugee Convention, in particular of the duty of *non-refoulement*, a significant number of scholars[117] contend that the duty is applicable not only within the territory of the State and at its border, but also in relation to any refugee *subject to or within the jurisdiction of the state*. This position incorporates the interpretation of the *refoulement* prohibition within the broader framework of the extraterritorial applicability of international and regional human rights instruments, in particular regarding its understanding of the concept of jurisdiction. In the view of Hathaway, certain Convention rights, among which is the principle of *non-refoulement*, are not subject to any territorial limitation. The obligation of States to respect these rights arises wherever "a State exercises effective or de facto jurisdiction outside its own territory" either by State agents themselves, by private companies hired by governments, or by officials of a transit country acting on behalf of a destination State.[118] This opinion is also supported by Goodwin-Gill and Mc Adam, who postulate that Article 33 does not require any physical presence in the territory, but prohibits the return of refugees "in any manner whatsoever" irrespective of the place where the relevant action occurs (at border posts, at transit points, in international

[115] Refugee Convention, art. 1.A.2.

[116] *Roma Rights*, para 18. The claim was, nevertheless, successful because the House of Lord considered that the pre-clearance procedure was discriminatory on racial grounds.

[117] There are also contrary opinions. See, Robinson, N., *Convention Relating to the Status of Refugees. Its History, Significance and Contents*, Institute of Jewish Affairs, 1952, p. 29.; Grahl-Madsen, A., *Territorial Asylum*, Stockholm: Almqvist & Wiksell International, 1980, p. 40; Aga Khan, S., United Nations High Commissioner for Refugees, "Legal Problems Relating to Refugees and Displaced Persons", *Recueil Des Cours, Collected Courses of the Hague Academy of International Law*, nº 149 (I), 1976, pp. 287-352 and 317-318.

[118] Hathaway, *op. cit.*, pp. 335–342.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

zones, beyond the national territory of the States, etc.).[119] These authors go further, pointing out that the principle of *non-refoulement* has crystallised into a rule of customary international law, binding on all states whether or not they are parties to the Refugee Convention. The core content of this customary rule is the "prohibition of return in any manner whatsoever of refugees to countries where they may face persecution"[120]. The territorial scope of this rule is informed by this essential purpose of the prohibition, thus regulating state action "wherever it takes place."[121]

This is also the view of the UNHCR in its Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the Refugee Convention, which stresses the paramount importance of the concept of jurisdiction in the sense that the States are bound by Article 33 wherever they exercise *effective jurisdiction*.[122]

In sum, there are strong legal grounds to admit the extraterritorial application of the duty of *non-refoulement*. However, there are significant gaps in the protective scope of Article 33 which have special relevance here. First, the duty of *non-refoulement* does not cover cases of mass influx of refugees insofar as it threatens the ability of the State to protect its national interests. But most importantly, the duty of *non-refoulement* does not limit passive measures of interception such as visa controls, carrier sanctions or ILOs, since refugees are not allowed to leave the territory of their own states. As the *Roma Rights* case shows, one compulsory requirement for refugees to be protected is that they actually leave their countries. Until and unless this requirement is met they are not entitled to the protection of Article 33.[123] With the aim of overcoming this second restriction, it has been argued that States must interpret treaties, including the duty of *non-refoulement* laid down in the Refugee Convention, in good faith, according to the principle of *pacta sunt servanda* as stated in Article 26 of the Vienna Convention on the Law of Treaties. This argument was re-

---

[119] Goodwin-Gill, G.S. and Mcadam, J., *op. cit.*, p. 246.

[120] Ibid, p. 248.

[121] Ibid.

[122] UNHCR, *op. cit.,* para 43.

[123] Hathaway, J.C., *op. cit.*, p. 367. See also Goodwin-Gill, G.S. and Mcadam, *op. cit.*, p. 385.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

jected, though, by the House of Lords in *Roma Rights* insofar as interpreting a treaty according to its wording cannot be contrary to good faith.[124]

## 2. RESPONSES TO THE GAPS IN THE PROTECTION OF REFUGEES

The above mentioned gap in the protection offered by the Refugee Convention has been referred as an "intractable dilemma" to the extent that as long as States do not find themselves bound by a duty to allow refugees to seek asylum in other countries, it is extremely difficult to find a proper response in international law to those measures of passive interception which "imprison would-be refugees within their own States."[125] Some alternative responses are exposed in following sections.

### A. ARTICLE 31 OF THE REFUGEE CONVENTION

Article 31 of the Refugee Convention prohibits States from imposing penalties on those refugees that enter irregularly into their territories. This provision implies an acknowledgement that due to the circumstances that lead refugees to escape they are not usually in possession of the documentation required to enter into the country. Read in conjunction with Article 33 and the right to leave a country and seek asylum, which will be discussed below, this article upholds the recognition of the right of refugees to obtain temporary admission in the territory of a state in order to have access to refugee status determination procedures.[126] According to the UNHCR, this is necessary in order to give effect to states" obligations under the Convention, meaning that they must at least grant asylum-seekers, access to their territories and to fair and efficient asylum procedures.[127]

However, despite the clarity of the wording of Article 31, this article has been disregarded in practice by States. Refugees who, according to this article, enter into a country without holding proper documentation frequently suffer from the so called "imputation of double criminality", that is, they become under domestic law the "unlawful non-citizen" who has entered irregularly

[124] *Roma Rights*, para 19.

[125] Hathaway, *op. cit.*, p. 368.

[126] Goodwin-Gill, G.S. and Mcadam, J., *op. cit.*, pp. 384-385.

[127] UNHCR, *op. cit.*, para 8.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

and is "aligned with crime" by national authorities and the media so that his or her claim is assumed to be illegitimate.[128]

### B. THE DUTY OF NON-REFOULEMENT IN INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

This second alternative provides strong arguments for reinforcing the Refugee Convention's duty of *non-refoulement*. The major human rights treaties have also established *non-refoulement* obligations for States, either through explicit provisions such as Article 3 of the Convention against Torture (CAT), Article 22(8) of the American Convention on Human Rights, and Article 2(3) of the OAU Convention governing the Specific Aspects of Refugee Problems in Africa, or indirectly by means of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, such as Article 3 of the ECHR and Article 7 of the ICCPR. With regard to the scope of obligations under Article 3 ECHR and Article 7 ICCPR, as construed by the Human Rights Committee and the ECtHR, they also encompass the prohibition of exposing individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country through their extradition, expulsion or return.[129]

Unlike Article 33 of the Refugee Convention, these standards of human rights law do not require the refugee to be outside of his or her country in order to trigger the State's duty of *non-refoulement*. Thus, ILOs in foreign airports or airline carriers who refuse embarkation to individuals at risk of persecution in the country they wish to leave could be considered a breach of the *non-refoulement* obligations of destination States, as stated in human rights instruments.[130]

In addition, international bodies in charge of interpreting these instruments have been much more prone to the applicability of the *non-refoulement* obligations of States in an extraterritorial context. One central case is the

---

[128] Goodwin-Gill, G.S. and Mcadam, J., *op. cit.*, pp. 384–385. See also Hathaway, *op. cit.,* pp. 370–371.

[129] In this regard, see Human Rights Committee, General Comment nº 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), Forty-fourth session, 1992, para 9; and *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR 23 February 2012), para 123.

[130] Goodwin-Gill, G.S. and Mcadam, J., *op. cit.*, pp. 385–387; Hathaway, *op. cit.*, pp. 368–369.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

ECtHR decision in the case of *Hirsi Jamaa and Others v Italy*.[131] The case was brought by 11 Somali nationals and 13 Eritrean nationals who were part of a group of about two hundred individuals who, departing from Libya, attempted to reach the Italian coast by boat. They were intercepted on the high seas by three ships from the Italian Revenue Police and the Coastguard, transferred to Italian military ships where their personal effects and documentation were confiscated, and returned back to Tripoli.[132] The ECtHR found that the interception of the vessels by the Italian authorities constituted an exercise of extraterritorial jurisdiction by Italy, triggering its obligations under the Convention.[133] In particular, the Court, although recognising the rights of States to establish their own immigration policies, considered that the removal of aliens in the context of interceptions on the high seas with the aim of preventing them from reaching the borders of the state or pushing them back to another state constituted an exercise of jurisdiction which engaged Italy's responsibility.[134] The Court stressed that "problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention" and that treaties must be interpreted in good faith bearing in mind the object and purpose of the treaty.[135]

The Committee against Torture has also established the extraterritorial jurisdiction of States engaged in the interception of boats on the high seas. In the *Marine I* case[136] a Spanish maritime rescue tug, in response to a distress call sent by the vessel *Marine I,* which carried 369 immigrants from

[131] See Bollo Arocena, M.D., "Push Back, expulsions colectivas y non refoulement: Algunas reflexiones a propósto de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia" in Torres Bernárdez, S. (coord.), *El derecho internacional en el mundo multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez,* Iprolex 2013, p. 647; and Moreno Lax, V. "*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?", *Human Rights Law Review,* nº 12(3), 2012, p. 574.

[132] *Hirsi Jamaa*, para 9–11.

[133] Ibid, para 178.

[134] Ibid, para 180.

[135] Ibid, para 179.

[136] Committee against Torture, *J.H.A. v Spain*, Communication no. 323/2007, CAT/C/41/D323/2007, (*Marine I*). See Wouters, K, and Den Heijer, M., "The *Marine I* Case: A Comment", *International Journal of Refugee Law*, nº 22(1), 2009.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

various Asian and African countries, towed *Marine I* from international waters towards the Mauritanian coast. Diplomatic negotiations began between Spain, Senegal and Mauritania regarding the fate of the vessel, and an agreement was reached by Spain and Mauritania eight days after the interception, during which time the ships remained anchored off the Mauritanian coast. Following the agreement, the passengers were disembarked in Mauritania and the Spanish national police force proceeded to identify them. During the recognition procedure they declared that they were fleeing persecution in India as a result of the conflict in Kashmir. The passengers were placed in a former fish processing plant under Spanish control throughout the repatriation process.[137] The claimants alleged a violation of Article 1 of the Convention against Torture on the grounds that their treatment by the Spanish authorities amounted to torture and of Article 3 because, if returned to India, they would be subjected to torture or cruel, inhuman and degrading treatment.[138] During the complaint procedure Spain denied its jurisdiction over the passengers because the incidents took place outside Spanish territory.[139] However, the Committee considered that Spain had *de facto* jurisdiction over the persons on board *Marine I* "from the time the vessel was rescued and throughout the identification and repatriation process."[140] The exercise of extraterritorial jurisdiction of the state in cases of interception in territorial waters of a third state was also postulated by the Committee against Torture in the *Sonko* case, brought against Spain.[141]

### C. THE RIGHT TO LEAVE ANY COUNTRY

The right to leave any country including one's own is laid down in several human rights instruments, namely, Article 13(1) of the Universal Declaration of Human Rights, Article 12 ICCPR, Article 2 of Protocol 4 of the ECHR, Article 22 of the American Convention on Human Rights, and Article 12(2) of the African Charter on Human and Peoples" Rights. It is not an absolute right and the above mentioned provisions establish limitations on grounds

[137] *Marine I*, para 2.1 – 2.6.

[138] Ibid, paras 3.1–3.3.

[139] Ibid, para 6.1.

[140] Ibid, para 8.2.

[141] Committee against Torture, *Fatou Sonko v Spain*, Communication no. 368/2008, CAT/C/47/D368/2008, para 10.3.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

such as national security, public order or the needs of a democratic society. However, as the Human Rights Committee has pointed out, restrictions of this right must be "provided by law, must be necessary in a democratic society for the protection of these purposes and must be consistent with all other rights recognized in the Covenant." Further, they must respect the principle of proportionality, be the least intrusive instrument to achieve the desired result, and be proportionate to the interest to be protected.[142] Immigration controls that restrict an individual's rights to leave do not meet these requirements.[143]

Nevertheless, there is no international mechanism to implement this right. Thus, there are no legal provisions which require the right to leave to be complemented by a "duty to admit" by other States. It has been considered, then, an "incomplete right" since there is not a correlative obligation on other States to allow entry to individuals other than their own nationals.[144] However, in the context of refugee protection some scholars refer to the "right to leave to seek asylum from persecution". In this particular context they contend that the right encompasses a correlative duty on other states, which consists of the prohibition of controlling the movements of persons in a manner that frustrates attempts to find effective protection.[145]

## IV. CONCLUSION

Europe is experiencing its largest movement of refugees and migrants since World War II. The EU reaction to this enormous challenge has given rise to heavy criticism. One of the main critiques refers to the EU's and EU Member States' recourse to a complex system of extraterritorial deterrence measures and instruments which prevent refugees from having any contact with the territory of the various EU Member States' territories. The implementation of this set of extraterritorial measures has to be considered as a

[142] Human Rights Committee, General Comment no 27, Freedom of movement (Article 12), 1999, CCPR/C/21/Rev.1/Add.9, paras 11–18. See also Moreno Lax, V., *op. cit.* (2008), pp. 351–353.

[143] Goodwin-Gill, G.S. and McAdam, J., *op. cit.,* pp. 381–382; Den Heijer, M., *op. cit.*, 246–247.

[144] Goodwin-Gill, G.S. and McAdam, J., *op. cit.*, 382–383. See also Moreno Lax, V., *op. cit.* (2008), pp. 353–354.

[145] *Ibid*; Den Heijer, *op. cit.*, p. 246.

factor that exacerbates the inherent vulnerability of asylum seekers. In addition to the causes that lead them to flee from their countries of origin, any refugee seeking protection is in a vulnerable situation, and in many cases they face compounded vulnerability when they belong to additional categories of vulnerable groups such as women, children or persons with disabilities. However, the extraterritorial instruments that have been analysed in this section fail to take into account the special protection needs of asylum seekers and may indeed increase their inherent vulnerability.

One of the main flaws of these instruments is that they are not implemented in a way that allows effective distinction between refugees and other categories of migrants. Some of them, such as the EU visa regime, are collectively implemented without any favourable treatment of asylum seekers or refugees, who are to comply with the requirement on the same footing as any national of a blacklisted state. In addition, a considerable number of "refugee-producing" countries are included in the so-called visa black list, that is, non-EU countries whose nationals must possess a visa to cross the external borders of the EU. Furthermore, some legal instruments such as the SBC additionally require some entry conditions that refugees, because of the circumstances that lead them to flee, are unlikely to fulfil, such as documents regarding the purpose and conditions of the stay in the receiving country and evidence regarding their means of subsistence for the duration of the stay and for the return to their country.

Another problematic issue is that some of these instruments, such as carrier sanctions, imply a "privatisation of migration control" in practice, where the control of visa and entry conditions are assumed by private companies which frequently lack the proper expertise and training to identify vulnerable passengers in need of protection. They are subject to boarding procedures that have to be urgently carried out, which make it very unlikely that carriers will undertake serious assessments. Finally, they are said to act on economic grounds that lead them to be cautious and to reject any doubtful passengers, and, more importantly, they are not directly bound by international human rights standards.

Problems in the identification of vulnerable refugees are exacerbated through the deployment in countries of origin of ILOs whose role and status is very controversial. They are not supposed to have any influence on the



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

control tasks carried out by sovereign host countries, but in practice their "advice or recommendation" to carriers or local authorities is crucial in order to prevent individuals from exiting the country concerned. Furthermore, no public information regarding their activities is provided, which has been the object of strong criticism.

Moreover, some legal instruments that create these instruments fail to consider the special vulnerabilities of refugees and include sometimes apparently contradictory rules. For example, the Visa Code does not exempt refugees from the visa requirement yet the SBC includes such an exemption, so a paradox is created due to the fact that refugees are not exempt from holding a visa until the very moment when this requirement is enforced in border or boarding checks.

Finally, the panorama of interception measures at sea is not at all encouraging. Due to the circumstances in which refugees are forced to travel, their vulnerability is especially pronounced in this context. They must frequently face high levels of violence, extortion and exploitation during their journeys. Moreover, a direct relationship between the reinforcement of migration controls and the increase in human smuggling has been reported. The main concern regarding these operations at sea is that in many cases they are in direct conflict with the Refugee Convention, notably with the prohibition of the States parties to return refugees to places where they face persecution. Regarding operations coordinated by Frontex the 2016 Regulation has not clarified the distribution of responsibilities among the Agency and the Member States whereas problems of human rights protection are still denounced in these operations.

In summary, what these instruments most importantly fail to do is to consider the most basic need of refugees: access to the territory of foreign states where they can find safety from the circumstances that lead them to flee. By ignoring this basic need they are also disregarding the most crucial guarantee recognised to refugees in both the Refugee Convention, to which all the EU Member States are parties, and the main international and regional human rights treaties, including the ECHR – that is, the prohibition of sending refugees back to the hands of their persecutors or the prohibition of *non-refoulement*. Denial of access to territory is therefore one of the crucial factors which makes refugees vulnerable.

Responses to these challenges must be found in legal, policy and practical scenarios. Some legal responses to the lack of protection of refugees, notably regarding the gaps in the Refugee Convention, have been pointed out in this article. Among them, international human rights law provides one of the strongest tools to protect refugees against the implementation of "non-entrée policies" by states. In addition, the EU and the EU Member States should put in place legal avenues to make it possible the enjoyment of refugee's right to seek asylum in the EU, such as the concession of humanitarian visas, the exemption of visa requirement for certain vulnerable groups, the simplification of asylum procedures and the documentation required to asylum-seekers, or the possibility of submitting asylum claims in embassies located in third countries or to officials carrying functions extraterritorially. In the policy arena, EU Member States must find a balance between their legitimate right to control access to their territories and to combat terrorism, illegal migration and trafficking in human beings, and the international standards of protection for refugees. EU policies are so strongly focused on security issues and the fight against illegal immigration that fail to take into consideration refugee rights. Evaluations of the impact of the policies on refugee's rights and safety are needed to avoid the exposure of refugees to more dangerous journeys to Europe. Humanitarian actors such as the Red Cross are calling Europe for the establishment of search and rescue operations in the Mediterranean Sea to put an end to the increasing number of deaths at sea.[146] Finally, EU instruments of pre-border control should be implemented in practice in a manner which incorporates enough guarantees to distinguish those who are in need of international protection and their specific vulnerabilities, and should not function as barriers to the right to seek asylum. Asylum claims should be individually examined, which requires a limitation in the use of collective procedures such as visa regime and procedures and carrier sanctions, which involve in practice the externalisation of examination procedures to private companies.

[146] Red Cross, Eu Office, "Addressing the Vulnerabilities linked to Migratory Routes to the European Union", *RCEU*, nº 12/2015-002, Position Paper 6.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 161-198
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.05

## BIBLIOGRAPHICAL REFERENCES

– ACOSTA SÁNCHEZ, M.A. and GONZÁLEZ GARCÍA, I., "Tribunal de Justicia de la Unión Europea - TJUE - Sentencia de 05.09.2012, Parlamento c. Consejo C-355/10, 'Código de fronteras Schengen - Decisión 2010/252/UE - Vigilancia de las fronteras marítimas exteriores - Normas adicionales sobre la vigilancia de fronteras - Competencias de ejecución de la Comisión – Alcance'. Vigilancia de fronteras marítimas y elementos esenciales en los actos de ejecución", *Revista de Derecho Comunitario Europeo*, nº 47, 2014, pp. 270 - 271.

– AFEEF, K.F., "The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific", *Refugee Studies Centre Working Paper*, nº 36, 2006.

– AGA KHAN, S., United Nations High Commissioner for Refugees, "Legal Problems Relating to Refugees and Displaced Persons", *Recueil Des Cours, Collected Courses of The Hague Academy of International Law*, nº 149 (I), 1976.

– BALDACCINI, A., "Extraterritorial Border Controls in the EU: The Role of Frontex in Operations by Sea" in *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, 2010..

– BASARAN, E., "Evaluation of the Carriers' Liability Regimen as Part of the EU Asylum Policy under Public International Law", *Uluslararas Hukuk ve Politika*, nº 15, 2008.

– BOLLO AROCENA, M.D., "Push Back, expulsions colectivas y non refoulement: Algunas reflexiones a propósto de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia" in TORRES BERNÁRDEZ, S. (coord.), *El derecho internacional en el mundo multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez,* Iprolex 2013.

– BRANDL, U. and CZECH, P., "General and Specific Vulnerability of Protection-Seekers in the EU: Is there an Adequate Response to their Needs?" in IPPOLITO, F. and IGLESIAS SÁNCHEZ, S., *Protecting Vulnerable Groups. The European Human Rights Framework*, Hart Publishing, 2015.

– CARRERA, S. and DEN HERTOG, L., "A European Border and Coast Guard: What's in a name?", *CEPS Paper in Liberty and Security in Europe*, nº 88, 2016, pp. 1-19.

– DEL VALLE GÁLVEZ, A.,"Unión Europea, Crisis de Refugiados y Limes Imperii", *Revista General de Derecho Europeo*, nº 38, 2016.

– DEN HEIJER, M., *Europe and Extraterritorial Asylum*, Hart Publishing, 2012, p. 166

– GAMMELTOFT-HANSEN, T. and GAMMELTOFT-HANSEN, H., "The Rights to Seek-Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU", *European Journal of Migration and Law*, nº 10, 2008.

– GAMMELTOFT-HANSEN, T. and HATHAWAY, J.C., "Non-Refoulement in a World of Cooperative Deterrence", *Columbia Journal of Transnational Law*, nº 53, 2015.

– GAMMELTOFT-HANSEN, T., *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, 2011.

– GIL BAZO, M.T., "The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited", *International Journal of Refugee Law*, nº 18(2–3), 2006.

– GOODWIN-GILL, G.S. and McADAM, J., *The Refugee in International Law*, Oxford University Press, 3rd edn, 2007.

– GRAHL-MADSEN, A., *Territorial Asylum*, Stockholm: Almqvist & Wiksell International, 1980.

– GUILD, E. and BIGO, D., "The transformation of European Border Controls" in RYAN, B. and MITSILEGAS. V. (eds.) *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff Publishers, 2010.

– HYNDMAN, J., and MOUNTZ, A., "Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe", *Government and Opposition*, nº 43(2), 2008..

– HATHAWAY, J.C., *The Rights of Refugees under International Law,* Cambridge University Press, 2005.

– McNAMARA, F., "Member State Responsibility for Migration Control within Third States — Externalisation revisited", *European Journal of Migration and Law*, nº 15, 2013.

– MORENO LAX, V. "*Hirsi Jamaa and Others v. Italy* or the Strasbourg Court versus Extraterritorial Migration Control?", *Human Rights Law Review,* nº 12(3), 2012.

– MORENO LAX, V., "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers" Sanctions with EU Member States" Obligations to Provide International Protection to Refugees", *European Journal of Migration and Law,* nº 10, 2008.

– MORENO LAX, V., "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", *International Journal of Refugee Law,* nº 23(2), 2011.

– MUSTANIEMI-LAAKSO, M*.,* "Vulnerability in EU policies on asylum and irregular migration" in FRAME Deliverable 11.3, *The protection of vulnerable individuals in the context of EU policies on* border *checks, asylum and immigration*, 11-24, http://www.fp7-frame.eu/reports/.

– ROBINSON, N., *Convention Relating to the Status of Refugees. Its History, Significance and Contents*, Institute of Jewish Affairs, 1952.

– SCHOLTEN, S. and MINDERHOUD, P., "Regulating Immigration Control: Carrier Sanctions in the Netherlands", *European Journal of Migration and Law*, nº 10, 2008.

– TREVISANUT, S., "The Principle of Non-Refoulement and the De-Territorialization of Border Control at Sea", *Leiden Journal of International Law,* nº 27, 2014.

– VALSAMIS, M., "Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens and Strengthening the State", *Indiana Journal of Global Legal Studies*, nº 19(1), 2012.

– WEINZIERL, R, and LISSON, U., *Border Management and Human Rights. A study of EU Law and the Law of the Sea*, German Institute for Human Rights, 2007.

– WILLIAMS, K. y MOUNTZ, A., "Rising tide. Analyzing the relationship between externalización and migrant deaths and boat losses", in ZAIOTTI, R., (ed.), *Externalizing Migration Management. Europe, Noth America and the spread of «remote control» practices*, Routledge, 2016.

– WOUTERS, K, and DEN HEIJER, M., "The *Marine I* Case: A Comment", *International Journal of Refugee Law*, nº 22(1), 2009.

– WOUTERS, K., *International Legal Standards for the Protection from Refoulement*, Intersetia, 2009.

# NOTES

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

**Citation**: GONZÁLEZ GARCÍA, I., «Immigration in Spain: Migratory Routes, Cooperation with Third Countries and Human Rights in Return Procedures », *Paix et Sécurité Internationales*, num. 7, 2019, pp. 201-230

**Received**: 14 November 2019
**Accepted:** 03 December 2019

# IMMIGRATION IN SPAIN: MIGRATORY ROUTES, COOPERATION WITH THIRD COUNTRIES AND HUMAN RIGHTS IN RETURN PROCEDURES

Inmaculada GONZÁLEZ GARCÍA[1]

I.- INTRODUCTION. II.- SEA AND LAND IMMIGRATION ROUTES TO SPAIN: COOPERATION WITH THIRD COUNTRIES TO FIGHT IRREGULAR IMMIGRATION. III.- ENTRY TO SPAIN VIA CEUTA, MELILLA AND SPANISH ISLANDS AND ISLETS IN NORTH AFRICA: THE 1992 SPANISH-MOROCCAN AGREEMENT ON READMISSION OF FOREIGNERS WHO HAVE ENTERED IRREGULARLY. IV.- FINAL ASSESSMENT

**ABSTRACT:** Following a brief overview of immigration in Spain, the present paper first analyses the main routes of irregular immigration into Spain, giving recent data on the number of arrivals by sea and land to the Iberian Peninsula, Balearic Islands, Canary Islands and Spanish territories in North Africa. The sea has traditionally been the main route of entry to Spanish territory for immigrants primarily from Sub-Saharan Africa. However, the years 2013 to 2015 proved an exception to this rule, with immigration by land outstripping that by sea due to an increase in the arrival of Syrian immigrants to the cities of Ceuta and above all Melilla. Next, a description is given of the political and operational mechanisms established by the Spanish authorities to control Spain's maritime borders, especially in the Canary Islands. Such border control is achieved through unilateral surveillance measures (the Integrated External Surveillance System, Spanish initials: SIVE), bilateral cooperation (inter-state agreements with Morocco and other countries in Sub-Saharan Africa) and regional cooperation within the European Union (EU). This is followed by a discussion of how immigration routes have been affected by increased cooperation between Spain and African States to intercept immigrants in their countries of origin or during transit. There is likewise an analysis of Spain's use of summary returns or pushbacks following assaults or

[1] Associate Professor (*Profesora Titular*) of Public International Law, University of Cadiz, <inma.gonzalez@uca.es>. This research was carried out in the framework of the Centre of Excellence Jean Monnet "Migration and Human Rights in Europe's External Borders", with the support of the Erasmus+ Programme of the European Union. In the analysis of the immigrant boat crisis (*cayucos* crisis), the author was assisted by the professors M. A. Acosta Sánchez and A. del Valle Gálvez, members of the Research Project "España, Seguridad y Fronteras Exteriores Europeas en el Área del Estrecho" [Spain, Security and the EU's External Borders in the Area of the Strait] (DER2015-68174-R (2016-2018)), financed by the Spanish Ministry of Economy and Competitiveness and the European Regional Development Fund (Principal Investigators: Dr A. del Valle Gálvez and Dr I. González García).

jumps on the border fences surrounding Ceuta and Melilla and attempts of arrival by swimming in Ceuta or by sea to Spanish islands and islets in North Africa, within the framework of the 1992 Spanish-Moroccan agreement on readmission of foreigners who have entered irregularly. Lastly, we argue that the reinforcement of border control alone is insufficient to curb migration flows: to be effective, it must be accompanied by common policies in the European countries of destination and increased investment in the countries of origin to provide their citizens with the opportunity to obtain a higher standard of living and overcome the temptation to emigrate as a first option.

**KEYWORDS:** Immigration, Spain, West African route, Western Mediterranean route, Ceuta, Melilla, border, border control, Spanish-Moroccan agreement on readmission, Morocco, Human Rights.

## LA INMIGRACIÓN EN ESPAÑA: RUTAS MIGRATORIAS, COOPERACIÓN CON TERCEROS PAÍSES Y DERECHOS HUMANOS EN LOS PROCEDIMIENTOS DE DEVOLUCIÓN

**RESUMEN:** Tras una breve presentación de la inmigración en España, se analizan las principales vías de entrada a España para la inmigración irregular, con datos recientes del número de llegadas por vía marítima y terrestre al territorio peninsular y balear, al archipiélago canario y a los territorios españoles en el norte de África. Las rutas marítimas se consolidan como la tradicional forma de acceso al territorio español para los inmigrantes procedentes, principalmente, del África Subsahariana. Una excepción se dio en los años 2013 a 2015, en los que la inmigración por vía terrestre fue superior a la marítima, debido al incremento de la llegada de inmigrantes sirios a las Ciudades de Ceuta y, principalmente, de Melilla. En particular, el análisis se centra en los mecanismos políticos y operativos establecidos por las autoridades españolas para mantener el control de sus fronteras marítimas, especialmente en las Islas Canarias. Estas fronteras marítimas se controlan mediante medidas unilaterales de vigilancia (Sistema Integrado de Vigilancia Exterior –SIVE-), cooperación bilateral (acuerdos interestatales con Marruecos y otros países del África subsahariana) y cooperación regional (dentro de la Unión Europea –UE-). Este estudio destaca cómo el aumento de la cooperación entre España y los Estados africanos en la interceptación de inmigrantes en los países de origen y tránsito ha alterado las rutas migratorias. Igualmente, se analiza la práctica española de las devoluciones en caliente de inmigrantes, tras los asaltos a las vallas fronterizas de Ceuta y Melilla, la llegada a nado a Ceuta o por vía marítima a las Islas y Peñones españoles en el norte de África, en el marco del acuerdo hispano-marroquí de readmisión de extranjeros entrados ilegalmente de 1992. Finalmente, se plantea cómo el refuerzo del control fronterizo es insuficiente para frenar los flujos migratorios, si no se complementa con políticas comunes en los países europeos de destino y con mayores inversiones en los países de origen, que den a sus ciudadanos la oportunidad de tener un nivel de vida más alto y superar la tentación de emigrar, como primera opción.

**PALABRAS CLAVE:** Inmigración, España, rutas migratorias, Ceuta, Melilla, frontera, control fronterizo, acuerdo hispano-marroquí de readmisión, Marruecos, derechos humanos.

## IMMIGRATION EN ESPAGNE: ROUTES MIGRATOIRES, COOPÉRATION AVEC LES PAYS TIERS ET DROITS DE L'HOMME DANS LES PROCÉDURES DE RETOUR

**RESUME:** Après une brève présentation de l'immigration en Espagne, les principales voies d'entrée en Espagne pour l'immigration clandestine sont analysées, ainsi que des données récentes sur le nombre d'arrivées par mer et par voie terrestre vers les territoires péninsulaire et baléare, les îles Canaries et les territoires espagnols en Afrique du nord. Les routes maritimes sont consolidées en tant que forme traditionnelle d'accès au territoire espagnol pour les immigrants originaires principalement de l'Afrique subsaharienne. Une exception s'est produite entre 2013 et 2015, dans

laquelle l'immigration par voie terrestre était supérieure à la mer, en raison de l'augmentation du nombre d'immigrants syriens dans les villes de Ceuta et, principalement, de Melilla. L'analyse porte en particulier sur les mécanismes politiques et opérationnels mis en place par les autorités espagnoles pour maintenir le contrôle de leurs frontières maritimes, notamment aux îles Canaries. Ces frontières maritimes sont contrôlées par des mesures de surveillance unilatérales (Système de surveillance externe intégré –SIVE-), une coopération bilatérale (accords entre États avec le Maroc et d'autres pays d'Afrique subsaharienne) et une coopération régionale (au sein de l'Union européenne –UE-). Cette étude souligne en quoi la coopération accrue entre l'Espagne et les États africains en matière d'interception des immigrants dans les pays d'origine et de transit a modifié les itinéraires de migration. De même, la pratique espagnole des renvois ou refoulements 'à chaud' d'immigrants est analysée, après les assauts contre les barrières frontalières de Ceuta et Melilla, les arrivées en nageant à Ceuta ou par voie de mer dans les îles, les îlots et les rochers espagnoles en Afrique du Nord ; pratique espagnole qui a comme cadre juridique l'accord de réadmission hispano-marocain de 1992 pour les étrangers entrés illégalement. Enfin, le renforcement des contrôles aux frontières est insuffisant pour freiner les flux migratoires, s'il n'est pas complété par des politiques communes dans les pays européens de destination et par des investissements plus importants dans les pays d'origine, qui donnent à leurs citoyens la possibilité d'un niveau de vie plus élevé et de vaincre la tentation d'émigrer, comme première option.
**MOTS CLES :** Immigration, Espagne, routes migratoires, Ceuta, Melilla, frontières, contrôle des frontières, accord de réadmission hispano-marocain, Maroc, droits de l'homme.

## I. INTRODUCTION

The aproval of the European Agenda on Migration has meant an unprecedented effort by the EU in the past four years to address the challenge of migration[2], which has contributed to reducing irregular arrivals to the lowest level in 5 years. Nevertheless, the recent rise in irregular arrivals in the Western Mediterranean shows that the situation remains volatile and that smugglers are constantly looking for new opportunities. In this sense, on the Western Mediterranean/Atlantic route, arrivals increased last year. The total number of arrivals to Spain in 2018[3] (almost 65,000 people) was 131% high-

[2] In May 2015, the European Commission presented a comprehensive European Agenda on Migration, intended to address immediate challenges and equip the EU with the tools to better manage migration in the medium and long term in the areas of irregular migration, borders, asylum and legal migration. See Doc. COM (2015) 240 final, Brussels, 13.5.2015, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration.

[3] In 2018, the Western Mediterranean became the most frequently used route into Europe. The number of detections in 2018 doubled for the second consecutive year to a record high of 57,034. Morocco was the main departure point to Europe for irregular migrants. Most of the migratory pressure registered on this route was linked to migrants originating from sub-

er than in 2017[4], and this trend has continued in 2019[5]. Moroccans were the largest single nationality arriving in Spain in 2018 (a fifth of the total crossings), followed by nationals of West African countries – Guinea, Mali, Côte d'Ivoire and The Gambia – as well as Algeria[6].

According to data published by the Office of the United Nations High Commissioner for Refugees (UNHCR), a total of 27,611 immigrants and refugees arrived in Spain (sea arrivals: 22,400 and land arrivals 5,211) between 1 January and 10 November 2019[7].

---

Saharan countries. However, towards the end of 2018, the number of Moroccan migrants began to increase. Migrants claiming to be minors accounted for 9% of the arrivals on this route. Overall, on both land and sea routes, Moroccans were the top detected nationality, followed by Guineans, Malians and Algerians. See <https://frontex.europa.eu/along-eu-borders/migratory-routes/western-mediterranean-route/>.

[4] The number of migrants detected reaching Spain from northern Africa jumped to 23,063 in 2017. Two of every five migrants were nationals of Algeria and Morocco. Most of the remaining people on this route came from Western Africa. *Ibidem*.

[5] In 2019 there has been a steady increase in irregular migration from the African continent, especially from West Africa. The main reasons for this increase is the instability in the countries of origin and transit. Despite the increasing smuggling prices this year, the Western Mediterranean Route is still more affordable compared with other maritime routes. An important factor in this context is also the short distance between the departure points and the Spanish shores. The recent use of powerful speed boats (usually involved in hashish smuggling), which can transport large numbers of migrants in a shorter time, could be another reason in the increasing number of arrivals. In addition, the dismantling of makeshift migrant camps in Morocco and Algeria might act as a 'push factor' in displacing migrants to other areas. See <https://frontex.europa.eu/media-centre/focus/focus-on-western-mediterreanean-route-frontex-in-spain-isGpCE>.

[6] Doc. COM (2019) 126 final, Brussels, 6.3.2019, Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the Implementation of the European Agenda on Migration, pp. 1-3.

[7] See <https://data2.unhcr.org/en/country/esp>. A total of 17,430 immigrants and refugees arrived in Spain between 1 January and 30 September 2017 (http://data2.unhcr.org/en/situations/mediterranean/location/5226), almost double the number of those recorded in the previous year for the same period (9,148). Arrivals by sea accounted for most of this increase in immigration (12,420 compared with 5,446 in 2016), but arrivals by land to the autonomous cities of Ceuta (1,922) and Melilla (3,506) have also escalated (a total of 5,010 compared with 3,702 in 2016). These cities have also witnessed a rise in arrivals by sea, to a greater extent in Ceuta than in Melilla, including arrivals to the Spanish islands and islets in North Africa. The data for 2016 is available in the report of the Spanish Commission


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

Maritime routes thus comprise the main gateway for irregular immigration to Spain, principally to the Andalusian coast (with 17,947 immigrants between 1 January and 10 November 2019), followed by the Mediterranean coast (1,539 between January and 3 November 2019) and the Canary Islands (1,493 arrivals)[8]. This predominance has been heightened by the Spanish Government's decision to reinforce the border fences surrounding Ceuta and Melilla, following the first mass assaults on the fences in 2005[9], and adopt a new "procedure" of rejection at the border in these cities, which entered into force on 1 April 2015[10]. But the number of immigrants arriving by land

for Refugee Aid (Spanish initials: CEAR), *Movimientos migratorios en España y Europa*, 2016, <https://www.cear.es/wp-content/uploads/2017/02/Informe-rutas-migratorias.pdf>.

The only time the number of immigrants arriving in Spain by land surpassed the number arriving by sea was in the period 2013 to 2015, mainly due to increased immigration from Syria.The arrival of 3,305 people from Syria to Ceuta and Melilla in 2014 marked a new trend that has increased migration flows in Ceuta and above all, in Melilla. See *Balance 2014 Lucha contra la Inmigración Irregular*, Spanish Ministry of the Interior, p. 9 in <http://www.interior.gob.es/documents/10180/3066430/Balance+2014+de+la+lucha+contra+la+inmigraci%C3%B3n+irregular/4a33ce71-3834-44fc-9fbf-7983ace6cec4>. This number rose to 7,189 in 2015, a much higher figure than that for other nationalities arriving in Ceuta and Melilla that year (a total of 4,435, mostly from Sub-Saharan Africa). See *Balance 2015 Lucha contra la Inmigración Irregular*, Spanish Ministry of the Interior, in <http://www.interior.gob.es/documents/10180/3066430/Balance+2015+de+la+lucha+contra+la+inmigraci%C3%B3n+irregular.pdf/d67e7d4b-1cb9-4b1d-94a0-9a9ca1028f3d>.

[8] <https://data2.unhcr.org/en/country/esp>.

[9] According to the above-mentioned 2014 report: "In 2014 there were close to 19,000 assaults on the fences at Melilla (350% more than in 2013). Thanks to deterrent measures and to the work of the State Security Forces, 90% of the assailants did not enter Ceuta or Melilla", p.10.

[10] In 2015, attempts to assault the border fences at Ceuta and Melilla fell by 67.8%, while entries to both cities using this method dropped by 78%. *Balance 2015…*, *cit.*, p. 11.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

and sea in Ceuta (between 1 January and 10 November 2019) was 1,665[11] and 4,575 to Melilla[12] in the same period.

The immigration by sea to Spain was mainly increased in 2017. In this sense, the first seven months of 2017, the number of immigrants reaching the Spanish coast tripled. This fact has coincided with the application of stricter measures against human trafficking by sea between Libya and Italy[13] and the consequent decline in maritime immigration by this route, and with "less surveillance" along the Moroccan coast, which some NGO have attributed to the unrest in the Rif region that Morocco has witnessed in that year[14].

However, a comparison between data on maritime immigration in 2006, the year of the *cayucos crisis* (with 39,180 immigrants: 31,678 to the Canary Islands and 7,502 to the Peninsula and Balearic Islands), and more recent data of 2019 reflects the changes in border control and migration flow management that have been implemented by Spain in conjunction with the countries of origin and transit of immigrants primarily from Sub-Saharan Africa.

In the first section below, the main immigration routes (sea and land) to Spain used by human trafficking mafias will be analysed, paying particular attention to the drop in maritime immigration to the Canary Islands following the 2006 *cayucos* crisis. This decline has been due to Spanish cooperation with third countries (mainly Morocco, Senegal and Mauritania) and institutional cooperation within the EU, both of which have served to reduce migration

[11] 1,163 immigrants by land (35,4% less than in 2018 with 1,799) and 535 by sea (34,4% more than in 2018 with 398). See *Informe Quincenal sobre inmigración irregular. Datos acumulados desde el 1 enero al 14 noviembre de 2019*, Ministerio del Interior, Gobierno de España, <http://www.interior.gob.es/documents/10180/11113854/informe_quincenal_acumulado_01-01_al_14-11-2019.pdf/2b97a27e-fc46-433d-b3b6-05ab0cb446dc>.

[12] 4,053 immigrants by land (2,4% less than in 2018 with 4,153) and 485 by sea (27,1% less than in 2018 with 665). *Ibidem*.

[13] *BBC Mundo* (21.08.2017): "Por qué España vuelve a ser ruta principal para los inmigrantes que buscan entrar en Europa por el Mediterráneo?" and "La crisis migratoria llega a España" (06.09.2017), <https://es.gatestoneinstitute.org/10950/crisis-migratoria-espana>.

[14] *Elpais.com* (14.09.2017): "La ruta española de pateras alcanza cifras de 2008". The situation in the Rif region of Morocco, the main transit country for migrants heading to Spain, created an opportunity for more departures from its western coast in the second half of the year. This was coupled with a growing use of high-capacity boats capable of transporting large numbers of migrants. See <https://frontex.europa.eu/along-eu-borders/migratory-routes/western-mediterranean-route/>.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

flows across the Atlantic, but have also spurred the quest for new routes of entry to Spain through Spanish territories in North Africa.

The second section will be focused on the arrival of immigrants in the autonomous cities of Ceuta and Melilla and to Spanish islands and islets in North Africa. In both cases, the Spanish practice of summary returns has aroused criticism. Although the Spanish Government adopted a new legal framework in 2015 with respect to the special regime of Ceuta and Melilla aimed at providing a legal basis for these returns (i.e. rejection at the border), this would not be applicable to immigrants who arrive by swimming to these cities, nor to those arriving in boats to Spanish islands and islets off the Moroccan coast.

To conclude, it will be discussed the economic measures that Spain and the EU have adopted in the field of development cooperation with the aim of improving conditions in countries of origin that encourage their citizens to seek a better, "safer" life on the European continent.

## II. SEA AND LAND IMMIGRATION ROUTES TO SPAIN: COOPERATION WITH THIRD COUNTRIES TO FIGHT IRREGULAR IMMIGRATION

There are two main routes to Spain for immigrants seeking to enter irregurarly[15].

One is the *West African route*, which encompasses sea crossings to the Canary Islands from countries such as Senegal, Mauritania and Morocco. The main countries of origin of the immigrants and refugees who use this route are Morocco, Senegal, Niger, Nigeria and Mali: in 2017, the majority of arrivals corresponded to nationals from Morocco, Guinea and Ivory Coast.

In 2019, 1,493 immigrants arrived by sea to the Canary Islands[16] in comparison with the 17,947 immigrants arriving to Andalucia. The decline in immigration by this route after the *cayucos crisis*, which in 2012 reached its lowest figures yet with 173 immigrants[17], has been due to agreements on the deployment of Spanish and EU sea and air patrols in the waters of these African countries; to the efforts of the Spanish police and authorities in the

[15] <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>.

[16] It means 270 immigrants more (22,1%) than in 2018 (1,223). See *Informe Quincenal sobre inmigración irregular…, cit*.

[17] *Balance 2015…, cit*, p. 8.

field of repatriation; and to increased police cooperation in Africa, which has led to an increase in detentions on land and the consequent dismantling of mafia networks operating there[18].

Of particular note has been the creation of joint Spanish and Moroccan patrols as a result of bilateral agreements on immigration signed by Spain and Morocco at the Marrakesh Summit held on 8 and 9 December 2003. The first patrol, launched in February 2004, consisted of members of the Spanish Civil Guard Naval Service and the Royal Moroccan Gendarmerie. Initially, two civil guards patrolled on Moroccan vessels in the area of Laayoune, but following the Marbella Summit in January 2004, this was extended to the area around the Strait of Gibraltar and the Atlantic region (Las Palmas, Laayoune, Algeciras-Tangiers and Nador-Almeria)[19].

The creation in 2002 of the Integrated External Surveillance System (Spanish initials: SIVE)[20] and the Spanish-Moroccan police cooperation launched in 2004 together prompted human trafficking mafias to seek a more southerly destination, the Canary Islands, which at the end of 2005 witnessed the first avalanche of immigrants.

Since the beginning of the *cayucos* crisis, the Spanish Government has adopted various operational measures to combat new routes of irregular immigration. Thus, in March 2006, an agreement was reached with Mauritania to

[18] Vélez Alcalde, F. J., "Pateras, cayucos y mafias transfronterizas en África: el negocio de las rutas atlánticas hacia las Islas Canarias", *ARI* nº 14/2008 (05/02/2008), Real Instituto Elcano, at 6.

[19] Acosta Sánchez, M. A. and Del Valle Gálvez, A. del, "La crisis de los cayucos. La Agencia Europea de Fronteras FRONTEX y el control marítimo de la inmigración clandestina", *Tiempo de Paz*, nº 83, 2006, pp. 19-30.

[20] The SIVE is an operational system with technical support that provides real-time information to a Control Centre which then issues the necessary orders to intercept any element approaching national territory from the sea. The prototype Centre is based in Algeciras and covers the entire Strait of Gibraltar area. This system uses cutting-edge technology (a complex network of mobile and fixed sensors) to detect small boats departing from Morocco, and is capable of accurately detecting the smallest boats on North African beaches, even under adverse conditions. The effectiveness of this system, which has enabled Spanish security forces to promptly detect and detain boats before their arrival onshore, rapidly created the need to seek other landing places. Subsequently, this system was gradually extended to cover the provinces of Cadiz, Malaga and Granada, the autonomous city of Ceuta and the island of Fuerteventura in the Canary Islands. According to sources in the Spanish Ministry of the Interior (20/08/2008), the Civil Guard has reinforced control of irregular immigration in Cadiz with a new mobile SIVE sensor station, which will monitor the coastline between Barbate and Conil de la Frontera.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

create joint patrols (operation *Cabo Blanco*), and the Mauritanian gendarmerie was given four patrol boats and training for the staff that would be working on them. In Spain, military buildings were equipped to receive immigrants and the Canary Islands security forces were strengthened. It was also agreed to extend the SIVE system to Tenerife. In addition to these measures, on 28 July 2006, the Council of Ministers adopted the 2006-2008 Comprehensive Security Plan for the Canary Islands. Finally, to further strengthen existing measures, on 10 October 2006, the Council of Ministers approved the agreement establishing the creation of the Canary Islands Regional Coordination Centre (Spanish initials: CCRC), which incorporated the FRONTEX Coordination and Control Centre (FCCC).

The need for a combined and comprehensive European strategy to combat irregular immigration, with economic and material support from the EU, led the Spanish Government to bring this matter before its European partners. As a result, in May 2006 Spain spearheaded a working group to strengthen the control of irregular immigration from Africa. At a meeting held in Madrid on 29 May 2006 under the direction of FRONTEX and with the equal participation of the European Commission and Europol, Member States reached an agreement to launch a joint operation in the area of origin of immigrant boats. Spain, Germany, Austria, Denmark, Estonia, Finland, France, Italy, Norway, the Netherlands, Poland, Portugal and the United Kingdom all offered to collaborate in the operation. European support was further evidenced at the European Council held in Brussels in June 2006, which welcomed the cooperation measures adopted by the Commission, FRONTEX and some Member States as a result of the situation in the Canary Islands and the Mediterranean. In addition, calls were made to intensify efforts to establish operational maritime cooperation that would enable effective monitoring of maritime borders, and to create rapid border intervention teams.

FRONTEX coordinated two operations. In the first of these, called Hera I, European experts were deployed to identify irregular immigrants arriving in the Canary Islands and determine their country of origin. The second, known as Hera II, was launched on 11 August 2006 and was aimed at controlling irregular immigration via the Atlantic. This was a humanitarian operation aimed at increasing surveillance of the coasts from which the boats transporting irregular immigrants from Africa to the Canary Islands departed, in

order to prevent their departure, or failing that, to intercept the boats in their territorial waters and return the immigrants to the Mauritanian[21], Senegalese[22] or Cape Verde authorities. The operation was subsequently extended to Guinea-Bissau[23]. Furthermore, it was in line with the July 2007 Rabat Action Plan for a Euro-African Partnership on Migration and Development. The initial duration of Hera II was between eight to nine weeks, but was subsequently extended through new dispositions.

Also of note was the Seahorse Project (2006-2008) adopted by the European Commission and spearheaded by Spain. The specific objectives of this project[24] were to establish an effective policy in the countries affected to prevent irregular immigration, which would include efforts to stop human trafficking; to establish and develop relations between the Maghreb and

---

[21] Thus, Spain reactivated the readmission agreement with Mauritania. See the Agreement on Immigration between the Kingdom of Spain and the Islamic Republic of Mauritania, signed in Madrid on 1 July 2003, the *Official State Gazette (BOE)* No. 185, 4 August 2003. On 22 September 2017, the Spanish Council of Ministers approved the signing of a new cooperation agreement with Mauritania to strengthen and reinforce police cooperation between the two countries in the fight against irregular immigration, among other matters. See *europapress* (22.09.2017): "España y Mauritania reforzarán su colaboración en la lucha contra la inmigración irregular y el terrorismo", <http://www.europapress.es/sociedad/noticia-espana-mauritania-reforzaran-colaboracion-lucha-contra-inmigracion-irregular-terrorismo-20170922151004.html>.

[22] In Dakar on 24 August 2006, Senegal and Spain signed a Memorandum of Understanding to combat irregular immigration to Europe from the coasts of Senegal, establishing joint patrols with the Spanish Civil Guard and Senegalese security forces to intercept immigrant boats destined for the Canary Islands. Since then it has been extended, as in 2009, when the Memorandum of police cooperation was signed with Mauritania. See Ministry of the Interior press release (03.11.2009): "Firma de dos Memorandos de cooperación policial con Senegal y Mauritania [Signing of two Memoranda on police cooperation with Senegal and Mauritania]". Recently, Spain and Senegal have signed a joint declaration, which will lead to the negotiation of a new Memorandum of Cooperation between the two countries. See Ministry of the Interior press release (20.07.2017): "España y Senegal acuerdan intensificar la cooperación bilateral para luchar contra el terrorismo, el crimen organizado y el narcotráfico, y reforzar la gestión de los flujos migratorios [Spain and Senegal have agreed to intensify bilateral cooperation to combat terrorism, organised crime and drug trafficking, and to strengthen migration flow management]".

[23] Due to the greater control exercised in Senegal, immigrant boats bound for the Canary Islands began to depart from the even more distant Guinea Bissau.

[24] See "VI Conferencia euro-africana sobre inmigración irregular" (18.10.2011), <http://www.guardiacivil.es/es/prensa/noticias/historico2/3220.html>.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

Sub-Saharan Africa, and foster dialogue on migration issues; to promote regional collaboration and dialogue on migration flow management, including transit and migration, irregular immigration and human trafficking; to provide training for staff dealing with migration issues; and to assess and improve the capacity to implement border control through operational cooperation.

This project was later enhanced by the creation of the Seahorse Network (2007-2008), which established a secure satellite information exchange network, with local points of contact in Mauritania, Cape Verde, Senegal and Portugal, and a South Atlantic Border Cooperation Centre in Las Palmas. Seahorse Project Cooperation Centres (2009-2010) transformed the points of contact into coordination centres similar to the Canary Islands Regional Coordination Centre (CCRC).

In the context of these projects, many actions were carried out in Morocco, Senegal, Mauritania, Gambia, Guinea-Bissau, Cape Verde, Portugal and Spain between 2006 and 2010. Lastly, a communications network (Seahorse Atlantic) was created with a centre in each of the participating countries (except for Mauritania, which has two) to enable operational coordination and permanent and secure information exchange via satellite[25].

In order to consolidate relations and cooperation with these countries, in late 2010 the European Commission launched the West Sahel Project (2011-2016), whose beneficiaries would be the countries in the Western Sahel, mainly Mauritania, Senegal, Mali and Niger, with the participation in some activities of Cape Verde, Gambia, Guinea-Bissau, the Republic of Guinea and Burkina Faso. All these projects have subsequently continued within the context of the proposal put forward by Spain, the Blue Sahel Project (2017-2019), aimed at coordination between the Spanish Civil Guard and the authorities of seven countries in the Sahel region to combat irregular immigration, drug trafficking and terrorism. The project consists of creating cross-border patrols and intelligence units, as well as training actions and cooperation with these countries.

These projects and Spain's bilateral cooperation with Mauritania and Senegal have virtually closed the sea route from West Africa for immigrants from these countries.

[25] See Spanish Ministry of the Interior (15.12.2010): "El Director General de la Policía y de la Guardia Civil asiste a la reunión del Proyecto Seahorse sobre control de la inmigración irregular por vía marítima".

However, Amnesty International has denounced the practice of summary expulsion[26] (i.e. the summary return of undocumented immigrants without respecting due process or these immigrants' human rights), in relation to the readmission agreement that Spain signed with Mauritania in 2003. Spain had signed agreements with Morocco, Algeria, Mauritania and Guinea-Bissau to return irregular immigrants intercepted at sea[27], and after the *cayucos* crisis, also with Ghana, Cape Verde, the Republic of Guinea, Mali, Gambia, Niger and Senegal. It is interesting to note that several of these agreements provide for the possibility of joint border control patrols in waters under the sovereignty or jurisdiction of the third State (e.g. the agreement with Cape Verde), with the implicit support of FRONTEX. This entails the participation of members of the Spanish Civil Guard on Spanish and third country vessels, performing border control tasks in maritime areas under the sovereignty or jurisdiction of a third State. The purpose is to prevent the launch of Europe-bound vessels carrying irregular immigrants and return these to their point of origin, even if they are nationals of the third State.

Thus, border guards from Member States are carrying out surveillance tasks beyond the European borders defined in the Schengen Borders Code, in order to control and prevent the arrival —or even the mere approach— of irregular immigrants to Europe's external maritime borders. In this sense, the UN Committee against Torture (subject matter: Detention of 23 Indian immigrations in Mauritania under Spanish control), considered in 2008 that the jurisdiction of a State party "must also include situations where a State party exercises, directly or indirectly, de facto o de jure control over persons in detention". The Committee observed that Spain maintained control over the persons on board the cargo vessel *Marine I* from the time it was rescued in international waters and throughout the identification and repatriation process of the immigrants. The 23 alleged victims, who refused to sign voluntary repatriation agreements, remained in detention under Spanish control in

---

[26] See Amnesty International Report "Mauritania: Nadie quiere tener nada que ver con nosotros". *Elmundo.es* (01.07.2008): "España 'obliga' a Mauritania a arrestar y expulsar de forma colectiva a los inmigrantes".

[27] On the complex and varied legal nature of these Agreements and Memoranda of Understanding, see Valle Galvez, A. del, "Mesures nationales sur le trafic illégal de personnes et la criminalité transnationale organisée" in Sobrino Heredia, J.M. (Dir.), *Sûreté maritime et violence en mer*, Bruylant, Bruxelles, 2011, pp. 19-28.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

Nouadhibou (Mauritania) in a former fish-procedding plant. The Committee observed that Spain exercised, "by virtue of a diplomatic agreement concluded with Mauritania, constant de facto control over the alleged victims during their detention in Nouadhibou"[28].

Meanwhile, the *Western Mediterranean route* encompasses the Moroccan-Spanish area and includes both sea and land routes. A decade ago, immigrants using this route mainly came from Morocco and Algeria, but these have now been joined by nationals from war-torn countries such as Mali, Sudan, South Sudan, Cameroon, Nigeria, Chad and the Central African Republic, among others. In recent years, it has also been used by people from Syria, who in 2015 formed the most numerous group, with 7,189 immigrants compared with 3,305 in the previous year. Between January and September of 2019, 27,611 immigrants were recorded, mostly from Morocco (29,4 %), Guinea (12,9 %), Algeria (12,2 %) and Mali (11,4 %)[29].

Spain has also strengthened bilateral cooperation on this route with the countries of origin and transit, as mentioned earlier, as well as cooperation within the framework of the EU and the G6.

Major actions include the Seahorse Mediterranean Project[30], approved by the European Commission in 2013 for a period of three years, with the participation of Spain, France, Italy, Malta, Portugal, Cyprus, Greece and Libya.

In addition, at a meeting of Interior Ministers of the G6 (Germany, Poland, Spain, France, the UK and Italy) held on 6 November 2014, Spain reiterated its commitment to strengthening the border control and migration management capacities of both the EU and the countries of origin and transit, as well as the operational capacities of FRONTEX. The Spanish Minister highlighted the three FRONTEX maritime operations led by Spain (Indalo and Minerva in the Mediterranean and Hera in Senegalese waters, this being a unique case since it is the only FRONTEX operation in African waters), and

[28] Decision of the Committee against Torture (Forty-first session, 3-21 November 2008), Communication no. 323/2007, CAT/C/41/D/323/2007, 21 November 2008, accessible in <https://cutt.ly/crqF821>.

[29] <http://frontex.europa.eu/trends-and-routes/migratory-routes-map/>; "Movimientos migratorios en España y Europa, *cit*., pp. 9-10 and <https://data2.unhcr.org/en/country/esp>, *cit*.

[30] <http://www.interior.gob.es/prensa/noticias/-/asset_publisher/GHU8Ap6ztgsg/content/id/1827498>.

reaffirmed Spain's commitment to continue providing material and human resources, in this case in the Triton operation in Italy. As particularly effective measures to strengthen the border control and migration management capacities of the countries of origin and transit, Spain proposed the establishment of joint investigation teams with these countries, and the coordination of return actions with FRONTEX and the International Organisation for Migration (IOM).

Furthermore, at the meeting of the G6 held in Seville on 16 October 2017, with the participation of senior representatives of the Interior from the EU and Morocco, the Interior Ministers agreed to strengthen cooperation with key countries in the fight against irregular immigration, such as Morocco, Mauritania, Senegal, Niger and Libya, with the aim of countering immigration pressure on the Mediterranean. At this meeting, the five cornerstones of cooperation on immigration were defined: prevention at source through cooperation with countries of origin and transit; operational projects on the ground; the fight against human trafficking networks; border control; and return. To achieve these objectives, concrete measures were envisaged to prevent the movement of irregular immigrants, such as assisting in capacity-building for border control in Sub-Saharan Africa and the Sahel; providing technical assistance to monitor sea and land borders; continuing to facilitate economic and social development on immigration routes, creating a sustainable alternative for immigrants in countries of origin and transit; and supporting the work of the UNHCR and IOM.

Related to the cooperating with Morocco, in late 2018, the EU approved EUR 140 million in support in border management and budget support and EUR 36 million in emergency assistance to help Spain on its southern border[31].

Lastly, it should be noted that depending on the origin of the immigrants, two methods are used to enter Spain via Ceuta and Melilla: one is to enter at

[31] Morocco has already been working to strengthen control of its border and has prevented a large number of departures. According to European Border and Coast Guard JORA data (Joint Operations Reporting Application), the Moroccan authorities prevented in 2018 almost 15,000 irregular migrants from departing from Morocco by sea. The Moroccan authorities are also conducting preventive actions inland. The Moroccan Ministry of Interior estimates that 88,761 migrants departures from Morocco were prevented in 2018. See Doc. COM (2019) 126 final, *cit.*, p. 5.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

border posts and the other by "assaulting" these posts or by attempts to jump the border fences surrounding Spanish territory in North Africa. Sub-Saharan African immigrants do not have access to Spain via border posts, so jumps or assaults on border fences are relatively common and have been accompanied by the Spanish practice of summary returns. This policy dates back to 2005 and has continued ever since, and has also been employed following the arrival of immigrants by sea to Spanish islands and islets in North Africa or by swimming to the beaches of the above-mentioned autonomous cities[32].

This procedure is only possible thanks to cooperation between Spain and neighbouring Morocco, since the latter is the main point of departure for immigrants arriving in Spain by the West Mediterranean route[33]. Cooperation on immigration is one of the main areas of Spanish-Moroccan relations; in contrast, within the framework of EU-Morocco relations, ensuring respect

[32] See González García, I., "El Acuerdo España–Marruecos de readmisión de inmigrantes y su problemática aplicación: Las avalanchas de Ceuta y Melilla", *Anuario Español de Derecho Internacional*, XXII, 2006, pp. 255-284; "La llegada de inmigrantes a Isla de Tierra en Alhucemas: Crisis migratoria entre España y Marruecos y violaciones de Derechos Humanos", *Revista Electrónica de Estudios Internacionales* (*REEI*), no. 27 (2014), pp. 1-28; and "Rechazo en las fronteras exteriores europeas con Marruecos: Inmigración y derechos humanos en las vallas de Ceuta y Melilla, 2005-2017", *Revista General de Derecho Europeo (RGDE)*, no. 43 (2017), pp. 17-57. See also the legal reports issued by the IUSMIGRANTE R+D+i Project (Iuspuniendi e inmigración irregular) (DER 2011-26449), coordinated by M. Martínez Escamilla, '*Expulsiones en caliente'. Cuando el Estado actúa al margen de la ley*, 27 June 2014 (last modification on 18 April 2016), pp. 1-21 in <http://eprints.ucm.es/25993/> and *'Rechazos en frontera': ¿Frontera sin derechos? Análisis de la disposición adicional décima de la Ley Orgánica 4/2000, de 1 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, introducida por la Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana*, 13 April 2015, pp. 1-34 in <http://eprints.ucm.es/29379/>.

[33] It should be noted that in the words of S. Zebda, cooperation in this area is excellent, mainly following the creation of joint patrols in 2004, the exchange of liaison and information officers and the signing of the 2012 Agreement on the creation of Spanish-Moroccan Police Cooperation Centres to coordinate the fight to prevent irregular immigration, among other goals. To this end, the Spanish Government has tripled spending on police cooperation with Morocco to increase control of the southern border. In 2012, €33,637 were allocated to border surveillance cooperation, a figure which by 2014 had risen to €108,733. See "XI Reunión de Alto Nivel hispano-marroquí, junio de 2015: reflexiones sobre la cooperación en economía, seguridad y cultura", *Paix et Securité Internationales*, 3, 2015, pp. 227-237 at p. 232.

for human rights has always played a major role[34]. This is reflected in the EU's readmission agreements with third countries, and in particular with Morocco, whose fifteenth round of formal negotiations was held on 10 May 2010[35].

## III. ENTRY TO SPAIN VIA CEUTA, MELILLA AND SPANISH ISLANDS AND ISLETS IN NORTH AFRICA: THE 1992 SPANISH-MOROCCAN AGREEMENT ON READMISSION OF FOREIGNERS WHO HAVE ENTERED IRREGULARLY

Below, the distinctive features of border control and migration flow management on the West Mediterranean route will be analysed in terms of entry to Spanish territories in North Africa. In 2015, the Spanish Government adopted a new "procedure" with respect to the special regimen of Ceuta and Melilla, consisting of rejection at the border[36], in order to provide a legal basis for the practice of summary returns. However, in its judgement of 3 October 2017, the European Court of Human Rights (ECHR) condemned Spain for this practice, in this case for having summarily returned two Sub-Saharan Africans (from Mali and Ivory Coast) who had managed to scale the border fence at Melilla on 13 August 2014[37].

---

[34] See Joint Declaration published after the EU-Morocco Summit, Granada, 7 March 2010, 7220/10 (Presse 54), 10 March 2010.

[35] SEC (2011) 209, Brussels, 23.02.2011, Commission staff working document accompanying the Communication from the Commission to the European Parliament and the Council, Evaluation of the EU Readmission Agreements, EU Readmission Agreements: Brief overview of State of play, February 2011, at 3-4. See *Europa Press* (02.02.2017). "Bruselas, en dificultades para avanzar acuerdos de readmisión de inmigrantes con países norteafricanos", including Morocco (whose negotiation has been blocked to date), Algeria, Tunisia and Jordan, in <http://www.europapress.es/internacional/noticia-bruselas-dificultades-avanzar-acuerdos-readmision-inmigrantes-paises-norteafricanos-20170202151737.html>.

[36] We question the appropriacy of this new "procedure", which to date (two years after its entry into force) has still not passed into the Aliens Regulation (see footnote 35). See our previous Studies GONZALEZ GARCIA I., "Rechazo en las fronteras exteriores europeas con Marruecos: inmigración y derechos humanos en las vallas de Ceuta y Melilla, 2005-2017", *Revista General de Derecho Europeo*, Nº. 43, 2017; "The Spanish-Moroccan Cooperation on Immigration: The Summary Returns Cases of Isla de Tierra-Alhucemas (2012) and Ceuta and Melilla (2014)" *Spanish yearbook of international law*, Nº 19, 2015, 349

[37] European Court of Human Rights/Cour Européenne des Droits de l'Homme (Strasbourg), Troisième Section, Affaire N.D. et N.T. c. Espagne (Requêtes nºs 8675/15 et 8697/15), Arrêt 3 octobre 2017.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

## 1. THE SPECIAL REGIME OF CEUTA AND MELILLA: FROM AN OPERATIONAL CONCEPT OF BORDERS TO REJECTION AT THE BORDER

The border fences surrounding Ceuta and Melilla demarcate the land border of Spain, and therefore the external borders between the EU and Morocco. Consequently, Spanish procedures for the return, expulsion or re-admission of immigrants seeking to enter the Schengen area irregularly must respect human rights.

Until 1996, the borders of Ceuta and Melilla were protected by a wire fence in Ceuta (from 1993) and a military fence in Melilla (from 1971). However, between 1996 and 1999, the Spanish Government ordered the border with Morocco to be reinforced, and two parallel fences were erected enclosing an inner road for border surveillance. At the same time, the height of the fences was increased from three metres in 2006 to six metres. That same year, while Spain was building a fence around the breakwater on the El Tarajal beach in Ceuta, Morocco was also digging a trench parallel to the fence outside the city, like the one already existing alongside the fence in Melilla. It was also agreed to raise a third fence or three-dimensional barrier in both cities, which was only erected in Melilla between the two already existing fences, reaching a height of two metres. Since 2014, further reinforcements have been made to this fence.

However, the layout of these fences does not coincide with Spain's conception of them as being "for the sole purposes of immigration". Although the legal concept of the border "is in accordance with the international treaties entered into between the kingdoms of Spain and Morocco", the functional or operational concept of the same "seems to respond to a political criterion of the Government, or to a simple police operation"[38], as it effectively facilitates the criticised summary returns that have been carried out by the Spanish security forces since 2005 against immigrants who become trapped between the Ceuta or Melilla border fences or who have swum to these cities, because once these have crossed the inner fence or the line formed by the civil guards waiting on the beach, they are deemed irregular immigrants on Spanish soil[39].

---

[38] See the ruling of the Court of First Instance and Instruction No. 2 of Melilla of 11 September 2014, Court Consideration no. 3.

[39] *'Rechazos en frontera': ¿Frontera sin derechos?*, *cit.*, p. 14.

Indeed, the sad episode on 6 February 2014, when members of the Civil Guard returned 23 immigrants who had swum to Ceuta's El Tarajal beach to Morocco (with other 15 immigrants drowned in Moroccan waters), clearly evidenced the concept of operational border used by the Spanish security forces. The Minister of the Interior, Mr Fernández Díaz, appeared in the Congress of Deputies on 13 February 2014 to defend the actions of the Civil Guard in applying this operational concept of the border[40], basing his argument on "the unique characteristics of border control" in Ceuta and Melilla.

According to a ruling on 11 September 2014 of the Court of First Instance and Preliminary Investigation No. 2 in Melilla, the Civil Guard also used this concept of an operational or functional border when on 18 June and 13 August 2014, an undetermined number of immigrants who had scaled the outer fence at Melilla and were in the space between the last two fences, or were on the upper part of the inner fence at Melilla, respectively, were handed over to the Moroccan authorities. This concept of land border that the Civil Guard applies to the border fence at Melilla implies that "...the inner fence embodies the line that defines Spanish territory, for the sole purposes of immigration"[41].

In response to widespread criticism of the practice of summary returns and the numerous complaints lodged before national and international courts as being contrary to the provisions of Spanish-Moroccan border treaties and international law on human rights, the Spanish Government introduced a series of partial amendments to the organic law on the protection of citizen security in order to "legalise" the practice. The tenth additional provision in

[40] The operational concept of border used by the Ministry of the Interior appears in the report of 8 February 2014 drawn up by the Civil Guard Deputy Directorate for Operations and addressed to its Directorate General, concerning the events on El Tarajal beach. The report was delivered by the Ministry of the Interior to the Congress of Deputies on 7 March 2014. See the above-mentioned legal reports: '*Expulsiones en caliente?'. Cuando el Estado actúa al margen de la ley*, p. 6 and *'Rechazos en frontera': ¿Frontera sin derechos?*, *cit*., p. 14.

[41] Concept applied to the fence in Melilla, according to the report of the Civil Guard of the Autonomous City (submitted on 2 September 2014 to the Court of First Instance and Instruction No. 2 in Melilla, Court Consideration no. 2.7 of the ruling adopted by said Court on 11 September 2014), which refers to the Order of Service 6/2014 entitled *Dispositivo anti intrusión en la valla perimetral de Melilla y protocolo operativo de vigilancia de fronteras*, signed by the Colonel-in-Chief of the Civil Guard Command in Melilla on 11 April 2014.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

the Aliens Act (Spanish initials: LOEx)[42] incorporates "rejection at the border" in the following terms:

> **Special regime of Ceuta and Melilla:**
> 1. Foreigners detected at Ceuta's and Melilla's borders trying to pass the border barriers and cross the border irregularly can be rejected to avoid their irregular entry into Spain.
> 2. These rejections will be implemented respecting the international law on human rights and international protection ratified by Spain.
> 3. International protection claims will be formalised at the places designated to this effect at border posts in line with international protection obligations.

However, in its attempt to provide a legal basis for summary returns through rejection at the border, the Spanish Government forgot that the unique characteristics of Ceuta and Melilla were already covered by Spanish legislation on immigration.

Thus, the LOEx and its Regulation[43] already regulate the procedures for "refusal of entry" at a designated border post when the person concerned does not have the required documentation and does not meet the requirements laid down in article 25 of the LOEx to enter Spanish territory, as well as those for the "expulsion" and "return" of aliens.

Expulsion occurs when a foreigner commits an offence classified as very serious or serious in the LOEx[44] and applies to cases in which the foreigner is already on Spanish soil.

But under the terms of article 58.3. b) of the LOEx, an expulsion order is not necessary for the return of foreigners intending to enter Spain irregularly, which includes foreigners who are intercepted at or nearby the border, under the terms of article 23.1. b) of the RLOEx. Regardless, the return shall be de-

[42] Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration (*BOE* No. 10, 12 January 2000).

[43] Royal Decree 557/2011, of 20 April, which approves the regulation of Organic Law 4/2000, on the rights and freedoms of foreigners in Spain and their social integration, following its amendment by Organic Law 2/2009 (RLOEx). *BOE* No. 103, 30 April 2011.

[44] Art. 57.1 LOEx.

cided by the governing authority responsible for expulsion, which in the case of single province autonomous communities is the Government Delegate[45].

Consequently, this return procedure renders rejection at the border unnecessary. The provisions of the RLOEx also establish procedural safeguards, indicating that when the State security forces responsible for guarding coasts and borders intercept such foreigners, they should conduct these as soon as possible to the corresponding police station of the National Police for identification and, where appropriate, return[46]. These safeguards are also intended to ensure respect for their human rights, expressly recognising their right to legal assistance, and an interpreter where necessary, in accordance with article 23.3. They furthermore provide for the possibility of requesting the legal authorities for permission to intern the immigrant in an immigration detention centre (Spanish initials: CIE) in the event that a return cannot be executed within 72 hours[47].

Applying the legal concept of border in the terms agreed by Spain and Morocco for Ceuta and Melilla (whose borders are represented by fences, where the outer fence is the border between Spanish territory and the neighbouring country), any immigrant trapped within the double/triple border fence, found climbing a fence or who has managed to scale them and is detained in their vicinity falls under Spanish jurisdiction and sovereignty for the purposes of immigration, because the fences are Spanish and are built on Spanish soil.

This is contrary to the provisions of paragraph 1 of the tenth additional provision of the LOEx, in which the operational concept of border is implicit. Therefore, we can conclude that the new procedure of rejection at the border not only violates the procedural safeguards established by Spanish law on immigration, but also breaches international treaties on human rights to which Spain is a party. This contravenes explicit recognition in paragraphs 2 (human rights) and 3 (international protection) of the tenth additional provision of the LOEx, indicating that written provisions do not guarantee compliance in practice.

[45] Art. 58.5 LOEx.

[46] Art. 23.2 RLOEx.

[47] Art. 58.4 LOEx and art. 23.4 RLOEx.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

Rejection at the border is intended for application to immigrants seeking to enter Ceuta and Melilla irregularly by climbing over the border fences (thus differentiating between rejection at the border and refusal of entry at the border post), but paragraph 2, which stipulates that such rejection should respect international human rights and international protection, is contingent on application for international protection being formalised at the places designated to this effect at border posts. However, as has been reported, Sub-Saharan immigrants have no access to these border posts due to repression from the Moroccan authorities[48].

## 2. HUMAN RIGHTS IN RETURN PROCEDURES

National immigration laws, the Spanish one included, are constrained by international customary an treaty law, which imposes limits intended to ensure respect for the dignity of human beings, this being the minimum standard of international protection accorded to foreign nationals, including irregular immigrants. Special mention should be made of the provisions concerning protection of the right of asylum and subsidiary protection, and in particular, of compliance with the provisional guarantees of entry and stay granted to foreigners by the receiving State, and the principle of non-refoulement.

Focusing on the right to seek asylum, irregular entry into Spanish territory cannot be punished, according to Spanish domestic law, when such entry has been effected by foreign nationals who meet the requirements to qualify for the status of refugees, provided they present themselves without delay to the authorities. In this case, expulsion or return should be suspended from the moment the foreign national requests the protection conferred by asylum until a decision is issued on the application admitted for processing[49].

Moreover, this right is recognised in the Geneva Convention of 28 July 1951 on the status of refugees, in its protocol of 31 January 1967, of which the Spain is a party[50], and in EU law.

---

[48] See the Servicio Jesuita a Migrantes-España Reports: *Vidas en la Frontera Sur*, 17 July 2014 and *Sin protección en la frontera. Derechos humanos en la frontera sur: Entre Nador y Melilla*, 22 May 2016.

[49] Art. 23.6.b) RLOEx and art. 58.4 LOEx.

[50] The State of Morocco is also party to the Geneva Convention and its Protocol, since 1956 and 1971, respectively.

Thus, the directive on return establishes several procedural guarantees for nationals of third countries subject to return[51] (including respect for the principle of non-refoulement), in accordance with fundamental rights and, in particular, the EU Charter of Fundamental Rights (EUCFR). These include respect for human dignity; the right to life; the prohibition of the torture and inhuman or degrading treatment or punishment; the prohibition of trafficking in human beings; the right to liberty and security; the right of asylum and protection against repatriation and expulsion; and the principle of non-refoulement.

Hence, EU-third country readmission agreements cannot be applied to persons who might be subject to persecution, torture or inhuman or degrading treatment or punishment in the country of return, nor can they be applied in these cases to citizens of third countries (who are not nationals of any of the parties), pursuant to the third country nationals (TCN) clause contained in all readmission agreements.

In the present case, the EU-Morocco agreement on mobility (*EU-Morocco Mobility Partnership*), signed on 7 June 2013, includes the TCN clause, thus establishing respect for human rights, in order to strengthen collaboration in the management of migration and mobility of Moroccan citizens.

On the other hand, fundamental rights (e.g. the right to life and the physical or moral integrity and legality of foreign nationals who are under the jurisdiction of a State) must be observed and ensured in expulsion/return procedures. This is indicated in ECHR case-law and the guidelines on forcible returns issued by the Committee of Ministers of the Council of Europe, which prohibit collective expulsion orders and stipulate the individual examination of each case and the adoption of individual decisions on return. It should also be borne in mind that in 2009, Spain ratified Additional Protocol 4 of the Rome Convention (1950) for the protection of human rights and fundamental freedoms, which prohibits the collective expulsion of foreign

[51] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, better known as the Returns Directive, transposed into Spanish domestic law by Organic Law 2/2009, of 11 December, on the amendment of Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration (*BOE)* No. 299, 12 December 2009). Chapter III (arts. 12, 13 and 14) provides for a procedure documented in writing, with the possibility of appeal and with the assistance of counsel and an interpreter.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

nationals. According to the interpretation made in ECHR case-law, this represents a prohibition in the qualitative rather than quantitative sense of the term, since its determining feature is not that it falls on a more or less numerous group of people, but that it "does not guarantee the possibility of making allegations or recording who the expelled person is or if the person needs any special protection"[52].

In fact, within the framework of the Council of Europe, 30 July 2015, the ECHR asked the Spanish Government for an explanation of the summary returns carried out on 13 August 2014, following the actions brought by two Sub-Saharan Africans (from Mali and Ivory Coast) who had managed to climb over the border fence at Melilla[53].

Lastly, in the aforementioned judgement on this issue of 3 October 2017, the ECHR ruled that Spain had violated article 4 of Protocol 4, which prohibits the collective expulsion of foreign nationals, and article 13 of the Rome Convention, which recognises the right to an effective remedy, made in relation to article 4 of Protocol 4[54].

### 3. VALIDITY OF THE SPANISH-MOROCCAN AGREEMENT ON READMISSION OF FOREIGNERS WHO HAVE ENTERED IRREGULARLY

Having questioned the legality and expediency of the new concept of rejection at the border, in line with the argument that the unique characteristics of Ceuta and Melilla are already contemplated in the Spanish law on aliens (articles 58.3.b) of the LOEx and 23.1.b) of the RLOEx), once the return of immigrants has been decided by resolution of the Government Delegate in Ceuta and Melilla, this would be implemented under the terms laid down in the 1992 Spanish-Moroccan agreement on readmission of foreigners who have entered irregularly, the validity of which has not yet been questioned[55].

[52] See *"Rechazos en frontera": ¿Frontera sin derechos?*, *cit.*, p. 27.

[53] <http://www.statewatch.org/news/2015/aug/echr-spain-hot-returns-decision-fr.pdf>.

[54] The ECHR thus recognised the collective nature of the expulsion, highlighting that it was performed in the absence of an administrative or judicial decision and without any procedure on the part of the Spanish authorities to identify the plaintiffs. In this ruling, the ECHR also established a connection between the collective expulsion of the plaintiffs on the border of Melilla and the fact that they were not allowed to present an appeal to the competent authority.

[55] Entry into force of the Agreement between the Kingdom of Spain and the Kingdom of Morocco concerning the movement of personnel and the transit and readmission of for-

This agreement allows the border authorities in Ceuta and Melilla to respect human rights and ensure compliance with the legislation on asylum and subsidiary protection.

Therefore, the return of Sub-Saharan immigrants should be implemented in accordance with the provisions of chapter I on "readmission of foreign nationals". The scope of this agreement is limited to nationals of third countries, who would be readmitted by the Moroccan border authorities at the formal request of the Spanish State, when they have irregularly entered Spanish territory from Morocco. This thus envisages the possibility of readmission of Sub-Saharan African immigrants found trapped between the fences, climbing a fence or located in their vicinity, in compliance with the provisions of article 2. According to this provision, readmission shall be made if it can be proven by any means that the foreign national whose readmission is sought has come from Moroccan territory. This is easy to prove in the case of those who have swum from Morocco to Ceuta or Melilla.

Once the return of immigrants has been decided by resolution of the Government Delegate in Ceuta or Melilla, in accordance with the Spanish legislation on immigrants (i.e. the provisions of articles 58.3.b) of the LOEx and 23.1.b) of the RLOEx), Spain has ten days from the moment of illegal entry into Spanish territory to lodge a request with the Moroccan authorities for their readmission to Morocco, if their right to apply for asylum or subsidiary protection has been denied.

This readmission request should include all available information on the identity and personal documentation of each immigrant and the conditions of their irregular entry into Spanish territory, as well as any other information possessed about each individual. Then, if the request is accepted, the Moroccan border authorities must formalise this by issuing a certificate or other document indicating the identity and, where appropriate, the documents held by the foreign national. Article 3 of the agreement thus ensures compliance with the Spanish legislation on international protection, as it does not provide for the readmission of foreign nationals who have been authorised to remain in Spain after their illegal entry, nor of those to whom Spain has accorded refugee status in accordance with the Geneva Convention of 1951: indeed, if

---

eigners who have entered illegally, signed in Madrid on 13 February 1992, *BOE* No. 299, 13 December 2012.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

such circumstances are revealed by investigations following their readmission to Morocco, they must be returned to Spain.

Lastly, according to article 5, Morocco shall ensure that returned foreign nationals are sent as soon as possible to their State of origin or to the State where they began their journey, if they do not have the right to remain on Moroccan territory.

Therefore, since the Spanish-Moroccan agreement on readmission of foreigners who have entered irregularly remains in force, why is it not applied, if it is the procedure for executing the resolution of the Government Delegate in Ceuta and Melilla that authorises the return?

## IV. FINAL ASSESSMENT

Late 2017 has witnessed a sharp increase in immigration by sea to Spain using the West Mediterranean route, consisting mainly of Sub-Saharan Africans and Algerian and Moroccan migrants departing from some point on the Moroccan coast (between Al Hoceima and Nador) and bound for Almeria and Granada[56]. Nevertheless, despite strengthening the Ceuta and Melilla border fences in recent years, immigrants continue to enter these cities by land, either swimming or during mass jumps or assaults on the fences or border posts. This means that close cooperation with Morocco is vital for Spain in the fight against illegal immigration, and this has been achieved despite occasional coolness in relations due to Morocco's claim to Spanish territories in North Africa.

Since 2005-2006, Sub-Saharan immigration has been a delicate issue in Spain's bilateral relations with countries such as Morocco, Mauritania or Senegal (in these latter cases, to halt the arrival of immigrant boats to the Canary Islands), and one which requires a much broader approach, both regionally (involving Europe and Africa) and in terms of scope (not solely limited to security issues). In this strategy Spain has since 2006 developed the "Africa Plans"[57].

[56] *Elpais.com* (04.11.2017): "Los inmigrantes se lanzan al mar de Alborán".

[57] See Alaminos, M. A., "La política exterior de España hacia África Subsahariana a través del análisis crítico de los Planes África", *UNISCI Discussion Papers*, Nº. 27, 2011; *Políticas de control migratorio y de cooperación al desarrollo entre España y África Occidental durante la ejecución del primer Plan África*, Alboan-Entreculturas, Bilbao 2011.

Consequently, following the migration events in Ceuta and Melilla in 2005, Spain and Morocco took the initiative and the commitment to promote "triangular" cooperation between countries of origin, transit and destination[58], which also took into account the link between migration and development. As a result, a conference on migration and development was held in Rabat on 10 and 11 July 2006, at which participants adopted a political Declaration and a Plan of Action[59].

This rendered it necessary to develop strategies for development cooperation in the States of origin and formulate policies that would help regulate the arrival of immigrants and their social and occupational integration[60]. The EU has adopted a new approach and perspective on these issues, as evidenced in the Commission's Green Paper: "An EU approach to managing economic

[58] See joint Declaration, adopted following the meeting of the Ministers of Foreign Affairs and of Cooperation, between the Kingdom of Morocco and the Kingdom of Spain, Madrid-Rabat, 11 October 2005, No. 9682 Spanish Ministry of Foreign Affairs and Cooperation (MAEC).

[59] See press release No. 117 MAEC (10.07.2006) and Sorroza Blanco, A. "La Conferencia Euroafricana de Migración y Desarrollo: más allá del "espíritu de Rabat"", *Real Instituto Elcano de Estudios Internacionales y Estratégicos*, ARI no. 93/2006, 28.08.2006 (in http://www.realinstitutoelcano.org/analisis/imprimir/1028imp.asp), who indicates the six areas into which the Plan of Action is divided: 1) Migration and development; 2) Legal migration; 3) Illegal immigration; 4) Police and judicial operational cooperation and assistance to victims; 5) Funding; and 6) Institutional and monitoring framework. See also Fajardo del Castillo , T., "La Conferencia Ministerial Euro-Africana de Rabat sobre la inmigración y el desarrollo. Algunas reflexiones sobre la política de inmigración de España y de la UE", *RDCE*, no. 25, 2006, pp. 913-943, in particular, pp. 924-929.

[60] Trujillo Marrero, A., "La atención en frontera a inmigrantes en situación irregular" in Del Valle Gálvez, A. del and Acosta Sánchez, M. A., *Inmigración irregular y Derecho*, Universidad de Cádiz, 2005, p. 67.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

immigration"[61], and in the "EU strategy for Africa: towards a Euro-African pact to accelerate Africa's development"[62].

Since 2006, Spain has implemented a policy whereby the provision of aid is conditional on fighting illegal immigration. Thus, for example, Mauritania and Senegal have received between 15 and 25 million euros annually since 2006. In total, Mauritania has received 108.45 million, of which 88.6 have been destined for border control and 19.8 for development aid. In the case of Senegal, Spanish aid (59.7 million euros in total) has been divided between border control (34.9) and development cooperation (24.8). This model has also been applied by the EU through the signing in 2016 of the so-called *Migration Compacts* with Niger, Nigeria, Mali, Senegal and Ethiopia; however, diplomatic sources admit that in view of the number of immigrants crossing

[61] Document COM(2004) 811, Brussels, 11 January 2005, which provides additional measures for integration, repatriation and cooperation with third countries, including the following (pp. 11-12): "To provide updated information on the conditions of entry and residence in the EU, create training and recruitment centres in countries of origin in relation to the qualifications required in the EU, as well as language and cultural training, create databases on the skills/occupation/sector (competence portfolio) of potential migrants, facilitate the transfer of migrants' remittances and compensate third countries for the costs of teaching the people who migrate to the EU".

[62] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, document COM (2005) 489 final, 12 October 2005. See "La Comisión Europea aprueba un `Plan Marshall´ para África" (http://www.elmundo.es, 12.10.05). In the words of Peral, this Plan would signify: "Cancelling the debt of African countries, removing tariffs and agricultural subsidies to allow free access of African products to western markets, and quadrupling over the next ten years the 25,000 million dollars that western countries currently donate to Africa". See L. Peral, "Vida, libertad y presión migratoria. Aproximación jurídica al problema de la devolución de personas en las fronteras de Ceuta y Melilla", Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE), 14.11.2005, p. 7/9.

See also the Communication from the Commission to the Council and the European Parliament, document COM(2005) 621 final of 30 November 2005, on *Priority actions for responding to the challenges of migration: First follow-up to Hampton Court*, which addresses those aspects of migration related to security and development (see in particular the initiatives referred to in paragraph III on "Dialogue and cooperation with Africa and in particular Sub-Saharan countries of origin", pp. 6-8), which served as the basis for the conclusions of the Presidency of the European Council in Brussels, 15 and 16 December 2005, appendix I to which was entitled "Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean".

the Mediterranean, these agreements are not yielding the desired result except in the case of Niger[63].

Hence, following the La Valletta Summit held in November of 2015, a new partnership framework has been established with third countries within the context of the European Agenda on Migration[64]. An EU Emergency Trust Fund for Africa was also created, as a policy instrument for local development aimed at fostering cooperation with third countries on migration issues[65]. Within the framework of the above-mentioned trust fund, the Spanish Agency for International Development Cooperation (Spanish initials: AECID) worked actively in 2016 with the Ministry of the Interior, the Ministry of Employment and Social Security, and African countries to promote cooperation projects that address immigration. Of particular note in this regard, was the AECID's approval of a cooperation project with Morocco to support implementation of its new immigration strategy, with a focus on respect for human rights, developed by the General Secretariat of Immigration and Emigration[66].

But the new assistance delivered to Morocco by the EU and Spain should be directed at reducing irregular arrivals from the Moroccan coast and lead to further engagement with Morocco and other relevant countries to increase

---

[63] *Elpais.com* (20.06.2017): "España ha gastado 168 millones en frenar la llegada de cayucos a Canarias".

[64] European Commission – Press release (Strasbourg, 7 June 2016): "La Comisión anuncia un Nuevo Marco de Asociación en Materia de Migración: una cooperación reforzada con terceros países para gestionar mejor la migración", European Commission – Press release (Strasbourg, 13 June 2017): "Partnership Framework on Migration: Commission reports on results and lessons learnt one year on"; Doc. COM (2017) 471 final, Brussels, 06.09.2017, Report from the Commission to the European Parliament, the European Council and the Council, Fifth Progress Report on the Partnership Framework with third countries under the European Agenda on Migration.

[65] As well as direct support to Morocco, the EU Emergency Trust Fund for Africais working to develop cooperation along the whole of the route to the Western Mediterranean. A new cross-border cooperation programme worth EUR 8.6 million is strengthening coordinated migration governance between Morocco, Senegal, Mali and Côte d'Ivoire, supporting intensified regional policy dialogues on migration. A specific budget support programme for Mauritania was approved at the end of 2018 to support the national development strategy, with a particular focus on migrants' protection and maritime security. Doc. COM (2019) 126 final, *cit.*, p. 5.

[66] *Informe Anual de Seguridad Nacional 2016*, Consejo de Seguridad Nacional, Part 8 "Ordenación de flujos migratorios", pp. 117-124 at p. 121.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 201-230
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.06

the effective readmission of irregular migrants as part of a comprehensive approach[67].

To conclude, we must emphasize that Spain must respect immigrants' human rights in expulsion/return procedures, in accordance with the Schengen Borders Code, the directive on return and the EUCFR. Therefore, the special regime of Ceuta and Melilla or the reinforcement of border control to stop the migratory flows from Morocco to Spain can not be alleged to the detriment of the procedural safeguards and the immigrants' human rights, recognized in Human Rights Treaties ratified by Spain.

But to curb migration flows, the reinforcement of border control must be accompanied by common policies in the European countries of destination and increased investment in the countries of origin and transit. The Spain's bilateral cooperation with Morocco, Mauritania, Senegal and other African countries could be in this sense an interesting experience to be considered.

## BIBLIOGRAPHICAL REFERENCES

– ACOSTA SÁNCHEZ, M. A. and DEL VALLE GÁLVEZ, A., "La crisis de los cayucos. La Agencia Europea de Fronteras FRONTEX y el control marítimo de la inmigración clandestina", *Tiempo de Paz*, nº 83, 2006, pp. 19-30.

– ALAMINOS, M. A., "La política exterior de España hacia África Subsahariana a través del análisis crítico de los Planes África", *UNISCI Discussion Papers*, Nº. 27, 2011;

– ALAMINOS, M. A., *Políticas de control migratorio y de cooperación al desarrollo entre España y África Occidental durante la ejecución del primer Plan Áfric*a, Alboan-Entreculturas, Bilbao 2011.

– DEL VALLE GALVEZ, A., "Mesures nationales sur le trafic illégal de personnes et la criminalité transnationale organisée" in Sobrino Heredia, J.M. (Dir.), *Sûreté maritime et violence en mer*, Bruylant, Bruxelles, 2011, pp. 19-28.

– FAJARDO DEL CASTILLO, T., "La Conferencia Ministerial Euro-Africana de Rabat sobre la inmigración y el desarrollo. Algunas reflexiones sobre la política de inmigración de España y de la UE", *Revista de Derecho Comunitario Europeo* (*RDCE)*, no. 25, 2006, pp. 913-943.

– GONZÁLEZ GARCÍA, I., "El Acuerdo España–Marruecos de readmisión de inmigrantes y su problemática aplicación: Las avalanchas de Ceuta y Melilla", *Anuario Español de Derecho Internacional*, XXII, 2006, pp. 255-284.

– GONZÁLEZ GARCÍA, I., "La llegada de inmigrantes a Isla de Tierra en Alhucemas: Crisis migratoria entre España y Marruecos y violaciones de Derechos Humanos", *Revista Electrónica de Estudios Internacionales* (REEI), no. 27 (2014), pp. 1-28;

[67] Doc. COM (2019) 126 final, *cit*., p. 8.

– GONZÁLEZ GARCÍA, I., "Rechazo en las fronteras exteriores europeas con Marruecos: Inmigración y derechos humanos en las vallas de Ceuta y Melilla, 2005-2017", *Revista General de Derecho Europeo (RGDE)*, no. 43 (2017), pp. 17-57.

– GONZÁLEZ GARCÍA, I., "The Spanish-Moroccan Cooperation on Immigration: The Summary ReturnsCases of Isla de Tierra-Alhucemas (2012) and Ceuta and Melilla (2014)" *Spanish Yearbook of International Law*, Nº 19, 2015, 349

– SORROZA BLANCO, A. "La Conferencia Euroafricana de Migración y Desarrollo: más allá del "espíritu de Rabat"", Real Instituto Elcano de Estudios Internacionales y Estratégicos, ARI no. 93/2006, 28.08.2006, in http://www.realinstitutoelcano.org/analisis/imprimir/1028imp.asp.

– TRUJILLO MARRERO, A., "La atención en frontera a inmigrantes en situación irregular" in Del Valle Gálvez, A. and Acosta Sánchez, M. A., *Inmigración irregular y Derecho*, Universidad de Cádiz, 2005, pp. 59-68.

– VÉLEZ ALCALDE, F. J., "Pateras, cayucos y mafias transfronterizas en África: el negocio de las rutas atlánticas hacia las Islas Canarias", *Análisis del Real Instituto Elcano, ARI* nº 14/2008 (05/02/2008), Real Instituto Elcano.

– ZEBDA, S., "XI Reunión de Alto Nivel hispano-marroquí, junio de 2015: reflexiones sobre la cooperación en economía, seguridad y cultura", *Paix et Securité Internationales*, no. 3, 2015, pp. 227-237.

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

**Citation**: NOUR, M. R., «Géopolitique de l'intélligence Artificielle : Les enjeux de la rivalité sino-americaine», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 231-259

**Received**: 21 August 2019
**Accepted:** 20 September 2019

# GEOPOLITIQUE DE L'INTELLIGENCE ARTIFICIELLE : LES ENJEUX DE LA RIVALITE SINO-AMERICAINE

Mohammed Rida NOUR[1]

I-INTRODUCTION. II-L'OFFENSIVE AMÉRICAINE EN MATIÈRE D'INTELLIGENCE ARTIFICIELLE. III- LA CHINE, TERRE PROMISE DE L'IA.

**RÉSUMÉ :** L'intelligence artificielle, en tant que révolution scientifique et technologique majeure, est en train de bouleverser la configuration même de la société internationale, tout en imposant une nouvelle redéfinition de la puissance et de la conflictualité. Ainsi, dans leur course vers la domination planétaire, les Américains et les Chinois ne ménagent aucun effort pour asseoir leur hégémonie, en procédant à de véritables « guerres »,opérées sur différents fronts de la planète par leurs guerriers regroupés sous le nom de GAFAMI pour les États-Unis et BHATX pour la Chine.
**MOTS CLÉS :** Intelligence artificielle, Chine, États unis, GAFAMI, BHATX, leadership, guerre technologique.

**LA GEOPOLÍTICA DE LA INTELIGENCIA ARTIFICIAL: LOS DESAFÍOS DE LA RIVALIDAD SINO-AMERICANA**

**RESUMEN:** La inteligencia artificial, como una importante revolución científica y tecnológica, está sacudiendo la configuración misma de la sociedad internacional, mientras impone una nueva redefinición del poder y la conflictividad. Así, en su carrera hacia el dominio planetario, los estadounidenses y los chinos no escatiman esfuerzos para establecer su hegemonía, al proceder a verdaderas Cruzadas, operadas en varios frentes del planeta por sus guerreros reagrupados bajo el nombre de GAFAMI para los Estados Unidos y BHATX para China.
**PALABRAS CLAVE:** Inteligencia Artificial, China, Estados Unidos, GAFAMI, BHATX, Liderazgo, guerra tecnológica.

**THE GEOPOLITICS OF ARTIFICIAL INTELLIGENCE: THE CHALLENGES OF SINO-AMERICAN RIVALRY**

**ABSTRACT:** Artificial intelligence, as a major scientific and technological revolution, is shaking up the very configuration of international society, while imposing a new redefinition of power and conflictuality. Thus, in their race towards the planetary dominion, the Americans and the Chinese spare no effort to establish their hegemony, by proceeding to true Crusades, operated on various fronts of the planet by their warriors regrouped under the name of GAFAMI for the States And BHATX for China.
**KEY WORDS:** Artificial Intelligence, China, United States, GAFAMI, BHATX, leadership, technological warfare.

[1] Enseignant-Chercheur à la FSJES-Fès (Maroc). Président fondateur du Centre marocain des études africaines et du développement durable (Maroc).

## I. INTRODUCTION

«Celui qui deviendra leader en ce domaine sera le maître du monde» déclarait Vladimir Poutine à propos de l'Intelligence artificielle (IA), en septembre, 2017 devant un parterre d'écoliers russes et de journalistes. Trois jours plus tard, dans une lettre ouverte adressée aux Nations unies en aout 2017 en compagnie de 115 autres leaders de l'IA et de la robotique, Elon-Musk, fondateur de Space X et Tesla, renchérissait : «La lutte entre nations pour la supériorité en matière d'IA causera probablement la troisième guerre mondiale». Des propos révélateurs d'une réalité où, entre **progrès et dangers,** il est souvent dur d'y voir clair.

Créée par John McCarthy au collège Dartmouth en 1955, l'IA est défini par l'un de ses créateurs, le scientifique américain Marvin Lee Minsky, dans le dictionnaire Larousse, comme étant la construction de programmes informatiques qui s'adonnent à des tâches qui sont, pour l'instant, accomplies de façon plus satisfaisante par des êtres humains, car elles demandent des processus mentaux de haut niveau tels que : l'apprentissage perceptuel, l'organisation de la mémoire et le raisonnement critique.« À partir de cela sont apparus deux courants de pensée en matière d'intelligence artificielle : le courant dit descendant (ou IA-faible) et le courant dit ascendant (IA-Forte) »[2]. C'est-à-dire une IA nonsensible qui se concentre sur des tâchesprécisément définies, pour la première, face à des machines ou des robots dotés de conscience, de sensibilité et d'esprit et qui sont capables de reproduire, voire même dépasser l'intelligence humaine avec toute sa complexité. Il s'agit donc, bel et bien, d'une véritable révolution historique et scientifique qui est en train de bouleverser le sort de l'humanité tout entière. Ainsi, « Après la robotisation de la production, la mondialisation de la production, l'« ubérisation » des services, l'IA est une révolution pour toute l'industrie au même titre que l'a été l'électricité après la vapeur. «*AI is new electricity*» répète à qui veut l'entendre Andrew Ng, le créateur de Google Brain »[3].

En deux siècles, le monde a connu trois grandes révolutions : La première s'est étaléeentre 1770 et 1850 et s'est caractérisée par l'apparition des pre-

---

[2] Kiyindou, Alain, *intelligence artificielle : pratiques et enjeux pour le développement*, L'Harmattan, Paris, 2019, p. 38.

[3] Roder, Stéphane, *Guide pratique de l'intelligence artificielle dans l'entreprise : Anticiper les transformations, mettre en place des solutions,* Ed. 1, Eyrolles, Paris, 2019, p. 15.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

mières usines puis machine à vapeur et le réseau de chemin de fer, alors que la seconde a débuté avec la naissance de l'aviation, l'automobile, la téléphonie et l'électricité et elle s'étend de 1870 à 1910. « La troisième révolution a débuté vers 2000, avec l'arrivée des technologies NBIC (Nanotechnologies, Biotechnologies, Informatique et sciences cognitives) qui vont bouleverser l'humanité (…) »[4]. Cette nouvelle mutation, avec son immense puissance informatique, met à notre portée des technologies dont nous pouvions à peine rêver il y a cinquante ans, tout en nous emmenant dans des mondes dont les règles fondamentales changent rapidement, et dont les conséquences, prometteuses, mais aussi douteuses, sont généralement imprévisibles.

Imbriquée dans la révolution numérique, avec tous ses progrès très rapides sur les plans économique, politique et militaire, l'intelligence artificielle, érigée en priorité stratégique par la Silicon Valley[5] et l'industrie 4.0[6], contribuera à déterminer l'ordre international des décennies à venir, en accélérant les dynamiques d'un Cycle ancien où technologie et pouvoir se sont toujours renforcés mutuellement. Elle transformera, en outre, certains axiomes de la géopolitique au travers de nouvelles relations entre territoires, dimensions spatio-temporelles et immatérialité.

Mais alors que l'Europe d'aujourd'hui se contente d'alliances stratégiques synonymes de «cyber-vassalisation» et l'Afrique s'annonce déjà comme un grand terrain d'affrontement, clairement menacé de «cybercolonisation», les prévisions les plus réalistes démontrent que les empires digitaux américains et chinois domineront, indiscutablement, la géopolitique internationale dans les années à venir, à travers une sorte de « techwar »,menée par leurs guerriers regroupés sous le nom de GAFAMI (Google, Amazon, Facebook, Apple, Microsoft et IBM) pour les États-Unis et BHATX (Baidu, Huawei, Alibaba, Tencent, et Xiaomi) pour la Chine.

[4] Laurent, Alexandre, *La guerre des intelligences*, Ed Jean Claude Lattès, Paris, 2017, pp. 12-13.

[5] Silicon Valley («Vallée du silicium») désigne le pôle des industries de pointe situé dans la partie sud de la région de la baie de San Francisco en Californie, sur la côte ouest des États-Unis, dont San José est la plus grande ville.

[6] Le concept d'industrie 4.0 ou industrie du futur correspond à une nouvelle façon d'organiser les moyens de production. Cette nouvelle industrie s'affirme comme la convergence du monde virtuel, de la conception numérique, de la gestion (finance et marketing) avec les produits et objets du monde réel.

La zone Atlantique qui avait été la plaque tournante de l'influence mondiale a désormais perdu sa prééminence. « Le centre économique, scientifique et politique du monde se situe désormais dans la zone Asie-Pacifique. C'est en Chine est dans la Silicon Valley que se prennent aujourd'hui les décisions qui conditionnent l'évolution des technologies qui forme de monde demain »[7].

## II. L'OFFENSIVE AMÉRICAINE EN MATIÈRE D'INTELLIGENCE ARTIFICIELLE

Pendant plusieurs années les Américains sont restés les précurseurs et les leaders internationaux de l'IA à travers les géants du web : les GAFAMI. Conséquence, en février 2017, le Danemark a décidé de nommer un ambassadeur auprès de ces monstres technologiques. En leur accordant la reconnaissance réservée généralement à un Etat, Copenhague reconnait ces structures non seulement comme des entités économiques, mais surtout comme des puissances politiques, avec toutes les conséquences qu'une telle reconnaissance crée envers les GAFAMI.

La réalité c'est que la capacité d'influence des GAFAMI s'étend au-delà des frontières des États-Unis et leur force de frappe ne se limite pas à leurs consœurs (les multinationales), mais s'étend aux États, les ONG et même les OIG. « Compte tenu de leur puissance, ils jouent un rôle oligopolistique pour reprendre une expression de Raymond Aron. C'est-à-dire qu'ils façonnent le cyberespace par leur activité et les normes qu'ils imposent »[8], ainsi que les batailles qu'elles lancent contre leur adversaire classique, à savoir l'Europe, tout en essayant d'entretenir des rapports privilégiés avec l'Afrique, dont les populations sont considérées comme étant les idiots utiles de cette nouvelle révolution.

### 1. LES RAPPORTS AVEC LE « VIEUX CONTINENT »

Grâce aux opportunités offertes par le marché européen les GAFAMI ont décidé de s'adonner à de vigoureuses guerres dans cette partie dynamique du globe. Souvent de nature conflictuelle, les relations transatlantiques se développent au fils des années dans une logique prédatrice en faveur des

[7] Laurent, Alexandre, *op, cit.,* p. 339.

[8] De Lespinois, Jérôme, « Guerre et paix dans le cyberespace », *Stratégique*, N° 117, 2017/4, p. 6.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

Américains, malgré le déploiement de quelquesstratégies de résistance de la part des Européens.

### A. LA PRÉDATION DES GAFAMI

D'abord, il faudrait préciser que l'hégémonie des GAFAMI en Europe est certes récente, mais quasi-totale. Conséquence, «Aujourd'hui sur les 10 sites les plus visités en Europe, plus de la moitié sont affiliés à des acteurs américains et plus de 60% des utilisateurs de ces sites sont des Européens»[9].

Cette situation n'aurait pas pu se concrétiser sans le quiétisme des Européens. Le vieux continent, qui n'a jamais aussi bien porté son nom, peine à décoller en matière d'Intelligence artificielle pour deux raisons : d'un côté, de l'insuffisance des fonds investis dans le secteur pour développer cette technologie et, de l'autre côté, du manque de volonté manifeste, constaté chez la majorité écrasante des leaders européens, de maîtriser cette technologie. Cet état de fait a mis l'Europe dans une position de consommateur des technologies et des outils d'IA américains qui constituent, paradoxalement, un Eldorado pour les experts européens qui n'ont pas de débouchés en Europe du fait du manque d'attractivité, comme l'atteste le cas de la fuite des cerveaux européens qui sont enivrés par le rêve américain.

Dès lors, les GAFAMI monopolisent la grande part d'un vaste marché européen, handicapé par le manque de compétitivité de ses entreprises technologiques. Un constat qui a été relaté par l'ex-président américain Barack Obama qui avait affirmé, lors d'une interview accordée au site Re/code : «Nous avons possédé Internet. Nos sociétés l'ont créé, développé, perfectionné d'une manière que les Européens ne peuvent pas concurrencer»[10]. Pour ainsi dire, les Américains ne risquent pas de lâcher leur trésor numérique dans les courtes années à venir, d'autant plus que leurs avancées technologiques sont si poussées qu'elles rendent quasi-caduques toutes les ébauches européennes de rattrapage de leur retard. Et même les rares tentatives de rajustement européennes se heurtent, généralement, à une violente contre-attaque de la part des Américains dans le but de préserver l'avanceet la maîtrise de l'IA. Ainsi, par exemple, face à la portée planétaire et la puissance grandissante de

[9] Marchais, Isabelle, «Bruxelles présente son plan d'action pour stimuler l'intelligence artificielle en Europe», disponible sur <www.lopinion.fr>.

[10] Bembaron, Elsa, «Le PDG d'Orange fustige les propos impérialistes et colonialistes d'Obama sur Internet», *Le figaro*, 18-02-2015, p. 21.

start-ups européennes telles le suédois «Spotify»[11] et le français «Deezer»[12], leaders incontestés du streaming musical, les entreprises américaines, notamment Apple, ont créé en 2015 le produit «Apple Music» afin de contrecarrer et freiner l'ascension de ces deux multinationales européennes. Les Américains mènent donc une véritable guerre dans laquelle ils semblent être les mieux armés face à un «concurrent» très mal organisé et désabusé, et dont les ressortissants (étudiants et ingénieurs), formés en Europe, sont de plus en plus attirés par les opportunités transatlantiques où les salaires et les conditions de travail et d'évolution sont beaucoup plus attractifs.

L'exemple le plus frappant est celui Yann LECUN, considéré par plusieurs spécialistes comme étant « le pape français du deep learning »[13], qui a été recruté en 2013 par Facebook dans sa division dédiée à l'IA, et qui vient de décrocher le prestigieux Prix Turing, le 27 mars 2019. Aujourd'hui, ce scientifique chapeaute une équipe de plus de 200 employés, dont une bonne partie est localisée à Paris ! Idem pour plusieurs milliers d'ingénieurs informaticiens européens qui ont été recrutés par le grand réseau des GAFAMI pour coiffer des centaines de projets dans le domaine de l'IA.

### B. LA DYSTOPIE EUROPÉENNE

Alors que les actions des GAFAMI n'ont cessé de s'accentuer et de se développer sur le vieux continent, les Européens, de leur côté, n'ont jamais pu s'organiser d'une manière sérieuse pour tenter de contrecarrer leurs actions. Mieux encore, les pratiques des géants américains tendent à diviser davantage un continent où les enjeux des pays semblent être de plus en plus hétérogènes. À titre d'exemple, dans le domaine de la fiscalité, la plupart des GAFAMI opérant en Europe préfèrent installer leur siège dans des pays tels l'Irlande, la Suède ou le Luxembourg où ils bénéficient de taux d'impôt très bas, au détriment des autres États européens. Une situation qui a poussé certains responsables politiques européens à suggérer quelques réformes pour tenter de remédier à ces anomalies. Ainsi, le ministre de l'Économie français Bruno Le Maire a lancée et défendu, en septembre 2017, l'idée d'instaurer

[11] Un service suédois de streaming musical sous la forme d'un logiciel propriétaire et d'un site Web.

[12] Un service français d'écoute de musique en streaming sous la forme d'un site Web et d'applications mobiles.

[13] RODER, Stéphane*, op. cit.*, p. 59.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

une «Taxe GAFAMI» qui consiste à taxer efficacement les géants de la Tech, notamment américains, accusés de transformer massivement leurs profits vers les paradis fiscaux sachant que, selon un rapport rédigé par l'eurodéputé socialiste Paul Tang, Google et Facebook « auraient fait perdre 5.4 milliards d'Euros d'impôts à l'UE entre 2013 et 2015 »[14].

Toutefois, c'était sans compter sur la résistance de certains pays européens qui tirent parti de la situation actuelle, mais surtout de la riposte des GAFAMI qui, rassemblés dans la Computer and Communications Industry Association, ont mobilisé, en avril 2019, les meilleurs avocats pour torpiller cette taxe qu'ils qualifient d'illégale et injuste !

Cecidit, il faudrait préciser, néanmoins, que si dans le domaine de l'IA le continent européen prend encore du retard par rapport aux États-Unis, les pays européens, pris individuellement, paraissent plutôt favorables au développement de cette technologie. L'Espagne, la France, le Royaume-Uni ou la Russie ne sont démunis ni d'ambitions ni de capacités comme en témoignent les start-upsArtebnics, Shift Technology et Darktrace. Sous l'égide de Vladimir Poutine, par exemple, Moscou n'a cessé ses tentatives d'obstruction et de lutte pour bloquer l'ascension des GAFAMI au sein de l'État fédéral. Aujourd'hui, s'il est vrai que Google est le moteur de recherche le plus utilisé au monde, en Russie il ne possède pas le monopole puisque 56% des Russes utilisent le moteur de recherche russe «Yandex», tandis que seuls 43.8% préfèrent Google. Le cas similaire est observé avec «Vkontakte», le Facebook russe. Avec près de 70 millions de visiteurs chaque jour, l'application surclasserait le concurrent américain Facebook utilisé par seulement 15 millions de visiteurs quotidiens.

Du côté de l'Allemagne et le Royaume-Uni où les GAFAMI sont déjà implantés, les start-ups locales tentent de procéder de la même manière, pour conquérir le marché. Mais, handicapées par leur jeunesse et leur défaillance en termes de compétitivité, elles n'ont pas encore pu se développer au point de constituer un danger pour les GAFAMI et ainsi les contrecarrer. À l'instar des politiques suivies par les institutions communautaires, en matière d'IA,et qui restent handicapées par un manque de réalisme accru et un certain dilettantisme de la part des responsables européens.

[14] Bussink, Henri et Tang Paul, *Perte de recettes fiscales de l'UE de : Google et Facebook*, PvdA Europa, La Haye, septembre 2017, p. 9.

Face à ce déficit monstrueux dans le domaine de l'IA et pendant que les Américains et les Chinois débloquent des sommes astronomiques pour développer davantage leur IA, les Européens se contentent de l'élaboration des rapports et de la défense d'une intégration de l'éthique dans le domaine de l'IA, tout en renégociant un partenariat stratégique de fait avec les États-Unis afin de limiter la casse. Ainsi, le ministre suédois du Développement numérique a déclaré, au moment de la publication de la stratégie de la Commission européenne en matière d'IA en avril 2018 : «Nous ne pouvons pas nous attendre à ce que la Chine mette en place des normes éthiques. Nous devons le faire. Avec une démocratie et un système juridique qui fonctionne, l'Europe doit considérer cela comme le facteur le plus important. La concurrence avec la Chine, la concurrence avec les États-Unis, est évidemment importante. Mais si nous ne créons pas de cadre juridique et éthique, nous serons de toute façon perdants»[15]. De cette manière l'Europe,considérée comme un pays sous-développé en matière d'IA, essaye de se protéger contre l'invasion et le règne des GAFAMI américains et des BHATX chinois sur son continent, à l'image de l'Afrique qui tente, laborieusement, de limiter les dégâts d'une cybercolonisation qui s'avère de plus en plus proche et inévitable. Ceci dit, le Continent africainregorge d'un potentiel considérabledans le domaine de la technologie, malgré la pénurie de ses ressources, et c'est d'ailleurs la raison pour laquelle plusieurs GAFAMI ont décidé de l'exploiter et se servir de ses potentialités.

## 2- LES AMBITIONS CYBER-COLONIALISTES DU CONTINENT AFRICAIN

De Casablanca à Abidjan et de Nairobi à Lagos en passant par Accra, jamais les incubateurs de start-up financés par les géants américains de l'Internet n'avaient autant pullulé sur le continent. Très actifs, les GAFAMI mènent de véritables guerres pour s'imposer dans le berceau de l'humanité.

### A- LES AVANTAGES DU MARCHÉ AFRICAIN

Le grand avantage qu'offre l'Afrique pour les GAFAMI,et qui a transformé le Continent en Far East à conquérir, se résume dans la souplesse et parfois même l'absence des législations relatives à l'IA et les activités annexes. Si en Occident (Europe et États-Unis), les utilisateurs et plusieurs gouver-

[15] Miailhe, Nicolas, « Géopolitique de l'Intelligence artificielle : le retour des empires ? », *Politique étrangère*, 2018-3 (Automne), p. 114.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

nements sont devenus de plus en plus méfiants à l'égard des GAFAMI, en Afrique ils peuvent compter sur 453 millions d'utilisateurs connectés. Une situation qui ne peut qu'enchanter Google, Facebook et consorts, surtout que l'époque où ils évoluaient dans un environnement échappant à toute réglementation est presque révolue en Occident.

Aujourd'hui, les spécialistes des tech et de l'IA se rabattent sur l'Afrique. Peu exigeants en termes de respects des normes fiscales, de la protection des données personnelles, de la souveraineté numérique, et de la lutte contre les fake news, certains pays émergents d'Afrique sont devenus, pour ces géants, des marchés cibles et privilégiés. D'autant plus qu'au cours de cette année, aux États-Unis « les régulateurs de la concurrence - le ministère de la Justice et la Federal Trade Commission (FTC)-ont prisl'initiative de se répartir la supervision de plusieurs entreprises de tech, le signe qu'elles envisagent d'ouvrir une ou plusieurs enquêtes sur l'aspect antitrust.Selon la presse américaine, le ministère de la Justice se chargerait de Google et Apple et la FTC d'amazone et de Facebook »[16], une situation qui risque de pénaliser ces géants du web et qui les pousse, par conséquent, à se « réfugier » ailleurs, en l'occurrence en Afrique.

Autre avantage, non moins important au sein du Continent africain,se résume dans son extraordinaire réservoir d'utilisateurs de plates-formes et de services : «453 millions d'Africains (sur 1,2 milliard) sont aujourd'hui connectés. Cette proportion (35 %) va s'accroître très sensiblement puisque le continent comptera 2,5 milliards d'habitants en 2050»[17].

L'Afrique dispose donc de grandes quantités de données personnelles qui ont une grande importance dans le système économique des GAFAMI qui se base sur la collecte et le traitement des données, considérés aujourd'hui comme étant la clé de voute de la nouvelle économie numérique et de l'IA ou, comme l'avait décrit le président de l'Alliance Active Data, Fabrice BENAUT, « Le pétrole d'aujourd'hui », et si « le pétrole voit logiquement ses

---

[16] Conesa, Elsa, « Washington prépare son offensive contre les géants de la tech », *Les Échos*, 05-06-2019, p. 24.

[17] Ballong, Stéphane et Olivier, Mathieu, «GAFAM : l'Afrique face aux géants du Web», *Jeune Afrique*, n°3005, 12 août 2018, p. 41.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

réserves diminuer avec le temps, la data, elle, double tous les dix-huit mois, telle la loi de Moore pour l'évolution de la puissance de calcul »[18].

Le problème c'est que, à l'instar du pétrole et des autres ressources naturelles africaines, ces trésors risquent, encore une fois de plus, de ne pas profiter aux populations africaines. Pire encore, ils peuvent être à l'origine d'une deuxième colonisation de l'Afrique par les géants mondiaux du numérique. C'est la raison pour laquelle certains pays, conscients de cette nouvelle cybercolonisation des GAFAMI, mais aussi du fait qu'ils ne peuvent rivaliser avec ses derniers, ont décidé de gérer l'accès à Internet aux utilisateurs finaux à travers «l'alliance Smart Africa»[19]. Présidée par Paul Kagame et lancée en 2013 lors du TransformAfricaSummit à Kigali, cette structure vise à atteindre de multiples objectifs : connecter l'Afrique, accélérer le désenclavement numérique panafricain, améliorer l'accès des populations aux services TIC et Télécoms et accélérer le développement socio-économique durable du continent. Pour cela, l'Alliance vient d'annoncer, en janvier 2019, le lancement d'un fonds de soutien, de 500 millions d'euros, aux start-ups africaines, mais espère mobiliser, au cours des dix prochaines années, quelque 300 milliards de dollars d'investissements publics et privés.

Dans la même logique le Maroc, et afin de conforter le développement de l'IA au sein du pays, s'est doté d'un High Performance Computing (HPC) de 700 cœurs. Une sorte de Datacenter universitaire qui a pour vocation d'offrir aux différents établissements d'enseignement supérieur et de recherche du Royaume des capacités de calcul de très haute performance. Et pour convaincre davantage les GAFAMI de l'attraction de son marché, le Royaume chérifien, à travers la société «Medasys» leader national de la construction et l'exploitation de datacenters neutres et en partenariat avec le géant britannique Zircom, a créé la première plate-forme Cloud Computing sur un site 100% marocain dans le but de convaincre Amazon, Google, Facebook et autres d'héberger dans le Royaume leurs données qui traitent de l'Afrique et

---

[18] CASSOU, Pierre-Henri, *L'Année des Professions Financières (2019) : Quelle finance en 2030 ? 40 points de vue d'experts*, RB édition, Paris, 2019, p. 243.

[19] Le Smart Africané en 2013, lors du TransformAfricaSummit qui s'est tenu à Kigali au Rwanda. Les pays se sont rendu compte que l'Afrique du Nord et ses partenaires du Moyen-Orient évoluent dans leur plan de développement par les TIC alors qu'en Afrique Subsaharienne les choses bougent très lentement. Les réalisations individuelles étant plus longues à réaliser, ils ont donc décidé de se rassembler pour aller plus vite.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

du Moyen-Orient. Sachant que les géants américains ont déjà entamé leurs expéditions technologiques dans plusieurs Régions du Continent.

### B- LES « APPORTS »DES GAFAMI

En mai 2018, et afin de bâtir une armée tech, Facebook s'est lancé dans la formation de cinquante mille entrepreneurs et développeurs de logiciels dans banlieue de Lagos, au Nigéria. Implanté au sein de la capitale économique du pays, plus précisément dans le «Yabacon Valley», une plaque tournante technologique qui regroupedes centaines d'institutions bancaires, des investisseurs en capital-risque, des sociétés technologiques et des start-ups de toutes nationalités envisagent de doper davantage leurs investissements. Conscient du potentiel de l'Afrique, Mark Zuckerberg a décidé de créer le premier centre technologique de l'Afrique «NG Hub from Facebook», en partenariat avec CCHub (NDLR Co-Creation Hub). Une structure technologique qui permettra aux différents acteurs du secteur de développer leurs compétences en IA et en réalité virtuelle. Quelques semaines plus tard, et toujours en Afrique de l'Est, le monstre de la Silicon Valley, Google, qui chapeaute déjà la formation de plus de cent mille développeurs africains et une soixantaine de start-ups dans tout le continent, a annoncé l'ouverture,en avril 2019, d'un Centre de recherche en IA à Accra avec pour objectif de développer plusieurs Accords de partenariat avec les universités et les centres de recherche ghanéens dans les domaines de l'éducation, la santé et l'agriculturesur tout le continent africain.En outre, et afin d'accélérer la transformation numérique du Continent et de repousser les limites de l'IA pour qu'elle puisse servir ces intérêts vitaux du Continent l'entreprise propose,dans plusieurs pays africains (Maroc, Tunisie, Ghana, Cameroun et autres), des bourses doctoralesafin de former les ingénieurs locaux aux métiers du numérique, tout en essayant d'orchestrer, auprès des entrepreneurs africains, des campagnes de sensibilisation relatives aux enjeux du digital. De même, en collaboration avec l'INICEF, plusieurs chercheurs de Google et de l'université de Stanford, en Californie, travaillent sur des projets de création d'algorithmes destinés à la définition précise du niveau de pauvreté de certains villages africains, qui font l'objet d'une étude pilote(en Tanzanie, Nigéria, Malawi, Ouganda et Rwanda). Le projet se base sur des photos satellitaires prises de nuit et de jouret qui déterminent le taux d'éclairage, et donc de richesse ou de pauvreté de ces endroitscibles, tout

en recourant à l'IA pour superposer les deux images et extraire le vrai taux d'électrification.

De son côté, Microsoft est déjà bien présente sur le continent en fournissant sa technologie à la quasi-totalité des gouvernements africains. Toutefois, malgré tous ces «exploits», la réalité parait assez pessimiste et largement au-dessous des exigences demandées pour que les Africains puissent espérer rivaliser, un jour, avec les géants américains ou même européens. «Pour l'Afrique, c'est quitte ou double. Ou bien on estime, avec BetelhemDessie, que c'est *« le levier qui permettra au continent de se hisser au rang des pays du Nord »*, une sorte d'accélérateur de développement qui fera oublier que l'Afrique a fait l'impasse sur les deux premières révolutions, l'industrielle et la postindustrielle. Ou bien les GAFAM (Google, Apple, Facebook, Amazon, Microsoft) ou les chinois BHATX (Baidu, Huawei, Alibaba, Tencent et Xiaomi) mettront la main sur les données produites par le continent et s'engraisseront sur son dos. *C'est d'ailleurs la grande menace qui guette l'Afrique s'elle n'arrive pas à s'organiser à l'échelle continentale. D'autant plus que* les BHATX n'ont pas pour seul objectif de mettre la main sur l'Afrique et ses richesses, mais envisagent d'aspirer les GAFAMI américaines pour devenir, d'ici quelques années, les leaders planétaires de l'IA. Une stratégie menée en étroite collaboration entre les multinationales chinoises et les pouvoirs politiques de Pékin.

## III. LA CHINE, TERRE PROMISE DE L'IA

Pendant plusieurs années les Chinois se sont intéressés à l'IA, mais sans avoir pour objectif de détrôner l'Oncle Sam qui accusait d'une avancée extraordinaire dans ce secteur. Mais lorsqu'en mars 2016 «Alpha Go» le programme informatique américain développé par Google Deep Mind, a réussi à battre le champion coréen «Lee Sedol» dans le jeu de go qui dispose d'une symbolique et d'une résonance culturelle exceptionnelle en Chine, l'événement a créé une véritable onde de choc chez les Chinois. Certains ont même parlé de «moment Spoutnik», qui a fait trembler l'empire du Milieu avec la crainte d'accumuler un grand retard technologique non rattrapable. Depuis, l'empire ne lésine pas sur les moyens dans le domaine de l'IA. Au service de l'État et du parti unique (PCC), l'IA est devenue un outil de supervision des populations et de divination des effets de sa politique, mais aussi, et surtout


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

un instrument susceptible de restituer à Pékin sa grandeur d'autrefois, pour passer du «made in china» au «created in China».

Pour ce faire, la contre-offensive chinoise est orchestrée par les BHATX qui sont des mastodontes nés de la volonté de l'empire du Milieu de conquérir le monde, et qui disposent d'atouts indéniables qui les conduisent à concurrencer, de façon remarquable, les GAFAMI déjà en place sur la scène mondiale.

Ainsi, dans ce jeu d'influence et de prédation, où les Chinois se présentent comme challenger numéro 1 à l'hégémonie américaine, on assiste à la mise en place de stratégies nouvelles pour la quête du Saint Graal de leader planétaire de l'IA. Le temps des BHATX semble se profiler à l'horizon. Leur influence semble s'élargir, de plus en plus, sur l'ensemble du globe aussi bien en Europe qu'en Afrique, mais se heurte, tout de même, à une résistance accrue de la part des États-Unis.

## 1- UNE DOUBLE STRATÉGIE ENVERS L'OCCIDENT

Les BHATX entretiennent des relations aussi bien avec l'Europe qu'avec les États-Unis. Mais si la conquête de l'Europe s'avère, plus au moins, facile, les « guerres » menées par les cinq sociétés semblent se heurter à un grand mur américain. En effet, depuis l'arrivée de Donald Tremp au pouvoir, les Chinois se trouvent obligés de faire face à un protectionnisme exacerbé et de plus en plus généralisé.

### A-LA PRÉDATION DU MARCHÉ EUROPÉEN

Pour ce qui est des relations du BHATX avec l'Europe, il convient de dire qu'elles sont plutôt nouvelles et fragiles, vu que l'Europe est en partie dominée par les GAFAMI américains qui s'y sont implantéles premiers sur le vieux Continent, et ce de façon durable. Mais sans complexe, les BHATX ont entrepris différentes stratégies en vue de concurrencer les Américains et tenter de remettre en cause leur domination du marché européen. C'est le cas par exemple de XIAOMI, spécialiste des smartphones et l'électronique grand public et qui a été classé quatrième constructeur mondial de téléphonie mobile en 2018. Pendant plusieurs années, la société chinoise s'était essentiellement focalisée sur le marché asiatique en misant sur la Chine et l'Inde, avec une stratégie commerciale très agressive. Aujourd'hui, le géant chinois tend à se développer sur toute l'Europe avec pour principal atout une qualité


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

acceptable et un prix souvent cassé permettant à la marque de développer sa présence partout sur le continent, sans oublier sa politique publicitaire quasiirréprochable, ce qui lui a permis d'attirer le maximum de clientèle européenne. Conséquence, juste dans la capitale française, Xiaomi a pu ouvrir une dizaine de boutiques MI Store.

Mieux que ça, lors d'une interview accordée à la chaîne CNBC, le vice-président de Xiaomi Wang Xiang a expliqué que «La firme compte multiplier par trois le nombre de boutiques physiques sur le vieux continent – y compris en France où des projets de nouveaux magasins sont dans les cartons. Le constructeur préfère l'Europe à un marché américain historiquement plus compliqué et défiant à l'égard des entreprises chinoises (…) Et poursuis en expliquant que Xiaomi compte passer de 50 magasins physiques à 150 sur le vieux continent d'ici fin 2019»[20].

Résultat, les concurrents directs du constructeur chinois sont en train de subir un véritable châtiment en termes de chiffres d'affaires et de bénéfices. Non seulement les parts de marché de Samsung et Apple ne progressent plus, mais se dégradent, alors que celles de Huawei et Xiaomi en particulier sont en pleine explosion, puisque la première affiche une croissance annuelle de +55,7%, alors que la seconde a réussi à atteindre +62%, selon Canalys 2018.

Autre exemple nonexhaustif de la prédation des multinationales chinoises, spécialisées dans le domaine de l'IA, en Europe est celui de Tencent. Le Holding chinois spécialisé, à priori, dans les services Internet et mobiles, mais qui commence à s'attaquer au milieu du divertissement, tente de s'accaparer des parts en Europe. Pour ce faire, «il a acquis des parts dans plusieurs sociétés qui évoluent en Europe. Notamment des sociétés américaines comme Fortnite, Snapchat, Spotify, QQ, WeChat, League of Legends, Clash of Clans (Supercell)»[21].

En effet, pour ne plus resté prisonnière du marché chinois, Tencent a décidé d'investir et d'acquérir des sociétés dont les produits sont utilisés à l'international surtout en Europe. C'est ainsi qu'elle a acheté des parts dans plusieurs entreprises occidentales de la Technologie comme la société suédoise de streaming musical Spotify, le leader du streaming musical payant. Une

[20] Pomian-Bonnemaison, Romain, «Xiaomi va tripler le nombre de boutiques physiques en France et en Europe d'ici fin 2019», 27-02-2019, disponible sur : <https://www.phonandroid.com>.

[21] Blanchot, Valentin, *op. cit.*


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

aubaine pour Tencent lorsqu'on sait que, au troisième trimestriel 2018, Spotify a enregistré un chiffre d'affaires de 1,35 milliard d'euros, en hausse de 31% sur un an, et aussi en progression par rapport au trimestre précédent (+6%). Enfin, le géant de l'Internet chinois est en train de fabriquer « une machine avec un potentiel comparable à celui d'AlphaGO, capable également de mettre au point des stratégies brillantes. Il y a fort à parier que les talents de cette machine, appelée Fine Art, trouveront également à terme des utilisations plus stratégiques que celles du jeu de GO »[22].

Ainsi, chaque jour sans le savoir des millions d'Européens utilisent des produits appartenant à Tencent, ou dans lesquels la société a investi. À la fin de 2017, elle a été la société la plus valorisée des BHATX devant Facebook.

Dernier exemple de la prédation des multinationales chinoises de l'IA enEurope, est illustré par la grande plate-forme «Alibaba», le géant du e-commerce chinois.

Longtemps, Alibaba et la vente en ligne chinoise étaient synonymes d'arnaques en tout genre. C'est d'ailleurs avec ce handicap que «Aliexpress.com», la version occidentale de Taobao, a essayé de prospérer en Occident. Si ce dragon chinois n'a pas encore pu détrôner le géant américain Amazon, la société de Jack MA (le président d'Alibaba Group) qui s'adresse, en priorité, aux produits lowcost pourrait mettre en péril des plates-formes européennes comme «Cdiscount», ou «Priceminister». D'ailleurs, la société chinoise a ouvert, en Europe, ses premiers data center en Allemagne et au Royaume-Uni et envisage d'ouvrir d'autres, notamment en France, mais aussi aux États-Unis où Alibaba Cloud a «supplanté IBM et pris la 4e place des fournisseurs de cloud public aux États-Unis, avec des ventes qui ont bondi de 93% au 1er trimestre à 710 millions de dollars»[23]. Néanmoins, cette expansion, à l'image de celles opérées par plusieurs sociétés chinoises aux États-Unis, a été stoppée par la montée en puissance des tensions entre le gouvernement américain et le pouvoir politique chinois accusé de porter atteinte à la sécurité nationale du pays.

[22] Cuillandre, Hervé, « Un monde meilleur : Et si l'intelligence artificielle humanisait notre avenir ? », Maxima, Paris, 2018, p. 19.

[23] Filippone, Dominique, «L'expansion d'Alibaba Cloud bloquée aux États-Unis», 04-07-2018, disponible sur : <www.lemonde.fr>.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259

DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

### B – LES CONFRONTATIONS AVEC LES AUTORITÉS AMÉRICAINES

En 2017 plus de 15 milliards de dollars ont été investis, à l'échelle mondiale, dans des start-ups spécialisées dans le secteur de l'intelligence artificielle, mais si 38% de cette somme a été investie par les Américains, près de la moitié de cette somme est allée directement vers la Chine. C'est d'ailleurs la première fois que les investissements vers la Chine, des start-ups spécialisées dans l'IA, surpassent ceux des États-Unis. Ce qui confirme davantage l'ascension rapide de l'empire du Milieu et le retard graduel des États-Unis, et explique par la même occasion les dessous d'une guerre féroce que se livrent les deux puissances, depuis plusieurs années, pour devenir le leader mondial de l'intelligence artificielle.

Ceci dit même si l'ascension des BHATX chinois est réelle, mais rien n'est encore joué pour l'instant, puisque la Silicon Valley est encore leader en matière d'IA. Et pour tous les acteurs américains, publics comme privés, la préservation de cette avance figure parmi les premières priorités. C'est d'ailleurs ce qu'avait poussé, en février 2019, le président Trump à signer un décret présidentiel, intitulé «American IA Initiative», faisant de la recherche sur l'IA une priorité nationale. Sauf que, de l'autre côté, la stratégie chinoise d'attaque et de prédation limitedoucement, mais surement l'efficience des tactiques américaines dans le domaine de l'IA, et fait perdre au pays son influence dans un domaine où il avait historiquement une longueur d'avance, et cela en suivant trois étapes.

Dans un premier temps, conscients de leur handicape dans le domaine, les Chinois se contenteront de suivre le rythme des autres pays leaders en termes de technologie et d'applications d'IA d'ici 2020, et cela afin de pouvoir créer et asseoir une industrie de base de l'IA, dont la valeur est estimée à 22 milliards de dollars. Et une fois que la deuxième phase, qui s'étale entre 2020 et 2025, est achevée par l'établissement des fondements juridiques de l'industrie, l'empire du Milieu aspire à devenir le maître incontesté de science de l'IA, avec pour objectif de devenir le centre d'innovation numéro 1 de l'IA, d'ici 2030. Donc, si ce projet se concrétise, les ravageurs chinois ne tarderont pas à détrôner l'oncle Sam, surtout que l'avantage concurrentiel dont disposent les Américains ne cesse de se rétrécir depuis 2013, face à une augmentation exponentielle du nombre des start-ups chinoises en IA. Un changement d'allure qui est dû à plusieurs explications :


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

– **Le « laissez-faire politique » américain** : d'abord, selon plusieurs spécialistes américains, la non-compétence et le non-intérêt du Président américain actuel aggravent davantage la situation des GAFAMI. Ensuite, depuis son arrivéeà la maison blanche, il a adopté une stratégie anti-migratoire, ce qui a diminué le nombre des visas accordés aux ingénieurs étrangers, et poussé par la même occasion, une grande partie des laboratoires de recherche des GAFAMI à s'installer dans d'autres pays du monde, que ça soit en Europe (Ex : Facebook a investi, en 2018, 10 millions d'euros pour son centre de Paris, dédié à l'IA. De même, Sony et Huawei ont établi des laboratoires de recherche dans la même ville) ou en Asie (Ex : la maison mère de Google, Alphabet, a déclaré vouloir installer un centre de recherche à Pékin).

– **La nature des propriétaires des plates-formes de données** : nous savons que le développement de l'IA est conditionné par le nombre de données nécessaires pour « composer » les systèmes d'IA. Le problème c'est qu'aux États-Unis, la grande partie de ces données est monopolisée par des entreprises privées (Amazon, Facebook et Google), alors qu'en Chine la majorité des entreprises sont soit publiques, soit liées aux pouvoirs publics d'une manière ou d'une autre. Donc, la pléthore des données, les milliers d'entrepreneurs et d'ingénieurs chevronnés, ainsi que le soutien actif du pouvoir politique, sont des ingrédients qui facilitent cette ascension chinoise. C'est d'ailleurs ce qui a poussé Kai-Fu Lee[24] à dire que « La Chine est l'Arabie Saoudite des données », vu que les BHATX réunis regroupent plus de données que les États-Unis et l'Europe assemblés. D'ailleurs, déjà à la de l'année 2018 le nombre d'internautes chinois avait atteint 829 millions, contre 475 millions en Europe et 325 millions aux États-Unis. De même, à titre d'exemple, l'intelligence de la reconnaissance faciale, qui repose principalement sur des techniques d'apprentissage profond, s'est beaucoup développée en Chine pour dépasser,en 2016,128 millions d'euros, alors qu'elle devrait être multipliée par cinq d'ici 2021. De même, l'une des composantes essentielles de l'IA, à savoir le maching learning qui repose, essentiellement, sur l'abondance des données se développe davantage en Chine à travers deux leaders mondiaux du paiement par mobile, qui sont AliPay et Tencent. En effet, aussi surprenant que cela puisse paraitre, les achats par mobiles effectués par les chinois sont 50 fois plus nombreux que ceux des Américains. Ce qui permet à Alibaba et Tencent

[24] Lee, Kai-Fu, *AI Super Powers*, Houghton Mifflin Harcourt, Boston, 2018, p. 32.

de maîtriser les choix et les modes de vie de plusieurs centaines de millions de Chinois.

Une tendance facilitée par la stratégie des pouvoirs politiques chinois qui veulent «une Chine sans les GAFAMI», à travers l'interdiction de l'ensemble des réseaux sociaux, des moteurs de recherche et des géants du paiement par carte bancaire américains sur le territoire chinois.

– **L'espionnage** : depuis plusieurs années le Guoanbu (L'agence de sécurité et de renseignement civil de la République Populaire de Chine) a changé ses priorités et prérogatives politiques et géopolitiques. Il a réussi à instaurer une cybersurveillance sophistiquée sur la plupart des multinationales mondiales, via l'approche des Américains proches des instances politiques, le recrutent d'agents de renseignement américain, la liquidation systématique des agents américains en Chine, la création de faux profils sur le réseau social professionnel LinkedIn, l'armada des étudiants éparpillés partout aux États-Unis (un quart des diplômés en sciences et technologies des Universités et Centres d'études américains sont de nationalité chinoise, selon le Pentagone). Ce qui explique que, comme l'avait signalé le ministère de la Justice américaine, Pékin soit« responsable de plus de 90 % des actes de cyberespionnage aux États-Unis »[25].

Et même sur son territoire, Pékin oblige les entreprises américaines à collaborer avec un homologue chinois, de stocker leurs données, même les plus sensibles, localement et de transmettre leurs brevets technologiques, au risque de perdre l'accès au marché de la deuxième économie mondiale.

Reste à préciser que même aux États-Unis, « le *Patriot Act1* oblige les sociétés américaines à transmettre au gouvernement les informations sensibles qui passent entre leurs mains »[26], mais d'une manière plus soft que celle imposée par les autorités communistes.

– **Le brevetage des inventions et des articles de recherche liés à l'IA :** en 2018-2019, d'après l'Organisation mondiale de la propriété intellectuelle (OMPI), les demandes de brevet en lien avec l'IA ont explosé. Deux États s'accaparent la part du lion dans le domaine, les États-Unis et la Chine. Mais depuis plusieurs années, la Chine enregistre plus de brevets et publie

[25] Viswanatha, Aruna et Volz, Dustin, «Comment l'espionnage chinois s'intensifie aux États-Unis», *Le figaro*, 21/04/2019, p. 13.

[26] Cuillandre, Hervé, *op. cit.,*p. 44.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

plus d'articles liés à l'IA. De même, le nombre de citations des recherches chinoises dans les revues scientifiques indexées commence à concurrencer, sérieusement, celui des Américains, alors que les dépôts n'ont commencé en Chine qu'au début des années 2000. «Si les tendances actuelles se maintiennent, la Chine est sur le point de dépasser les États-Unis dans les 50% des articles les plus cités cette année, dans les 10% les plus cités de l'année prochaine et dans le 1% des articles les plus cités d'ici 2025»[27]. Et une analyse approfondie des brevets immatriculés aux États-Unis nous montre que le nombre des brevets aux États-Unis est gonflé, vu que plusieurs entreprises et institutions non américaines (surtout Suisses et Néerlandaises) préfèrent déposer leur demande de brevet aux États-Unis plutôt qu'à domicile.

– **L'investissement des BHATEX en IA** : soutenues par les pouvoirs publics chinois, les BHATX multiplient, jour après jour, leurs investissements dans l'IA. Des milliers de «Silicon Valley de l'IA» ont été ouvertes dans toutes les régions de Chine. Et même si plusieurs seront condamnés à disparaître, il est fort probable que, au moins, des dizaines vont prospérer et générer des pôles de compétences très compétitifs. D'ailleurs, plusieurs entreprises ont commencé à tirer profit de cette stratégie.

Ainsi, après avoir investi dans le Cloud, et afin de baisser ses coûts de main-d'œuvre, Alibaba a récemment présenté sa nouvelle invention : un hôtel futuriste et assez singulier, puisqu'il s'agit d'un établissement 100% connecté et où les humains ont été remplacés par des robots. Et alors que Google est toujours en train d'expérimenter son intelligence artificielle «Duplex» censée passer des coups de fil, Alibaba a réussi ce pari en créant un assistant vocal qui a été expérimenté en 2018 et compte déjà plusieurs heures d'avance par rapport à l'assistant de Google.

De même, la société chinoise Lenovo qui avait racheté, en 2005, la branche «ordinateurs personnels» de la multinationale américaine IBM, a déclaré en 2018 que l'IA serait au centre de ses préoccupations pour la création des produits à venir. D'ailleurs, une année plutôt, en 2017, la société avait annoncé la création de nouveaux matériels et logiciels destinés à rationaliser l'apprentissage automatique (machine learning) sur les systèmes informatiques haute performance (HPC pour High Performance Computing).

[27] Braun, Elisa, «Intelligence artificielle : la Chine attire plus d'investissements que les États-Unis», 16-02-2018, disponible sur : <https://www.siecledigital.fr>.

Toujours dans le domaine des superordinateurs, support incontournable de l'IA, les deux pays (Chine et États-Unis) se livrent à une course au coude à coude. Depuis 2012, les Chinois ont dominé la scène mondiale puisqu'ils sont restés à la tête du TOP 500 des superordinateurs jusqu'en juin 2018, date pendant laquelle les Américains ont repris le flambeau avec le superordinateur Summit, appelé aussi «BeholdSummit» ou «OLCF-4», construit par IBM et pouvant atteindre 200 pétaFLOPS. Alors que pendant plusieurs années, la tête du podium était occupée par des machines chinoises telles que «Sun way Taihu Light» et «Tianhe-2». Cependant, cette avance américaine demeure relative, puisque dans la liste du Top 500 des superordinateurs du monde, 206 machines sont fabriquées par les Chinois, contre seulement 124 Américaines.

Sur le plan sécuritaire, un nouveau front est en train de s'ouvrir dans la guerre technologique, vu que le leader mondial de la fabrication des drones civils est chinois. Après la faillite de la multinationale américaine GoPro, Da Jiang Innovation (DJI) est devenu le premier producteur avec plus de 70% des drones civils de la planète. Une situation qui a inquiété l'armée américaine au point qu'elle a interdit, en 2017, l'utilisation des drones DJI pour raisons de sécurité.

– **Les prises de participations dans des entreprises américaines stratégiques** : dans le but de s'accaparer du savoir-faire des multinationales américaines, en échange de l'accès à son grand marché intérieur, la Chine a entamé depuis des années un processus assez intelligent de financement, indirect, de grands fonds, start-ups et incubateurs de la Silicon Valley, tel que Westlake Ventures, spécialisée dans les logiciels et les technologies de l'information, et TechCode, dédiée à l'exploitation d'incubateurs et à l'intégration de ressources d'innovation mondiales.

À la tête des plus grosses réserves mondiales de change, l'empire du Milieu est en train de devenir un exportateur net de capital dans tous les secteurs d'investissements, et spécialement en IA où il a réussi à faire monter des multinationales chinoises dans le domaine de l'IA. Le cas le plus flagrant est celui de Huawei.

Une tactique dénoncée par le Pentagone qui a révélé, en se basant sur les enquêtes de CB Insight, qu'entre 2015 et 2017, Pékin aurait investi plus de 24 milliards de dollars dans la tech américaine, ce qui lui a permis d'assurer un transfert, indubitable,des technologies et des savoirs vers l'empire du Mi-


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

lieu[28]. Ainsi, par exemple, Baidu et JD ont récemment pris part aux actions de la société américaine ZestFinance[29]. De même, Baidu a acquis la start-up Seattleite «Kitt.ai», tout en concluant un Accord de partenariat avec le fabricant américain de puces Nvidia. De son côté, le chinois Tencent, spécialisé dans les services Internet et mobiles ainsi que la publicité en ligne, a acheté de grandes parts dans la société newyorkaise ObEN et vient de dépasser, en 2018, Facebook en bourse «atteignant l'équivalent de 523 milliards de dollars de capitalisation»[30].

Et comme si tout cela ne suffisait pas, les BHATX ont commencé à s'attaquer aux Bourses. Ainsi, au NASDAQ Tencent et Baidu sont déjà cotées, alors qu'Alibaba a intégré le New York Stock Exchange. De son côté Xiaomi a fait son entrée à la bourse de Hong Kong au mois de juillet 2018. Et même si Huawei n'est pas encore cotée en Bourse, puisqu'il se dit appartenir à ses employés, mais en réalité sa structure actionnariale reste complètement opaque. Sans oublier que la plupart des firmes chinoises développent d'importantes activités sur le plan international, à l'image de Baidu qui, depuis 2011, il a conclu plusieurs Accords avec le géant américain Microsoft concernant l'utilisation du moteur de recherche «Bing» pour les recherches effectuées en langue anglaise sur son site.

Pour ce qui est du domaine de l'informatique de très haute puissance dans le Cloud, appelé aussi le cloud Computing ou nuagique, pilier incontournable et indispensable de l'IA, avec le Big data et le machine learning, les entreprises chinoises, comme Alibaba, ont procéder à une offensive singulière contre les géants américains pour essayer de les déstabiliser et rafler quelques parts de marchés que les firmes américaines contrôlent et monopolisent depuis plusieurs années. Néanmoins, les ambitions de la firme chinoise de développer son «Alibaba Cloud» se sont heurtées à une opposition catégorique de la part

---

[28] En 2018 les investissements ont baissé à 5,6 milliards de dollars, avec une chute de 80%, à cause des restrictions qui ont été imposées par D. Trump, mais aussi parce que les autorités chinoises ont incité certaines multinationales à diversifier leurs investissements, partout dans le monde, pour assurer davantage leur santé financière.

[29] Société de technologie des services financiers basée à Los Angeles, qui utilise l'apprentissage automatique et la science des données pour aider les entreprises à prendre des décisions de crédit plus précises.

[30] Richaud, Nicolas, «Bourse : le géant chinois Tencent a dépassé Facebook», *Les Échos*, 19-01- 2018, pp. 5-7.

du nouveau locataire de la Maison-Blanche, Donald Trump et des autorités américaines.

En réalité, depuis 2010, les BHATX sont sous une surveillance étroite à cause des craintes de piratage et d'espionnage. Plusieurs objets chinois sont soupçonnés de dissimulation de ce qu'on appelle le «backdoor», un cheval de Troie caché dans un logiciel, et qui peut servir d'outils d'espionnage pour le compte des services secrets chinois, à l'image de ce qu'entreprend le géant chinois Huawei, qui a été sanctionné par Donald Trump, poussant Google à prendre ses distances et suspendre toute collaboration avec la firme chinoise.

En outre, le 2 janvier 2019, les régulateurs américains, invoquant le motif de sécurité nationale, ont bloqué la tentative de fusion entre le spécialiste américain des paiements électroniques MoneyGram International et Ant Financial Services, bras financier du géant chinois du commerce en ligne Alibaba Group Holding en raison du «risque pour la sécurité nationale lié à des transferts potentiels de propriété intellectuelle». Et toujours pour le même motif, le Comité pour l'investissement étranger aux États-Unis (CFIUS), un organisme fédéral placé sous la houlette du Trésor américain, et qui est chargé d'examiner les acquisitions étrangères, s'est opposé à cette opération, après avoir «recommandé» au président Trump, en septembre 2018, de s'opposer au rachat du fabricant américain de circuits logiques programmable «Lattice-Semiconductor Corporation» par le fonds d'investissements Canyon Bridge Fund, une entreprise dont la majorité des actionnaires est chinoise.

Et pour barrer la route aux Chinois, le président américain, via un «*exécutive order*» signé en février 2019, a sommé toutes les Agences fédérales de faire de la recherche en IA leur priorité, surtout que le Pentagone n'a pas cessé d'insister sur le risque de se faire devancer par la Chine.

Donc, les autorités américaines tentent tant bien que mal de ralentir l'ascension des BHATX. Mais, même si ces dernières ne sont pas pour l'heure en mesure de rivaliser avec les GAFAMI, mais il parait certain qu'elles sont en train de s'en rapprocher rapidement, ce qui symbolise ouvertement la volonté de la Chine de prouver la supériorité de son modèle économique et social. C'est d'ailleurs la raison pour laquelle les Chinois tentent de diversifier leurs partenaires, mais aussi leurs cibles pour éviter tout blocage de leurs stratégies par leur concurrent direct (États-Unis) et indirect (l'Europe), en procédant à



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

une conquête générale d'un continent tout aussi important dans cette guerre à l'IA, à savoir l'Afrique.

## 2. LES AMBITIONS CYBERCOLONISATRICES DU CONTINENT AFRICAIN

Dans sa quête de l'hégémonie planétaire en matière d'IA, la Chine s'est lancée dans la conquête de l'Afrique qui constitue, pour elle, une véritable aubaine et un marché prometteur. De nombreuses firmes technologiques chinoises ont assailli les marchés africains avec leurs produits et marchandises. En effet, la Chine se présente comme un partenaire de l'Afrique qui semble-t-il l'aidera à entamer sa révolution technologique. Pour certains pays africains, conscients d'avoir raté plusieurs révolutions industrielles et que, par conséquent, ils ne doivent pas manquer celle de l'intelligence artificielle, la Chine est un «partenaire» qui serait à même de contribuer à cette évolution technologique du Continent africain.

### A- LES INVESTISSEMENTS DES BHATX EN AFRIQUE

Depuis une décennie les BHATX tendent à s'implanter en Afrique, et ce de façon pérenne. Dans le domaine de l'IA, la Chine est actuellement le premier partenaire commercial des États africains, suivie de l'Inde, de la France, alors que les États-Unis n'occupent que la quatrième place suivie de l'Allemagne. En effet, le Continent africain dispose d'un énorme potentiel pour explorer les applications de l'IA. «D'après une étude du cabinet Deloitte plus de 660 millions d'Africains devraient être équipés d'un smartphone en 2020, un contexte qui ne devrait qu'accentuer la multiplication des usages déjà très divers»[31].

Cet ainsi par exemple que le géant chinois Tencent a réussi, depuis 2013 date du lancement de l'application sur le marché africain, une expansion fulgurante à travers son application mobile«WeChat», 100 % chinoise. Il s'agit, en effet, d'une application complète (tout faire) qui regroupe les fonctionnalités de Wathsapp, Twitter, PayPal et Facebook, c'est-à-dire, la messagerie, les appels audio et vidéos, sans oublier une originalité extraordinaire qui se résume dans le transfert d'argent, les réservations et les virements financiers qui peuvent, tous, être effectué juste par une reconnaissance faciale. Des atouts qui ont conquis plus de 5 millions d'utilisateurs africains qui ont adopté «WeChat», que ça soit en Afrique du Sud, au Kenya, en Angola ou au Nigéria. À

[31] Lacombe, Lukas, *TMT Prédictions Afrique 2018*, avril 2018, Deloitte SAS, Dakar, p. 8.

un moment où le nombre d'utilisateurs de Facebook, implanté depuis longtemps en Afrique, ne dépasse guère les 12 millions, et alors que la société chinoise vient juste d'entamer sa conquête de l'Afrique francophone. Dans ce sens et pour faciliter davantage son expansion en Afrique et les échanges d'argent entre les utilisateurs, Tencent a signé plusieurs Accords de collaboration avec plusieurs partenaires africains, à l'instar de la société kényane «M-Pesa», pionnière des paiements mobiles en Afrique.

Néanmoins, Tencent n'est pas la seule entreprise chinoise à lorgner le Continent. Les deux géants mondiaux des télécoms chinois Huawei et Xiaomi, ont pénétré le marché africain en proposant des smartphones polyvalents, de grande qualité et à un prix très réduit, par rapport aux concurrents.

Pour Huawei, premier fournisseur mondial de solutions de technologies de l'information et de la communication, et ambitionne de dépasser Samsung et devenir ainsi le numéro un des Smartphones en Afrique. Déjà implanté dans une quarantaine de pays, en fournissant plus de la moitié du réseau 4G sur le continent, Huawei envisage d'accélérer davantage ses investissements en Afrique surtout après avoir été banni du marché américain, suite à des accusations d'espionnage, et alors même que le quotidien français «Le Monde» avait affirmé, 26 janvier 2018, que la Chine avait espionné le siège de l'Union africaine, construit en 2012 par Pékin, à Addis-Abeba[32]. Toutefois, la majorité des Africains estiment qu'elle n'a guère le choix, au risque de rater, encore une fois, cette nouvelle révolution du 21e siècle.

Pour ce qui est de Xiaomi dont les mobiles sont les plus vendus en Chine et qui se classe, sur le plan international, en quatrième position derrière Samsung, Apple et Huawei, l'entreprise a su, depuis novembre 2015, conquérir l'Afrique grâce à ses prix qui défient toute concurrence.

Profitant d'un partenariat fructueux avec des opérateurs locaux tel que Mobile in Africa Group, la marque s'est attaquée, en premier lieu, aux marchés sud-africain, nigérian et kényan et dernièrement au Sénégal et au Maroc, en recrutant du personnel africain, Xiaomi a décidé, en janvier 2019, de créer tout un département Afrique afin d'accentuer ses investissements sur le Continent africain.

Donc, il s'agit d'une véritable tentative de conquête du continent par les BHATX dans le but de limiter les effets de la mainmise américaine sur

[32] Kadiri, Ghalia et Tilouine, Joan, «A Addis-Abeba, le siège de l'Union africaine espionné par Pékin», 26-01-2017, disponible sur : <https://www.lemonde.fr>.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

l'Afrique. D'ailleurs ce cybercolonialisme «positif» chinois semble être plus accepté, par certains pays africains, que celui des Américains ou même des Européens. Les Accords signés avec la Chine permettent aux Africains de se connecter à des prix très compétitifs, via des mobiles pas chers et qui encouragent le partage des compétences en ingénierie et en télécommunication ainsi que la réalisation de plusieurs chantiers dédiés au déploiement de l'Internet fixe, mobile, de fibre optique et même les câbles sous-marins.

### B-VERS NÉO-COLONIALISME NUMÉRIQUE « MADE IN CHINA »

Dans le cadre de sa course à l'hégémonie planétaire, la Chine au travers de différentes réalisations de projets tend à se projeter dans la conquête des marchés africains, via le développement de l'IA, surtout qu'une telle technologie ne nécessite pas forcément des infrastructures distinctives. Néanmoins, l'Afrique compte plus d'un milliard d'individus et d'ici 2050 ce chiffre va doubler. Une réalité assez suffisante pour rendre le Continent africain assez attrayant pour les géants chinois et américains de l'IA.

Par le biais de ses nouvelles routes de l'information, concrétisées par des investissements faramineux dans les domaines des télécoms, l'Internet fixe et mobile ainsi que la fibre optique, la Chine prétexte vouloir désenclaver un Continent où un tiers seulement des habitants est connecté, et cela à travers des infrastructures télécoms fiables et performantes, qui n'ont rien à envier aux infrastructures et équipements américains. Une stratégie fructueuse puisqu'elle a incité plusieurs gouvernements africains tels que la Zambie, le Zimbabwe et l'Éthiopie à faire appel, en 2018, aux services de plusieurs entreprises chinoises pour instaurer des systèmes de contrôle d'Internet et des réseaux de télécommunication.

Dans la même logique, Pékin tente de façonner des corridors logistiques à travers son premier câble des nouvelles routes de la soie, baptisé PEACE (Pakistan and East AfricaConnecting Europe). Long de 12.000 km, ce nouveau câble reliera, d'ici 2020, le Pakistan, Djibouti, le Kenya, l'Égypte et la France pour atteindre, juste après, l'Afrique du Sud. En effet, la Chine a articulé le numérique et l'IA dans sa stratégie géopolitique, à travers l'initiative *Belt& Road,*qui vise la construction d'une infrastructure solide capable de relierl'Asie, l'Afrique et Europe. « Confirmée par le 19e congrès du PCC, la *Belt and Road Initiative* (BRI) va guider la politique extérieure de la seconde économie mondiale, appelée à devenir la première dans un futur pas très éloigné.

*Le rêve chinois*, formulé par XI Jinping, se retrouve dans cette initiative qui entend contribuer à l'amélioration du niveau de vie des populations chinoises, mais aussi à la renaissance de la nation chinoise, renaissance qui n'est pas seulement puissance matérielle, mais aussi morale et civilisationnelle »[33]. La dernière avancée du programme a été concrétisée par la création, en février 2018, d'un nouveau centre international d'excellence des « Routes digitales de la Soie » en Thaïlande.

D'ailleurs, depuis quinze ans les BHATX, et en collaboration avec l'État chinois, n'ont cessé de diversifier les investissements dans les équipements télécoms, mais aussi dans les câbles sous-marins en Afrique, afin de faire du Continent un tremplin essentiel dans la quête mondiale de leadership en matière d'IA.

Néanmoins, cette stratégie cyber-colonialiste chinoise est loin d'être complètement favorable au Continent africain. Encore traumatisés par les séquelles de la colonisation européenne, plusieurs pays africains sont en train de nouer avec Pékin un partenariat techno-industriel logique, mais largement déséquilibré. À l'image du plan Marshall et des Américains en Europe après la Seconde Guerre mondiale, l'empire du Milieu exporte massivement en Afrique ses technologies, sa culture, ses standards. Alors qu'en réalité le régime communiste chinois ne recherche qu'à fournir aux BHATX un support fiable de commercialisation de leurs produits et services en Afrique, face à la concurrence des GAFAMI américains.

Sans oublier que le déploiement de ces infrastructures télécoms facilitera, pour Pékin, le développement de son bizness dans des secteurs vitaux, comme celui des mines et les métaux rares, indispensables pour la fabrication de la majorité des produits high-tech. D'ailleurs, pour atteindre ses objectifs, la Chine n'hésite point à recourir à une arme redoutable, à l'instar de plusieurs pays occidentaux, qui consiste à endetter au maximum certains pays africains afin de créer et pérenniser un état de dépendance vis-à-vis de la Pékin. En 2017, avec une hausse de 40 % en trois ans, la dette publique en Afrique subsaharienne, par exemple, a représenté 45 % du PIB, et bien évidemment l'empire du Milieu demeure le premier créancier. Une situation qui risque de faire perdre à plusieurs pays africains leur souverainetéou, au moins, ce qu'il en reste.

[33] DHOMPS, Pierre et TSIANG, Henri, *Le big bang des nouvelles routes de la soie*, L'Harmattan, Paris, 2017, p.9.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

Pour ainsi dire, dans cette course à l'Intelligence artificielle, les Chinois ont décidé de jeter leurs dévolus sur l'Afrique afin de réaliser des projets ayant une ampleur géostratégique dans leur positionnement sur la scène internationale. Et dans un Continent, incapable de couper le cordon ombilical aussi bien avec la Chine qu'avec les États-Unis, l'Afrique est devenue l'un des terrains de guerre d'influence, privilégié, entre les puissances chinoises et américaines et un terrain d'affrontement pour les empires digitaux. «Ces grandes plates-formes captent toute la valeur ajoutée : celle des cerveaux qu'elles recrutent, et celle des applications et des services, par les données qu'elles absorbent. « Le mot est très brutal, mais techniquement c'est une démarche de type colonial : vous exploitez une ressource locale en mettant en place un système qui attire la valeur ajoutée vers votre économie.

Cela s'appelle une cybercolonisation»[34].Une situation qui ne laisse pas indifférente les autorités américaines puisque, un mois après la décision du président Xi Jinping, lors du Sommet Chine-Afrique en septembre 2018, de consacrer un fonds de 60 milliards de dollars pour développer les infrastructures africaines, le Sénat américain a voté, en octobre 2018, la loi BuildAct dans le but de créer une nouvelle Agence, appelée «US International Development Finance Corporation», dédiée au développement du continent africain et qui sera, aussi, d'une enveloppe de 60 milliards de dollars. De même, lors de son premier roadshow en Afrique, l'entreprise américaine SAS, spécialiste du Big Data, a annoncé en avril 2019 un investissement de 1 milliard de dollars en Afrique, dans le but d'assurer l'accès des opérateurs locaux à ses dernières technologies liées à l'intelligence artificielle, ce qui permettra au géant américain de développer sensiblement sa présence sur le Continent.

Dans le même sens, et afin de contrecarrer l'expansion des BHATX, Google avait lancé, en 2012, en partenariat avec d'autres entreprises comme BlackBerry ou MasterCard 2012, l'institut africain pour les sciences mathématiques. Et en avril 2019, la firme californienne via son groupe de MountainView a lancé à Accra, comme nous l'avions expliqué précédemment, un nouveau centre de recherche en intelligence artificielle. Donc, les GAFAMI multiplient les incubateurs de start-up et les programmes de soutien au développement des talents africains dans les domaines de l'IA. Ce qui revient à dire que, malgré tous les exploits des Chinois, les Américains gardent enco-

[34] Belote, Laure, «Intelligence artificielle en Afrique : le risque de captation de valeur existe, décrypte Cédric Villani», *Le Monde*, 17-05-2018, disponible sur : <https://www.lemonde.fr>.

re des avantages concurrentiels sur le Continent africain. Et abstraction fait de l'IA l'Afrique demeure, en effet, tributaire de l'appui américain dans plusieurs domaines, surtout militaire, et d'autant plus que ces dernières années ont été le témoin d'une mutation rapide du terrorisme et de l'islamisme sur tout le continent. Les réponses aux niveaux régional, sous-régional et national n'ayant pas pu endiguer ce fléau, plusieurs pays africains comme le Nigéria, le Kenya, le Tchad ou le Cameroun dépendent encore de la collaboration militaire avec les Américains pour pouvoir lutter contre les groupes terroristes.

Ceci dit, cette avancée risque d'être de court terme puisque lors du premier «Forum sino-africain sur la défense et la sécurité» tenu à Pékin en juin 2018, le président chinois s'est engagé à mettre en place des mécanismes de coopération et de financement des armées africaines, dans le but de former les officiers africains, et par la même, énoncer une image de puissance mondiale. D'ailleurs, la Chine qui ambitionne de devenir la première puissance mondiale et qui a déjà lancé des programmes de modernisation de son armée depuis plus de 10 ans consacre plus de 157 milliards d'euros au budget Défense du pays, le deuxième du monde après celui des États-Unis. Ainsi, selon un récent rapport du Sipri, le Stockholm international peace research institute, «les ventes d'armes chinoises à l'Afrique ont augmenté de 55%, depuis l'arrivée au pouvoir du président Xi Jinping en 2013»[35]. Une situation qui risque de déplacer des conflits sur d'autres terrains non moins dangereux que celui de la tech et défricher des chemins dont il est, aujourd'hui, impossible de savoir où ils mènent.

## REFERENCES BIBLIOGRAPHIQUES

– BALLONG Stéphane et OLIVIER Mathieu, «GAFAM : l'Afrique face aux géants du Web», *Jeune Afrique*, n°3005, 12 août 2018.

– BEMBARON, Elsa, «Le PDG d'Orange fustige les propos impérialistes et colonialistes d'Obama sur Internet», *Le figaro*, 18-02-2015.

– BRAUN, Elisa, «Intelligence artificielle : la Chine attire plus d'investissements que les États-Unis», 16-02-2018, disponible sur : https://www.sieclédigital.fr.

– BUSSINK, Henri et TANG Paul, *Perte de recettes fiscales de l'UE de : Google et Facebook*, PvdA Europa, La Haye, septembre 2017.

[35] Trends in international arms transfers, 2017, disponible sur : <https://www.sipri.org>


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 231-259
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.07

– CASSOU, Pierre-Henri, *L'Année des Professions Financières (2019) : Quelle finance en 2030 ? 40 points de vue d'experts*, RB édition, Paris, 2019.

– CONESA, Elsa, « Washington prépare son offensive contre les géants de la tech », *Les Échos*, 05-06-2019.

– CUILLANDRE, Hervé, « Un monde meilleur : Et si l'intelligence artificielle humanisait notre avenir ? », Maxima, Paris, 2018.

– DE LESPINOIS Jérôme, « Guerre et paix dans le cyberespace », *Stratégique*, N° 117, 2017/4.

– DHOMPS, Pierre et TSIANG Henri, *Le big bang des nouvelles routes de la soie*, L'Harmattan, Paris, 2017.

– KIYINDOU, Alain, *intelligence artificielle : pratiques et enjeux pour le développement*, L'Harmattan, Paris, 2019.

– LACOMBE, Lukas, *TMT Prédictions Afrique 2018*, avril 2018, Deloitte SAS, Dakar.

– LAURENT Alexandre, *La guerre des intelligences*, Ed Jean Claude Lattès, Paris, 2017.

– LEE Kai-Fu, *AI Super Powers*, Houghton Mifflin Harcourt, Boston, 2018.

– MIAILHE, Nicolas, « Géopolitique de l'Intelligence artificielle : le retour des empires ? », *Politique étrangère*, 2018-3 (Automne).

– RICHAUD, Nicolas, «Bourse : le géant chinois Tencent a dépassé Facebook», *Les Échos*, 19-01- 2018.

– RODER, Stéphane, *Guide pratique de l'intelligence artificielle dans l'entreprise : Anticiper les transformations, mettre en place des solutions,* Ed. 1, Eyrolles, Paris, 2019.

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

**Citation**: BOZA MARTÍNEZ, D.; PÉREZ MEDINA, D., «New Migrant Detention Strategies in Spain: Short-term Assistance Centres and Internment Centres for Foreign Nationals», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 261-277

**Received**: 17 June 2019
**Accepted:** 13 November 2019

# NEW MIGRANT DETENTION STRATEGIES IN SPAIN: SHORT-TERM ASSISTANCE CENTRES AND INTERNMENT CENTRES FOR FOREIGN NATIONALS

Diego BOZA MARTÍNEZ[1]
Dévika PÉREZ MEDINA[2]

I. - INTRODUCTION. II.-SHORT-TERM ASSISTANCE CENTRES FOR FOREIGN NATIONALS (CATES). III.- THE CIES AFTER THE CATES. MORE EFFICIENT? IV.- THE ROUTE FOLLOWING DETENTION: THE CAEDS. V.- CONCLUSIONS

**ABSTRACT:** Under Pedro Sánchez leadership, the Spanish Government has modified migration management in Spain, essentially in relation to arrival and reception, through the creation of new institutions for the detention of recently arrived migrants. Termed Short-Term Assistance Centres for Foreign Nationals, these new facilities have prompted a change in the role of Internment Centres for Foreign Nationals.

Here, it shall be analysed the concept, creation, conditions and (non-existent) regulatory framework of these Assistance Centres and their function as regards managing migrant arrivals. I shall also explore the concomitant change in the role played by Internment Centres in migration management in Spain over the past year.
**KEYWORDS:** Detention centres, migration, CATEs, CIEs, arrivals.

**NUEVAS ESTRATEGIAS EN LA DETENCIÓN DE MIGRANTES EN ESPAÑA: LOS CENTROS DE ATENCIÓN TEMPORAL DE EXTRANJEROS (CATE) Y LOS CENTROS DE INTERNAMIENTO DE EXTRANJEROS (CIE)**

**RESUMEN:** El Gobierno de Pedro Sánchez ha modificado la gestión de las migraciones, esencialmente en lo relativo a la llegada y la primera acogida, a través de la creación de nuevas instituciones para la detención de los migrantes recién llegados. En concreto, se ha desarrollado la figura de los Centros de Atención Temporal de Extranjeros (CATE) que han propiciado una modificación en el rol de los Centros de Internamiento de Extranjeros (CIE).

En este trabajo se analiza la creación de los CATE, su concepto, sus condiciones, su -inexistente- regulación, así como su función en el entramado de la gestión de las llegadas de migrantes y su relación con el cambio del papel que han jugado los CIE en el último año dentro de la gestión migratoria española.

---

[1] Lecturer (Profesor Ayudante Doctor) in Criminal Law, University of Cadiz, Member of the INDESS (Instituto Universitario para el Desarrollo Social Sostenible), Universidad de Cádiz, Spain.

[2] PhD Candidate (Doctoranda), University of Cadiz.

**PALABRAS CLAVE:** Centros de detención, migración, Centros de Atención Temporal de Extranjeros (CATE), Centros de Internamiento de Extranjeros (CIE), llegadas.

**NOUVELLES STRATÉGIES EN MATIÈRE DE DÉTENTION DES MIGRANTS EN ESPAGNE: LES CENTRES TEMPORAIRES ET LES CENTRES D'INTERNEMENT D'ÉTRANGERS**

**RESUMÉ:** Le gouvernement de Pedro Sánchez a modifié la gestion de la migration, essentiellement en ce qui concerne l'arrivée et le premier accueil, à travers la création de nouvelles institutions pour la détention des migrants nouvellement arrivés. Plus précisément, il a développé le concept des centres temporaires d'étrangers (CATE) qui a entraîné une modification du rôle des centres d'internement d'étrangers.

Cet article analyse la création des CATE ; le concept, les conditions, le vide juridique, ainsi que le rôle de ces centres dans le réseau de la gestion des arrivées de migrants et leur relation avec le changement du rôle joué par les CIE au cours de la dernière année.
**MOT CLÉ:** Centres de détention, migrations, CATEs, CIEs, arrivées

## I. INTRODUCTION

Since Pedro Sánchez became president of the Spanish Government, some of the basic strands of Spanish immigration policy have changed, especially as regards the arrival of migrants from Africa. The stated aim has been to reduce these arrivals[3], and to this end, the Government has intensified relations with Morocco and has modified migration control and sea rescue systems by creating a single authority and restricting Spain's maritime space for action, rendering Moroccan services responsible for sea rescue.

The handling of migrant arrivals in the Spanish territory has also been changed through the creation of Short-Term Assistance Centres for Foreign Nationals (*Centros de Atención Temporal de Extranjeros*, Spanish initials: CATEs) to manage irregular migrants arriving in small boats from North Africa. This in turn has changed the role of Internment Centres for Foreign Nationals (*Centros de Internamiento de Extranjeros*, Spanish initials: CIEs), which official figures show were responsible in 2018 for the highest percentages of repatriations and the lowest percentage of sub-Saharan internees in recent years.

Here, it shall be addressed questions related to the creation of the various CATEs along the Spanish coast, their conditions and their function within the immigration system. Subsequently, I shall analyse how this function has influenced the operation of the CIEs, leading to the highest rate in historical

[3] "El Gobierno traza un plan para reducir un 50% la migración irregular" [The Government outlines a plan to reduce irregular migration by 50%], *El País*, 30th January, 2019.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

records of deportations from these latter. It shall be also considered other related questions such as the creation of Assistance, Emergency and Referral Centres (*Centros de Atención de Emergencia y Derivación*, Spanish initials: CAED).

## II. SHORT-TERM ASSISTANCE CENTRES FOR FOREIGN NATIONALS (CATEs)

### 1. ORIGIN OF THE CATEs

The origin of the Short-Term Assistance Centres for Foreign Nationals within the Spanish system is obscure that there is no consensus about when they were first introduced. The term was first used in relation to a facility located in the port of Motril. The official name at the time was the "Motril Centre for Initial Assistance and Detention of Foreign Nationals" (*Centro de Primera Asistencia y Detención de Extranjeros de Motril*), as noted by the Ombudsman on his visit in November 2017[4]. However, following the Ombudsman's recommendation that the centre be closed, it began to be referred to as the Short-Term Assistance Centre, although this cannot be considered the official name.

The term CATE became widely used in official language[5] following the inauguration of the *Crinavis* centre in the port of Algeciras. It was in the opening of this centre, with a capacity for 450 people, that the notion of the CATE entered public debate, and the need to explain the meaning and function of this institution was even raised in parliament[6].

However, in retroactive application, some government representatives have referred to detention facilities in the ports of Almeria and Motril for recently arrived migrants as CATEs, when they were not previously designated as such. In fact, as we shall see, both centres were remodelled to resemble the *Crinavis* centre and align more closely with the concept of a CATE.

---

[4] <https://www.defensordelpueblo.es/evento-mnp/centro-primera-asistencia-detencion-extranjeros-motril-granada/>. All links were last accessed on the 15th of September, 2019.

[5] Neither the term CATE nor the term "Short-Term Assistance Centre for Foreign Nationals" appeared in the Official State Gazette or in the Official Transcript of Parliamentary Proceedings (*Diario de Sesiones del Congreso de los Diputados o el Senado*) before the inauguration of the *Crinavis* centre in San Roque.

[6] The term CATE was first used in the Congress of Deputies on the 29th of August, 2018, in an address by the Minister of the Interior, Fernando Grande-Marlaska. Vid. Diario de Sesiones del Congreso de los Diputados, 2018, No. 577, pp. 5 and ss.

The confusion is such that in response to a parliamentary question from member of parliament Jon Iñarritu, the Government itself reported that the Motril and Almeria CATEs had been in operation since 2017[7]. However, this term does not appear in any public document until well into 2018 in the case of Motril and only after August 2018 in the case of Almeria.

## 2. CONCEPT, CONDITIONS AND REGULATORY FRAMEWORK OF THE CATEs

The foregoing invites reflection on the reasons behind this confusion, which might even be considered misrepresentation. There are several possibilities, but it could well be politically motivated, in response to the legal argument that there is no regulatory framework whatsoever for the CATEs. This institution was introduced in practice without any type of regulatory legislation. References to the existence of CATEs prior to May 2018, the date when Pedro Sánchez came into office, blur the responsibility for their lack of a regulation, attributing it to previous governments that put such centres into operation. However, this view is not factually correct. In fact, in an appearance before the Senate Committee of the Interior, the Minister of the Interior himself reproached the People's Party (*Partido Popular*) for not having launched the CATEs in Almeria and Motril[8].

The lack of a regulatory framework hinders definition of this type of centre. In principle, it can be concluded that the CATEs do not form part of the network of migration centres referred to in articles 264 and subsequent of Royal Decree 557/2011, of 20 April, approving the Regulation of Organic Law 4/2000, on the rights and freedoms of foreign nationals in Spain and their social integration, as amended by Organic Law 2/2009. This is for two reasons. First, because article 264 of RD 557/2011 establishes that this network exists for "the purposes of social integration", and second because article 265 stipulates that a Ministerial Order is required to establish these centres, and as has been indicated, no such order exists for the CATEs.

Due to the absence of specific legislation, a definition of the CATEs must therefore be sought from other sources. One such source is the definition given by the Minister of the Interior, Grande-Marlaska, in his appearance before the Committee of the Interior on the 29th of August, 2018. In

[7] Response of the 26th of July, 2019, to parliamentary question 184/481, of the 21st of June, 2019, from member of parliament Jon Iñarritu García.

[8] Diario de Sesiones del Senado of the 2nd of October, 2018, no. 327, p. 40.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

response to an intervention by the spokesperson for the political party *Unidas Podemos*, the Minister stated that "it is a police station, but one that provides many of the services they need, including interpreters, health care for those not in need of hospitalisation, the UNHCR, CEAR, and the police. That is a CATE. People never stay there for more than the seventy-two hours stipulated; it is not a CIE"[9].

To the Minister's words can be added the definition given in the Resolution of the Secretary of State for Security, referring to the urgent need to process the paperwork necessary to inaugurate the CATE (not designated as such in the resolution) known as *Crinavis*[10]. This resolution states that "The intended purpose of these facilities is to conduct initial identification procedures and background checks, with a maximum stay of 72 hours, for subsequent referral to CIEs or NGOs".

Both definitions invite several conclusions, the first of which is that a CATE is an extension of a police station. In other words, CATEs are large outdoor prisons in which people are detained, and although people recently arrived in Spain are held there for a maximum period of 72 hours, such detention centres lack a specific regulatory framework. Furthermore, as we shall see, they do not comply with Directive 11/2015, of the Secretary of State for Security, approving the "Technical Directive for the design and construction of detention areas".

In sum, CATEs are facilities in the vicinity of certain ports on the south coast of Spain that have been equipped by the Government for the detention of recently arrived migrants. They are, therefore, detention centres managed by the police. As stated by the Minister, Grande-Marlaska, they must provide a series of specific services required by the circumstances of the detainees, such as interpreters, legal assistance, health care and advice on issues related to international protection. However, their fundamental role as instruments of law enforcement eclipses the provision of such services.

[9] Diario de Sesiones del Congreso de los Diputados, 2018, No. 577, cit., p. 30.

[10] Resolution of the 23rd of July, 2018, of the Secretary of State for Security, declaring the urgent need to process contracts for accommodation, sustenance, cleaning and other needs arising from the unexpected and massive arrival on Spanish shores of boats carrying immigrants, especially in the far south (Almeria, Granada, Malaga and Cadiz and Huelva).

## 3. CONDITIONS IN THE CATEs ON THE SOUTHERN COAST

At present, there are four CATEs in Andalusia: San Roque-Algeciras (Cadiz), Motril (Granada), Almeria and Malaga. Their creation marks the failure of the previous system. The 2017 annual report of the National Mechanism for the Prevention of Torture contained harsh criticisms following visits to the detention centres established on the Spanish coast, mainly located in ports. The report claimed that the port facilities were not being used for purposes of initial assistance[11] and recommended the creation of suitable infrastructures, the provision of specialist human resources staff and the application of criteria for collaboration and coordination between the authorities, international organisations and civil society. In addition, it demanded that the facilities be equipped to accommodate detainees in a dignified manner for as short a time as possible[12].

The creation of CATEs as places of detention for recently arrived migrants was proposed as an instrument to rectify the shortcomings condemned in the report of the National Mechanism for the Prevention of Torture. Nonetheless, the question arises as to whether the requirements outlined in this report have been met.

The inauguration of these facilities began with the CATE in San Roque, known as *Crinavis*, which opened on the 2nd of August, 2018, and received more than 2,500 people in its first six weeks of operation[13]. Installed by the Military Emergency Unit, this CATE can accommodate up to 450 people, thus exceeding the estimated capacity for 350 people envisaged by the Secretary of State for Security[14].

The stated purpose of these facilities is to provide a more dignified and humanitarian reception to recent arrivals, although it should not be forgotten that they are also detention centres. In this respect, it should also be borne in

[11] 2017 Annual Report of the National Mechanism for the Prevention of Torture, available at <https://www.defensordelpueblo.es/wp-content/uploads/2018/07/Informe_2017_MNP.pdf>, p. 77

[12] *Ibid.*, p. 91

[13] "El CATE atiende a 2.563 inmigrantes desde su apertura en San Roque" [The CATE has assisted 2,563 immigrants since it was opened in San Roque], *Andalucía Información*, 20th of September, 2018, available at https://andaluciainformacion.es/campo-de-gibraltar/776653/el-cate-atiende-a-2563-inmigrantes-desde-su-apertura-en-san-roque/.

[14] Resolution of the 23rd of July, 2018, of the Secretary of State for Security, cit.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

mind that previously, the increased arrival of people by sea in the province of Cadiz had led to the opening of sports facilities unsuitable for their detention, such as leisure centres. However, although the present situation is an improvement on the conditions that prevailed in police stations and leisure centres, the resources provided remain inadequate.

Barely a month after the San Roque CATE opened, the Police Union called for real, feasible solutions that involved annual planning and organisation, the creation of more immigrant reception centres and better health and hygiene resources. The Union indicated that healthcare staff and resources at the *Crinavis* CATE were insufficient and condemned the lack of an interpreter for nocturnal arrivals, despite the fact that immigrants were frequently admitted at night[15]. As a result of this lack of staff, police officers had been obliged to provide health care for newly arrived immigrants without being equipped or trained to do so. This was despite the Government's announcement months previously that they would have a 24 hour healthcare service[16].

For months, *Crinavis* not only received people arriving on the Cadiz coast, but also those arriving by boat in Malaga, who were redirected to San Roque. Consequently, in just five months in 2018, this centre received 9,860 people[17].

In parallel with the opening of the *Crinavis* centre, the Motril facility was remodelled. Initially called the Centre for Initial Assistance and Detention of Foreign Nationals, this latter had begun to be termed the Short-Term Assistance Centre, albeit unofficially, following a visit by the National Mechanism for the Prevention of Torture in 2017, which prompted a recommendation

[15] "SUP lamenta los casos de sarna en el Centro de Atención Temporal de Extranjeros de San Roque" [The Police Union decries cases of scabies in the San Roque Short-Term Assistance Centre for Foreign Nationals], *Europa Press*, 5th of September, 2018, available at <https://www.europapress.es/andalucia/cadiz-00351/noticia-sup-lamenta-casos-sarna-deficiencias-higienicas-cate-san-roque-cadiz-20180905153719.html>.

[16] "El Centro de Atención Temporal de Extranjeros (CATE) de Algeciras ya está en funcionamiento" [The Short-Term Assistance Centre for Foreign Nationals (CATE) opens in Algeciras], *The Huffington* Post, 5th of August, 2018, available at <https://www.huffingtonpost.es/2018/08/05/el-centro-de-atencion-temporal-de-extranjeros-cate-de-algeciras-ya-esta-en-funcionamiento_a_23496336/>.

[17] Response to parliamentary question 184/481 of the 26th of July, 2019, formulated by member of parliament Jon iñarritu on the 21st of June, 2019.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

for its closure due to unhealthy conditions and the need to construct new facilities[18].

The Motril centre's 80-person capacity had proved insufficient, and on numerous occasions, recent arrivals were detained in places such as the municipal sports hall or even in a cultural centre. As a result, Mariano Rajoy's Government approved the modification of this facility. However, it was not until August 2018, after the San Roque CATE had opened, that the Motril centre underwent remodelling, again with the help of the Military Emergency Unit. The Motril CATE had a capacity for 250 people housed in tents, which had to be replaced by cell blocks due to severe flooding. Nonetheless, the building previously used for this purpose remained in operation[19].

Conditions at the new facility also presented severe deficiencies. For example, the College of Lawyers in Granada warned of the disgraceful conditions in which immigrants received legal aid, due to the serious lack of material and human resources at the centre. Furthermore, in December 2018, the Ombudsman demanded the immediate closure of this centre. According to the report, it lacked adequate protection mechanisms and many of the detainees had to sleep on mats on the floor, in breach of Directive 11/2015 of the Secretary of State for Security. In addition, the Police Union warned that the centre continued to present serious shortcomings that put the detainees at risk.

To address these concerns, construction began in July 2019 on new centre in a restricted access zone in the port of Motril. This new CATE will have a capacity for 200 people in an area measuring 2,000 square metres. However, there is still no information as to whether this new centre will be the definitive one or merely a transitional facility pending completion of works on the initial centre[20].

---

[18] 2017 Annual Report of the National Mechanism for the Prevention of Torture, cit., p. 78.

[19] "Instalado el nuevo CATE de Motril (Granada) con 250 plazas para atender a inmigrantes" [New CATE opened at Motril (Granada), with a capacity for 250 immigrants], *Europa Press,* 26th of August, 2018, available at <https://www.europapress.es/andalucia/noticia-ya-operativo-nuevo-cate-motril-granada-250-plazas-atender-inmigrantes-20180826105424.html>.

[20] "Nuevo CATE de Motril cerca del final" [New CATE in Motril close to completion], *Granada Hoy,* 5th of September, 2019, <https://www.granadahoy.com/provincia/nuevo-CATE-Motril-cerca-final_0_1388561605.html>.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

With regard to the reception area in Almeria, the visit in 2017 of the National Mechanism for the Prevention of Torture revealed that the previous facility was not equipped with the minimum basic services necessary for a 72-hour period of detention. It was found that detainees slept on mattresses on the floor in unheated rooms, a source of concern given the centre's proximity to the sea[21]. In July 2019, the CATE was expanded with new blocks specifically intended to accommodate women and children[22]. There is no information on the exact capacity of this CATE or on its dimensions.

Lastly, in July 2019, a new CATE was opened in Malaga with a capacity for 300 people. When the centre received its first intake of 130 people, including 22 children, in August 2019, its deficiencies immediately became apparent: it did not have a separate block for women and children.

Furthermore, the CATE in Malaga was found to be in breach of Directive 11/2015 as regards detention centre conditions because it only allocated 2.3 square metres per person within the facility, which is 1.7 square metres less than the stipulated minimum in a cell, in accordance with the directive.

The Spanish Ministry of the Interior's response underlines the confusion surrounding these institutions: the Ministry claimed that CATEs cannot be considered detention centres and are therefore exempt from the measures required by Directive 11/2015[23].

## 4. THE FUNCTION OF THE CATEs WITHIN THE IMMIGRATION SYSTEM

The Government has provided figures on the operation of the CATEs in 2017 (retroactively applying the designation of CATE to facilities in place prior to their definition as such, contrary to the parliamentary statements of

[21] 2017 Annual Report of the National Mechanism for the Prevention of Torture, cit., p. 78-79.

[22] "El Centro de Acogida de Extranjeros del puerto de Almería se amplia con tres módulos, uno para mujeres y niños" [The Reception Centre for Foreign Nationals at the port of Almeria adds three blocks, one for women and children], *Europa Press,* 16th of July, 2019, available at <https://www.europapress.es/andalucia/almeria-00350/noticia-centro-acogida-extranjeros-puerto-almeria-amplia-tres-modulos-mujeres-ninos-20190716142547.html>.

[23] "El nuevo centro de migrantes del puerto de Málaga dedica 2,3 m² por persona, la mitad que un calabozo para detenidos" [The new centre for migrants at the port of Malaga allocates 2.3 m² per person, half that of a prison cell for people who have been arrested], eldiario.es, 28th of July, 2019, available at <https://www.eldiario.es/desalambre/Gobierno-destinara-calabozos-Malaga-retenidos_0_922158093.html>.

the minister himself), 2018 and early 2019[24]. These data evidence the high turnover in the CATEs in recent months. Thus, the San Roque centre, which opened in August 2018 with a declared capacity of about 450 people, received 9,860 people in the last five months of 2018. This figure subsequently fell, with only 1,970 people received between January and July 2019 at San Roque centre. Meanwhile, 3,868 recently arrived migrants by sea were detained in the Motril centre in 2017, 8,685 in 2018 and 1,831 from January to July 2019. Similarly, 5,567 recently arrived migrants by sea were detained in the Almeria centre in 2017, 12,254 in 2018 and 2,746 from January to July 2019. Since the official data show that a total of 10,475 people arrived by sea on Spanish shores in the first six months of 2019[25], the foregoing figures indicate that over 60% of those who arrived in Spain by sea were detained in a CATE.

The CATEs serve primarily as a place of detention for recently arrived migrants. For all that their name conceals their purpose, and despite the Government's attempts to deny their function as detention centres, referring to them instead as reception centres and even humanitarian aid centres[26], the fact is that they are detention centres for people who at best have just crossed the Mediterranean in appalling conditions, and at worst, have survived a shipwreck.

The preponderance of security criteria, in which detention and law enforcement prevail over humanitarian aid or psychological and human questions,

[24] Response of the 26th of July, 2019, to a parliamentary question from member of parliament Jon Iñarritu García, cit.

[25] Ministry of the Interior data reported by Europa Press in "Descienden un 40% las llegadas de migrantes en patera a España en lo que va de 2019" [Migrant arrivals by sea in Spain fall by 40% in 2019], of the 2nd of August, 2019, available at <https://www.europapress.es/epsocial/migracion/noticia-descienden-40-llegadas-migrantes-patera-espana-va-2019-20190801191957.html>.

[26] For example, the Government Delegate in Andalusia, Javier Gómez de Celis, made a striking statement in relation to the CATEs when he claimed that they are mechanisms of the "*system through which humanitarian aid is given to people who have just reached dry land, many of whom are in a terrible state of hypothermia, women who in some cases have been raped, pregnant women, children and people with some kind of illness*". Vid.: "Celis: "Ni en Motril ni en ningún otro lugar de Andalucía hay previsión de abrir ningún CIE" [There are no plans to open a CIE in Motril or anywhere else in Andalusia], Europa Press, 8th of October, 2018, available at <https://www.europapress.es/andalucia/noticia-gomez-celis-asegura-motril-ningun-otro-lugar-andalucia-hay-prevision-apertura-ningun-cie-20181008150522.html>.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

renders these centres as the visualization of the Spanish immigration system. It should also be noted that despite improvements to the conditions in which recently arrived migrants by sea are housed in the CATEs, these remain inadequate. The presence of NGOs such as the Red Cross, CEAR or international institutions such as the UNHCR is insufficient to ensure compliance with minimum standards in these centres. Furthermore, their lack of a specific regulatory framework renders it difficult to monitor the centres or guarantee suitable protocols and procedures to protect the most vulnerable.

Notwithstanding the (insufficient) improvements in the conditions of detention of recently arrived immigrants, the distribution of the CATEs reflects a strategy to increase system efficiency similar to the hotspots designed to respond to the refugee crisis in 2015. The CATEs are not strictly intended to identify between economic migrants and refugees but rather, and more simply, to identify between migrants who may be subject to repatriation procedures and those who are not.

In this regard, the introduction of the CATEs, together with other new entities not strictly involved in detention such as the Assistance, Emergency and Referral Centres (Spanish initials: CAED), which will be discussed below, has led to a two-pronged management approach. There is one system for people of sub-Saharan origin: they are the majority of those detained in the CATEs and, from the CATEs, they may be transferred to the CAEDs or released. However, there is a different system for migrants from countries in the Maghreb, essentially Morocco and Algeria. Given the greater ease with which these nationals can be returned to their countries of origin, they are rarely detained in the CATEs; instead, most are sent to police stations, from where they are directly returned or interned in a CIE for subsequent return or deportation. This approach is confirmed by an analysis of the latest data on CIE operations for the year 2018.

## 5. THE CIEs AFTER THE CATEs. MORE EFFICIENT?

As a result of the confusion arising from the lack of clarity as regards the CATEs, in certain situations they have been equated with the CIEs. Through various spokespersons, the Government has striven to deny this equivalence by indicating the differences. Evidently, differences do exist, as has been highlighted above. For example, the CATEs are intended for the initial detention of recently arrived migrants by sea whereas the CIEs fulfil a different

function, that of interning people for a longer period of up to 60 days in order to execute the expulsion of migrants subject to a deportation or return procedure.

This latter function is one of the requirements established by the Constitutional Court in its judgement 115/1987 in order for the internment of foreign nationals to comply with the constitutional framework. The other two requirements were that internment must be decided individually by the competent judge after analysing the circumstances of each case and must be carried out in non-penal centres specifically intended for this purpose.

Among the various criticisms that have been directed against the CIEs[27], some of the most forceful have been related to non-compliance with the first requirement, i.e. the purpose of internment for deportation. In effect, according to the published data, only 29% of the people interned in CIEs in 2016 were deported and only 37% in 2017. Furthermore, these figures are even lower for CIEs in areas near the borders with Africa (Algeciras and the Canary Islands), where deportations in 2017 did not exceed 15% of the people interned[28].

However, this inclusion of CATEs in the system for managing irregular arrival of migrants, and therefore in the deportation process, has significantly influenced the operation of the CIEs, leading to an increase in the rate of returns. As noted above, only 29% of the people interned in 2016 were deported and only 37% in 2017. However, in 2018 this percentage rose to 58%[29],

[27] VV.AA., *Razones para el cierre de los CIE: del reformismo a la abolición,* OCSPI, Málaga, 2017; Martínez Escamilla, M. (2016): "Centros de Internamiento para extranjeros: Estado de la cuestión y perspectivas de futuro", in *Revista Electrónica de Ciencia Penal y Criminología*, no. 1 8-23, 1-38; Brandariz García, J.A., Fernández Bessa, C., "La Crimigración en el contexto español: el creciente protagonismo de lo punitivo en el control migratorio", in López-Sala, A., Godenau, D., (Coords.), *Estados de contención, estados de detención,* Anthropos, Barcelona, 2017, p. 119 and ss.

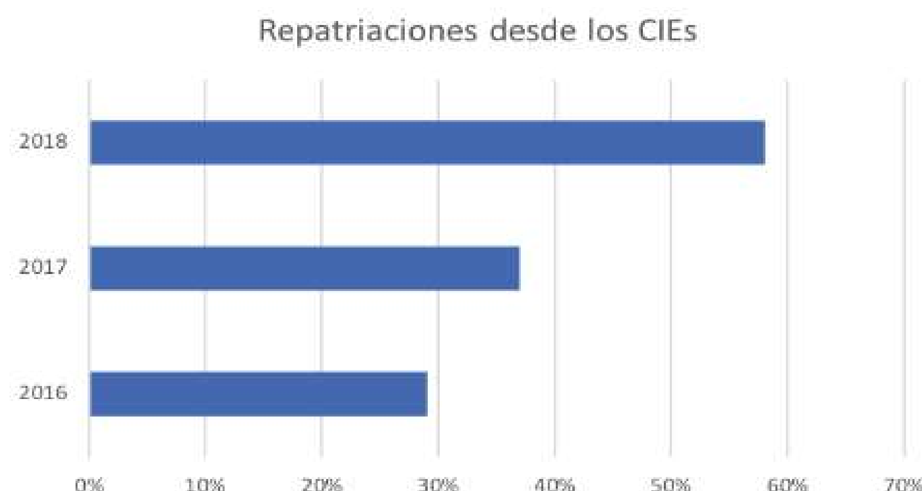
[28] Boza Martínez, D., "El internamiento de personas extranjeras: más allá de los límites de la privación de libertad", in López-Sala, A., Godenau, D., (Coords.), *Estados de contención, estados de detención, op. cit.*, p. 97 and ss.

[29] The data for 2016 and 2017 were obtained from the respective reports of the National Mechanism for the Prevention of Torture. Since the 2018 report of the National Mechanism for the Prevention of Torture had still not been published at the time of writing, the data for 2018 were taken from the 2018 report of the Jesuit Service for Migrants, *Discriminación de origen*, available at <https://sjme.org/wp-content/uploads/2019/06/Informe-CIE-2018-


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

as shown in Figure 1. The total figures also evidence an increase, since 2,205 people were deported from CIEs in 2016 and 3,286 in 2017, whereas in 2018 the figure rose to 4,582.

**Figure 1. Repatriations from the CIEs.**




Compilation based on the reports of the National Mechanism for the Prevention of Torture and Jesuit Service for Migrants (see note 29)

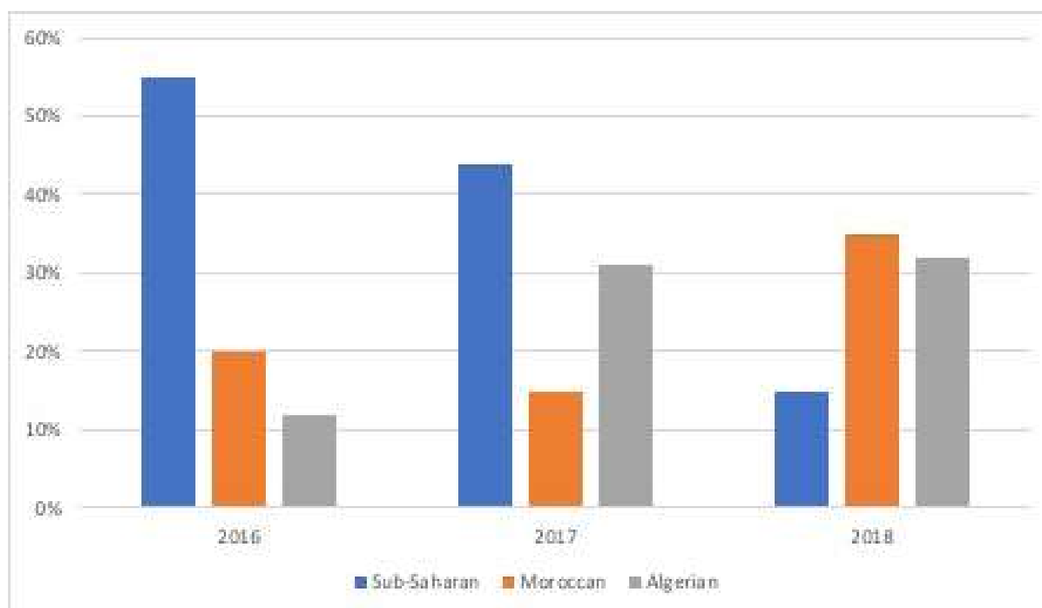
These data should be viewed in conjunction with other relevant figures in relation to CIE operations in 2018 compared to previous periods. For example, the number of sub-Saharan people interned in CIEs fell dramatically last year while the number of North Africans rose, as illustrated in Figure 2.

Thus, in 2016, 55% of the people interned in CIEs were of sub-Saharan origin, 20% were Algerian and 12% Moroccan. In 2017, the majority of internees (44%) were again of sub-Saharan origin, compared with 31% who were Algerian and 18% who were Moroccan. This trend underwent a substantial change in 2018: internees of sub-Saharan origin fell to 15%, Moroccan internees rose to 35% and Algerian internees continued to account for 32%. In consequence, 67% of people interned in a CIE in 2018 came from one of the countries in the Maghreb.

In short, the inclusion of CATEs in the migration management system has led to an increase in the number of people from Morocco who are interned and an increase in internee repatriation rates. This has generated a

SJM.pdf>, which can be considered official because the data were obtained via requests for information on the Transparency Portal.

**Figure 2. CIE internees by nationality.**




Compilation based on the reports of the National Mechanism for the Prevention of Torture and Jesuit Service for Migrants (see note 29)

differential —one might say discriminatory— system which prioritises the repatriation of Moroccan nationals while opens new routes for sub-Saharan people. This has been achieved by means of a new institution, the CAEDs.

## III. THE ROUTE FOLLOWING DETENTION: THE CAEDs

But also the creation of the CATEs that has added to the profusion of acronyms for centres involved in migration management; at the same time, the Sánchez Government approved the creation of another new institution, the Assistance, Emergency and Referral Centres (*Centros de Atención, Emergencia y Derivación*, Spanish initials: CAED). It should be noted that these centres were initially called Short-Term Reception and Assistance Centres (*Centros de Acogida y Atención Temporal*).

The first similarity between the CAEDs and the CATEs is their lack of any legal framework. Although these centres could be located within the scope of the network migration centres referred to in articles 264 and subsequent of RD 557/2011, they were created without the publication of any



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

Ministerial Order. While it appears that the seven CAEDs operating in Spain to date (September 2019) fulfil the purpose of "social integration" referred to in the above-mentioned precepts, there is no evidence of a regulatory framework for any of them.

The Government began to open these centres in the summer of 2018, the first being opened in Chiclana de la Frontera with the capacity for 500 people. Subsequently, others were opened in Merida, Granada, Guadix (province of Granada), Seville, Almeria and Malaga. In total, they have the capacity to accommodate around 1,500 people, and are run along predominantly humanitarian profile rather than security and law enforcement criteria. According to the response to a parliamentary question from member of parliament Carles Campuzano i Canadés[30], the CAEDs are specifically intended for emergency reception and are endowed with a permanent, structural system. The centres are intended to meet the basic needs of migrants after initial assessment in a CATE, for a maximum period of 15 days. During these two weeks, those in charge of the centres, usually the Red Cross, are responsible for helping them contact their family or social networks and for their transfer to accommodation provided via humanitarian aid. These centres were conceived as an alternative to the sports centres that had previously been used to accommodate arrivals on the south coast.

The Government's definition suggests several conclusions. First, the CAEDs complement the CATEs in underpinning the previously mentioned two-pronged system. When people detained in the CATEs are released, they are transferred to the CAEDs for care and assessment. Therefore, the CAEDs represent an alternative to internment in the CIEs in those cases where repatriation is considered unlikely.

Another characteristic of the CAEDs is that they are run by NGOs, primarily but not exclusively by the Red Cross. However, outsourcing management to the third sector raises problems of transparency regarding admission protocols, care provision and departure criteria. This seems to be the most notable negative aspect. These centres play an essential role in managing the arrival of people of diverse origin and high vulnerability. Nonetheless, given the rights affected and the vulnerability of the people involved, this mechanism should be combined with other instruments available to the State in

[30] Response to parliamentary question 184/44383 of the 28th of February 2019, formulated by member of parliament Carles Campuzano i Canadés on the 18th of January 2019.

order to ensure satisfactory management of reception. Indeed, the proper course of action would be for reception to remain the responsibility of public institutions rather than subcontracted entities.

The necessary audit of this type of activity would be better conducted by purely public institutions, instead of outsourcing it to other entities. Given the importance of the task, the rights affected, the highly vulnerable situation of the people concerned and the use of public money, it would be advisable to devise mechanisms to determine the conditions of admission to these centres, how long people can stay in them, the services and care they receive and the criteria for departure from the centres. In this regard, it seems essential that organisations in defence of fundamental rights should be able to enter the facilities as observers.

Transparency in the structure, management and operation of the CATEs and CAEDs is imperative. Consequently, regulations should be approved that include monitoring their compliance in daily operations. Such agreements with NGOs or private institutions should prioritise transparency regarding the mechanisms of action and protection of people.

## IV. CONCLUSIONS

The widespread implementation of CATEs as an instrument for migration management reflects a substantial change in Spanish policy on irregular immigration by sea. Over half of the people arriving in Spain by sea are detained in CATEs.

CATEs are detention centres, but don't fulfil the requirements established in current legislation. Perhaps the most serious consequence of this is that they lack any specific regulatory framework that would enable monitoring of compliance with the stipulated conditions for the detention of these people. Furthermore, a predominantly security and law enforcement approach prevails with respect to people who in most cases have just survived a traumatic experience.

In the first instance, it will be necessary to regulate the care procedures, legal assistance mechanisms, length and conditions of stay and other elements necessary to enable these centres to respect as far as possible the human rights of detainees and, most especially, of those in situations of vulnerability and extreme vulnerability.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 261-277
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.08

The creation of these centres has enabled the Spanish Government to generate two differentiated management systems. One of these targets people of Maghreb origin, who are not usually taken to the CATEs but are instead detained at police stations for subsequent transfer to the CIEs, from where they can be deported with greater ease due to agreements between Spain and their respective countries of origin. The other targets people of sub-Saharan origin, for whom the rate of internment is lower: following detainment in the CATEs, other new mechanisms are brought into play. The alternative to internment in a CIE proposed by the Government for sub-Saharan migrants is reception in a CAED. This has enabled the Sánchez Government to improve the efficiency of the CIEs and increase their repatriation rates, with a reduction in sub-Saharan internees and an increase in those from the Maghreb.

In short, the CATEs represent a novel element in migration management that facilitates deportation. Their creation evidences significant deficiencies, such as unsatisfactory conditions and the lack of a regulatory framework or protocols. However, the goal was not to create a better system but rather one that facilitated discriminatory deportation of Maghreb over sub-Saharan migrants, and this has been successfully achieved through the CATEs.

## REFERENCES

– BOZA MARTÍNEZ, D., "El internamiento de personas extranjeras: más allá de los límites de la privación de libertad", en LÓPEZ-SALA, A., GODENAU, D., (Coords.), *Estados de contención, estados de detención*, Anthropos, Barcelona, 2017.

– BRANDARIZ GARCÍA, J.A., FERNÁNDEZ BESSA, C., "La Crimigración en el contexto español: el creciente protagonismo de lo punitivo en el control migratorio", en LÓPEZ-SALA, A., GODENAU, D., (Coords.), *Estados de contención, estados de detención,* Anthropos, Barcelona, 2017.

– MARTÍNEZ ESCAMILLA, M., "Centros de Internamiento para extranjeros: Estado de la cuestión y perspectivas de futuro", *Revista Electrónica de Ciencia Penal y Criminología*, 18-23, 2016.

– MECANISMO NACIONAL DE PREVENCIÓN DE LA TORTURA, Informe anual 2017, accesible en <https://www.defensordelpueblo.es/wp-content/uploads/2018/07/Informe_2017_MNP.pdf>.

– SERVICIO JESUITA A MIGRANTES, *Informe de 2018. Discriminación de origen*, SJM, 2018, accesible en <https://sjme.org/wp-content/uploads/2019/06/Informe-CIE-2018-SJM.pdf>.

–Vv.Aa., *Razones para el cierre de los CIE: del reformismo a la abolición,* OCSPI, Málaga, 2017.

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

**Citation**: IRAQI, A., «L'investissement direct étranger en tant que facteur géopolitique du Soft Power marocain en Afrique :réflexion interprétative», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 279-297

**Received**: 17 June 2019
**Accepted:** 13 November 2019

# L'INVESTISSEMENT DIRECT ÉTRANGER EN TANT QUE FACTEUR GÉOPOLITIQUE DU SOFT POWER MAROCAIN EN AFRIQUE : RÉFLEXION INTERPRÉTATIVE

Ahmed IRAQI[1]

I. INTRODUCTION – II. IDE ET SOFT POWER MAROCAIN EN AFRIQUE : AMBIVALENCE STRATÉGIQUE –III. JUXTAPOSITION GÉOPOLITIQUE DES IDE MAROCAINS EN AFRIQUE – IV. MISE EN PERSPECTIVE ANALYTIQUE DE L'INFLEXION DE L'INVESTISSEMENT MAROCAIN EN AFRIQUE – V. CONCLUSION.

**RÉSUMÉ :** Les investissements directs étrangers (IDE) sont de nos jours implicitement instrumentalisés par les États, pays d'origine d'IDE, dans l'optique de provoquer une dépendance économique extérieure des pays d'accueil et ce afin de disposer d'un soft power à connotation économique dans le but de défendre *in fine* leurs intérêts géopolitiques. De son côté, le Maroc a fait de ses IDE intracontinentaux un instrument considérable dans le cadre de sa politique africaine notamment en devenant l'un des premiers investisseurs intra-africainsen 2016, sachant que ce statut coïncide entre autres, d'une part avec sa réintégration de l'union africaine et d'autre part avec l'accord de principe qu'il a obtenu pour intégrer la CEDEAO. À ce sujet, ce travail apportera une interprétation analytique qui essayera de décortiquer la ventilation géopolitique des investissements publics et privés marocains en Afrique.

**MOTS CLÉS :** Investissements directs étrangers ; Maroc ; Afrique ; Soft-Power ; Géopolitique.

**LA INVERSIÓN EXTRANJERA DIRECTA COMO FACTOR GEOPOLÍTICO DEL PODER SUAVE MARROQUÍ EN ÁFRICA: REFLEXIÓN INTERPRETATIVA**

**RESUMEN:** La inversión extranjera directa se convertido en un elemento de la política exterior que los Estados instrumentalizan implícitamente. El objetivo es provocar una dependencia económica externa de los países anfitriones. Se trata de una estrategia de un poder blando con connotación económica con el fin de defender en última instancia los intereses geopolíticos. Por su parte, Marruecos ha convertido su inversión intercontinental directa en el extranjero un instrumento clave de su política africana, al convertirse en uno de los primeros inversores intra-africanos en 2016. Esta política coincide, entre otros, con su retorno a la Unión Africana y, por otro lado, con el acuerdo en principio que obtuvo

[1] Doctorant (PhD candidate) en relations économiques internationales à la Faculté des Sciences Juridiques, Economiques et Sociales de Tanger, Université Abdelmalek Essaâdi (Maroc).

para integrar la CEDEAO. En este sentido, este trabajo proporcionará una interpretación analítica que tratará de diseccionar la ventilación geopolítica de la inversión pública y privada marroquí en África.

**PALABRAS CLAVE:** Inversión extranjera directa; Marruecos; África; Soft-Power; Geopolítica.

**FOREIGN DIRECT INVESTMENT AS A GEOPOLITICAL FACTOR OF MOROCCAN SOFT POWER IN AFRICA: INTERPRETIVE REFLECTION**

**ABSTRACT:** Foreign direct investment is today implicitly instrumentalised by the States, country of origin of FDI, with the aim of causing an external economic dependence of the host countries and this in order to have a soft power with economic connotation in order to ultimately defend their geopolitical interests. For its part, Morocco has made its intracontinental FDI a considerable instrument within the framework of its African policy, in particular by becoming one of the first intra-African investors in 2016, knowing that this status coincides, among others, with his return to the African Union and on the other hand with the agreement in principle he obtained to integrate ECOWAS.In this regard, this work will provide an analytical interpretation that will try to dissect the geopolitical ventilation of Moroccan public and private investments in Africa.

**KEY-WORDS :** Foreign direct investment; Morocco; Africa; Soft-Power; Geopolitics.

## I. INTRODUCTION

La prise de conscience étendue et manifeste des pays africains quant à l'intérêt des politiques d'attraction des investissements étrangers et de leur impact sur l'économie nationale a mobilisé ardemment la prédation économique des firmes multinationales (FMN) occidentales vis-à-vis du continent à fortiori quand celui-ci présente des opportunités d'affaires et d'investissement inouïes eu égard aux déficiences structurelles et à l'arriération endémique qu'il présente.[2]

Dit autrement, le temps des hostilités mutuelles est réciproquement révolu, quand d'un côté l'Afrique, région particulièrement contrastée, craignait une ère néocoloniale avec la montée de mouvements de déprédation économique et de l'autre côté, l'occident, confronté au spectre de la péremption des marchés intérieurs, en quête d'alternatives économiques, redoutait l'insécurité et l'instabilité. Subséquemment, le Maroc ne demeure pas des moindres en

[2] Iraqi, A., «Étude descriptive de l'état des lieux et des perspectives de développement des infrastructures en Afrique subsaharienne : Entre attraction et répulsion des investissements étrangers», Mohammed Rajaa (Dir.), *La logistique de demain, l'essence de l'excellence de la chaîne logistique* (Ouvrage collectif), p. 21-39.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

devenant le premier investisseur intra-africain en 2016[3] ainsi que le 5ème investisseur en Afrique dans le monde la même année[4], en réintégrant l'union africaine en 2017 et en obtenant l'accord de principe pour adhérer à la CEDEAO durant la même année[5]. Constat factuel, tous les indices indiquent indéniablement que le royaume cherche à s'ériger en puissance régionale après avoir mis de son côté toutes les variables pour s'assurer de la réussite de sa stratégie africaine.

En effet, il est inéluctable que l'impact outre-économique des investissements marocains en Afrique a joué un rôle amplificateur dans l'offensive africaine de l'État chérifien à travers l'implication des plus grosses entreprises nationales des principaux secteurs économiques à l'image d'Attijari Wafa Bank, de Maroc télécom, d'Addoha et de l'OCP.

Cette stratégie d'incorporation de l'investissement au service du politique a même vu l'implication effective et personnelle du souverain marocain qui y a interprété le rôle de disséminateur à travers ses multiples tournées africaines précédant la signature d'accords commerciaux et d'investissement et donnant par-là, naturellement, un caractère régalien à ces initiatives outre un discernement rédhibitoire aux opposants éventuels. Au-delà du poids du souverain, l'impact des mastodontes marocains est d'autant plus profond dans leur incarnation de l'image du royaume en tant que puissance émergente sur le continent, interprétant par-là, implicitement, non seulement le simple statut d'opérateurs économiques étrangers mais la fonction d'ambassadeurs du Maroc, rôle qu'on va circonscrire à la lumière des développements suivants. Entretemps, avant de développer notre analyse, il s'avère judicieux de procéder à une dichotomie de la notion de Soft-power qui a été pour la première fois pensée[6] par Joseph Samuel NYE en la qualifiant d'alternative voire de substitut à la force militaire et coercitive classique dite Hard-power qui intervient après une prise de conscience élargie du fait que le pouvoir politique et

[3] Banque africaine de développement, Organisation de coopération et développement économiques, Programme des nations unies pour le développement, *Perspectives économiques en Afrique*, 2017, p. 54-56.

[4] *Ibid.*

[5] Communauté économique et des États de l'Afrique de l'ouest, *Communiqué final de la cinquante et unième session de la conférences des chefs d'état et de gouvernement de la CEDEAO*, p. 10 (voir <https://www.ecowas.int/wp-content/uploads/2019/01/2017-51st-Session-June_1.pdf>.

[6] Nye, J., *Bond to lead : The changing nature of American power*, Basic books, 1990.

la force tous azimuts ne sont plus garants d'un positionnement robuste sur l'échiquier mondial.

Ainsi, NYE définit cette force douce par la capacité d'un État à obtenir ce qu'il souhaite d'un autre État sans que celui-ci n'en soit même conscient à travers l'influence, l'attraction et la séduction.[7] Par ailleurs, l'auteur identifie trois grandes catégories construisant les sources du soft power, en l'occurrence, la culture, les valeurs politiques et les politiques publiques.[8]

Cette définition nous offre un point de départ pour analyser la relation du soft power avec l'implantation internationale des investissements en tant qu'instrument de puissance nationale notamment dans le cas du Maroc en Afrique. Tout aussi important, voire plus, notons que le soft power marocain repose essentiellement sur les dimensions culturelle[9], religieuse et sécuritaire[10] de sa diplomatie concomitamment à son aspect économique. Toutefois, il est important de retourner à la définition du Hard power qui conjugue la force militaire au pouvoir économique étant donné qu'on peut menacer et inciter d'autres États en leur imposant des sanctions économiques voire un isolement économique. L'angle de vue qu'on adopte dans ce sens n'est pas relatif aux menaces mais plutôt à la réputation liée à l'image des investissements et des FMN étrangères auprès des populations locales. À partir de cet ancrage théorique, nous pouvons souligner que, de prime à bord, il s'ensuit que cette relation IDE et Soft-power tient au fait qu'elle est un élément d'un ensemble plus vaste avec des composantes essentiellement hétérogènes. Celui-ci englobe non seulement la diplomatie économique mais aussi la diplomatie publique, et s'étend même bien au-delà. Les FMN marocaines investissant en Afrique constituent le cœur de la diplomatie économique mais agissent aussi en tant qu'acteurs de la diplomatie publique en mobilisant « différents

[7] NYE, J., *Soft Power: The Means to Success in World Politics*, Public Affairs, 2004

[8] *Ibid.*

[9] IRAQI, A.,«Étude des composantes élémentaires du Marketing pays du Maroc en Afrique», *Proceedings des actes du colloque international sur le management et la stratégie des organisations CIMSO 2018*, 2018, p. 477-492.

[10] IRAQI, A.,«L'articulation de la dimension sécuritaire et religieuse dans la politique étrangère du Maroc en Afrique subsaharienne : Branding religieux à double face», *International Journal of Innovation and Applied Studies*, 2019, p. 890-899.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

moyens pour communiquer l'image d'un Maroc prospère et conscient » des enjeux de sa coopération sud-sud gagnant-gagnant.[11]

Cela dit que ces IDE tant publics que privés destinés à l'Afrique renforcent le soft power marocain au niveau régional au sens le plus large du terme en renforçant son écho à travers le continent mais aussi le monde, puisqu'ils véhiculent l'image d'un pays qui a tracé une stratégie africaine claire et pivotée par le souverain qui s'implique notoirement et activement de façon dynamique à tous les niveaux.[12]

En Afrique, le royaume a fait usage d'une diplomatie économique libérale au service de sa politique africaine. Outre la multiplication de ses investissements directs étrangers et l'intégration des instances multilatérales panafricaines telles que l'union africaine et la CEDEAO dont l'impact sur le renforcement des IDE dans le bloc régional a été confirmé[13], la politique étrangère marocaine a toujours misé sur la diffusion d'une identité culturelle et religieuse singulière en élargissant son espace géoculturel et en jouant sur une identité marquée par l'ouverture et la tolérance pour tenter d'exercer un soft-power toujours impulsé par les initiatives royales.[14]On affirme par-là que la réputation marocaine en Afrique demeure toujours définie par son identité religieuse[15] plus que son dynamisme économique, du moins pour le moment.Cependant, s'agissant de l'impact réel de l'image des IDE sur son soft-power, bien qu'ils soient notablement difficiles à mesurer, ils ont inéluctablement un effet implicite et indirect sur le long terme.

## II. IDE ET SOFT-POWER MAROCAIN EN AFRIQUE : AMBIVALENCE STRATÉGIQUE

D'après la cartographie globale de l'implantation sectorielle des investissements marocains en Afrique [Voir Figure 1], nous remarquons limpidement une nette densification des investissements marocains dans les pays de l'Afrique de l'ouest. Or, en sollicitant la finalité du concept de soft-power et partant du fait qu'une telle approche est normalement opérée de façon indirecte pour convaincre et persuader les opposants et les détracteurs à adhérer aux idéologies et aux intérêts nationaux, la stratégie marocaine dans cette optique est relativement contrastée.

Ce qui laisse dire à priori que les IDE marocains obéissent à une logique historique, étant donné que géographiquement parlant, la zone de confort


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

habituelle du Maroc en Afrique a toujours été l'Afrique de l'ouest[16] et ce pour des raisons d'ordre religieux, culturel et commercial[17].

De même qu'il est d'importance de considérer le soft-power comme une alternative résolument tournée face aux non partisans, à savoir que celui-ci doit être naturellement régi au service de l'action diplomatique contre antagoniste.

En d'autres mots, à première vue, sans pour autant nuancer le scope de notre étude, les IDE marocains se manifestent en Afrique à l'opposé de ce qui devrait être selon l'approche du soft-power. En effet, dans le cas du Maroc, d'une part, les régions les plus partisanes à la pseudo RASD, en l'occurrence l'Afrique australe, l'Afrique de l'est et l'Afrique du nord, sont celles qui accueillent le moins d'investissements, en particulier en termes de concentration et de diversification sectorielles. D'autre part, on remarque une politique de densification d'IDE dans les régions les plus coutumières aux investissements marocains, à savoir l'Afrique de l'ouest et l'Afrique centrale, d'ailleurs, cette dernière n'abrite aucun pays qui reconnait le pseudo RASD.[18]

Conséquemment, la ventilation des IDE marocains sur le continent est paradoxale puisqu'elle remet en cause son impact outre-économique à travers sa présence timide dans les régions où le Maroc est modestement connu voir détraqué par le régime au pouvoir. À notre avis, ce contraste apparent dans la manœuvre d'implantation des IDE marocains qu'on qualifie d'ambivalence stratégique, peut avoir deux explications ; la première se base sur une hypothèse de réticence économique du Maroc vis-à-vis de ces pays qui reconnaissent la pseudo RASD et qui sont subdivisés en deux groupes, à savoir, d'un côté les grandes puissances économiques du continent qui concurrencent historiquement le royaume comme le Nigéria, l'Algérie, l'Afrique du sud, l'Égypte et l'Angola et où le royaume se réserve et/ou n'est pas permis d'investir à cause de la concurrence directe, et de l'autre côté les pays africains à régimes

---

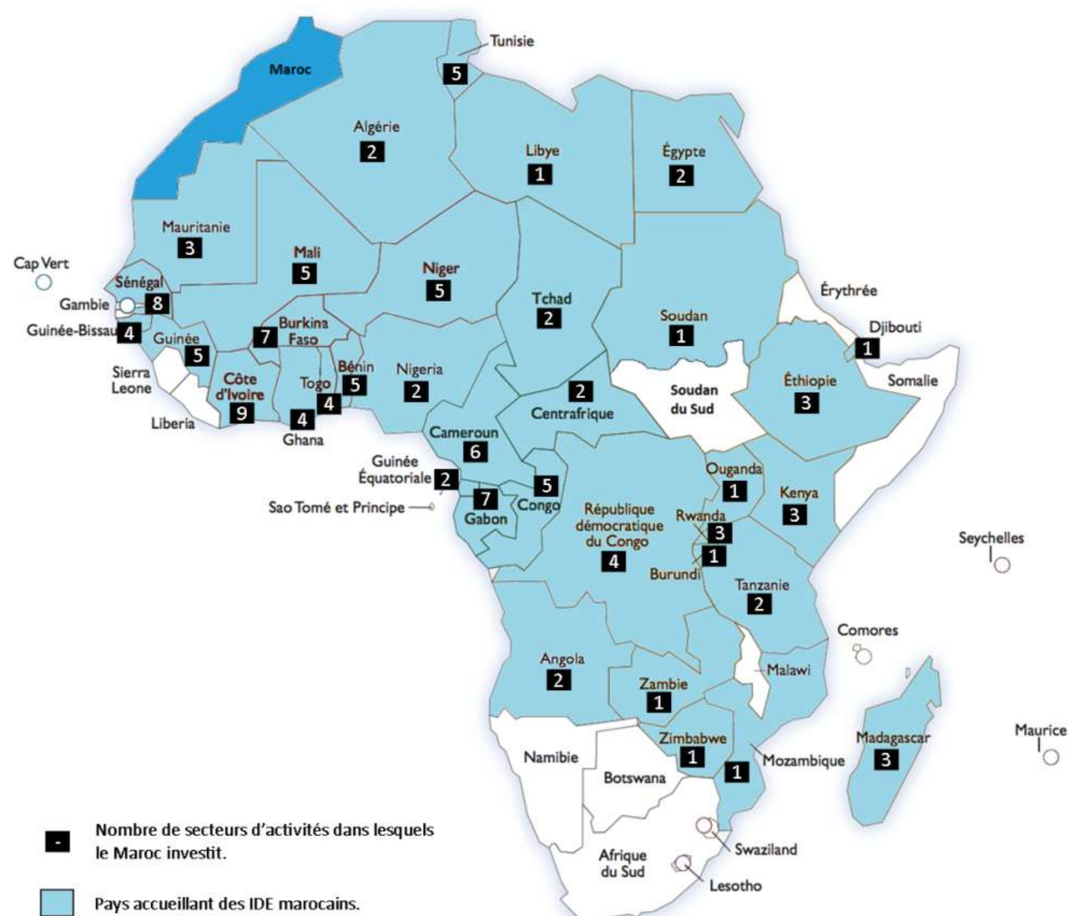
[16] Office des Changes, *Échanges Maroc-Afrique Subsaharienne*, 2017, p. 24-33

[17] Iraqi, A.,*La Maroc et l'Afrique, ébauche nostalgique d'une histoire multiséculaire et pluridimensionnelle*, éditions Edilivre-Aparis, 2019

[18] Iraqi, A., «Répartition cartographique des investissements directs étrangers marocains en Afrique : Lecture géostratégique», *Public & Non profit management Review*, vol. 4.2, 2019, p. 39-56.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

**Figure 1 : Cartographie globale des investissements directs étrangers marocains en Afrique**




*Source : Auteur*

anocratiques[19]qui souffrent d'habitude du ralentissement de leur économie et où le taux de rendement de l'investissement étranger est relativement très faible ou comporte beaucoup trop de risques pour les investissements marocains publics et privés, notamment dans le cadre de due diligence relative à l'investissement.

La deuxième hypothèse suppose que le Maroc possède une stratégie de Soft-power dite de confortation à la base de la massification de ses IDE dans les régions où il est habituellement et historiquement omniprésent pour pé-

[19] En référence à l'anocratie qui se rapporte à un régime politique qui n'est ni amplement démocratique ni pleinement autocratique.

renniser davantage sa présence et son hégémonie économique. En somme, Si l'on s'intéresse de manière plus précise à ces deux hypothèses, on constatera que les problématiques qu'elles soulèvent se complètent et peuvent justifier mutuellement l'approche stratégique émancipatoire employée par le Maroc en Afrique. Néanmoins, nonobstant cela, le royaume est dans l'obligation d'élargir le champ d'action géographique de ses investissementsafricains que ce soit pour son intérêt économique à la lumière des opportunités d'affaires qu'offre le continent ou pour l'incidence politique y afférentedans le but d'élargir la liste de ses alliés et imposer *in fine* son leadership continental

## III. JUXTAPOSITION GÉOPOLITIQUE DES IDE MAROCAINS EN AFRIQUE

Pour mieux appréhender la distribution géopolitique des IDE marocains en Afrique, nous avons choisi de reposer notre juxtaposition, à travers une approche synchronique[20], sur la base de deux variables, en l'occurrence les visites officielles du souverain en Afrique en addition à la langue des pays ciblés. Nous justifions ce choix par la place pivot que joue le roi dans l'orchestration de la politique étrangère du Maroc et en particulier dans sa stratégie africaine. Loin d'être aberrant, le choix de la variable linguistique est quant à lui motivé par l'hypothèse qui marie naturellement la montée en puissance du royaume en Afrique avec la subtilité de ses liens vis-à-vis des pays africains majoritairement francophones. Cette dernière thèse trouve son fondement de base dans l'étroitesse des relations multiséculaires et multidimensionnelles liant le royaume à cette partie de l'Afrique.[21]

### 1. L'EFFET CATALYSEUR DES VISITES DU SOUVERAIN :

La mise en relief transposant le nombre de visites effectuées par le roi Mohamed VI en Afrique depuis son intronisation par rapport au nombre de pays africains [Voir Figure 2] ainsi qu'au nombre des secteurs d'activités [Voir

[20] Sans prendre en considération l'évolution des IDE marocains en Afrique dans le temps (approche diachronique).

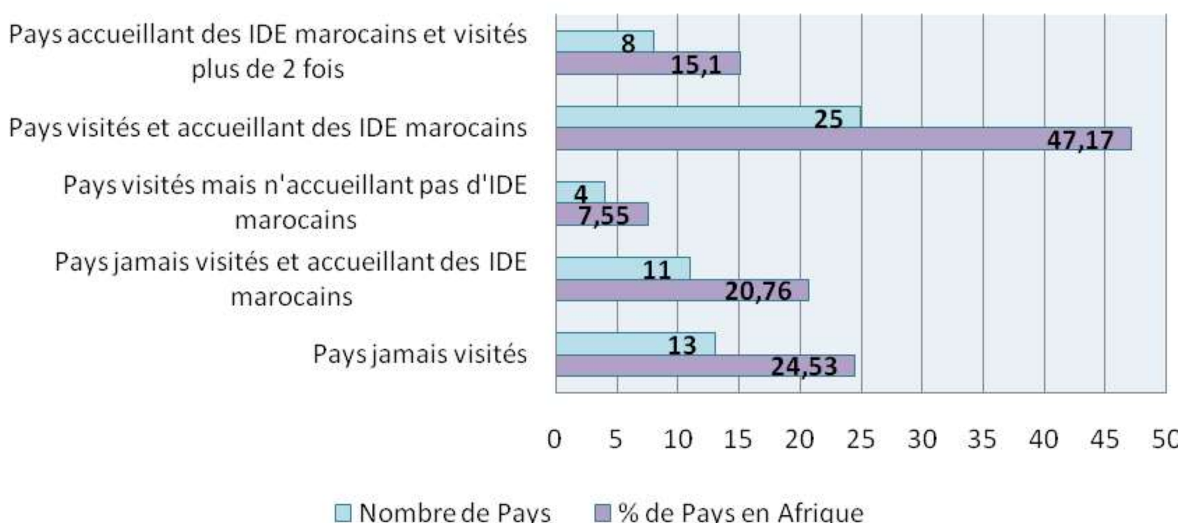
[21] *Ibid.*



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

Figure 3] dans lesquels les entreprises marocaines investissent[22] démontre une corrélation logique, faisant des déplacements du souverain le fil d'ariane de la stratégie africaine du Maroc. Dans le même ordre d'idées, en un peu plus de 15 ans, 53 visites royales ont été effectuées dans 29 pays africains[23][24] sous la houlette du roi Mohamed VI. D'ailleurs, comme un symbole, les visites africaines du souverain chérifien dépassent de très loin ses visites aux pays du Maghreb et des pays du Moyen orient, ce qui nourrit davantage la réflexion que nous voulons mettre en exergue dans ce sens eu égard au caractère ostentatoire de ces visites.

**Figure 2 : Corrélation entre le nombre des visites du Roi Mohamed VI en Afrique et les pays dans lesquels le Maroc investit - 2018[25]**




*Source : Auteur*

Concrètement, selon la figure précédente, on constate que 25 des 29 pays africains visités par le souverain accueillent des IDE marocains soit l'équivalent de 47,17% du total des pays de l'Afrique, contre seulement 4 pays visités et qui n'accueillent aucun investissement chérifien soit 7,55% de l'ensemble des pays africains. De la même manière, on conclue que seulement 11 pays africains jamais visités par le roi du Maroc voient entrer des IDE marocains soit 20,76%. Cependant, dans toute l'Afrique, seuls 13 Pays n'ont jamais reçu d'IDE marocains et n'ont aussi jamais étés visités par le souverain, soit 24,53%.

Enfin, on remarque que le souverain a visité plus de 2 fois 8 pays africains, soit 15,1% des pays du continent. La somme de ces rencontres bilatérales vis-à-vis ces 8 pays est de 32 visites, équivalentes à 60,38% de l'intégralité des visites qu'a effectués le souverain marocain sur le continent depuis son accession au trône. Aussi, dans ces 8 économies, la moyenne des secteurs dans lesquels le royaume investit est de 6 secteurs, ce qui veut dire presque le double de sa moyenne sur le continent, à savoir 3,38 secteurs. Au regard de toutes ces considérations, nous estimons que le foisonnement tentaculaire du statut du souverain marocain, en qualité de commandant des croyants, de chef d'État et de roi en même temps, offre aux investissements marocains dont les accords sont signés sous sa présidence effective et celle des chefs d'État des pays hôtes, un caractère consigné et solennel, d'où la connotation géopolitique de ces IDE.

Pareillement, pour entériner l'effet accélérateur des visites royales en termes d'IDE, les données de la cartographie que nous avons conçu dans ce sens [voir Figure 3] démontrent une connexité ostensible entre la récurrence des visites du souverain[26] et la diversification sectorielle des IDE marocains,[27] à l'instar des cas du Sénégal, du Gabon, de la Côte d'ivoire, de la Guinée, du Cameroun et du Mali qui ont accueilli pas moins de 5 visites royales et qui ont reçu des IDE marocains touchant à, respectivement, 8, 7, 5, 3 et 2 secteurs d'activités.

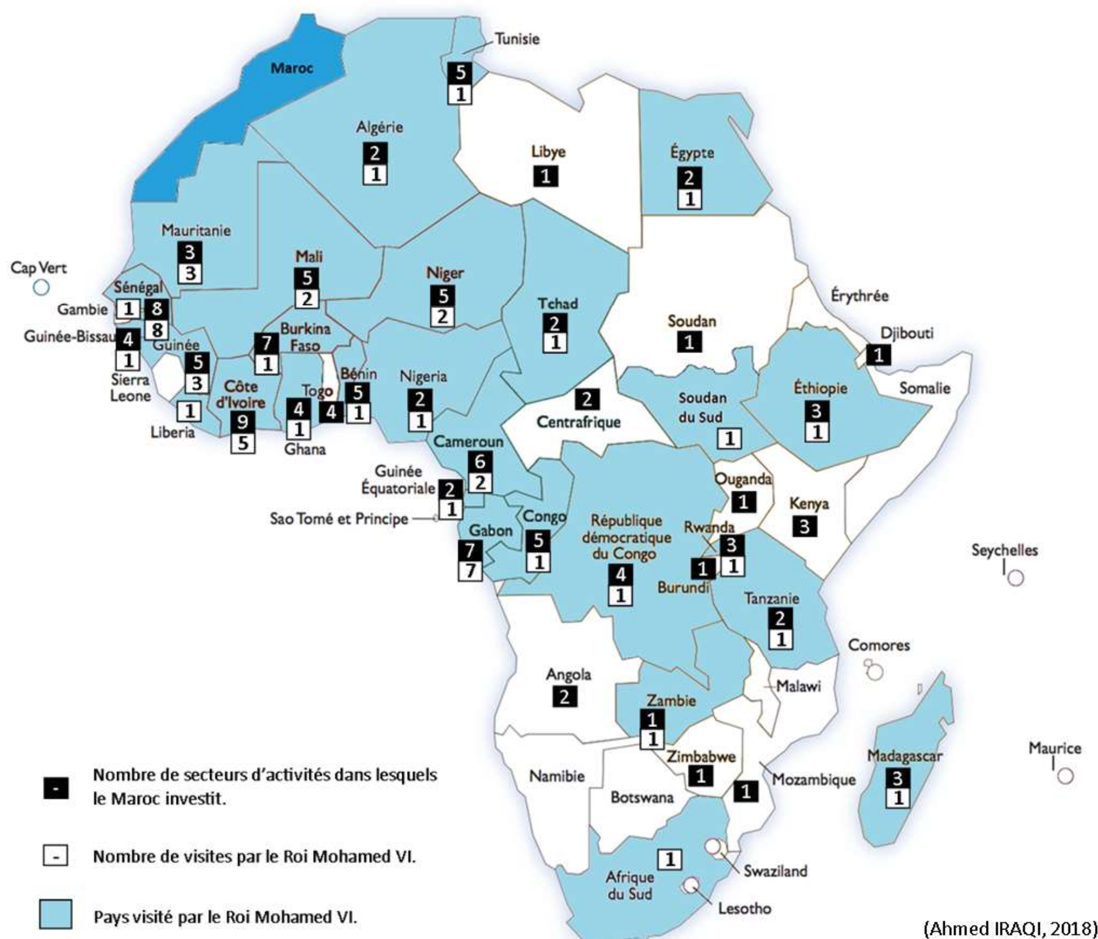
Ipso facto, moins les visites royales étaient récurrentes dans un pays, moins les investissements marocains l'étaient en termes de ségrégation sectorielle. Cette affirmation renvoie au double enjeu des visites royales dans la mesure où elles peuvent être alignées aussi bien sur une perspective de consolidation des acquis que sur une manœuvre d'initiation d'investissements. Enfin, loin d'être une variable de corrélation conditionnelle, les retombées outre-politiques des visites du roi sont pour autant omniprésentes et demeurent un facteur stimulant à considérer attentivement dans toute réflexion géopolitique touchant à la stratégie africaine du royaume.

[26] En référence à 2 visites ou plus.

[27] En référence à 3 secteurs ou plus.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

**Figure 3 : Carte de corrélation entre le nombre des visites du Roi Mohamed VI en Afrique et le nombre des secteurs d'activités dans lesquels le Maroc investit**




*Source : Auteur*

## 2. LA DIMENSION LINGUISTIQUE EN TANT QUE DÉTERMINANT D'IMPLANTATION DES IDE MAROCAINS EN AFRIQUE :

Certes, la langue facilite les affaires et la négociation, à défaut, les différences linguistiques peuvent hypothétiquement dans certains cas, entraver l'intention d'investissement même si cela reste, au jour d'aujourd'hui, un obstacle surmontable voire illégitime avec le consensus du monde des affaires sur l'anglais en tant que langue des affaires voire en tant que langue universelle.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

La [Figure 4] met au diapason les investissements marocains en Afrique par rapport aux différentes zones linguistiques du continent. Partant d'un aperçu global de la carte, à première vue, on ne constate aucune observation particulière, cependant, en décortiquant les dessous de la carte, on s'aperçoit de l'existence d'une divergence de localisation en rapport avec la langue comme élucidé dans le tableau suivant.

**Tableau 1 : Tableau synthétique multi-variable de la répartition régionale du Stock des IDE marocains en Afrique**

| | Nombre de Pays | Nombre de pays accueillant les IDE marocains | Taux de pénétration des IDE marocains par zone linguistique | Moyenne des Secteurs d'activités dans lesquels le Maroc investit |
|---|---|---|---|---|
| **Afrique francophone** | **25** | **22** | **88%** | **4,27** |
| **Afrique lusophone** | **5** | **3** | **60%** | **2,33** |
| **Afrique anglophone** | **18** | **8** | **44,45%** | **2,25** |

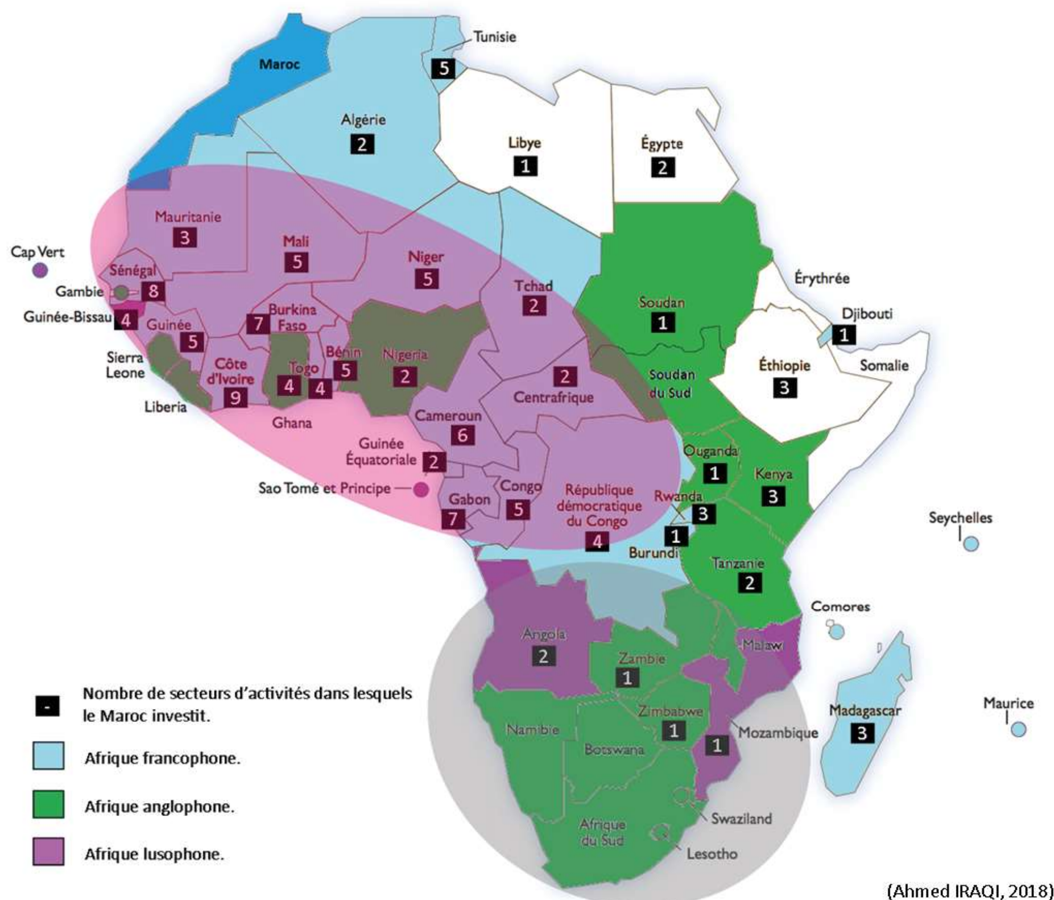
*Source : Auteur*

Les résultats du Tableau montrent que le Maroc a fait de l'Afrique francophone sa prédilection en tant qu'espace préféré en matière d'implantation d'IDE avec un taux de pénétration moyen de 88% et une moyenne d'investissement sectoriel de 4,27. Dans cette même lignée arrive ensuite l'Afrique lusophone avec un taux de pénétration de 60% et une moyenne sectorielle de 2,33. Enfin, l'Afrique anglophone reste la région la moins pénétrée par les investissements marocains avec un taux de pénétration au-dessous de la moyenne, soit 44,45% et une moyenne sectorielle de 2,25. Derrière cette tendance accentuée, il n'est pas superfétatoire de souligner le rôle prépondérant du partage de la langue française et de la proximité géographique sachant que la majorité des pays francophones sont localisés en Afrique de l'ouest. L'explication que nous avançons dans ce cadre s'articule autour d'une conjonction de facteurs interdépendants qui oscillent principalement autour des


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

déterminants géographiques et linguistiques, à l'instar des rapprochements historiques, religieux et culturels entre la région et le royaume.

**Figure 4 : Carte de corrélation entre l'implantation des IDE marocains en Afrique et la dimension linguistique[28]**




*Source : Auteur*

## 3. INVESTISSEMENTS MAROCAINS EN AFRIQUE : STRATÉGIE ABSOLUE OU CONDITIONNÉE ?

Si on reprend analytiquement la cartographie élucidant la répartition des IDE marocains en Afrique [Voir Figure 1], on constatera vite la nature hétéroclite de la géo-économie des pays africains reconnaissant le pseudo RASD. En d'autres mots, ces derniers se caractérisent distinctivement comme étant des puissances continentales, des pays pauvres, des pays voisins, des pays éloignés, des pays de culture proche ou des pays de culture résolument différente, observation qui entrave toute conclusion de caractéristique commune dans cette

optique. Par ailleurs, tout lecteur avisé fera face à deux hypothèses explicatives dans ce sens dans la mesure où d'une part, les investissements marocains sont implantés dans 11 des 15 pays reconnaissant l'État fictif, soit un taux de présence de 73,34%, ce qui nous pousse à écarter toute hypothèse de démobilisation avérée à l'égard des détracteurs africains du royaume.

D'autre part, la présence sectorielle du Maroc cette fois-ci reste relativement timide et considérablement déséquilibrée comparativement aux alliés de la cause marocaine. [Voir figure 5] Constat qui déclenche des interrogations de stratégie préméditée.

Subséquemment, au-delà de ces considérations visiblement anodines, nous pourrons soulever trois caractéristiques partagées par la majorité des pays alliés de l'État fictif [voir Tableau 2]. Ce faisant, il ressort de ces données certaines justifications qui argumentent l'absence ou la faiblesse éventuelle de la pénétration des IDE marocains dans quelques pays ennemis de l'intégrité territoriale marocaine, à commencer par la distance géographique, caractéristique partagée par 66,67% des pays reconnaissant la pseudo RASD, en revanche, de nos jours, dans un monde notoirement globalisé, l'éloignement géographique n'est plus un motif justifiant le désintérêt économique. Ensuite, 73,34% de ces pays ne sont pas francophones, ce constat est le plus partagé parmi ces pays, ce qui laisse planer un doute derrière la considération importante de cette constatation en tant que cause directe de réticence. Enfin, 53,34% des pays concernés sont des puissances économiques concurrençant le Maroc sur l'échiquier continental, cet argument est par conséquent tout à fait logique si on prend en considération la concurrence que mènent les FMN marocaines qui entreprennent sur le continent et en particulier celles qui performent dans les secteurs très concurrencés comme les banques, les télécoms, l'immobilier et autres.

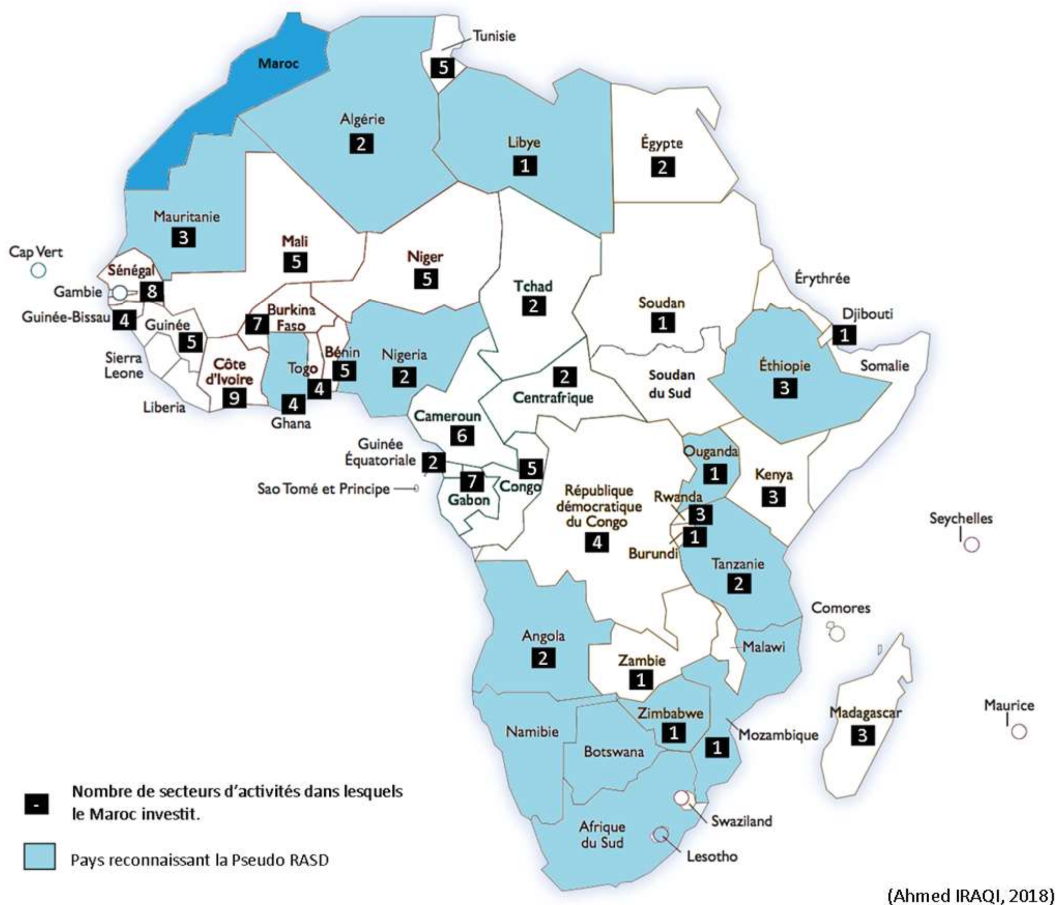
**Tableau 2 : Caractères spécifiques partagés par les pays reconnaissant le pseudo RASD**

| Caractéristique | Pays | % des Pays reconnaissant la pseudo RASD |
|---|---|---|



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

**Figure 5 : Carte de corrélation entre les pays reconnaissant la pseudo RASD et le nombre des secteurs d'activités dans lesquels le Maroc investit**




*Source : Auteur*


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

| | | |
|---|---|---|
| **Éloignement géographique** | Afrique du Sud - Lesotho - Botswana - Namibie - Zimbabwe - Mozambique - Angola - Tanzanie - Ouganda - Éthiopie | 66,67% |
| **Pays anglophone ou lusophone** | Nigéria - Ghana - Angola - Namibie - Botswana - Afrique du sud - Lesotho - Zimbabwe - Mozambique - Ouganda - Tanzanie | 73,34% |
| **Puissance économique continentale**[29] | Algérie - Afrique du sud - Libye - Nigéria - Éthiopie - Tanzanie - Ghana - Angola | 53,34% |

*Source : Auteur*

Pour discerner tout cela, nous reprendrons le débat de la notion du relatif en affirmant que rien n'est absolu, tout est relatif. En effet, s'agissant de la stratégie d'investissements marocains en Afrique, son socle est largement dépendant de plusieurs facteurs à la fois endogènes, et notamment la compétitivité internationale des FMN et leur connaissance des marchés africains, et exogènes de par le risque pays, les barrières à l'entrée et le retour sur investissement.[30]

S'il faut trancher sur le cheminement stratégique emprunté par les IDE marocains en Afrique dans un cadre de ciblage, toutes les données montrent que le royaume a opté pour une stratégie absolue préconisant par-dessus-tout le motif économique et rejetant toute différenciation d'ordre politique et ce malgré l'instrumentalisation implicite du vecteur économique.

## IV. MISE EN PERSPECTIVE ANALYTIQUE DE L'INFLEXION DE L'INVESTISSEMENT MAROCAIN EN AFRIQUE :

Dans une approche globale, il est certain que toute incidence économique induit des décisions politiques défendant l'intérêt légitime de l'État. Ainsi, compte tenu des secteurs ciblés par les investissements marocains en Afrique, il est clair que l'impact économique sur les pays d'accueil est avantageux sans pour autant commenter son déséquilibre relatif. Toutefois, nous attestons

[29] Calculée selon le classement (Top 10) des pays africains par produit intérieur brut (PIB). (Source : Banque mondiale, *Gross domestic product*, 2018)voir : <https://databank.worldbank.org/data/download/GDP.pdf>.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 279-297
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.09

qu'il est complexe de qualifier, d'évaluer et de généraliser l'incidence politique des IDE marocains en Afrique étant donné que chaque économie africaine est singulière de par ses faiblesses économiques et structurelles ainsi que par ses enjeux géopolitiques.

Suivant une réflexion analytique basée sur les éléments précités, les IDE marocains devraient alors naturellement se focaliser sur les pays africains présentant un avis contrasté vis-à-vis l'intégrité territoriale du royaume, or, la réalité est tout autre, puisque la ventilation des IDE marocains n'est caractérisée par aucune différenciation notable hormis une concentration sectorielle dans les pays de l'Afrique de l'ouest et de l'Afrique centrale.

Pour mieux positionner notre réflexion, nous reprendrons le succès diplomatique du Maroc lors de sa réintégration de l'union africaine en 2017 après avoir obtenu l'accord de 42 pays africains, dépassant ainsi largement le nombre de 28 accords favorables nécessaires à cet effet. Nous citons ce succès puisqu'il intervient après l'année 2016 qui a été marquée par l'explosion des IDE marocains en Afrique, plaçant par-là le royaume à la tête du classement des investisseurs intra-africains.[31] Cette offensive a manifestement engendré une incidence politique puisqu'elle a influencé l'accord de certains pays africains qui reconnaissaient d'office le pseudo RASD mais qui ont toutefois exprimé leur accord pour l'adhésion du Maroc au sein de l'UA à la manière du Nigéria, du Ghana, de l'Éthiopie, de la Tanzanie et de la Mauritanie.

Dans un sens comme dans l'autre, certes, les IDE marocains ne représentent pas à eux seuls l'unique explication derrière ce revirement politique de certains États africains dans la mesure où, les instances diplomatiques marocaines pivotées par le souverain en personne ont employé des efforts considérables à travers des tournées marathoniennes précédent l'assemblée générale de l'UA dans le but de défendre leur retour au sein de la famille panafricaine. Le plus frappant dans cet évènement n'est autre que les visites effectuées par le souverain et les membres de sa délégation officielle au Nigéria, en Éthiopie et en Tanzanie, trois pays reconnaissant la pseudo RASD, seulement trois mois avant la tenue de l'assemblée générale de l'UA pour signer des accords de coopération et notamment d'implantation d'investissements marocains. Évidemment, par la suite, les trois pays ont accueilli favorablement le retour

[31] Banque africaine de développement, Organisation de coopération et développement économiques, Programme des nations unies pour le développement, *Perspectives économiques en Afrique*, 2017, p. 54-56

du royaume à l'UA. Aux vues de ces constats, il s'avère clairement que les IDE peuvent potentiellement jouer un rôle déterminant dans les considérations politiques des enjeux économiques, par conséquent, les investissements marocains dans les pays reconnaissant le pseudo RASD auront une incidence politique certaine à long terme à condition d'être conjuguées à d'autres variables interpellant des mécanismes diplomatiques complémentaires et adéquats aux spécificités singulières des pays concernés.

## V. CONCLUSION

En définitive, dans son acception la plus ample, en tenant compte de ces enjeux, et partant du fait qu'il fait partie intégrante de l'histoire millénaire et de l'avenir prometteur du continent, le Maroc, dans sa localisation à l'interface entres les principaux dynamos du système économique mondial et des territoires africains, a manifestement amplifié son offensive économique *sui generis* aux répercussions profondément politiques en Afrique à travers une vision royale longue-termiste et intégrée, faisant de l'Afrique l'alpha et l'oméga de ses perspectives de coopération agissante et portant comme credo la coopération sud-sud, le partenariat gagnant-gagnant et le codéveloppement. Cette densification de liens avec l'Afrique, synonyme de diversification de ses débouchés économiques, lui sera amplement bénéfique et constituera pour son économie un réel levier de développement tout azimut, répercussion qui se reflétera sensiblement sur son taux de croissance sur le court et le moyen terme au-delà des retombées outre-économiques qui pourront être instrumentalisées à bon escient dans l'instauration de son leadership régional.

### REFERENCES BIBLIOGRAPHIQUES

– IRAQI, A., «Étude des composantes élémentaires du Marketing pays du Maroc en Afrique», *Proceedings des actes du colloque international sur le management et la stratégie des organisations CIMSO 2018*, 2018.

– IRAQI, A., «Étude descriptive de l'état des lieux et des perspectives de développement des infrastructures en Afrique subsaharienne : Entre attraction et répulsion des investissements étrangers», Mohammed RAJAA (Dir.), *La logistique de demain, l'essence de l'excellence de la chaîne logistique* (Ouvrage collectif).

– IRAQI, A., «Répartition cartographique des investissements directs étrangers marocains en Afrique : Lecture géostratégique», *Public & Non profit management Review*, vol. 4.2, 2019.

– IRAQI, A.,«L'articulation de la dimension sécuritaire et religieuse dans la politique étrangère du Maroc en Afrique subsaharienne : Branding religieux à double face», *International Journal of Innovation and Applied Studies*, 2019.

– IRAQI, A.,*La Maroc et l'Afrique, ébauche nostalgique d'une histoire multiséculaire et pluridimensionnelle*, éditions Edilivre-Aparis, 2019.

– IRAQI, A.,*La stratégie du Maroc en Afrique subsaharienne : Diplomatie polymorphe, soubassements, limites et enjeux*, Éditions universitaires européennes, 2019

– LORD, C.,«Diplomatie publique et *soft power*», *Politique américaine*, Vol. 3, N. 3, 2005.

– NYE, J., *Bond to lead : The changing nature of American power*, Basic books, 1990.

– NYE, J., *Soft Power: The Means to Success in World Politics*, Public Affairs.

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

**Citation**: JIMÉNEZ GARCÍA-CARRIAZO, A., «Small Island, Big Issue: Malta and its Search and Rescue Region - SAR», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 299-321

**Received**: 17 August 2019
**Accepted:** 03 October 2019

# SMALL ISLAND, BIG ISSUE: MALTA AND ITS SEARCH AND RESCUE REGION – SAR

Ángeles JIMÉNEZ GARCÍA-CARRIAZO[1]

I.-INTRODUCTION. II.-SEARCH AND RESCUE REGIONS. III.- INTERPRETATION OF THE CONCEPT OF PLACE OF SAFETY. IV. DISTRESS: A HUMANITARIAN OR A SECURITISED TERM?. V. MALTA, AT THE CROSSROADS IN THE MEDITERRANEAN SEA.VI. -CONCLUSIONS

**ABSTRACT:** Malta is located at the frontline of the Central Mediterranean route. It is a waypoint for migrants coming from the North African coast and crossing the Mediterranean, who have to pass through the Maltese search and rescue region. Malta acceded to the 1979 SAR Convention in 2002, but it has not yet signed the 2004 Amendments which clarify that the disembarkation of persons found in distress at sea must be done in a place of safety.
**KEYWORDS:** SAR Convention - SAR region - Malta - search and rescue - place of safety.

**UNA PEQUEÑA ISLA, UN GRAN PROBLEMA: MALTA Y SU ZONA DE BÚSQUEDA Y SALVAMENTO–SAR**

**RESUMEN:** Malta se encuentra en la primera línea de la ruta del Mediterráneo central. Es un punto en el recorrido de los migrantes que vienen de la costa norteafricana y cruzan el Mediterráneo, que tienen que pasar por la zona de búsqueda y salvamento maltesa. Malta se adhirió al Convenio SAR de 1979 en 2002, pero aún no ha firmado las Enmiendas de 2004 que aclaran que el desembarco de personas encontradas en peligro en el mar debe realizarse en lugar seguro.
**PALABRAS CLAVE:** Convenio SAR - Zona SAR - Malta - búsqueda y salvamento marítimo - lugar seguro.

**PETITE ÎLE, GROS PROBLÈME : MALTE ET SA RÉGION DE RECHERCHE ET DE SAUVETAGE – SAR**

**RÉSUMÉ:** Malte est située sur la ligne de front de la route méditerranée centrale. C'est un point de passage pour les migrants venant de la côte nord-africaine et traversant la Méditerranée, qui doivent parcourir la région maltaise de recherche et de sauvetage. Malte a adhéré à la Convention SAR de 1979 en 2002, mais n'a pas encore signé les Amendements de 2004 qui précisent que le débarquement des personnes trouvées en détresse en mer doit être réalisé en lieu sûr.
**MOTS CLES:** Région SAR - Malte - recherche et sauvetage - lieu sûr.

[1] The Nippon Foundation Lecturer on Ocean Governance, IMO International Maritime Law Institute, Malta.

## I. INTRODUCTION

Every year, hundreds of thousands of people endanger their lives in journeys across the Mediterranean Sea as a result of famine, armed conflicts, poverty, and many other causes. In the pursuit of better conditions of life, Malta is one of the main points of arrival.

Many of these migrants find themselves in distress during those long journeys. The duty to assist persons in distress at sea is a long-established rule of customary international law which was codified as a general and unconditional obligation by the United Nations Convention on the Law of the Sea[2] (hereinafter, UNCLOS). Article 98 of UNCLOS states, with regards to flag States, that:

> Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.

Article 98(2) further provides that "all coastal States promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose."

The duty to assist in distress as such is not geographically limited in any way.[3] Irrespective of where a vessel encounters another vessel in distress, it is obliged to assist it. The duty to rescue is further clarified in a number of international maritime law instruments, namely, the Convention for the Safety of Life at Sea,[4] and the International Convention on Maritime Search and Rescue (hereinafter, SAR Convention).[5]

---

[2] The United Nations Convention on the Law of the Sea of 10 December 1982, entered into force on 1 November 1994, 1833 UNTS 397.

[3] Gallagher, A.T., David, F., *The International Law of Migrant Smuggling*, Cambridge University Press, Cambridge, 2014, p. 447. Although Article 98 is located in the Part of UNCLOS concerning the high seas, it is submitted that the duty in question applies in all maritime zones.

[4] International Convention for the Safety of Life at Sea of 1 November 1974, entered into force on 25 May 1980, 1184 UNTS 278 (SOLAS Convention).

[5] International Convention on Maritime Search and Rescue of 27 April 1979, entered into force on 22 June 1985, 1405 UNTS 118.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

Before the SAR Convention, there was no international system for standardised search and rescue operations.[6] The International Maritime Organisation (hereinafter, IMO) highlights how the SAR Convention guarantees that "no matter where an accident occurs, the rescue of persons in distress at sea will be co-ordinated by a SAR organisation and, when necessary, by co-operation between neighbouring SAR organisations."[7] The declaration of a search and rescue region (hereinafter, SAR region) is a unilateral right of States contracting party to the SAR Convention. In accordance with the international rules, the interested State shall initiate a process to establish SAR bilateral agreements with its neighbours.

In this context, Malta, at the crossroads in the Mediterranean Sea, is responsible for a vast area and must take primary responsibility for ensuring that assistance is provided within its SAR region to any person in distress, either individually or in co-operation with other States.[8]

## II. SEARCH AND RESCUE REGIONS

Following the adoption of the SAR Convention, IMO divided the world's oceans into thirteen search and rescue areas, in each of which the relevant countries have a delimited SAR region for which they are responsible.[9] Parties to the Convention are encouraged to enter into agreements with neighbouring States in order to delimit the SAR regions and arrange cooperation in search and rescue operations. These regions should be contiguous and, as

6 Mulqueen, M., Sanders, D., Speller, I., *Small Navies: Strategy and Policy for Small Navies in War and Peace,* Corbett Centre for Maritime Policy Studies Series, Routledge, New York, 2014, p. 137. There is a true distinction between the duty to "assist" and the duty to "rescue." According to the SAR Convention, search is "[a]n operation, normally co-ordinated by a rescue coordination centre or rescue sub-centre, using available personnel and facilities to locate persons in distress" (Annex 1.3.1), while rescue is "[a]n operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety" (Annex 1.3.2).

7 IMO, "SAR Convention", <http://www.imo.org/en/OurWork/Safety/RadioCommunicationsAndSearchAndRescue/SearchAndRescue/Pages/SARConvention.aspx>, (accessed on 4 August 2019).

8 SAR Convention, Annex 2.1.3.

9 IMO, n 7 *supra.*

far as practicable, not overlap.[10] SAR regions are notified to the IMO Secretary-General[11] and are made available in the IMO Global Search and Rescue Plan.

The obligation of States to provide search and rescue services is principally limited to their own SAR region.[12] In this regard, the SAR Convention provides that "[o]n receiving information that any person is, or appears to be, in distress at sea, the responsible authorities of a Party shall take urgent steps to ensure that the necessary assistance is provided."[13]

In order to effectuate this provision of service, States are directed to establish national rescue co-ordination centres (hereinafter, RCCs), which shall arrange for the receipt of distress alerts originating from within its SAR region.[14] If a RCC receives information of a distress incident taking place beyond its SAR region, it is obliged to take immediate action to assist and notify the responsible RCC in whose area the incident has occurred.[15]

In the case of Malta, its location in the southern Mediterranean places this island in an area which is conducive to the arrival of people who risk their lives aboard unseaworthy boats. Malta is located in the path of migration flows from North Africa (particularly, Libya) to Europe where it serves both as a destination and transit point[16] along the Central Mediterranean route.[17]

In contrast to the small size of its territorial waters, Malta maintains a

---

[10] SAR Convention, Annex 2.1.3.

[11] SAR Convention, Annex 2.1.4.

[12] KOMP, L-M., "The Duty to Assist People in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?", in MORENO-LAX, V., PAPASTAVRIDIS, E., (ed.), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, International Refugee Law Series, vol. 7, Brill, Leiden, 2016, p. 234.

[13] SAR Convention Annex 2.1.1.

[14] SAR Convention Annex 2.3.2.

[15] SAR Convention Annex 4.3.

[16] Malta is rarely the intended destination for migrants; most aim at landing in Italy and either end up accidentally on Maltese territory or, more commonly, are rescued within the Maltese SAR region and subsequently disembarked in Malta.

[17] EUROPEAN COMMISSION, DG MIGRATION & HOME AFFAIRS, "A study on smuggling of migrants: Characteristics, responses and cooperation with third countries Case Study 2: Ethiopia–Libya–Malta/Italy", 2016.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

vast SAR region, covering some 260,000 square kilometres.[18] Its SAR region coincides with the Malta Flight Information Region, which the State inherited from the British Flight Identification Region.[19] The SAR region of Malta extends from Tunisia, to the west, to the Greek island of Crete, to the east. Toward the north, there is an overlap between Maltese and Italian SAR regions.

**Figure 1: Maltese SAR region**

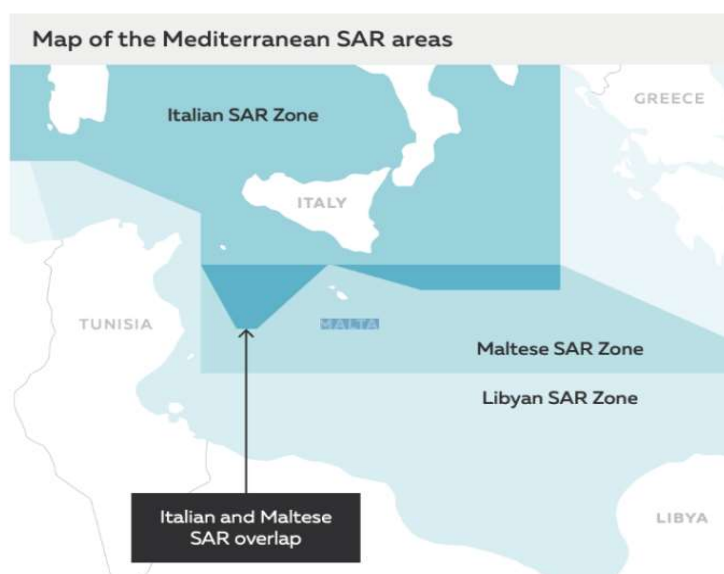
Source: Armed Forces of Malta

[18] MALLIA, P., *Migrant Smuggling by Sea Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework,* Publications on Ocean Development, vol. 66, Brill, Leiden, 2009, p. 13.

[19] COPPENS, J., "Search and Rescue", in PAPASTAVRIDIS, E., TRAPP, K.N., *La criminalité en mer,* Académie de Droit International de la Haye, Martinus Nijhoff, Leiden, 2014, pp. 381-427, p. 404.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

**Figure 2: Overlapping SAR regions**




Source: UNHCR

The Maritime Safety Committee of IMO[20] at its 69th session adopted by resolution MSC.70(69),[21] amendments to revise the Annex to the SAR Convention. The revised annex puts greater emphasis on the regional approach and co-ordination between maritime and aeronautical search and rescue operations. Subsequently, at the 78th session, the Maritime Safety Committee adopted, by resolution MSC.155(78),[22] new amendments to Chapter II (organization and co-ordination) relating to definition of persons in distress, Chapter III (co-operation between States) relating to assistance to the master in delivering persons rescued at sea to a place of safety, and Chapter IV (operating procedures) relating to rescue co-ordination centres initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.

The clarification of these obligations in the latter amendments responds to the well-known *Tampa* affair, which involved a Norwegian vessel that res-

[20] The Maritime Safety Committee deals with all matters related to maritime safety and maritime security which fall within the scope of IMO, covering both passenger ships and all kinds of cargo ships.

[21] Resolution MSC.70(69), adopted on 18 May 1998, adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979.

[22] Resolution MSC.155(78), adopted on 20 May 2004, adoption of Amendments to the International Convention on Maritime Search and Rescue, 1979, as amended.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

cued over 430 asylum seekers in the Indian Ocean and was refused entry to Australian waters.[23]

According to the latter revision, States Parties shall co-ordinate and co-operate to ensure that the masters of ships providing assistance by embarking people in distress at sea are released from their obligations with minimum further deviation from the ship's intended voyage, as well as relevant measures are taken for the disembarkation to be effected as soon as reasonably practicable.[24] The government in charge of the SAR region in which the survivors are recovered is held responsible for providing a place of safety on its own territory or ensuring that such a place of safety is granted.[25]

The SAR Convention provides as follows:[26]

---

[23] On 26 August 2001, M/V *Tampa*, a Norwegian container ship, was asked by the Australian RCC to assist in the search and rescue operation for an Indonesian ship, the *Palapa I,* in the waters between Indonesia and Christmas Island (Australia). The *Tampa* diverted from its course and found the Indonesian ship in a sinking condition approximately 75 nautical miles off Christmas Island. After having rescued and taken on board 438 persons (most of whom were asylum-seekers from Afghanistan) the *Tampa* resumed its northbound voyage with the plan to disembark the rescued persons along the way in Indonesia about 250 nautical miles to the north. However, the course was changed and set for Christmas Island in response to pressure from some of the rescued persons. This led Australian authorities to inform the master of the *Tampa* that the Australian territorial sea was closed to the ship and that the course should be changed for Indonesia and that failure to do so would lead to prosecution for people smuggling. After waiting a couple of days offshore Christmas Island and the health condition of some of the rescued persons began to deteriorate, the *Tampa* issued a distress signal and headed towards Christmas Island. Within short, the *Tampa* was boarded by Australian special military forces. The rescued asylum-seekers were eventually transferred to an Australian warship that would take them to Papua New Guinea, from where they would be transported to Nauru and New Zealand for further processing. Ratcovich, M., "The Concept of 'Place of Safety': Yet Another Self Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?", *Australian Year Book of International Law*, vol. 33, 2015, p. 1-2; Rothwell, D. R., "The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty", *Public Law Review*, vol. 118, 2002, p. 118; Barnes, R., "Refugee Law at Sea", 53 *International and Comparative Law Quarterly*, 2004, p. 47-48; Baillet, C., "The Tampa Case and its Impact on Burden Sharing at Sea", *Human Rights Quarterly*, vol. 25, no. 3, 2003.

[24] SAR Convention, as amended 2004, Annex 3.1.9.

[25] Ibid.

[26] Ibid.

> Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.

Malta has formally objected the 2004 Amendments to the SAR Convention. The Maltese authorities argued that the amendments required the State responsible for the SAR region within which persons are rescued to assume responsibility for providing the safe disembarkation place.[27] On 22 December 2005, the depositary received the following communication from the Ministry of Foreign Affairs of Malta:

> […] the Ministry wished to inform that, after careful consideration of the said amendments, in accordance with article III(2)(f) of this Convention, the Government of Malta, as a Contracting Party to the said Convention, declares that it is not yet in a position to accept these amendments."[28]

Therefore, Malta is not bound by the amendments on the grounds that they could be interpreted as imposing on the State the obligation to disembark on its own territory and offer assistance to all those rescued within its SAR region.[29]

## III. INTERPRETATION OF THE CONCEPT OF PLACE OF SAFETY

The concept of place of safety is undefined in SAR Convention. The Convention does not provide specific rules for interpretation and does not

[27] Maltese authorities maintain that disembarkation must occur at the nearest safe port, which, as a result of the size of Malta's SAR region and the coordinates of rescues performed by the Armed Forces of Malta, is often Lampedusa.

[28] IMO, "Status of IMO Treaties. Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions", September 2019.

[29] Amnesty International, "Italy/Malta: Obligation to safeguard lives and safety of migrants and asylum seekers", Public Statement, May 2009, p. 3.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

identify which is the State, among a number of neighbouring States, which should provide assistance in a given case. The fact that the Government of the SAR region in which the survivors are recovered is responsible for providing a place of safety, or ensuring that such a place of safety is provided, means that migrants in distress at sea are sometimes brought to the SAR region of another State.[30]

Some authors consider that the primary responsibility of the State responsible for the SAR zone relates only to ensure co-ordination and co-operation.[31] However, the SAR Convention does not address how to solve the situation in the case that no agreement is reached, and avoids any reference which could imply the assumption that, in default of any specific agreement, people saved should be disembarked in the State responsible for the SAR region.[32]

In the absence of legal definition, and with the aim of guaranteeing that persons rescued at sea are provided a place of safety regardless of their nationality, status or the circumstances in which they are found, the Guidelines on the Treatment of Persons Rescued at Sea were adopted by IMO.[33] Although the Guidelines do not establish any binding duty, they provide some guidance on the interpretation of the obligations to render assistance at sea.[34] The Guidelines define a place of safety as "a location where rescue operations are considered to terminate. It is also a place where the survivors' safety of life is no longer threatened and where their basic human needs (such as food,

---

[30] Coppens, J., "The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin", 44 *Journal of Maritime Law and Commerce* 89, 2013, p. 4.

[31] In this regard, Papanicolopulu states: "The provision assumes that relevant States will coordinate and, while the State responsible for the SAR zone has primary responsibility, this responsibility relates only to ensuring such co-ordination and co-operation occurs." Papanicolopulu, I., "The duty to rescue at sea, in peacetime and in war: A general overview", *International Review of the Red Cross*, vol. 98, no. 2, 2016, pp. 491–514, p. 501.

[32] Ibid.

[33] IMO Resolution MSC. 167(78), Annex 34, Guidelines on the Treatment of Persons Rescued at Sea, adopted on May 20, 2004.

[34] Barnes R., "The International Law of the Sea and Migration Control", in Ryan, B., Mitsilegas, V. (eds), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff, Leiden, 2010, pp. 103-150, p. 103.

shelter and medical needs) can be met."[35]

A narrow construction of the place of safety might lead to the consideration that any port where basic needs are satisfied would comply with the requirements to be considered a safe place.[36] However, some scholars believe that the obligation on the coastal State to allow disembarkation is implicit in the SAR Convention.[37]

This runs in parallel with the principle of *non-refoulement*.[38] The Guidelines on the Treatment of Persons Rescued at Sea state "[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea."[39] In short, a place of safety understood within the meaning of the SAR Convention must be interpreted in accordance with refugee law and human rights provisions. A place cannot be deemed safe for refugees simply because distress at sea has

[35] IMO Resolution MSC. 167(78), para. 6.12. The rescuing vessel cannot be seen as a place of safety: "An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship. An assisting ship may not have appropriate facilities and equipment to sustain additional persons on board without endangering its own safety or to properly care for the survivors. Even if the ship is capable of safely accommodating the survivors and may serve as a temporary place of safety, it should be relieved of this responsibility as soon as alternative arrangements can be made." (para. 6.13).

[36] Di Filippo, M., "Irregular Migration Across the Mediterranean Sea: Problematic Issues concerning the International Rules on Safeguard of Life at Sea", *Paix et Sécurité Internationales*, no 1, 2013, pp. 53-76, p. 64; Coppens, J., Somers, E., "Towards New Rules on Disembarkation of Persons Rescued at Sea", *International Journal of Marine and Coastal Law*, vol. 25, 2010, p. 387.

[37] Tondini considers that "[w]hile international maritime law does not formally impose upon States an obligation to grant boat people access to their territory, it is clear that - in practice - the 'disembarkation burden' rests primarily upon the warship's flag state, with the SAR coordinating state concurring." Tondini, M., "The Legality of the Interception of Boat People Under Search and Rescue and Border Control Operations", *Journal of International Maritime Law*, vol. 18, 2012, p. 63; Fischer-Lescano, A., Löhr, T., Tohidipur, T., "Border Controls at Sea: Requirements under International Human Rights and Refugee Law", *International Journal of Refugee Law*, vol. 21, Issue 2, 2009, pp. 256–296, p. 290. Papanicolopulu, I., n 30 *supra*.

[38] The *non-refoulement* principle operates with respect to individuals in need of protection or where there are substantial grounds for believing that the person concerned faces a real risk of torture or inhuman or degrading treatment or punishment upon return or extradition.

[39] Guidelines on the Treatment of Persons Rescued at Sea, para. 6.17.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

been prevented; it is only safe when *non-refoulement* is guaranteed.[40]

In response to this situation, the Facilitation Committee of IMO[41] adopted principles regarding disembarkation of persons rescued at sea which specify that "[i]f disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with immigration laws and regulations of each Member State into a place of safety under its control in which the persons rescued can have timely access to post rescue support."[42]

Despite this initiative, the principles have not been successfully incorporated into the SAR Convention. Today it is considered that the coastal State has only the obligation to ensure that a place of safety is provided to rescued people without being under an explicit obligation to allow disembarkation on its own territory.[43]

How does this apply to the Maltese case? Malta has formally objected the amendments to the SAR Convention and has entered reservations concerning the Facilitation Committee's abovementioned principles.[44] Its main neighbour involved in rescue operations, Italy, did agree to the amendments. In substantive terms, this means that whereas Malta is bound to ensure the disembarkation of persons rescued within its SAR region at the nearest safe port, Italy's understanding of disembarkation in the SAR regime is that this ought to occur in the State responsible for the SAR region. This leads to constant diplomatic rows as to which State is responsible to operate rescues or disembark migrants who have been rescued by seafarers, particularly in

---

[40] Fischer-Lescano, A., Löhr, T., Tohidipur, T., n 37 *supra*, p. 290.

[41] The Facilitation Committee deals with matters related to the facilitation of international maritime traffic, including the arrival, stay and departure of ships, persons and cargo from ports.

[42] IMO FAL.3/Circ.194, Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea, adopted on 22 January 2009.

[43] Papastavridis, E., "Rescuing 'Boat People' in the Mediterranean Sea: The Responsibility of States under the Law of the Sea", Blog of the European Journal of International Law, <https://www.ejiltalk.org/rescuing-boat-people-in-the-mediterranean-sea-the-responsibility-of-states-under-the-law-of-the-sea/>, (accessed on 5 August 2019).

[44] IMO Facilitation Committee, "Report of the Facilitation Committee on its Thirty-fifth Session", FAL 35/17, 19 March 2009, para. 6.46.

those cases where persons are rescued within Malta's SAR region, but geographically closer to Lampedusa.[45]

A clear example is found in the *Pinar E* incident. In April 2009, a Turkish owned and Panamanian registered vessel M/V *Pinar E* rescued over 140 migrants 41 nautical miles off the coast of Lampedusa, and approximately 114 nautical miles from Malta. The ship and the rescued migrants were the subject of an ensuing diplomatic clash between Italy and Malta regarding who would receive the migrants. While Malta insisted that the M/V *Pinar E* would take the migrants to the nearest port, namely, Lampedusa; Italy maintained that the persons were rescued in the Maltese SAR region and urged Malta to take responsibility. Although Italy finally agreed to allow the disembarkation in Sicily, the decision was made exclusively in consideration of the painful humanitarian emergency aboard the cargo ship. Italy made clear that its acceptance of the migrants must not in any way be understood as a precedent nor as a recognition of Malta's reason for refusing them.[46]

The situation has worsened due to the political developments in Italy. The issuance of the Code of Conduct for NGOs undertaking Activities in Migrants' Rescue Operations at Sea[47] placed significant restrictions on NGO activities, where failure to comply effectively meant refusal of disembarkation into Italy. A change in government in 2018 led the then Italy's deputy prime minister to adopt a stricter approach to disembarkation.[48] Furthermore, in August 2019, Italy passed a law which limits the entry of NGO humanitarian vessels in Italian territorial waters for reasons of public order and security.[49]

The standoffs have been recurrent. In December 2018, two German-fla-

[45] Díaz Tejera, A., "The interception and rescue at sea of asylum seekers, refugees and irregular migrants", Report of the Committee on Migration, Refugees and Population to the Parliamentary Assembly of the Council of Europe, 1 June 2011, Doc. 12628, p. 17.

[46] Barnes, R., "The International Law of the Sea and Migration Control", in Ryan, B., Mitsilegas, V., (ed.), *Extraterritorial Immigration Control: Legal Challenges*, *Immigration and Asylum Law and Policy in Europe*, vol. 21, Brill, 2010, p. 142.

[47] Codice di Condotta per le ONG Impegnate nelle Operazioni di Salvataggio dei Migranti a Mare, Ministero dell'Interno, 18 July 2017.

[48] Attard, F.G., "The Duty of the Shipmaster to Render Assistance at Sea under International Law", Ph.D. thesis submitted to the IMO International Maritime Law Institute, 2019, p. 267.

[49] Decreto legge n. 53 del 14 giugno 2019, approvato in via definitiva il 5 agosto 2019.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

gged vessels, the *Sea Watch 3* and the *Sea-Eye* rescued 32 people and 17 migrants, respectively and were denied permission to land in Italy and Malta. After 19 days stranded at sea, migrants were allowed to land in Malta.[50]

In 2019 *El Hiblu I*, a vessel registered in Palau sailing from Turkey to Libya, responded to a distress alert and embarked almost a hundred migrants and proceeded towards his next port of call, namely, Tripoli.[51] After the migrants realized they were being returned to Libya, they threatened crew members. Faced with the difficulty of reaching Libyan coast due to the internal riot, the vessel headed north. Both Italy and Malta initially refused entry of *El Hiblu I*, but it was finally allowed to disembark the rescues in Maltese ports.[52]

On 14 August 2019, the Administrative Tribunal of the Lazio Region (Italy) issued an injunction to the Government to let the vessel *Open Arms*, with 147 rescued migrants on board, to enter Italian territorial sea due to circumstances of exceptional gravity and urgency.[53] Italy and Malta had refused permission to dock and unload the migrants.

All these cases show the discrepancy between the Maltese perception of place of safety in terms of search and rescue and the place of safety in terms of humanitarian law.[54] The main point of resistance is the great extent of its SAR region, which makes that the closest safe port of call from the place of rescue is often located in Lampedusa.[55]

The express reference to the "guidelines developed by the Organiza-

---

[50] Frenzen, N., "Week in Review – 30 December 2018", Migrants at Sea, <https://migrantsatsea.org/2018/12/>(accessed on 26 September 2019).

[51] "Captain Feared Death In Migrant Hijack At Sea", *The Malta Independent,* 29 March 2019, <https://Www.independent.com.mt/Articles/2019-03-29/Local-News/Hijacked-Captain-Feared-Death-In-Migrant-Hijack-At-Sea-6736205878> (Accessed On 25 September 2019).

[52] Press Release by the Armed Forces of Malta, government services and information, 28 March 2019, <https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2019/March/28/pr190637.aspx> (accessed on 26 September 2019).

[53] Frigo, M., "Is Salvini closing just harbours or also the Rule of Law?", International Commission of Jurists, 20 August 2019, <https://www.icj.org/is-salvini-closing-just-harbours-or-also-the-rule-of-law/> (accesed on 28 September 2019).

[54] Klepp, S., "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538, 2011, p. 549.

[55] Ibid.

tion" in 2004 Amendments to SAR Convention[56] has given it a boost, at least among State parties, as they must be taken into account when implementing SAR obligations. Malta did not accept the amendments neither the Guidelines on the Treatment of Persons Rescued at Sea and does not recognise the link between the two approaches which is reflected in these instruments.[57]

## IV. DISTRESS: A HUMANITARIAN OR A SECURITISED TERM?

According to the SAR Convention, the distress phase is defined as "[a] situation wherein there is reasonable certainty that a person, vessel or other craft is threatened by grave and imminent danger and requires immediate assistance."[58]

As stated in *The Eleanor* case,[59] the distress must be something of a grave necessity that entails urgency, but not necessarily an actual physical necessity. This is reflected in the SAR Convention as follows:[60]

> Unless otherwise agreed between the States concerned, a Party should authorize, subject to applicable national laws, rules and regulations, immediate entry into or over its territorial sea or territory of rescue units of other Parties solely for the purpose of searching for the position of maritime casualties and rescuing the survivors of such casualties.

In the *Rainbow Warrior* case, the arbitral tribunal took a broader view including "circumstances of extreme urgency involving medical or other considerations of an elementary nature" as circumstances reflecting distress.[61]

The concept of distress cannot just be considered in situations of *force majeure*. Overcrowded and unseaworthy vessels traversing the Mediterranean Sea are *de facto* in distress due to the imminent danger, and hence there is an obligation to render assistance. Moreno-Lax even suggests that unseawor-

---

[56] SAR Convention, as amended 2004, Annex 3.1.9.

[57] COPPENS, S., n 19 *supra.*

[58] SAR Convention Annex 1.3.13.

[59] *The Eleanor* (1809), Edwards Admiralty Reports, 165 ER 1058.

[60] SAR Convention Annex 3.1.2.

[61] Arbitral Award, Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements, concluded on 9 July 1986 between the two States and which related to the problems arising from the *Rainbow Warrior* Affair, *New Zealand v. France*, 30 April 1990, 10 UNRIAA 215, para. 79.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

thiness *per se* entails distress.[62] This is consonant with the rationale of search and rescue operations, which is exclusively the protection of human beings.[63] There are clearly strong humanitarian grounds to provide assistance "regardless of the nationality or status of such a person or the circumstances in which that person is found"[64] and to treat rescued people "with humanity, within the capabilities and limitations of the ship."[65]

Although the search and rescue system has its own international legal regime, it is increasingly associated with migration issues, which has distorted the primary humanitarian object of the regime[66].

A restrictive interpretation of distress would lead to the conclusion that the obligation to render assistance would not apply to a vessel that is not well equipped, yet not in immediate danger of being lost.[67] However, if a broader construction is advanced, a vessel which is not in imminent peril, but overloaded and unfit for the sea journey, and therefore, very vulnerable to many hazards, may fall under the term distress. The likeliness getting into a very perilous situation in the proximate future would justify this view. This is the situation in which many boats carrying migrants and asylum seekers usually find themselves.[68]

It is clear that unseaworthy vessels threaten the life of persons aboard. Talking of distress at sea, is an actual danger required or a threat of danger enough? An excessively flexible definition would encourage some vessels to

[62] Moreno-Lax, V., "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", 23 *International Journal of Refugee Law* 174, 2011, p. 195.

[63] Papastavridis, E., n 43 *supra.*

[64] SAR Convention, as amended, Annex 2.1.10.

[65] Guidelines on the Treatment of Persons Rescued at Sea, para. 5.1.2.

[66] As explained by Ghezelbash et al.: "[T]he increasing linkage between this regime and migration control has begun to infuse SAR with similar characterizations and responses to those seen in relation to irregular migration and its portrayal as 'a threat'. The basis for the shifting approach, away from the core focus of humanitarian assistance, is the use of a 'securitization frame', which assists in understanding why States take certain actions in response to boat migration." Ghezelbash, D., Moreno-Lax, V., Klein, N., Opeskin, B., "Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia", *International and Comparative Law Quarterly*, vol. 67, 2018, pp. 315-351, p. 330.

[67] Komp, L-M., n 12 *supra*, p. 233.

[68] Ibid.

leave in poor conditions with the intent of needing a rescue. However, this potential call effect cannot hamper a humanitarian base system of rescue of stranded people at sea.

In the present case, Malta defines unseaworthiness as a ship which is "unfit to proceed to sea without danger to human life, property or the marine environment."[69] It extends the interpretation of unseaworthiness to include "undermanning; overloading or unsafe or improper loading; unfamiliarity by the master or the crew with essential shipboard procedures relating to the safety of ships."[70]

Malta follows the definition of distress drawn directly from the SAR Convention. A distress situation is one in which persons are faced with imminent danger at sea and require immediate assistance, and where failure on the part of the Armed Forces of Malta to intervene in the most expeditious manner possible would result in injury or death.[71]

## V. MALTA, AT THE CROSSROADS IN THE MEDITERRANEAN SEA

Located in the heart of the Mediterranean Sea, Malta has been considered as a gateway to the European Union over the last fifteen years. Its vast SAR region stretches all across the Mediterranean basin and includes areas that are geographically closer to Italian ports than to its own. It shares boundaries with its maritime neighbours in this regard, namely, Italy, Libya and Greece. Tunisian SAR region has not been established yet.

As mentioned above, Malta objected the 2004 Amendments to SAR Convention. Agreeing to the amendments would have made Malta responsible for nearly every search and rescue operation across the Mediterranean. Faced with this prospect, the Maltese Government has consistently made it clear that it does not recognise the amendments.

The existing issues with Italy has been dealt under Part III above with a long list of vessels which found themselves caught in a diplomatic impasse.

Regarding the requested co-operation and co-ordination with Libya, on 18 March 2009, Libya and Malta signed a Memorandum of Understanding (MoU) in the field of search and rescue, aimed at coordinating the search and

[69] Malta Merchant Shipping Act, article 278(1).

[70] Ibid, article 278(2).

[71] Attard, F.G., n 48 *supra*, p. 222.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

**Figure 3: SAR regions in the Mediterranean Sea**

Source: Robitaille, M., with permission from IMO.

rescue operations within their respective SAR regions.[72]

The MoU provides that both countries coordinate, cooperate and support each other for search and rescue operations within their respective SAR regions. Both sides also agreed to authorize their RCCs to request assistance via the rescue centre of the other country and to provide all information on the distress situation in their respective SAR region. It also provides for joint search and rescue training for inter-operability purposes, exchange of visits and training at the Armed Forces of Malta SAR Training centre apart from periodic meetings of representatives of both sides to ensure continued, enhanced cooperation.[73]

[72] "Malta, Libya, reach search and rescue agreement", *Times of Malta,* 20 March 2009, <https://timesofmalta.com/articles/view/malta-libya-reach-search-and-rescue-agreement.249630> (accessed on 9 August 2019).

[73] "MOU Signed in Tripoli: Malta, Libya, to cooperate in search and rescue operations", *Malta Independent*, 21 March 2009, <https://www.independent.com.mt/articles/2009-03-21/news/mou-signed-in-tripoli-malta-libya-to-cooperate-in-search-and-rescue-operations-222104/>,

The Armed Forces of Malta confirmed that the Libyan coastguard became slightly more effective and carried out some rescue operations.[74] However, the MoU took a back seat due to the armed conflict in Libya.[75]

Eight years later, in August 2017, the Libyan authorities declared the establishment of its SAR region. Libya withdrew the application for the establishment of the SAR region in December 2017.[76] This withdrawal was followed by the submission of a new notification on 14 December.[77] In June 2018, IMO publicised the coordinates of the Libyan SAR region in the Global Integrated Shipping Information System.

In a meeting with the United Nations Support Mission in Libya (UNSMIL) in October 2018, the spokesperson of the Libyan Coast Guard confirmed extending Libya's SAR region to 94 nautical miles off its coast, as of August 2017, and assuming coordination of operations in that zone with the support of the Italian RCC.[78] Indeed, Italy endorsed the declaration of the Libyan SAR region.[79]

As far as we are concerned, Libya has not completed the procedures in

(accessed on 29 September 2019).

[74] Amnesty International, "Lives Adrift. Refugees and Migrants in Peril in the Central Mediterranean", September 2014, p. 33.

[75] European Union Agency For Fundamental Rights, "Fundamental Rights at Europe's Southern Sea Borders", 2013, p. 32.

[76] Gombeer, K., Fink, M., "Non-Governmental Organisations and Search and Rescue at Sea", *Maritime Safety and Security Law Journal,* Issue 4, 2018-2019, pp. 1-25, p. 8; "Libya Drops Claim to Search-and-Rescue Zone, IMO Confirms", *News Deeply*, 14 December 2017, <https://www.newsdeeply.com/refugees/executive-summaries/2017/12/14>, (accessed on 9 August 2019).

[77] Ibid.; United Nations Secretary-General, Report of the Secretary-General: Implementation of Resolution 2380 (2017), 31 August 2018, UN Doc. S/2018/807, para. 12.

[78] United Nations Support Mission In Libya, "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya", Office of the High Commissioner for Human Rights, 20 December 2018.

[79] Following the Libyan declaration, Italy's then Minister for Foreign Affairs, Angelino Alfano, stated that Libya's actions meant that "balance is being restored in the Mediterranean". He said the Libyan government was "ready to put in place a search and rescue zone in its waters, work with Europe and invest in its coast guards." "Italy Works with Libyans to Stop Migrants and Control NGOS", The Diplomatic Observer, <http://diplomaticobserver.com/_haber/italy-works-with-libyans-to-stop-migrants-and-control-ngos>, (accessed on 9 August 2019).



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

**Figure 4: Libyan SAR region**

Source: IMO Global Integrated Shipping Information System

establishing search and rescue services. It is not clear when the Libyan SAR region may be expected to be fully functional. The question then remains: can Libya be considered a place of safety for the purpose of disembarkation following interception at sea?

According to the United Nations High Commissioner for Refugees (UNHCR), Libya does not meet the criteria for a place of safety given the volatility of the country and compromised safety, as well as the considerable risk of those returned being subjected to serious human rights violations and abuses, including prolonged arbitrary detention in inhuman conditions, torture and other ill-treatment, unlawful killings, rape and other forms of sexual violence, forced labour, extortion and exploitation.[80]

Within this legal framework, the news on attempts of disembarkation and diplomatic rows are continual. Just considering the last few months, alarming headlines report one after the other. In January 2019, 32 migrants rescued by the vessel *Sea Watch 3* were in limbo for nearly three weeks until Malta opened its doors, as part of a redistribution deal involving nine countries. Another

[80] UNHCR, "Desperate and Dangerous: Report on the human rights situation of migrants and refugees in Libya", UNSMIL, Office of the High Commissioner for Human Rights, p. 17.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

17 migrants on another ship, the *Sea Eye*, arrived in Malta as part of the same arrangement after waiting for two weeks. In March 2019, the vessel *El Hiblu 1* intended to send the migrants back to Libya. But several migrants, fearful of returning to that country, allegedly overtook the boat by force and directed it toward Malta. Maltese special forces unit stormed the boat, regained control, and escorted it to port, where the migrants were allowed to disembark. In April 2019, Italy and Malta both denied the vessel *Sea Eye* port entry; the migrants ultimately disembarked in Malta with military patrol boats, to be distributed among four countries. In June 2019, the vessel *Sea Watch* rescued the migrants, headed toward Italy, and was ordered not to enter Italian territorial waters. The boat remained in international waters until its 14th day at sea with the rescued migrants, when the captain decided to defy Italian orders and head toward the island of Lampedusa. In August 2019, Malta offered to take only 39 migrants aboard the ship, and not the additional 121 migrants which had been on the vessel *Open Arms* for nine days.[81] After 19 days, the rescuees disembarked in Lampedusa.

Despite these regretful events, Maltese SAR region is a unilateral declaration subject to the principle of good faith. The SAR Convention only compels States to co-ordinate search and rescue services in the area under their responsibility. Thus, there is no obligation for States to do this individually as they can act in co-operation with other States.[82] Arguably, failure to co-operate is worthy of criticism, but difficult to prosecute (unless provided in the domestic legislation) since IMO itself has no powers to enforce the SAR Convention.

## VI. CONCLUSIONS

The application or not of the 2004 Amendments to the SAR Convention, along with the dearth of resources to operate the Libyan SAR region and the influx of migrants in the Central Mediterranean route hinder the possibility of finding a speedy solution.

---

[81] "A year of standoffs over rescued Mediterranean migrants", The Washington Post, <https://www.washingtonpost.com/world/europe/a-year-of-standoffs-over-rescued-mediterranean-migrants/2019/06/26/d595c14e-9829-11e9-8d0a-5edd7e2025b1_story.html>, (accessed on 11 August 2019).

[82] Coppens, S., n 30 *supra,* p. 5.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

The 2004 Amendments to the SAR Convention and the body of soft law developed by IMO have offered some guidance on SAR operations. However, the Guidelines on the Treatment of Persons Rescued at Sea and the Principles relating to Administrative Procedures for Disembarking Persons Rescued at Sea are not binding, so the major issue remain unresolved: where can the rescued people be disembarked within the current legal framework?

Two currents of thought exist about the concept of place of safety and the primary responsibility of the State responsible for the SAR region. The first holds that the State in question has an implicit obligation to allow disembarkation when all efforts to find a place of safety have been exhausted.[83] The second argues that the primary responsibility relates only to ensure co-ordination and co-operation, so the disembark will be in the closest safe port of call from the place of rescue.

The lack of agreement has rendered the situation more dependent of the political goodwill of States to accept disembarkation, as they generally either refuse or require sharing of persons aboard between States before authorising disembarkation.[84]

The ratification of the 2004 Amendments to the SAR Convention by Malta would represent a major achievement since most of the coastal States of the Mediterranean basin[85] would speak the same language. Implementing the amendments would ensure that the obligation of the master to render assistance is complemented by a corresponding obligation to co-operate in rescue situations, thereby relieving the master of the responsibility to care for survivors, and allowing individuals who are rescued at sea in such circumstance to be delivered promptly to a place of safety.[86]

Additionally, the follow-up of the Guidelines and the Principles would clarify the implications of the notion of place of safety. Logically, the pur-

---

[83] Trevisanut, S, "Search and Rescue Operations in the Mediterranean: Factor and Co-operation or Conflict?", *International Journal of Marine and Coastal Law*, vol. 25, 2010, pp. 523-542, p. 530.

[84] Attard, F.G., n 48 *supra,* p. 417.

[85] Albania, Algeria, Croatia, Cyprus, France, Greece, Italy, Lebanon, Libya, Monaco, Montenegro, Morocco, Slovenia, Spain, Syria, Tunisia, Turkey have already accepted them.

[86] Consiglio Italiano per i Rifugiati, "CIR Report Regarding Recent Search and Rescue Operations in the Mediterranean", 2007, <http://www.europarl.europa.eu/hearings/20070703/libe/cir_report_en.pdf> (accessed on 11 August 2019).

pose of any rescue operation is to save lives, consequently, survivors cannot be conducted to a place where they might be subject to further risks or persecution[87]; however, the refusal of entry into Maltese ports also leads to vulnerable situations. As found above, co-operation and co-ordination cannot be neglected.

## BIBLIOGRAPHICAL REFERENCES

– ATTARD, F.G., *The Duty of the Shipmaster to Render Assistance at Sea under International Law*, Ph.D. thesis submitted to the IMO International Maritime Law Institute, 2019.

– BAILLET, C., "The Tampa Case and its Impact on Burden Sharing at Sea", *Human Rights Quarterly*, vol. 25, no. 3, 2003.

– BARNES R., "The International Law of the Sea and Migration Control", in RYAN, B., MITSILEGAS, V. (eds), *Extraterritorial Immigration Control: Legal Challenges*, Martinus Nijhoff, Leiden, 2010, pp. 103-150.

– BARNES, R., "Refugee Law at Sea", 53 *International and Comparative Law Quarterly*, 2004.

– BARNES, R., "The International Law of the Sea and Migration Control", in RYAN, B., MITSILEGAS, V., (ed.), *Extraterritorial Immigration Control: Legal Challenges*, Immigration and Asylum Law and Policy in Europe, vol. 21, Brill, 2010.

– COPPENS, J., "The Essential Role of Malta in Drafting the New Regional Agreement on Migrants at Sea in the Mediterranean Basin", 44 *Journal of Maritime Law and Commerce* 89, 2013.

– COPPENS, J., "Search and Rescue", in PAPASTAVRIDIS, E., TRAPP, K.N., *La criminalité en mer,* Académie de Droit International de la Haye, Martinus Nijhoff, Leiden, 2014, pp. 381-427.

– COPPENS, J., SOMERS, E., "Towards New Rules on Disembarkation of Persons Rescued at Sea", *International Journal of Marine and Coastal Law*, vol. 25, 2010.

– DI FILIPPO, M., "Irregular Migration Across the Mediterranean Sea: Problematic Issues concerning the International Rules on Safeguard of Life at Sea", *Paix et Sécurité Internationales*, no 1, 2013, pp. 53-76.

– DÍAZ TEJERA, A., "The interception and rescue at sea of asylum seekers, refugees and irregular migrants", Report of the Committee on Migration, Refugees and Population to the Parliamentary Assembly of the Council of Europe, 1 June 2011, Doc. 12628.

– FISCHER-LESCANO, A., LÖHR, T., TOHIDIPUR, T., "Border Controls at Sea: Requirements under International Human Rights and Refugee Law", *International Journal of Refugee Law*, vol. 21, Issue 2, 2009, pp. 256–296.

– FRENZEN, N., "Week in Review – 30 December 2018", Migrants at Sea, https://migrantsatsea.org/2018/12/ (accessed on 26 September 2019).

87 TONDINI, M., n 37 *supra*, p. 63.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 299-321
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.10

– FRIGO, M., "Is Salvini closing just harbours or also the Rule of Law?", International Commission of Jurists, 20 August 2019, https://www.icj.org/is-salvini-closing-just-harbours-or-also-the-rule-of-law/ (accesed on 28 September 2019).

– GALLAGHER, A.T., DAVID, F., *The International Law of Migrant Smuggling*, Cambridge University Press, Cambridge, 2014.

– GHEZELBASH, D., MORENO-LAX, V., KLEIN, N., OPESKIN, B., "Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia", *International and Comparative Law Quarterly*, vol. 67, 2018, pp. 315-351.

– KLEPP, S., "A Double Bind: Malta and the Rescue of Unwanted Migrants at Sea, A Legal Anthropological Perspective on the Humanitarian Law of the Sea", 23 *International Journal of Refugee Law* 538, 2011.

– KOMP, L-M., "The Duty to Assist People in Distress: An Alternative Source of Protection against the Return of Migrants and Asylum Seekers to the High Seas?", in MORENO-LAX, V., PAPASTAVRIDIS, E., (ed.), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach. Integrating Maritime Security with Human Rights*, International Refugee Law Series, vol. 7, Brill, Leiden, 2016.

– MALLIA, P., *Migrant Smuggling by Sea Combating a Current Threat to Maritime Security through the Creation of a Cooperative Framework,* Publications on Ocean Development, vol. 66, Brill, Leiden, 2009.

– MORENO-LAX, V., "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", 23 *International Journal of Refugee Law* 174, 2011.

– MULQUEEN, M., SANDERS, D., SPELLER, I., *Small Navies: Strategy and Policy for Small Navies in War and Peace,* Corbett Centre for Maritime Policy Studies Series, Routledge, New York, 2014.

– PAPANICOLOPULU, I., "The duty to rescue at sea, in peacetime and in war: A general overview", *International Review of the Red Cross*, vol. 98, no. 2, 2016, pp. 491–514.

– PAPASTAVRIDIS, E., "Rescuing 'Boat People' in the Mediterranean Sea: The Responsibility of States under the Law of the Sea", Blog of the European Journal of International Law, https://www.ejiltalk.org/rescuing-boat-people-in-the-mediterranean-sea-the-responsibility-of-states-under-the-law-of-the-sea/ (accessed on 5 August 2019).

– RATCOVICH, M., "The Concept of 'Place of Safety': Yet Another Self Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?", *Australian Year Book of International Law*, vol. 33, 2015.

– ROTHWELL, D. R., "The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty", *Public Law Review*, vol. 118, 2002.

– TONDINI, M., "The Legality of the Interception of Boat People Under Search and Rescue and Border Control Operations", *Journal of International Maritime Law*, vol. 18, 2012.

– TREVISANUT, S, "Search and Rescue Operations in the Mediterranean: Factor and Co-operation or Conflict?", *International Journal of Marine and Coastal Law*, vol. 25, 2010, pp. 523-542.

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

**Citation**: BORDÓN, J., «The European Union and the Egyptian Neighbour: assessing the characterization of resilience as an external action priority», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 323-348

**Received**: 26 July 2019
**Accepted:** 08 September 2019

# THE EUROPEAN UNION AND THE EGYPTIAN NEIGHBOUR: ASSESSING THE CHARACTERIZATION OF RESILIENCE AS AN EXTERNAL ACTION PRIORITY

Javier BORDÓN[1]

I- INTRODUCTION. II- METHODOLOGY. III- LITERATURE REVIEW. IV-RESULTS OF THE QUANTITATIVE ANALYSIS: RESILIENCE IN THE ACTION PROGRAMMES. V- A BROADER VIEW: BILATERAL ARMS SALES AND THE CIVIL SOCIETY FACILITY. VI- RECOMMENDATIONS FOR EU RESILIENCE STRATEGY. VII-BIBLIOGRAPHICAL REFERENCES.

**ABSTRACT:** The concept of resilience acquired academic momentum and pervaded a growing number of crosscutting disciplines along the second half of the twentieth century. Drawing on its epistemological flexibility, its implicit redefinition of agency and the inclusion of the parameters of uncertainty and the inevitability of crisis in its very core, it did not take long until the fields of International Relations and foreign policy-making paid thorough attention to its potential outreach and operationalization. Nor it is surprising that the European Union, imbued in a comprehensive review of its external strategy's flaws and shortages, embraced the term as a means to underpin the paradigmatic bridge laid by the guidance of principled pragmatism. Yet, resilience-fostering can point at states or societies, and the authoritarian nature of Egypt's regime compels to prioritize the latter, in accordance to EU's democratic stance. The current paper will offer a brief review of EU foreign-policy approaches vis-à-vis Egypt, an European Neighbourhood Policy/Instrument walkthrough and it will aim at putting in quantitative terms what kind of resilience is the Union placing at the forefront. To conclude, a series of recommendations will be formulated for EU resilience strategy.
**KEYWORDS:** state/societal resilience, ENP, MENA, stability-democracy dilemma, authoritarianism, civil society, policy outputs, Annual Action Programmes.

**LA UNIÓN EUROPEA Y EL VECINO EGIPCIO: EVALUANDO LA CARACTERIZACIÓN DE LA RESILIENCIA COMO PRIORIDAD DE ACCIÓN EXTERIOR**

**RESUMEN:** El concepto de resiliencia captó el interés de la academia y penetró en un número progresivo y transversal de disciplinas a lo largo de la segunda mitad del siglo XX. Apoyándose sobre la flexibilidad epistemológica, la redefinición implícita de la agencia y la inclusión de los parámetros de incertidumbre e inevitabilidad de la crisis en su seno, las áreas de Relaciones Inter-

[1] Research Assistant Trainee (Asyudante de Investigación en Prácticas) at King Faisal Center for Research and Islamic Studies (KSA) and Master's in Geopolitics and Strategic Studies at University Carlos III of Madrid (Spain). ORCID ID: <https://orcid.org/0000-0002-3522-7833>.

nacionales y diseño de política exterior no tardaron en posar su atención sobre su alcance y operacionalización. Tampoco es de extrañar que la Unión Europea, imbuida en una revisión integral de los defectos y carestías de su estrategia exterior, acogiera el término con afán de apuntalar el puente paradigmático que tiende el llamado pragmatismo con principios. Ahora bien, la promoción de la resiliencia puede apuntar a los estados o a las sociedades, y en este sentido, de acuerdo con la lógica pro-democrática de la UE, la naturaleza autoritaria del régimen de Egipto exigiría una priorización de aquella segunda dimensión. Este artículo pretende ofrecer un repaso ligero de los enfoques de política exterior de la Unión vis-à-vis Egipto, una guía a lo largo de la Política (o Instrumento) Europea de Vecindad, y procurará resolver en términos cuantitativos qué tipo de resiliencia sitúa la Unión en primera línea. A modo de conclusión, se ordenará una serie de recomendaciones para la estrategia de resiliencia de la UE.
**PALABRAS CLAVE:** resiliencia estatal/social, PEV, MENA, dilema estabilidad-democracia, autoritarismo, sociedad civil, productos de política, Programas de Acción Anual.

**L'UNION EUROPÉENNE ET LE VOISIN ÉGYPTIEN: ÉVALUER LA CARACTÉRISATION DE LA RÉSILIENCE EN TANT QUE PRIORITÉ DE L'ACTION EXTÉRIEURE**

**RESUME:** Le concept de résilience a acquis une dynamique académique et a imprégné un nombre de disciplines transversales le long de la seconde moitié du XXe siècle. S'appuyant sur son la flexibilité épistémologique, sa redéfinition implicite d'agence et l'inclusion des paramètres de l'incertitude et l'inévitabilité de la crise, les domaines des Relations Internationales et de la politique étrangère n'ont pas tardé à se concentrer sur son champ d'application et son opérationnalisation. Il n'est pas surprenant non plus que l'Union européenne, chargée d'un examen approfondi des défauts et des carences de sa stratégie étrangère, ait adopté ce terme dans le but de soutenir le pont paradigmatique que l'on appelle généralement pragmatisme avec principes. Pourtant, le renforcement de la résilience peut pointer vers des États ou des sociétés, et la nature autoritaire du régime égyptien oblige à donner la priorité à ces derniers, conformément à la position démocratique de l'UE.

Le présent document proposera un aperçu des approches dynamiques vis-à-vis de l'Égypte, une procédure pas à pas pour la politique européenne de voisinage et visera à mettre en termes quantitatifs le type de résilience que l'Union place au premier plan. Pour conclure, une série de recommandations sera formulée pour la stratégie de résilience de l'UE.
**MOTS-CLES:** résilience étatique/sociale, PEV, MENA, dilemme stabilité-démocratie, autoritarisme, societé civile, résultats politiques, Programmes d'Action Annuels.

## I. INTRODUCTION

In 2016, the EU Global Strategy (EUGS), signed by the High Representative for Foreign Affairs and Security Policy and drafted by her close advisor Nathalie Tocci, seated the strategic priority of resilience at the core of EU foreign policy, notwithstanding it had already been introduced as a purposeful tenet in the 2015 Reviewed European Neighbourhood Policy (ENP). Feeding on its first steps within psychology studies and its later transposition to the field of environmental policy, an overarching definition of resilience must comprise the basic elements introduced by Haris Alibasic,

who deems resilience as "the capacity and ability of organizational systems to recover from shocks and disasters and to continue to thrive during and after disasters"[2]. The term 'disaster' can be easily replaced by that of 'crisis', leading to the EUGS' formula: "the ability of states and societies to reform, thus withstanding and recovering from internal and external crises"[3].

On one hand, this conceptualization falls in line with the challenging equilibrium between the reminder that stability is no substitute for sustainability –what EU circles could label, among different aspects, as 'good governance', or plain democracy- and the need to avoid preaching[4], that is to say, while acknowledging the limits to EU policies on the ground. On the other, it poses a clear distinction, although not always readily applicable to the highly complex realities of MENA, between those potential recipients of the resilience-driven efforts: states and societies. And in a rhetorically subtle, yet informative way, the EUGS delineates where the ideal preference lies. Almost invariably at the centre of the community's system of beliefs, whose relevance also derives from they being policy drivers and sources of credibility, authoritarian states are considered inherently fragile in the long term, while they can boost their resilience "when societies feel they are becoming better off and have hope in the future"[5]. Adding the assumption that major improvements demand a *home-grown* character to the resilience vocabulary, non-state actors or civil society would come to represent the preferential targets when addressing its neighbourhood.

Under this logic, democratic environments are better suited for absorbing the negative effects of a shocking event, hence authoritarian states, apart from being unstable and threatening long-term security, are less accountable in the advancement of human rights and democratisation, thus represent an obstacle to EU resilience by themselves. Andrea Dessì attempts to clarify EUGS provisions and supply with strategic guidance by concluding that 'au-

[2] Alibasic, H., "Ethics of Resiliency in Crisis Management", In A. Farazmand (ed.), *Global Encyclopedia of Public Administration, Public Policy and Governance*, Springer International Publishing, 2018, pp. 1.

[3] Council of the EU, *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the EU's Foreign and Security Policy*, 2016, p.23.

[4] Tocci, N., *Framing the EU Global Strategy*. Rome, Italy: Springer International Publishing, 2017.

[5] Council of the EU, *Shared Vision, Common Action: A Stronger Europe... cit.*, p. 25.

thoritarian resilience', despite embodying the customary practice, would be a backlash for EU interests, therefore "greater resources and focus should be placed on the societal dimension"[6].

The present research paper will try to answer, finding the channel for the bulk of the relations between the EU as a whole and Egypt in the European Neighbourhood Instrument (ENI), the question of: what kind of resilience is the EU prioritising vis-à-vis Egypt? State or society resilience?. In doing so, the author will frame his assessment in order to verify whether the European Union is prioritizing a state-resilience approach vis-à-vis Egypt, thus becoming our hypothetical statement.

## II. METHODOLOGY

This case study will focus on the main instrument the European Union has for accomplishing its foreign policy objectives regarding Egypt, which, without undermining its own casuistry, depicts an exemplary partner for analysing and weighing the set of understandings and tools and their underlying concerns that we may find within the context of the so called Southern Neighbourhood, the territorial demarcation giving content to the EU's strategy towards the Middle East and North Africa. The time frame for the research will encompass the EU-Egypt Annual Action Programmes under the ENP since 2014, once Abdelfatah Al Sisi formally becomes President of the Republic and the political scene in Egypt enters a process of stabilisation, until the last Multiannual Programme that is expected to stretch its components until 2020. Through empirical research, and following OECD's recommendation to ensure the quantitative nature[7] when building policy output indicators, this paper will itemise the financial allocations for the array of projects within those programmes, classify the monetary units by the criteria of what kind of resilience are they attempting to target and conclude where the priority in EU decision-making lies.

---

[6] Dessí, A., "Crisis and Breakdown: How Can the EU Foster Resilience in the Middle East and North Africa?", *IAI Working Papers*, nº 17, 2017, p.16. Retrieved from: <https://www.iai.it/sites/default/files/iaiwp1737.pdf>.

[7] OECD., S*lovak Republic: Better Coordination for Better Policies, Services and Results*. Paris, France: OECD Publishing, 2015.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

Together with legal documents portraying their bilateral cooperation, EU official websites content and EU institutions' releases, media documents, reports by experts and various types of academic works will provide the sources for conducting the current research. The first section, covering the literature review, will be divided in a number of subsections dealing briefly with the concept of resilience and its state and societal dimensions at the EU level; the evolution and main aspects of the ENP and ENI, particularly in their form in regards to Egypt; and the salient foreign policy approach to this country materialising the fault line between Maghreb and Mashreq, also paying attention to very specific issues at the domestic level that might help to explain EU behavioural patterns. Then the second section will offer the quantitative analysis of policy outputs around state and society resilience, observing and categorising amounts, stakeholders and recipients. In order to stress the potential discordances between rhetoric and practice, a short third section will comment upon two different mechanisms out of the Action Programmes that have the potential to foster respective kinds of resilience: Member States' arms sales to Egypt and the EC Civil Society Facility. Lastly, a series of recommendations for EU resilience strategy will be put in place.

## III. LITERATURE REVIEW

### 1. RESILIENCE IN THE EUROPEAN EXTERNAL STRATEGY

The European Union strategic tenets and premises face a ream of potential and serious contradictions that, while offering a necessary dose of ambiguity for a wider room for manoeuvre, poses some difficulty in foreign policy design. For instance, it is asserted that "our enduring power of attraction can spur transformation in these countries"[8], however, it is equally accepted that can only happen with those countries wishing to develop stronger relations with the EU. Here, the notion of principled pragmatism finds its adequate fit, stemming from "a realistic assessment of the strategic environment as from an idealistic aspiration to advance to a better world"[9]. In this sense, the components of the concept of resilience become the bridge for both pur-

[8] Council of the EU, *Shared Vision, Common Action: A Stronger Europe... cit.*, p. 9.

[9] Ibid, p. 16.

poses, being "an ingredient for stability, good governance and prosperity"[10], although dropping the emphasis on democratisation of the neighbourhood[11].

The assiduously mentioned key principles for the unified foreign policy –differentiated approach, flexibility, tailor-made policies, endorsement of home-grown initiatives, greater local ownership– reverberate the perception of an international stage, specifically in MENA, characterised by a growing complexity, a rampant dynamism[12], where the EU counts with diminishing prospects for fulfilling its will and sees itself surrounded by an arc of instability[13]. All those tenets can be integrated into the logic of resilience, whose strength resides in its measured commitment and the acknowledgement of the own weaknesses and the existence of other worldviews. In sum, a fresh intake of *realpolitik*.

For its detractors, the novel concept implies "stability for authoritarian regimes and supporting reforms in the countries the governments of which are eager to accommodate them"[14]. For its advocates, it means drafting feasible goals and choosing a non-linear, long-term path through which neighbouring entities can build capacities for improvement and adaptation. The former stance may miss that a resilience-driven foreign policy decision entails qualifying "the resilience of whom (or what) and resilience to whom (or what)"[15]. In other words, EU external action towards its southern partners will have to deem the recipients' state or –very often, and– societal character, "not only to prevent EU policy from inadvertently strengthening 'authoritarian resilien-

[10] Dessí, A., "Crisis and Breakdown: How Can the EU... cit.", p. 4.

[11] Gahmaranova, A., "The Resilience Paradigm in the 2016 EU Global Strategy, the European Neighbourhood and Democratization", *Around the Caspian*, 2018. Retrieved from: <http://caspianet.eu/2018/11/29/the-resilience-paradigm-in-the-2016-eu-global-strategy-the-european-neighbourhood-and-democratisation/>.

[12] Soler i Lecha, E. and Tocci, N., "Implications of the EU Global Strategy for the Middle East and North Africa", *MENARA Future Notes*, Nº1, 2016. Retrieved from: <https://www.iai.it/en/pubblicazioni/implications-eu-global-strategy-middle-east-and-north-africa>.

[13] Tocci, N., "The European Union in a changing global environment: a more connected, contested and complex world", *EEAS Working Paper*, 2015.

[14] Gahmaranova, A., "The Resilience Paradigm in the 2016... cit."

[15] Colombo, S. and Ntousas, V., "Introduction Framing Resilience: A New Pathway For EU-MENA Relations", In S. Colombo, A, Dessí and V. Ntousas (eds.), *The EU, Resilience and the MENA region*, Brussels, Belgium: Foundation for European Progressive Studies and Istituto Affari Internazionali, 2017, pp.11-28.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

ce', [...] but also in order to ensure that its policies are based on the largest possible pool of viewpoint and concerns"[16], specially relevant in a region where security and economic problems find a great deal of association with deep crises of governance and the dividing line between both targets of resilience is often blurred. In addition, a source of containment for the Union's ambitions is to be found in the wariness these authoritarian regimes have in relation to the European commitment to the promotion of values and third actors and its indirect weakening effect upon the regimes' survival, leading to the rationale that, for the engagement to be somehow successful, its credibility as a reliable partner must remain rather intact.

Regarding state resilience, it will make reference to the capacity of the state[17], that is to say, virtually every policy targeting the governmental institutions, administration, public firms and services. In contrast, society resilience will cover non-state actors, encompassing civil society, "cultural organisations, religious communities, social partners and human rights defenders"[18], which could be further developed into student organisations, women's groups or worker unions.

## 2. EUROPEAN NEIGHBOURHOOD POLICY AND INSTRUMENT

The Euro-Mediterranean Partnership (EMP), launched in 1995, opened the window for the first modest steps in the institutionalization of EU-Egypt bilateral relations, as exemplified by the 2001 Association Agreement, still in effect. Yet, the scope for such a non-binding cooperation soon proved insufficient in the light of rapidly mounting changes that urged the EU to secure a broader leverage across the sea, and to the east to Central Asia: the media-called 'big bang' enlargement abruptly moved the external borders, posing emerging challenges amid potential instability spillovers and the unsteady dynamics stemming from fault lines separating political spaces vastly differentiated in socioeconomic and security terms; the changing geostrategic environment, namely the failure of the Middle East Peace Process, the 'War on Terror' and U.S. invasions in the region[19]; and the disappointing outcomes

[16] Dessí, A., "Crisis and Breakdown: How Can the EU... cit.", p. 16.

[17] Colombo, S. and Ntousas, V., "Introduction Framing Resilience... cit."

[18] Council of the EU, *Shared Vision, Common Action: A Stronger Europe... cit.*, p. 27.

[19] Stivatchis, Y., "The EU and the Middle East: The European Neighbourhood Policy". In Y. Stivatchis (ed.), *Conflict and Diplomacy in the Middle East*, 2018, pp. 110-127, .

of the EMP framework, which did not prevent from growing domestic islamophobia and irregular migration.

For all the aforementioned, the year 2004 gave birth to the European Neighbourhood Policy and, in 2007, the first EU-Egypt Action Plan entered into force, coinciding with the implementation of the European Neighbourhood and Partnership Instrument (ENPI), "the main financial instrument to fund cooperation programmes with the Neighbourhood partner countries (and committing) 1€ billion for the period 2007-2013"[20] to Egypt. Four years later, the Arab uprisings and the subsequent excessive optimism led to the novelty of an incentive-based approach, the '*more for more*' principle, "whereby efforts by partner countries were to be rewarded with additional financial and other support"[21]. In Egypt's case, the debate around the drivers plunging, first Hosni Mubarak's ouster and later Muhammad Morsi's in 2013, still discusses the triggering effect of regional mobilisation networks and the role played by external sponsors as much as it cannot be fully grasped without stressing internal developments in place. For some, popular discontent primarily stemmed from a lack of social justice, economic opportunities and a proper administration beyond coercive and extractive means. Mubarak's regime depicted a continuity with Perlmutter's characterization of the '*praetorian state*'[22]. Morsi's last months were plagued with service shortages and upward prices and unemployment, despite being democratically elected in rather free polls and championing a reformist Islamist agenda that, in principle, might be appealing for a conservative society like Egypt. Yet, critics in the opposition feared the President's widening powers and, even if Islamization gathers supporters, those aspirations do not systematically equate to the Muslim Brotherhood[23]. For others, the sudden opening of the political space reignited the competition among visions over the nature and role of the state that can be traced back to the irruption of modern governance and the abrogation of

[20] European Commission, *European Neighbourhood Policy and Enlargement Negotiations: Egypt*, 2018.

[21] European External Action Service, European Neighbourhood Policy (ENP), 2016.

[22] Perlmutter, A. "The Praetorian State and the Praetorian Army: Toward a Taxonomy of Civil-Military Relations in Developing Polities", *Comparative Politics*, vol. 1 (3), 1969, pp. 382-404.

[23] McCarthy, A. "Shari'a after Morsi: Egypt revolted against inept governance, not Islamic supremacism", *National Review*, vol.65(14), 2013..



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

the Ottoman Caliphate. In Shadi Hamid's understanding, liberalism is only neutral for those who are already liberals[24], and the fact is democracy would not smoothly come hand-in-hand with the former. With lessening support abroad and intensifying protests at home, the army's coup d'état initiated a process of stabilisation, crashing the dissidence and restructuration of the state grip over the country. The European Union did not condemn the government's toppling, instead fixed its position to the return to the democratic process and the rejection of the use of violence[25].

In sum, under the '*more for more*' principle, turning out to be poorly reflected upon, the top-down mentality and 'one size fits all' motto towards political and economic reform did not manage to produce satisfactory results. The unexpected demographic movements seeking asylum in Europe evidenced the need for a new turn.

Learning from failure, a strategic shift calls for new labels. The 2015 Reviewed ENP and the ENI did not renounce to imbue a resemblance of the traditional *logic of appropriateness* –"the idea of the 'good life' that is grounded in the identity of a specific community"[26]–, sticking to the conceptualization of the universal values as inherent EU interests, nonetheless, as explained before, a logic of consequences –"deliberate consideration of alternatives, assessment of their outcomes and preference-driven choices"[27]– consolidated within the communitarian vocabulary. Stabilisation –suggesting state resilience- becomes the core driver. The joint priorities for cooperation under ENP maintain the goal of good governance and human rights but it will be framed by economic development and stabilisation, security and migration and mobility[28], the last two pointing at a heavy weight for governmental resilience, and only after conceiving a complementary role for civil society's

[24] Hamid, S., *Islamic Exceptionalism: How the struggle over Islam is reshaping the world*, St. Martin Press, New York, 2016.

[25] BBC, "World reaction to the ousting of Egypt's Mohammed Morsi", *BBC News*, July 4, 2013.

[26] Sjursen, H. and Smith, K., Justifying EU foreign policy: the logics underpinning EU enlargement. In B. Torna and T. Christiansen (eds.), *Rethinking European Union foreign policy*, pp. 126-142, 2004, p.127.

[27] Schulz, M., "Logic of Consequences and Logic of Appropriateness". In M. Augier and D. Teece (eds.), *Palgrave Encyclopedia of Strategic Management*, 2014, pp. 1-17, p.2.

[28] European Commission, *European Neighbourhood Policy: What is it?*, 2016.

involvement. On the ground, Arab non-state actors have also tended to perceive EU's stance as biased in favour of arbitrarily selected organisations, adding to an insufficient financial support, undue bureaucratic hurdles and very slow disbursement[29].

For the period 2014-2020, the ENI is expected to allocate over 15€ billion to the Neighbourhood[30]. The bulk of it would be assumed to be channelled through the Annual Action Programmes, later replaced by the multiannual frameworks -since 2017-, which aim to provide cohesion and continuity to the concrete policies and facilitate their evaluation. According to the EC, out of that figure approximately 1€ billion corresponds to cooperation with Egypt[31]. Quite interestingly, as we will see, the numbers codified within the Action Programmes do not even get close to the former, suggesting that the Single Support Framework might not be that 'single' after all. Unfortunately, the review of those missing components falls out the scope of this research, coupled with the fact that some of them remain out of public disclosure.

## 3. EU APPROACH TO EGYPT

Whether digging into the bilateral agreements constituting the legal structure for their cooperation, assessment reports released by EU institutions or independent academic diagnosis, conclusions tend to converge to very similar findings and dilemmas, suggesting the general lines of the joint strategy vis-à-vis Egypt have consistently prevailed, in spite of an entirely new rhetorical repertoire and innovative outputs that proved lacking, or were silently withdrawn: the stability of now, rather than the one of tomorrow, pays worthy. The security-stability nexus requires a close engagement with the state, even if it implies overlooking the regime's behaviour or whether they have virtually fused in one, but Egypt's meaning for the EU has other bifurcations, yet mostly leading to the state. As commented on a policy paper requested by one of the parliamentary committees, Egypt implies "the need to preserve political stability of many authoritarian regimes because of their moderate foreign policy outlook, their strategic and geopolitical significance, their cooperation with many countries in fighting terrorism and limiting illegal migration, and because of the EU's need to secure energy routes from North

[29] Stivatchis, Y., "The EU and the Middle East: The European... cit."

[30] European External Action Service, *European Neighbourhood Policy... cit.*

[31] European Commission, *European Neighbourhood Policy... cit.*


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

Africa and keep oil and gas prices stable"[32]. Beyond this, in line with the resilience priority, the Union has become aware of a previously unsuspected anchorage of the regional nation-states, as the litmus test brought about by the Arab uprisings was not followed by the Sykes-Picot map's disruption, in fact, the initial weakening of their internal sovereignty has not been necessarily matched with the same levels of erosion at their external dimension[33], making it even more compelling to deal with the state structures struggling for survival, at the expense of a civil society clutter without enough prospects for success or trustworthiness.

The Partnership Priorities for 2017-2020 show the uneasy concessions the EU has to make to Sisi's government in order to guard its security and economic concerns and try to advance a meaningful compliance in return. For example, the opening paragraphs underline a "shared commitment to the universal values of democracy, the rule of law and the respect for human rights"[34]. The document refers to the sustainability of the economy and social development, strengthening their foreign policy ties, enhancing domestic stability, security, terrorism and migration management as the central pillars in the forthcoming years. To address these issues, the agreement systematically fingers at the public role, winks at the private sector participation in the economy, in accordance to the Union's traditional business approach, and only in the end both parties confirm to agree in the involvement of civil society as a "potent contributor"[35].

The cosmetic changes in EU's stance might not be relinquished to be just so if, without undermining the common geopolitical interests placed in Egypt and the specific reinforced importance for some Member States, as the former being the world's third largest arms importer depicts[36], in the current internal context, it was not that difficult to "challenge the entrenched posi-

[32] Ghafar, A.A., "A stable Egypt for a stable region: Socio-economic challenges and prospects", *EP Directorate-General for External Policies Policy Paper*, 2018, p.32.

[33] Soler i Lecha, E., del Sarto, R. Malmvig, H., "Interregnum: The Regional Order in the Middle East and North Africa After 2011", *MENARA Final Reports*, 1, 2019, p.13.

[34] Council of the EU, *Communication to the Delegations on the EU-Egypt Partnership Priorities 2017-2020*, 2017, p.1.

[35] Ibid., p. 9

[36] Maged, M., "SIPRI: Egypt occupies 3rd position among world's 25 largest arms importers", *Egypt Independent*, 2019.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

tions by the Government"[37]. Similarly to other MENA countries, state and regime are growingly interdependent, the public sector supplies the biggest percentage of employment, the army is the key to the government and the so called 'Arab social contract' has not preceded a feasible substitute. But a distinctive feature curbs out the opportunities to pursue society resilience under the ENP in Egypt: the recent and ongoing development of one of the most restrictive NGO laws in the world, the multilayered mechanisms for controlling financing and the pervasive penetration of third competitors. Enacted on 29th May 2017, the new 'NGO law' makes "human rights work virtually impossible"[38], the National Regulatory Agency monitors funds, goals, operations and recipients, opinion polls under supervision are banned and punitive measures are extremely severe. Moreover, international donors interested in Egypt and in securing the regime's favour have heavily diversified during the last years. China, Russia, Turkey and the Gulf states have sidelined the North American and European leverages and fragmented the range of options for a government looking for the best bargain. While countries like Saudi Arabia, UAE and Kuwait have managed to direct around 12 billion USD right after the 2014 coup[39], EU's contribution is way smaller, time-consuming in terms of gaining access and subjected to stronger scrutiny and demand for reform.

Regarding the ENP, and in particular towards Egypt, its present, more visible deficiencies do not differ vastly from those that can be equally traceable in the Common and Foreign Security Policy. The strategic bonds with a number of major Member States renders the Egyptian state to play them to compete against each other, collect the benefits and limit the scope for a common position. The insufficient consistency in EU outputs leads the organisation to usually appear to simply move from one crisis to the next one[40]. However, there is no doubt at certain aspects, such as perceiving Egypt as a first line of defence against illegal migration. Indeed, all these contingent factors have an impact on the chances for prioritising what kind of resilience.

[37] Gómez Isa, F., "EU Promotion of Deep Democracy in Egypt After the Arab Spring: A missed opportunity?", *Revista Electrónica de Estudios Internacionales*, 33, 2017, p.27.

[38] Moonrises, J. and Zenzzi, M., "In Search of a More Efficient EU Approach to Human Rights: Civil Society and EU Strategies in Egypt", *MedReset Working Papers*, 2018, p.10.

[39] Gómez Isa, F., "EU Promotion of Deep Democracy in Egypt... cit", p. 24.

[40] Ghafar, A.A., "A stable Egypt for a stable... cit.", p. 34.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

## IV. RESULTS OF THE QUANTITATIVE ANALYSIS: RESILIENCE IN THE ACTION PROGRAMMES

The current section of the research departs from the assumption that the Annual –and Multiannual- Action Programmes (AAPs) agreed between the European Union and Egypt in the bilateral cooperation structure embodied by the Association Council constitute the legal roadmaps enabling the effective implementation of the European Neighbourhood Instrument, at least of its main components. At the same time, a variety of complementary instruments, like the European Endowment for Democracy, the European Instrument for Democracy and Human Rights (EIDHR) and the Sustainable Energy Finance Facility, are understood as operating tools thus they absorb a significant yet minor amount of the financial resources previewed for the ENP and ENI. This second array of institutionalized mechanisms falls out the scope of this research, arguing the EU-led calls for standardization and integration of the legal frameworks pertaining the cooperation strategy into unitary documents –ie. Single Support Frameworks, since 2014– would have led to a lesser atomization of the funds across projects. Nevertheless, when contrasting EU publicly available data at different levels, the discovery is quite surprising.

According to European Commission's official online content, the ENI mounted for Egypt total numbers of 115€ million in 2014, 105€ million in 2015, 100€ million in 2016, another 100€ million in 2017's AAP and an estimated allocation between 432€-528€ million for the period 2017-2020[41]. These statements genuinely contrast with the total amount of 272.4€ million for the period 2014-2020 that the current analysis sums by quantifying the financial resources codified within the same AAPs and their available annexes in the same EC's official website. This gaping figures suggest, on one hand, the complementary mechanisms for conducting the ENI might be more prominent than initially thought, on the other, a good deal of funds are not made publicly available.

In order to assess whether the EU prioritises state or society resilience in the Action Programmes with Egypt, the author has examined the following documents: AAP 2014; AAP 2015 –four annexes–; AAP 2016 (Part I) –two annexes–; APP 2016 (Part II) and APP 2017 (Part I) –one annex–; AAP

[41] European Commission, *European Neighbourhood Policy... cit.*

2017 (Part II) –two annexes–; Multiannual Action Programme 2018-2020 –three annexes-. Through each of them, the smaller components –concrete and operational projects– have been revised to identify the exact individual amount of monetary units that has been allocated to them and the key stakeholders involved in the project. A particular actor is deemed to be a stakeholder if it is an important implementing agent within the project or if it is a clearly established beneficiary. Then, depending on the objectives and the recipient(s) within each project, we categorise the types of resilience that the policy output is aiming to strengthen into: a) state resilience; b) society resilience; and c) both state and society resilience.

Firstly, the state resilience category encompasses the cases in which the stakeholders are the government, public administration in general, legal and judiciary branches, critical economic sectors run by the state and national policy programmes. For its part, the society resilience category includes private companies –ie. Micro, Small and Medium Size Enterprises (MSMEs)-, civil society organisations (CSOs), disability organisations (DPOs) and NGOs in general.

A component is considered to apply for both state and society resilience in those cases where, in the light of no further information available that might permit to break down the funds in a more precise way, one of the conditions set at the left column of the following chart occurs in combination with one of the conditions at the right column:

**TABLE 1 – Both State and Societey Resilience**

| | |
|---|---|
| A) the state plays a prominent role in the management of funds.<br>B) the state is a clear beneficiary. | 1) at least, part of the financial resources are managed by non-state entities.<br>2) public-private joint ventures.<br>3) non-state actors are clear beneficiaries. |

Elaborated by the author.

A more detailed disaggregation of the components is provided in the annex to this paper. The total amount of 272.4€ million for the period 2014-2020 is divided in: a) 53.05€ million allocated to state resilience; b) 47.83€ million set aside to society resilience; and c) 160.84€ million for both state and society resilience. The total figure for our time frame -272.4€ million- includes the derived costs from EU project evaluation, audit, communication and


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

visibility, whereas the other figures represent the net monetary units allocated to each resilience priority.

Notwithstanding the former, the key test for assessing the prioritisation is found in the 'both state and society resilience' category. Apart from accumulating the biggest amount by far, it is illustrative to analyze what is the implementation rationale in relation to the triad: primary agent/second agent/end beneficiary. In most of the cases, the public entities are the prevailing agents entitled with the supervision, approval, monitoring and implementation of the components; very often depict the direct beneficiaries; and sometimes are expected to receive an indirect positive impact by giving support to an output centrally targeting civil society. Meanwhile, non-state actors, although in a well-framed manner, tend to be qualified as the end beneficiaries; sometimes have competences for a joint implementation with the state in egalitarian terms; but more often represent the secondary agent with partial instruments for enforcement under public supervision. The pervasiveness of the governmental actors has also to be considered in relation to the fact that Egypt possesses one of the highest corruption rates in the world[42]. In sum, when a combination of the two dimensions is advanced, the strength of the public structures tends to go in the first place while society resilience is usually targeted as the last stop.

## V. A BROADER VIEW: BILATERAL ARMS SALES AND THE CIVIL SOCIETY FACILITY

It has become clear to us that the state-resilience approach gathers more resources than the society-resilience goal along the various Action Programmes, nonetheless, is that an analogous pattern to the broader assemblage of EU foreign policy towards Egypt? The previous insights quoting different experts, which stress that security and economic interests have generally displaced the promotion of European standards, already suggest that stabilisation implies a closer engagement with the state for gaining its favour and ensuring its survival as a geopolitical asset. With the objective of corroborating that assessment, we will take a very brief glance at two other cooperation mechanisms, one that could be deemed as a quintessential thrust for state resilience and the other a sole commitment to society resilience: bilateral arms sales to Egypt and the EC Civil Society Facility, respectively.

[42] Transparency International. *Corruption Perceptions Index 2018,* [website content], 2018.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

Weapons trade with Egypt, although an exclusive competence by Member States, is relevant to our assessment because it is an indicator of the disparity in the added value of each kind of resilience from a monetary perspective, but also as evidence for the real attachment to the so called 'authoritarian resilience' discourse. Between 2014 and 2018, Egypt more than doubled its arms imports and France and Germany prevailed among the five largest weapon exporters[43]. Not being conclusive enough, in 2016, British sales to Egypt were estimated at 168€ million –more than the financial resources allocated to both state and society resilience for a six-years period–, France closed agreements for approximately 7.2€ billion, including dual-use technology, and Germany signed a billion-euro contract for two submarines in 2014[44]. Backed with data produced by SIPRI, a policy brief published last year concluded that France had surpassed the U.S. as the top provider of arms to Egypt and Germany increased its sales by 205% in five years[45].

For its part, the Civil Society Facility was created after the Arab uprisings in 2011 in an attempt to cooperate closer and more fruitfully with social actors in Egypt, hence mitigating the society's long-standing absence from institutionalized political participation and, in some incipient understanding, enhance the country's resilience by targeting capabilities for its population's development and well-being. Nowadays, the newly enacted legal provisions and the overall regime's reluctance have rendered the Facility almost non-enforceable in Egypt, however, even in 2011, "the financial envelop of the facility was small to match with its stated objectives"[46]. The highest figure of 900.000€[47] in 2013 is nothing comparable to the resources devoted to state resilience.

[43] Maged, M., "SIPRI: Egypt occupies 3rd position among world's... cit."

[44] Michou, H., "EU-Egypt Bilateral Relations: What Scope for Human Rights Advocacy?", *EuroMed Rights Working Paper*, 2016.

[45] TIMEP, "European Arms Sales to Egypt", *TIMEP Briefs*, 2018.

[46] Hassib, B., "EU Cooperation with Civil Society in Egypt: Assessing the New Neighbourhood Civil Society Facility", paper presented at the International Conference on Social Sciences and Humanities, at the Queen's College, University of Oxford, 2018, p.8

[47] Ibid.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

## VI. RECOMMENDATIONS FOR EU RESILIENCE STRATEGY

For resilience –defined as t*he ability of states and societies to reform, thus withstanding and recovering from internal and external crises*– to be met as the top, overarching priority it represents at the EU's foreign policy core, while keeping in mind that the 'authoritarian resilience' model has already proven to be a double-edge instrument in a growingly unstable neighbourhood, a set of recommendations needs to be introduced:

– The European Union, even acknowledging the limits to its external outreach, has to deploy a diversity of efforts to diminish and deter the ongoing process of personalization within Egyptian politics. In fact, since times of Gamal Abdel Nasser, reliance of the political system's sustainability upon one figure of leadership has been an endemic pattern in the country. 'Strongmanship' without a sufficiently consolidated underpinning structure collides with the long-term, crisis-containment endeavour that the concept of resilience poses, therefore, the EU must persevere in supporting the institutionalization of an administrative class attached to a bureaucratic model having some key resemblances with the Webberian one, that is to say, a class not easily subjected to co-optation, preferably depoliticized and constituting a firewall in the face of the risk of indistinctiveness between regime and state.

– The credibility of the EU as a supranational project with global aspirations is repeatedly questioned due to the far-fetched, often cosmetic operationalization of its pursued objectives and the recurrent dissonances in relation to its Member States' behaviour. The geopolitical significance of issues like energy, migration, terrorism or weapons trade for Europe is practically insurmountable, however, it is convenient to take into consideration that better prospects for securing those areas demand an adequate and decisive promotion of society resilience too.

– Despite the former statement, the Union also needs to be aware of engaging in cooperation with civil society segments without triggering or favouring an unaffordable weakening of the state that would dangerously conduct to its collapse. Capacity-building of Egyptian social groups non-aligned nor co-opted by the regime would be desirable as long as a sufficiently high and double-checked benchmark for their democratic credential can be confirmed. The Egyptian state might be entitled to implement some sort of supervision


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

in this sense, but the EU should make sure that its selection of beneficiaries, monitoring and financial commitment is stronger. Political Islam should not be systematically discarded among the targeted groups, although the approach to it should be extremely thorough and it must ensure that the potential beneficiary is not permeated by extremist discourses and components, even consolidating a comprehensive stopcock for the latter.

– Third competitors like China or Saudi Arabia are sidelining the EU as international donor, however, the Union remains the critical market for Egyptian goods and services and its major trading partner. The EU should remind this to Egypt's government as a potential deterrence against letting these emerging powers to penetrate into the national financial sustenance so easily, since an uninterrupted and profiting international trade is key for the regime's legitimacy.

## VII. BIBLIOGRAPHICAL REFERENCES

– ALIBASIC, H., "Ethics of Resiliency in Crisis Management". In A. Farazmand (ed.), *Global Encyclopedia of Public Administration, Public Policy and Governance*, pp. 1-6, Springer International Publishing, 2018.

– COLOMBO, S. and NTOUSAS, V., "Introduction Framing Resilience: A New Pathway For EU-MENA Relations", In S. Colombo, A, Dessí and V. Ntousas (eds.), *The EU, Resilience and the MENA region*, pp.11-28. Brussels, Belgium: Foundation for European Progressive Studies and Istituto Affari Internazionali, 2017.

– DESSÍ, A., "Crisis and Breakdown: How Can the EU Foster Resilience in the Middle East and North Africa?", *IAI Working Papers*, nº 17, 2017. Retrieved from: https://www.iai.it/sites/default/files/iaiwp1737.pdf.

– GAHMARANOVA, A., "The Resilience Paradigm in the 2016 EU Global Strategy, the European Neighbourhood and Democratization", Around the Caspian, 2018. Retrieved from: http://caspianet.eu/2018/11/29/the-resilience-paradigm-in-the-2016-eu-global-strategy-the-european-neighbourhood-and-democratisation/.

– GHAFAR, A.A., "A stable Egypt for a stable region: Socio-economic challenges and prospects",EP Directorate-General for External Policies Policy Paper, 2018. Retrieved from:http://www.europarl.europa.eu/RegData/etudes/STUD/2018/603858/EXPO_STU(2018)603858_EN.pdf

– GÓMEZ ISA, F., "EU Promotion of Deep Democracy in Egypt After the Arab Spring: A missed opportunity?", *Revista Electrónica de Estudios Internacionales*, 33, 2017. Retrieved from: http://www.reei.org/index.php/revista/num33/articulos/eu-promotion-of-deep-democracy-in-egypt-after-the-arab-spring-missed-opportunity.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

– HAMID, S., *Islamic Exceptionalism: How the struggle over Islam is reshaping the world*, St. Martin Press, New York, 2016.

– HASSIB, B., "EU Cooperation with Civil Society in Egypt: Assessing the New Neighbourhood Civil Society Facility", paper presented at the International Conference on Social Sciences and Humanities, at the Queen's College, University of Oxford, 2018.

– MAGED, M., "SIPRI: Egypt occupies 3rd position among world's 25 largest arms importers", *Egypt Independent*, 2019. Retrieved from: https://egyptindependent.com/sipri-egypt-occupies-3rd-position-among-worlds-25-largest-arms-importers/.

– MCCARTHY, A. "Shari'a after Morsi: Egypt revolted against inept governance, not Islamic supremacism", *National Review*, vol.65(14), 2013. Retrieved from: https://go-galecom.libproxy1.nus.edu.sg/ps/i.do?p=AONE&u=nuslib&id=GALE|A337371301&v=2.1&it=r&sid=AONE&asid=52ca8142.

– MICHOU, H., "EU-Egypt Bilateral Relations: What Scope for Human Rights Advocacy?", *EuroMed Rights Working Paper*, 2016. Retrieved from: https://euromedrights.org/wp-content/uploads/2016/10/EuroMed-Rights-EU-Egypt-report-external-EN.pdf.

– MOONRISES, J. and ZENZZI, M., "In Search of a More Efficient EU Approach to Human Rights: Civil Society and EU Strategies in Egypt", *MedReset Working Papers*, 16, 2018. Retrieved from: http://www.medreset.eu/wp-content/uploads/2018/07/medreset_wp_16.pdf.

– PERLMUTTER, A. "The Praetorian State and the Praetorian Army: Toward a Taxonomy of Civil-Military Relations in Developing Polities", *Comparative Politics*, vol. 1, (3), pp.382-404, 1969.

– SCHULZ, M., "Logic of Consequences and Logic of Appropriateness". In M. Augier and D. Teece (eds.), *Palgrave Encyclopedia of Strategic Management*, pp. 1-17, 2014. Retrieved from: http://www.martinshub.org/Download/LoC_LoA_PrePub.pdf.

– SJURSEN, H. and SMITH, K., Justifying EU foreign policy: the logics underpinning EU enlargement. In B. Torna and T. Christiansen (eds.), *Rethinking European Union foreign policy*, pp. 126-142, 2004.

– SOLER I LECHA, E., DEL SARTO, R. MALMVIG, H., "Interregnum: The Regional Order in the Middle East and North Africa After 2011", *MENARA Final Reports*, 1, 2019. Retrieved from: http://www.menaraproject.eu/portfolio-items/interregnum-the-regional-order-in-the-middle-east-and-north-africa-after-2011/.

– SOLER I LECHA, E. and TOCCI, N., "Implications of the EU Global Strategy for the Middle East and North Africa", *MENARA Future Notes*, 1, 2016. Retrieved from: https://www.iai.it/en/pubblicazioni/implications-eu-global-strategy-middle-east-and-north-africa.

– STIVATCHIS, Y., *The EU and the Middle East: The European Neighbourhood Policy*. In Y. Stivatchis (ed.), *Conflict and Diplomacy in the Middle East*, pp. 110-127, 2018. Retrieved from: https://www.e-ir.info/publication/conflict-and-diplomacy-in-the-middle-east-external-actors-and-regional-rivalries/.

– TOCCI, N., *Framing the EU Global Strategy*. Rome, Italy: Springer International Publishing, 2017.

– TOCCI, N., "The European Union in a changing global environment: a more connected, contested and complex world", *EEAS Working Paper*, 2015. Retrieved from: http://eeas.europa.eu/archives/docs/docs/strategic_review/eu-strategic-review_executive_summary_en.pdf.

## Annex I: Component Classification by Type of Resilience

| EU-EGYPT Annual Action Programme | State resilience | Society resilience | Both state and society resilience |
|---|---|---|---|
| *Annual Action Programme 2014 / Annex 'Expanding Access to Education and Protection for at Risk Children in Egypt'.*<br>-EU budget cost: EUR 30 million | Component 3 – Operationalising Child Law:<br>-Amount: 9.5 million.<br>-Stakeholders: Government and targeted administration. | | Component 1 – Community Schools:<br>-Amount: 13.4 million.<br>-Stakeholders: Ministry of Education, governorates, local communities.<br>Component 2 – Inclusive-model schools:<br>-Amount: 6.5 million.<br>-Stakeholders: MoE and civil society. |
| *Annual Action Programme 2015 / 4 Annexes.*<br>-EU budget cost: 63.4 million. (included the 4.4 millions financed by third entities, like Germany). | | | |
| *Annual Action Programme 2015 / Annex I 'Citizen Rights Project'.*<br>-EU budget cost: EUR 11.4 million (10 million to the projects; 0.4 by third parties and 1 million for evaluation etc.) | Component 1 – Support to the National Council for Human Rights (NCHR):<br>-Amount: 3.7 million.<br>-Stakeholders: NCHR. | | Component 2 – Increase women participation in public life:<br>-Amount: 6.7 million.<br>-Stakeholders: National Council for Women, several Ministries, civil society, particularly women. |



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

| | | | |
|---|---|---|---|
| *Annual Action Programme 2015 / Annex II 'Promoting Inclusive Economic Growth in Egypt'.*<br>-EU budget cost: EUR 16 million. (15 million + 1 million for evaluation and audit, contingencies, etc.) | | Component 2 – Grant Facility Schemes that will implement projects of specific added-value:<br>-Amount: 11 million.<br>-Stakeholders: private sector and civil society delivering support services to MSMEs. | Component 1 – strengthening the capacity of stakeholders to implement business climate…:<br>-Amount: 4 million.<br>-Stakeholders: several Ministries, selected MSMEs, CSOs. |
| *Annual Action Programme 2015 /Annex III 'Upgrading Informal Areas Infrastructure'.*<br>-EU budget cost: EUR 28 million (27 million + 1 million for evaluation, etc.) | | Component 1:<br>-Amount: approx. 16.2 million.<br>-Stakeholders: CSOs. | Component 2:<br>-Amount: approx. 10.8 million.<br>-Stakeholders: Ministries, administration and public companies , private contractors, residents. |
| *Annual Action Programme 2015 / Annex IV 'Fostering Reforms in the Egyptian Renewable Energy and Water Sectors through Developing Capacity Building'.*<br>-EU budget cost: EUR 8 million (7.4 million for the project and 0.6 million for evaluation, etc.). | Component 1 – Strengthening the capacities at central and local levels in the water sector:<br>-Amount: 4.6 million.<br>-Stakeholders: Ministry of Water Resources and Irrigation.<br>Component 2 – Strengthening the capacities at central and local levels in the energy sector:<br>-Amount: 2.8 million.<br>-Stakeholders: The Ministry of Electricity and Renewable Energy. | | |
| *Annual Action Programme 2016 (Part I) / 2 Annexes*<br>- EU budget cost: 50 million. | | | |

| | | | |
|---|---|---|---|
| *Annual Action Programme 2016 (Part I) / Annex I 'Advancing Women's Rights in Egypt'*<br><br>-EU budget cost: EUR 10 million (+0.24 being financed by potential grant beneficiaries; 9.34 million for project and 0.9 million for evaluation, etc.) | Component 1 – Support to the implementation of the National Action Plan for Female Genital Mutilation abandonment:<br><br>-Amount: 4.6 million.<br><br>-Stakeholders: National Population Council, Ministry for Population, Ministry of Health, Ministry of Justice. | | Component 2 – Support women's access to justice and legal empowerment:<br><br>-Amount: 4.74 million.<br><br>-Stakeholders: Legal Aid Offices, Dispute Settlement Offices, women citizens. |
| *Annual Action Programme 2016 (Part I) / Annex II 'National Drainage Programme III'*<br><br>-EU budget cost: EUR 40 million. | Component B – Technical assistance for capacity building for strengthening EPADP's and MRWI's planning sector:<br><br>-Amount: 2.65 million.<br><br>-Stakeholders: EPADP and MRWI. | | Component A – Investment, mainly through work contracts, for increased efficiency of drainage:<br><br>-Amount: 37 million.<br><br>-Stakeholders: EPADP, MWRI, final user bodies (BCWUAs and private sector), farmers and their families. |
| *Annual Action Programme 2016 (Part II) and Annual Action Programme 2017 (Part I) / 1 Annex*<br><br>-EU budget cost: EUR 20 million. | | | |



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

| | | | |
|---|---|---|---|
| *Annual Action Programme 2016 (Part II) and Annual Action Programme 2017 (Part I) / Annex I 'EU Facility for Inclusive Growth and Job Creation'.*<br>-EU budget cost: EUR 20 million (18.1 million for project and 1.9 million for evaluation, etc.) | | Component 2 – Increased potential of SMEs to add value in the economy and generate jobs:<br>-Amount: 3 million.<br>-Stakeholders: representative organizations of businesses, academic research institutes and think tanks. | Component 1 – Improved enabling environment for business creation and economic development:<br>-Amount: 15.1 million.<br>-Stakeholders: Egyptian SMEs , Ministry of Finance, the Egyptian Tax Authority, Egyptian Customs Authority, business associations, NGOs, think tanks. |
| *Annual Action Programme 2017 (Part II) / 2 Annexes*<br>-EU budget cost: EUR 33 million. | | | |
| *Annual Action Programme 2017 (Part II) / Annex I 'Support to Accountability and Democratic Governance'.*<br>-EU budget cost: EUR 6 million (5.57 million for project and 0.25 million for evaluation, etc.). | Component 1 – Support to fight against corruption:<br>-Amount: 3.7 million.<br>-Stakeholders: the Administrative Control Authority, the Illicit Gains Department, the Egyptian Financial Intelligence Unit, etc.<br>Component 2 – Support to the House of Representatives:<br>-Amount: 2.05 million.<br>-Stakeholders: The Egyptian Parliament and the Parliament Training Institute. | | |

| | | | |
|---|---|---|---|
| *Annual Action Programme 2017 (Part II) / Annex II 'Support to Egypt's National Population Strategy'.*<br><br>-EU budget cost: EUR 27 million (26.6 million for project and 0.4 for visibility and evaluation). | Component 3 – Population governance:<br><br>-Amount: 2 million.<br>-Stakeholders: National Population Council and public task-forces. | | Component 1 – Improved Family Planning supplies:<br><br>-Amount: 16.6 million.<br>-Stakeholders: Ministry of Health, private enterprises, citizens.<br><br>Component 2 – Increased Family Planning demand:<br><br>-Amount: 8 million.<br>-Stakeholders: Ministry of Health, CSOs. |
| *Multi Annual Action Programme 2018-2020 / 3 Annexes.*<br><br>-EU budget cost: EUR 76 million. | | | |


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

| | | | |
|---|---|---|---|
| *Multi Annual Action Programme 2018-2020 / Annex I 'EU4 Energy and Water'.*<br><br>-EU budget cost: EUR 40 million (37.8 million for projects and 2,2 million for evaluation, etc.). | | | Component 1 – Enhance capacities at central and local levels to efficient demand driven systems:<br><br>-Amount: 18.8 million.<br><br>-Stakeholders: Government, financial organisations, investors, think tanks, user associations.<br><br>Component 2 – Modernisation of the water and energy management framework:<br><br>-Amount: 9.5 million.<br><br>-Stakeholders: public-private partnerships, financial entities, administration.<br><br>Component 3 – Improving the investment climate in the water and energy sectors:<br><br>-Amount: 9.5 million.<br><br>-Stakeholders: the New and Renewable Energy Authority, the Water Regulatory Activity, private sector participation. |

| | | | |
|---|---|---|---|
| *Multi Annual Action Programme 2018-2020 / Annex II 'EU for fair access to basic services'.*<br><br>-EU budget cost: EUR 12 million (11.8 million for project and 0.2 million for evaluation, etc.). | Component 1 – Support National specialized councils' roles in inclusion and protection of vulnerable groups:<br><br>-Amount: 5.8 million.<br><br>-Stakeholders: National Council for Childhood and Motherhood, National Council on Disability Affairs. | Component 2 – Targeted support to vulnerable groups through civil society organisations:<br><br>-Amount: 6 million.<br><br>-Stakeholders: CSOs, disability organisations. | |
| *Multi Annual Action Programme 2018-2020 / Annex III 'Complementary support for capacity development and civil society'.*<br><br>-EU budget cost: EUR 24 million (23.3 million for project and 0.7 for evaluation, etc.). | Component 1 – Institutional capacity development:<br><br>-Amount: 11.65 million.<br><br>-Stakeholders: state structures. | Component 2 – Support to civil society:<br><br>-Amount: 11.65 million.<br><br>-Stakeholders: Big and small CSOs and NGOs. | |
| **TOTALS** | | | |
| **EUR 272.4 million** (includes evaluation costs, etc.) | **EUR 53.05 million** | **EUR 47.83 million.** | **EUR 160.84 million** |



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 323-348
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.11

AGORA

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.12

**Citation**: JIMÉNEZ CORTÉS, C.; PI LLORENS, M.: «Diffusion of Research Results 'Research Projects on Immigration and Human Rights: CIMCETT Project'», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 351-360

**Received**: 26 July 2019
**Accepted:** 08 September 2019

# DIFFUSION OF RESEARCH RESULTS 'RESEARCH PROJECTS ON IMMIGRATION AND HUMAN RIGHTS: CIMCETT PROJECT'

(http://www.cimcett.es/en/)

Claudia JIMÉNEZ CORTÉS[1]
Montserrat PI LLORENS[2]

## I. THE PROJECT

The project "International cooperation as an essential means to combat trafficking and smuggling of human beings: the role of the EU and other international organizations" (CIMCETT) is financed by the Ministry of Economy and Competitiveness of the Spanish Government for the years 2017 to 2019. Its main interest lies in assessing international cooperation in the fight against the smuggling and trafficking of human beings from both legal and institutional perspectives.

To accomplish this aim, and to contribute to the state of play of the regulatory framework on combating human smuggling and trafficking and to identify the existing shortcomings in terms of laws, structures and working methods, the research project has focused on three specific objectives:

1. Systematize the existing international and European legal instruments. Based on this analysis, the research team has classified the current measures according to their typology.
2. Systematize the existing structures and their coordination in order to identify dualities and deficiencies. This systematization seeks to de-

[1] Associate Professor (Profesora Titular), Universitat Autònoma de Barcelona (UAB), IP of project "International cooperation as an essential means to combat trafficking in human beings: the role of the EU and other international organizations" (CIMCETT).

[2] Associate Professor (Profesora Titular), Universitat Autònoma de Barcelona (UAB), researcher of project "International cooperation as an essential means to combat trafficking in human beings: the role of the EU and other international organizations" (CIMCETT).

velop a possible strategic plan aiming at improving the coordination between EU agencies and international organizations.

3. Identify the existing measures related to the victims of the smuggling and trafficking of human beings. It will lead to the creation of a classification of measures according to their typology and it will suggest potential mechanisms for improvement.

## II. DEVELOPMENT

To achieve the objectives, the research team has been working with primary and secondary sources. The analysis of the first ones (primary sources) has been useful for the elaboration of charts with which both instruments and international structures have been systematized, placing special emphasis on the three "p's": prevention, persecution and protection. The second ones (secondary sources) have been used by the team members for the analysis of the lack of cooperation in the fight against trafficking and smuggling of human beings that has culminated in participation in congresses and seminars, as well as the preparation of monographs, articles and presentations on specific aspects related to the objectives of the project, all of which are included on the research group web page: http://www.cimcett.es/en/dissemination-activities/.

In addition to the publications and conferences cited, the project's theme has led several components of the research group to develop specific studies, some of which have been the subject of funding. Such is the case, for example, of the R-ICIP 2017 project "The response of the international community to the crisis of the immigrants trapped in Libya", as well as the participation in a H2020 Project "ITFLOWS- tools and methods for managing migration flows" funded by the EU.

In relation with the work with primary sources, and more specifically, with regard to the preparation of maps, it is worth highlighting:

### 1. Chart of measures

The design of this chart seeks to illustrate the normative measures adopted by the states and international organizations in the field of human trafficking and smuggling. Particularly, it assesses the degree of formal interstate cooperation in each of the measures enacted in the fight against human tra-



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 351-360
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.12

fficking and migrant smuggling. Despite the disparity of instruments examined (universal-European scope; smuggling- trafficking areas, general; specific purposes) the chart offers a classification that shows whether there is a high or low degree of homogeneity when such laws are implemented and enforced to combat human trafficking and migrant smuggling.

The choice for the different categories of the chart was based on two delimiting criteria: 1. They had to be international instruments (of universal or European scope) and have a normative nature.

2. They had to be "measures", that is, actions that pursue the fight against human trafficking and / or migrant smuggling, falling under at least one of the three main categories: a) prevention; b) persecution (divided between measures of substantive law and measures of a procedural nature) and c) protection of victims.

Within this scope, the measures included in the chart have been systematized according to their nature and their degree of precision.

The result of this sistematization can be found on the research team website http://www.cimcett.es/docs/chart-measures.pdf.

## 2. Chart of structures and chart of networks

The design of these charts seeks to illustrate the degree of coordination as well as overlaps between the different intergovernmental structures in the field of human trafficking and smuggling. The reason is that, in order to limit the object of study, the research has focused on the analysis of international cooperation in its intergovernmental and formalized dimension, either through intergovernmental organizations, or through agencies which specialized in issues related to human trafficking and smuggling.

In this case and unlike the instrument map, the research team has chosen to separate the structures and the networks within them as this allows for a better systematization since the organizations under analysis reflect in themselves international cooperation of the first level while the networks represent a second level coordination. Hence, in the delimitation of the networks, it was decided as a criteria to analyse networks of a formal nature and those integrated by agencies and / or intergovernmental organizations that deal with a relevant aspect of the problem of human trafficking and smuggling, either exclusively or predominantly. Therefore, informal networks have been discar-

ded, as well as those composed eminently by states and / or non-governmental organizations.

**2.A) Structures chart.** Within the chart of the agencies, attention has focused mainly on three aspects: 1) the partnership in specific projects that are not networks; 2) the actions systematized around the three main axes of prevention, persecution and protection of the victims and 3) the direct outputs emanating from them, with special attention to databases. The comparison between agencies aims to give visibility to the degree of coordination and the overlaps between them.

**2.B) Networks chart.** For its part, the network chart focuses on the participating agencies, the degree of formalization and again the actions and outputs in the same line of the previous chart. In this case, in addition to the visibility of the coordination and overlaps at this second level, an attempt was made to reflect the impact of these networks on the strategies and work plans of the different agencies that integrate them.

## III. MAIN RESULTS SO FAR

### 1. First Objective

In relation to the first objective, the designed map shows that, in general, the formal regulatory instruments designed by the states are very taxative, as can be seen in the scarce presence of self-executing clauses. And this, obviously, is more accentuated in the rules of universal scope than in the European ones. This leads us to question its meaning and its usefulness. In this sense the team has come to the conclusion that, for instance, in the case of the Palermo protocol and its role, at least in the persecution of trafficking and smuggling, it has to be pointed out that it has been and still is a useful tool if it is fairly adjusted into the context of a multilateral international law/rule, which means positive in the long term but slow in regard to impact. There is no doubt that the presence of protocols is an improvement on the former situation, because a certain level of harmonisation is being achieved with them. Furthermore, judiciary and police actions have increased in those countries where the protocol was implemented. That said, as it was mentioned, the international dimension of the protocol cannot be ignored and therefore the objectives to be achieved though those mechanisms require some preliminary stages: the first one is


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 351-360
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.12

to obtain their ratification (171 states). Only once the commitment has been taken, can the second stage be activated. This second stage is to promote their implementation and application within the different domestic jurisdictions. To do that, the formal act of commitment is not enough, but also an integrated propositional action, that means including the protocol in their regulatory frameworks to give the judicial and police structures the necessary capacities to achieve an effective application of the protocol. In fact, states have decided to create a committee responsible for following-up the protocol's application for this purpose, always with the voluntary submission of the parties and this mechanism generates certain expectations.

Having said that, the truth is that the practice shows that the main cooperation in persecution has been of a bilateral/restricted nature and normally through informal instruments like Memorandums of Understandings (MOU). For the authorities and operators MOUs are indeed useful instruments, to structure and formalize the cooperation between agencies or bodies and states as well as between the different agencies. In fact, MOUs are especially useful to provide the data exchange with a legal basis. In that sense it is important to see the recently agreement signed with Ameripol, or the agreement signed between Europol and the Sophia operation in 2017-2018. However, it is even more important to have a legislation or cooperation agreement with the diplomatic representations and private companies which are widely used by organised crime and, to that extent, have key data for the investigation a persecution of such organised crime in human trafficking. It refers, for example, to travel agencies, money transfer companies, airlines and even consulates. All that would be desirable, but there is still a long way ahead.

## 2. Second objective.

### 2.A. Coordination

In relation to the second objective, one of the main issues that the group has to investigate is the coordination between networks and initiatives. In this regard, the main one relating to trafficking in human being should probably be carried out by the ICAT network. Twenty-three agencies (not only in the UN family) participate in ICAT and it is currently under the UNODC presidency. Its main function is to elaborate guidelines and a common discourse, which may be useful to set up the agendas of those agencies belonging to it. In this sense it can be considered a positive forum for dialogue.

Apart from this general purpose network, we can find other attempts to harmonize different policies related to trafficking and smuggling on a smaller scale. That is the case, for instance of GLO.ACT, (*Global Action against trafficking in persons and the Smuggling of Migrants*)[3]. Four agencies (UNODC; UNICEF, IOM, European Union) take part in this project aimed at assisting the participating states in elaborating and implementing a national strategy to fight against both the trafficking and smuggling of human beings. That allows for fostering a common approach to the three main lines: prevention, protection and prosecution. However, the Project has faced some troubles when developing its potential, due to the difficulties in implementing the intended measures practically in the field.

During the study, the group has found that, although all the agencies in their guidelines shared the same perspective, when putting it into practice it has done to light the fact that setting up the project at local level highly depends on each national office and their agenda and priorities. That is the reason why not always all agencies take part in all countries. The IOM experience in Libya confirmed such idea: the different priorities of the different actors makes it difficult to reach a greater harmonisation. During field operations, each mission has a certain autonomy depending, on one hand, on the needs and possibilities of the territory where it is acting and, on the other hand, depending on the priorities set by the agency. For instance, the IOM's priority in Libya are the victims where the agency is devoted to giving them assistance, providing its expertise in "individual case management", helping in their identification and sometimes even in the process of returning them.

At a European level it can be said that there are some areas with a higher coordination between the different European agencies, for example in matters of victim identification through the PEDRA program, which is shared between Frontex and Europol or in cooperation with Eurojust. However, this cooperation is limited to the issues that are within each agency's mandate.

Finally, the efforts made to achieve a certain consensus, in December 2018 in Marrakesh, in the commitments included in the Global Compact on Migration should be pointed out. The importance of this Conference can be appre-

[3] For further information please see: <https://www.unodc.org/unodc/en/human-trafficking/glo-act/index.html> [Electronic source , visited last time on 23th November 2018].


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 351-360
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.12

ciated, precisely in the strong opposition it received from some states, despite not being a document with binding legal effects.

**2.B Databases**

Another issue that the group was concerned about are the overlaps between networks and organizations, which is especially important in the case of databases. Certainly, there are overlaps between networks and organizations, which is evidenced by the existence of more than 150 guidebooks on victims' identifications. The match in the mandates (all of them related to human rights and security) makes these overlaps largely unavoidable. Nevertheless, that fact does not lead to a correspondence between perspectives when approaching these issues, and in addition to this, there are the priorities of the member states that each project found. For instance in the Libya case, the states are founding projects of different agencies relating to human trafficking and smuggling, ranging from training Libyan personnel (including coastguard and police officers) to giving assistance to immigrants, which are victims of such officers. Clearly it results in roughly unavoidable overlaps, given the different perspectives from which they are addressed. On the other hand, the opposite situation may happen, that is, the priorities of the agencies may result in certain situations not being covered while others may be covered twice. And this problem is still unsolved and causes misuse of resources. This is especially relevant in the case of databases where there are a lot of them on very similar issues but its usefulness is not so clear for different reasons:

1) The heterogeneity of the data and its sources. Databases are built on information provided by the states, but such information does not come from the same sources; by instance, information providing from the judiciary cannot be statistically analysed together with information provided by the police, though it is performed in some ONUDD databases. On other occasions, as happens with the OIM, statistics are preformed from estimates based on the work in the field experience of the organisations.

2) The information is set out without following any harmonized criteria. It withdraws any possibility of using the information to elaborate prospective studies and foresights. This is especially relevant when the information is presented in percentages without showing a number value. One court conviction may represent a 100%, giving a wrong image of judiciary action in that country regarding the analysed topic.


ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 351-360
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.12

Although some efforts have been made to harmonise at least the indicators (at least at European level with the platform to host harmonised data designed in Portugal) unfortunately they have not been successful. To all this it is necessary to add the specificity of the problem regarding the personal data databases under the persecution perspective. In this case, at a European level, there are different databases (e.g. Europol has a record of more than 90,000 suspects.) which contrast with the lack of a single database for all of the European Union, although attempts are being made to achieve the interoperability of all the existing databases. In that regard, the fact that the states (and the agencies themselves) are reluctant to share their information (even at national level) makes it very difficult to systematize it, especially considering that the EU agencies have access to information collected by other agencies or governments, which have their own data protection systems. In short, a useful platform is not enough (although it is at least desirable), as it is basic for building up a relationship of trust between all the actors involved based on a proper use of the collected data.

### 3. Third objective

Finally, in relation to the third objective –the victims- there is a consensus that their identification is a serious problem that is still not resolved for various reasons:

One reason is the difficulty of distinguishing between victims of trafficking in persons and smuggled migrants. Although in the legal theoretical sphere the difference is clear, in practice it is not, because most of them are controlled by mafias and organized crime. This implies that a large number of people start by searching or allowing a third-party involvement to be able to cross borders but during the long journey to their final destination they end up being trafficking victims. This is especially appalling when it refers to women and unaccompanied minors who are systematically deceived and subject to inhumane treatment. It is well known that in hubs to Europe like Libya all the migrants were victims of human trafficking, consequently the difference between one and another form is totally blurred. From the scope of protection, that is why IOM and generally all the institutions engaged in assisting victims in that area do not make such a difference and assist them in the same way, independently of the kind of abuse of which they had been victims (rape, sexual slavery, abduction, forced labour, torture, etc..).



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 351-360
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.12

Accordingly, another argument to point out the difficulties in identifying victims of people trafficking and migrant smuggling is that people trafficking is a phenomenon that, in most cases, is hidden behind other criminal behaviours like prostitution or illegal labour. This situation makes victims feel especially vulnerable and extremely wary of the authorities, so victims rarely cooperate with authorities. Victims' fear is founded and increases because of the possible retaliations they may suffer for cooperating with authorities. Therefore, the role of the NGOs is crucial.

Together with these two reasons an aspect that cannot be set aside is the cultural differences between states and society on the perception of irregular immigration situation according to their origin. From authorities – such as coastguards or detention centres' officers- to all other citizens their sympathy or hostility towards immigrant people depends on the origin of the immigrant and consequently their perception as "victims". Are women victims of trafficking or prostitutes? Is minors' mistreatment; education or abuse? This becomes particularly noticeable at detention centres in transit areas and in countries of destination.

So, how to face this problem? In the group's opinion there are two work lines from national and international bodies.

The first one is the development of performance indicators to harmonize and for a better identification of possible victims. Accordingly, among the more than 150 handbooks mentioned before two stand out: one recently developed by the General Council of the Judiciary of Spain and one developed by Frontex. There are also similar efforts at ONUDD, among others.

The second work line is related to training. The multiple actions developed by agencies through different training programmes must insist in this aspect and the perception of migrants not as criminals but as "victims".

## IV. KEY IDEAS SO FAR:

1) From the study of the three objectives one idea is present in all of them: the need to achieve a higher level of mutual trust. The lack of it, leads each state or body to launch their own initiatives or actions which usually are overlapped with actions from other states or institutions. That is reflected, for example, in the large number of about 500 liaison officers from the different EU member states that are in third party countries reporting to their own

countries without any global coordination mechanisms among them, something that should be essential when persecuting translational organised gangs. However, that could be solved not by launching more actions and plans but by starting to coordinate the already existing action plans and improve their follow-up in order to avoid fraud which create misgivings instead.

2) In relation to the persecution of the offences of trafficking and smuggling of people, in order to succeed, it is essential, on the basis of mutual trust, to achieve a better and higher level of harmonisation of the existing databases, as well as the provision of better legal instruments of cooperation with both public and private agents.

3) In relation with victims, despite the vast amount of support material to assist with victims' identification, it is still one of the main outstanding tasks in the fight against trafficking and smuggling. The reasons for this situation are from the distortion entailed by the organized crime on the distinction between both crimes, to the cultural problems on the perception of people who are hostages of the mafias as victims. Accordingly, the NGOs work is essential because of their presence in the field. From this point of view, maybe the most relevant aspects here is the NGO's proximity to the victims, which is really useful or even essential for the international organizations and states to carry out their actions. For example, the victims' trust in those NGOs allows access to information about their personal situation and obtain data that otherwise not even the police neither state agencies would be able to obtain. Having said that, they are essential but not enough. A structural (sensitivity) transformation on authorities and society for improvement in that area is also necessary.

4) Apart from the persecution and aid for victims, fighting against trafficking and smuggling of people needs to be more effective regarding the third pillar (which is, in fact, the first one): Prevention. People trafficking and smuggling is not only related to organized crime but also to poverty, underdevelopment and conflicts. Therefore, in order to achieve an effective policy to fight against such crimes it is essential to offer dignified life opportunities to potential victims at their origin, which discourage them from starting their journey to horror.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 351-360
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.12

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

**Citation**: ROMERO BARTUMEUS, L., «¿Sobrevivirá el Plan MARES al Plan Integral de Seguridad Marítuma? La falta de doctrina estratégica española hacia el Área del Estrecho de Gibraltar», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 361-381

**Received**: 26 July 2019
**Accepted:** 08 November 2019

# ¿SOBREVIVIRÁ EL PLAN MARES AL PLAN INTEGRAL DE SEGURIDAD MARÍTIMA? LA FALTA DE DOCTRINA ESTRATÉGICA ESPAÑOLA HACIA EL ÁREA DEL ESTRECHO DE GIBRALTAR

Luis ROMERO BARTUMEUS[1]

I.- INTRODUCCIÓN. II.- EL NUEVO PLAN DE ACCIÓN DE SEGURIDAD MARÍTIMA (PASM). III.- EL ESTRECHO EN LOS DOCUMENTOS ESTRATÉGICOS EN LAS ÚLTIMAS DÉCADAS. IV.- EL PLAN MARES. V.- LA AUTORIDAD DE COORDINACIÓN DE LA INMIGRACION EN EL ESTRECHO. VI.- CONCLUSIONES

**RESUMEN:** La aprobación del nuevo Plan de Acción de Seguridad Marítima por parte del Consejo de Seguridad Nacional plantea la necesidad de revisar el Plan Integral de Seguridad Marítima para el estrecho de Gibraltar, denominado Plan MARES y, en base a él, elaborar un Plan Integral de Seguridad Marítima que abarque todos los espacios marítimos de soberanía nacional. No queda claro, sin embargo, si el Plan MARES sobrevivirá al Plan Integral propuesto o quedará como un anexo a este último. A lo largo de las últimas décadas, la relevancia del Estrecho en los documentos político-estratégicos ha seguido una línea en forma de diente de sierra, con altos y bajos, lo que ha impedido que se elaborara una doctrina coherente y constante en torno a este espacio de relevancia estratégica internacional. Esa misma falta de coherencia se ha constatado también con el nombramiento de una Autoridad de Coordinación para luchar contra la inmigración irregular en el Estrecho al margen del Sistema de Seguridad Nacional.

**PALABRAS CLAVE**: Plan MARES, Estrecho de Gibraltar, Plan de Acción de Seguridad Marítima, Estrategia Nacional de Seguridad Marítima, Estrategia de Seguridad Nacional.

**WILL STRAIT PLAN MARES SURVIVE MARITIME SECURITY INTEGRAL PLAN? THE LACK OF SPANISH STRATEGIC DOCTRINE TOWARDS THE AREA OF THE STRAIT OF GIBRALTAR**

**ABSTRACT:** The approval of new Maritime Security Action Plan by National Security Council addresses the need to review previous Maritime Security Integral Plan for Strait of Gibraltar, entitled MARES Plan, with the aim of developing a Maritime Security Plan including all areas under Spanish sovereignty. It is unclear whether MARES Plan will survive the new Plan or will become

[1] Colaborador Honorario (Honorary Lecturer) del Área de Derecho Internacional Público y Relaciones Internacionales de la Universidad de Cádiz (UCA): <luisantonio.romero@uca.es>.
Trabajo realizado en el marco del Grupo de Investigación SEJ-572: «Centro de Estudios Internacionales y Europeos del Área del Estrecho-CINTERGIB», dirigido por el Dr. A. del Valle.

an annex of it. Over the last few decades, the Strait of Gibraltar has suffered ups and downs in terms of relevance in politico-strategic papers. Therefore, a consistent doctrine on this internationally relevant area has not been set. One further consequence of it was the designation of a Coordinating Authority to fight against irregular immigration outside of the National Security System.

**KEYWORDS:** MARES Plan, Strait of Gibraltar, Maritime Security Action Plan, National Maritime Security Strategy, National Security Strategy.

**LE PLAN MARES SURVIVRA-T-IL DU PLAN INTÉGRAL DE SÉCURITÉ MARITIME? L'ABSENCE DE DOCTRINE STRATÉGIQUE ESPAGNOLE À L'ÉGARD DE LA ZONE DU DÉTROIT DE GIBRALTAR**

**RESUME:** L'approbation du Nouveau Plan d'Action pour la Sécurité Maritime par le Conseil National de Sécurité répond à la nécessité de revoir le Plan Intégral de Sécurité Maritime pour le détroit de Gibraltar, appelé plan MARES, dans le but d'élaborer un plan de sécurité maritime englobant tous les espaces maritimes sous souveraineté espagnole. Cependant, il n'est pas clair si le plan MARES va survivra au plan global proposé ou en deviendra une annexe. Au cours des dernières décennies, la pertinence du détroit dans les documents politico-stratégiques a suivi une ligne en dents de scie, avec des hauts et des bas, l'a empêché de mettre en place une doctrine cohérente autour de cet espace d'importance stratégique internationale . Au cours des dernières décennies, le détroit de Gibraltar a connu des hauts et des bas en termes de pertinence dans les documents politico-stratégiques. Par conséquent, une doctrine cohérente sur ce domaine d'importance internationale n'a pas été établie. Une autre conséquence de cette décision a été la désignation d'une autorité de coordination chargée de lutter contre l'immigration clandestine en dehors du système de sécurité nationale.

**MOTS-CLÉS:** plan MARES, détroit de Gibraltar, Plan d'Action pour la Sécurité Maritime, stratégie nationale de sécurité maritime, stratégie de sécurité nationale.

## I. INTRODUCCIÓN

El Plan de Acción de Seguridad Marítima (PASM) 2019[2], aprobado por el Consejo de Seguridad Nacional (CSN) el 15 de marzo de 2019, y difundido a través del Boletín Oficial del Estado (BOE) dos meses después (25 de mayo), contempla revisar el Plan Integral de Seguridad Marítima para el estrecho de Gibraltar, conocido como Plan MARES, y la elaboración, en base al anterior, de un Plan Integral de Seguridad Marítima aplicable a todos los espacios de soberanía marítima nacional.

El Plan de Acción de Seguridad Marítima de 2015, al que sustituye el ahora aprobado, contemplaba la elaboración de un plan integral para el Estrecho que se materializó, el 20 de enero de 2015, en el Plan MARES. El PASM 2015, no difundido en su momento, definió cinco líneas de actuación para las cuales se crearon cinco grupos de trabajo en el seno del Consejo Nacio-

[2] Orden PCI/567/2019, de 21 de mayo, por la que se publica el Plan de Acción de Seguridad Marítima, aprobado por el Consejo de Seguridad Nacional. *BOE*, 25 de mayo de 2019.

nal de Seguridad Marítima (CNSM), uno de los cuales estaba centrado en el Plan MARES, según explicó en su momento el Jefe del Estado Mayor de la Defensa (JEMAD), almirante general Fernando García Sánchez, a la sazón presidente el CNSM[3].

A la vista del contenido del PASM 2019, aunque ambiguo en alguno de sus extremos, parece claro que el Plan MARES perderá su singularidad y el Estrecho dejará de ser la única zona de nuestra geografía con un plan específico de seguridad. Arrojar luz sobre por qué se va a producir esta circunstancia es el objetivo este documento. Para ello analizaremos el contenido del último PASM, nos adentraremos en la consideración que el Estrecho ha tenido en los documentos político-estratégicos de las últimas décadas y nos detendremos en una decisión gubernamental reciente que afecta al Estrecho y que resulta relevante para comprobar el permanente vaivén de decisiones en torno a esta zona de nuestra geografía, por otro lado, tan evidentemente estratégica.

## II. EL NUEVO PLAN DE ACCIÓN DE SEGURIDAD MARÍTIMA (PASM)

El PASM 2019 contempla cinco líneas de acción y cuatro objetivos específicos. Para el cumplimiento de estos objetivos se configuran siete 'hitos', asociados tanto a las distintas líneas de acción como a los objetivos. Se identifica como «esfuerzo principal» el referido a los hitos 1 y 2: conocimiento compartido del entorno marítimo y «la implementación de un Plan Integral de Seguridad Marítima» que abarque todas las zonas marítimas de soberanía. En el segundo de estos hitos, denominado genéricamente: «Planes de coordinación operativa interdepartamental implementados», se considera como acción prioritaria la revisión del Plan Integral de Seguridad Marítima para el estrecho de Gibraltar (Plan MARES), cuyo objetivo era «conseguir una adecuada coordinación y cooperación de los organismos competentes en la zona del Estrecho, mar de Alborán y golfo de Cádiz». La experiencia acumulada en estos años, asegura el nuevo PASM, hacen aconsejable una revisión de este documento.

[3] Comunicado de Prensa del EMAD: *El JEMAD expone la Estrategia de Seguridad Marítima Nacional* (04/03/2015). [En línea] <http://www.emad.mde.es/EMAD/novemad/noticias/2015/03/Listado/150303-conferencia-cluster-seguriodad-maritima-nacional.html> (Todas las páginas web de referencia han sido consultadas por última vez el 4 de septiembre de 2019).

Junto a esto, y citando dos iniciativas llevadas a cabo en los últimos tiempos por el Gobierno, como el nombramiento de una Autoridad de Coordinación para hacer frente a la inmigración irregular en el Estrecho y la adopción de nuevas medidas legales contra el tráfico ilícito de personas y mercancías (la limitación del uso de embarcaciones semirrígidas), justifican, dice el PASM, «la redacción de un nuevo Plan Integral de Seguridad Marítima», tomando como punto de partida el Plan MARES, y que, paulatinamente, deberá extenderse a todos los espacios de soberanía marítima nacional, así como la inclusión de la función de coordinación en toda la zona del mar Mediterráneo (NAVAREA III)[4].

El órgano responsable de la ejecución de dicha nueva redacción será el Ministerio de Defensa y la programación temporal establecida para dicha labor se sitúa entre 2019 y 2021.

Hasta el momento, la única zona geográfica del territorio nacional que contaba con un plan específico de seguridad derivado de la Estrategia de Seguridad Nacional (ESN) era la del Estrecho, precisamente gracias a la elaboración e implementación del Plan MARES. La tendencia a expandir dicha planificación a todas las zonas marítimas, centrada en la coordinación de organismos públicos y privados ante una situación de crisis en el ámbito marítimo, venía resultando evidente, al menos, desde la segunda de las reuniones de la Conferencia de Centros Operativos de Seguridad Marítima, celebrada el 7 de junio de 2016[5], en la sede del Departamento de Seguridad Nacional (DSN).

En este segundo encuentro, y a diferencia de lo ocurrido en el primero, celebrado el 29 de junio de 2015[6], el Estrecho fue el gran ausente entre los

---

[4] NAVAREA: Son radioavisos transmitidos por satélite (Inmarsat C) por una autoridad hidrográfica. Están dentro del Servicio Mundial de Radioavisos Náuticos, que ha dividido la tierra en 21 zonas, llamadas Zonas NAVAREA. España está incluida en dos zonas NAVAREA: la II y la III. El coordinador de la NAVAREA III, que abarca todo el Mediterráneo y Mar Negro, es España a través del Instituto Hidrográfico de la Marina (IHM). [En línea] <http://www.salvamentomaritimo.es/mejora-tu-seguridad/control-y-servicios-en-la-mar/radioavisos>.

[5] España. Departamento ee Seguridad Nacional: *Segunda conferencia de centros operativos de seguridad marítima.* (08/06/2016) [En línea] <http://www.dsn.gob.es/es/actualidad/sala-prensa/segunda-conferencia-centros-operativos-seguridad-mar%C3%ADtima>.

[6] España. Departamento ee Seguridad Nacional: *La Presidencia del Gobierno aborda medidas para mejorar la coordinación en el estrecho de Gibraltar.*(27/08/2015) [En línea] : <http://www.dsn.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

asuntos planteados y debatidos, al menos eso se deduce de los comunicados difundidos por el mismo DSN.

Valga como muestra que a la primera de las conferencias señaladas asistieron los responsables de seguridad marítima de la Comunidad Autónoma de Andalucía y de Ceuta y Melilla, tratándose entre otros asuntos el Plan Especial de Protección Civil «Operación Paso del Estrecho 2015», así como el Plan MARES y «las medidas operativas de coordinación reforzada a implementar en escenarios exigentes de inmigración y salvamento marítimo, así como la contaminación marina», que claramente apuntaban a la zona del Estrecho.

En la segunda Conferencia, los asuntos a debate se centraron en «la creación de un entorno de conocimiento virtual en seguridad marítima» cuya finalidad era «mejorar el conocimiento compartido del entorno marítimo mediante un proceso que favorezca el intercambio de información». A este segundo encuentro ya no fueron invitados los responsables autonómicos de la zona del Estrecho, sino los jefes nacionales de los centros operativos de seguridad marítima de cinco ministerios.

Dado que desde el primero de estos encuentros, en junio de 2015, no ha vuelto a reunirse la mencionada Conferencia para analizar el Plan MARES, o al menos no se ha difundido información al respecto, y que los ejercicios desarrollados han sido siempre diseñados y dirigidos por la Armada, nunca por el DSN, en un contexto donde se incluían otras zonas marítimas, cabe deducir que una vez elaborado el nuevo Plan Integral de Seguridad Marítima, el Plan MARES pasará a convertirse en un anexo más de aquel, junto a los de otras zonas marítimas. Dada la innegable dimensión y relevancia marítima de España parece lógico pensar que el Plan MARES fuese el embrión de una serie de planes de seguridad marítima por zonas, aunque eso nunca se explicitó en los documentos accesibles. El propio CSN, al aprobar el PASM 19, expresó que éste constituía «un paso decisivo hacia el diseño de una seguridad marítima más eficiente e integral» y que su objetivo era «impulsar una política global de seguridad en este ámbito»[7].

---

gob.es/es/actualidad/sala-prensa/presidencia-del-gobierno-aborda-medidas-para-mejorar-coordinaci%C3%B3n-estrecho#sthash.fNPXkb5p.dpuf>.

[7] España. Departamento ee Seguridad Nacional: *Consejo de Seguridad Nacional (15/03/2019)* [En línea] <https://www.dsn.gob.es/es/actualidad/sala-prensa/consejo-seguridad-nacional-15032019>.

## III. EL ESTRECHO EN LOS DOCUMENTOS ESTRATÉGICOS DE LAS ÚLTIMAS DÉCADAS

Sin embargo, y teniendo en cuenta la consideración del PASM 19 como un documento político-estratégico, resulta significativo que en él se destaque «la intensidad con que se manifiesta la inmigración irregular y el tráfico de flujos ilícitos en un área de gran importancia estratégica como el estrecho de Gibraltar, el mar de Alborán y aguas adyacentes», concluyendo que se constata "una tendencia al alza de estas amenazas en el Mediterráneo Occidental". De nuevo la única referencia en este documento a una zona concreta de nuestra geografía se centra en el Estrecho.

Pese a todo, la relevancia del Estrecho en las últimas décadas para los responsables de la Seguridad Nacional no ha seguido una línea recta, sino más bien la de dientes de sierra. Desde que la Junta de Jefes de Estado Mayor (JUJEM) estableciera en febrero de 1980 que «el centro de gravedad de nuestra estrategia es la zona del estrecho de Gibraltar con sus accesos prolongados hasta las islas Baleares y las Canarias»[8], constituyendo el acta de nacimiento del denominado ya para siempre Eje Baleares-Estrecho-Canarias; hasta que la Estrategia de Seguridad Nacional (ESN) de 2017 cite al estrecho de Gibraltar como «área de máxima relevancia estratégica» en dos ocasiones[9]; en estos casi cuarenta años, el enfoque no ha sido el mismo y los vaivenes, constantes.

Así, la Directiva de Defensa Nacional de julio de 1984 (DDN 01/84)[10] proclama de forma explícita el Estrecho como uno de los principales objetivos de la Defensa Nacional. Con anterioridad, y durante la presidencia de Calvo-Sotelo, se produce el ingreso de España en la OTAN y tras las tres rondas de conversaciones para concretar la forma que iba a adoptar dicho ingreso (aunque no se llegó a ningún acuerdo por falta de tiempo ante la inminencia de las elecciones generales) el documento que se redactó con este

[8] Franco Gonzalez-Llanos, H: "La Zona Marítima del Estrecho". *Revista General de Marina;* mayo de 1983. Tomo 204. p. 672.

[9] *Estrategia de Seguridad Nacional 2017*. Madrid, Presidencia del Gobierno, 2017, pp. 27 y 43.

[10] Para un análisis más detallado, ver: Romero Bartumeus, L.: «La relevancia del Estrecho en el planeamiento estratégico español». *ARI* (Real Instituto Elcano) *nº* 181/2004 (26/11/2004). [En línea] <http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido/!ut/p/a1/04_Sj9CPykssy0xPLMnMz0vMAfGjzOKNQ1zcA73dDQ38_YKNDRwtfN1cnf2cDf1DjfULsh0VAepxmvs!/?WCM_GLOBAL_CONTEXT=/elcano/Elcano_es/Zonas_es/ARI%20181-2004>.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

motivo reconocía «la importancia del eje Baleares-estrecho de Gibraltar-Canarias para la seguridad de España»[11].

Ya por entones, no todos los que debían asumir esta visión estratégica española como propia interpretaban de la misma manera el concepto. Mientras para la Armada, diseñadora desde los años 60 del siglo XX de esta visión, la trascendencia de la relación este-oeste era lo que en realidad unía los intereses estratégicos aliados y los españoles, destacados representantes del Ejército de Tierra se centraban en la necesidad de ligar la Península con las plazas del norte de África, es decir, ponían el énfasis en la relación norte-sur. El teniente general Díez-Alegría dudaba, incluso, que la totalidad del Eje pudiera responder a una sola estrategia[12].

En octubre de 1985 se produce el primer indicio de que algunas cosas empiezan a cambiar. El Plan Estratégico Conjunto (PEC) introduce en la definición del Eje una novedad: de los tres elementos que lo componen, el Estrecho es sustituido por la Península, por lo que queda definido como Eje Baleares-Península-Canarias.

Tras el referéndum sobre la permanencia de España en la OTAN se reanudan las conversaciones para concretar nuestro encaje en la Alianza Atlántica. Jaime Ojeda, el embajador español ante la organización, tras quince meses de negociaciones presenta la conocida como «Carta Ojeda»[13], donde se especifican los seis cometidos a desarrollar por las Fuerzas Armadas españolas, al margen de la estructura militar aliada. De los seis cometidos, tres tienen que ver con el Eje estratégico y de estos uno es, con claridad, «el control del estrecho de Gibraltar y sus accesos». En diciembre de 1988 se aprueban las Directrices para la coordinación de las fuerzas españolas con las aliadas, pero hasta 1992 no se da el visto bueno al último de los acuerdos de coordinación, el que resultó más complicado, conocido como punto «Charlie», que era precisamente el del control del Estrecho y sus accesos.

---

[11] Ver el texto íntegro de dicho documento en; Rupérez, J.: «Cuando entramos en la OTAN». *Revista Española de Defensa*. nº 112, junio de 1997.

[12] Díez-Alegría, M.: «La integración en la OTAN. B) Aspectos militares de la integración». En, Hagemeyer, B., Rupérez, J. y Peña,F.J. (Eds.): *España, Europa, Occidente. Una política integrada de seguridad*. Madrid, Distribución y Comunicación SA, 1984.

[13] Ver el texto íntegro de la «Carta Ojeda» en; Martínez-Esparza Valiente, J.: «España en la Alianza Atlántica: siete años después». *Revista de Aeronáutica y Astronáutica,* abril de 1989.

Al final de la década de los ochenta empieza a materializarse un progresivo abandono del Eje estratégico como único elemento relevante de nuestro planeamiento. La nueva Directiva, la DDN 01/92, no incluye ni una sola referencia al Estrecho ni mucho menos al Eje estratégico. Es más, puede interpretarse en alguno de sus párrafos una especie de justificación de esta ausencia, al manifestar que «nuestra seguridad [...], no se circunscribe a un espacio territorial propio e inmediato, ya que los intereses de nuestra nación también requieren ser protegidos fuera de los límites de ese espacio».

El Concepto Estratégico de 1993, fruto inmediato de la Directiva de 1992, constituye una definición claramente terrestre de los postulados estratégicos, donde se afirma que el territorio nacional es una entidad estratégica única, cuyo centro de gravedad reside en el territorio peninsular, base fundamental de proyección de fuerzas[14].

La caída del muro de Berlín, la disolución del Pacto de Varsovia, la distensión internacional y un enfoque gubernamental más centrado en la cooperación y las relaciones comerciales, propicia un cambio sustancial en el enfoque estratégico.

En pleno proceso de abandono del Eje estratégico como elemento central del planeamiento español, un acontecimiento internacional viene a removerlo todo. Se produce la invasión de Kuwait por los ejércitos iraquíes y se pone en marcha el mecanismo de reacción internacional. Más de medio millón de soldados con todo su material debe desplazarse hasta Arabia Saudí, dando lugar a la II Guerra del Golfo (1991) y a la liberación de Kuwait. El Estrecho y sus accesos aparecen como una zona clave de paso en las rutas de abastecimiento y despliegue desde el Atlántico. Las Fuerzas Armadas españolas, como parte de su aportación al esfuerzo internacional, ponen en marcha en la zona, y durante meses, tres operaciones distintas para garantizar el libre tránsito sin dificultades y una navegación segura de los convoyes con destino al otro extremo del Mediterráneo (Canal de Suez)[15].

Una nueva Directiva, la DDN 01/96, ya con el primer Gobierno del Partido Popular, excluye también al Estrecho de su contenido. En el proceso de incorporación de España a la estructura militar de la Alianza, incluidos los in-

---

[14] Argumosa Pila, J.R.: «El nuevo marco estratégico». *Ejército*; nº 656, noviembre de 1994.

[15] Romero Bartumeus, L.: *El Estrecho en la política de seguridad española del siglo XX*. Algeciras, APCG, 2003. pp. 242-244.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

tensos debates parlamentarios que se produjeron[16], la delimitación de responsabilidades en el área del Estrecho adquirió de nuevo todo el protagonismo.

Satisfacer los intereses estratégicos españoles era el objetivo general de los debates, que se concretaba en que «tanto las islas Canarias como los accesos atlántico y mediterráneo al estrecho de Gibraltar habrán de quedar en el área de responsabilidad del mando aliado ubicado en España», definiendo como «nuestro inmediato interés estratégico» el que se encontraba proyectado «en la estabilidad del Mediterráneo y la garantía de los accesos al estrecho de Gibraltar». De los cuatro objetivos militares que el Gobierno definió durante la negociación, tres se referían al Estrecho o a su área de influencia.

Tras el acuerdo final, lleno de dificultades sobre todo por la posición británica, los Términos de Referencia del Comandante en Jefe del Cuartel General Subregional Sudoeste, que se estableció en Retamares (Madrid), incluían entre sus misiones la de contribuir a la salvaguarda de las líneas de comunicación, incluyendo los accesos desde y hacia el Mediterráneo. En realidad ese extremo resultó ser una función para la que el referido mando no estaba dotado[17].

En diciembre de 2000 una nueva Directiva, la DDN 01/2000, vuelve a no incluir referencias directas a zonas de esencial interés estratégico. Un documento novedoso, el «Libro Blanco de la Defensa 2000»[18], sí incluye como zonas de interés estratégico para España: el estrecho de Gibraltar, el Mediterráneo occidental y el Norte de África. Se trata de la primera vez, desde 1992, que en un texto oficial público vuelve a aparecer citado expresamente como zona de interés estratégico el estrecho de Gibraltar.

Otro documento elaborado por primera vez, la «Revisión Estratégica» de 2003[19], incluye también al Estrecho y sus zonas de influencia de forma explícita. Tras ligar la seguridad española a la estabilidad general en el área mediterránea, plantea como un riesgo para nuestra seguridad la condición del Estrecho como paso de las líneas de comunicación por las que fluyen los recursos básicos energéticos para España.

---

[16] *Diario de Sesiones del Congreso de los Diputados. Pleno y Diputación Permanente.* VI Legislatura. nº 38 y 39, de 13 y 14 de noviembre de 1996.

[17] Romero Bartumeus, L.: La relevancia del Estrecho... cit. Ver nota 10.

[18] *Libro Blanco de la Defensa 2000*. Madrid, Ministerio de Defensa, 2000. p. 69.

[19] *Revisión Estratégica de la Defensa*. Madrid, Ministerio de Defensa, 2003.

En ese mismo año 2003 se va a producir un salto cualitativo en lo que a la relevancia del Estrecho se refiere en el contexto internacional. La invasión de Irak por Estados Unidos (III Guerra del Golfo) pone sobre la mesa, de nuevo, la relevancia de este paso angosto para buena parte de los pertrechos de guerra necesarios. Tras el 11-S todo había cambiado y ya no se trataba solamente de establecer controles ante una amenaza lejana y puramente convencional, como en 1991. La Operación *Active Endeavour* (Esfuerzo Activo), que la OTAN había puesto en marcha en el Mediterráneo para disuadir en la zona oriental de dicho mar, se va a trasladar al Estrecho[20].

El ataque en octubre de 2000 al destructor norteamericano *USS Cole* con una lancha cargada de explosivos en el puerto de Aden (Yemen) y al petrolero francés *Limburg*, cargado con 54.000 toneladas de crudo, en julio de 2002, también en la costa yemení, fue una llamada de atención.

Previamente a la decisión aliada, desde el 9 de febrero se había puesto en marcha una operación de carácter bilateral España-USA, a petición norteamericana, para dar seguridad a su paso por el Estrecho de los buques mercantes fletados para el transporte de material militar. Se activó así la operación *Strog Escort*, para dar escolta y protección a los buques aliados no combatientes a su paso por el Estrecho.

La decisión norteamericana de solicitar a España su colaboración para hacer efectivo este control, puede llevarse a cabo dada la multiplicación de medios que desde hacía al menos un par de décadas España estaba acumulando en la zona del Estrecho para asegurar su control. También resulta relevante la identificación del Gobierno español de la época con la estrategia norteamericana respecto a Irak.

El 10 de marzo, la misión que durante un mes ha sido bilateral es asumida por la Alianza, al ampliar la *Active Endeavour* al Estrecho, por lo que *Strog Escort* pasa a formar parte de la anterior, bajo la denominación *Active Endeavour Rev 1*. Un contralmirante español, al frente en esos momentos STANAVFORLANT, asume el mando de la nueva operación, subordinado al comandante de las fuerzas navales aliadas del Sur de Europa, con sede en Nápoles. El relevo programado de este mando debía recaer, por rotación, en un oficial británico, lo que el Gobierno español considera inaceptable. El control

[20] Para una versión más detallada, ver: Romero Bartumeus, L.: «Lo estratégico en la cuestión de Gibraltar». *UNISCI Discussion Papers*. Octubre 2006, nº 12. [En línea] <https://www.ucm.es/data/cont/media/www/pag-72529/UNISCIRomero12.pdf>.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

operativo de la misión es asumido entonces por la Armada española, con la intervención de fuerzas navales de diez países, todos miembros de la OTAN.

En la zona considerada de mayor riesgo, la más angosta de solo 14 kilómetros de anchura, es el Mando de Artillería de Costa español (MACTA) quien asume el cometido de mantener actualizada la situación de los buques que navegan por el Estrecho, proceder a su identificación y proporcionar la información precisa al Centro de Operaciones Navales de la Flota (CONFLOT) y al buque que actúa en cada caso como mando de escoltas. En esta operación el Centro de Operaciones del MACTA realiza la coordinación de todos los demás sistemas desplegados y actuantes en el Estrecho, asumiendo la última decisión de dar paso a los convoyes.

Durante más de un año, el MACTA se mantuvo activado de forma permanente durante todas las horas de luz, durante las cuales se efectúan pasos, asistido por sus sistemas optrónicos y electrónicos desplegados a ambos lados del Estrecho. La protección física se complementa con la prohibición de sobrevuelo a baja cota del Estrecho mientras dure la operación de escolta y la obligación de respetar un resguardo mínimo de 500 yardas alrededor de los buques convoyados, así como mantener la escucha en el canal 16 de VHF. El comandante militar naval de Algeciras difundió un aviso a navegantes en los primeros meses de 2003 en el que se informaba que «cualquier buque que se aproxime a la formación militar sin establecer comunicación (previa), se le puede considerar que tiene intenciones potencialmente hostiles». Desde el 9 de febrero de 2003 a finales de mayo de 2004, se escoltaron 543 cargueros, interviniendo algo más de medio centenar de escoltas de diez Armadas distintas. Para el profesor Antonio Marquina «la actuación española en la operación *Active Endeavour* nos indica el camino a seguir», dado que fortaleciéndose en el Estrecho permitirá a España «no seguir corriendo el riesgo de posibles puenteos y consecuencias indeseables en una zona especialmente caliente como es el Magreb»[21]. En definitiva, para el profesor Marquina, «esta es una buena lección sobre lo que es necesario potenciar y mejorar»[22].

[21] Marquina, A.: "La pista de aterrizaje de Gibraltar y la base militar". En *Gibraltar. 300 años.* Del Valle Gálvez, A. y González García, I. (Eds.) Cádiz, Servicio de Publicaciones de la Universidad de Cádiz, 2004. p. 192.

[22] Marquina, A.: *Ibidem*, p. 190.

La DDN 01/2004, sin embargo, mantuvo la ausencia de referencias al Estrecho[23]. En la de 2008 se hace directamente referencia a la necesidad de una Estrategia de Seguridad que englobe la DDN, manteniendo que la «seguridad de España está también ligada a la seguridad en el área mediterránea»[24]. La Estrategia Española de Seguridad de 2011, la primera de estas características con que ha contado España, incidiría en esta línea al señalar que «el Magreb es una zona prioritaria para España»[25].

La ESN de 2013 incluye «la paz, la estabilidad y la prosperidad en la ribera meridional del Mediterráneo» como prioritarias para la Seguridad Nacional, a la vez que resalta el particular interés que tiene para España la situación en el Magreb[26]. Cita además a Gibraltar y la califica como «una anomalía en la Europa de hoy», entendiendo que plantea «problemas de seguridad en distintos ámbitos»[27].

La actualmente en vigor Estrategia de Seguridad Nacional 2017 señala que «la Seguridad Nacional de España sigue estando condicionada por su singular posición geoestratégica, crucial para la definición de prioridades y la planificación en esta materia»[28]. Hasta en siete ocasiones se cita expresamente la posición geoestratégica de España como determinante de buena parte de su visión de seguridad. Es por ello que define al Mediterráneo y al norte de África como espacios de «prioridad estratégica para España» y al estrecho de Gibraltar como «enclave estratégico de máxima relevancia»[29], destacando en varias ocasiones el volumen del tráfico marítimo que por él transita como elemento de referencia.

Por su parte, la Estrategia de Seguridad Marítima Nacional de 2013[30], que se ha decidido no revisar tras la entrada en vigor de la ESN 2017, define al estrecho de Gibraltar como "uno de los estrechos con mayor tráfico maríti-

---

[23] *Directiva de Defensa Nacional 2004*. Madrid, Ministerio de Defensa, 2004, pp. 3 y 6.

[24] *Directiva de Defensa Nacional 2008*. Madrid, Ministerio de Defensa. 2008. p. 5.

[25] *Estrategia Española de Seguridad 2011*. Madrid, Presidencia del Gobierno, 2011. p. 29.

[26] *Estrategia de Seguridad Nacional 2013*. Madrid, Presidencia del Gobierno, 2013. p. 14.

[27] *Ibidem*.

[28] *Estrategia de Seguridad Nacional 2017*. Madrid, Presidencia del Gobierno, 2017. p. 24.

[29] *Ibidem*. pp. 27 y 43

[30] *Estrategia de Seguridad Marítima Nacional 2013*. Madrid, Presidencia del Gobierno, 2013.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

mo del mundo (con una media de 300 buques al día)"[31], además de como "un punto estratégico de confluencia del tráfico marítimo mundial"[32].

## IV. EL PLAN MARES

El Plan Integral de Seguridad Marítima para el estrecho de Gibraltar (Plan MARES), fue aprobado por el CNSM el 9 de diciembre de 2014, recibiendo el visto bueno del CSN el 20 de enero de 2015, en las mismas fechas que lo hacía el PASM 2015. Se trataba de trasladar a la zona del Estrecho la visión y las previsiones de la Estrategia de Seguridad Marítima Nacional (ESMN) y conseguir que se pudiera llevar a cabo una respuesta coordinada de todos los organismos del Estado, con competencias en seguridad marítima, en los espacios que conforman el estrecho de Gibraltar, mar de Alborán y golfo de Cádiz. Esta zona se consideró la más relevante y la de mayor riesgo de la geografía española, donde con mayor probabilidad podría materializarse una crisis grave, de ahí la necesidad de contar con un plan específico.

La consideración del Estrecho como una de las zonas de mayor tráfico marítimo del mundo, con más de 115.000 buques al año[33]; con la presencia de tres dispositivos de separación de tráfico tanto en la angostura (Estrecho) como en sus accesos oriental (Cabo de Gata) y occidental (Cabo San Vicente); su consideración como frontera sur de la Unión Europea; la presencia permanente de dos potencias ajenas a la realidad geográfica de la zona (Estados Unidos en Rota y Gran Bretaña en Gibraltar); la presencia de numerosas infraestructuras estratégicas, mayoritariamente relacionadas con el transporte y producción de energía; ser zona de paso obligado para comunicar con las ciudades de Ceuta y Melilla y la isla de Alborán (eje norte-sur) y para acceder al canal de Suez desde el Atlántico (eje este-oeste); ser el escenario donde convergen al menos cinco dispositivos españoles distintos de control 24/7, además de soportar la mayor presión del flujo migratorio regular (Operación

[31] *Ibidem*. p. 13.

[32] *Ibidem*. p. 28.

[33] Tanto en el eje este-oeste como el norte-sur, las dos torres de control de tráfico marítimo existentes en el Estrecho, en Tarifa y Tánger respectivamente, totalizaron en 2017: 115.394 buques identificados. En 2018, la cifra total ascendió a 115.708. (Datos facilitados por el Centro de Coordinación y Salvamento de Tarifa)

Paso del Estrecho)[34] e irregular[35] de la península, así como estar a la cabeza de las estadísticas del tráfico de productos estupefacientes, le confieren objetivamente la consideración de zona de elevado interés estratégico[36] y de necesario y permanente control, junto a la consideración de principal escenario potencial de una crisis.

Mantener la libertad de navegación en una zona tan sensible y relevante, además de prevenir y luchar contra cualquier tipo de actividad ilícita y de cualquier posible afectación del medio ambiente, además de proteger el litoral y ser capaz de hacer frente de forma integral a cualquier crisis que pudiera producirse en un entorno marino tan congestionado, fueron motivos más que suficientes para considerar la necesidad de un plan como éste[37], en principio único.

Para la gestión de este entorno lo primero que se consideró necesario fue una monitorización que permitiera contar con una información actualizada y permanente 24/7 de la actividad en la mar, lo que significa un adecuado conocimiento del entorno marino tanto del Estrecho como de sus accesos. Tres fueron las situaciones de seguridad marítima previstas inicialmente en el Plan MARES (SEGMAR 1, 2 y 3). La primera, de normalidad, definía nueve

[34] La Operación Paso del Estrecho, que se concreta del 15 de junio al 15 de septiembre todos los años, es la mayor operación periódica de migración controlada del planeta, registrando en 2018 un volumen total de tránsito, ida y vuelta, de 3.244.679 pasajeros y 734.240 vehículos. En 2019 las cifras de la misma operación fueron de 3.343.795 pasajeros y 761.061 vehículos. Datos de la Dirección General de Protección Civil, del Ministerio del Interior. [En línea] <http://www.proteccioncivil.es/operaciones/pasoestrecho/historico-de-informes>.

[35] Por primera vez en los últimos cinco años, en 2018 España estaba a la cabeza de Europa en llegada de inmigrantes irregulares por mar, siendo las costas andaluzas donde mayor número de llegadas se producían. Ver, Herrera, M.J., «Análisis y reflexión sobre las migraciones en España». En, Comité Especializado de Inmigración: *El fenómeno migratorio en España. Reflexiones sobre el ámbito de la Seguridad Nacional.* Ministerio de la Presidencia, Relaciones con las Cortes e Igualdad, Madrid, 2019. p. 89 [En línea] <https://www.dsn.gob.es/es/documento/fenómeno-migratorio-españa-reflexiones-desde-ámbito-seguridad-nacional> y Villaverde, S., «Andalucía triplica el número de inmigrantes llegados en patera con más de 51.000 al cierre del año». En, El Mundo (31/12/2018) [En línea] <https://www.elmundo.es/andalucia/2018/12/31/5c291b5e21efa0f4418b461a.html>.

[36] No debe obviarse como de menor relevancia la presencia en el Estrecho de dos potencias como los Estados Unidos en Rota y Gran Bretaña en Gibraltar.

[37] Romero Bartumeus, L., "Los actores que intervienen en la estrategia del estrecho de Gibraltar". En, *Cuadernos de Gibraltar / Gibraltar Reports*, nº 2, 2016/17. pp. 29-32.



*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

acciones a desarrollar en todo tiempo por los elementos actuantes en la zona de forma habitual y cotidiana. Estas acciones abarcan tareas de monitorización, patrulla, salvamento, policía, investigación, seguimiento, coordinación e inteligencia. La segunda describía una emergencia que precisara del refuerzo de medios no habituales o del apoyo de varios organismos para afrontarla. La tercera situación se canalizaría a través de lo previsto en el artículo 23 de la Ley de Seguridad Nacional, para Situaciones de Interés para la Seguridad Nacional, que requieran «de la coordinación reforzada de las autoridades competentes en el desempeño de sus atribuciones ordinarias, bajo la dirección del Gobierno, en el marco del Sistema de Seguridad Nacional, garantizando el funcionamiento óptimo, integrado y flexible de todos los recursos disponibles»[38].

Una veintena de organismos pertenecientes a ocho ministerios se identificaron como implicados con distintas competencias y tares por lo que era necesaria su coordinación para llevar a cabo este plan.

Los ejercicios denominados MARSEC, herederos de los FAMEX y luego FLOTEX, que la Armada realizaba desde 2004, centrados en la seguridad marítima, se publicitaron en 2017 para poner en práctica el Plan MARES[39], aunque desde sus comienzos tuvieron una proyección hacia todas las zonas marítimas peninsulares e insulares del país. La Armada fue y es la responsable de su ejecución cada año, aunque dependiendo de cada escenario (hasta quince diferentes) asume la dirección de cada uno de ellos un organismo distinto de la Administración, según sus competencias. En el ejercicio MARSEC 17, uno de los supuestos fue definido como de «escenario avanzado», aplicándose, según informó el propio DSN, el Plan MARES, para dar respuesta a una incidencia grave en el área del Estrecho. Desde 2015 el Departamento de Seguridad Nacional aparece como participante en estos ejercicios, pero no es hasta 2017 que uno de sus escenarios es definido concretamente para poner a prueba dicho Plan.

---

[38] Ley 36/2015, de 28 de septiembre, de Seguridad Nacional. *BOE,* nº 233, de 29 de septiembre de 2015.

[39] España. Departamento de Seguridad Nacional: *El Departamento de Seguridad Nacional participa en un ejercicio de seguridad marítima organizado por la Armada para incrementar la seguridad en el estrecho de Gibraltar*. (29/05/2017) [En línea] <https://www.dsn.gob.es/es/actualidad/sala-prensa/departamento-seguridad-nacional-participa-un-ejercicio-seguridad-mar%C3%ADtima>.

En el MARSEC 18 se diseñó un ejercicio de seguridad marítima, con participación del CNSM, que requería «coordinación interministerial al más alto nivel» y toma de decisiones en el nivel político-estratégico, para poner en práctica las situaciones MARSEC 2 y 3[40]. Se desarrolló en el golfo de Cádiz y el objetivo era, igualmente, evaluar el Plan MARES. El CNSM, en conexión con los centros operativos en tiempo real, puso en práctica su función de órgano de apoyo para el asesoramiento del CSN en los asuntos relacionados con la seguridad marítima[41]. En el último MARSEC, el de 2019[42], también se diseñó un escenario específico en torno al plan MARES, en el golfo de Cádiz, con la finalidad de «fomentar la coordinación interdepartamental en un escenario relacionado con el tráfico ilícito de armas y/o personas» unido a un incidente de catástrofe medioambiental.

## V. LA AUTORIDAD DE COORDINACIÓN DE LA INMIGRACION EN EL ESTRECHO

Tanto el PASM como el Plan MARES se encuentran perfectamente imbricados en el Sistema de Seguridad Nacional. El Sistema se apoya en el Departamento de Seguridad Nacional de Presidencia del Gobierno, que actúa como secretaría técnica del CSN y de los demás órganos sectoriales que se derivan de éste. Así sucede con el CNSM y con el Comité Especializado de Inmigración.

Este último Comité actúa como órgano de apoyo del Consejo de Seguridad Nacional «para reforzar, a nivel político-estratégico, los esfuerzos del conjunto de las Administraciones Públicas y demás actores implicados, para atender las consecuencias de la inmigración con un enfoque omnicomprensivo»[43].

---

[40] Armada Española: *Dossier de Prensa: Reunión Final de Planeamiento del ejercicio de Seguridad Marítima MARSEC.* (10/04/2018) [En línea] <http://www.armada.mde.es/archivo/noticias/conocenosnoticias/00noticias/2018/04/NT039/Dossier%20prensa%20MARSEC-18.pdf>.

[41] España. Departamento De Seguridad Nacional: *La seguridad marítima, escenario de relevancia estratégica para España.* (23/05/2018) [En línea] <https://www.dsn.gob.es/es/actualidad/sala-prensa/seguridad-mar%C3%ADtima-escenario-relevancia-estrat%C3%A9gica-para-espa%C3%B1a>.

[42] Armada Española : *Dossier de Prensa: Reunión Final de Planeamiento del ejercicio de Seguridad Marítima MARSEC* (26/03/2019).

[43] España. Departamento De Seguridad Nacional: *Comité Especializado de Inmigración.* [En línea] <https://www.dsn.gob.es/sistema-seguridad-nacional/comit%C3%A9s-


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

La ESN 2017 identifica la inmigración irregular como un desafío para la Seguridad Nacional y, entre las principales líneas de acción a llevar a cabo, establece: vigilar y controlar los accesos a las fronteras exteriores españolas.

Tras el evidente repunte de las cifras de inmigración irregular en el sur de la península durante el año 2017, y que se incrementarían aún más en 2018, el Gobierno adopta la decisión de crear una «Autoridad de Coordinación de las actuaciones para hacer frente a la inmigración irregular en la zona del estrecho de Gibraltar, mar de Alborán y aguas adyacentes»[44]. En contra de lo que podría parecer lógico, esto se produce al margen del Sistema de Seguridad Nacional. A imagen y semejanza de lo que se hizo cuando la crisis de los Cayucos en las Islas Canarias en 2006[45], el Ejecutivo decidió poner a un general de la Guardia Civil al frente de un autodenominado «mando único»[46] en el sur peninsular, pero sin relación ninguna con el Comité Especializado de Inmigración del Sistema de Seguridad Nacional. La gran diferencia entre un caso y otro tiene que ver con las fechas en que se producen ambos. En el primer caso, el de Canarias[47], no existía Estrategia de Seguridad Nacional, ni Sistema de Seguridad Nacional, ni Ley de Seguridad Nacional. Por lo tanto, tampoco existía un Comité Especializado de Inmigración. Cuando se produce el caso del Estrecho, todo lo anterior está en pie y funcionando, por lo que, aunque fuera necesario realizar tal nombramiento, no se entiende que se hiciera al margen de lo ya construido. Todavía se entiende menos que sea precisamente uno de los motivos aducidos para revisar el PASM la creación de

especializados/comit%C3%A9-especializado-inmigraci%C3%B3n#collapseSix>.

[44] Orden PCI/842/2018, de 3 de agosto. *BOE* nº 188, de 4 de agosto de 2018.

[45] Orden PRE/3108/2006, de 10 de Octubre. *BOE* nº 243, de 11 de octubre de 2006.

[46] El Ministerio del Interior publicó (*BOE* nº 204, de 23 de agosto de 2018) el nombramiento del primer general que ocupó este cargo con la denominación de «Mando Único Operativo en la Zona del Estrecho contra la inmigración irregular» sin que la Orden que creaba la figura (Ver cita 43) respaldara dicha denominación. Cuando el general Manuel Contreras fue sustituido por el general Félix Jesús Blázquez (*BOE* nº 2, de 2 de enero de 2019) éste último ya fue nombrado Autoridad de Coordinación y no «mando único». Sin embargo, la Nota de Prensa del Ministerio del Interior (28/12/2018) que daba cuenta de este relevo insistía en esta denominación.

[47] Acosta Sánchez, M.A y Del Válle Gálvez, A.: «La crisis de los cayucos. La agencia Europea de Fronteras-FRONTEX y el control marítimo de la inmigración clandestina». En, *Tiempo de Paz*, nº 83, Invierno 2016.

esta Autoridad de Coordinación, que parece totalmente desligada del Sistema de Seguridad Nacional.

Bien es cierto que desde el 6 de octubre de 2014 en que se constituye el Comité Especializado de Inmigración, hasta el 21 de septiembre de 2018, en que vuelve a reunirse, no se constata ninguna sesión de dicho órgano, según puede leerse en la misma página web del DSN[48]. A este encuentro de 2018 no asiste el general Contreras, nombrado para el puesto, aunque sí lo hace unos días después a la reunión del Consejo Nacional de Seguridad Marítima[49].

La Orden que crea la Autoridad de Coordinación fue sustituida por otra cuando apenas se habían cumplido seis meses desde su publicación[50]. Aunque se mantenían sus funciones en el ámbito de la coordinación, supervisión, asignación de zonas, solicitud de refuerzos y propuesta de operaciones, su contenido varía en no pocos apartados. Desaparece la referencia a la integración del Centro de Coordinación y Control de FRONTEX en el Centro de Coordinación de dicha Autoridad. Igualmente deja de afirmarse que el Centro de Coordinación se constituye en Centro de Situación y Seguimiento «de la gestión de fronteras marítimas», a la vez que la asunción de la coordinación de las actividades «que lleve a cabo la Armada con carácter permanente» y las del Departamento Adjunto de Vigilancia Aduanera, es sustituida por: «Coordinar las actuaciones de apoyo de la Dirección Adjunta de Vigilancia Aduanera y de las Fuerzas Armadas, relacionadas con la inmigración irregular, en la zona de responsabilidad de la Autoridad».

También se suavizan algunas expresiones, sustituyendo la frase «la centralización de la coordinación y el seguimiento de todas las actuaciones[…]», por «la coordinación y el seguimiento de las actuaciones[…]». Los roces que se produjeron entre distintos organismos de varios ministerios, también implicados en las operaciones contra la inmigración irregular, a raíz de la publicación de la Orden que creaba la Autoridad de Coordinación para el Estrecho, estuvieron en el trasfondo de estos cambios. El relevo de un general de

---

[48] España. Departamento De Seguridad Nacional*: Comité Especializado de Inmigración: Otras funciones*. [En línea] <https://www.dsn.gob.es/sistema-seguridad-nacional/comit%C3%A9s-especializados/comit%C3%A9-especializado-inmigraci%C3%B3n#collapseSix>.

[49] España. Departamento de Seguridad Nacional: *Reunión Consejo Nacional de Seguridad Marítima*. (10/10/2018). [En línea] <https://www.dsn.gob.es/es/actualidad/sala-prensa/reuni%C3%B3n-consejo-nacional-seguridad-mar%C3%ADtima-0>.

[50] Orden PCI/121/2019, de 11 de febrero. *BOE* nº 37, de 12 de febrero de 2019.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 361-381
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.13

brigada por otro de división de la Guardia Civil igualmente pudo tener que ver con las relaciones que debían establecerse entre organismos con mandos dispares y niveles administrativos no coincidentes. Circunstancia que podría haberse evitado si hubiera tenido encaje en el Sistema de Seguridad Nacional.

Pese a esa falta de coherencia entre el Sistema de Seguridad Nacional y la decisión gubernamental de no integrar la gestión de esta crisis relacionada con la inmigración irregular en el Estrecho en aquel, lo cierto es que las cifras de inmigrantes se han moderado de forma clara. Hasta el mes de agosto de 2019, inclusive, han llegado por mar a España este año un 45 por ciento menos de inmigrantes que en 2018[51]. En el Ministerio del Interior se habla de un «cambio», y aluden como razones del descenso a «la creación de la Autoridad de Coordinación en el Estrecho, la colaboración de la UE y el trabajo realizado por España en cooperación con los países de origen y tránsito, especialmente con Marruecos»[52].

## VI. CONCLUSIONES

Resulta evidente que, a lo largo de las últimas décadas, no ha habido en los documentos político-estratégicos y, en consecuencia, tampoco en las decisiones operativas subsiguientes, continuidad a la hora de considerar al Estrecho una zona de especial relevancia, lo que ha traído consigo un constante vaivén en la materialización de una doctrina sólida. Así, la falta de una idea clara a lo largo del tiempo explica que, pese a la multitud de indicadores que avalan la relevancia del área del Estrecho, que provocó que se conformara en la única zona de nuestra geografía con un plan político-estratégico específico, el Plan MARES acabe transformándose en un anexo de un Plan general.

El PASM 2019 contempla una revisión del Plan MARES y la elaboración, en base a él, de un Plan Integral que abarque todas las zonas marítimas de soberanía. No queda claro si el Plan MARES, que nació con la vista puesta

[51] En 2017 llegaron a la península y Baleares 20.757 inmigrantes irregulares por vía marítima. En 2018 la cifra ascendió a 54.703. Hasta el 1 de septiembre de 2019 fueron 14.425. Datos del Ministerio del Interior. [En línea] <http://www.interior.gob.es/es/prensa/balances-e-informes/2019>.

[52] Sanmartín, O.R., "Marruecos controla las pateras tras un sinfín de favores de España". En El Mundo, 12 de agosto de 2019. [En línea] <https://www.elmundo.es/espana/2019/08/12/5d5059cffdddff22768b4640.html>

en la zona del Estrecho, Mar de Alborán y Golfo de Cádiz, va a mantenerse como tal o va a quedar integrado en el nuevo, como un anexo. Todo indica que así será.

¿Es coherente esta deriva con la consideración del Estrecho como la zona que soporta el mayor riesgo de crisis? ¿Es coherente con un análisis objetivo de su relevancia estratégica? ¿Es coherente con la ESN 2017 que califica al Estrecho como «enclave estratégico de máxima relevancia»?

Como se constató en 2003, disponer desde tiempo de no crisis de un despliegue y una práctica basada en lo conjunto e incuso en lo combinado, en una zona tan sensible a nivel mundial como el estrecho de Gibraltar, proporciona capacidad de proyectar seguridad y prestigio internacional.

Además, la creación de una Autoridad de Coordinación de la lucha contra la inmigración irregular en el área del Estrecho, al margen del Sistema de Seguridad Nacional, no es precisamente una decisión coherente con el desarrollo del propio Sistema, que es el que debe dar continuidad a su vez a la acción de Gobierno en el ámbito de la Seguridad.

## REFERENCIAS BIBLIOGRÁFICAS

– ACOSTA SÁNCHEZ, M.A y DEL VÁLLE GÁLVEZ, A.: "La crisis de los cayucos. La agencia Europea de Fronteras-FRONTEX y el control marítimo de la inmigración clandestina". En *Tiempo de Paz*, nº 83, 2016, pp. 19-30.

– ARGUMOSA PILA, J.R.: "El nuevo marco estratégico". *Ejército*; nº 656, noviembre de 1994.

– DÍEZ-ALEGRÍA, M.: "La integración en la OTAN. B) Aspectos militares de la integración". En, HAGEMEYER, B., RUPÉREZ, J. y PEÑA,F.J. (Eds.): *España, Europa, Occidente. Una política integrada de seguridad.* Madrid, Distribución y Comunicación SA, 1984.

– FRANCO GONZALEZ-LLANOS, H: "La Zona Marítima del Estrecho". *Revista General de Marina*; mayo de 1983. Tomo 204. p. 672.

– MARQUINA, A.: "La pista de aterrizaje de Gibraltar y la base militar". En *Gibraltar. 300 año*s. DEL VALLE GALVEZ, A. y GONZALEZ GARCIA, I. (Eds.) Cádiz, Servicio de Publicaciones de la Universidad de Cádiz, 2004. pp. 177-192.

– MARTÍNEZ-ESPARZA VALIENTE, J.: "España en la Alianza Atlántica: siete años después". *Revista de Aeronáutica y Astronáutica*, abril de 1989.

– ROMERO BARTUMEUS, L., "Los actores que intervienen en la estrategia del estrecho de Gibraltar". En, *Cuadernos de Gibraltar / Gibraltar Reports*, Universidad de Cádiz, nº 2, 2016/17. pp. 29-32.

– ROMERO BARTUMEUS, L.: "La relevancia del Estrecho en el planeamiento estratégico español". *ARI (Real Instituto Elcano)* nº 181/2004 (26/11/2004). [En línea] http://www.realinstitutoelcano.org/wps/portal/rielcano_es/contenido/!ut/p/a1/04_Sj9CPykssy0xPLMnMz0vMAfGjzOKNQ1zcA73dDQ38_YKNDRwtfN1cnf2cDf1DjfULsh0VAepxmvs!/?WCM_GLOBAL_CONTEXT=/elcano/Elcano_es/Zonas_es/ARI%20181-2004

– ROMERO BARTUMEUS, L.: "Lo estratégico en la cuestión de Gibraltar". *UNISCI Discussion Papers*. Octubre 2006, nº 12. [En línea], https://www.ucm.es/data/cont/media/www/pag-72529/UNISCIRomero12.pdf

– ROMERO BARTUMEUS, L.: *El Estrecho en la política de seguridad española del siglo XX*. Algeciras, APCG, 2003.

– RUPÉREZ, J.: "Cuando entramos en la OTAN". *Revista Española de Defensa*. nº 112, junio de 1997.

# DOCUMENTATION

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.14

**Citation**: CALVO MARISCAL, L., «Relación de Tratados, Acuerdos no Normativos, Memorandos de Entendimiento y Comunicados conujuntos España-Marruecos», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 385-389.

**Received**: 26 July 2019
**Accepted:** 08 September 2019

# RELACIÓN DE TRATADOS, ACUERDOS NO NORMATIVOS, MEMORANDOS DE ENTENDIMIENTO Y COMUNICADOS CONJUNTOS ESPAÑA-MARRUECOS, 2018-2019

Lorena CALVO MARISCAL[1]

## I. TRATADOS BILATERALES

1. Protocolo entre el Reino de España y el Reino de Marruecos para la donación irrevocable de la propiedad del "Gran Teatro Cervantes" de Tánger. *BOE,* núm. 68, de 20 de marzo de 2019, pp. 27672-27673.

## II. ACUERDOS NO NORMATIVOS

### 1. CONVENIO

1. Convenio entre el Reino de España y el Reino de Marruecos sobre cooperación en materia de seguridad y de lucha contra la delincuencia (Rabat, 13 de febrero de 2019)[2].

[1] Investigadora (Researcher; Chercheur) del Centro de Excelencia Jean Monnet «Inmigración y Derechos Humanos en las Fronteras Exteriores Europeas – Migration and Human Rights in Europe's External Borders». Profesora Sustituta del Área de Derecho Internacional Público y Relaciones Internacionales, Universidad de Cádiz. Grupo de Investigación «Centro de Estudios Internacionales y Europeos del Área del Estrecho» –SEJ 572-, del Plan Andaluz de Investigación, del que es Investigador Responsable el Dr. Alejandro del Valle Gálvez, Catedrático de Derecho Internacional Público y RRII de la Universidad de Cádiz. Proyecto de I+D «España, seguridad y fronteras exteriores europeas en el área del Estrecho», DER2015-68174-R, Investigadores Principales A del Valle Gálvez e I. González García. Proyecto financiado por el Ministerio de Economía y Competitividad y Fondos FEDER de la UE.

[2] España. Ministerio del Interior, «Grande-Marlaska firma en Rabat un convenio para estrechar la cooperación entre España y Marruecos en la lucha contra el terrorismo y la delincuencia organizada»: <http://www.interior.gob.es/prensa/noticias/-/asset_publisher/GHU8Ap6ztgsg/content/id/9938222>, 13.02.2019.

## 2. MEMORANDOS DE ENTENDIMIENTO

1. Memorando de Entendimiento entre el Instituto de Investigación en energía solar y nuevas energías -IRESEN- y el Centro para el Desarrollo tecnológico Industrial de España- CDTI –(Marruecos, 11 de octubre de 2018)[3].

2. Memorándum de Entendimiento para la concesión de subvenciones y ayudas a lectorados de español MAEC-AECID entre la AECID y la Universidad Euroed de Fez. (Madrid, 11 de enero de 2018)[4].

3. Memorando de Entendimiento para el establecimiento de una asociación estratégica en el ámbito de la energía entre el Ministerio para la Transición Ecológica del Reino de España y el Ministerio de Energía, Minas y Desarrollo sostenible del Reino de Marruecos (Rabat, 13 de febrero de 2019)[5].

4. Memorando de Entendimiento entre el Museo Nacional Centro de Arte Reina Sofía del Reino de España, y la Fundación Nacional de Museos del Reino de Marruecos para la Organización de una Exposición de arte contemporáneo marroquí (Rabat, 13 de febrero de 2019)[6].

5. Memorando de Entendimiento entre Patrimonio Nacional del Reino de España y los archivos reales del Reino de Marruecos para la organización de una exposición en el Palacio Real de Madrid (Rabat, 13 de febrero de 2019)[7].

---

[3] España. Ministerio de Ciencia, Información y Universidades. Centro para el Desarrollo Tecnológico Industrial, «Firma del MOU CDTI-IRESEN y apertura de la primera Convocatoria bilateral INNO-ESPAMAROC ENERGY entre España y Marruecos», *North Africa & Middle East Spanish Innovation Times*, 18.11.2018, <http://cdtioficial.es/recursos/doc/Programas/Cooperacion_internacional/Argelia/Newsletter/18509_6116112018105215.pdf>.

[4] Documento obtenido gracias al Portal de Transparencia de la Administración General del Estado: <https://transparencia.gob.es/transparencia/transparencia_Home/index.html>.

[5] La Moncloa, 13.02.2019. «Acuerdo con el Reino de Marruecos para el desarrollo de una tercera interconexión eléctrica y una estrategia de colaboración en el ámbito de la energía», <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/ecologica/Paginas/2019/140219-energiamarruecos.aspx>.

[6] La Moncloa, 13.02.2019. «España y Marruecos colaborarán en el ámbito de Museos»: <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/cultura/Paginas/2019/130219-museos.aspx>.

[7] Infomarruecos.ma, 14.02.2019. «Marruecos-España: organización en el Palacio Real de Madrid de una exposición sobre las colecciones reales de los dos países»: <https://


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 385-389
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.14

6. Memorando de Entendimiento entre el Ministerio de Cultura y Deporte del Reino de España y la Fundación Nacional de Museos del Reino de Marruecos para la colaboración en materia de Museos (Rabat, 13 de febrero de 2019)[8].

7. Memorando de Entendimiento para el establecimiento de una asociación estratégica global entre el Gobierno del Reino de España y el Gobierno del Reino de Marruecos (Rabat, 13 de febrero de 2019)[9].

8. Memorando de Coloración avanzada para la puesta en marcha del dispositivo de facilitación de los flujos comerciales y de pasajeros a través del Estrecho de Gibraltar entre el Reino de España y el Reino de Marruecos (Rabat, 13 de febrero de 2019)[10].

9. Memorando de Entendimiento relativo al desarrollo de una tercera interconexión eléctrica España-Marruecos entre el Ministerio para la Transición Ecológica del Reino de España y el Ministerio de Energía, Minas y Desarrollo sostenible del Reino de Marruecos (Rabat, 13 de febrero de 2019)[11].

10. Memorando de Entendimiento entre la Comisión Nacional del Mercado de Valores del Reino de España y la Autoridad Marroquí del Mercado de

infomarruecos.ma/marruecos-espana-organizacion-en-el-palacio-real-de-madrid-de-una-exposicion-sobre-las-colecciones-reales-de-los-dos-paises/>.

[8] La Moncloa, 13.02.2019. «España y Marruecos colaborarán en el ámbito de Museos»... *cit.* nota 6.

[9] España. Ministerio de Asuntos Exteriores, Unión Europea y Cooperación. Oficina de Información Diplomática. Ficha país: Reino de Marruecos, octubre 2019, p. 7. Disponible en: <http://www.exteriores.gob.es/Documents/FichasPais/MARRUECOS_FICHA%20PAIS.pdf>

[10] Referencia obtenida a través de la «Resolución de la Presidencia de la Autoridad Portuaria de la Bahía de Algeciras por la que se acuerda la delegación de funciones en su Director General para la firma del Memorando de Colaboración para la puesta en marcha del dispositivo de facilitación de los flujos comerciales y de pasajeros a través del Estrecho de Gibraltar entre el Reino de España y el Reino de Marruecos», publicada en el *BOE,* núm. 35, de 9 de febrero de 2019, páginas 6909 a 6909 (1 pág.)

[11] La Moncloa, 14.02.2019. «Acuerdo con el Reino de Marruecos para el desarrollo de una tercera interconexión eléctrica y una estrategia de colaboración en el ámbito de la energía»: <https://www.lamoncloa.gob.es/serviciosdeprensa/notasprensa/ecologica/Paginas/2019/140219-energiamarruecos.aspx>.

capitales del Reino de Marruecos relativo a asistencia y cooperación mutua (Rabat, 13 de febrero de 2019)[12].

11. Memorando de Entendimiento y cooperación entre la Fiscalía General del Estado del Reino de España y la Presidencia del Ministerio Público del Reino de Marruecos (Rabat, 26 de marzo de 2019)[13].

12. Memorando de Entendimiento entre la Agencia Estatal de Meteorología del Reino de España y la Dirección Nacional de Meteorología del Reino de Marruecos para fomentar la colaboración en actividades de meteorología y climatología[14].

## 3. OTRAS REUNIONES Y COMUNICADOS CONJUNTOS

1. Declaración conjunta firmada por el Ministro Delegado para la Reforma de la Administración y el Servicio Público del Reino de Marruecos, Sr. Mohamed Ben Abdelkader, y la Ministra española de Política Territorial y Servicio Público, Meritxell Batet (Madrid, 24 de enero de 2019)[15].

2. Reunión bilateral entre la Ministra de Defensa, Margarita Robles, del Reino de España y ministro delegado ante el Jefe de Gobierno del Reino de Marruecos, encargado de la Defensa Nacional, Abdeltif Loudyi (Madrid, 4 de marzo de 2019)[16].

---

[12] Documento accesible a través del Portal web de la Comisión Nacional del Mercado de Valores (CNMV): <https://www.cnmv.es/DocPortal/Legislacion/Acuerdo/MOU_MARRUECOS_es.pdf>.

[13] Departamento de la Comunicación del Reino de Marruecos, 26.03.2019. «Marruecos-España: Firmado en Rabat un memorando de entendimiento en materia de cooperación judicial»: <http://www.maroc.ma/es/actualites/maroc-espagne-signature-rabat-dun-memorandum-dentente-en-matiere-de-cooperation>.

[14] Información obtenida a través de la División de Tratados Internacionales y Acuerdos no Normativos. Ministerio de Asuntos Exteriores, Unión Europea y Cooperación (España).

[15] Embajada del Reino de Marruecos en Madrid, 25.01.2019: «Marruecos y España dan un nuevo impulso a su cooperación en la modernización de la función pública»: <http://www.embajada-marruecos.es/marruecos-y-espana-dan-un-nuevo-impulso-a-su-cooperacion-en-la-modernizacion-de-la-funcion-publica/>.

[16] España. Ministerio de Defensa, 04.03.2019: «La ministra de Defensa mantiene una reunión de trabajo con su homólogo marroquí»: <https://www.defensa.gob.es/gabinete/notasPrensa/2019/03/DGC-190304-ministro-marroqui.html>


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 385-389
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.14

3. Encuentro entre el Ministro de Asuntos Exteriores, Unión Europea y Cooperación, Josep Borrell y su homólogo marroquí, Nasser Bourita, en el marco del seminario de reflexión sobre el futuro de las relaciones entre Marruecos y la Unión Europea con el horizonte de 2030, organizado por el Ministerio de Asuntos Exteriores y de Cooperación Internacional de Marruecos (Rabat, 3 de junio de 2019)[17].

4. Reunión bilateral entre el Ministro de Asuntos Exteriores, Unión Europea y Cooperación en funciones Josep Borrell; y el Ministro de Asuntos Exteriores de Marruecos, Cooperación Africana y marroquíes residentes en el exterior, Nasser Bourita (Nueva York, 24 de septiembre de 2019)[18].

5. Comunicado conjunto del Gobierno de España y del Gobierno de Marruecos, sobre la contratación en el país de origen para la campaña 2018-2019 de fresas y frutos rojos en Huelva (Huelva, 29 de octubre de 2019)[19].

6. Reunión bilateral entre el Ministro de Asuntos Exteriores, Unión Europea y Cooperación en funciones Josep Borrell; y el Ministro de Asuntos Exteriores de Marruecos, Cooperación Africana y marroquíes residentes en el exterior, Nasser Bourita (Madrid, 27 de noviembre de 2019)[20].

[17] España. Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, 03.06.2019: «El ministro de Asuntos Exteriores, Unión Europea y Cooperación visita Marruecos»: <http://www.exteriores.gob.es/Portal/es/SalaDePrensa/NotasDePrensa/Paginas/2019_NOTAS_P/20190603_NOTA89.aspx>.

[18] España. Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, 24.09.2019: «El ministro de Asuntos Exteriores, Unión Europea y Cooperación se reúne con el Ministro de Asuntos Exteriores de Marruecos»: <http://www.exteriores.gob.es/Portal/es/SalaDePrensa/NotasDePrensa/Paginas/2019_NOTAS_P/20190924_NOTA123.aspx>.

[19] Documento disponible en la página web del Ministerio de Trabajo e Inserción Profesional del Reino de Marruecos: <http://www.emploi.gov.ma/attachments/article/846/Communiqu%C3%83%C2%A9%20conjoint%20agriculture%20Espagne%20MTIP%20V%20FR.pdf>.

[20] España. Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, 27.11.2019: «El Ministro de Asuntos Exteriores, Unión Europea y Cooperación se reúne con el Ministro de Asuntos Exteriores de Marruecos, Cooperación Africana y marroquíes residentes en el exterior»: <http://www.exteriores.gob.es/Portal/es/SalaDePrensa/NotasDePrensa/Paginas/2019_NOTAS_P/20191127_NOTA158.aspx>.

# BIBLIOGRAPHIE CRITIQUE

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.15

**Citation**: REINA GRAU, M., «DÍEZ PERALTA, Eva, *El matrimonio infantil y forzado en el derecho internacional. Un enfoque de género y de los derechos humanos*. Tirant lo Blanch, Valencia, 2019, 319 pp», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 393-398

**Received**: 25 November 2019
**Accepted:** 30 November 2019

# DÍEZ PERALTA, Eva, *El matrimonio infantil y forzado en el derecho internacional. Un enfoque de género y de los derechos humanos*. Tirant lo Blanch, Valencia, 2019, 319 pp.

Ante nosotros se nos presenta una obra que elabora un profundo estudio acerca de una práctica nociva llevada a cabo en numerosos países del mundo y que supone una grave violación de derechos humanos. En este contexto, la aportación de la autora resulta especialmente grata, asimismo, el desarrollo de la obra nos aporta un conocimiento completo del marco legislativo y jurisprudencial que prohíbe esta práctica e, igualmente, nos incita a reflexionar sobre las lagunas normativas y sobre la necesidad de crear nuevas y mejores medidas que protejan, verdaderamente, los derechos de aquellas personas que ven el desarrollo de sus vidas determinadas por el matrimonio infantil.

La obra se compone de cinco capítulos. En primer lugar, la autora comienza con una introducción donde ofrece un análisis del concepto de *matrimonio infantil, precoz y forzado* y, para ello, acude a diversos informes y resoluciones de organizaciones internacionales. Tras el desglose de cada uno de estos conceptos, llega a la conclusión de que todos ellos se encuentran relacionados entre sí y que, por consiguiente, siempre que sea un matrimonio infantil, es también un matrimonio forzado, ya que, un menor de dieciocho años carece de capacidad suficiente para dar consentimiento de contraer matrimonio. Más allá del estudio de la terminología, aborda los factores que favorecen la vulneración de los derechos de las mujeres y niñas, como es el caso de la cultura o la influencia que ejerce el derecho a la religión o creencias. Además de ello, en términos generales, la autora expone el grave problema a nivel mundial y las terribles consecuencias que derivan de este acto en la vida de las mujeres y niñas, sobre todo, además del negativo desarrollo, tanto social como económico, que produce en los países donde el matrimonio infantil es una práctica habitual. Señala también, que, principalmente gracias al activismo de las organizaciones no gubernamentales, la eliminación del matrimonio infantil se ha convertido en un objetivo a nivel universal y se encuentra introducido en la

Agenda 2030 y en la Agenda 2063 de la Unión Africana. Finalmente, la autora cierra esta introducción añadiendo los objetivos que desea alcanzar a lo largo del desarrollo de la obra.

Una vez terminada la introducción, comienza el segundo capítulo, donde se aborda un amplio análisis sobre el marco normativo que regula los derechos de las mujeres y niñas, así como la universal prohibición del matrimonio infantil. Este punto se inicia con el estudio de los derechos reconocidos en la Convención sobre la Eliminación de todas las formas de Discriminación contra la Mujer de 1979 y su protocolo facultativo, a través de los cuales, se aporta una definición al concepto de «discriminación a la mujer» y refuerza un marco normativo dedicado a la protección de los derechos y a aplicar las medidas oportunas de protección por parte de los Estados partes de la Convención.

Por otro lado, nos abre el debate jurídico que subyace ante la cuestión relativa a la edad apropiada para contraer matrimonio, asimismo, no existe a día de hoy una edad mínima establecida en los tratados y convenciones. Este hecho, provoca una desprotección para los niños y niñas de origen de países donde la tradición del matrimonio infantil está más arraigada. Además, la autora defiende, señalando distintas observaciones y recomendaciones elaboradas por órganos de organizaciones internacionales, que debe establecerse una edad mínima, garantizando la igualdad de género y que esta sea igual tanto para hombres como para mujeres, siendo la edad más defendida la de dieciocho años. A su vez, menciona la necesidad de creación de medidas de prevención, sobre todo en las zonas donde mayormente se produce este tipo de prácticas y, hace hincapié en las normas relativas a la igualdad en el matrimonio y, en las relaciones familiares. La autora lleva a cabo una reflexión sobre las reservas que los Estados parte de la Convención han establecido sobre el artículo 16, el cual, dispone que los Estados garanticen la igualdad en el matrimonio y la libre elección de la mujer a la hora de elegir cónyuge y de contraer matrimonio. Dentro del estudio de este campo normativo, nos enseña la importancia de algunas declaraciones que, aunque no tengan efecto vinculante, han ejercido una gran influencia y han terminado convirtiéndose en una costumbre internacional, como la Declaración sobre la Eliminación de la Violencia de Género, recogida en la Resolución 48/104.

Otro punto interesante de este capítulo es el apartado titulado *El matrimonio forzado como una forma contemporánea de esclavitud, trata y explotación sexual,*


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 393-398
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.15

en el que se ejerce una equiparación de la noción de matrimonio infantil con respecto al de esclavitud. Según la autora, el matrimonio forzado cumple con los elementos del concepto de esclavitud que se presentan en las distintas convenciones relativas a la misma, como es la Convención de la Esclavitud de 1926 y sus convenciones complementarias. De hecho, algunas organizaciones internacionales también han manifestado la idea de que esta práctica nociva es, al mismo tiempo, un tipo de esclavitud moderna y que, por esa razón, su ejercicio no se puede tolerar ni permitir por parte de ningún Estado, aunque este se ampare en cuestiones de cultura y tradición. A causa de lo último que hemos señalado y del elevado número de matrimonio infantiles, la autora ha querido destacar que los órganos de Naciones Unidas muestran una gran preocupación sobre el matrimonio infantil y que han elaborado multitud de recomendaciones y observaciones por los diferentes Comités dedicados al control y protección de los derechos de mujeres y niñas. Por lo que demuestra, que en sus políticas e instituciones existe un gran deseo de destruir los perjuicios sexuales y acabar con estas prácticas que violan los derechos humanos.

Tras llevar a cabo una exposición de todo el marco jurídico relativo a los derechos de las mujeres y niñas a nivel universal, la autora también analiza los instrumentos de protección de derechos humanos a nivel regional. Para ello, se ha centrado en analizar cuatro sistemas en concreto: el sistema africano, el sistema interamericano, el sistema del mundo árabe y asiático y el sistema europeo.

En cuanto al primer sistema, nos muestra el progreso de los últimos años y las disposiciones normativas que han ido naciendo con el fin de reconocer los derechos de las personas. Especialmente, la autora profundiza en aquellos instrumentos de protección de las mujeres y niñas frente al matrimonio infantil como es la Carta Africana de los Derechos y el Bienestar del Niño y la Carta Africana de los Derechos Humanos y de los Pueblos sobre los derechos de la mujer. Sin embargo, a pesar del reconocimiento de los derechos de este vulnerable colectivo y prohibir el matrimonio infantil o la ablación genital, estas siguen siendo prácticas que ejecutan diariamente en el pueblo africano.

En segundo lugar, por detrás del África Subsahariana, América Latina es la zona donde hay un mayor número de matrimonios infantiles en el mundo, así que, por esa razón, la autora nos enseña que, aunque no existan tratados de defensa de los derechos de la infancia, sí existen otras herramientas

destinadas a su protección. En este contexto, hace mención de la Convención Americana sobre Derechos Humanos de 1969, la Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia sobre la Mujer de 1994 y la Convención de Belém do Pará.

A continuación, lleva a cabo un análisis del sistema asiático y del mundo árabe, en el que nos expone numerosas organizaciones e instrumentos dedicados a la promoción y a velar por el interés de los derechos humanos, como es el caso de la Asociación de Naciones del Sureste Asiático, la Asociación Regional en Asia del Sur, la Liga de los Estados Árabes y la Organización para la Cooperación Islámica. Al mismo tiempo, estas organizaciones han desarrollado importantes documentos, como la Carta Árabe de Derechos Humanos, que tal como expone la autora, aunque su fin sea proteger los derechos humanos, en ella se encuentran algunas disposiciones controvertidas que producen una desprotección en los derechos fundamentales, debido a que en la práctica, la aplicación de estas disposiciones se encuentran fuertemente influenciados por la ley Sharía.

En último lugar, se elabora un estudio del marco normativo a nivel regional del sistema europeo a través de un doble enfoque. Por un lado, analiza este sistema desde el marco del Consejo de Europa, donde la autora defiende la idea de que en Europa no podemos ignorar el hecho de que en otras partes del mundo el matrimonio infantil y forzoso es una práctica habitual. De hecho, este tema ha sido objeto de estudio por el Tribunal Europeo de Derechos Humano y la autora nos presenta la jurisprudencia elaborada por este tribunal sobre casos relacionados con el matrimonio forzoso. También, menciona algunas medidas de erradicación de estas violaciones que vienen incluida en la Recomendación adoptada por el Comité de Ministros del Consejo de Europa, el 30 de abril de 2002 y destaca la importancia del Convenio del Consejo de Europa sobre Prevención y Lucha contra la Violencia contra la Mujer y la Violencia Doméstica, firmado en Estambul, así como otros instrumentos de carácter no vinculantes. Por otra parte, desde el marco de la Unión Europea, se presentan los instrumentos, como el Tratado de Lisboa o el TFUE y diversas directivas, con los que cuenta para proteger los derechos humanos y, gracias a los mismos, demuestra que la Unión Europea presenta una línea de defensa firme y clara para erradicar y condenar todas las prácticas que supongan una violación de los derechos de las mujeres y niñas.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 393-398
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.15

Finalmente, este segundo capítulo concluye con unas *breves consideraciones sobre la perspectiva de género en el derecho internacional de los refugiados.* En este punto, introduce la idea de que los flujos migratorios y el aumento de personas refugiadas, fomentan el incremento de matrimonios infantiles. A continuación, la autora expone las disposiciones normativas aplicables para abolir la desigualdad y cualquier tipo de costumbre o práctica que discrimine por razón de género o atente contra la dignidad de cualquier persona.

La obra continúa con un tercer capítulo dedicado a tratar el tema del matrimonio forzado en el ámbito de conflictos armados. Durante este capítulo la autora trata de expresar la gran discriminación de la mujer durante los conflictos armados, a pesar de lo dispuesto en los diferentes tratados internacionales. Todo ello causado por el componente estratégico que supone el matrimonio forzado y otras formas de violencia sexual. Sustenta esta idea, a través de los informes mundiales sobre la Trata de Personas, entre otros, que muestran que las violaciones contra las mujeres y las niñas se magnifican durante los tiempos del conflicto. Por esta razón, la autora aborda, durante un apartado de este capítulo, la Agenda de seguridad, a la cual la violencia sexual se ha incluido, como un asunto de gran importancia para el Consejo de Seguridad y ha elaborado multitud de Resoluciones que la condenan. En este capítulo, también desarrolla *el matrimonio forzado en la jurisprudencia penal*, el cual ha ayudado a fortalecer la lucha contra los crímenes cometidos contra las mujeres y niñas. Durante este apartado, la autora estudia el proceso histórico de esta jurisprudencia y subraya los *asuntos Brima, Ruf y Charles Taylor ante el Tribrunal Especial de Sierra Leona* por los que se reconocía el matrimonio forzoso como un acto inhumano y de esclavitud sexual. También, ese reconocimiento se trasladó a la Sala Extraordinaria en los Tribunales de Camboya y, la autora cuenta las medidas de prevención de esta práctica, así como, proyectos tanto de cooperación como de otra índole para promover la igualdad y la concienciación sobre las consecuencias dañinas que produce el matrimonio forzado. Para terminar, este capítulo concluye con un estudio acerca de las prácticas de esta naturaleza ante la Corte Penal Internacional.

En el cuarto capítulo de la presente obra se contempla la legislación española relativa a la prohibición del matrimonio infantil. Se aborda la legislación en general y resalta las disposiciones sobre la edad mínima para contraer matrimonio. Además, durante este capítulo se estudiará la normativa tanto desde

el punto de vista punitivo, en el cual la autora señala cada una de las disposiciones que tipifican esta violación, como desde el punto de vista estratégico para evitar la práctica del matrimonio forzado en nuestro país.

Finalmente, en el quinto y último capítulo, la autora hace una recopilación de los datos que ha aportado durante toda la obra y aborda una opinión reflexiva acerca de cada uno de ellos.

En definitiva, esta lectura es una gran aportación para el derecho internacional, ya que la alta cualificación investigadora de la autora durante toda la obra y la sencilla estructura que hace que la lectura sea sencilla y amena, consigue que esta obra sea necesaria, tanto para aquellos juristas que aspiran a mejorar sus conocimientos en este área del derecho, como también, sirve de herramienta para despertar en los lectores la preocupación y el interés por querer cambiar la realidad que amenaza a miles de personas de todo el mundo. Además, hay que tener en cuenta de que el estudio de estas prácticas nocivas es relativamente nuevo y el nacimiento de obras como la presente, suponen un avance en la investigación de este campo normativo y ayuda a que en un futuro se puedan crear medidas más eficientes que erradiquen el ejercicio de las mismas tanto a nivel internacional, como la elaboración de una legislación nacional que consiga un mejor control en los flujos migratorios y salvaguarde los derechos humanos de las personas y, en especial, de las mujeres y niñas frente a las formas de violación sexual.

Marta REINA GRAU
Universidad Nacional de Educación a Distancia – UNED


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 393-398
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.15

**PAIX ET SÉCURITÉ INTERNATIONALES**
**Journal of International Law and International Relations**
Num 7, janvier-décembre 2019 | ISSN 2341-0868
DOI http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.16

**Citation**: BÜRGIN, A. C., «OANTA, G.A. (coord.), El Derecho del Mar y las personas y grupos vulnerables, JM Bosch Editor, Vallirana, 2018, 426 pages», *Paix et Sécurité Internationales*, num. 7, 2019, pp. 399-403

**Received**: 26 July 2019
**Accepted:** 08 September 2019

# OANTA, G.A. (coord.), *El Derecho del Mar y las personas y grupos vulnerables*, JM Bosch Editor, Vallirana, 2018, 426 pages.

The United Nations Convention on the Law of the Sea (UNCLOS) is undoubtedly the cornerstone of the Law of the Sea; however the international set of rules related to the oceans and seas has increased significantly addressing specific issues that are not regulated by UNCLOS. The evolution of the international legal marine and maritime framework also includes that more attention has been paid to new actors such as human beings by regulating both rights and obligations of people at sea *sensu lato*. While UNCLOS's focus lies on States and establishes their competencies and responsibilities in the different maritime zones, a set of rules from different fields of law has emerged dealing with situations of individuals in a maritime context that are not specifically covered by UNCLOS. While there are regulations related to human activities at sea in a broader sense, attention also has been drawn to people and communities who are in a vulnerable situation within a maritime context, i.e. people facing obstacles that result in human rights violations. This collective work addresses exactly these kinds of situations analyzing the legal framework and/or the lack of existing rules protecting people and communities in specific maritime contexts.

This book is coordinated by Prof. Dr. Gabriela A. Oanta (Profesora Titular at the University of Coruña) and contains works from eleven academics from Public international law and Labour Law departments from Spanish and French universities as well as professionals, and is the result of the papers presented at the conference "El Derecho del mar y las personas y grupos vulnerables" on 24 May 2018, which was organized in the framework of the Jean Monnet Module "Política Marítima Integrada de la Unión Europea" (574770-EPP-1-2016-1-ES-EPPJMO-MODULE) and co-financed by the Erasmus+ Programme of the European Union. The main purpose of this collective work is twofold and thus to reflect, first, on the variety of situations

where people and communities may find themselves in vulnerable circumstances in a maritime context. Second, every contribution analyzes specific aspects of vulnerability of people in a maritime context and thus provides the reader with highly valuable reflections on regulations and possible lack of rules for particular individuals or communities.

The first two chapters of the book deal with questions regarding the connection between the law of the sea and human rights law, and the applicability of the latter on maritime spaces. Chapter one, elaborated by *Joana Abrisketa Uriarte*, examines the interaction of two different, but complementing, legal frameworks, i.e. the law of the sea and international human rights law from a theoretical point of view focused on the protection of the individual both by the law of the sea in a broader sense and the international human rights law. She highlights that even though the protection of people is not a central issue of the UNCLOS, there are international regulations whose objective is to protect people at sea such as SOLAS or SAR convention, or more recently the Convention nº. 188 of the ILO. Analyzing the set of rules of international human rights law, the article focuses specifically on several aspects of the applicability of the European Convention on Human Rights on maritime spaces due to the fact that the European Court of Human Rights has addressed this question in several cases.

*Miguel Ángel Acosta Sánchez* focuses in chapter two on the European Border and Coast Guard Agency (FRONTEX) analyzing several questions related to its mandate, which is to control the maritime external borders of the EU, in a special context that is the migratory crisis. On the one hand, he examines the operative capacity of the Agency and the respect of the law of the sea by the States. On the other hand, he addresses the respect and protection of fundamental rights during operations of the own Agency and thus drawing the attention to a particular vulnerable community, i.e. migrants using maritime routes. In his analysis, he both takes into consideration the protection of fundamental rights, but also analyzes the mechanisms for claiming rights if people feel that their rights were violated. Besides the in-depth analysis of these questions in an EU context, in the final paragraph he makes reference to a particular bilateral relation in order to address the migratory crisis in the Mediterranean, namely the relationship and cooperation between Spain and Morocco.


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 399-403
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.16

Two authors focus their work on a group of people that doesn't find themselves in vulnerable situations per se, just as other individuals or communities, but due to their specific working conditions they might be more subjected to vulnerability than other workers. *Xosé Manuel Carril Vázquez* (chapter three) and *Andrés Ramón Trillo García* (chapter eleven) address specific questions related to seafarers and therefore specifically focusing on socioeconomic aspects of their work that might put them into a vulnerable situation. *Carril Vázquez* offers, on the one hand, the reader the broader picture of the specific labour situation of seafarers in general and why this community might find themselves in a vulnerable situation; on the other hand, he realizes a critical review of the level of protection of seafarers in an EU context. *Trillo García* makes an in-depth analysis of the Special Social Security Scheme for seafarers in Spain and discusses the requirements for retirement.

*François Féral* (chapter four) discusses the situation of indigenous communities who are considered by the United Nations as vulnerable group and whose rights are defined by international law. In his contribution, he specifically addresses the question of vulnerability in the sense that these communities often are deprived of their rights regarding natural resources, including marine resources such as fisheries. The illustration of examples underlines his arguments, such as the situations in the Pacific Ocean.

Chapter five, whose author is *Laura Movilla Pateiro*, also focuses on natural resources and the challenges faced by developing states to have access to marine genetic resources and the distribution of its profits. After analyzing the most important international regulations regarding marine genetic resources, the reader learns that there is a consolidated international regulation about marine genetic resources within the jurisdiction of coastal States, namely the Convention on Biological Diversity and the Nagoya Protocol; however, the author concludes that an increase in ratifications of the Protocol and the practical implementation of its three pillars would help to reduce the vulnerability of some concerned developing states.

In Chapter six, *Gabriela A. Oanta* deals with gender questions related to the law of the sea. She shows in a clear way that this crosscutting issue has also found its way into the set of rules related to maritime issues over the last decades. Again, women are not per se a vulnerable community, but throughout the production chain of maritime products such as fisheries products,

gender issues have been given more importance. Her contribution is split into two main parts: on the one hand, she analyzes gender equality within the context of the law of the sea; on the other hand, she focuses on gender issues in the fisheries sector in the context of the European Union and particularly regarding the Common Fisheries Policy.

*Antoni Pigrau Solé* addresses in his contribution (chapter seven) climate change and the directly related rise of sea level, and its consequence for Small Island and Archipelagic states. These states are considered to be more vulnerable to the adverse effects of climate change and its consequences on the sea due to their geographic and economic special characteristics, and because a majority of its population lives on the coast. Their specific conditions were recognized by the Intergovernmental Panel Climate Change and latest in the Paris Agreement of 2015. In its in-depth analysis he mentions the consequences of the rising of sea levels, but also the participation in international forums and the specific claims of this particular community of states.

Chapter eight, who's author is Ángel J. Rodrigo, deals with the specific subject of so-called failed states and examines the legal consequences of their conditions within the legal framework regulating the seas and oceans. He describes the today's law of the sea as a "delicate mosaic" of rights and obligations of costal States, flag States and port States. According to him, the "balanced functioning of this puzzle" is only possible when the different actors respect the international rules. So-called failed States pose numerous challenges in order to uphold their obligations and to exercise their rights. In his contribution, he specifically addresses the legal consequences in the framework of the law of the sea in order to protect their own state interests; rights and interests of third States; and the protection of the global public interest in the seas and oceans.

*Belén Sánchez Ramos* discusses in chapter nine the violation of the rights at sea of a community, namely children. In the preliminary chapter she offers the readers information of the exploitation of children in numerous sectors related to maritime activities, and thus highlighting their vulnerability. In her analysis she systematically examines the different legal instruments of the broader fight against human trafficking related to labour exploitation and forced labour. She also mentions the important roles some international organizations and the fisheries sector itself have had in fighting these situations,


*Paix et Securité Internationales*
ISSN 2341-0868, Num. 7, janvier-décembre 2019, pp. 399-403
DOI: http://dx.doi.org/10.25267/Paix_secur_int.2019.i7.16

and shows how Thailand has responded to this challenge.

The law of the sea and Non-Self-Governing Territories is the subject of chapter ten, elaborate by *José Manuel Sobrino Heredia*. In a preliminary analysis of the legal characteristics of these territories, he highlights that they have their own particularities and are highly diverse regarding their economic situation, population, political-administrative organization or the relation they have with the State of which they depend on. In a lot of theses territories there are movements defending a higher grade of autonomy or including independence, and these movements not only defend political, but also economic interests over the natural resources located in their territories as well as in the territorial sea and the maritime spaces under their jurisdiction. In his contribution he examines complex situations that result from their condition being Non-Self-Governing Territories and analyzing, on the one hand, the principle of the self-determination of peoples and the exploitation of the natural resources; and, on the other hand, the challenges related to the conservation and management of the natural resources located in the maritime spaces under their control due to the fact that both, the administration of the Non-Self-Governing Territories as well as the administration of the State with whom they have a constitutional tie, have rights and duties.

This collective work by researchers of the research group REDEXMAR is, in our opinion, a highly interesting contribution in the Spanish language to current debates focusing on a subject that hasn't been addressed before in this way, namely the vulnerability of people and communities related to the *sea* in a broader sense. There is a clear common thread throughout the very well structured book, i.e. the vulnerability of people and communities in a maritime context, but the plurality of topics gives an interesting and valuable insight into the complexity of questions where different fields of law converge. For readers specially interested in questions related to people at sea, this book offers a fascinating overview of the variety of challenges that must be dealt with.

Annina Cristina BÜRGIN
Universidade de Vigo

# TABLEAU D´EQUIVALENCE DES POSTES UNIVERSITAIRES
# TABLA DE EQUIVALENCIAS DE CARGOS ACADÉMICOS
# ACADEMIC RANKS

| ESPAGNE<br>ESPAÑA<br>SPAIN | MAROC<br>MARRUECOS<br>MOROCCO | FRANCE<br>FRANCIA<br>FRANCE | ROYAUME-UNI<br>REINO UNIDO<br>UNITED KINGDOM | ITALIE<br>ITALIA<br>ITALY | ETATS UNIS<br>ESTADOS UNIDOS<br>UNITED STATES |
|---|---|---|---|---|---|
| AYUDANTE DOCTOR | - | ATTACHÉ TEMPORAIRE DE RECHERCHE(ATER) | LECTURER | RICERCATORE | LECTURER |
| PROFESOR CONTRADO DOCTOR | PROFESSEUR ASSISTANT | MAÎTRE DE CONFERENCES ASSISTANT | SENIOR LECTURER | RICERCATORE CONFERMATO | ASSISTANT PROFESSOR |
| PROFESOR TITULAR | PROFESSEUR HABILITÉ | MAÎTRE DE CONFÉRENCES | ASSOCIATE PROFESSOR | PROFESSORE ASSOCIATO | ASSOCIATE PROFESSOR |
| CATEDRÁTICO | PROFESSEUR D'ENSEIGNEMENT SUPERIEUR | PROFESSEUR DES UNIVERSITÉS | FULL PROFESSOR | PROFESSORE ORDINARIO | FULL PROFESSOR |

**Tableau non officielle, uniquement pour ce Journal**

**Lista no oficial. Sólo para esta Revista**

**Unofficial list, only for this Journal**

# NORMAS PARA LOS AUTORES

La Revista *Paix et Sécurité Internationales* publica trabajos de investigación sobre el Derecho Internacional y las Relaciones Internacionales y sobre las relaciones Euromediterráneas. La publicación de trabajos y contribuciones en la Revista está abierta a todos los especialistas con independencia de su nacionalidad.

**Trabajos de Investigación**

Solo se aceptarán trabajos originales e inéditos. Los originales se enviarán en lengua castellana, francesa o inglesa escritos en Microsoft Word (DIN A4, Times New Roman 12, interlineado 1,5), siendo aceptados como *Estudios* (máx. 40.000 caracteres) o *Notas* (máx. 20.000 caracteres) e incluyendo título, resumen y palabras clave en inglés, francés y español. Se aceptarán versiones en otras lenguas de trabajos ya publicados. Se harán llegar preferentemente por correo electrónico a la dirección *paixetsecurite@uca.es*; de no ser posible su envío por correo electrónico, se podrán enviar en papel (una copia), con un archivo en disquete o CD, a nombre de Miguel Ángel Acosta Sánchez, Director Ejecutivo de la Revista, a la dirección: Área de Derecho Internacional Público, Facultad de Derecho, Universidad de Cádiz, Avda. de la Universidad s/n. 11405 – JEREZ-CADIZ-ESPAÑA.

Se acusará recibo de todos los originales en el plazo de treinta días desde su recepción.

**Epígrafes, Sumario, Resúmenes, Palabras clave, Títulos**

Los trabajos se estructurarán en epígrafes y subepígrafes con el orden de sucesión de numerales –I (II, III, IV…)—1 (2,3,4…)—A (B, C, D…)—a (b, c, d,…)—i (ii, iii, iv…). Los originales deben ir acompañados de un Sumario en forma de esquema con los numerales referidos. También de un resumen en castellano, en francés y en inglés. Igualmente, deben añadirse las Palabras Clave (en castellano, francés y en inglés), y el título del trabajo traducido al inglés y francés.

**Citas**

Las referencias bibliográficas se ordenarán alfabéticamente por apellidos, en mayúsculas, del autor. Todas las notas irán a pie de cada página, numeradas mediante caracteres arábigos.

En la citas de libros, éstos van escritos en cursiva (Ejemplo, GARCIA GARCIA, J. D. A., *Las relaciones Euromediterráneas*, Ed. Algeciras, Madrid, 2012, en pp. 54-92). En las citas de artículos, el título del trabajo va entrecomillado, y en cursiva sólo la Revista u obra colectiva (Ejemplo, GARCIA GARCIA, J. D. A., "España y Marruecos en el siglo XXI", *Paix et Sécurité Internationales*, nº 7, 2012, pp. 54-92).

La jurisprudencia nacional e internacional debe referirse según el sistema de cita de cada Tribunal.

Las referencias textuales de frases o párrafos de trabajos de otros autores o de documentos o resoluciones judiciales, irán entrecomilladas sin cursiva, preferiblemente en notas a pie de página. Se ruega reducir al mínimo las citas de direcciones o enlaces a sitios WWW localizables a través de Internet.

**Proceso de Publicación**

Los órganos de dirección de la Revista decidirán la publicación de los Estudios presentados sobre la base de dos informes de evaluación emitidos por sendos especialistas ajenos a la organización editorial de la Revista, aplicándose el método del doble ciego. Se valorarán la creatividad, rigor, metodología, propuestas y aportaciones de los trabajos. La publicación podrá quedar condicionada a la introducción de cambios con respecto a la versión original, y sujeta a modificaciones conforme a Reglas de edición. La comunicación de la decisión sobre la publicación, la publicación previa revisión, o la no publicación, será motivada y no excederá de seis meses. Los autores de trabajos aceptados para publicación podrán ser requeridos para la corrección de pruebas de imprenta, que habrán de ser devueltas en el plazo de 48 horas. No se permitirá la introducción de cambios sustanciales en las pruebas, quedando éstos limitados a la corrección de errores con respecto a la versión aceptada.

**Libros y Recensiones**

Los libros enviados a la Revista serán objeto de publicación en una Lista de libros recibidos. La Dirección de la Revista encargará en determinados casos una Reseña, Recensión o Comentario. Sólo se publicarán las Recensiones encargadas por la Revista *Paix et Sécurité Internationales*.

**Copyright**

Es condición para la publicación que el autor o autores ceda(n) a la Revista, en exclusiva, los derechos de reproducción. Paix et Sécurité Internationales es una revista de acceso abierto. Su contenido está abierto, sin coste alguno, para cualquier usuario particular o institución. Los usuarios podrán leer, descargar, copiar, distribuir, imprimir, buscar o enlazar el texto completo de los artículos publicados, o utilizarlos para cualquier otro propósito, dentro de la legalidad vigente. Y podrán hacerlo sin coste alguno, y sin necesitad de solicitar permiso al editor a al autor. Todo ello de acuerdo con la definición de acceso abierto de la Iniciativa Acceso Abierto de Budapest.

**Información**

Cualquier otra información puede obtenerse en la siguiente dirección: *paixetsecurite@uca.es*; o bien por correo postal al Director Ejecutivo de la Revista: Miguel Ángel Acosta Sánchez, Área de Derecho Internacional Público, Facultad de Derecho, Universidad de Cádiz, Avda. de la Universidad s/n. 11405 – JEREZ-CADIZ.

**Advertencia**

Cualquier incumplimiento de las presentes normas constituirá motivo para el rechazo del original remitido.

# DIRECTIVES POUR LES AUTEURS

La Revue *Paix et Sécurité Internationales*, publie des travaux de recherche sur les thèmes suivants : Le Droit International, les Relations Internationales et les relations euro-meditérranéenes. La revue est ouverte à tous les spécialistes dans les domaines susmentionnés, indépendamment de leurs nationalités.

**Travaux à publier**

Seules les œuvres originales et inédites seront acceptées. Les articles originaux peuvent être soumis en langue espagnole, française ou anglaise (DIN A4, Times New Roman 12, espace 1,5) et seront acceptés comme *Études* (Max. 40.000 caractères) ou *Notes* (máx. 20.000 caractères) et doivent inclure un titre, un résumé et des mots-clés en français, en anglais et en espagnol. Seront acceptés également les articles qui ont déjà fait l'objet de publication dans une autre langue. Il est recommandé aux auteurs de nous faire parvenir les articles de préférence par courrier électronique, à l'adresse suivante : *paixetsecurite@uca.es*. Si les propositions d'articles ne peuvent être envoyés par courrier électronique, les auteurs peuvent aussi envoyer, par voie postale, une copie en papier en prenant le soin d'y joindre une version numérique dans un support CD ou disquette. Le coli sera adressé à: Miguel Ángel Acosta Sánchez, Directeur Exécutif de la revue: Área de Derecho Internacional Público, Facultad de Derecho, Univesidad de Cádiz, Avda. de la Universidad s/n 11405 – JEREZ-CADIZ (ESPAGNE).

Les auteurs seront informés de la réception de leurs propositions d'articles, dans un délai de trente jours

**Parties, résumés, Mots-clés, Titres**

Les propositions d'articles devront être structurées de la manière suivante : Titres, sous-titres présentés dans un ordre de succession numérique –I (II, III, IV…) —1 (2, 3,4…) —A (B, C, D…) —a (b, c, d,…) —i (ii, iii, iv…). Celles-ci devront en outre être accompagnées d'un résumé sous forme d'un schéma du texte qui reprend les titres et sous-titres numériques susmentionnés, respectivement en espagnol, en anglais et en français. Les auteurs incluront les mots-clés dans ces trois langues et s'assureront que le titre de la proposition d'article est également repris dans ces langues.

**Références**

La bibliographie sera ordonnée alphabétiquement et en majuscule en commençant par le (s) nom(s) de famille de l'auteur. Toutes les notes de bas de page doivent être en caractère numériques (1, 2, 3, etc.).

Les références sont présentées de la façon suivante : pour les livres, en italique (exemple : GARCIA GARCIA, J. D. A., *Las relaciones Euromediterráneas*, Ed. Algeciras, Madrid, 2012, p. 54-92). Pour les articles, le titre sera mis entre guillemets et l'intitulé de la revue en italique (exemple, GARCIA GARCIA, J. D. A., "España y Marruecos en el siglo XXI", *Paix et Sécurité Internationales*, nº 7, 2012, p. 54-92).

Les références relatives à la jurisprudence nationale et internationale doivent adopter les formes propres de citations des tribunaux en question. Les citations textuelles, phrases, paragraphes empruntés à d'autres auteurs, les extraits de documents ou résolutions des tribunaux devront être mis entre guillemets, de préférence en notes de bas de page, mais pas en italique. Il est conseillé aux auteurs de faire un usage minimal des références 'webographiques'.

**Procédure de publication**

Le Comité éditorial décide de la publication des Études sur la base de deux rapports d´évaluation emis par deux spécialistes étrangers à l´organisation éditoriale de la Revue en appliquant la méthode du doublé aveugle. L'évaluation des travaux à publier tient compte des critères suivants : la créativité, la rigueur, la méthodologie, et le contenu des propositions et contributions scientifiques. Le Comité se réserve le droit de solliciter les modifications qu'il juge nécessaire

La communication de la décision de publication, la publication sous condition de modification du texte, ou la décision de rejet de la publication seront motivées et envoyées aux auteurs dans un délai qui n'excédera pas six mois. Les auteurs dont les propositions d'articles seront acceptées en vue de leur publication pourraient être invités à collaborer dans la révision du texte avant sa mise à impression. Dans ce cas, les corrections devront être retournées dans un délai de 48 heures à la Revue, étant exclues les modifications substantielles du texte. Seules seront admises les corrections d'erreurs sur la version originale acceptée.

**Livres et Recensions**

La Revue publiera une liste des livres reçus. Elle pourra commander des comptes-rendus, des recensions ou commentaires de livres. Bien entendu, les envois spontanés de recensions demeurent possibles, mais les propositions en question ne seront pas nécessairement acceptées.

**Copyright**

Les auteurs cèdent à la Revue les droits exclusifs de reproduction de leurs articles. Paix et Sécurité Internationales c'est une Revue de libre accès. Son contenu est ouvert et gratuit pour tout utilisateur particulier ou institution. Les utilisateurs peuvent lire, télécharger, copier, distribuer, imprimer, rechercher ou lier le texte intégral des articles publiés, ou les utiliser pour d'autres fins, dans le cadre de la législation en vigueur. Et ils seront en mesure de le faire sans frais, et sans avoir besoin de demander l'autorisation de l'éditeur ou de l'auteur. Tout cela conformément à la définition du libre accès de l'Initiative de Budapest pour l'Accès Ouvert.

**Information**

Pour plus d'information vous pouvez écrire à *paixetsecurite@uca.es* ou alors contacter le Directeur Exécutif de la Revue par courrier postal : Miguel Ángel Acosta Sánchez, Área de Derecho Internacional Público, Facultad de Derecho, Universidad de Cádiz, Avda. de la Universidad s/n. 11405 – JEREZ-CADIZ.

**Rappel**

Le non-respect des règles etablies par la revue constituera un motif pour la rejet de la proposition de article reçue.

# GUIDE FOR AUTHORS

The *Paix et Sécurité Internationales Journal* publishes articles on International Law and International Relations, specially about the Euro-mediterranean relations. Publication of contributions is open to all scholars regardless of their nationality.

**Research Papers**

Only original and unpublished works will be accepted. Papers should be written in Spanish, French or English, using Microsoft Word (DIN A4, Times New Roman 12, 1.5). Papers will be accepted as Studies (max. 40.000 characters) or *Notes* (max. 20.000 characters) and they must included title, summary and keywords in English, French and Spanish. Published articles in another language version will be accepted. They can be sent preferably by e-mail to paixetsecurite@uca.es. If the paper can not be sent by e-mail, a printed copy or a file on diskette or CD can be mailed to Miguel Ángel Acosta Sánchez, Director Ejecutivo de la Revista, at: Área de Derecho Internacional Público, Facultad de Derecho, Universidad de Cádiz, Avda. de la Universidad s/n. 11405 – JEREZ-CADIZ (SPAIN).

Authors will be notified within thirty days of receipt.

**Headings, Summary, Keywords, Titles**

The work should be structured with the following headings and subheadings: sequence of numerals - I (II, III, IV ...) -1 (2,3,4 ...)-A (B, C, D ...)-a (b, c, d, ...)-i (ii, iii, iv ...). Manuscripts must be accompanied by a Summary in outline form with the numeral order listed above and must contain a summary in Spanish, French and English. Likewise, keywords and a title are required and must also be translated into Spanish, French and English.

**Citations**

The references must be listed alphabetically by last name of the author, written in capital letters.. Numbered citations should be inserted at the bottom of each page using Arabic numerals.

Book citations must be written in italics (Example, GARCIA GARCIA, J., *Euro-Mediterranean relations*, Ed Algeciras, Madrid, 2012, at p. 54-92). In article citations, the title should have quotation marks, and magazines or collective works should be in italics. (Example, GARCIA GARCIA, J., “Spain and Morocco in the XXI century”, *Paix et Sécurité Internationales,* No. 7, 2012, pp. 54-92).

National and international case law must be cited according to the system of each Court or Tribunal.

The textual references of sentences or paragraphs from works of other authors or documents or judgments should have quotation marks without italics, preferably in the footnotes. Please minimize citations or links to Internet websites.

**Release Process**

The Editorial Board will decide which Studies to publish based on two evaluation reports issued by two specalists outside the editorial organisation of the Journal applying the double blind method.. Creativity, exellence, methodology, proposals and the main contributions of the paper will be taken into consideration. Papers will be published under the condition that the authors accept to make the changes suggested by the *Review* and other pertinent changes in accordance with publishing rules. The communication of the decision regarding publication and revision prior to publication or non-publication, shall be substantiated and shall not exceed six months. Authors of papers accepted for publication will be required to correct proofs, which are to be returned within 48 hours. Substantial changes to the proofs are not allowed. Only the correction of errors regarding the accepted version are authorized

**Books and Book Reviews**

Books sent to the *Review* shall be published on a list of Received Books. The Editorial Board can commission, in certain cases, a Book Review or Comment. Only the Book Reviews commissioned by *Paix et Sécurité Internationales Review* will be published.

**Copyright**

Papers will be published under the condition that the author or authors yield to the Journal exclusive reproduction rights. Paix et Sécurité Internationales is an open access journal which means that all content is freely available without charge to the user or his/her institution. Users are allowed to read, download, copy, distribute, print, search, or link to the full texts of the articles, or use them for any other lawful purpose, without asking prior permission from the publisher or the author. This is in accordance with the BOAI definition of open access.

**Information**

Any other information can be obtained at the following address: paixetsecurite@uca.es, or by mail to the Director Ejecutivo de la Revista: Miguel Ángel Acosta Sánchez, Área de Derecho Internacional Público, Facultad de Derecho, Universidad de Cádiz, Avda. de la Universidad s/n. 11405 – JEREZ-CADIZ.

**Warning**

Any breach of these regulations shall constitute grounds for rejection of the manuscript submitted.

# PAIX ET SÉCURITÉ INTERNATIONALES

07

2019

JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

## SOMMAIRE / Janvier -Décembre 2019 / Nº 7


### ÉTUDES

Mar CAMPINS ERITJA
Transboundary Water Resources in Central Asia and its Impact in the Emergency of Conflicts Affecting Regional Stability

Eric TREMOLADA ALVAREZ
The Land and Maritime Delimitation of the Court of The Hague in the Affairs of Costa Rica v. Nicaragua, in Light of Their Proposals (February 2, 2018)

Karouma OMAR
Mutualisaton des Puissances et Sécurité en Afrique: pour une approche néopragmatiste du rôle du droit

Alejandro del VALLE GÁLVEZ
The Refugee Crisis and Migration at the Gates of Europe. Deterritoriality, Extraterritoriality and the Externalization of Border Migration Controls

Maria NAGORE CASAS
The Instruments of Pre-border Control in the EU: A New Source of Vulnerability for Asylum Seekers?

### NOTES

Inmaculada GONZÁLEZ GARCÍA
Immigration in Spain: Migratory Routes, Cooperation with Third Countries and Human Rights in Return Procedures

Mohamed REDA NOUR
Géopolitique de l'Intélligence Artificielle : Les enjeux de la rivalité sino-americaine

Diego BOZA – Dévika PÉREZ
New Migrant Detention Strategies in Spain: Short-Term Assistance Centres and Internment Centres for Foreign Nationals

Ahmed IRAQI
L'investissement direct étranger en tant que facteur géopolitique du Soft Power marocain en Afrique : réflexion interprétative

Angeles JIMENEZ GARCIA-CARRIAZO
Small Island, Big Issue: Malta and its Search and Rescue Region – SAR

Javier BORDON
The European Union and the Egyptian Neighbour: Assesing the Characterization of Resilience as and External Action Priority

### AGORA

Claudia JIMÉNEZ CORTÉS – Montserrat PI LLORENS
Diffusion of Research Results 'Research Projects on Inmigration and Human Rights : CIMCETT PROJECT'

Luis ROMERO BARTUMEUS
¿Sobrevivirá el Plan Mares al Plan Integral de Seguridad Marítima? La falta de doctrina estratégica española hacia el área del Estrecho de Gibraltar

### DOCUMENTATION

Lorena CALVO MARISCAL
Relación de Tratados, Acuerdos no Normativos, Memorandos de Entendimiento y Comunicados Conjuntos España-Marruecos, 2018-2019

### BIBLIOGRAPHIE CRITIQUE

DIAZ PERALTA, E., El matrimonio infantil y forzado en el Derecho Internacional. Un enfoque de género y derechos humanos, ed. Tirant Lo Blanch, Valencia, 2019. Par Marta REINA GRAU

OANTA, G. (Coord.), El Derecho del mar y las personas y grupos vulnerables, Bosch Editor, Barcelona, 2018. Par Annina BÜRGIN

### TABLEAU D'EQUIVALENCE DES POSTES UNIVERSITAIRES

Tableau d'equivalence des postes Universitaires – Tabla de equivalencia de cargos académicos – Academic Ranks



Moroccan Association of International Relations and International Law MAIRIL

OEM Observatoire d'Études Méditerranéennes

CÁTEDRA JEAN MONNET INMIGRACIÓN Y FRONTERAS

Centre of Excellence Jean Monnet UNIVERSITY OF CADIZ

cei·mar campus d'excellence internationale de la mer

INDESS INSTITUTO UNIVERSITARIO DE INVESTIGACIÓN PARA EL DESARROLLO SOCIAL SOSTENIBLE