Fvcina di Marte
28

Law in a Divided World

Geolegal readings of post-globalisation

Proceedings of the Conference of 5 December 2025, Rome, Roma Tre University, Department of Law

Edited by

Ignazio Castellucci, Filippo Ruschi and Sirio Zolea

Roma Tre Università degli Studi
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FVCINA DI MARTE

COLLANA DELLA SOCIETÀ ITALIANA DI STORIA MILITARE

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> L'expérience historique a favorisé la prise de conscience théorique. La raison, effectivement, ne s'exerce pas dans le vide, elle travaille toujours sur une matière, mais Clausewitz distingue, sans les opposer, la conceptualisation et le raisonnement d'une part, l'observation historique de l'autre.
>
> R. Aron, *Penser la guerre*, 1976, I, p. 456

Fondata nel 1984 da Raimondo Luraghi, la Società Italiana di Storia Militare (SISM) promuove la storia critica della sicurezza e dei conflitti con particolare riguardo ai fattori militari e alla loro interazione con le scienze filosofiche, giuridiche, politiche, economiche, sociali, geografiche, cognitive, visive e letterarie. La collana *Fvcina di Marte*, dal titolo di una raccolta di trattati militari italiani pubblicata a Venezia nel 1641, affianca la serie dei Quaderni SISM, ricerche collettive a carattere monografico su temi ignorati o trascurati in Italia. Include monografie individuali e collettive di argomento storico-militare proposte dai soci SISM e accettate dal consiglio scientifico.

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Introduction

Studying Law in a World of Fragmented Meaning.

by Ignazio Castellucci, Virgilio Ilari,

Filippo Ruschi, Sirio Zolea

This volume brings together the proceedings of the conference of 5 December 2025 'Law in a Divided World: Geolegal Readings of Post-Globalisation', held at the Department of Law of Roma Tre University and organised jointly by the Italian Society of Military History and the law departments of Roma Tre University and the Universities of Teramo and Florence, with the participation of scholars from various disciplines, through targeted invitations and a call for papers.

In a historical period characterised by a general redefinition of geopolitical fault lines, protean and profoundly divergent worldviews are coming into conflict. This gives rise to widespread entropy, a form of structural uncertainty marked by the (re-)emergence of multiple centres of power, which is redefining the roles of the winners and losers of globalisation. At the same time, as this tension expands, it is spilling over into new domains, notably outer space and cyberspace. All this is taking place at a time when old and new doctrinal frameworks are competing with one another to redraw the global boundaries.

In this context, so different from the unipolar era that began at the turn of the century, law is increasingly less the domain in which a single global language is defined, a projection of a balance based on a shared ground, or an instrument for neutralising conflict. Rather, it is breaking down into unilateral theories that convey divergent horizons of meaning, yet are at the same time destined to intersect along the ever-shifting geopolitical paths of the post-globalisation era. The universalist vocation of international law is steadily waning in the face of a plurality of logics and narratives, engaged in an increasingly strained dialogue with one another. Without common points of reference beyond contingent needs, the legal phenomenon fragments into a shifting multiplicity of perspectives, rooted in opposing visions of the relationship between the individual and the community, and of the relationship between the spheres of law, politics and the economy. Moreover, these same forces also compete with one another even within each of the geopolitical actors, rendering them inherently unstable, polarising internal conflict, disrupting constitutional systems and altering the political dialectic.

The call for papers was therefore intended as an invitation to scholars from various disciplines to examine the underlying characteristics and structural contradictions of the epochal transition currently underway, exploring these beyond opposing rhetorics and disciplinary boundaries and adopting a historical-comparative perspective aimed at investigating the genesis, developmental trends and points of friction between the various visions on the rules governing the relationships and balances between geopolitical entities. The relationship between these processes and the technological transformations currently taking place was also a focus of attention.

The conference welcomed papers which – within the analytical framework outlined – aimed to explore in depth:

a) the conflicting dynamics between international law and the new rules-based world order;
b) the legal instruments of economic and financial warfare (tariffs, sanctions, lawfare, etc.) in relation to the rules of international trade and the role of 'neutral' third parties in conflicts;
c) *ius in bello* and differentiated (discriminatory) conceptions of the state of war (*quod licet Iovi non licet bovi*);
d) the legal implications of geopolitical revisionism and the rediscovery, from a geopolitical perspective, of the plurality of legal cultures;
e) seizures and confiscations of foreign assets, domestic constitutional guarantees and private international law.

The conference was divided into four sessions, devoted respectively to 1) the transition towards a multipolar order; 2) the new geometries of conflict (cyberspace and outer space); 3) the uncertain search for a *nomos* amidst the fluctuations and fragmentation of the global order; 4) and the relationship between economy and law in the post-globalisation era.

As for the first macro-topic, in a thought-provoking opening essay, Renato Ibrido wonders what geopolitical role the law can play in a context of shifting power balances. Giulia Sulpizi focuses on the sanctions against Russia in light of private property rights, looking for a balance between safeguarding constitutional prerogatives (particularly in light of the Italian Constitution) and international interests. Marco Baldassari's paper argues that the contemporary transition towards multipolarity is not merely a redistribution of power among states but a deeper contest over the meaning of the universal itself. Drawing on the works of Pier Paolo Portinaro, Alexandre Kojève, Étienne Balibar, François Jullien, Zhao Tingyang, this article explores the rise of civilizational states as political actors that challenge both the Westphalian state system and the universalist assumptions of liberal internationalism. Marta Bono examines how the growing use of economic lawfare has influenced the evolution of BRICS cooperation and assesses whether the group's institutional responses are contributing to a more diversified international economic order. She argues that sanctions, export controls and other coercive economic measures have not merely constrained several BRICS members but have accelerated pre-existing efforts to develop alternative mechanisms of financial, monetary and commercial cooperation. Such analysis adopts a qualitative legal and geopolitical approach, combining the literature on economic lawfare and weaponised interdependence with the examination of BRICS declarations, institutional documents and recent policy developments. Gianmatteo Sabatino critically examines the conceptual, historical, and legal foundations of contemporary Chinese approaches to the regulation of the global order. Moving beyond representations of China either as a harmonious alternative to Western hegemony or as an emerging revisionist power, he argues that China's international projection is best understood through the inter-action of flexibility, relationality, institutional pluralism, and culturally embedded notions of political efficacy.

As for the second macro-topic, Raoul Cardellini Leiperz looks at the fragmentation of the international order in the space field, moving from universalism to competitive legal pluralism. Davide Ragnolini observes that regulating hypersonic weapon systems represents a grey area of international law, one that is difficult to address legally in the short term through the direct renegotiation of existing treaties: his article analyses how the proliferation of legal regimes results in a fragmented and inconsistent regulatory landscape, which fails to ensure effective and uniform compliance with existing directives and, at the same time, creates regulatory gaps that encourage various actors to resort to evasive strategies to continue the hypersonic military-technological race. Antonello Palasciano, assessing the recognition of cyberspace as the fifth domain of conflict, traces the progressive dematerialisation of conflict from both legal and geopolitical perspectives: he examines the evolution of hybrid warfare, from the theories of Messner and Gerasimov to contemporary conceptions of conflict, before analysing the principal interpretive approaches through which cyber operations have been accommodated within the existing framework of international law, including attribution, the threshold for the use of force, and the protection of critical infrastructure. The article then considers whether the same interpretive approach can be extended to cognitive operations and to the emerging debate over the recognition of a sixth domain of conflict. Aniello Inverso investigates cyberspace in the post-globalisation era, observing a selective de-globalisation in the digital domain; not a generalised isolation, but rather a reconfiguration of interdependence through legal constraints, standards, localization requirements, export restrictions on critical technologies, and trusted connectivity policies. Marzio Di Feo, starting from the essay *The Worker: Dominion and Form* (1932) of Ernst Jünger, seeks to examine the progressive capacity of artificial intelligence (AI) to constitute an epitome or an expected breaking point, acting within the decision-making process *per se* as an agent endowed with decisional and cognitive abilities entering the fray for the first time, as a surrogate for human intelligence.

As for the third macro-topic, Tiberio Graziani analyses the genealogy of *casus belli* as a privileged vantage point from which to examine the relationship between law and power, between events and narratives, between reality and perception. Sirio Zolea assesses the weight of geopolitical imperatives in relation to the competing weight of representative democratic mechanisms, concluding with the concern that, in the current context, of rarefaction of intermediate bodies, personalization of politics, and (proclaimed) depoliticization of society and economy, such constraints are acquiring a pernicious upper hand over those mechanisms, under the formula of the primacy of the absolute 'external bond'. Giulio Di Donato examines the relationship between international law and the balance of power from the perspective of critical realism. His analysis focuses on the transformations of the contemporary world order – marked by the decline of unipolarity and the emergence of a multipolar configuration – and explores the conditions for a peace- and security-oriented international order. Francescantonio Eramo, reconstructing Schmitt's account of the *Jus Publicum Europaeum* and its dissolution, traces how the passage from bracketed inter-state war to a more diffuse and less clearly bounded form of conflict has unsettled the distinctions between combatant and civilian, interior and exterior, war and peace: on this reading, international law has increasingly shifted from regulating violence among formal equals to accommodating a more permanent, asymmetrical exception, one that revives, under different names, practices once associated with piracy. The article concludes by asking whether a fuller acknowledgement of the political, and at times conflictual, character of international relations might offer a more adequate account of them than the vocabulary of universal humanity alone. Niccolò Nobile analyses the legal status of combatants serving in military formations deemed unlawful, adopting a comparative approach that moves across historical periods and contemporary jurisdictions. By considering how the United States, Israel, and the Russian Federation classify and treat prisoners of war captured from formations labelled as unlawful or terrorist, the study shows how current conflicts have pressured – and in some cases altered – the normative contours of *ius in bello*. Within the historical dimension, the inquiry also highlights the enduring interplay between *ius in bello* and *ius ad bellum*, an interaction that has significantly shaped the modern architecture of the law of armed conflict.

As for the fourth macro-topic, Barbara Annicchiarico and Valerio Dionisi, while recognising that the political drive and the public support toward globalisation have been in regression, if not come to a halt, argue that frequent proclamations about the end of globalisation may reflect a reading of evidence that privileges only certain dimensions of international economic integration, mainly the cross-border trade in goods and the flows of financial capital, while neglecting others. Edoardo Vinchesi analyses the relation between geopolitical crises and supervening events, affirming that the new context of international politics should not lead to a radical rejection of traditional categories; rather, it reveals the need for those categories to adapt. Vincenzo Delli Priscoli studies how customs duties are undergoing a profound functional transformation: traditionally conceived as fiscal instruments designed to generate public revenue and regulate international trade, tariffs are increasingly assuming a multidimensional regulatory function (instruments of industrial policy, economic security, environmental protection, technological competition, and geopolitical influence). Through an analysis of the economic strategies pursued by China, the United States, and the European Union, Amelia Fiore examines the new instruments emerging in response to increasing trade tensions and the strategic rationale underlying their adoption, highlighting how traditional legal instruments of trade policy are progressively being transformed into tools of economic defence and instruments for the implementation of broader geopolitical and economic strategies at the global level. Isabelle Ablas, Carl Dalhammar and Flávio Ribeiro investigate about legal pathways towards resilient and decentralised economies in the deglobalisation era, taking into account the right to repair.

"Back to the future": law in the shift of power, 140 years after Berlin

by Renato Ibrido

Between November 1884 and February 1885, an event took place in Berlin that might appear marginal to our eyes, but that Carl Schmitt regarded as having a bewildering and unprecedented gravity: for the first time, an extra-European power – the United States – was admitted to participate in an interstate conference within the framework of *jus publicum europaeum*.[1] This was a crucial moment from at least three different perspectives.

First of all, it represented a turning point on the legal plane, marking for the *jus publicum europaeum* the "beginning of the end".

Secondly, this episode also marked a methodological turning point: the rise of a maritime power such as the United States created an ideal habitat for the emergence of an interdisciplinary method applicable to the analysis of mappable power conflicts: the geopolitics. It is no coincidence that the entire first phase of classical geopolitics appears to be characterized by the dispute over the terrestrial or maritime origins of hegemony (land power vs. sea power).

Eventually, at the level of international relations, this event signalled the consolidation of the United States' position as the principal revisionist power poised to challenge existing balances and the "rules of the game" of the international order.

Today, too, we find ourselves in a phase of shift of power, but one of the opposite sign to that on which Schmitt sought to reflect: in the current international context, the United States finds itself playing the opposite role, that of a *status quo* power challenged by increasingly resolute adversaries, both at the regional and at the systemic level.

1 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum.* Greven Verlag, Köln 1950.

In light of these transformations, one question naturally arises: what geopolitical role can law play in a context of shift of power, and in this one in particular?

In this brief contribution, I will seek to problematize the thesis – implicitly accepted in certain circles of international relations and geopolitical analysis – according to which law would count for nothing in power competition.

This thesis is sometimes evoked through a manipulation of Thucydides' thinking, who is considered the first theorist of the unconditional prevalence of the "law of the strongest" over the "force of law" (especially in relation to the Dialogue between the Athenians and the inhabitants of Melos contained in The Peloponnesian War).[2]

In order to problematize this thesis, I will introduce four arguments: (*i*) law always enters into the decision-making process of the international actor who decides to violate the legal norm; (*ii*) conversely, law does not necessarily enter the decision-making process of the actor who decides to comply with the law; (*iii*) the average degree of compliance with international legal norms is higher than their average degree of violation; (*iv*) at the international level, incentives to comply with legal norms vary according to the 'size' of an actor and its position in the power rankings: nuclear superpower, great power, medium power, *etc*.

In my view, these four arguments can be accepted both from a constructivist and from a realist perspective.

Moving on from the first argument, the legal norm always enters into the decision-making process of the international actor who decides to violate it. Indeed, such an actor invariably carries out a cost–benefit analysis concerning the potential reputational damage connected with the breach of the norm. Not by chance, in order to mitigate these costs, the international actor often puts forward an alternative strategy for interpreting the legal norm.

It suffices to recall Vladimir Putin's speech of 24 February 2022, in which the military invasion of Ukraine was justified under Article 51 of the Charter of the United Nations, by invoking the right of collective self-defence following

2 About this manipulation, see Virgilio Ilari, 'Thucydides' Traps. The Peloponnesian War in American Political Rhetoric and in Senior Military Education' in Luca Iori, Ivan Matijašić, eds. *Thucydides in the "Age of Extremes" and Beyond. Academia and Politics*. HCS Newcastle-Venice 2022, pp. 263-299.

a "request for assistance" by the self-proclaimed Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR). Quite apart from the implausible soundness of these arguments, what matters from a theoretical standpoint is that the use of force was not claimed as a purely extra-legal act, but was framed within a structure of legal justification: this precisely shows that law continues to function as a reference yardstick even when it is instrumentalized or openly stretched.

If it is true that the international actor always takes legal norms into account when deciding to violate them, the opposite is not necessarily true: as constructivists have shown, the choice to comply with the standard of conduct prescribed by a legal norm is not always the result of a cost–benefit calculation. At times, certain legal norms are internalized at such a deep level that the international actor does not even raise the question of whether to comply with them or to violate them. To illustrate this point, Alexander Wendt refers to the example of the Bahamas: why should a nuclear superpower such as the United States respect the sovereignty of a defenseless State like the Bahamas? An argument based on egoistic self-interest would suggest that the reputational damage resulting from the invasion of the Bahamas would outweigh the advantages of its conquest. However, according to Wendt, this argument is not entirely convincing, since it is extremely unlikely that American policymakers ever engaged in such a rational calculation. Wendt's claim is that the independence of the Bahamas derives from an internalization of the norms of international law on sovereignty at such a deep level that even a superpower comes to define its own interests accordingly.[3]

However, it is not necessary to adhere to constructivism in order to recognize a role for law within power competition. Even the "founding father" of political realism, Hans Morgenthau, acknowledged that the vast majority of norms of international law are complied with voluntarily and are characterized by a far from negligible degree of effectiveness. For Morgenthau, the problem instead arises with regard to a series of cases – which, though quantitatively limited, are particularly important from the standpoint of international politics, as they affect the vital interests of a State. In such cases, it is considerations related to power, rather than legal considerations, that determine both compliance with and the application of the law. It is nonetheless emblematic that this attempt to circumscribe the cases of violation of international law came from a former

3 See Alexander Wendt, *Social Theory of International Politics*. CUP, Cambridge 1999.

jurist, who had chosen to turn to international relations after having developed a disenchanted attitude toward the role of international law.

In any case, even today, supporters of the theory of the unconditional prevalence of the law of the strongest have not provided empirical evidence capable of refuting Louis Henkin's famous maxim: "*almost* all nations observe *almost* all principles of international law and *almost* all of their obligations almost all of the time".[4] Of course: that "*almost*" – in which the dramatic alternative between war and peace is generally played out – encapsulates all the main raw nerves of law in the competition between powers. Nevertheless, while the 'failures' of law in this field almost always make the news, its "successes" are invisible and routine.

Eventually, at the international level, incentives to comply with legal norms vary according to the 'size' of an actor and its position in the power rankings: nuclear superpower, great power, medium power, *etc*.

From this perspective, the category of actors that has the strongest structural interest in consolidating the role of law as a regulator of international relations is that of the middle powers. Indeed, middle powers cannot use force either upward or downward: unlike the pre-nuclear era, even the largest coalition of middle powers without nuclear deterrence would be defeated in an armed conflict that a single nuclear superpower perceives as existential. At the same time, middle powers cannot use force even against small powers, because in doing so they would legitimize the use of violence by superpowers against themselves.

By contrast, nuclear superpowers have different incentives to comply with legal norms. For example, as Ikenberry has shown, legal, institutional, and procedural frameworks designed to regulate the relationship between a leading State and its secondary allied States make it possible to stabilize such primacy: law reduces the "dividends of victory" by limiting hegemony but at the same time it makes this leadership more legitimate, enduring, routinized and less exposed to uncertainty.[5]

More in general, even in the international field, law plays an indispensable role in transforming force into reliable and predictable power. The creation of

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4 See Louis Henkin, *How Nations Behave: Law and Foreign Policy*[2]. CUP, New York 1979, p. 47.

5 See G. John Ikenberry, *After Victory. Institutions, strategic restraint and the rebuilding of order after major wars*. PUP, Princeton 2001.

a climate of mutual trust and reliance through this technology of cooperation is beneficial to all actors, because it removes international relations from uncertainty, insecurity, chaos and, ultimately, the 'law of the strongest'. The latter logic proves to be inefficient and extremely risky even for the international actor with the greatest coercive capacity.

Once again, it must be reiterated that the law – far from being a moralistic trapping – remains an essential resource for bringing predictability to the realm of uncertainty, "cooperation at the heart of conflict." And the presumption that we can do without this resource will be paid for dearly over time, as a tragic miscalculation.

Sanctions against Russia: are they harmful to private property rights or necessary? Looking for a balance between safeguarding constitutional prerogatives and international interests

by Giulia Sulpizi

This work starts from the Russian-Ukrainian war which has imposed, in the current globalised context, the adoption of sanctioning measures. These elements do influence the juridical and political context, even more starting from February 2022.

In any case, sanctions are international law instruments that interact both with the commercial and economic aspects and with the legal framework. Giving this assumption, we can distinguish between two different kinds of measures. The first ones are multilateral sanctions, adopted in the UN context under the supervision of the UN Security Council through the application of legal provisions (such as the sanctions against Iraq). The second ones are unilateral sanctions, which are adopted by States on their own.

Among these second type of sanctions, we can acknowledge the freezing of the foreign reserves of the Russian Central Bank and, more generally, of public and private assets located in Europe and in the United States. It is significant that, through these measures, their owners are unable to use them, but this element questions which kind of act it is.

Furthermore, we have to study the possibility of confiscating Russian assets. This particular aspect would have no precedent in international law, as a new type of "third-party countermeasure" based on a newly developed agreement, which can find no basis in the current UN provisions[1]. However, it raises constitutional issues, especially regarding the potential compromise of the right to private property *ex* art. 42 of the Italian Constitution, principle that also extends

1 Chessa, 2024.

to non-Italian citizens. Confiscation, in fact, would entail a transfer of ownership to third countries for an indefinite period, a transfer which would have irreversible nature.

Thus considered, we could investigate whether there are alternative solutions, less damaging to the constitutional interests mentioned, but equally aimed at "hitting" – indirectly – the attacking State and at supporting the attacked.

Therefore, we first examine the current provisions regarding assets freezing, considering its regulation and case law framework, before moving on to the possible – but not yet implemented – confiscation of Russian assets.

A notable precedent is the case brought to the attention of the Court of Justice of the European Union regarding the freezing of assets established by Regulation (EC) No. 1210/2003, which sought to determine whether it resulted in the assets being removed from the recipient's assets. In this case, the Court of Justice asked for a preliminary ruling from the European Court of Justice to clarify whether such freezing resulted in the immediate transfer of ownership of the resources to the Development Fund for Iraq or whether they remained the property of the recipient company. If the first interpretation were chosen, the Court would have also questioned whether authorization from the competent State was required for transactions involving the attribution of assets or whether such authorization was only necessary to unfreeze the Fund. In the Court's view, such freezing has the same effect of freezing the recipient's assets, assuming a precautionary nature. Indeed, in line with previous case law, it is a measure aimed exclusively at limiting the number of economic transactions relating to the goods subject to freezing, with the function of preventing or discouraging the commission of certain acts[2].

In particular, the precautionary nature of this instrument is evident from several factors. First, these sanctions appear similar to internationally recognized smart sanctions. Secondly, this freezing prevents the blocked resources from being made available to individuals and organizations for terrorist purposes and discourages conduct that undermines the values on which the Union is founded.

Significantly, the 2003 European Regulation itself determines how, if necessary, these funds can be released. In fact, it establishes that this can only happen thanks to the national authority which will have the possibility of transferring them to the Development Fund for Iraq[3].

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2 Court of Justice of the European Union, VIII Chamber, decision taken on December 15th, 2022, joined cases c-753/21 and c-754/21, *Instrubel NV*.

3 As stated in article 4. On this subject, Bianco, 2023, pp. 1397-1404. The author stress-

A major change occurred in 2012, when the United States froze the assets of the Iranian Central Bank with the effect of sanctioning this State, using an economic power which had important effects on the political context as well[4].

In this perspective, the first Community-based regulation on assets freezing was adopted with EU Regulation No. 269/2014, whose art. 2 states that all funds and economic resources belonging to, owned or controlled, directly or indirectly, by any natural person or any of the natural or legal persons, entities or bodies associated with them listed in Annex I are frozen. Specifically, with reference to the freezing of funds, art. 1, lett. *f*) affirms that it involves the prohibition on moving, transferring, altering, using, or accessing funds in any way that would alter their volume, amount, location, ownership, possession, nature, destination, or otherwise enable the use of the funds in question, including portfolio management, while art. 1, lett. *e*) defines the freezing of economic resources as the prohibition on using economic resources to obtain funds, goods, or services in any way, including through sale, rental, or mortgaging.

In any case, starting from the aforementioned provisions, this freezing of goods causes the loss of availability of assets, without any change in ownership. Moreover, this mechanism operates in the absence of any notice of a crime, appearing similar in effect to administrative or judicial seizure, even though the legislative text itself expressively uses the term "freezing". The application of this instrument, however, defines the creation of a list of entities thus "monitored" by the European Union, subjected to the application of such measures.

This "blacklist" was significantly expanded following the adoption of EU Regulation No. 330/2022, which contains, in addition to a reference to the invaded Donbass region, a new provision defining an innovative element, since this institution may refer to anyone providing material or financial support to the Government of the Russian Federation and to prominent entrepreneurs or legal persons, entities, or bodies operating in economic sectors that constitute a significant source of income for the Government of the Russian Federation, as well as to natural or legal persons associated with the persons or entities included in the list.

According to these supranational norms, there have also been several cases of this kind of freezing in Italy, affecting Russian villas, yachts and estates worth millions.

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es the difference between the Iraq's case and the compensation for damages suffered by Ukraine as a result of the attack launched by Russia.

4 Picotti, 2025, pp. 75-77.

Anyway, we can notice that this framework is founded on the above mentioned precedent, which refers to the blocking of financial flows suspected of being aimed at funding terrorists or related organizations, as occurred with three different United Nations Security Council resolutions, adopted between 1999 and 2001 to fight Al Qaeda's affiliates. Bearing this very famous and important case in mind, we can underline a significant difference between those acts and the present EU Regulations: in fact, these ones are adopted by the European Union and they are not based on a Security Council decision under Chapter VII of the United Nations Charter. The reason seems obvious: the Russian Federation itself is a permanent member of the Security Council.

Starting from this aspect, we can see that Italy has adopted a broad "applicative" legislation. We can refer to the d.lgs. no. 109/2007, based on art. 215 TFEU, that affirms that, after a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union provides for the interruption or reduction, totally or partially, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof. In addition to that, the Council may adopt restrictive measures against individuals or legal entities, groups or non-State subjects. It therefore appears that this provision consists of an application of art. 29 TEU, which concerns the decisions taken by the Council of the Union on common foreign and security policy, a determination which forms the basis of the adopted Regulation and, consequently, of the Italian legislative decree which marks its concrete implementation.

Taking into account this international context, Italy has identified a specific body, the Financial Security Committee, composed of fifteen members and chaired by the Director General of the Treasury, with the task of preventing the use of the financial system for the purpose of laundering the proceeds of criminal activities to finance subversive armed groups, which now also include those who directly or indirectly subsidize Russia. In particular, it operates in three macro-areas. The first concerns the enforcement, over which it supervises, of the freezing measures established by Security Council resolutions. The second deals with national freezing measures against individuals who engage in —or attempt to engage in—terrorism or terrorist financing. This specifically aims at preventing the designated entity from engaging in asset-diversion operations, pending the adoption of relevant international acts, in order to evade the aforementioned asset freeze. The third and final function consists in the ability to submit proposals to the competent authorities of the United Nations and the European Union for the inclusion of individuals or legal entities in the aforementioned blacklists.

Given these elements, it is important to examine the legal nature of the notion of freezing in order to understand if and which kind of constitutional compatibility issues arise in this regard and then to outline the differences with the confiscation system.

Starting from the literal interpretation of art. 75 TFEU, we can see that freezing is included among the set of administrative measures that the Council and the European Parliament can adopt for the prevention and fight against terrorism and related activities. The Italian legislator, essentially reproducing this supranational provision, has chosen a similar approach, requiring this measure to be adopted by decree of the Minister of Economy and Finance following an administrative proceeding[5]. In other words, it would be an administrative act with ablative effects[6], not dissimilar from administrative seizure or confiscation. In particular, the first one is precautionary and provisional, generally preparatory to the second one, which is a true sanction. In this last hypothesis, the owner of the asset loses its availability and enjoyment, but not its ownership, unlike the latter.

However, there are some differences with the freezing of assets here examined, the adoption of which is independent of elements of danger, linked to the owner of the asset or to the asset itself: it is difficult to imagine, for example, that a villa or a yacht could actually be used for the commission of illegal actions, especially of an international nature[7].

Nor could any similarities be identified, regarding the provision's *ratio* and fundamental principles, with criminal confiscation[8], although some authors have stressed this possibility considering freezing and the confiscation provided for by the anti-mafia code[9]. In any case, we can acknowledge significant differenc-

5 Bassi, 2012, pp. 695 ss. Here the author agrees on the administrative nature of the measure. Also Barberini, 2022 states that the measure is similar to administrative or judicial seizure in its effects, but not in its form: therefore, certain precautions are adopted.

6 For a definition of this type of provision, see Giannini, 1988, pp. 1196 ss., saying that the substance of these proceedings is simpler, although perhaps dogmatically more subtle: they are almost the mirror image of property granting proceedings, that is, they consist of a patrimonial attribution, not of public property in favour of private individuals, but of and on private property in favour of public authorities.

7 Cupaioli, 2024, pp. 716-717.

8 On this point see Paliero, Travi, 1989, pp. 365 ss.

9 Battaglini, 2017, pp. 66 ss., noting that preventive confiscation therefore presents itself

es: confiscation under special criminal law generally occurs following a seizure order issued by a court, the outcome of judicial proceedings, and involves the transfer of the assets in question to the State; the freezing measure based on the 2007 legislative decree, on the other hand, only involves the possible involvement of the judicial authority and does not involve any transfer of ownership.

Furthermore, it is noteworthy that institutional websites, dealing with measures adopted because of EU Regulation, describe them as sanctions, almost referring to administrative sanctions. However, even this conclusion does not seem fully supported. Upon closer inspection, some of the typical characteristics of a sanction are missing. Among these, we can find the retributive element, since in this case Russian citizens would be affected without proof that they played an "active" role in the ongoing conflict[10]. In addition to that, the principles of specificity and of non-retroactivity as well as the prohibition on analogical interpretation are also absent[11]. In addition to that, there is an exception regarding common rules about jurisdiction: in fact, in cases of asset freezing, jurisdiction is granted only to the Regional Administrative Court of Lazio, Rome.

Starting from this aspect, the administrative judge itself seems to be helpful in this issue, having defined the freezing and other sanctioning measures as instruments aimed at reacting to the international wrong perpetrated by the Russian Federation against Ukraine, represented by the violation of the general international norm of binding nature of territorial sovereignty and its corollary of the exclusive and free exercise of government power over one's own territorial community[12]. There is, therefore, a connection between the sanctions adopted and the need to provide a response to Russia's international attitude, even if they appear to have a specific character. In fact, they have the legal nature of international law countermeasures as they are abstractly illicit actions which find concrete

as a hybrid, para-criminal type of measure , since in substance it appears to take on the characteristics of a penalty, given its afflictive nature, but formally it is given the legal name of preventive measure, thus removing it from the legally binding status of criminal law. Like any *ante delictum* preventive measure, confiscation involves a significant anticipation of the threshold of criminal liability, thus placing it in conflict with a variety of constitutional principles. These critical issues appear particularly marked with reference to the institution of capital freezing, since its application, in contrast to national asset prevention measures, does not occur following a judicial proceeding, but rather an administrative one.

10 On this distinction see Chiovenda, 1935, pp. 247 ss.

11 Allena, 2017.

12 T.AR.. Lazio, Rome, section II, decision no. 8669/2022.

justification since they are adopted, *ex post*, by a member of the international community to react to the violation of a norm of *ius cogens* which, although it concerns a specific sovereign State, has protective effects *erga omnes* towards the entire community[13].

Despite the difficulty of classifying this freezing under the notion of administrative sanctions, we can conclude that it is a qualified and specific category of sanctions, since its use is justified as a means to fight Russia's unlawful conduct, even if this instrument is potentially characterized by numerous aspects of illegitimacy.

From this perspective, it is worth considering how the 2014 Regulation seems particularly problematic. First, the applicable administrative procedure appears to lack procedural guarantees, as the Committee is exempt from a notification of initiation of the procedure and even after the notification of conclusion no participatory intervention by the administered entity is permitted. Secondly, the decision does not appear to be supported by a fully knowable motivation, as only the public part of the reasons of the decision is disclosed[14], without letting know how the decision-making evaluations are made[15]. All of these elements are well-considered by administrative jurisprudence, which finds the freezing measures incompatible with the provisions of l. no. 241/1990.

Nonetheless, administrative judges state that procedural participation guarantees would be met by the provisions about the list cancellation procedure, which the Committee could request from the Council of the European Union. This, however, is not entirely correct: upon closer inspection, the law does not provide for the possibility for the party, subject to the asset freezing, to submit reports or request a hearing.

Furthermore, regarding judicial protection, the assets freezing decree, as an administrative act, can only be reviewed considering symptomatic abuses of power. However, in the absence of a complete and legally binding legislation, we face generic provisions that make it difficult to formulate specific grounds for appeal[16]. In addition to that, it should be noted that the judicial authority, even if invested with the legitimacy of a freezing, cannot extend its jurisdiction to the fact itself, since the appropriateness of the measure remains confined to the decision

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13 *Ibidem*.

14 Art. 4 *quinquies*, c. 1, lett. a), d.lgs. no. 109/2007.

15 Art. 4 *quater*, d.lgs. no. 109/2007.

16 Cupaioli, pp. 730-731.

of the Council of the European Union. The only tool that can be used to protect one's rights would be to file an appeal to the Court of Justice, since the Regulations on asset freezing directly impact individual rights, invoking, for example, the lack of adequate adversarial proceedings or the absence of reasoning[17].

The peculiarity of the "blacklist" system seems to be confirmed by the circumstance that the death of the listed individual is not sufficient for the assets to be unfrozen: in fact, a new evaluation by the Committee is necessary, aimed at removing the above mentioned *status*. Therefore, the effect of making frozen funds immediately available to the heirs or persons related to the individual himself, in the absence of a prior evaluation by the body that imposed the sanction is not permitted[18].

In other words, the freezing measures have been embodied in national legislations as acts of general aims which prohibit a specific category of recipients from making economic resources available to the entities listed in the various Annexes, thus effectively reducing themselves to individual decisions against the aforementioned entities[19].

Therefore, given the unique nature of the asset freezing mechanism, it is worth noting that it can be characterized as "retaliation"[20] against Russia's unlawful conduct, starting from a supranational perspective. This can be justified within the international law framework, but it appears difficult to reconcile it with the constitutional principles of the Italian legal system, also considering European provisions.

Thus, we have to underline the recent proposal that deals with the possibility

17 Barberini, cit.

18 See T.A.R. Lazio, Rome, section II, decision no. 5011/2023.

19 See, among others, Court of Justice of the European Union, decision taken on March 28th, 2017, c-72/15 *Rosneft* (paragraph 102).

20 Pedrazzi, 2022, where it states that from the perspective of international law, such measures qualify as retaliation, where they do not affect previously existing international obligations, or, otherwise, as collective countermeasures, i.e., adopted unilaterally by States (in this case through an intergovernmental organization) not specifically harmed by violations of *erga omnes* obligations. The legality of such countermeasures, consistently supported by Western countries, is still debated, although there is no doubt that in the case at hand, such measures contribute, at least in their objectives, to the implementation of the obligation incumbent on all States to cooperate in order to put an end to serious violations of ius cogens, especially in the case of aggression. In any case, it should be remembered that the countermeasures must not entail the violation of the fundamental rights of the populations of the recipient States or the unjustified violation of individual rights.

of adopting new international sanctions, which has no precedent both in the Italian and in the international landscape. This would involve confiscating frozen Russian assets, with the resulting transfer of these assets to the State. However, this proposal raises a series of international and constitutional issues.

a) First of all, it has been argued that, since this is an unprecedented measure that would in any case require regulatory/prescriptive approval at a supranational level, it should be based on a specific, newly-designed agreement, under penalty of Europe's lack of financial credibility[21].
b) Secondly, we have to remember that Central Banks have national immunities that give no chance to other States to confiscate their assets[22].
c) Thirdly, this instrument could be considered a sanction *ex post* impacting on the right to property *ex* art. 42 of the Constitution, which must be protected against all subjects of the legal system, while maintaining the private law principles dictated by the civil code[23].
d) In addition to that, there are further negative elements to consider, which relate to the non-legal framework. These aspects deal with reputational damage (since other countries might view the seized Russian assets with concern, fearing the application of this mechanism to their own countries as well) and financial damage. From this latter perspective, entities like Euroclear (the Belgian company that holds the Russian frozen assets) would be considered unreliable, with the consequent risk of new financial claims, loss of attractiveness and of trust dealing with money issues[24].

Starting from point a), we can see that this type of confiscation, among other things, would operate in a similar manner to the aforementioned preventive confiscation, *ex* art. 24 of the anti-mafia code. From this perspective, it is therefore essential to ensure compliance with the principle of legality (interpreted in its various declinations)[25], as the Constitutional Court has also clarified on several

21 Casadei, 2025.

22 This aspect is mainly established in United Nations Convention on Jurisdictional Immunities of States and Their Property, ratified in New Tork on December 2nd, 2004.

23 V. Crisafulli, L. Paladin (eds.), 1992, p. 297.

24 Picotti, p. 80.

25 This confiscation can be applied to assets held by individuals who may facilitate, in any way, the activities of those who actively participate in acts of violence: in these cases, social danger is an unavoidable prerequisite. Therefore, only assets purchased within the period where we can find this social danger can be susceptible to confiscation, as stated by the Supreme Court of Cassation, decision no. 30974/2018.

occasions[26].

Furthermore, we should have the chance to verify the rightfulness of the concrete application of these sanctioning measures, whether they involve the freezing of assets or confiscation[27].

In addition to that, a problematic compatibility issue concerns the lack of effective *ex post* judicial protection. An important ruling by the Court of Justice of the European Union[28] provides some useful information on this aspect. It stated,

26 With decisions no. 24 and no. 25 of 2019 the Italian Constitutional Court ruled on issues relating to the relationship between the principle of legality and the legislative discipline regarding personal and financial preventive measures, currently contained in d.lgs. no. 159/2011 (anti-mafia code). These rulings, although from different perspectives, address issues concerning the nature and function of preventive measures, their constitutional and conventional legal status and the relationship between domestic law and supranational law (taking also in account European case law and the most recent decisions of the Italian Supreme Court of Cassation). In particular, the first one (no. 24) concerns the application of the personal and patrimonial measures of prevention, while the second (n. 25) concerns the crime itself that punishes the violation of provisions imposed with personal measure of special public safety surveillance. The two rulings, although having different objects, share a starting point, that is the judgment of February 23rd, 2017, *de Tommaso v. Italy,* of the Grand Chamber of the European Court of Human Rights. Here it was held that the Italian legislation on preventive measures was not in conformity with the canons of legality, because of the lack of precision, certainty and foreseeability, which both the Convention and its Protocols require. In particular, the European Court had found a violation of art. 2 Prot. n. 4 ECHR – relating to the right of circulation, compressed by personal preventive measure of special surveillance – under a double profile. Firstly, the Strasbourg Court had deemed excessively imprecise the provisions which identify among the recipients of the prevention measure the so-called “generic dangerous subjects”. Secondly, the ECHR had found the excessive imprecision of the provisions applicable to the recipient of the personal measure of special surveillance, among which are those of living honestly and of respecting the laws, as well as that of not giving any reason for suspicion with regard to one’s conduct.

27 Court of Justice of the European Union, V Section, *Azarov v. Council of the European Union*, December 19th, 2018, where it is held that the effectiveness of the judicial review guaranteed by art. 47 of the Charter requires that when carrying out the review of the legality of the reasons on which the decision to include or maintain the name of a person on the list of persons subject to restrictive measures is based, the EU judicial bodies must ensure that that decision, which has individual significance for that person, is based on a sufficiently solid factual basis. This implies a verification of the facts alleged in the statement of reasons underlying that decision, so that judicial review is not limited to the assessment of the abstract plausibility of the reasons for the decision put forward, but is intended to establish whether those reasons, or at least one of them considered sufficient in itself to support those measures, are well founded.

28 *Kadi, Yusuf and Al- Barakaat v. Council and Commission,* delivered in the Grand Cham-

on the one hand, that sacrificing property rights cannot be considered inappropriate or disproportionate when faced with an objective of general interest as fundamental to the international community as the fight by all means against threats to international peace and security arising from terrorist acts. On the other hand, it was also argued that even in such cases the principles of adversarial proceedings and effective judicial protection must be ensured, consisting in the possibility for an impartial judge to verify the absence of errors in assessing the facts and evidence adduced for inclusion in the list, in compliance with the "parity of arms" principle.

Starting from this analysis, it can be argued that not only the current asset freezing mechanism, especially if lacking appropriate procedural and jurisdictional safeguards, and the more problematic confiscation are difficult to reconcile with the Italian constitutional system, at least unless accompanied by specific regulatory provisions inspired by principles of the 1948 Italian Charter and by the main international and European acts.

In conclusion, the freezing instrument – the only one theoretically compatible with the Constitution because it does not directly violate art. 42 – should be supported by new guarantees, including: 1) effective participation in the administrative procedure for imposing the sanction; 2) knowledge of the reasons for the adopted measure and 3) a genuine adversarial process, with the possibility of submitting briefs and requesting removal from the *blacklists* before the administrative judge.

Regarding point b), we can acknowledge that nowadays there is a tension between the near absolute immunity of central bank assets and the allure of foreign central bank assets to satisfy large monetary awards and as the target of sanctions to achieve political objectives. This element is particularly significant when it comes to assets freezing in the Russian case. For instance, in the U.S. it is a President Biden's executive order that blocked Russian Central Bank assets by directing that those assets may not be "transferred, paid, exported, withdrawn or otherwise dealt in"[29]. Some authors, given the particular nature of freezing assets, affirmed that this measure did not involve immunity under domestic or international law, because it does not deal with assertion of jurisdiction by domestic courts, nor it is related to the enforcement or execution of a court judgement. In any case, most scholars argue that immunity does apply to any tool that

ber on September 3rd, 2008.

29 The Executive Order of April 15th, 2021.

restraints a foreign government's use of its own property in the forum State, including among them hypothesis such as a President's executive order or acts of other executive authorities imposing economic sanctions. Therefore, they stress that there are three main arguments in favour of broader immunity rules of this kind, such as State practice, a general opposition to unilateral sanctions and the difficulty in distinguishing between judicial and executive functions[30].

Thus mentioned, we can see that there even international law difficulties in dealing with these types of sanctions.

Considering point c), we have to remember that, by incorporating confiscated assets into the State's patrimony, the State will have their full availability and it will also acquire their legal fruits, thus enriching the country thanks to a measure adopted in the absence of the aforementioned constitutional guarantees.

Finally, in order to deal with point d), we have to consider some facts.

For months there was uncertainty regarding how these frozen assets could be used. In fact, the French, German and British Prime ministers consistently supported the importance of using these funds to finance Ukraine, thus putting Russia in difficulty [31].

In this situation, it is worth noting that the frozen assets of the Russian Central Bank have been immobilized both permanently and temporarily. This means, in other words, that these sanctions are permanent since they do not need to be renewed unanimously every six months, but the ban on transferring such funds to Moscow is temporary. Otherwise, it is not possible opting for a full confiscation, which, as has already been argued, violates international law, as well as the provisions of the Italian Constitution. This caused a violent reaction from Russia, which has threatened to sue Euroclear, the Brussels-based company that holds €185 billion of the €210 billion in Russian assets immobilized in the EU. This decision put pressure on Belgium which, together with Italy, Bulgaria and Malta, called on the European Commission and the Council to continue to explore and discuss other options in line with European law, with predictable parameters and suitable for outlining other solutions that ensure the Union's support for Ukraine[32].

In this context, the joint decision to maintain the frozen assets, to be used

30 See for further enquiries, Brunk, 2023, pp. 14 ss.

31 Tito, 2025.

32 Basso, 2025 and Mastrobuoni, 2025.

solely and exclusively for the reconstruction of Ukraine (in a similar way of the Development Fund for Iraq) and not for the country's defence, takes on particular significance[33].

In addition to that, the European Commission noted that the so-called windfall profits, or interest generated by these assets, have been used for over a year to support the war expenses and Ukraine's budget needs. This approach had the advantage of preserving capital, considered untouchable according to the current interpretation of international law, reducing the risk of disputes and maintaining relative political cohesion among the member States. However, these interests generated by the assets, that are not of little importance, remained insufficient compared to Kiev's financial needs[34]. Also this choice, even though acceptable at an international level, could be incompatible with the Italian Constitution's principles, since a country is dealing with amounts of money generated by assets that are not "incorporated" by the State itself. Therefore, we could speak of unjustified enrichment, since a State would generate profits, to be used for its own supranational purposes, from assets not owned by it, thus once again compromising the validity of art. 42 of the Italian Charter. This means that, even though the above-mentioned rules have been applied, it is not sure whether they abide by the Italian fundamental values.

This solution, however, remained unimplemented, preferring a different decision, strongly supported by the Italian Government, which approved a €90 million loan to Ukraine as international support. Starting from this assumption, it was decided not to touch the frozen funds, using instead debt securities with interest paid by the European budget[35].

This had two effects: on the one hand, the continued freezing of Russian assets as a means of exerting pressure on the country; on the other, concrete support for Ukraine without using the aforementioned funds, but with different measures and tools.

After that, we can see that Euroclear refused to abide by Russian justice. In fact, on May 15th, the Moscow Arbitration Court upheld the Bank of Russia's appeal, ordering Euroclear to repay 18.2 trillion rubles, equivalent to approximately $251 billion. This sum included frozen funds, the value of blocked securities and accumulated lost earnings.

33 Canettieri, 2025.

34 Lovi, 2025.

35 Canettieri, 2025, and Fabbrini, 2025.

In any case, Euroclear announced that, despite the ruling issued by the Moscow Arbitration Court, the assets of the Central Bank of the Russian Federation held at Euroclear Bank will remain frozen as stated thanks to international sanctions.

The decision to ignore the verdict is based on a fundamental reason: the claim brought by the Russian regulator against Euroclear is not recognized by European law, and Euroclear itself does not recognize the Court's jurisdiction. Euroclear has also announced that it intends to appeal the ruling in the appropriate Courts.

Meanwhile, the European Commission is seeking the consent of member States to allocate these assets to finance Ukraine's reconstruction. On May 8th, Euroclear announced that it had already transferred €6.6 billion in proceeds from the reinvestment of Russian assets to Kiev starting in 2024. The next payment, amounting to €1.4 billion, is scheduled for July 2026[36].

Thus considered, we can concretely see that there are several things that interact in a comprehensive dimension. Geopolitics in in fact founded on spatial and territory criteria, alongside with concrete powers exercised by main actors (such as States) and the legal tool, which is binding. This means that legal rules are influenced and, on the other hand, influence institutional behaviour, sometimes changing perspectives, attitudes and objectives of national entities[37].

In conclusion, this case involves international law decisions and agreements that have a concrete impact on constitutional provisions. In particular, we can affirm that the possible seizure of frozen Russian assets is in contrast both with supranational provisions and Italian constitutional rights, since it involves a loss of private property without a solid legal basis. In addition to that, we have to stress that politics often influences the legal framework. Thus, it is up to institutions and Governments to find innovative legislative solutions, capable of balancing opposing interests. In fact, it is vital to create a new international agreement that would take into account Russian citizens' property rights and the necessity of "striking" the Russian State.

So the definitive decision is up to national authorities that have to act all together in an international dimension.

36 Serra, 2026.

37 Passaglia, 2026, pp. 158-163. In a similar way, we can look at Ibrido, 2025, p. 31, where it is stated that law should not be considered merely as the final product of decisions made by political authorities following an evaluation of conditioning factors, but the law itself can incorporate a conditioning factor.

Empires, Civilizational State and Multipolarity: Competing Universals in a Fragmented World

BY MARCO BALDASSARI

1. The Return of Empire as a Political Category

In recent decades, political and geopolitical thought has witnessed the gradual re-emergence of empire as a key category for interpreting the transformation of international order. For much of the twentieth century, modern political theory regarded the nation-state as the definitive institutional form of political modernity. At the same time, the rise of globalization encouraged the belief that sovereign states would eventually be superseded by increasingly integrated supranational governance structures.

Yet recent developments challenge both assumptions. The crisis of the post-1989 liberal order, the return of geopolitical rivalry, the fragmentation of globalization, and the rise of non-Western powers have exposed not only the limits of the narrative that proclaimed the "end of history" and the universal triumph of liberal democracy, but even the collapse of the liberal international order[1]. In this context, empire returns not as a nostalgic project but as an analytical concept capable of capturing political realities that exceed the framework of the nation-state. As Pier Paolo Portinaro has argued, the *polis–empire–state* tri-

1 For a comprehensive reconstruction of the trajectory of the liberal international order, from the end of the Cold War and the post-1989 "unipolar moment" to the Global War on Terror and the contemporary polycrisis, see A. Colombo, *Il suicidio della pace. Perché l'ordine internazionale liberale ha fallito (1989–2024)*, Raffaello Cortina, Milano, 2025, and A. Tooze, *Shutdown: How Covid Shook the World's Economy*, Viking, London 2021. Tooze's analysis is particularly valuable for understanding how the pandemic, geopolitical rivalry, financial instability, and climate change have converged into what he has famously described as a "polycrisis". See also G. Segre, *La fine della fine della storia. Abitare la scomodità del mondo*, Bollati Boringhieri, Torino 2026. On the recent critical revival of imperial logics in contemporary international politics, see also V. E. Parsi, *Contro gli imperi. Il futuro delle nostre democrazie nel nuovo ordine mondiale*, Bompiani, Milano 2026.

ad should not be understood as an evolutionary progression. Rather, political history resembles a labyrinth of institutional forms characterized by recurring cycles, hybridisations, and transformations[2]. Empires, states, and cities coexist, overlap, and periodically reappear in new configurations. Empire, in this sense, may be understood as the organisation of heterogeneity within a large political space. Unlike nation-states, whose legitimacy rests upon territorial closure, legal uniformity, and a relatively homogeneous political community, empires are structurally plural. They govern diversity rather than eliminate it. Their strength derives precisely from their capacity to incorporate multiple peoples, identities, and legal orders within a broader political framework. This distinction was already recognized by Alexandre Kojève in the aftermath of the Second World War. Rejecting both liberal expectations of a post-political economic administration and Marxist hopes for a direct transition from nation to humanity, Kojève argued that any genuinely post-national political order would necessarily assume an imperial form. Between the nation and humanity, he suggested, stands the empire. "It is impossible to jump from the Nation to Humanity without going via Empire"[3].

From this perspective, empire is not simply a larger state. As Herfried Münkler has shown, empires possess porous frontiers, multiple centers of authority, and a fundamentally dynamic relationship between center and periphery[4]. Their instability derives not from civil war in the modern sense, but from the constant renegotiation of these relationships between center and periphery. What distinguishes empire from the state is not merely scale, but also its distinctive relationship to universality. Sovereign states exist within a system of formally recognised political units, each bounded by territorial limits and juridical equality. Empires, by contrast, tend to exceed the logic of mere territorial sovereignty. They project an image of order whose meaning and validity are not confined to their immediate borders. Every empire, implicitly or explicitly, presents

2 See P.P. Portinaro, *Il labirinto delle istituzioni nella storia europea*, Il Mulino, Bologna 2007.

3 A. Kojève, 'L'Empire latin. Esquisse d'une doctrine de la politique française', *La Règle du jeu*, no. 1, mai 1990, pp. 89–123. Trad. it. *L'impero latino. Progetto di una dottrina della politica francese (27 agosto 1945)*, in *Il silenzio della tirannide*, a cura di Antonio Gnoli, Adelphi, Milano 2004, p. 170. English edition: 'Outline of a Doctrine of French Policy', *Policy Review,* no. 126 (August–September 2004), pp. 3–40. Available here: https://www.marxists.org/reference/subject/philosophy/works/fr/kojeve2.htm.

4 See H. Münkler, *Empires: The Logic of World Domination from Ancient Rome to the United State*, Polity Press, Cambridge 2007.

itself not only as a center of power, but also as the bearer of a wider political, cultural, or civilizational principle. For this reason, the contemporary return of imperial forms cannot be understood simply as a revival of classical imperialism. It points instead to the emergence of large geopolitical spaces whose ambitions transcend the traditional framework of inter-state relations. These spaces do not merely seek influence or security; they also advance competing visions of order, legitimacy, and historical destiny. This is where the question of universality becomes central. If we follow John Mearsheimer's argument that the liberal international order has failed, we may conclude that the Western project of a universal liberal order is no longer capable of organizing world politics[5]. "Any ideological international order based on a universalistic ideology, such as liberalism or communism, is destined to have a short life span, mainly because of the domestic and global difficulties that arise when the unipole seeks to remake the world in its own image"[6]. Yet, according to our analysis, this does not mean that universality as such disappears. What has entered crisis is a specific Western conception of universality: the idea that liberal democracy, market society, individual rights, and rule-based governance could provide a single normative horizon for humanity. The last thirty years were shaped by precisely this conception of universality, commonly expressed through the narrative of globalization. Globalization was not only an economic process; it was also a political and ideological claim. It presented Western liberal modernity as the implicit destination of global history.

The return of empires and "civilizational states"[7] suggests that this claim is now being contested. The central question is therefore not whether the universal

5 See J.J. Mearsheimer, 'Bound to Fail: The Rise and Fall of the Liberal International Order', *International Security* 43, no. 4 (Spring 2019): 7–50; J.J. Mearsheimer, *The Tragedy of Great Power Politics*. Updated ed. W. W. Norton & Company, New York 2014.

6 J.J. Mearsheimer, *Bound to Fail*, p. 17.

7 For a comprehensive discussion of the contested concept of "civilization" and its renewed prominence in contemporary political thought, see C. Coker, *The Rise of the Civilizational State*, Polity Press, Cambridge, 2019. Drawing on a wide range of historical and political literature, Coker traces the genealogy of the concept from the nineteenth-century distinction between *Kultur* and *Zivilisation* to its contemporary revival. He highlights the inherently contested nature of the term, its historical association with the "civilizing mission" of European imperialism, and its enduring relationship with claims of Western cultural and political primacy. "[Civilization] accredits some kind of valued achievement, though it is not always clear what is being valued. As a concept it always begs the question: What is 'civilized' about civilization? It allows more variations of judgement in this respect than the notion of society, for we can discuss the stability or viability of a society without necessarily asking whether it is especially 'sociable'", p. 24.

has vanished, but whether different forms of universality are now emerging. If empires have historically functioned as vehicles of universal claims, then the contemporary inter-imperial or multipolar order may be understood as a struggle among competing universals: liberal, civilizational, geopolitical, religious, technological, or economic. In this sense, the crisis of the liberal international order does not simply mark the end of universalism. Rather, it opens a new phase in which the meaning of the universal itself becomes an object of political conflict.

2. From Inter-State Relations to Inter-Imperial Relations

One of Portinaro's most provocative theses is that contemporary international politics is increasingly moving from inter-state relations to inter-imperial relations. "Understanding the context in which contemporary asymmetric wars are fought requires acknowledging that international politics has ceased to be primarily an inter-state arena and has increasingly assumed an inter-imperial character, notwithstanding the fact that the competing actors represent different models of empire. These models may differ substantially in their ideological foundations and in the degree to which they recognize and uphold the norms of international law (norms whose historical development they have shaped to varying extents). Nevertheless, they share important similarities in the practical exercise of their respective forms of power and domination"[8]. Globalization has revealed the inadequacy of many categories inherited from both liberal internationalism and classical realism. Markets do not operate in a political vacuum. Economic globalization presupposes powerful political structures capable of guaranteeing legal order, managing externalities, and projecting strategic power. The contemporary world appears increasingly organized around large-scale political formations that combine state sovereignty with broader civilizational or imperial ambitions. "Imperial multipolarity seems to constitute the inevitable outcome of the evolution of a global economic system that remains either ungoverned or only inadequately governed by states. [...] This form of imperial capitalism functions as the mechanism through which global oligarchies are selected and reproduced. At the apex of this capitalist order stands an informal oligarchy"[9]. The United States constituted perhaps the clearest example of what Raymond Aron called an "imperial republic"[10]. Although lacking the formal ter-

8 P.P. Portinaro, *La metamorfosi degli imperi. Nuove guerre e catastrofe del diritto,* Solferino, Milano 2025, p. 126 (Translated by AI).

9 Ivi, pp. 59-59. (Translated by AI).

10 R. Aron, *The Imperial Republic: The United States and the World 1945-1973* (1974),

ritorial control characteristic of historical empires, the United States exercises a form of global influence through military infrastructure, financial institutions, technological networks, and cultural power. Even though all this entered in a new phase of crisis, it is, in a sense, still an empire without colonies. China presents a different configuration. It is not merely a nation-state but a civilizational state whose political self-understanding is rooted in a continuous historical tradition extending far beyond the modern Westphalian framework. As Pino Arlacchi argues, China represents a distinctive imperial experience whose historical success cannot be explained primarily by military expansion or territorial conquest. Rather, its durability has rested on its capacity to integrate diverse peoples through administrative cohesion, economic development, and political incorporation, making it an empire sustained more by inclusion than by continuous expansion[11]. Russia combines statehood with imperial imaginaries. Contemporary Russian geopolitical discourse increasingly invokes the notion of a "Greater Russia," understood not simply as nationalism but as a civilizational project encompassing a broader Eurasian space[12]. The European Union occupies a more ambiguous position. Often described as a "civilian power"[13] or even a "cosmopolitan empire"[14], the EU combines regulatory authority with a post-sovereign political structure[15]. Yet the geopolitical crises of recent years

Routledge, New York, 2017.

11 P. Arlacchi, *La Cina spiegata all'Occidente*, Fazi Editore, Roma 2025.

12 J. Burbank, F. Cooper, Post-imperial Possibilities. Eurasia, Eurafrica, Afroasia, Princeton University Press, Princeton and Oxford, 2023

13 See M. Telò, *Europa potenza civile,* Laterza, Roma-Bari 2004.

14 See U. Beck, E. Grande, *Das kosmopolitische Europa*, Shurkamp Verlag 2004. English *translation: Cosmopolitan Europe,* Polity Press, Cambridge, 2007 and J. Zielonka, *Europe as Empire: The Nature of the Enlarged European Union*. Oxford University Press Oxford, 2006.

15 See A. Bradford, *The Brussels Effect: How the European Union Rules the World*. Oxford University Press, New York, 2020; A. Bradford *Digital Empires*, Oxford University Press, 2023. For a comprehensive analysis of the evolution of the European integration theory see L. Hooghe, G. Marks (2019) 'Grand theories of European integration in the twenty-first century', in *Journal of European Public Policy*, 26:8, 1113-1133; S. Fabbrini, *A Federalist Alternative for European Governance*. Cambridge University Press, Cambridge 2024; N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*. Oxford University Press, Oxford 1999; J.H.H. Weiler, *The Constitution of Europe*. Cambridge University Press, Cambridge 1999. P.C. Schmitter, *Imagining the Future of the Euro-Polity with the Help of New Concepts,* in *Governance in the European Union*, edited by Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter, and Wolfgang Streeck, London: Sage, 1996, pp. 121–150.

have exposed the limits of purely normative power and have revived debates about strategic autonomy, defence, and geopolitical dimension[16]. The emerging world order is therefore less accurately described as a system of sovereign states than as a constellation of competing geopolitical spaces, each advancing its own vision of political order, legitimacy, and universality. This transformation is also reshaping the European Union itself. Far from confirming earlier expectations of an ever more post-sovereign polity, the recent polycrisis has reinforced intergovernmental decision-making while simultaneously accelerating the construction of common strategic capacities. On the one hand, the European Council has consolidated its role as the principal political center of gravity, confirming what Sergio Fabbrini has described as a "compound polity" increasingly driven by intergovernmental dynamics. On the other hand, the war in Ukraine, the return of great-power competition, and the growing emphasis on economic security have generated unprecedented pressure for the creation of a sort of European defence market, the strengthening of the European Defence Technological and Industrial Base (EDTIB), and the pursuit of strategic autonomy through initiatives such as the European Defence Fund, ASAP (Act in Support of Ammunition Production), EDIRPA (European Defence Industry Reinforcement through Common Procurement Act), SAFE (Security Action for Europe) and Readiness 2030. Rather than signalling a return to classical federalism, these developments point towards a form of pragmatic integration in which sovereignty is selectively pooled in those sectors considered essential to geopolitical competitiveness. It is precisely in this context that Mario Draghi's call for a "pragmatic federalism"[17] should be understood: not as the revival of the traditional federalist project, but as a functional response to an increasingly competitive and fragmented international environment, where collective European action becomes a strategic necessity rather than an ideological aspiration.

Another key interpretative framework is that of "multipolarity". Although the

16 For analyses of the EU's geopolitical turn see Costa, Oriol, Eduard Soler i Lecha, and Martijn C. Vlaskamp, eds. *EU Foreign Policy in a Fragmenting International Order*. The European Union in International Affairs. Cham: Palgrave Macmillan, 2025; G. Majone, *Europe as the Would-be World Power: The EU at Fifty*. Cambridge: Cambridge University Press, 2009; S. Biscop, *Grand Strategy in 10 Words: A Guide to Great Power Politics in the 21st Century*. Bristol University Press, Bristol 2021. A. Stubb, *The Triangle of Power: Rebalancing the New World Order*, Biteback Publishing, London 2026.

17 See Draghi, Mario, 'Speech on the Occasion of the Charlemagne Prize'. Aachen, 14 May 2026. Available here Union of European Federalists: https://federalists.eu/federalist-library/mario-draghis-speech-in-aachen-14-05-2026/?utm_source=chatgpt.com.

term has its roots in the Cold War era - particularly in relation to the Bandung Conference and the Non-Aligned Movement - it has acquired new meanings in contemporary debates on global order. Today, multipolarity is often used to describe the emergence of large regional and geopolitical spaces in which economic interests are increasingly intertwined with political, strategic, and cultural ties. The rise of the BRICS, as well as the growing relevance of the so-called Global South, are often cited as examples of this post-Western reconfiguration of international politics. Admittedly, neither the BRICS nor the Global South constitute coherent or homogeneous political entities, nor can they be considered genuine "poles" in the classical realist sense of the term. Nevertheless, their growing visibility signals a broader transformation: the gradual erosion of the liberal international order founded on Western predominance and the diffusion of alternative centres of power, influence, and normative authority. Rather than indicating the consolidation of a stable multipolar system, these developments reveal a more complex process of geopolitical fragmentation and pluralization. What is at stake is not simply a redistribution of power among states, but the emergence of multiple political, economic, and civilizational projects competing to shape the future architecture of global order. As will be argued throughout this paper, multipolarity should therefore be understood less as a settled condition than as a symptom of the ongoing crisis and deconstruction of the liberal international order.

On the other hand, a vast body of literature on post-sovereign governance argued that the nation-state had become increasingly obsolete under the conditions of globalization[18]. From different theoretical perspectives, scholars converged on the assumption that growing economic interdependence, global markets, transnational institutions, and technological integration would progressively erode the centrality of territorial sovereignty. Liberal internationalists envisioned a world in which economic integration and rule-based governance would gradually displace traditional power politics, while technocratic expertise would increasingly replace political decision-making as the primary mechanism for

18 For the seminal literature see: J. Habermas, *The Postnational Constellation: Political Essays*. Polity Press, Cambridge, 2001. D. Held, *Global Covenant: The Social Democratic Alternative to the Washington Consensus*. Polity Press, Cambridge, 2004. D. Held, A. McGrew, D. Goldblatt & J. Perraton, *Global Transformations: Politics, Economics and Culture*. Polity Press, Cambridge, 1999. A-M. Slaughter, *A New World Order*. Princeton University Press, Princeton, 2004. William I. Robinson, *Global Capitalism and the Crisis of Humanity.* Cambridge University Press, Cambridge, 2014. S. Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton University Press, Princeton, 2006.

managing global affairs. In this view, politics would be superseded by *governance,* and sovereignty by regulation. A parallel argument emerged within critical and post-Marxist traditions. Here, the focus was not on liberal institutions but on the structural transformations of capitalism itself. The expansion of global financial markets, the fragmentation of production chains, and the emergence of transnational circuits of accumulation appeared to undermine the political and economic relevance of national borders[19]. Capital increasingly operated on a global scale, while states seemed progressively subordinated to the imperatives of financialization and global competition. The dominant image was that of a deterritorialized capitalism whose logic transcended the traditional framework of sovereign states[20]. Authors such as Sandro Mezzadra and Brett Neilson have offered one of the most sophisticated versions of this argument. While rejecting simplistic narratives of borderless globalization, they have emphasized the coexistence of processes of deterritorialization and reterritorialization. Borders do not disappear; rather, they are transformed, multiplied, and relocated within global circuits of production, logistics, and circulation. In their analysis, contemporary capitalism is increasingly organized around infrastructures of mobility, supply chains, logistical corridors, and mechanisms of circulation that connect production and distribution on a planetary scale. Circulation itself becomes a strategic dimension of capitalist power and a crucial terrain of political struggle. Central notion is "aggregate global capital"[21]. Yet, despite these important qualifications, neoliberal globalization remains the implicit horizon of much of this literature. The central assumption is that the logic of capital accumulation continues to operate primarily through transnational networks that progressively relativize the importance of territorial sovereignty and national political spaces. Recent developments, however, compel us to reassess this paradigm. The return of geopolitical rivalry, the weaponization of finance and trade, the restructuring of global supply chains, the rise of industrial policies, the strategic competition between the United States and China, and the growing emphasis on economic security all suggest that the relationship between capitalism and territory is undergoing significant transformation. The question is therefore no longer whether

19 D. Harvey, *A Brief History of Neoliberalism*. Oxford University Press, Oxford, 2005. For an influential interpretation of the global financial crisis as a structural crisis of finance capitalism, see L. Gallino, *Finanzcapitalismo. La civiltà del denaro in crisi*, Torino, Einaudi 2011.

20 M. Hardt, T. Negri. *Empire*. Cambridge, Harvard University Press, 2000.

21 See S. Mezzadra, B. Neilson, *The Rest and the West: Capital and Power in a Multipolar World*, Verso, London and New York 2024.

neoliberal globalization has disappeared, but how it has mutated. What we are witnessing is not a simple return to the classical nation-state, nor a straightforward continuation of post-sovereign globalization. Rather, we seem to be entering a new historical configuration in which markets, states, and geopolitical power are being recombined in novel ways. Economic interdependence has not vanished; it has become increasingly politicized. Global networks have not disappeared; they have become strategic assets to be controlled, protected, and, when necessary, weaponized. It is precisely within this context that the return of empire becomes analytically relevant. The resurgence of imperial logics should not be understood as a nostalgic revival of nineteenth-century imperialism, but as the emergence of large geopolitical spaces capable of organizing economic, technological, military, and cultural power within and beyond the framework of the nation-state at the same time. The contemporary debate on civilizational states, strategic autonomy, great-power competition, and multipolarity points towards the reappearance of political forms that combine territorial sovereignty with broader claims to civilizational, geopolitical, and even universal significance. The key issue, therefore, is not whether sovereignty has returned, but in what form. The contemporary world appears increasingly characterized by the coexistence of transnational capitalist networks and large political formations -empires, civilizational states, continental blocs - that seek to govern and territorialize those networks. Understanding this transformation requires moving beyond both the post-sovereign optimism of globalization theory and the traditional state-centric assumptions of classical realism.

3. The End of Liberal Globalism and the Persistence of Neoliberalism[22]

The most significant misconception of the current era - marked by geopolitical fragmentation, war, and systemic transition - is the belief that the decline of the liberal international order automatically implies the demise of neoliberalism. Although liberal globalism as a political and ideological project is clearly losing legitimacy, neoliberalism remains remarkably resilient. Its survival derives from its ability to transform itself and adapt to changing historical circumstances.

Neoliberalism should not be equated with globalization. A substantial body of neoliberal thought has always acknowledged the need for legal, institution-

22 This chapter is a revised and expanded English version of the article by M. Baldassari, *Metamorfosi della governance neoliberale: dal globalismo al neo-statismo competitivo*, in La fionda n. 2, 2026.

al, and territorial mechanisms capable of protecting markets and guaranteeing competitive orders. The widespread assumption that stronger states and renewed public intervention necessarily signal the end of neoliberalism therefore rests on a misunderstanding of neoliberalism itself[23]. Contrary to popular interpretations, neoliberalism has never simply advocated deregulation or the reduction of state power. Rather, it has relied on a powerful state capable of constructing markets, constitutionalizing economic rules, insulating strategic decisions from democratic contestation, and transforming political choices into technical necessities. Markets are not spontaneous entities; they are political constructions sustained by legal frameworks, administrative institutions, and technocratic expertise. What is changing today is not the centrality of the market but its geopolitical location. Markets are no longer presented as neutral and universal spaces of exchange. They increasingly appear as strategic infrastructures that must be protected, regulated, and defended. Consequently, the contemporary return of the state should not be interpreted as a rejection of neoliberalism but as its reorganization along securitarian, geo-economic, and competitive lines. This transformation can be described as a form of *mutating neoliberalism*[24] or *authoritarian neoliberalism*[25]: a political configuration that preserves the primacy of market rationality while strengthening state authority and reducing the space available for democratic contestation.

Three major interpretative frameworks have emerged in recent debates regarding the transformation of neoliberal governance.

23 See W. Streeck, *Taking Back Control? States and State Systems after Globalism*. Translated by Ben Fowkes and Joshua Rahtz. London and New York: Verso, 2024. (Originally published as *Zwischen Globalismus und Demokratie: Politische Ökonomie im ausgehenden Neoliberalismus*, Suhrkamp, Berlin 2021); M. Florio, *Il Capitale contro lo Stato. L'intelligenza sociale e il futuro della democrazia*, Feltrinelli, Milano 2026. Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism*, Harvard University Press, Cambridge 2018.

24 C. William, Z. Manfredi, eds. *Mutant Neoliberalism: Market Rule and Political Rupture*, Fordham University Press New York, 2019. The volume examines, from different perspectives, how neoliberalism has adapted to the crisis of the liberal international order, giving rise to hybrid political forms in which market rationality continues to operate while becoming increasingly intertwined with populism, authoritarianism, nationalism, and new modes of governance.

25 See C. Schmitt, H. Heller, Du *libéralisme autoritaire*. Présentation, traduction et notes de Grégoire Chamayou, Éditions La Découverte, Paris 2020; O. Malatesta, *Authoritarian* 'Liberalism versus Social Pluralism: Some Notes on Heller, Schmitt and the Ordoliberals in the European Context', *Pólemos* 1, no. 1 (2021): 69–88.

Mutating Neoliberalism

The first interpretation emphasizes continuity. According to this perspective, neoliberalism has not disappeared but has entered a new phase characterized by three interconnected tendencies. The first is an *authoritarian* tendency. State structures become increasingly rigid and insulated from democratic pressures. In Europe, this process may be described as a form of *bureaucratic Caesarism*[26], whereby economic decisions are embedded within institutional and legal frameworks that neutralize political contestation. In the United States, by contrast, one can observe a more overtly political and leader-cantered form of authoritarianism, combining populist rhetoric with strong executive power. The second tendency is *securitarian*. Security concerns increasingly justify policies that would previously have been politically controversial. The transition from austerity to warfare exemplifies this shift. Defence spending, military preparedness, and strategic resilience become political priorities, often at the expense of social expenditure and welfare provisions. The third tendency is *geo-economic*. Markets are increasingly weaponized. Financial systems, technological infrastructures, energy supplies, rare earths, and global value chains become instruments of geopolitical competition. Economic interdependence no longer functions primarily as a mechanism of peace but as a source of strategic leverage.

From this perspective, *what has ended is not the market economy itself but the belief that markets can depoliticize conflict*. Conflict has returned, and it increasingly takes economic forms.

National Market Liberalism

A second interpretation is provided by Branko Milanovic's concept of national market liberalism[27]. According to Milanovic, the emerging world order is characterized by the coexistence of markets and strong states within a multipolar system. In this framework, markets remain central, but they are increasingly embedded within national strategies of competitiveness and geopolitical rivalry. States actively support domestic industries, technological sectors, and strategic infrastructures. Economic competition no longer occurs primarily between

26 The concept of "bureaucratic Caesarism" was developed by the economists Cédric Durand and Razmig Keucheyan to describe the system of powers and competences that characterizes the European Union's economic constitutional order. See C. Durand, R. Keucheyan, 'Bureaucratic Caesarism. A Gramscian Outlook on the Crisis of Europe', in *Historical Materialism*, 23.2 (2015), pp. 23-5.

27 B. Milanovic, *The Great Global Transformation: The United States, China, and the Remaking of the World Economic Order*, University of Chicago Press, 2026.

firms operating in a global market but between national capitalist systems.

This perspective resonates with neo-Weberian analyses of political capitalism[28], which emphasize the growing role of state power in shaping economic outcomes. The key issue is no longer the survival of neoliberal rationality but the re-nationalization of markets and the competition among different capitalist models.

Post-Neoliberalism

A third interpretation speaks of post-neoliberalism. According to this view, recent developments indicate a genuine transformation of the relationship between state and market. Industrial policy, green transition strategies, technological sovereignty, and economic security all point towards a renewed role for public authority. However, this transformation does not necessarily imply a break with the underlying structures of financialized capitalism. Global finance and the concentration of capital continue to shape the parameters within which public intervention takes place. The European Union offers a particularly interesting example. Initiatives such as Next Generation EU, the European Chips Act, the Net-Zero Industry Act, and economic security strategies demonstrate a significant strengthening of public coordination capacities. Yet these instruments do not replace market mechanisms; rather, they recalibrate them within a new geo-economic environment. From a neo-Weberian perspective, this transformation reflects an expansion of rationalized administrative power. From a Poulantzian perspective, it can be interpreted as a new condensation of social and economic power relations, mediated through state institutions that coordinate and protect capital accumulation under conditions of global fragmentation.

Post-neoliberal interpretations remain divided. While some scholars view the current conjuncture as an opportunity for the re-democratization of econom-

28 See A. Aresu, *Le potenze del capitalismo politico*. *Stati Uniti e Cina*, La nave di Teseo, 2020. Aresu centered the notion of political capitalism on “national security”. As Sandro Mezzadra and Brett Neilson have argued, the notion of “political capitalism” differs significantly from the traditional concept of “state capitalism” commonly employed in Marxist debates on the Soviet Union. Rather than referring to the direct control of economic activity by the state, political capitalism highlights the capacity of capitalist dynamics to shape and orient processes of state transformation. In this perspective, capital accumulation operates through the continuous reconfiguration of global divisions and hierarchies, reshaping the relationships between states, corporations, financial actors, and other agents involved in governance. Political capitalism thus draws attention to the ways in which economic and political power become increasingly intertwined in the production of contemporary global order. See Mezzadra, Neilson, *The Rest and the West*, p. 177.

ic governance and the emergence of new forms of transnational solidarity, others stress the risk that the return of the state may simply reinforce mechanisms of control, security, and geopolitical competition. In the former perspective, the contradictions of contemporary capitalism do not merely generate new forms of domination; they also create political spaces in which social struggles can transcend national boundaries and give rise to democratic practices operating across multiple scales and territories[29]. The European Union constitutes perhaps the clearest empirical terrain on which these competing interpretations can be assessed. For much of the post-Cold War period, European integration embodied the neoliberal and post-sovereign paradigm: economic integration was institutionalized through ordoliberal rules, market discipline, and technocratic governance, while democratic legitimacy was increasingly displaced from national arenas towards supranational institutions. The European project rested on three closely intertwined assumptions: that economic interdependence would foster peace, that market integration would promote prosperity, and that the nation-state would gradually be superseded by a post-sovereign political order. The succession of crises since 2008 has profoundly destabilized this paradigm. Financial instability, the pandemic, geopolitical rivalry, the war in Ukraine, and the growing emphasis on economic security have simultaneously exposed the limits of post-sovereign governance and accelerated the return of strategic state intervention. Yet this transformation does not point unequivocally towards a post-neoliberal settlement. Rather, the European Union has become the site of a fundamental tension. On the one hand, new instruments of common borrowing, industrial policy, and strategic investment appear to reopen the possibility of a more solidaristic and politically accountable Union. On the other hand, the same dynamics have reinforced executive decision-making, intergovernmental bargaining, defence integration, and security-driven governance, suggesting that public intervention may be reconfigured less as an alternative to neoliberalism than as its geopolitical adaptation. Economic interdependence has become a source of vulnerability. Strategic competition has displaced the expectation of perpetual integration. The shift from austerity to warfare illustrates this transformation. Defence policy is increasingly integrated through industrial and market

29 See Laruffa, F., & Plehwe, D. (2026). 'After Neoliberalism? Interregnum, Polycrisis and the Principle of Expansive Democratisation' in *Global Society*, 40(3), 335–361. https://doi.org/10.1080/13600826.2026.2647237. In this text the autohors explictly elaborate an analytical framework centered on the principle of expansive democratisation for distinguishing between political initiatives that aim to reinforce neoliberal hegemony and between reactionary and progressive counterhegemonic projects.

mechanisms rather than through classical foreign policy instruments. The EU does not directly federalize defence; instead, it creates the material conditions for military integration through industrial coordination, common public procurement mechanisms, and strategic investment programmes[30]. As a result, a hybrid political configuration emerges. Economic integration deepens while political sovereignty remains largely national. *Means become integrated; ends remain fragmented*.

4. Competing Universals: Western Universalism and Chinese Pluriversality

The contemporary debate on civilizational states ultimately raises a deeper question than that of power politics: namely, the question of universality. The rise of China, the return of imperial imaginaries, and the fragmentation of the liberal international order are not merely geopolitical developments. They also reflect competing conceptions of the universal and of humanity's political future. For more than two centuries, the West has tended to identify universality with a particular historical trajectory. From the Enlightenment onwards, universal reason, individual rights, constitutional government, and later international law were progressively conceived not simply as Western achievements but as normative horizons for humanity as such. Liberal internationalism inherited this assumption and transformed it into a global political project. The contemporary crisis of this order has exposed a fundamental ambiguity: what has often been presented as universal may also be interpreted as the historical particularity of a specific civilization projected onto the world stage. As Immanuel Wallerstein argued,

> there are three main varieties of this appeal to universalism. The first is the argument that the policies pursued by leaders of the pan-European world are in defense of 'human rights' and in furtherance of something called 'democracy'. The second comes in the jargon of the clash of civilizations, in which it is always assumed that 'Western civilization' is superior to 'other' civilizations, because it is the only one that has come to be based on these universal values and truths. And the third is the assertion of the scientific truths of the market, the concept that 'there is no alternative' for governments but to accept and act on the laws of neoliberal economics.[31]

30 See A. Somma, 'Noi, l'America e l'atlantismo. Sull'inerzia e i guasti di una ideologia costitutiva della costruzione europea', in *La fionda* 1/2025.

31 I. Wallerstein, *European Universalism. The Rhetoric of Power*, The New Press, New York 2006, p. XIII-XIV.

More than two decades after Wallerstein formulated this critique, the normative foundations of these three pillars appear increasingly fragile. The universal appeal of liberal democracy, free markets, and human rights no longer commands the degree of legitimacy it once enjoyed, either internationally or within Western societies themselves. Externally, these principles are increasingly challenged by the rise of alternative civilizational and geopolitical projects that reject the assumption that Western modernity constitutes the sole path to political and economic development. Internally, they are undermined by growing political polarization, democratic backsliding, widening social inequalities, and the erosion of trust in liberal institutions. The issue, therefore, is not simply the decline of the liberal international order, but the weakening of the Western claim to universality that underpinned it. What is being contested is less the relevance of democracy, markets, or human rights as such than the assumption that their Western liberal articulation provides the only legitimate or universally valid model of political order.

This critique has been developed from different perspectives by thinkers such as Étienne Balibar and François Jullien. Their approaches differ significantly, yet both challenge the identification of universality with a single civilizational trajectory. For Balibar, universality cannot be reduced to an accomplished institutional order. Universal principles emerge through conflict, exclusion, and political struggle. The universal is not a stable foundation, but a process constantly confronted by its own contradictions. Modern notions such as citizenship, equality, and human rights are universal not because they transcend history, but because they remain permanently unfinished and contested and they constantly exceed the institutional forms through which they are articulated. The very notion of the universal embodies a fundamental paradox. Drawing on the Hegelian tradition, Étienne Balibar argues that the more the universal presents itself as a complete and self-sufficient totality - as was the case with the Enlightenment project - the more it exposes itself to contestation, contradiction, and negation. Universality is never given once and for all; it only exists through its historical articulation and therefore remains intrinsically open to critique. As Balibar observes, "discourses of the universal do not exist prior to their enunciation; they begin with that very act of enunciation. Discourses on the universal are always already inscribed within a context, one that Hegel describes as a context of writing"[32]. Universality, therefore, cannot be conceived as a transcendental

32 E. Balibar, *Des Universels. Essais et conférences*, 2016 Editions Galilee, Paris Trad. it. *Gli universali. Equivoci, derive e strategie dell'universalismo*, Bollati Boringhieri, 2018

principle existing outside history. Every universal emerges within a particular historical, political, and cultural constellation, even when it claims to transcend it. This insight is crucial for understanding the contemporary crisis of liberal universalism. The problem is not simply that Western universal claims have been challenged by other political actors. Rather, their historical contingency has become increasingly visible. Liberal democracy, human rights, and the market no longer appear as self-evident expressions of humanity as such, but as historically situated articulations of a particular civilizational experience. Yet Balibar also warns against interpreting this development merely as a competition among rival universalisms. As he writes,

> the sensitive point is not the competition between universalisms (as, for example, between liberalism and communism), which ultimately presupposes the existence of a common ground, even if this is a critical common ground, an agreement founded precisely on disagreement and on what is at stake in that disagreement, but rather what points to a more fundamental heterogeneity.[33]

This distinction is decisive. Competing universalisms still belong to a shared conceptual horizon: they dispute the content of the universal while accepting the very possibility of a universal political language. The more profound challenge arises when different civilizations no longer share the same conceptual grammar through which universality is articulated. Every universal contains its own exclusions, and every claim to universality generates new demands for inclusion. In this sense, universality should not be confused with universalism. Universalism is the political doctrine that claims possession of the universal. The universal itself remains open, incomplete, and historically mediated. Balibar therefore invites us to distinguish between the universal and universalism. Universalism is the doctrine that claims to possess the universal and to embody it in a definitive political form. The universal itself, by contrast, remains an open process, permanently subjected to critique, reinterpretation, and transformation. François Jullien develops a complementary critique from the perspective of intercultural philosophy. According to Jullien, modern Western thought has frequently confused the universal with the uniform. "The uniform represents the corrupted double of the universal that globalization has progressively spread across the world"[34]. What is presented as universally valid often becomes a

Torino. P. 41.

33 Ivi, p. 45.

34 F. Jullien*, L'universale e il comune, Il dialogo tra culture*, Laterza p. XIX.

process of standardization, reducing cultural diversity to a single normative framework. Against this tendency, Jullien proposes a distinction between the *universal*, the *uniform*, and the *common*. The common is not the extension of a particular identity to the entire world, nor the homogenization of differences. Rather, it emerges through dialogue among different cultural traditions and through the recognition of what can be shared without being made identical. Therefore, the notion of "*écart*" (distance) becomes crucial. Does the universal exist as an a priori, prior to culture? Can it be defined independently of the particular historical and cultural context of a given civilization? According to François Jullien, these questions compel us to rethink the very validity of the universal. Rather than conceiving it as a positive, self-contained, and complete totality, the universal should be understood through what he calls the "specific demand of the negative: the capacity to reopen every closed and self-satisfied universality, precisely the kind of universality upon which every universalism claims to rest"[35]. By contrast, the "common" should not be understood as a multicultural assemblage in which different cultures are simply juxtaposed within a harmonious and spontaneous mosaic. Nor does it represent a synthesis, a lowest common denominator, or a foundational principle capable of reconciling all differences. Rather, as Jullien argues, the common is "a shared dimension of intelligibility, continuously unfolding under the guidance of the universal as a regulative principle"[36]. It is therefore a dynamic process of encounter and mutual intelligibility rather than the fusion or homogenization of cultural differences. This distinction allows Jullien to contrast the common with what he calls the "rule of the uniform". The uniform is the pathological double of the universal: instead of opening a space for dialogue and plurality, it standardizes differences and imposes sameness through the homogenizing logic of globalization. Whereas the universal remains open, reflexive, and self-critical, the uniform transforms a historically situated particularity into a supposedly universal norm. This distinction becomes particularly significant when examining the Chinese intellectual response to Western universalism. Contemporary Chinese political thought does not simply reject the universal. Rather, it proposes an alternative way of conceiving it. Whereas the dominant Western tradition has often imagined universality through abstraction - from the individual subject to universal law and cosmopolitan order - Chinese political philosophy has traditionally approached universality through relationality and coexistence. The central ques-

35 Ivi, p. XI (Translated by AI).

36 Ibidem (Translated by AI).

tion is not how autonomous individuals can be integrated into a universal order, but how different communities can coexist within a broader and harmonious whole. This alternative understanding is evident in the contemporary revival of the concept of *Tianxia* ("All Under Heaven"), particularly in the work of Zhao Tingyang[37]. Originally associated with the Zhou dynasty (3100 B.C), Tianxia refers not merely to a territorial arrangement but to a cosmological and political vision. Rather than beginning from sovereign individuals or sovereign states, it begins from relationships and coexistence. The fundamental political problem is not how autonomous units can coexist, but how a pre-existing world can be ordered harmoniously. Tianxia does not begin from sovereign individuals or sovereign states. Whereas Western political thought has often imagined the universal as an abstract principle encompassing all particularities within a single normative order - from *ius civile* to international law and ultimately cosmopolitan law - Chinese political philosophy has traditionally conceived order through relationality rather than abstraction. Tianxia begins from the assumption of an already existing world whose primary political challenge is not competition but *coexistence*. The goal is not the universalization of a normative model but the construction of an order capable of incorporating diversity without eliminating it. From this perspective, China does not simply oppose Western universalism with cultural particularism. Rather, it advances what might be described as a civilizational, or communitarian, universalism: a conception of order rooted in relationality, hierarchy, harmony, and historical continuity rather than in abstract legal equality. The Chinese challenge to liberal internationalism therefore concerns not whether universality is possible, but how universality itself should be understood. For Zhao, the crisis of the current international order stems from its inability to internalize the world politically. Modern international relations remain trapped within a logic of externality: states confront one another as separate actors pursuing competing interests. Tianxia seeks to overcome this con-

37 T. Zhao, *All under Heaven: The Tianxia System for a Possible World Order,* University of California Press, 2016. Trad it. *Sotto il cielo. Tianxia: un antico sistema per un mondo futuro*, Astrolabio Ubaldini, Roma 2024. "A tianxia system is to be established on the basis of three constitutional concepts: (1) the internalization of the world, inclusive of all nations in a shared system that constitutes a world with no negative externalities; (2) a relational rationality that gives priority to minimizing mutual hostility over the maximizing of exclusive interests and stands in contrast to individual rationality and its pursuit of the maximization of self-interest; (3) Confucian improvement requiring one improves if-and-only-if all others improve. It is a nonexclusive improvement for all and is thus more compelling than Pareto's improvement. In other words, Confucian improvement is Pareto's improvement not for one person but for everyone." pp. 271–274.

dition by imagining the world as a single relational space. This vision has led some observers to describe Tianxia as a Chinese form of cosmopolitanism[38]. This alternative conception of world order is rooted in a broader philosophical orientation that distinguishes much of classical Chinese thought from the metaphysical assumptions underpinning the Western political tradition. As François Jullien has argued, one of the defining features of Chinese philosophy is not simply the absence of transcendence in the Western sense, but the predominance of an ontology of immanence, process, and transformation[39]. Rather than beginning from fixed substances, autonomous subjects, or transcendent principles, Chinese thought conceives reality as an ongoing configuration of relations whose equilibrium is continuously negotiated. Whereas European philosophy, from Plato to modern political thought, has largely been structured around a series of conceptual dualisms (being and becoming, subject and object, internal and external, nature and culture), Chinese philosophy has generally privileged continuity over rupture, correlation over opposition, and transformation over essence. Political order, accordingly, is not conceived as the imposition of a universal norm upon a plurality of autonomous actors, but as the gradual harmonization of relationships within an ever-evolving whole.

As Shuchen Xiang observes:

> The self is not a thing, but a process of maintaining equilibrium and harmony with the environment. An organism persists because it is actively maintained, not because of what it is passively given or because of a property that it always possesses. Stasis, for an organism, is death.[40]

His understanding reflects a fundamentally different conception of both the individual and the political community. Identity is not an immutable substance but a dynamic process of self-cultivation, adaptation, and relational adjustment.

38 See S. Xiang, *Chinese Cosmopolitanism. The history and philosophy of an idea*, Princeton University Press, Princeton & Oxford 2023: "The ontological dualism and Great Chain of Being intrinsic to Western metaphysics prevented the Western tradition from developing a notion of tianxia."

39 See F. Jullien, *Figures de l'immanence. Pour une lecture philosophique du Yi King, le Classique du changement*, Grasset, Paris 1993. Over the past two decades, Jullien has progressively refined his conceptual vocabulary, moving away from "immanence" as his central analytical category. Instead, his more recent work has increasingly focused on concepts such as *de-ontologization*, *process*, *transformation*, the *between* (*l'entre*), and *resources of thought* as the key categories through which to understand the distinctive character of Chinese philosophy. See F. Jullien, 'Between Is Not Being. Theory', *Culture & Society* 40, no. 4–5 (2023): 239–249.

40 S. Xiang, *Chinese Cosmopolitanism*, p. 37.

Likewise, political order is not grounded in the separation of sovereign entities or in the management of external threats, but in the continuous production of harmony through reciprocal interaction. Jullien's distinction between the *universal*, the *uniform,* and the *common* becomes particularly illuminating in this context. If the Western tradition has often tended to translate the universal into the uniform, that is, into the extension of a historically situated model to the world as a whole, the Chinese tradition suggests a different path. The common does not arise from the homogenization of differences but from the cultivation of what can be shared through dialogue and reciprocal transformation. Universality, therefore, is not conceived as a completed totality but as an open and regulative horizon emerging from the relational fabric of the world itself. It is precisely this relational ontology that informs Zhao Tingyang's reinterpretation of tianxia. The objective is not to universalize a particular civilization or political model, but to construct an inclusive order in which the world is progressively internalized as a shared political space. The emphasis is placed not on the maximization of individual or national interests but on minimizing hostility and fostering coexistence through what Zhao calls *relational rationality*. Similarly, the Confucian principle that "one improves if -and only if - all others improve" replaces the liberal logic of competitive optimization with an ethic of mutual flourishing. From this perspective, tianxia should not be understood simply as a Chinese alternative to the liberal international order. More profoundly, it embodies a different philosophical grammar of universality. Whereas the dominant Western tradition has often constructed the universal through abstraction, legal formalization, and the distinction between self and other, Tianxia approaches universality through relational integration, immanence, and the continuous transformation of coexistence into political community. The contemporary debate on civilizational states thus raises a question that extends well beyond geopolitics: whether the transition to a multipolar world also signals the emergence of competing ontologies of the universal itself. Unlike Kantian cosmopolitanism, Tianxia is not grounded in individual autonomy, universal rights, or procedural rationality. Its foundations are civilizational rather than juridical, relational rather than contractual, and ethical rather than legal. Western political thought, particularly after the Enlightenment, tends to construct universality through abstraction: the individual citizen, the rational subject, the universal norm. Chinese political thought, by contrast, tends to construct universality through integration and relationality: family, community, civilization, and harmonious order. In this respect, Tianxia offers not an alternative to universality, but an alternative universalism. Hence, the confrontation between Western and

Chinese political thought should not be interpreted as a clash between universalism and relativism. Both traditions articulate universal aspirations. What differs are the philosophical assumptions through which the universal is imagined and institutionalized. The emerging multipolar order may therefore be understood as a contest among competing universals rather than as a confrontation between universalism and particularism. The central question of the twenty-first century is no longer whether a universal order is possible, but whether different forms of universality can coexist without seeking to eliminate one another. In this sense, the concept of "pluriversality" becomes particularly relevant. Borrowing from Raimon Panikkar[41], the concept of pluriversality does not imply the abandonment of the universal. Rather, it recognizes that different civilizations may generate distinct yet legitimate paths toward universality. The challenge is not to replace one universal with another, but to create the conditions under which multiple universals can coexist within a shared world.

5. Conclusion

The contemporary discourse on civilizational states should therefore not be understood as a rejection of universality in favour of particularism. Rather, civilizational states seek to articulate alternative forms of universality. This is evident not only in China but also, albeit differently, in Russia, India, and even the United States. Each of these political formations presents itself as more than a sovereign state. Each claim to embody a historical mission, a distinctive conception of order, and a vision of humanity that transcends its territorial boundaries. In this sense, civilizational states may be interpreted as contemporary manifestations of imperial political forms. As this analysis has argued, empire, understood sociologically rather than normatively, is not simply a structure of domination. It is a political form capable of organizing diversity within a broader horizon of meaning. Historically, empires have often functioned as vehicles of universality, linking local communities to larger political and cultural worlds. Therefore, the return of imperial logics in the twenty-first century reflects not merely geopolitical competition but also a struggle among competing universals. What is emerging is not a post-universal world, but a world of competing universalities. The central challenge of the emerging multipolar order is therefore neither the triumph nor the disappearance of universality. The real question concerns the

41 See R. Panikkar, *Cultures and Religions in Dialogue. Pluralism and Interculturality. Opera Omnia*, Vol. VI, Part One. Maryknoll, Orbis Books, New York 2018.

possibility of coexistence among different universals. The liberal international order assumed that a single normative framework could gradually integrate humanity into a common political horizon. The rise of civilizational states challenges this assumption. Yet it does not necessarily imply a return to pure relativism or civilizational isolation. Between universalism and relativism lies a third possibility: pluriversality. The notion of pluriversality therefore should not be understood as the abandonment of the universal, but as the recognition that different civilizations may articulate distinct yet equally legitimate conceptions of universality. The universal does not disappear; rather, it becomes contested. The emerging international order is consequently less a universal political community than a field of interaction - and, at times, confrontation -among competing civilizational projects, each advancing its own normative horizon, institutional architecture, and vision of global order.

This transformation cannot be reduced to the familiar transition from unipolarity to multipolarity. More fundamentally, it reflects the exhaustion of the liberal claim to a single universal and the emergence of competing universals, each embedded in different historical experiences, political traditions, and conceptions of legitimacy. The central question is therefore no longer whether universality is possible, but how different universal claims can coexist without any one civilization asserting an exclusive monopoly over its meaning. Within this broader transformation, the return of the state should not be interpreted simply as a restoration of classical sovereignty. Rather, it signals the emergence of a new political configuration that might be described as *competitive neo-statism*: within a neoliberal paradigm a form of statehood in which public authority is reconstituted around strategic competition, economic security, technological sovereignty, industrial policy, and geopolitical rivalry, while remaining deeply embedded in the structures of neoliberal capitalism. In such a context, states no longer compete merely for power or territory, but also for the capacity to universalize their own political, economic, and civilizational models. The contemporary transition is therefore not only from unipolarity to multipolarity, but from a single hegemonic universalism to a world structured by competing universals and rival forms of political modernity.

Lawfare, Institutional Adaptation and the BRICS: Towards a More Diversified International Economic Order

BY MARTA BONO

In the contemporary international system, competition among major powers is increasingly conducted through economic means other than purely military ones. In fact, although armed conflict remains an enduring feature of international relations, states tend to resort more frequently to economic instruments to strategically influence the behaviour of targeted states. Unilateral sanctions, secondary sanctions, export controls, tariffs, investment restrictions, trade embargoes and financial measures have thus become central components of some states' foreign policies[1]. A clear example is represented by the United States, which has frequently employed economic sanctions as a central instrument of their foreign policy, in an attempt to isolate targeted states from the global economy[2]. This derives largely from Washington's ability to leverage its position within the international financial system and the dominance of the US dollar, enabling it to enforce sanctions unilaterally and to extend their effects well beyond its own territorial jurisdiction.

In this context, the concept of *lawfare*—understood as the strategic use of legal norms and institutions to pursue geopolitical objectives—has acquired a renewed relevance.[3] More precisely, it is economic law that it is being employed as a vehicle through which states seek to constrain competitors, project influ-

1 Perry S Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law' *Missouri Law Review* 83 (2018); AF Lowenfeld, 'Trade Controls for Political Ends: Four Perspectives' *Chinese Journal of International Law* 4 (2003) p. 355

2 Tom Ruys, Cedric Ryngaert 'Secondary sanctions: a weapon out of control? The international legality of, and European responses to, US secondary sanctions' *The British Yearbook of International Law (*2020) pp. 1–116.

3 Jill Goldenziel, 'Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare' *Cornell Law Review* 106 (2021) pp. 1085-1172.

ence and protect strategic interests, making it more appropriate to speak in terms of *economic lawfare*.[4]

Over the past decade, and even more intensively in the last few years, the extensive use of economic coercion, especially in the form of sanctions, has particularly affected several States belonging to the BRICS group. To make some examples, Russia has been subject to successive waves of Western sanctions since 2014, which have intensified following the invasion of Ukraine in 2022. China has become the target of an expanding network of technological restrictions, export controls and investment screening measures especially on behalf of the United States, while Iran has long experienced comprehensive economic sanctions that have profoundly limited its access to international financial markets. These developments have pushed the BRICS states, both singularly and collectively, to look for alternative solutions to alleviate the detrimental effects deriving from said measures. This essay identifies five main pillars of the BRICS response, which stretch from the creation of alternative payment and financial circuits to the increase of trade and economic relations not only among the BRICS member countries but also with states that are or have undergone economic sanctions, arguing that, by intensifying their cooperative efforts in said strategic areas, the BRICS are ultimately contributing to the creation of a parallel economic order.

1. Introducing the BRICS

To truly understand the BRICS' role in today's international order and, in particular, to grasp the way the group is reacting to economic lawfare, one must examine first its unique history, scopes and institutional identity.

The BRICs acronym was originally coined in 2001 by Jim O'Neill, then chief economist of Goldman Sachs.[5] In the analytical report of global investment of his company, he forecast that China, Russia, India, and Brazil, the four emerging markets with promising economic development, would catch up with – and by

4 For a scholarly reconstruction of the notion of 'economic lawfare' see Michael Glanzel, 'Warfare by Other Means: China's Economic Lawfare' *University of Pennsylvania Asian Law Review*, 20 (2025) pp. 9-15.

5 This essay uses the two versions of the acronym: BRICs and BRICS. The first version has been used to designate the group until its enlargement to South Africa, which entailed a change in the initial shape of the acronym that now sees a capital S to denote, precisely, the new BRICS country.

2050 overtake – the G7 countries in terms of total GDP.[6] Initially conceived as a purely analytical category, BRICs gradually evolved into a political project.

The first political step in this sense occurred in 2006, when the foreign ministers of Brazil, Russia, India and China met informally on the margins of the United Nations General Assembly to discuss the possibility of closer cooperation. The decisive turning point, however, came in the aftermath of the global financial crisis of 2008. In fact, said crisis hit the then major economies and political powers (the United States and the European Union) and exposed the vulnerability of Western financial systems, reinforcing a shared perception among the future BRICs countries that global economic governance needed to be reformed, as it was structured around outdated power relations which no longer reflected the geography of the world economy.[7]

This new political convergence culminated in the first BRICs Summit, held in Yekaterinburg in June 2009, which formally inaugurated the grouping.[8] South Africa joined two years later at the Sanya Summit in 2011, upon Beijing's invitation. Since then, the BRICS leaders have been meeting regularly once a year, alternating in hosting the summits and in shaping the related agendas, guided by a "win-win" logic: a spirit of mutual benefit, respect, and understanding.[9]

The Yekaterinburg Declaration already contained several objectives that would become enduring priorities in the work of the BRICS. In brief, the member states called for the reform of the main international financial institutions (i.e., the International Monetary Fund and the World Bank) where they demanded greater voice and representation for emerging and developing economies; advocated a more stable and diversified international monetary system, and emphasized the principles of sovereign equality and multilateral cooperation.[10] With time, the BRICS have progressively broadened their agenda beyond questions of institutional reform to include, *inter alia*, cooperation in trade and fi-

6 Jim O'Neill, 'Building better global economic BRICs' *Goldman Sachs Global Economics Paper* (2001) no. 66.

7 Marta Bono, 'The dark side of the BRICS: the lack of a legal definition' *Opinio Juris in Comparatione* 1 (2023) pp. 465-466. See also Andrew F Cooper, Asif B Farooq. 'BRICS and the Privileging of Informality in Global Governance' *Global Policy*, 4 (2013) pp. 428–433.

8 Joint Statement of the BRICs Countries' Leaders, Yekaterinburg, June 16th 2009.

9 Marta Bono, 'L'allargamento BRICS: riflessioni sul fronte della cooperazione interna' *DPCE Online* 4 (2024) pp. 2733-2734.

10 Joint Statement of the BRICs Countries' Leaders, points 3 and 15.

nance, infrastructure, sustainable development, food and energy security, scientific and technological innovation, and public health, thus turning the group into a multilayered and multifaced platform of cooperation.[11]

One of the defining characteristics of BRICS has been their highly informal institutional design. Unlike international organizations, the group has never adopted a constitutive treaty, nor does it have a permanent secretariat, headquarters or legally binding decision-making procedures. Cooperation relies instead upon consensus, rotating presidencies and an increasingly dense network of summit meetings, ministerial consultations, technical working groups and people-to-people exchanges.[12] Such institutional flexibility proved particularly valuable during the group's formative years, allowing countries with very different political systems, economic models and strategic interests to cooperate without having to accept supranational constraints or to transfer sovereign authority to common institutions.[13]

In the last years, the BRICS has undergone two significant expansions. Egypt, Ethiopia, Iran, Saudi Arabia[14] and the United Arab Emirates joined the

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11 Lucia Scaffardi, 'BRICS, a Multi-Centre "Legal Network"?' *Beijing Law Review* 5 (2014) p. 140

12 Andrew F. Cooper, Asif B. Farooq, 'BRICS and the Privileging of Informality in Global Governance' *Global Policy* 4 (2013) p. 429. See also Bono, 'L'allargamento BRIC' at 2740.

13 See e.g, Katarina Kralikova, 'BRICS: Can a Marriage of Convenience Last?' *European View* 13 (2014) p. 243. For a more in-depth analysis of the legal and constitutional aspects of BRICS see Lucia Scaffardi, 'BRICS, a Multi-Centre' "Legal Network"? at p. 140 and ff; Mihaela Papa, 'BRICS as a Global Legal Actor: from Regulatory Innovation to BRICS Law?', in Lucia Scaffardi (ed) *The BRICS group in the spotlight* Edizioni Scientifiche Italiane 2015; Michele Carducci, 'Il BRICS Come "Legal Network" e le sue implicazioni costituzionali' in *Costituzione, Economia, Globalizzazione. Liber amicorum in onore di Carlo Amirante*, Edizioni Scientifiche Italiane 2013; Michele Carducci, Anna Silvia Bruno, 'The BRICS Countries between Justice and Economy, Methodological Challenges on Constitutional Comparison' *Sociology and Anthropology* 2 (2014).

14 Although the BRICS official website lists Saudi Arabia as a member, the Kingdom has yet to provide a definitive confirmation of its accession, leaving its membership status formally uncertain. This ambiguity was reflected in Crown Prince Mohammed bin Salman's absence from the 2024 BRICS Summit, where Saudi Arabia was represented only by its foreign minister, who attended the final day of the meeting. Such caution has generally been interpreted as part of Riyadh's effort to avoid complicating its relations with Washington during a particularly sensitive phase of bilateral negotiations. More broadly, Saudi Arabia continues to pursue a strategy of strategic balancing. While China has become its largest purchaser of crude oil and a leading actor within the BRICS, the Kingdom remains heavily dependent on the United States for security guarantees and

grouping in 2024,[15] whereas Indonesia became a member in 2025[16]. Today, the BRICS encompass an exceptionally vast portion of the world's territory, abundant in natural and mineral resources. They represent over 45% of the global population and almost 40% of global GDP (World Economics 2025) and now account for 41% of global oil production. In fact, the BRICS now encompass key energy producers, strategic logistics hubs, and states seeking greater room for manoeuvre within an increasingly fragmented international economy.[17]

It is worth mentioning that the expansions were neither automatic nor uncontested. China had long promoted the idea of "BRICS+" to be a broader network of cooperation linking the BRICS with regional organizations and developing countries across the Global South.[18] Russia strongly supported the enlargement, particularly after the imposition of extensive Western sanctions following the war in Ukraine, seeing in a larger BRICS an opportunity to deepen economic partnerships and mitigate diplomatic and economic isolation.[19] By contrast,

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advanced technologies. Rather than aligning exclusively with either side, Saudi Arabia appears intent on preserving constructive relations with both the BRICS and its Western partners, thereby maximizing its strategic flexibility. On the point see Oliver Stuenkel and Margot Treadwell, 'Why Is Saudi Arabia Hedging Its BRICS Invite? Riyadh's fence-sitting strategy reflects its desire to keep all doors open. Others may follow its lead'. *Carnegie* (2024) online at the site "Why Is Saudi Arabia Hedging Its BRICS Invite? (Carnegie) - Oliver Stuenkel".

15 BRICS, 'Johannesburg Declaration' 2023, point 91.

16 BRICS, 'Rio de Janeiro Declaration' 2025, point 3.

17 Bono, 'L'allargamento BRICS' at pp. 2734-35.

18 The 2024 enlargement should be distinguished from the Chinese "BRICS+ initiative". Proposed by Chinese Foreign Minister Wang Yi in 2017, BRICS+ referred not simply to an enlarged membership but to a broader framework for South-South cooperation based on dialogue and partnership with a wider range of developing countries and regional groupings. The initiative sought to create an innovative platform through which participating states could express shared interests while promoting regional and bilateral alliances among countries belonging to regional integration blocs in which BRICS economies already played a leading role. Building upon these existing economic partnerships, the initiative envisaged the gradual expansion of a broader network of cooperation extending beyond the formal membership of the BRICS. Although the BRICS+ project remains at an embryonic stage, its future development will depend on the group's ability to address its internal challenges and on the broader international environment. For more on the point see Yaroslav Lissovolik, 'BRICS-Plus: Alternative Globalization in the Making?' *Valdai Papers* 69 (2017); see also Yaroslav Lissovolik, 'BRICS expansion: new geographies and spheres of cooperation. Editorial for special Issue', *BRICS Journal of Economics* 5 (2024).

19 Bono, 'L'allargamento BRICS' at p. 2735.

India and Brazil initially expressed reservations, fearing that a rapid expansion would dilute the group's cohesion and increase Chinese influence within it[20].

Even though the enlargements have consolidated the BRICS as truly global actor, spanning from Africa, to Asia, Middle East and Latin America, they have also exacerbated the heterogeneity that has always characterized the group.[21] Indeed, the BRICS brings together economies at markedly different stages of development and characterized by highly diverse economic structures. Brazil is a major agricultural exporter, Russia and South Africa are largely resource-based economies, India has developed a predominantly services-oriented model, China remains the world's leading manufacturing power[22], while Saudi Arabia, the United Arab Emirates and Iran are among the world's principal energy exporters. Some members are major capital exporters and net creditors, whereas others continue to rely heavily on external financing. These differences are reflected not only in their development strategies but also in their trade policies, financial positions and macroeconomic priorities.[23]

Political diversity is equally pronounced. The BRICS encompass liberal democracies, hybrid regimes and authoritarian systems, whose constitutional traditions, levels of protection of civil and political rights, and approaches to economic governance differ substantially. Moreover, several members maintain significant geopolitical rivalries. China and India remain engaged in longstanding border disputes; Saudi Arabia and Iran continue to compete for regional influence despite their recent diplomatic rapprochement; Egypt and Ethiopia remain divided over the management of the Nile waters; whereas the United Arab Emirates and Iran continue to dispute sovereignty over islands in the Persian Gulf.[24]

Yet it is precisely this diversity that makes the BRICS distinctive. Unlike integration projects such as the European Union, the grouping is not founded upon

20 Bono, 'L'allargamento BRICS' at p. 2735. See also Adel Benamor, 'BRICS and the Enlargement Issue: Economic Gains and Challenges' *Management & Economics Research Journal* 4 (2023) p. 140.

21 On the point Michele Carducci, Anna Silvia Bruno, 'BRICS as Constitutional Inhomogenous Dynamics' *Federalismi.it* 20 (2014) pp. 1-13.

22 Kralikova, 'BRICS: Can a Marriage of Convenience Last?' at p. 243 and ff.

23 Alicia Garcia-Herrero, 'Potential geoeconomic and geopolitical consequences of an expanded BRICS' *EconPol Forum* 2 (2024) at pp. 5-9.

24 Bono, 'L'allargamento BRICS' at p. 2739.

legal harmonization, supranational institutions or a shared political identity.[25] Instead, it operates as a flexible framework in which bilateral disagreements are largely compartmentalised from the multilateral cooperation conducted within the group. Rather than producing immediate paralysis, such diversity has encouraged a pragmatic approach centered on technical cooperation and functional compatibility, which again proves to be the strongest suit for a *sui generis* formation such as BRICS.

This characteristic is crucial for understanding the response of the BRICS to the growing weaponization of international economic relations. Because the group is not bound by deep institutional integration, it can adapt relatively quickly to new geopolitical pressures and develop selective mechanisms of cooperation without requiring broad political uniformity.

2. Economic sanctions as catalysts of institutional adaptation

Among the various instruments through which economic lawfare manifests itself, sanctions occupy a particularly prominent position. As mentioned, over the last decade, some BRICS states, both old and new, have increasingly become the target of unilateral sanctions and other forms of economic coercion adopted primarily by the United States and the European Union[26].

Out of the BRICS countries, Russia represents the clearest example of this evolution. Since 2014, following the annexation of Crimea, the United States, the European Union and several of their state partners have adopted successive rounds of sanctions targeting increasingly strategic sectors of the Russian economy, particularly finance and energy.[27] Following the invasion of Ukraine in February 2022, these measures expanded on an unprecedented scale. Russian sovereign assets held abroad were frozen, access to international capital markets

25 Lucia Scaffardi, 'BRICS, a Multi-Centre' "Legal Network"? at p. 140 and ff; see also Lucia Scaffardi, 'Pensare l'im-possibile: BRICS, tra miraggio e realtà' in Lucia Scaffardi (ed) *BRICS: Paesi emergenti nel prisma del diritto comparato* Giappichelli, Torino, 2012, 147 ss.

26 Steven Blockmans, *Extraterritorial Sanctions with a Chinese Trademark: European Responses to Long-Arm Legal Tactics*, CEPS Policy Insights, No. PI2021-01; see also Ruys, Ryngaert 'Secondary Sanctions: a weapon out of control?' at p. 5.

27 Bureau of Industry and Security (BIS), 'Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR)' U.S. Department of Commerce, 24 February 2022; Council of the European Union, 'EU Restrictive Measures in Response to Russia's Invasion of Ukraine' online at the site of the Council of the European Union.

was severely restricted, export controls were extended to a wide range of advanced technologies, while sanctions were imposed on energy exports, maritime transport and insurance services.[28] Particularly significant was the exclusion (or *"cut-off")* of several major Russian banks from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) one of the most important infrastructures underpinning international financial transactions[29]. Although SWIFT is formally constituted as a politically neutral global cooperative, it proved to be capable of being used by the United States as an operational tool to enforce far-reaching economic sanctions against hostile states, e.g., Russia.[30]

A different yet equally instructive trajectory can be observed in the case of Iran. Unlike Russia, whose targeting intensified rapidly following a specific geopolitical event, Iran has experienced decades of progressively expanding sanctions connected primarily to concerns regarding its nuclear programme. Since the reintroduction of comprehensive United States sanctions following Washington's withdrawal from the Joint Comprehensive Plan of Action (JCPOA)[31] in 2018, Tehran has faced extensive restrictions affecting banking, energy exports, shipping, insurance, technology transfers and access to international finan-

28 Office of the United Nations High Commissioner for Human Rights, 'United States of America: Sanctions related to the Russian Federation (2022)' *OHCHR Sanctions Platform*, online at the site sanctionsplatform.ohchr.org/record/4322.

29 Office of Foreign Assets Control (OFAC), U.S. Department of the Treasury. 'Directive 4 under Executive Order 14024: Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation.' U.S. Department of the Treasury, 28 February 2022; Council of the European Union, 'EU Agrees to Exclude Key Russian Banks from SWIFT'. Council of the European Union, 2 March 2022. See also Iman Bastanifar, Kashif Hasan Khan and Halil Koch, 'Understanding BRICSIZATION through an economic geopolitical model' *Journal of Open Innovation: Technology, Market, and Complexity* 11 (2025) p. 2.

30 Federico Cuomo, 'La moneta digitale cinese nel confronto geopolitico' *Documenti Geografici* 1 (2024) p. 475. Notwithstanding its empirical importance to sanctions the SWIFT system seems remarkably understudied. However, for more on its history and role see Susan V Scott and Markos Zachariadis, *The Society for Worldwide Interbank Financial Telecommunication (SWIFT): Cooperative Governance for Network Innovation, Standards, and Community*. Routledge, London 2014; see also Erik Jones and Andrew Whitworth, 'The Unintended Consequences of European Sanctions on Russia? *Survival* 5 (2014) pp. 21–30.

31 With the Joint and Comprehensive Plan of Action (JCPOA) the international community had lifted nuclear-related sanctions against Iran, after which trade with Iran could resume.

cial markets. Just as Russia, many Iranian banks have been excluded from the SWIFT system in 2012.[32] Moreover, the extraterritorial nature of many American sanctions has further amplified their impact by discouraging third-country companies from maintaining commercial relations with Iranian entities, even where such transactions remained formally permissible under their own domestic legislation[33].

The prolonged experience of economic coertion has profoundly influenced Iranian foreign economic policy. Rather than attempting to regain unrestricted access to Western markets, Tehran has increasingly prioritised regional integration and South-South cooperation. Relations with China have deepened significantly following the conclusion of the twenty-five-year Comprehensive Strategic Partnership Agreement,[34] while economic cooperation with Russia has intensified across sectors ranging from energy and transport to financial services. Iran's accession to the BRICS therefore represents more than a symbolic diplomatic achievement. It reflects the country's broader strategy of embedding itself within alternative economic networks less vulnerable to the unilateral application of Western sanctions.

China presents a substantially different case. Unlike Russia and Iran, Beijing is not subject to a comprehensive sanctions regime designed to isolate its economy from global markets. Indeed, China remains deeply integrated into international trade, investment and global value chains. Nevertheless, strategic competition between China and the United States has increasingly shifted from conventional trade disputes towards broader technological, financial and industrial rivalry.[35] Beginning with the tariff measures introduced during the

32 Council of the European Union, 'Council Regulation (EU) No 267/2012 of 23 March 2012 Concerning Restrictive Measures against Iran' Official Journal of the European Union, 24 March 2012. See also Henry Farrell, Abraham L Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' *International Security* 44 (2019) p. 68.

33 For an overview of EU companies' divestment resulting from the reinstatement of US sanctions see US Congressional Research Service, 'Iran Sanctions' (Report RS20871) updated 15 November 2019. Scholars call the types of specific US secondary sanctions towards Iran as "access restrictions". For more on the point see Ruys, Ryngaert 'Secondary Sanctions: a weapon out of control?', at p. 11 and ff.

34 Abdulaziz, Hamad, Mohammed Al-Sulami. *The Iran-China 25-Year Comprehensive Strategic Partnership: Challenges and Prospects*. International Institute for Iranian Studies (Rasanah) 2021.

35 On the US – China trade rivalry the literature abounds. See, among others, Steen, Bård

Trump administration and continuing under President Biden, the United States has progressively expanded export controls on advanced semiconductors,[36] restrictions concerning artificial intelligence technologies, investment screening mechanisms, limitations affecting high-performance computing and telecommunications equipment, and measures targeting companies such as Huawei.[37] These measures are explicitly intended to preserve the US technological leadership in sectors regarded as critical to national security while limiting China's capacity to acquire or develop strategically sensitive technologies.

The analytical framework developed by Henry Farrell and Abraham Newman helps explain how and why States willing to issue sanctions and restrictive measures could (and would) intervene in such specific sectors. In their theory of *weaponized interdependence*, Farrell and Newman argue that globalization has not produced a flat and decentralized economic system, but rather a series of highly asymmetric networks organized around a limited number of central financial, technological and informational hubs. States exercising jurisdiction over these strategic hubs are therefore able to transform interdependence itself into a source of geopolitical leverage.[38] On the one hand, they may exploit what the authors describe as the *chokepoint effect*, namely the possibility of denying access to critical infrastructures that have become indispensable for participation in the global economy such as international payment systems (as it happened with the SWIFT). On the other hand, they may benefit from the *panopticon effect*, i.e., the advantage derived from their capacity to monitor the flow of information on finance, trade and data circulating through those same

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Nikolas Vik (ed) *Not Just Another Cold War: The Global Implications of the US-China Rivalry.* Oxford University Press, 2025; Chow, Peter C. Y., ed. *Technology Rivalry Between the USA and China.* Palgrave Macmillan, 2025; Allison Graham, Kevin Klyman, Karina Barbesino, and Hugo Yen. *The Great Tech Rivalry: China vs. the U.S.* Belfer Center for Science and International Affairs, 2021.

36 Bureau of Industry and Security (BIS), 'Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China' U.S. Department of Commerce, 7 October 2022. See also Karen M Sutter, 'U.S. Export Controls and China: Advanced Semiconductors', Congressional Research Service, Report No. R48642, updated 19 September 2025.

37 Jill C Gallagher, 'U.S. Restrictions on Huawei Technologies: National Security, Foreign Policy, and Economic Interests', Congressional Research Service, Report No. R47012, 5 January 2022. The Huawei case is extremely complex. For more see Goldenziel, 'Law as a Battlefield' at pp. 1130 and ff.

38 Farell, Newman 'Weaponized Interdependece', at p. 45.

nodes.[39] Now, despite the obvious differences among the three cases mentioned above, they collectively reveal an important structural dynamic. Indeed, albeit in different forms and degrees, Russia, Iran and China have all experienced the growing capacity of western states to exploit asymmetries embedded within the global economy, and they attempted to do the same in reverse, creating new poles, new nodes, where they could exercise the same sort of control.

Within BRICS these developments have generated an apparent paradox. Economic sanctions, generally designed to isolate targeted states by increasing the costs of a politically undesirable behaviour, within the BRICS framework, they have often produced the opposite effect. In fact, within and among the BRICS countries, external pressure has acted more as a catalyst for institutional innovation rather than as a force of fragmentation. This can be drawn by the fact that many initiatives that for years had existed only at the level of political declarations (such as the establishment of alternative payments systems e.g., the BRICS Pay) transformed into concrete projects exactly when reducing dependence on financial, monetary and technological infrastructures largely controlled by Western economies became imperative.

It light of the said geopolitical context and drawing from the weaponized interdependence doctrine, the development of alternative payment systems, the strengthening of BRICS financial institutions, the growing use of national currencies in international trade for de-dollarization purposes, the expansion of intra and extra BRICS economic cooperation, even with sanctioned states, should be regarded as five, mutually influenced, pillars of a broader strategy through which the BRICS are seeking to transform a shared condition of vulnerability into a source of greater collective resilience.

The concept of resilience is particularly useful because it shifts analytical attention away from ideological confrontation and towards institutional adaptation. The BRICS are not attempting to construct an entirely new international order *ex nihilo*. Instead, they are incrementally expanding the range of institutional options available to their members and, increasingly, to other countries across the Global South.[40] Such diversification reduces the capacity of a single actor to monopolise access to critical infrastructures while simultaneously increasing the

39 Farell, Newman 'Weaponized Interdependece', at p. 54 and ff.

40 Li Ying Jinhong Han 'International Sanctions and Export Restructuring: How Economic Integration among BRICS Nations Drives Trade Transformation in Russia' *Finance Research Letters* 85 (2025).

bargaining power of participating states within the broader international system. It is to these five interconnected dimensions that the analysis now turns.

3. Alternative payment systems and the search for financial autonomy

Among the various initiatives promoted within the BRICS framework, the development of alternative payment infrastructures constitutes perhaps the clearest manifestation of the broader attempt to reduce dependence upon Western-controlled financial networks. That is because they represent the essential infrastructure through which international trade, investment and capital movements are conducted. Consequently, the ability to restrict access to these systems has become one of the most effective instruments of economic coercion available to states occupying central positions within the global financial architecture.

Long before 2022, both Russia and China had already begun developing domestic alternatives to reduce their dependence upon Western-controlled payment networks. Russia established the System for Transfer of Financial Messages (SPFS) a channel for exchanging electronic messages on financial transactions, in the aftermath of the first sanctions adopted following the annexation of Crimea in 2014. Initially conceived as a contingency mechanism capable of ensuring the continuity of domestic financial communications, SPFS has progressively expanded its international connections, particularly with banks located in Eurasia and several BRICS countries, however its international reach remains considerably smaller than that of SWIFT, in terms number of users, frequency of use and scope of application.[41]

China pursued a similar strategy by establishing, in 2015, the Cross-Border Interbank Payment System (CIPS) its own financial messaging and clearing system.[42] Unlike SPFS, CIPS was not developed exclusively as a response to sanctions. Its creation formed part of Beijing's broader strategy to internationalize the Chinese currency and reduce transaction costs associated with renminbi-denominated trade. Nevertheless, the intensification of strategic competition with the United States has significantly increased the geopolitical importance of

41 Fan Yinbin, Elena Voronkova, 'Modern Payment Infrastructure of Cross-Border Settlements of Russia and China' *E3S Web of Conferences* 533 (2024); Nicola Bilotta, 'The Weaponisation of Finance and the Risk of Global Economic Fragmentation' *IAI Commentaries*, *Istituto Affari Internazionali*, no. 22 April 2022;

42 Yinbin and Voronkova, 'Modern Payment Infrastructure of Cross-Border Settlements of Russia and China' at p. 3.

the system. As more international transactions involving Chinese firms are settled directly through CIPS, dependence upon dollar-based clearing mechanisms gradually diminishes. However, it is worth mentioning that although the number of CIPS users continues to grow, the system is still very reliant on SWIFT for cross-border financial messages.

This same logic underlies the BRICS collective effort regarding the BRICS Pay project, which was launched during the BRICS Summit in Kazan in 2024.[43] The initiative is mainly related to cross-border payments in international trade between companies, investment banks, and microfinance institutions. Although it remains under development, its strategic significance lies in the attempt to facilitate cross-border transactions among member states without requiring systematic reliance upon traditional correspondent banking arrangements denominated in US dollars. The project seeks to improve interoperability among national payment systems while encouraging the use of local currencies for commercial exchanges. By reducing the number of intermediaries involved in cross-border settlements, such mechanisms may lower transaction costs while simultaneously limiting exposure to financial restrictions imposed through third-country jurisdictions.[44]

Closely related to said initiative is the *BRICS Bridge*, an independent payment system based on *Central Bank Digital Currencies* (CBDCs) and centralized blockchain technology. The goal of this platform is to harmonize national digital currencies, allowing them to circulate and be exchanged within a distributed ecosystem, thereby elevating the group's position in the international monetary framework. This technical infrastructure supports a "common unit of account" approach[45] (similar to the historical European Currency Unit (ECU) providing a stable alternative for pricing commodities and raw materials without depending on a single emission center.[46] China has emerged as one of the world's lead-

43 BRICS, 'Kazan Declaration' 2024, points 65-67.

44 BRICS Pay has been adopted by various institutions and companies in BRICS countries and is continuously expanding. The State Bank of India, Russia's Sberbank, the Bank of China, Petrobras, and many others as the British Standard Chartered Bank has also integrated BRICS Pay into its digital payment platform. For more see Mario Lettieri, and Paolo Raimondi, 'Con il sistema del Brics Pay, Russia Cina e India accelerano il processo di de-dollarizzazione' *Linkiesta*, 5 February 2024.

45 Edoardo Tedeschi, 'L'apporto delle CBDC e delle tecnologie a registro distribuito nella cooperazione monetaria dei BRICS+' *DPCE Online* 68 (2024) p. 2834 and ff.

46 The ECU was not a circulating currency, but rather a system designed to facilitate trade within the European Union and with other countries, paving the way for the process of

ing innovators in this field through the development of the digital renminbi[47] (e-RMB or e-CNY), which is now classified as “money in circulation” (M0),[48] whereas several other BRICS members are actively exploring comparable technologies.[49] Of particular significance is the participation of China and the United Arab Emirates, together with other partners, in the *mBridge* (Multiple CBDC Bridge) project. Unlike other experimental projects, *mBridge* was developed directly by the participating central banks to enable real-time cross-border payments using a *Payment-versus-Payment (PvP)* method, ensuring that transactions occur only when both currencies are ready for transfer. This architecture utilizes *Distributed Ledger Technology (DLT)* to establish direct links between central banks, bypassing SWIFT and other third-party intermediaries.[50] During its pilot phase, the project successfully processed 305 transactions, with Chinese banks alone accounting for nearly half of the volume.[51]

For the time being, none of these developments is mature enough to challenge the existing payment systems. Nevertheless, the strategic significance of the initiatives promoted within the BRICS lies precisely in their cumulative character. Each additional payment channel, each new settlement mechanism denominated in local currencies and each technological innovation capable of facilitating autonomous financial transactions marginally reduces dependence upon infrastructures historically dominated by Western jurisdictions. Hence, if taken individually these initiatives may appear limited in scope, but considered collectively, they reveal a gradual process of institutional adaptation through which financial resilience increasingly complements economic efficiency.

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monetary, political, and institutional integration of Europe. For more see Mario Lettieri, Paolo Raimondi, ‘Vasto programma. L’allargamento dei BRICS e il piano per un nuovo ordine economico internazionale’ *Linkiesta*, 2 September 2022.

47 Cuomo, ‘La moneta digitale cinese nel confronto geopolitico’ at p. 467; see also Edoardo Tedeschi, ‘L’apporto delle CBDC e delle tecnologie a registro distribuito nella cooperazione monetaria dei BRICS+’ .

48 Cuomo, ‘La moneta digitale cinese nel confronto geopolitico’ at p. 467-468.

49 Russia, for example, not only had been working a digital ruble but efforts have been increasing in this direction after the Ukranian invasion. On the point see Gaia Vendettuoli, ‘La Russia lancia il rublo digitale per aggirare le sanzioni’ *AGI – Agenzia Italia*, 15 August 2023.

50 Cuomo, ‘La moneta digitale cinese nel confronto geopolitico’ at p. 482.

51 Cuomo, ‘La moneta digitale cinese nel confronto geopolitico’ at p. 484.

4. Strengthening financial institutions and diversification

The search for greater financial autonomy is equally evident in another dimension of the BRICS cooperation. While payment systems determine how international transactions are conducted, developing finance determines who possesses the capacity to mobilize capital for long-term economic growth. It is therefore unsurprising that, in a time of collective dissatisfaction, when financial institutions were considered too western oriented and incapable of meeting developing and emerging countries needs, that the BRICS have resorted to the creation of their own institutions, and such institutions acquire a new meaning within the current geopolitical context. However, before delving into the latest developments it is worth discussing the circumstances which led to the creation of such "BRICS" financial institutions in the first place and how they differentiate from the traditional ones in features, scopes and orienting principles.

Since the end of the Second World War, institutions such as the International Monetary Fund and the World Bank have played a central role in financing development, promoting macroeconomic stability and response mechanisms to financial crises.[52] Despite their undeniable contribution to international economic governance, as mentioned, these institutions have long been criticized by emerging economies for reflecting an outdated distribution of power that no longer corresponded to economic reality. The BRICS have repeatedly demanded a more equitable redistribution of voting shares and governance structures, producing only very limited reforms. This reinforced the perception that existing institutions remain disproportionately influenced by advanced Western economies.

In the face of the financial institutions' *inertia*, the BRICS decided to establish the New Development Bank (NDB) during the Fortaleza Summit in 2014.[53] The NDB was conceived primarily as a complementary institution intended to mobilize additional financial resources for infrastructure and sustainable development projects, particularly within emerging economies, which struggled the

52 Ngaire Woods, 'Bretton Woods Institutions' in Sam Daws and Thomas G. Weiss (eds.) *The Oxford Handbook on the United Nations* Oxford University Press (2009) 233–253.

53 The NDB is a financial institution established through the intergovernmental agreements reached by the BRICS during their sixth Summit held in Fortaleza on July 15th, 2014. The Bank, operating since 2016, is headquartered in Shanghai, whereas a branch for the African area has been opened in Johannesburg in 2017.

most to get loans and financial support at the traditional institutions.[54]

The legal and institutional design of the Bank reflected the BRICS pragmatic approach. Each founding member subscribed to an equal share of the Bank's initial capital (10 billion dollars each), thereby avoiding the hierarchical governance structures characterizing many traditional international financial institutions.[55] Decisions are taken by consensus, once more to preserve equality among members, while the presidency rotates periodically between participating states. The institution is open to welcoming states who do not belong to the BRICS group. Indeed, today, States as Bangladesh, Algeria or Uzbekistan participate in the NDB even though they are not BRICS member countries.[56] This institutional architecture was deliberately designed to reinforce the perception that the NDB constitutes a genuinely multilateral institution rather than an instrument dominated by BRICS or any single power, including China (despite the fact that its considerably larger economic weight would have allowed the Chinese state to exercise more influence in the institution and in BRICS in general). However, even with new members joining, the five founders will always hold no less than 55% of the institution's voting rights, in a deliberate attempt not to lose sight of the institution.[57]

Since becoming operational in 2016, the Bank has gradually expanded both its geographical scope and its financial activities. Infrastructure projects in transport, renewable energy, water management, digital connectivity and urban development have been financed across member countries.[58] Nonetheless, the strategic significance of the NDB extends beyond the volume of loans it has approved and lies instead in the alternative governance philosophy that it embraces. Rather than attaching extensive political or macroeconomic conditionality

54 BRICS, 'Fortaleza Declaration' point 11.

55 Bert Hofman, PS Srinivas, 'New Development Bank's Role in the Global Financial Architecture' *Global Policy* 15 (2024) pp. 451–457.

56 New Development Bank, "Members" at the *New Development Bank* site. See also Gianmatteo Sabatino, 'The BRICS' Contribution to the Development of Alternative Models of Transnational Economic Cooperation: A Cross-Cutting Analysis from the Perspective of the New Development Bank' *DPCE Online* 68 (2024) pp. 2815–2829.

57 Adriana Erthal Abdenur, Maiara Folly, 'The New Development Bank and the Institutionalization of the BRICS' *R/evolutions: Global Trends & Regional Issues* 3, (2015) pp. 66–92.

58 William Daldegan, Vitória de Borba, 'The Development Concept in BRICS: An Analysis of Projects Financed by the NDB' *International Organisations Research Journal* 18 (2023) pp. 7–33.

to the issuance of loans, the NDB emphasizes national ownership, respect for domestic policy choices and the financing of projects identified by borrowing governments themselves.[59] This approach resonates strongly with many developing countries that have historically criticized the extensive conditionality policy associated with structural adjustment programmes implemented especially during the 1980s and 1990s.[60]

An equally important innovation concerns the Bank's increasing reliance upon local currencies.[61] One of the principal vulnerabilities exposed by recent sanctions regimes has been the dependence of international finance on the US dollar. Dollar-denominated borrowing inevitably exposes both borrowers and lenders to fluctuations in exchange rates while simultaneously increasing the relevance of financial regulations adopted within jurisdictions exercising influence over dollar clearing mechanisms. For this reason, the NDB has progressively expanded its issuance of bonds denominated in the national currencies of member states while encouraging local-currency lending wherever feasible.[62] Although these operations still represent only a fraction of the Bank's overall portfolio, they reflect a broader effort to reduce the structural dependence of development finance upon a single reserve currency.

The acceleration of sanctions against Russia after 2022 further highlighted both the opportunities and the limitations confronting the institution. Shortly after the outbreak of the conflict in Ukraine, even the NDB announced the suspension of new operations involving Russia in order to preserve its access to international capital markets and protect its own financial stability[63]. At first

59 Sabatino, 'The BRICS' Contribution to the Development of Alternative Models of Transnational Economic Cooperation' at 2818.

60 Biziwick Mayamiko, Nicolette Cattaneo, David Fryer, 'The Rationale for and Potential Role of the BRICS Contingent Reserve Arrangement' *South African Journal of International Affairs* 22 (2015) pp. 307–324. See also Aike I Würdemann, 'The BRICS Contingent Reserve Arrangement: A Subversive Power Against the IMF's Conditionality?' *The Journal of World Investment & Trade* 19 (2018) pp. 570-593.

61 Agreement on the New Development Bank – Fortaleza, July 15, article 24.

62 Bas Hooijmaaijers, 'the Internal and External Institutionalization of the BRICS Countries: The Case of the New Development Bank' *International Political Science Review* 43 (2022) p. 483; see also Sabatino 'The BRICS' Contribution to the Development of Alternative Models of Transnational Economic Cooperation' at 2821. and Gregory T Chin, 'Introduction – The Evolution of New Development Bank (NDB): A Decade Plus in the Making' *Global Policy* 15 (2024) pp. 368–382.

63 New Development Bank, 'Statement by the New Development Bank' *New Development*

glance, this decision appeared to contradict the widespread perception that the Bank had been created specifically to shield its members from Western financial pressure. Yet a closer examination suggests a more complex reality. The episode demonstrated that the NDB itself remains deeply embedded within the existing international financial system. Its capacity to raise capital still depends significantly upon global investors, international credit ratings and access to financial markets where Western institutions continue to play a dominant role. This resonates with the overall idea of BRICS who created said institution, at least at declaratory level, not to serve merely their interests nor to become a counterweight to the World Bank, but to complement international efforts by providing what, according to their perspective, the international financial sector was lacking.[64]

Closely linked to the New Development Bank is another, often less visible, institution created during the Fortaleza Summit, i.e., the Contingent Reserve Arrangement (CRA).[65] Whereas the NDB provides long-term development finance, the CRA was conceived as a financial safety net capable of providing short-term liquidity support to member states experiencing balance-of-payments pressures. With a committed reserve pool amounting to one hundred billion US dollars, the mechanism resembles, at least conceptually, regional financial arrangements such as the Chiang Mai Initiative in East Asia.[66] Although the CRA has never been activated on a significant scale, its existence possesses considerable symbolic and strategic value as it signals the determination of the BRICS to develop their own crisis-management instruments rather than relying exclusively upon emergency assistance provided through the IMF.

In the end, the emergence of new development financial mechanisms reflects a gradual process of institutional layering in which additional organisations are created alongside existing ones. Borrowing countries increasingly benefit from a more diversified financial landscape in which multiple institutions compete, cooperate and occasionally complement one another. From the perspective of *weaponized interdependence*, this diversification performs an important strategic function. Dependence upon a limited number of financial institutions in-

Bank, 3 March 2022.

64 Bono, 'The dark side of the BRICS' at 481.

65 Treaty for the Establishment of a BRICS Contingent Reserve Arrangement July 15, 2014, Fortaleza, Brazil. See BRICS, 'Fortaleza Declaration' 2014 point 11.

66 Cooper, Farooq 'BRICS and the Privileging of Informality in Global Governance' p.429.

evitably increases exposure to political conditionality, regulatory influence and external pressure, whereas expanding the number of available lenders reduces these vulnerabilities by increasing the bargaining power of recipient states, limiting the capacity of any single institution to exercise disproportionate influence over national development strategies. Financial pluralism thus becomes another dimension of resilience.

5. De-dollarization: monetary sovereignty or strategic diversification?

Few issues have attracted as much attention in recent years as the growing debate surrounding de-dollarization. Frequently portrayed in political discourse as an imminent challenge to the international monetary order, the concept has too often been surrounded by overly simplistic narratives. On the contrary, the BRICS has always approached de-dollarization with a rather functional approach aiming to reduce the risks and vulnerabilities associated with an excessive dependence upon a single currency that simultaneously functions as the principal means of international exchange and as one of the most effective instruments of geopolitical influence.[67]

The privileged international position of the dollar has historically generated significant advantages for the United States.[68] Beyond the well-known macroeconomic benefits associated with issuing the world's primary reserve currency, dollar centrality also confers substantial regulatory authority over international financial transactions. Since the overwhelming majority of cross-border payments are either denominated in dollars or ultimately cleared through financial institutions subject to United States jurisdiction, American authorities possess an unparalleled capacity to monitor international financial flows, enforce sanctions and restrict access to global financial markets.[69] Furthermore, the US dollar continues to occupy a central position in the pricing and settlement of international trade, particularly in commodity markets such as oil, reinforcing its indispensable role within the global financial system.

For many emerging economies excessive dependence upon the dollar expos-

67 Arnold Theryn D, 'De-dollarization and Global Sovereignty: BRICS' Quest for a New Financial Paradigm' *Human Geography* 18 (2025) pp. 78–83.

68 Arnold Theryn D, 'De-dollarization and Global Sovereignty' p. 79; see also Steven Blockmans, '*Extraterritorial Sanctions with a Chinese Trademark'* at p. 6.

69 Barry Eichengreen, *Exorbitant Privilege: The Rise and Fall of the Dollar and the Future of the International Monetary System*. Oxford University Press, 2011.

es states to risks that are fundamentally geopolitical other than purely economic. Indeed, fluctuations in exchange rates, changes in United States interest rates or financial market volatility represent inherent features of the international monetary system[70]. Even more so, monetary dependence may also translate into strategic dependence whenever access to dollar-based financial infrastructures becomes conditioned by political considerations. It is precisely within this context that the de-dollarisation initiatives promoted by BRICS members should be interpreted.

When we speak of de-dollarization within the BRICS, we should think of it as a gradual and selective process. It is advancing primarily in strategic sectors—such as energy, raw materials, and technology—and is also being driven by the growing use of contracts denominated in local currencies.

Russia and China have dramatically expanded settlements denominated in rubles and renminbi following the imposition of Western sanctions. However, already in 2021, Russia and China conduced a substantial portion of their trade in local currencies, accounting to 25% of their transactions in that year.[71] India and Brazil as well have explored mechanisms to settle commercial transactions in their respective national currencies whereas trade invoicing in local currencies has been increasingly used especially in transactions involving China, India, and Russia, highlighting a cautious but consistent movement toward greater monetary autonomy.[72] Brazil and China have concluded agreements facilitating bilateral trade without requiring systematic conversion into dollars. Similar arrangements have proliferated across sectors, particularly energy, agriculture and manufactured goods.

An equally significant dimension of this process concerns the proliferation of bilateral currency swap agreements among central banks. Such arrangements enable participating countries to provide liquidity in one another's currencies during periods of financial stress while facilitating commercial transactions without immediate recourse to dollar financing.[73] The People's Bank of China

70 Arnold Theryn D, 'De-dollarization and Global Sovereignty' p. 79.

71 Arnold Theryn D, 'De-dollarization and Global Sovereignty' p. 80.

72 Dmitry Kondratov, 'Internationalization of the currencies of BRICS countries' *Her Russ Acad Sci* 91(2021) pp. 37–50. See also Li Yuefen, 'Trends, reasons and prospects of de-dollarization' Research Paper no. 181 (2023) South Centre, Geneva, Switzerland.

73 Bahaj, Saleem, Ricardo Reis 'Central Bank Swap Lines' *NBER Working Paper* No. 28539, 2021.

has concluded an extensive network of swap agreements with numerous countries across Asia, Africa, Latin America and the Middle East, several of which are either BRICS members or prospective partners.[74] Although originally designed primarily to promote the international use of the renminbi, these agreements simultaneously reinforce broader efforts to diversify the currency composition of international trade.

Gold reserves have also acquired renewed importance within this changing monetary environment. Several BRICS central banks, particularly those of Russia and China, have significantly increased their gold holdings over the past decade.[75] This trend reflects a broader reassessment of gold's function within the international monetary system. Amid rising geopolitical tensions and growing concerns over the long-term stability of a dollar-centred financial order, gold has regained prominence as both a safe-haven asset and an instrument of reserve diversification[76].

A final observation is warranted. De-dollarization should not be understood as an anti-dollar project. Indeed, most BRICS members continue to hold substantial dollar reserves, maintain active participation in dollar-based financial markets and rely upon the currency for significant portions of their international trade. Again, rather than abandoning the dollar, they are pushing for the use of their national currencies (at least, the most competitive ones, as the renminbi) attempting to reduce the costs associated with overdependence upon it. Therefore diversification, not substitution, remains the defining principle of their strategy.

74 Brazil and China signed a currency swap agreement in 2013 worth $30 billion, allowing for direct exchanges between the Brazilian real and the Chinese yuan without relying on the dollar as an intermediary currency. See on the point Andreas Antoniades 'The new resilience of emerging and developing countries: Systemic interlocking, currency swaps and geo economics' *Global Policy* 8 (2016) pp. 170–180. See also Hao Kaixuan, Liyan Han, Tony Wei Li 'The Impact of China's Currency Swap Lines on Bilateral Trade' *International Review of Economics & Finance* 81 (2022) pp. 173–183.

75 As of late 2025, gold constitutes over 40% of Russia's total reserve assets by value, whereas China's central bank, officially reports holding 2,300 tonnes of gold as of mid-2025, a figure which suggests that China has more than doubled its gold reserves over the past decade. See Muhammad Taimur Fahad Khan, 'Russian and Chinese Gold Holdings: Strategies, Status, and Global Implications' *Russian Sinology* (*Rossiiskoe Kitaevedenie*) 14 (2026) pp. 26-28

76 'Muhammad Taimur Fahad Khan, 'Russian and Chinese Gold Holdings' pp. 24–43.

6. Expanding intra-BRICS trade in a fragmented global economy

Trade has always represented one of the main areas of BRICS cooperation. Yet the strategic significance of intra-BRICS trade has changed considerably over the past decade. What was initially conceived primarily as an instrument for promoting economic development has increasingly become a mechanism for enhancing resilience against the disruptions generated by geopolitical competition and economic coercion.

This transformation reflects broader changes affecting the organisation of international production. The period commonly described as hyper-globalisation was characterised by the rapid expansion of global value chains, the geographical fragmentation of production processes and the pursuit of maximum economic efficiency through increasingly integrated international markets.[77] Firms optimised production by locating different stages of manufacturing wherever costs proved lowest, while governments generally regarded deep integration into global supply chains as an indicator of successful economic modernization.

The experience of recent years has profoundly challenged this assumption. The COVID-19 pandemic exposed the fragility of highly concentrated global supply chains, while the subsequent intensification of geopolitical rivalries further demonstrated that trade flows could be disrupted by sanctions, export controls, transport restrictions and strategic competition.[78] Increasingly, governments have begun to incorporate resilience alongside efficiency when designing trade and industrial policies. Concepts such as *friend-shoring*, *near-shoring* and *de-risking* have entered the vocabulary of international economic policy, reflecting the growing recognition that commercial relationships cannot be separated from broader geopolitical dynamics.[79]

77 Arvind Subramanian, Martin Kessler 'The hyperglobalization of trade and its future' in Franklin Allen et al (eds) *Towards a better global economy. Policy implications for citizens worldwide in the 21st century* Oxford University Press, New York, 2014 pp. 216-276.

78 Escaith Hubert, 'From Hyper-Globalization to Global Value Chains Decoupling: Withering Global Trade Governance?' *Journal of Applied Economic Sciences* 17 (2022 pp. 404–418. See also Barry Eichengreen, 'Globalization: Uncoupled or Unhinged?' *Journal of Policy Modeling* 45 (2023) pp. 685–692.

79 "Nearshoring" refers to the practice of relocating production facilities closer to a nation's home territory to minimize shipping distances, time costs, and logistical complexities. "Friendshoring" (also known as allyshoring) is an inherently political strategy where suppliers are selected based on shared political values and alliances rather than purely

Within this changing environment, the BRICS have sought to strengthen commercial integration not through the creation of conventional free trade areas but by progressively removing practical obstacles to economic cooperation. Indeed, unlike regional integration projects such as the European Union or the African Continental Free Trade Area, the BRICS have never pursued comprehensive trade liberalization through legally binding agreements. Tariff harmonization, customs unions or common markets have never constituted realistic objectives for a grouping whose members possess such highly diversified economic structures and maintain numerous overlapping regional commitments.[80]

Instead, cooperation has focused upon facilitating commercial exchanges through improved financial connectivity, transport infrastructure, digital commerce and sectoral cooperation. The gradual expansion of settlements in national currencies, discussed previously, directly contributes to this objective by reducing exchange costs and increasing the predictability of bilateral trade. Likewise, cooperation among customs authorities, export promotion agencies and chambers of commerce has sought to improve the practical conditions under which firms operating in different BRICS economies conduct business with one another.[81]

As commercial relations with the European Union contracted dramatically after the 2022 sanctions, Russian exports of energy commodities were redirected towards Asian markets, especially China and India.[82] India, which had historically imported relatively limited quantities of Russian crude oil, rapidly

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on economic efficiency, specifically to mitigate the risk of supply chain weaponization. Finally, "de-risking" represents a strategic middle ground, popularized by the European Union, which seeks to reduce or eliminate vulnerabilities in sensitive sectors (such as high-end technology and dual-use goods) without pursuing a total economic decoupling from rivals. On the poin see Dan Ciuriak, 'The Economics of Supply Chain Politics: Dual Circulation, Derisking and the Sullivan Doctrine' *Verbatim* C.D. Howe Institute, 25 May 2023. See also Etel Solingen, Bo Meng, Xu Ankai 'Rising Risks to Global Value Chains' Global Value Chain Development Report 2021: Beyond Production, World Trade Organization (2024) pp. 134–178.

80 Kishore C Dash, 'The 'BRICS Plus' as the First International Platform Connecting Regional Trade Agreements' *Asia-Pacific Social Science Review* 19 (2019) pp. 45–61.

81 Irina Yarygina et al., 'Trade and Economic Cooperation of BRICS: Problems and Prospects' *Academic Journal of Interdisciplinary Studies* 9 (2020) pp. 89–104.

82 According to the General Administration of Customs of China, the trade turnover between Russia and China in 2022 increased by 29.3% to a record $190.271 billion. On the point see Yinbin and Voronkova, 'Modern Payment Infrastructure of Cross-Border Settlements of Russia and China' at p. 1.

emerged as one of Moscow's principal energy customers. China simultaneously expanded purchases of Russian hydrocarbons while increasing exports of manufactured goods, machinery and consumer products.[83] These developments did not simply compensate for lost European markets, they also accelerated the consolidation of commercial networks that had already been developing before the outbreak of the conflict in Ukraine.

The enlargement of the BRICS has further reinforced these dynamics. The accession of major energy producers such as Saudi Arabia, Iran and the United Arab Emirates significantly enhanced the complementarity of the group's internal markets. Combined with the manufacturing capacities of China and India, the agricultural resources of Brazil and the strategic geographical position of Egypt and Ethiopia, the enlarged BRICS encompass an exceptionally broad spectrum of productive capabilities. Such diversity increases the potential for intra-group trade by creating opportunities for supply chain diversification across multiple sectors, including energy, food security, manufacturing, logistics and digital services.[84]

Transport connectivity has become an equally important component of the BRICS strategy. In fact, trade diversification cannot be achieved solely through financial innovation if physical infrastructure continues to depend upon a limited number of vulnerable routes. Consequently, increasing attention has been devoted to the development of alternative transport corridors capable of facilitating commercial exchanges among BRICS members and their partners.[85] The

83 Ashot A Tavadyan, Aghasi A Tavadyan, 'Redirection of Russian Oil Exports: Analyzing the Impact of Western Sanctions' in Igor Ilin and Ma Youzhong (eds) *Digital Systems and Information Technologies in the Energy Sector*, Springer, Cham, 2025, pp. 31–46. On the point, see also Lala Rajeev, 'India, West Europe, and Russia: Bridging the Oil and Natural Gas Divide' in Rajendra Kumar Jain (ed) *India and Western Europe: Engagement, Contestation, Cooperation*, Palgrave Macmillan Singapore, 2026, pp. 419–439.

84 Raul Gouvea, Margarida Gutierrez, 'BRICS Plus': A New Global Economic Paradigm in the Making?' *Modern Economy* 14 (2023) pp. 539–550. See also Zahia Kettab, 'The Expansion of BRICS Membership and Its Impact on International Trade' *Russian Law Journal* 12 (2024) pp. 1925–1935.

85 Cooperation on hydroelectric projects, modernization of transportation and logistics systems for internal trade, other than access to cutting-edge agricultural technology are essential for the countries such as Ethiopia. On the poin see Marco Carrasco-Villanueva, 'Managing Waves of Change: The Recent BRICS Expansion' *TI Observer* 40 (2024) p. 16. See also Paolo Motta, 'BRICS Corridors & Urban Settlements Integration. A Challenge to Reduce Territorial Inequalities' EURISPES BRICS-LAB, Rome-Italy, 13 May 2019.

International North-South Transport Corridor (INSTC) linking India, Iran, the Caucasus and Russia through a multimodal network of maritime, rail and road infrastructure, represents one of the most significant examples of this trend.[86] Although the corridor has been under discussion for many years, geopolitical developments since 2022 have considerably accelerated efforts to increase its operational capacity.

The strategic importance of the INSTC lies not merely in its potential to reduce transport times between South Asia and Northern Europe. More fundamentally, it contributes to the diversification of Eurasian logistics by providing an alternative to traditional maritime routes passing through the Suez Canal or other strategically sensitive *chokepoints*.[87] From the perspective of resilience, such diversification reduces the exposure of commercial exchanges to political disruptions affecting individual transport corridors. Similar considerations have encouraged growing cooperation between several BRICS members and China's Belt and Road Initiative, despite the political sensitivities that continue to surround certain aspects of the project.

Digital commerce represents yet another increasingly important dimension of intra-BRICS integration. The rapid expansion of electronic payments, cross-border digital services, e-commerce platforms and technological cooperation has created new opportunities for economic interaction. Cooperation in areas such as telecommunications, fintech, artificial intelligence and digital public infrastructure has progressively occupied a more prominent place within successive BRICS summit declarations.[88]

86 Rakesh Kumar, 'Cartographies of Power: Reconfiguring Eurasian Geopolitics and India's Position in the Emerging Multipolar World' *InSight Bulletin: A Multidisciplinary Interlink International Research Journa*l 2(2025) pp. 150–153.

87 Kumar, 'Cartographies of Power'. See also Saran Samir, Jhanvi Tripathi, 'BRICS Cooperation: A Programme for Trade and Investment' *Observer Research Foundation*, Special Report no. 265, 19 June 2025, pp. 1-22 but especially at p. 5. For more on the importance of economic corridors from a geopolitical perspective, see Khan Kashif Hasan, 'Strategic Navigation Through Economic Corridors: Intersecting Geoeconomics and Geopolitics—An Introduction' in Kashif Hasan (ed) *Strategic Navigation through Economic Corridors: Intersecting Geoeconomics and Geopolitics*, *Europe-Asia Connectivity,* Palgrave Macmillan, Singapore, 2025, pp. 1–12.

88 Recent declarations of the BRICS leaders such as which Johannesburg II Declaration 2023 have particularly emphasized the importance of technology, innovation, and connectivity as engines of sustainable growth. The latest 2025 Rio de Janeiro Declaration at point 16 captures this evolution: "*We [the BRICS] emphasize that e-commerce has become an important driver of global economic growth, fostering international trade in*

Initiatives such as the "BRICS Institute of Future Networks" foster cooperation on artificial intelligence (AI), 5G, and the Internet of Things, while knowledge-sharing mechanisms enhance digital resilience through the exchange of best practices in cybersecurity, e-governance, and infrastructure management. At the policy level, greater regulatory alignment in areas such as data protection, intellectual property, and digital trade are intended to enhance the bloc's global competitiveness. Along these lines, the BRICS have recently concluded the "BRICS Data Economy Governance Understanding" a roadmap to leverage the data economy across BRICS in order to promote safe access to technology, safeguard individual and national interests, promote the digitalization of industry and services, and the expansion of intra-BRICS trade.[89]

The emphasis placed upon digital cooperation reflects once more a lesson derived from recent geopolitical tensions. Just as financial infrastructure may become subject to political restrictions, technological ecosystems have likewise emerged as arenas of strategic competition. In fact, restrictions on digital platforms and disputes concerning telecommunications infrastructure have demonstrated that technological dependence may also generate vulnerabilities comparable to those associated with financial dependence.[90] Consequently, efforts to strengthen digital cooperation within BRICS increasingly complement broader initiatives aimed at enhancing the financial and commercial ones.[91]

7. Economic engagement with sanctioned states and the emergence of parallel commercial networks

Perhaps the most politically sensitive dimension of contemporary BRICS cooperation concerns the gradual expansion of economic relations with states

goods and services, ensuring foreign investment flows and facilitating innovation. We are resolved to further increase trust in e-commerce and ensure full-fledged protection of the rights of e-commerce parties, by intensifying cooperation in the realms of utilizing digital technologies for consumer rights protection, exploring online dispute resolution tools and creating enabling environment for businesses to enter global markets, exchanging views on the issue of small value product trade through the cross-border e-commerce".

89 BRICS, 'Rio de Janeiro Declaration' 2025, point 66.

90 Subramaniam Mohan, 'Digital Ecosystems and Their Implications for Competitive Strategy' *Journal of Organization Design* 9 (2020).

91 On the point Andrade, Cristiana Rennó D'Oliveira, Cláudio Reis Gonçalo 'Digital Transformation by Enabling Strategic Capabilities in the Context of 'BRICS' *Revista de Gestão* 28 (2021) pp. 297–315.

that have become the target of Western sanctions, even though the topic so far has received very limited scholarly attention forcing us to make more assumptions than affirmations. Nonetheless, one may interpret this trend as evidence that the group seeks to undermine the effectiveness of international sanctions regimes or to provide economic shelter for governments isolated by the United States and its allies. However, behind this explanation lies a more complex phenomenon. Far from representing an accidental by-product of geopolitical tensions, these relationships increasingly constitute an important element of the broader process through which alternative channels are being constructed across the emerging international economy, adding to the ones mentioned above.

The most convincing way to approach this subject, is to look at Western sanctions as institutional mechanisms that shape incentives and opportunities for trade deflection i.e., the politically induced redirection of export flows toward non-sanctioning partners when access to traditional markets is restricted.[92]

Particularly significant in this sense are the relationships entertained between BRICS and some sanctioned Latin America states such as Venezuela and Bolivia.[93] Venezuela represents a complex case of "reallocation of connectivity" where the structural displacement of its oil from US markets, due to asset freezes, flows through a highly concentrated, license-dependent configuration and a redirection toward BRICS partners.[94] Bolivia demonstrates a "contingent" form of trade deflection, where political shifts and the pursuit of resource sovereignty over lithium have driven selective cooperation with non-Western partners for industrial upgrading.[95] Meanwhile, Cuba exhibits structurally consolidated trade

92 Maribel Aponte-Garcia, 'Latin America and the Caribbean in BRICS+ New Strategic Regionalism and the Geopolitics of Trade and Supply Chains' *BRICS Journal of Economics* 7 (2026) pp. 101–128, particularly at p. 102.

93 It is worth mentioning that Cuba and Bolivia are officially recognized 'partners' by BRICS, whereas Venezuela attempted to take part in the grouping but it was allowed due to Brazil's objections. See Aponte-Garcia, 'Latin America and the Caribbean in BRICS+' at p. 103.

94 Aponte-Garcia, 'Latin America and the Caribbean in BRICS+' at p. 123.

95 Aponte-Garcia, 'Latin America and the Caribbean in BRICS+' at p. 115. See also Adriana R Cadena Cancino, Maribel Aponte-García. 'Litio. Cadenas de valor, empresas, políticas de industrialización y golpe de Estado en Bolivia' in Tamara Lajtman et. al (eds) *Bolivia y las implicaciones geopolíticas del golpe de Estado* CLACSO and UNAM (2021) pp. 133–160. Mario Antonio Padilla Torres, 'La colaboración biofarmacéutica y biotecnológica Cuba–China: Algunos apuntes de su historia y realidades' *Cuadernos de Nuestra América* 14 (2025) pp. 85–91.

deflection under a long-standing comprehensive blockade, relying on BRICS partners for survival in sectors like energy and biotechnology.[96]

Similar dynamics can be observed, albeit to varying degrees, in relation to other sanctioned or politically isolated economies. Belarus, for example, has increasingly redirected elements of its external trade towards Eurasian markets following successive rounds of European and American restrictive measures.[97] Several African countries subject to more limited forms of economic restrictions have likewise expanded South-South cooperation as part of broader strategies aimed at reducing dependence upon traditional Western partners, as it was the case of Zimbabwe, which trade and investment ties with the BRICS countries until 2016 helped mitigate the adverse effects of Western sanctions.[98]

This certainly does not mean that sanctions have become ineffective. The Russian economy continues to experience restricted access to advanced technologies, international capital and financial markets. Iran remains confronted by severe financial limitations that continue to constrain long-term economic development. Even China faces growing difficulties in acquiring cutting-edge semiconductor technologies subject to increasingly sophisticated export controls. Economic adaptation therefore does not imply economic immunity. Rather, it illustrates the capacity of states to reconfigure commercial relationships in response to changing geopolitical constraints.

The broader significance of these developments lies in their cumulative impact upon the architecture of international economic relations. As trade among sanctioned and non-sanctioned emerging economies expands, complementary financial and logistical infrastructures become increasingly necessary. Alternative payment systems acquire greater practical relevance because they facilitate these commercial exchanges. Development banks capable of financing infrastructure projects become more valuable because they support expanding transport corridors and industrial cooperation. Local currency settlements become increasingly attractive as trade volumes grow. Each institutional innovation

96 Aponte-Garcia, 'Latin America and the Caribbean in BRICS+' at p. 113. See also

97 Katarzyna Kosowska, Piotr Kosowski, 'Belarusian Economy in the Face of Western Sanctions' *Stosunki Międzynarodowe – International Relations* 60 (2024) pp. 235–257.

98 For more on the Zimbabwe case and the impact the US-EU sanctions on the country see Oscar Mujana, Sertac Sonan 'Emerging Economic Partners: Revisiting BRICS-Zimbabwe Trade and Investment Relations Under Western Sanctions (2000–2016)' *Journal of Asian and African Studies* 61 (2026) pp. 2499–2523.

therefore reinforces the others, generating a gradual process of cumulative institutional development.

This process also explains why an increasing number of countries have expressed interest in joining the BRICS or participating in its expanding partnerships.[99] Many of these states have not themselves experienced comprehensive sanctions and maintain constructive relations with both Western and emerging economies. For this reason, their interest goes beyond a political alignment and resonates more with the valuable channels that become available once part of the BRICS network.

8. Concluding remarks

The five pillars examined throughout this essay reveal a common underlying logic. Rather than constituting isolated responses to successive sanctions regimes, they represent mutually reinforcing dimensions of a broader strategy aimed at diversifying the institutional architecture of the international economy. More precisely, the analysis developed here suggests that the growing use of means of economic lawfare has not fundamentally altered the trajectory of BRICS cooperation. Rather, it has accelerated an agenda (alternative payment systems, strengthened financial institutions, local-currency settlements, expanding intra-BRICS trade and deeper economic engagement) that was already embedded in the group's founding objectives. In this sense, economic sanctions have not functioned as a constraint but as a catalyst of institutional adaptation.

Viewed through the lens of the *weaponized interdependence* theory, these initiatives acquire a broader significance. Collectively, they seek to reduce dependence upon the strategic financial, monetary and technological nodes through which economic coercion can be (and has been) exercised while expanding the institutional alternatives available both to BRICS members and, increasingly, to other countries across the Global South. In this sense, the BRICS are contributing not to the replacement of the existing international economic order, but to its gradual diversification through a process of institutional layering in which new mechanisms coexist with, rather than displace, established institutions.

99 Bono, 'L'allargamento BRICS' at p. 2734.

Beyond harmony. An outlook of Chinese approaches to regulating the world order.

by Gianmatteo Sabatino

1. The many masks of China on the world stage

One of the most notorious images projecting the idea of China going "outward" is that of the Silk Road[1]. Traditionally, and for more than a century, the Silk Road has functioned as an almost foolproof paradigm of the constant connection between China and Europe, between the East and the West[2]. It was, after all, the road walked by Marco Polo and rutted by Western merchants.

More recently, however, and increasingly in the past fifteen years, historians and scholars have challenged this vision. Relying on documental and archaeological evidence, they have shown that, for most of its existence and, especially, for most of the time it was actually used by Chinese people, the "Silk Road" was much more of a bundle of relatively short-distance trade routes linking China with nearby polities than a long line going all the way to the Mediterranean[3].

In other words, what one knows as Silk Road was not conceived as a bipolar trade order, but rather revolved around a diffuse network of powers, sometimes cooperating, sometimes competing. Within this network, major political powers (and above all China) exported their goods and tried to impose their standards, but were often forced to leave the management of routes to expert intermediaries, used to living in plural political and legal environments and capable of influencing, through integration, the rules governing long-distance trade. Among them, both Chinese and Western literature lists the Sogdian merchants[4].

1 Tim Winter, *Geocultural Power. China's Quest to Revive the Silk Roads for the Twenty-First Century*. University of Chicago Press, Chicago 2019.

2 Tamara Chin, 'The Invention of the Silk Road, 1877', in *Critical Inquiry*, 40(1), 2013, pp. 194 ff.

3 V. Hansen, *The Silk Road: a New History*. Oxford University Press, Oxford 2015, henceforth Hansen, *The Silk Road*.

4 V. Hansen, *The Silk Road*; Rong Xinjiang, 中古中国与粟特文明 (*Medieval China and*

Now, this essay claims that this deconstructed and reconstructed image of the Silk Road is a good metaphor to interpret the way Chinese law is allegedly influencing "new" global orders.

For more than a decade, it is said, a "Chinese challenge" has been launched at the global order[5]. Such challenge does not necessarily imply – as it is often suggested – a desire of the Chinese leadership to autonomously set the rules of future international relations and trends of economic globalisation. Indeed, the emergence of a "Chinese challenge" reflects the inevitable outward projection of a complex and refined cultural system whose philosophical and political bases find in socio-economic development the perfect platform to acquire a truly global status.

Yet, the image of China as an "alternative" power – vis-à-vis the United States – in leadership of global affairs seems to suffer from an apparently unsolvable contradiction.

On the one hand, China is increasingly playing the role of institutional sponsor of large-scale initiatives of transnational and international cooperation[6]. From an eminently commercial perspective, the Belt and Road Initiative (BRI) and the BRICS group represent the most ambitious, albeit fragmented, alternatives to Western approaches to development cooperation[7]. From a political perspective, the triad now represented by the Global Development Initiative, the Global Security Initiative and the Global Civilisation Initiative embodies the spirit of the doctrine of the Community of Shared Future for Mankind, an ideological pillar of Xi Jinping's thought[8].

Sogdian Culture). SDX Joint Publishing Company, Beijing 2014, henceforth Rong, *Medieval China*.

5 Antonio Fiori, Matteo Dian (eds) *The Chinese Challenge to the Western Order*. FBK Press, Trento 2014.

6 Matteo Dian, Silvia Menegazzi, *China's Blueprint for Global Leadership: GSI, GDI, GCI and Xi Jinping's Vision for the International Order*. Palgrave, Cham 2025, henceforth Dian, Menegazzi, *China's Blueprint*.

7 Dalton Lin, 'The Belt and Road Initiative and China's Pursuit of Agenda-SettingPower', in *Orbis*, 67(4), 2023, pp. 496-523. Gianmatteo Sabatino, 'The BRICS' contribution to the development of alternative models of transnational economic cooperation. A cross-cutting analysis from the perspective of the New Development Bank', in *DPCE Online*, 4, 2024, pp. 2815-2829, henceforth Sabatino, *The BRICS' contribution*.

8 Dian, Menegazzi, *China's Blueprint*. Xi Jinping, *The Governance of China*, Vol. II. Foreign Language Press, Beijing 2017, pp. 569 ff.

On the other hand, however, the historical success of the Chinese development model – i.e. the same success that justifies China's international projection nowadays – has always depended on institutional features deliberately connoted as peculiar to the Chinese context: the notorious "Chinese characteristics"[9]. It was the emphasis on Chinese specialness which underlay the development narrative of socialist market economy, by painting China as a unique experience, as such incapable of representing a model to be exported but, at the same time, protected from the intrusion of undesired foreign standards[10].

China's dilemma is that of a country which seeks to reshape the rules of transnational political and economic engagement while maintaining a façade of uniqueness. In other words, China is a great power pursuing its own interest and actively seeking a detachment from previous standards of international relations, but that does not want, at least officially, to be imitated. Inevitably, thus, engaging with foreign partners implies, for China, a degree of mutual adaptiveness to the "host" environments.

As a consequence, Chinese visions of new global orders – be they economic or political – are firmly entrenched within a narrative of multilateralism, multipolarism and mutual respect for differences among polities[11]. In such general and vague form, however, these visions do not say much. Culturally, from the Chinese perspective, they seem to appeal to the traditional paradigm of harmony[12]. Still, they fail to establish clear pattern of institutional develop-

9 Deng Xiaoping, *Build Socialism with Chinese Characteristics*. Foreign Language Press, Beijing 1985. The historical experience of the Chinese economic reforms fueled copious debates about the very possibility of identifying a "Chinese model" of development, with its own characteristics, as well as about its replicability outside China. See Shaun Breslin, 'The 'China model' and the global crisis: from Friedrich List to a Chinese mode of governance?', in *International Affairs* (Royal Institute of International Affairs 1944-), 87(6), 2011, pp. 1323-1343.

10 Such is the logic underlying the selective adaptation of foreign models in China, about which see Pitman B. Potter, 'Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices', in *Washington University Global Studies Law Review*, 2, 2003, pp. 118-150.

11 See the White Paper "A Global Community of Shared Future: China's Proposals and Actions", of The State Council Information Office of the People's Republic of China, September 2023.

12 Linus Hagström, Astrid H. M. Nordin, 'China's "Politics of Harmony" and the Quest for Soft Power in International Politics', in *International Studies Review*, 22(3), 2020, pp. 507-525. Adam Grydehøj, Ping Su, *China and the pursuit of harmony in world politics: understanding Chinese International Relations theory*, Routledge, New York 2022.

ment at the global stage. Chinese-sponsored *fora* of cooperation are essentially occasions for intergovernmental debates. Some opinions are keen on detecting hegemonic attempts behind the purported flexibility of Chinese mechanisms of cooperation, especially when backed by relevant fluxes of Chinese investments in developing countries[13].

What this essay argues is that Chinese visions of the global order, in spite of them being often advertised through the lenses of biased paradigms, carry the whole historical experience of Chinese-fashioned international relations behind them. It is a complex and diversified experience one must therefore consider. It is, above all, a historical experience grounded in notions of space, time and normativity vastly different from those underlying modern theories of geopolitics and international relations.

Indeed, multipolarism is not something which is destroying an old established order, nor are Chinese approaches dismantling universal and codified paradigms of transnational engagement. Global networks of power and trade have always been multipolar. Geopolitical hierarchies have often masked the ever-present hybridity of the rules of transnational engagement. Even more, Western strategic designs have attached to their corresponding philosophies a universal character which has never been really so. Especially, this has never been the case for China, which has always employed – since its first contacts with Western powers – foreign conceptual categories through profound adaptations and overhauls, and never as mere "transplants". The most relevant example is, of course, that of Marxism-Leninism. Still officially the leading doctrine of the Chinese state, it has marked the historical experience of the People's Republic of China by lending itself to interpretations serving the purpose of preserving culturally-entrenched hierarchies and systems of values. Even when looking at the Cultural Revolution (1966-1976) some scholars have likened the ideological orders underlying the "rule of men" (opposed to the "rule of law") to the ritual governance embodied by the ancient rites (*li*)[14]. More generally, established claims regarding the Chinese legal tradition highlighted how Marxism –

13 William A. Callahan, 'China's 'Asia Dream': The Belt Road Initiative and the New Regional Order' in *Asian Journal of Comparative Politics*, 1(3), 2016, pp. 226-243.

14 Lucian W. Pye, *The Mandarin and the Cadre: China's Political Cultures*. University of Michigan Press, Ann Arbor 1988; Daniel Leese, *Mao Cult. Rhetoric and Ritual in China's Cultural Revolution*. Cambridge University Press, Cambridge 2011; Stefan R. Landsberger, 'Mao as the Kitchen God: Religious Aspects of Mao Cult During the Cultural Revolution', in *China Information*, 11(2-3), 1996, pp. 196-211.

filtered through Soviet-fashioned institutional settings – was a tool to rejuvenate traditional Chinese political philosophies, Confucianism in the first place[15]. The inherent flexibility of socialist legality, at the service of public powers, became the perfect vessel to bring the ancient binomial governance through law/governance through virtue to modern times[16].

By reframing the old/new global order dichotomy in terms not of opposition but of constant hybridization of governance practices, one is therefore able to assess the key concepts of China's outward projection in the light of their proper historical trajectory and degree of interactions with foreign orders and settings.

Let us therefore consider some of the most relevant among these concepts and construe a tentative and basic grammar of the Chinese approach to regulating the world order.

2. "Soft" China

The first notable term that must be assessed is that of "soft" or "softness". A perception of softness – albeit ever-changing – pervades the whole narrative of China's rise to geopolitical relevance in the past forty years, also in connection with its most ancient history[17]. "Soft" is the power through which China establishes partnerships, by eschewing conditional approaches and rule of law-based or human-rights based claims[18]. "Soft" is also the law underlying much of China's efforts in transnational cooperation[19]. If one takes the BRI as an example, it is well established that its legal framework combines series of Bilateral Investment Treaties with a huge number of Memorandums of Understanding (MOUs), often vague and broad in formulation, functioning as political legitimisation of Chinese investments in partner countries[20]. No complex transnational rules are

15 Patrick Glenn, *Legal Traditions of the World*. Oxford University Press, Oxford 2014.

16 Li Lanfen, 当代中国德治研究 (*Research on the Rule of Virtue in Contemporary China*). People's Press, Beijing 2008.

17 Ma Xiaohong, 中国古代法文明的模式 (*The Model of Ancient Chinese Legal Civilization*). Renmin University Press, Beijing 2023.

18 Matthew S. Erie, 'The Soft Power of Chinese Law', in *Columbia Journal of Transnational Law*, 61, 2023.

19 Giuseppe Martinico, Xueyan Wu (eds), *A Legal Analysis of the Belt and Road Initiative*. Palgrave Macmillan, London 2020.

20 Heng Wang, 'The Belt and Road Initiative Agreements: Characteristics, Rationale, and Challenges', in *World Trade Review*, 20, 2021, pp. 282 ff. Sabatino, *The BRICS' contribution*.

codified. No political or rights-related commitments are undertaken: the mutual engagement effort sanctioned by the MOUs and broadly regulated by BITs is implemented through contracts, usually between a Chinese investor (either state-owned or private) and the government (local or national) of a partner country, concerning the realization of a project (in most cases infrastructural). Here, at the level of contractual negotiations, the irenic image of Chinese soft power starts displaying its inherent complexity.

Few data are publicly available concerning BRI-related contracts. However, the combined analysis of such information and other pre-BRI contractual evidence points towards certain common trends[21]. In the first place, the choice of the contracts' governing law: when concluding contracts with developing countries and, especially, with countries in Asia and Africa, Chinese parties tend to impose Chinese law as the one governing the contract. Similarly, arbitration clauses display a strong favour towards tribunals based in China[22]. On the other hand, when contracts are concluded with European, North American or Latin American parties, Chinese law (and China-based arbitration tribunals are rarely chosen. In the second place, from the analysis of contractual clauses it emerges that the non-conditional approach of Chinese cooperation schemes translates, in concrete, quite often in an imposed rejection of Western paradigms, formalized through clauses. Among the most notable examples are the clauses which prevent the contractual parties from referring to the "Paris Club" in cases of necessity to renegotiate the obligations arising from the contract. This practice shows an extremely nuanced notion of "softness": it is not simply a matter of avoiding Western *fora* for re-negotiating debts, but also of preserving wide spaces of discretion not subjected to established standards. The infamous "debt traps" associated with flows of Chinese investments in poor countries, in this context, surely function as political leverage to ensure amiable treatments of investors and favourable international alignments, but they are at the same time conceived to be extremely dynamic and transforming patterns of economic "dependence". Chinese parties, with the approval of political authorities, are often well-disposed towards the continuous renegotiation and even the partial cancellation of out-

21 See the database 'How China Lends', online at https://www.aiddata.org/publications/how-china-lends-2-0-research-brief. The information mentioned is drawn from this database.

22 Usually, the China International Economic and Trade Arbitration Commission (CIETAC).

standing debts, rather than wanting to act upon their credit[23]. Incidentally, such practice clearly mirrors traditional patterns of Chinese business, where constant renegotiation of contractual clauses in the light of changing circumstances was a common paradigm[24].

There is, indeed, an underlying logic which inspires the epiphanies of Chinese "softness" in transnational cooperation. It is a logic grounded in history and echoing peculiar strategic designs. As brilliantly explained by François Jullien, the apparent "blandness" of Chinese attitudes – in business, in law, in relations – conceals a notion of efficacy (and therefore of effectiveness of human actions) very different from the Western ones[25]. Challenging Aristotelian paradigms, the Chinese idea of efficacy rests upon the capacity of human action to adapt to surrounding environments, to historical circumstances. Building up on a holistic notion of time, the Chinese strategic mind is known to operate on a long-distance scale, thus conceiving human "planning" as a combination of long-term ultimate goals and adaptive capabilities, rather than a discrete stream of fixed objectives[26]. Jullien exemplifies these concepts evoking the well-known figures of the strategist Sun Tzu, who famously believed that great generals are those who win only easy battles, since they know how to choose the best moment and the best conditions to accept a fight.

Adaptability is the most pervasive notion in all Chinese approaches to transnational engagement. It is reflected in the emphasis placed upon the principle of non-interference; it fits well in the interpretation of the notion of sovereignty; it serves the purpose of reinforcing intergovernmental *fora* of cooperation while at the same time supporting, at least on a theoretical basis, the existence of a common global institution (the United Nations) designed to foster those *fora*.

In 2025, China, together with fifteen other countries[27], set up the Interna-

23 Michal Himmer, Zdeněk Rod, 'Chinese debt trap diplomacy: reality or myth?', in *Journal of the Indian Ocean Region*, 18(3), 2023, pp. 250-272.

24 Marina Timoteo, *Il contratto in Cina e Giappone nello specchio dei diritti occidentali*. Cedam, Padova 2004. Ignazio Castellucci, *Rule of Law and Legal Complexity in the People's Republic of China*. University of Trento, Trento 2012, pp. 124 ff.

25 François Jullien, *In Praise of Blandness: Proceeding from Chinese Thought and Aesthetics*. Zone Books, New York, 2004.

26 François Jullien, *Traité de l'efficacité*. Grasset, Paris 1996.

27 Nicaragua, Venezuela, Congo, Kiribati, Pakistan, Kenya, Dominica, Central African Republic, Myanmar, Cambodia, Belarus, Mauritania, Serbia, Cuba, Sierra Leone.

tional Organisation for Mediation, which today counts forty-six members[28]. The IOMed is headquartered in Hong Kong. Its main purpose is to offer mediation services to its members for international disputes[29]. Its guiding principles are those of respect for sovereignty and territorial integrity, equality, non-interference, commitment to international rule of law, party autonomy, good faith and spirit of cooperation and a «flexible and efficient approach to peaceful settlement of disputes through mediation»[30]. The IOMed deliberately appeals to a culture of mediation to be promoted and developed among states and upholds confidentiality as one of the operative paradigms of its services[31]. Its inner structure – composed of a governing council and a Secretariat – reflects the traditional architecture of international institutions. From a combined political-legal perspective, the IOMed, albeit not declaring so, clearly claims to provide an alternative to UN-based systems of dispute resolution.

The promotion of plurality of institutional settings is in line with a notion of strategy which is ready to both impose original standards and adapt to existing ones depending on the parties involved, on the quality and status of the interlocutors. Traditional institutions – e.g. the United Nations, the International Monetary Fund – are made to coexist with new organisations and institutional designs just as MOUs, BITs, debt traps, jurisdiction clauses and debt-renegotiation practices coexist within Chinese-sponsored schemes of transnational commercial and development cooperation.

3. China as an empire. China and imperialism

If one shifts from the level of cooperation standards to a broader outlook upon the evolution of power relations, the complex structure of Chinese "softness" entails the fundamental question whether or not it reflects a renewed form of imperialism. The question is relevant also because Chinese initiatives of international/transnational engagement are sustained by the political assumption – firmly held by official Chinese positions – that China has never been an imperialist power[32].

28 From Africa, Asia and Oceania and counting some of the most relevant emerging powers on a global scale such as Indonesia and Nigeria.

29 Article 5 of the Convention on the Establishment of the IOMed.

30 Article 4 of the Convention.

31 Article 5 of the Convention.

32 See the White Paper 'China's Peaceful Development Road' of the State Council Informa-

Such historical claim is rooted in both domestic and international antecedents. The People's Republic of China, reinterpreting Leninist outlooks as formulated in the Third International, ideologically supported both the decolonisation movements and the geopolitical reorientation of decolonised countries within the context of the US-USSR divide. From a national perspective, however, the modern discourse of Chinese nationalism was (and still is) indivisible from the goal of erasing the humiliations suffered at the hands of Western powers after the first Opium War[33]: China is therefore described as a country having undergone phases of semi-feudalism and semi-colonisation due to the combined effects of archaic imperial structures and Western oppression[34]. This narrative is undoubtedly a tool of legitimisation of CPC rule but serves also the indirect purpose of establishing an international image of China which is appealing to post-colonial countries.

The underlying question remains: is China imperialist?

Geopolitical analysts often define contemporary China as an empire. Such conclusion mirrors the assumption of sociological research[35]: the Chinese state is the result of more than two millennia of multiethnic, hierarchical and bureaucratic construction supported by a spiritual doctrine of power (the Mandate of Heaven). Indeed, if one embraces the official claim that Chinese civilisation has five-thousand years of history, it must be inevitably pointed out that what today is considered "China" came to be only as a result of a long and slow process of expansion of the original polities which inhabited the region of the central plains, i.e. the ancient cradle of Chinese culture and language[36]. Regions and provinces like Yunnan, Heilongjiang, Tibet and Xinjiang were, for most of their history, fully or relatively independent from Chinese imperial power. At times they were seats of powerful enemies of the Chinese emperor. Indeed, today's Heilongjiang (historically also known as Manchuria) was not incorporated in

tion Office, 2005.

33 Alison Adcock Kaufman, 'The "Century of Humiliation," Then and Now: Chinese Perceptions of the International Order', in *Pacific Focus*, 25, 2010, pp. 1-33. Lihe Wang, "The century of humiliation' and the politics of memory in China', in *Leviathan*, 11(1), 2020, pp. 38-42.

34 See the Resolution of the CPC Central Committee on the Major Achievements and Historical Experience of the Party over the Past Century, 11 November 2021.

35 Krishan Kumar, *Empires: A Historical and Political Sociology*. Polity Press, Cambridge, 2021, henceforth also Kumar, *Empires*.

36 Kumar, *Empires*.

the Chinese empire until the seventeenth century, when the Manchus, as foreign invaders, defeated the Ming dynasty and established the Qing rule, i.e. the last dynasty of imperial China.

China, therefore, is the result of a long process of enlargement and assimilation of previously foreign entities. In some cases – such as the previously aforementioned formation of the historical Silk Road – the mutual engagement between the Chinese empire and the polities of Central Asia (also including those inhabiting the Tarim basin in modern-day Xinjiang) was central to the establishment of Chinese political influence over trade routes as well as cultural influence over the area[37].

Other areas, such as Korea, Japan or modern-day Vietnam were also the object of Chinese expansion campaigns, aimed sometimes at direct conquest, more often at establishing protectorates or reinforcing political influence.

On the other hand, in terms of international relations, imperial China famously developed, albeit with shifting degrees of formalisation, a system of diplomacy revolving around the notion of tribute. Historians such as Fairbank emphasized the hierarchical premise upon which the system was based, insofar as China conceived relations with foreign polities in a manner akin to a loose vassalage[38]. Such approach deeply affected foreign trade as well: as the general idea that the empire could trade with lower-standing polities was rejected, exchanges of goods between foreign merchants and Chinese parties were not only controlled by the imperial government but also presented as an exchange of tributes and corresponding gifts[39]. The tribute system eventually tumbled under Western guns in the nineteenth century, after, for decades, the empire had refused to engage with European states in ways other than treating them as tributary kingdoms[40].

This system, whose cultural projection had a considerable impact at least in the East-Asian experience of international relations, must not, however, be in-

37 Hansen, *The Silk Road*.

38 John K. Fairbank (ed), *The Chinese World Order; Traditional China's Foreign Relations*. Harvard University Press, Cambridge 1968; Id., 'Tributary Trade and China's Relations with the West', in *The Far Eastern Quarterly*, 1, 1942, pp. 129-149.

39 Manjeet S. Pardesi, 'Decentering Hegemony and "Open" Orders: Fifteenth-Century Melaka in a World of Orders', in *Global Studies Quarterly*, 2, 2022, pp. 1-13, henceforth Pardesi, Decentering Hegemony.

40 Krishan Kumar, 'What can the Chinese experience of empire tell us about the Belt and Road Initiative?', in *Theory and Society*, 51, 2022, pp. 729-760.

terpreted too strictly. Non-Chinese historical evidence shows, indeed, that many of the polities trading with China, while willingly and eagerly submitting to the rituality of the tribute system, never considered themselves to be imperial subjects or vassals[41]. In turn, the Chinese empire never actually controlled – directly or indirectly – polities such as those of the Malaysian peninsula and Indonesian archipelago, which were among the most active as far as trade with China was concerned. Furthermore, from the perspective of circulation of governance models, while Confucian rituality, as learnt from Chinese merchants, exerted, over time, an influence over business practices in the area, the governance schemes of the aforementioned polities were influenced primarily by Dharma (thus drawing from the Indian experience) and later by Islamic law.

The tribute system was then a powerful conceptual tool and was surely perceived as an element of political order; still, it was not uniformly implemented and was often perceived more as a ritual code than as a concrete expression of dominance. Furthermore, interactions with foreigners, especially in trade, were marked by a quite intense degree of legal pluralism as far as the "law in action" was concerned. For instance, in border areas and oases along the Silk Road, during the Tang dynasty, foreign merchant communities (especially Sogdian ones) employed their own trade practices and customs, integrating them within the legal system of the empire[42]. The structure of the empire itself was conceived to be inherently porous: the Tang code allowed for criminal disputes between foreigners to be governed by foreign law, even within its own borders[43].

Once again, the transnational projection of China, in historical terms, surely fits within the sociological category of "empire" but connotes "imperiality" in a very nuanced and flexible way. When China, today, claims not to be an empire, it does so by relying on the fact that the modern notion of "imperialism" – born in nineteenth-century Europe – has always been alien to China. In the past two centuries China has indeed never "conquered" another country. On the other hand, those who claim that China is upholding its own imperial vision of the global order point the finger at the cultural influence of the old tributary system as well as at the inherent imbalance in trade relationships between China and its partner countries, for instance along the BRI.

It seems legitimate to state that China's narrative of its own role within

41 Pardesi, *Decentering Hegemony*.

42 Rong, *Medieval China*.

43 Article 48 of the Tang Code.

the current global order also relies on an imperial background: it does so by claiming China's unique role in the course of human history, due to its alleged long-standing cultural continuity; it does so by construing an ideological and national discourse aimed at setting standardized – albeit partially differentiated – identities for the plurality of its ethnic and religious groups[44]; it does so by embracing its role as a global power and promoting its own attitude to international relations; it does so, as discussed later on, by letting its intellectuals derive from its own traditional cultures theories for world governance[45].

Still, it would be a mistake to interpret China's imperial attitudes using the same paradigms generally applied to other Western imperial powers of the present and the past. Chinese "imperiality" takes pluralism, hybridity and multipolarism as a necessary premise. Indeed, it needs at least a certain degree of plurality to ensure its existence, since it proceeds according to flexible and adaptive terms of transnational engagement. Chinese models, be they legal or political or economic, operate in this context as vectors of authoritativeness due to a prestige which is first and foremost "ethical", in the sense that they are presented as the only ones able to channel harmony and peace. Within this context, when Chinese money, products and services circulate worldwide, they sometimes have spillover effects in terms of expansion of governance models. For instance, in Ethiopia, Chinese FDIs, especially in Special Economic Zones (SEZs), have fostered, over the years, the growth of a regulatory and business culture influenced by Chinese models, in terms of adaptability to circumstances, negotiation rhythms and implementation and enforcement of competition rules[46]. As far as the legislation on SEZs is concerned, recent legislative developments even suggest a formal "transplant" of certain notions of Chinese law, such as that of "negative list" for investments and the idea of special zones as testing fields for regulatory solutions to be later applied to the whole country[47].

Chinese rules and standards appear to be embedded in a bundle of relational paradigms covering governance, institutions and business practices. If Chinese laws are not transplanted, Chinese legal cultures and practices, together with their corresponding institutional settings, appear to have the capacity to oper-

44 As exemplified by the recently issued Law on Promoting Ethnic Unity and Progress.

45 The reference is, obviously, to Zhao Tingyang and his theory of *Tianxia*.

46 Edson Ziso, *A Post-State Centric Analysis of China-Africa Relations*. Palgrave Macmillan, Cham 2018.

47 Articles 4(4) and 33(2) of Proclamation no. 1322/2024.

ate abroad, of constraining or orienting not only the behaviour of the actors involved in bilateral relationships, but also the evolution of other systems as a whole.

This process of transfusion of Chinese standards operates on different levels of depth and intensity. At its most comprehensive and visible, the process involves, for instance, the application of Chinese development paradigms in countries which, albeit retaining or establishing their own conceptual frameworks of civil and commercial law, adhere to market socialism: this is the case of Vietnam and Laos which, in the second half of the 1980s, both launched an overhaul of their economic and legal systems inspired by the experience of Chinese reform and opening up. In both countries, the presence of a Soviet-based constitutional architecture and of a ruling Communist Party certainly facilitated the adoption of Chinese solutions to evolve from a traditional planned economy to a socialist market economy, by integrating planning structures and capitalist civil and commercial rules[48]. On the other hand, however, such a process happened without explicit transplants: in Vietnam, reformed civil law adapted old French models to national circumstances. In Laos, the 2020 civil code was drafted with the contribution of Japanese lawyers, not of Chinese ones[49]. Still, elements such as the reorientation of planning law from vertical to horizontal and inclusive; the incorporation of party cells within corporate structures; the extensive application of use and management rights to marketize state-owned or collective lands all bear distinctive traces of Chinese influence[50]. A "lighter" but still relevant degree of transfusion operates, as previously mentioned, when Chinese investments and enterprises "go global", taking with them contractual standards and business practices, as well as the well-known disdain for conditionality-based cooperation. In these cases, the outward projection of Chinese models enjoys a much wider scope, not limiting itself to socialist countries but encompassing, potentially, all countries, especially in Asia and Africa, sharing China's suspicions about Western-based rule of law. Chinese law, here, is able

48 On the topic, in general, see Hualing Fu, John Gillespie, Pip Nicholson, William Edmund Partlett (eds), *Socialist Law in Socialist East Asia*. Cambridge University Press, Cambridge 2018.

49 The Lao Civil code, entered into force in 2020, was drafted with the assistance of the Japan International Cooperation Agency (JICA), which provided legal consultancy services.

50 Gianmatteo Sabatino, *I paradigmi giuridici della pianificazione per lo sviluppo*. Editoriale Scientifica, Napoli 2022.

to function not only as a carrier of legal innovations but also as a legal irritant, by stimulating and prompting domestic developments pointing away from neo-liberal standards and instead seeking to adjust rules to a recurring triad of tendencies: global polycentricity in transnational relations; state capitalism and economic interventionism; assertiveness of public control over media. The areas touched by such transfusion processes can be both geographically and thematically diverse. The Ethiopian example is a leading case as far as business law is concerned. However, other African countries have shaped and are shaping their own internet laws after being fascinated by Chinese approaches to network security, as well as to censorship and content control[51].

4. A Chinese philosophy of global politics: Tianxia

The penetration of Chinese governance models in foreign countries is shaping a new geography of laws and institutional settings which seems destined to foster an increasing diversification of international grids of power, authority and development. If, from a strictly Chinese perspective, this state of things echoes the adaptive nature of human beings, to non-Chinese eyes it raises the critical issues of stability and order. Indeed, regardless of one's criticism of its hypocrisy and constant failures, the Western – *rectius*, American – attempt at proclaiming the universal applicability of neo-liberal development paradigm in connection with the narrative of human rights, has functioned as a powerful ideological platform to sustain the evolution of current international law. It is a platform which Chinese discourses today explicitly eschew, pointing out its detachment from current reality and inherent unilaterality. However, the mere appeal to respect for political, religious and cultural diversity as expressed in Chinese doctrines of international relations does not overcome the risk of vagueness and, worse, the accusation of ethical relativism.

The most refined counterclaim to these objections probably comes from one of the most celebrated and disseminated visions of modern Chinese political theory: that of contemporary *Tianxia*, elaborated by political philosopher Zhao Tingyang. *Tianxia* (天下), as a term, originally appears in the texts and documents of the Spring and Autumn Period (8th to 5th Century B.C.) and the Warring States Period (5th to 3rd Century B.C.), but it refers mainly to an ancient govern-

51 Willem Gravett, 'Digital neo-colonialism: The Chinese model of internet sovereignty in Africa', in *African Human Rights Journal*, 20, 2020.

ance model elaborated in the early period of the Zhou dynasty, around the 11^{th} Century B.C., after the Zhou overthrew the Shang dynasty and took control of much of the central plains and the Yellow River basin. Zhao Tingyang explicitly refers to this concept associating it with the Zhou[52]. Interestingly, Zhao considers *Tianxia* the first to establish a concept of world politics, while Ancient Greek thought established the basic concepts of national politics[53].

The birth of the *Tianxia*, similarly to what happened with the connected notion of Heavenly Mandate, is closely related to the circumstances in which the Zhou overthrew the Shang. Here, myth and history are often indistinguishable one from the other. The traditional view states that the Zhou – originally a realm either outside the domain of the Shang or, sometimes, a vassal or tributary realm of the Shang – rallied several polities against the Shang in the light the latter's corrupt and morally decayed rule. The authority of the Zhou dynasty was therefore based on a moral claim, rather than a purely military or political one[54].

Regardless of the credibility of such narrative, it is likely that direct domains of the Zhou were not capable, by themselves, of sustaining a military force capable of controlling the whole territory of the Shang dynasty. Furthermore, several areas of the realm remained loyal to the previous rulers even after the conquest[55]. Therefore, the main problem of the Zhou was that of a small entity having to rule over a bigger one[56]. The solutions elaborated revolved around the establishment of a cultural and moral dominance over the then-known world – what was under Heaven, *Tianxia*. Since the Zhou controlled much of the central plains, i.e. the places where the Chinese civilization was born, they were empowered to exert a moral authority which could set common standards and principles to maintain peace without having to rely on direct administrative control over day-by-day governance matters of all the subject polities. It is easy to see how such a theory, genuine or not, fits perfectly within the political discourse of the great history of Chinese civilization. *Tianxia* establishes a theory of governance which does not rely solely on law, but primarily upon virtue, in line with

52 Zhao Tingyang, *Tianxia, tout sous un même ciel*. Les éditions du cerf, Paris 2018.

53 Zhao Tingyang, *Tianxia*, p. 61.

54 Wang Mingming, 'All under heaven (tianxia) Cosmological perspectives and political ontologies in pre-modern China', in *HAU: Journal of Ethnographic Theory*, 2(1), 2012, pp. 337-383.

55 Zhao Tingyang, *Tianxia*, pp. 61 ff.

56 Zhao Tingyang, *Tianxia*, p. 65.

what Confucianism would have claimed centuries later[57]. Furthermore, it frames world governance in terms of construction of a common ethical culture, resulting from the combination of basic ethical standards and integrated differences among the specific governance solutions of the different polities constituting the world. The *Tianxia* doctrine underlay much of the historical path of the Chinese nation, as recognized by Zhao himself when he points out that the region of the central plains, even after losing economic primacy, remained the vital area to be controlled in order to claim authority over "China", since it represented the cultural core of the empire[58].

Zhao's goal is to draw inspiration from the traditional concept of *Tianxia* and adapt some of its main features to the current geopolitical landscapes, so as to propose a renewed architecture of the global order for the ultimate purpose of ensuring peace and stability. From the standpoint of political philosophy, Zhao's primary aim is to use the notion of Tianxia in order to frame the world as a whole in terms of a political subject, superior to national frameworks. In the second place, his theory supports the identification of a moral authority intertwined with the world and thus encompassing all states[59]. The moral core of the highest political subject (i.e. the world) should be able to promote a relational network of international connections, not guided by national self-interest but rooted in the common perception of universal objectives shared by all states[60]. In Zhao's words, this is the relational rationality (关系理性 – *guanxi lixing*) of *Tianxia*[61]. The emphasis upon such concepts serves the purpose of pursuing global initiatives while preserving differences among polities and solving conflicts of interest not by adjudication on the basis of fixed standards – usually derived from the culture of only one or some state – but, as just noted, through relational efforts.

Zhao does not claim that the world's moral core should be China: he is very clear in emphasizing that no state can perform such a function and rejects accusations of Sinocentrism as reflecting the philosophical limitations of Western

57 Jiang Dengfeng, 中国先秦德治、法治及人性基础 (Analysis on Rule by Virtue, Rule by Law of the Pre-Qin Period of China and Their Humanity Bases), in *Jingmao falǜ pinglun*, 2, 2020, pp. 16 ff.

58 Zhao Tingyang, *Tianxia*.

59 Zhao Tingyang, 天下： 在理想主义和现实主义之间 (*Tianxia: Between Idealism and Realism*), in *Exploration and Free Views*, 9, 2019, pp. 100-108, henceforth Zhao Tingyang, *Between Idealism*.

60 Zhao Tingyang, *Tianxia*.

61 Zhao Tingyang, *Between Idealism*.

views of the international order[62]. He vaguely points to a renewed and rejuvenated form of United Nations as the possible institutional representative of the modern *Tianxia*, but his elaboration is very general on this point[63].

The relation between Zhao's theory and China's contemporary approaches to international relations is ambivalent. On the one hand, Zhao's modern *Tianxia* echoes several claims of the doctrine of a Community of Shared Future for Mankind. The "shared future" envisaged by China as the polar star of future transnational politics refers to universal challenges awaiting humanity – e.g. climate change; world peace – to be tackled through multilateral engagements and constant differentiation of standards and goals depending on changing circumstances. The similarities with the flexible approach to relational governance in the *Tianxia* doctrine are evident. Still, Zhao's appeal to conceive, institutionally, a global political subject seems inevitably to be at odds with the strictly inter-national vision of global politics upheld by China. While national/state interest – not a general "public" interest – constantly inspires and determines several key mechanisms of China's legislation and policies in critical fields, its promotion of intergovernmental cooperation takes the defense and pursuit of national differences as a premise. Therefore, assuming that a form of United Nations free from the constraints of great powers could exist, it would hardly be supported by China[64].

From a philosophical point of view, therefore, Zhao's theory really holds a potentially universal significance, not being strictly attached to Chinese contingent policies. His criticism of the current global order and of globalization emphasizes the lack of a proper global political framework[65]; the conflict of logic between the advancement of economic integration and the consolidation of states and great powers as the main drivers of international law and politics; the unilateral ethical fiber of current international standards, too grounded in Western values. By proposing the idea of the world as a composite subject and by referring to flexible models of global governance, Zhao's theory puts a very

62 Vv.Aa., "新天下主义"纵论（笔谈）(*A discussion on New Tianxia thought*), in *Literature, History and Philosophy*, 1, 2018, pp. 5-22.

63 Zhao Tingyang, *Tianxia*.

64 Tokujin Matsudaira, 'Tianxia, or another Grossraum? U.S.–China Competition and Paradigm Change in the International Legal Order', in *Chicago Journal of International Law*, 23(1), 2022, pp. 131-143.

65 Zhao Tingyang, *Between Idealism*.

credible nail in the coffin of neo-liberal international law.

Still, when criticism must leave the floor to the *pars construens*, the *Tianxia* theory displays some limits, especially when reasoning in terms of legal and institutional construction of the new order. *Tianxia* is a Chinese concept of governance and its mere comprehension, let alone its implementation, is strictly linked to the acceptance of Chinese philosophical and anthropological premises. As previously noted, flexible governance requires a notion of efficacy of human action which, in China, has solid cultural roots, but is not so straightforwardly applicable in other contexts, especially in the West. The construction of a global moral authority, when projected on a multifaceted international community, cannot overlook that in the West – and, albeit to different extents, also in several other contexts – governance has been for centuries increasingly linked to the idea of the rule of law. If the unilateral elevation of such paradigms to universal standards produces a biased international law, on the other hand it should be noted that, taken as it is, the modern theory of *Tianxia* seems to conceive an order which is culturally very Chinese, thus incurring the risk of replicating the same bias, only from a different perspective.

Tianxia is a concept which, historically, truly established the core of a refined political theory and its adaptation to modern circumstances offers fundamental insights about the multipolar destiny of contemporary international law. Still, it seems it cannot function as a proper institutional framework for global governance. Its major contribution is indeed cultural. By evaluating the logic of Zhou dynasty's rule, Zhao Tingyang highlights the significance that centers of cultural production – in terms of relational standards and moral frameworks – have upon the development of networks of political power. In doing so, the theory of *Tianxia* undermines sometimes simplistic and para-Marxist visions which reduce geopolitics to a matter of economic dominance, as well as approaches that overemphasize military capabilities in assessing balances of power.

5. Conclusions

The analysis carried out in the previous paragraphs should have demonstrated that when discussing "Chinese approaches" to the future global order one cannot reduce it to isolated paradigms, as fascinating as they might be. Official narratives are intertwined with culturally-oriented notions of power, cooperation, efficacy, time, imperialism and sovereignty. To say that China had a disruptive effect upon the Western-dominated international order is, paradoxically, both an understatement and an overstatement. For sure China provided the world with alternative paradigms of cooperation, alternative hierarchies of international rules, alternative platforms of values which are attractive to entire macro-regions of the globe. Unlike other powers in the past (such as the USSR) it does not frame such alternative choices in terms of an ideological narrative, but as a philosophical outlook over the common challenges awaiting mankind and the community of national states in the future, not eliminating but embracing differences. On the other hand, however, contemporary Chinese visions use the prestige derived from China's "rise" to act upon contradictions that universalist approaches – such as the Western neo-liberal one – always had. Indeed, as previously noted, a comparative outlook upon the world's legal traditions would show that paradigms such as the rule of law or the certainty of law are essentially a heritage of the Western legal tradition, whereas other cultural environments have developed refined and complex alternatives. By simply acknowledging it, China, as obvious as it may seem today, proves to be a step ahead of its fellow great powers. Yet, its proposals for a new global architecture are multifaceted and contradictory. In terms of cooperation and transnational trade, they are able to derive from general principles – e.g. of non-conditionality and respect of sovereignty – clauses and mechanisms serving as vessels of transnationalization of Chinese laws and practices. This results in a process of hybridization of Chinese and foreign rules, due to the application of flexible negotiation and cooperation standards. When China's action moves to the broader level of international relations, much of the legitimacy of its positions still revolves around the deliberate vagueness and ambiguity of the values it promotes, without implementing proper and stable institutional settings capable of overcoming the weaknesses of the great powers' dialectic. Chinese visions of the global order, therefore, remain deeply "domestic" in their underlying ethical platforms, fully comprehensible and effective only for minds trained and embedded in Chinese political culture.

The main consequence of this state of things is, as of now, the fragmentation of the centers of production of international law, reflecting the multipolar order that is rapidly becoming entrenched. Global rules for peace and cooperation will compete; great and medium powers will strive to develop their own models; at the same time, they will use or reject, depending on the circumstances and the interlocutors, competitors' models.

Flexibility and adaptiveness are the new normal. China learned this lesson long ago.

The Fragmentation of International Space Law: From Universalism to Competitive Legal Pluralism.

by Raoul Cardellini Leipertz

1. Introduction

International space law shows with unusual clarity how legal authority is being redistributed after the universalist phase of twentieth-century multilateralism. Its basic legal structure came to be in the 1960s, when space activity remained technologically exceptional, overwhelmingly State-led, and disciplined by Cold War rivalry. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (OST), gave that structure its legal form.[1] The OST used universal language for strategic ends. Outer space was to be free for exploration and use, immune from national appropriation, used for the benefit and in the interests of all countries, and understood as "the province of all mankind".[2] Those principles still supply the basic legal vocabulary of the field, and the OST has long been treated as its constitutional charter.[3] They now govern a far more operationally dense environment: commercial launch markets, large constellations, lunar infrastructure planning, and regional regulation all press on a treaty text drafted before such activity became routine.[4]

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1 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, opened for signature 27 January 1967, entered into force 10 October 1967, 610 UNTS 205.

2 OST, above n 1, Articles I and II.

3 Frans G. von der Dunk, 'The Origins of Authorisation: Article VI of the Outer Space Treaty and International Space Law', in Frans G. von der Dunk, ed. *National Space Legislation in Europe: Issues of Authorisation of Private Space Activities in the Light of Developments in European Space Cooperation*, Martinus Nijhoff, Leiden 2011, pp. 3-28, p. 3.

4 Rossana Deplano, 'The Artemis Accords: Evolution or Revolution in International Space Law?', *International and Comparative Law Quarterly*, vol. 70, no. 3, 2021, pp. 799-819, pp. 799-803; Maria Manoli, 'The Architecture of Authority in Global Space Governance:

The term "post-global" refers here to a legal and political condition in which universal treaty-making weakens while other sites of governance acquire authority. Outer space is a concentrated, and thus perfect, example of this process: territorial sovereignty is excluded, but the institutions now applying the OST's universal language are themselves far from universal, raising the classic problem of a global commons.[5] This has led to a situation in which comprehensive treaty-making has slowed,[6] but legal development has continued through other forms of governance.[7] At the same time, the specification of treaty principles has continued through domestic and regional regimes, guidance developed within the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), coalition frameworks such as the Artemis Accords and the International Lunar Research Station (ILRS), and technical standards promoted by agencies, firms, and expert networks.[8] Common treaty rules are now being specified outside the treaty-making process itself. The consequence is that formal authority and applied content no longer coincide. A rule may remain formally authoritative while its application is shaped in settings

The Moon Agreement as a Deconflicting Mechanism of Space Activities', *Utrecht Law Review*, vol. 20, no. 1, 2024, pp. 100-113.

5 Marianne Riddervold and Akasemi Newsome, 'Introduction: Cooperation, Conflict, and Interaction in the Global Commons', *International Relations*, vol. 35, no. 3, 2021, pp. 365-383.

6 International Law Commission, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, UN Doc. A/CN.4/L.682, 13 April 2006, paras 5-8; Andrew F. Cooper, Emel Parlar Dal, and Samiratou Dipama, 'Fragmented Multilateralism and International Institutions: Between Complexities and Challenges', *Third World Quarterly*, vol. 46, no. 15, 2025, pp. 1825-1837.

7 Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance', *International Organization*, vol. 54, no. 3, 2000, pp. 421-456; Joost Pauwelyn, Ramses A. Wessel, and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', *European Journal of International Law*, vol. 25, no. 3, 2014, pp. 733-763; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford University Press, Oxford 2010; Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', *International Journal of Constitutional Law*, vol. 15, no. 3, 2017, pp. 671-704; Cooper, Parlar Dal, and Dipama, above n 6.

8 United Nations Committee on the Peaceful Uses of Outer Space, Guidelines for the Long-term Sustainability of Outer Space Activities, UN Doc. A/74/20, Annex II, 2019; Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, signed 13 October 2020; China National Space Administration and State Space Corporation Roscosmos, *International Lunar Research Station: Guide for Partnership*, Version 1.0, June 2021.

marked by unequal participation, limited transparency, or infrastructural dependence.

This chapter asks how the OST's universalist settlement is being fragmented through the administrative, coalition-based, resource-related, soft-law, and exit practices built around the Treaty. Its hypothesis is that contemporary space law is moving from universalist treaty-centred governance to competitive legal pluralism. The OST remains legally central, but its applied meaning increasingly depends on differentiated sites of implementation that remain formally connected to the Treaty while competing to define what its principles require.

The contribution is doctrinal and conceptual. Doctrinally, the chapter treats contemporary conflicts in space law as disputes over interpretation and administrative practice. Article VI of the OST is the clearest example: it mediates private activity through public responsibility by requiring authorisation and continuing supervision of non-governmental activities while preserving State responsibility for national activities in outer space.[9] Conceptually, treaty exit is addressed only as the limit case: a test of whether the OST's common-interest function can survive formal withdrawal by a major spacefaring State.

The chapter proceeds in five steps. It first reconstructs the OST settlement through Articles I, II, III, VI, and IX. It then explains fragmentation as a method, using the International Law Commission (ILC) Study Group report, the Vienna Convention on the Law of Treaties (VCLT), and relevant scholarship. The analysis then moves through Article VI implementation, Artemis and ILRS coalition practice, resource governance, safety zones, soft law, and private authority. Treaty exit is addressed last as a stress test for the OST's common-interest function. The conclusion develops ordered pluralism as the normative response.

2. The Universalist Architecture of the Outer Space Treaty

The OST supplied the early space age with its basic legal settlement. It was constitutional in a limited, functional sense: it established the foundational structure of the regime without creating a complete administrative code. The OST joined equal access and non-appropriation to a public-responsibility structure built

9 OST, above n 1, Article VI; Charles Stotler, 'Interpretation as Creation: Article VI of the Outer Space Treaty', *Chicago Journal of International Law*, vol. 26, no. 1, 2025, pp. 133-147, pp. 135-140.

around State responsibility, due regard, and conformity with general international law. That design reflected the conditions of the 1960s. Space activity was still exceptional, State-led and strategically sensitive. The OST restrained escalation and territorial enclosure through broad principles, leaving detailed regulation to later interpretation and implementation. Its authority and its difficulty have the same source: the Treaty governs generally, but administers little directly.

Article I is the Treaty's universalist premise. Outer space, including the Moon and other celestial bodies, is free for exploration and use by all States without discrimination, on a basis of equality, and in accordance with international law. Exploration and use must be carried out "for the benefit and in the interests of all countries", and they are described as "the province of all mankind".[10] This is where the regime's common-interest vocabulary begins. The provision identifies the beneficiaries of space activity, but it does not establish the institutions or distributive criteria through which benefit is to be assessed. Article I supplies a standard. It does not provide the machinery that would make the standard self-executing.

Article II supplies the anti-enclosure rule. Outer space, including the Moon and other celestial bodies, is not subject to national appropriation "by claim of sovereignty, by means of use or occupation, or by any other means".[11] The rule removes celestial territory from the ordinary techniques through which territory becomes subject to State sovereignty. Its wording is categorical. Its later application is more difficult. The provision leaves unresolved the status of extracted resources, priority of use, operational control, and long-term occupation short of sovereignty. The doctrinal difficulty lies in applying the rule to practices that may produce control without a formal sovereignty claim. Contemporary disputes over lunar resources, safety zones, and infrastructure arise within that gap.

Article III opens the OST to general international law. It requires States Parties to carry on activities in the exploration and use of outer space in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding.[12] The OST does not operate as an isolated *lex specialis*. Its rules on free use, non-appropriation, responsibility, and due regard must be interpreted within the wider legal field constituted by the law of treaties, State re-

10 OST, above n 1, Article I.
11 OST, above n 1, Article II.
12 OST, above n 1, Article III.

sponsibility, the UN Charter, environmental principles, and the peaceful settlement of disputes. Article III keeps the regime connected to general international law and provides the treaty basis for later arguments about systemic integration.

Article VI is the Treaty's bridge between private activity and public responsibility. It provides that States Parties bear international responsibility for national activities in outer space, whether conducted by governmental agencies or non-governmental entities, must assure their conformity with the Treaty, and must authorise and continuously supervise non-governmental activities through the appropriate State Party.[13] The clause accommodates private activity without allowing it to escape the State-centred structure of international responsibility, but it also leaves significant questions unresolved: what counts as a "national activity", which State is "appropriate", how intensive supervision must be, and how treaty responsibility relates to ordinary attribution rules. Those questions have produced competing readings, with one view treating Article VI as a distinctive responsibility rule extending to non-governmental activities within a State's regulatory reach, and another keeping it closer to due diligence and ordinary State responsibility.[14] National legislation therefore does more than execute the provision; it helps determine whether Article VI operates as a broad responsibility rule, a due-diligence standard, or a hybrid mechanism. Debris mitigation shows the same point. Read together with environmental-law reasoning, impact assessment, cooperation, and notification,[15] Article VI may support preventive supervision, although that claim remains partly *lex ferenda*: the provision does not itself create a space traffic management regime or debris-mitigation code, but it can connect treaty responsibility to preventive administration.

Article IX supplies the Treaty's due-regard and consultation standard. States Parties must conduct activities in outer space with due regard to the corresponding interests of other States Parties, avoid harmful contamination of outer space and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter, and undertake appropriate international consultations where

13 OST, above n 1, Article VI.

14 Bin Cheng, 'Article VI of the 1967 Space Treaty Revisited: International Responsibility, National Activities, and the Appropriate State', *Journal of Space Law*, vol. 26, no. 1, 1998, pp. 7-32; Stotler, above n 9, pp. 135-140.

15 Luca Erhart and Maria Boutovitskai, 'Transforming Article VI of the Outer Space Treaty into an Effective Mechanism of Space Debris Mitigation', *Proceedings of the 8th European Conference on Space Debris*, ESA Space Debris Office, Darmstadt, 20-23 April 2021, pp. 1-10.

planned activities would cause potentially harmful interference with the peaceful exploration and use of outer space by other States Parties.[16] Article IX gives the regime a procedural and relational dimension. It does not prescribe a complete protocol for risk assessment, notification, deconfliction, or dispute settlement. That openness later becomes important for deconfliction practice.

The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement) of 1979 shows the path that a more determinate universalist settlement might have taken. Article 11 declares the Moon and its natural resources to be the "common heritage of mankind", excludes property in the surface, subsurface, and natural resources in place, and requires States Parties to establish an international regime to govern exploitation when such exploitation is about to become feasible.[17] Limited participation, especially among major spacefaring States, has prevented the Moon Agreement from becoming the central positive-law framework for resource governance.[18] Its importance here is analytical: it preserves a multilateral counter-model to the OST's more open settlement.[19]

The OST's universalism is durable and incomplete. Its durability lies in the vocabulary it still supplies for legal justification and contestation. Its incompleteness lies elsewhere: the Treaty states principles whose applied meaning depends on later implementation. The OST has not been displaced at the level of formal validity. Its legal effect now depends increasingly on the administrative and technical practices built around it.

3. Fragmentation as Method

Fragmentation is used here as a method rather than as a synonym for disorder. The OST no longer receives its operative meaning from a single institutional setting. The question is where its open-textured principles acquire content as much as what the Treaty says. The starting point is the 2006 report of the ILC Study Group on fragmentation, on the difficulties arising from the diversification and expansion

16 OST, above n 1, Article IX.

17 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature 18 December 1979, entered into force 11 July 1984, 1363 UNTS 3 (Moon Agreement), Article 11.

18 Deplano, above n 4, pp. 812-815; Manoli, above n 4, pp. 100-113.

19 Manoli, above n 4, pp. 100-113.

of international law.[20] The report treats fragmentation as a consequence of specialised regimes and institutions capable of producing competing interpretations. The difficulty is not confined to normative conflict. Fragmentation may also produce overlap, specialisation, hierarchy questions, and new forms of coordination.

For space law, that account matters in three ways. *Lex specialis* explains how specialised rules can operate without displacing general international law. Systemic integration, especially Article 31(3)(c) of the VCLT, prevents the OST from being read in isolation by requiring relevant rules of international law applicable between the parties to be taken into account together with the context.[21] Regime interaction captures the way space law draws on adjacent bodies of law, including State responsibility, environmental reasoning, technical standards, and general international law.[22]

Article III of the OST makes that connection internal to the space-law regime. Activities in the exploration and use of outer space must be carried out in accordance with international law, including the UN Charter. The OST is not a self-contained regime sealed off from the rest of international law. Its provisions on free use, non-appropriation, State responsibility, due regard, consultation, and withdrawal must be interpreted against the wider legal setting in which they operate.[23]

The materials considered here do not carry the same legal weight. Article 38(1) of the Statute of the International Court of Justice (ICJ) identifies treaties, international custom, and general principles as sources applied by the Court, with judicial decisions and teachings operating as subsidiary means for determining rules of law. Within that framework, the OST, the Moon Agreement, the Registration Convention and the Rescue Agreement operate as treaty law for their parties.[24]

20 International Law Commission, Fragmentation of International Law, above n 6, paras 5-8, 37-43, 56-122, and 410-480.

21 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331 (VCLT), Article 31(3)(c).

22 International Law Commission, Fragmentation of International Law, above n 6, paras 56-122, and 410-480; Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization', *International Journal of Constitutional Law*, vol. 15, no. 3, 2017, pp. 671-704.

23 OST, above n 1, Article III; International Law Commission, Fragmentation of International Law, above n 6, paras 410-480.

24 Statute of the International Court of Justice, 26 June 1945, Article 38(1); Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, opened for signature 22 April 1968, entered into force 3 December 1968, 672 UNTS 119 (Rescue Agreement); Convention on Registration of Objects

Customary international law requires a general practice accepted as law.[25] Soft-law instruments, political commitments, technical standards, domestic legislation, procurement conditions and private practices are not equivalent to treaties.[26] Their relevance depends on use. They may assist interpretation, evidence practice, or *opinio juris*, set administrative benchmarks, or supply the operational conditions through which treaty obligations are applied. Competitive legal pluralism depends on that unevenness: norms multiply, but they do not bind in the same way.

Space law fits this method because the OST is authoritative without being a regulatory code. Its rules draw on treaty law, State responsibility, environmental reasoning, and domestic administration rather than operating as a closed system. Its central concepts require interpretation through other legal and institutional materials. The OST's practical reach now depends less on treaty amendment than on the administrative and technical settings in which States apply it.

The analysis distinguishes vertical, horizontal, and functional dispersion. Vertical fragmentation concerns the translation of shared international obligations into national and regional systems. Horizontal fragmentation concerns competing coalition projects operating within the same legal field. Functional fragmentation concerns the shaping of treaty meaning through standards, operational practice and private conduct.

These forms of dispersion make possible the chapter's central concept: competitive legal pluralism. The competition is legal because it concerns the interpretation and implementation of binding principles. It is pluralist because no single institution controls that work, and its competitive character lies in the fact that interpretive influence often follows material capacity, market access, infrastructure, and coalition-building power. The concept identifies a legal condition rather

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Launched into Outer Space, opened for signature 14 January 1975, entered into force 15 September 1976, 1023 UNTS 15 (Registration Convention); Moon Agreement, above n 17.

25 International Law Commission, Draft Conclusions on Identification of Customary International Law, with commentaries, Report of the International Law Commission on the Work of its Seventieth Session, UN Doc. A/73/10, 2018, Conclusions 2, 4, 6, 9, 10, 11, 12, 13, and 14; *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, p. 3, paras 74-77; *Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, ICJ Reports 1986, p. 14, paras 183-186.

26 Statute of the International Court of Justice, above n 24, Article 38(1); International Law Commission, Draft Conclusions on Identification of Customary International Law, above n 25, Conclusions 2, 4, 6, 9, 10, 11, and 12; Abbott and Snidal, above n 7.

than a geopolitical mood. It differs from Krisch's postnational pluralism, which describes the absence of a single hierarchical order among overlapping legal regimes: competitive legal pluralism operates within a single treaty framework and adds a further claim, namely that the sites specifying the OST's open-textured principles are unequally endowed with material capacity, market access, and coalition-building power, and that this inequality shapes which interpretations gain practical authority.

Article VI provides the first doctrinal test: how does a common treaty obligation become domestic administration, and when can that administration affect the interpretation of the Treaty itself?

4. Vertical Fragmentation: National and Regional Transpositions of Article VI of the OST

Article VI is where the OST first becomes domestic administration. It states a common rule of public responsibility: States Parties bear international responsibility for national activities in outer space, must assure conformity with the Treaty, and must authorise and continuously supervise non-governmental activities through the appropriate State Party.[27] The provision leaves the machinery to States. That matters because "national activities", the "appropriate State", post-launch supervision, and transfer of control all depend on regulatory choices made after the Treaty. Article VI therefore permits private activity, but only through a State-centred structure of responsibility whose practical effect depends on domestic or regional law.

Article VI is foundational because implementation may shape interpretive meaning. Its open terms acquire legal content through domestic and regional practice. Under Article 31(3)(b) of the VCLT, such practice becomes interpretively significant only where it amounts to subsequent practice in the application of the Treaty establishing the agreement of the parties regarding interpretation.[28] Short of that threshold, implementation remains relevant as evidence of regulatory understanding, administrative practice, or supplementary interpretive context. It is not binding interpretation in itself.

A possible objection is that this is ordinary treaty implementation, not fragmentation in any legally significant sense. The objection is partly correct: Article VI

27 OST, above n 1, Article VI.
28 VCLT, above n 21, Article 31(3)(b).

expects States to legislate, and divergence is not unlawful merely because national systems differ. The concern arises when implementation begins to affect the Treaty's practical meaning: when licensing choices define supervisory control, determine the treatment of transfers, allocate environmental risk, or become evidence in later interpretive disputes.

The doctrinal debate concerns the legal intensity of Article VI. One reading treats it as a distinctive rule extending State responsibility to non-governmental activities within a State's regulatory reach; another keeps it closer to ordinary State responsibility and due diligence.[29] Recent work on debris mitigation illustrates the stakes. Article VI may support preventive regulation where licensing is tied to environmental review, cooperation and notification,[30] but it does not itself create a space traffic management regime or a debris-mitigation code. Due diligence helps only if used as a context-dependent standard of conduct, shaped by the primary obligation, foreseeable risk, State capacity and available regulatory measures.[31]

National practice confirms that Article VI is not implemented through a single model. United Nations Office for Outer Space Affairs (UNOOSA) materials show that States combine licensing, registration, liability allocation, and supervision in different ways, often attaching mission-specific requirements to debris mitigation or end-of-life disposal.[32] Belgium locates control through the operator's effective control of the space object and requires prior approval for transfers of that control. Austria places greater weight on registration, insurance, technical capacity, and debris mitigation. Both laws implement Article VI, but they locate supervisory control differently.[33]

29 Cheng, above n 14, pp. 7-32; Stotler, above n 9, pp. 135-140.

30 Erhart and Boutovitskai, above n 15, pp. 4-10; United Nations Office for Outer Space Affairs, Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space, ST/SPACE/49, 2010.

31 International Law Commission, First Report on Due Diligence in International Law, by Penelope Ridings, Special Rapporteur, UN Doc. A/CN.4/792, 4 March 2026, paras 3-7, 13-18, and 21-27.

32 United Nations Office for Outer Space Affairs, National Space Law Database, online at the site UNOOSA; United Nations Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, Schematic Overview of National Regulatory Frameworks for Space Activities, UN Doc. A/AC.105/C.2/2025/CRP.6, 2 May 2025.

33 Belgium, Law of 17 September 2005 on the Activities of Launching, Flight Operation or Guidance of Space Objects, consolidated text as revised by the Law of 1 December 2013, Articles 2-6, and 13-15; Austria, Federal Law on the Authorisation of Space Activities and the Establishment of a National Space Registry, 2011; Austria, Regulation of

Italy's Law No. 89 of 13 June 2025 follows the same pattern in a more recent legislative setting. It applies to activities conducted from Italian territory and to Italian operators abroad, requires authorisation, provides for registration where Italy is the launching State, regulates operator liability and links supervision to a national plan for the space economy.[34] It shows how Article VI implementation now also serves industrial strategy.

The proposed European Union (EU) Space Act adds a regional layer.[35] The Commission presents divergent national space laws as a source of internal-market fragmentation and relies on Article 114 of the Treaty on the Functioning of the European Union (TFEU) because Article 189 TFEU excludes harmonisation of Member State laws.[36] The proposal seeks common requirements on safety, resilience, and environmental sustainability, including mechanisms for third-country operators and equivalence decisions. It therefore mediates Article VI implementation inside the internal market while projecting Union standards outward.[37] That projection should be understood cautiously: any Brussels-effect dynamic[38] is likely to be sector-specific, more plausible for commercial services, satellite data, environmental-footprint assessment and cybersecurity than for launchers, military capabilities, or sovereign infrastructure.[39]

Vertical pluralisation does not remain confined to domestic law. Once national and regional systems define licensing criteria, recognise resource-related entitle-

the Federal Minister for Transport, Innovation and Technology in Implementation of the Federal Law on the Authorisation of Space Activities and the Establishment of a National Space Registry, 2015.

34 Italy, Legge 13 giugno 2025, n. 89, Disposizioni in materia di economia dello spazio, Gazzetta Ufficiale della Repubblica Italiana, Serie Generale, no. 144, 24 June 2025, entry into force 25 June 2025.

35 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the safety, resilience and sustainability of space activities in the Union, COM(2025) 335 final, Brussels, 25 June 2025.

36 European Commission, COM(2025) 335 final, above n 35, Explanatory Memorandum, 'Reasons for and objectives of the proposal', 'Consistency with existing policy provisions in the policy area', and 'Legal basis'; Treaty on the Functioning of the European Union, consolidated version, OJ C 202, 7 June 2016, Articles 114 and 189.

37 European Commission, COM(2025) 335 final, above n 35, Articles 20, 21, 62, 64, 69, 70, 94, 97, and 105.

38 Anu Bradford, 'The Brussels Effect', *Northwestern University Law Review*, vol. 107, no. 1, 2012, pp. 1-68.

39 Raoul Cardellini Leipertz, 'EU Space Act e soft law: quando il mercato interno guarda alle stelle', in *Atti del Convegno SIDI 2026*, Editoriale Scientifica, Napoli, forthcoming.

ments or regulate deconfliction, they become channels through which coalition commitments take legal effect. A State may join the Artemis Accords and give that alignment practical force through licensing, registration, procurement, or supervision. The vertical and horizontal axes then reinforce one another.[40]

5. Horizontal Fragmentation: Artemis, ILRS, and Rival Lunar Orders

Coalition-based projects now shape lunar governance alongside the OST. Their legal importance lies in the way they organise cooperation around open treaty principles without amending the Treaty. Article III remains central: coalition projects are not autonomous legal orders, and their practices remain subject to international law, including the UN Charter.

The Artemis Accords were adopted in 2020 in connection with the National Aeronautics and Space Administration (NASA) Artemis programme. They are political commitments rather than treaties. They affirm consistency with the OST and related instruments while setting out principles on transparency, interoperability, resource use, deconfliction, safety zones, and debris.[41] Their legal effect is indirect. They do not amend the OST or create a universal code, but they give one set of interpretations an institutional home.[42] Repeated implementation and reliance by partners may give that practice normative weight, especially where it becomes embedded in mission design, procurement, interoperability requirements, or licensing.

Section 10 is the clearest example. It treats space-resource extraction as compatible with the OST and states that extraction does not inherently constitute national appropriation under Article II.[43] That is an interpretive claim, not a treaty amendment and not subsequent practice establishing the agreement of all OST parties. Its importance lies in giving a contested reading of Article II a coalition setting.

Section 11 performs a similar function for due regard. Article IX requires due regard and consultation but does not prescribe a spatial technique for deconfliction. The Accords supply such a technique through safety zones. Whether that tech-

40 OST, above n 1, Article VI; Artemis Accords, above n 8, Sections 10 and 11; European Commission, COM(2025) 335 final, above n 35, Articles 20, 21, 62, 64, 69, 70, 94, 97, and 105; Schematic Overview of National Regulatory Frameworks for Space Activities, above n 32.

41 Artemis Accords, above n 8, Preamble and Sections 1-13; NASA, The Artemis Accords, online at the site NASA.

42 Deplano, above n 4, pp. 799-803 and 816-819.

43 Artemis Accords, above n 8, Section 10.

nique remains coordination or begins to affect access and priority is taken up in the next section.[44]

The ILRS works differently. The ILRS Guide for Partnership, issued by the China National Space Administration and Roscosmos in 2021, presents the ILRS as a scientific and infrastructural programme for lunar surface or orbital activity, with the prospect of later human presence. It is not an Artemis-style statement of principles. Its importance lies in the legal expectations that may be produced through infrastructure, mission sequencing, and partnership design. Site selection, technical compatibility, data practices, and resource-related experimentation may shape how participants understand access and long-term presence without presenting those expectations as treaty rules.[45]

The comparison is necessarily asymmetrical. Artemis orders through political commitments, interoperability, and deconfliction; the ILRS orders through infrastructure, mission sequencing, partnership categories, and data practices. Both may shape expectations about resource use, deconfliction, and long-term presence while COPUOS remains the principal universal forum. This matters for emerging, non-aligned, and non-core space actors. Participation may provide access to missions, technology, data, and diplomatic visibility, but it may also require alignment with a technical ecosystem designed elsewhere. A TWAIL- and SWAIL-sensitive reading, extended cautiously to non-core, semi-peripheral, and post-socialist positionalities, strengthens this case: unequal participation in standard-setting, infrastructure design, and mission access may later be presented as neutral, technical, or responsible conduct.[46]

44 OST, above n 1, Article IX; Artemis Accords, above n 8, Section 11.

45 China National Space Administration and State Space Corporation Roscosmos, *International Lunar Research Station: Guide for Partnership*, above n 8.

46 Riddervold and Newsome, above n 5; Cooper, Parlar Dal, and Dipama, above n 6. For Third World Approaches to International Law (TWAIL) as a critical approach to hierarchy and unequal participation in international legal ordering, see Makau Mutua, 'What is TWAIL?', *Proceedings of the 94th Annual Meeting of the American Society of International Law*, 2000, pp. 31-48; B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', *International Community Law Review*, vol. 8, 2006, pp. 3-27; James Thuo Gathii, 'TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography', Trade, Law and Development, vol. 3, no. 1, 2011, pp. 26-48; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge 2012. On Second World Approaches to International Law (SWAIL), see Marek J. Wasiński and Patryk I. Labuda, 'Special Issue Editorial: Second World Approaches to International Law', *International Community Law Review*, 14 May 2026.

Artemis and the ILRS do not destroy the OST order. Their effect is subtler, and thus potentially more dangerous: they relocate interpretive authority into competing operational architectures while the Treaty remains formally unchanged. Space resources and safety zones are where that relocation begins to affect access, priority, and control.

6. Space Resources, Safety Zones, and De Facto Appropriation

Space resources bring the chapter's main forms of fragmentation together. Article II prohibits national appropriation of outer space, including the Moon and other celestial bodies, "by claim of sovereignty, by means of use or occupation, or by any other means". The rule clearly excludes sovereignty over celestial territory, but it does not fully answer questions of title, transfer, or commercial use once resources have been removed.[47] That ambiguity now has operational consequences. Domestic resource laws, mission design, and safety practices increasingly shape the applied content of a rule drafted before sustained lunar presence, *in situ* resource utilization, and commercial extraction became realistic objectives.

The Moon Agreement offers the clearest multilateral counter-model. Article 11 declares the Moon and its natural resources to be the "common heritage of mankind", excludes property in the surface, subsurface, and natural resources in place, and requires an international regime to govern exploitation when such exploitation is about to become feasible. Limited participation prevents it from functioning as the dominant *lex lata* framework for contemporary resource governance.[48] It remains important as a counterfactual legal path. The Agreement shows that reliance on domestic statutes, coalition commitments, and technical standards is a political and institutional outcome, not a doctrinal inevitability.

National resource laws move in a different direction. The United States Commercial Space Launch Competitiveness Act, now reflected in Title 51 of the United States Code, provides that a United States citizen engaged in commercial recovery of an asteroid resource or space resource is entitled to possess, own, transport, use, and sell the resource obtained, in accordance with applicable law and the international obligations of the United States. Luxembourg's 2017 law provides

47 Fabio Tronchetti, *The Exploitation of Natural Resources of the Moon and Other Celestial Bodies: A Proposal for a Legal Regime*, Martinus Nijhoff, Leiden 2009, pp. 215-240; Deplano, above n 4, pp. 804-808.

48 Moon Agreement, above n 17, Article 11; Deplano, above n 4, pp. 812-815; Manoli, above n 4.

that space resources are capable of appropriation and establishes an authorisation framework for exploration and use.[49] These laws do not claim sovereignty over celestial bodies. Their legal technique is to detach ownership of extracted resources from sovereignty over the place from which those resources are removed. Their external significance lies in normalising the separation between territorial non-appropriation and ownership of extracted material.

The Artemis Accords adopt the same interpretive line in coalition form. Section 10 affirms that space-resource extraction should comply with the OST and does not inherently constitute national appropriation under Article II.[50] The proposition should be treated cautiously. The Accords do not constitute subsequent practice establishing the agreement of the parties under Article 31(3)(b) VCLT, nor do they amend the Treaty. They may operate as supplementary interpretive material under Article 32 and may contribute to expectation formation. Only practice supported by general practice accepted as law could become relevant to custom.[51]

Safety zones intensify the resource problem because they translate Article IX into spatial practice. Section 11 of the Artemis Accords links due regard to notification and coordination through zones defined by the risk of harmful interference.[52] The strongest defence is that safety zones are coordination tools, not appropriation devices: they can promote information-sharing, protect operators and make due regard operational. Article III nevertheless prevents such techniques from becoming self-contained coalition rules.

The legal difficulty is when coordination begins to produce control. If safety zones are temporary, necessary, technically justified, and open to scrutiny, they may implement due regard. If they become durable perimeters around scarce sites or infrastructure, they begin to perform a different function. Extensive, indefinite, or renewable zones may produce exclusionary advantage without a sovereignty

49 United States, Commercial Space Launch Competitiveness Act, Public Law 114-90, 25 November 2015; United States Code, Title 51, § 51303; Luxembourg, Loi du 20 juillet 2017 sur l'exploration et l'utilisation des ressources de l'espace, Mémorial A, no. 674, 28 July 2017, Articles 1 and 2.

50 Artemis Accords, above n 8, Section 10; OST, above n 1, Article II.

51 VCLT, above n 21, Articles 31(3)(b) and 32; Deplano, above n 4, pp. 804-808; International Law Commission, Draft Conclusions on Identification of Customary International Law, above n 25, Conclusions 2, 9, and 11.

52 OST, above n 1, Article IX; Artemis Accords, above n 8, Section 11; Alexander Q. Gilbert, 'Implementing Safety Zones for Lunar Activities under the Artemis Accords', *Journal of Space Safety Engineering*, vol. 10, no. 1, 2023, pp. 103-111.

claim, leaving Article II formally intact while weakening the common-interest function of non-appropriation.

The risk is acute on the Moon because valuable operational sites are unevenly distributed. Water ice and favourable illumination, coupled with communications access or nearby infrastructure, may concentrate strategic value in a small number of sites. Where scarcity combines with safety-based deconfliction, the distinction between coordination and priority access becomes unstable. The legal test should ask whether safety zones are transparent, temporary, technically justified, and open to multilateral review. Those safeguards prevent deconfliction from becoming the procedural vocabulary of enclosure.

COPUOS matters here for precisely this reason. The Working Group on Legal Aspects of Space Resource Activities keeps resource governance within a forum where non-Artemis, non-ILRS, and emerging space actors can contest the meaning of lawful extraction, benefit-sharing, due regard, and non-appropriation.[53] The problem is not which mode of legal development should prevail, but how domestic statutes and coalition instruments interact with technical standards and multilateral principles. COPUOS cannot resolve every conflict, but it can keep resource governance connected to the universal legitimacy of the OST framework.

Global-commons scholarship clarifies the stakes. Outer space belongs to a family of domains in which formal sovereignty is limited, or fully absent, and access is framed through common-interest language.[54] Technological accessibility changes the function of such domains. They cease to be symbolic spaces of common benefit and become sites of extraction and strategic positioning, structured by infrastructure and logistics. Space law must therefore address control practices as well as sovereignty claims. Domestic law, coalition practice, and technical standards should not become substitutes for the Treaty's common-interest function.

7. Soft Law, Private Authority, and Norm Entrepreneurship

The post-global space order is normatively dense even where formal treaty-mak-

53 United Nations Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, Working Group on Legal Aspects of Space Resource Activities, Updated Draft Set of Recommended Principles for Space Resource Activities by the Chair and the Vice-Chair of the Working Group on Legal Aspects of Space Resource Activities, 28 April 2026, online at the site UNOOSA.

54 Riddervold and Newsome, above n 5.

ing is slow. COPUOS guidelines, political commitments, licensing conditions, and industry practice now create practical benchmarks for responsible conduct without binding all States as treaties.[55] That flexibility is useful in a technically complex field where operational conditions change faster than consensus can form.[56] Soft law can reduce paralysis by creating provisional standards for debris mitigation, cyber-resilience, interoperability, and mission safety. Its legal force, however, lies in expectation formation and later incorporation, not in equivalence with treaty law.

Article III supplies the legal limit. Activities in outer space must be carried out in accordance with international law, including the UN Charter, so soft law and technical standards cannot operate as autonomous substitutes for the OST or general international law. Their relevance depends on use. COPUOS guidelines, technical standards, industry practices, procurement conditions, and Artemis-type commitments may guide the implementation of Articles VI and IX, support claims about State practice or *opinio juris* where the requirements for custom are met, inform treaty interpretation, or become binding domestically once incorporated into licences, contracts, procurement rules, or legislation.[57] They are influential, but influence is not formal source status.

The strongest defence of this practice is pragmatic: technical standards are often indispensable where treaty negotiation cannot keep pace with engineering, cyber-resilience, debris mitigation, or interoperability. The objection is not to expertise as such. It is to standards becoming *de facto* compulsory through licensing, procurement, insurance, or market access without adequate transparency or multilateral contestation. A technical standard may embody the preferences of a dominant coalition; a licensing condition may convert industry practice into an administrative benchmark; a procurement or insurance requirement may make compliance commercially necessary even where no treaty requires it. The risk is asymmetrical norm capture: formally non-binding standards may become *de facto*

55 United Nations Committee on the Peaceful Uses of Outer Space, Guidelines for the Long-term Sustainability of Outer Space Activities, above n 8; United Nations Office for Outer Space Affairs, Space Debris Mitigation Guidelines, above n 30; United Nations Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, Working Group on Legal Aspects of Space Resource Activities, above n 53; Artemis Accords, above n 8.

56 Abbott and Snidal, above n 7; Pauwelyn, Wessel, and Wouters, above n 7; Cooper, Parlar Dal, and Dipama, above n 6.

57 Statute of the International Court of Justice, above n 24, Article 38(1); International Law Commission, Draft Conclusions on Identification of Customary International Law, above n 25, Conclusions 2, 4, 6, 9, 10, 11, and 12; Abbott and Snidal, above n 7, pp. 421-456; Pauwelyn, Wessel, and Wouters, above n 7, pp. 733-763.

compulsory before they have been tested in an inclusive forum.

Norm entrepreneurship explains how this occurs. In space governance, the promotion and internalisation of standards of appropriate behaviour is not confined to States.[58] Agencies, operators, insurers, standards bodies, and mission partners help define what responsible conduct requires through interoperability requirements, debris-mitigation practice, cyber-resilience standards, safety-zone procedures, contracts, technical cooperation, and procurement. Article VI formally keeps private activity within a State-responsibility framework: private operators are not internationally responsible under Article VI in the same way as States Parties, but their activities trigger State responsibility and supervisory obligations on the international plane.[59] The difficulty is that private actors may shape the factual and technical environment in which public authorities later interpret due regard, safety, supervision, and acceptable resource activity.

This matters wherever private infrastructure shapes access, resource use, or regulatory supervision. A company that designs mission architecture, supplies communications infrastructure, provides launch capacity, or defines interoperability requirements may influence how States later assess due regard, safety, responsible conduct, or acceptable resource activity. That influence is not necessarily unlawful, nor is it neutral. Where private capacity becomes indispensable to public missions, Article VI performs a double role: it keeps private activity within State responsibility while making regulators dependent on the technical practices they are expected to supervise.

The legal response is procedural discipline. Technical governance requires specialised knowledge, and COPUOS guidelines can give operational content to due regard, sustainability, and cooperation while preserving an inclusive multilateral forum. Where soft law becomes a dominant vehicle of norm production, transparency, participation, review, and multilateral contestation are necessary safeguards. Soft law does not replace the OST, but it increasingly shapes how States and operators apply it. Without procedural discipline, competitive pluralism can harden into asymmetrical norm capture.

8. Treaty Exit and Negative Norm Entrepreneurship

58 Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization*, vol. 52, no. 4, 1998, pp. 887-917.

59 OST, above n 1, Article VI; von der Dunk, above n 3; Manoli, above n 4, pp. 100-113.

Treaty exit is the limit case of fragmentation. Article XVI permits a State Party to withdraw from the OST by written notification to the Depositary Governments, with withdrawal taking effect one year after receipt.[60] The question is not whether exit would destroy space law. It would not. The question is what withdrawal by a leading spacefaring State would do to a regime whose practical meaning already depends on coalition practice, domestic licensing, technical standards, private infrastructure, and the conduct of States that remain parties.

Withdrawal would alter the treaty basis of obligation prospectively, but it would not erase general international law. A withdrawing State would no longer be bound by Article III as a treaty provision, but it would remain bound by the UN Charter and any applicable customary rules. Articles 43 and 70 of the VCLT reinforce that point: withdrawal does not impair obligations binding independently of the treaty, nor does it affect rights, obligations, or legal situations created through prior execution unless the treaty or parties provide otherwise.[61]

The most consequential hypothetical is withdrawal by the United States. The example is structural rather than polemical. The United States combines advanced space capabilities, a powerful private sector and leadership of the Artemis Accords. It also has a record of using withdrawal and institutional review as tools of strategic repositioning. Recent examples concerning climate commitments, the World Health Organization, and United Nations bodies are relevant as political context.[62] Earlier examples in security law, including the Anti-Ballistic Missile Treaty, the Intermediate-Range Nuclear Forces Treaty, and the Treaty on Open Skies, show the same technique in a strategic register.[63] These examples do not prove that OST

60 OST, above n 1, Article XVI.

61 VCLT, above n 21, Articles 43 and 70; International Law Commission, Draft Conclusions on Identification of Customary International Law, above n 25, Conclusions 2, 11, and 12.

62 White House, Putting America First in International Environmental Agreements, 20 January 2025, online at the site White House; White House, Withdrawing the United States from the World Health Organization, 20 January 2025, online at the site White House; White House, Withdrawing the United States from and Ending Funding to Certain United Nations Organizations and Reviewing United States Support to All International Organizations, 4 February 2025, online at the site White House. These sources are used as political context rather than as legal authority.

63 Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, signed 26 May 1972, United States withdrawal effective 13 June 2002; Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, signed 8 December 1987, United States with-

withdrawal is likely. They show only that exit is a recognisable legal-political technique in United States practice.

A United States administration could frame the OST as outdated, insufficiently protective of commercial freedom, too restrictive of resource activity, or poorly adapted to military competition. Such arguments would be contestable, but they would fit a recognisable grammar of exit: the treaty is said to have become obsolete; competitors are said to exploit it; continued membership is framed as unilateral restraint; domestic, bilateral, or coalition arrangements are presented as more effective alternatives. In space law, that grammar could be directed at resources, safety zones, counterspace threats, or lunar infrastructure.

A withdrawal by a leading Artemis State would be different from ordinary treaty exit. The United States combines party status with authorship of a coalition instrument that presents itself as reinforcing commitment to the OST, the Registration Convention, the Rescue Agreement, and related norms of responsible behaviour.[64] The Artemis Accords matter because they guide practice without amending the Treaty. A State could leave the OST while continuing to shape the conduct of States that remain parties through Artemis cooperation, technical standards, procurement, licensing, mission architecture, and access to infrastructure. Formal withdrawal need not entail loss of practical normative influence.

This produces what is better described as proxy interpretive pressure. Under Article 31(3)(b) of the VCLT, subsequent practice in the application of a treaty may be relevant where it establishes the agreement of the parties regarding interpretation.[65] A withdrawing State would no longer contribute to such practice as a party applying the OST. Its conduct would lose that formal interpretive character. Its influence would not necessarily disappear. If Artemis partners that remain parties adapt their national laws, licensing standards, safety-zone practices, resource policies, or deconfliction procedures around a United States-led architecture, their conduct may still affect the interpretive environment of the Treaty, as well as the later crystallisation of custom. The legal source would be the conduct of those remaining parties; the operational pressure could come from outside the Treaty.

Treaty exit may also operate as negative norm entrepreneurship, in a limited

drawal effective 2 August 2019; Treaty on Open Skies, signed 24 March 1992, United States withdrawal effective 22 November 2020.

64 Artemis Accords, above n 8, Preamble and Sections 1-13; Registration Convention, above n 24; Rescue Agreement, above n 24.

65 VCLT, above n 21, Article 31(3)(b); Deplano, above n 4, pp. 804-808.

sense. Repudiation does not create law by itself. A major State may nevertheless seek to alter the normative environment by rejecting an existing framework and forcing other actors to organise their legal and operational positions around that rejection.[66] Withdrawal by a major spacefaring State would become legally relevant through the responses it provokes: allies might preserve cooperation through Artemis or bilateral arrangements; rivals might use the withdrawal to justify counter-interpretations; emerging space actors might face sharper pressure to choose between treaty fidelity and access to dominant operational ecosystems.

After withdrawal, law would still structure the field. Its content would depend on the ordinary sources of international law. Some OST principles may have claims to customary status, but that claim cannot be assumed from treaty text alone. It requires evidence of general practice accepted as law. The ICJ's formulation in the *North Sea Continental Shelf* cases remains the orthodox starting point: practice must be sufficiently extensive and virtually uniform, and must be accompanied by *opinio juris*. *Nicaragua* confirms that customary obligations may exist independently of treaty obligations, even where treaty and custom have similar content.[67] Non-appropriation and free exploration and use may have stronger customary claims than the detailed institutional requirements of Article VI authorisation and continuing supervision or Article IX consultation. The prior-consultation requirement in Article IX, in particular, has a weaker claim to survival outside the Treaty as a detailed procedural obligation unless supported by separate evidence of custom. A withdrawing State might accept a thin customary core while rejecting the broader treaty framework. The result would be residual universalism: treaty law among remaining parties, contested customary claims against the withdrawing State, domestic authorisation, coalition standards, and private operational practice.

No formal cascade of withdrawals is needed for exit to affect the regime. Rivals could remain within the OST while claiming that the withdrawing State has forfeited legal authority to criticise their conduct. Allies could remain parties while adapting their practice to preserve access to missions, markets, infrastructure, and technical systems. The threat of exit alone can become bargaining power in

66 Finnemore and Sikkink, above n 58; Cooper, Parlar Dal, and Dipama, above n 6.

67 Statute of the International Court of Justice, above n 24, Article 38(1)(b); International Law Commission, Draft Conclusions on Identification of Customary International Law, above n 25, Conclusions 2, 9, and 11; North Sea Continental Shelf, above n 25, paras 74-77; Military and Paramilitary Activities in and against Nicaragua, above n 25, paras 183-186; OST, above n 1, Articles I, II, VI, IX, and XVI; Tronchetti, above n 48, pp. 215-240; von der Dunk, above n 3.

COPUOS, in Artemis implementation, in resource-governance negotiations, and in national licensing practice.

Treaty exit remains a limit case, not the chapter's centre of gravity. Vertical, horizontal, and functional fragmentation presuppose the OST as a common frame. Exit tests whether that frame can survive strategic abandonment by a leading actor that retains practical influence from outside. The legal challenge is not to deny the possibility of withdrawal, but to prevent withdrawal from becoming a means of escaping the common frame while continuing to dominate the practices through which that frame is interpreted.

9. Conclusion: Towards Ordered Pluralism

International space law remains anchored in the OST, but the Treaty now operates through a more dispersed legal environment. Articles I, II, III, VI, IX, and XVI still structure the field: they preserve free use, non-appropriation, due regard, State responsibility, systemic integration, and the possibility of withdrawal. Yet the application of those principles increasingly occurs through national licensing, regional regulation, coalition practice, technical standards, private infrastructure, and, at the limit, post-treaty influence. This chapter has described that condition as competitive legal pluralism, which portrays a redistribution of authority away from universal treaty-making and towards multiple sites of interpretation and implementation. The legal task is to ensure that plurality remains a mode of adaptation rather than a route to enclosure.

Ordered pluralism is the normative response. It accepts that space governance will remain plural, technical, and geopolitically contested, but insists that each site of rule-production remain disciplined by the OST's common-interest logic. It does not seek to restore a universalism detached from practice. It seeks to preserve the legal function of universalism within a fragmented environment.

The first safeguard is transparency in implementation. States should make authorisation and continuing supervision more visible through clearer reporting to COPUOS on licensing criteria, supervisory methods, transfer of control, end-of-life requirements, debris mitigation, resilience, and sustainability conditions. The Legal Subcommittee could serve as a clearinghouse for national space laws, licensing models, and implementation reports, building on existing UNOOSA databases and recommendations adopted by the United Nations General Assembly

(UNGA) on national legislation.[68]

The second safeguard is anti-enclosure discipline. Resource activities and safety zones should be notified, technically justified, temporary, necessary, non-discriminatory, and compatible with free access to celestial bodies. The Working Group on Legal Aspects of Space Resource Activities could record and compare domestic resource laws, coalition practices, safety-zone notifications, and benefit-sharing claims without becoming a licensing authority.[69]

The third safeguard concerns standards and private authority. Technical standards should remain open to review and contestation when they enter licences, procurement systems, insurance conditions, or supervisory practice. Private expertise is necessary, but standards incorporated into licences or procurement systems become instruments of governance. Their authority should not depend only on the market position or technical capacity of the actors that designed them.

The fourth safeguard concerns treaty exit. COPUOS cannot prevent withdrawal under Article XVI. It can reduce the normative effects of withdrawal by preserving a public record of treaty practice, resource claims, deconfliction measures, and objections by remaining States Parties. Exit should not allow post-treaty influence to become a substitute for universal legal authority.

Ordered pluralism requires source discipline as well as institutional discipline. Article 31(3)(c) of the VCLT requires relevant rules of international law applicable between the parties to be taken into account together with the context. Article III of the OST gives that discipline a specific space-law foundation by requiring space activities to be conducted in accordance with international law, including the UN Charter.[70] No OST provision should be read in isolation from the Treaty's

68 United Nations General Assembly, Resolution 68/74, Recommendations on National Legislation Relevant to the Peaceful Exploration and Use of Outer Space, UN Doc. A/RES/68/74, 11 December 2013; United Nations Office for Outer Space Affairs, National Space Law Database, above n 32; United Nations Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, Schematic Overview of National Regulatory Frameworks, above n 32.

69 United Nations Committee on the Peaceful Uses of Outer Space, Legal Subcommittee, Working Group on Legal Aspects of Space Resource Activities, above n 53; United Nations Committee on the Peaceful Uses of Outer Space, Guidelines for the Long-term Sustainability of Outer Space Activities, above n 8.

70 VCLT, above n 21, Article 31(3)(c); International Law Commission, Fragmentation of International Law, above n 6, paras 410-480; OST, above n 1, Articles I, II, III, VI, IX, and XVI.

common-interest logic or from general international law. Article II should be interpreted alongside Article I, so that resource use does not hollow out free access and benefit for all countries. Article IX should preserve due regard as a reciprocal and inclusive standard, not as a vocabulary for unilateral risk management. Article VI should remain a mechanism of public responsibility over private activity, not a formal licensing checkpoint. Article XVI should be read as a withdrawal clause whose exercise does not erase customary law, general international law, or the continuing legal interests of other States.

The post-global transformation of space law has two faces. It can make the OST more adaptable by allowing implementation through domestic, regional, technical, and soft-law processes. It can also weaken the Treaty's common-interest function by allowing power to migrate into sites with fewer safeguards. Repeating the universalist formula is no longer enough. The task is to preserve its legal function in a fragmented environment: to order competitive pluralism so that adaptation does not become enclosure, and innovation does not quietly displace the common interest.

Ubi finitur armorum velocitas. Hypersonic weapons and international law of armed conflict

by Davide Ragnolini

The premium on haste […] is undoubtedly […]
the greatest source of danger that peace will explode
into all-out war.

(Thomas Schelling, 1966, *Arms and Influence*)

The UN Secretary-General's report on the activities of the Advisory Board on Disarmament Matters, dated July 2016, recommended that Member States, and in particular the United Nations Office for Disarmament Affairs (UNODA), undertake a study on "the development of long-range conventional weapons, including those utilizing hypersonic technologies" (23e),[1] i.e. weapons that could "upset strategic stability" and trigger a "new arms race" (14).[2]

In 2019, the UNODA confirmed the existence of such a "race" to "develop new long-range delivery systems, namely hypersonic boost-and-glide systems",[3] warning that such systems would pose "an additional challenge to the current architecture of arms control and disarmament agreements";[4] finally, it concluded that "many States" had shown "little or no awareness of the technologies and issues relating to HGVs [hypersonic glide vehicles]".[5]

1 United Nations General Assembly, *Review of the Implementation of the Recommendations and Decisions Adopted by the General Assembly at Its Tenth Special Session: Work of the Advisory Board on Disarmament Matters. Report of the Secretary-General (A/71/176)*. United Nations, New York 2016 p. 10.

2 United Nations General Assembly (2016) *A/71/176* p. 7.

3 John Borrie, Amy Dowler, Pavel Podvig, *Hypersonic Weapons: A Challenge and Opportunity for Strategic Arms Control*. United Nations Office for Disarmament Affairs – United Nations Institute for Disarmament Research, New York 2019 p. V.

4 John Borrie, Amy Dowler, Pavel Podvig *Hypersonic Weapons* p. 22.

5 John Borrie, Amy Dowler, Pavel Podvig *Hypersonic Weapons* p. 35.

In “Section E” (Space and Aerospace Technologies) of the most recent UN report entitled *Current developments in science and technology and their potential impact on international security and disarmament efforts*, published in July 2024, the UNODA devoted two specific paragraphs to hypersonic glide vehicles (41) and hypersonic propulsion vehicles (42), namely – respectively – “warheads capable of gliding and manoeuvring at hypersonic speeds over long distances within the atmosphere” and “hypersonic cruise missiles better able to evade air defence and missile defence systems”.[6] These are weapon systems capable of generating an explosive effect equivalent to 5–10 tonnes of TNT even without a warhead, which can be armed with nuclear warheads and can strike almost any location on Earth within 30 minutes.[7]

In the context of a decentralised and anarchic world order, which encourages a growing pursuit of missile capabilities by different state actors,[8] the future of these systems will depend not only on the technical challenges involved in their development, but also on the ability to manage the geopolitical risks associated with their deployment. The speed and unpredictability of hypersonic weapons may prompt states to adopt more aggressive behaviour or take pre-emptive action. Consequently, the strategic implications of hypersonic weapons are profound, capable of influencing the balance of power and enabling global strike capabilities.[9]

1. *Ontology of hypersonic weapons*

According to the *HPCR Manual* on international law applicable to air and missile warfare, ‘missiles’ are defined as “unmanned, self-propelled weapons – launched from aircraft, warships or ground-based launchers – which are either guided or ballistic” (z).[10] More generally, missiles fall within the category of

6 United Nations General Assembly, *Role of Science and Technology in the Context of International Security and Disarmament: Current Developments in Science and Technology and Their Potential Impact on International Security and Disarmament Efforts*. *Report of the Secretary-General (A/79/224)*. United Nations, New York 2024 p. 9.

7 Piotr Malinowski, ‘Hypersonic Weapons as a New Challenge for the Anti-Aircraft Defence Command and Control System’ *Safety & Defence* 6 (2020) p. 91.

8 Debalina Ghoshal, *Role of Ballistic and Cruise Missiles in International Security*. Springer International Publishing – Palgrave Macmillan, Cham 2024 p. 4.

9 Richard Skiba, *Mach 5 and Beyond: Hypersonic Warfare, Missile Technology and Global Strategic Implications*. After Midnight Publishing, London 2024 p. 38.

10 Harvard Program on Humanitarian Policy and Conflict Research, *HPCR Manual on In-*

'means of warfare', that is, "weapons, weapon systems or platforms used for offensive purposes" (t).[11] Whilst all "missiles" fall within the category of "means of warfare", certainly not every means of warfare is a missile.

Some vehicles, in fact, are neither self-propelled nor armed, but may serve to carry munitions. In addition to *the* missile booster and its payload, some missile systems may also include a re-entry vehicle, that is, a terminal delivery vehicle or, to use the DoD's terminology, a "delivery package"[12] for the warhead. In this case, it is not a 'missile' but a 'platform' which, if armed, falls into the category of 'munition', as it forms part of the "integral equipment directly necessary to generate the force that launches the munitions".[13] Therefore, individual components of missile systems can be classified simultaneously under broader categories ("vehicles") or narrower ones ("munitions"), depending on the function they perform.

In general, hypersonic weapons may be missiles (guided or semi-guided) and/or means of warfare (platforms), characterised by hypersonic speeds, i.e. equal to or greater than Mach 5, or approximately 6,174 km/h, equivalent to five times the speed of sound.[14] This property, however, is a necessary but not sufficient condition for the definition of a "hypersonic weapon".

Compared with traditional missile systems, hypersonic weapons are characterised by a number of distinctive features that contribute to their strategic advantage in terms of speed, manoeuvrability, range and survivability.[15] The hypersonic nature of a weapon is not determined solely by its speed of movement, since even the V-2 ballistic missiles were capable of reaching Mach 5 during

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ternational Law Applicable to Air and Missile Warfare. Harvard University, Cambridge (MA) 2009 p. XXV.

11 *HPCR Manual on International Law Applicable to Air and Missile Warfare* p. XXIV.

12 U.S. Department of Defense, *MIL-STD-881F: Work Breakdown Structures for Defense Materiel Items*. *Department of Defense*, Washington DC 2022 p. 80.

13 *HPCR Manual on International Law Applicable to Air and Missile Warfare* p. 50.

14 The Mach number (Ma or M) is a physical unit of measurement that refers to the speed of an object travelling through the air relative to the speed of sound. From so-called transonic speeds (from Mach 0.8 onwards), an aircraft is subject to physical phenomena that do not occur at lower speeds. At around Mach 5, the airflow acquires certain very important characteristics that are absent at lower speeds (discussed in more detail below), hence the specific term 'hypersonic flow'. Consequently, the term 'hypersonic' refers, in principle, to any vehicle travelling through the atmosphere at a speed of Ma 5 or higher.

15 Richard Skiba *Mach 5 and Beyond* p. 9.

their ascent and re-entry phases, much like the X-15 rocket plane.[16] In fact, intercontinental ballistic missiles (ICBMs) were hypersonic 'by design' because their hypersonic speed is a consequence of the physics of ballistic flight,[17] and not a technological choice: only at orbital speeds can they cover intercontinental distances within a reasonable timeframe.

In the literature, a weapon is properly considered 'hypersonic' if it possesses two cumulative attributes, namely a speed exceeding Mach 5 and the ability to manoeuvre, both vertically and horizontally.[18] The idea of using a rocket to launch a re-entry vehicle (RV) capable of gliding over long distances at hypersonic speeds is not particularly original.[19] The origins of hypersonic technology, in fact, date back to the 1930s, but it is only in the last two decades that the capability for reliable and sustained hypersonic flight has produced satisfactory results.[20]

According to some observers, it is precisely "advanced manoeuvrability, range and low-altitude capability that distinguish these technologies from those of existing weapon systems".[21] However, manoeuvrability – just like hypersonic speed – is not *in itself* a technological innovation. Certain forms of exo-atmospheric manoeuvrability were already possible in the past using *Post-Boost Vehicles* (PBVs), which performed mini-manoeuvres outside space using small jet engines. Such manoeuvrability outside the atmosphere, however, is not comparable in terms of effectiveness to that within the atmosphere.

In fact, whilst manoeuvrability is an essential requirement for the survival of a hypersonic weapon during the terminal phase of flight, it is more accurate to identify "endo-atmospheric manoeuvrability"[22] — together with speed and

16 Richard Skiba *Mach 5 and Beyond* p. 168.

17 See David M. Van Wie, 'Hypersonics: Past, Present, and Potential Future' *Johns Hopkins APL Technical Digest* 35 (2021) p. 336; Clayton K. Chun, *Thunder Over the Horizon. From V-2 Rockets to Ballistic Missiles*. Praeger Security International, Westport 2006 p. 4.

18 Richard Skiba *Mach 5 and Beyond* p. 20.

19 James M. Acton, 'Hypersonic Boost-Glide Weapons' *Science & Global Security* 23 (2015) p. 191.

20 Imran Raza, Mehmood Nasir, 'Hypersonic Weapon Systems – A New Wave of Arms Race in the Indian Ocean Region' *Margalla Papers* 27 (2023) p. 529.

21 Ashton Earl, 'An Overview of Global Hypersonic Weapon Technological Advancements with Potential Remediation and Policy Options' *Journal of International Security and Strategic Studies* 6 (2022) pp. 10-11.

22 Kolja Brockmann, Dmitry Stefanovich, *Hypersonic Boost-Glide Systems and Hypersonic*

precision — as the defining characteristics of this category of weaponry.

The way a hypersonic system is guided, and its manoeuvrability, depend on the nature of its propulsion, that is, on its ability to travel under sustained power or solely by kinetic gliding force. According to a traditional classification, a hypersonic vehicle can be divided into two categories: powered, and unpowered.[23] The first category refers to objects equipped with an engine and therefore capable of sustained autonomous flight; the second comprises objects that lack propulsion and move along ballistic trajectories determined primarily by gravity.

Whilst the category of propelled aircraft includes hypersonic cruise missiles – that is, self-propelled projectiles capable of travelling through the atmosphere along variable aerodynamic trajectories – unpropelled aircraft correspond to ballistic missiles, characterised by predefined suborbital parabolic trajectories that traverse both the atmosphere and the exosphere. However, the complexity of modern missile technology does not currently allow for a complete understanding of the full spectrum of nuances in the propulsion and manoeuvring capabilities of missile systems. In a sense, it is precisely hypersonic weapons that have contributed to making the distinction between cruise missiles and ballistic missiles "increasingly artificial",[24] by introducing significant elements of manoeuvrability into their trajectories.

Some self-propelled weapons (e.g. the Russian 3M-22 Tsirkon) with high aerodynamic capability reach hypersonic speeds that defy the conventional subsonic speed associated with cruise missiles; conversely, some hypersonic aircraft (e.g. the Russian Avangard), which use rocket assistance for a parabolic ascent similar to that of ballistic missiles, are capable of ensuring extensive manoeuvrability within the atmosphere during descent. In other words, some cruise missiles are achieving speeds traditionally associated with ballistic weapons, whilst some ballistic delivery systems carry payloads with manoeuvrability similar to that of cruise missiles.

In summary, hypersonic weapons can be 'missiles' – ALBMs or SLBMs, or HCMs – or, more generally, 'vehicles' – HGVs – capable of speeds exceeding the speed of sound and of performing high-precision manoeuvres within the at-

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Cruise Missiles. Stockholm International Peace Research Institute, Stockholm 2022 p. 4.

23 Marek Czajkowski, 'Hypersonic Weapons – Selected Political and Strategic Issues' *Politeja* 79 (2022) p. 39.

24 Steven T. Dunham, Robert S. Wilson, *The Missile Threat: A Taxonomy for Moving Beyond Ballistic*. The Aerospace Corporation, El Segundo (CA) 2020 p. 18.

mosphere. For this reason, these are weapon systems falling within the category of so-called *Hypersonic High-Speed Strike Weapons* (HHSSW), which, since the early 2000s, have been designed to enable global strike capabilities.[25]

These aspects constitute a "qualitatively new" threat compared to traditional ones: the capability for strategic strikes, yet below the nuclear threshold, and the ability to conduct kinetic operations with the same precision as a cruise missile, but without the possibility of defence.[26] In the contemporary political-technological context, the development of such hypersonic weapons forms part of a broader trend towards increasing speed in modern conventional warfare, running parallel to the development of anti-satellite (ASAT) capabilities, cyber technologies and artificial intelligence.[27]

Hypersonic weapons therefore represent a genuine "transformative element" and a "revolutionary force"[28] – or disruptive[29] – within the landscape of contemporary warfare. Their introduction not only redefines the strategic and operational dynamics of modern conflicts but also forms part of a broader process of technological acceleration affecting the military sphere globally.

Consequently, some analysts argue that they could lead to a new arms race, whilst others maintain that they would merely reinforce existing deterrence strategies.[30] The intense competition sparked by hypersonic weapons could al-

25 Manan Kalvinkar, Jacob Kiran, Reddy Prajwal, R. Kruthik, 'Hypersonic high-speed strike weapons: Design, research and development', *Acceleron Aerospace Journal* 3(5) (2024) p. 593.

26 Timothy Wright, 'Hypersonic Missile Proliferation: An Emerging European Problem?' *EU Non-Proliferation and Disarmament Paper* 80 (2022) pp. 17–18.

27 Dean Wilkening, 'Hypersonic Weapons and Strategic Stability' *Survival* 61 (2019) p. 138.

28 Richard Skiba *Mach 5 and Beyond* pp. 8, 217.

29 Attila Tarjáni, 'Hypersonic Weapon Systems as an Indicator of Changes in Concepts and Theories' *AARMS – Academic and Applied Research in Military and Public Management Science* 22 (2023) pp. 91-99.

30 Richard Skiba *Mach 5 and Beyond* p. 232; according to Ivan Oelrich, 'Cool Your Jets: Some Perspective on the Hyping of Hypersonic Weapons' *Bulletin of the Atomic Scientists* 76 (2020), however, the novelty of hypersonic weapons is mitigated by the ability of ballistic weapons to follow low-angle trajectories without the thermal stress experienced by HGVs, by the advantages of terminal manoeuvres, by their low radar cross-section, and by the necessary trade-off between accuracy and destructive power due to the plasma generated by hypersonic speeds; finally, the need for HCMs to maintain high speed is determined more by the technical requirements of the scramjet than by the operational need to evade air defence systems. In conclusion: "hypersonic weapons will offer some new capabilities, but these are not quite so revolutionary as they are often presented" (p.

ready be an indicator of a new development and a hallmark of an arms race. Indeed, the introduction of hypersonic capabilities by one nation may spur other nations to develop similar systems or to strengthen their defences, creating a cycle of action and reaction that is bound to undermine long-term stability.[31]

For other scholars, however, the debate surrounding hypersonic weapons has fuelled a "hype" around the transformative expectations of these systems,[32] leading to an underestimation of elements of continuity with traditional deterrence systems.

In any case, in terms of collective perception – both civilian and military – HGV and HCM systems are emerging as "new symbols of military power".[33] The race to develop hypersonic weapons sees states competing to secure their technological superiority in this domain. According to some US officers, China may be more advanced than the United States in the competitive landscape of hypersonic capabilities,[34] whilst Russia "is widely regarded as the leader in hypersonic weaponry", and its Avangard a 'catalyst' for the global race.[35]

Overall, the role of hypersonic weapons is not limited to that of a "strategic game-changer"[36] in future high-intensity conflicts, but also constitutes a tool suited to current "hybrid scenarios", capable of imparting to the "kinetic domain" that "acceleration of time and pace" made possible by ICT technologies, artificial intelligence and the IoT within the "infosphere".[37]

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43); see, similarly, Tracy Cameron, *Slowing the Hypersonic Arms Race: A Rational Approach to an Emerging Missile Technology*. Union of Concerned Scientists, Cambridge (MA) 2021 p. 9, who states that "in short, hypersonic weapons offer nothing new with respect to the evasion of missile defences"; and Van Loon, Margot, 'Hypersonic Weapons: A Primer' *Defence Technology Programme Brief* 18 (2019) p. 2, who adds: "certainly, hypersonic threats do not necessarily require hypersonic responses, and the logic of deterrence still matters".

31 Richard Skiba *Mach 5 and Beyond* p. 250.

32 Mark Smith, 'Tipping the Scales? The Influence of Hypersonic Weapons on the Military Balance between NATO and Russia' *Air and Space Power Review* 24 (2021) p. 45.

33 Joseph Henrotin, *Hypersonic Weapons: What Are the Challenges for the Armed Forces?* Institut Français des Relations Internationales, Paris 2021 p. 1.

34 Richard Skiba *Mach 5 and Beyond* p. 39.

35 Richard Skiba *Mach 5 and Beyond* pp. 179, 207.

36 Ralph D. Thiele (ed.), *Hybrid Warfare: Future and Technologies*. Springer, Wiesbaden 2021 p. 98.

37 See the speech by the former commander of NATO's Allied Command Transformation, from 2018 to 2021: André Lanata, *Opening Remarks by the Supreme Allied Commander*

2. *Too fast to handle. Hypersonic weapons and LOAC*

As William Boothby has noted, every process of technological sophistication widens the gap between those who have access to new weapons and those who do not,[38] thereby accelerating the transition in the mechanisms and forms through which states fulfil their obligations under the *ius in bello*.[39] Military technologies challenge existing legal provisions, with a direct impact on that branch of the *ius in bello* concerned with developing rules for the use of weapons, namely the law of weapons (*Weapons Law*).[40] In particular, it is the innovative nature of weapons systems that constitutes, in this sense, a source of new legal case law.

To date, current missile defence systems are not optimised to defend against the unique characteristics of hypersonic flight, which can significantly reduce the time available to decision-makers assessing their response options and enable them to evade interception by defence systems.[41] Consequently, hypersonic weapons have been described as "a completely new dimension of aerial threat".[42]

Hypersonic gliding aircraft, for example, rely on aerodynamic forces rather than continuous propulsion to maintain their high speed, and strike the target along a flattened trajectory, rather than via the traditional free fall of ballistic missiles; they can adjust their trajectory mid-flight and change their angle of attack, thereby increasing the warhead's unpredictability and, consequently, its survivability.

There are numerous operational applications. HGVs have been assessed as weapons of unrivalled lethality and versatility,[43] with a wide range of military applications, ranging from their use in preventive strike missions to neutralise high-value targets such as military installations, radar systems or command and

Transformation at the Chiefs of Transformation Conference 2019. NATO, Brussels 2019.

38 William H. Boothby, *Conflict Law. The Influence of New Weapons Technology. Human Rights and Emerging Actors*. Springer, The Hague 2014 p. 460.

39 William H. Boothby *Conflict Law* p. 193.

40 William H. Boothby, *Weapons and the Law of Armed Conflict*. Oxford University Press, Oxford 2016 pp. 3-4.

41 Congressional Research Service, *Hypersonic Weapons: Background and Issues for Congress. CRS Report R45811*. Library of Congress, Washington DC 2020 p. 3.

42 Piotr Malinowski 'Hypersonic Weapons as a New Challenge for the Anti-Aircraft Defence Command and Control System' p. 91.

43 Richard Skiba *Mach 5 and Beyond* p. 127.

control centres;[44] or to destroy or incapacitate key enemy assets.[45]

In particular, hypersonic weapons can be used to strike high-value targets such as aircraft carriers, missile defence systems, critical infrastructure or communications networks; they create an operational environment in which reaction times are drastically reduced, with the potential to escalate the conflict before diplomatic or defensive measures are activated;[46] furthermore, they can serve as a powerful means of overcoming Anti-Access/Area Denial defences,[47] or even pave the way for large-scale operations involving the use of other types of missiles or air strikes.[48]

These are use cases involving the selective deployment of these weapon systems, focused on specific high-value or time-sensitive missions.[49] This implies that such weapons are not designed for mass deployment, but as precision instruments, to be used only in contexts where the tactical or deterrent advantage outweighs the cost and complexity of their use.

However, the high economic and operational costs do not preclude the possible use of hypersonic technology even by smaller states, as an essential element of an asymmetric warfare strategy, capable of levelling the playing field against adversaries with larger arsenals.[50]

It is precisely hypersonic speed that endows aircraft with immense kinetic energy capable of inflicting severe structural damage on a target from a distant engagement point, enabling the destruction of protected and/or time-critical targets through impact energy alone.[51] These characteristics enable the penetration of infrastructure and passive defences, as well as long-range strike capability (*stand-off capability*), thereby eliminating the distinction between the front line and the rear on the battlefield; finally, they enable preventive counter-force ac-

44 Richard Skiba *Mach 5 and Beyond* p. 42.

45 Richard Skiba *Mach 5 and Beyond* p. 47.

46 Richard Skiba *Mach 5 and Beyond* p. 126.

47 Andrew F. Krepinevich, *The Origins of Victory. How Disruptive Military Innovation Determines the Fates of Great Powers*. Yale University Press, New Haven-London 2023, p. 128.

48 Richard Skiba *Mach 5 and Beyond* p. 231.

49 Richard Skiba *Mach 5 and Beyond* p. 230.

50 Richard Skiba *Mach 5 and Beyond* p. 434.

51 Romică Cernat, 'The Potential of Hypersonic Weapons and the Great Military Powers Strategy regarding their Production – Case Study' *Romanian Military Thinking* 4 (2021) p. 235.

tions to be conducted from a remote operational area: "in a regional context – as two Pakistani scholars have noted – these weapons are used primarily in an offensive manner to paralyse the adversary's command and control infrastructure before the enemy detects them and decides to take aggressive action".[52]

Last but not least, they can also be used to "gain a strategic advantage through deterrence by denial", with the effect of disabling an adversary's nuclear launch platforms, early warning systems or command and control (C2) beyond the traditional attack/retaliation dynamic.[53]

The emergence of hypersonic missile technology has posed many critical challenges to global defence systems, including exoatmospheric and endoatmospheric interceptors, as well as short-range air defence systems for the terminal phase. At the exoatmospheric level, for example, the vehicles are out of reach of current interceptor systems, whilst at the endo-atmospheric level, the systems, by their very nature, defend only a small area compared to the potential glide range.[54] In other words, "[hypersonic] weapons fly too high and too fast for endo-interceptors and too low for exo-interceptors".[55]

Overall, taken together, these potential operations have the capacity not only to alter the tactical and strategic landscape of contemporary warfare,[56] but also to complicate the legal framework of international law relating to armed conflict (LOAC).

The content of the LOAC norms is the result of a compromise between two opposing principles: the principle of humanity and the principle of *necessitas belli*.[57] *The United States Navy Manual on the Law of Naval Warfare* (1959) reaffirms and reformulates these two principles – one negative and one positive – as follows: military necessity – which permits a belligerent to apply only that degree and type of regulated force, not otherwise prohibited by the laws of war, necessary for the partial or total subjugation of the enemy with the least possible

52 Imran Raza, Mehmood Nasir, 'Hypersonic Weapon Systems – A New Wave of Arms Race in the Indian Ocean Region' pp. 33–34.

53 Nancy Teeple, 'Offensive Weapons and the Future of Nuclear Arms Control' *Canadian Journal of European and Russian Studies* 14 (2020) p. 82.

54 Richard Skiba *Mach 5 and Beyond* p. 212.

55 James Kraska, Raul Pedrozo, *Disruptive Technology and the Law of Naval Warfare*. Oxford University Press, New York 2022, p. 219.

56 Manan Kalvinkar, Jacob Kiran, Reddy Prajwal, R. Kruthik 'Hypersonic high-speed strike weapons: Design, research and development' p. 596.

57 See the Preamble to the *Hague Convention IV*, 1907.

expenditure of time, lives and material resources; humanity, which prohibits the use of any kind or degree of force not necessary for the purposes of war, that is, for the partial or complete subjugation of the enemy with the least possible expenditure of time, lives and material resources; and chivalry, which prohibits the use of dishonourable methods of warfare.[58]

The principle of military necessity cannot, however, be used to undermine the application of the protective rules which have been regarded as a requirement of the LOAC itself. The LOAC is in fact governed by two fundamental principles: the principle of limitation, according to which "the right of belligerents to adopt means to harm the enemy is not unlimited";[59] and the principle of humanity (in particular: Article 3 of the *Geneva Conventions I–IV*). The *rationale* behind the LOAC can be set out in greater detail through the following principles:

- the principle of distinction (Article 48 of *Additional Protocol I*);
- the principle of necessity, originally set out in the 1868 St Petersburg Declaration (Article 57[3] of *Additional Protocol I*), which requires that as little harm as possible be caused and that no measures of war be undertaken which do not offer a definite advantage;
- the principle of proportionality (Article 51(5)(b) of *Additional Protocol I*), which requires that the military advantage gained from a particular operation must outweigh the damage caused to civilians or civilian objects by that action;
- the principle of precaution, which requires verification that the target is indeed military (Article 57(2)(a)(i) of *Additional Protocol I*).

The principles of the *Law of War* derive from these philosophical and legal premises. Under *Additional Protocol I* to the 1977 Geneva Conventions, States involved in an armed conflict are subject to restrictions on the choice of means and methods of warfare (Article 35(1)). In particular, the use of weapons whose nature is such as to cause superfluous injury or unnecessary suffering is prohibited; that is to say, injury or suffering that cannot be justified by a proportionate military necessity (Article 35(2)).

Weapons of an indiscriminate nature are also prohibited, namely those that

58 Robert Kolb, Richard Hyde, *An Introduction to the International Law of Armed Conflicts*. Hart Publishing, Oxford-Portland (OR) 2008 p. 1.

59 Article 22 of the *Hague Regulations*, reaffirmed in Article 35(1) of *Additional Protocol I*.

cannot be directed against a specific military objective or whose effects cannot be limited as required by international humanitarian law (Article 51(4)(b) and (c)). Finally, the use of weapons designed or likely to cause serious, widespread and long-lasting damage to the natural environment is not permitted, in accordance with the provisions of Articles 35(3) and 55 of the same Protocol.

Among analysts who argue that hypersonic weapons are transforming the balance of power between the major powers, the main concerns can be traced back to several fundamental issues. Firstly, the narrow window of opportunity offered by such weapon systems may lead actors to adopt "trigger-happy" behaviour,[60] that is, to trigger an escalation due to the unpredictability of the target. In such cases, in the absence of sufficient certainty regarding the military nature of the target, the risk of violating the precautionary principle is high.

Secondly, the desire of actors to safeguard the integrity of their 'second-strike' capability may lead to a "use-it-or-lose-it" mentality: a nation under attack may, in other words, find itself compelled to launch a massive retaliatory strike before fully understanding the nature of the incoming threat.[61] Such behaviour runs counter to the principle of proportionality, which requires a correlation between the intensity of the response and the severity of the actual threat.

Another problematic element is the phenomenon of "warhead ambiguity":[62] due to the dual nature of hypersonic technology, decision-makers may be led to make erroneous calculations. On the one hand, so-called conventional-nuclear integration (CNI) deliberately introduces an element of uncertainty at the strategic-political level, for example in Russia's "escalate to de-escalate" strategy;[63] on the other hand, at the regulatory level, the principle prohibiting indiscriminate weapons (Art. 51(4)(b)-(c), *Additional Protocol I*) is violated, since it is precisely the ambiguity regarding the type of warhead that may lead to the attack being mistakenly perceived as indiscriminate, thereby increasing the risk of indiscriminate reactions.

Fourthly, hypersonic speed alters the perception of danger to the extent that

60 Richard Skiba *Mach 5 and Beyond* p. 241.

61 Richard Skiba *Mach 5 and Beyond* p. 256.

62 Richard Skiba *Mach 5 and Beyond* p. 241.

63 Daniel Martìn Menjón, 'Hypersonic Weapons: Technology, Critical Chains, Doctrines and Governance (2010–2035). A Six-Chapter Technical–Strategic Assessment of Capability, Defence and Implications for International Stability', online at the site: *Hermes-Kalamos* (2025).

it undermines the very principle of deterrence, because the pre-emptive use of a hypersonic nuclear weapon could disable the adversary's nuclear forces before a retaliatory strike – on which the logic of deterrence was traditionally based – could be launched.[64] This phenomenon is also described as a shift towards a "first-strike" doctrine, enabled by the prospect of "no-warning strikes".[65] In such a case, the resort to pre-emptive defence without imminent danger, or in the absence of a situation where the use of force may be "necessary to maintain or restore international peace and security" (Article 51), constitutes a violation of Article 2(4) of the *United Nations Charter*, which prohibits the threat or use of force against other States.

The development and deployment of hypersonic weapons, due to their unprecedented speed, manoeuvrability within the atmosphere and high precision, are particularly advantageous from a military standpoint (*necessitas belli*), but pose challenges to be addressed within the current regulatory framework of humanitarian law. Certain additional risks and practical consequences stem from the erosion of the principles mentioned above:

- the possibility of striking with little warning may increase the likelihood of civilian casualties and has a destabilising effect;[66]
- The fact that the weapon cannot be intercepted may lead to a false sense of security regarding its use, highlighting the need to rethink military strategies to minimise harm to civilians and critical infrastructure;[67]
- long-range precision may facilitate political assassinations or aerial decapitation strikes, thereby increasing the risk of exacerbating regional conflicts;[68]
- the absence of specific regulation may lead regional powers to prioritise investment in this military technology at the expense of other, more heavily regulated technologies;[69]
- the ability of hypersonic weapons to neutralise an adversary's nuclear capabilities may undermine the principle of MAD, which had underpinned the logic of nuclear strategies.[70]

64 Richard Skiba *Mach 5 and Beyond* pp. 241-242.
65 Richard Skiba *Mach 5 and Beyond* p. 435.
66 Richard Skiba *Mach 5 and Beyond* p. 375.
67 Richard Skiba *Mach 5 and Beyond* p. 377.
68 Richard Skiba *Mach 5 and Beyond* p. 378.
69 Richard Skiba *Mach 5 and Beyond* p. 378.
70 Richard Skiba *Mach 5 and Beyond* p. 380.

However, these are not unprecedented risks associated with aerial warfare and its relationship with the LOAC. According to some scholars, the introduction of hypersonic missiles would have entailed, from a legal perspective, "a change in degree, or quantitative, rather than qualitative [*a change in degree, but not in kind*]" in the regulation of *missile warfare*: just as ICBMs are not uninterceptable, hypersonic weapons are capable of evading air defences and carrying nuclear or conventional warheads; the difference, if anything, lies in the reduction of the "decision-making time available to meet the requirements of the law of armed conflict (LOAC)".[71] In this sense, hypersonic weapons have been identified as instruments that "merely amplify" an already known problem, without precluding the continuation of past deterrence policies.[72]

Nevertheless, the emergence of hypersonic military technology poses paradoxes that are difficult to reconcile within the framework of current LOAC. Under international law, only weapons that cannot be targeted with a reasonable degree of precision are illegal *per se*: to be lawful, therefore, missiles or vehicles must be, *by design*, capable of complying with the principle of distinction through internal sensors or external guidance.[73] A first paradox concerns the mutual compatibility of certain principles of LOAC. Hypersonic weapons are extremely precise, but at the same time they undermine human decision-making capacity, creating a contradiction between the principle of distinction and that of human control vis-à-vis automated responses.

A second paradox is of a technical-legal nature, arising from the discrepancy between the formal classification of these weapon systems and their actual impact. In terms of *payload*, in fact, hypersonic delivery systems have the same capacity as conventional missiles and can therefore be armed with various types of warheads already governed by the various regulatory regimes; however, their kinetic effects are greater. This implies that the weapon is comparable to conventional missiles in terms of type and payload weight, but its actual effects are amplified by the physics of hypersonic flight.

71 James Kraska, Raul Pedrozo *Disruptive Technology and the Law of Naval Warfare* p. 220.

72 Eben Coetzee, 'Hypersonic Weapons and the Future of Nuclear Deterrence' *Scientia Militaria – South African Journal of Military Studies* 49 (2021), p. 50.

73 James Kraska, Raul Pedrozo *Disruptive Technology and the Law of Naval Warfare* p. 229. It is also noted that, according to the *HPCR Manual*: 'State practice demonstrates that unguided bombs are not as such indiscriminate by nature' (p. 61).

A third paradox relates to the imbalance between technological advancement and the erosion of regulatory safeguards. The greater the technological progress in flight design and control, the greater the unpredictability and the difficulty of detection; consequently, the more complex the prior assessment of the requirements of proportionality and distinction laid down in Articles 48, 51 and 57 of the *Additional Protocol I*.

3. *Regulating 'Hyperkrieg'*

The shift from 'early warning' to 'real-time' timeframes, brought about by hypersonic weapons systems,[74] has created the conditions for a new technical and operational mode of warfare: a *'Hyperkrieg'* in which the time factor alters, from a legal and procedural perspective, the compliance requirements set out by LOAC.

Notwithstanding the limited operational viability of such weapon systems – attributable partly to their high economic costs and partly to the tendency of actors to avoid strategic escalation (such as their use for the kinetic degradation of C2 systems)[75] – defence against *'Hyperkrieg'* requires not only new passive and active technical measures, but also new regulatory mechanisms at the legislative level.

The impact of hypersonic weapons on global stability, therefore, also depends on national (doctrines and strategies) and international (multilateral agreements) political initiatives. In the interplay between the strategic and political doctrines of individual states and agreements between multiple states, it is possible to discern the emergence of an *opinio juris* and *state practice* capable of regulating *'Hyperkrieg'*, starting with mechanisms to control the proliferation of hypersonic weapons. In this sense, both the law of arms and international law relating to armed conflicts may be modified to varying degrees by phenomena such as 'offence-defence' competition and the dynamics of deterrence management according to a realist approach; through the negotiation of new treaties or the renegotiation of existing treaties in line with a regulatory approach; and through the recognition and adoption of new *confidence-building* measures (CBMs) and multilateral cooperation by means of an accountability-based approach.

In the first case, the risk of hypersonic warfare would be managed through

74 Richard Skiba *Mach 5 and Beyond* p. 429.

75 Mark Smith 'Tipping the Scales?' p. 61.

systemic self-regulation of armaments, that is, by stabilising the arms race through an *oversupply* of hypersonic weapons; in the second case, regulation would be ensured by controlling the number of hypersonic weapons, keeping it *below* the States' actual technical and operational capabilities for producing such weapons; finally, in the third case, through transparent management mechanisms to ensure that the various states maintain their respective hypersonic military capabilities in a *proportionate* manner.

About the 'offence-defence' competition, a realist strategic-political option could follow the Waltzian *"more may better"* approach:[76] the proliferation of hypersonic weapons would establish limits and acceptable behaviour through a more widespread distribution of hypersonic military-technological capabilities. In other words, the impossibility of completely obliterating an adversary's retaliatory capability through hypersonic weapons would ensure that deterrence policy remains effective.

Regarding regulatory measures aimed at controlling and discouraging hypersonic technology, the international legal framework is highly fragmented, with such weapons being only partially or indirectly covered by existing instruments.

Chronologically speaking, the *Outer Space Treaty* (1967) provides only tangential regulation: it prohibits the placement of nuclear weapons in outer space, but does not address conventional technologies, let alone the suborbital trajectories typical of certain hypersonic systems. The operation of HGVs in the upper atmosphere, below the Kármán line, therefore, raises new challenges for both defence systems and current regulatory frameworks, as such technologies largely evade the treaty's constraints.

An equally marginal role is played by the *Treaty on the Non-Proliferation of Nuclear Weapons* (NPT, 1968), which is relevant only where hypersonic weapons serve as delivery systems for nuclear warheads. The NPT does not, in fact, regulate hypersonic technology as such, but refers only to "nuclear weapons or other nuclear explosive devices" (Art. 1),[77] thereby producing an indirect and limited regulatory effect.

From the perspective of humanitarian law, the *Convention on Certain*

76 In this regard, the classic position expressed in Kenneth N. Waltz, 'The Spread of Nuclear Weapons: More May Be Better' *The Adelphi Papers* 21 (1981).

77 United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*. United Nations, New York 1967.

Conventional Weapons (CCW, 1980) might be applicable should hypersonic weapons produce effects that "cause excessive suffering or have indiscriminate effects" (Art. 1),[78] which are incompatible with the fundamental principles of international law. However, as already noted, the precision capabilities of hypersonic weapons might exclude them from the category of weapons that produce indiscriminate effects. Furthermore, the CCW regulates weapons based on their effects rather than their technical characteristics; consequently, hypersonic speed or flight profile do not, in themselves, constitute a regulatory criterion.

Of greater significance, however, is the role of *the Missile Technology Control Regime* (MTCR, 1987), an informal political agreement between 35 supplier states aimed at limiting the proliferation of missiles and launch systems capable of delivering chemical, biological or nuclear (CBN) weapons, defined as weapons of mass destruction. The MTCR includes two categories of items, with different restrictions: a "Category I" comprising complete missiles or UAVs capable of delivering a payload of at least 500 kg over a distance of 300 km, which is subject to a strong presumption of export denial; a "Category II" comprising dual-use components and systems related to missiles and UAVs, and complete missiles or UAVs with a range of at least 300 km, regardless of their payload capacity.[79] Hypersonic weapons, however, are not sufficiently classified, nor are they fully suited to the proposed dual categorisation.

Only one unofficial document – namely the 2017 MTCR Manual – explicitly mentions hypersonic weapons such as the HGV, defined as "a potential type of *manoeuvrable re-entry* vehicle" (MaRV), that is, a conical object that houses and protects the missile's payload, with manoeuvring and evasion capabilities.[80] Whereas in the most recent version of the manual from 2024, there is no reference at all to hypersonic weapons or vehicles, although re-entry vehicles are mentioned and classified as the 'payload' of 'ballistic missiles'.[81] In both cases, both HGVs and re-entry vehicles – included in the first and second versions of

78 United Nations, *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*. United Nations, New York 1980.

79 MTCR - Missile Technology Control Regime (1987). *MTCR Guidelines and Equipment, Software and Technology Annex*: online at the site: https://www.mtcr.info/de.

80 *MTCR - Missile Technology Control Regime (2017). MTCR Annex Handbook – 2017*, p. 24.

81 *MTCR - Missile Technology Control Regime (2024). Equipment, Software and Technology Annex*, p. 11.

the document respectively – are classified under "Category I" as items posing an extremely high risk.

However, the MTCR's technological coverage remains incomplete: HGVs might not fall within "Category I" because, despite having a long range, they could have a total weight of less than 500 kg;[82] if, on the other hand, they were considered as a set of dual-use technologies or components, rather than complete weapon systems, they could be included in "Category II", and thus lawfully exportable despite being capable of being armed with nuclear warheads.

Added to this gap in the MTCR's classification system is its narrow scope of application: the agreement regulates only exports, leaving the domestic development of such systems entirely unaddressed.

Another, better-known instrument designed to regulate missile systems, such as the 1987 *INF Treaty* (*Intermediate-Range Nuclear Forces Treaty*), is unsuitable for regulating the development and proliferation of hypersonic weapons for two reasons: firstly, it did not originally include a dynamic list of technological categories to be updated periodically; furthermore, any revision of the treaty is precluded because it is no longer in force. The Treaty, in Article III (1–2),[83] referred to "existing types of intermediate-range missiles" and "existing types of short-range missiles", both ballistic and cruise missiles, without any reference to hypersonic variants of these, or to other hypersonic weapon systems. Admittedly, Article XVI provided for the possibility for each party to "propose amendments" to the Treaty; however, it was formally terminated on 2 August 2019, with the United States having initiated its withdrawal six months earlier, on 1 February 2019, and Russia responding by declaring its termination on 2 August 2019.

Treaty language that is less tied to specific technical parameters (e.g. range,

82 It should be added that, under the MTCR regime, the total weight of the re-entry vehicle is considered as 'payload', i.e. a single mass comprising both the re-entry vehicle and the warhead, with no indication as to how the ratio between the weight of the vehicle and the weight of the warhead is calculated; this would allow for the possibility of loading a lightweight but highly lethal warhead, compatible with the overall 500 kg threshold for the 'payload', thereby circumventing the criterion for inclusion in Category I; on these 'definitional ambiguities', see Kolja Brockmann, Dmitry Stefanovich *Hypersonic Boost-Glide Systems and Hypersonic Cruise Missiles* pp. 15–17.

83 *United States of America – Union of Soviet Socialist Republics, Treaty between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles*. Washington DC 1987.

weight, etc.) – as in the case of the MTCR – or to narrow classifications of system types – as in the case of the INF Treaty – could, on the other hand, provide a regulatory framework capable of encompassing emerging systems or technologies that did not exist at the beginning of the 21st century.

This is the case with the *Hague Code of Conduct against Ballistic Missile Proliferation* (HCOC, 2002), which could serve as an initial reference document in this direction. Although it is a non-binding political instrument, it aims to enhance transparency in missile programmes and orbital mission activities. Alongside the limitation and prevention of the proliferation of ballistic missiles and space launch vehicles (SLVs), the agreement also provides for the monitoring of other objects that may "contribute to carrier systems for weapons of mass destruction, given that such programmes could be used to disguise ballistic missile programmes" (3, d).[84] Indeed, it is not uncommon for the development of SLVs to be interpreted by state actors as a precursor to the development of ICBMs.[85] In this sense, the code may support a sufficiently broad interpretation to bridge any regulatory gaps in the international regulation of weapons systems.

Some normative coverage is provided under bilateral agreements. The *New START Treaty* – which entered into force in March 2011 and was extended for five years in February 2021 – in Article V (2), allows the parties to discuss the possible inclusion of a *"*new *kind* of *strategic offensive arm*" within the Bilateral Consultative Commission, thereby opening up a space, albeit limited, for future forms of shared regulation. The *'new kind'* referred to in Article V should not be confused with the term *'type'* which appears several times in the text of the Treaty: whilst a possible new 'type' refers to new ICBMs, SLBMs or bombers, the term 'new kind' refers to a new strategic-range offensive weapon that does not meet the Treaty's definitions, and may therefore raise the question of whether such a weapon should be brought within the scope of the Treaty's restrictions.[86] The Treaty expired in February 2026, bringing an end to this bilateral regulatory framework and marking the termination of one of the last remaining pillars of US–Russian arms control.

84 *Hague Code of Conduct against Ballistic Missile Proliferation (HCOC)*. The Hague 2002.

85 Debalina Ghoshal, *Role of Ballistic and Cruise Missiles in International Security* p. 5.

86 U.S. Department of State, *Article-by-article analysis of the Treaty between the United States of America and the Union of Soviet Socialist Republics on the elimination of their intermediate-range and shorter-range missiles (INF Treaty)*. Washington, DC 1987, p. 13.

Taken together, these documents show that the current regulatory framework is characterised by significant gaps: no treaty directly addresses hypersonic technology in its specific form, and most regulations operate by analogy or indirect inference.

Confidence-building measures (CBMs) between States may serve as auxiliary tools for the international development of a new arms control regime.[87] This represents a third option for the controlled management of hypersonic technology development, also defined by the UNODA as transparency and confidence-building measures *(TCBMs*), which may involve the establishment of an *ad hoc* GGE to discuss the matter.[88] Other non-legally binding diplomatic initiatives may include bilateral or multilateral proposals; the separation of sites for conventional and nuclear forces to reduce the problem of warhead ambiguity; the establishment of no-fly zones for hypersonic weapons, which could thereby extend their flight time and thus increase the window of opportunity for their detection; and the setting up of communication hotlines for de-escalation.[89]

Other measures may involve the adoption of so-called "functionally-related observable differences" (*FRODs*), designed to enable states to make their platforms distinguishable – and therefore monitorable – by an external observer.[90] Some scholars also suggest clarifying, on the basis of existing legal regimes, the scope of the MTCR to explicitly define whether and when hypersonic glide vehicles (HGVs) fall under Categories I or II of the regime, in order to avoid regulatory grey areas, as well as to update the control lists to include dual-use technologies used in hypersonic systems (materials, scramjet engines, guidance systems).[91]

In this regard, the Wassenaar Arrangement (1995), a multilateral agreement for the monitoring of exports of conventional weapons and dual-use technologies, could also serve as a further technical and regulatory benchmark.[92] Currently, the Agreement classifies hypersonic re-entry vehicles under the "Ammu-

87 Richard Skiba *Mach 5 and Beyond* p. 260.

88 John Borrie, Amy Dowler, Pavel Podvig *Hypersonic Weapons* pp. 33–34.

89 Dean Wilkening 'Hypersonic Weapons and Strategic Stability' p. 145.

90 Steve Fetter, Tim Thies, Victor Mizin 'Hypersonic Glide Vehicles: Evaluating Inadvertent Escalation Risks', *Deep Cuts Brief 17, IFSH – Deep Cuts Commission*, Hamburg 2024, p. 7.

91 Kolja Brockmann, Dmitry Stefanovich *Hypersonic Boost-Glide Systems and Hypersonic Cruise Missiles* pp. 22–24.

92 John Borrie, Amy Dowler, Pavel Podvig *Hypersonic Weapons* p. 29.

nition" section (ML4), although such vehicles could technically also fall under "high-velocity kinetic energy weapon systems" (ML12).[93] Here too, therefore, definitional ambiguities need to be resolved in order to ensure greater consistency in terminology and practice amongst international actors, thereby facilitating the controlled development of hypersonic technology.

4. *Conclusions*

Hypersonic technology has established an offensive dominance in contemporary "conventional-strike warfare".[94] With the introduction of hypersonic weapons, a "new category of threats"[95] to aviation security has emerged, which may warrant the identification of a new era in the history of the "verticalization of violence".[96]

Regulating hypersonic weapon systems – from their development and proliferation through to their deployment in the field – therefore represents a grey area of international law, one that is difficult to address legally in the short term through the direct renegotiation of existing treaties alone. The uncertain classification of these new weapons – sometimes conceived as 'weapon systems' similar to traditional ones, at other times as 'platforms' or 'munitions' – poses an obstacle to the 'formulation' of the very conduct governing the use of hypersonic military technology. Furthermore, the proliferation of legal regimes results in a fragmented and inconsistent regulatory landscape, which fails to ensure effective and uniform compliance with existing directives and, at the same time, creates regulatory gaps that encourage various actors to resort to evasive strategies to continue the hypersonic military-technological race.

Within the framework of LOAC, this technology has a direct impact on the nature of belligerent conduct and on the way obligations under humanitarian law are fulfilled, particularly due to the dramatic compression of decision-making times. As some military observers have argued, the advent of *hyperwarfare* has placed limits "on how quickly and how many decisions can be taken" by human

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93 Wassenaar Arrangement, *List of Dual-Use Goods and Technologies and Munitions List. Wassenaar Arrangement Secretariat*, Vienna 1996.

94 Dean Wilkening 'Hypersonic Weapons and Strategic Stability' p. 142

95 Radosław Bielawski, 'Space as a New Category of Threats to National Security' *Safety & Defense*, 5(2) (2019), pp. 1-7.

96 Filippo Ruschi, *Guerra aerea e razionalità giuridica (1899-1938). La protezione degli inermi nel prisma della filosofia del diritto internazionale*. Giuffrè, Milano 2024, p. X.

beings, foreshadowing a type of conflict in which human decision-making will be "almost entirely absent from the OODA cycle: observe-orient-decide-act".[97] In terms of the *ius in bello*, as has been noted, hypersonic kinetic warfare introduces certain paradoxes amongst the fundamental principles of LOAC, pitting, for example, the need to accurately distinguish targets through precision strikes against the difficult assessment of the requirement for proportionality, which is made problematic by the reduced window of opportunity.

Over the centuries, technological developments have altered the political and military balance of power, and long-range weapons have been used to define and demarcate areas characterised by different legal regimes. Whilst the modern cannon could define a State's exclusive coastal jurisdiction by virtue of the range it achieved (*ubi finitur armorum vis*),[98] contemporary hypersonic weapons can penetrate any protected space by virtue of the speed they attain.

The distinctive features of the new hypersonic weapon systems introduce an unprecedented race against time, in which the timing of kinetic and physical operations – traditionally slow and time-consuming – is approaching that of the faster pace of the information and cybernetics revolution. In this technological and operational context, therefore, the regulatory capabilities of LOAC with regard to hypersonic warfare can only stand a chance of success through new instruments of preventive regulation (control measures or confidence-building measures) capable of ensuring, *ex ante,* an alignment of the law of armed conflict (i.e. Weapons Law) with the cognitive timescales of human operators.

97 John R. Allen, Amir Husain, 'On Hyperwar' *Proceedings* 143(7), U.S. Naval Institute (2017).

98 Ernesto Sferrazza, 'Ubi finitur armorum vis. Ontologia e geometria politica nel dibattito moderno sulla sovranità dei mari (1355-1782)', in *Jura Gentium*, 19(2) (2022), pp. 7-31.

The invisible front: international law and the dematerialisation of conflict

BY ANTONELLO PALASCIANO

1. The dematerialisation of conflict

On 13 July 1870, Counsellor Heinrich Abeken sent a telegram to Berlin reporting a conversation between King William I of Prussia and the French ambassador, Vincent Benedetti, concerning the Hohenzollern candidature to the Spanish throne. Before releasing the telegram to the press, Otto von Bismarck edited it into a shorter and more confrontational text. The published version was received in Paris as a diplomatic insult and in Berlin as a national humiliation. Within days, public opinion in both countries had been inflamed, and on 19 July France declared war. It was not an army but the manipulation of a text that set the armies in motion[1].

Viewed through the lens of contemporary legal and strategic categories, the Ems Dispatch already exhibits the defining features of what is now understood as information warfare: the selective presentation of information, the distortion of meaning, and the manipulation of public opinion as a strategic instrument. That a single act of textual manipulation could mobilise hundreds of thousands of men without a shot being fired foreshadowed a development that would later become the defining characteristic of contemporary conflict: its progressive dematerialisation.

This article traces that trajectory by beginning with its most developed manifestation and then identifying the underlying conditions that made it possible. As conflict progressively sheds the material characteristics traditionally associated with armed conflict, including territory, kinetic force, the battlefield, and the combatant, the legal framework built around those concepts struggles to

1 M. Howard, *The Franco-Prussian War. The German Invasion of France, 1870-1871*, London, 1961, pp. 40-57, on the episode of the Ems telegram and on its redaction by Bismarck as the diplomatic detonator of the Franco-Prussian conflict.

keep pace. The analysis proceeds in three parts. The first reconstructs the doctrinal genealogy of the dematerialisation of war, from twentieth-century Russian and Western theories to the contemporary concept of hybrid warfare. The second examines cyberspace as the fifth domain of conflict and the interpretive approaches through which cyber operations have been accommodated within international law, focusing on the legal questions at the heart of that debate[2].

The third examines cognitive operations and the contested notion of a sixth domain, asking whether the interpretive framework developed for cyberspace can, and should, be extended to this emerging field.

The contribution of this article is not to propose new legal categories, but to assess the elasticity of the existing interpretive framework across successive domains of conflict. It argues that the interpretive techniques through which cyber operations have been accommodated within international law remain workable in cyberspace but begin to break down when transposed to the cognitive domain. In doing so, the article identifies the point at which adaptation through interpretation ceases to provide an adequate response.

2. The disappearance of the front: a doctrinal genealogy of hybrid threats

Recognition that the nature of war was changing long predates its articulation in legal terms. The concept of 'fourth-generation warfare', developed in the late 1980s[3], reflected the growing perception that conflict was becoming increasingly diffuse, transcending traditional battlefields and shifting its focus towards civilian society and the democratic institutions of the adversary[4]. Alongside this development, the turn of the century witnessed the emergence of Thomas Hu-

2 These are the three questions that the conference paper placed at the foundation of the inquiry: when a cyberattack amounts to a *use of force* under Article 2(4) of the UN Charter; under what conditions self-defence may be invoked pursuant to Article 51; and to what extent *jus in bello* may extend to hostilities devoid of physical materiality.

3 In the Western tradition, the reflection moves from the theory of the 'generations' of war, formulated by William Lind at the end of the 1980s and taken up by Martin Van Creveld and Thomas Hammes. Cf. W. Lind et al., *The Changing Face of War: Into the Fourth Generation*, 1989.

4 O. Fridman, *Russian Hybrid Warfare. Resurgence and Politicisation*, Oxford University Press, Oxford, 2018, to which reference is made, in general, for the reconstruction of the doctrinal genealogy summarised here.

ber's concept of "compound warfare"[5] and, above all, Qiao Liang and Wang Xiangsui's theory of "unrestricted warfare"[6]. The latter rejects conventional boundaries between forms of conflict and advocates the coordinated employment of informational, financial, commercial, and psychological instruments. Building on these developments, Rupert Smith's concept of 'war amongst the people', articulated in 2005, described a form of conflict in which the use of force extends beyond the battlefield into society itself, blurring the distinction between combatants and civilians and allowing the latter to become both the targets and the instruments of warfare[7]. The United States National Defense Strategy, issued that same year, formally identified "disruptive challenges" as a distinct category of strategic threats[8].

Within this emerging body of thought, Frank Hoffman developed the two concepts that would become most influential. He defined "hybrid warfare" as the combined use of conventional capabilities, irregular tactics, terrorism, and criminal activity, while the term "hybrid threat" referred to an actor employing those means simultaneously in pursuit of political objectives[9]. From 2010 onwards, NATO progressively expanded the concept beyond the military domain to encompass economic coercion, social pressure, and media and information campaigns. The 2014 Ukraine crisis marked its definitive politicisation, as the concept came to be applied to the conduct of the Russian Federation[10].

Long before the more recent doctrinal developments examined above, the

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5 T. Huber (ed.), *Compound Warfare. That Fatal Knot*, U.S. Army Command and General Staff College Press, Fort Leavenworth, 2002.

6 Qiao Liang and Wang Xiangsui, *Unrestricted Warfare*, Beijing, 1999. The trans-domain combination there expressly includes informational, financial, commercial and psychological warfare.

7 R. Smith, *The Utility of Force. The Art of War in the Modern World*, London, 2005, where the notion of *war amongst the people is developed.*

8 Dept. of Defense, *The National Defense Strategy of the United States of America*, 2005; for the framing cf. G. Giacomello and G. Badialetti, *Manuale di studi strategici. Da Sun Tzu alle 'guerre ibride'*, Milan, Vita e Pensiero, 2016.

9 F. Hoffman, *Conflict in the 21st Century. The Rise of Hybrid Wars*, Potomac Institute for Policy Studies, 2007. Hoffman distinguishes *hybrid warfare* from the *hybrid threat*, referring the latter to the actor who simultaneously employs conventional means, irregular tactics, terrorism and criminality.

10 On the conceptual evolution within NATO (ACT and USJFCOM JIWC, 2010) and on the subsequent politicisation of the term after the Ukrainian crisis of 2014 cf. O. Fridman, *Russian Hybrid Warfare*, cit., pp. 105 ff.

intellectual origins of the dematerialisation of conflict can be found in the Russian strategic tradition. As early as 1931, Evgenij Messner observed that the entire population had become involved in warfare, a process he described as the 'nationalisation' of war. From this premise, he identified a fourth, psychological dimension of conflict, which he regarded as destined to become the decisive one. Once society as a whole had been drawn into the conflict, he argued, the soul of the enemy nation became the principal strategic objective. Building on this premise, Messner developed his theory of *myatezhevoyna* ("war of subversion" or "war of sedition"), a form of conflict in which the principal objective is to capture the minds and souls of the enemy population through political destabilisation, propaganda, and support for internal opposition movements[11]. Building on this intellectual tradition, Aleksandr Dugin[12] and Igor Panarin[13] further developed these ideas several decades later. Dugin's concept of "net-centric war" holds that images matter more than reality and that control of the informational domain ultimately determines control over every other dimension of conflict. Panarin, by contrast, conceived "information war" as a process structured around three phases: politico-strategic analysis, informational influence, and informational defence.

The most systematic formulation is provided by the Russian military officers Sergej Chekinov and Sergej Bogdanov, who distinguish between "new-generation war", in which non-military means precede and prepare the ground for the use of force, and *gibridnaya voyna* ("political clash"), in which non-military instruments replace military force, reducing it to a purely deterrent role[14]. It is within this framework that General Valerij Gerasimov's 2013 and 2016 writings should be understood[15]. He describes hybrid methods as the integrated

11 On E. E. Messner and on *myatezhevoyna* (rendered as 'war of subversion' or of sedition) cf. O. Fridman, *Russian Hybrid Warfare*, cit., pp. 55 ff.

12 A. Dugin, *Geopolitika postmoderna* [Александр Дугин, Геополитика постмодерна], Amfora, Saint Petersburg 2007.

13 I. N. Panarin, L. G. Panarina, *Informatsionnaya voyna i mir* [И. Н. Панарин, Л. Г. Панарина, Информационная война и мир], OLMA-PRESS, Moscow 2003; I. N. Panarin, *Pervaya mirovaya informatsionnaya voyna: razval SSSR* [Первая мировая информационная война: развал СССР], Piter, Saint Petersburg 2010. Cf. O. Fridman, *Russian Hybrid Warfare*, cit.

14 T. Thomas, *The Chekinov-Bogdanov Commentaries of 2010-2017: What Did They Teach Us About Russia's New Way of War?*, Foreign Military Studies Office (FMSO), Fort Leavenworth 2021.

15 Cf. V. Gerasimov, *Cennost' nauki v predvidenii* ('The Value of Science in Prediction'),

use of political, economic, and informational instruments, "supported by military force", to achieve political objectives while minimising the use of military force, eroding the adversary's capabilities through sustained psychological and informational pressure until it is ultimately plunged into chaos.

Against this doctrinal background, strategic manuals have developed sophisticated analytical frameworks. Qiao and Wang's concept of "unrestricted warfare" distinguishes twenty-four forms of warfare, ranging from financial and media warfare to psychological warfare and lawfare, all of which may be employed in combination across multiple domains. The hybrid actor coordinates these instruments across time and space, employing them with varying intensity according to a logic of coercion and deterrence that echoes Schelling's "contractual model" [16], in which the mere capacity to inflict harm constitutes a source of bargaining power capable of bending the adversary's will without requiring its actual use.

Within this framework lies what is perhaps the point of greatest significance from a legal perspective. The very precision of the law of armed conflict comes to define the boundary between hybrid conflict and armed conflict proper: the clearer the legal threshold, the more acute the perception of the risk of escalation. Far from being a mere spectator, the law is itself an integral part of the aggressor's strategic calculus[17].

Despite these classificatory differences, the Western tradition tends to confine conflict to its military and tactical dimensions, whereas the Russian tradition treats the whole of public life as a potential domain of conflict. The two lines of development ultimately converge on the Sun Tzu principle that conflict is most effective when it undermines the adversary's cohesion before degrading its military capabilities, an effectiveness that derives precisely from ambiguity and resists clear attribution[18]. It is precisely within this tension that the chal-

2013, and the subsequent reworking of 2016, where hybrid methods are defined as a complex employment of political, economic and informational instruments 'supported by military force'; on the point O. Fridman, *Russian Hybrid Warfare*, cit., pp. 98 and 143.

16 T. C. Schelling, *Arms and Influence*, Yale University Press, New Haven 1966, ch. I.

17 On the models of synchronisation-intensity and on the coercion-deterrence dynamic cf. P. J. Cullen - E. Reichborn-Kjennerud, *MCDC Countering Hybrid Warfare Project: Understanding Hybrid Warfare*, 2017; J. A. Echevarria II, *Operating in the Gray Zone*, U.S. Army War College, 2016; the 'contractual model' is in T. C. Schelling, *Arms and Influence*, New Haven, 1966.

18 M. Weissmann, *Hybrid Warfare and Hybrid Threats Today and Tomorrow: Towards an*

lenge for the law lies. The very features that make hybrid warfare strategically attractive, namely ambiguity, deniability, reliance on non-kinetic means, and the absence of a formal declaration, are also those that undermine a legal order structured around the concepts of armed attack, the front, the combatant, and territory. The front, understood in its traditional physical sense, has all but disappeared, becoming almost invisible, as noted at the outset.

3. The fifth domain: cyberspace between legal rigidity and technological dynamism

Cyberspace has provided the technological foundation for the process of dematerialisation described above while also securing its formal recognition, making it the natural starting point for the present analysis. From a legal perspective, it is the most fully developed of the phenomena examined here. Having come to be recognised as a fully fledged operational domain and the 'fifth dimension' of conflict alongside land, sea, air, and outer space, cyberspace has brought into sharp relief the structural tension between the formal rigidity of the legal order and the inherently fluid and hybrid character of digital technologies[19]. Cyber operations, although capable of producing effects comparable to those of an armed attack, do not fit neatly within the categories of an international legal order structured around a predominantly kinetic conception of conflict[20].

State practice in recent years confirms this assessment. In 2022, the Homeland Justice cyber operation against Albania[21], attributed to actors linked to Iran, prompted Tirana to consider invoking Article 5 of the North Atlantic Treaty. It ultimately chose instead to sever diplomatic relations with Tehran, marking the first time a State had taken such a step in response to a cyber operation. Together with the precedents of Estonia in 2007[22], Georgia in

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Analytical Framework, in *Journal on Baltic Security*, 2019.

19 L. Martino, *La quinta dimensione della conflittualità. L'ascesa del cyberspazio e i suoi effetti sulla politica internazionale*, in *Politica & Società*, 2018. Cyberspace is recognised as the fifth operational domain within NATO from the Warsaw summit of 2016.

20 M. Roscini, *World Wide Warfare - Jus ad bellum and the Use of Cyber Force*, in *Max Planck Yearbook of United Nations Law*, vol. 14, 2010, pp. 85 ff.

21 G. Gabrielli, *La governance internazionale della cybersicurezza: cyber attacchi contro infrastrutture critiche nella prospettiva dello jus ad bellum*, in R. Brighi, G. Adinolfi (eds.), *Governare la sicurezza degli (eco)sistemi cyberfisici*, Giappichelli, Turin, 2025, pp. 79 ff.

22 On the *distributed denial of service* (so-called DDoS) attack campaign conducted against

2008[23] as well as the Stuxnet worm[24], this episode demonstrates the extent to which cyberspace blurs the boundaries between crime, espionage, and hostilities.

This gives rise to three questions that structure the legal analysis. The first is when a cyberattack amounts to a 'use of force' within the meaning of Article 2(4) of the UN Charter. The second concerns the conditions under which the right of self-defence may be invoked pursuant to Article 51. The third is the extent to which jus in bello extends to forms of conflict that lack a physical dimension yet affect critical infrastructure and civilian populations. Legal scholarship and State practice have responded to these questions not by developing a new body of law[25], but by elaborating interpretive approaches designed to accommodate the phenomenon within the existing legal framework.

4. Bringing cyber within international law: interpretive approaches

The first interpretive approach begins with the fundamental premise that international law applies to cyberspace. That the rules and principles of the UN

Estonia in the spring of 2007 — directed against institutional, banking and media sites against the backdrop of the removal of the Soviet monument in Tallinn — and on its legal qualification cf. E. Tikk, K. Kaska, L. Vihul, *International Cyber Incidents: Legal Considerations*, NATO Cooperative Cyber Defence Centre of Excellence (CCDCOE), Tallinn, 2010, pp. 14 ff.

23 On the cyberattacks that accompanied the Russo-Georgian conflict of August 2008, commonly indicated as the first case of cyber operations synchronised with a conventional military offensive, cf. E. Tikk, K. Kaska, L. Vihul, op. cit., pp. 66 ff.

24 On the Stuxnet worm, identified in 2010 and directed against the industrial control systems (SCADA) of the Natanz enrichment plant — the first malware conceived to inflict physical damage upon a critical infrastructure — as well as on the qualification problems that follow from it on the plane of *jus ad bellum*, cf. M. Roscini, *Cyber Operations and the Use of Force in International Law*, Oxford University Press, Oxford, 2014, esp. ch. 2; and M. N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.

25 To this effect is the well-known suggestion of F. H. Easterbrook, *Cyberspace and the Law of the Horse*, in *University of Chicago Legal Forum*, vol. 1996, 1996, pp. 207-216, esp. p. 207, where the Author denies any usefulness to an autonomous 'law of cyberspace', on the ground that the best way to learn the discipline of specialised activities remains the study of the general rules. Easterbrook himself moreover attributes its paternity to K. Llewellyn, who, in elaborating the Uniform Commercial Code, had designated as *law of the horse* the idiosyncratic transactions between non-professionals, as opposed to the rules of commerce between qualified operators.

Charter apply equally to cyber activities is now almost universally accepted. This position was first affirmed by the United Nations Group of Governmental Experts (UNGGE) in its 2013 report and has been consistently reaffirmed in subsequent reports, a consensus later reinforced through the work of the Open-Ended Working Group (OEWG). The 2015 report also articulated eleven voluntary, non-binding norms of responsible State behaviour[26]. Three of these norms specifically address critical infrastructure, most notably norm 13(f), which recognises that cyber operations, even where they cause no physical destruction, may nevertheless have serious consequences for essential services[27]. Nonetheless, significant grey areas remain as to how these norms apply in practice to State conduct.

The second interpretive approach concerns the more challenging issue of attribution. A distinction must be drawn between technical attribution, which seeks to identify the source of a cyber operation, and legal attribution, which determines whether the conduct is attributable to a State. In this respect, international case law has developed the "effective control" test, first articulated by the International Court of Justice in the Nicaragua case[28] and subsequently reflected in Article 8 of the Draft Articles on State Responsibility. Under this test, the conduct of private actors is attributable to a State only where it exercises effective control over the conduct in question[29]. The experts behind the *Tallinn Manual* have adapted this framework to the cyber context[30]. Its application, however, as illustrated by the Stuxnet operation, which was widely attributed to a State yet never conclusively proven, is complicated by the anonymity and plausible deniability inherent in cyberspace, both of which significantly increase the evidentiary burden on the injured State[31].

26 UN GGE, *Report* A/68/98 (2013), A/70/174 (2015) and A/76/135 (2021); as well as the works of the *Open-Ended Working Group* (OEWG). The 2013 report affirms the applicability of international law and of the UN Charter to cyberspace; that of 2015 sets out the eleven voluntary norms of responsible State behaviour.

27 In particular norm 13(f), devoted to the protection of critical infrastructure: cf. G. Gabrielli, *La governance internazionale*, cit., pp. 85 ff.

28 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *I.C.J. Reports*, 1986, para. 115, on the criterion of 'effective control'.

29 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Article 8 and related commentary.

30 M. N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017, pp. 91 ff.

31 On Stuxnet, traced — without conclusive proof — to a joint operation, and on the dif-

The third interpretive approach concerns the threshold for the use of force. Both the prohibition of the use of force under Article 2(4) of the UN Charter[32] and the right of self-defence under Article 51[33] rest on the concepts of 'use of force' and "armed attack", respectively, concepts that were developed with kinetic warfare in mind. To address this difficulty, legal scholarship has developed the effects-based approach, which applies the "scale and effects" test to the cyber context. Under this approach, a cyber operation amounts to a use of force where its consequences are comparable to those of a kinetic operation, including physical destruction, damage, or loss of life[34]. Below that threshold, a hostile cyber operation may instead violate the principles of non-intervention or sovereignty, both of which provide broader legal grounds for characterising internationally wrongful conduct, although the scope of each remains contested[35]. This limitation is far from incidental. As both the institutions of the European Union and recent strategic doctrine have recognised, hybrid and cognitive operations are deliberately designed to remain below the threshold of armed conflict, thereby exploiting the legal ambiguity that surrounds such activities, as well as the comparatively slower decision-making processes of open societies[36].

ficulties of technical attribution cf. G. Gabrielli, *La governance internazionale*, cit. cf. N. Tsagourias, *Cyber Attacks, Self-Defence and the Problem of Attribution*, in *Journal of Conflict & Security Law*, 2012. The anonymity and the *plausible deniability* structural to cyberspace aggravate the evidentiary burden borne by the injured State. Cf. for Italian scholarship A. Stiano, *Attacchi informatici e responsabilità internazionale dello Stato*, Naples, Edizioni Scientifiche Italiane, 2023, esp. pp. 32-63.

32 Article 2(4) of the Charter of the United Nations; for the extension of the prohibition to acts conducted by means of ICT cf. M. Roscini, *World Wide Warfare*, cit.

33 Article 51 of the UN Charter; on the notion of 'armed attack' as a threshold distinct from and higher than the 'use of force' cf. M. N. Schmitt (ed.), *Tallinn Manual 2.0*, cit., rules 71 ff.

34 The *scale and effects* criterion, of jurisprudential origin, is transposed to the digital environment through the *effects-based* approach: a cyber operation amounts to a use of force when its effects are comparable to those of a kinetic operation. Cf. M. N. Schmitt (ed.), *Tallinn Manual 2.0*, cit.; M. Roscini, *World Wide Warfare*, cit.

35 For a discussion of the principles of non-intervention and sovereignty as alternative legal thresholds below the prohibition of the use of force, see G. Gabrielli, *La governance internazionale*, cit.

36 The deliberately 'below-threshold' character of such operations is underlined both by the institutions of the Union and by strategic doctrine: cf. EPRS, *EU Response to Hybrid Threats*, Briefing PE 789.374, European Parliament, 2026; L. Vaz - P. Ferreira, *Cognitive Warfare and Strategic Uncertainty: Planning under the Threshold in Open Societies*, in *Bulletin of "Carol I" National Defence University*, 15(2), 2026, pp. 229-256.

The fourth interpretive approach concerns the application of jus in bello. The central difficulty is twofold. First, the very notion of "critical infrastructure" remains indeterminate. Extending it to encompass privately owned civilian networks and services that are nevertheless essential to society further blurs the distinction between legitimate military objectives and protected civilian objects[37]. Second, applying the cardinal principles of international humanitarian law, namely distinction, proportionality, and precaution, to hostilities that lack a physical dimension yet affect civilian infrastructure and populations requires careful interpretive adaptation[38]. In all these cases, the underlying method is to interpret existing legal categories rather than create new ones, thereby accommodating new phenomena within the existing legal framework.

A fifth interpretive approach concerns the law of State responsibility. Where a cyber operation falls short of an armed attack giving rise to the right of self-defence, the injured State may respond by adopting proportionate countermeasures, provided that the wrongful conduct is attributable to another State. More fundamentally, all States are subject to an obligation of due diligence, derived from the principle that no State may knowingly allow its territory to be used for acts that harm the rights of other States, an obligation that the Tallinn Manual extends to cyber infrastructure. Yet both countermeasures and due diligence depend on what cyberspace most conspicuously lacks, namely reliable attribution. The analysis therefore returns to what remains its weakest point[39].

5. The limits of the existing framework: attribution, intelligence, and the 'Digital Geneva Convention'

However sophisticated these interpretive approaches may be, they encounter significant limits that reveal their provisional character. The first concerns the blurred boundary between intelligence activities and military operations. Many

37 On the indeterminacy of the notion of 'critical infrastructure' and on its repercussions as regards the distinction between legitimate targets and protected goods cf. M. Roscini, *World Wide Warfare*, cit., pp. 117 ff.

38 On the extension of the principles of distinction and proportionality to hostilities devoid of physical materiality yet bearing upon civilian infrastructure and populations cf. G. Gabrielli, *La governance internazionale*, cit., pp. 90 ff.

39 On the obligation of *due diligence* — traceable to the *Corfu Channel* case (*I.C.J. Reports*, 1949) — and on its extension to the cyber domain cf. M. N. Schmitt (ed.), *Tallinn Manual 2.0*, cit., rules 6-7; on countermeasures and their limits G. Gabrielli, *La governance internazionale*, cit.

cyber operations lie in the grey area between espionage, which remains largely unregulated under international law, and military operations, so that their legal characterisation ultimately depends on factual determinations that are systematically frustrated by plausible deniability[40]. The second limitation concerns the domestic legal order. The exercise of war powers has become increasingly concentrated in the executive, with legal indeterminacy often serving to facilitate the expansion of executive power[41]. International law and constitutional law, in other words, are marked by the same ambiguity, which constrains the former and at times serves the interests of the latter.

These limitations have prompted both legal scholarship and private actors to advocate the adoption of a dedicated convention, a kind of 'Digital Geneva Convention' modelled on international humanitarian law, which would commit States to a set of specific rules governing cyberspace[42]. Its necessity and practical value, however, remain contested. Any process of codification faces inherent limitations in a field that evolves rapidly, creating the risk that newly adopted rules may already be outdated by the time they enter into force[43]. Codification, in short, is no panacea. Recognising its limits requires looking beyond the fifth domain.

6. Beyond the fifth domain: cognitive operations and the emergence of a "sixth domain"

The terminology employed in this section requires a preliminary clarification. While phenomena such as foreign information manipulation and interference (FIMI), coordinated disinformation campaigns, and influence operations

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40 On the ambivalence between *intelligence* functions — largely unregulated by international law — and operations of a military nature, and on *plausible deniability* as a deliberate strategy, cf. N. Tsagourias, *Cyber Attacks*, cit.

41 R. Chesney, *The Domestic Legal Framework for US Military Cyber Operations*, in J. Goldsmith (ed.), *The United States' Defend Forward Cyber Strategy*, New York, 2022, on the progressive imbalance of *war powers* in favour of the executives.

42 The proposal, most notably advanced by Microsoft in 2017 and subsequently discussed in the legal literature, provides a useful framework for debate. See Microsoft, *A Digital Geneva Convention to Protect Cyberspace*, 2017; G. Kerschischnig, *Cyberthreats and International Law*, The Hague, 2012.

43 C. Talem, *International Law in Cyberspace: Cyber Attacks as Use of Force*, CSSII, 2020. The proposal remains controversial as to its actual necessity and usefulness, since every normative process encounters limits of adaptability in a domain in continual evolution.

are well documented in both academic literature and institutional practice, the broader concept of "cognitive warfare" remains a more recent and contested analytical construct, developed primarily within strategic and defence policy circles rather than as an established category of international law. For the purposes of this article, the concept is used as an analytical lens through which to examine the legal challenges posed by operations directed at human cognition.

Within that analytical framework, if cyber operations primarily target digital systems, cognitive operations are understood as targeting the processes through which individuals and societies perceive, interpret, and act upon information. Often described as the "ultimate frontier" of hybrid conflict, they rely on digital technologies, including platform algorithms, large-scale data analytics, and increasingly artificial intelligence, to shape the information environment of a target State through sustained influence and disinformation campaigns capable of fostering polarisation, radicalisation, and social fragmentation.

Their objective is a victory of the kind envisioned by Sun Tzu, defeating the enemy without engaging in battle[44]. Many of the concepts associated with cognitive warfare, including "cognitive decoherence", "systemic invariants", and the characterisation of cognition as a battlespace, originate in recent NATO-affiliated or defence policy literature[45]. Although these frameworks have stimulated an important debate on the evolution of contemporary conflict, their analytical status remains contested. Several authors have questioned both their conceptual boundaries and their empirical distinctiveness, arguing that they risk conflating well-established practices of propaganda, psychological operations, and information warfare under a single, expansive label. The distinction is not merely terminological. Whereas foreign information manipulation and interference (FIMI) describes well-documented practices, "cognitive warfare" remains a broader and contested analytical construct. Whether it identifies a genuinely new form of conflict or merely reframes established practices of psychological and informational influence remains open to debate. In this article, it is used as a heuristic framework for examining the legal challenges posed by operations

44 E. Pietrobon, *Guerra cognitiva. La nuova minaccia ibrida*, *Dossier* no. 42, Centro Studi Politici e Strategici Machiavelli, July 2023. Cognitive operations are there described as the 'ultimate frontier' of hybrid war and as 'psycho-digital' weapons that poison the informational environment through a pervasive *disinfodemic*.

45 The term 'cognitive warfare' is attributed, in 2017, to General D. Goldfein; cf. A. Castiello d'Antonio, *Cognitive Warfare. Aspetti psicologici e uso dei social media*, in *QI - Hogrefe*, May 2022.

directed at human cognition.

The phenomenon is well documented. The Virtual Manipulation Brief 2025 of the NATO Strategic Communications Centre of Excellence[46] documents the expanding use of artificial intelligence in foreign information manipulation and interference (FIMI), including the automated generation of multilingual content, coordinated networks of inauthentic accounts, deepfakes targeting Western leaders, and synchronised campaigns conducted across multiple platforms. The academic literature on computational propaganda[47] has shown how deepfakes, bots, and algorithmic manipulation have transformed traditional propaganda techniques into instruments of information manipulation on an unprecedented scale. Information, from a secondary support of conflict, becomes its principal field.

It is in this context that the idea of a "sixth domain" emerges. A recent study[48] advances the debate by treating cognitive warfare as distinct from the five recognised domains. In this account, cyberspace provides the means of delivery, but the true target is the "sense-making layer" rather than the network itself. The authors identify five systemic invariants that underpin the cohesion of a community: epistemic structures (what counts as true), axiological hierarchies (the ordering of values), identity constructs (belonging), architectures of trust, and teleological projections (a shared vision of the future). They describe the cascading collapse of these elements as "cognitive decoherence", a condition in which institutions continue to function but no longer function as a coherent whole. What makes this form of conflict particularly insidious is its "constitutive invisibility". Those subjected to it perceive the induced changes, new

46 G. Bergmanis-Korats et al., *Virtual Manipulation Brief 2025. From War and Fear to Confusion and Uncertainty*, NATO Strategic Communications Centre of Excellence, Riga, 2025. The report documents the growing role of artificial intelligence in *foreign information manipulation and interference* (FIMI), estimating at about 7.9% the interactions bearing statistical signs of coordination and noting the employment of *deepfakes* against Western leaders.

47 S. O. Olanipekun, *Computational Propaganda and Misinformation: AI Technologies as Tools of Media Manipulation*, in *World Journal of Advanced Research and Reviews*, 25(1), 2025, pp. 911-923.

48 F. Korobeynikov, A. Davydiuk and V. Mokhor, *Ontological Foundations of Cognitive Warfare*, NATO Cooperative Cyber Defence Centre of Excellence, Tallinn, 2026. The authors treat cognitive warfare as a category distinct from the five recognised domains — the cyber instrument conveys the attack, but the target is the sense-making layer — and identify five systemic invariants: epistemic structures, axiological hierarchies, identity constructs, architectures of trust and teleological projections. The cascading collapse of such layers is defined as *cognitive decoherence*.

doubts and new values, as the product of their own thinking rather than the result of an external attack. As François du Cluzel observes[49] in a foundational text, there is no moment at which the target recognises itself as being at war, nor, by definition, can there be a peace treaty or an act of surrender. The conflict therefore has no clear endpoint and may become effectively unbounded.

This underscores its significance. The cognitive domain remains the subject of debate as a possible sixth NATO operational domain and has not yet been formally recognised[50]. Some legal scholars have also challenged the conceptual boundaries of cognitive warfare[51], arguing that the concept has been stretched to the point of blurring the distinction between cognitive warfare and adjacent concepts such as hybrid threats, FIMI, and traditional information warfare. From a legal perspective, the challenge is even greater than in the cyber domain. Cognitive operations typically produce neither physical effects nor a discrete 'event', meaning that the effects-based threshold, already difficult to apply in cyberspace, provides little meaningful guidance in this context. Existing legal categories, including the prohibition of the use of force, the principles of non-intervention and sovereignty, are difficult to apply to influence operations that are embedded in protected speech and conducted through otherwise lawful platforms. The difficulty, however, is not only legal but structural. Recent strategic doctrine describes open societies as facing a twofold paradox, one of openness and one of deterrence, that encourages adversaries to rely on indirect and deniable methods deliberately designed to remain below the threshold of legal response. In doing so, they exploit both the evidentiary constraints and the deliberative pace of democratic systems, with the result that attribution itself becomes as much a political as a technical exercise[52].

49 F. du Cluzel, *Cognitive Warfare*, NATO Allied Command Transformation - Innovation Hub, 2020, where it is observed that such a form of conflict is potentially unlimited, no peace treaty or surrender being conceivable for it.

50 The cognitive domain remains, as things stand, a debated candidate to become the sixth official domain of NATO, not yet having been formally recognised: F. Korobeynikov et al., *Ontological Foundations*, cit.

51 C. Deppe and G. S. Schaal, *Cognitive Warfare: A Conceptual Analysis of the NATO ACT Cognitive Warfare Exploratory Concept*, in *Frontiers in Big Data*, 2024, who impute to the concept a *conceptual stretching*: its boundaries blur with those of the hybrid threat, of FIMI and of traditional information war.

52 On the twofold 'paradox' — of openness and of deterrence — that exposes open societies to indirect and deniable methods kept below the threshold, and on attribution as an act at once political and technical, cf. L. Vaz - P. Ferreira, *Cognitive Warfare and Strategic Uncertainty*, cit.

Added to this is the liar's dividend[53], which enables authentic content to be dismissed as false, thereby undermining the very possibility of establishing the factual record.

Empirical evidence underscores the scale of the challenge. Over a number of years, the Russian group known as the Internet Research Agency used social media platforms to fuel racial tensions in the United States. Coordinated networks disseminated narratives across X, Telegram, and YouTube portraying the Ukrainian president as the architect of an imminent "Third World War". Deepfakes repeatedly targeted European leaders, while manipulated videos falsely depicted Berlin advertising hoardings displaying portraits of Soviet soldiers that had never in fact appeared there. These operations cause no physical destruction and produce no discrete "event". Yet they gradually erode the architectures of trust and identity constructs that sustain the cohesion of a community[54].

7. Extending or rethinking the categories of international law

A natural response is to extend to the cognitive domain the interpretive approaches already developed for cyberspace, including the applicability of existing international law, effects-based thresholds, attribution based on the effective control test, voluntary norms developed within the UN framework, and the principles of non-intervention and sovereignty. Among these, the principle of non-intervention appears to offer the most promising legal basis. Unlike the prohibition of the use of force, it does not require physical effects but only coercion in matters falling within the State's domaine réservé, which is precisely what cognitive operations seek to achieve[55]. Each of these interpretive approaches, however, becomes increasingly strained when transposed to the cognitive domain, ultimately reaching breaking point.

53 R. Chesney and D. Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, in *California Law Review*, 2019, to whom is owed the notion of the 'liar's dividend', which allows even authentic content to be discredited as false.

54 For the cases recalled — from the activity of the *Internet Research Agency* to the anti-Zelenskyy cascades, from deepfakes against European leaders to the false 'hoardings' of the Immortal Regiment in Berlin — cf. E. Pietrobon, *Guerra cognitiva*, cit., and G. Bergmanis-Korats et al., *Virtual Manipulation Brief 2025*, cit.

55 The principle of non-intervention appears the most promising anchorage, since — unlike the prohibition of the use of force — it does not require the production of physical effects, but only coercion in matters reserved to the *domaine réservé* of the State. On its limits of application to the informational domain cf. G. Gabrielli, *La governance internazionale*, cit.

Further straining these interpretive approaches is artificial intelligence, which dramatically compresses the timeframe for legal adaptation. The Virtual Manipulation Brief already anticipates the use of interoperability standards for autonomous systems to coordinate swarms of generative agents capable of modulating and amplifying content in near real time[56]. In such a scenario, the limits of adaptation inherent in any codification become particularly acute, as already noted in the context of the proposed Digital Geneva Convention. By the time new rules are adopted, they may already be obsolete.

The available approaches are not mutually exclusive. Existing law may be extended by analogy, with the principle of non-intervention serving as the cornerstone of the legal framework. Soft-law norms addressing the information and cognitive domains may be developed along the lines of the UNGGE, and an ad hoc convention may ultimately be envisaged, subject to the limitations already discussed. The most realistic lesson, however, lies in resilience. If conflict is potentially unlimited and invisible, the focus of defence shifts from responding to individual incidents to the proactive preservation of social cohesion, what NATO describes as cognitive resilience. At the societal level, this also requires the promotion of critical thinking[57] and media literacy as essential safeguards for liberal democracies[58]. In this regard, the European Union's response, built around prevention, protection, and response through measures ranging from intelligence cooperation and the protection of critical infrastructure to sanctions regimes, strategic communication, and civil preparedness, in complementarity with NATO's defensive capabilities, offers the most comprehensive institutional framework currently available. At the same time, strategic doctrine increasingly identifies not control of the information domain but rather "lawful speed" and legitimacy itself as the core operational strengths of democratic societies[59].

56 The *Virtual Manipulation Brief 2025*, cit., foreshadows the employment of interoperability standards for autonomous systems (MCP, A2A, ACP) in order to coordinate 'swarms' of generative agents capable of modulating and amplifying content in near-real time.

57 E. Pietrobon, *Guerra cognitiva*, cit., who identifies in the development of critical thinking and in *media literacy* the principal line of defence of liberal democracies.

58 NATO qualifies as *cognitive resilience* such a posture of proactive preservation of coherence; cf. F. Korobeynikov et al., *Ontological Foundations*, cit., and G. Bergmanis-Korats et al., *Virtual Manipulation Brief 2025*, cit., section *Recommendations*.

59 On the response of the European Union articulated upon prevention, protection and reaction, and on its complementarity with NATO, cf. EPRS, *EU Response to Hybrid Threats*, cit.; on 'lawful speed' and on legitimacy as an operational capability of democracies cf. L. Vaz - P. Ferreira, *Cognitive Warfare and Strategic Uncertainty*, cit.

From this perspective, the formal recognition of a "sixth domain" is neither a necessary objective nor a talisman against future threats. If anything, it simply gives a name to the problem of governing the sense-making layer, which the law can no longer afford to leave unaddressed.

8. Conclusions

From the Ems Dispatch to AI-enhanced cognitive operations, one constant has shaped the evolution of conflict: information has progressively become a source of power capable of producing material effects while increasingly shedding its material form. The analysis developed in this article, from the emergence of hybrid threats, through cyberspace as the fifth domain of warfare, to the contested cognitive domain, shows that international law has consistently adapted only after technological and strategic change had already occurred. What initially appeared to be a temporary delay has become a structural gap. A legal framework built around territory, armed force, and physical violence struggles to regulate forms of conflict that are increasingly intangible, deniable, and dispersed.

That gap is nevertheless more pronounced in some domains than in others. In cyberspace, existing international law has proved capable of accommodating many new forms of conduct through interpretation rather than institutional redesign. The applicability of the UN Charter, the effective control test, the scale and effects doctrine, and the principles of sovereignty and non-intervention together provide a coherent, albeit incomplete, legal framework. Its principal weakness, however, lies in attribution. The legal architecture depends upon identifying the State responsible for a cyber operation, whereas cyberspace is specifically designed to frustrate reliable attribution. As a result, legal sophistication continues to coexist with evidentiary uncertainty and political constraint.

The position is markedly different in the cognitive domain. Here the same interpretive techniques approach their practical limits. Operations directed at shaping perceptions rather than disrupting systems produce no physical destruction, often no identifiable event, and are conducted through activities that are ordinarily lawful, including public communication and digital platforms protected by fundamental rights. Attribution becomes even more elusive, not least because of the liar's dividend and the rapidly expanding capabilities of generative artificial intelligence. In these circumstances, neither the effects-based approach nor the principle of non-intervention provides an entirely satisfactory legal basis for responding to conduct deliberately designed to remain below established legal thresholds.

Two broader conclusions emerge. The first concerns legal methodology. Extending existing legal categories remains both necessary and, within important limits, feasible. At the same time, interpretive development, soft law instruments, and proposals for a dedicated convention should be understood as complementary responses rather than competing alternatives. None, however, can fully overcome the structural difficulty posed by technological change, because legal codification inevitably proceeds more slowly than the technologies it seeks to regulate.

The second conclusion is strategic. Because conflict in cyberspace and the cognitive domain is continuous, difficult to attribute, and largely unconstrained by traditional temporal or geographical boundaries, effective defence depends less on the legal classification of individual operations than on strengthening societal resilience before those operations occur. Cognitive resilience, media literacy, critical thinking, institutional preparedness, and coordinated action within the European Union and NATO therefore become not merely policy objectives but essential components of contemporary security. Whether cognitive operations should ultimately be recognised as a distinct sixth domain is of secondary importance. The more significant issue is that they expose a dimension of conflict for which existing legal categories provide only a partial response.

The invisible front therefore represents more than a new theatre of conflict. It marks the point at which the assumptions underlying the modern law governing the use of force are increasingly called into question. The issue is no longer simply whether new forms of conflict can be accommodated within existing legal categories, but whether legal concepts developed for warfare based on physical violence remain adequate when conflict increasingly targets information, perception, and human cognition. The analysis advanced here suggests that interpretation can carry international law a considerable distance into the fifth domain. Beyond that point, however, the limits of adaptation become increasingly apparent. As conflict shifts from systems to minds, the question is no longer whether the law should evolve, but how it can do so while preserving the values on which the international legal order itself ultimately rests.

From International Law to the Rules-Based Order: Cyberspace in the Post-Globalization Era

by Aniello Inverso

The contemporary international system is characterized by a profound restructuring, marked by processes of re-centering (the shift of the decision-making and regulatory center of gravity towards state and macro-regional poles that resume leadership capacities over value chains, technological standards, and critical infrastructures)[1], and functional segmentation (an environment lacking a shared and stable ordering principle, characterized by a density of partially overlapping but not hierarchically ordered institutions), guided by strategic considerations.[2] Interdependence between states does not disappear, but is selectively reconfigured according to the logic of weaponized interdependence. States and major economic actors aim to reduce asymmetric vulnerabilities and maximize levers of influence, exploiting the topology of global networks to exercise coercion through surveillance effects (panopticon effect) and denial of access (chokepoint effect).[3] Cyberspace assumes a specific centrality in this dynamic. The crisis of linear globalization, marked by the re-emergence of functional borders, trade wars, economic sanctions, and dynamics of weaponization, weakens the idea of a single, neutral network primarily oriented towards flow efficiency. The technical interconnections that made the Internet the priv-

1 García Pinzón C. and Wolff J., *From Decentering to (Re)centering in Peace and Conflict Studies: Contestations, Resignification, and Collaborations*, in *The Rowman & Littlefield Handbook of Peace and Conflict Studies*, Rowman & Littlefield, Lanham, 2025, p. 567, online at the site doi.org/10.5040/9798881842390.

2 International Monetary Fund, *Geo-Economic Fragmentation and the Future of Multilateralism*, Staff Discussion Note SDN/2023/001, Washington DC, 2023, p. 4, online at the site rba.gov.au/information/foi/disclosure-log/pdf/232429.pdf.

3 Alter K. J. and Raustiala K., *The Rise of International Regime Complexity*, Annual Review of Law and Social Science, vol 14, 2018, pp. 329, 342, online at the site annualreviews.org/doi/10.1146/annurev-lawsocsci-101317-030830.

ileged infrastructure of global openness are today subjected to regulation, segmentation, and control interventions, as well as employed as strategic resources for security, technological autonomy, and industrial competition. A selective de-globalization is observed in the digital domain; not a generalized isolation, but rather a reconfiguration of interdependence through legal constraints, standards, localization requirements, export restrictions on critical technologies, and trusted connectivity policies. This transformation also modifies the agenda of the legal analysis of cyberspace. The question of whether international law applies to activities in the digital domain appears less problematic than the question of how different legal regimes: general international law, trade law, sanction regimes, data protection norms, and technical standards; are mobilized, within a framework of regime complexity, to govern, condition, or interrupt digital interdependence. In a fragmented world order, such regimes operate not only as frameworks of legitimation or responsibility, but also as instruments of power, capable of producing extraterritorial effects, reshaping the conditions of access to markets, and impacting the very architecture of networks and platforms.[4]

The genesis of cyberspace can be traced back to the joint evolution of scientific research, telecommunications engineering, and strategic doctrine which, from the post-war period onwards, transformed an experimental military network into a domain of social interaction and conflict. ARPANET, created in 1969 by the Advanced Research Projects Agency to connect US universities and research centers in a decentralized manner, constitutes the first embryo of the modern Internet, based on packet switching and a topology designed to ensure the resilience of communications.[5] In the early 1980s, the adoption of the TCP/IP protocol suite allowed for the stable interconnection of heterogeneous networks and confirmed the transition from ARPANET to a true *network of networks*,[6] while in the early 1990s the invention of the World Wide Web at the European Organization for Nuclear Research and the spread of graphic browsers made access to online services available to increasingly vast scientific communities, later opening the way for the commercialization and mass distribution of the network.[7] During the same period, technical-institutional bodies responsible for managing standards, protocols, and critical resources (such as domain name

4 Alter K. J. and Raustiala K., op. cit., pp. 342-343.

5 Abbate J., *Inventing the Internet*, Mit Press, Cambridge (Ma) 1999, pp. 7-42.

6 Hafner K., Lyon M., *Where Wizards Stay Up Late*, Simon & Schuster 1996, pp. 240-255.

7 Abbate J., op. cit., pp. 181-220.

assignment) were consolidated, marking the emergence of an initial form of transnational network governance that anticipated the future political problematization of cyberspace. At a cultural and conceptual level, the term cyberspace appeared in the early 1980s in William Gibson's work Neuromancer, only to be rapidly adopted by social sciences and political discourse as a metaphor for a shared virtual space generated by the global interconnection of computer systems.[8] Cyberspace was understood as an immaterial environment where geographically dispersed subjects could interact, exchange information, and build forms of collective presence that no longer coincided with the physical borders of states, becoming almost synonymous with the Internet and the World Wide Web within academic communities and digital rights movements during the 1990s. Manuel Castells' theoretical reflection on the *network society* describes the transformation of advanced societies into structures organized around electronic information and communication networks, in which data flows become the primary infrastructure through which power is exercised and inclusion and exclusion are redistributed.[9] His concept of the *space of flows*, characterized by instantaneous temporality and relationships detached from territorial proximity, provides a decisive analytical framework for understanding cyberspace not only as a technical infrastructure, but as a new morphology of power, where the *phygital* dimension redesigns the relationship between physical space, mediated space, and political institutions.[10] On the security side, phenomena showing how increasing digital interconnection produced new systemic vulnerabilities already emerged in the mid-1980s. The 1986 Brain virus, considered the first malware for IBM-compatible personal computers and spread on a global scale, infected the boot sector of floppy disks and inaugurated a true international epidemic. Two years later, the Morris Worm, generally considered the first mass cyberattack, based on a worm capable of self-replicating on the network, compromised thousands of computers causing service interruptions, with such an economic and symbolic impact that it catalyzed the attention of institutions on cyber threats.[11] The management of these incidents pushed universities, research centers, and government agencies to establish specialized teams for incident

8 Gibson W., *Neuromante*, Milano, Editrice Nord, 1986, p. 6.

9 Castells M., *The Rise of the Network Society (The Information Age: Economy, Society and Culture, vol I)*, Blackwell 1996, pp. 407–459.

10 *ibidem*, pp. 440-444.

11 Orman H., *The Morris Worm: A Fifteen-Year Perspective*, *IEEE Security & Privacy*, 1, 5, 2003, pp. 35-37.

response, such as the first Computer Emergency Response Teams, and stimulated the adoption of specific regulatory interventions regarding computer crime, marking the birth of cybersecurity as an autonomous field of policy and practice.[12]

During the 2000s, several Western governments adopted national strategies dedicated to information and network security, explicitly linking the protection of critical digital infrastructures to the continuity of essential services, economic stability, and the resilience of the State in the event of a crisis or conflict. The United States led the way with the *National Strategy to Secure Cyberspace* (2003), followed by the United Kingdom with its first *National Cyber Security Strategy* (2009), Australia (2009), Canada (2010), and Germany and France (2011), which simultaneously established dedicated government agencies, the strengthening of the German Federal Office for Information Security (BSI) and the French ANSSI, demonstrating how the cyber threat was by then perceived as a full-fledged national security issue.[13] On an operational-military level, this translated into the progressive creation of specialized units in cyber-intelligence and cyber-operations within the armed forces and security agencies, tasked with conducting information-gathering activities in the digital domain, protecting military and government networks and, in some cases, developing offensive capabilities.[14] In 2007, Estonia became the first setting for a campaign of distributed denial of service attacks.[15] The attacks began in late April, coinciding with the political crisis linked to the Estonian government's decision to move the Soviet "Bronze Soldier" monument from a central square in Tallinn to the city's outskirts, and continued for approximately three weeks, striking in a coordinated manner the websites of the Presidency and Parliament, various ministries, the main newspapers, broadcasters, and the country's major banking institu-

12 Kaplan F., *Dark Territory: The Secret History of Cyber War*, Simon & Schuster, New York 2016, pp. 18-20.

13 Shakarian P., Shakarian J., Ruef A., *Introduction to Cyber-Warfare: A Multidisciplinary Approach*, Syngress, Waltham (Ma), 2013, pp. 24-31.

14 Ibidem, pp. 23-31.

15 A Distributed Denial of Service (DDoS) attack consists of a deliberate attempt to make a network resource unavailable to its intended users, saturating the system with a volume of traffic from multiple distributed sources (often botnets).
Mirkovic J. and Reiher P., *A Taxonomy of DDoS Attack and DDoS Defense Mechanisms*, ACM SIGCOMM Computer Communication Review, vol 34, no 2, 2004, pp 39-53.

tions.[16] Although there was no permanent damage to physical infrastructure and essential activities were overall restored, the episode vividly demonstrated the vulnerability of a State heavily dependent on electronic and digital services, in a context where the political responsibility for the cyber conflict, with reference to Russia, could not be conclusively proven but constituted a central element in the interpretation of the event.[17] On the domestic front, the attacks prompted Tallinn to quickly approve national plans to strengthen cybersecurity, reform the organizational and legislative framework and, in the medium term, present itself as an advanced laboratory for cyber resilience and innovation, including the use of technologies such as *blockchain* in the protection of certain critical registries. On the Euro-Atlantic level, the Estonian case acted as a catalyst for the redefinition of NATO's cyber defense posture: Allied defense ministers agreed on the need for urgent intervention; the first Allied cyber defense policy was drafted and approved in 2008; and the decision was made to establish, in Tallinn itself, the NATO Cooperative Cyber Defence Centre of Excellence, destined to become a central hub for research, training, and doctrinal development. The Russo-Georgian war of August 2008 represented a further step, in which cyber operations were no longer just an autonomous form of pressure but were integrated temporally and functionally with the conventional military offensive. As in Estonia, the cyber-attacks in Georgia aimed to degrade the State's ability to communicate with its population and the outside world; unlike 2007, however, they were part of a framework of simultaneous military operations, marking a qualitative evolution in the Russian model of coercion, just as Russian troops were crossing the border into South Ossetia.[18] Specialized literature emphasizes how the coordinated use of *botnets*, mobilization platforms for pro-Russian *hacktivists*, and online propaganda tools, including the distribution of *Denial of Service* software and target lists via the *StopGeorgia* website, gave these operations a clear military dimension, even in the absence of definitive proof of direct command and control by the Russian authorities. This makes Georgia the first case in which cyber operations were documented in close synchrony with conventional military maneuvers, unlike Estonia, where a land military dimension was absent, configuring the conflict as a paradigmatic case of hybrid warfare

16 Tikk E., Kaska K., Vihul L., *International Cyber Incidents: Legal Considerations*, Nato Ccdcoe, Tallinn, 2010, pp. 15-25.

17 Ibidem, pp. 18-25.

18 Shakarian P., Shakarian J., Ruef A., op. cit., pp. 24-27.

in which cyberspace is used simultaneously to support conventional land military tactics and kinetic and cognitive operations.[19] In 2010, with the discovery of Stuxnet, the militarization of cyberspace achieved a further qualitative leap, transitioning from the disruption of information services and infrastructures to the concrete demonstration of a cyber weapon's capacity to inflict physical damage on critical infrastructures. Technical and journalistic analyses converge in describing Stuxnet as an extremely sophisticated malware, designed to target specific configurations of Siemens industrial control systems employed in the Natanz uranium enrichment plant. It exploited an unprecedented combination of zero-day[20] vulnerabilities, drivers signed with stolen certificates, and advanced stealth techniques to manipulate the operational parameters of the centrifuges and cause their progressive failure without immediately alerting the operators.[21] Stuxnet is widely interpreted as the first "cyber weapon" in the strict sense, capable of integrating intelligence, industrial sabotage, and control engineering into a single targeted operation. It has become a reference case in the legal debate concerning the threshold between espionage, the unlawful use of force, and a possible "armed attack" under the Charter of the United Nations.[22] Following these events, in 2011 the United States Department of Defense officially declared cyberspace a new operational domain, alongside land, sea, air, and space. An initial unofficial recognition had already occurred in 1999 by the US Air Force with the report *Cyberspace: The Fifth Domain*, which acknowledged that military operations critically depend on the ability to act "in, through, and from" cyber space.[23] This recognition was accompanied by the adoption of the Department of Defense Strategy for Operating in Cyberspace and the strengthening of

19 Tikk E., Kaska K., Vihul L., op. Cit., pp. 73-76.

20 A 'zero-day' vulnerability is a software security flaw unknown to the vendor or developers at the time of its exploitation, for which no corrective patch is yet available. The term indicates that developers had 'zero days' to fix the problem before the attack.
Bilge L. and Dumitraş T., *Before We Knew It: An Empirical Study of Zero-Day Attacks in the Real World*, Proceedings of the 2012 ACM Conference on Computer and Communications Security (CCS 12), 2012, pp 833–844.

21 Zetter K., *Countdown to Zero Day: Stuxnet and the Launch of the World's First Digital Weapon*, Crown Publishers, New York, 2014, pp. 1-15, 88-100.

22 Schmitt M. N. (ed), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge 2017, pp. 330-345.

23 US Department of Defense, *Department of Defense Strategy for Operating in Cyberspace*, 2011, online at the site csrc.nist.gov/csrc/media/projects/ispab/documents/dod-strategy-for-operating-in-cyberspace.

U.S. Cyber Command. In doctrinal terms, cyberspace was thus integrated into traditional processes of joint planning, targeting, and command and control. The objective was to ensure the United States' freedom of action in global networks while denying it to adversaries, translating into operational structures the idea of a fifth dimension of conflict that had emerged in the previous decade.[24]

The 2017-2018 period represents the watershed of a further transformation in malicious activity; the WannaCry and NotPetya episodes demonstrate how endemic technical vulnerabilities can be exploited to generate cross-border systemic shocks. The first case highlights the convergence between mass extortion logics and automated propagation mechanisms based on protocol vulnerabilities, indiscriminately striking healthcare services and industrial networks.[25] The second, while adopting the technical mask of ransomware, reveals a different functional nature, establishing itself as a strategic coercion weapon (wiper) designed to inflict irreversible damage and operational paralysis. The attribution of NotPetya to state actors in the context of the Russian-Ukrainian conflict confirms the use of global economic interdependence as a domain of confrontation, where civilian infrastructure becomes a legitimate target and collateral damage to non-belligerent third parties is accepted as a calculated cost.[26] This trajectory becomes more radical in the following three-year period with the industrialization of the Ransomware as a Service model, which makes access to sophisticated offensive capabilities increasingly horizontal and transforms digital sabotage into a lever for political and social pressure.[27] The systematic compromise of municipal administrations, healthcare facilities, and logistics networks demonstrates how the disruption of essential services has become a structural tactic to maximize economic impact, exploiting the intrinsic fragility of hyper-connected ecosystems.[28] The attack against the Colonial Pipeline in May 2021 further

24 Ibidem.

25 Trautman L. J. and Ormerod P. C., *WannaCry, Ransomware, and the Emerging Threat to Corporations,* Tennessee Law Review, vol 86, no 3, 2019, p. 505, online at the site ssrn.com/abstract=3238293.

26 Steinberg S., Stepan A. and Neary K.*, NotPetya: A Columbia University Case Study*, School of International and Public Affairs-21-022.1, Columbia University, 2021, p 4, online at the site .sipa.columbia.edu/sites/default/files/2022-11/NotPetya%20Final

27 Reeder J. R. and Hall T., *Cybersecurity's Pearl Harbor Moment: Lessons from Colonial Pipeline*, The Cyber Defense Review, vol 6, no 3, Summer 2021, pp. 1–8, online at the site cyberdefensereview.army.mil.

28 North Atlantic Treaty Organization Cooperative Cyber Defence Centre of Excellence, *Addressing State-Linked Cyber Threats to Critical Maritime Port Infrastructure: Policy*

heightens risk perception, establishing a direct link between cyber vulnerability and national energy security. The decision to preemptively halt the physical flow of hydrocarbons to contain an Information Technology compromise highlights how the convergence between Information Technology and Operational Technology systems has created critical points of failure, where private criminal action can generate effects comparable to military sabotage, forcing the state apparatus into emergency measures. Similarly, the 2022 campaign against Costa Rica illustrates the vulnerability of entire state apparatuses to massive attacks, forcing a government to declare a state of national emergency to face administrative and fiscal paralysis, a precedent that redefines digital sovereignty as a prerequisite for institutional stability.[29] The Russian invasion of Ukraine in 2022 finally formalizes the doctrinal integration between cyber operations and conventional military maneuvers. The coordinated use of destructive wipers against government networks, attacks on satellite communications (Viasat), and attempted sabotage of power grids (Industroyer2), in synchronization with kinetic operations, defines the paradigm of contemporary hybrid warfare. In this theater, the digital domain does not act as a substitute but as a force multiplier, aimed at degrading the opponent's infrastructural and cognitive resilience.[30] Developments during the 2024–2025 period confirm the consolidation of this scenario, characterized by the persistence of hybrid threats that merge the penetration capabilities of state actors with the opportunism of criminal groups. The recurring incidents against critical nodes of the global supply chain and strategic infrastructures, combined with silent pre-positioning activities within defense networks, outline an operating environment where cyberspace is firmly integrated into the competition strategies between powers.[31] On December 29, 2025, coordinated destructive attacks struck over thirty facilities of the Polish power system. These included wind farms, photovoltaic plants, a cogeneration plant, and a manufacturing company, compromising Operational Technology and Industrial Control Systems through internet-exposed edge devices. The action

Brief, 2025, pp. 3–4, online at the site ccdcoe.org/uploads/2025/07/CCDCOE_Policy_ Brief.

29 Mueller G. B., Jensen B., Valeriano B., et al, *Cyber Operations During the Russo-Ukrainian War*, Center for Strategic and International Studies, July 2023, p. 3, online at the site csis.org/analysis/cyber-operations-during-russo-ukrainian-war

30 Mueller G. B., Jensen B., Valeriano B., et al, op. cit., pp. 14-22.

31 North Atlantic Treaty Organization Cooperative Cyber Defence Centre of Excellence, op cit, pp. 4-8.

damaged Remote Terminal Units, corrupted firmware, and deleted data from Human-Machine Interfaces, depriving operators of the ability to remotely monitor and control the plants, although it did not cause supply interruptions due to network redundancy. Computer Emergency Response Team Polska and the Cybersecurity and Infrastructure Security Agency attributed the operation with moderate confidence to the Static Tundra/ELECTRUM cluster, a Russia-aligned group already known for its systematic interest in the European energy sector, marking the first publicly documented destructive activity attributable to this actor outside the Ukrainian theater.[32] The Polish case confirms a trajectory already emerged with Industroyer2. The primary target is shifting from the main transmission grid toward the distributed edge of the network, where renewable plants and cogeneration systems have structurally weaker security controls, serving as privileged access vectors to national critical infrastructure.

The longitudinal analysis of cyber events, from the 2007 Estonian case to the 2025 Polish attack, highlights a structural reconfiguration of the morphology of war. We observe the overcoming of the spatially circumscribed conception of conflict in favor of a widespread and permanent state of confrontation, where the digital domain becomes the primary theater of a competition characterized by perpetual continuity. The chronology of incidents confirms the capacity of cyber operations to degrade state decision-making sovereignty (Estonia 2007, Georgia 2008), to produce physical effects on strategic assets in the absence of a formal declaration of war (Stuxnet), and to generate systemic shocks to essential cross-border services (WannaCry, NotPetya). This evolution has eroded the threshold of inhibition regarding the use of force, normalizing the use of offensive tools defined as sub-threshold.[33] Cases such as Colonial Pipeline and Costa Rica demonstrate how even formally criminal actions can take on a warlike significance, impacting energy security and national administrative continuity, making the distinction between a security incident and an act of war increasingly

32 Cybersecurity and Infrastructure Security Agency, *Alert: Poland Energy Sector Cyber Incident Highlights OT and ICS Security Gaps*, 2026, online at the site cisa.gov/news-events/alerts/2026/02/10/poland-energy-sector-cyber-incident-highlights-ot-and-ics-security-gaps.

33 Davydiuk Y. and Potii A., *National Cybersecurity Governance: Lessons Learned from the Ukraine–Russia War*, Nask–Piit, Warsaw, 2024, pp. 15–19, online at the site ccdcoe.org/uploads/2024/08/National-Cybersecurity-Governance_Ukraine_Davydiuk_Potii_2024.

blurred.[34] Critical infrastructures become the new centers of gravity of conflict. The objective is no longer immediate territorial conquest, but rather the degradation of the state's capacity to provide essential services, with the intent of generating systemic crises and eroding the bond of trust between institutions and citizens. In the Ukrainian theater, the systematic aggression against power and communication networks aims to undermine the psychological and material resilience of the population, while ransomware campaigns transform data into assets for economic and political pressure. This dynamic culminates in an intrinsically hybrid form of conflict, where cyber operations, conventional maneuvers, economic pressure, and disinformation converge into a single integrated strategy.[35] The simultaneous proliferation of asymmetric actors, criminal groups, state proxies, and activists operating with tools technically comparable to those of governments further complicates the situation, increasing the risk of involuntary escalation stemming from incorrect perceptions of adversary intent.[36]

Transformations in the perception, objectives, and typology of conflict directly impact the categories through which international law has traditionally regulated the use of force. The difficulty of clearly distinguishing between peacetime and wartime, between the front line and the rear, or between military targets and civilian infrastructures makes the application of classical notions of sovereignty, non-intervention, and armed conflict less straightforward, forcing doctrine and practice to examine how principles originating in physical contexts can be applied to cyberspace. The tension between operational reality and the international legal framework is particularly evident in the very existence of the Tallinn Manual. Developed under the auspices of the North Atlantic Treaty Organization Cooperative Cyber Defence Centre of Excellence, the manual was established in 2013 as the first systematic attempt to reconstruct the application of customary international law norms to cyber operations. In its first version, the analysis focused predominantly on jus ad bellum, the conditions that legitimize

34 Reeder J. R. and Hall T., *Cybersecurity's Pearl Harbor Moment: Lessons Learned from the Colonial Pipeline Ransomware Attack*, *The Cyber Defense Review*, vol 6, no 3, Summer 2021, pp 16–21, online at the site cyberdefensereview.army.mil/Portals/6/Documents/2021_summer_cdr/02_ReederHall_CDR_V6N3_2021.

35 Davydiuk Y. and Potii A., op. cit, pp. 12-14.

36 United Nations, *Final report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, A/76/135, 2021, 17–23, online at the site digitalwatch.giplatform.org/resource/un-gge-2021-final-report.

the recourse to force, and jus in bello, namely the rules governing the conduct of hostilities once an armed conflict has begun. The Tallinn Manual 2.0, published in 2017, significantly expands the reference normative horizon. While maintaining the core dedicated to the law of armed conflict, it extends the analysis to general rules of international law applicable to the cyber domain during peacetime: state sovereignty, the principle of non-intervention, international state responsibility, and the protection of human rights in the digital environment. The issue of due diligence assumes particular importance, imposing an obligation on states not to knowingly allow their territory to be used for offensive cyber operations against other states, with significant implications for cases such as Estonia and Georgia, where state involvement was not definitively provable but was plausible. The work, although not legally binding as it is the product of a group of independent experts rather than an interstate negotiation process, constitutes the main doctrinal reference point in the international debate on the regulation of cyber operations, reflecting the structural difficulty of adapting legal categories developed in a pre-digital era to an operational domain characterized by anonymity, uncertain attribution, and actions systematically conducted below the threshold of conventional armed conflict.[37] This same trajectory is confirmed at the intergovernmental political level by the reports of the United Nations Group of Governmental Experts from 2013 and 2015, which recognize the applicability of international law and the United Nations Charter to information and communication technologies and identify an initial core of voluntary norms for responsible behavior,[38] subsequently consolidated and systematized by the United Nations Open Ended Working Group established in 2018 with universal participation, leading to the formalization of eleven voluntary norms, useful as shared parameters for assessment and as a basis for practice and opinio juris regarding responsibility and duties of diligence.[39] Russian aggression against Ukraine has made this tension particularly visible by linking the practice of

37 Schmitt M. N., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, 2017, pp. 50–150.

38 United Nations General Assembly, *Resolution 70/150: Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, A/RES/70/150, 2015, online at the site documents.un.org/doc/undoc/gen/n15/441/14/pdf/n1544114.

39 United Nations General Assembly, *Advancing Responsible State Behaviour in Cyberspace in the Context of International Security*, A/76/150, 2021, online at the site docs.un-.org/en/A/76/150.

conflicts to the stability of the rules-based international order. The Euro-Atlantic position was consolidated with the 2022 North Atlantic Treaty Organization Strategic Concept, which defines Russia as the most significant threat to allied security, committing the Alliance to defending the international order even in the cyber domain against revisionist attempts at erosion.[40] The White House, in the 2023 National Cybersecurity Strategy, reaffirms that Russian cyber operations constitute sub-threshold aggressions that undermine the rules-based order, justifying multilateral countermeasures.[41] Russian cyber operations against Ukrainian energy infrastructure, communications, and administration are interpreted as forms of aggression against the principles of the United Nations Charter and as a test of the norms of responsible State behavior developed within the United Nations. A divergent perspective emerges from the Brazil, Russia, India, China, and South Africa group, which claims a project for an order also based on rules but alternative to Western centrality. In the 2023 Johannesburg II Declaration, the leaders of the bloc affirm the goal of a multipolar, fair, and inclusive international system founded on the centrality of the United Nations Charter, sovereign equality, and non-interference, invoking these principles also in relation to cooperation in the field of information and communication technologies.[42] Critical literature highlights, however, how the practice of some members pursues state-centric models of digital sovereignty, based on internal control of information, the segmentation of network space, and a political use of technologies, producing a significant gap between the language of fidelity to the Charter and actual policies. Agendas on digital sovereignty and autonomous infrastructures appear as a response to the perceived asymmetry of the existing order and as a vehicle for a reconfiguration of rules in the digital space, contributing to the configuration of cyberspace as a normative archipelago where different regimes, practices, and interpretations coexist and compete. United Nations processes, through the two lines of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in

40 North Atlantic Treaty Organization, *Strategic Concept*, Madrid, 2022, online at the site act.nato.int/wp-content/uploads/2023/05/290622-strategic-concept.

41 The White House, *National Cybersecurity Strategy,* Washington DC, 2023, online at the site bidenwhitehouse.archives.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.

42 BRICS, *Johannesburg II Declaration*, adopted at the 15th Brics Summit, Johannesburg, 2023, pp. 1-3, online at the site gov.za/sites/default/files/speech_docs/Jhb%20II%20Declaration%2024%20August%202023

the Context of International Security and the Open Ended Working Group on Developments in the Field of Information and Communication Technologies in the Context of International Security, have produced a core of voluntary norms anchored to the application of the United Nations Charter and existing international law, while doctrinal initiatives such as the Tallinn Manual and numerous national position papers, including the Italian document International Law and Cyberspace (Ministry of Foreign Affairs and International Cooperation, 2021),[43] the Swedish document Position Paper on the Application of International Law in Cyberspace (Ministry for Foreign Affairs of Sweden, 2022),[44] and the Irish one Position Paper on the Application of *International Law* in Cyberspace (Department of Foreign Affairs of Ireland, 2023),[45] have sought to specify the application of sovereignty, non-intervention, the prohibition of the use of force, state responsibility, and due diligence to cyber operations.

The transformation observed in the cyber domain does not only affect the material application of existing norms but concerns the very grammar of the international legal order. In the twentieth-century tradition, the United Nations Charter and the development of general international law were interpreted as expressions of a normative universalism, a body of rules that is fundamentally unitary and applicable to all states as members of the same legal community, structured around powerful categories such as jus cogens, erga omnes obligations, and the collective protection of peace and fundamental rights. From this perspective, cyberspace would simply be the fifth domain for applying already established rules, to be extended without any principled fractures. However, the practice of recent decades and the critical interpretations of legal scholarship offer indispensable insights for deconstructing this claim of homogeneity. While Antonio Cassese, in his International Law, already highlighted the structural tension between the aspiration toward universal community values and the per-

43 Ministry of Foreign Affairs and International Cooperation of Italy, *Italian Position Paper on 'International Law and Cyberspace'*, 2021, online at the site esteri.it/mae/resource/doc/2021/11/italian_position_paper_on_international_law_and_cyberspace.

44 Ministry for Foreign Affairs of Sweden, *Position Paper on the Application of International Law in Cyberspace*, 2022, online at the site government.se/contentassets/3c2cb6febd0e4ab0bd542f653283b140/swedens-position-paper-on-the-application-of-international-law-in-cyberspace.

45 Department of Foreign Affairs of Ireland, *Position Paper on the Application of International Law in Cyberspace*, 2023, online at the site cyberlaw.ccdcoe.org/wiki/National_position_of_Ireland.

sistent reality of a society of sovereign states driven by national interest,[46] Martti Koskenniemi, in works such as *From Apology to Utopia*, represents the most closely aligned theoretical reference. His critique reveals how international legal discourse constantly fluctuates between the apology for existing power, ratifying what states in a dominant position enact, and a normative utopia detached from political reality.[47] This is a dynamic that, in cyberspace, risks reducing universal norms to empty rhetoric if not supported by enforcement mechanisms that inevitably fall back into the logic of power. At an operational level, the illusion of a digital domain intrinsically immune to state sovereignty has been dismantled by the seminal analyses of Jack Goldsmith and Tim Wu. In *Who Controls the Internet?*, they demonstrate how geography remains a determining factor: states impose their coercive will on the physical intermediaries of the network (Internet Service Providers, servers, companies located on the territory), de facto territorializing digital flows and fragmenting the utopia of a borderless global network.[48] On an even deeper level, Laura DeNardis, in *The Global War for Internet Governance*, has clarified how the battle for control takes place not only in courtrooms but within the very architecture of the network. Her thesis that "protocols are politics" highlights how the management of technical standards, Internet Protocol addresses, and routing constitutes an invisible lever of governance capable of determining civil rights and national security more than written laws.[49] These analyses show how universalism has been progressively eroded by the emergence of partial and selective legal regimes, often promoted by coalitions of states or geopolitical blocs. In Euro-Atlantic political discourse, the expression "rules-based international order" tends to indicate not so much international law as such, but rather a set of rules and institutions, the World Trade Organization, sanction regimes, technical standards, soft law, which largely reflect the normative preferences of Western liberal democracies and are proposed as a criterion for the legitimacy of state conduct. At the same

46 Cassese A., *International Law*, 2nd ed, Oxford, Oxford University Press, 2005, pp. 66–67, 72–73.

47 Koskenniemi M., *From Apology to Utopia: The Structure of International Legal Argument*, Reissue with a new Epilogue, Cambridge, Cambridge University Press, 2005, pp. 158–164.

48 Goldsmith J. L. and Wu T., *Who Controls the Internet?: Illusions of a Borderless World*, New York, Oxford University Press, 2006, pp. 22–24, 48-52.

49 DeNardis L., *The Global War for Internet Governance*, New Haven, Yale University Press, 2014, pp. 1–5.

time, revisionist actors or those from the Global South claim their own versions of a "rules-based international order," formally anchored to the United Nations Charter but reinterpreted in terms of non-interference, digital sovereignty, and multipolarity. This is demonstrated on a bilateral level by the Sino-Russian Joint Statement on Cooperation in the Development of Information Space (2016)[50] and the Joint Statement on the International Relations Entering a New Era (2022);[51] and on a multilateral level by the International Code of Conduct for Information Security promoted by the Shanghai Cooperation Organization (2011, revised in 2015)[52] and the final declarations of the Brazil, Russia, India, China, and South Africa group summits in Johannesburg (2023)[53] and Kazan (2024)[54]. In this normative ecosystem, the distance between international law conceived as universal and a constellation of bloc-based rules-based orders becomes particularly visible. On one hand, doctrine such as the Tallinn Manual 2.0 and United Nations processes, specifically the United Nations Group of Governmental Experts and the Open Ended Working Group on Developments in the Field of Information and Communication Technologies, insist on the continuity of general international law, affirming that sovereignty, non-intervention, the prohibition of the use of force, state responsibility, and human rights apply fully to cyber operations as well. On the other hand, the European Union is building its own digital regulatory space through instruments such as the Network and Information Security Directive 2 and the Cyber Resilience Act; the United States articulates a cyber order centered on operational doctrine, extraterritoriality through the Clarifying Lawful Overseas Use of Data Act and export controls, and the centrality of its own technological companies; while Russia, China, and part of the Brazil, Russia, India, China, and South Africa group promote models

50 Presidency of the People's Republic of China, *Joint Statement on Cooperation in Developing Information Space*, 2016, online at the site chinadaily.com.cn/china/2016-06/26/content_25856778.htm.

51 European Parliament, *Russia's war on Ukraine: The digital dimension*, 2022, online at the site europarl.europa.eu/RegData/etudes/BRIE/2022/729349/EPRS_BRI(2022)729349_EN.pdf.

52 Ministry of Foreign Affairs of the People's Republic of China, *International Code of Conduct for Information Security*, 2015, online at the site mfa.gov.cn/eng/wjb/zzjg_663340/jks_665232/jkxw_665234/202406/t20240606_11405001.html.

53 BRICS, op.cit., 2023.

54 BRICS, *Kazan Declaration: Strengthening Multilateralism for Just Global Development and Security*, 2024, online at the site mfa.gov.cn/eng/wjb/zzjg_663340/jks_665232/jkxw_665234/202406/t20240606_11405001.htm

of information sovereignty and network segmentation that lead to the splinternet. Speaking of a transition from international law to a rules-based order in cyberspace therefore means recognizing that the global network is not governed by a single set of universalistic rules, but by an archipelago of competing legal regimes, each of which uses the language of law to institutionalize, legitimize, and project specific balances of power in post-globalization. The development of international law on state responsibility in cyberspace is currently structured around two pillars: the doctrinal elaborations of the Tallinn Manual and the negotiation processes within the United Nations which, despite having different legal statuses, converge in recognizing that the general framework of the United Nations Charter and general international law fully applies to cyber operations. Specifically, these instruments address three central points: the classification of cyber operations in light of the categories of use of force and armed conflict; the criteria for attribution and violation of primary obligations, such as sovereignty, non-intervention, and due diligence; and the legal consequences of wrongful acts and the role of countermeasures.[55]

It is precisely to navigate this complexity that the European Union has developed its own autonomous strategic posture, in an attempt to translate the abstract principles of international law into a binding and operational regulatory system capable of resisting the pressures of global fragmentation. Within the domestic context, which falls fully under the application of sovereignty, the European Union represents the most coherent core of the liberal-democratic paradigm, both due to its explicit anchoring to the United Nations Charter and human rights, and its intense internal regulatory production regarding cybersecurity and digital governance. Member states clearly affirm that sovereignty, non-intervention, the prohibition of the use of force, state responsibility, due diligence, and fundamental rights apply fully to cyber operations, positively recalling the work of the Tallinn Manual and the norms of responsible behavior developed within the United Nations Group of Governmental Experts and the United Nations Open Ended Working Group on Developments in the Field of Information and Communication Technologies. In terms of security policies and external action, the European Union presents itself as a defender of an open, global, and rules-based digital order, in which the protection of critical infrastructure and network resilience must be reconciled with the protection of privacy, freedom of expression, and the rule of law in the online space. On the inter-

55 Schmitt M. N., op. cit, pp 404–445, 446–473, 474–501, 502–539.

nal regulatory level, the European Union has built a stratified framework. The Network and Information Security Directive and the Network and Information Security Directive 2 establish risk management obligations, minimum security requirements, and incident notification regimes for operators of essential services and digital service providers, reinforcing the capacity of member states to prevent, detect, and manage significant cyber events. The Cybersecurity Act establishes a European certification system for information and communication technologies products, services, and processes, conferring a central role upon the European Union Agency for Cybersecurity in defining common schemes and supporting the convergence of security standards within the internal market.[56] Other sector-specific acts regulate the protection of critical infrastructure, such as the Critical Entities Resilience Directive 2022/2557, personal data, and cloud and electronic communication services, contributing to outlining an increasingly organic body of rules on the security of the European digital space. Within this architecture, the General Data Protection Regulation constitutes the pillar of European data sovereignty. It recognizes strong subjective rights for data subjects, imposes principles of lawfulness, minimization, and purpose limitation of treatment, and provides specific security and breach notification obligations that burden any entity, inside or outside the European Union, that processes data of European Union residents.[57] The extraterritorial character of the General Data Protection Regulation, combined with an incisive sanctions regime and the role of national supervisory authorities coordinated by the European Data Protection Board, transforms European data law into an instrument of regulatory power capable of conditioning global processing practices, forcing platforms and providers outside the European Union to align with European standards to access the internal market.[58] The protection of personal data is not only a guarantee of fundamental rights but also an essential component of the digital sovereignty strategy of the European Union, which aims to reduce infor-

56 European Parliament and the Council, *Directive (EU) 2016/1148 of 6 July 2016, 2016*, online at the site eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L1148; European Parliament and the Council, *Directive (EU) 2022/2555 of 14 December 2022*, 2022, online at the site eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-:32022L2555.

57 European Parliament and the Council, *Regulation (EU) 2019/881 (Cybersecurity Act)*, 2019, online at the site eur-lex.europa.eu/eli/reg/2019/881/oj.

58 European Data Protection Board, *Work Programme 2021-2022*, 2021, online at the site edpb.europa.eu/system/files/2021-01/edpb_workprogramme_2021-2022_en.pdf.

mation asymmetry relative to large technology companies and to govern cross-border data flows in terms of strategic autonomy. Alongside the General Data Protection Regulation and the Network and Information Security Directive 2, the Cyber Resilience Act completes the framework by shifting the focus from the mere operation of services and infrastructures to the security by design of products with digital elements throughout their entire life cycle. The regulation, which entered into force in 2024, establishes that connected hardware and software can be placed on the Union market only if they comply with essential cybersecurity requirements, imposing obligations on manufacturers for risk analysis and management, the release of security updates, vulnerability disclosure, and the notification of severe incidents to national Computer Security Incident Response Teams and to the European Union Agency for Cybersecurity within strict deadlines.[59] In combination with the Network and Information Security Directive 2, the Cyber Resilience Act extends the logic of resilience from critical infrastructures to digital supply chains and the Internet of Things, aiming to reduce the market presence of intrinsically insecure products and to transform security into a regulated attribute of the product, rather than leaving it solely to the technical discretion of manufacturers. The result is an integrated corpus, the General Data Protection Regulation for personal data, the Network and Information Security Directive 2 for networks and essential services, and the Cyber Resilience Act for digital products, which makes it clear how the digital sovereignty of the European Union translates into a coherent set of legal standards on data, infrastructures, and technologies, with de facto extraterritorial effects that project the European model far beyond the borders of the Union.[60] On the external front, the European Union Cyber Diplomacy Toolbox allows for the adoption of coordinated restrictive and diplomatic measures. These include targeted sanctions, declarations of attribution, and the suspension of forms of cooperation against state and non-state actors held responsible for significant cyberattacks, thereby directly linking cyber behavior to international responsibility and the collective European response.[61] This framework is complemented by an active participation in United Nations processes, specifically the United Nations

59 European Parliament and the Council, *Regulation (EU) 2024/2847 (Cyber Resilience Act)*, 2024, online at the site eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-:32024R2847.

60 European Parliament and the Council, *Regulation (EU) 2019/881*, op. cit.

61 Council of the European Union, *Council Implementing Regulation (EU) 2025/173*, 2025, online at the site eur-lex.europa.eu/eli/reg_impl/2025/173/oj/eng.

Group of Governmental Experts, the United Nations Open Ended Working Group on Developments in the Field of Information and Communication Technologies, and the negotiations for the new United Nations Convention on Cybercrime, as well as regional processes, such as the Council of Europe for the Budapest Convention and its Second Additional Protocol, where the European Union advocates for an approach centered on judicial cooperation, procedural guarantees, and the respect for fundamental rights even in countering cybercrime.[62] The strengths of the European framework lie in its high degree of regulation and the internal coherence among security, the market, and rights. Indeed, the European Union model tends to translate otherwise merely proclaimed principles, such as due diligence, operator responsibility, and notification obligations, into binding rules, creating concrete incentives for cyber risk management and setting standards that de facto possess an extraterritorial reach for all providers intending to operate within the European market. Furthermore, the insistence on the protection of fundamental rights and the transparency of security measures, even in sensitive sectors such as countering terrorism and cybercrime, makes the European model an important reference point for those who conceive of the digital space as an extension of the constitutional order, rather than as a mere technical arena for competition between powers.[63] At the same time, the European Union model presents structural weaknesses and critical issues. First and foremost, there is a clear gap between the regulatory ambition of Brussels and the operational and financial capabilities of many member states. Numerous national systems struggle to fully implement the Network and Information Security Directive 2, to establish truly effective Computer Security Incident Response Teams, and to exercise substantial controls over complex supply chains that are heavily dependent on a few large technology vendors outside the European Union.[64] In addition, the strong centrality of secondary legislation and agencies, such as the European Union Agency for Cybersecurity and the Computer Emergency Response Team for the European Union institutions, bodies, and agencies, can reinforce, especially in the eyes of external actors, the image of a hyper-bureaucratic system, which is highly efficient in producing standards but less capable of reacting rapidly to emerging threats, particularly when com-

62 Council of the European Union, *Council Implementing Regulation (EU) 2025/173,* op. cit.

63 European Parliament and the Council, *Regulation (EU) 2024/2847*, op. cit.

64 European Parliament and the Council*, Regulation (EU) 2024/2847,* op. cit.

pared to more operational models such as that of the United States.[65] Finally, the inclination of the European Union to propose itself as a normative power in cyberspace, by imposing or promoting its own standards globally, is subject to criticism both from those in the Global South and the Brazil, Russia, India, China, and South Africa group who perceive this projection as a new form of regulatory hegemony, and from those within Europe who fear that an excess of constraints could compress innovation and technological competitiveness relative to the United States and China.

While the institutions of the Old Continent seek to assert their sovereignty through regulatory power and the single market, a radically different vision emerges from the other side of the Atlantic, where security is built not only through rules, but through the active projection of force and jurisdiction. In the United States model, cyberspace is simultaneously an operational domain of strategic importance, an object of fragmented internal regulation, and a central instrument for the projection of the rules-based international order according to the American interpretation. United States authorities have asserted for years that the United Nations Charter and general international law fully apply to state activities in cyberspace, framing the promotion of norms of responsible behavior as part of an international strategy aimed at supporting an open and secure digital ecosystem anchored to international commitments and international law, including international human rights law.[66] National security strategies and the doctrines of the Department of Defense, specifically the 2018[67] and 2023[68] Department of Defense Cyber Strategies, have developed the operational concepts of defend forward and persistent engagement, which entail proactive and continuous cyber activity below the threshold of the use of force to counter hostile

65 Council of the European Union, *Council Implementing Regulation (EU) 2025/173*, op. cit.

66 United States Department of State, *United States International Cyberspace and Digital Policy Strategy: Towards an Innovative, Secure, and Rights-Respecting Digital Future*, 2024, pp. 7–8, online at the site state.gov/wp-content/uploads/2024/07/United-States-International-Cyberspace-and-Digital-Strategy-FINAL-2024-05-15_508v03-Section-508-Accessible-7.18.2024.

67 United States Department of Defense, *Summary of the 2018 Department of Defense Cyber Strategy*, 2018, pp. 1-2, online at the site dodcio.defense.gov/Portals/0/Documents/Library/CyberStrategy2018.

68 United States Department of Defense, *Summary: 2023 Cyber Strategy of the Department of Defense*, 2023, pp. 1-3, online at the site media.defense.gov/2023/Sep/12/2003299076/-1/-1/1/2023_DOD_Cyber_Strategy_Summary.

campaigns before they produce serious effects on United States territory or interests.[69] Cyberspace is a space where traditional deterrence is scarcely effective and security is played out in a constant but contained conflict, in which operations of intrusion, pre-positioning, and disruption within adversary networks are considered legitimate as long as they remain below the threshold of an armed attack.[70] On the domestic front, the United States combines a strong emphasis on voluntary standards and public-private partnerships, such as the National Institute of Standards and Technology Cybersecurity Framework and the role of the Cybersecurity and Infrastructure Security Agency as a federal hub, with targeted regulatory interventions in critical sectors, often triggered by shocks such as the attack on the Colonial Pipeline.[71] Following the 2021 case, the Department of Homeland Security and the Transportation Security Administration introduced binding security directives for pipeline operators, imposing mandatory requirements on governance, incident reporting, risk assessment, and response plans, marking the transition from an almost entirely voluntary model to a regulatory compliance regime for critical energy infrastructures.[72] On the external front, the United States systematically utilizes extraterritorial law enforcement tools, such as indictments by the United States Department of Justice against advanced persistent threats and ransomware groups, as well as seizures of wallets and illicit proceeds, and coercive diplomacy, including Office of Foreign Assets Control sanctions and public designations, to target state and non-state actors held responsible for hostile cyber operations. Simultaneously, it seeks to consolidate, through official statements and practice, an interpretation of international law that legitimizes a wide margin of maneuver for defending forward.[73] Relevant examples include the 2020 indictments against six officers of the Main Directorate of the General Staff of the Armed Forces of the Russian

69 Leitzel B. C. and Hillebrand G. D., *Strategic Cyberspace Operations Guide*, United States Army War College, 2022, pp. 15-17.

70 United States Department of Defense, op. cit., 2018, p. 12.

71 United States Department of Defense, *Defense Industrial Base Cybersecurity Strategy 2024*, 2024, online at the site https://dodcio.defense.gov/Portals/0/Documents/Library/DIB-CS-Strategy.

72 United States Department of State, *United States International Cyberspace and Digital Policy Strategy: Towards an Innovative, Secure, and Rights-Respecting Digital Future*, 2024, pp. 11-12, online at the site state.gov/wp-content/uploads/2024/07/United-States-International-Cyberspace-and-Digital-Strategy-FINAL-2024-05-15_508v03-Section-508-Accessible-7.18.2024.

73 United States Department of Defense, op cit, 2023, pp. 4-5.

Federation for a series of destructive attacks, including NotPetya and other operations against Ukrainian and Georgian infrastructures; global actions against ransomware criminal groups such as NetWalker and REvil, involving arrests through international cooperation and seizures of proceeds; and the recovery by the United States Department of Justice of approximately 2.3 million dollars of the ransom paid by Colonial Pipeline to DarkSide, achieved by tracking Bitcoin flows.[74] On the sanctions side, the Office of Foreign Assets Control has designated groups such as Lazarus, Evil Corp, and the SUEX exchange for their role in ransomware campaigns and in facilitating transactions related to banking malware, signaling that even the payment of ransoms to sanctioned entities can constitute a violation of the sanctions regime, thereby targeting the financial infrastructure of the criminal ecosystem.[75] Added to this framework is the 2018 Clarifying Lawful Overseas Use of Data Act, which explicitly extends the extraterritorial scope of orders issued under the Stored Communications Act regarding United States providers. Companies subject to United States jurisdiction are required to provide data in their possession, custody, or control, regardless of the physical location of storage, even if situated in data centers in Europe or other third countries. The Clarifying Lawful Overseas Use of Data Act simultaneously introduces a mechanism for bilateral executive agreements with trusted partners, which allows foreign authorities to directly approach United States providers to obtain electronic evidence, and recognizes the possibility for providers to challenge orders that conflict with the laws of the country where the data is stored.[76] It is precisely this combination of personal jurisdiction over major United States cloud providers and selective bilateral agreements that has fueled tensions with the European legal framework, particularly regarding the General Data Protection Regulation and Article 48,[77] as well as fears that this instrument is being used to consolidate United States hegemony over access to cloud data for security and law enforcement purposes. Within the framework of the rules-

74 Leitzel B. C. and Hillebrand G. D., op cit, 2022, pp. 24-26.

75 United States Department of State, Treasury, Homeland Security, and Federal Bureau of Investigation, *Democratic People's Republic of Korea Cyber Threat Advisory, Annex I*, 2020, online at the site ofac.treasury.gov/media/36061/download?inline.

76 United States Congress, *House of Representatives 4943 - Clarifying Lawful Overseas Use of Data Act*, 115th Congress, 2018, online at the site congress.gov/bill/115th-congress/house-bill/4943/text

77 Cochrane T., *Hiding in the Eye of the Storm Cloud: How Clarifying Lawful Overseas Use of Data Act Agreements Expand United States Extraterritorial Investigatory Powers*, *Duke Journal of Comparative and International Law*, vol 32, 2021, pp. 153, 175-189.

based order promoted by Washington, a growing role is also played by export controls on strategic technologies, particularly in the sectors of advanced semiconductors, high-performance computing, and artificial intelligence applications. Since 2018, the Bureau of Industry and Security has adopted and tightened packages of measures that limit the capacity of China and, to varying degrees, other states considered adversaries, to access high-end chips, semiconductor manufacturing equipment, and dual-use technologies with military and surveillance relevance.[78] These rules, presented as the implementation of the small yard, high fence strategy, aim to slow down the development of advanced algorithmic warfare capabilities and autonomous technological ecosystems in rival countries, transforming export control regimes, along with financial sanctions, entity lists, and technical standards, into one of the primary tools through which the United States seeks to selectively shape access to critical technological resources in global cyberspace.[79] A peculiar element of the United States framework is the weight of quasi-state private actors, whose infrastructure becomes an integral part of the security posture and the conduct of conflicts, as demonstrated by the case of Elon Musk and the Starlink constellation. Following the 2022 Russian invasion, the rapid activation of Starlink in Ukraine provided the Ukrainian government and armed forces with a satellite communication backbone resilient against attacks and interference, becoming critical infrastructure for both civilian functions and military coordination on the field.[80] At the same time, unilateral decisions to restrict or deny service in specific operational areas, for example in relation to Ukrainian operations in Crimea, and revelations regarding direct contacts between Musk and the Russian leadership have demonstrated how the choices of a single private actor can influence the course of hostilities,[81] raising questions about the capacity of the United States government to direct and bind such decisions in alignment with its own security strategies and assumed international obligations. In this sense, recent scholar-

78 United States Department of Commerce Bureau of Industry and Security, *Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification*, *Federal Register*, vol 87, no 197, 2022, pp. 62186-62189, online at the site govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21658.

79 Ibidem, p.62191.

80 Davydiuk Y. and Potii A., op.cit., pp. 18-21.

81 United States Department of Defense, *Commercial Space Integration Strategy*, 2024, pp 3-5, online at the site media.defense.gov/2024/Apr/02/2003427610/-1/-1/1/2024-DOD-COMMERCIAL-SPACE-INTEGRATION-STRATEGY.

ship speaks of a form of corporate sovereignty, wherein major United States technology companies, by controlling crucial segments of the global digital and space infrastructure, assume a de facto role comparable to that of geopolitical actors, on one hand strengthening the overall position of the United States in cyberspace, but on the other hand introducing new vulnerabilities linked to state dependence on opaque corporate decisions that are difficult to trace back to traditional mechanisms of democratic and international accountability.[82] The strengths of this model lie in its high operational and adaptive capacity. The integration of cyber into command structures, the centrality of the United States Cyber Command, and the adoption of concepts such as persistent engagement make it possible to react rapidly to hostile campaigns, to proactively protect electoral processes and critical infrastructure,[83] and to project regulatory power through exemplary criminal and punitive actions, which are now accompanied by jurisdictional instruments such as the Clarifying Lawful Overseas Use of Data Act and technological tools like export controls with a global reach.[84] Furthermore, the official position that international humanitarian law and the rules on the use of force apply to conflict-level cyber operations contributes to legitimizing the United States model within the democratic camp and in multilateral forums, while maintaining an interpretative margin favorable to its own sub-threshold operational doctrine.[85] However, the critical issues are not negligible. On the domestic front, the reliance on voluntary standards and the fragmentation of federal and state responsibilities generate inconsistencies in infrastructure protection and uncertainty for operators; on the international front, defend forward and persistent engagement raise doubts regarding compatibility with the principle of sovereignty and the prohibition of intervention, as they imply regular activities within the networks of other states without shared consent when this constitutes a violation of sovereignty; finally, mass surveillance programs and controversial offensive operations fuel accusations of double standards, while the growing influence of major private actors such as Elon Musk and Space Exploration Technologies Corporation introduces an additional

82 Atal M. R., Taggart J., Schindler S. et al, *Oligarchic sovereignty: Technology and the future of global order*, Review of International Studies, 2025, pp. 8-12, online at the site doi.org/10.1017/S0260210525101599.

83 United States Department of Defense, op cit, 2023, pp. 4-6.

84 United States Department of Commerce Bureau of Industry and Security, op cit, 2022, p. 62188.

85 Leitzel B. C. and Hillebrand G. D., op cit, pp. 15-17.

layer of ambivalence between the enhancement and privatization of United States digital power projection.[86]

Despite their internal differences, namely the regulatory-normative approach of the European Union on one hand and the operational and jurisdictional projection of the United States on the other, the two Western models share a concept of cyberspace as an open space governed by applicable international law and by norms of responsible behavior. The authoritarian side proposes a radical alternative to this approach, as Russia and China converge on an ontologically different idea of cyberspace. Not an open global space, but a digital extension of territorial sovereignty, to be compartmentalized, filtered, and, if necessary, separated from the global infrastructure.[87] This vision pragmatically fuels what is defined as the splinternet, a functional fragmentation of the Internet into blocs regulated by different legal and infrastructural regimes, wherein the political control of information and infrastructure prevails over the original logic of a single, interoperable network. In scholarship, this is connected to the process of territorialization of cyberspace and to digital sovereignty agendas, which Russia and China present as a response to dependency on Western technologies and to the perceived interference of the United States and the European Union.[88] In the Russian case, the splinternet project translates into a complex legal framework that combines information security doctrine, digital sovereignty laws, and tools for infrastructure and data control. The 2016 Information Security Doctrine of the Russian Federation, adopted by presidential decree, defines the information space, and therefore cyberspace as well, as a central dimension of national security, including not only the technical protection of networks but also the defense of the information environment against contents deemed hostile, the protection of spiritual and moral values, and the prevention of foreign interference in domestic political processes.[89] On this basis, a series of ordinary laws are grafted. The Data Localization Law, specifically Federal Law 242-Federal Law, which amends Federal Law 152-Federal Law on personal data, has imposed since 2015 the obligation for Russian and foreign operators to record and store the personal data of Russian citizens on servers located in Russia, upon prior notification to the Roskomnadzor, the Federal Service for Supervi-

86 Atal M. R., Taggart J., Schindler S. et al, op.cit., pp 15-18.
87 United States Department of State, op.cit., 2024, pp. 13-14.
88 United Nations General Assembly, op.cit., 2021, pp. 4-5.
89 United States Department of State, op cit, 2024, pp 11-12.

sion of Communications, Information Technology and Mass Media, formally to increase security and privacy but de facto creating a data fortress that facilitates control and regulatory pressure.[90] The Yarovaya package of 2016 introduces, instead, stringent obligations for the retention of metadata and, for certain operators, even content, alongside the obligation to provide decryption keys to the authorities, justified as anti-terrorism measures but with very broad impacts on the confidentiality of communications.[91] The specific pillar of network sovereignty is represented by the law on the sovereign Runet, often referred to as the Sovereign Internet Law, which entered into force in 2019. It provides for the mandatory installation, at the operators' expense, of equipment for deep packet inspection and traffic filtering, confers upon the Roskomnadzor the power to centrally manage the routing of national traffic in the event of a threat, establishes mechanisms for the control of interconnection points with foreign countries, and promotes the creation of a national Domain Name System, with the declared objective of protecting the Russian segment of the Internet but with the effect of allowing, in principle, a selective or total isolation of the Runet from the rest of the global network.[92] This is accompanied by the law on the security of critical information infrastructures, specifically Federal Law 187-Federal Law of 2017, which defines the categories of critical infrastructures, prescribes security and incident notification obligations for their operators, attributes inspection and guidance powers to competent authorities, and establishes a sanctions regime for non-compliance, configuring a relatively detailed framework for the protection of national critical information infrastructures.[93] In parallel, further amendments, such as the Virtual Private Network law, reinforce the capacity to block

90 Andreeva K., Kiseleva A. and Neskoromyuk A., *Data Localization Laws: Russian Federation*, *Practical Law Country Question and Answer*, 2021, pp 1-2, online at the site morganlewis.com/-/media/files/publication/outside-publication/article/2021/data-localization-laws-russian-federation.

91 Pynnöniemi K. and Kari M. J., *Russia's New Information Security Doctrine: Guarding a besieged cyber fortress*, FIIA Comment, no 26, 2017, online at the site fiia.fi/wp-content/uploads/2017/04/comment26_russia_s_new_information_security_doctrine.

92 Russian Federation, *Federal Law No 90-Federal Law on amendments to the Federal Law 'On Communications' and the Federal Law 'On Information*, Information Technologies and Information Protection' (Sovereign Internet Law), 2019, online at the site internetgovernance.org/wp-content/uploads/Federal-law-FZ-90-Summary.

93 Russian Federation, *Federal Law No 187-Federal Law on the Security of the Critical Information Infrastructure of the Russian Federation*, 2017, online at the site prlib.ru/en/node/692141

or degrade services that allow for the bypassing of national filters, consolidating a vertical of digital control entrusted to the Roskomnadzor and the security apparatus.[94] This framework presents certain strengths from the perspective of state security, as it provides clear legal bases to classify and protect critical infrastructures, to impose minimum security standards and incident notifications, to exercise coordinated control over cross-border traffic in the event of a crisis, and, at least in theory, to increase the resilience of the Runet against external attempts to disconnect or manipulate the infrastructure. Furthermore, the doctrine and certain norms formally recognize the need to protect the rights and legitimate interests of citizens within the information space, including privacy and access to reliable information, elements that are utilized in the official narrative to justify the construction of a secure and sovereign Internet, which is nonetheless not devoid of critical elements. The breadth of the definitions of information threat and extremism, the combination of data localization, data retention obligations, deep packet inspection, and blocking powers conferred upon the Federal Service for Supervision of Communications, Information Technology and Mass Media entail a level of state control over the digital space that is hardly compatible with robust standards of freedom of expression, the right to privacy, and pluralistic access to information. Furthermore, the progressive technical and regulatory separation of the Russian Internet from the global network, fueled by the rhetoric of digital sovereignty and the conflict with the West after 2014 and even more so after 2022, risks accentuating technological and economic isolation, slowing down innovation, and further strengthening the dependency on Chinese providers and standards, thereby transforming a project of autonomy into a new form of structural vulnerability.[95]

The Chinese model of cyberspace regulation is the most complete example of state-centric cyber sovereignty. The State conceives the Internet as an extension of its own legal and political territory, to be regulated in a unitary manner through a corpus of laws on cybersecurity, data, and information that

94 Epifanova A., *Deciphering Russia's 'Sovereign Internet Law': Tightening Control and Accelerating the Splinternet*, German Council on Foreign Relations Analysis, no 2, 2020, pp 6-8, online at the site dgap.org/sites/default/files/article_pdfs/dgap-analyse_2-2020_epifanova_0.

95 Nocetti J., *A Splintered Internet? Internet Fragmentation and the Strategies of China, Russia, India and the European Union*, Études de l'Ifri, 2024, pp 18-21, online at the site ifri.org/en/studies/splintered-internet-internet-fragmentation-and-strategies-china-russia-india-and-european.

reinforce both internal control and the capacity to use infrastructure and data as levers of external power.[96] The Chinese leadership asserts that this framework is necessary to protect national security, social order, and citizens' rights, but the combination of information control, the Great Firewall, localization obligations, the centralized classification of networks, and broad powers of data access assigns a dominant role to the Party-State apparatus over almost every aspect of digital life.[97] The regulatory framework rests on the 2017 Cybersecurity Law. This framework law on cyberspace formally introduces the principle of sovereignty within the information space, defines security obligations for network operators and service providers, establishes a regime for the protection of critical information infrastructures with enhanced requirements, and mandates that these entities store personal data and data classified as important collected within the territory in China, subordinating cross-border transfers to security assessments.[98] The 2021 Data Security Law, on the other hand, defines the classification of data categories, which are subject to risk assessments and controls over processing and sharing activities, while the Personal Information Protection Law, also from 2021, introduces an organic regime for the protection of personal data that partly incorporates well-known categories, such as legal basis, data subject rights, and data controller obligations, but places the role of the state at the center as the ultimate guarantor and decision-maker regarding the balance between privacy, national security, and economic development.[99] These texts are accompanied by the Multi-Level Protection Scheme 2.0 classification system, which requires all networks to be classified into five levels of criticality with increasing security obligations, and the Cybersecurity Review regime, which allows the Cyberspace Administration of China to scrutinize the use of information and communication technologies products and services, especially if they are of foreign origin or intended to manage large volumes of sensitive

96 Gao X., *An Attractive Alternative? China's Approach to Cyber Governance and Its Implications for the Western Model*, The International Spectator, vol 57, no 3, 2022, p 15, online at the site doi.org/10.1080/03932729.2022.2074710.

97 Wang A., *Cyber Sovereignty at its Boldest: A Chinese Perspective*, The Ohio State Technology Law Journal, vol 16, no 2, 2024, pp 21, 47, online at the site papers.ssrn.com/sol3/papers.cfm?abstract_id=4779801.

98 Li Y., *Cross-border Data Transfer Regulation in China*, Rivista Italiana di Informatica e Diritto, no 1, 2021, pp 3-4, online at the site doi.org/10.32091/RIID0028.

99 Ibidem, pp. 10-12.

data, to evaluate their impact on national security.[100] This framework has a clear internal rationality: to ensure that critical infrastructures and strategic data remain under the effective control of the Party-State, to reduce dependency on Western vendors, to promote the development of a national technological ecosystem, and to present China, including through initiatives such as the Global Initiative on Data Security and the International Code of Conduct for Information Security within the framework of the Shanghai Cooperation Organization, as a promoter of alternative global norms centered on digital sovereignty and collective security.[101] From a functional standpoint, the combination of the Cybersecurity Law, the Data Security Law, the Personal Information Protection Law, and the Multi-Level Protection Scheme 2.0 provides a relatively comprehensive framework for the management of cyber risk, the protection of critical infrastructures, the regulation of cross-border data flows, and the definition of the responsibilities of public and private operators, producing a high degree of certainty for authorities and, at least in part, for domestic enterprises regarding the expectations of the regulator. However, this primarily produces a pervasive role for the state as a privacy guardian and ultimate data controller, which means that the Personal Information Protection Law and other laws, while offering formal protections for citizens and imposing stringent obligations on businesses, do not create equivalent constraints for public authorities and security agencies, raising serious doubts about the possibility of independent oversight regarding state abuses.[102] Secondly, the breadth of the categories of national security, public interest, and important data, combined with the powers of data access and censorship attributed to the Cyberspace Administration of China, renders the framework highly discretionary, with significant impacts on freedom of expression, access to information, and the operations of foreign enterprises, which must adapt to stringent requirements regarding localization, security reviews, and cooperation with authorities.[103] Finally, while the emphasis on digital sovereignty and internal control on one hand strengthens the capacity of Beijing to shape its own information space and to export standards and technologies through the Digital Silk Road, on the other hand it contributes to the fragmenta-

100 Ibidem, pp. 5-6.

101 Qiao-Franco G., *An Emergent Community of Cyber Sovereignty: The Reproduction of Boundaries?*, Global Studies Quarterly, vol 4, no 1, 2024, pp 5-6, online at the site academic.oup.com/isagsq/article/4/1/ksad077/7590537.

102 Wang A., op cit, pp 445-448.

103 Li Y., op cit, pp 75-77.

tion of the global Internet and fuels regulatory tensions with other models, such as the European Union model, particularly regarding the adequacy of data flows, rendering the construction of a truly shared cyber order more difficult.[104]

The Sino-Russian path toward a splinternet demonstrates that it is technically possible to build relatively closed digital enclosures, but at the same time highlights why such a model cannot rise to become the foundation of a rules-based international order in a context of long-term structural lawfare. In a framework where the network is segmented into sovereign blocs and subjected to political filtering of traffic and content on the basis of broad and discretionary categories of national security, the ordering criterion is not the force of common and verifiable norms, but the preeminence of domestic legislations as a strategic tool of power, wherein states like Russia and China selectively reinterpret international law to consolidate domestic control, external projection, and a capacity for prolonged legal contestation against geopolitical adversaries. The structural fragmentation of connectivity weakens interoperability and global reach, increases the costs of technical and investigative cooperation, and makes it more probable that incidents and hostile operations will be interpreted exclusively through geopolitical lenses, within a context of prolonged normative competition that erodes the predictability of law and favors sub-threshold operations that are difficult to attribute. This framework produces regional orders, but not a rules-based order in a strong sense: it generates parallel and potentially conflicting regimes, wherein the normative element remains subordinate to the ongoing dynamic of instrumentalizing law between rival blocs, with Russia and China utilizing their domestic legislations as an extension of power strategy within the fifth domain. The current situation confirms the normative archipelago that characterizes cyberspace as one of the most evident manifestations of legal post-globalization. We are not witnessing a pure and simple return to anarchy, nor a collapse of rules, but rather that fluctuation which Martti Koskenniemi, in *From Apology to Utopia*, identified as structural to international legal discourse: between the apology for existing power, which ratifies what dominant blocs enact, and a normative utopia detached from political reality.[105] Within cyberspace, this fluctuation assumes a particularly acute form: universal norms risk being reduced to empty rhetoric when not supported by enforcement mechanisms that inevitably fall back into the logic of power. As Antonio Cassese anticipated, the structural

104 Gao, X., op.cit., pp. 24-26.

105 Koskenniemi M., op.cit., pp 16-35.

tension between the aspiration toward community values and the reality of a society of sovereign states driven by national interest does not disappear within the digital domain; rather, it becomes radicalized there.[106] Western models of a rules-based order and the sovereignist architectures of Russia and China do not place themselves outside of international law but, as Jack Goldsmith and Tim Wu demonstrated regarding the territorialization of the network, they reinterpret it in terms of power, projecting into cyberspace the specific tensions of a historical phase wherein globalization does not disappear, but is rather renegotiated through data, infrastructures, and platforms.[107] This diagnosis does not, however, equate to a verdict of ungovernability. If the idea of a rules-based cyber order is taken seriously, the plausible foundation is neither the pure liberal-multilateral paradigm in its original version, which has proven insufficient in the face of systematic erosion by revisionist actors and the structural asymmetries of Internet governance, nor the authoritarian model of closed digital sovereignty, which is incompatible with the protection of fundamental rights and international cooperation. The most promising perspective is that of a liberal-democratic paradigm with enhanced normative sovereignty. A model that preserves the foundational values of the international order, such as the United Nations Charter, customary international law, and human rights, integrating them with a more robust state control over critical infrastructures, more stringent data protection standards, and the reduction of technological dependency on untrusted actors. Such an approach requires, on one hand, consolidating the extension to cyberspace of general international law already affirmed by the Tallinn Manual, the United Nations Group of Governmental Experts, and the United Nations Open Ended Working Group on Developments in the Field of Information and Communication Technologies, recognizing that sovereignty, non-intervention, the prohibition of the use of force, state responsibility, and human rights bind all actors, regardless of political alignment and the normative conflict strategies adopted; on the other hand, it requires reducing double standards in the application of obligations such as due diligence and the norms on the responsible behavior of states, even when operations conducted or tolerated by democracies within the framework of a prolonged competition are at stake. From this perspective, the normative core developed within the United Nations and the official positions of numerous states already offer a shared grammar to be progressively transformed

106 Cassese A., op.cit., pp 48-61.

107 Goldsmith J. L. and Wu T., op.cit., pp 149-163.

into binding practices and stable mechanisms of attribution, collective response, and reparation.[108] Data governance constitutes one of the material pillars of this model. If data represents the primary strategic resource of the network society and if, as Laura DeNardis has shown, protocols are politics and network architecture determines civil rights more than written laws, then their collection, aggregation, and analysis do not merely produce competitive advantages, but reshape power asymmetries between states, large platforms, and individuals.[109] A rules-based order must therefore equip itself with common standards regarding personal data protection, limitations on profiling, and legal accountability for both public and private actors, preventing such resources from becoming a terrain for normative contention between competing legal systems. Instruments such as the European General Data Protection Regulation demonstrate that it is possible to recognize data as a legally sensitive asset within a liberal-democratic framework; simultaneously, they indicate the direction toward which a mature cyber order should orient itself, adopting elevated thresholds of protection as a minimum international standard rather than as a regional exception. Finally, critical infrastructures represent the structurally most exposed areas of cyberspace and the point where enhanced normative sovereignty translates into the most concrete requirement. An international framework that recognizes these infrastructures as objects of special protection, both in times of peace and in conflict, adapting the principles of distinction, proportionality, and precaution to systems that are increasingly interconnected and vulnerable to hybrid conflict strategies. It is within this nexus of security, sovereignty, and rights that the credibility of a rules-based order for the fifth domain is measured, and that cyberspace confirms its nature as a normative archipelago: not a legal vacuum, but a space of permanent competition between partial regulatory orders that reflect, amplify, and redesign the tensions of post-globalization.[110]

108 Schmitt M. N., op.cit., pp 11-28.
109 DeNardis L., op.cit., pp 67-83.
110 Nocetti J., *op.cit.*, pp 29-32.

Machines and Titans at War: Dominion and Form of a Divided World

BY MARZIO DI FEO

1. Introduction: the seductive logic of technology and the mystery of war

In his essay *The Worker: Dominion and Form* (1932), Ernst Jünger contemplated, amid the ruins and lunar landscapes of the tragedy of the First World War, radical changes, *in nuce* and *in fieri*, defining the *Arbeiter* ("worker") as the form of a new will to power, oriented toward dominion over the world, and technology as the mobilization of the world enacted by the form of the worker. Jünger sought to identify what might be called a new "typus," expression and imprint of an epoch, enmeshed in a permanent bond to a shared substance. This represents a form that possesses "an almost metaphysical character, as metaphysical as Goethe's idea of the *Urpflanze*," the primordial plant, a form, therefore, of the man of technology, whose essential features were revealed in those tragic moments.[1] War revealed itself in new elements and new domains, foreshadowing the full extent of its power, while humanity became ever more closely and *centaurically* intertwined with it through technical means, in a tightening interdependence. The phenomenon of warfare continues to manifest its protean nature on today's battlefields as well. The debate over the changing character of war in its technologically shaped manifestations appears to feed on empirical evidence and to proliferate with every new advancement in technology, revealing varying degrees of technological obsession among decision makers who seek to see in technology the necessary instrument both to overcome war's destructive spectre and to achieve a desired competitive advantage, viewing it as either a decisive resolver or a determining factor in conflict. At the same time, this technological obsession reverberates in the way war is conducted and

1 Gnoli, Antonio, and Franco Volpi. *I prossimi Titani. Conversazione con Ernst Jünger*. Adelphi, 1997, p. 39. All translations from non-English sources are mine unless noted otherwise.

waged: by whom it is fought, with what means, and within what constraints, based on imperatives aimed at achieving or imposing order that may ultimately bring about decisive transformations and reversals. The literature surrounding the relationship between technologies and war, and its implications, has gravitated along the lines of a pendulum between techno-fetishism and radical scepticism, alternating between a vision that might be defined "techno-optimistic," inclined to see in every technological innovation a reflection of change and a determining impact, and a "reductionist" vision that, drawing on the classics of strategic thought, has emphasized the limits of such impacts in achieving political objectives. The first school of thought, in particular, has given rise to numerous iterations across various theories, interpretations, and buzzwords absorbed into military doctrine, which, in an attempt to better specify and delimit the conceptual scope, have unpacked, parcelled out, and diluted the debate: from "hyperwar"[2] to "cybernetic war," created by machines for machines;[3] through "mosaic warfare," where each individual component or platform, like a small ceramic tile in mosaics, is assembled to offer a broader picture;[4] from "robotic war" or "robot war"[5] to "algorithmic warfare"[6] and "multi-domain operations."[7] The *fil rouge* running through each of these lies in the recognition of the battlefield's growing automation and the entrusting of fundamental parts of the decision making process, including operational choices, to more or less autonomous machines, with the intent of overcoming the mystery of war and subduing its Clausewitzian elements of interaction, friction, and chance. This process today appears to be marked by two logical tensions: on the one hand, the transforma-

2 Allen, John R., and Amir Husain, "On Hyperwar." *U.S. Naval Institute Proceedings*, vol. 143, no. 7, July 2017, pp. 30-37.

3 Cf. Rid, Thomas. *Rise of the Machines: A Cybernetic History*. W.W. Norton & Company, 2016, pp. 294-298.

4 Magnuson, Stew. "DARPA Tiles Together a Vision of Mosaic Warfare: Banking on Cost-Effective Complexity to Overwhelm Adversaries." *DARPA*, 24 September 2018, online at the site: darpa.mil/news/features/mosaic-warfare.

5 Cf. Shaw, Ian G. "Robot Wars: US Empire and Geopolitics in the Robotic Age." *Security Dialogue*, vol. 48, no. 5, October 2017, pp. 451-470.

6 Cf. Jensen, Benjamin M., et al. "The Future of Algorithmic Warfare: Fragmented Development." *War on the Rocks*, 20 July 2023, online at the site: warontherocks.com/the-future-of-algorithmic-warfare-fragmented-development.

7 Cf. North Atlantic Treaty Organization (NATO), Allied Command Transformation (ACT). "Multi-Domain Operations and Digital Transformation: Enabling Converged Effects in the Modern Battlespace." *ACT-NATO*, 2 May 2025, online at the site: act.nato.int/article/mdo-dt-enabling-converging-effects.

tion of the battlefield into lines of code, or rather, the transfiguration of the architecture of the components present on the field into nodes interconnected and permeated by a shared language, or alternatively, the understanding of the battlefield, consumed by the virtual and orchestrated by the software, as composed of the informational flow within which the opposing forces are stationed and clash;[8] on the other hand, the proliferation of drones, unmanned systems, and robotic assets, acting in a coordinated manner within operational environments as a swarm or integrated into a coherent "system of systems."[9] The essay seeks to examine the progressive capacity of artificial intelligence (AI) to constitute an epitome or an expected breaking point, acting within the decision making process *per se* as an agent endowed with decisional and cognitive abilities entering the fray for the first time, as a surrogate for human intelligence. Alongside this, a new "typus" seems to be emerging, a renewed form of technological Titanism that plays a key role in AI developments and brings with it a series of fundamental questions about the role such actors may come to play on the international stage. During the "Global Conference on AI, Security and Ethics 2025" organized by UNIDIR (United Nations Institute for Disarmament Research), in an attempt to establish shared ethical and normative boundaries for the use of AI systems in warfare, the co-deputy head of the institute underlined the importance of the current moment for the development of AI capabilities as an "Oppenheimer moment," in a reference to the theoretical physicist who played a key role in the development of the atomic bomb.[10] In November 2025, the United States President launched the "Genesis Mission" dedicated to AI in scientific research, described as "comparable in urgency and ambition to the Manhattan Project that was instrumental to our victory in World War II."[11] Among machines and Titans,

8 See, among others, Mulchandani, Nand and John N.T. Shanahan, *Software-Defined Warfare: Architecting the DOD's Transition to the Digital Age*. Center for Strategic and International Studies (CSIS), September 2022.

9 On the debate over a revolution in military affairs caused by the massive deployment of drones, see Calcara, Antonio, et al. "Why Drones Have Not Revolutionized War." *International Security*, vol. 46, no. 4, Spring 2022, pp. 130-171. For the concept of "swarming", see Arquilla, John, and David Ronfeldt, *Swarming and the Future of Conflict*. RAND Corporation, 2000. For the concept of "system of systems", see Owens, William A. "The Emerging U.S. System of Systems." *Strategic Forum*, no. 63, February 1996.

10 Maigné, Juliette. "AI's 'Oppenheimer moment': Why new thinking is needed on disarmament." *UN News*, 5 April 2025, online at the site: news.un.org/en/story/2025/04/1161921.

11 United States, Executive Office of the President Donald J. Trump. *Executive Order 14363 of November 24, 2025: Launching the Genesis Mission*. Federal Register, vol. 90,

the mystery of war continues to reveal itself in its protean succession, and under present circumstances the more fluid and uncertain the future becomes, the more petrified the present appears.

2. Definitions and perspectives

The way of thinking about artificial intelligence is becoming one of the central questions of our time: it compels us, in fact, to interrogate the fundamental characteristics of human and animal intelligence and its way of relating to reality. Turning to science fiction, the visions of an artificial creation or a non-human entity capable, at a certain point, of progressing and acting on the basis of conjectures are countless: one need only think of HAL in Kubrick's *2001: A Space Odyssey*, or the numerous stories of Philip K. Dick, imbued with an almost mystical-religious vision, or indeed the "intelligent ocean" in *Solaris* by Stanislaw Lem. In general, the expression "artificial intelligence" is used broadly to describe machines capable of solving problems of varying degrees of difficulty, that would otherwise be required of the human component. Machine learning is a subset of this field in which the combined deployment of data and algorithms serves to train a model on the basis of such data, so as to enable it to make predictions or develop its own decision making process.[12] The capacity to learn is based on massive volumes of data, through mechanisms that would attempt to imitate human behaviour, such as neural networks, composed of nodes and layers, with a considerable expenditure of resources, understood as computational power and algorithmic complexity (deep learning).[13] At present, generative AI and, as its subset, large language models (LLMs) are used to process natural language on the basis of training data, consisting of large sets of content, and, by means of these, following the analysis of input data and the identification of patterns, produce a single, final output.[14] In the domain of autonomous weapons systems (AWS), the term autonomous weapons, according to the International Committee of the Red Cross (ICRC), refers to "[a]ny weapon system with au-

no. 227, 28 November 2025, pp. 55035-039, online at the site: govinfo.gov/content/pkg/FR-2025-11-28/pdf/2025-21665.pdf.

12 Blank, Steve. *Artificial Intelligence/Machine Learning Explained*. Stanford University – Gordian Knot Center for National Security Innovation, May 2022, p. 2.

13 *Ibidem*.

14 "How Generative AI and LLMs Work." *Microsoft*, 13 March 2026, online at the site: learn.microsoft.com/en-us/dotnet/ai/conceptual/how-genai-and-llms-work.

tonomy in its critical functions. That is, a weapon system that can select (i.e. search for or detect, identify, track, select) and attack (i.e. use force against, neutralize, damage or destroy) targets without human intervention."[15] The expression "without human intervention" means that the application of force by weapons systems occurs automatically, even after the initial activation by a human operator, in response to information from the operational environment provided by sensors or detections of heat, light, movement, shape, velocity, weight or acoustic or electromagnetic signals, and on the basis of a generalized target profile.[16] The activation of force may occur through the use of platforms that can be either rudimentary or sophisticated, and not necessarily rely on AI technology.[17] The use of a learning capability would render the behaviour of a weapons system highly unpredictable and would fundamentally pose practical problems from the perspective of Article 36 of the First Additional Protocol of 1977 to the Geneva Conventions, which requires verification, in the case of the study, development, acquisition or adoption of a new weapon, means or method of warfare, that it does not violate norms of international law.[18] Within the category of AWS, lethal autonomous weapons systems (LAWS), referring to weapons systems with the capacity for lethal application of force,[19] must also be considered. A 2022 study compared a plethora of definitions of AWS found in official documents produced by states and international organizations, including those of China, France, Germany, Israel, NATO, and the United States, highlighting four recurring characteristics: autonomy, intervention and control, adapting

15 International Committee of the Red Cross (ICRC). *Views of the ICRC on Autonomous Weapon Systems*. Paper submitted to the Convention on Certain Conventional Weapons Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS), ICRC, 11 April 2016, p. 1.

16 International Committee of the Red Cross (ICRC). *Submission On Autonomous Weapon Systems to the United Nations Secretary-General*. ICRC, 19 March 2024, p. 4.

17 Cf. International Committee of the Red Cross (ICRC). *Autonomous Weapons Systems and International Humanitarian Law: Selected Issues.* Position Paper, ICRC, December 2025.

18 Boulanin, Vincent, and Maaike Verbruggen. *Article 36 Reviews: Dealing with the Challenges posed by Emerging Technologies*. Stockholm International Peace Research Institute (SIPRI), December 2017, p. 20 et seq.

19 There is no common consensus among states on the word "lethal." Some states, in fact, emphasize that lethality is linked to the use of a weapon rather than to its design; others, objecting to the addition of the attribute "lethal," point out that the term has no legal basis in international humanitarian law. See United Nations, General Assembly. *Lethal Autonomous Weapons System: Report of the Secretary-General*. A/79/88, 1 July 2024, pp. 5-6.

capabilities (emphasized exclusively in the definitions provided by China and France), and purpose of deployment.[20] Across all of these, divergent definitions and perspectives are apparent, rendering the debate opaque and complicating attempts to establish a shared conceptual framework from which regulatory action should flow.[21] A major concern with a direct relevance for AWS also includes the AI-enabled decision support system (DSS) in targeting, computerized tools

> that use AI techniques to collect and analyze data, provide information about the operational environment as well as actionable recommendations, with the aim of aiding military decision makers in evaluating factors relevant to legal compliance such as taking precautions and ensuring proportionality in attacks.[22]

With particular reference to military targeting, once activated, AWS can identify, select and engage a target without the need of human intervention, while AI-DSS are intended to mediate characteristics and elements from the battlefield to support the decision making process and could have broader implications beyond military applications.[23] The lines of differentiation between AI-DSS and AWS, despite their distinctive trait in the direct or indirect involvement of the human operator and their reciprocal challenges, are blurred in relation to some key areas such as characterization, risk of unintended harm, legal aspects, and response to AI integration in military targeting, and their relation could involve the tools used, technical limitations, and risks for human judgement.[24] A further element of complexity is the impossibility of anticipating new developments in AI and the difficulty of abstracting oneself from rhetorical proclamations: in particular, ranging from AGI (Artificial General Intelligence) regarded by some as capable of adapting at least as well as a "human scientist" and there-

20 Taddeo, Mariarosaria, and Alexander Blanchard. "A Comparative Analysis of the Definitions of Autonomous Weapons Systems." *Science and Engineering Ethics*, vol. 28, no. 5, October 2022, online at the site: link.springer.com/article/10.1007/s11948-022-00392-3.

21 *Ibidem*.

22 Bo, Marta, et al. "Views of members of the scientific community and civil society to Resolution 79/239" in United Nations, General Assembly. *Artificial intelligence in the military domain and its implications for international peace and security: Report of the Secretary-General*. A/80/78, 5 June 2025, p. 140.

23 See Blanchard, Alexander, and Laura Bruun. *Autonomous Weapon Systems and AI-enabled Decision Support Systems in Military Targeting: A Comparison and Recommended Policy Responses*. Stockholm International Peace Research Institute (SIPRI), June 2025, pp. 3-7.

24 *Ibid.*, pp. 20-23.

fore able to formulate hypotheses, plan and perform experiments autonomously, learn cause and effect, and balance the exploration necessary to acquire new knowledge with the action required to reap its benefits,[25] to superintelligence,[26] capable of substantially surpassing human cognitive performance across every domain. Against a horizon shaped by these developments, the mere grafting of AI onto the battlefield introduces change not only at the tactical level but also at the strategic level. DeepMind has already demonstrated, in this regard, an ability to defeat human opponents in strategy games involving imperfect information, including the possibility of deceiving the adversary.[27] In the event of a confrontation on the battlefield, artificial intelligence models may pursue short-term objectives that can appear divergent from, or counterintuitive to, the decisions a human operator might take: choices that could, for example, lead to the loss of an outpost or a battle, or that entail, in any case, an uncertain number of human casualties, but which, in the long term, are directed, according to the model's projections, toward achieving war victory. The dialectic of opposing wills and choices could thus escape all human logic, including the possibility of considering different priorities on the battlefield.

3. The military use of AI between myth and reality: the acceleration of targeting and empirical evidence of a phenomenon at the experimental stage

The achievement of new, uncertain developments in AI systems rests on the possibility of refining their training through vast datasets, something that requires considerable computational capacity, energy, storage, and technical specialization, thereby leading to a concentration of research activities, which at present constitute a patrimony largely divided between the United States and China.[28] In particular, the change appears all the more decisive the greater the degree of incalculability and uncertainty of the AI system becomes, or the be-

25 Bennett, Michael Timothy. "What The F*ck Is Artificial General Intelligence?" *Artificial General Intelligence*, July 2025, online at the site: arxiv.org/abs/2503.23923.

26 See Bostrom, Nick. *Superintelligence: Paths, Dangers, Strategies*. Oxford University Press, 2014.

27 Cf. Perolat, Julien, et al. "Mastering Stratego, the classic game of imperfect information." *Google DeepMind*, 1 December 2022, online at the site: deepmind.google/blog/mastering-stratego-the-classic-game-of-imperfect-information.

28 Cf. Lee, Kai-Fu. *AI Superpowers: China, Silicon Valley, and the New World Order*. Houghton Mifflin Harcourt, 2018.

haviour it will adopt in a given situation, which is inherently unique, and according to a specific set of data. Human functions may be delegated to AI systems, such as the operation of vehicles or the management of radar systems (as in the ARTUμ co-pilot system[29]), and these may act according to their own logic with rapid response capabilities. This situation makes an *ex ante* assessment of the capabilities of weapons systems difficult, including with respect to compliance with international humanitarian law, since their potential is only expressed after their concrete deployment, through their perception of the situation, and their capacity for adaptation and response. Adaptive capabilities could have ruinous collateral effects should a confrontation between two AI systems become a *dialogue de sourds*, whether due to difficulties in understanding the adversarial system or because they are built according to reward criteria based on speed and the achievement of divergent objectives. Further uncertainties may arise from the relationship with the human component, with reference to the understanding and interpretation of adversarial tactics and techniques, risking rendering void or opaque any strategic thinking hitherto considered consolidated. From this perspective, existential risks deriving from the use of AI in military dynamics are frequently mapped out: the Future of Life Institute campaign, based on a Stockholm International Peace Research Institute (SIPRI) report on strategic stability and nuclear risk,[30] showed how, in the event of an accident, excessive reliance on the capabilities of AI systems could lead to rapid nuclear escalation,[31] or, well beyond the "Terminator conundrum", the possibility of a single machine choosing and attacking its own targets, a catastrophic risk of extinction from AI.[32] Speculation about these scenarios interrogates the developments of AI with a necessary effort of imagination: since nothing is yet predetermined, predictive capabilities simultaneously generate scepticism, fears, and anxieties that require an adequate level of preparedness in the face of identified threats. In the discourse surrounding the United States' "Third Offset

29 Secretary of the Air Force Public Affairs. "AI Copilot: Air Force achieves first military flight with artificial intelligence." *U.S. Air Force*, 16 December 2020, online at the site: af.mil/News/Article-Display/Article/2448376/ai-copilot-air-force-achieves-first-military-flight-with-artificial-intelligence.

30 Boulanin, Vincent, et al. *Artificial Intelligence, Strategic Stability and Nuclear Risk*. Stockholm International Peace Research Institute (SIPRI), June 2020.

31 Future of Life Institute. "Artificial Escalation." *Future of Life Institute*, 17 July 2023, online at the site: futureoflife.org/project/artificial-escalation.

32 Center for AI Safety. "Statement on AI Risk: AI Experts and Public Figures Express Their Concern about AI Risk." *AI Statement*, n.d., online at the site: aistatement.com.

Strategy" (2016), AI was identified as the "next big thing" and it was declared that human-machine collaboration on the battlefield up to "new levels of human-machine symbiosis" would be necessary.[33] In 2017, the Project Maven (Algorithmic Warfare Cross-Functional Team) at the U.S. Department of Defense,[34] now the Department of War, initiated a process of fusion, integration, and interpretation of a considerable volume of data drawn from diverse sources, through the use of machine learning and deep learning systems, in order to accelerate human decision making on the battlefield, engaging the capabilities of the private sector,[35] and ultimately arriving at an acceleration of targeting, tested in controlled environments and then delivered in real-world operations.[36] Despite having originated from the United States government's intention to assist the human operator within an "in the loop" logic, the contribution of a targeting system with a certain degree of autonomy carries with it all the dangers of a geometric growth in strike capabilities: in the words of a United States military officer, engaging as many as 80 targets per hour, versus 30 without the use of the Maven system, resolving the entire process into a rapid staccato: "Accept. Accept. Accept."[37] The operator, while retaining the faculty to intervene, thus tends to defer to the machine, aligning at the operational level, thereby weakening any pretence of control and rendering inevitable the delegation to the AI system of decisions, a fulfilment of the most elementary Hegelian dialectic between serv-

33 Work, Bob. "Remarks by Deputy Secretary Work on Third Offset Strategy." Brussels, 28 April 2016.

34 Cf. Pellerin, Cheryl. "Project Maven to Deploy Computer Algorithms to War Zone by Year's End." *DOD News*, U.S. Department of War, 21 July 2017, online at the site: war.gov/News/News-Stories/Article/Article/1254719/project-maven-to-deploy-computer-algorithms-to-war-zone-by-years-end.

35 After news emerged that Google employees were unaware of the project's purposes, and following subsequent protests, Google withdrew from the project: O'Neill, Patrick Howell. "Gig Workers Unknowingly Helped Google and the Pentagon Build AI for Drones: Report." *Gizmodo*, 4 February 2019, online at the site: gizmodo.com/gig-workers-unknowingly-helped-google-and-the-pentagon-1832340422; Statt, Nick. "Google Reportedly Leaving Project Maven Military AI Program after 2019." *The Verge*, 1 June 2018, online at the site: theverge.com/2018/6/1/17418406/google-maven-drone-imagery-ai-contract-expire.

36 Ibrahim, Ahmad. "United States' Project Maven and the Rise of AI-Assisted Warfare." *Global Defense Insight*, 15 December 2024, online at the site: defensetalks.com/united-states-project-maven-and-the-rise-of-ai-assisted-warfare.

37 Manson, Katrina. "AI Warfare Is Already Here." *Bloomberg*, 28 February 2024, online at the site: bloomberg.com/features/2024-ai-warfare-project-maven.

ant and master, and a reversal between subject and object. Born to serve (it is worth noting that the motto of Project Maven is "*officium nostrum est adiuvare*," as if in a tragically ironic destiny), the system has entered the cycle of the "kill chain", i.e., the mechanism to identify threats, determine courses of action, execute actions and assess the effects,[38] and the "kill web," a "kill chain" enhanced by AI capabilities, able to connect sensors, platforms, and command-and-control nodes in order to increase effectiveness and reduce targeting time.[39] The Nietzschean perspective of the negation of action to man presents itself in the human component: a potential *ressentiment* toward the disappearance from the decision making mechanism. The emphasis on the use of AI on the battlefield has reached a point of significance in the war in Ukraine, in Israel's operations in Gaza, and in the 2026 U.S. military operations in Iran, whose operational contribution has generated an "insatiable appetite" for technology.[40] In Ukraine, it is frequently reported in major international outlets that AI is becoming indispensable for the interpretation of large volumes of data, including "50,000 video streams [from the front line] every month,"[41] the selection of targets, and the final phases of drone missions, even with the use of a non-advanced AI system,[42] with drones responsible for between 70 and 80 percent of

38 Cf. Johnson, Bonnie, et al. "Mapping Artificial Intelligence to the Naval Tactical Kill Chain." *Naval Engineers Journal*, vol. 135, no. 1, March 2023, pp. 155-167; Crifasi, Jesse R. "Targeting at Machine Speed: The Capabilities - and Limits - of Artificial Intelligence." *Modern War Institute*, 17 July 2025, online at the site: mwi.westpoint.edu/targeting-at-machine-speed-the-capabilities-and-limits-of-artificial-intelligence. See also Brose, Christian. *The Kill Chain: Defending America in the Future of High-Tech Warfare.* Hachette Books, 2020.

39 The "kill web," according to DARPA, would allow for the consideration of no longer predefined and monolithic "kill chains," but rather the selection of sensors and support elements across every domain in order to achieve desired effects; the "kill web" thus operates adaptively across all available options. Cf. Defense Advanced Research Projects Agency (DARPA). "Creating Cross-Domain Kill Webs in Real Time." *DARPA*, 18 September 2020, online at the site: darpa.mil/news/2020/cross-domain-kill-webs.

40 Freedberg, Sydney J. Jr. "'Insatiable Appetite' for AI: Maven Usage Surged for Strikes on Iran, Pentagon AI Chief Says." *Breaking Defense*, 12 May 2026, online at the site: breakingdefense.com/2026/05/insatiable-appetite-for-ai-maven-usage-surged-for-strikes-on-iran-pentagon-ai-chief-says.

41 Abdurasulov, Abdujalil. "The New AI Arms Race Changing the War in Ukraine." *BBC*, 10 October 2025, online at the site: bbc.com/news/articles/cly7jrez2jno.

42 MacDonald, Alistair. "AI-Powered Drone Swarms Have Now Entered the Battlefield." *The Wall Street Journal*, 2 September 2025, online at the site: wsj.com/world/ai-powered-drone-swarms-have-now-entered-the-battlefield-2cab0f05.

human casualties in the conflict.[43] As Zelenskyy has reiterated, it is only a matter of time before drones fight other drones in a fully autonomous manner and without human involvement, "except the few who control AI systems."[44] The capillarity and the ubiquity of technology also include an AI platform called "Avengers" that enables Ukraine to identify targets rapidly (in 2.2 seconds),[45] and the "Prisma" platform for the coordination of drone strikes.[46] As early as 2021, the Israeli military had defined an eleven-day operation against Hamas as the world's first "AI war,"[47] with reference to systems used for targeting and decision making which, according to publicly available sources, are several in number, such as "The Gospel," "Lavender," "Where's Daddy," "The Alchemist," "Depth of Wisdom," and "Fire Factory."[48] These systems would allow for the collection and analysis of large volumes of intelligence data, with the expected intent of identifying threats and targets, increasing the precision of strikes, the speed of their execution, and the effectiveness of the mission. However, a mode of targeting systematically facilitated by an AI-configured approach to warfare, as highlighted by several scholars, may increase the moral devaluation of violence.[49] Along an ideal line of temporal proximity, battlefields are becoming

43 Santora, Marc. "Russia Intensifies Assaults on an Exhausted Ukraine." *The New York Times*, 20 November 2024, online at the site: nytimes.com/2024/11/20/world/europe/russia-ukraine-war-attacks-trump.html; Santora, Marc, et al. "A Thousand Snipers in the Sky: The New War in Ukraine." *The New York Times*, 3 March 2025, online at the site: nytimes.com/interactive/2025/03/03/world/europe/ukraine-russia-war-drones-deaths.html.

44 Zelenskyy, Volodymyr. "Speech by the President During the General Debate of the UN General Assembly in New York." New York, 24 September 2025.

45 Odessa Journal. "Ukrainian Defence Ministry Showcases DELTA System and AI Platform Avengers at London Conference." *The Odessa Journal*, 13 May 2025, online at the site: odessa-journal.com/ukrainian-defence-ministry-showcases-delta-system-and-ai-platform-avengers-at-london-conference.

46 Khomenko, Ivan. "Inside Ukraine's Palantir-Powered AI War Room Guiding Drone Strikes Deep Into Russia." *United24Media*, 1 June 2026, online at the site: united24media.com/war-in-ukraine/inside-ukraines-palantir-powered-ai-war-room-guiding-drone-strikes-deep-into-russia-19356.

47 "For the first time, artificial intelligence was a key component and power multiplier in fighting the enemy." Ahronheim, Anna. "Israel's Operation Against Hamas Was the World's First AI War." *The Jerusalem Post*, 27 May 2021, online at the site: jpost.com/arab-israeli-conflict/gaza-news/guardian-of-the-walls-the-first-ai-war-669371.

48 Gray, Chris Hables. *AI, Sacred Violence, and War – The Case of Gaza*. Palgrave Macmillan, 2025, pp. 85-92.

49 Renic, Neil, and Elke Schwarz. "Crimes of Dispassion: Autonomous Weapons and the

"laboratories" for the development, deployment, and field improvement of AI systems, as reiterated by analysts, military officers, and political decision makers.[50] The binary opposition between mass and precision, between scalability and sophistication, has thus been overcome in the era of "precise mass."[51] The configuration of theatres of war as laboratories and development opportunities for AI systems operates in a bidirectional manner: on the one hand, refining strategies and tactics of deployment and, on the other, enabling the evolutionary training of the system, which in turn intervenes in the interpretation of the battlefield, with the risk of a gradual loss of the human component in field decision making and, taken to the extreme, the loss of political control over military operations. If, in the face of any technological change, war remains always "an affair of the heart," as Coker recalls citing van Creveld,[52] the prototypal moment, which appears to characterize the wars currently underway and which may therefore characterize those to come, entails the progressive disappearance of human mediation and the symbolic annulment of every emotional element. The need to see more deeply, to activate targeting in an iterative process at machine speed so as to render it more effective and optimized, and, more broadly, the tendency to interpret the phenomenon in a scientific manner, *more geometrico*, has overturned the relationship between the observing subject and the ob-

Moral Challenge of Systematic Killing." *Ethics & International Affairs*, vol. 37, no. 3, Fall 2023, pp. 321-343.

50 In the 2023 words of British Defence Secretary Ben Wallace, Ukrainian territory had "tragically become a battle lab." Adams, Paul, and Sam Hancock. "Ben Wallace: Ukraine Has 'Tragically Become a Battle Lab' for War Technology." *BBC*, 18 July 2023, online at the site: bbc.com/news/uk-66229336. "At the end of the day, this became our laboratory," in the words of a United States military officer: York, Chris. "NYT: Project Maven AI Having Mixed Results on Ukraine's Battlefields." *The Kyiv Independent*, 24 April 2024, online at the site: kyivindependent.com/nyt-project-maven-ai-having-mixed-results-on-ukraines-battlefields. According to a Bloomberg article, "the US has used satellite intelligence and Maven Smart System to supply the locations of Russian equipment to Ukrainian forces" and "during the first 10 months supporting Ukraine, Maven underwent more than 50 rounds of improvement, according to another person with knowledge of its development," in Manson, Katrina. "AI Warfare Is Already Here." *Bloomberg*, 28 February 2024. See also Seloom, Muhanad. "Will Israel's Algorithmic Counter-Insurgency Proliferate to the West?" *War on the Rocks*, 29 October 2025, online at the site: warontherocks.com/will-israels-algorithmic-counter-insurgency-proliferate-to-the-west.

51 Horowitz, Michael C. "Battles of Precise Mass: Technology is Remaking War and America Must Adapt." *Foreign Affairs*, vol. 103, no. 6, November-December 2024, p. 35.

52 Coker, Christopher. *The Improbable War: China, The United States and the Continuing Logic of Great Power Conflict*. C. Hurst & Co., 2017, p. 172.

ject of observation, modelled by AI, placing the human component in a precarious and subordinate position.

4. In search of an international normative framework

The empirical evidence of a phenomenon still at the laboratory stage reveals how closely it concerns the redefinition of the process from decision to action. As a necessary *caveat*, it should be noted that, given its prototypal nature, it is not possible to limit AI on the battlefield to what is empirically observable, even through the fog of information: the actors who employ it may secretly possess or be working on further implementations, rendering any assessment of the balance of forces imponderable, as well as any verification of the actual capabilities of AI, given its characteristics of contingency and adaptability. The ongoing regulatory processes, such as the Group of Governmental Experts (GGE) of the High Contracting Parties related to emerging technologies in the area of lethal autonomous weapons systems (LAWS), within the framework of the Convention on Certain Conventional Weapons (CCW),[53] and the expert meetings and reports by the International Committee of the Red Cross (ICRC) on AWS[54] are attempting to codify minimum safeguards and obligations, including, for example, the prohibition on the use of autonomous weapon system to target human beings and the deployment of unpredictable autonomous weapons systems due to their potentially indiscriminate effect, as well as limits on targets, duration, geographical scope, scale of use, and requirements for human-machine interaction to ensure human supervision and timely deactivation.[55] In particular, the ethical and normative debate appears to have found a driving element in the concept of "meaningful human control," aimed at entrusting supervision to the human component and thereby establishing a threshold of accountability, as demonstrated by the

53 United Nations Office for Disarmament Affairs (UNODA). "Convention on Certain Conventional Weapons (2026) - Group of Governmental Experts on Lethal Autonomous Weapons Systems." *UNODA Meetings Place*, 2026, online at the site: meetings.unoda.org/ccw-/convention-on-certain-conventional-weapons-group-of-governmental-experts-on-lethal-autonomous-weapons-systems-2026.

54 See International Committee of the Red Cross (ICRC). *Autonomous Weapons Systems and International Humanitarian Law: Selected Issues.* Position Paper, ICRC, December 2025.

55 International Committee of the Red Cross (ICRC). "ICRC Position on Autonomous Weapon Systems." *ICRC*, 12 May 2021, online at the site: icrc.org/en/document/icrc-position-autonomous-weapon-systems.

numerous references in the positions of states and organizations featured in the 2024 Report of the United Nations Secretary-General,[56] a concept that appears to find its foundation in the aforementioned Article 36 of the First Additional Protocol of 1977 to the Geneva Conventions (which the United States has not ratified and Israel, among others, has not signed), and which has nonetheless been subjected to criticism in the positions of the United States[57] and Russia.[58] The Report identifies the elements considered necessary for human control: a) sufficient information, including on the capabilities of the weapons system and the operational context, to ensure compliance with international law; b) the ability to exercise judgment with regard to the requirements of international humanitarian law; c) the ability to limit the types of tasks and targets; d) the ability to place limitations on the duration, geographic scope, and scale of use; e) the ability to redefine or modify the objectives or missions of the system; f) the ability to interrupt or deactivate the system.[59] The very definition of an autonomous system thus appears to be undermined: for human control to be considered "meaningful," it would need to have the capacity to intervene directly on a system deemed autonomous only because it is possible to delegate to it a capability or an action otherwise performed by a human. This should also apply to the design phases of the AI system, considering, therefore, that ethical or normative qualities or constraints can and must be attributed to them. However, if the question of accountability is regarded as a critical element from both a legal and practical standpoint, human control should directly concern whoever takes the decision to employ lethal force, thereby scaling up the chain of command in the field and seeking to define the level at which such control ought to be exercised.[60] Within the frame-

56 United Nations, General Assembly. *Lethal Autonomous Weapons Systems: Report of the Secretary-General*. A/79/88, 1 July 2024.

57 *Ibid*., p. 115. "The United States supports the use of these measures and others included in the draft articles. But the United States does not use terms like 'meaningful human control' in its own policies and has explained in detail why a focus on 'control' would obscure rather than clarify the genuine challenges in this area."

58 *Ibid*., p. 96. "We consider it inappropriate to bring the concepts of 'meaningful human control' and 'forms and degrees of human involvement', which are promoted by certain States, into the discussion, since such notions generally have no legal bearing and lead only to the politicization of discussions. The Russian Federation believes that States and individuals (including developers and manufacturers) at any time bear responsibility under international law for their decisions to develop and use new technologies in the area of lethal autonomous weapons systems."

59 *Ibid*., pp. 6-7.

60 See Horowitz, Michael C., and Paul Scharre. *Meaningful Human Control in Weapon Sys-*

work of the meetings of the Group of Governmental Experts (GGE) in Geneva, under the chairmanship of Ambassador Robert in den Bosch of the Kingdom of the Netherlands, a "rolling text" was drafted and circulated in 2025, revised during the 2026 sessions of the GGE, and structured around provisions addressing the characterization of a lethal autonomous weapon system, the application of international humanitarian law, including the principles of distinction, proportionality, and precautions in attack, measures applicable across the life cycle of LAWS, including legal reviews to determine their compliance with international law and voluntary exchange of relevant practices between states, and the responsibility and the accountability of states, parties to armed conflict, and individuals, and not machines.[61] The text recalls the importance of human judgment and control, together with limitations on targets, duration, geographical scope, and the number of engagements.[62] With reference to the central principles in international humanitarian law, pursuant to the Geneva Conventions of 1949 and the Additional Protocols of 1977, namely the principles of distinction between combatants and civilians, proportionality, and precautions, the questions raised by the deployment of AWS are linked as much to the unpredictability of machines in circumstances that are difficult to predefine as to the loss of human control or habituation to machine behaviour: e.g., in military operations conducted in urban warfare scenarios, where part of the civilian population and property become directly involved in hostilities, or in the assessments of indiscriminate attacks against an anticipated military advantage that are entirely devoid of any discretionary character. Moreover, the use of AI to support decision making could lead to an indiscriminate use of the force, raising similar questions of responsibility and accountability, also in relation to the protection of civilians and civilian infrastructure, and increasing the intensity and lethality of conflicts.[63] Without generating broad attention at the international level and a similar debate for a normative framework as AWS, the risks of AI-DSS concern also technological considerations, the security and the concrete functioning of the system, the quality of the data and the human-machine interaction such as the "automation bias," i.e.,

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tems: *A Primer.* Working Paper. Center for a New American Security, March 2015.

61 Group of Governmental Experts on lethal autonomous weapons systems (LAWS) - GGE on LAWS. Rolling Text, status date: 5 June 2026.

62 *Ibidem*.

63 United Nations, General Assembly. *Artificial intelligence in the military domain and its implications for international peace and security. Report of the Secretary-General*. A/80/78, 5 June 2025, p. 6 et seq.

"a propensity to rely on machine outputs even when other available information may call those outputs into question."[64] Nevertheless, also due to a general alignment to the principle surrounding the debate on human control, while exacerbating the effects of a blind trust and overreliance in AI systems and possibly reducing *de facto* the human element in the entire decision making process to a single decision, AI-DSS remain "understudied, under-addressed and unregulated."[65] Not only can machines prove to be far from infallible, as in the interpretation of the concrete meaning of data, or in their vulnerability to manipulation or to direct attacks,[66] but empirical evidence also demonstrates the limits of the human-machine symbiosis precisely in targeting, where tendencies toward a relationship of dependency of the former on the decisions of the latter become manifest. Against this backdrop, it seems difficult to imagine that, in compliance with the principles of international humanitarian law, the human component could be excluded from machine supervision, requiring that machine behaviour be capable of meeting a certain degree of reasonableness and human logic. The United Nations Secretary-General has called for negotiations on a shared normative instrument to be concluded by 2026, on the grounds that the deployment of autonomous weapon systems is "politically unacceptable, morally repugnant."[67] Apparently straightforward solutions might suggest themselves: it would suffice to recognize the repugnance of entrusting to machines, whether above or below the threshold of human intelligence, the capacity to activate an attack against persons, and for that reason to provide the machine with a moral framework to follow in operations, in the form of instructions or orders to be observed. This framework would need to be grounded in a collective and shared vision of ideal behaviour in given situations, that is, in treating war as also "an affair of the heart" and not solely in its material aspects. Some therefore contend that there

64 International Committee of the Red Cross (ICRC). *Submission to the United Nations Secretary-General on Artificial Intelligence in the Military Domain*. ICRC, April 2025, p. 5.

65 Bo, Marta, et al. "Views of members of the scientific community and civil society to Resolution 79/239" in United Nations, General Assembly. *Artificial intelligence in the military domain and its implications for international peace and security. Report of the Secretary-General*. A/80/78, 5 June 2025, p. 142.

66 See Kwik, Jonathan. "Is wearing these sunglasses an attack? Obligations under IHL related to anti-AI countermeasures." *International Review of the Red Cross (IRRC)*, vol. 106, no. 926, August 2024, pp. 732-759.

67 "'Politically unacceptable, morally repugnant': UN chief calls for global ban on 'killer robots'." *United Nations News*, 14 May 2025, online at the site: news.un.org/en/story/2025/05/1163256.

may be a different framework, guided by the utilitarian calculation of the greatest good.[68] In this case too, however, on initial analysis numerous debatable aspects would appear to emerge: to what end? Toward what goal? *Cui prodest*? There may be considerable cultural differences in assessing the levels of acceptability of an attack if it leads to a greater good, notwithstanding its adverse consequences.[69] The effects are paradoxical when one considers that the development of such highly sophisticated systems also stems from the desire to dominate the elements of uncertainty inherent in war, a gratification without commitment, a war without collateral effects. A further point of debate emerges from the possibility of holding the machine or an AI system responsible, sooner or later, with the risk of resorting to the last human cause or, in any case, to a certain degree of human control over the action; thereby reducing the considerations set out thus far to the question of whether AI constitutes a subtraction from humanity, a corruption of a defined order, and, as such, an evil.[70] The root of that evil would be traceable to the human component that develops these systems and to the capacity to translate moral and normative principles into lines of conduct, with the risk of losing ultimate control over operations. Attempts to prohibit the use of autonomous systems or AI in battle risk colliding with the impossibility of defining the problem in a shared manner so long as it remains a chimera and a symbol of inter-state competition, and of assessing the real consequences of a component of a given platform necessary to automate a weapons system, or indeed of observing and understanding its functioning, even while the human operator retains a supervisory faculty. The incentive to disregard a prohibition *a priori* and the problems of secrecy surrounding developments, which ought in principle to provide an impetus for regulation, could ultimately translate into instability and fragility in regulatory processes. For this reason, some regard self-regulation as the only viable trajectory, grounding it in a revision of Asimov's laws of robotics so as to maintain human responsibility over design, and relying on the accuracy and interpretive capacity of the AI system to understand the operator's intentions, drawing on the concept of "courageous restraint" and on the "sacrifice" of the machine and the AI system to protect the human component, without however

68 For an overview of the debate, see Wright, Aaron. "War Machines: Can AI for War Be Ethical?" *The Cove*, Australian Army, 4 December 2020, online at the site: cove.army.gov.au/article/war-machines-can-ai-war-be-ethical.

69 Payne, Kenneth. *I, Warbot: The Dawn of Artificially Intelligent Conflict*. C. Hurst & Co., 2021, p. 228 et seq.

70 *Ibid.*, p. 232.

undermining the objectives of the mission.[71] In the description of courage (*andreia*) in Book III of the *Nicomachean Ethics*, Aristotle recalls that "a courageous man could be said to be someone who is fearless when it comes to a noble death and to any situation that brings death suddenly to hand. What pertains to war is above all of this character."[72] In the age of the machine, the classical hero once bound to courage appears destined to accept, without hesitation, a single *amor fati*: the translation of the will of the intelligent machine, beyond his control, which will be accessible only to those who prepare and design the discovery.

5. The re-emergence of the Titans

In the classical myths, the victory of the Gods over the Titans made it possible to establish order and the dominion of the former over the world. One of them, Prometheus, initially allied with the Gods, is presented as a symbol of philanthropy for having forged and moulded humankind from mud and rainwater, gifting it both intelligence in the image of the Gods and fire. One of Prometheus's capacities, from which his name is said to derive, is the ability to "learn," to "have in mind" (*mantáno*) "beforehand" (*pro-*). After the torments of divine punishment for having stolen fire from the Gods, nailed to a column and condemned to the attacks of an eagle upon an ever-regenerating liver, according to a lost tragedy by Aeschylus (*Prometheus Unbound*), Prometheus would finally be freed by Heracles and would accept the authority of the Gods over the world. In the only surviving tragedy of the presumed trilogy dedicated to the Titan composed by Aeschylus (*Prometheus Bound*), he has passed fire, knowledge and strength to those who fade in a single day, not without tragic consequences; and in the dialogue with Io, the duality of a malign destiny emerges, set against a Prometheus as donor of the light that illuminates the world, reaching as far as the wish for the downfall of the kingdom of the Gods. The words of Jünger are evoked here to better express the symbolic relationship between Titanism and technology, particularly in the form of the "worker" mentioned at the opening of this essay. In *Maxima-Minima*, conceived as a work of marginal annotations on the *Arbeiter*, he writes:

> With the form [*Gestalt*] of the worker, then, a brother of Antaeus, Atlas, and Prometheus rather than of Heracles enters the scene - a new Titan,

71 *Ibid.*, pp. 246-256.

72 Aristotle. *Nicomachean Ethics*. Translated by Robert C. Bartlett and Susan D. Collins. The University of Chicago Press, 2011, Book III, Chapter 6, p. 55.

> son of the great serpent of which the demigod annihilated only a simulacrum. Now it is not only historical structures that are blown apart, but also their mythical and cultic presuppositions, if not indeed their human ones, which lie at the foundation of everything. The form of the worker corresponds to no class, no estate [*Stand*], nation, culture [*Kultur*], or faith other than those of matter, which is rather a knowledge, or a firm certainty. It responds as the Gods once did, but in an even stronger and more visible manner.[73]

And a few passages earlier:

> War promotes technology and science [*Wissenschaft*], annihilates the world of the muses. It has long since become alien to the warrior caste. For the warrior caste it has long since become unsettling. (…) The worker fights and dies inside machinery, not only without having 'elevated ideas', but having consciously rejected them. His ethos lies entirely in honest service to the apparatus. He must not trouble himself with thought; he does not possess an overview of the plan. At times appeal is made to a national ethos, but only as a formality, as a concession to passion.[74]

Beyond symbolic visions and mythical meanings, following Jünger's theoretical interpretation, the link becomes evident between scientific discovery, technology, and Titanic *hubris*, the reduction of *ethos*, and at the same time the relationship between this new form, responsible for the destiny of the world, and a new organisation under the moulting of technology and, today, of its increasing autonomy. Harari has described the technological evolution of the human species as the advent of *Homo deus*, men who seek to gain control over their biological substrate, in a process of continuous integration with robotic or computerised components.[75] In the state of *Homo deus*, men would lose their military utility, and even in the interest of greater compliance with the norms of international law and with ideal principles of justice, it would be preferable to replace humans with robots: "[e]ven if you care more about justice than victory, you should probably opt to replace your soldiers and pilots with autonomous robots and drones."[76] This process is not without tragic consequences, insofar as it could lead to a fundamental differentiation, within technological indifferenti-

73 Jünger, Ernst. *Maxima-Minima. Annotazioni su L'Operaio*. Guanda Editore, 2012, p. 58 (orig. ed. *Maxima-Minima. Adnoten zum «Arbeiter»*. Klett-Cotta, 1983; first published in *Antaios*, March 1964, pp. 493-518).

74 *Ibid.*, pp. 20-21.

75 Harari, Yuval Noah. *Homo Deus: A Brief History of Tomorrow*. Harvill Secker, 2016.

76 *Ibid.*, p. 311.

ation, through the creation of an *élite* of *homines dei*, desirous of overcoming the limits of humanity once and for all and of attaining "immortality, bliss and divinity,"[77] set against the mass of men still fixed at the previous evolutionary stage due to limitations of resources or opportunity. The new prophetic language and the new impetus that will sustain the advent of the former will emerge, according to Harari, from research laboratories, where advances in technology move toward the surpassing of human intelligence. The paradigm that appears to emerge from the empirical evidence of the battlefields reveals the role of private actors in the international arena alongside, or as rivals to, states. Elon Musk's message in September 2022 concerning the shutdown of the Starlink satellite constellation service, essential for guaranteeing communications for Ukrainian troops, which caused panic among soldiers and rendered drone operations and long-range artillery less effective,[78] along with subsequent threats of shutdown, represent only one face of this role, raising questions about the capacity of states to guarantee critical contributions in wartime. The literature on the erosion of state power and on the entrusting of fundamental aspects of security and violence to private actors has already highlighted the risks of outsourcing critical national security or defence services to the private sector, both in terms of legitimacy and accountability, and in terms of the weakening of Weberian state sovereignty and the increase of international instability.[79] The extension of the private technological world into typically military and intelligence domains has spilled over into the growing militarisation of private research lab-

77 *Ibid*., p. 350.

78 Roulette, Joey, et al. "Musk ordered shutdown of Starlink satellite service as Ukraine retook territory from Russia." *Reuters*, 27 July 2025, online at the site: reuters.com/investigations/musk-ordered-shutdown-starlink-satellite-service-ukraine-retook-territory-russia-2025-07-25. In a post on X dated 9 March 2025, a few days after the meeting between Trump and Zelenskyy at the White House, Elon Musk described the role of Starlink in the conflict as follows: "I literally challenged Putin to one on one physical combat over Ukraine and my Starlink system is the backbone of the Ukrainian army. Their entire front line would collapse if I turned it off. What I am sickened by is years of slaughter in a stalemate that Ukraine will inevitably lose. Anyone who really cares, really thinks and really understands wants the meat grinder to stop..." Musk, Elon [@elonmusk]. "I literally challenged Putin to one on one physical combat over Ukraine and my Starlink system is the backbone of the Ukrainian army. Their entire front line would collapse if I turned it off…" *X*, 9 March 2025, online at the site: x.com/elonmusk/status/1898612062533956047.

79 Consider, for example, the debate about the role of Private Military Companies (PMCs). See Singer, Peter W. *Corporate Warriors: The Rise of the Privatized Military Industry*. Cornell University Press, 2003.

oratories, the development of AI systems, and the mass production of drones for deployment on the battlefield.[80] Alex Karp, co-founder and Chief Executive Officer of Palantir ("the dominant player in pure software in defense in the world"[81]) has on multiple occasions reiterated the lessons learned from the war in Ukraine and the significant changes they hold for the future of warfare: "The lesson was that the only thing that basically mattered was how to get through the jam space and get your device to deliver its payload. So it's the ability to interact with the device, plan where the device is going, and gather intel from the device. That's very different from how war has been fought in the past."[82] The American advantage would therefore hinge on AI development: "The way I look at it is: Is America going to be scarier or are our adversaries going to be scarier? You need high-end satellites, you need to be able to coordinate with the satellites, and you need software and large language models. It's advantageous for America because we're very strong in those areas,"[83] and "who harnesses the AI will win."[84] For this reason, any attempt to limit or prohibit AI developments would amount to a loss of that competitive advantage, unless actors such as China and Russia were to become "peaceful."[85] The founder of Anduril Industries, Palmer Luckey, at an event at Pepperdine University, emphasised that: "There is a shadow campaign being waged in the United Nations by many of our adversaries to trick Western countries that fancy themselves morally aligned into not applying AI for weapons or defense."[86] On this point, Alex Karp has stated: "(…) on the AI

80 Cf. Corbyn, Zoë. "Move fast, kill things: the tech startups trying to reinvent defence with Silicon Valley values." *The Guardian*, 29 March 2025, online at the site: theguardian.com/world/2025/mar/29/move-fast-kill-things-the-tech-startups-trying-to-reinvent-defence-with-silicon-valley-values.

81 As stated in a session dedicated to "software-defined war" at the Baltic Miltech Summit 2023. "Palantir CEO Alex Karp at the Baltic Miltech Summit 2023." *YouTube*, uploaded by Palantir, 27 April 2023, online at the site: youtube.com/watch?v=A1RWYAnKuy0.

82 Levy, Steven. "Alex Karp Goes to War." *Wired*, 10 November 2025, online at the site: wired.com/story/alex-karp-goes-to-war-palantir-big-interview.

83 *Ibidem*. These arguments are developed extensively in Karp, Alexander C., and Nicholas W. Zamiska. *The Technological Republic: Hard Power, Soft Belief, and the Future of the West*. Crown Currency, 2025.

84 "Palantir CEO Alex Karp at the Baltic Miltech Summit 2023." *YouTube*, uploaded by Palantir, 27 April 2023, youtube.com/watch?v=A1RWYAnKuy0.

85 *Ibidem*.

86 Goel, Shubhangi. "Anduril's Palmer Luckey slammed restrictions on AI use in the military." *Business Insider*, 2 October 2024, online at the site: businessinsider.com/palmer-luckey-slams-ai-restrictions-military-and-weapons-anduril-2024-10. As will be seen below, the Tolkienian reference is not an isolated one: in this case, Andúril ("Flame of

front, one of the reasons we are in a kind of a doom or AI cycle is because you can only explain the promise of AI if you understand and embrace the superiority of America and its culture. Because there are dangers in AI. But the reality is there's only two cultures that are going to win in the next year. It's going to be us or China."[87] This concept had also been developed at the conclusion of the shareholder letter presenting the 2024 annual results: according to Karp, the rise of the West, citing Huntington, as "Westerners often forget" and as, conversely, "non-Westerners never do," had been made possible by superiority in the application of organised violence, and not by any presumed superiority of ideas, values, or religion.[88] In Ukraine, Karp would see the possibility of defending the West at a moment of declining unipolarity and of "scaring the f-ck out of our enemies,"[89] since it is on fear that deference is founded.[90] The Promethean capacity of the new technological Titanism is in line with the reference to the Tolkienian universe: the *palantíri* (a compound of *palan-*, "far," "wide," and *tir*, "to watch," "to guard") are the seeing-stones, crafted by the Noldor, perhaps by Fëanor himself, and subsequently scattered, which had the capacity to reveal events far off in space and in time, making it possible to be aware of many things that enemies wished to keep hidden, with little escaping their vigilance.[91] In this light, AI swells as an element of rupture between utopia and dystopia, between the possibility of attaining renewed prosperity and the fatal dilemmas of catastrophe. "AI will probably, most likely, sort of lead to the end of the world," in the words of Sam Altman of OpenAI,[92] or, to put it in Elon Musk's

the West"), a symbol of royalty and of the triumph of light over darkness, is the sword wielded by Aragorn in his quest to restore Gondor to its ancient glory.

87 The transcript of the speech is available on the Hudson Institute website. "Palantir CEO Alex Karp Receives Hudson Institute's 2025 Herman Kahn Award." *Hudson Institute*, 11 November 2025, online at the site: hudson.org/events/palantir-ceo-alex-karp-receives-hudson-institutes-2025-herman-kahn-award.

88 Karp, Alexander C. "Letter to Shareholders." *Palantir*, 3 February 2025, online at the site: palantir.com/q4-2024-letter/en.

89 Bergengruen, Vera. "How Tech Giants Turned Ukraine Into an AI War Lab", *TIME Magazine*, 8 February 2024, online at the site: time.com/6691662/ai-ukraine-war-palantir.

90 "Palantir CEO Alex Karp at the Baltic Miltech Summit 2023." *YouTube*, uploaded by Palantir, 27 April 2023, online at the site: youtube.com/watch?v=A1RWYAnKuy0.

91 Cf. Tolkien, John R. R. *The Silmarillion.* George Allen & Unwin Ltd., 1977, p. 346. Note that one of them, used by Denethor to resist the power of Mordor and Sauron, was subsequently turned against him by the latter to break his will, revealing to him the immense power of Mordor and driving him to madness.

92 Cited in Gilson, Dave. "At What Point Do We Decide AI's Risks Outweigh Its Promise?"

terms: “the good future of AI is one of immense prosperity where there’s an age of abundance, no shortage of goods and services, and everyone can have everything they want,” yet at the risk of “human annihilation.”[93] The imagery seems almost an attempt to grow accustomed to scenarios of ruin, to the triumphs of the boundless potential of technology. In this direction lie also the appeals against killer robots, promoted by Musk and Suleyman, co-founder of DeepMind, the declarations against the development of a superintelligence,[94] and the Anthropic call for laboratories to pause in development due to the increasing “risks of humans losing control over AI systems” caused by its full recursive self-improvement.[95] On the contrary, for Palantir co-founder Peter Thiel, regulating AI would be akin to accelerating the coming of the Antichrist, who would arrive in the form of an attempt at world government, including under the guise of AI regulation.[96] The force of an eschatological imaginary carries not only rhetorical weight but reveals the ethical and political foundations and priorities of the new Titans. In the final analysis, as written by Elke Schwarz,[97] it leads to the paralysis of the political debate and tends to bind to violence a necessary force of justified purification in a polarised struggle between good and evil on a global scale. Behind the idea of the coming of the Antichrist in the form of a global government over AI,[98] or rather, of a form of global regulation or

Stanford Institute for Economic Policy Research (SIEPR), 31 May 2024, online at the site: siepr.stanford.edu/news/what-point-do-we-decide-ais-risks-outweigh-its-promise.

93 Cited in Hart, Jordan. “Elon Musk explains his 80/20 prediction for what AI means for humans.” *Business Insider*, 11 September 2024, online at the site: businessinsider.com/elon-musk-all-in-podcast-ai-prediction-2024-9.

94 Future of Life Institute. “An Open Letter to the United Nations Convention on Certain Conventional Weapons.” *Future of Life Institute*, 20 August 2017, online at the site: futureoflife.org/open-letter/autonomous-weapons-open-letter-2017; Future of Life Institute. “Statement on Superintelligence.” *Superintelligence-Statement*, 22 September 2025, online at the site: superintelligence-statement.org.

95 Anthropic. “When AI builds itself. Our progress toward recursive self-improvement, and its implications.” *Anthropic*, June 2026, online at the site: anthropic.com/institute/recursive-self-improvement.

96 Dastin, Jeffrey. “Exclusive: Peter Thiel in Talk on ‘Antichrist’ Says He Told Elon Musk Not to Give Wealth to Charity.” *Reuters*, 10 October 2025, online at the site: reuters.com/world/us/peter-thiel-talk-antichrist-says-he-told-elon-musk-not-give-wealth-charity-2025-10-09.

97 Csernatoni, Raluca, et al. “Myth, Power, and Agency: Rethinking Artificial Intelligence, Geopolitics and War.” *Minds and Machines*, vol. 35, no. 3, September 2025, online at the site: link.springer.com/article/10.1007/s11023-025-09741-0.

98 Cf. “A.I., Mars and Immortality: Are We Dreaming Big Enough? | Interesting Times with

self-regulation, lies the fear of a restriction on the possibilities of technological development and the hostility personified by a *Zeitgeist* of a civilisation that seeks to save itself from the clutches and dangers of progress.[99] Thiel's vision and inspiration derive from a revisitation of René Girard's concepts of founding violence and mimetic rivalry, and of the Schmittian concept of *katechon*, drawn from the Second Letter of Paul to the Thessalonians,[100] which, in its struggle against nihilism, obstructs the coming of the Antichrist and the end of the world.[101] The Schmitt and Girard scholar Wolfgang Palaver has engaged with this vision and has introduced a kind of ideal path necessary to overcome any Schmittian interpretation that would favour the creation of vast spaces managed by empires, given the existence of structures unable to withstand change, promoting instead the creation of a global order in the manner of a polyhedron.[102] Thiel addressed this metaphysical aspiration in an essay written as a reflection on the events of 11 September, entitled *The Straussian Moment* (2007). In it, he outlines a re-examination of the political debate centred on the containment of violence, linked to the disappearance of the question of human nature following the widespread acknowledgement of the death of God, and, in particular, issues a call to "awaken from that very long and profitable period of intellectual slumber and amnesia," because a world devoted to unity would renounce politics and make room for the illusion of a world that appears to administer itself, and for the realisation of the dark figure of the Antichrist, who "will surreptitiously take over the entire world at the end of human history by seducing men with the promise of 'peace and security'."[103] With constant references to a mode of writing that distinguishes between the "esoteric," addressed to the few, and the "ex-

Ross Douthat." *YouTube*, uploaded by New York Times Podcasts, 26 June 2025, online at the site: youtube.com/watch?v=vV7YgnPUxcU.

99 On this point, see also: Bostrom, Nick. "The Vulnerable World Hypothesis." *Global Policy*, vol. 10, no. 4, November 2019, pp. 455-476.

100 On the concept of *katechon* ("kat-echon"), see Schmitt, Carl. *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. Telos Press, 2003, pp. 59-62 (orig. ed. *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*. Duncker & Humblot, 1974 [1950]).

101 Thiel, Peter. "The Straussian Moment." *Politics and Apocalypse*, edited by Robert Hamerton-Kelly, Michigan State University Press, 2007, pp. 189-218.

102 Cf. Palaver, Wolfgang. "Desacralize the Katechon, Do Not Create Empires!" *The Bulletin of the Colloquium on Violence and Religion*, vol. 83, February 2025, pp. 11-17, online at the site: violenceandreligion.com/bulletin-83-february-2025/#Katechon.

103 Thiel, Peter. "The Straussian Moment," p. 198 and p. 203.

oteric," at the surface of things and comprehensible to all, the loss of faith described has unleashed the force of technology and economics, while at the same time increasing vulnerabilities and inducing a self-reflexive defence: "the Straussian project sets out to preserve the *katechon*, but instead becomes a 'hastener against its will'. No new Alexander is in sight to cut the Gordian knot of our age."[104] For this reason, "[i]nstead of the United Nations, filled with interminable and inconclusive parliamentary debates that resemble Shakespearean tales told by idiots, we should consider Echelon, the secret coordination of the world's intelligence services, as the decisive path to a truly global *pax Americana*."[105] Here the Girardian concept of mimesis is grafted on, pushed to its extreme so as to contain violence up to the sacrifice of the scapegoat, the secret origin of everything, concealed by myth and reiterated in religious rituals that evoke the founding violence, whose unveiling and unravelling may deprive humanity of an effective means of protection against unlimited violence.[106] In light of the incapacity of archaic rituals to function in the modern world, mimetic prestige would lead to the continuous pursuit of technological superiority and to the instability that ensues, as a dynamic of escalation whose apocalyptic, revelatory force is underestimated.[107] The metaphysical impetus outlined by Thiel, echoed in the words of Karp and Luckey cited above, thus turns to technology as a source of human domination over man and as a fundamental axis of defence against the mimetic danger of unlimited violence: new *condottieri* of a state that continues to dissolve from its fully Weberian sense. The technological Titans, convinced champions against the end of the world, demand a new understanding of the limits of sovereignty, as well as the interpretation of a relationship involving a state actor that becomes entrenched in war and requires new criteria of accountability. The dispute between Anthropic and the United States Department of War, concerning the Pentagon's demand to insert the expression "any lawful use" into contracts involving AI,[108] and to remove certain guardrails on

104 *Ibid.*, p. 207.

105 *Ibid.*, p. 208.

106 On this point, among the works of René Girard, see Girard, René. *Violence and the Sacred*. Johns Hopkins University Press, 1977 (orig. ed. *La Violence et le Sacré*. Grasset, 1972).

107 Thiel, Peter. "The Straussian Moment," p. 212.

108 Secretary of War. *Artificial Intelligence Strategy for the Department of War*. Memorandum for Senior Pentagon Leadership, Commanders of the Combat Commands, and Defense Agency and DOW Field Activity Directors. 9 January 2026.

the use of the Claude model,[109] on pain of the company's designation as a supply chain risk[110] and the subsequent entry of OpenAI,[111] shows how the conflict currently underway concerns also the capacity of each actor to establish constraints and limits of legitimacy among themselves, potentially in opposition or with no space for a shared decision. The possibility that this dispute arose, as suggested by the Under Secretary of War for Research and Engineering, from the use of Claude during the January 2026 military operation to capture Maduro,[112] and that Palantir played a role in relaying to the Department of War an Anthropic executive's inquiry about Claude's use in the raid, raising concerns over the dangers that technological dependence and the activation of guardrails might pose to future operations,[113] reveals the implications of fractures and opposing positions.[114] The transformative force highlights the limits of regulation even in

109 Anthropic. "Statement from Dario Amodei on Our Discussions with the Department of War." *Anthropic*, 26 February 2026, online at the site: anthropic.com/news/statement-department-of-war. See also Amodei, Dario. "Policy on the AI Exponential." *Dario Amodei*, June 2026, online at the site: darioamodei.com/post/policy-on-the-ai-exponential. It is worth noting the recurrence of the Tolkienian reference, in particular to Hobbits, representing AI companies, facing Treebeard, "a wise but ponderous sentient tree," representing political institutions, in the *incipit* of the post.

110 Secretary of War Pete Hegseth [@SecWar]. "This week, Anthropic delivered a master class in arrogance and betrayal as well as a textbook case of how not to do business with the United States Government or the Pentagon…" *X*, 27 February 2026, online at the site: x.com/SecWar/status/2027507717469049070?s=20.

111 OpenAI. "Our Agreement with the Department of War." *OpenAI*, 28 February 2026, online at the site: openai.com/index/our-agreement-with-the-department-of-war.

112 Ramkumar, Amrith, et al. "Pentagon Used Anthropic's Claude in Maduro Venezuela Raid." *The Wall Street Journal*, 15 February 2026, online at the site: wsj.com/politics/national-security/pentagon-used-anthropics-claude-in-maduro-venezuela-raid-583aff17?eafs_enabled=false.

113 The All-In Podcast [@theallinpod]. "Emil Michael Reveals the "Holy Sh*t Moment" That Caused the Pentagon-Anthropic Fallout..." *X*, 7 March 2026, online at the site: x.com/theallinpod/status/2030335927458087137.

114 Moreover, on 12 June 2026, Anthropic announced that the U.S. government had applied the export controls to its AI models, Claude Fable 5 and Claude Mythos 5, requiring the suspension of access for all foreign nationals, whether inside or outside the United States. The measure was justified on the basis of a reported method for bypassing the safeguards of Fable 5 ("jailbreaking"). The export controls were lifted on 30 June 2026, after which Anthropic announced the restoration of access to Fable 5 globally and the expansion of the access to Mythos 5 for a set of U.S. organizations, following the U.S. government's approval on June 26. "Redeploying Fable 5." *Anthropic*, 30 June 2026, online at the site: anthropic.com/news/redeploying-fable-5.

attempts at self-regulation, assuming that such a direction is possible, if it is perceived through the lens of a negative force, whether metaphysical or political; and it closely concerns the thing in itself, moving toward its limitation through rules of engagement and new normative codifications that tend to intervene from the very development phases, in a perspective of future force projection, but which is realised in war as a Promethean workshop. This new power relationship, as highlighted by several scholars, appears to be distinguished by three particular characteristics: the gaze of the Titans is strategic and long-term, not always aligned with the general strategy of a state or an alliance of states, and takes concrete form in domains created and controlled by the Titans themselves.[115] To these must be added the capacity to construct an imaginary that attempts to transcend state boundaries, and the political tension toward the transformation of pure vision into reality. The form of the Titan, in its extension to new domains over which he holds dominion, prefigures his affirmation on the global stage, the possible contestation of structures no longer capable of sustaining the new power relationships, and the non-recognition of norms and rules oriented toward uncertain mechanisms that attempt to curb his ascent. This consideration could lead to an intensification of the struggle between the parties and the distinction between power and law: *ad absurdum*, an actor who operates in war under conditions of non-reciprocity and superiority *vis-à-vis* the state within his own domains, or where the state no longer suffices in its forms of containing violence, as emerges in the words of Thiel, endowed with a *justa causa* clothed in a continuous struggle between good and evil, could arrive at the identification of a designated enemy and override every form of juridical or moral discrimination, reviving the fears expressed by Schmitt concerning modern means of annihilation over a space still in the process of definition.[116] The mere invocation of an eschatology of AI development already seems a declaration of *imperium* that overlaps with authority and structures. To this will correspond the necessary reorganisation of new spaces, physical or otherwise, of AI, of a new *nomos*: the new skin of the Titan is not transformed into the withdrawal of the symbols of boundary, sword, and war, but into the dynamic power of his dominion over them, through the mastery of a medium laden with spiritual force.

115 Cf. Matania, Eviatar, and Udi Sommer, "Tech titans, cyber commons and the war in Ukraine: An incipient shift in international relations." *International Relations*, vol. 39, no. 4, December 2025, pp. 586-611.

116 Schmitt, Carl. *The Nomos of the Earth*, pp. 309-322.

6. The analogy with the atomic weapon

The desire to halt the end of the world is a privilege that goes beyond all knowledge of nature and seems to suit the present moment little or not at all, especially if in it one discerns the tension of progress toward better times, while the capacity to reshape the world at will through the technological instrument is simultaneously expressed. The parallel between the destructive consequences of AI and the atomic weapon, as well as their relationship with a transformative will, is employed both in political discourse and among experts. In particular, frequent is the reference to the effects that excessive trust in AI could have on the decision making and escalation process typical of nuclear confrontation,[117] and frequent is the characterisation of the urgency of the issue, as the need for regulation of the phenomenon, in order to avoid the disastrous consequences of allowing it to expand without limits. It should also be recalled that the association between new weapons, especially when their outcomes are unknown, and the atomic weapon is not new: it has been used by analysts and political decision makers as a conceptual framework for deterrence to fill the strategic vacuum.[118] In this case, however, the analogy between the atomic weapon and AI concerns not only the need to adapt the latter to the conceptual framework of the former, but also the possibility of adapting potential regulatory responses to the phenomenon of AI according to the dictates of what has been deployed for the control of nuclear weapons. With regard to the first of these analogies, one will recall the widespread perception of living through a renewed "Oppenheimer moment," in which attempts to steer AI toward uncharted paths would represent the foundations of a new Manhattan Project, the United States-led programme for the realisation of the first atomic bombs, within which the physicist J. Robert Oppenheimer played the determining role of scientific director. It should come as no surprise, therefore, that, confident in the destructive, creative, and transformative properties of AI, the new Titanism sees in the fathers of the atomic bomb a crucial point of reference for our times. Alex Karp has declared himself to be "the new Oppenheimer"[119] and that the sense of guilt over the development

117 On this point, see Lin, Herbert. "Artificial Intelligence and Nuclear Weapons: A Commonsense Approach to Understanding Costs and Benefits." *Texas National Review*, vol. 8, no. 3, Summer 2025, pp. 98-109.

118 Cf. Cirenza, Patrick. "The Flawed Analogy between Nuclear and Cyber Deterrence." *Bulletin of the Atomic Scientists*, 22 February 2016, online at the site: thebulletin.org/2016/02/the-flawed-analogy-between-nuclear-and-cyber-deterrence.

119 Haskins, Caroline. "'I'm the New Oppenheimer!': My Soul-Destroying Day at Palantir's

of destructive weapons stems from the possibility of being alive and that it is necessary to exploit the advantage over adversaries.[120] For Sam Altman, the Manhattan Project stands as the exemplary case, and AI, like the atomic weapon, is a "completely new, not human scale, kind of power" that "will reshape the course of human history."[121] Indeed, to put it in Alex Karp's terms, AI in war will bring about the eclipse of atomic bombs, because any technical parity with the adversary is in itself insufficient.[122] In nuclear confrontation, the strategic paradox centred on the disproportionality of weapons relative to any political objective, a disproportionality that could lead, in the final analysis, to mutual annihilation. As Bernard Brodie recalls in *The Absolute Weapon*, the supreme objective would no longer be to win wars, but to avert them.[123] The fear of confrontation would have induced the contending parties, in paranoid cycles of expectations and fears regarding each other's behaviour, to refrain from making the first move, or to slide slowly and dangerously toward battlefield confrontation, even in the case of a limited or tactical use, uncertain whether it would in fact remain so, and to choose, therefore, whether to concentrate on developing first strike or second strike capabilities. Such a logic placed the decisive strategic advantage in offensive capabilities, in a kind of stability guaranteed by the shared objective of avoiding mutual destruction, encapsulated in the "unfortunate acronym" MAD (Mutual Assured Destruction).[124] The logic of nuclear confrontation thus raised a series of questions from every perspective from which one attempted to address it: if the atomic weapon could not be used to achieve a crushing military victory on the battlefield, the possibility opened up of interrogating, including through wargaming tools and methods, or mathematical ones, as in the case of

First-Ever AI Warfare Conference." *The Guardian*, 17 May 2024, online at the site: theguardian.com/technology/article/2024/may/17/ai-weapons-palantir-war-technology.

120 "Palantir CEO Alex Karp at the Baltic Miltech Summit 2023." *YouTube*, uploaded by Palantir, 27 April 2023, online at the site: youtube.com/watch?v=A1RWYAnKuy0.

121 "Sam Altman | This Past Weekend w/ Theo Von #599." *YouTube*, uploaded by Theo Von, 23 July 2025, online at the site: youtube.com/watch?v=aYn8VKW6vXA.

122 Karp, Alexander C., and Nicholas W. Zamiska. "New Weapons Will Eclipse Atomic Bombs. Their Builders Ask Themselves This Question." *The Washington Post*, 25 June 2024, online at the site: washingtonpost.com/opinions/2024/06/25/ai-weapon-us-tech-companies.

123 Brodie, Bernard. "Implication for Military Policy". *The Absolute Weapon: Atomic Power and World Order*, edited by Bernard Brodie, Harcourt, Brace & Co., 1946, p. 76.

124 Freedman, Lawrence. "The First Two Generations of Nuclear Strategists." *Makers of Modern Strategy from Machiavelli to the Nuclear Age*, edited by Peter Paret, Princeton University Press, 1986, p. 758.

Thomas Schelling,[125] the dynamics of confrontation, the possibilities of either party controlling escalation, and the possibilities of mutual understanding. Within this strategic framework, arms control, combined with the principle of non-proliferation, that is, the non-diffusion of the weapon and of the technologies and knowledge necessary for its realisation, was directed toward the limitation or abolition of nuclear weapons. The negotiations for the limitation of strategic arms (Strategic Arms Limitation Talks - SALT I, 1969-1972, and SALT II, 1972-1979), the Anti-Ballistic Missile Treaty (ABM, 1972), the Intermediate-Range Nuclear Forces Treaty (INF, 1987), and, finally, the START Agreement (1991) for the reduction of strategic arms first sought to reduce the nuclear arms race by adding limits to the use, development, and deployment of nuclear weapons; but above all they attempted to crystallise and embed the nuclear question within the pursuit of stability and world order, on the basis of the shared assumption regarding the fatal risks of confrontation.[126] The uncertainty and secrecy surrounding the present and future capabilities of AI complicate any attempt to adapt the nuclear framework. A mechanism inclined to favour the unlimited development of technology, quantitatively and qualitatively, would thus also be activated in this case, should actors begin to harbour a widespread perception of insecurity regarding their own capabilities and those of the surrounding context. Any situation of presumed balance would be inherently unstable *tout court*, given the incentive to conceal one's real capabilities and the difficulties of monitoring any provision, or imposition of obligations or prohibitions. A further parallel might concern the voracious appetite for energy and productive resources required by the development of both technologies: in the case of AI and its data centres, however, accessibility is related more to the energy and computational capacities needed to train vast neural networks, whose requirements contribute to causing the global shortage of semiconductors and processors,[127] and not to the dependence on critical resources or raw materials. Some would favour the creation of an international agency on artificial intelligence,[128] modelled on the International Atomic Energy Agency (IAEA), estab-

125 Cf. Ghamari-Tabrizi, Sharon. "Simulating the Unthinkable: Gaming Future War in the 1950s and 1960s." *Social Studies of Science*, vol. 30, no. 2, April 2000, pp. 163-223.

126 Kissinger, Henry. *World Order: Reflections on the Character of Nations and the Course of History.* Penguin Books, 2014, p. 331 et seq.

127 Pilz, Konstantin F., et al. *AI's Power Requirements Under Exponential Growth: Extrapolating AI Data Center Power Demand and Assessing Its Potential Impact on U.S. Competitiveness*. RAND Corporation, 2025.

128 Cf. Robinson, Mark. "The Establishment of an International AI Agency: An Applied

lished in 1957 on the basis of Eisenhower's 1953 "Atoms for Peace" proposal,[129] to prevent global diffusion while at the same time legitimising its development despite the risks. For AI, on the other hand, no demarcation lines or shared mechanisms have yet been defined around which states might, as seen, find a common point of arrival in the near term. The difficulties of applying such an analogy are evident not only in the differences between the two instruments, in particular due to the vast range of applications of AI, but also in the questions relating to access to this technology and its gradual strategic impact.[130] A prospect that seems still distant, all the more so if the debate on the strategic, political, and social implications appears caged by uncertainty over the future of AI. The difficulty of applying strategic doctrines to so mercurial an element reverberates in the difficulties of reaching a shared regulatory framework and in the capacity to know and recognise whether, and what, limits one's rivals might place on the development and deployment of AI-guided weapons systems or on AI itself. The fallacy, if not an outright *non sequitur*, of the analogy between the two phenomena is also apparent from the standpoint of the intrinsic characteristics of the two technologies and seems to reach a deeper interpretation in their homology on the existential imagery of the potential impacts in reshaping the course of the world.

7. Conclusion: war and dominion in a divided world

The greater role played by non-state actors, defined as the re-emergence of a new Titanism, positions itself in a competitive manner but is not destined, in the near term, to replace an order defined by the presence of states: if anything, it will be capable of preparing the ground and will integrate itself with existing dynamics, contesting those that most limit its rise. Some have defined the upheavals currently underway as the trajectory of a "technopolar" world, in which large technology companies are sovereigns *de facto*, contribute in a determining

Solution to Global AI Governance." *International Affairs*, vol. 101, no. 4, July 2025, pp. 1483-1497.

129 Cf. Roehrlich, Elisabeth. *Inspectors for Peace: A History of the International Atomic Energy Agency*. Johns Hopkins University Press, 2022.

130 Horowitz, Michael C., and Lauren A. Kahn, "Nuclear Non-Proliferation Is the Wrong Framework for AI Governance: Placing AI in a Nuclear Framework Inflates Expectations and Distracts from Practical, Sector-Specific Governance." *AI Frontiers*, 27 June 2025, online at the site: ai-frontiers.org/articles/nuclear-non-proliferation-is-the-wrong-framework-for-ai-governance.

manner to the definition of rules and to the way in which societies communicate, trade, and make and conduct war, and position themselves in competition with states for geopolitical influence. Within this vision, three lines of development of a new geopolitical ecosystem are outlined: either the state will continue to maintain its own predominance, rewarding national technological champions; or the large corporations will wrest control from the state in the digital space; or, finally, the state will vanish altogether.[131] In the "technopolar" moment, even the new non-state actors would have a clear sense of their place in the world, positioning themselves, as occasion demands, as "globalists," oriented toward achieving a global user base, "national champions" aligned with the objectives of specific national governments, or "techno-utopians," intent, driven by the innovative expectations of technology, on replacing states.[132] The debate has unfolded along two opposing positions. The first, whose proponents include Stephen Walt, who, emphasising the relevance of physical space over the digital and the presence and influence of economic giants throughout American history, restores the state to its position of centrality as an actor endowed with authority, the means of defence, and the capacity, in international politics, to "blithely break the law and do horrendous things in the name of national security."[133] Against this, Ian Bremmer forcefully reaffirms the action of "technopolarity" toward its consolidation: artificial intelligence would be the instrument for the conquest of greater geopolitical, economic, and military influence, and, faced with a revenge of the state, rather than attempting to compete with it openly, the technology companies would be attempting to ensnare it in a sudden "techno-authoritarian turn."[134] The lines of development previously proposed are reduced to the realisation of a future bifurcated into two spheres of influence: on one side, the technopolar world embodied by the United States, with a rising role for technological powers and control over certain key sectors; on the

131 Bremmer, Ian. "The Technopolar Moment: How Digital Powers Will Reshape the Global Order." *Foreign Affairs*, vol. 100, no. 6, November-December 2021, pp. 112-128.

132 Cf. Bremmer, Ian. "The Next Great Game: Politicians vs Tech Companies." *GZERO Media*, 7 December 2021, online at the site: gzeromedia.com/video/state-of-the-world/the-next-great-game-politicians-vs-tech-companies.

133 Walt, Stephen M. "Big Tech Won't Remake the Global Order." *Foreign Policy*, 8 November 2021, online at the site: foreignpolicy.com/2021/11/08/big-tech-wont-remake-the-global-order.

134 Bremmer, Ian. "The Technopolar Paradox: The Frightening Fusion of Tech Power and State Power." *Foreign Affairs*, 13 May 2025, online at the site: foreignaffairs.com/united-states/technopolar-paradox-ian-bremmer-fusion-tech-state-power.

opposite side, a Chinese model of state capitalism, in which every possibility of private innovation remains entirely subordinated to state power; with Europe caught between these two opposing poles.[135] Reshaping the global order would therefore result in growing political, economic, and technological fragmentation, and would see, in parallel, the outright affirmation of the technopolar moment in its concrete manifestations. Toward a correspondence of meaning with the atomic weapon, alongside Herman Kahn's considerations on a multipolar world and stability,[136] it is probable that, more or less naturally, a constellation of great powers on a regional scale will take shape around AI, alongside or behind the Sino-American competition. The most controversial aspect of this trajectory is that if war continues to be conducted and interpreted also as a laboratory experiment on the impacts of this technology, it will be necessary to arrive at such a demonstration in order to grasp the destructive and violent implications of these systems. A further aspect of greater complexity resides in the position of predominance assumed by the new Titanism, which holds control and primacy in this domain. This could spill over into crises arising from dynamics internal to the system, positioning itself in contrast or in collaboration with states or political spaces in a changing landscape, adopting or rejecting the belief systems of one or the other, or imposing its own visions through constructed myths designed to reshape the global order. On the battlefield, war-turned-laboratory is taking shape as a fabric in which drones, satellites, robotised systems, or any other sensor, information or data become instruments of the software at the helm of the phenomenon. The rise of this system is opening the doors to the habituation of man to the decisions of the machine, to the benefit of an optimisation of processes and compliance with the response times required, that is, the time of the machine itself, which will increase the more the acceleration of action is demanded. The illusion of man is always the same: to win the war through instruments of either high destructive potential or, in the case of artificial intelligence, far greater precision and capacity for extending human understanding; a prismatic mirror that reflects the need for technical expertise whose first outpost, and sanctuary, lies far from the battlefield, in the name of remotely controlling

135 *Ibidem*.

136 Cf. Kahn, Herman. *Thinking the Unthinkable in the 1980s*. Simon and Schuster, 1984, p. 200 et seq. It should be noted that a debated and controversial position on the spread of nuclear weapons as a stabilising effect was expressed by Waltz: Waltz, Kenneth N. "The Spread of Nuclear Weapons: More May Be Better." *International Institute for Strategic Studies (IISS)*, *Adelphi Papers,* vol. 21, no. 171, September 1981.

war. The conviction that technology can confer a decisive advantage in war is also shared by the new Titans, who see in it a means of transcending their own domain and shifting it to a global scale, as an instrument of affirmation and elevation of their status in the international arena. At the operational level, the increasing overreliance on AI systems, especially when built according to commercial models primarily oriented toward scaling and optimisation, entails the incorporation of commercial logic into systems that operate on the battlefield:[137] the distinction between the combatant and the service provider who enables and supports military operations could collapse, and with it the very conception of the state's monopoly on the legitimate use of force.[138] At the same time, the soldier appears to be transformed into a myopic executor of the machine's instructions, until his complete disappearance: the way of thinking about war will also have to be grounded in a new way of conceiving the relationship between the machine and the human component, in the implications that the latter may rapidly transform itself into the mere extension of the former, in the midst of a progressive dissolving and until its complete oblivion. At the conclusion of *The Worker*, Jünger had envisioned the construction of geopolitical spaces as an assault launched against the nation state and as an attempt to construct imperial spheres; in *Maxima-Minima* he had reiterated the worker's voracious appetite for space and time. But given the new course of the Earth, one might speak instead of the new form, the Titan, who, laden with his own imaginary, chafes for space as well, emboldened by the dominion of models and platforms, through the highest articulations of power, in control over the actions of war and the future of the world.

137 Cf. Schwarz, Elke. "From Blitzkrieg to Blitzscaling: Assessing the Impact of Venture Capital Dynamics on Military Norms." *Finance and Society*, 2025, pp. 1-24.

138 Cf. Barrett-Taylor, Rupert, and Matthew Ford. "Eroding Sovereignty in the Age of 'War as a Service'." *Opinio Juris*, 3 November 2025, online at the site: opiniojuris.org/2025/11/03/eroding-sovereignty-in-the-age-of-war-as-a-service.

Casus belli: Anatomy of a Justification for War Over the Last 125 Years

by Tiberio Graziani

1. Introduction: Definition and Problematization

The Latin term *casus belli*, literally meaning "occasion for war," refers to the event or circumstance invoked by a state as the formal justification for initiating an armed conflict. It should not be confused with the deeper causes of war, which relate to structural factors such as geopolitical rivalries, economic competition, or ideological tensions. *Casus belli* operates at a different level: it is a rhetorical and political device, an act of legitimation that transforms latent motivations into a public and ostensibly acceptable narrative for the use of force. Not surprisingly, in many languages it has been accompanied by related terms—"reason for war," "pretext," "spark of conflict"—which highlight its ambivalent nature, at once juridical and discursive.[1]

1 From a legal perspective, this terminological plurality reflects the transition from the Roman concept of *bellum iustum* to the modern practice of international law. In Anglo-Saxon doctrine, expressions such as *cause of war* or *just cause for war* recur (Grotius, H. [1625]. *De iure belli ac pacis*), while the French tradition employs terms such as *prétexte de guerre* or *motif de guerre* (Dupuy, R.-J. [1991]. *Droit international public*). This semantic variability indicates that *casus belli* constantly oscillates between a legal title and a rhetorical justification. From a historical perspective, the various expressions demonstrate how each era has interpreted *casus belli* according to its own cultural and political codes. In English, the formula *cause of war* became established (Howard, M. [1971]. *The Causes of Wars*. London); in French, *motif de guerre* (Renouvin, P. [1925]. *Les origines de la guerre de 1914*. Paris); while in Italian historiography, variants such as "spark of the conflict" or "reason for war" are common. These lexical shifts underscore the mutable and contextual nature of the concept. From a linguistic and communicative perspective, the multiplicity of related terms (*cause of war, prétexte de guerre,* "spark of the conflict") shows that *casus belli* has been perceived not only as a legal category but also as a narrative frame. Political rhetoric has consistently oscillated between the idea of legal justification and that of symbolic storytelling, aimed at mobilizing collective emotions and legitimizing decisions to use force (cf. Nye, J. [2004]. *Soft Power*. New York;

Every war, even the most brutal, requires a narrative that renders it understandable and acceptable, both in the eyes of the citizens of the belligerent state and before the international community. As Michael Walzer emphasizes in his work *Just and Unjust Wars*, "no war is ever presented as unjust: all states believe, or make others believe, that they have a good reason." It is precisely this "good reason," formulated as a public justification, that takes the name of *casus belli*. Ancient Rome had already grasped its centrality through the rituals of the *fetiales*, which transformed a suffered offense into a solemn justification for war.[2] The Christian Middle Ages had regulated it through the doctrine of *bellum iustum*; the modern age had formalized it through declarations and diplomatic protocols. In the twentieth century, finally, it was transformed into an increasingly sophisticated rhetorical weapon, embedded in the language of great powers and multilateral institutions.

The best-known historical examples—from the assassination in Sarajevo (1914) to the attack on Pearl Harbor (1941), and the controversial Gulf of Tonkin incident (1964)—show how an isolated event becomes a *casus belli* only if reinterpreted within a pre-existing narrative and political framework. It is never a simple event that causes war; rather, it is the way in which that event is narrated, politicized, and instrumentalized that transforms it into a "reason for war." This dynamic explains why, over the past 125 years, the evolution of the concept reflects not only changes in international law but also the major schools of international relations theory: for realists, the *casus* is a veil concealing power interests; for liberals, a mechanism to be filtered through multilateral rules and public opinion; for constructivists, a performative narrative that helps create political reality itself.

In this sense, *casus belli* represents a privileged vantage point from which

Kaldor, M. [2012]. *New and Old Wars*. Cambridge). This semantic plurality confirms that the use of the term varies between the technical-legal register and political-narrative language.

2 On the *fetiales* as a juridical-religious institution of Republican Rome, see Livio, *Ab Urbe Condita*, I, 32, where the ritual of the *clarigatio* and the casting of the spear into enemy territory are described. In the modern era, Grotius invoked the *fetiales* as a paradigmatic example of a procedure that transformed an offense into a legitimate title for conflict (*De iure belli ac pacis*, 1625, I, 3). Contemporary historiography (cf. Mommsen, T. [1887]. *Römisches Staatsrecht*, vol. I, Leipzig; De Francisci, P. [1959]. *Primordia Civitatis*, Rome; Dumézil, G. [1977]. *La religion romaine archaïque*, Paris) has emphasized how such rituals fulfilled a function of public legitimation, embedding the use of force within a framework of symbolic legality.

to examine the relationship between law and power, between events and narratives, between reality and perception. Analyzing its genealogy makes it possible not only to better understand the wars of the past, but also to identify the strategies through which states, even today, build consensus around the use of force.

2. Conceptual Origins and Theoretical Framework

2.1. The Roots of Bellum Iustum

The idea that war requires justification is certainly not a modern invention. Already in the Roman world, the concept of *bellum iustum* (just war) implied that the use of force could not be arbitrary. The *fetial* priests carried out formal rituals to declare war: the casting of a spear into enemy territory signified that the conflict was justified by a suffered offense or a violation of law.

With the advent of Christianity, this need for legitimation took on a theological dimension. Saint Augustine of Hippo (4th–5th century)[3] developed the first systematic theory of just war: war could be considered permissible only as a response to an injustice suffered and if aimed at restoring peace and justice. Violence in itself remained condemned, but the defense of the divine order and the community of the faithful could justify its use.

In the thirteenth century, Thomas Aquinas[4] systematized Augustinian doctrine by introducing three fundamental conditions that would long influence European thought:

1. Legitimate authority – only the sovereign or a legitimate political authority may declare war;
2. Just cause – war must be a response to an injustice suffered or an act of aggression;
3. Right intention – the objective must be the common good, not conquest or enrichment.

3 Augustine, *De civitate Dei*, XIX, 7 and XIX, 12; *Epistula ad Bonifacium* (Ep. 189), where war is conceived as an extraordinary means to restore peace and punish injustice. For a modern analysis, see Russell, F.H. (1975). *The Just War in the Middle Ages*. Cambridge: Cambridge University Press, pp. 16–34.

4 Thomas Aquinas, *Summa Theologiae*, II-II, q. 40, a. 1, where the three conditions of just war are formulated: legitimate authority, just cause, and right intention. For a modern analysis, see Johnson, J.T. (1975). *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*. Princeton: Princeton University Press, pp. 123–146.

These criteria, formulated in a religious context, had a lasting impact. They marked the transition from a use of force regulated by custom and ritual to an ethical-juridical framework that required a public and rationally arguable justification.

2.2. Modernity and the School of Salamanca

In the sixteenth century, with European expansion into the New World, the doctrine of *bellum iustum* was reinterpreted by the theologian-jurists of the School of Salamanca[5], including Francisco de Vitoria and Francisco Suárez.

Vitoria, addressing the issues surrounding the conquest of the Americas, argued that war could be considered just only as a defense against a manifest injustice, such as the violation of universal natural rights (for example, freedom of trade or preaching). He denied the legitimacy of purely offensive wars or the subjugation of indigenous peoples, thereby establishing ethical limits on colonial expansion.

Suárez, along the same lines, emphasized that the legitimacy of war depended not only on the authority declaring it, but also on adherence to universal moral principles. Both jurists contributed to shifting the discourse from a purely religious sphere to that of natural law, anticipating the development of modern international law.

2.3. From Modern Sovereignty to Grotius and Beyond

With the Peace of Westphalia (1648) and the emergence of the international system based on state sovereignty, war became the exclusive prerogative of sovereign rulers. In this context, *casus belli* assumed a predominantly political and diplomatic function: a means of presenting to the world the reasons for a conflict.

5 Francisco de Vitoria, *De iure belli* (1539), in *Relectiones Theologicae*, ed. L. Pereña (Madrid: Consejo Superior de Investigaciones Científicas, 1960), where the classical criteria of *bellum iustum* are reaffirmed and limits on the use of force in colonial conquests are introduced. See also Francisco Suárez, *De triplici virtute theologica* (1621), in *Opera Omnia*, vol. XII (Paris, 1856), which further examines the role of legitimate authority and the law of nations. For a modern contextual analysis, see Pagden, A. (1991). *Spanish Imperialism and the Political Imagination*. New Haven: Yale University Press, pp. 57–89.

Hugo Grotius, in *De iure belli ac pacis* (1625), was the first to systematize the law of war and peace in secular terms. He recognized that states had the right to use force in cases of injustice suffered, but insisted on the need for common rules, thereby laying the foundation for the law of nations (*ius gentium*). His work marked the transition from a theological perspective to a shared juridical framework. Samuel Pufendorf, in the second half of the seventeenth century, expanded the Grotian perspective by emphasizing the contractual nature of relations between states: wars could be avoided only through respect for common laws and by resorting to force as an *extrema ratio*[6].

In the eighteenth century, Emer de Vattel, in The Law of Nations (1758), reaffirmed the importance of formal justification: every state, in declaring war, was required to provide a reason and make it public, so that it could be judged by the international community. The transparency of the *casus belli* thus became an essential condition of legitimacy.

2.4. Carl Schmitt and the Politicization of the Law of War

A decisive contribution to the twentieth-century debate came from Carl Schmitt,[7] who in *The Nomos of the Earth* (1950) highlighted the intrinsically political nature of international law. According to Schmitt, the traditional distinction between just and unjust wars had already lost its meaning with the modern age: within the system of sovereign states, each power determined for itself what was legitimate.

In the twentieth century, however, the emergence of a world order dominated

6 Hugo Grotius, *De iure belli ac pacis* (1625), ed. J. Barbeyrac (Amsterdam, 1735), particularly Book II, chapters I–XXV, where war is secularized and grounded in natural law and the law of nations, distinguishing between just and unjust wars on the basis of the injustice suffered. Samuel Pufendorf, *De jure naturae et gentium* (1672), ed. J. Barbeyrac (London, 1749), instead emphasizes the contractual nature of international relations and the necessity of public declarations in order to render a war legitimate. For a contemporary interpretation, see Tuck, R. (1999). *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*. Oxford: Oxford University Press, pp. 78–112.

7 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Cologne: Greven, 1950), particularly pp. 140–189, where he discusses the crisis of the distinction between just and unjust wars and introduces the concept of *Grossraum* as a juridical-political space dominated by a great power. On the significance of *casus belli* from this perspective, see also Meierhenrich, J., & Simons, O. (eds.) (2016). *The Oxford Handbook of Carl Schmitt*. Oxford: Oxford University Press, pp. 326–344.

by geopolitical blocs led Schmitt to speak of "greater spaces" (*Grossräume*): areas in which a leading power defined not only the political order but also the boundaries of juridical legitimacy. From this perspective, *casus belli* was no longer a neutral legal argument, but an instrument for the politicization of the law of war: dominant powers could transform their own interests into norms presented as universal.

This critical interpretation anticipates dynamics that we clearly recognize today: the overlap between legal justification, political legitimation, and power strategy.

2.5. Casus Belli and Contemporary International Relations Theory

More recent debate[8] has further enriched the understanding of *casus belli*, integrating it into the principal schools of international relations theory.

- Michael Walzer, in *Just and Unjust Wars* (1977), revisits the *bellum iustum* tradition, emphasizing the role of moral norms and international consensus as criteria for distinguishing legitimate from unjust wars. From this perspective, *casus belli* becomes an ethical justification subject to the judgment of the global community.
- Classical and neorealist realism (Hans Morgenthau, Kenneth Waltz, John Mearsheimer), by contrast, interprets *casus belli* as a rhetorical instrument masking power interests. States, operating within an anarchic system, act according to logics of security and survival; *casus belli* serves merely to render politically acceptable what is dictated by necessity.
- Institutional liberalism, represented by authors such as Hedley Bull and Joseph Nye, emphasizes the importance of international institutions and shared rules: *casus belli* must be filtered through multilateral organizations and in-

8 For the contemporary debate, see: Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), which revisits the *bellum iustum* tradition from an ethical-normative perspective; John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York: Norton, 2001), which interprets *casus belli* as a rhetorical mask for power interests; Joseph Nye, *Soft Power: The Means to Success in World Politics* (New York: PublicAffairs, 2004), which highlights the role of legitimacy and international persuasion; Mary Kaldor, *New and Old Wars* (Cambridge: Polity, 2012), which analyzes new hybrid wars and the centrality of narratives; Hedley Bull, *The Anarchical Society* (London: Macmillan, 1977), which emphasizes the importance of international institutions as filters on the recourse to force.

ternational public opinion. Nye, through the concept of *soft power*, demonstrates how the legitimacy of a *casus belli* depends not only on military force, but also on the capacity for persuasion and attraction.

· Finally, constructivist and postmodern approaches, such as that of Mary Kaldor, have highlighted the discursive and performative nature of *casus belli*. In contemporary wars, often hybrid and fragmented, the narrative construction of legitimacy becomes as important as force on the battlefield: *casus belli* does not simply describe reality, but helps create it, shaping perceptions, political identities, and power relations.

These different theoretical perspectives confirm that *casus belli* is never an objective given, but rather a political, juridical, and discursive criterion of legitimacy—a bridge between ethics, law, and *raison d'état*. This legacy provides the necessary premise for understanding the modern and contemporary evolution of the concept.

In conclusion, the trajectory from Augustine's *bellum iustum* to contemporary theories of international relations demonstrates how *casus belli* has always represented a point of intersection between norms, power, and narrative. Over the centuries, it has been interpreted, in turn, as an ethical-religious criterion of legitimacy (Augustine, Aquinas), as a universal natural law principle (Vitoria, Suárez), as a formal juridical requirement linked to state sovereignty (Grotius, Pufendorf, Vattel), as an instrument for the politicization of law by great powers (Schmitt), and finally as a device variously understood by contemporary schools of thought: moral justification (Walzer), mask of power (Mearsheimer), institutional filter (Bull, Nye), performative narrative (Kaldor).

This trajectory reveals a constant tension: the more international law has sought to constrain war within binding norms, the more states have had to refine their discursive strategies in order to present their actions as legitimate. It is no coincidence that the modern *casus belli* appears less as an "objective fact" and increasingly as a strategic construction, combining juridical, political, moral, and communicative elements.

For this reason, addressing the issue of *casus belli* today means not only asking "why" states declare war, but also "how" they construct and communicate the narrative of their reasons. It is in this shift—from fact to narrative, from cause to justification—that the key to understanding the dynamics of modern conflicts resides.

From this follows the usefulness of a typology of *casus belli*, capable of classifying the various forms it has assumed over time: from the territorial and defensive *casus belli* of the modern age to the ideological and propagandistic ones of the twentieth century, and finally to the humanitarian, preventive, and asymmetric *casus belli* of the twenty-first century. Only through this conceptual map will it be possible to read recent history not merely as a succession of events, but also as an ongoing attempt to construct legitimacy.

3. Typology of Casus Belli

The variety of forms assumed by *casus belli* over the centuries suggests the need for a typological classification. This is not intended as a rigid taxonomy, but rather as an interpretive framework useful for understanding how states have articulated their justifications for war in different historical contexts.

3.1. *Territorial and Defensive Casus Belli*

Definition: events framed as the defense of sovereignty and territorial integrity.

Historical examples:

- Russo-Japanese War (1904): dispute over Manchuria and Korea.
- Soviet invasion of Finland (1939): justified as the preventive defense of Leningrad's borders.
- Falklands War (1982): Argentine territorial claim.

Characteristic: often anchored to a specific episode (border incident, perceived aggression).

3.2. Honor- and Prestige-Based Casus Belli

Definition: justifications linked to the defense of national honor or international credibility.

Historical examples:

- Spanish-American War (1898): "Remember the Maine!"
- Austrian ultimatum to Serbia (1914): defense of the dynastic honor of the Habsburgs.

Characteristic: a strong symbolic and rhetorical dimension, closely connected to nationalism and prestige.

3.3. Economic and Resource-Based Casus Belli

Definition: justifications centered on the control of strategic resources or trade routes.

Historical examples:

- U.S. oil embargo against Japan (1941), which became a casus belli for the attack on Pearl Harbor.
- The Gulf Wars (1990–91): linked to the control of oil reserves and energy routes.

Characteristic: more difficult to declare openly; often masked by moral or security-based motivations.

3.4. Ideological and Systemic Casus Belli

Definition: justifications based on ideological or systemic oppositions (democracy vs. totalitarianism, communism vs. capitalism).

Historical examples:

- Korean War (1950): defense of the "free world" against communist expansionism.
- Vietnam War (1964–75): the Gulf of Tonkin as a pretext, tied to a broader ideological context.

Characteristic: global narratives that transform local conflicts into episodes of a universal struggle.

3.5. Fabricated or Manipulated Casus Belli (False Flag)

Definition: incidents fabricated or manipulated to provide a pretext for aggression.

Historical examples:

- Gleiwitz incident (1939): orchestrated by Nazi Germany against a German radio station and attributed to Poland.
- Gulf of Tonkin incident (1964): used by the United States to justify esca-

lation in Vietnam.

Characteristic: the widest possible gap between factual reality and the official narrative.

3.6. Humanitarian and Protection-Based Casus Belli

Definition: justifications based on the defense of human rights, minorities, or civilian populations.

Historical examples:

- NATO intervention in Kosovo (1999): protection of the Albanian population.
- Intervention in Libya (2011): protection of civilians from Gaddafi, invoking the R2P (*Responsibility to Protect*) doctrine.

Characteristic: modern justifications, legitimized by emerging norms of international law.

3.7. Preventive Casus Belli

Definition: justifications based on anticipating a threat deemed imminent or inevitable.

Historical examples:

- Six-Day War (1967): Israel justified the attack as preventive self-defense against Arab encirclement.
- Invasion of Iraq (2003): weapons of mass destruction presented as a potential threat.

Characteristic: closely tied to the debate on *jus ad bellum* and collective security.

3.8. Asymmetric, Hybrid, and Future Casus Belli

Definition: emerging justifications in unconventional conflicts, where the line between war and peace is blurred.

Historical/contemporary examples:

- War in Afghanistan (2001): response to the terrorist attacks of September 11.

- Conflict in Ukraine (since 2022): Moscow has claimed the “protection of Russian minorities” and “denazification” as casus belli.
- Allegations of cyberattacks or space sabotage as possible casus belli of the future.

Characteristic: the centrality of the communicative dimension and the media construction of threat.

3.9. Typological Synthesis

The proposed typology demonstrates that *casus belli* lies at the intersection of law and rhetoric, necessity and pretext. It may arise from real events, strategic perceptions, or deliberate manipulations; it may be expressed in juridical, moral, or propagandistic language. In every case, however, its function remains unchanged: to render war legitimate and acceptable.

The typology outlined above has not only classificatory value, but also offers an interpretive lens through which to read concrete conflicts. Each category of *casus belli*—territorial, honor-based, economic, ideological, humanitarian, preventive, or hybrid—should not be understood as a watertight compartment, but rather as a narrative form that may intertwine with others in a given historical context. Real wars, in fact, are rarely explained by a single *casus*; more often, they combine different elements in a mosaic that brings together security concerns, prestige, economic interests, and ideological constructions.

Over the past 125 years, from the twilight of the nineteenth-century imperial age to the post-9/11 wars, international practice has offered numerous examples of this plurality. The assassination in Sarajevo in 1914, the Gleiwitz incident in 1939, the Gulf of Tonkin in 1964, September 11, 2001, or the intervention in Libya in 2011 are not merely isolated episodes, but nodal points that condense structural tensions, power dynamics, and carefully constructed narratives.

Analyzing the genealogy of *casus belli* therefore means tracing the thread that connects abstract typology with historical reality. It is on this terrain that the political effectiveness of *casus belli* is measured: not so much in its intrinsic value, but in its capacity to persuade—citizens, allies, and international institutions—of the necessity of war. The following section will be devoted precisely to this analysis, retracing the major conflicts of the period under consideration and highlighting how, in each case, *casus belli* was mobilized as a key instrument of legitimation.

4. Historical Cases of the Last 125 Years

The application of the proposed typology makes it possible to retrace the major conflicts of the twentieth and twenty-first centuries not merely as military events, but as discursive constructions of legitimacy. By analyzing the *casus belli* declared—or fabricated—by states, a complex picture emerges in which geopolitical interests, legal constraints, and narrative strategies intertwine. The most significant cases are examined below, divided into major historical phases: the imperial age and early twentieth century, the world wars, the Cold War, the post–Cold War period, and the twenty-first century.

4.1. Imperial Age and the Early Twentieth Century (1898–1914)

The Spanish-American War (1898)

The conflict that marked the rise of the United States as a global power had as its casus belli the sinking of the battleship USS Maine in the harbor of Havana on February 15, 1898. Although the causes of the explosion were never conclusively established, the American sensationalist press attributed it to Spain, pushing public opinion and Congress to support the war. Here, the casus belli belongs to the category of honor/prestige, combined with economic motivations (access to Caribbean and Asian markets).

The Russo-Japanese War (1904–1905)

Triggered by the struggle for control over Manchuria and Korea, its immediate casus belli was the surprise Japanese attack on the Russian fleet at Port Arthur. The episode, presented by Tokyo as a response to latent Russian aggression, falls within the typology of territorial and defensive casus belli, although it reflected broader imperial rivalries.

The First World War (1914–1918)

The assassination of Archduke Franz Ferdinand in Sarajevo by Gavrilo Princip on June 28, 1914, represents the quintessential casus belli of the twentieth century. The event, limited in itself, was used by Austria-Hungary to impose an ultimatum on Serbia, triggering the alliance system. This casus belli belongs to the category of honor and dynastic defense, but was situated within a broader context of systemic rivalries.

4.2. The World Wars (1914–1945)

The Mukden Incident (1931)

Japan used an explosion on the South Manchurian Railway, attributed to "Chinese saboteurs," as a pretext for invading Manchuria. This was a fabricated *casus belli*, belonging to the false flag typology, intended to justify Japanese expansionism.

The Gleiwitz Incident (1939)

Nazi Germany orchestrated a fake attack by Polish soldiers on a German radio station in order to justify the invasion of Poland. It remains one of the most emblematic examples of a fabricated *casus belli*, in which narrative manipulation served to legitimize a planned act of aggression.

The Attack on Pearl Harbor (1941)

The Japanese bombing of the American naval base in Hawaii constituted a territorial and defensive *casus belli* for the United States, which declared war on Japan. Unlike other cases, here the *casus belli* was a real rather than fabricated attack, but it immediately became narratively instrumental in mobilizing the nation.

4.3. The Cold War (1947–1991)

The Korean War (1950–1953)

The *casus belli* was the invasion of South Korea by the North. The United Nations, under strong American impetus, intervened in defense of Seoul, invoking the legitimacy of resisting aggression. Here, the *casus belli* belongs to the ideological and systemic category, given the broader context of the communism/capitalism confrontation.

The Suez Crisis (1956)

When Nasser nationalized the Suez Canal, France and the United Kingdom, in coordination with Israel, organized a military intervention, presenting it as a defense of freedom of navigation. In reality, the *casus belli* was economic-strategic in nature, masked as a matter of collective security.

The Six-Day War (1967)

Israel justified its preemptive attack against Egypt, Jordan, and Syria on the grounds of the threat of encirclement and the closure of the Strait of Tiran. This case falls within the category of preventive/preemptive *casus belli*.

The Vietnam War (1964–1975)

The official *casus belli* was the alleged North Vietnamese attack on two U.S. destroyers in the Gulf of Tonkin (1964). It later emerged that the incident had been largely exaggerated or fabricated. This therefore constitutes a fabricated/manipulated *casus belli*, used to legitimize the American military escalation.

4.4. The Post–Cold War Period (1991–2001)

The Gulf War (1990–1991)

Iraq's invasion of Kuwait was presented as a violation of the sovereignty of a UN member state. The *casus belli* was territorial/defensive in nature, but with strong economic connotations (control of oil resources).

Kosovo (1999)

NATO justified its aerial intervention against Serbia on the grounds of the need to protect the Albanian population of Kosovo from ethnic cleansing. This constitutes a humanitarian *casus belli*, anticipating the doctrine of the Responsibility to Protect (R2P).

4.5. The 21st Century: Terrorism, Resources, and Hybrid Wars

September 11 and the War in Afghanistan (2001)

The terrorist attacks of September 11 constituted an asymmetric and defensive *casus belli*, invoked by the United States to activate Article 51 of the UN Charter (self-defense) and Article 5 of NATO (collective defense).

The Iraq War (2003)

The principal *casus belli* invoked was Iraq's alleged possession of weapons of mass destruction and its purported links to international terrorism. It was later established that this evidence was unfounded. This was therefore a preventive/fabricated *casus belli*, which raised strong criticism regarding the legality of the intervention.

The War in Libya (2011)

The NATO intervention was justified by the need to protect civilians from the violence of Gaddafi's regime. This is an emblematic case of a humanitarian *casus belli*, supported by the R2P doctrine, but contested because the scope of operations extended well beyond the initial protective mandate.

The Conflict in Ukraine (2014–2022)

Russia invoked the protection of Russian-speaking minorities and the "denazification" of Ukraine as its *casus belli*. This constitutes a hybrid and ideological *casus belli*, combining elements of ethnic protection, preventive defense, and political propaganda.

4.6. Synthesis of the Historical Section

The analysis of the major conflicts from 1898 to the present demonstrates that *casus belli* constantly adapts to the normative and political context: from border incidents of the imperial era, to manipulated or real attacks in the twentieth century, to the humanitarian and hybrid justifications of the twenty-first century. In every phase, *casus belli* has served the function of constructing legitimacy, not only in the eyes of the actors directly involved, but also before the international community.

The analysis of conflicts from 1898 to the present highlights a constant dynamic: although *casus belli* has taken different forms—territorial, ideological, preventive, humanitarian, or hybrid—its political effectiveness has always depended on its relationship with the prevailing international normative framework. In other words, it is not sufficient for a state to identify a reason for war; that reason must also be made credible and, at least in part, compatible with legal rules and the expectations of the international community.

From the Kellogg-Briand Pact (1928) to the Charter of the United Nations (1945), international law has progressively reduced the sphere of legitimacy for war, imposing a framework in which the traditional *casus belli*—understood as a unilateral justification—has lost much of its juridical validity. However, as recent cases from Iraq to Libya demonstrate, the use of force has often been accompanied by narratives that seek to adapt to, reinterpret, or circumvent normative constraints.

To fully understand the contemporary role of *casus belli*, it is therefore necessary to examine its place within contemporary international law: a terrain in which the tension between the near-absolute prohibition of war and the resilience of state practice generates continual ambiguities, transforming *casus belli* from a juridical instrument into a political-discursive device.

5. *Casus Belli in Contemporary International Law*

5.1. From the Kellogg-Briand Pact to the Charter of the United Nations

The twentieth century marks a fundamental turning point in the regulation of war. After the First World War, the international community attempted to place limits on the use of force through the Kellogg-Briand Pact of 1928, which declared war to be "an instrument outlawed from national policy." Although it lacked effective enforcement mechanisms, it established for the first time at the multilateral level the idea that war was no longer a legitimate instrument of foreign policy.

The true watershed, however, was the Charter of the United Nations of 1945, whose Article 2, paragraph 4, states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.

From that moment onward, the use of force became juridically illegitimate, with only two exceptions:

1. Individual or collective self-defense (Article 51), when a state suffers an "armed attack";
2. Authorization by the Security Council (Chapter VII of the Charter), for collective actions aimed at maintaining or restoring international peace and security.

This normative architecture drastically reduces the scope of the traditional *casus belli*, transforming it from a unilateral justification into an argument that must be presented and defended within a multilateral framework.

5.2. Self-Defense as a Recognized Casus Belli

Article 51 of the UN Charter today constitutes the principal legal foundation for the legitimacy of *casus belli*. However, the concept of "armed attack" has generated considerable debate:

- Some interpreters limit it to an actual act of aggression (missile attack, armed invasion).
- Others include imminent threats (*anticipatory self-defense*), thereby opening the way to preventive justifications.

Recent historical examples:

- Afghanistan (2001): the United States and NATO invoked Article 51 after the September 11 attacks, interpreting a non-state terrorist attack as an armed attack relevant for the purposes of collective defense. This was a crucial precedent, extending the concept of self-defense to transnational terrorism.
- Israel (1967 and beyond): has frequently invoked preventive self-defense, prompting debates over the compatibility of such an interpretation with Article 51.
- Ukraine (2022): Russia claimed to be acting in "preventive defense" against alleged threats to the Russian-speaking population, a justification that met with broad international rejection, as it lacked factual basis and conflicted with the prohibition on the use of force.

Self-defense therefore remains the principal channel through which states seek to translate an event—real, perceived, or constructed—into a juridically recognizable *casus belli*.

5.3. The Role of the Security Council

The United Nations Security Council represents the core of the collective security system. Only its resolutions can authorize the use of force to maintain or restore peace. However, state practice reveals a constant tension between law and politics:

- Korean War (1950): the Security Council authorized intervention in defense of South Korea.
- Gulf War (1990–91): authorization to "use all necessary means" to liberate Kuwait.
- Kosovo (1999): absence of UN authorization; NATO justified the intervention as a "humanitarian intervention," establishing a controversial precedent.
- Libya (2011): authorization through Resolution 1973, invoking the doctrine of the *Responsibility to Protect* (R2P), but with criticism regarding the expansion of operations beyond the original mandate.

The Security Council thus appears as an imperfect arbiter, often paralyzed by the veto power of the great powers. In this context, *casus belli* continues to be used unilaterally by states, even in the absence of an international mandate.

5.4. Casus Belli and New Forms of Conflict

Contemporary international law is now confronted with challenges that put traditional categories under strain:

- International terrorism: after 2001, states invoked the right of self-defense against non-state actors, broadening the definition of armed attack.
- Cyberattacks: some legal scholars argue that a cyberattack capable of destroying critical infrastructure could constitute a *casus belli*.
- Outer space: increasing militarization raises questions about which incidents might justify the use of force.
- Hybrid warfare: as in the Ukrainian case, where propaganda, information manipulation, and covert operations accompany humanitarian or defensive justifications.

These developments show that *casus belli* is increasingly shifting onto the terrain of strategic narrative, where the ability to persuade the international community and public opinion becomes at least as crucial as the legal foundation itself.

5.5. From Law to Narrative

In contemporary international law, *casus belli* has lost its centrality as a unilateral juridical title. However, it has not lost its importance: rather, it has been transformed into a discursive device through which states seek to frame their actions within the legitimate exceptions to the prohibition on the use of force, or to circumvent the impasse of the Security Council.

What emerges is an unresolved tension: on the one hand, the international legal order seeks to outlaw war except in clearly defined exceptional circumstances; on the other, states continue to produce *casus belli* in order to present as legitimate military decisions often driven by considerations of power. It is precisely in this grey area, between law and politics, that *casus belli* retains its contemporary relevance as an indispensable instrument of wartime diplomacy.

6. The Communicative and Propagandistic Dimension of Casus Belli

6.1. The Centrality of Narrative

As the juridical dimension of *casus belli* has progressively lost weight with the emergence of the near-absolute prohibition on the use of force, its communicative dimension has become increasingly significant. In a globalized world, where public opinion and the international community are crucial actors, *casus belli* is not merely a formal justification, but a performative narrative capable of shaping perceptions, directing opinion, and legitimizing decisions already taken.

Every war, before being fought on the battlefield, is fought in the realm of communication: official speeches, public declarations, traditional media, and digital platforms. In this sense, *casus belli* represents the moment in which politics translates a strategic interest into a persuasive narrative, constructing domestic consensus and external support.

6.2. Propaganda and Public Opinion: From "Remember the Maine!" to the Gulf of Tonkin

As early as the late nineteenth century, the media played a decisive role in transforming isolated events into *casus belli*. During the Spanish-American War (1898), the American sensationalist press—the so-called yellow journalism of Hearst and Pulitzer—amplified the explosion of the battleship *Maine*, turning it into a symbol of Spanish aggression. The slogan "Remember the Maine!" became a battle cry that made war politically inevitable.

Similarly, in the Gulf of Tonkin (1964), the Johnson administration exploited the incident—partly fabricated—to obtain broad congressional authorization for intervention in Vietnam. Here, propaganda functioned as a mechanism of simplification: an obscure and ambiguous event was transformed into proof of aggression, with decisive political consequences.

These examples show how *casus belli* operates not only as a legal argument, but also as a media mechanism capable of mobilizing collective emotions—indignation, fear, the desire for retaliation—in support of the decision to wage war.

6.3. Cold War and Ideological Wars: The Construction of Universal Narratives

During the Cold War, *casus belli* became embedded within broader ideological narratives that transformed local conflicts into episodes of the universal struggle between capitalism and communism. The Korean War and the Vietnam War were presented, respectively, as the defense of the "free world" or as resistance to Western imperialism.

The media—cinema, radio, and television—amplified this dimension, transforming the *casus belli* from an event into a total narrative framework: every act of aggression, real or alleged, acquired the meaning of a piece in the global confrontation between two systems. In this sense, *casus belli* ceased to be a contingent episode and became part of a genuine political mythology, designed to legitimize long-term strategies.

6.4. The 21st Century: Global Media and Casus Belli in Real Time

With the advent of the internet and social media, *casus belli* has undergone a new acceleration. Events become immediately visible on a global scale, and narratives are constructed in real time.

- September 11, 2001 represents an emblematic case: the live images of the collapse of the Twin Towers were not merely a collective trauma, but immediately became the *casus belli* for intervention in Afghanistan. The emotional impact of the images rendered any further justification superfluous.
- The Iraq War (2003), by contrast, shows how the construction of a *casus belli* can fail over the long term: the evidence regarding weapons of mass destruction, initially accepted by large segments of public opinion, was later exposed as manipulation. This produced a lasting crisis of legitimacy for the United States and its allies.

In both cases, the decisive role of global media emerges as an echo chamber: they not only disseminate the *casus belli*, but also determine its credibility, duration, and political effectiveness.

6.5. Propaganda, Post-Truth, and Hybrid Wars

In the contemporary context of "post-truth" and hybrid warfare, *casus belli* has become a terrain of informational conflict. States and non-state actors use fake news, deepfakes, psychological operations, and social media campaigns to construct or delegitimize justifications for war.

- Ukraine (2014–2022): Russia justified its military actions through narratives centered on the protection of Russian-speaking minorities and "denazification," widely contested as propaganda. At the same time, Kyiv and its Western allies constructed their own narrative focused on resistance to aggression and the defense of democratic values.
- Future conflicts: cyberattacks and acts of sabotage in outer space could be used as *casus belli*, but their invisible and highly technical nature opens even greater space for narrative manipulation.

In this context, *casus belli* is no longer merely a legal or political argument, but a genuine informational battlefield, in which credibility is as important as military force.

6.6. Casus Belli as a Communicative Device: Synthesis

The evolution of *casus belli* demonstrates that, in the age of global communication, the propagandistic dimension has become central. Whereas in the past *casus belli* was anchored in official declarations and diplomatic documents, today it is the product of multimedia narratives, constructed through political speeches, viral images, media campaigns, and influence operations.

In this sense, *casus belli* takes shape as a complex communicative device serving three principal functions:

1. To legitimize the decision to wage war domestically before citizens;
2. To persuade the international community and allies externally;
3. To delegitimize the adversary, portraying them as an aggressor, criminal, or universal threat.

The result is that, in the twenty-first century, war no longer begins with a cannon shot, but with an effective narrative capable of transforming an event into a *casus belli*.

7. Critical Analysis and Conclusions

7.1. An Ancient Concept in a New World

The trajectory we have traced—from the medieval *bellum iustum* to the hybrid and digital *casus belli* of the twenty-first century—shows that the concept has never lost its relevance, even as it has undergone radical transformation. Initially an ethical-religious criterion aimed at distinguishing just wars from unjust ones, *casus belli* gradually became a political and narrative device, indispensable for justifying war before citizens, allies, and the international community.

The paradox that emerges across the 125 years under consideration is evident: the more international law has sought to constrain and prohibit the use of force, the more states have had to develop increasingly sophisticated *casus belli*, grounded in discursive constructions capable of conferring at least an appearance of legality and legitimacy.

7.2. Casus Belli as a Mirror of the International System

By analyzing the different *casus belli* over time, one can observe that they faithfully reflect the structure of the international system in which they are formulated:

- Imperial age and early twentieth century: territorial and honor-based *casus belli*, consistent with an anarchic system founded on colonial powers.
- World wars: fabricated and manipulated *casus belli*, designed to mobilize masses and alliances in total wars.
- Cold War: ideological *casus belli*, embedded in the confrontation between two systemic blocs.
- Post–Cold War period: the emergence of humanitarian *casus belli*, linked to the rise of human rights as a principle of international legitimacy.
- Twenty-first century: asymmetric and hybrid *casus belli*, in which terrorism, cyberattacks, and digital propaganda become new "sparks of war."

This sequence confirms that *casus belli* is never an autonomous entity, but rather the product of the historical, legal, and technological conditions of its time.

7.3. Norms vs. Practice: An Unresolved Tension

The analysis has also shown the constant tension between the prohibition on the use of force enshrined in international law and the actual practice of states. On the normative level, the UN Charter has relegated the traditional *casus belli* to the margins, permitting the use of force only in cases of self-defense or with authorization from the Security Council. In practice, however, states continue to invoke unilateral *casus belli*, sometimes fabricated, to justify military interventions.

This gap produces a legitimacy deficit that can have lasting consequences: the 2003 invasion of Iraq, based on evidence later shown to be unfounded, not only delegitimized the intervention itself, but also undermined the credibility of multilateral institutions and reinforced cynicism toward international law.

7.4. The Role of Communication and Public Opinion

In the age of global communication, *casus belli* no longer serves merely to justify war on the diplomatic plane: it must also persuade increasingly sensitive and fragmented public opinions. Traditional media, and even more so social media, amplify or dismantle war narratives with unprecedented speed.

This means that the success of a *casus belli* depends not only on its juridical coherence or factual strength, but also on its narrative credibility and persuasive capacity. "Communicative effectiveness" thus becomes an integral part of international legitimacy.

7.5. Toward a Critical Theory of Casus Belli

To understand the contemporary role of *casus belli*, it is necessary to adopt a critical approach that considers it as a performative construction: not merely a response to external events, but a discursive act that contributes to creating the political reality of war.

From this perspective, *casus belli* appears as:

1. An instrument of domestic legitimation, aimed at transforming elite decisions into collectively acceptable choices;
2. A diplomatic device, used to persuade or neutralize allies and rivals;
3. A geopolitical narrative, in which universal values and particular interests intertwine and mutually conceal one another.

7.6. Open Conclusions

The concept of *casus belli* retains extraordinary vitality in contemporary geopolitics. Although international law has diminished its formal function, its political and communicative dimension is now more central than ever. The wars of the future—whether fought on the battlefield, in cyberspace, or across digital media—will still require a *casus belli*.

Whether real, fabricated, or entirely narrative, *casus belli* will continue to represent the symbolic spark through which states seek to transform the use of force into an act that appears legitimate and necessary. For this reason, studying its forms and transformations does not merely mean analyzing the past, but equipping ourselves to understand the wars of the present and, inevitably, those of the future.

From Dual Loyalty to the External Bond: Geopolitics and Democracy in Domestic Law

BY SIRIO ZOLEA

It is not, sir, the scaffold that I fear:
There are so many still and secret means
By which her majesty of England may
Set all my claims to rest. Oh, trust me, ere
An executioner is found for me,
Assassins will be hired to do their work.
(F. Schiller, *Mary Stuart*, Act I, Scene VI)

1. The arcana imperii *and the law: seeking a difficult equilibrium between conspiracy theories and denialism of the dark side of politics*

At the conference held at Roma Tre the day December 5, 2025, aimed at the analysis of the complex interactions between law and geopolitics in the multipolar world, my contribution was focused on certain domestic implications of geopolitics in (domestic) public law, analyzing, in the Italian context, how certain fundamental features of the way of functioning of the public institutions, and of the legal mechanisms regulating them, are intensely determined by overriding geopolitical imperatives. The present article develops such reflections, trying to assess the weight of these imperatives in relation to the competing weight of representative democratic mechanisms, concluding with the concern that, in the current context, of rarefaction of intermediate bodies, personalization of politics, and (proclaimed) depoliticization of society and economy, such constraints are acquiring a pernicious upper hand over those mechanisms, under the formula of the primacy of the absolute ‘external bond’.

The topic of *arcana imperii*, and the related effort for disclosure of state secrets[1], motivated by a variety of (academic, political, personal, etc.) reasons, since antiquity accompanies political and historical studies, as secret history, or history of secrecy, occupying an ambiguous and often discredited role, but whose importance cannot be fully denied[2]. In fact, it is particularly difficult to navigate between two opposing (but complementary) extremist views. One, encouraged by mainstream thinking and, ultimately, by the will to defend and legitimize the *status quo*, tends to radically discredit any (journalistic, political, historical) effort to disclose the secrets of the power, deeming it as a granted fall into gossip, defamation, slander, and conspiracy theories; the other tends to explain every act or fact as a manifestation or result of an all-embracing[3] set of unproven and unprovable conspiracies, instead of class struggle, concrete geopolitical dynamics, etc. The sole practical consequence of conspiracy theories is to camouflage any actual conspiracy behind a smokescreen, like the Hegelian "night in which all cows are black": due to their confusing effect, they are also encouraged by mainstream thinking. The first view is, of course, widespread in academia, while the second view, susceptible to taking root easily in paranoid personalities, tends to spread more widely in our age marked by a continuous flow of complex information to which everyone is subjected, accompanied by a decline in the critical ability to decode. An ability which, in the last century, thanks above all to the work of mass parties, trade unions, and intermediate bodies in general, and with a significant role played by the penetration of the fundamentals of the Marxist method into popular mass culture, had allowed the formation of structured and articulate counter-narratives, conveyed by those social and political forces representing the demands of the popular classes, which, inside and outside institutional settings, fought a battle for political power.

1 See, *ex ceteris*, N. Bobbio, *Democrazia e segreto*, Einaudi, 2011.

2 See V. Ilari, *Secret history. An Early Survey*, in *Nuova Antologia Militare*, 2024, vol. 19, n. 5, pp. 559 ff.

3 Cf. R. Hofstadter, *The Paranoid Style in American Politics*, in R. Hofstadter, *The Paranoid Style in American Politics and Other Essays*, Harvard University Press, 1996, p. 29: "there *are* conspiratorial acts in history, and there is nothing paranoid about taking note of them. This is true. All political behavior requires strategy, many strategic acts depend for their effect upon a period of secrecy, and anything that is secret may be described, often with but little exaggeration, as conspiratorial. The distinguishing thing about the paranoid style is not that its exponents see conspiracies or plots here and there in history, but that they regard a 'vast' or 'gigantic' conspiracy as *the motive force* in historical events". On this topic, see also the novel of the Italian writer U. Eco, *Il pendolo di Foucault*, Bompiani, 1988.

However, the mentioned difficulty in navigation does not mean that the narrow right course is impossible, with the necessary scientific rigor, using elements that have emerged, for example, from the connection of serious and consistent clues, from whistleblowers or hackers, or from the declassification of information or entire archives due to judicial or parliamentary investigations, historical upheavals, regime changes, the passage of time, etc., as some historians patiently do. It has been observed that

> although they are a typical facet of social and political life, in the overall scheme of things most conspiracies are narrow in scope, restricted in their effects and of limited historical significance. But this is not always the case. It should be obvious that, whenever powerful political figures engage in secret planning, the impact of their decisions on others will be correspondingly greater and more difficult to counteract. […] There is nothing mysterious about this, however. It is simply a covert reflection of existing and sometimes readily visible power relations, and should be recognized as such. […] [T]here are fundamental differences between 'conspiracy theories' and actual covert and clandestine politics, differences that must be taken into account if one wishes to avoid serious errors of historical interpretation. The problem is that most people, amateurs and professionals alike, consistently fail to distinguish between them[4].

Legal studies, probably even more than historical and other social studies, are wary of the *arcana imperii*, generally preferring to base their arguments on grounds that are easier to find, public and, in their existence, objective, although debatable in their content, such as legislative texts, court rulings, and interpretations of legal scholarship. Only in extreme circumstances do public revelations of previously secret affairs – of such magnitude as to have a dramatic impact on the functioning of institutions and on the relationship between them and with citizens – sometimes prompt legal scholars to express their views and debate on them and their implications and consequences[5].

4 J. M. Bale, *The Darkest Sides of Politics*, Vol. I: *Postwar Fascism, Covert Operations and Terrorism*, Routledge, 2018, pp. 51-52.

5 See S. Rodotà, *P2 e Stato. Le dinamiche di occupazione del potere da parte del partito occulto*, in M. Ramat *et alii*, *La resistibile ascesa della P2. Poteri occulti e Stato democratico*, De Donato, 1983, pp. 145-166; see also, *ex ceteris*, M. S. Giannini, *Associazioni segrete e gruppi di potere*, in *Giurisprudenza costituzionale*, 1981, pp. 1756-65; G. Branca *et alii, Diritti civili e libertà di associazione: limiti e garanzie giuridiche. La vicenda della loggia massonica «Propaganda n. 2»*, Istituto per la documentazione e gli studi legislativi, 1981; L. Barbieri *et alii*, *Le associazioni segrete. Libertà associativa e diritto dell'associato tra legge Rocco (1925) e legge sulla P2 (1982)*, Jovene, 1984; A. Garga-

However, at least in the field of comparative law, most of scholars of our time are accustomed to thinking in terms of social functions[6] more than of positive norms, turning their attention also to those implicit or contextual elements that form the cultural framework of a legal system, allow the interpretation and determine the substantive application (or non-application) of positive norms, by placing them within a horizon of meaning. Comparative lawyers have to take also into account 'cryptotipes', which are implicit models assumed by the actors, public institutions, and commentators within a legal system, without even being aware of it[7], a set of premises that form the basis of ideology (or in any case demarcate the field for the ideological clash taking place) in a system. From this perspective, the *arcana imperii* need to be included in legal analyses, particularly when they rise to become a pivotal element of a political power structure – perhaps helping to explain certain deviations of public authorities' activities not only from specific rules but even from the values and attitudes, for example the constitutional ones, that underpin a legal system, determining their ineffectiveness in a more or less radical way. And the more the secrets and unspoken truths of the *raison d'état*, which can never be eliminated in the life of a country, are converted from exceptional elements (of last resort) of the context of law into permanent, structural and determining elements of the long-term nature of the law in action of a certain country, the more this should be a wake-up call for those scholars who focus their attention on the health of that country's democratic institutions.

2. Some retrospective legal thoughts on the 'dual loyalty' based on the Italian 'stay-behind' affair

It is obviously not possible, in this paper, to summarize history of secrecy in Italy, even just in the Republican era, due to lack of space and expertise. What is worth noting is how, since the postwar period, during the so-called "thirty glorious years"[8], Italy experienced steady and powerful economic growth; a constant

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ni, *Strutture occulte ed interferenze sui pubblici poteri*, in L. D'Andrea *et alii, Potere e responsabilità nello Stato costituzionale. Prospettive costituzionalistiche e penalistiche*, Giappichelli, 2014, pp. 11-19.

6 About functionalism in comparative law, and the related debate, see M. Siems, *Comparative Law*, 2nd ed., Cambridge University Press, 2018, pp. 31 ff.

7 See R. Sacco, P. Rossi, *Introduzione al diritto comparato*, VI ed., in R. Sacco (diretto da), *Trattato di diritto comparato*, UTET, 2015, pp. 119-121.

8 J. Fourastié, *Les Trente Glorieuses ou la révolution invisible de 1946 à 1975*, Fayard, 1979.

increase in the share of wages relative to the share of profits, resulting in a redistribution of income top down driven by workers' struggles; a consolidation of workers' rights and guarantees; the nationalization of strategic industrial sectors and their management in the public interest; ambitious strategic economic planning; the experimentation of a genuine "third way" alternative to both socialism and liberal economic theories; continuous expansion of social emancipation; the establishment of a strong welfare state; and the achievement of universal, high-quality healthcare and education systems: all being accompanied by an autonomous foreign policy in the NATO bloc, characterized by closeness to the Arab countries and good relations, especially commercial and cultural, with the leading country of the other geopolitical bloc, making Italy a "bridge" between the blocs. This transformation, heralded by the constitutional pattern of solidarity and substantive equality, to be achieved through the commitment of public institutions, was driven by the 'internal bond' of active democracy and granted by consistent and enduring social struggle, aimed at breaking the privileges and injustices of the past.

It is therefore not surprising that certain economic forces, recessive but very wealthy, certain social forces, struggling but not vanquished, and certain parts of the public apparatuses, largely composed by members of the ruling class of the deposed fascist regime, opposed these developments; and that some external forces (but internal to the same geopolitical bloc) were equally opposed, for other converging reasons, consisting in the will to maintain at any cost Italian firm loyalty to the Western geopolitical bloc and to the liberal ideology. It was from this complex combination of forces – in a turbulent historical period in which, within the NATO bloc, similar situations (Greece, Turkey) culminated in the direct seizure of power by the armed forces and the establishment of military dictatorships, while at the same time there were also openly fascist dictatorships (Portugal) within the same bloc – that some *coup* attempts occurred in Italy, with the support of members of the institutions and the armed forces. And when it became apparent that a *coup d'état* in Italy could not have sufficient support to succeed, new strategies of tension[9] gained momentum, activities aimed at destabilizing democratic institutions, about which thousands of pages have been

9 On the strategy of tension, see, *ex multis*, N. Tranfaglia, *La strategia della tensione e i due terrorismi*, in *Studi Storici*, 1998, vol. 39, n. 4, pp. 989-998; M. Gotor, *«Un intrigo difficile da districare». La strage di piazza Fontana e la strategia della tensione nel memoriale di Aldo Moro*, in *Dimensioni e problemi della ricerca storica*, 2020, n. 2, pp. 107-132.

written, also with regard to the extent of support from the United States and other NATO allies for the aforementioned strategies[10]. Over the years, with the involvement of neo-fascist fringe groups[11], subversive Masonic lodges[12], and organized crime, these strategies were supported by terrorist activities on national territory, with the participation of some segments of the civil and military authorities, especially concentrated in the secret services, at least by activities of cover-up and diversion, as demonstrated also in court proceedings. Ultimately, the permanently instable situation deriving from the succession of risks of *coup d'état* and applications of strategies of tension allowed organized anti-democratic sectors within the country's civilian and military ruling class to carry out a growing occupation and control of public spaces, emptying them of their democratic and popular significance, by gradually shifting the venues and roles of political decision-making to hidden and clandestine levels[13].

With regard to these historical processes, what is relevant to note here is the link between 'parallel' Italian intelligence and military apparatuses[14], some-

10 *Ex plurimis*, see G. De Lutiis, *Il lato oscuro del potere. Associazioni politiche e strutture paramilitari segrete dal 1946 a oggi*, Editori Riuniti, 1996.

11 For the theoretical framework behind certain hybrid operations of that period carried out by neo-fascist forces, see the book *La guerra rivoluzionaria - Atti del primo convegno di studio promosso e organizzato dall'istituto Alberto Pollio svoltosi a Roma nei giorni 3, 4, 5 maggio 1965 presso l'hotel Parco dei Principi*, Volpe editore, 1965.

12 See T. Anselmi (relatore), *Relazione della commissione parlamentare d'inchiesta sulla loggia massonica P2*, IX legislatura, doc. XXIII, n. 2, comunicata alle Presidenze delle Camere il 12 luglio 1984, pp. 87 ff.

13 See S. Rodotà, *P2 e Stato. Le dinamiche di occupazione del potere da parte del partito occulto*, in M. Ramat *et alii*, *La resistibile ascesa della P2. Poteri occulti e Stato democratico*, De Donato, 1983, pp. 156 ff.

14 To stick to an extreme simplification, see the synthesis in J. M. Bale, *The Darkest Sides of Politics*, Vol. I: *Postwar Fascism, Covert Operations and Terrorism*, Routledge, 2018, pp. 176-177: "there were reportedly three main levels of such secret, parallel, anti-communist apparatuses within Italy. The highest level, linked to the NATO and U.S. secret services and nominally under the authority of reliable Italian statesmen, was a kind of 'super' secret service within the secret services composed of 'patriotic' elements (known, among other names, as 'parallel SID' and as 'Super SISMI') that only select pro-Atlantic politicians and officials were aware of. This level was apparently centered within Ufficio R of SIFAR, SID, and finally SISMI, and perhaps also the UAR. Beneath this was a second level composed of regular units of the military and Carabinieri that would form 'stay/behind' or rapid response groups and would activate pre-planned operational protocols for resistance in the event of external invasion or internal civil disturbances. The third level was composed of the civilian 'stay/behind' paramilitary groups that were mainly designated, in Italy, under the code name 'Gladio'. It was later discovered that

times referred to as a form of 'dual state', and corresponding apparatuses of foreign powers within NATO involved in 'stay behind' operations. This connection gave rise to an undeclared external bond, which took the form of constant pressure on political direction and acted as a limit and a form of sabotage to the efforts of implementation of the constitutional project of mass democracy[15], in an attempt to superimpose a substantial anti-communist constitution onto a formal anti-fascist constitution, as a form of guarantee of Italy's geopolitical positioning[16]. Thus, it has been observed that

> there is the no less important matter of the still murky covert relationships between those many parallel structures in Italy and the neo-fascist paramilitary groups that actually carried out the 'strategy of tension', on the one hand, and the foreign intelligence apparatuses of the United States and NATO then operating in Italy (and beyond), on the other. In this context, we are truly entering into a 'wilderness of mirrors' given the complexity of the situation and the difficulties of obtaining reliable information about such secretive activities. Nevertheless, there are many circumstantial indications that personnel from both the Italian parallel intelligence and paramilitary networks and from […] neo-fascist groups had links to, provided information to, and periodically collaborated with, components of both the CIA apparatus and the intelligence structures affiliated with NATO and the U.S. military that were operating in Italy[17].

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these civilian groups, whose members were trained by special operations personnel and armed, equipped, and funded by the higher level parallel apparatuses, comprised some right-wing extremists along with a majority of law-abiding, pro-Atlanticist anti-communists. Elements from these parallel organizations were also at times allegedly involved in infiltrating, manipulating, and/or 'collaborating with' seemingly autonomous political extremists, both neo-fascist and leftist, as well as in recruiting elements from criminal organizations, in order to carry out various illegal, 'dirty', and plausibly deniable actions".

15 See G. Preterossi, *Per una critica del vincolo esterno assoluto*, in *Diritto costituzionale*, 2025, vol. VIII, n. 1, pp. 134-136; see also L. Paggi*, Violenza e democrazia nella storia della Repubblica*, in *Studi storici*, 1998, vol. 39, n. 4, pp. 943 ff.

16 See R. Benini*, Sorvegliata speciale. Le reti di condizionamento della prima repubblica*, Rubbettino, 2023; focused on the years after the war, cf. R. Faenza, M. Fini, *Gli americani in Italia*, Feltrinelli, 1976; M. Del Pero*, Gli Stati Uniti e la «guerra psicologica in Italia» (1948-56)*, in *Studi Storici*, vol. 39, n. 4, pp. 953-988.

17 J. M. Bale, *The Darkest Sides of Politics*, Vol. I: *Postwar Fascism, Covert Operations and Terrorism*, Routledge, 2018, p. 177; for a more recent analysis, highlighting how Italian intelligence agencies and organizations did not act in full submission to the more powerful US agencies, but had a complex, often ambiguous relationship with them, which incorporated various forms of cooperation and of competition and confrontation, see N. Petrelli, *I Servizi Segreti italiani e l'intelligence USA. Da Gladio alla strategia della tensione*, Carocci, 2025; cf. V. Ilari, *Le Forze Armate tra politica e potere*, 1943-

In the context of this paradigm, susceptible, in the most difficult moments, to culminate in a full-fledged double/dual/parallel state[18], dual loyalty, as affirmed by the historian De Felice, meant loyalty (both) to one's country and to a political camp: consequently, the ruling groups were formed by incorporating this duality. This meant that the elements of emergency and military preparedness, both offensive and defensive, were further specified in a precise political-strategic choice; in the attenuation of the distinction between domestic and external, because both elements were redefined on the basis of dual loyalty; and, ultimately, in a problematization of national identity itself[19].

1976, Vallecchi, 1979; V. Ilari, *Il generale col monocolo*, Nuove ricerche, 1994.

18 On such notions, see, in addition to the article of De Felice mentioned at the following note, *ex ceteris*, G. Pellegrino, *Proposta di relazione finale della Commissione parlamentare d'inchiesta sul terrorismo in Italia e sulle cause della mancata individuazione dei responsabili delle stragi,* depositata il 12 dicembre 1995; P. Cucchiarelli, A. Giannuli, *Lo stato parallelo. L'Italia «Oscura» nei documenti e nelle relazioni della Commissione stragi*, Gamberetti, 1996 (according to which, at p. 18, a 'dual state' exists when part of the institutional elite, for the sake of self-preservation, forms a hidden power with its own principle of legitimacy – separate from and opposed to that of the formal Constitution – in order to permanently influence the political system through illegal methods without subverting the formal order, which retains some of its effectiveness); N. Tranfaglia, *Un capitolo del «doppio stato». La stagione delle stragi e dei terrorismi, 1969-74*, in *Storia dell'Italia Repubblicana*, v. 3, t. 2, Einaudi, 1997, pp. 7-80; P. Craveri, *Commissione stragi e storia*, in *Nuova Storia Contemporanea*, 1999, n. 2, pp. 151 ff.; F. M. Biscione, *All'origine del concetto di doppio Stato. Il PCI e la sconfitta della solidarietà nazionale*, in S. Pons (ed.) *Novecento Italiano. Studi in ricordo di Franco De Felice*, Carocci, 2000, pp. 325 ff.; F. Barbagallo, *Il doppio Stato, il doppio terrorismo, il caso Moro*, in *Studi Storici*, 2001, vol. 42, n. 1, pp.127 ff.; G. Sabbatucci, *Il "doppio Stato"*, in *Dimensioni e problemi della ricerca storica*, 2009, n. 1, pp. 89 ff. In the presence of a wide-ranging debate among historians on this subject, the notion of 'dual state' can, in any case, be used at least in a minimal meaning, consisting in the consolidation over time of a system of dual (or plural) loyalty with both domestic and international origins: with this meaning, it can be considered suitable, not as a historiographical category, but as a purely descriptive category, for the description of certain operating methods of sectors of the civil and military state administration, operating on two levels, one known, the other intended to remain secret even from the Parliament and the judicial authorities, with the area of secrecy extending far beyond what is permissible in a democratic system (see G. Pellegrino, *Appunti per una relazione conclusiva del Presidente della Commissione stragi*, 9 gennaio 2001, p. 5).

19 F. De Felice, *Doppia lealtà e doppio Stato*, in *Studi storici*, vol. 30, n. 3, p. 507.

3. Genesis and continuation of the external (geopolitical) bond: from putschism to technocracy

With regard to the formation and persistence of an institutional system of dual loyalty, of which geopolitical conditions are one of the foundational reasons – perhaps the main one – the legal dimension is deeply involved and should not be dismissed as merely ancillary. Most of scholars studying geopolitics, analyzing the spatial dimension of power, tend to mistakenly relegate the legal phenomenon as a merely superficial and predetermined form of power relations superordinate to it, without significant possible feedback[20]. Conversely, legal scholars, in their research, tend to start[21] from the assumption of the autonomous consistency of rules with respect to the facts they regulate[22]. However, the written constitution is only one part of the overall state legal order, originating from a non-legal source, which results from the basic organization of social forces permanently ordered around a system of interests and corresponding goals. Such organization finds in the system of constitutional powers the necessary tool to stabilize and guarantee the satisfaction of these interests and, in certain circumstances, can bend the functioning of the system to the goals that condition it: all this must enter into the field of analysis of the legal scholars, in order to trace the features giving legal status to social behaviors and relationships, so

20 *Contra*, see V. Ilari, *Pezzi di carta? Il diritto serve innanzitutto a fare la guerra*, in *Limes*, 2020, n. 2, pp. 197-202.

21 For a growing interest in geopolitics among certain Italian legal authors, especially those of comparative law and legal philosophy, see the contributions in *GNOSIS*, 2020, n. 2 (ed. I Castellucci); A. D'Attorre, *Metamorfosi della globalizzazione. Il ruolo del diritto nel nuovo conflitto geopolitico*, Laterza, 2023; the contributions in *Diritto costituzionale*, 2025, vol. VIII, n. 1, issue on *Geopolitics and Constitution* (ed. A. Guazzarotti); R. Ibrido, *Geopolitica costituzionale: una introduzione*, Il Mulino, 2025; M. Balestrieri, *Realismo politico e diritto internazionale*, pp. 59-75, and M. Ruschi, *Verso l'anarchia? Vecchi paradigmi e nuovi scenari dell'ordine internazionale,* pp. 76-89, both in *Aut aut*, 2025, n. 405, issue on *L'anarchia del moderno. Tra geopolitica e filosofia* (eds. M. Balestrieri and A. Giustiniani); R. Peleggi*, La globalizzazione nell'era delle crisi e della conflittualità geopolitica*, in *Comparative Law Review*, 2025, vol. 16, n. 2, pp. 68-85; I. Castellucci, *Geodiritto, cinque anni dopo.* Lessons learnt, in *GNOSIS*, 2025, n. 2, pp. 28-56; F. Cerquozzi, Contribution at the forum *I recenti conflitti e il ruolo del diritto costituzionale*, in *Gruppo di Pisa: dibattito aperto sul diritto e la giustizia costituzionale*, 2025, n. 3, pp. 219-227; R. Ibrido, *Exploring Constitutional Geopolitics: Paradigms, Tools, and 'Rules of Engagement'*, in *Constitutional Studies*, 2026, vol. 12, n. 1, pp. 133-165; P. Passaglia, *Geopolitica e diritto: un legame trascurato*, FrancoAngeli, 2026.

22 On this point, cf. I. Masso Pinto, *Geopolitica e (ir)rilevanza del diritto costituzionale*, in *Diritto costituzionale*, 2025, vol. VIII, n. 1, p. 17.

that the actual unfolding of these relationships in a legal system must be considered part of the real constitution of a country[23].

The ‘stay-behind’ operations in Italy plastically show how law is not just an aseptic covering but a substantial form of relations, including geopolitical relations, in which the relative connections and influences are carried out, in a mutual interaction whose delicate balance must be analyzed in each particular instance in order to realistically understand its nuances. In several ways law is involved: (1) as a source of constant non-application and misapplication not only of certain rules of positive law, for example by providing systematic impunity for behaviors that are strictly punished by criminal law, administrative rules, and military bylaws, but also of the fundamental principles of democracy of the constitutional order, to the extent of defusing the democratic and social project set out by the constitution and shaping an actual ‘alternative constitution’; (2) as well as a formal basis for power structures that have expanded exponentially over time due to political contingencies and power relations.

On the first point, it is worth noting how the geopolitical factor can not only influence and enhance the plurality of legal systems that exist within the same territory – in Santi Romano’s view, which included in this plurality both the mafia and revolutionary organizations[24] – strengthening one or the other of these systems or in various ways overdetermining the relationships between them, but can also fuel a form of pluralism within the state system itself, giving a certain direction to the interpretation and implementation of its rules, to the point of creating new, actual rules alternatives to the formal ones. Segments of the state apparatus, loyal to this other legal system within the state legal system, strive to implement it, until, potentially, the success of such a political struggle could lead to social and legal community acceptance of the new direction of policy of law, with or without further *ex post* changes even to the unapplied formal text of the laws and constitution. In fact, as observed by Costantino Mortati, consideration of the formal system of legal rules alone cannot provide an accurate understanding of the law in action, and therefore risks, if isolated in an exclusively formalistic view, giving rise to interpretations that are not reflected in reality, which must be taken into account, according to the view that the law is not what is enshrined in legal texts by the mere fact of such enshrinement,

23 C. Mortati, *Costituzione (Dottrine generali)*, in *Enciclopedia del diritto*, vol. XI, Giuffrè, 1962, pp. 168-169.

24 S. Romano, *L’ordinamento giuridico*, part I, Enrico Spoerri Editore, 1918, pp. 110 ff.

but rather the other ‘living’ law that manifests itself in actual relationships and behaviors, when these, even if they conflict with the formal laws themselves, present aspects and characteristics that suggest their stabilization[25].

On the second point, some studies[26] have focused on the legal basis which was used for hybrid warfare operations planned on the Italian territory by the US intelligence forces, soon after the end of the war, in the event of the communists taking power in Italy, either through insurrection or democratic means. Scholars have analyzed documents from the US National Security Council that contemplated the use of covert operations and stay-behind operations. Some Italian budget documents are also clues to the existence of secret armed forces and intelligence structures created in the 50s for counterinsurgency purposes, related to the US corresponding structures. However, in general, the Italian documents, even when declassified and retrieved, are often reticent and incomplete, making it more difficult for historians to reconstruct how many ‘stay-behind’ structures were present on the national territory, unknown to parliamentary institutions, and to what extent some of these multi-level structures were for some reasons activated in subsequent years, following the electoral advance of left-wing forces, to support first the planification of coup attempts and then strategies of tension. ‘Gladio’, having become the most known structure after its revelation, had its legal ground in an agreement between American and Italian secret services, of 1956, which, however, referred to previous agreements already in place, revised and updated by the agreement of 1956. In this manner, a secret operational agreement between intelligence agencies (along with, presumably, several similar agreements) was able to permanently override the constitution, disregarding the formal hierarchy of sources of law, as it was underpinned by a specific international geopolitical structure and supported by a domestic system of dual loyalty. Another secret agreement with the USA, of 1954, the Bilateral Infrastructure Agreement, regulates organizational procedures for the practical implementation of bilateral infrastructure programs and, at the same time, the American military presence in Italian infrastructures[27]: this document is inter-

25 C. Mortati, *Istituzioni di diritto pubblico*, VIII ed., Cedam, 1969, p. 26.

26 N. Tranfaglia, *Un capitolo del «doppio stato». La stagione delle stragi e dei terrorismi, 1969-74*, in *Storia dell'Italia Repubblicana*, v. 3, t. 2, Einaudi, 1997, pp. 11 ff., and the bibliography referred to there.

27 See G. De Ruvo, *Il trattato segreto che gli USA non vogliono pubblicare*, in *Limes*, 2024, n. 3, pp. 33-34; about the problematic status of secret agreements in the Italian legal system, see, in general, A. M. Calamia, *Accordi in forma semplificata e accordi segreti:*

esting too, for understanding the contours of the permanent external bond operating in Italy since the end of the last (lost) world war.

Anyway, at some point, something intangible and disruptive happens. While the strategy of tension slowly fades away, albeit with a series of bloody aftershocks and fallouts, a profound anthropological change starts to take place in the country, which the intellectual Pier Paolo Pasolini had prophetically understood as early as 1975[28], a few months before his (mysterious) death: with the overcoming of Italy's agricultural and paleo-capitalist connotations, the values (Church, homeland, family, obedience, order, thrift, morality) that had characterized the first decades of the Republic, in continuity with the previous (Fascist) period, lost their material basis, with an epochal change brought about by the violent homogenization of industrialization and the formation of new masses (of consumers) that were no longer the ancient masses of peasants and artisans. Pasolini connected this anthropological change with the sudden opening of a political void, while the old bases of power (the Vatican and its influence on the peasant world; a nationalist army, etc.) and the old ways of exercising it were suddenly becoming outdated, and he foreshadowed the course of a new power, capable of contaminating even military institutions: a technocratic, transnational power, therefore impersonal and fungible.

It is important to understand the all-encompassing, perhaps totalitarian, nature of this change and of the passive mobilization of the masses in its implementation, driven by an anxiety for 'modernization', imposed by the power of consumption, to feel ashamed of themselves and their past, and driven to the mythologization of foreign models as alleged bearers of modernization[29]. This process of abdication by the working classes to the creation of a counter-power on bases different and alternative to that of capitalist 'modernization' by the market has therefore led to the loss of any counterweight that allowed for balance with the traditional cosmopolitanism of the Italian intellectual classes: a continuation of the medieval cosmopolitanism derived from the Church and the

questioni scelte di diritto internazionale e di diritto interno, in *Ordine internazionale e diritti umani*, 2021, n. 1, pp. 1-18.

28 P. P. Pasolini, *Il vuoto del potere in Italia*, in *Corriere della Sera*, February 1, 1975.

29 Cf. E. Diodato, *Il vincolo esterno. Le ragioni della debolezza italiana*, Mimesis, 2014; on the external bond, see also G. Guerra, *La presidenza Mattarella, l'unione economica e monetaria e il "vincolo esterno" alla forma di governo*, in D. Paris (ed.), *Il primo mandato di Sergio Mattarella: la prassi presidenziale tra continuità ed evoluzione*, Editoriale scientifica, 2022, pp. 57-75.

Empire, conceiving themselves as universal, and for this very reason an obstacle rather than an impetus to the emergence and realization of any patriotic sentiment and awareness[30]. All this may help to understand how the external bond, which had emerged after the war as an instrument of control, limitation, and discipline against people's democratic sovereignty, was able at a certain point to gradually spread, meeting a spontaneous inclination of the intellectual classes and encountering ever less resistance from the working classes, which were less and less involved in economics, politics, and society. In this way, the external bond became a common thread, in the fall of every other point of reference, between the 'First' and the 'Second Republic', in a new guise, universalized and become common sense, thus realizing the political, economic, and social project of the bourgeoisie, victorious after the end of the Cold War, to the detriment of the sovereign democratic project of social emancipation of the Constitution.

4. Italy in post-Maastricht Europe: generalization, absolutization, and super-constitutionalization of the external bond

With the historical background outlined in the previous paragraph, in the 1990s the European Union represented for Italy an extension and an institutionalization of the already established external bond, fulfilling, more extensively, the same function. In fact, it represented an extension of the constraint from the Atlantic dimension (also) to the European one: the first focused on a foreign policy and defense bond, with economic influence in the direction of a liberal market system; the second focused on a liberal market system bond, with an influence in the direction of certain foreign policy and defense choices. These are two complementary aspects of a single constraint that was becoming an in-

30 See A. Gramsci, *Selection from the prison notebooks*, ElekBook, 1999, p. 153: "As far as Italy is concerned the central fact is precisely the international or cosmopolitan function of its intellectuals, which is both cause and effect of the state of disintegration in which the peninsula remained from the fall of the Roman Empire up to 1870"; p. 306: "Where was the basis for this Italian culture? It was not in Italy; this 'Italian' culture is the continuation of the mediaeval cosmopolitanism linked to the tradition of the Empire and the Church. Universal concepts with 'geographical' seats in Italy. The Italian intellectuals were functionally a cosmopolitan cultural concentration"; pp. 326-327: "The reason for the failures of the successive attempts to create a national-popular collective will is to be sought in the existence of certain specific social groups which were formed at the dissolution of the Communal bourgeoisie; in the particular character of other groups which reflect the international function of Italy as seat of the Church and depositary of the Holy Roman Empire; and so on".

creasingly tight noose, undermining the effectiveness of ever-wider areas of the constitutional system, from the repudiation of war (with the Italian involvement in theaters of war such as the Balkans, Afghanistan, Iraq, etc.) to the project of solidarity and social equality (with its subordination and conditioning to market priorities, starting with the dismantling of the previous mixed economy system and continuing with the gradual erosion of worker protections and wages and of public education and health systems).

This evolution also represented an institutionalization of the constraint, because the anti-constitutional subversivism of (part of) the ruling class, which had been happening in the shadows until the Maastricht Treaty, expressing itself in mechanisms of dual loyalty, at that moment acquired the highest level of legal legitimacy, being in an international treaty ratified by Italy, giving rise to a supranational governance structure with extensive powers of compliance over states: a legal source that stands above and is integrated within national law[31] and that – beyond the bland theory of counter-limits, confined to extreme situations of violation of the supreme principles of the Italian constitutional order and the inalienable rights of the individual[32] – is effectively capable of rendering inoperative and derogating from broad provisions of the Constitution, essentially repealing them without doing so formally. Some changes to the formal text of the Constitution have been made in more recent years: in 2001, an explicit obligation for the legislator to comply with the constraints deriving from European and international law was inserted into Article 117; in 2012, the principle of balance of budget was inserted into Article 81 (as an implementation of the previous European Fiscal Compact of the same year), with strict limits on resorting to borrowing. The expansionary trend of the external bond has developed further over the years, enhanced by the tendency of the European legislator to regulate matters that go far beyond those expressly attributed to it by the treaties, under the pretext of taking measures (indirectly) necessary for the establishment and functioning of the internal market, to the point of rendering meaningless, at least with regard to the digital sphere, even parts of the constitution aimed at guaranteeing fundamental rights such as freedom of expression and information[33].

31 See the case law of the European Court of Justice, since Flaminio Costa v ENEL (1964) C-6/64.

32 See Italian Constitutional Court, Order 24/2017, of 26 January 2017.

33 On such implications of the Digital Services Act, see V. Zeno-Zencovich, *Speech as "Hybrid Warfare"*, in *Public Governance, Administration and Finances Law Review*, 2025, vol.10, n. 1, pp. 33-42.

The analysis of the 1992 Maastricht Treaty as a qualitative leap of the external bond is not, however, only the personal opinion of the author of this paper, but rather the observation expressed by the person who, on behalf of Italy, actually had negotiated the Maastricht Treaty, the then Minister of the Treasury Guido Carli, on the structural change of a constitutional nature, without changing the formal constitution, which was implied by the international agreement he had signed on February 7, 1992, with the national Parliament that had been dissolved some days before[34]. Guido Carli affirmed that

> The vast scope of the legal innovation contained in the Maastricht Treaty entails a change of a constitutional nature. [...] It is a construction based on concepts that had no place in our Constitution or in our legal system [...]. Yet, once again, we must admit that structural change is brought about by the imposition of an "external bond." [...] Once again, it has been necessary to circumvent the sovereign Parliament of the Republic, building elsewhere what could not be built at home[35].

With the monetary union and the new currency, the Euro, adopted by taking the Deutsche Mark as a model of governance at the expense, among other things, of the Italian model of monetary governance – and depriving the states involved of monetary sovereignty – a reorganization of the domestic economy and the state has been enacted, redefining the balance of power in favor of the upper, more internationalized layer of capital and to the detriment of wage earners and the subordinate classes in general, further undermining democratic and popular sovereignty and the ability of the majority of the population to influence the public decisions[36], now reduced to little more than an autopilot. The neoliberal (or ordoliberal) substantially irreformable nature of the European Union has been largely analyzed by scholars, highlighting the accomplished creation of a sort of super-state whose economic policy confines itself to depoliticizing the market in order to guarantee the functioning of free competition: the persistence of this approach is ensured by the institutional architecture of the Union, evident from a simple examination of the texts of the Treaties, but also by a system which deploys its strategy mainly by taking advantage of moments of crisis to

34 See M. Olivetti, *Lo scioglimento delle Camere del 2 febbraio 1992. Una «curiosità costituzionale» o un precedente imbarazzante?*, in *Giurisprudenza Costituzionale*, 1993, pp. 599-619.

35 G. Carli, *Cinquant'anni di vita italiana*, Laterza, 1993, pp. 7-8 (translated from Italian).

36 See D. Moro, *Eurosovranità o democrazia? Perché uscire dall'euro è necessario*, Meltemi, 2020.

condition states, a mechanism that Alessandro Somma identified as the 'market of reforms': in fact, any form of financial assistance to member states is conditional upon their anchoring in neoliberal orthodoxy[37].

5. (Not) to conclude: constitutionalism as a flatus vocis *when the external bond prevails over the (democratic) internal bond*

In this article, it was intended to offer a diachronic analysis of the external bond – at the same time a foreign policy bond and a market bond – over the Italian law in action, with particular reference to constitutional law. This has been formalized in international legal acts (the North Atlantic Treaty of 1949, the Bilateral Infrastructure Agreement of 1954, the SIFAR-CIA agreement of 1956, the Maastricht Treaty of 1992, followed by the Lisbon Treaty of 2007, the the European Fiscal Compact of 2012, etc.), but, beyond the wording of these treaties, over time it has exerted and continues to exert a much broader influence on the Italian constitutional system, to the point of paralyzing the functioning of increasingly large parts of it. This was initially expressed in secret deals that allowed to surreptitiously override higher sources of law, thanks to the double loyalty of state segments and institutions, and then, within the European Union, it became institutionalized in a 'parallel' system of sources of law based on international treaties, which gave the external bond open legitimacy that allowed it to overshadow even the Constitution. Moreover, the growing regulatory functions delegated to the European level are carried out in a context where the level of democracy is very low: with the procedures of a proto-parliament devoid of legislative initiative, and with contents that technocrats tend to negotiate much more with lobbies than with intermediary bodies.

Of course, this article does not intend to generally and absolutely reject the opportunity for any external bond[38]. The external bond, as a limitation of sovereignty due to the existence of objective international power relations, is present for every political entity in every historical period, and cannot be denied or rejected without falling into utopianism. To venture a comparison with psychoanalysis, to conceive the external bond we can evoke the Superego, if

37 See A. Somma, *L'Unione europea non è un progetto incompleto e neppure riformabile: è un dispositivo neoliberale di successo*, in *Ragion pratica*, 2023, n. 1, pp. 161-186.

38 Cf. M. Goldoni, *Costituzionalismo e vincoli geoeconomici: il modello estrattivista*, in *Diritto costituzionale*, 2025, vol. VIII, n. 1, p. 112.

the internal constraint, the sovereign democratic will, can be metaphorically compared to the Id. The task of the Ego is to mediate between these instances, where the failure of the Ego is precisely when one of them breaks the balance. The major problem with Italian constitutional law is the consolidation of a process, no longer adequately balanced, which has led to foreign constraints taking precedence over all other constraints and demands emanating from the people (*demos*), sterilizing the very essence of democracy through an autopilot mechanism that now covers, in whole or in part, all fundamental areas of public policy: monetary policy, budget policy, industrial policy, foreign policy, defense policy, etc., and is now seeking to extend to the area of fundamental rights with the aim of excluding or limiting from the (at least online) internal debate – under the label of fake news or hate speech – any attempt to bring the above-mentioned areas of public policy back into the realm of what can be democratically debated and contested. In other words, the problem arises not from the existence of an external bond, but from its becoming absolute[39], acquiring a primacy that is incompatible both with the Italian constitutional system and with the democratic paradigm in general. In these terms, the geopolitical question of the external bond is so crucial that it becomes the necessary core of any constitutional discourse, because it fundamentally determines both of the major issues of contemporary constitutionalism: the legitimization of power and the limitation of power. Therefore, the less the issue of external constraints is present in the current debate among constitutionalists, the more concrete is the risk that this debate reduces itself to *flatus vocis*, to rhetoric celebration of the system, its solidity, and its resilience, which translates, *de facto* – through the deliberate choice not to exercise critical scrutiny of what is at the center of the real power system of our time, capable of overdetermining both the constitutional project and every present expression of sovereign democratic will – acquiescence to the current state of things, to the predominance of the external bond and to the authoritarian turn[40] that this is bringing about in all economic, social, and political relations.

39 See G. Preterossi, *Per una critica del vincolo esterno assoluto*, in *Diritto costituzionale*, 2025, vol. VIII, n. 1, pp. 131-152.

40 Cf. T. Fazi, *La torsione autoritaria dell'Europa*, in *La fionda*, 2025, n. 1, pp. 55-62.

Balance of Power and International Law

by Giulio Di Donato

1. Limitations and Potential of International Law

International law has a constitutive relationship with the balance of power, linked not only to its origins but also to the way it functions. In the absence of a supranational authority endowed with centralized coercive powers, it can best fulfill its function as an instrument for negotiation and for the resolution of conflicting interests only if the main players, especially the world's great powers, keep each other in a relative balance. «Some form of regulation of international relations among sovereign actors» can indeed «arise, only where there is no asymmetry of economic and military power»; otherwise, international law is likely to be reduced to the mere legitimization of the order designed by the dominant power and serving to maintain its position[1].

The very aim of international law, that is, to contain and limit the use of war, both in terms of the *ius ad bellum* and the *ius in bello*, is all the more achievable when there are fewer imbalances that could place one party in a position of overwhelming superiority.

Therefore, the effectiveness of international law within the "system of states" rests on two conditions: on the one hand, the balance of power; on the other, the ability of the law to align with the interests of its addressees – primarily the great continental states, or "empire-states", each with its own hegemonic agenda and a different "degree of imperialism" – by identifying a minimal core of common interests to be protected or promoted. As Hedley Bull wrote, the importance of international law does not lie in the willingness of states to adhere to its principles at the expense of their interests, but in the fact that «they so often judge it

1 A. D'Attorre, *Metamorfosi della globalizzazione. Il ruolo del diritto nel nuovo conflitto geopolitico*, Laterza, Roma-Bari, 2023, p. 11.

in their interests to conform to it»[2].

One more connection between international law and the balance of power is that both pursue or are concerned with order and security in relations among states. As Sadun Bordoni[3] has pointed out, history presents us with two models of order: one based on balance, the other stemming from a "hegemonic peace" guaranteed by the role of a single dominant power. In the latter case, there is a preponderance of power rather than a balance, accompanied by a concession to certain unilateralist claims. The first model (i.e. balance of power) is always preferable, since it creates the grounds for law to function as a stabilizing factor and to promote an order that nonetheless finds elsewhere its guarantees and the reasons for its existence.

As aptly noted by Alfredo D'Attorre, international law stands as an «inextricable intertwining of factuality and normativity, where the latter is meant to stabilize and rationalize a balance that is basically set by the former»[4]. On the one hand, it is interwoven with elements of power, decision-making and force, and incorporates strenght and national-state interests from the geopolitical side; on the other hand, in order to effectively carry out its functions, it needs, as a prerequisite, the absence of imbalances that would compromise the very possibility of a regulated and predictable regime for conflict mitigation[5].

More specifically speaking, nuclear deterrence can actually work as a factor of relative stability, helping to contain the risk of an "extreme scenario." It still raises a barrier to nuclear escalation, as the threat of mutual assured destruction powerfully prevents the outbreak of major conflicts.

In general, nuclear deterrence and global interdependence seem to recreate, at the level of nations, that state of widespread vulnerability that Hobbes, then Hart identified – in the state of nature – as the foundation for the necessity of law. When no country can claim to be immune from substantial harm, global actors should be rationally willing to preserve or rebuild, at least to some minimal extent, channels of communication and agreement[6].

2 H. Bull, *La società anarchica. L'ordine nella politica mondiale* (1977), Vita e pensiero, Milano, 2005, p. 64.

3 G. Sadun Bordoni, *Guerra e natura umana. Le radici del disordine mondiale*, il Mulino, Bologna, 2025.

4 A. D'Attorre, *Metamorfosi della globalizzazione*, cit., p. 32.

5 *Ivi*, p. 22.

6 *Ivi*, p. 145.

Then again, in regard to the potential of international law, the above-mentioned arguments lead us to distance ourselves from two opposing and extreme stances: on the one hand, "pan-legalism," which attributes to law a full and unconditional capacity to regulate international relations; on the other, "pan-politicism," which denies this capacity by reducing law to a mere reflection or ideological cover for power relations, to the point of dissolving it into the logic of geopolitics[7]. In other words, the role of international law cannot be either overestimated – as if it were capable of guaranteeing order and peace on its own – or underestimated – as if it were irrelevant in the global play[8].

So, «international law is a social reality to the extent that there is a very substantial degree of conformity to its rules; but it does not follow from this that international law is a powerful agent or motive force in world politics»[9]. Such a role should be played indeed by the world's major political actors, whose acts will hopefully promote cooperation rather than conflict and imply consequent choices. As Carlo Focarelli wrote, «international law, as well as law in general, cannot ensure order by itself, as it is just one of the components of the world order»[10]. It can be viewed as a "conditioning factor", but it is not the primary instrument for achieving and maintaining order.

However, the point of leverage on which law can build is the willingness of the key players on the international stage – primarily nations, then, in a broader sense, any supranational, transnational, public and private entity – to *pacta servare* (uphold their agreements); that is, it relies not only on the adversarial nature, but also on the cooperative nature of a global landscape that is fragmented and unified at the same time[11]. The network of national and international norms and institutions, with the necessary support of other (material and spiritual) features, can positively affect this willingness and, more generally, underpin a balance of power (with all its contradictions and ambiguities) by promoting a convergence of efforts. On the other hand, even power politics can make use of the common language of law, which subjects the actions of nations and global organizations to a specific "criticizer's register" and to a "legitimizing pres-

7 *Ivi*, pp. 18-19.

8 *Ivi*, p. 32.

9 H. Bull, *La società anarchica*, cit., p. 163.

10 C. Focarelli, *Diritto internazionale*, Cedam, Padova, p. 45.

11 L. Baccelli, "Il genocidio nella terra promiscua: la fine del diritto (internazionale)?", *La fionda*, 2/2025, p. 237.

sure": which means, a framework of accountability and a set of codes for communication, negotiation, justification and "stabilization of expectations"[12] that may foster trusting relationships and shape conflicts, while providing space and expression for different interests, identities and aspirations.

The issue of power and balance of power cannot, therefore, be ignored: the goal is to create conditions under which actors have an incentive to respect international law, or perceive the costs of violating it as too high.

Anyway, if the aims of international law are order, security and peace, and if a defense of basic individual and collective rights is undoubtedly needed both at a national and international scale, the challenge is how to make all transnational interventions compatible with cultural diversities, with the identity and dignity of peoples, and with the integrity of the legal and political structures they have freely adopted. This is possible only by envisioning a "minimalist" redefinition of human rights that, following John Rawls, we can trace back to Articles 3-18 of the 1948 Universal Declaration, and doing so from a non-Western perspective, without compromising the principle of non-interference and the "rejection" of offensive war, however disguised, that represent two pillars of the international order[13].

2. The Logic of the Balance of Power

As we have seen, the effectiveness of international law requires reciprocity and can only be guaranteed «if there is a balance of power among the members of the family of nations»[14]. Both international relations and international law thus operate within the classic dichotomy: balance or hegemony, balance or unilateralism.

Today, as international relations are being reshaped around the logics of geopolitical and geoeconomic realism, complete with an awakening from the dogmatic slumber of liberal-globalism, it is clear that the stabilization of international relations cannot be based on law. And this revives, in forms that need to be rethought, the logic of the balance of power, a prerequisite for the effectiveness of international law according to a conviction common to international law prior to World War I[15]. As is well known, the system of the balance of power first

12 A. D'Attorre, *Metamorfosi della globalizzazione*, cit., p. 146.

13 G. Sadun Bordoni, *Diritto e politica. Studi sull'epoca post-globale*, Giappichelli, Torino, 2011, p. 39.

14 H. Bull, *La società anarchica*, cit., p. 128.

15 G. Sadun Bordoni, *Diritto e politica*, cit., p. 39.

emerged among the principalities and republics of Italy, then among the great European states; it prevailed, more or less, until World War I (although the first signs of its crisis were already visible toward the end of the nineteenth century). Until that time, the concept of the balance of power was considered an indispensable prerequisite of international law: in the absence of such a balance, since there is no central political authority above sovereign states, law becomes an expression of whichever power happens to be hegemonic at any given time. The age of the world wars marked the abandonment of the classical, Westphalian vision of international relations, pivoted on the idea of the balance of power, in favor of a liberal and abstractly universalist vision. In terms of substantive relations, however, the post-World War II age ushered in a new balance, bipolar in nature and projected on a global scale, which was to last until 1989. With the end of the Cold War, a new phase began, characterized by U.S.-driven neoliberal hyperglobalization, which developed between the last decades of the 20th century and the 2008 financial crisis – an event that marked the beginning of its decline. This brings us to the present day: the conflict in Ukraine marks the start of a further new phase, confirming the reality of a world in which powers have emerged capable of opposing unilateralism and global, unlimited Atlanticist interventionism. It is not that, up until then, power dynamics, national interests, and so on did not matter: they were simply shrouded in a veil of hypocrisy that obscured a reality in which there were not yet powers capable of challenging the primacy of the sole superpower left after 1989.

In short, alongside the emergence of new key players, other major powers – China, India, Russia, Brazil, Indonesia, and others – have regained influence and the capacity to take the initiative on the international stage, so that the international landscape has effectively turned pluralistic, and geopolitical considerations have become central again, now coexisting (not without mutual tensions) with economic ones.

As Carlo Galli wrote, the scenario is as follows:

> From Two to One to Three (at least): this, in short, is the evolution of international political dynamics from 1945 to the present. […] An increasingly central and hegemonic position for China in Asia and Africa (with strong projections toward Europe); a general shift of global economic and political power toward the East; and a reaction of fear and disbelief on the part of the United States, which perceives its own relative decline as an inconceivable refutation of its "manifest destiny" and its universalistic exceptionalism. This has led to the temptation – to which it is succumbing – to regain status and power by rushing to take defensive measures

> and engaging in economic and military confrontations wherever it feels threatened, both in the space it has designated – thanks to the old Monroe Doctrine (1823) – as their "backyard", and in the hotspots of its sphere of influence, international alliances, and rivalries (particularly in the Middle East). These active and reactive dynamics are frictions between political-economic blocs of continental or subcontinental dimensions, that seek either to take shape or to establish a new pluralistic world balance, or to prevent it in order to restore the old solitary hegemony. Armed conflicts and direct or indirect interventions in geopolitically volatile or unstable regions are not ongoing wars between empires, but rather efforts and attempts to reach a new compromise among empires whose borders, roles and hierarchies are still being defined[16].

In the background, as Piero Paolo Portinaro pointed out, a struggle is also taking place between oligopolistic markets and imperial powers: an imperial capitalism composed of corporations that operate in the market as global empires, enjoying the protection of imperial states and providing them – through a complex interplay of concessions and blackmail – with the material and immaterial resources necessary for their sustenance[17].

As Portinaro further noted, the power of empires undermines, yesterday as today, the "grammars of law." After all, empires are distinguished not only by their spatial magnitude but also by their lack of precise boundaries, which are meant to mark distinct levels of power and influence. They do not recognize neighbors as equals, but instead establish relationships of subordination, organizing spaces and populations into hierarchies according to an expansive logic. This is the fundamental contradiction that has characterized the global community of states since the end of World War II: on the one hand, a democratic assembly of states; on the other, an oligarchy of imperial states[18].

In any case, the Cold War age teaches us that a situation of balance and mutual deterrence among hegemonic powers – which arose by chance and was unintended – can lead to positive developments not only in terms of maintaining the international balance but also in slowing the arms race, if managed wisely through cooperative efforts.

After all, D'Attorre points out, the confrontation between the three current superpowers (the U.S., Russia, and China) may revive that simplifying frame-

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16 C. Galli, *Necessità della politica*, Raffaello Cortina Editore, Milano, 2026, pp. 235-236.

17 P. P. Portinaro, *Le metamorfosi degli imperi*, Solferino, Milano, 2025.

18 *Ibidem*.

work which, during the Cold War, made it possible to establish a balance and international stability – albeit based on mutual nuclear deterrence and the centripetal force exerted by the two opposing ideological blocs. From this perspective, however, the current scenario presents significant differences, both due to the greater importance and size of the countries seeking to maintain a significant degree of autonomy from the two hegemonic poles, and due to the very different nature of the challenge posed today by China compared to that posed in the past by the Soviet Union. One of the defining features of China's rise is that it aims to play an increasingly influential global role, while at the same time renouncing any universalist claims regarding its political, cultural, and economic model[19].

Focusing specifically on the relationship between the U.S. and China, a new global bipolarity undoubtedly poses enormous potential risks for the future of mankind, as argued first and foremost by proponents of the "Thucydides Trap" referring to the competition between a declining power and a rising one. However, it could also lay the groundwork for a completely different outcome – namely, a new global order that is more orderly, predictable, and centered on rules of multilateral cooperation grounded in law. This outcome could become more likely if other regions of the world, starting with Europe, were able to play a skillful role in fostering dialogue and mediation. This would make the new global bipolarity more flexible and nuanced and, therefore, conducive to the development of new multilateral instruments, rather than to a rigid confrontation between blocs, in a world where not only has the number of geopolitical actors aspiring to a more autonomous role increased, but above all the objective degree of global interdependence has grown[20].

Certainly, the goal of preserving a balance of power, yesterday as today, can sometimes come into conflict with certain key principles of international law, such as the principle of non-interference. Within the logic of power, every major actor aims first and foremost to secure regional hegemony. Consider, for example, the concept of a "sphere of influence," which has been in play from the colonial partitions of the nineteenth century to the division of Europe during the Cold War. Since the post-Columbian era, which marked the birth of geopolitics, great powers have repeatedly claimed the right to intervene in the politics, economies, and security arrangements of their neighbors. However, this concept confuses two distinct notions, as Jeffrey Sachs recently observed: the legiti-

19 A. D'Attorre, *Metamorfosi della globalizzazione*, cit., pp. 133-144.

20 *Ivi*, pp. 111-114.

mate need of great powers to prevent or counter hostile encirclement, and the illegitimate claim to interfere in the internal affairs of more vulnerable states. The former is best described as a "security sphere," the latter as a "sphere of influence." Recognizing this distinction is not merely a matter of semantics: it clarifies what should be accepted as legitimate in world politics and what must be resisted. It also points to neutrality as a practical policy for smaller states caught between great powers: neutrality respects the security concerns of powerful neighbors without submitting to their domination. A sphere of influence undermines the sovereignty of small countries; a sphere of security, on the other hand, can be compatible with it, especially if those countries themselves adopt neutrality. Neutrality – Sachs confirms – is not submission: it is an active diplomatic stance aimed at maximizing national sovereignty, while acknowledging the reality of current geopolitical balances and power dynamics. An international policy strategy inspired by the principles of critical realism would therefore seek to legitimize spheres of security and reject spheres of influence, with a view toward a more stable and secure international order[21].

Ultimately, the question we must ask ourselves, along with Massimo Cacciari, is this: «What *Nomos* of the Earth is coming? Will it emerge from Yalta-style negotiations among imperial spaces governed in different ways? And what empires might these be?»[22].

Two scenarios are in view. It may happen

> that the unity of the technical-economic-financial system prevents an "absolute" struggle for global hegemony, to which no power today could "peacefully" aspire. But the opposite may also be true: that it is in the system's interest to bring about a great catastrophe in order to give rise, under its unchallenged dominion and by freeing itself from all the "old politics", to a New Beginning[23].

What openly shows is the stressing point in which we find ourselves, given «the enduring political power of "contained" spaces compared to the universal power of the forces of globalization» (technology, the market, the American way of life)[24].

21 J.D. Sachs, "Sfere di sicurezza contro sfere di influenza: una riconsiderazione dei confini delle grandi potenze", online at the site acro-polis.it

22 M. Cacciari, "Il mito del globo", in M. Cacciari, R. Esposito, *Kaos*, il Mulino, Bologna, p. 43.

23 *Ivi*, p. 44.

24 *Ivi*, p. 34.

What is certain, Roberto Esposito adds, is that

> global space seems once again to reject the possibility of being reduced to a single entity (as European space had already done, having always been traversed by at least three major, constantly shifting axes: the Mediterranean-Latin, the Central European, and the Slavic)[25].

Actually, as Carl Schmitt would have said it, a future lies ahead, in which the struggle will continue between a model of coexistence among different forms of autonomy – each with its own historical, economic, and cultural characteristics – and a global order characterized by the presence of mere decentralized branches, subordinate to a single world ruler, based on a homogenizing paradigm of ideas, interests, and lifestyles, whose claim to *reductio ad unum* is constantly challenged by the world's resistance and disunity[26].

One final question, then, rises: now that

> once again the illusion of being able to bring peoples, cultures, and places back to a single home, into *unum ovile* [has been shattered], what's awaiting us? An age of *foedera*, the formation of a vast network of pacts and treaties, still based on state sovereignty; or, on the contrary, a war to *decide* who should play the role of the Monarch?[27]

3. The Paths of Critical Realism

In his first encyclical, titled *Magnifica Humanitas*, Pope Leo XIV advocates for «authentic realism», which «does not give up on changing the world: it begins by clearly seeing interests, fears, constraints, and power dynamics», but not with the aim of fostering a hypocritical resignation to "cynicism", rather «to assess what can be achieved and through what steps». This approach «does not reduce politics to morality», «nor does it surrender it to violence: it seeks viable paths so that peace may be more than just a word, that is, credible institutions, verifiable guarantees, patient negotiations, conflict prevention, and the protection of civilians». After all, understanding the world for what it is helps us find more effective strategies to improve it (as far as possible) as well as to prevent the world itself from falling into ruin.

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25 R. Esposito, "Geopolitica e metafisica", in M. Cacciari, R. Esposito, *Kaos*, cit., pp. 36-37.

26 C. Schmitt, *Stato, grande spazio, nomos*, Adelphi, Milano, 2015, pp. 243-245.

27 R. Esposito, "Geopolitica e metafisica", in M. Cacciari, R. Esposito, *Kaos*, cit., p. 41.

Consequently, those who interpret the Catholic stance as a cry of protest uttered in the name of an abstract and moralistic "ought" are mistaken. Indeed, it is not unaware that history does not follow a linear course and that full redemption and fulfillment are never achieved within the theater of this world.

This is why there is no contradiction, but rather a possible and fruitful interplay, between the Christian-inspired prophecy of peace and a vision rooted in what is known as "critical realism", which presupposes the recognition of reality as an unstable and conflict-ridden dimension, never fully reconciled or pacified.

The mission of realism is to understand reality in its entirety, that is, in all its ambivalences, ambiguities and contradictions, because the world is not only a cosmos but also chaos. And this has nothing to do with cheap cynicism, nor with abstract utopianism. For human history is permeated by the negative (disorder, the death drive, aggression), but also by the attempt, more or less successful, to escape its grip.

Critical realism therefore requires setting aside the notion of "ought" in order to pursue a profound and radical analysis, without, however, succumbing to a cynical and resigned defense of the status quo.

Incidentally, as Roberto Esposito has pointed out[28], if we look at the major realist thinkers of the Western tradition – Thucydides, Machiavelli and Weber –, we sense in each of them a sort of regret for what reality cannot be, for the "not" that surrounds it from the outside and defines it by contrast. But the classical thinker in whom this tragic dialectic takes on its most acute form is Saint Augustine, which helps us reestablish a bridge with the Christian tradition. Never more so than in his words do the two cities relate to one another across an irreducible distance. And yet they continue to mirror one another: one is defined by its difference from the other. Therefore, Augustine can be considered the greatest Christian realist thinker. The *civitas terrena* (earthly city) is in conflict not only with its rival city but also with itself; and this is a fact that cannot be denied or remedied except by Grace. Moreover, Augustine does not agree with Eusebius, who sanctifies political authority, nor with Pelagius, who believes that man's redemption from evil is possible. Politics remains the realm of passions and power, but it should be neither demonized nor sanctified. Perfect and eternal peace is beyond our reach. This does not mean, however, that *concordia universalis* (universal harmony) should not be tirelessly pursued, but rather that it must be

28 *Ivi*, pp. 95-100.

pursued with an awareness of its fundamental unattainability, of the limits that prevent us from making it fully our own. The strength of the "responsible" politician, in Weber's sense, lies then in the awareness that the boundary between the possible and the impossible is unbreakable – in defiance of all perfectionism –, but also that we cannot give up striving against it in the never-ending attempt to cross over to the other side, that is, to the side of the "dream of a thing," to quote Pier Paolo Pasolini.

Adopting the point of view of critical realism therefore means rejecting any superficially moralistic interpretation, whether from "pure-hearted" and/or fanatical perspectives, because it is never merely a matter of "good" and "bad," but rather a field of conflicting forces and interests. Yet, those who attempt to convey the complexity of historical events, beyond the Manichaean dichotomy of the struggle between Good and Evil and the *reductio ad monstrum*, are repeatedly accused of justificationism and complicity with the enemy.

Instead, we should "think tragically to avoid tragedy". Not fleeing from a tragic situation, but truly confronting it means exposing oneself to the impact of the negative, with the goal of taming it and containing it as much as possible. If the politic cannot avoid coming into contact with the immense power of the negative, the challenge is to face it head-on in order to keep it within certain bounds and mitigate its destructive effects, working generally on the contradictions and ambiguities of reality in an attempt to steer them as much as possible in a progressive direction.

Cultivating hope, even while knowing the truth about the human condition and the structural ambivalence of human affairs, does not mean closing our eyes to the negative, but rather not letting ourselves be blinded by it, so as not to stifle the impulse for change and the transformative passion that drive us to give a shape to the shapeless, to extract meaning from meaninglessness.

Critical realism open to the *esprit de finesse* of Christianity: this is how we might define the perspective from which we should view the arena of international relations.

But how is this taking shape? Let us start with the U.S. For some time now, the foreign policy line pursued by the new administration has been fairly clear, albeit amid countless fluctuations and contradictions, partly due to obvious internal conflicts, such as those between Marco Rubio's neoconservative stance and J.D. Vance's MAGA stance. This line can be traced back to a few fundamental elements: an updated version of the Monroe Doctrine; the pursuit of a "competitive" balance of power, in which each great power is allowed to think in terms of "security spheres" and primacy in the balance of power, both military and techno-economic; and the adoption of "containment" policies, primarily against China's rise, accompanied by attempts to decouple China and Russia.

From this perspective, U.S. policy toward Ukraine can also be interpreted in terms of the recognition of respective spheres of influence, although the very concept of a sphere of influence is far broader than the narrower dimension of the "backyard" (to the point of coinciding with Israel's security and hegemonic needs in the Middle East); and such an attitude is consistent with a scenario of "competitive" balance and a Kennan-style "containment" strategy[29] (i.e., weakening through the selective application of pressure on strategically decisive areas and key geopolitical and geoeconomic nodes) of the main rival power – in this case, China –, which may also involve widespread destabilization tactics, especially targeting the weakest links in an adversarial alliance chain. The goal remains, this time without rhetorical pretense, to assert "America First", albeit within a framework of international relations recognized as inherently pluralistic and conflictual, which nevertheless does not contemplate the possibility of an open and total confrontation between the great powers.

At the same time, if we look at the U.S.-led operation in Venezuela in January 2026, the military and political strategy of external interference appears to be shifting compared to, for example, the neocon and neodem models – and with it, the way in which it is justified, this time in a harsh and blunt manner. It is no longer about the overthrow of an entire regime or the wholesale destruction of a state apparatus, but rather a model based on targeted, pragmatically oriented interventions. The reference is to the paradigm inaugurated with

29 George F. Kennan's lesson is effectively summarized by Roberto Esposito: «The enemy should not be opposed militarily but rather "contained" – *containment* being the term that would long characterize American policy toward communism – through a series of counter-moves executed only where the adversary attempts to gain ground. [...] And this without engaging in an ideological clash, but rather by relying on a political strategy that is armed yet non-aggressive, vigilant yet non-provocative, and flexible yet resolute. Since America is already the stronger power, it need not aim to weaken its adversary; indeed, it must avoid any escalation, eschewing regime change – a goal that is both impossible and risky. Unlike the policy of "rollback" – that is, preemptive counter-attack, such as the approach later adopted by Nixon and Reagan – the strategy of containment entails realism and patience. Above all, however, it requires a profound understanding of the adversary: of its motivations and intentions, as well as its strengths and weaknesses» (R. Esposito, "Geopolitica e metafisica", cit., p. 93).

the killing of Iranian General Soleimani in 2020: that is, striking selectively through precision operations, while avoiding being dragged into the quagmire of an extremely costly and grueling war (a pattern already tested with the U.S. invasion of Afghanistan after 2001). Similarly, on the political front, rather than the complete removal of a regime, the preference is for gangster-style pressure on those elements within the government apparatus of the attacked country who appear most accommodating: which means trading a relative continuity in the transfer of power for a state of limited – or rather, plundered – sovereignty. In the case of Iraq, for example, the approach today might have been limited to the removal of Saddam Hussein and the pursuit of advantageous agreements with more compliant figures, such as Tareq Aziz might have been. More recently, the U.S. administration has sought to apply the same strategy it tested in Venezuela to Iran, but, as is well known, with different results.

If, therefore, U.S. foreign policy – which has always been swinging between imperial isolationism and global interventionism – seems today to be settling, albeit amid countless contradictions and uncertainties, on the line we outlined above, then Italian and European political initiatives, limited to a core group of "kindred nations," should – let us reiterate – play a unifying role, for dialogue and mediation among different geopolitical areas, promoting conditions and incentives for cooperation rather than conflict. In other words, this would involve working within the framework of the balance of power, underpinning it with increasing elements of peace, justice, and progress (by redefining, for example, the concept of "spheres of influence" in terms of "spheres of security" and emphasizing the principles of international law, the protection of which serves the national interests of a middle power such as Italy)[30], in support of an international order that is necessarily pluralistic and polycentric. On the other hand, if in today's gloomy and pseudo-futuristic West only words and images of war, of permanent alert, and of a suffocating narrowing of horizons are left; if there remains a vast void of meaning, belonging, and direction, which is counterbalanced by an abundance of masks, ghosts, and simulacra; if, finally, only the harsh language of force and the selfish calculation of particular interests is left, then the logic of balance and deterrence, however important it may be, ends up taking on only regressive characteristics, with the risk of sliding, even unconsciously and by chance, toward the absolute barbarism of total war.

The problem, however, as for the role the European Union can play, is that

30 R. Ibrido, *Geopolitica costituzionale. Una introduzione*, il Mulino, Bologna, 2025.

the EU was designed precisely to make it impossible for it to develop an autonomous political identity, as well as to stifle the agency and vitality of individual member states. In an era marked by the return of the "hard line" in geopolitics and the decline of an irenic, post-sovereign cosmopolitan model – based on the link between globalism (somehow "alter-" at times) and a legal-moralistic flight from politics –, the EU is called upon to redefine the fundamental premises of its integration process. Still, there is no sign of such a reevaluation among Europe's ruling classes. On the contrary, there are even plans to proceed with further enlargement, beyond the already high number of twenty-seven member states. Yet it should be obvious – if only there were no lack of historical-dialectical insight – that what is gained in breadth and scope is lost in intensity and depth, that is, in awareness of one's own identity, goals and interests.

The scenario we are facing is certainly fraught with risks, but it also offers opportunities, if the goal is to breathe new life into the independent initiatives of individual European countries, especially in their relations with one another. But to do so, we must have a clear understanding of our strategic interests and possess adequate analytical capabilities and foresight.

However, precisely in the spirit of critical realism, we must give due prominence to the dynamics of global financial techno-capitalism, as a full-fledged geopolitical and geoeconomic actor alongside states. This might make the idea of a balance of power more problematic, but it could also help ground it on a more solid foundation. Essentially the point is that, while geopolitics (like law) is also a matter of form and measure, capitalism (and even more so today's hyper-centralized and hyper-financialized form of it) thrives on excess – that is, on a constant impulse to expand beyond the borders of the nation-state. This is why the redrawing of spheres of influence appears structurally precarious and at risk of constantly producing new imbalances.

In any case, if a balance of power breaks down, there will be no irenic, post-sovereign cosmopolis, no world federation of "decent" states, no emergence of a model of "global constitutionalism"[31], but rather the unipolar dominance of a single power, destined to interpret or reconfigure the fabric of international law in a manner increasingly suited to its own interests. In fact, what

31 As Martti Koskenniemi has argued, global constitutionalism can also be viewed as a reformulation of the perennial liberal attempt to escape from politics (M. Koskenniemi, "The Politics of International Law", *European Journal of International Law*, 1, 1990, p. 6).

holds true in the domestic sphere also holds true in the realm of international relations: one power must check, limit, and contain the other, since a power lacking checks and balances tends to overstep its bounds, regardless of the arguments – however reasonable or acceptable they may be – with which it seeks to cloak its imperial ambitions. Consequently, the logic of power finds its limit not so much in a legal rule or an abstract principle of justice, but rather in the existence of other powers or in reasons inherent within itself.

If the political world, as Carl Schmitt wrote, is a multiverse – not a single universe – due to the tendency of human beings to come together in distinct communities that are irreducible to one another (which by no means implies that they are closed off or impervious to one another), the perspective we should assume is precisely to seek a balance, an equilibrium valid, above all, among those "hegemonic sovereign states" (which, as we have seen, various observers have classified as "empire-states") called upon to grapple with the need to coexist peacefully and cooperate in the face of certain major common challenges that, while intersecting with national interests, transcend their inescapable dimension. This is a model of order which, though precarious, imperfect, and rife with the most varied tensions, nevertheless remains the one that best reflects and enhances the complexity and diversity of the world, in opposition to any attempt at *reductio ad unum* and subordination to a single ruler of the Earth, resting upon a homogenizing paradigm of ideas, customs, and interests. In the words of Anthony D. Smith, «a pluralistic world of nations and nation-states remains the sole safeguard against imperialist tyranny»[32].

In general, however harsh, fraught with pitfalls, and often difficult to sustain, the logic of (currently only) competitive balance of power appears preferable to the Manichaean dichotomy between democracies and autocracies, to the rhetoric of the "clash of civilizations", as well as to the attempts to apply the *reductio ad Hitlerum* to the leaders of other continental powers, with whom, precisely because of such a characterization, it would be impossible to engage in genuine negotiations after a period of turmoil. It is, in fact, more productive to operate within the framework of rebalancing – however conflictual it may be – rather than within that of an ideologically supremacist unipolar system, which effectively narrows the scope for political and legal mediation and makes the risk of a war of extreme magnitude more concrete (with the possibility – if we consider

32 Anthony D. Smith, *Nazioni e nazionalismo nell'era globale* (1995), Asterios, Trieste, 2000, p. 162.

the chance for the conflict in Ukraine to escalate – that it could be fought on European land).

All of this is certainly true when it comes to scenarios and balances that are actually possible, beyond the illusions of liberal globalism. But the challenge is also to inject dynamism into these very balances, drawing on new political and spiritual energies – operating from both the bottom up and the top down – capable of propelling reality beyond itself and broadening the range of possibilities glimpsed so far. The "cold stream" of realism therefore needs the "warm stream" of an "operative pacifism", that would cultivate the "sense of what is missing" and the "spirit of utopia" while confronting the harsh realities of geopolitics and the dark corners of our individual and collective lives, and bringing along, in a world increasingly permeated by a feeling of ineluctability and unwilling to open upward and forward, new seeds of hope, trust and fraternity. This is the path of critical realism, animated by an interweaving of critical visions, prophetic impulses, the memory of the abyss, and hopes for salvation – beyond «tragedy and utopia», to quote Reinhold Niebuhr[33].

33 R. Niebuhr, *Realismo cristiano e potere politico*, Morcelliana Scholé, Brescia, 2025.

The Eclipse of the Nomos of the Earth: Carl Schmitt, the Partisan, and the Juridical Genealogy of the Enemy from Piracy to the Drone

BY FRANCESCANTONIO ERAMO

For much of the twentieth century, the dominant narrative of international law[1] portrayed the post-1945 legal order as the decisive rupture with the European imperial age. The prohibition of the use of force, the formal equality of sovereign states and the progressive universalisation of human rights were presented as the normative foundations of an international community increasingly governed by law rather than by power. Against this optimistic account, Carl Schmitt advanced a different interpretation. Writing in the aftermath of the Second World War, he argued that the transformation of international law had not overcome the political logic of enmity but had instead altered its juridical form. In *Theory of the Partisan*, his last major essay on the concept of the political, Schmitt argued that the irregular fighter – the partisan – was not an aberration from an otherwise orderly system of inter-state war, but the symptom of a deeper mutation. In other words, it was a transition from a bracketed, limited war among recognised equals to an unlimited, moralised war of annihilation waged in the name of humanity itself.[2]

The present study revisits this diagnosis in order to reconsider one of the central assumptions underpinning contemporary international legal thought, namely, that the universalisation of legal norms necessarily entails the progressive

1 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001); David Kennedy, *The Dark Sides of Virtue* (Princeton: Princeton University Press, 2004).

2 Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, trans. G. L. Ulmen (New York: Telos Press, 2007 [1963]). See also Gabriella Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror* (Basingstoke: Palgrave Macmillan, 2009), pp. 55-78.

neutralisation of political conflict. Rather than treating humanitarian universalism[3] and constitutionalist projects as the culmination of the international legal tradition, this article explores the extent to which they reproduce, in transformed normative language, enduring structures of political exclusion. From this perspective, Schmitt's reconstruction of the passage from the *justus hostis* to the partisan provides not merely a historical account of twentieth-century warfare but a conceptual framework through which broader transformations in the legal production of enmity may be examined.

The argument developed here is consequently analytical rather than genealogical in the strict historical sense. Its objective is not to demonstrate an uninterrupted line of historical continuity from early modern Europe to contemporary counterterrorism, but rather to identify the persistence of a juridical structure that repeatedly re-emerges under changing political and technological conditions. The transition from the pirate to the partisan and ultimately to the target of contemporary drone warfare illustrates successive historical expressions of the same underlying logic: the gradual replacement of reciprocal enmity between formally equal political communities with asymmetrical forms of violence directed against actors whose legal status is progressively exceptionalised.[4]

The discussion therefore proceeds in four stages. It first reconstructs Schmitt's interpretation of the *Jus Publicum Europaeum* as a spatial and juridical order whose relative moderation depended not upon humanitarian principles but upon the mutual recognition of the *justus hostis*.[5] It then examines *Theory of the Partisan*, where the distinction between *hostis* and *inimicus* becomes the decisive criterion for understanding the transformation of modern warfare and the progressive moralisation of political conflict. A third section analyses the ideological function of humanitarian discourse through Schmitt's critique of the

3 Anne Orford, *Reading Humanitarian Intervention* (Cambridge: Cambridge University Press, 2003); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

4 On the Western concept of political community underlying this reciprocal structure of recognition, see Giovanni Bombelli, *Occidente e "figure" comunitarie (volume introduttivo). "Comunitarismo" e "comunità": un percorso critico-esplorativo tra filosofia e diritto* (Naples: Jovene, 2010).

5 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos Press, 2003 [1950]). On the colonial foundations of the *Jus Publicum Europaeum*, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), pp. 32-114; Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001), pp. 98–178.

appeal to humanity and its subsequent reformulation in Danilo Zolo's[6] work on humanitarian intervention. Finally, the article traces two figures of the enemy across this genealogy – the early-modern pirate and the contemporary target of drone warfare – in order to argue that both exemplify the gradual displacement of international law from a legal order regulating relations among formally equal sovereigns towards a framework increasingly organised around permanent asymmetries and exceptional forms of coercion.[7]

A further, complementary section draws on Agamben's account of the state of exception and Koskenniemi's critique of international legal argument to situate this trajectory within a broader theoretical framework. From this perspective, acknowledging the ineradicably political character of international conflict may offer a more convincing account of the evolution of international law than approaches that continue to interpret contemporary legal universalism primarily as the progressive transcendence of power politics.[8]

Schmitt, especially in *The Nomos of the Earth*[9], undertakes an ambitious reconstruction of the spatial order (*Ordnung*) that, in his view, made possible the relative humanity of European international law between the sixteenth and the early twentieth century. From an anti-idealist perspective, using Schmitt's categories, it can be argued that European war was contained because a specific spatial and legal order, founded upon the land-appropriations (*Landnahmen*) of the New World and the consequent drawing of amity lines beyond which no law applied, allowed European sovereigns to recognise one another as equal, non-criminal belligerents. This feature of Schmitt's reconstruction is not incidental to the argument that follows. The same amity lines that guaranteed reciprocal recognition among European sovereigns also marked the threshold beyond which no such recognition, and no such restraint, applied, so that the celebrated humanity of the bracketed war was the underside of a violence displaced elsewhere and left unlimited. The exclusionary logic that this article's

6 Danilo Zolo, *Invoking Humanity: War, Law and Global Order*, trans. Federico and Gordon Poole (London: Continuum, 2002).

7 Grégoire Chamayou, *A Theory of the Drone*, trans. Janet Lloyd (New York: The New Press, 2015); Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York: Zone Books, 2009).

8 This reconstruction falls within the framework of international legal criticism, which considers the fundamental categories of international law to be historically contingent and politically contested.

9 Schmitt, *The Nomos of the Earth*, pp. 86–126. See also Stephen C. Neff, *War and the Law of Nations* (Cambridge: Cambridge University Press, 2005), pp. 170–198.

diagnosis of humanitarian universalism seeks to unmask could thus be said to be already prefigured, in miniature, within the same order taken as its point of departure. Because the state, and only the state, was the legitimate subject of war, and because every European state recognised every other as a *justus hostis*, war among them could be bracketed, fought by uniformed armies, concluded by treaty, and stripped of the annihilating logic that a war against a criminal necessarily implies.

Schmitt's insistence on the juridical, rather than moral, foundation of this order is central to his argument. War was not conceived in terms of justice. Under the *Jus Publicum Europaeum*, it was regarded as neither just nor unjust in itself, but as a formal confrontation between juridically equal sovereigns. It was precisely this suspension of moral judgement that made war capable of remaining limited. The reintroduction of just-war reasoning, Schmitt argues, paradoxically intensifies instead of restraining violence, since a belligerent convinced of the moral superiority of its cause has little incentive to moderate the means employed against an enemy no longer recognised as a legitimate adversary but redefined as evil. The relative humanity of the bracketed war depended upon an amoral formalism grounded in the reciprocal recognition of the enemy. Because such recognition did not require agreement about the justice of either side's cause, it allowed the enemy to remain a political adversary while retaining the status of an equal belligerent.[10]

The eclipse of this order, in Schmitt's account, begins with the erosion of the state monopoly on the categorisation of the enemy and accelerates through the twentieth century's discovery of new global lines: the meridians of colonial partition, the maritime demarcations of naval power, and eventually the invisible thresholds of an undifferentiated, planetary battlespace.[11] For Schmitt, the exhaustion of the global *nomos* marks the disappearance of the external spaces through which European political violence had long been geographically displaced. Once those spaces vanished, the legal architecture of the *Jus Publicum Europaeum* could no longer contain political antagonism within the reciprocal framework of interstate war. The distinctions separating combatant from civil-

10 See also Reinhart Koselleck, *Critique and Crisis* (Cambridge, MA: MIT Press, 1988), pp. 3–25; David Kennedy, *The Dark Sides of Virtue* (Princeton: Princeton University Press, 2004), pp. 235–310.

11 See also Pier Paolo Portinaro, *La crisi dello jus publicum europaeum. Saggio su Carl Schmitt* (Milan: Edizioni di Comunità, 1982); Emanuele Castrucci, *Nomos e guerra. Glosse al "Nomos della terra" di Carl Schmitt* (Naples: La Scuola di Pitagora, 2011).

ian, war from peace, and domestic from international conflict gradually lost their juridical stability, giving way to forms of conflict no longer governed by reciprocal recognition among sovereign equals.

Whereas *The Nomos of the Earth* explains the collapse of the *Jus Publicum Europaeum* through the transformation of the spatial order, *Theory of the Partisan* approaches the same historical process from a different perspective: the changing legal and political construction of the enemy. Schmitt identifies four defining characteristics of the partisan-irregularity, exceptional mobility, intense political commitment and a fundamentally telluric attachment to a particular territory.[12] Unlike the regular soldier, whose status derives from the juridical framework of the state, the partisan emerges at the margins of that framework, occupying an ambiguous position between legality and illegality, war and criminality.

Yet the figure does not remain historically static. In the later sections of *Theory of the Partisan*, Schmitt argues that the classical, territorially rooted partisan gradually gives way to a qualitatively different actor. Revolutionary warfare and ideological conflict detach irregular combat from its local foundations, producing what he describes as the "motorised" or "global" partisan, whose political identity is no longer defined by attachment to a specific homeland but by commitment to a universal ideological project. This transition marks more than a military innovation. It signals the erosion of the territorial limits that had previously constrained political conflict and anticipates the emergence of forms of enmity no longer anchored to a determinate political space.

The significance of this transformation lies less in the military characteristics of the partisan than in the legal consequences that follow from his emergence. Within the *Jus Publicum Europaeum*, the regular soldier confronted a *justus hostis*: an enemy recognised as a lawful belligerent whose capture neither extinguished his legal status nor transformed him into a criminal. The partisan unsettles this juridical symmetry. Because he operates outside the institutional framework of the sovereign state and often beyond the conventional requirements of regular armed forces, his status becomes increasingly indeterminate. He no longer fits comfortably within the categories through which classical international law distinguished legitimate warfare from criminal violence.

12 Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political* (New York: Telos Press, 2007), pp. 6–20. On Schmitt's four defining characteristics of the partisan, see also Gabriella Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror* (Basingstoke: Palgrave Macmillan, 2009), pp. 57-78.

For Schmitt, this ambiguity is historically significant because it foreshadows a broader transformation in the legal construction of enmity. As reciprocal recognition between belligerents weakens, the enemy is progressively redefined through exceptional legal categories that suspend, rather than apply, the ordinary protections of the law. Although the historical contexts differ substantially, the contemporary figure of the "unlawful enemy combatant" illustrates the persistence of this underlying juridical logic. Rather than recognising the adversary as a lawful participant in armed conflict, the category establishes an intermediate legal status situated between combatancy and criminality, thereby legitimising exceptional forms of detention, prosecution and targeted force.[13]

What interests Schmitt above all is not the partisan's tactics but what his existence reveals about the enemy concept in general. The discriminating distinction between *hostis* and *inimicus*, between the public, political enemy and the private, criminal one, is, for Schmitt, foundational to a limitable politics.[14] A *hostis* can be fought, defeated and eventually recognised once more as a legitimate interlocutor; an *inimicus*, by definition, cannot. The historical trajectory that Schmitt traces[15], from the bracketed wars of early modern Europe through the total wars of the twentieth century to the global counterinsurgencies of the Cold War, is the trajectory by which political enemies are increasingly redescribed in the register of criminality: as pirates, as outlaws, as terrorists, as enemies not of a particular state but of humanity as such.[16]

13 See Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven: Yale University Press, 2003), on the afterlife of Schmitt's partisan concept in post-9/11 legal debate. The analogy should not be understood as implying historical continuity or direct doctrinal influence. Rather, it highlights the recurrence of a juridical structure through which certain categories of adversaries are denied the reciprocal legal status traditionally associated with lawful belligerency. On the emergence of the "unlawful enemy combatant" after 11 September 2001, see Jens David Ohlin, *The Assault on International Law* (Oxford: Oxford University Press, 2015), pp. 71-109; David Luban, "Military Necessity and the Cultures of Military Law", *Leiden Journal of International Law*, 26 (2013), pp. 315–349.

14 Schmitt, *Theory of the Partisan*, pp. 85–95; Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000).

15 Schmitt's reconstruction should not be read as a descriptive history of international law but as an ideal-typical account of changing forms of political enmity. Several historians of international law have questioned both the historical coherence of the *Jus Publicum Europaeum* and the sharpness of the transition that Schmitt describes. See Martti Koskenniemi, *The Gentle Civilizer of Nations*; Stephen C. Neff, *War and the Law of Nations*; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*.

16 Schmitt, *Theory of the Partisan*.

The transformation of the enemy into a criminal or an outlaw is inseparable, in Schmitt's analysis, from the emergence of a new political vocabulary centred on the notion of humanity. Already in *The Concept of the Political*, Schmitt argued that appeals to humanity rarely function as neutral moral claims. Rather, they operate as political categories whose universal language conceals particular relations of power. Far from transcending conflict, the invocation of humanity reshapes it by establishing a normative standard against which one party may present itself as the representative of civilisation while denying equivalent legitimacy to its adversary.[17]

It is in this context that Schmitt formulates his well-known observation – borrowing and reformulating an aphorism commonly associated with Pierre-Joseph Proudhon – that "whoever invokes humanity wants to cheat." The provocation is not directed against humanitarian ideals as such, but against the political appropriation of universal concepts. To monopolise the language of humanity is simultaneously to deprive the adversary of participation in that same humanity, transforming political conflict into a struggle between civilisation and barbarism, legality and criminality, humanity and its presumed enemies. Once this conceptual shift occurs, violence no longer appears as reciprocal warfare between recognised opponents but as the enforcement of a supposedly universal moral order.[18]

Humanity is not, in his view, a political subject capable of acting in its own name. It possesses neither territorial unity nor sovereign institutions and cannot itself wage war. Consequently, whenever a state or coalition claims to act "on behalf of humanity", it necessarily appropriates a universal concept in order to legitimise particular political objectives. Whether or not one accepts Schmitt's conclusion, the argument exposes an enduring tension within modern international law between universal normative aspirations and the inevitably particular political authorities through which those aspirations are implemented.[19]

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17 Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 2007 [1932]).

18 The famous formula (*Wer Menschheit sagt, will betrügen*) is generally associated with Schmitt's reformulation of an aphorism attributed to Pierre-Joseph Proudhon. On its intellectual genealogy, see Heinrich Meier, *The Lesson of Carl Schmitt* (Chicago: University of Chicago Press, 2011), pp. 157–164.

19 Schmitt's critique has generated a substantial literature in contemporary international legal theory. For contrasting assessments, see Danilo Zolo, *Invoking Humanity: War, Law and Global Order* (London: Continuum, 2002); David Kennedy, *The Dark Sides of Virtue* (Princeton: Princeton University Press, 2004), pp. 235-310; Anne Orford, *Reading*

Schmitt's critique did not remain confined to his own reconstruction of the *Jus Publicum Europaeum*. Precisely because it concerns the legal production of the enemy rather than any specific historical conflict, it has proved remarkably adaptable to later transformations of international law. Few authors have developed this line of argument more systematically than Danilo Zolo, whose analysis of humanitarian intervention relocates Schmitt's categories within the post-Cold War legal order.

Among the authors who have dealt with it, Danilo Zolo's *Invoking Humanity* offers one of the most sustained contemporary elaborations of this thesis. According to Zolo, the rhetoric of humanitarian war does more than accompany the exercise of Western military power. It constitutes the specific juridical-ideological form through which that power is legitimated in a supposedly post-political age. War undertaken in the name of human rights, on this account, escapes the constraints of proportionality among equals, the possibility of negotiated peace the eventual restoration of the enemy's political standing that classical international law imposed upon war among states. It is no longer war against a state but a police action against a criminal. The same logic recurs across the vocabulary of contemporary international relations: the rogue state, the outlaw regime, the individual terrorist are each constituted, discursively and juridically, as an *inimicus* instead of a *hostis*, and each is thereby placed outside the structure of recognition that alone, on the Schmittian account, makes limited war possible.[20]

Schmitt's claim is narrower and, at times, more unsettling. The relative limitation of European war did not depend, in his account, upon humanitarian progress or shared moral values, but upon the reciprocal juridical recognition of the enemy as a legitimate political adversary. Once that relationship becomes moralised, the legal symmetry on which limited warfare had rested is progressively undermined. Violence is no longer constrained by the recognition of an equal opponent but justified through the imperative of defeating an enemy represented as criminal, inhuman or hostile to humanity itself.[21]

The conceptual transition from the *hostis* to the *inimicus* finds one of its

Humanitarian Intervention (Cambridge: Cambridge University Press, 2003), pp. 1–30. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, rev. ed. (Cambridge: Cambridge University Press, 2005), who analyses the persistent tension between universal legal claims and political decision-making.

20 See also Louiza Odysseos and Fabio Petito, eds., *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London: Routledge, 2007).

21 Schmitt, *The Nomos of the Earth*.

earliest and most enduring juridical expressions in the figure of the pirate. As Daniel Heller-Roazen has demonstrated, the pirate occupies a singular position within the history of international law because he falls outside the reciprocal framework governing relations among political communities.[22] Already in Roman legal thought, a distinction emerged between the *hostis* – the public enemy recognised as a lawful belligerent – and an altogether different category of adversary who belonged to no political order and with whom neither peace nor treaty could be contemplated. It is from this latter tradition that the familiar formula *hostis humani generis*, the enemy of all humankind, gradually acquired its enduring legal significance. Unlike the *justus hostis*, the pirate possessed neither territorial jurisdiction nor sovereign representation. Precisely because he stood outside every recognised political community, no single sovereign claimed exclusive authority over him. His capture and punishment could therefore be undertaken by any state asserting jurisdiction, a principle that later international law would develop into the doctrine of universal jurisdiction. What distinguishes the pirate is thus not merely the commission of violent acts at sea, but the juridical form through which those acts are constructed: he is denied the reciprocal legal status that made classical interstate warfare possible and is instead situated beyond the ordinary protections accorded to recognised belligerents.

Heller-Roazen identifies four conditions that jointly constitute the figure of piracy: an operative space situated beyond ordinary territorial jurisdiction; an agent who cannot be identified with any recognised state; a systematic collapse of the distinction between the criminal and the political; a corresponding transformation in the concept of war itself, from a contest between equals into an operation of pure police enforcement against an enemy who, being universal, may be fought by anyone, anywhere, without the constraints that reciprocal recognition would impose. Whenever one encounters a region beyond the line in which acts of indiscriminate violence are committed against humanity, Heller-Roazen suggests, one is in the presence of a structure inherited directly from the ancient law of piracy, whatever contemporary name – terrorism, insurgency, organised crime – is attached to it.

Schmitt himself, in *The Nomos of the Earth*, had already identified the pirate

22 Marcus Tullius Cicero, *De Officiis*, III.107, Loeb Classical Library 30 (Cambridge, MA: Harvard University Press, 1913), where the pirate is described as *communis hostis omnium*, the common enemy of all. See also Heller-Roazen, *The Enemy of All*, on the classical origins of the *hostis humani generis* tradition. See also Filippo Ruschi, "*Communis hostis omnium. La pirateria in Carl Schmitt*," *Quaderni fiorentini per la storia del pensiero giuridico moderno* 38 (2009): 1215-1276.

as one of the paradigmatic figures excluded from the bracketed order of the *Jus Publicum Europaeum*, because the pirate operated on the free, unappropriated seas, and because he represented no sovereign, he stood outside the reciprocal recognition that European powers extended to one another, and could therefore be hunted down and destroyed. The pirate is, in this sense, the negative image of the *justus hostis*. The persistence of this logic becomes particularly visible when attention shifts from maritime piracy to contemporary military technology.

If the pirate is the classical figure of the enemy of all, the armed drone represents the contemporary technological realisation, and, at the same time, its radical intensification. In *A Theory of the Drone*, Grégoire Chamayou argues that the remotely piloted aircraft does not merely provide a new weapons platform but reconfigures the structure of armed confrontation. Where war, in its classical conception, presupposed a reciprocal exposure to risk between combatants, drone warfare converts the duel into what Chamayou terms a manhunt, an operation in which lethal violence flows in a single direction, from an invulnerable operator toward a target who has, structurally, no capacity to reciprocate.[23]

This transformation is juridically significant. By eliminating reciprocity between opponents, it further erodes the conceptual conditions under which the enemy can still be recognised as a juridical equal rather than treated as the object of a unilateral exercise of force.

Because the drone's operator faces no physical danger, Chamayou notes, the entire ethical vocabulary developed to justify killing in war – sacrifice, courage, the mutual acceptance of risk – becomes inapplicable, and is replaced by what he polemically calls a necroethics, in which the preservation of the striking party's life is treated as an absolute value against which the minimisation of the target's death is secondary.

Although Chamayou develops his argument from theoretical premises far removed from Schmitt's, the ethical transformation he describes converges upon a strikingly similar juridical reconfiguration. Once reciprocity disappears, the target comes to occupy a juridical position structurally analogous to that previously assigned to the pirate: no longer a recognised adversary, but the object of a unilateral exercise of coercive force.[24]

The comparison with the classical *hostis humani generis* should therefore be

23 Chamayou, *A Theory of the Drone*.

24 Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008).

understood as analytical rather than merely metaphorical. The point is not to assimilate piracy and contemporary targeted killing as identical legal categories, but to identify a recurring juridical structure through which particular forms of violence are detached from the reciprocal framework of interstate conflict. A possible objection is that the pirate traditionally pursued private gain, whereas the contemporary target of drone operations is generally represented as a politically motivated actor. From the perspective adopted in this article, however, this distinction concerns the declared purposes of the actors involved rather than the legal logic through which they are constituted. Neither derives legal status from membership in a recognised sovereign community, and both are represented as operating beyond the ordinary framework of territorial jurisdiction and reciprocal interstate relations. Consequently, the protections historically associated with lawful belligerency become attenuated or disappear altogether, while coercive action is justified through exceptional legal rationales rather than through the mutual rights and obligations governing war between recognised states. The historical contexts remain fundamentally different; the juridical mechanism through which exclusion is produced nevertheless displays a striking degree of continuity.

The transformation brought about by drone technology therefore concerns not only military capability but also spatial scale. Whereas early modern campaigns against piracy remained confined to geographically identifiable maritime spaces, contemporary systems of remote warfare make it possible to project lethal force across virtually the entire globe with unprecedented speed and minimal operational risk for the attacking side.

The disappearance of a clearly delimited spatial order of war finds its juridical correlate in the transformation of exception from a temporary suspension of the legal order into a permanent modality of government. Giorgio Agamben's analysis of the *state of exception*[25] offers one of the most radical theoretical accounts of this transformation. Although Agamben's genealogy is not reducible to Schmitt's theory of the sovereign decision, it begins precisely from the paradox identified by Schmitt. The sovereign is revealed through the capacity to decide upon the exception, that is, upon the situation in which the validity of the

25 On Agamben's reconstruction of the state of exception as a juridical paradigm rather than merely an emergency measure, see Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: University of Chicago Press, 2005). The argument develops themes first introduced in *Homo Sacer: Sovereign Power and Bare Life*, (Stanford: Stanford University Press, 1998), especially concerning the relation between sovereignty, inclusion through exclusion, and the production of bare life. Agamben's analysis constitutes a critical reworking of Carl Schmitt's theory of sovereignty rather than a simple adoption of it.

norm is preserved through its suspension.

Agamben's intervention, however, consists in demonstrating that the exception cannot be understood merely as an extraordinary decision external to the juridical order. In modern governmental rationality, the exception progressively loses its character as a temporary interruption and becomes instead a permanent threshold internal to law itself. The decisive feature of the state of exception is therefore not simply the suspension of legal guarantees, but the production of an indistinct zone[26] in which the categories of legality and factual force, inclusion and exclusion, inside and outside the juridical order, can no longer be clearly separated.

This conceptualisation is particularly relevant for contemporary forms of warfare and counterterrorism. Practices such as targeted killings, indefinite detention, and military operations conducted beyond traditional territorial boundaries are not merely examples of unlawful departures from an existing legal framework; they reveal a deeper transformation in the spatial and temporal assumptions upon which modern legality was historically constructed. The classical law of war presupposed identifiable theatres of conflict, legally recognisable belligerents, and a distinction between wartime and peacetime. The contemporary paradigm of security, by contrast, operates through a permanent mobilisation of exceptional measures whose geographical and temporal limits remain fundamentally indeterminate.

In this respect, Agamben's analysis provides a theoretical articulation of the transformation already anticipated by Schmitt's critique of the dissolution of the *Jus Publicum Europaeum*. Indeed, once the spatial ordering of international law no longer corresponds to a division between distinct political spaces, exception tends to become globalised. The result is not the absence of law, but rather a form of legality in which law increasingly operates through the production of zones, populations, and subjects placed in a condition of reduced juridical protection.

A complementary, though independent, diagnosis emerges from Martti Ko-

26 Agamben's concept of the *zone of indistinction* refers to a juridical space in which the distinction between norm and fact, legality and violence, inclusion and exclusion becomes structurally unstable. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*; idem, *State of Exception*. For the Schmittian background against which this argument is developed, see Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2005). On the theological genealogy of sovereignty in critical dialogue with Schmitt, see also Massimo Cacciari, *Il potere che frena. Saggio di teologia politica* (Milan: Adelphi, 2013).

skenniemi's[27] critical reconstruction of international legal argument. Whereas Agamben investigates the internal relation between sovereignty and exception, Koskenniemi examines the epistemological and argumentative structure through which international law claims to regulate political conflict. His central thesis, developed most systematically in *From Apology to Utopia*, is that international legal reasoning is characterised by a structural indeterminacy that prevents it from grounding political decisions upon purely legal foundations.

According to Koskenniemi, international legal argument constantly oscillates between two contradictory tendencies. On the one hand, the *apologetic* tendency reduces law to a reflection of existing distributions of power: international law becomes merely the language through which sovereign interests are articulated. On the other hand, the *utopian* tendency presents law as an autonomous normative order capable of imposing constraints independently of political reality, but risks losing any connection with effective authority. Neither pole can achieve definitive supremacy, because international law requires both normative transcendence and political effectiveness in order to sustain its authority.

If international law lacks a fully autonomous standpoint from which political decisions can be objectively neutralised, then the juridical qualification of enemies, interventions, and forms of violence cannot be separated entirely from the political struggles that produce them. The language of legality does not simply regulate pre-existing conflicts, but it participates in constituting the categories through which conflicts become intelligible. The distinction between lawful combatant and criminal actor, legitimate intervention and aggression, security measure and act of war, is therefore not merely applied by law but continuously produced through legal argument.

Agamben and Koskenniemi both reveal the weakening of law's capacity to function as an external limit to sovereign power. In Agamben, this occurs because exception becomes internal to the normal functioning of government; in Koskenniemi, because legal reasoning cannot entirely escape the political decisions that it seeks to discipline. Taken together, their analyses illuminate

27 Martti Koskenniemi's *From Apology to Utopia* is widely regarded as one of the foundational texts of contemporary critical international legal theory. Rather than denying the normativity of international law, Koskenniemi argues that its authority depends upon a permanent oscillation between the consensual structure of state sovereignty (*apology*) and the aspiration to autonomous legal normativity (*utopia*). See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

the juridical consequences of the transition from the classical European order of limited war to a global order of permanent security. When the enemy is no longer located within a reciprocal legal framework but constructed through categories of exclusion - terrorist, outlaw, enemy of humanity - the law of nations risks abandoning the principle of juridical equality that constituted its traditional foundation. This is the risk to which the law is exposed.

In conclusion, the argument reconstructed here suggests that the self-image of contemporary international law, as the progressive, depoliticised triumph of universal human rights over the discretionary violence of an earlier age, may mistake a change in vocabulary for a change in structure. The genealogy that runs from the *justus hostis* of the *Jus Publicum Europaeum*, through the partisan and the pirate, to the drone operator's kill list, is arguably not a story of humanisation but of the substitution of one juridical technique of enmity for another. A technique that, because it operates in the name of a universal humanity that cannot itself bear arms or negotiate peace, dispenses with the reciprocity that once, however imperfectly, limited war's destructiveness. The point is therefore not that contemporary international law has abandoned legality, but that legality itself has become increasingly structured around asymmetrical forms of enmity.

The genealogy traced here is offered not as the last word on international law, but as a reminder, uncomfortable and for that reason worth taking seriously, that every appeal to humanity is also, and perhaps inescapably, an act of politics. From this perspective, it is only by recognising this intrinsically polemogenic character of the political, instead of disguising it behind the vocabulary of universal humanity, that international relations can be understood scientifically rather than moralistically. Whether Schmitt's diagnosis is ultimately accepted or rejected, the genealogy reconstructed here suggests that the language of universal humanity cannot be treated as analytically innocent. It forms part of the juridical and political processes it purports to describe.

On this account, the task of a genuinely scientific analysis of international relations is not to celebrate or lament this trajectory but to describe it without recourse to the moralising categories that are themselves part of the phenomenon under examination.

New Theories of the *Partisan*? A Comparative Inquiry into the Legal Classification and Treatment of Detained Unlawful Combatants

BY NICCOLÒ NOBILE

1. Introduction

This essay seeks to examine the legal qualification of combatants belonging to military formations regarded as unlawful, from a comparative perspective both diachronic and synchronic. It will therefore be necessary to begin with a historical analysis of the earliest regulatory frameworks and of the corresponding *opinio iuris*, in an analytical trajectory that will guide the reader towards the legal present. Thus, by examining the legal treatment of prisoners of war captured from military formations labelled as unlawful and terrorist actors by the military justice systems of the United States, Israel, and the Russian Federation, the Essay seeks to illuminate how contemporary conflicts have strained, and in some instances reconfigured, the normative boundaries of *ius in bello* or, according to the now prevailing terminology, international humanitarian law (IHL).[1] Yet it is within the sphere of diachronic comparison that the necessary connection and mutual influence between the *ius in bello* and the *ius ad bellum* will emerge – an interaction that has

1 The concepts of *ius in bello* and international humanitarian law appear, at first sight, to share entirely the same semantic field. The International Committee of the Red Cross defines IHL as "a set of rules that seeks, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not, or are no longer, directly or actively participating in hostilities, and imposes limits on the means and methods of warfare. IHL is also known as 'the law of war' or 'the law of armed conflict'." The distinction from *ius ad bellum* – the traditional branch of public international law concerned with the legal legitimacy of the resort to armed force – is likewise emphasised. On this basis, no apparent differentiation seems to operate between IHL and *ius in bello*. However, as will become apparent, the terminological shift constitutes the culmination of the structural transformation (*Strukturwandel*) that occurred within international law during the second half of the last century.

decisively shaped the present situation.

The synchronic comparative inquiry focuses on three emblematic theatres of conflict: the United States' interventions in Afghanistan against the Taliban during the war on terrorism; Israel's engagement with Hamas and allied militias in the latest phases of the Israeli-Palestinian conflict; and Russia's war of aggression against Ukraine, particularly with respect to the Azov brigade and Aidar battalion. These cases collectively reveal how sovereign States despite their formal adherence to the international legal order – have developed divergent and often controversial approaches to the classification, detention, and prosecution so-called unlawful combatants. This selection is justified by the cumulative recurrence of two sets of circumstances.

The first is that these three mentioned Powers are historically embedded within the international legal order and formally share its foundational premises of law and legitimation. Indeed, the United States and Russia – or, more precisely, the Soviet Union, of which the Russian Federation is the continuator State under international law – emerged as the victorious Powers of the Second World War and, consequently, hold permanent seats on the United Nations Security Council. The international order constructed around the United Nations was founded upon, and subsequently developed through, the delicate equilibrium of institutional arrangements and ideological alignments embodied by the two poles of the Cold War. By contrast, the State of Israel is a direct product both of the Second World War – specifically of the imperative to address the "Jewish question" – and, in formal legal terms, of the institutional framework established under the United Nations system. The second is that each has, in recent decades, confronted armed groups whose legal characterisation oscillates between insurgency, terrorism, and irregular combatancy – categories that challenge the traditional architecture of international humanitarian law and expose its doctrinal fault lines. However, the intention underpinning this research is not merely to document serious violations of *ius in bello*, but rather to frame the issue of the non-recognition of the status of lawful combatant within a broader perspective: that of the internal disintegration of the international rules-based order.

The crisis of the international order has become an increasingly recurrent theme. It emerges both in analyses that emphasise the progressive disarticulation of the system of international relations, and in those that focus on the erosion of the rules-based order that such disarticulation has inevitably brought about. The concept of "crisis" has constituted a constant element of the vocabulary of political modernity ever since the eighteenth century, the period in which a form of secularised teleology first emerged as a philosophy of history. It denotes the pathological onset of a morbid distortion of a given and autonomous natural order, a distortion that must be repressed and restored to the tracks of normality. This is a development of the conceptual lineage descending from the physio pathological terminology coined by Galen, which ultimately prevailed over an older strand of thought centred on the idea of "crisis" as a procedural phase of decision and judgment. In constitutional modernity, this decisive moment is deemed to have been already surpassed through the constituent act, which occurs once and for all. The critical moment is extinguished in the revolutionary genesis of the legal order, which entails a fundamental and exclusionary decision. From that point onwards, there can only be assaults or deviations from the order thus realised. Yet the procedural dimension of "crisis", even when concealed, is destined never to disappear entirely. It reveals itself in states of emergency, in which the essence of power relations – and of relations between Powers – as well as the institutional architecture that the legal order has given itself, become manifest.[2] Of the two dimensions of the concept of "crisis" whose conceptual genesis Reinhart Koselleck subtly reconstructed, the aspect most frequently examined is its pathological one, which manifests itself as an anomalous deviation from an established normality. Nonetheless more refined analyses suggest that the crisis of the international order cannot consist merely of tragic distortive episodes but must instead be understood as a process whose ultimate roots lie in the internal contradictions of that very order.[3] Viewed from this perspective, much has been written about the deterioration

2 In such moments, a fragment of the authentic exception is disclosed, albeit in a muted form and stripped of the foundational pathos of the original decision that characterises, instead, the *Ausnahmezustand*, that is, the state of exception in the theological-political reflection of Carl Schmitt. More profoundly still, "crisis" as decision is embedded within the latent potentialities of the constituent power, which cannot be negated by a teleological reading of constitutional history. For the evolution of the concept of crisis, reference must be made to the indispensable works of Reinhart Koselleck: 'Krise', in Otto Brunner, Werner Conze, Reinhart Koselleck (Hrsg.), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*. Vol. III. W. Kohlhammer Verlag Stuttgart 1982, pp. 617–650; but see also Reinhart Koselleck, *Kritik und Krise: ein Beitrag zur Pathogenese der bürgerlichen Welt* [1959]. Suhrkamp Verlag Frankfurt a. M. 1976, especially pp. 132–157, where the author – while diagnosing the corrosive nature of Enlightenment political utopianism – remains nonetheless firmly anchored to a pathological interpretation of the critical concept.

3 See generally Alessandro Colombo, *Il suicidio della pace. Perché l'ordine internazionale liberale ha fallito (1989-2024)*. Raffaello Cortina Editore Milano 2025; Georges-Henri

of the structures of international relations. However, it is perhaps by considering the fragility of the juridical framework that sustained and justified those structures that one may arrive at a deeper understanding of the radical nature of the problem.[4]

A closer focus must be placed on this second dimension, for it confronts the public law jurist with a specific articulation of what is arguably the central problem of legal modernity. To adopt the expression that Ernst Forsthoff employed critically in relation to the *Sozialstaat* of the Federal Republic of Germany,[5] the issue concerns the "introverted" legitimacy of any modern legal order. The term is intended to capture the impossibility, within a secularised legal system, of grounding concrete legitimacy on foundations other than the material configurations of

Soutou, *La grande rupture. De la chute du mur à la guerre d'Ukraine, 1989-2024*. Éditions Tallandier Paris 2024.

4 See from different perspectives Danilo Zolo, *I signori della pace. Una critica del globalismo giuridico*. Carocci Roma 1998; Id., *La giustizia dei vincitori. Da Norimberga a Baghdad*, Laterza Bari-Roma 2006; Alfredo D'Attorre, *Metamorfosi della globalizzazione. Il ruolo del diritto nel nuovo conflitto geopolitico*. Laterza Bari-Roma 2023; Joachim Dolezik, *Die prekäre Verbindung von Menschenrechten und Frieden. Zur Ambivalenz des Liberalismus und der Ordnungsmuster des Völkerrechts*. Duncker und Humblot Berlin 2024.

5 Ernst Forsthoff, 'Der introvertierte Rechtsstaat und seine Verortung' in Id., *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1950–1964*. C.H. Beck München 1976, pp. 175-187; on the same subject, see also Herbert Krüger, *Rechtsstaat, Sozialstaat, Staat. Oder: Rechtsstaat + Sozialstaat ergeben noch keinen Staat*. Metzner Frankfurt am Main 1975, and Werner Weber, 'Der deutsche Bürger und sein Staat' in Id., *Spannungen und Kräfte im westdeutschen Verfassungssystem*. Duncker und Humblot Berlin 1970, pp. 329-344. Each of these authors voiced, in striking terms, the concern that the State's transformation from a singular collective endowed with its own ethical autonomy into a mere tier of governance – reduced to a service-providing apparatus and subordinate to civil society – would inevitably erode its normative capacity, rendering it, in Werner Weber's words, "a battleground for private interests and an object of predatory appropriation", see Weber, p. 340. For a more balanced construction of the State's newly acquired social character by a contemporary German author, however, see Hans Peter Ipsen, 'Über das Grundgesetz' [1949] in Id., *Über das Grundgesetz. Gesammelte Beiträge seit 1949*. Mohr Siebeck Tübingen 1988, pp. 1-37, whose analysis offers a countervailing interpretation that tempers the more dramatic accounts of its alleged functional dissolution. For appraisals of the German *sozialer Rechtsstaat* informed by a Smendian perspective, see also Ulrich Scheuner, 'Die neuere Entwicklung des Rechtsstaats in Deutschland' [1960], in Id., *Staatstheorie und Staatsrecht. Gesammelte Schriften*. Duncker und Humblot Berlin 1978, pp. 185-222, and Peter Badura, 'Verfassung und Verfassungsgesetz', in Horst Ehmke, Joseph H. Kaiser, Wilhelm A. Kewenig et alii, *Festschrift für Ulrich Scheuner zum 70. Geburtstag*. Duncker und Humblot Berlin 1973, pp. 19-40.

power from which that system has emerged.[6] In other words, such legitimacy is self-referential and contingent upon the continued material stability of those configurations. More specifically, the reference is to the fragility of the ensemble of norms, doctrines and institutions that, for decades, have served as the guardians and formal keepers of the international order. It is an ensemble that appears unlikely to survive the erosion of the political conditions that enabled its creation, and that now reveals the contradictions inherent in its own structure.

To clarify this position by drawing on concepts borrowed from constitutional theory, one may speak of a diastasis between the constitution in its formal sense and the *material constitution* of the international order as it has taken shape over recent decades. The concept of the material constitution has lent itself, over the history of constitutional theory, to multiple doctrinal articulations. The distinct understanding of the material constitution adopted here, however, is the one formulated by the Italian constitutional scholar Costantino Mortati. Mortati located the materiality of the constitutional order in the ensemble of forces, relations and interests "that operate within a sphere transcending the system of norms and the institutions regulated by them […] sustained by a criterion that makes it possible to unify the various manifestations of state life".[7] Mortati's notion is readily capa-

6 The concept of "secularisation" must, in the present context, be understood not as the legal process by which ecclesiastical property is confiscated by the State and possibly alienated to private actors. Rather, it denotes a cultural phenomenon: the semantic transformation of legal and political concepts following the dissolution of the metaphysical foundations upon which public authority had traditionally relied. Secularisation is therefore to be read not only within the history of legal doctrine, but also within the concrete history of institutions. On the general concept of secularisation and its semantic evolution, see Hermann Lübbe, *Säkularisierung. Geschichte eines ideenpolitischen Begriffs*. Verlag Karl Alber Baden-Baden 2003. On the formation of the State as a process of secularisation, reference must naturally be made to Böckenförde, who situates and develops on the terrain of legal history – the fertile intuition of Schmitt's political theology. Carl Schmitt identified an interpretative framework for modernity that allows the fundamental legal-political concepts to be traced back to their secularised analogues of theological notions. Yet the modern State, which derives its legitimacy from the neutralisation of conflict (in this case, confessional conflict), remains compelled to seek its conceptual referents through analogy with the theological; see Ernst-Wolfgang Böckenförde, 'Die Entstehung des Staates als Vorgang der Säkularisation' in Karl Doehring, *Säkularisation und Utopie. Ebracher Studien. Ernst Forsthoff zum 65. Geburtstag*. W. Kohlhammer Stuttgart 1967, pp. 75–94

7 See Costantino Mortati, *Istituzioni di diritto pubblico*. Vol. I Cedam Padova 1969, pp. 26-27; see generally Id., 'Costituzione (Dottrine generali e Costituzione della repubblica italiana)' in Francesco Calasso, *Enciclopedia del diritto*. Vol. 11. Giuffrè Milano 1962,

ble of being transposed from the state-national plane to that of the international

pp. 162-164; for a slightly different conceptualisation, see Costantino Mortati, *La costituzione in senso materiale* [1940]. Giuffrè Milano 1998, especially pp. 53-113; on Mortati's conceptions, see Cesare Pinelli, *Costituzionalisti del Novecento*. Quodlibet Macerata 2024, pp. 133-141; Omar Chessa, *Costituzione materiale*. Il Mulino Bologna 2026, pp. 281-331, 345-367. Naturally, it will not escape notice that the first distinction between the formal (*Verfassung im materiellen Sinn*) and the material constitution (*Verfassung in materiellen Sinn*) was elaborated by one of the noblest figures of the *Staatslehre*, Georg Jellinek. Adopting a non-formalist approach to the concept of the "constitution" (*Verfassung*), Jellinek argued that the latter could not be collapsed into the documentary constitution – into the constitutional statute (*Verfassungsgesetz*). Comparative analysis enabled Jellinek to avoid a nominalist conception of the constitution, demonstrating that the identification of the constitution with a single foundational normative document is by no means universal. Moreover – and perhaps even more significantly – he had already observed that every constitutional order, irrespective of whether such a document exists, consists of "constitutional laws or, more precisely, norms of constitutional law, whether gathered entirely or only in part within a constitutional document," which "define the fundamental organisation of the State and the delimitation of the competences of the State's directing organs"; see Georg Jellinek, *Gesetz und Verordnung. Staatsrechtliche Untersuchungen auf rechtsgeschichtlicher und rechtsvergleichender Grundlage*. Mohr Siebeck Freiburg i. B. 1887, pp. 263, 262. It is readily apparent how this approach influenced constitutional law scholarship and, in particular, comparative constitutional law, leading to the development of a doctrine of the material constitution applicable to those legal orders lacking a single foundational normative document from which the legitimacy of the entire system might be derived. The meaning attributed to the term material constitution is again different in Hans Kelsen, who identified it with the set of substantive norms governing the creation of legislation and the organisation of public power, thereby constituting the effective core of the legal order generated by the *Grundnorm*. By contrast, both Carl Schmitt and Rudolf Smend – although neither explicitly invokes the notion of the material constitution – developed conceptions of the constitution not far removed from Mortati's. For Schmitt, the constitution corresponds to the concrete order that the political community gives itself; for Smend, it is the principle guiding the integration of social and cultural manifestations into the State understood as a *Wertsystem* (system of values). A further, distinct understanding holds that materiality consists in the necessary conditions for the existence of a constitutional regime: organisational requirements (such as the separation of powers) or immediate guarantees (such as the explicit entrenchment of fundamental liberties), potentially combined with the former. It is in this way that constitutionalism advances its totalising and exclusionary claim vis-à-vis the earlier history of constitutional thought. Historically, this is, for example, the meaning of Article 16 of the Déclaration des droits de l'homme et du citoyen, of the late-eighteenth-century reflections of Georg Wedekind and Johann Adam Bergk, and of the grievances voiced by Freiherr vom Stein during the Prussian reform era; see Dieter Grimm, 'Verfassung (II)', in Otto Brunner, Werner Conze, Reinhart Koselleck (Hrsg.), *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*. Vol. VI. W. Kohlhammer Verlag Stuttgart 1990, pp. 872–873.

legal order, particularly insofar as one postulates an underlying unity of both its ideal and political purposes. One may therefore consider, as the formal constitution of the international order, the complex of normative documents and customary practices that together constitute the corpus of public international law, and, as its material constitution, the concrete configuration of the interests and the practices of the international actors. The divergence strikes at the concrete normativity of the former, which cannot escape the resulting recoil without, in effect, negating itself.

2. The contemporary "partisan" within the international legal order

The purpose of this essay is therefore to illustrate a specific manifestation of the critical erosion of the international legal system, by connecting it with a detailed diachronic historical analysis of the parallel development of the conceptions of *ius ad bellum* and *ius in bello* within juridical modernity. Thus, this essay concerns the legal classification and the treatment, by Powers firmly embedded within the international order, of prisoners of war belonging to armed formations regarded as non-state actors or designated as terrorist organisations. Such designations reflect political and security assessments, yet they dot alter the fact that these groups have been responsible for severe harm, loss of life, and human rights violations.

Naturally, the cases under examination differ in important respects. Between 1997 and 2001, and again following the recapture of Kabul in August 2021, the Taliban formed the backbone of the armed forces of the Islamic Emirate of Afghanistan. At the time of Operation Enduring Freedom, as today, the relationship between the Taliban and the Emirate's military apparatus was one of near-complete overlap, making any clear distinction between the two effectively impossible. A similar dynamic applies to the Azov Brigade and the Aidar Battalion. Since 2014, Azov has been incorporated into the National Guard of Ukraine – an institution under the authority of the Ministry of the Interior that performs policing and gendarmerie functions – while Aidar has been integrated into the Ukrainian Ground Forces, forming part of Ukraine's regular armed forces. Despite these formal incorporations, both the Taliban and the two Ukrainian formations have been designated as terrorist organisations by the enemies of their respective States. Such classifications have been used to impede the application to their members of those rules of international humanitarian law that would otherwise apply to regular armed forces.

The case of Hamas is more complex. Hamas is a paramilitary organisation that cannot be fully assimilated to a formally constituted military corps integrated into the armed forces of a State – armed forces which, in any event, the so-called Palestinian territories do not formally possess. Yet it is significant that the repressive measures adopted by the State of Israel do not apply exclusively to Hamas combatants, but extend to any Palestinian individual suspected of having committed terrorist acts or of having colluded with terrorist organisations. Their structural position therefore differs markedly from that of the Taliban or the Ukrainian formations, insofar as it operates entirely outside any recognised State military framework. It is, however, in relation to Hamas that Carl Schmitt's notion of the "partisan" – to be clarified conceptually below– can be most fully appreciated. By contrast, its application to the Taliban and to the Ukrainian formations Azov and Aidar is mediated by the legal classifications assigned to them by their respective adversaries.[8]

However, it is precisely the circumstance that the "irregularity" of at least two of

8 Conversely, the Schmittian notion of the partisan is not validly applicable to the radical Islamist paramilitary group al-Qaeda. The refusal to consider al-Qaeda under the Schmittian partisan rubric does not stem from its designation as a terrorist organisation by numerous international actors – including the United States, the State of Israel, the European Union and the United Nations Security Council. Rather, the decisive consideration is the absence of two fundamental and closely interdependent requirements derivable from Schmitt's classification. First, al-Qaeda lacks a rooted spatial dimension: it currently operates in Afghanistan, the Maghreb, Mali, north-western Pakistan and Yemen, and has at times been active in Iraq and Syria. Secondly, although it positions itself in stark ideological opposition to the liberal-democratic order by advancing the most extreme forms of radical Islamism, it is difficult to exhaust this stance in a concrete *politicality*. Beyond the propagation of terror, it is not easy to identify clearly delineated political objectives, save for the vague and indeterminate aspiration to establish a global *sharia* order. In this regard, one may recall the judgment once formulated by Raymond Aron when referring to the drift of the "rationalised" terrorism of revolutionary warfare towards anarchic terrorism: "a terrorist without a cause resembles a common street bandit"; see Raymond Aron, *Penser la guerre, Clausewitz* Vol. II: *L'Âge planétaire*. Gallimard Paris 1976, p. 210. None of this affects the circumstance that, even in relation to prisoners belonging to this terrorist and paramilitary formation, it remains at least legitimate to consider applicable the guarantees typical of the *ius in bello* in the context of a non-international armed conflict. This refers, in the first instance, to the international human rights protection norms, to common Article 3 of the four 1949 Geneva Conventions, to Article 5 of the Third Geneva Convention on Prisoners of War, and possibly to the provisions of Second Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) of 1977, insofar as al-Qaeda were capable of exercising, "under the responsible command of a leadership, such control over a part of its territory as to enable it to conduct sustained and concerted military operations"; see Art. 1(1) of Protocol II. By contrast, the *a fortiori* applicability of the Fourth Geneva Convention – concerning the protection of civilians in time of war – to al-Qaeda militants is far more debatable.

these armed groups depends exclusively – and arbitrarily – on the legal classification assigned to them by their enemy States that allows to reflect upon the validity of Schmitt's criterion of the partisan and its relevance for understanding certain mechanisms underlying the present disintegration of public international law.

What unmistakably unites all the formations styled below is the presence of the distinctive features of political intensity and telluric rootedness. Political intensity is expressed in the absolute character of the enmity directed towards their adversary, an enmity mirrored in the absolute condemnation issued by that adversary: for the Taliban, the secularised West; for the Ukrainian formations, Russia, a historically inherited enemy by virtue of centuries of domination and occupation, and a present one by virtue of its aggression; and for Hamas, the State of Israel, a doubly configured enemy by reason of its ethno-religious foundations and its asserted appropriation of the original Arab land. The telluric element, by contrast, lies in the anchoring of these armed actors in "a concrete piece of terrain" which they present themselves as defending in an exemplary manner against their enemy, thereby becoming "one of the last sentinels of the earth, that element of universal history not yet completely destroyed."[9] Of the remaining Schmittian criteria – mobility, rapidity and the unpredictability of attack – are not decisive in the present context, for the development of technical means of warfare has stripped them of their former exclusivity to then so-called "partisan" forces.[10] Conversely, the designation of these actors as "irregulars" as "terrorists" or "unlawful combatants" is, in the cases examined, less a precondition of their action than a corollary drawn by the enemy: a State-organised actor confronted with a political intensity and spatial rootedness that constitute irrepressible characteristics of these formations and stand in absolute antithesis to its own claims.

The designation of irregularity does not depend primarily on the lack of a formal qualification by the relevant State of affiliation (in the case of the Taliban or the Ukrainian formations) on the absence of the typical attributes of an organised military force (in the case of Hamas), but on the legal characterisation of the conflict

9 Carl Schmitt, *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen* [1963]. Duncker und Humblot Berlin 2017, p. 74.

10 After all, Schmitt had already noted that mere tactical mobility does not constitute a definitive criterion of the partisan, since "its theorisation remained the exclusive task of military science. Only revolutionary warfare made it a key figure of universal history"; see Schmitt 1963, p. 80. Considering this clarification, the historicist objections advanced by Raymond Aron against Schmitt's conceptualisation appear to lose much of their force; see Aron, pp. 210-222.

adopted by the opposing States. It thus becomes evident that the concept of the "irregular" has completed a radical transformation: from a "purely technical-military fact", linked to the tactical means employed, to a "legal–illegal opposition in the juridical sense of international or constitutional law".[11] This is substantiated in the assertion of a claim to sovereign legality over another, whose validity is denied: "in the face of it no sovereignty of law exists. It transforms the irregularity of the partisan into mortal illegality."[12] The legal position of the enemy is thus reduced to the rank of a mere criminal and pathological deviation from an order deemed universally valid and superior to internal sovereignty, however asserted by – and to the benefit of – individual sovereign States. How is this conceptual transformation to be explained within contemporary international legal thought? It is in addressing this theme that the internal aporias of the international legal order, as it presently appears, come to the surface.

After conducting the legal examination of the cases under consideration, however, two closely interrelated questions must be addressed through diachronic comparison, which alone will make it possible to understand the trajectory of the international legal order towards its present condition of critical instability. The first question is of a historical-conceptual nature and will allow a window to be opened onto the contemporary legal conception of war and of the enemy, as well as to introduce certain elements of the formal constitution of the international legal order, that is, the second question. In this case, the focus is on the sources of law and on the rules of international law governing the relationship between the State and the enemy combatant, considered not as juridicised moral absolutes transcending history, but as the normative product of specific historical-spiritual *temperie*. Accordingly, they will not be treated separately, but rather together within the historical progression, in order to demonstrate that, in the absence of a coherent and genuinely egalitarian conception of the *ius ad bellum*, the *ius in bello* – or international humanitarian law – is destined to collapse into an empty shell.

2.1 The Taliban case

11 Schmitt 1963, p. 23.

12 Schmitt 1963, p. 86; it follows: "Irregularity in itself, however, creates nothing. It simply becomes illegality", see Schmitt, *ibid*. From these lines there naturally emerges the opposition between the formal legality of positive law and the legitimacy rooted in the concrete order – an opposition that constitutes a central *topos* of Schmitt's legal thought.

It is well established that the Taliban, or Islamic Movement of Taliban, are a Deobandi-inspired organisation, belonging to the more fundamentalist strands of Sunni Islam, which governs Afghanistan and was in control of its government at the time of the 2001 military intervention by the United States and their allies. At present, six States classify the Taliban as a terrorist organisation – while the United States, which, however, designate only certain Taliban leaders as Specially Designated Global Terrorists;[13] six additional States adopted similar designations from 2003 onwards, though these have been revised in the past years.[14] The Taliban's politico-religious ideology differs from that of other fundamentalist Islamic groups in that it is not directed towards the establishment of a global sharia order; rather, it is firmly rooted in Afghan territory, combining religious elements with a form of cultural nationalism. The Taliban's restorative-revolutionary impetus is therefore spatially confined to Afghan territory.[15]

Furthermore, as noted above, there was, at the time of the invasion, and there is now a complete coincidence between the Taliban movement and the governmental and military organs of Afghanistan: they are not distinguishable, for each of them is permeated by, and subject to, the politico-religious authority of the Islamist group. Moreover, in defining the nature of an international armed conflict between States, the International Criminal Court has held that such a conflict "exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State."[16] The Taliban would readily fall within the second limb of this definition. This appeared to be the very initial position of the United Nations Security Council and of the United States themselves, which addressed the Taliban in order to obtain a ceasefire and the surrender of al-Qaeda leader Osama bin Laden following the attacks of 11 September 2001.

13 See Executive Order 13224 –Blocking Property and Prohibiting TransactionsmWith Persons Who Commit, Threaten To Commit, or Support Terrorism Notice of September 24, 2001 – Continuation of Emergency With Respect to UNITA.

14 These States were: the Russian Federation, Turkey, Kazakhstan and Kyrgyzstan.

15 See generally Gilles Dorronsoro, *Revolution Unending. Afghanistan, 1979–2001*, Columbia University Press New York 2005, pp. 287-292, 300-305; Antonio Giustozzi, *Koran, Kalashnikov and Laptop. The Neo-Taliban Insurgency in Afghanistan*. Columbia University Press New York 2008, pp. 12-15, 38-41, 94-97; Carter Malkasian, *The American War in Afghanistan*. *A History*. Oxford University Press Oxford-New York 2020, pp. 54-58, 112-115, 420-423.

16 See *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, §§ 654-656; given that the United States has not ratified the Statute of the International Criminal Court, this reference carries merely persuasive authority.

During the course of the military invasion of Afghanistan, on 13 November 2001 President Bush issued a military order titled Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, whose legal basis was a statute enacted by the United States Congress in October of the same year.[17] The order sought to regulate the detention, treatment and procedural discipline of

> any individual who is not a United States citizen… for whom there is reason to believe that (i) he is or was a member of the organisation known as al-Qaeda; (ii) has engaged in, aided or abetted, or conspired to commit acts of international terrorism, or acts in preparation thereof, that have caused, threaten to cause, or have as their aim to cause injury to, or adverse effects on, the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harboured one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order.[18]

In particular, although the order took care to lay down criteria of humane treatment for the detainee,[19] it provided that the captured individual was to be "detained at an appropriate location designated by the Secretary of Defense outside or within the United States",[20] without indicating "any minimum or maximum limits, so that detention could therefore assume an unlimited duration".[21]Moreover, the detainee was removed from the ordinary jurisdiction and instead subjected to the jurisdiction of special military commissions – thus not pre-existing the capture – established by the Secretary of Defense.[22] The latter could also prescribe "such other conditions" of detention.[23] Finally, against the decisions of the military commissions, the convicted detainee could not avail himself of any instrument of appeal

17 See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, 115 Stat. 272.

18 See President Issues Military Order. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, Sec. 2(a)(1).

19 See President Issues Military Order. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Sec. 3(b), (c), (d).

20 See President Issues Military Order. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Sec. 3(a).

21 Roberto Bartoli, *Lotta al terrorismo internazionale. Tra diritto penale del nemico,* jus in bello *del criminale e annientamento del nemico assoluto*. Giappichelli Torino 2008, p. 78.

22 See President Issues Military Order. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Sec. 4, 5.

23 See President Issues Military Order. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Sec. 3(e).

or review.[24]

The military order under consideration was applied not only to members of al-Qaeda, but, from as early as 11 January 2002, indiscriminately to fighters captured in Afghanistan and transferred to the military base at Guantánamo Bay. Consequently, its application was extended to any combatant belonging to the Taliban organisation. Specifically, the applicability of the Third Geneva Convention on the treatment of prisoners of war was denied in respect of such individuals, on the ground that the military operations in question did not constitute an international armed conflict. The Office of Legal Counsel – which which may be regarded as a kind of *scrinium memoriae*[25] of the U.S. Department of Justice – reached this conclusion on the basis of the view that Afghanistan was a "failed State" to which the Geneva Convention would not be applicable – a conclusion that was itself contradictory in light of the assertion that the United States had been engaged in an international armed conflict, and thus one that was ontologically inter-State in nature. Moreover, the Taliban were characterised as a mere "militia or faction": accordingly, they would fall under the newly invented category of the "unlawful combatant."[26] Even if one were to assume that the intervention in Afghanistan could not be characterised as an international armed conflict, the minimum humanitarian guarantees set out in common Article 3(1) of the four 1949 Geneva Conventions and in Article 4(1)(2) of Second Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) of 1977[27] ought nonetheless to have remained ap-

24 See President Issues Military Order. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, Sec. 7(b).

25 See Gaetano Scherillo, Aldo Dell'Oro, *Manuale di storia del diritto romano*, Cisalpino Milano 1949, p. 399.

26 See U.S. Department of Justice, Office of Legal Counsel, *Memorandum for William J. Haynes II. General Counsel, Department of Defense Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees*, 9 January 2002. This thesis was corroborated by at least one subsequent memorandum; see U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Alberto R. Gonzales Counsel to the President Re: Status of Taliban Forces Under Article 4 on the Third Geneva Convention of 1949*, 7 February 2002.

27 See common Article 3(1), which state: "1. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without

plicable, insofar as the Taliban were capable of exercising "under the responsible command of a leadership, such control over a part of its territory as to enable it to conduct sustained and concerted military operations".[28] In such a scenario, the distinction between civilian and insurgent combatant would have been attenuated in relation to the Taliban fighter; yet he would still have been liable under domestic law for participation in hostilities, or for the commission of war crimes where, again under the relevant domestic law, a nexus between the conflict and the criminal act could be established. Moreover, by pushing to its furthest implications the denial of military status to the Taliban, one might have argued *a fortiori* for the applicability of the Fourth Geneva Convention relative to the

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any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

And see Article4(1)(2) of Protocol II, which state: "1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Slavery and the slave trade in all their forms;
(g) Pillage;
(h) Threats to commit any of the foregoing acts."

28 See Article 1(1) of Protocol II.

Protection of Civilian Persons in Time of War. At first sight, such a thesis appears paradoxical, insofar as a fighting individual would be treated as if he were an unarmed civilian. Yet the wording of Article 4(1) of the Fourth Convention, which defines its *ratione personae* scope, is sufficiently broad to encompass the situation of an irregular combatant who has been captured.[29] Article 8 – by stipulating that civilians cannot renounce the rights conferred upon them by the Convention[30] – appears to lend further support to this interpretation.[31] This line of reasoning ultimately stretches the notion of civilian status beyond any temporal or situational boundary, and although defensible on a strictly textual basis, it proves difficult to sustain under a teleological interpretation of the relevant provisions. Nonetheless, it has the merit of shielding the *iniustus hostis* from the punitive logic of the *iustum bellum*.

The legal position of the United States Government changed shortly thereafter, acknowledging that it had been engaged in an international armed conflict and thus extending the Third Geneva Convention to Taliban detainees. At the same time, however, it denied them prisoner-of-war status, asserting that they did not meet the requirements of Article 4(A)(1)(2) of the Convention – namely, the historically established conditions under which even an irregular combatant may validly be regarded as a prisoner of war.[32] However, in response to the

29 See Article 4(1) of Fourth Geneva Convention Convention relative to the Protection of Civilian Persons in Time of War, which is applicable to every person "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".

30 See Article 8 of Fourth Geneva Convention.

31 This expansive interpretation also finds support in the *Delalić* judgment of the International Criminal Tribunal for the former Yugoslavia as well as in a substantial portion of international-law scholarship; see e.g. Knut Dörmann, 'The legal situation of "unlawful/unprivileged combatants"' *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 85 (2003), pp. 45-74.; Robert Kolb, *Ius in bello. Le droit international des conflits armés. Précis*. Helbing & Lichtenhahn-Bruylant Bâle-Bruxelles 2003, p. 158-159; see *also Čelebići Camp, Prosecutor v Delalić (Zejnil) and ors*, Trial judgment, Case No IT-96-21-T, ICL 95 (ICTY 1998), 16th November 1998, United Nations [UN]; United Nations Security Council [UNSC]; International Criminal Tribunal for the Former Yugoslavia [ICTY]; Trial Chamber II [ICTY].

32 See Article 4(A)(1)(2) of Third Geneva Convention the relative to the Treatment of Prisoners of War (12 August 1949), which states: "Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2)

objections raised by the Department of State,[33] the White House Legal Counsel Gonzales reiterated the refusal to apply the Third Geneva and its Additional Protocols to Taliban detainees, on the basis of operational and axiological considerations centred on the peculiarity of the so-called "war on terrorism" and on the allegedly immoral character of the activities of the individuals potentially involved.[34] Yet, as Roberto Bartoli observed, the requirements of Article 4(A)(2) "are deemed implicit, or even absolutely presumed",[35] in relation to regular armed forces. Moreover, the legal presumption established by Article 5(2) of the Third Geneva Convention, and reiterated in the Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),[36] applies to "persons who have committed a belligerent act and who have fallen into the hands of the enemy",[37] thereby extending the Article 4(A)(1)(2) criteria to doubtful cases. Even assuming the complete and indisputable absence of the foregoing requirements, and the inability to distinguish the Taliban fighter from the civilian population, Article 44(3)(4) of Protocol I could still have applied. That provision stipulates that an irregular combatant who is intermingled with the civilian population shall nonetheless be entitled to prisoner-of-war status and the corresponding guarantees, provided that he "carries his arms openly (a) during each military engagement; and (b) during such time as he is visible to the

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war."
For the most part, this amounts to a reiteration of the traditional requirements al-ready prescribed by Article 2 of the Fourth Hague Convention concerning the Laws and Customs of War on Land and its annexed Regulations (1907).

33 See Department of State, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan*, 8 January 2002.

34 See *Memorandum for the President. Decision in Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, 25 January 2002.

35 Bartoli, p. 82.

36 See Article 45(1)(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1).

37 See Article 5(2) of Third Geneva Convention.

adversary while engaged in a military deployment preceding the launching of an attack in which he is to participate."[38] Should even these conditions not have been met, the combatant would still have benefited from the same guarantees afforded to a prisoner of war,[39] save where he was suspected or convicted of conduct harmful to the State.[40] In the latter case, the applicable rules would have been those of domestic legislation, which is in principle constrained by the State's international obligations. However, it is reasonable to conclude that Taliban combatants did not fall within these latter options, given that they constituted an organised armed group integrated into the State, hierarchically structured, recognised as an international interlocutor, and exercising political, military, and administrative control over the Afghani territory.

As it is well known, not only were the combatants detained at Guantánamo deprived of the ordinary guarantees afforded to prisoners of war, but, notwithstanding the reassuring tone of the military order, the United States Department of Justice repeatedly took the view that their detention regime could lawfully include enhanced techniques of interrogation. A memorandum submitted by the Office of Legal Counsel to the Counsel to the President asserted that "cruel, inhuman, or degrading" treatment could not be subsumed under the statutory definition of torture for the purposes of federal law.[41] However, the legal dilemma surrounding the use of torture – handled with notable ease by DOJ lawyers – concerned primarily the ambit of presidential authority under the Constitution and the legal definition of torture according to federal statutes, rather than its implications under international law. In particular, the detention regime and the interrogation techniques author-

38 See Article 44(3) of Protocol I.

39 See Article 44(4) of Protocol I.

40 See Article 5 of the Fourth Geneva Convention.

41 See U.S. Department of Justice, Office of Legal Counsel, *Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards for Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A*, 1 August 2002. The issue of the legality of the President's authorisation to employ torture against detainees designated as "unlawful combatants" had already been brought to the fore in at least one memorandum; see U.S. Department of Justice, Office of Legal Counsel, *Memorandum for William J. Haynes II*. Subsequently, the Office of Legal Counsel issued further memoranda and letters addressed to the Counsel to the President; however, these are not of particular relevance for the purpose of analysing the legal status of detained Taliban combatants, as they concerned members of al-Qaeda; see e.g. U.S. Department of Justice, Office of Legal Counsel, *To Alberto R. Gonzales Counsel to the President. Letter regarding "the views of our Office concerning the legality, under international law, of interrogation methods to be used on captured al Qaeda operatives"*, 1 August 2002.

ised by the Department of Justice resulted in a clear violation of Articles 13, 14 and 17(4)[42] of the Third Convention of Geneva, concerning, respectively, humane treatment, respect for the person and for honour, and the prohibition of torture and any other form of coercion of prisoners, and arguably of part of the other special provisions laid down in Section II of the Convention.[43] However, the memoranda were more concerned about the applicability of United States federal norms criminalising torture to acts authorised by the President in the exercise of his war powers as Commander-in-Chief, as well as the potential constitutional legitimacy of a federal statute intended to regulate the interrogation of captured unlawful combatants. In both instances, the Department of Justice affirmed the authoritative character of presidential prerogatives, relying on an originalist interpretation[44] of the Vesting

42 This provision is further specified by Article 99(2), which prohibits the use of moral or physical coercion to induce a prisoner of war to admit guilt. The Commentary of the International Committee of the Red Cross interprets the rule stated in article 17(4) as applying "not only to questioning at the point of capture to identify a person but also to any subsequent interrogation." It further clarifies that "in addition to the prohibition of torture and coercion, the requirements contained in Article 13 that prisoners of war be at all times treated humanely and protected against acts of violence, intimidation and insults also apply to interrogation. All forms of ill-treatment, including cruel, inhuman and degrading treatment, are prohibited. This will have an impact not only on the methods of interrogation, but also on its duration and frequency"; see *International Committee of the Red Cross 2020 Comment*, §1825.

43 Moreover, it hardly requires emphasis that the use of torture against prisoners of war is expressly prohibited by Common Article 3 of the Geneva Conventions; that Article 7 of the International Covenant on Civil and Political Rights (1966) declares that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"; and that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) likewise proscribes such conduct. Moreover, Article 8 of the Statute of the International Criminal Court (1998) classifies torture as both a crime against humanity and a war crime, as well as a grave breach of the Geneva Conventions. Since the United States has not ratified the latter instrument, it is referred to here solely for informational purposes.

44 By originalism is meant a school of American constitutional interpretation grounded in fidelity to the semantic meaning of constitutional provisions, considered within the historical context of their adoption by a reasonably informed member of the public (*original public meaning originalism*). The earlier variant of originalism, by contrast, tended to attribute decisive weight to the intentions of the Framers (*original intent originalism*). Beyond these two principal strands, at least a third may be identified, combining elements of both and focusing on the interpretive methods regarded as correct at the time of the Constitution's adoption (*original methods originalism*). With a certain degree of approximation, one may state that the current majority of the Supreme Court now adopts an originalist interpretative approach. The literature either espousing origi-

Clause of Article I[45] and of the Commander-in-Chief Clause of Article II of the Constitution.[46] Similarly, the Supreme Court's decision in the case of an alleged Taliban combatant who possessed United States citizenship and was detained by federal authorities focused essentially on the procedural guarantees owed to a citizen under the Due Process Clause of the Fourteenth Amendment.[47]

The memoranda issued by the Department of Justice and the Supreme Court are therefore of interest chiefly for what they reveal concerning the conception of

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nalism, taking originalism as its object of study, or engaging with it as a privileged polemical target – or, indeed, now broadly informed by originalist canons – has become extremely vast. See at least: Robert H. Bork, *The Tempting of America. The Political Seduction of the Law*. Simon and Schuster New York 1990; Antonin Scalia, A *Matter of Interpretation. Federal Courts and the Law*. Princeton University Press Princeton (NJ) 1997; Antonin Scalia, Bryan A. Garner, *Reading Law. The Interpretation of Legal Texts*. Thomson/West St. Paul, 2012; Jack M. Balkin, *Living Originalism*. Harvard University Press Cambridge-London 2014; Lee J. Strang, *Originalism's Promise. A Natural Law Account of the American Constitution*, Cambridge University Press Cambridge-New York 2019; Joseph B. Staab, *Limits of Constraint. The Originalist Jurisprudence of Hugo Black, Antonin Scalia, and Clarence Thomas*. Kansas University Press Wichita (KS) 2022; Jonathan Gienapp, *Against Constitutional Originalism*. Yale University Press New Haven–London 2024; Larry B. Solum, 'The Fixation Thesis. The Role of Historical Fact in Original Meaning' *Notre Dame L. Rev.* 91 (2015), pp. 1-78; Larry Alexander, Saikrishna B. Prakash, '"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility', *San Diego L. Rev.* 41 (2004), pp. 967-995; Richard S. Kay, 'Original Intention and Public Meaning in Constitutional Interpretation', *Nw. U. L. Rev.* 103 (2009), pp. 703-726; John McGinnis, Michael Rappaport, 'Original Methods Originalism. A New Theory of Interpretation and the Case Against Construction' *Nw. U. L. Rev.* 103 (2011), pp. 751-802; Anthony J. Bellia Jr., Bradford R. Clark, 'The Constitutional Law of Interpretation' *Notre Dame L. Rev.* 91 (2022), pp. 519-616; William R. Baude, 'Is Originalism Our Law?' *Columbia L. Rev.* 115 (2015), pp. 2349-2408.

45 See Article I, Section 1, Clause 1 of the U.S. Constitution. On this point see e.g. Saikrishna B. Prakash, *The Living Presidency. An Originalist Argument Against its Ever-Expading Powers*. Harvard University Press Cambridge-London 2020, pp. 148-214; Curtis A. Bradley, Jack L. Goldsmith, 'Foreign Affairs, Nondelegation, and the Major Questions Doctrine' *U. Penn. L. Rev.* 172 (2024), pp. 1743-1801.

46 See Article II, Section 2, Clause 1 of the U.S. Constitution. On this point see e.g. Michael W. McConnell, *The President Who Would Not Be King. Executive Power under the Constitution*. Princeton University Press Princeton (NJ) 2020, pp. 195-196, 296-300; *sed etiam* Robert J. Delahunty, John Yoo, 'The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them' *Harv. J.L. & Pub. Pol'y* 25 (2002), pp. 487-517; Id., 'Making War' *Cornell L. Rev.* 93 (2007), pp. 123-167.

47 See Amendment XIV, Section 1, Clause 3 of the U.S. Constitution; and see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

the *ius in bello* adopted by the United States Government and by the highest judicial organ of the American system. As regards the former, one witnessed the generalised criminalisation of an entire class of combatants, designated as "unlawful" and thereby placed *hors la loi*. Although the Taliban had initially been recognised as political interlocutors, they were at first denied not only the applicability of the Third Geneva Convention, but also that of Protocol II governing non-international armed conflicts. This decision – legally questionable on both counts – was adopted on the basis of the classification of the conflict as non-international and of the characterisation of the Taliban as "militias". As noted above, the applicability of the Third Geneva Convention to Taliban detainees was subsequently acknowledged, though without recognising them as lawful combatants and therefore as prisoners of war. As a result, the Taliban were consigned to a legal limbo alien to international law, by means of the nebulous and indeterminate classification of "unlawful combatant". A 2006 Act of Congress, the Military Commissions Act of 2006, provided an *ex-post* definition of the legal category of the "unlawful combatant", as:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents and who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaeda, or associated forces); (ii) or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[48]

From this definition, both its circular character and the attempt to evade a traditional definition of war immediately come into view, retreating instead into the vagueness of the term "hostilities", which does not allow the conflict to be fully characterised as international. Accordingly, the statute maintained the inapplicability of the Geneva Conventions, as well as of ordinary and constitutionally mandated habeas corpus guarantees. It was on this latter point that the Supreme Court intervened in *Boumediene v. Bush*[49], declaring unconstitutional the provision of the Act that failed to extend *habeas corpus* protections to foreign nationals suspected of international terrorism.[50] In *Hamdi v. Rumsfeld*, by contrast, the Court reaffirmed the constitutional guarantees of due process for United States citizens detained in connection with the "war on terror"; yet it upheld the legal classification

48 See Military Commissions Act of 2006, 120 Stat. 2600, § 948a. Definitions (1)(i)(ii).

49 553 U.S. 723 (2008).

50 See Section 7 Military Commissions Act of 2006, Sec. 7.

of "unlawful combatant"[51] as articulated in *Ex parte Quirin*.[52] The latter decision, without providing a substantive description of the legal status invoked, merely stated that "unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful".[53] The application of the *Ex parte Quirin* standard – originally formulated in a case concerning saboteurs and clandestine agents operating within the domestic order – can be explained in light of the American citizenship of the Taliban fighter involved. At the same time, the fact that he operated in, and was captured in, Afghanistan, together with the applicability of the *Ex parte Quirin* definition to individuals who lack United States citizenship, raises significant doubts as to whether the Court's conception of the category is grounded more in a criminal-law logic than in an international-law understanding of the notion of an enemy combatant.

What, then, was the underlying premise for the degradation of an armed group integrated into the State – such as the Taliban – into the category of "unlawful combatant", and thus for the blatant violation of the most elementary norms of *ius in bello*? The premise must be sought in a distortion of the *ius ad bellum*, which in turn dragged with it a corresponding distortion of the *ius in bello*. The invasion of Afghanistan was justified as an act of self-defence against a State alleged to be a sponsor of international terrorism and to have provided refuge to the strategists of the 11 September 2001 attacks. Consequently, the aggressor – and thus the violator of Article 2(4) of the United Nations Charter[54] – was not to be identified with the United States, but rather with the Taliban government itself. The latter was thereby placed *hors la loi* twice over: as a State sponsoring terrorism and, in effect, as a terrorist entity; and as an aggressor vis-à-vis the United States. The application of the category of terrorism made it possible to expand the boundaries between peace and war, producing an inherent hybridisation of the law of armed conflict and criminal law that operated in both directions: characterising war as an instrument for repressing criminal conduct, and treating members of the targeted organisation as criminals rather than as lawful combatants or, at the very least, protected persons. Yet this expansion was rendered possible – and effective – by a second element: the characterisation of military force as a means of repressing the

51 *Hamdi v. Rumsfeld* at 10.

52 317 U.S. 1 (1942).

53 *Ex parte Quirin* at 31.

54 See below.

international wrong of aggression. The United States government merely pushed to its extreme consequences the criminalisation of the aggressor, relying, in a legally highly questionable manner,[55] on the right of self-defence under Article 51 of the United Nations Charter.[56]

Although the invasion of Afghanistan was formally characterised as an international armed conflict, the Taliban fighters constituting the army of the Emirate were not accorded prisoner-of-war status. They were instead construed as an "alternative collectivity aimed at dissolving the substantive premises upon which the existence of a legal order rests", bearers of an ideology "incoercible to dialogue"[57], and thus subject to what Günther Jakobs has termed the "criminal law of the enemy (*Feindstrafrecht*)".[58] The enemy was presented as a criminal because both a terrorist and an aggressor. Yet the fundamental premise enabling such a construction was the postulate of a shared membership of aggressor and aggrieved within a unitary legal order, in which the act of aggression is itself conceived as deviant and criminal. It is this that allows the aggrieved party to exercise police-type powers over the aggressor, repressing the unlawfulness of the conduct. The degradation of the enemy combatant – embedded within a State structure – into the perpetrator of a criminal offence so grave as to override the egalitarian guarantees of *the ius in bello* was nothing other than the logical development, carried to its most extreme and radical consequences, of this underlying premise.

2.2 The Ukranian case

The case of the Ukrainian Azov Brigade and Aidar Battalion presents itself in exceptionally simpler terms. As noted above, both units are structurally embedded within the Ukrainian State. What is today designated as the 12th Special Forces Brigade "Azov" is currently incorporated into the 1st Corps of the Ukrainian National Guard "Azov", whereas between 2014 and 2023 it formed part of the 12th Brigade of Operational Assignment of the National Guard of Ukraine. The Aidar Battalion, by contrast, is integrated into the Ukrainian Armed Forces, ini-

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55 See below for a characterisation of the requirements of individual or collective self-defence.

56 See *Letter of John Negroponte to the President of the Security Council*, October 7, 2001; and see below for an brief assessment of the collective right to self-defense.

57 Bartoli, p. 14.

58 See Günther Jakobs 'Diritto penale del nemico' in Massimo Donnini, Michele Papa, *Diritto penale del nemico. Un dibattito internazionale*. Giuffrè Milano 2007, pp. 40 ss.

tially within the 10th Mountain Assault Brigade "Edelweiss", and subsequently within the 5th Separate Assault Brigade "Kyiv". The original peculiarity of both formations – one subordinated to the Ministry of the Interior and the other to the Ministry of Defence – derives from the fact that each emerged from the spontaneous mobilisation of armed volunteers during the 2014 War in Donbas. Yet even under this profile, it is appropriate to draw an initial distinction. Aidar arose within the framework of the territorial defence battalions, voluntary combat units placed from the outset under the direct authority of the Ministry of Defence, but characterised by a broad operational autonomy that frequently bordered on insubordination. As regards the origins of Azov, they are enveloped in a considerably greater degree of obscurity and must be traced to the milieu of paramilitary groups of radically nationalist and revanchist inspiration, marked by neo-Nazi undertones and financed by private actors, which emerged during the protests of the so-called Euromaidan against the Yanukovych government. During the Donbas War, owing to the scarcity of regular troops, the Ministry of Defence authorised the formation of volunteer paramilitary groups, among which the so-called Black Corps constituted the nucleus of what became the Azov Battalion. Only in November 2014, after having taken part in numerous engagements, Azov was formally integrated into the Ukrainian National Guard.[59]

During the ongoing Russo-Ukrainian war, the armed forces of the Russian Federation have adopted a markedly discriminatory policy towards prisoners belonging to these two formations and, apparently, also towards civilians in some way connected to them – for instance, former members. Specifically, following the Russian victory in the battle of Mariupol, twenty-two Ukrainian prisoners of war belonging to Azov and eighteen belonging to Aidar were subjected to criminal proceedings on charges of for countering the so-called special military operation, of participation in a terrorist organisation and of "attempts to overthrow the government" of the Donetsk People's Republic, and were exposed to degrading public treatment. The legal bases for the classification of Azov and Aidar under Russian positive law must be sought in the judgment of the Supreme Court of the Russian Federation of 22 August 2022, which declared Azov a terrorist organisation,[60]

59 See generally Andreas Umland, 'Irregular Militias and Radical Nationalism in Post-Euromaidan Ukraine' *Terrorism and Political Violence* 31 (2019), pp. 105–131; Christian Kaunert, Alex MacKenzie, Adrien Nonjon, *In the Eye of the Storm Origins, Ideology, and Controversies of the Azov Brigade, 2014-2023*. ibidem Press, Hannover 2024.

60 See «ВС РФ признал украинский полк "Азов" террористической организацией» [Supreme Court of the Russian Federation recognized Azov regiment as terrorist organi-

thereby incorporating the decision adopted in 2016 by the so-called Donetsk People's Republic. According to the National Anti-Terrorism Committee of Russia, the designation was justified on several grounds: the alleged threat posed to Russian security through participation in military operations in eastern Ukraine and acts of sabotage in Crimea; the espousal of neo-Nazi and other radical ideological positions; and the commission of conduct characterised as war crimes.[61] Moreover, according to the Organisation for Security and Co-operation in Europe, the defendants were subjected to degrading treatment throughout the proceedings:

> these trials have raised questions as to their fairness, impartiality and independence, and appear to violate a range of IHL rules, including […] including the prohibitions on exposing prisoners of war to public curiosity, on subjecting them to ill-treatment, and on coercing confessions of guilt.[62]

The classification of Azov and Aidar fighters as regular combatants should leave no doubt as to the applicability of the definition of lawful combatant set out in Article 4(A)(1) of the Third Geneva Convention. In particular, with respect to the combatants belonging to the Azov and Aidar units, the potential violation by Russian authorities of Article 85 of the Third Geneva Convention comes into focus, in addition to the previously mentioned provisions of Articles 13, 17 and 99(2). Article 85 provides that "prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[63] The prevailing interpretation of the term "act" is that it encompasses "any conduct – act or omission – that constitutes an offence under the laws of the Detaining Power," with the exception of conduct cov-

zation], Interfax.ru, 2 August 2022.

61 See Maksym Vishchyk, 'Trials of Ukrainian prisoners of war in Russia: Decay of the Combatant's Immunity' *Just security* on August 21, 2023.

62 See the Organisation for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights, *Fourth Interim Report on reported violations of international humanitarian law and international human rights law in Ukraine*, p. 24; on the previous OSCE reports, see Wolfgang Benedek, Veronika Bílková, Marco Sassòli, 'Violations of international humanitarian and human rights law, war crimes and crimes against humanity committed in Ukraine since 24 February 2022. Summary of the Report by a Mission of Experts under the OSCE Moscow Mechanism' *EJIL: Talk! Blog of the European Journal of International Law*, April 19, 2022; Veronika Bílková, Elīna Šteinerte, 'The Moscow Mechanism Expert Report: On the Arbitrary Deprivation of Liberty of Ukrainian Civilians by the Russian Federation' *EJIL: Talk! Blog of the European Journal of International Law*, May 23, 2024.

63 See Article 85 of the Third Geneva Convention.

ered by the so-called "combatant immunity."[64] These latter acts would encompass conduct such as inflicting injury or causing the death of opposing combatants, as well as damaging or destroying enemy military assets, all of which fall within the scope of combatant immunity. By contrast, conduct amounting to unlawful behaviour under international law – including international crimes such as war crimes[65] – and common criminal offences with no nexus to the conduct of hostilities[66] remains fully subject to criminal prosecution. To reasonably assess the commission of international or domestic offences by fighters belonging to the Azov and Aidar groups, access would be required to evidentiary materials that are not presently available to us. Nevertheless, the logic that appears to underpin the proceedings brought against them seems to be of an entirely different nature, namely one directed towards the ideological criminalisation of the combatant, given that "none of these grounds appear to be manifestly invoked by the Russian prosecution."[67]

How, then, is the derogation – and thus the non-application of the rules of *ius in bello* – justified? In this instance as well, one is confronted with a Power which, having invoked an *iusta causa*, considers itself entitled to discriminate among the combatants of the opposing side on the basis of a policing-oriented interpretation of belligerent activity. It is well known that, according to its own government, the Russian Federation is not conducting an interstate war in Ukraine, but rather what it describes as a "special military operation."[68] In this instance as well, the interna-

64 See *International Committee of the Red Cross 2020 Comment*, §3631.

65 See *ibidem*, §3634.

66 See e.g. Manuel Galvis Martinez, 'Defection and Prisoner of War Status: Protection under International Humanitarian Law for Those Who Join the Enemy?' *Canadian Yearbook of international Law/Annuaire canadien de droit international* 57 (2020), pp. 41-88, at p. 83.

67 See Vishchyk.

68 See *Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General*, 24 February 2022; for the legal implications of this concept see generally Olivier Corten, Vaios Koutroulis, 'The 2022 Russian intervention in Ukraine: What is its impact on the interpretation of *jus contra bellum*?' *Leiden Journal of International Law* 36 (2023), pp. 997-1022; James A. Green, Christian Henderson, Tom Ruys, 'Russia's Attack on Ukraine and the *jus ad bellum*' *Journal on the Use of Force and International Law* 9 (2022), pp. 4-30; Michael J. Bazyler, Noëlle Quénivet, Ashot Agaian et alia, *The Russo-Ukrainian War Law Handbook*. Carolina Academic Press Durnham (NC) 2025, pp. 262-266; Masahiko Asada, 'The War in Ukraine Under International Law: Its Use of Force and Armed Conflict Aspects', in Masahiko Asada, Dai Tamada, *The War in Ukraine and International Law*. Springer Singapore 2024, pp. 3-32; Tatsuya Abe, 'Use of Force by Russia and *jus ad bellum*', in *ibidem*, pp. 33-54.

tional-law basis invoked for the conduct of the operation has been grounded in the right of individual and collective self-defence under Article 51 of the Charter of the United Nations. However, the letter addressed to the United Nations Security Council through which the President of the Russian Federation Putin notified the resort to self-defence does not refer to the Ukrainian State. Rather, it invokes, first and foremost, the claim that NATO's expansion into Europe represents "a real threat not just to our interests, but to the very existence of our State and its sovereignty," such as to constitute "for our country […] ultimately a matter of life and death, the question of our historical future as a people."[69] Ukraine, never explicitly mentioned, is implicitly characterised as an "anti-Russia"[70] serving the interests of the United States and NATO, portrayed as its political emanation. Secondly, the letter refers to Russia's alleged alliance obligations towards the two so-called People's Republics of Donbass, obligations said to require Russian intervention in order to halt the crimes against humanity purportedly committed there against the ethnic-Russian population. The reference to the alleged genocide provides the basis for the third pillar of the justification, namely the asserted duty to protect the numerous holders of Russian passports residing in Donbass.

Irrespective of any assessment grounded in political history or international relations, the justification advanced by the Russian Federation clearly illustrates a distortion of the *ius ad bellum* that enables the compression of the guarantees afforded by the *ius in bello*. The military operations are construed, once again, both as a defensive action against an absolute enemy – albeit here confronted only in a symbolic or surrogate form – and as a humanitarian mission directed against criminal elements, namely "nationalist fringe and neo-Nazis […] [who] kill defenceless people, just as members of the punitive units of Ukrainian nationalists and Hitler's accomplices did during the Great Patriotic War."[71] In the view of the Government of the Russian Federation, Russia's "just war" is not directed against the Ukrainian State, nor – still less – against the Ukrainian people as such, but rather against factions portrayed as embodying an absolute enmity, both historical and existential in nature. The *iusta causa* does not permit the *hostis* beyond the border to be regarded as *iustus*, with all that this entails in terms of the discrimination and criminalisation of the enemy.

69 *Letter from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General*.

70 See *ibidem*.

71 See *ibidem*.

2.3 The case of Hamas and other Palestinian "unlawful combatants"

Hamas is a political organisation of radical Islamic inspiration, equipped with a paramilitary wing known as the al-Qassam Brigades, which has governed the Gaza Strip since 2005. Unlike Fatah – the political faction of the Palestine Liberation Organization that preceded Hamas in the administration of this territory – Hamas did not emerge as a patriotic-nationalist movement but as an offshoot of the Muslim Brotherhood. Moreover, unlike Fatah, which exercises control over it, Hamas is not represented within the Palestinian National Authority, the body that nominally administers the West Bank, one of the others Middle Eastern territories claimed by the Palestinian National Authority. Furthermore, only the latter – controlled by Fatah and not recognised by Hamas as a political interlocutor – is represented at the United Nations as the "State of Palestine," holding since 2012 the status of non-member observer state. The legal status of the Palestinian Territories remains contested. On the one hand, they are recognised as a State by roughly fifty members of the international community, while Israel describes them through an intermediate formula as "disputed territories". The sovereignty of the so-called "State of Palestine" is rejected on the basis of the argument that the territories in question did not belong to any sovereign State in 1967 and that Israel exercises military control over the West Bank. This argument entails, among other things, Israel's refusal to apply the Fourth Geneva Convention, notwithstanding that the law of occupation must be implemented as customary international law within administrative practice.[72] On the other hand, this position is not endorsed by the majority of States, which either acknowledge the hybrid nature of the territories as occupied land or go further and recognise Palestine as possessing the attributes of statehood. Moreover, Palestine not only holds observer status at the United Nations General Assembly, as already noted, but is also formally a party to various international treaties – including the Statute of the International Criminal Court.

However, from a strictly legal standpoint, Hamas represents nothing beyond itself. It certainly cannot be regarded as representative of the Palestinian National Authority and, at most, may be said to reflect the interests of the population of Gaza. Even this latter claim is doubtful: although Hamas lawfully secured a majority of seats in the 2006 elections for the Palestinian Legislative Council, it

72 See *Duweikat et al. v. Government of Israel et al.* HCJ 390/79, 10 October 1979; *Beit Sourik Village Council v. Government of Israel* HCJ 2056/04, 29 February 2004; *Mara'abe v. Prime Minister of Israel* HCJ 7957/04, 15 September 2005.

subsequently took political and military control of the Gaza Strip through an armed coup, violently ousting Fatah and thereby severing itself from the Palestinian National Authority. Nevertheless, Hamas alone has developed the military capability necessary to exercise effective control over a portion of the Palestinian territories and to resist – in the sense of being able to inflict concrete harm upon the population and the State of Israel – Israeli claims over one of the areas assigned to Palestinian administration under the Oslo Accords of 1993.[73] Moreover, Hamas, unlike Fatah, has succeeded in obtaining material support from third parties in its struggle, including the Iranian State and other Islamist paramilitary groups such as Hezbollah. This does not amount to legal recognition, but rather to a political-strategic form of support. The militants of Hamas thus present themselves as a particularly clear species of "partisan": characterised by an absolute enmity – of which they are simultaneously the agents and the objects – by a strong territorial rootedness, and by the irregularity of their methods of warfare.

Following the brutal attack perpetrated by Hamas between 7 and 9 October 2023 against the State of Israel – an attack marked by large-scale killings of civilians, hostage-taking, and other grave violations of international humanitarian law – Israel initiated self-defence military operations against what it described as "the Palestinian terror group Hamas", invoking Article 51 of the Charter of the United Nations.[74] Although the formulation of the principle of self-defence in Article 51 appears confined to inter-State confrontation, Israel could rely on a substantial body of precedents in order to invoke it against Hamas – all of which, however, post-date the declaration submitted by the United States in relation to al-Qaeda.[75] Moreover, the Knesset has repeatedly amended the Incarceration of Unlawful Combatants Law[76] and has adopted a special statute – the Death Penalty for Terrorists Law[77] – which reintroduces capital punishment by hanging exclusively for Palestinian

73 See Declaration of Principles on Interim Self-Government Arrangements (Oslo accords), 13 September 1993.

74 See *Identical Letters from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council*, 7 October 2023.

75 See Eric A. Heinze, 'International Law, Self-Defense, and the Israel-Hamas Conflict' *Parameters* 54 (2024), pp. 71-86, at pp. 78-80.

76 See 5762-2002; see Amendment No. 4 and Temporary Order – Iron Swords 5784-2023 of 18 December 2023 (in force from 18 December 2023 to 17 April 2024) and Amendment No. 4 and Temporary Order – Iron Swords 2024 of 18 April 2024 (in force from 19 April 2024 until 1 July 2024).

77 See 5786–2026.

individuals convicted of fatal terrorist offences and who are not Israeli citizens.

The Incarceration of Unlawful Combatants Law, even in its original formulation, defined its *ratione personae* scope as applying to "a person who has either (a) taken a direct or indirect part in hostilities or (b) is affiliated with a force conducting hostile activities against Israel, and who is not a prisoner of war under article 3 of the Third Geneva Convention 1949".[78] The wording is largely obscure. As already noted, the category of the "unlawful combatant" does not exist in international law. Moreover, it is unclear what is meant by "indirect" participation in hostilities, creating a serious tension with the principle of legality. By excluding individuals who cannot be regarded as prisoners of war in non-international armed conflicts, the statute's scope extends, *a fortiori*, to civilians not taking part in hostilities, to fighters who have laid down their arms, to persons *hors de combat* due to wounds, illness, capture or other causes, and above all to members of non-state armed groups who cannot be subsumed under the category set out in Articles 4(A)(2) and 5(2) of the Third Geneva Convention.[79] Specifically, the statute would apply to civilians "who are carrying out the function of a combatant"[80]. This last aspect is particularly significant because, in the absence of an amendment modifying the original conditions of applicability, the statute stands in contradiction with the recognition of the international character of the conflict between Israel "and the terrorist organizations that operate outside Israel"[81] by both the Israeli Supreme Court and the government itself through its reliance on Article 51. Consequently, the statute results in the application, within an international armed conflict, of rules that are typical of a non-international armed conflict and that reflect the repressive logic of internal police powers. Such a condition would require the application of the Fourth Geneva Convention.[82] However, certain provisions of the statute, together with elements of its implementing practice, cast serious doubt on its con-

78 See Unlawful Combatants Law, s.2.

79 Article 45(1)(2) of the Protocol I is, however, not applicable, since Israel has not ratified the Protocol.

80 See *Public Committee against Torture in Israel v Government of Israe*l, HCJ 769/02, 14 December 2006, para 31.

81 See e.g. *A and B v Israel*, Israeli Supreme Court (Court of Appeal), CrimA 6659/06, 11 June 2008, para. 9.

82 With regard to the controversy surrounding the legal regime specifically applicable to Hamas fighters in connection with the recognition or non-recognition of Palestinian statehood, see Jérôme de Hemptinne, 13/11/23'Classifying the Gaza Conflict Under International Humanitarian Law, a Complicated Matter' *EJIL:Talk! Blog of the European Journal of International Law*, 13 November 2023.

formity with the Fourth Geneva Convention, notwithstanding the contrary position adopted by the Israeli Supreme Court[83] and by the statute itself.[84]

In particular, the Incarceration of Unlawful Combatants Law contains no provisions concerning notification, correspondence and visits with detainees' family members, as required by Articles 106, 107 and 116 of the Fourth Geneva Convention, nor does it guarantee access to detainees by the ICRC, as mandated by Articles 76(6) and 143, as well as by ICRC Customary IHL Rule 124. Even more significant is the fact that the statute may give rise to violations of Articles 43(1) and 78(2) of the Convention, which establish the right of detained civilians to have their cases "reconsidered as soon as possible by an appropriate court or administrative board"[85] and a right of appeal "with the least possible delay".[86] In its amended form, however, the statute provides that the detainee must be brought before a district court within 75 days of incarceration, rather than the 14 days set out in the original version – a period already deemed barely sufficiently proportionate to Convention requirements by the Israeli Supreme Court.[87] Finally, the statute may result in a grave breach of international law among the ones listed by Article 147 of the Fourth Geneva Convention and, thus, in a war crime.[88] In fact, the administrative detention of civilians, which is permissible only when "absolutely necessary" for security[89] or "imperative for security".[90] In particular, "the Law fails to adequately regulate the grounds or duration of detention between the apprehension of a person by Israeli forces and the issuing of a temporary detention order once the person is 'brought before' an officer", and fails "to specify on what grounds Israeli forces may detain for the purpose of bringing the person before an officer".[91] The extension of the statute to former participants or affiliates of hostilities "does not

83 See *ibidem*, para. 41

84 See Unlawful Combatants Law, s.1.

85 See Article 43(1) of the Fourth Geneva Convention.

86 See Article 78(2) of the Fourth Geneva Convention.

87 See *A and B v Israel*, para. 41.

88 See Article 147 of the Fourth Geneva Convention: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: [...] unlawful confinement of a protected person."

89 See Article 42(1) of the Fourth Geneva Convention.

90 See Article 78 (1) of the Fourth Geneva Convention.

91 See Ben Saul, 'Gaza Amendments to Israel's "Unlawful Combatants Law" are Inconsistent with International Law' *Opinio Iuris*, 4 August 2025.

illustrate that a person continues to pose a threat to Israel such that their detention is absolutely necessary”,[92] since such a determination would require an individualised and case-specific assessment.

Beyond the imperatives of necessity imposed by the gravity of the situation and by reasons of State, this dilution of the Fourth Geneva Convention’s provisions can be explained by the specific conception of the *ius ad bellum* articulated by Israel. The result is an apparent antinomy. On the one hand, Israel maintains that it is conducting an international armed conflict in self-defence. Yet, at the same time, this conflict does not oppose Israel to another State in a condition of juridical equality and sovereign reciprocity, but rather to a non-state entity. This entity, however, presents two peculiar features whose implications are far-reaching. First, Hamas is not rooted in Israel’s own territory, but in an entity situated within a juridical hybrid – halfway between statehood and a space subject to permanent occupation. Second, although Hamas is indeed a non-state actor, its mode of existence is not assimilable to that of purely civilian subjects; a circumstance that the statute reasonably takes into account in establishing a particularly stringent repressive regime. Consequently, Israel is compelled to reinterpret its ius ad bellum as a police-type operation conducted within a territorial space that is juridically external to it, and directed against actors who are rooted in that space and stand in a relation of mortal enmity towards it. At the same time, however, Israel seeks to repress an assault on its internal legal order by relying on the denial of the enemy’s statehood: in doing so, it effectively forces its adversaries to enter and submit to its own legal system, thereby generating a new form of a criminal law of the enemy, which will become all the more repressive the more intense the enmity.

At this juncture, it becomes necessary to ascertain the manner in which the evolution of the concept of *ius ad bellum* has shaped – and, indeed, reconfigured – the subordinate notion of *ius in bello*, thereby producing a profound paradigmatic transformation within the international legal order. It must, moreover, be recognised that the contemporary crisis of international legality was already present *in nuce* within that very juridical revolution.

3. The ‘Political’ and the State: the classical age of international law

It is first necessary to clarify the conceptual foundations of the argument. The concept of the “partisan” to which reference is made descends from another of

92 *Ibidem*.

Schmitt's conceptualisations, as the subtitle of the work itself indicates: namely, the concept of the *Political*, grounded in the opposition between friend (*Freund*) and foe (*Feind*).[93] It is necessary to dispel a recurrent misunderstanding: Schmitt's concept functions not as a normative standard, but as a hermeneutical schema through which the lineaments of political modernity may be understood. It thus stands alongside that of political theology, which enables one to recognise the features of statehood and of the post-traditional legal order, incapable of grounding its legitimacy in anything other than its concrete position.[94] The concept of the Political, by contrast, allows to discern the principle by which political communities are capable of recognising the foundation of their own unity and relate to one another.[95] For Schmitt, the organised community thereby becomes capable of being eminently political and of recognising in the other a friend to the extent that it is capable of enmity.[96]

The enemy is therefore not configured as an absolute, mortal and existential adversary, but rather as the bearer of a concrete and circumscribed hostility, grounded in a relationship of mutual and sovereign recognition of enmity.[97] Concreteness is an essential element of Schmitt's conceptualisation, which excludes any idealistic or spiritual conception of enmity. The existential nature of conflict does not arise

93 "The specific political distinction to which political actions and motives may be referred is the distinction between friend and foe. It provides a conceptual definition, that is, a criterion, not an exhaustive definition or an explanation of substantive content. […] It is autonomous not in the sense of constituting a new, concrete and particular domain, but in the sense that it is founded neither upon one nor upon several of the other antitheses, nor is it reducible to them. […] It does not, in truth, delineate a specific concrete sphere, but merely the degree of intensity with which human beings associate or dissociate themselves", see Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien.* Duncker und Humblot Berlin 1979, p. 76, 78, 118. The German edition quoted here is the synoptic version etited versions of 1928 and 1933.

94 See Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* [1922]. Duncker und Humblot Berlin 2021.

95 On this respect, see among others Ernst-Wolfgang Böckenförde, 'Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts' in Id., *Staat, Verfassung, Demokratie. Studien zur Verfassungstheorie und zum Verfassungsrecht*. Suhrkamp Verlag Frankfurt a. M. 1991, pp. 281–302.

96 Schmitt 1963, p. 93.

97 "He is simply the other, the foreigner; and it suffices for his very essence that he be, in an existential and particularly intensive sense, something other and alien, such that, in the extreme case, conflicts with him may arise which cannot be resolved either through any predetermined normative framework or through the intervention of a 'disengaged' and therefore 'impartial' third party", see Schmitt 1932, p. 78, 80.

from abstraction, but from "a concrete conflictuality […], whose extreme consequence is the friend–foe grouping (manifested in war and revolution), and [these concepts] become empty and lifeless abstractions once this situation ceases to exist."[98] The friend–foe distinction therefore does not advance any normative claim.

In juridical modernity, the institution that proved capable of assuming upon itself the burden of the friend/foe distinction was the State. It was able to identify the friend/foe polarity as "the decisive human grouping" (*maßgebende menschliche Gruppierung*)[99] that is, as the configuration capable of grounding sovereignty upon the legal order. This was possible insofar as it succeeded in recognising and subsequently neutralising its own internal foe – namely, the class and confessional pluralism – thereby establishing its sovereignty. The concept of the State itself is the product of a specific historical conjuncture that can be traced to the completion of the secularisation of the medieval legal order. It is therefore not entirely correct to speak of "States" when referring to pre-modern political organisations. The proper concept of the State arises from a precise historical and cultural context and is inseparable from that of sovereignty, for it is only with the State that the latter acquires a meaning distinct from the mere designation of complex relations of lordship. It is indeed the State that became the bearer of a legitimacy that was immanent rather than transcendent, finding its fulfilment in the plenitude of normative competence.[100] Thus, the concept of sovereignty itself must be situated and understood within its historically concrete dimension: "sovereignty may be described as the criterion of the State".[101] The State assumed the one of fundamental

98 Schmitt 1932, p. 92.

99 Schmitt, 1932, p. 118.

100 It is at this point that the pulsating core of the concept of sovereignty becomes discernible, freed from the superstructures generated by the various declensions attributed to it throughout modern and contemporary history. The holding of sovereignty requires unity in the claim to a monopoly of law and, above all, in the claim to a monopoly over law. For an order to be sovereign in a concrete sense, it cannot recognise a divided sovereignty, the priority of a competing legal order, or the originary character of a juridical claim – whether hierarchically superior, subordinate, or merely external – to the one it asserts. See, among others, Olivier Beaud, *La Puissance de l'État*. Presses Universitaire de France Paris, 1994; Helmut Quaritsch, *Staat und Souveränität*. Vol. 1: *Die Grundlagen*. Athenäum Verlag Frankfurt a. M. 1970, pp. 259, 266.

101 See Dietrich Murswiek, *Die verfassunggebende Gewalt nach dem Grundgesetz für die Bundesrepublik Deutschland*. Duncker und Humblot Berlin 1978, p. 165. Historically, the State presented itself as the guarantor of unity and as the agent of neutralisation in relation to the politicisation of pluralism within legal orders, estates, and – perhaps above all – religious confessions, thereby generating in turn the politicisation of indi-

prerogative of sovereignty: the *ius belli*, whose development was shaped by the internal neutralisation it had effected.[102] In fact, the post-Westphalian States neutralised the medieval concept of the just war[103] and gave themselves a new *Nomos*,

vidual consciousness in its private projection. Likewise, the distinction between public law and private law attains "its full completion with the separation between State and society in the nineteenth century" and does not coincide "either with the distinction between jus publicum and jus privatum in Roman law (…) or with medieval distinctions such as that between *mallus publicus* and *privata audientia*", see Otto Brunner, 'Moderner Verfassungsbegriff und mittelalterliche Verfassungsgeschichte' *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 14 (1939), pp. 513-528. For the development of the concepts of State and sovereignty, see Beaud, pp. 27-198; Werner Conze, Reinhart Koselleck, Görg Haverkate et alii, 'Staat und Souveränität', in Brunner, Conze, Koselleck 1982, pp. 1-154; Quaritsch; Dieter Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs*. Berlin University Press Berlin 2009; Diego Quaglioni, *La sovranità*. Laterza Bari-Roma 2004.

102 "To the State, as a substantively political unit, there pertains the *jus belli*: that is, the real capacity to determine, in given cases and by virtue of its own decision, the foe and to wage war against him", see Schmitt 1927, p. 129; for the corresponding sovereign prerogative to conclude peace and thereby bring enmity to an end, see Ulrich Scheuner, 'Die großen Friedensschlüsse als Grundlage der europäischen Staatenordnung zwischen 1648 und 1815' [1964] in Id., *Schriften zum Völkerrecht*. Duncker und Humblot Berlin 1984, pp. 349-378, especially pp. 371-378.

103 As Antoine Pillet observed, the morality of the legal title to wage war became "a pure question of personal conscience", see Antoine Pillet, *Les Conventions de La Haye du 29 juillet 1899 et du 18 octobre 1907, étude juridique et critique*. A. Pedone Paris 1918, p.1. This was indeed the understanding shared by a large part of the jurists of the classical period of international law: Gentili, Vattel, van Bynkershoek. Moreover, it does not appear correct to ascribe Grotius to the supporters of the concept of just war, since "unlike the Spaniards the Dutch jurist makes 'just' war equivalent to 'solemn' war; he interprets justice in terms of formal requirements set by natural law or *ius gentium* and adhered to by belligerents", see James Turner Johnson, *Ideology, Reason, and the Limitation of War. Religious and Secular Concepts 1200-1740*, Princeton University Press Princeton (NJ) 1977, p. 232. The thesis of a "Grotian tradition of international law" grounded in the preservation of the pre-modern concept of just war, still cherished by the Spanish scholastics, must therefore be rejected; see Joseph Kunz, 'Bellum Iustum and Bellum Legale' *American Journal of International Law* 45 (1951), pp. 528-534; Georg Dahm, *Völkerrecht* [1958-1969]. Bd. II De Gruyter Berlin 1998, p. 340; Yehuda Melzer, *Concepts of Just War*, A.W. Sijthoff Leyden 1975, pp. 13, 114; Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte*. Nomos Verlag Baden-Baden 1984, pp. 254-259; for the contrary view, see Cornelis van Vollenhoven, *Grotius and Geneva*. E.J. Brill Leida 1926; Hersch Lauterpacht, 'The Grotian Tradition in International Law' [1946] in Id., *International Law. Being the Collected Papers of Hersch Lauterpacht*. Vol. II: *The Law of Peace*. Part. I: *International Law in General*. Cambridge University Press Cambridge 1975, pp. 307-365.

distinct from that of the *respublica christiana*[104], which found in polarity a neutral, concrete and non-transcendent criterion.

This criterion was grounded, on the one hand, in the internal political neutralisation effected by the State, upon which its externally recognised claim to sovereignty rested, and, on the other, "in the real possibility of conflict," which made it possible to conceive war not as "the aim and purpose, or even the content, of politics," but as its "presupposition."[105] This situation came to reach its peak with the stabilisation of the classical phase of the doctrine of international law,[106] which Wilhelm Grewe, in his fascinating historical periodisation, identifies with the "British era" of international law (1815-1914)[107]. Following the radical conceptual

104 The term *respublica christiana* is employed by Schmitt and by other authors to denote, in a necessarily simplifying sense, the political structure of the entire European Middle Ages from the imperial foundation of Charlemagne on-wards, and it is used in that same sense here. Its conceptual scope, however, must be circumscribed to the representation of the spiritual unity of the medieval political oikoumene, bearing in mind that "the term entered common us-age only in the late Middle Ages and served as an emblem of a community of Christian rulers and peoples conceived as equals, and as an antithesis to the universal monarchy of the [Holy] German Empire," and that it was subsequently popularised through the notion of the "Christian nation," formally articulated for the first time in Article II of the constitutive treaty of the Holy Alliance concluded in Paris in September 1815; see Quaritsch, p. 51, n. 30. Moreover, the poet Novalis had already anticipated the ideal recuperation of this late-medieval notion in his *Die Christenheit oder Europa* (1799).

105 Schmitt 1932, p. 98, 106.

106 See Grewe, p. 679; see also Stephan Verosta, 'Die Geschichte des Völkerrechts' in Alfred Verdross, *Völkerrecht*. Springer Verlag Wien 1964, pp. 63-68.

107 See Grewe, pp. 499-676. For more ordinary periodisations of the history of international law, see Arthur Nussbaum, *Concise History of the Law of Nations*, McMillan New York 1947, which, however, is marked by an excessive Western-centric predisposition; Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*, Cambridge University Press Cambridge-New York 2001, which is distinguished by its sociological orientation and by its particular attentiveness to the history of ideas, while but temporally limited; but see also Ernst Wolgast, *Grundriß des Völkerrechts*. Vol. 1: *Allgemeine Grundlagen*, Wissenschaftliche Verlagsanstalt K.-G. Hannover 1950, pp. 72-85; Bruno Paradisi, *Civitas Maxima. Studi di Storia del Diritto internazionale*. Olschki Firenze 1974; Stephan Verosta, 'Regionen und Perioden der Geschichte des Völkerrechts' *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* 30 (1979), pp. 1-12; and the most recent José Maria Beneyto Pérez, *Historia del Derecho Internacional Público. Una aproximación global*. Tecnos Madrid 2022. For a periodisation more closely aligned with that proposed by Grewe, see Wolfgang Preiser, 'Völkerrechts-Geschichte', in Hermann Kunst, Siegfried Grundmann et alii, *Evangelisches Staatslexikon*. Kreuz Verlag Stuttgart-Berlin 1975, pp. 2823-2826, and Karl-Heinz Ziegler,

transformations of the Spanish phase (1494-1648) and the subsequent consolidation in the French one (1648-1815)[108], the act of waging war came to be configured as a sovereign right of States (*freedom to wage war*, *liberté de guerre*, *compétence de guerre*, *Kriegsfreiheit*), and as an exclusive prerogative of their will[109]. It was a sovereign legal entitlement, grounded in the recognition of the juridical equality of States themselves[110] and indifferent to the correctness of the legal title invoked.

More important than the formal legitimacy of the legal claim on the basis of which war was undertaken became the procedural characteristics of war itself. In this now decidedly old-juridical conception, war could validly be regarded "as an arm of the law"[111] or, more precisely, as a factual condition operating within the

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Völkerrechtsgeschichte. C.H. Beck München 2007. It is worth recalling that Grewe's work first saw the light, in its original form, in 1941 as his *Habilitationsschrift* at the Albertus-Universität Königsberg. Although intended for publication, the copies were lost during the Allied bombardments. In an entry dated 16 October 1948 in his *Glossarium*, Carl Schmitt – who knew Grewe as a student of Ernst Forsthoff and through his writings on the legality of the Nuremberg process – remarked: "he is now the first German scholar in international law. This is not only an achievement and a task, but also a situation. May Heaven grant that all good spirits assist him."; see Carl Schmitt, *Glossarium. Aufzeichnungen aus den Jahren 1947 bis 1958*. Duncker und Humblot Berlin 2015, p. 154. The unfortunate editorial circumstances allowed the young scholar to embark upon a distinguished diplomatic career and to rework the text over the following decades, culminating in its publication in 1984. A 2000 English-language edition, prepared by Michael Byers under Grewe's own supervision, extends the analysis to cover developments in international law during the final decade of the twentieth century.

108 See Grewe, pp. 163-498.

109 See *inter alii* Henry Wheaton, *Elements of International Law with a Sketch of the History of the Science*. Carroll Lea Blanchard Philadelphia 1836, p. 274; Théophile Funck-Brentano, Albert Sorel, *Précis du droit des gens*. Paris Plon 1877, p. 497.

110 An international law treatise of the late nineteenth century summarised the point as follows: "both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights", see William Edward Hall, *A Treatise on International Law*. Clarendon Press Oxford 1880, p. 52, n. 4.

111 Hersch Lauterpacht, *Lawrence Oppenheim's International Law. A Treatise*. Vol. II: *Disputes, War and Neutrality*. Longmann Green & co. London-New York, 1952, p. 177. Lauterpacht's definition does not appear entirely convincing, for it necessarily connects the exercise of the State's power to wage war with the protection of a right of the State presumed to have been violated: a notion that seems overly bound to the idea of just war. Lauterpacht acknowledged, moreover, that in the classical conception war could also constitute a legitimate instrument for altering the international order, not dissimilar to a revolution on the domestic plane; see *ibidem*, p. 179. On the other hand, Lauterpacht himself affirmed that "war is not a condition of anarchy indifferent or hostile to law, but subject", see *ibidem*, p. 301.

juridical orbit and regulated by it,[112] if not indeed as a fully juridicised procedure for the settlement of disputes between States.[113] Within this context, the reciprocal influence and interdependence of the *jus ad bellum* and the *jus in bello* becomes apparent.

The *ius ad bellum* presents itself as a sovereign prerogative of States, as the juridical recognition of a factual possibility. Within the framework of this conception of war as a highly rationalised legal procedure, the correctness of the formal declaratory requirements of the state of war replaces the juridical or moral legitimacy of the claim concretely asserted through armed force.[114] The formulary origin of declarations inaugurating hostilities is of considerable antiquity. In its earliest manifestations, it was closely associated with the chivalric ceremonial of the *lettre de défi* (*entsang Brief* or *ontzegbrief*), through which the parties formally established a condition of mutual enmity and renounced any existing bonds of

112 See Carl Lueder, 'Krieg und Kriegsrecht im Allgemeinen' in Franz von Holtzendorff, *Handbuch des Völkerrechts*. Vol. 4: *Die Staatsstreitigkeiten und ihre Entscheidung*. Verlag von F.J. Richter Hamburg 1889, pp. 174–194, p. 176; John Westlake, *International Law*. Vol. II: *War*. Cambridge University Press Cambridge 1907, especially pp. 52-59; Josef Kohler, *Grundlagen Des Volkerrechts. Vergangenheit, Gegenwart, Zukunft*. F. Enke Verlag Stuttgart 1918, p. 171.

113 See Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt*. C.H. Beck Nördlingen 1869, p. 510; Robert Phillimore, *Commentaries upon international law*, Vol. II. Butterworths London 1885, p. 77; Hall, p. 51; Augustus von Bulmerinq, *Das Völkerrecht oder das internationale Recht*. J.B.V. Mohr Freiburg i. B. 1887, p. 92; *sed contra* Lauterpacht 1952, p. 202. This concept was carried to its extreme consequences by Erich Kaufmann, who sought to recognise in the quasi-procedural dimension of war the instrument through which the right of the stronger party could emerge. War would therefore not be "a cessation of the legal order, but the only conceivable final proof of right within a coordinated legal system"; see Erich Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus. Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriff*. Mohr Siebeck Tübingen 1911, p. 179. For a similar equation between the assertion of force and the assertion of right through war, see also Adolf Lasson, *Das Kulturideal und der Krieg*. Deutschen Bücherei Berlin 1868, pp. 153, 179, 198.

114 There was, in this phase as well, no shortage of conceptions of the law of war that appealed to a limiting principle of legitimacy. One may think, for example, of the notion of "jural war" coined by the British Lorimer, who advanced an interpretation admitting armed conflict exclusively as the consummation of the annexation of a territory already socially and economically drawn into the sphere of domination of a State. The only legally admissible war, for Lorimer, was thus the concluding procedure of economic colonisation; see James Lorimer, *The Institutes of the Law of Nations. A treatise of the jural relations of separate political communities*. Vol. 2. Blackwood and sons London 1884, pp. 18, 25.

alliance.[115] In the French and Spanish periods, the *opinio iuris* and the practice of States remained markedly ambiguous.[116] Yet, with the nineteenth-century consolidation of a juridical-procedural conception of belligerent hostilities, the declaration of war (together with the ultimatum) progressively came to acquire constitutive significance as the lawful formal expression of the *animus belli*. This understanding was, at the level of positive law, subsequently incorporated into Article 1 of the 1907 Third Hague Convention on the Opening of Hostilities, which codified the requirement that hostilities be preceded by an explicit and authoritative notification.[117]At the same time, the regulation of the subjects to whom the armed conflict may extend becomes central. From this latter perspective, classical doctrine confines the perimeter to States and their agents, not to ordinary citizens.[118] It thus becomes necessary to specify the content of the *ius in bello* and, consequently, the material features that the conduct of this juridical procedure must assume. Following the classical determination coined by Friedrich Berber, *ius in bello* assumes the character of "restrictions upon war imposed by international law upon belligerents with regard to the use of the means by which to prevail, defeat, overpower, or disarm the enemy, which constitutes the effective objective of war," and of "temporal […] and spatial limitations on the employment of the means of warfare," as well as of a norm concerning the juridical guarantees of such restrictions.[119] In short, it was a matter of realising Grotius's *temperamenta belli*.

115 On occasion, such instruments also opened the possibility of a limited confrontation, or even a strictly personal duel between leaders or champions – an option made conceivable by the concrete, personalised conception of power characteristic of medieval legal thought; see Jan Hendrik Willem Verzijl, *International Law in Historical Perspective*. Vol. 9-A: *The Laws of War*. Sijthoff & Noordhoff Alphen aan den Rijn 1978, pp. 58-59.

116 Between 1700 and 1800, only ten formal declarations of war can in fact be identified. Among jurists, Grotius and Vattel regarded such declarations as possessing constitutive importance, whereas Cornelis van Bynkershoek considered them to have merely contingent, and by no means necessary, value; see Verzijl, pp. 59 ss.

117 See Article 1 of the Third Ague Convention.

118 This thesis, typical of the continental European doctrine of international law, had already been formulated by the French prize judge Portalis in 1801. *A fortiori*, the Hague Conference of 1907 limited the obligations of neutrality to the governments of States alone, and not to individuals. It is worth contrasting this with the characteristically Anglo-Saxon conception of the law of war which – shaped by maritime custom and by the political centrality of commerce – viewed hostilities as extending to every subject of the enemy; see Grewe, pp. 628-629; Lauterpacht 1952, p. 205.

119 See Friedrich Berber, *Lehrbuch des Völkerrechts*. Bd. II. *Kriegsrecht*. C.H. Beck, München 1962, p. 64.

It is to this phase in the development of international law that there can be traced, in particular, an initial formal regulation favourable to the *levée en masse* and to *Kleinkrieg*, as well as to the treatment of prisoners of war. As regards the *levée en masse*, a delicate balance was struck between, on the one hand, the right of the civilian population of an invaded State to organise its own defence, insofar as the territory in question had not yet been invaded, and, on the other, the right-duty of the occupying power to guarantee its own security and the public order of the occupied territory.[120] More significant, however, was the inclusion – already in the preamble to the Second Hague Convention on the Laws and Customs of War on Land (1899), and then taken up with slight modifications in the Fourth Hague Convention concerning the Laws and Customs of War on Land and the annexed Regulations (1907) – of the so-called "Martens Clause". The latter, devised and elaborated by the delegate of the Russian Empire, Professor Friedrich von Martens, established the general extension to belligerents and civilian populations of the protection of "the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."[121] Naturally, beyond the humanitarian impetus that emerges from the treaty clause, the central issue lies in its necessary discriminatory nuance: the application of these additional juridical guarantees was made to depend, as far as armed groups engaged in a conflict were concerned, upon their

120 See Article 2 of the Fourth Hague Convention, today Article 4 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949); already in Articles 9–11 of the Brussels Declaration on the Codification of the Laws of War (1874). In this connection, the juridical distinction between "invasion" and "occupation" of territory by the enemy is of particular relevance. In the former case, the right of the civilian population of an invaded State to organise its own defence is guaranteed without limitation; in the latter, it is presumed that the occupying power is capable of establishing an administration able to impose itself and to safeguard public order, including for the protection of the civilian population; see Lauterpacht 1952, p. 259. According to Lauterpacht, the occupying administration acquires the position of a *locum tenens*, thereby almost guaranteeing sovereign continuity between successive occupants of a given territory; see *ibidem*, p. 346. This is supported by the rule that the occupant may not modify local laws, as set out in Article 43 of the Fourth Hague Convention and today in Article 64 of the Fourth Geneva Convention, save where such laws constitute a threat to its security or an obstacle to the application of the Convention. The norms on the *levée en masse*, in an age of asymmetric and technologically intensive warfare, may appear obsolete. Yet the moral force and reactive capacity of peoples subjected to a war of aggression – even in the most recent events – do not deserve to be consigned to the dust of history.

121 See Preamble of the Second Hague Convention and Preamble of the Fourth Hague Convention.

juridical qualification as "belligerents". This qualification underwent an important development in Article 1 of the Fourth Convention. It extended – through a notorious formula – the applicability of "the laws, rights, and duties of war" also to "to militia and volunteer corps fulfilling the following conditions: 1. to be commanded by a person responsible for his subordinates; 2. to have a fixed distinctive emblem recognizable at a distance; 3. to carry arms openly; and 4. to conduct their operations in accordance with the laws and customs of war."[122] Consequently, the juridical status of combatants belonging to armed groups not formally incorporated into the State's armed forces was formally recognised, provided that they satisfied the hierarchical-organisational criteria typical of statehood and adhered to the codes of military honour and chivalry. In short, these non-state combatants were accorded juridical relevance to the extent that they were concretely capable of conforming to the juridical and ethical codes of statehood.

As regards the treatment of prisoners of war, with the exception of certain contradictory decrees of the French National Assembly during the era of the Revolutionary Wars[123], it was the object of partial conventions between States throughout the nineteenth century. The earliest modern formulation of such a clause can be considered Article 24 of the 1785 Treaty of Amity between the United States and the Kingdom of Prussia. Binding normative instruments, however, required waiting for the Brussels Convention of 1874 – which produced only a non-binding declaration – and, above all, for the Second and Fourth Hague Conventions.[124] These, in Articles 4 to 20, addressed the definition of the protected juridical status of the prisoner of war and, among other matters, the regulation of detention. The punitive character of the latter was definitively abandoned, being instead qualified as a mere precautionary measure. According to Berber's definition, "the prisoner

122 See Article 1 of the Fourth Hague Convention.

123 See Verzijl, pp. 96-97. For an analysis of the ideological origins of the National Assembly's decrees that criminalised the wartime enemy and that construed war as "une croisade de la liberté universelle", in Brissot's words, see Roman Schnur, 'Weltfriedensidee und Weltbürgerkrieg 1791/92' [1963] in Id., *Revolution und Weltbürgerkrieg. Studien zur Ouverture nach 1789*. Duncker und Humblot Berlin 1983, pp. 11-32; Grewe, pp. 485-498.

124 The 1907 Fourth Hague Convention, unlike its 1899 predecessor, is understood by Lauterpacht not as a work of general codification, but rather as a mere declaratory restatement of the relevant rules of customary international law. This appears to have been the interpretation adopted by the International Court of Justice in the so-called Corfu Channel case, see *United Kingdom v. Albania*, Judgment, 1948 I.C.J. 15 (Mar. 25).

of war became the holder of an inalienable juridical right vis-à-vis the captor,"[125] comprising humane treatment, the protection of his private property of a non-military character, maintenance, and parity in terms of salary and juridical treatment with the soldiers of the enemy Power. The applicability of the "Martens Clause" to actors falling outside the Convention also remained firmly established.

From the foregoing summary, it becomes apparent that the material constitution of the international legal order in the classical age of international law was that of a system fundamentally centred upon statehood that is, upon the reciprocal recognition of sovereign powers, including the sovereign prerogative freely to wage war, and upon the willingness to extend legal recognition and guarantees to those entities that conformed to the then-prevailing canons of statehood. The reciprocity underpinning the recognition of legitimate international actors, of *iusti hostes*, played a pivotal role in this structure. As Friedrich Berber observed, the *ius in bello* responded not solely to humanitarian considerations but also to imperatives of military rationality – imperatives grounded in mutual reliance on the reciprocity of treatment.[126]

Naturally, like any material constitution, that of the classical age operated through forms of exclusion. The principal outsiders to the structure of public international law were precisely those actors deemed foreign to the then-categories of statehood: namely, peoples and nations considered outside the circle of so-called "civilized nations", as well as insurgents and *franc-tireurs*. A brief consideration of the latter two categories is in order. Their exclusion from the guarantees typical of the ius in bello followed directly from the notion that only States were capable of validly waging war. It was therefore necessary to acknowledge their legal incapacity to exercise a *ius ad bellum*. Thus, the hostile acts of insurgents and *franc-tireurs* could be understood merely as criminal deviations from the internal legal order, or as cowardly assaults upon the mutuality of recognition that existed between combatants. In particular, the legal qualification of insurgents as legitimate belligerents was made to depend upon their formal recognition. Such recognition was conditioned upon the existence of a generalised state of hostilities – thus excluding merely localised rebellions – upon the occupation and administration of a determinate portion of territory, upon observance of the laws of war, and upon the practical necessity for a third State to define its own position.[127] It was therefore required

125 Berber 1962, p. 152.

126 Berber 1962, pp. 62-63.

127 See *inter alii* Lauterpacht 1952, pp. 209, 248, which reflects the *opinio iuris* in this re-

that insurgents possess the capacity to present themselves as autonomous political actors, endowed with an internal organisation and with the ability to determine their external relations. Failing this, recognition by a third State would amount to an unlawful intrusion into the *domaine réservé* of another State, infringing its sovereign exercise of police powers.[128] In any event, recognition by third States would not bind the State toward the insurgents' hostilities were addressed.[129] The situation of the *franc-tireurs* and other irregulars operating against the occupying State was even more tragic, and their assimilation to ordinary criminals was taken for granted.[130] They could therefore be assimilated to the position of a national of a third State who, in time of peace, had committed acts of violence on foreign territory. The only difference being that, in the latter case, jurisdiction could fall under the civil courts of either State, whereas the *franc-tireur* would be subject to the military jurisdiction of the occupying Power.[131] At most, they could seek to rely on a formal authorisation issued by their government: the will of the State remained the sole valid criterion of recognition.[132] To conclude: the material constitution of

spect as articulated by Vattel, Bluntschli and Westlake; Berber 1962, pp. 7, 163-165; Giorgio Balladore Pallieri, *Diritto bellico*. Cedam Padova 1954, p. 35.

128 See Lauterpacht 1952, p. 250, especially n. 2; Josef Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht*. W. Kohlhammer Stuttgart 1928, p. 192.

129 A particularly interesting legal dilemma arose in connection with events during the First World War, which saw insurgents incorporated into the armed forces of certain belligerents. In the case of soldiers of the so-called Polish *Armée bleue*, commanded by General Józef Haller and integrated into the French army, the Permanent Court of International Justice held that their recognition by the Entente Powers could not be invoked against Germany; see *German Interests in Polish Upper Silesia (Germ. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7 (May 25).

130 Grewe formulates a rather curious observation concerning the tendency of naval Powers to characterise the naval forces of insurgents as "pirates", irrespective of any recognition by third States or of the degree of their organisation. Upon insurgents possessing naval forces there was thus imposed the most infamous stigma of the agent *hors la loi*, thus demonstrating the fundamentally political character of the concept of piracy; see Grewe, pp. 672-676 see also Carl Schmitt, 'Der Begriff der Piraterie' [1937] in Id., *Positionen und Begriffe im Kampf mit Weimar– Genf– Versailles 1923–1939* [1940]. Duncker und Humblot Berlin 2014, pp. 274-277; Filippo Ruschi, *Il mare, il pirata, il diritto. Una ricerca di filosofia del diritto internazionale*. Pacini Modena 2020.

131 See Berber 1962, p. 7, which conveys a striking and rather intriguing observation by Treitschke concerning the Freikorps Schill, operating after the conclusion of the armistice with Napoleonic France, and another by President Jefferson on the phenomenon of private war.

132 This was the practice followed by States at least since the Franco-Prussian War. A paradigmatic instance was the case decided by the French Court of Cassation in 1947 con-

the international order accorded political standing solely to the State and to those actors capable of assimilating themselves to it. Insurgents and irregulars remained irretrievably excluded, thereby confirming that the prerequisite for the application of the *ius in bello* is invariably tied to the prior recognition of the *ius ad bellum*.

4. Towards the dethronement of the State from its sovereign prerogative to wage war

For a radical shift of paradigm in international law to occur, a new conceptual pair had to be introduced – one expressive of the emerging configuration, then still in the process of consolidation, of the material constitution of the international legal order. This refers to the appearance, in the aftermath of the First World War of the figure of political armed partisan and of a widespread tendency in favour of both the outlawry of war. This new conceptual pair, wholly foreign to classical international law, dismantled its very structure and thereafter advanced in tandem throughout legal history.

The Schmittian partisan, as previously defined, crystallises only at the end of the First World Warn– "concluded as a global civil war of revolutionary class enmity".[133] At that point, the armed irregular emancipated himself from a merely tactical-operational designation and assumed a distinctly political stature, grounded in the logic of absolute enmity. Novel figures thereby entered the battlefield, through whom the friend–foe polarity underwent a qualitative intensification in the mutual denial of the other's existential right.[134] Thus the 'Political' encountered the 'partisan'. Both partisan and his enemy slipped beyond the reciprocal relation sustained by the rationality of the State and became, symmetrically, object and subject of discrimination. This marked the beginning of the erosion of the post-Westphalian *Nomos* – the *Nomos* of statehood – as armed conflict became saturated with existential drama and the struggle for existence. Such a transformation required the

cerning two German nationals prosecuted for intelligence with the enemy on French territory in the absence of any formal authorisation; see *In re Friess and Ronnenberger* (Cour de cassation (Chambre criminelle), 17 April 1947).

133 Schmitt 1963, p. 96.

134 "In enmity, the one who has been deprived of his rights seeks his right. In it he finds the meaning of the matter and the meaning of law when the shell of protection and obedience that he has hitherto inhabited breaks apart, or when the normative fabric of legality, from which he had previously expected law and legal protection, is torn. At that point, the conventional game comes to an end", see Schmitt 1963, p. 92.

passage of a *Sattelzeit*, inaugurated by the Bolshevik Revolution and by the alignment of the irregular fighter with a philosophy of history.

The figure of the partisan – the irregular combatant not fully subsumable under the category of statehood – was still not adequately protected by the *ius in bello*. For such protection to arise, the State had first to be dethroned from its position of predominance as the sole legitimate subject of the international order, sovereign in its unfettered authority to wage war. It was in this direction that a peculiar alliance was forged between the depoliticising impulse towards the outlawry of war and the highest expression of political intensity, the "partisan": an alliance destined to alter permanently the material constitution of the international legal order. However, this merely contingent alliance – one dependent upon a very specific historical context – was destined to reveal the fragility of its own premises.

The political and intellectual movement aimed at removing the *ius ad bellum* and transforming it into *ius contra bellum*[135] has ancient origins, which must be sought in the American reflection on international law. It was only with the conclusion of the Great War that this movement began to take shape within positive law. As Camilo Barcia Trelles wrote,

> with regard to the North American tendency in favour of 'The outlawry of war' […], two origins may be identified, one proximate and the other remote; to put it more precisely: it was born with the independence of the United States and was affirmed as a consequence of the European war.[136]

The underlying thesis sought to devise the legal instruments capable of ensuring world pacification and of constituting a terrestrial unity open to free exchange, within which States might act in the peaceful guarantee of their own interests and thus be neutralised.

This thesis converged with the typically Anglo-Saxon conception – anchored in natural-law jurisprudence, which in those very decades experienced an unexpected

135 See Lothar Kotzsch, *The Concept of War in Contemporary History and International Law*. E. Droz Genève 1956, p. 96.

136 Camilo Barcia Trelles, *Doctrina Monroe y Cooperacion Internacional*. Mundo Latino Madrid 1931, p. 497; for commentary on Barcia Trelles, see Juan Pablo Scarfi, 'Camilo Barcia Trelles on the Meaning of the Monroe Doctrine and the Legacy of Vitoria in the Americas' *European Journal of International Law* 31 (2020), pp. 1463–1475; on Barcia Trelles influence on Carl Schmitt, see José Maria Beneyto, 'Camilo Barcia Trelles on Francisco de Vitoria: At the Crossroads of Carl Schmitt's Grossraum and James Brown Scott's "Modern International Law"' *European Journal of International Law* 31 (2020), pp.1477–1492.

renoveau both in international law and in constitutional thought[137]– that the only admissible form of belligerent violence was 'just' war. That is to say, war directed towards the protection of a legitimate legal claim against an adversary who, through his conduct, had placed himself *hors la loi*. In confirmation of the constant historical parallelism and reciprocal influence which, for Grewe, characterises the development of doctrines and regimes of constitutional law and international law, it may be observed that the renewed appreciation for natural law within twentieth-century legal science extended also to the latter. This occurred in Europe at least from Alfred Verdross's *Verfassung der Völkerrechtsgemeinschaft* (1923) onwards, the work that marked his departure from the early value-neutral positivism of the Vienna school, perhaps anticipating Hans Kelsen's own crossing "onto the terrain of a supra-positive conception (*überpositive Auffassung*) of law".[138] Particularly significant, in the search for a supra-positive foundation of international law, were the theories advanced in Europe by Georges Scelle[139] and then by Anglo-Saxon authors: Lauterpacht, Fischer-Williams and, above all, James Brown Scott.[140] In

137 It seems superfluous, in this context, to dwell on the influence of the natural-law *renouveau* especially on the constitutional codifications immediately following the Second World War – most notably the Italian and, above all, the German constitutions. This *renouveau* had heterogeneous cultural origins: partly in the varied reaction against value-neutral legal positivism; partly in the updating of the Thomist and Protestant natural-law traditions; partly in an erroneous historical understanding of the juridical phenomenology of totalitarian regimes, in which Radbruch's legal-philosophical conversion undoubtedly exercised a legitimating influence; on this last point, see the most recent Rodrigo Borges Valadão, *Rechtspositivismus und Nationalsozialismus. Entstehung, Widerlegung und Überwindung der Positivismuslegende*. Duncker und Humblot Berlin, 2024; on the self-understanding of post-war German legal science in natural-law terms, see Lena Foljanty, *Recht oder Gesetz. Juristische Identität und Autorität in den Naturrechtsdebatten der Nachkriegszeit*. Mohr Siebeck Tübingen 2013; for an interesting contemporary discussion of the natural-law influence on post-war German legal scholarship, see Hans-Ulrich Evers, 'Zwischen Naturrecht und Rechtspositivismus. Bericht über einige Neuerscheinungen' *Juristen Zeitung* 7 (1964), pp. 237–240; for Radbruch, see of course Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' *Süddeutsche Juristenzeitung* 5 (1946) pp. 105–108.

138 Ulrich Scheuner, 'Naturrechtliche Strömungen im heutigen Völkerrecht' [1960] in Scheuner, pp. 99–158, at 134.

139 Indebted to Léon Duguit's sociology of the legal fact, Scelle did not turn to the rediscovery of a juridicity axiomatically superior to positive international law, but rather to the primacy of individual legal relations between subjects belonging to different national orders; cf., e.g., Georges Scelle, 'Le Concept de Société Internationale. Ses conséquences en technique juridique' *Revue de droit international* 1 (1935), pp. 3-21.

140 See Grewe, pp. 711-714.

each of these authors there emerged the need to overcome, in favour of a unitary legal foundation transcending the will of States, the state-centred positivism that typified a dualistic conception of the international order.[141] In parallel, those theories of law that, rejecting the state-centred conception of sovereignty, sought to recognise – within a normativist framework – a legal order in the international system superior to that of the States, and from which the latter would derive their formal-legal legitimacy, acquired increasing significance.[142] Each of these authors was an authoritative interpreter of the juridical *Zeitgeist* oriented towards the overcoming of statehood, and furnished the political movement for world unity and the outlawry of war with the intellectual instruments that made it possible to construct a legal edifice endowed with claims to unity. Moreover, they all converged on one point: the illegitimacy of the State's claim to a sovereign right to wage war, and the juridical validity of "just war", albeit articulated upon different normative grounds.

However, for the idea that had originated on the "great island" beyond the Ocean[143] to take its first steps within positive international law, the horrors of the First World War were required, together with the expansion of the system of international relations beyond the spatial boundaries that had characterised it until then, ultimately encompassing – through a process of partial democratisation of the international order – all the "peace-loving nations of the world".[144] A first step

141 See e.g. Heinrich Triepel, *Völkerrecht und Landesrecht*. C.L. Hirschfeld Leipzig 1899.

142 See Hugo Krabbe, *Die Lehre der Rechtssouveranitat. Beitrag zur Staatslehre*. Wolters Groningen 1906; Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*. J.B. Mohr Tübingen 1920.

143 The reference is to Admiral Mahan's geopolitical doctrine, which exercised a penetrating and enduring influence on the self-representation that Americans, in the first decades of the last century, fashioned of their own position in the world. It is worth noting that Alexander Hamilton, already in *Federalist No. 8*, hoped that the young Republic might enjoy the benefits typical of an insular reality. Distance from Europe and its conflicts would free the Union from the need to maintain a permanent army, to the advantage of the liberty of its citizens – both in the sense of emancipation from onerous fiscal burdens and from the regime of control associated with militarisation. Strictly speaking, the insular nature of the United States is here not yet the seal of a universalist projection, but rather the reflected image of the political utopia to be founded and territorially rooted.

144 This was the expression employed by President Wilson during his address to the U.S. Congress of 8 January 1919, in which he formulated the famous Fourteen Points. Similar expressions – aimed at expanding as far as possible the number of nations admitted into the *societas maxima* then being pacified and constructed – may be found in Article 1 of the Covenant of the League of Nations ("The High Contracting Parties, In order to promote international co-operation and to achieve international peace and security…"), in the preambles of the Briand–Kellogg Pact (the contracting parties being "deeply sensible

towards the compression of the States' *ius ad bellum* was taken by the Covenant of the League of Nations. Its Preamble required of the contracting parties "the acceptance of obligations not to resort to war",[145] and whose Articles 12, 13 and 15 prescribed an elaborate arbitral procedure for the settlement of "disputes likely to lead to a rupture".[146] Moreover, Article 16 of the Covenant introduced a first derogation from the principle – firmly rooted in classical international law – according to which a neutral State was under no obligation to sever commercial or financial relations with a belligerent State. Indeed, the Article provided that:

> Should any Member of the League resort to war […] it shall ipso facto be deemed to have committed an act of war against all other Members of the League. These Members hereby undertake immediately to break off all trade or financial relations, to prohibit all intercourse between their nationals and the nationals of the Covenant-breaking State, and to prevent all financial, commercial or personal communications between the nationals of that State and the nationals of any other State, whether a Member of the League or not.[147]

In effect, the Covenant thus resembled more a treaty of alliance than the constitutive instrument of a juridical community, instituting a first form of criminalisation of the State that contravened it. By failing to resort to the arbitral procedures for the settlement of disputes, the belligerent State would assume upon itself the stigma of anti-juridicity, placing itself *hors la loi*. No less radical was the novelty of extending the condition of belligerency not only to State organs but also to private individuals, thereby incorporating into the constitutional structure of the international legal order a principle of conduct foreign to the classical European-continental statehood international law. Article 16 likewise introduced a regime of sanctions – economic and, where necessary, military – thereby articulating for

of their solemn duty to promote the welfare of mankind" and "hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavour") and of the Saavedra-Lamas Pact, concluded in 1933 within the framework of the Inter-American Conventions for the Consolidation of Peace (the contracting parties being adhering to "the effort that all civilised nations have made to further the spirit of universal harmony"), and in the protocol adopted by the Buenos Aires Conference of 1936 (the contracting parties being willing "to assure the bene fits of peace in their mutual relations with all the nations of the earth").

145 See Preamble of the Covenant of the League of Nations.

146 See Article 12(1) of the Covenant of the League of Nations.

147 See Article 16(1) of the Covenant of the League of Nations.

the first time the concept of collective self-defence.[148] Moreover, Article 17 extended the applicability of these provisions to States that were not members of the League of Nations. The principle of sovereign equality thus suffered an initial rupture. War undertaken in violation of the Covenant could no longer be conceived as a clash between equals, but as a confrontation between subjects whose juridical claims differed qualitatively – even without going so far as to interpret the sanctions regime as a fully-fledged instrument of international police power within the closed community of contracting States.[149]

Subsequently, more serious attempts were undertaken to move beyond the mere resort to arbitral settlement of disputes and to anchor within the international legal order a genuine outlawry of war. The earliest efforts in this direction may be traced to the draft Treaty of Mutual Assistance discussed within the League of Nations in 1923 and rejected owing to persistent British opposition; to the Preamble of the never-adopted 1924 Geneva Protocol for the Pacific Settlement of International Disputes; and to a resolution adopted by the General Assembly of the League of Nations at the initiative of the Polish delegation in 1927. Regional or bilateral treaties that prohibited the use of armed force among the contracting parties must be mentioned as well.[150]

However, what decisively marked what Berber so aptly termed the "soteriological turn of international law"[151] was the Kellogg–Briand Pact, concluded in Paris on 27 August 1928. The initiative originated with the French Prime Minister Briand, who addressed an appeal to the American people – an appeal in fact drafted by Columbia University Professor James T. Shotwell – "in which the theme of

148 See below.

149 This appears to have been Georges Scelle's understanding, inasmuch as he conceived the provisions of the Covenant as establishing a general competence to intervene for the protection of the life and property of every individual, including the subjects of the aggressor State; see Georges Scelle, *Précis du droit des gens. Principes et systématique*. Vol. 2. Sirey Paris 1934, pp. 13, 31.

150 See Article 2 of the Treaty of friendship between Persia and the Soviet Union (1921); Article 2 of the Treaty of Mutual Guarantee between Belgium, France, Germany, Great Britain and Italy (part of the Final Protocol of the Locarno Conference, 1925); Article 1 of the Treaty of friendship between France and Romania (1926); Article 3 of the Soviet–Lithuanian Non-Aggression Pact (1926); Treaty of friendship between France and Yugoslavia (1927). Particularly significant, however, was a treaty which, for the first time, made the illegality of the ultimatum flow directly from their violation; see Article 1 of the Soviet–Polish Non-Aggression Pact (1932).

151 Fritz Berber, *Sicherheit und Gerechtigkeit. Eine gemeinverständlichliche Einführung in die Hauptprobleme der Völkerrechtspolitik*. Carl Heymanns Verlag Berlin 1934, p. 27.

the renunciation of war was proposed as the subject of a bilateral agreement."[152] The United States accepted the French proposal, but conditioned its acceptance on the multilateral enlargement of the agreement. It was therefore not to be a treaty of alliance between two friendly Powers, but a foundational instrument for the formal constitution of world peace. The Pact, originally ratified by fifteen and then by sixty-three States, recognised in its Preamble that "the time has, come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated".[153] Consequently, recourse to armed force for the exercise of the State's sovereign will was rejected in favour of "pacific means" for the settlement of disputes. Articles 1 and 2 further specified, respectively, the renunciation of war "for the solution of international controversies" and "as an instrument of national policy", and the undertaking to compose divergences between States by peaceful means.[154] It is significant that the Pact excluded recourse to war only as an instrument of national policy. Two consequences follow. First, implicitly, the Pact had to amount to a renunciation of aggressive war: the legitimacy of resorting to armed force in self-defence "does not constitute an exception to the ban on war laid down by the Pact, but its logical consequence."[155] In reacting to unlawful aggression – to an unjust war – the attacked State would be entitled to defend itself legitimately against an illegitimate enemy, an *iniustus hostis*. This principle was made explicit by Secretary of State Kellogg in the United States Note of 23 June 1928.[156] Second, although common sense might have suggested otherwise,[157] nothing excluded recourse to war as an instrument of international policy, to be understood, however, as a means of repressing the unjust aggressor.[158] In this sense, moreover, the

152 Ennio Di Nolfo, *Storia delle relazioni internazionali*. Vol. I: *Dalla pace di Versailles alla conferenza di Potsdam* [2015]. Laterza Bari-Roma 2023, p. 83.

153 See Preamble of the General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact, 1928).

154 See Article 1 and 2 of the Kellogg-Briand Pact (1928).

155 Berber 1962, p. 37.

156 Quoted in Bernhard Roscher, *Der Briand-Kellogg Pakt von 1928. Der „Verzicht auf den Krieg als nationaler Politik"im völkerrechtlichen Denken der Zwischenkriegszeit*. Nomos Verlag Baden-Baden 2004, pp. 279-280.

157 See Berber 1962, p. 38.

158 From this perspective, it is worth considering the introduction of a kind of new, global Monroe Doctrine through the proposal advanced by the United States at the Inter-American Conference held in Lima in 1938, namely, the conclusion of a treaty establishing a collective power of intervention for the protection of security and democratic constitutional institutions throughout the Western Hemisphere.

reservations entered by certain States to the Pact are telling. The United Kingdom introduced a reservation concerning the exercise of war in regions of the globe of "special and vital interest" to the British Crown.[159] The United States, for its part, considered the Monroe Doctrine to be encompassed within the concept of legitimate self-defence.[160] Consequently, it appears legitimate to affirm that certain major Powers interpreted the Pact as sanctioning a legal discrimination against any State that violated their territorial integrity or the integrity of those regions of the globe falling under their influence. These latter territories would, in effect, be absorbed into the jurisdictional orbit of such Powers; and thus, the use of armed force in those areas would not be regarded as an act of aggression, but rather – de facto – as an exercise of police power. As one historian of international relations has remarked, "in crude terms, one might say that the treaty was a conscious deception carried out by the protagonists of power politics."[161] Yet it has been rightly observed that the Pact of Paris inaugurated a new chapter of human history. This was not so much because it succeeded in "catalysing the human-rights revolution,"[162] but because it "dethroned war as an international prerogative of the sovereign State"[163], thus altering "the global configuration of international law".[164] With the Briand–Kellogg Pact, war did not cease to be a possibility within the life of the law;[165] rather, its juridical status was brought within the orbit of anti-juridicity, wrested from the sovereign prerogative of States. A State that resorted to war – an *aggressor* State – would place itself outside the sphere of civilised and peace-loving nations. This condition was reinforced by the predominantly moral pathos animating the text of the Pact, in contrast to the more eminently procedural tenor of the Covenant of the League of Nations. It is not by chance that Hans Wehberg described it as the "definitive break with the classical doctrine of *iusti hostes*."[166]

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159 See Lauterpacht 1952, p. 186; Grewe, p. 729.

160 See Lauterpacht 1952, p. 186.

161 Di Nolfo, p. 84.

162 Oona A. Hathaway, Scott J. Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World*. Simon and Schuster New York 2017, p. XV.

163 Lauterpacht 1952, p. 192.

164 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* [1950]. Duncker und Humblot Berlin 1974, p. 255.

165 This had been the thesis advanced by several eminent jurists; among others: Antonio Sánchez de Bustamante y Sirvén and Hans Wehber; see Lauterpacht 1952, p. 183, n. 4.

166 Hans Wehberg, *Krieg und Eroberung im Wandel des Völkerrechts*. Metzner Verlag Frankfurt a. M.-Berlin 1953, p. 44; *sed contra* Josef Kunz, 'The Laws of War' *American Journal of International Law* 50 (1956), pp. 313-337.

It is therefore unsurprising that authors writing in the early years of the United Nations Charter continued to regard the Briand–Kellogg Pact as a fundamental source of international law – indeed, as superior to the UN Charter itself, both because it had by then become part of customary international law[167] and because, unlike the 1945 Charter, it contained no right of withdrawal.[168] The historical significance of the Briand–Kellogg Pact could be appreciated only *ex post*,[169] as an ideal milestone in the evolution of international law, for its structure was marked by numerous *lacunae*, exacerbated by the mounting polarisation of world affairs. The reservations entered by the United Kingdom and the United States already weakened an otherwise sparse normative framework. The Preamble's reference to the procedural settlement of disputes did not establish a genuine legal obligation, nor did the Pact provide sanctions for its breach, save for its non-applicability to the aggressor State during hostilities. Most serious of all, however, was the absence of any typified definition of "aggression".[170] Without an international organ competent to determine it, the qualification of conduct was left to the authoritative and discretionary judgment of individual States.[171] Where, then, were the boundaries between "aggression" and "self-defence"?

As historical events amply demonstrated, neither the Covenant of the League of Nations, nor the Kellogg–Briand Pact, nor – still less – the various regional and

167 Lauterpacht 1952, pp. 195-196; Berber 1962, p. 40.

168 Lauterpacht 1952, pp. 195-196. Formally, the Pact of Paris remains in force, but it may be regarded as having been superseded by Articles 2(4) and 51 of the United Nations Charter.

169 In fact, even the jurists most sceptical of the outlawry of war paid only limited attention to the Pact of Paris, especially when compared with the far greater doctrinal energy invested in the ill-fated Geneva Protocol of 1924; see e.g. Berber 1934, p. 108, who confines himself to noting the Pact's inherently ambiguous formulation; Schmitt 1950, p. 255.

170 An attempt to typify the notion of aggression as a form of military attack was, however, undertaken in the Convention on the Definition of Aggression concluded on 3 July 1933 between the Soviet Union, Afghanistan, Persia, Poland, Turkey, Romania, Estonia and Latvia. A similar definition was elaborated that same year by the Security Questions Committee of the Disarmament Conference. The Nuremberg Tribunal, by contrast, adopted the definition formulated by United States Secretary of State Webster in 1840 in connection with the so-called *Caroline affair*.

171 See Lauterpacht 1952, pp. 186 ss. As early as 1933, Lauterpacht had exposed the inherent contradiction between this interpretative scheme and the purposes of the Pact, arguing that a discretionary determination by States of the existence of aggression could be tolerated only where a genuine *periculum in mora* was present; see Hersch Lauterpacht, *The Function of Law in the International Community*. Oxford University Press Oxford 1933, pp. 41-50.

bilateral treaties concluded in the interwar period proved capable of restraining the States' will to power. What, then, were their concrete effects upon the constitutional structure of the international legal order? They delivered a decisive blow to the displacement of the *ius ad bellum* from the international legal order, which was thereby denied as a prerogative of States. This introduced what Carl Schmitt – through a controversial formulation – described as the "discriminatory concept of war (*diskriminierenden Kriegsbegriff*)", consisting in the attraction of the State that had undertaken the unilateral act of resorting to war into the sphere of international illegality.[172] Such a State would not merely forfeit the benefits of treaty membership; it would place itself outside the international order altogether. This, however, presupposed the existence – largely fictitious – of a closed, autonomous and unitary international legal order within which the use of armed force could be reconceived as an enforcement function of international law. Yet the absence of a typified definition of aggression, together with the eminently political and discretionary nature of the concept itself, soon led to a dramatic confrontation between competing and irreconcilable claims. The possibility of collective legal intervention against the offending State thus transformed itself into the assertion of a value-laden prejudice against the deviant subject, a prejudice ultimately dependent upon the concrete consensus of each belligerent State within the international community. The immediate effect was the discrediting of the traditional rules of the *ius ad bellum*, beginning with the declaration of war, which was increasingly circumvented in order to evade the Damoclean sword of illegality.[173] Parallel to this development, attempts were made to strengthen the guarantees of the *ius in bello*.[174] However, as Grewe observed, it "was subordinated to the *ius contra bellum*, and the principle upon which it rested – namely, the juridical equality of all States – was called into question".[175] The full contradiction inherent in this paradigmatic shift would emerge only later, within contemporary international law.

172 See Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* [1938]. Duncker und Humblot Berlin 2007.

173 Berber, p. 41, Grewe, p. 731, in reference to the Japanese aggressions against China, the war in Ethiopia, the conflict between Peru and Colombia (1932-1933, the so-called *Leticia War*), and the Second World War.

174 This refers to the Convention relative to the Treatment of Prisoners of War, ratified at Geneva in 1929 by forty-seven States upon the invitation of the Swiss Government. It incorporated Articles 4 to 20 of the Fourth Hague Convention of 1907.

175 Grewe, p. 732.

5. The "partisan" and the outlawry of war

Far more than either the Covenant of the League of Nations or the Kellogg–Briand Pact, it was the Second World War that constituted the *Wendepunkt* in the history of contemporary international law.[176] That conflict superseded the older conception – still retained by Clausewitz – of war as a duel between States, and became, simultaneously, both absolute and total (*absolutem oder gar totalem Krieg*)[177]. It was absolute (*bellum legibus absolotum*) insofar as it was conducted in disregard of the norms of international law; and it was total in that it entailed: the mobilisation of all human, spiritual and material resources of the belligerents; the universalisation of the confrontation, not merely in geographical terms but through the involvement of every sector of collective life; the radicality of a "struggle for survival, to the last drop of blood, ending either in victory or annihilation, without compromise; [in which] the demand for unconditional surrender replaces the armistice and the peace treaty".[178] The Second World War imposed itself as a war of absolute enmity, if not as the projection onto the international plane of the ideological civil war that had been simmering across Europe in the preceding decades. It is no coincidence that it witnessed the massive participation of national resistance movements against the Axis powers, engaged in an uncompromising political struggle for the defence of their own sovereign existence and of mutually incompatible anthropological conceptions. In a word, the Second World War marked the definitive passage of the partisan from a figure of military tactics and colonial insurgency to an agent of the historical struggle for existence.

Up to and including the War, the partisan remained legally trapped within the categories of the *franc-tireur* or the colonial insurgent, or some hybrid thereof. During the Second World War, the partisan, was subjected to severe discrimination by the Axis Powers, that was extended also to those individuals who, although legally incorporated into the enemy's armed forces, performed functions of political direction of a highly ideological character, as the Commissar Order (*Kommissarbefehl*) attests.[179] Only thereafter – partly owing to the significant role played by

176 See Grewe, p. 749.

177 Berber 1962, p. 14.

178 Berber 1962, p. 15.

179 See Richtlinien für die Behandlung politischer Kommissare, F. H. Qu., den 6. 6. 1941. It is significant that the troops of the France libre – save for the arbitrary exception of those soldiers originating from Alsace-Lorraine, which had been incorporated into the German Reich – were accorded the status of lawful combatants as from 1942, owing to the pres-

resistance movements in certain war theatres – the legal praxis begin to admit the possibility of juridical recognition of the partisan. Even so, the primacy of statehood did not fully recede. The Nuremberg Military Tribunal continued to regard resistance movements as knowingly exposed to the risks of repression by the occupying Power,[180] whereas domestic and special military courts tended to adopt a more favourable stance.[181] In addition to the three requirements laid down in Article 1 of the Fourth Hague Convention, a further decisive criterion was, in this instance as well, the existence of an authorisation issued by the legitimate government of the country to which the members of the resistance belonged, and the circumstance that they acted under its direction.[182] In any event, the right of captured partisans to receive a fair trial, in accordance with the principles of law common to civilised nations, remained firmly upheld.[183]

The world order generated by the global conflict found institutional expression in the establishment of the United Nations and in its constitutive Charter. It was an international order whose material constitution consisted in the compromise struck among the victorious Powers, within which a reciprocal recognition of ideological

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sure exerted by the International Committee of the Red Cross; see Charles Rousseau, *Droit international public*. Sirey Paris 1953, p. 557.

180 See *United States of America v Wilhelm List and Others (Hostages Case)* (Judgment of 19 February 1948) Trials of War Criminals Before the Nurem-berg Military Tribunals under Control Council Law No 10, vol XI, pp. 56-59, 75: "We are obliged to hold that such *guerrillas* were *francs tireurs* who, upon capture, could be subjected to the death penalty. Consequently, no criminal responsibility attaches to the defendant List because of the execution of captured partisans […]. Technically, not lawful belligerents are not entitled of protection as prisoner of wars when captured."

181 See e.g. *P. v. Carl Bauer et al* (Permanent Military Tribunal at Dijon, 1945); *In re Hoffmann* (Højesteret, 1948*); In re von Lewinski (called von Manstein)* (British Military Court at Hamburg, 1949); *In re Rauter*, (Bijzondere Raad van Cassatie, 1949); but see also *In re Bruns and Others* (Høyesterett, 1948).

182 See e.g. *Smulders et Piccinati v Société Anonyme "La Royale Belge"* (Tribunal de Liège, Belgium, 1943); *Van Hoeve de Freyer v Fire Insurance Company* (Hoge Raad, Netherlands, 1947), two damage claims that depended on whether the actions of the Dutch and Yugoslav resistance movements were to be treated as acts of war and therefore not insured. Lauterpacht correctly observed that the weight accorded to the authorisation of resistance movements by governments-in-exile made it possible to break the equation between the occupation of a country and its final *debellatio*; see Lauterpacht 1952, pp. 213-214.

183 See e.g. *In Re Bruns*; *United States of America v Wilhelm von Leeb and Others (High Command Case)* (Judgment of 27 October 1948) Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, vol XI.

irreducibility and antagonism was tacitly acknowledged. This material constitution was reflected, first and foremost, in the catalogue of foundational purposes set out in paragraph 2 of the Charter's Preamble. To the more perceptive observers, these appeared vague, resistant to the articulation of determinate standards or unequivocal value-commitments[184], thereby producing only a fictive representation of unity that concealed the coexistence – and competition – of mutually antithetical systems of international law.[185] Even more clearly, the compromise-laden nature of the post-war international order is revealed in the structure of the Security Council, governed by Article 24 of the UN Charter and entrusted with "the primary responsibility for the maintenance of international peace and security"[186]: a structure in manifest tension with the principle of the sovereign equality of States proclaimed in Article 1 of the same Charter.

It was, however, precisely this compromise that made it possible to engrave the outlawry of war into the positive law of the international order. Article 4(1) of the Charter already introduced, as a positive criterion for admission to the international community, the condition of being a "peace-loving State". This was an indeterminate criterion, one that even lent itself to interpretations capable of denying admission to the United Nations to States unable to defend themselves and thus incapable of safeguarding both the international order and their own existence against threats to the peace.[187] It is not by chance that contemporary practice favours unconditional acceptance, subject always to the principle – originating in the so-called Stimson Doctrine – that any alteration of territorial sovereignty obtained through violence must be regarded as null and illegitimate. Yet this criterion made it possible to elevate peace to a standard of civilisation and to a ground of discrimination for entry into the community of States. Its discriminatory nature emerged even more clearly during the Cold War, when it was employed to exclude from the United Nations those States deemed excessively aligned with one of the two mutually hostile Great Powers.

Furthermore, Article 2(4) of the Charter marked a decisive advance beyond the

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184 See Alfred Verdross, 'Die Wertgrundlagen des Völkerrechts' *Archiv des Völkerrechts* 4 (1953), pp. 129-139. It is highly significant that Boris Meissner identified an additional deficiency in the absence of substantive content within the statute of the international community: namely, the lack of a concrete spatial anchoring, without which its political character could not be effectively realised; see Grewe, p. 759.

185 See Grewe, p. 759.

186 See Article 23(1) of the Charter of the United Nations.

187 Wilhelm Wengler, *Völkerrecht*. Vol. 2. Springer Verlag Heidelberg-Berlin 1964, p. 1322.

tendency towards the outlawry of war already discernible in the Covenant of the League of Nations and in the Paris Pact.[188] The advance beyond the earlier instruments on the outlawry of war is made evident, first, by the explicit reference to the mere threat of aggression[189]; secondly, by the reference to the use of force, which closes the loopholes previously afforded by the absence of a formal declaration of war[190]; and, finally, by the clause concerning incompatibility with the Purposes of the United Nations, which confines the legitimate use of force to a purely repressive measure directed against a State that has contravened the prohibition. Legitimate force thus becomes configured as a modality of policy that is always reactive and repressive in relation to a violation of the international legal order. Moreover, Chapter VII of the Charter established a mechanism for assessing the gravity of threats and determining the measures to be adopted – no longer left to the discretionary judgement of individual States, but entrusted to a superior organ, the Security Council.[191] Further confirmation of tendency towards the outlawry of war is found in the exception set out in Article 51, which governs the inherent right of individual and collective self-defence as the sole permissible form of non-authorised use of force.[192] Yet even the earliest doctrinal reflections admitted the possibility of anticipatory self-defence, provided that the State was confronted with an instant and overwhelming necessity[193], or with a direct and immediate danger, or that the attack was already underway, or, again, that there existed certainty of an imminent atomic strike[194]. According to Berber's more restrictive interpretation, such recourse would be permissible only insofar as the Security Council had un-

188 See Article 2(4) of the Charter of the United Nations. I t provides that "Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

189 See Grewe, p. 783.

190 See Berber 1962, p. 41. Further, according to Lauterpacht the ultimatum ought reasonably to be regarded as obsolete, since in cases of collective action or self-help it would be supplanted by warnings and resolutions; see Lauterpacht 1952, p. 297. It may further be observed that the formula "renunciation of the use of force" was already contained in the Atlantic Charter of 1941; see Grewe, p. 783, n. 1.

191 See Articles 39-51 of the Charter of the United Nations.

192 See Article 51 of the Charter of the United Nations.

193 See Derek W. Bowett, *Sel-Defence in International Law*. University Press Manchester Manchester 1958, p. 187.

194 See Dahm, p. 415.

dertaken no action, or such action was manifestly insufficient.[195]

What conclusions may be drawn from this articulation? First, that the act of war properly so-called – and thus illegitimate – is solely that of aggression, whether concrete or merely threatened. A new concept of *bellum legale* was thereby affirmed: no longer a juridical procedure for the settlement of international disputes placed within the sovereign discretion of States, but a juridical procedure of repression directed against violations of positive international law. The defence of the international order, threatened by aggression, whether actual or incipient, against one of its members, thus becomes the *iusta causa* of contemporary legality.[196] The aggressor, however defined, would thereby place itself dramatically outside the international legal order. It is not accidental that Berber interpreted collective recourse to self-defence as an indiscriminate entitlement available to every member of the international community.[197] Yet, he observed, such a development would, in the name of international solidarity, transcend the friend–foe polarity, which nonetheless constitutes the criterion of the political; thereby revealing the tendency towards neutralisation and depoliticization inherent in the idea of a unitary order that has elevated peace to a discriminatory standard.

It is instructive to observe the reaction of contemporary European-continental legal scholarship to the paradigm shift just described. The heirs of the great European juridical tradition found themselves in a state of manifest disorientation as they attempted to reconcile the outlawry of war with the foundational principles of sovereign statehood. Balladore Pallieri opted to characterise it as "a special juridical condition" that alters the ordinary international legal order – namely, the order of peace – and thus a condition not prohibited by international law, lawful insofar as it is preceded by the manifest formalisation of the animus belli and capable of giving rise to certain legal effects (among which the applicability of the *ius in bello*).[198] Verdross, rejecting the circularity inherent in a legal formalism grounded in the declaration of a state of war, chose instead the sparse qualification of "a state

195 See Berber 1962, p. 45, n. 3. Nevertheless, the most restrictive position on self-defence was advanced by Antonio Cassese, who categorically excluded the possibility of resorting to it in a preventive form; see Antonio Cassese, *International Law*. Oxford University Press Oxford-New York 2001, p. 310.

196 See Grewe, p. 787.

197 Friedrich Berber, *Lehrbuch des Völkerrechts*. Vol. 3: *Streiterledigung. Kriegsver verhütung. Integration*. C.H. Beck, München 1964, p. 110.

198 Balladore Pallieri, pp. 3-14.

of inter-State violence (…) which results in the rupture of peaceful relations".[199] Berber preferred to rely on the notion of a "special legal order" arising from the suspension of the ordinary one by military force.[200] A position closely aligned with this latter thesis was formulated by Friedrich August von der Heydte, for whom war constituted the very state of exception (*Ausnahmezustand*) of international law and, consequently, the ius in bello represented the typical law of that specific juridical sphere generated by the suspension of the preceding and ordinary order. He added: "whether the old norms will return into force after the end of the state of emergency is a question that can only be decided on a case-by-case basis".[201] One may say that von der Heydte – drawing somewhat opportunistically upon Schmitt's formula – fully grasped the epochal significance of the last war: the decline of an old international order and the emergence of a new one. By contrast, Anglo-American legal scholarship understood the question of the juridical definition of war far more clearly: it could be conceived, quite simply, as an international crime.[202]

The second aspect concerns the scope of application of Article 2(4). The prohibition of the use and threat of force pertains solely to States, which are thereby dethroned from the employment of armed force externally. Implicitly preserved, therefore, was the use of organised violence internally – the *domaine réservé* of States. As one author wrote, "brute force cannot therefore be employed to interfere with the internal sovereignty or foreign policy of other States."[203] However, the confinement of the prohibition on the use of belligerent violence solely to the external projection of State power encompassed a far deeper dimension. By refraining from criminalising civil war and revolution, it effectively preserved "a gate to a legally permissible form of warfare"[204], thereby opening for the partisan a passage into the realm of international legality.

The international order honoured its alliance with the partisan primarily through a profound reform of the *ius in bello*. This reform reflected, first and foremost, the humanitarian demands that led to its requalification as "international humanitarian

199 Verdross 1964, p. 432.

200 Berber 1962, p. 3.

201 Friedrich August von der Heydte, *Völkerrecht. Ein Lehrbuch*. Vol. 2. Kiepenhauer und Witsch Köln-Berlin 1960, p. 194.

202 See Lauterpacht 1952, p. 217.

203 Dahm, p. 199.

204 See Berber 1962, p. 42.

law".[205] Yet it also mirrored an awareness of the decisive role played by resistance movements during the Second World War, as well as of the role that other irregular movements would come to assume in the global *Kleinbürgerkrieg* that unfolded in the second half of the twentieth century. Reference is made, in particular, to the adoption of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, which partly recodified and largely supplemented and elaborated the pre-existing ius in bello. Their provisions most relevant to the qualification of lawful combatants and prisoners of war have already been examined *supra*. It is, however, important to recall that the definition of a lawful combatant in an international armed conflict under Article 4(A)(2) of the Third Convention was extended to members of organised resistance movements that satisfied the conditions set out therein; that the humanity criteria contained in the common Article 3 to all four Conventions were to apply both in international and in non-international armed conflicts; and, finally, that the Fourth Convention established a detailed regime governing the treatment of the civilian population during international armed conflicts. Moreover, Protocol I, in addition to enshrining the principles of proportionality and the prohibition of indiscriminate attacks, conferred legal status upon the combatants of national liberation movements, whereas Protocol II provided a more extensive regulation of non-international armed conflicts.

At long last, the partisan – the irregular fighter of civil war – had obtained juridical recognition and protection through the compression of the States' right to wage war, being acknowledged as a legitimate bearer of international juridicity. Yet this recognition rested upon the fragile compromise that underpinned the post-war international order. It was a compromise grounded in the reciprocal acknowledgment, by the two Great Powers of the bipolar world of their restrained hostility and of the need to confine war outside their respective spheres – precisely where the partisan could still operate and assert his right to existence.

6. Conclusion

The fragility of an international order conceived and neutralised in this manner became apparent once competitive bipolarism came to an end and the international system could finally present itself as fully unified, grounded in a shared political and juridical consciousness and in a common set of rules.

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205 See Emily Crawford, 'The Terminological Architecture of Jus in Bello: Law, Language and Warfare' *Articles of War*, 17 February 2026.

At that point, the institutions of the UN-centred outlawry of war found themselves largely emptied of their original rationale and revealed the discriminatory risks latent within them. The instrument of collective self-defence was readily transformed into a mechanism for pursuing the international repression of States deemed responsible for human-rights violations under the formula of humanitarian intervention.[206] Preventive self-defence, moreover, often lost its character as a safeguard of sovereignty and of the State's right to existence. The most reasonable contemporary interpretation of Article 51 of the U.N. Charter is that preventive self-defence is admissible only where an attack has already begun or is on the verge of commencing, and the burden of proof lies with the State that intends to invoke it.[207] Yet it came to be interpreted as permitting a State that perceived itself as threatened to intervene even in the absence of the requirements of necessity and proportionality, and – in the case of Afghanistan – even in the absence of any imputability link between the aggression or threat of aggression and the decision to resort to self-help. In short, Article 51 disclosed a meaning made possible only by the end of bipolarism, namely the meaning, already glimpsed by an older author, of "allowing the reinterpretation of genuine aggressive war as defensive war".[208] From this perspective, the international-policing character assumed by intervention operations also becomes apparent. The various forms of military intervention have increasingly assumed the character of restoring a violated international order vis-à-vis the actual or alleged aggressor, now recast as an international criminal. In this way, the outlawry of war has been inverted into its very opposite. What was originally conceived as an instrument of pacification has become the legal title for asserting the sovereign right of States to project power externally, albeit under the protective mantle of the *iusta causa* of international repression directed against an *iniustis hostis*. This torsion of the *ius ad bellum* has forcefully spilled over into

206 Otto Kimminich, 'Der Mythos der humanitären Intervention' *Archiv des Völkerrechts* 33 (1995), pp. 430-458; See Dietrich Murswiek, 'Souveränität und humanitäre Intervention. Zu einigen neueren Tendenzen im Völkerrecht' *Der Staat* 35 (1996), pp. 31-44; Stefan Oeter, 'Humanitäre Intervention und die Grenzen des völkerrechtlichen Gewaltverbots – Wen oder was schützt das Völkerrecht: Staatliche Souveränität, kollektive Selbstbestimmung oder individuelle Autonomie?', in Herfried Münkler, Karsten Malowitz, *Humanitäre Intervention. Ein Instrument außenpolitischer Konfliktbearbeitung. Grundlagen und Diskussion*. Verlag für Sozialwissenschaften Wiesbaden 2008, pp. 29-64; Christian Tomuschat, 'Humanitäre Intervention – ein trojanisches Pferd?, in *ibidem*, pp. 65-88.

207 See Dietrich Murswiek, 'Die amerikanische Präventivkriegsstrategie und das Völkerrecht' *Neue Juristische Wochenschrift* (2003), pp. 1014-1020.

208 Berber 1962, p. 11.

the *ius in bello*. Indeed, as early as 1952, Lauterpacht had already celebrated this development:

> Insofar as war has ceased to be a right […] fully permitted by international law, an illegal war, i.e. a war resorted to contrary to the fundamental obligations accepted by a State and proscribing the institution of war as such, can no longer confer upon the guilty belligerent all the rights which traditional international law […] conferred upon the belligerent.[209]

The partisan – who had so greatly benefited, in terms of the juridical guarantees afforded to his position, from the dethronement of the State and of its sovereign right to wage war – found himself once again subjected to juridical discrimination.

The origins of this renewed discrimination are to be found in the historical self-consciousness of the Great Powers of the global order. Having nourished themselves on the illusion of a new teleology of history – one neither metaphysical nor transcendent – they found themselves confronted with the irruption, into a historical linearity cloaked in necessity, of elements they chose to interpret in pathological terms, as morbid distortions of a presumed immanent order. It is within this framework that the concept of crisis in the international order emerges under the guise of pathology. One such pathological element is the re-emergence of the figure of the *partisan*. This is a combatant who embodies a form of absolute hostility of which he is simultaneously the acting subject and the object. He is a combatant who cannot often be readily understood through the categories proper to statehood, yet who can no longer be subsumed under the philosophical-political categories of the Western philosophy of history, as could be the case, for example, with the Marxist militant or *guerillero*. Rather, he is a combatant *pro aris et focis*, fighting for the sovereign existence of the political community to which he belongs, or for the political autonomy denied to the former, thereby founding and representing a concrete spatialisation.

Within the liberal international order, the contemporary partisan's elusiveness (or presumed elusiveness) vis-à-vis the legal categories of statehood should not constitute an insurmountable obstacle, given the progressive devaluation of the concept of sovereignty and the increasing juridical recognition accorded to non-state actors. Yet it is that Powers firmly embedded within the liberal international order that have persistently refused, in their legal practice, to recognise in their adversaries the hallmarks of regular belligerency or to extend to them the

209 Lauterpacht 1952, pp. 217-218.

guarantees typical of international humanitarian law. This refusal has not been justified by recourse to the now-obsolete categories of classical international law – which although systematically constructed around the institutional centrality of the State, offered greater protections to the irregular combatant than those afforded by contemporary practice. By contrast, even combatants fully embedded within the institutional structure of the State have become the object of serious violations of the *ius in bello*. The condition that renders such violations possible lies in the fact that the combatant eludes the very legal order whose outward projection of force his State-enemy seeks to impose upon him. He is not regarded as external to the legal order, but rather as "included and subordinated on the basis of a political presumption of dangerousness, of hostility towards the values"[210] that the legal order itself embodies. And "non-value enjoys no rights vis-à-vis value, and when the supreme value is to be asserted no price is too high."[211] Thus, in the struggle between values seeking to annihilate their corresponding non-values by invoking the outlawry of war as a juridical title against an *iniustus hostis*, the ius in bello ceases to exist in historical concreteness. The principal victim of this development is the very figure who had benefited most from its earlier evolution: the partisan.

Now divested of the requirement of formal irregularity, the partisan becomes liable to being projected into the very role once occupied by his historical enemies: the State-incorporated troops. In this way, the destiny of the ius in bello is fulfilled: through the devaluation of the sovereignty of State actors, reduced to the status of "illegitimate combatants" by virtue of a concept of war that excludes the reciprocity of sovereign powers. Accordingly, the diastasis between the formal constitution and the material constitution of the international legal order appears irrecoverable, unless one attempts to condition it upon a form of legitimacy that is not merely the contingent product of compromise.

> Atque eo magis necessaria est haec opera, quod et nostro saeculo non desunt, et olim non defuerunt, qui hanc iuris partem ita contemnerent, quasi nil eius praeter inane nomen existeret[212]

210 Bartoli, pp. 13-19.

211 Carl Schmitt, *Die Tyrannei der Werte*. Duncker und Humblot Berlin 1967, pp. 51-52.

212 Hugo Grotius, *De iure belli ac pacis*, Proleg. 3, quoted by Berber 1962, p. 60.

Beyond Deglobalisation: Global Economic Integration in an Era of Structural Transformation

by Barbara Annicchiarico; Valerio Dionisi

1. Introduction

For much of the late twentieth century, the progressive deepening of economic, cultural, and political interdependence across national borders was widely taken to be, if not inevitable, then at least self-reinforcing. The advent of the European Single Market, the opening of China to world markets, the establishment of the World Trade Organization, the increasing integration of financial markets, the enlargement of the European Union, the proliferation of bilateral and multilateral trade agreements, and the revolution in information and communication technologies all seemed to confirm a narrative of irreversible and deep integration.

According to the dominant view in the political and economic debate, the so-called *globalisation* was supposed to bring unprecedented prosperity to all countries, although the potential redistributive effects of deeper integration were well-known in international economics since the seminal work of Stolper and Samuelson[1] and has been the object of textbook economics.[2] This partially ex-

1 Stolper, Wolfgang F., and Paul A. Samuelson. "Protection and real wages." *The Review of Economic Studies* 9.1 (1941): 58-73. Henceforth Stolper and Samuelson (1941).

2 See, e.g., Krugman, Paul, Maurice Obstfeld, and Marc Melitz, *International Economics: Theory and Policy*. Pearson, London 2017. The optimistic view, based on trade liberalization theories, was also supported by the idea that as long as the overall benefits accruing to the winners of deepening market integration outweigh the losses borne by the losers, deeper market integration increases economic efficiency. In this respect, the prevailing paradigm used to evaluate the social welfare consequences of international trade was the Kaldor-Hicks compensation principle according to which the public choice of embarking onto further market integration is justified on the grounds that those who would benefit from it could *potentially* compensate, through the redistributive mechanism of taxation, those who would loose from it.

plains why this process of deepening of market integration was initially greeted with euphoria finding almost undisputed support at least until the first major protest against it, which took place in Seattle in December 1999, and the subsequent huge demonstrations occurring in occasions of every major meeting and international trade negotiations.[3] Notably, the so-called no-global demonstrations embodied multi-faced movements who, like modern Cassandras, anticipated some of the least obvious, at least for non-experts, side-effects of hyper-globalisation. These movements warned against risks of loss of sovereignty especially of small and/or low-income countries, excessive interdependence, risk of social dumping, and exacerbated inequalities, letting alone the adverse impact on the environment and biodiversity, and the risk of crowding out of cultural diversity in favour of a dominant capitalist development model or, more bluntly, of the homogenization of local cultures under the pervasive influence of a Western cultural template.[4]

This opposition to the deepening of globalisation and to the dominant economic development model was relegated to the margins of the public debate under the label of *radical*, if not extremist, ideas. Globalisation, in fact, continued to enjoy broad and largely cross-partisan political support, at least until the global financial crisis exposed, in dramatic fashion, some of the systemic vulnerabilities that its critics had long warned about.[5] The global financial crisis started at the end of 2007, which transmitted economic distress from the U.S. mortgage subprime market to the rest of world economy with dramatic speed, raising serious concerns about the resilience of an economic model based on almost fully integrated financial markets and on trade interdependence.[6]

3 In this respect, see Stiglitz, Joseph E., *Globalization and Its Discontents*. W. W. Norton & Company, New York 2002. Henceforth Stiglitz (2002).

4 The use of the adjective *Western* is itself worth pausing on. The term subtly reflects a sort of Eurocentric perspective embedded in the very language of economic and policy debate. As Chakrabarty has argued, such word choices are rarely neutral, carrying with them historically layered assumptions about who sets the norm and who is measured against it. See Chakrabarty, Dipesh. "Provincializing Europe: Postcoloniality and the critique of history." *Cultural Studies* 6.3 (1992): 337-357. The present work, undoubtedly, suffers from the very same biased Eurocentric perspective.

5 On the marginalization of the anti-globalization critique and the rethinking triggered by the 2008 crisis, see Rodrik, Dani, *The Globalization Paradox: Democracy and the Future of the World Economy*. W. W. Norton, New York 2011. Henceforth Rodrik (2011).

6 Notably, the global financial crisis originated in the housing bubble, driven by sustained massive increases in housing prices and extremely permissive regulation. See Reinhart,

The subsequent years brought a succession of events: the euro area crisis; a prolonged period of weak trade growth; the Brexit; the political rise of populist and protectionist movements in major economies, with the return of policy international trade barriers and tighter restrictions on migration; the disruption of global supply chains during the COVID-19 pandemic; the conflict in Ukraine and its cascading effects on energy and commodity markets; and an increasingly confrontational rivalry between the U.S. and China that many analysts describe as a structural geopolitical realignment.[7] The events of recent months, with the world economy put under strain by the erratic and, at times, hostile policies of the Trump administration, and the conflicts in the Middle East, further challenge the optimistic view that economic integration would be a reliable source of prosperity and peace.

In this context, so uncertain, it does not come as a surprise that proclamations of the "end of globalisation" or deglobalisation have become very popular in both academic and policy circles. While recognizing that the political drive and the public support toward globalisation have been in regression, if not come to a halt, this paper seeks to challenge that narrative. This paper argues that proclamations about the end of globalisation may reflect a reading of evidence that privileges only certain dimensions of international economic integration, mainly the cross-border trade in goods and the flows of financial capital, while neglecting others.

This paper supports the view that the world is not deglobalising, rather it is reglobalising along different axes. The movement of people, the trade in services, the cross-border delivery of digitally enabled outputs, and the global diffusion of knowledge, technology, and above all, of ideas are expanding rapidly, even as merchandise trade and foreign direct investment have stagnated relative to world output over the last decade. This gives rise to a contradiction of our times: barriers to the exchange of goods are rising and demands for protectionism and economic nationalism are growing louder; yet the world is more tightly connected than ever through the near-instantaneous exchange of complex information and knowledge. Integration in immaterial flows of services, data, and

Carmen M., and Kenneth S. Rogoff, *This Time Is Different: Eight Centuries of Financial Folly*. Princeton University Press, Princeton 2009.

7 See, e.g., IMF, *Geoeconomic Fragmentation and the Future of Multilateralism*. Staff Discussion Note SDN/2023/001, International Monetary Fund, Washington DC 2023. Henceforth IMF (2023).

ideas shows no sign of reversal. It is this tension between the material and the immaterial that defines the globalisation of our time.

The paper is structured as follows. Section 2 discusses the deglobalisation thesis, and its related concepts. Section 3 presents some facts on five dimensions of global integration and seeks to take stock on what the evidence seems to suggest. Section 4 presents some concluding remarks.

2. The Concepts of Globalisation, Deglobalisation, and Reglobalisation

In the context of social sciences, Anthony Giddens offered what remains one of the most influential definitions of globalisation:

> the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa

In this formulation, globalisation is not limited to the intensification of international economic relations; it encompasses legal, cultural, technological, and political dimensions that are analytically distinct and may move at different speeds and in different directions.[8]

The current debate on deglobalisation may look like a product of the crises of the last two decades and of recent geopolitical turbulence, however its intellectual foundations are considerably older. Karl Polanyi, writing at the end of the Second World War, described what he called the "double movement": the tendency of market expansion to generate, almost inevitably, a societal demand for protection. In Polanyi's reading, the liberal international order of the nineteenth century did not collapse for lack of economic logic; rather, it collapsed because it failed to manage the social dislocations it produced. As he put it, the social history of the nineteenth century was shaped by

> the clash of the organizing principles of economic liberalism and social protection which led to deep-seated institutional strain[9]

The parallel with our own time is difficult to ignore.[10]

8 Giddens, Anthony, *The Consequences of Modernity*. Stanford University Press, Stanford 1990, p. 64.

9 Polanyi, Karl, *The Great Transformation: The Political and Economic Origins of Our Time*. Farrar & Rinehart, New York 1944. Quotation from p. 140 of Beacon Press 2001 paperback edition. Henceforth Polanyi (1944).

10 Historians of the world economy identify a first wave of globalization spanning rough-

More recently, Rodrik (2011) gave this tension a more formal structure through his famous "trilemma" of the world economy: deep economic integration, national sovereignty, and democratic politics cannot all be achieved simultaneously, at most, two of the three can be sustained. The political turbulence and the rise of populist movements of the last decades can be interpreted, in large part, as the democratic backlash that Rodrik's trilemma predicts. The political settlement that had sustained hyper-globalisation began to be questioned when the distributional costs of integration became too visible in deindustrialized communities suffering from stagnant wages, precarious labout markets, and widening inequalities.

Those distributional effects of deeper market integration and reallocation were, of course, not entirely unforeseen. As already mentioned in the Introduction, the potential for international trade to generate winners and losers had been formalized as early as Stolper and Samuelson (1941) whose "factor-price equalization effect" is still taught in the context of the canonical Heckscher-Ohlin international trade model.[11] However, what changed in the decades of hyper-globalisation was the scale and visibility of these effects.

In this respect, Stiglitz (2002) delivered perhaps one of the most influential critique, by arguing that the problem was not globalisation as such, but its governance: the rules of the game had been written by and for the interests of advanced economies and multinational corporations, leaving low-income countries and the vulnerable people exposed to the, at times, dire consequences of sectoral reallocation and volatility of financial markets without adequate safe-

ly 1870 to 1914, during which trade, capital flows, and mass migration reached levels, relative to world output, that would not be matched again until the late twentieth century. The so-called first globalization ended abruptly at the onset of the First World War and was followed by two decades of protectionism, competitive devaluations, and the rise of economic nationalism. For more details, see O'Rourke, Kevin H., and Jeffrey G. Williamson. *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy*. MIT Press, Boston 2001, henceforth O'Rourke and Williamson (2001); James, Harold. *The End of Globalization: Lessons from the Great Depression*. Harvard University Press, Harvard 2009.

11 See, e.g., Lawrence, Robert Z., Matthew J. Slaughter, Robert E. Hall, Steven J. Davis, and Robert H. Topel, "International trade and American wages in the 1980s: giant sucking sound or small hiccup?" *Brookings Papers on Economic Activity. Microeconomics* 1993.2 (1993): 161-226. Borjas, George J., and Valerie A. Ramey. "Foreign competition, market power, and wage inequality." *The Quarterly Journal of Economics* 110.4 (1995): 1075-1110.

ty nets. This argument anticipated, well before 2008, many of the fault lines that the global financial crisis would expose. Barry Eichengreen's historical work reinforced the point from a different angle, showing that financial globalisation is prone to recurring crises and that the stability of the international monetary system has always depended on political arrangements that markets alone cannot sustain.[12] It is important, however, not to let the critique crowd out the strong counterargument of the undoubtedly benefits deriving from deeper market integration. In this respect, Jagdish Bhagwati, one of the most rigorous defenders of open trade, insisted that the benefits of globalisation — in terms of poverty reduction, technological diffusion, and long-run growth — were real and substantial, and that the appropriate response to its adverse side-effects was domestic redistribution and better governance, not protectionism.[13] The debate on the costs and benefits of market integration is not yet settled, and any honest assessment of the current conjuncture must hold both sides of it in view.

In the last decade, the economic and policy debate on the winners and losers of hyper-globalisation has been enriched by new evidence.[14] In addition, the raising inequalities in terms of income and wealth, have become so striking and unbearable pushing several scholars to question the sustainability of the current capitalist paradigm, characterized not only by hyper-connected markets, but also by fiscal competition and social dumping.[15] Moreover, as discussed by Acemoglu and Johnson, the spectacular advances in computer have benefitted only a very narrow set of entrepreneurs and investors, leaving behind most of

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12 Eichengreen, Barry, *Globalizing Capital: A History of the International Monetary System*. Princeton University Press, Princeton 2008.

13 Bhagwati, Jagdish, *In Defense of Globalization*. Oxford University Press, New York 2004.

14 See, e.g., Williamson, Jeffrey G., Winners and Losers Over Two Centuries of Globalization. In: *Wider Perspectives on Global Development. Studies in Development Economics and Policy*, Atkinson, Anthony Barnes, Kaushik Basu, Jagdish Bhagwati, Douglass C. North, Dani Rodrik, Frances Stewart, Joseph E. Stiglitz, and Jeffrey G. Williamson (eds.), Palgrave Macmillan, Hampshire UK 2005.

15 The causes of rising inequality are, of course, manifold, including skill-biased technical change, inadequate fiscal systems, the excessive deregulation of financial markets, and the deterioration of public education. Several of these, however, may be less independent than they appear, reflecting in part a generalized race to the bottom in rights and economic justice, driven by the *fear* of capital outflows and by the lobbying of organized interest groups.

the people, especially those without a college degree.[16]

The influential contribution of Thomas Piketty gave this concern a long-run, structural foundation. In his *Capital in the Twenty-First Century*, Piketty analysed two centuries of data to argue that whenever the rate of return on capital exceeds the rate of economic growth, wealth accumulated in the past grows faster than output and wages, so that capital concentrates and inherited wealth reasserts its weight over earned income.[17] On this reading, the widening inequality of recent decades is not a side effect of globalisation but the resurfacing of a tendency intrinsic to capitalism itself, one that the exceptional growth of the post-war decades had only temporarily masked. The implication is uncomfortable for the optimistic narrative: absent deliberate political correction, deeper integration of capital markets works with, not against, the forces of divergence.

Where Piketty traces the concentration of wealth within the advanced economies, Branko Milanovic shifts the lens to the global distribution of income. In this respect, his work on global income distribution made the pattern strikingly clear.[18] His popular "elephant curve" showed that the largest income gains accrued to the emerging-market middle class and to the global top one percent while the working and lower-middle classes of the advanced economies largely stagnated,[19] offering, at once, an empirical picture and a political explanation for the populist turn.[20]

16 See Daron Acemoglu and Johnson, Simon. *Power and progress: Our thousand-year struggle over technology and prosperity*. Hachette, London 2023.

17 Piketty, Thomas, *Capital in the Twenty-First Century*. Harvard University Press, Cambridge MA 2014.

18 Milanovic, Branko. *Global Inequality: A New Approach for the Age of Globalization*. Harvard University Press, Cambridge MA 2016.

19 For further evidence, see Lakner, Christoph, and Branko Milanovic, "Global income distribution: from the fall of the Berlin Wall to the Great Recession." *The World Bank Economic Review* 30.2 (2016): 203-232; Alvaredo, Facundo, Lucas Chancel, Thomas Piketty, Emmanuel Saez, and Gabriel Zucman, "The Elephant Curve of Global Inequality and Growth." *AEA Papers and Proceedings* 108 (2018): 103-08.

20 Inequality alone, however, does not exhaust the explanation. Sandel argues that the populist backlash is driven as much by moral and cultural grievances as by material ones: in an era of stagnant social mobility, the rhetoric of "rising" has turned into a reproach, and the meritocratic order adds to economic loss the further injury of social esteem denied, that is the tacit verdict that those left behind have only themselves to blame. In this respect, the resentment would be a response not merely to lower incomes but to the disdain of a credentialed elite. See M. J. Sandel, *The Tyranny of Merit: What's Become of the Common Good?* Farrar, Straus and Giroux, New York 2020.

At the sectoral level, the influential studies by Autor, Dorn, and Hanson on the "China shock" demonstrated that import competition from China caused large, geographically concentrated, and surprisingly persistent job losses in exposed American manufacturing communities, adjustment costs that the standard trade framework had tended to treat as smaller and more transient than they proved to be.[21] Together, these contributions overturned the complacent consensus that the gains from trade would be broadly shared and that adjustment would be smooth.

In this context, the term *deglobalisation* has gained momentum. In its strong form, it implies a directional reversal: a movement back toward the national self-sufficiency and restricted exchange that characterized much of the first half of the twentieth century. In its weaker form, it describes simply a retreat from the hyper-globalisation of the 1990s and 2000s. Both versions, however, tend to measure globalisation through the same narrow lens: the ratio of goods trade to gross domestic product (GDP), the volume of cross-border financial flows, and the level of formal tariff barriers. Measured against these metrics alone, the picture does look bleak. A more cautious framing was proposed by *The Economist* in 2019 with the concept of *slowbalisation*: a deceleration of certain forms of integration, not their reversal.[22] The term captures something real. After decades in which world trade grew consistently faster than world output, the two have moved largely in step since the global financial crisis.

Other contributions have sharpened the empirical case for a slowdown in global integration. Richard Baldwin, in his account of the "great convergence," has shown how the unbundling of production across global value chains (GVCs) drove the trade boom of the 1990s and 2000s, implicitly suggesting that this process has natural limits.[23] Data show that the long-run elasticity of trade to GDP, which had risen above two in the 1990s, fell back toward unity in the 2000s, suggesting that roughly half of the post-crisis slowdown was structural rather

21 See, e.g., Autor, David H., David Dorn, and Gordon H. Hanson. "The China syndrome: Local labor market effects of import competition in the United States." *American Economic Review* 103.6 (2013): 2121-2168. Autor, David H., David Dorn, and Gordon H. Hanson. "The China shock: Learning from labor-market adjustment to large changes in trade." *Annual Review of Economics* 8.1 (2016): 205-240.

22 See The Economist, *Slowbalisation: The Future of Global Commerce*, January 26th 2019.

23 Baldwin, Richard. *The Great Convergence: Information Technology and the New Globalization*. Harvard University Press, Cambridge MA 2016. Henceforth Baldwin (2016).

than demand-driven.[24] This tendency could then be interpreted as a maturing of global value chains rather than a temporary weakness in aggregate demand. Goldberg and Reed reach a similar conclusion using data on trade, capital, and labour flows: the traditional metrics reveal a slowdown but no reversal, with trade in fact rebounding after the pandemic.[25] What has shifted decisively, they argue, is not the underlying integration but the policy environment and public sentiment in the largest economies, a turn they date to around 2015, well before the COVID-19 pandemic. The distinction matters for the present argument: the retreat is political before it is economic. Following the 2008 crisis, analysts observed a persistent decoupling between world trade and GDP growth, a reversal of the long-running tendency for trade to grow faster than output.[26]

The COVID-19 pandemic added new urgency to these debates. The sudden contraction of GVCs (evident in global shortages of personal protective equipment, semiconductors, and pharmaceutical inputs) prompted widespread calls for "reshoring", "friendshoring", and strategic self-sufficiency. However, while pandemic-related disruptions were severe, the structural drivers of GVC formation had not disappeared.[27] The geopolitical dimension has been equally salient: the escalating trade and technology competition between the United States and China has led to significant decoupling in high-technology sectors, raising the prospect of a bifurcation of global production networks.[28]

Yet *slowbalisation*, too, may understate the depth of the transformation underway. The deceleration has not been uniform. A slowdown along some dimensions of integration has coincided with an acceleration along others. The contrast is already visible in the data: trade in digitally delivered services has been the fastest-growing segment of world trade for two decades, expanding at roughly eight percent a year since 2005, even as merchandise trade has stagnat-

24 See, e.g., Constantinescu, Cristina, Aaditya Mattoo, and Michele Ruta. "The global trade slowdown: cyclical or structural?" *The World Bank Economic Review* 34.1 (2020): 121-142.

25 Goldberg, Pinelopi K., and Tristan Reed. "Is the Global Economy Deglobalizing? If so, Why? And What is Next?" *Brookings Papers on Economic Activity* 2023.1 (2023): 347-423.

26 WTO, *World Trade Report 2016: Levelling the Trading Field for SMEs*. World Trade Organization, Geneva 2016.

27 See, e.g., Antràs, Pol. *De-globalisation? Global value chains in the post-COVID-19 age*. No. w28115. National Bureau of Economic Research, 2020.

28 See IMF (2023).

ed relative to output.[29] Baldwin himself (and co-authors), having mapped the great unbundling, now locates the future of trade in intermediate services rather than goods.[30] It is precisely this asymmetry that defines the current moment. The argument advanced in this paper is that what we are witnessing is better described as *reglobalisation*: a structural reconfiguration of the axes along which the world economy integrates, from goods and capital toward services, data, knowledge, and people. The following section presents some facts and evidence supporting this claim across five dimensions.

3. Recent Trends of Economic Globalisation

Discussions of globalisation are often accompanied by the adjective "great". Karl Polanyi described the profound economic and social changes of the nineteenth century as the "Great Transformation" while Richard Baldwin has characterized the integration of the contemporary world economy as a "Great Convergence".[31] The recurrence of this adjective is revealing. It reflects the idea that globalisation is not a linear or immutable process, but rather a succession of major transformations that periodically reshape the ways in which economies, firms, and individuals are connected. Against this background, an important question emerges: are we witnessing another great transformation of the global economy, or the beginning of a process of deglobalisation?

To address the above question, the present section examines a set of indicators drawn from World Bank data and related international sources. The evidence suggests that the contemporary global economy is not experiencing a generalized retreat from international integration. Rather, different dimensions of globalisation are evolving in different ways. On the one hand, some of the mechanisms that characterized the hyper-globalisation era of the 1990s and early 2000s—most notably trade intensity and capital movements—have slowed down or stabilized. On the other hand, the mobility of people, the expansion of services, and the diffusion of digital technologies and knowledge continue to deepen cross-border interconnections. Taken together, these patterns are more consistent with the notion of reglobalisation than with that of deglobalisation: a

29 WTO, *World Trade Statistical Review 2024*. World Trade Organization, Geneva 2024.

30 Baldwin, Richard, Rebecca Freeman, and Angelos Theodorakopoulos. "Deconstructing deglobalization: the future of trade is in intermediate services." *Asian Economic Policy Review* 19.1 (2024): 18-37.

31 See Polanyi (1944) and Baldwin (2016).

process in which globalisation becomes slower, more selective, and increasingly centred on intangible rather than purely physical flows.

3.1 Trade Volumes

The historical evolution of world trade provides little support for claims of a cyclical retreat from globalisation. Economic historians identify only a few episodes of genuine deglobalisation—most notably the period between World War I and World War II—while the broader long-run trend since the 1800s has been one of unprecedented expansion in international economic integration.[32]

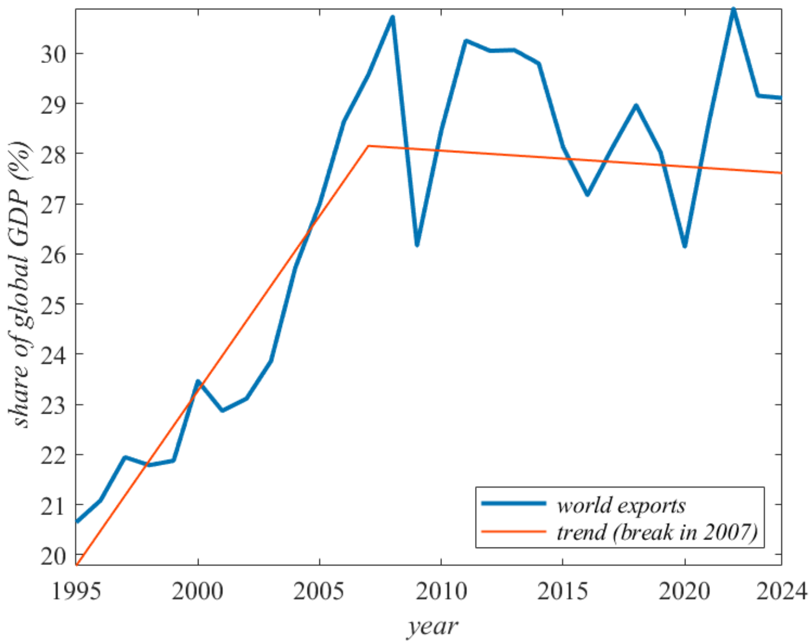


Figure 1: The Dynamics of World Exports

Note: Global exports are measured as a share of world GDP. The linear trend (orange) is estimated before and after a structural break in 2007. *Source*: World Bank and authors' calculations.

32 See O'Rourke and Williamson (2001).

Yet, it is clear that the relationship between trade and economic growth has changed. While global exports increased rapidly relative to world GDP throughout the late twentieth century and the early 2000s, this trend has gradually lost momentum since the Global Financial Crisis started in 2007. This pattern is clearly visible in Figure 1, which plots global exports as a share of world GDP using World Bank data. A linear trend with a structural break in that year highlights this shift particularly well: whereas the pre-2007 trend is strongly positive, the post-2007 trend is essentially flat. This evidence, rather than indicating a contraction of global trade, it points to a weakening link between economic growth and export growth: the world economy continues to expand but no longer relies on ever-increasing trade intensity to the same extent as in previous decades. The implication is not that globalisation has gone into reverse, but that it has entered a new phase characterized by slower growth in cross-border trade relative to overall economic activity.

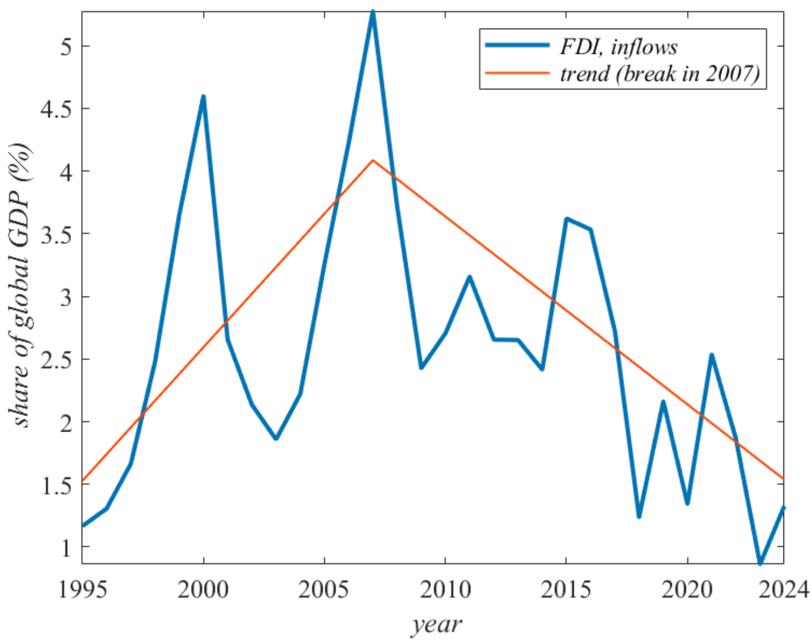


Figure 2: The Dynamics of World FDI

Note: FDI are measured as a share of world GDP. The linear trend (orange) is estimated before and after a structural break in 2007. *Source*: World Bank and authors' calculations.

3.2 Monitoring the Balance of Payments

A similar pattern emerges when examining Foreign Direct Investment (FDI), another key indicator of global economic integration. Throughout the 1990s and early 2000s, cross-border investment flows expanded rapidly, reflecting the growing internationalization of production networks and corporate activity. As shown in Figure 2, however, this trend changed markedly after the Global Financial Crisis. Measured as a share of world GDP, global FDI inflows declined from more than 5.2 percent before the Great Recession to approximately 1.25 percent in 2024. This contraction is substantially more pronounced than the slowdown observed in international trade. Also in this case, a trend analysis with a structural break in 2007 reveals a clear reversal in the trajectory of global FDI flows. Whereas the pre-2007 trend is strongly positive, indicating a period of accelerating cross-border investment, the post-2007 trend exhibits a negative slope, pointing to a sustained decline in the relative importance of FDI within the world economy. Several factors might have contributed to this shift, including the lingering effects of financial crises, rising geopolitical tensions, greater regulatory scrutiny of foreign acquisitions, and broader uncertainties surrounding the global economic outlook.

Yet, the decline in FDI should not be interpreted as evidence of deglobalisation. Although cross-border investment flows have become smaller relative to global output, they remain a fundamental channel through which economies are interconnected. Multinational firms continue to organize their production across borders, transfer technology, and coordinate global value chains. The evidence therefore suggests not the dismantling of international investment networks, but rather their adaptation to a more uncertain and fragmented global environment. In this respect, the evolution of FDI is mostly consistent with the broader phenomenon of slowbalisation: global integration has become less widespread than in the early 2000s, but it remains deeply embedded in the structure of the world economy.

A broader perspective on the evolution of globalisation emerges when looking at international capital flows. Financial integration was one of the main features of the hyper-globalisation era, as capital moved increasingly freely across borders through foreign direct investment, portfolio investment, and international bank lending. As shown in Figure 3, these flows expanded rapidly throughout the 1990s and early 2000s, rising from less than 4 percent of world GDP in the mid-1990s to more than 15 percent on the eve of the Global Financial Crisis.

The 2007 crisis marked a turning point. Total cross-border capital flows fell abruptly in 2008 and have remained well below their pre-crisis peak ever since, barely increasing thereafter and stabilising at around 4-5 percent of world GDP. The adjustment was particularly severe in portfolio and other investment flows, both of which turned negative during the crisis, indicating a sudden retrenchment of international financial activity. While portfolio investment returned to positive territory as early as 2009, other investment flows remained negative and deteriorated further, reflecting a prolonged process of balance-sheet adjustment within the international banking system. Foreign Direct Investment, as already discussed, also lost momentum after the mid-2000s, although its decline was less abrupt than that observed in other categories of capital flows. From 2010 onwards, no further negative values are observed and all components of capital flows returned to positive territory, suggesting that the acute phase of financial retrenchment had ended.[33]

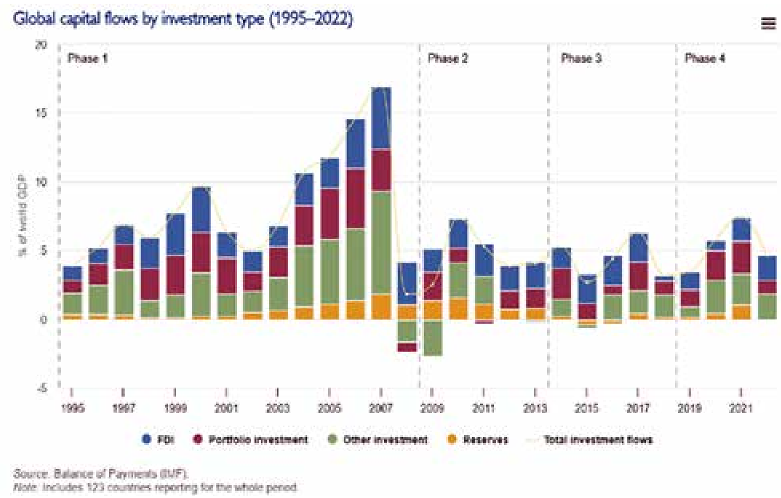


Figure 3: Global Capital Flows by Investment Type

Note: Gross cross-border capital flows as a percentage of world GDP, distinguishing across types of investments. *Source*: Oesterreichische Nationalbank Report 2024/8 using Balance of Payments data from the International Monetary Fund (IMF) on 123 countries over the whole period.

33 These patterns can also be read as suggesting that the Global Financial Crisis marked less a deceleration of globalisation than a crisis of the system of trust and credit underpinning the global financial integration, in which the pre-2008 expansion of cross-border capital flows reflected a broader transformation of credit relations within the international financial system. See e.g., Graeber, David, *Debt: the first 5,000* years. Melville House, New York 2011.

The decline in capital flows reflects primarily the end of an exceptional period of financial expansion rather than the dismantling of international financial integration. Capital continues to move across borders on a large scale, multinational firms remain deeply embedded in international production networks, and global financial markets continue to connect economies in ways that were unimaginable only a few decades ago. The evidence therefore points not to the reversal of globalisation but to a transformation in its character.

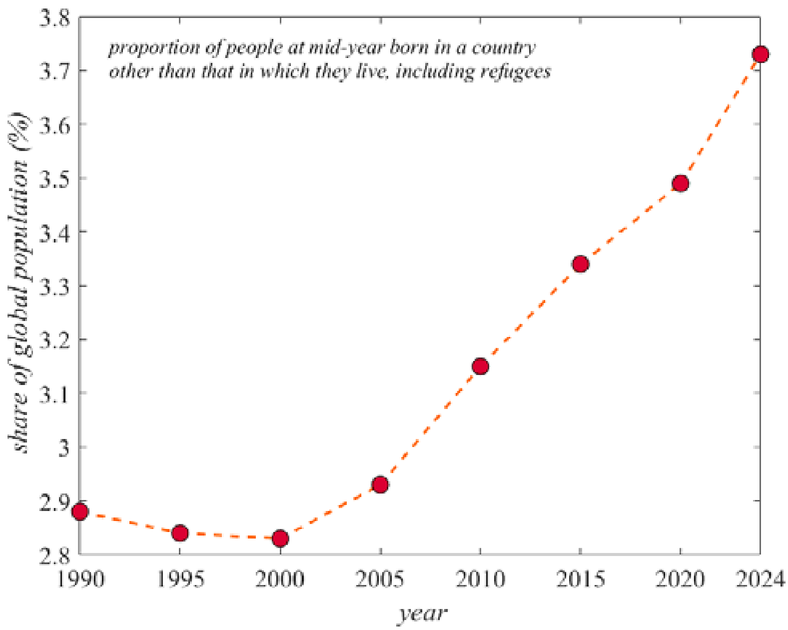


Figure 4: International Migrant Stock (IMS)

Note: Share of the world's population living in a country different from that of birth, the International Migrant Stock index. *Source*: World Bank and authors' calculations.

3.3 Mobility of People

The picture changes, however, when attention shifts from the mobility of goods and capital to the mobility of people. In fact, the evolution of international migration provides further evidence that globalisation is not retreating but rather changing in form. While trade and investment flows have slowed relative to the rapid expansion observed before the Global Financial Crisis, the cross-border mobility of people has continued to increase over time. Figure 4 reports the evolution of the International Migrant Stock (IMS), measuring the number of foreign-born individuals relative to the world population. The data reveals a remarkably steady upward trend over the past three decades, with no evidence of the structural slowdown observed in trade or foreign direct investment.

At the global level, the share of the population born in a country other than the one in which they currently reside increased from almost 2.9 percent in 1990 to more than 3.7 percent in 2024. Although these changes may appear modest, they correspond to hundreds of millions of individuals and represent a significant expansion in the scale of human mobility. The trend is even more pronounced in several advanced economies.

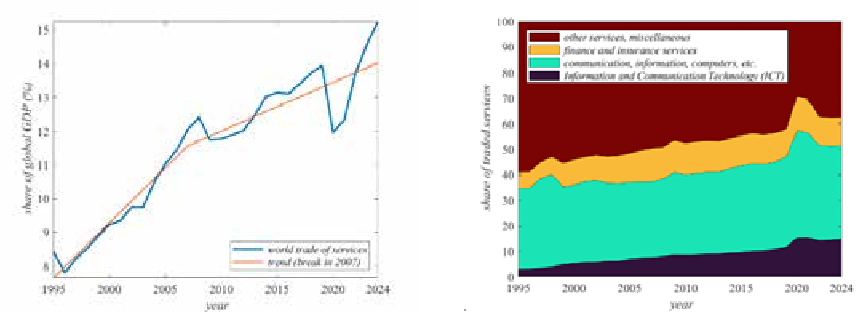
This sustained growth is particularly noteworthy given the increasing political sensitivity of migration issues, the tightening of border controls in many countries, and recurring episodes of economic and geopolitical instability. Despite these constraints, international migration has continued to expand, reflecting persistent differences in income levels, demographic dynamics, labour market opportunities, and educational prospects across countries. The evidence therefore suggests that the migration remains an active and growing dimension of global integration.

3.4 The Increasing Role of Exporting Services

The growing importance of services in international trade provides perhaps the clearest indication that globalisation is evolving rather than retreating. As shown in Figure 5a, the share of services in world exports increased steadily from approximately 9 percent in the mid-1990s to around 15 percent in 2024. Unlike the patterns observed for trade intensity and foreign direct investment, this trend exhibits remarkable continuity over time. A trend analysis with a structural break in 2007 reveals only negligible differences between the pre- and post-crisis periods: in both cases, the trajectory remains strongly positive and broadly linear. In other words, the shift toward services appears to be a long-term structural transformation rather than a temporary phenomenon.

This development reflects profound changes in the organization of economic activity. Advances in digital technologies, telecommunications, and information systems have made it increasingly feasible to provide services across borders without requiring the physical movement of goods or people. For instance, financial institutions can originate, process, and manage transactions across multiple jurisdictions; multinational firms can distribute research, design, and managerial functions across global networks; and a growing range of professional, business, and technological services can be delivered remotely. As a result, the globalisation of services has continued to deepen even as other dimensions of globalisation have slowed.

The composition of service-based exports further illustrates this transformation. In this regard, Figure 5b shows that the expansion of services trade has been driven increasingly by knowledge-intensive and digitally enabled



(a) Services in global trade (b) Composition of services

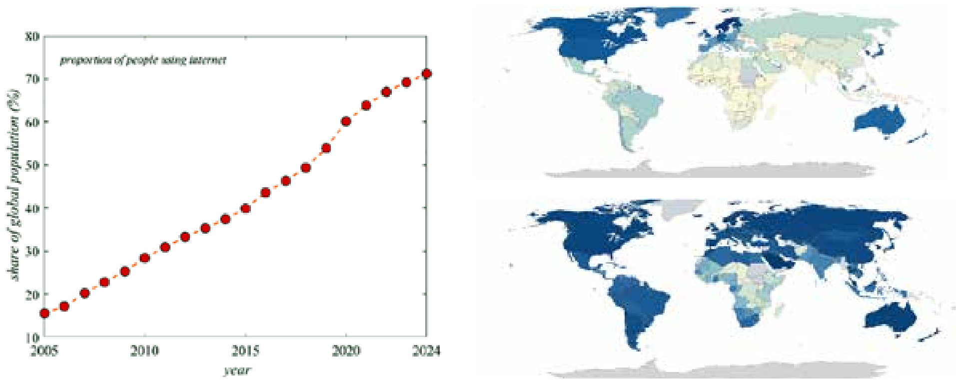
Figure 5: Changing Evolution of Services

Note: Evolution of services in world trade. Panel (a) represents the services exports as a share of total world exports, where the orange line denotes linear trends estimated before and after a structural break in 2007. Panel (b) plots the shares of major service categories in total world service exports; the stacked areas sum to 100 percent in each year. *Source*: World Bank and authors' calculations.

activities. Over time, a growing share of global service exports has shifted toward Information and Communication Technology (ICT) services, financial and insurance services, and communication and information services. By contrast, more traditional service categories have become relatively less dominant. This compositional change suggests that contemporary globalisation is increasingly centred on the cross-border exchange of data, knowledge, expertise, and intangible assets rather than on the movement of physical goods alone.

3.5 Towards a Globalisation of Exchanging Ideas

If the rise of services points to a gradual shift from tangible to intangible forms of exchange, the diffusion of digital connectivity reveals an even deeper transformation in the nature of global integration. The final piece of evidence concerns the diffusion of knowledge and information across borders. While the globalisation of ideas is inherently more difficult to measure than trade, investment, or migration flows, developments in digital connectivity provide a useful proxy for understanding how access to information and participation in global knowledge networks have evolved over time. Figure 6a shows the share of the world's population using the internet between 2005 and 2024. The trend is striking: internet usage increased from approximately 15 percent of the global



(a) Share of people (b) World decomposition

Figure 6: Internet Usage

Note: Evolution in the use of internet services. Panel (a) represents the share of people using internet as a share of the world population. Panel (b) reports two maps from the World Bank website, plotting the geographic dispersion of people across the world in 2005 (upper map) and in 2024 (lower map); progressively darker areas correspond to more people involved. *Source*: World Bank and authors' calculations.

population in 2005 to more than 70 percent in 2024, following a sustained and nearly uninterrupted upward trajectory throughout the period.

The two maps reported in Figure 6b complement this evidence by illustrating the geographical expansion of digital connectivity. In 2005 (i.e., the upper panel), high levels of internet usage were concentrated in a relatively small group of countries, primarily in North America, Western Europe, Australia, and a few advanced economies in East Asia. Most developing countries exhibited substantially lower levels of connectivity. By 2024 (i.e., the lower panel), however, internet access had become far more widespread across all regions of the world. Although significant differences remain, particularly in parts of Central and Sub-Saharan Africa, the maps reveal a much more geographically diffuse pattern of connectivity than two decades earlier. What was once concentrated on a limited number of highly connected economies has progressively expanded to encompass a large share of the global population.

The economic significance of this transformation extends beyond internet access itself. The expansion of digital connectivity facilitates the cross-border exchange of information, the dissemination of knowledge, and collaboration in research, innovation, and production processes. As emphasized by the literature on economic growth, including the work of Charles Jones and Paul Romer, the creation and diffusion of ideas play a central role in generating productivity gains and long-run economic growth.[34] The rapid spread of digital technologies has therefore expanded the scope for international interactions that do not require the physical movement of goods or capital.

Overall, Figure 6 suggests that one important dimension of globalisation has continued to deepen even as other indicators have slowed. The growing reach of digital networks has made the global circulation of information, knowledge, and innovation more extensive and geographically dispersed than in the past. This evidence is consistent with the broader argument developed throughout this paper: globalisation has not disappeared but is increasingly taking forms that are less visible in traditional measures of trade and investment and more closely linked to the movement of data, knowledge, and ideas across borders.

3.6 Taking Stocks

The evidence reviewed above points to a simple conclusion: globalisation has not become weaker; it has become different. Less centred on goods and capital, more centred on services, people, data, and knowledge. Taken together, the evidence presented in this section suggests that the current phase of the world

34 Jones, Charles I., and Paul M. Romer. "The new Kaldor facts: ideas, institutions, population, and human capital." *American Economic Journal: Macroeconomics* 2.1 (2010): 224-245.

economy is better characterized as a reconfiguration of globalisation than as its reversal, i.e., reglobalisation.

As technologies evolve and demand shifts toward new goods and services, the structure of production changes, accordingly, altering the forms through which economies become interconnected. International integration is not a static phenomenon: what countries exchange, how they exchange it, and which sectors drive cross-border interactions evolve over time. From this perspective, the growing importance of services, digital activities, and knowledge-intensive sectors should be understood as part of a broader process of structural transformation rather than as evidence of globalisation's decline. As pointed out by Joel Mokyr in his account of modern economic development, the widening circulation of useful knowledge across increasingly extensive networks of exchange constitutes one of the fundamental mechanisms underlying long-run economic progress.[35]

At the same time, major economic and financial crises tend to reshape the architecture of international integration without necessarily reducing the degree of interdependence itself. The history of the international economy suggests that periods of disruption are frequently followed by the emergence of new mechanisms, institutions, and channels linking countries together.[36] The evidence reviewed here is consistent with this interpretation. Since the late 2000s, globalisation has become less centred on merchandise trade and large-scale capital flows and more reliant on services, migration, digital networks, and the circulation of knowledge. The world economy remains deeply interconnected, but the channels through which that interconnectedness operate are increasingly different from those that characterized the hyper-globalisation era. This, ultimately, is the essence of reglobalisation: not the end of globalisation, but the transition from one configuration of global interdependence to another.

35 Refer to Mokyr, Joel. *The Gifts of Athena: Historical Origins of the Knowledge Economy*, or to Mokyr, Joel. *A Culture of Growth: The Origins of the Modern Economy*, both edited by Princeton University Press, Princeton NJ, in 2004 and 2018, respectively.

36 In this respect, see, e.g., De Cecco, Marcello. "Global imbalances: past, present, and future." *Contributions to Political Economy* 31.1 (2012): 29-50.

4. Conclusion

The political drive toward globalisation has come to a halt. The question is how to read that halt. Is it the leading edge of a reversal, that is one that could, in time, reopen the door to autarkic pressures and a retreat into economic nationalism? Or is it the natural consequence of a deeper transformation: the simultaneous saturation of certain dimensions of integration and the deepening of others? This paper has argued for the second reading. What looks, through the narrow lens of goods trade and tariff barriers, like a retreat is better understood as a shift in the axes along which the world economy integrates, away from goods and capital and toward services, data, knowledge, and people.

The evidence assembled across the five dimensions points in the same direction. The slowdown is real but partial; it is concentrated precisely in those forms of integration: merchandise trade, cross-border capital, that had defined the hyper-globalisation of the 1990s and 2000s, while the dimensions that are accelerating are the ones least visible to the conventional metrics. The slowbalisation thesis captures the deceleration but misses the displacement; the deglobalisation thesis mistakes a change of direction for a loss of momentum.

This reading carries an implication that the autarkic interpretation obscures. If the current moment is a reconfiguration rather than a retreat, then the policy choice is not between more globalisation and less, but about which globalisation. The forces driving cross-border integration in services, data, and knowledge are, if anything, harder to reverse than those that drove the trade in goods. Moreover, these forces raise governance questions, from data flows to the mobility of labour to the cross-border reach of intangible capital, for which the institutions built for a goods-trading world are poorly equipped. The risk, on this view, is not that globalisation unwinds, but that its newer forms outrun the rules meant to govern them.

Geopolitical Crises and Supervening Events: Reflections on Private and Administrative Law in the Post-Globalisation Era

by Edoardo Vinchesi

1. Post-Globalisation as a Legal Laboratory for Supervening Events

In recent years, the doctrine of supervening events has acquired a centrality which, although it had long been the subject of study by the most attentive private-law scholars[1], now appears more pronounced than ever within legal transactions[2].

Traditionally, supervening events were conceived as an exception: an external, extraordinary and unforeseeable event, capable of affecting a legal relationship already in existence, yet still positioned at the margins of the ordinary course of transactions[3]. The contract, in particular, was understood as the place

1 Among the most authoritative scholars, reference may be made to Paolo Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto,* Milano, 1992 Paolo Gallo, voce *Revisione del contratto*, Digesto Civ., XVII, Torino, 1998, p. 431; Francesco Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine,* Napoli, 1996; Vincenzo Maria Cesaro, *Clausole di rinegoziazione e conservazione dell'equilibrio contrattuale,* Napoli, 2000; Gianluca Sicchiero, voce *Rinegoziazione*, in *Digesto Civ., Agg*., II, Torino, 2003, p. 1217; Francesco Paolo Traisci, *Sopravvenienze contrattuali e rinegoziazione nei sistemi di civil e di common law*, Napoli, 2003; Francesco Gambino, voce *Rinegoziazione*, (dir. civ.), in Enc. Giur., Agg., XV, Roma, 2007; Sara Landini, *Vincolatività dell'accordo e clausole di rinegoziazione. L'importanza della resilienza delle relazioni contrattuali*, in *Contratto e Impresa*, 2016, p. 182.

2 Accordingly, the view expressed by careful scholarship appears highly persuasive, in clarifying that such "theories have been cyclically revived and refined with the emergence of extraordinary events, such as wars, epidemics and energy crises", Stefania pia Perrino, *La rinegoziazione "coercibile" nel nuovo Codice dei contratti pubblici: alla ricerca di una base legale, tra riforme fallite e riforme riuscite*, in *Contratto e Impresa*, I, 1 gennaio 2024, p. 178.

3 Ultimately, "a circumstance beyond the parties' sphere of control",Silvia Monti*, Il Co-*

in which the parties' arrangement of interests was stabilised; the administrative measure, by contrast, as the endpoint of an orderly public-law assessment, based on a defined evidentiary and investigative framework.

Post-globalisation has undermined both assumptions. Contemporary geopolitical crises — from the Russia-Ukraine conflict to the Middle Eastern crisis, from trade tensions to energy and logistical restrictions — have shown that instability is no longer an anomaly external to the system, but rather one of its ordinary components. These circumstances have brought back to the centre of legal debate the impact of supervening events on legal relationships (domestic and non-domestic ones), redefining balances that the law had traditionally conceived as stable. From this perspective, the geopolitical supervening event is not merely a historical fact, but a testing ground for the legal order's adaptive capacity.

This transformation affects – among other fields - private law, as anticipated. In instantaneous contracts, the supervening event may result in impossibility of performance or excessive onerousness, but it also raises the more subtle issue of performances already rendered or immediately due. In long-term contracts, by contrast, time itself becomes a factor of risk, since performance is exposed to regulatory, economic, energy-related and logistical changes.

The same transformation, however, also concerns administrative law. A geopolitical supervening event does not merely alter the risks borne by private parties: it alters public priorities, the allocation of resources, the convenience and suitability of administrative action, the equilibrium of public contracts, and the very notion of administrative result.

On the one hand, private law reacts through the instruments of the synallagma, good faith, renegotiation and liability. On the other hand, administrative law reacts through the updating of the public interest, self-review powers, the revision — more precisely, renegotiation — of public contracts, and the application of the principle of result.

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vid-19 e il revival dell'obbligo di rinegoziazione, in Danno e Responsabilità, V, 2020, p. 587. See also Vincenzo Farina, *Interruzione brutale del rapporto di franchising. Abuso di dipendenza economica e recesso del franchisor,* in *Obbl. e contr.,* 2011, 806 ss., according to whom "the law of supervening events, together with the related and underlying issue of the allocation of contractual risk, has become the crossroads at which several significant needs converge: from those relating to the preservation of the stability of the relationship to those aimed at preventing abuses and imbalances in the assumption of contractual risk, both at the formation stage of the agreement and during its performance".

The underlying thesis may be anticipated from the outset: geopolitical crises should not lead to a radical rejection of traditional categories; rather, they reveal the need for those categories to adapt. Familiar institutions, whether belonging to civil-law categories or to administrative legislation, undergo a change in the conditions of their application, in the thresholds of relevance, in the criteria for allocating risk and — as the truly innovative element — in the role of the judge, depending above all on the type of contract at issue. It is therefore necessary to distinguish between the "classic" contract, the consumer contract, and the structurally imbalanced contract between a small professional and a large professional undertaking, the so-called "third type" of contract.

2. The Fundamental Civil-Law Categories Affected by Supervening Events: Obligation, Performance, Creditor's Interest, Synallagma and Good Faith

In order to understand the real scope of geopolitical supervening events, it is not sufficient to start solely from Articles 1256 and 1467 of the Italian Civil Code. Those provisions certainly represent the codified points of reference most immediately invoked when a subsequent event affects the performance of the relationship; however, they do not exhaust the problem. A supervening event is not merely a fact that renders a performance impossible or excessively onerous.

The obligation can no longer be conceived as a merely elementary relationship between the creditor's claim and the debtor's subjection, nor as a simple legal bond whose object is an economically assessable performance. Rather, it presents itself as a complex relationship, in which the principal duty of performance is accompanied by duties of fairness, protection, cooperation and safeguarding of the other party's legal sphere.

The normative starting point is therefore Article 1173 of the Italian Civil Code, which identifies the sources of obligations in contract, tort and any other act or fact capable of producing them "in accordance with the legal order". As is well known, this formula marks the overcoming of a rigidly typical conception of sources. The reference to the legal order, and not merely to statute, makes it possible to read the law of obligations in the light of constitutional principles and, in particular, of duties of solidarity, fairness and protection of legitimate reliance. Accordingly, an obligation does not arise exclusively from closed legal categories but may be recognised whenever a legally qualified relationship makes it necessary to impose duties of conduct consistent with the system.

This openness also affects the field of supervening events. If the obligation were a closed bond, entirely defined at the moment of its creation, the supervening event could be treated only as an external cause of release or termination. If, on the other hand, the obligation is to be understood as a complex relationship, also shaped by rules of fairness and protection, the supervening event enters into the physiology of the relationship: it is relevant not only for the purpose of establishing whether performance is still possible or economically tolerable, but also for determining how the parties must behave during the crisis phase. Yet, although it may be regarded as substantially settled that the parties must also take good faith into account in the concrete performance of a long-term relationship[4], it is far more difficult to determine how good faith translates into remedies within the transaction itself. In this respect, the debate is divided — as should be anticipated — between those who merely identify general duties to respect the other party's legal sphere, and thus not to harm it where it is possible to avoid doing so; those who recognise actual duties of information, whether prior to or concurrent with performance; and a minority of scholars who conceive of a genuine duty to renegotiate, even in the face of supervening events of the most drastic impact. This point will be addressed more fully below[5].

4 And in this sense, "good faith, from a principle inspiring freedom, thus becomes a component shaping contractual will", Antonino De Domenico, *La tutela dell'impresa debole: quando la forza (negoziale) diventa abuso,* in *I Contratti*, I, 2026, p. 77.

5 In this sense, the most authoritative scholarship is divided. In the debate, mention may be made, among others, of: in a restrictive sense, Francesco Gambino, in *Revisione del contratto e autonomia privata, in Riv. dir. privato*, 2007, p. 347, where the Author clarifies that "The law of supervening events is dominated, by legal tradition and by virtue of the law in force, by the coexistence of two opposing legal phenomena: one revolving around the principle pacta sunt servanda, the other around the dissolution of the effects of the contract. On the one hand, the binding force of the contract, which, by performing an immobilising function, ensures certainty and predictability in the conduct of the contracting parties and, therefore, stability in economic relationships; on the other hand, termination for supervening excessive onerousness of performance, which, marking one of the limits beyond which the bond between the parties loses its force, is provided for by Article 1467 of the Civil Code"; equally critical, even with regard to hardship clauses where they are generic, is Pietro Rescigno, *L'adeguamento del contratto nel diritto italiano. Considerazioni conclusive,* in *Contratti internazionali e mutamento delle circostanze: clausole monetarie, hardship, forza maggiore*, con introduzione di Piero Pajardi,1989, p. 95 ss., where he states that "A clause contemplating the duty to review or redetermine the terms of the contract, if drafted in generic terms, may even cast doubt on its validity". By contrast, favourable views appear to be expressed, ex plurimis, Francesco Macario, *Rischio*

This aspect, together with Article 1174 of the Civil Code, is in any event central in geopolitical crises. A performance may remain physically capable of being carried out yet no longer be suitable to satisfy the creditor's interest as incorporated into the relationship. The delivery of goods after the closure of the destination market, the provision of a logistics service in a context in which routes have been interdicted, or the making available of an asset that can be used only to a minimal extent as a result of regulatory or factual restrictions are all situations in which the problem is not simply one of material possibility, but of the continuing functional utility of the performance.

This gives rise to the need to distinguish between impossibility, excessive onerousness and supervening unusability under Articles 1256, 1464 and 1467 of the Civil Code. Impossibility concerns the disappearance of performance as an executable object; excessive onerousness concerns the alteration of the cost of performance in relation to the original equilibrium; unusability concerns the total or partial loss of interest in the performance, even though it remains materially possible. The three notions do not overlap, but they share a common feature: they all express a crisis in the relationship between performance and interest.

In reality, the rules appear to set out a substantially closed framework: the supervening events that are relevant for the legislature are those indicated in the Civil Code, and only those. Thus, in the absence of total impossibility, it will not be possible to invoke the rules on termination provided for such cases, leaving the party exposed to the consequences of non-performance — essentially damages, in addition to termination of the contract. Nor, in the presence of supervening excessive onerousness, will it be possible to configure non-terminating

contrattuale e rapporti di durata nel nuovo diritto dei contratti: dalla presupposizione all'obbligo di rinegoziare, in Riv. dir. civ., 2002, I, p. 72 ss., who extends not only the general duty of protection but also — in an evolutionary sense — Article 1467, paragraph 3, of the Civil Code; Francesco Galgano, *Diritto civile e commerciale*, Padova, 2004, II, 1, pp. 646-647; Id., *Trattato di diritto civile*, Padova, 2009, II, pp. 573-575; Paolo Gallo, *Sopravvenienza contrattuale e problemi di gestione del contratto,* Milano, 1992, pp. 367-372; Gerardo Marasco*, La rinegoziazione e l'intervento del giudice nella gestione del contratto,* in *Contr. e impr.*, 2005, p. 539; Francesco Paolo Patti, *Obbligo di rinegoziare, tutela in forma specifica e penale giudiziale, in I Contratti, VII, 2*012, p. 571; Pietro Rescigno, in *Premessa a Trattato dei Contratti*, a cura di Enrico Gabrielli, II ed., Torino, 2006, II; Rodolfo Sacco – Giorgio De Nova, *Il contratto,* in *Trattato di Diritto Civile* a cura di Sacco, Torino, 2004, II, pp. 722-725; Carlo Giuseppe Terranova, *l'eccessiva onerosità nei contratti* - Artt. 1467- 1469 , in *Il codice civile commentato*, diretto da Piero Schlesinger, Milano, 1995, p. 248.

remedies, such as renegotiation, still less to allow them to be invoked by the party not affected by the effects of the provision.

Good faith and fairness emerge precisely as criteria for governing supervening events in order to overcome the rigidities produced by such a reading. They do not operate merely as negative limits, or as barriers against abuse of rights, but as sources of positive duties of activation. From them would follow the need for the crisis to be managed through cooperation, transparency and preservation of the residual utility of the relationship. Renegotiation finds its foundation here: not as an obligation necessarily to reach a new agreement, but as an obligation to participate loyally in a process of adjustment of the contractual content.

This approach is certainly consistent with the progressive enhancement of protective obligations[6]. The contemporary obligatory relationship is no longer constructed exclusively around the principal performance. Alongside it operate ancillary obligations aimed at preserving the personal, patrimonial and organisational integrity of the other party. Such obligations emerge with particular clarity in qualified relationships, long-term contracts, pre-contractual negotiations and relationships characterised by reliance. Geopolitical supervening events accentuate this dimension, since they expose the parties to risks that may be avoided, mitigated or aggravated by the conduct of the other party.

However, while this reconstruction is certainly persuasive insofar as it provides a descriptive framework for this changed understanding of the contractual synallagma, now viewed within the mutable context imposed by continuous supervening events in current scenarios, it appears to clash — and, in the present author's view, does clash — with the limitations that this very line of reasoning imposes on the interpreter who concretely seeks to rely upon it. To what extent, indeed, can a party be compelled to comply with a duty to renegotiate?

Speaking of a dynamic synallagma does not appear automatically capable of granting the judge a generalised power to remake the contract. Certainly, where the supervening event is such as to destroy the function of the contract, the rem-

6 As regards fairness understood in these terms, it has recently been stated that it "enriches the content of the individual contract by deriving collateral obligations — of protection, cooperation and information", Carolina Magli, *Emergenza sanitaria, obbligo di rinegoziazione e buona fede integrativa*, in *Il Corriere Giuridico*, VI, 1 giugno 2021, p. 805; on this point, see also Fabrizio Criscuolo, *Equità e buona fede come fonti di integrazione del contratto. Potere di adeguamento delle prestazioni contrattuali da parte dell'arbitro (o del giudice) di equità,* in *Riv. arb.,* 1999, p. 77, who specifies that good faith, rather than creating a new purpose, shapes conduct in accordance with that purpose.

edy of termination will undoubtedly be available; but it is not in that terrain that these principles can bear fruit. Attention must rather be directed to the more delicate framework of non-destructive supervening events — that is, those without terminating effects — in order to determine whether the normative framework allows space to be envisaged for maintenance-oriented remedies, primarily the duty to renegotiate.

3. Supervening Events in Instantaneous and Long-Term Contracts: Impossibility, Onerousness and Preservation of the Relationship

The first inquiry that geopolitical crises impose on civil law concerns the legal characterisation of the supervening event. Not every alteration of the economic or regulatory context produces the same effects. It is necessary, first of all, to distinguish between an event that prevents performance, an event that renders it excessively onerous, and an event that, while leaving it materially possible, reduces or eliminates its concrete utility. War, sanctions, the closure of trade routes, the increase in energy costs and the unavailability of raw materials do not, in themselves, constitute a unitary legal category: they become relevant only insofar as they affect the performance due, the creditor's interest and the synallagmatic equilibrium[7].

In instantaneous contracts, or contracts requiring immediate performance, the supervening event tends to appear in a more clear-cut form. The principal question is whether, before performance, the obligation has become impossible or radically altered; yet this raises problems that are considerably more limited than the issue of the survival of the relationship, which is evidently typical of long-term contracts. The question of impossibility in these cases is more complex.

In geopolitical crises, impossibility may be material or legal in nature. It is material where the object of the performance is destroyed, where the promised good is no longer available, where the infrastructure necessary for performance

7 In this sense, the issue is effectively summarised by Enrico Del Prato, *Sulle clausole di rinegoziazione del contratto,* in *Rivista di Diritto Civile*, III, 2016, p. 801: "the impact on the contract of relevant supervening events — that is, those exceeding the normal contractual risk under Article 1467 of the Civil Code — is resolved in the alternative between dissolution — within which arises the question of the manner in which dissolution takes place, whether by operation of law, judicially, as in the case of Article 1467 of the Civil Code, or by withdrawal —, intangibility and adaptation to the new circumstances".

has ceased to exist, or where an essential component cannot be replaced by reasonable means. It is legal where a supervening domestic or supranational rule prohibits performance: embargoes, export bans, sanctioning measures, customs restrictions, subjective or objective prohibitions. In such cases, the debtor is not released because performance has become inconvenient, but because it is no longer materially or legally capable of being carried out.

The concept of impossibility nevertheless retains strict boundaries. The supervening event must therefore be broken down analytically: if it prohibits performance, legal impossibility applies; if it destroys the object, material impossibility applies; if it increases costs, the matter falls within the field of onerousness; if it reduces utility, an issue of unusability or reduction of the counter-performance arises.

Temporary impossibility deserves separate consideration. Article 1256, paragraph 2, of the Civil Code excludes the debtor's liability for delay for as long as the impossibility persists, but provides for the extinction of the obligation where, having regard to the title of the obligation or the nature of its object, the debtor can no longer be considered bound, or the creditor no longer has an interest in performance. The decisive criterion is therefore not the mere duration of the impediment, but the relationship between time, the title of the obligation and the creditor's interest.

The logic of supervening excessive onerousness is different. Article 1467 of the Civil Code does not presuppose that performance has become impossible, but that it has become excessively onerous as a result of extraordinary and unforeseeable events, in contracts with continuous, periodic or deferred performance. Here performance remains possible; what enters into crisis is the economic equilibrium of the transaction. Even in this case, however, an increase in costs is not sufficient. The relevant onerousness does not coincide with a reduction in the profit margin or with an unfavourable fluctuation of the market. The event must exceed the normal contractual risk and transform the economic transaction into something substantially different from what the parties had planned.

From this perspective, a geopolitical crisis may constitute a form of qualified onerousness. Ordinary price fluctuations fall within business risk; energy shocks resulting from conflicts, sanctions or forced reconfigurations of supply chains may instead affect the economic basis of the exchange. It is not enough, however, to establish that costs have increased; it is necessary to verify whether the increase has altered the economic structure of the performance and the proportion between sacrifice and utility.

It is precisely here that the limit of the codified remedy becomes apparent. Article 1467 of the Civil Code primarily offers a destructive remedy: the disadvantaged party may seek termination, while the other party may avoid it by offering an equitable modification of the terms. The Civil Code, therefore, does not construct excessive onerousness as a general right to judicial modification of the contract. The logic remains that of dissolution, tempered by the possibility of preservation left to the offer of the other party. This explains why contemporary scholarship has sought, especially in long-term contracts, instruments other than the mere extinguishing of the contractual bond[8].

Long-term contracts are, indeed, the terrain most exposed to supervening events. In such contracts, time is not an external datum, but a structural element of the relationship. Performance is not exhausted in a single act; it is distributed over a sequence in which wars, restrictions, cost increases, logistical blockages and regulatory changes may occur. The synallagma is therefore not a snapshot of the original equilibrium, but a relationship that develops over time. Geopolitical crisis affects precisely this dimension: it may not entirely prevent the relationship, but may progressively alter its costs, utility, modes of performance and economic assumptions.

For this reason, in long-term contracts, exclusively destructive remedies are often unsatisfactory[9]. Terminating the contract may be inefficient where the relationship retains residual utility, where investments are specific, where performance is tailored to the needs of the other party, where relocation on the market is difficult, or where the creditor's interest can still be partially satisfied. In such cases, the legal order tends to value preservative remedies: reduction of the counter-performance, suspension, adjustment and renegotiation. Although civil law does not provide for a general clause of contractual revision, it contains significant indications of this logic.

8 It has been argued that there is a radical "inadequacy, due to its incompleteness, of the codified rules on supervening events", as clarified by Francesca Maltese, *Sopravvenienze pandemiche e prospettive rimediali,* in *I Contratti,* II, 2026, p. 223.

9 Ultimately, "the response offered by civil law to supervening events [...] no longer proves adequate today to fully satisfy the parties' lasting interest", as drastically stated by Carlo Basunti, *La rinegoziazione in una disciplina di settore: riflessioni e spunti alla luce del codice dei contratti pubblici ,* in *Contratto e Impresa*, I, 2026, p. 155.

The principal reference is Article 1464 of the Civil Code. In the case of partial impossibility of performance, the party entitled to performance may obtain a corresponding reduction of its own counter-performance and may withdraw only where it has no appreciable interest in partial performance. The rule is of considerable systemic importance because it introduces, alongside the terminating remedy, a preservative remedy. If performance is only partially possible, the contract need not necessarily fall; it may be maintained, provided that it is rebalanced through a reduction of the counter-performance. This logic has also been developed beyond its literal scope, as a general criterion for preserving the relationship in cases where performance is partially executable or partially useful.

Article 1464 of the Civil Code also makes it possible to address the problem of supervening unusability. There are cases in which performance remains materially possible, but is no longer capable of satisfying, in whole or in part, the interest incorporated into the contract. The performance is not physically impossible; it is, however, functionally unsuitable. Case law has progressively enhanced the notion of the concrete cause of the contract in order to assimilate, at least at the remedial level, material impossibility to the uselessness of performance, where performance is no longer capable of achieving the practical purpose of the contract. From this perspective, a performance that is materially possible but unusable may justify preservative remedies, above all the reduction of the counter-performance, where a residual interest in the continuation of the relationship remains.

The centrality of preservative remedies is explained not only by the interest in maintaining the relationship in the face of persistent uncertainty in contemporary reality, but also in light of the economic structure of many economic relationships. In long-term contracts, the parties often make specific investments that are difficult to reuse outside that relationship. Where performance is tailored to the creditor's needs, termination may not represent an efficient solution: the debtor is unable to relocate the performance usefully on the market, while the creditor loses an already organised relationship. In such cases, the proper preservation of the relationship may prove more rational than its extinction. Hence the importance of the connection between Article 1464 of the Civil Code, good faith and renegotiation.

Renegotiation, however, must be examined carefully. It cannot be transformed into a generalised judicial power to rewrite the contract in every case of supervening events. In relationships between parties of equal bargaining power, the legal order continues to distinguish between the destructive remedy under Article 1467 of the Civil Code and preservative remedies expressly provided for or inferable from the system. Good faith may ground an obligation to participate loyally in discussions, to communicate the crisis, to avoid aggravating the damage and not to unreasonably refuse balanced solutions; but, in the present author's view, it cannot allow a party to obtain a constitutive judgment modifying the content of the contract. The problem becomes different in asymmetric relationships, in which consumer-protection rules or the prohibition of abuse of economic dependence may broaden the corrective powers of the judge.

4. Good Faith and Renegotiation: The Problem of Preservative Remedies Between Private Autonomy, Supervening Events and the Limits of Judicial Power

Renegotiation represents one of the most delicate point in the modern theory of supervening events. Once it has been established that the supervening event does not necessarily determine impossibility of performance, and that excessive onerousness leads, according to the general codified model, to termination of the contract, the issue becomes whether the legal order may require the parties to adopt conduct different from the mere alternative between performance and dissolution. In other words, the question is whether the crisis of the relationship must be governed solely through terminating remedies, or whether space may be found for a preservative technique, grounded in good faith, aimed at preserving the contract through its adjustment by means of a duty to renegotiate[10].

In this respect, Article 1467 of the Civil Code is often invoked. As is well known, the provision governs supervening excessive onerousness in contracts with continuous, periodic or deferred performance, and grants the party whose performance has become excessively onerous the power to seek termination. The other party may avoid termination by offering to modify the contractual terms equitably. The remedy granted to the disadvantaged party is, in the structure of the rule, a destructive remedy; the preservative remedy is instead left to the initiative of the advantaged party. This is where the core problem of renegotiation arises: if the legislature has expressly provided that reductio ad aeq-

10 Clearly favourable in this respect is footnotes Luciano Castelli, *L'obbligo di rinegoziazione,* in *I contratti*, II, 2016, p. 185, where he states that "by virtue of the principle of good faith, the parties are subject to a legal obligation to renegotiate", thus adhering to the favourable scholarship already mentioned in the preceding footnotes.

uitatem is a faculty of the party against whom termination is sought, can good faith transform that faculty into an obligation? And, above all, can the judge replace the parties in determining the new content of the contract?

A generic duty to renegotiate, without any possibility of judicial intervention where the negotiations fail, risks having limited effectiveness and, at most, taking the form of a compensatory remedy in the case of refusal to negotiate. If, on the other hand, renegotiation were understood as an obligation to conclude a new rebalanced contract, the problem would become far more incisive: it would be necessary to ask whether breach of that obligation could be replaced by a constitutive judgment pursuant to Article 2932 of the Civil Code and, therefore, whether the judge has sufficiently determinate parameters to substitute the will of the inert or obstructive party[11].

It is here that the structural limit of renegotiation in the general law of contracts emerges. Article 2932 of the Civil Code presupposes an obligation to conclude a contract whose content is determined or determinable. If the original contract contains hardship clauses, adjustment criteria, objective parameters for price revision, indexation formulae or risk-allocation mechanisms, judicial intervention may find a sufficiently defined basis. In the absence of such parameters, by contrast, a modifying judgment would risk conferring upon the judge a creative power incompatible with the principle of private autonomy. Good faith may impose fairness, cooperation, information and loyalty in the management of the crisis; it is more difficult to assume that it always permits the judicial determination of the new economic equilibrium of the contract[12].

Renegotiation must therefore be reconstructed by distinguishing three levels. The first is that of the duty of conduct, for example a duty of timely information. In this dimension, renegotiation is a procedural obligation: it does not necessarily require the parties to reach a new agreement, but it does require them to participate loyally in the attempt to preserve the relationship.

11 Critical in this respect, as regards the lack of parameters available to the judge, is Gianluca Sicchiero, *Contratti sopravvenienze - Il Covid ha ucciso anche la solidarietà Costituzionale?* In *Giurisprudenza Italiana*, XII, 2025, p. 2495.

12 By contrast, Castelli, p. 190 , is expressly favourable, arguing for the applicability of the provision; along the same lines, although within authoritative but rather sparse scholarship, (Francesco Galgano, *Trattato di diritto civile,* Padova, 2009, II, p. 574; Vincenzo Roppo, *Il Contratto,* in *Trattato di diritto privato,* a cura di Iudica, Zatti, Milano, 2001, p. 1047).

The second level is that of liability. Breach of the duty to renegotiate may amount to non-performance of ancillary duties of fairness and protection. An unjustified refusal to negotiate, the concealment of relevant information, failure to communicate the crisis in a timely manner, the arbitrary breakdown of adjustment negotiations, or the instrumental use of the supervening event may give rise to liability in damages. However, such liability does not automatically coincide with a right to obtain the modified contract; once again, it operates only on the compensatory plane, to be calculated by reference to the negative interest[13].

The third level is that of specific performance. This is the most problematic level. In order for the judge to issue a decision substituting the agreement of the parties, the obligation to adjust must be sufficiently determined. This may occur where the contract provides for structured renegotiation clauses, where the law establishes objective revision criteria, or where the contractual type contains special rules capable of overcoming a purely termination-oriented logic. In the absence of such elements, judicial intervention risks becoming an equitable assessment lacking an adequate legal basis[14].

There is more. Another limit to conceiving such an impact of the duty of good faith lies in the fact that, where the legislature intended to impose on the parties a duty to adjust the contract to supervening events, it did so expressly. Civil law does, in fact, recognise important models of preservative remedies. The first is Article 1464 of the Civil Code, which, in the case of partial impossibility, allows the party retaining an interest in partial performance to obtain a corresponding reduction of its own counter-performance. This constitutes a significant indication of the system's tendency to favour, where possible, the preservation of the relationship over its extinction. For this very reason, price

13 The debate concerning the measure of damages is effectively reconstructed by Shaira Thobani, *Il contenuto dell'obbligo di rinegoziare,* in *Il Corriere Giuridico*, V, 2020, p. 631; see also Franco Trubiani, *La rinegoziazione contrattuale tra onere e obbligo delle parti*, in *Obbl. contr.,* 2012, p. 453.

14 Sicchiero, p. 2495 ss. appears indeed to be critical of the remedy consisting in a duty to renegotiate. The Author — who, several months before another canal was closed, had already envisaged the harmful consequences that a new closure of the Suez Canal might entail — persuasively rejects that assumption, recalling that case law has rejected not only the applicability of Article 2932 of the Civil Code, but also, quite often, even a generic duty to renegotiate. He effectively argues instead for a temporary solution: a pro tempore intervention in the contract, such as — as the Author suggests — suspension of the duty to perform, by means of a parallel that appears effective with a remedy, namely temporary suspension of performance, which is expressly recognised in the Civil Code.

reduction has sometimes been developed beyond the strictly literal case of partial impossibility, as a general rebalancing remedy in cases where performance is partially defective, partially unusable, or only partly capable of satisfying the creditor's interest.

A second model is Article 1664 of the Civil Code on contracts for works. The provision gives relevance to unforeseeable variations in the cost of materials or labour exceeding a given threshold, allowing price revision. The rule is particularly significant because, unlike Article 1467 of the Civil Code, it does not proceed from the logic of dissolution, but from that of adjustment. The reason lies within the contractual type itself. In contracts for works, the contractor's performance is often tailored to the needs of the client; it is not easily relocated on the market if the relationship is dissolved. The preservative remedy is therefore justified because termination would risk dissipating a performance specifically oriented towards the creditor's interest.

This rationale makes it possible to consider the analogical extension of the model. Not every long-term contract can be assimilated to a contract for works; nevertheless, its logic may acquire systemic value in relationships presenting analogous features: specific investments, performance tailored to the needs of the other party, difficulty of relocation on the market, a long-term relationship, economic dependence and the absence of realistic alternatives. In such cases, preservation of the relationship may appear more consistent with the concrete function of the contract than termination.

This reconstruction also allows the relationship between renegotiation and risk to be clarified. Renegotiation does not serve to neutralise every risk. If the event falls within the normal contractual risk, the party affected by it must bear its consequences. By contrast, where the supervening event exceeds the assumed risk, radically alters the original equilibrium and affects a relationship whose termination would produce dysfunctional effects, the duty of cooperation intensifies. Good faith does not automatically redistribute risk, but prevents one party from shifting it entirely onto the other in a manner incompatible with the function of the relationship. Yet the problem remains the limited scope that should be allowed to judicial intervention: in contracts for works or services, the predetermination of the price permits an economic readjustment linked to the proportional reduction of performance; in other cases, this does not, in truth, appear capable of being configured.

The case of asymmetric relationships appears different. In such cases, the refusal to renegotiate or abusive renegotiation are not merely violations of good faith, but may amount to abuse of economic dependence or abuse of the informational imbalance that normally characterises the relationship between consumer and professional.

5. The Three Contractual Models in the Face of Supervening Events: Contracts Between Parties of Equal Bargaining Power, Consumer Contracts, and Asymmetric Contracts Between Undertakings

The issue of supervening events is today affected by the transformation undergone by contract law. The Civil Code of 1942 proceeded from a model of private autonomy that was tendentially based on equality: two formally equal parties, capable of freely determining the content of their relationship, each assuming its own share of risk[15]. The subsequent evolution of private law, however, has shown that the contemporary contract could not be confined to a single paradigm. Alongside the ordinary contract, founded on the presumption of equality between the parties, at least two other models have progressively emerged: the consumer contract, in which informational and professional asymmetry justifies a protective control over the content of the contract; and the contract between undertakings characterised by economic dependence, in which weakness does not derive from the status of one party, but from the structural position of economic subjection of one undertaking vis-à-vis another.

This tripartition — the first contract, the second contract and the third contract — assumes particular importance precisely in the field of supervening events, including geopolitical events. In contracts between parties of equal bargaining power, the supervening event primarily raises a problem concerning the application of typical remedies: impossibility, excessive onerousness, partial impossibility, good faith and renegotiation within the limits already examined. In consumer contracts, by contrast, the supervening event must be filtered through the rules on protection, transparency and control of unfair terms. Finally, in asymmetric contracts between undertakings, it may become an instrument of pressure and abuse: not merely an external fact altering the relationship, but

15 In this sense, it has effectively been observed that "the first contract, governed by the Civil Code, would be characterised by a relationship of equality between the parties, who are regarded as equal in terms of bargaining power and information", De Domenico, p. 77.

a lever used by the stronger party to impose modifications, transfer risks or consolidate the counterparty's dependence.

The difference between the three models is most clearly perceived by looking at the role of the judge. In the first contract, the judge is tendentially bound by the principle of private autonomy, at least according to the dominant theory. In the second and third contracts, by contrast, judicial power intensifies: in the former case because the legal order protects the consumer; in the latter because it represses the abuse of a position of economic strength. The geopolitical supervening event thus becomes the terrain on which the different depth of judicial intervention in the various contractual models emerges most clearly.

In the first contract, the supervening event may certainly have the effects highlighted in the preceding sections. However, it does not in itself justify judicial revision of the content of the contract, given the presumption of equality; and supervening events certainly cannot transform the judge into a general administrator of contractual risk.

The second model, that of the consumer contract, is different. Here the legal order does not assume the substantive equality of the parties. The professional party normally enjoys informational, organisational, technical and economic superiority; the consumer often adheres to unilaterally drafted terms, without any real capacity to influence the content of the contract. Consumer law arises precisely in order to correct this asymmetry, through information duties, transparency requirements, control of unfair terms, remedies against unfair commercial practices and instruments of protective integration of the relationship.

The central point is that, in consumer contracts, clauses governing supervening events are subject to judicial review, which here is expressly provided for by the Consumer Code (Articles 33 and 36). In this model, the judge has more incisive powers than in contracts between parties of equal bargaining power[16]. The judge may declare unfair terms void, prevent the application of unjustified or non-transparent unilateral modifications, give relevance to a failure to provide information, verify the proportionality of economic variations, and consider the impact of the supervening event on the effective utility of performance.

16 In particular, the clause found to be unfair does not bind the contracting parties, while the contract "remains binding on the parties according to the same terms", on this point, see Antonio Musio, *Nullità delle clausole vessatorie nei contratti dei consumatori tra etero-integrazion*e *legale, potere correttivo del giudice e obbligo di rinegoziazione in Danno e Responsabilità,* VI, 2025, p. 693.

This does not mean that the consumer is shielded from every effect of the supervening event. Even in B2C contracts, increased costs may justify adjustments, suspensions, modifications or even termination where the relationship is no longer sustainable. In any event, however, the drastic change lies in the fact that European Union case law has long clarified that, in such cases, in order to protect the consumer where the invalidation of the relationship or of the clause would be unfavourable to him or her, the judge may intervene in a supplementary manner[17].

The third model, that of the asymmetric contract between undertakings, is even more complex. Here there is no consumer, but neither is there genuine economic equality. The weaker undertaking may depend on another for the most varied reasons: access to the market, continuity of supplies, distribution of its products, use of platforms, infrastructure, commercial networks or know-how. The category of economic dependence, governed by Article 9 of Law No. 192 of 18 June 1998, makes it possible to repress abuse committed by an undertaking that is able, in its commercial dealings with another, to determine an excessive imbalance of rights and obligations. The decisive factor is not the subjective size of the undertaking, but the absence of satisfactory alternatives on the market.

From this perspective, renegotiation changes its nature. In contracts between parties of equal bargaining power, it is primarily a duty of procedural loyalty. In the third contract, by contrast, it may become a safeguard against abuse. Refusal to renegotiate, renegotiation conducted instrumentally, the imposition of unfair terms and the full transfer of risk onto the dependent party may be assessed not only as breaches of good faith, but as abuse of economic dependence. The supervening event does not automatically justify alteration of the relationship; on the contrary, it requires verification of whether the stronger party is using the crisis to obtain a disproportionate advantage.

Judicial power in this field is more intense. Article 9 of Law No. 192/1998

17 Martina D'Onofrio, *Nullità delle clausole abusive, interpretazione e (limitato) ruolo del* giudice in sede di integrazione contrattuale nella giurisprudenza della Corte di Lussemburgo, in *Jus civile*, 2022, IV, p. 941 ss.; ultimately, the point is that the judge cannot in any event distort the contract, transforming it into something different in order to provide greater protection to the consumer, since the judge's intervention remains limited to a supplementary function on the basis of the provisions of national law that are relevant from time to time. See CGUE, 30 aprile 2014, C-26/13, Kásler e Káslerné Rábai; CGUE, Grande Sezione, 26 marzo 2019, cause riunite C-70/17 e C-179/17, Abanca Corporación Bancaria e Bankia; CGUE, 3 marzo 2020, C-125/18, Gómez del Moral Guasch.

provides for the nullity of the agreement through which the abuse is carried out and allows compensation in damages. Moreover, the repression of abuse may affect the content of the relationship, preventing the application of unbalanced conditions or requiring the removal of the abusive effects. In this sense, the third contract is the context in which supervening events most strongly call into question the classic model of the contract between parties of equal bargaining power, given the judge's power to intervene in relation to specific clauses precisely by reason of the economic result they produce, including through positive or negative injunctions concerning the continuation of the relationship[18].

The comparison between the three models makes it possible to clarify the relationship between supervening events and judicial intervention. In the first contract, the judge intervenes in a typical and limited manner: he or she verifies impossibility, onerousness, good faith and any liability. In the second contract, the judge also reviews the content drafted by the professional party, the transparency of the clauses and the normative equilibrium of the relationship, being able to intervene, but only in a supplementary manner[19]. In the third contract, the judge assesses whether the supervening event has been used as an opportunity for abuse, affecting conditions which, although formally negotiated between undertakings, are in substance imposed by the economically dominant party; here the judge has a power of reconfiguration — and of inviting renegotiation — that reaches its greatest breadth.

6. Supervening Events in Administrative Law

The transition from private law to administrative law requires a shift in perspective. In private contractual relationships, the question is whether the bond should be preserved, dissolved or adjusted, and under what conditions. In administrative law, by contrast, the supervening event does not primarily affect an exchange equilibrium between two private autonomies, but rather the context within which a public power must be exercised for the pursuit of a general interest.

18 Regarding this matter see De Domenico, p. 77; Roberto Natoli, *La subfornitura nelle attività produttive e l'abuso di dipendenza economica, in Trattato dei contratti*, diretto da A. Benedetti - V. Roppo, Milano, 2014, p. 377 ss.; Roberto Natoli, *L'abuso di dipendenza economica. Il contratto e il mercato*, Napoli, 2004, p. 118 ss.

19 It is barely necessary to specify, in this topic, that the consumer is under no obligation to renegotiate, benefiting instead from a duty of protection, Musio, p. 693.

The difference is structural, above all because the administrative measure is not an expression of freedom as to its purpose: it is the exercise of a power conferred by law and functionally directed towards the pursuit of the public interest. The administration does not decide in order to realise an interest of its own, nor to maximise an individual utility; it decides in order to pursue an interest that the legal order has qualified as public.

This perspective makes it possible to avoid a static reading of the public interest, since the administration must give concrete form to that purpose within a changing reality, between a normative dimension and an implementing dimension. The former is defined by law; the latter emerges within the procedure, through the investigation, the balancing of interests, the assessment of concrete circumstances and the statement of reasons. The supervening event affects precisely this second dimension: it forces the administration to verify whether the originally envisaged manner of pursuing the public interest is still reasonable, proportionate and useful.

This is all the truer in contemporary geopolitical crises. A public work planned in a given historical phase may become excessively costly or no longer a priority; a tender procedure may be disrupted by the unavailability of materials; an authorisation may have to be reassessed in light of new risks; a concession may no longer be sustainable under the original economic and financial plan; an administrative measure may require adjustments in order to continue pursuing the public result.

In this framework, the supervening event does not automatically determine the abandonment of the original decision. Rather, it requires a review of its current relevance, and an administration that ignores a relevant supervening event risks acting unreasonably.

From this point of view, the administrative procedure acquires a central function. It must ascertain the actual impact of the supervening event; participation allows the affected parties to put forward interests, legitimate expectations and alternatives; the statement of reasons must explain why the new arrangement is preferable to the preservation of the original one; discretion must translate the change in context into a proportionate choice. In the absence of these steps, the supervening event remains a fact invoked, not an administrative reason legitimately relied upon.

The difference from private law also emerges when considering the position of the private party. In the ordinary contract, the private party holds a subjective right to performance, subject to the remedies arising from the crisis of the relationship. In administrative law, by contrast, the private party is confronted with a public power, by virtue of his or her legitimate interest in obtaining or preserving a substantive benefit through the proper exercise of that power; and precisely that proper exercise may be called upon to readjust itself in light of the changed context of reference.

Administrative supervening events therefore require an intensification of the investigative inquiry, given the extraordinary nature of the supervening conditions. In private law, the principal question is who must bear the risk of the event. In administrative law, by contrast, the principal question is whether, in light of the event, the public choice continues to be suitable for the purpose pursued.

This logic is particularly evident in public contracts, which will constitute the privileged terrain of the following sections, after some brief reflections on the effect of supervening events on administrative measures in general.

7. The Administrative Measure in the Face of Supervening Events: Investigation, Discretion, Proportionality and Self-Review Powers

The first context in which supervening events become relevant is the investigative phase. The administrative procedure is not a merely formal sequence, but the moment in which the knowledge base of the decision is constructed. If new and relevant circumstances emerge during the procedure, the administration must acquire and assess them; otherwise, the measure risks being vitiated by an inadequate investigation, distortion of the facts, lack of reasoning or unreasonableness. Not every change, of course, will require the procedure to be reopened, but only one capable of genuinely affecting the arrangement of interests.

Supervening events also affect administrative discretion. Discretion is not arbitrariness, but the balancing of interests in view of the public purpose. A choice that was originally reasonable may become disproportionate; a useful measure may become uneconomic; a programme that was initially coherent may lose its current relevance. Reassessment is therefore possible, and at times necessary, but it must be supported by specific reasoning.

The most delicate terrain, however, appears to be that of self-review powers. In this framework, it is necessary to distinguish annulment ex officio from revocation, the latter being the institution that, more than any other, can be brought close to the issue of supervening events. Revocation affects, as is well known, a lawful act impacted by changes in the factual situation and by legitimate expectations that may have become consolidated. It requires an updated investigation, strengthened reasoning, a balancing between the supervening public interest and the position of the private party, as well as, in the cases provided for by law, compensation. In the framework under consideration, such compensation represents the economic preservation of equilibrium, although it is based on criteria of assessment radically different from those governing damages in the event of non-performance in a private-law contract[20].

Judicial review by the administrative court is situated on this plane. The court does not substitute its own assessment for that of the administration, but verifies that the supervening event is real, relevant, properly investigated and reasonably connected to the decision adopted. Review concerns the completeness of the investigation, the coherence of the statement of reasons, the proportionality of the measure and respect for legitimate expectations. The more the act affects consolidated positions, the more intense the administration's justification must be.

8. Public Contracts as a Laboratory for Supervening Events

Public contracts probably represent one of the *sedes materiae* in which supervening events assume their broadest configuration. They belong to the contractual dimension, because they involve performances, consideration, obligations, liability, performance and non-performance; however, they are not relationships wholly assimilable to the general law of contracts, since they arise from a public-law procedure for the selection of the contractor.

This dual nature explains why public contracts are today one of the principal normative laboratories of renegotiation[21]. In ordinary private law, the obligation to renegotiate is reconstructed above all on the basis of good faith and encounters the limits of private autonomy and of the difficulty of attributing to the judge a general power to rewrite the contract. In the new Public Contracts Code,

20 In the latter case, consequential loss will have to take into account actual loss and loss of profit, as well as the negative interest, whereas, on the public-law field, the amount represents compensatory relief aimed at restoring the balance between the public interest in not obtaining the asset now deemed useless and the private party's economic expectation.

21 Indeed, the choice made by the new Code shows a clear position in this respect in favour of the institution of renegotiation in this field (see Basunti, p. 155).

by contrast, the preservation of contractual equilibrium receives express recognition. Article 9 of Legislative Decree No. 36/2023 affirms the principle of preservation of contractual equilibrium and connects renegotiation, in accordance with good faith, to extraordinary and unforeseeable circumstances, external to the normal contractual risk, to ordinary economic fluctuation and to market risk. The supervening event is no longer regarded solely as a cause of dissolution, but also as the prerequisite for a possible preservative revision[22].

Public-law renegotiation, however, does not perform the same function that it may have in private contracts. It does not simply serve to protect the disadvantaged party from the crisis, nor to guarantee the economic operator the profit margin originally expected. It is functionally directed towards preserving the relationship insofar as such preservation is consistent with the public interest[23]. Contractual equilibrium is relevant because its disruption may jeopardise the completion of the work, the continuity of the service, the quality of performance or the overall convenience of the operation. The administration does not renegotiate out of contractual solidarity in the private-law sense, but because a contract economically overwhelmed by the supervening event risks no longer producing the result for which it was awarded[24].

Article 60 of Legislative Decree No. 36/2023 is situated within this perspective, requiring tender documents to include price-revision clauses. Price revi-

22 In this aspect, it has been argued that the debate as to whether renegotiation is appropriate or not has been definitively overcome precisely by Article 9: Sandro Nardi, *La modificabilità del contratto pubblico in corso di esecuzione tra rinegoziazione e revisione,* in *Le Nuove Leggi Civili Commentate*, I, 2026, p. 245.

23 In the sense that the objective is, in reality, the restoration of the original equilibrium, without advantaging the contractor or concessionaire, see Giovanni Balocco, Giovanna Scaccheri, *L'obbligo di rinegoziazione nel nuovo Codice nel rispetto dei principi costituzionali?,* in *Urbanistica e appalti*, VI, 2024, p. 713.

24 The issue is effectively summarised by the Authors last cited, who state that, in this context, "renegotiation is a principle of an operational nature, which could be understood as a rule identifying the facts of the general and abstract legal provision and the effects connected to them, and which could therefore be described as a second-level principle in relation to the principles of result, trust and access to the market, which instead possess the features of the highest degree of generality and abstraction, constituting criteria for the interpretation and application of the Code's provisions and which, accordingly, could be defined as first-level principles, or even value-principles, without a legal hypothesis, subject to an interpretation based primarily on assessments characterised by persuasiveness, reasonableness, internal coherence and, above all, carried out following a balancing with other values of higher or even equal rank."

sion is not an exceptional concession to the contractor, but an ordinary mechanism for governing economic supervening events. Its function is compensatory, but also planning-oriented: at the moment of award, the administration must already foresee that the relationship may be exposed to changes in costs and must provide instruments capable of governing them. The supervening event is no longer treated as an event radically external to the contract, but as a risk to be regulated *ex ante* through clauses enabling the relationship to be preserved without arbitrarily altering its content[25].

Price revision assumes particular importance in the current scenario, marked by a renewed exacerbation of geopolitical crises, because such crises affect essential production factors: energy, transport, raw materials, technological components and supply costs. In the absence of an adjustment mechanism, the operator might be induced to slow down, suspend, reduce the quality of performance or abandon the relationship; the administration, in turn, might find itself faced with the inefficient alternative between requiring the original performance of an economically unsustainable contract or terminating the relationship and launching a new tender procedure. Price revision, by contrast, makes it possible to absorb the crisis within the relationship, while maintaining the public function of the contract.

It cannot, however, be transformed into the complete neutralisation of business risk. Even in public contracts, the operator assumes a degree of risk: not every cost increase justifies compensation, not every reduction in profit margin requires adjustment, and not every market difficulty can be passed on to the administration. The threshold for revision must be read consistently with Article 9: only extraordinary, unforeseeable circumstances external to ordinary risk are relevant. The Code thus constructs a balance between two requirements: preventing the administration from demanding performance under conditions that have become unreasonable, while avoiding the operator transferring every unfavourable economic fluctuation onto the community.

Alongside price revision, the other central institution is modification of the contract during performance. Article 120 of Legislative Decree No. 36/2023 governs the cases in which the contract may be modified without a new award procedure. Here too, a logic of preservative adaptation emerges: the public con-

25 In general, the objective is to ensure that the party is entitled to submit a request for renegotiation, including with coercive effect, albeit only in the sense of an obligation to negotiate (Perrino, p. 178).

tract is not immobile and may be modified where objective supervening events make it necessary to adjust its terms, modes of performance, obligations or economic conditions. Such flexibility, however, encounters an essential limit: the modification must not alter the overall nature of the contract nor amount, under the guise of adjustment, to a new award without a tender procedure[26].

The preservation of equilibrium is therefore not an absolute value: where the relationship has become radically unsuitable for achieving the result, where the necessary modification would entail a new award, or where serious impediments emerge, dissolution once again becomes the correct solution. Despite these limits on the application of the institution, the legislative choice has not been immune from criticism, some regarding it even as capable of leading to a violation of the separation of powers[27].

9. The Principle of Result and Its Limits

The principle of result represents one of the most significant points of systemic innovation in the new Public Contracts Code. It should not be understood as a merely efficiency-oriented formula, nor as a clause designed simply to accelerate procedures. The result does not coincide with the formal closure of the tender procedure, with the conclusion of the contract, or with the mere material performance of the obligation. More radically, it refers to the effective realisation of the public utility underlying the award. In this sense, the principle of result requires a reinterpretation of the public interest in functional, rather than static, terms.

From this perspective, the principle of result is also connected to the principle of preservation of contractual equilibrium. Article 9 of Legislative Decree No. 36/2023, as noted, recognises that extraordinary and unforeseeable circumstances, external to the normal contractual risk, may alter the original equilib-

26 The preservative logic then finds a limit in the final remedies of dissolution. Articles 122 and 123 of Legislative Decree No. 36/2023 show that not every supervening event can be absorbed through revision, modification or rebalancing. Article 123 governs the withdrawal of the contracting authority, as a unilateral power of a private-law nature; Article 122, although referring to termination, has a more complex structure, since it includes situations of a substantially public-law nature, connected to defects or supervening events affecting the award, alongside more properly performance-related cases of serious non-performance or delay.

27 Balocco, Scaccheri, p. 713.

rium of the relationship and make renegotiation in accordance with good faith necessary. The provision is decisive because it shows that the new Code does not regard supervening events solely as pathological factors, but also as grounds for adjustment. And if public-law renegotiation is not aimed at the mere protection of the economic operator, but is functional to preserving the relationship where preservation is consistent with the public result, the link between renegotiation and the principle of result is clear[28].

In this sense, price revision, contractual modifications and, ultimately, all the outcomes of renegotiation do not constitute occasional derogations, but instruments through which the principle of result operates during the performance phase. Price revision prevents an exceptional increase in costs from making performance impossible or unreasonable; similarly, *mutatis mutandis*, a variation order allows the work to be adapted to unforeseen technical or material facts; an extension neutralises delays not attributable to the contractor, and so forth.

The principle of result, however, cannot be absolutised. It is not a super-principle, it is not a general remedial clause, and it does not authorise the administration to sacrifice *par condicio* or to circumvent competition. It operates within legality, not above it. It may guide the exercise of discretion where the administration has several lawful solutions available; it cannot render lawful a solution that violates essential rules governing public procurement. In other words, result is an operative criterion, not a curative one.

Consider the case, recently addressed by the Council of State, of the successful tenderer who participated in a procedure in which the tender notice did not indicate the minimum environmental criteria, although the successful tenderer complied with them during the performance phase[29]. If the *lex specialis* omits mandatory minimum environmental criteria, it is not sufficient to argue that the successful tenderer is, in concrete terms, nevertheless able to perform in conformity with them. The defect does not concern only the final content of performance, but the structure of competition itself. Minimum environmental criteria must be provided upstream, in the tender documentation, because they affect the object of the award, the requirements, the costs, the manner in which tenders are formulated and the range of interested operators. Their omission alters the competitive comparison and cannot be remedied by invoking the final

28 Basunti, p. 155.

29 Consiglio di Stato, sez. V, 25.01.2024 n. 807; see also Consiglio di Stato, sez. III, 27.05.2024 n. 4701; Consiglio di Stato, sez. III, 11.11.2024, n. 8171.

utility of the performance, contrary to what was argued by the applicant in the case mentioned in the footnote.

Or consider the case, recently decided by the Veneto Regional Administrative Court, concerning the revocation of a tender due to lack of funding resulting from the use of funds to address sudden supervening events — and therefore from the allocation of the same resources to other purposes — and how that choice is not incompatible with respect for the principle of result, but rather confirms it in its broader interpretation[30].

Ultimately, the principle of result may justify the adaptation of performance, but not the ex post correction of the tender procedure in defiance of the principles of competition and, more broadly, procedural legality.

10. Conclusion

In the post-globalisation era, supervening events can no longer be treated as exceptional occurrences. Geopolitical, energy-related, logistical, environmental and regulatory crises demonstrate that instability has become an ordinary condition of legal relationships. The law is therefore called upon to govern change without sacrificing stability, legitimate expectations and legality.

In private law, supervening events affect performance, the creditor's interest, the contractual synallagma and the allocation of contractual risk. Articles 1256, 1464 and 1467 of the Civil Code have traditionally provided the principal responses within the private-law framework: extinction of the obligation in the event of impossibility; reduction or preservation of the relationship in cases of partial impossibility; and termination for supervening excessive onerousness. Alongside these remedies, good faith and renegotiation allow a cooperative logic to emerge: one that remains limited in the first contractual model, but may also produce supplementary effects through judicial intervention in asymmetric relationships.

In administrative law, by contrast, supervening events do not strictly concern the synallagma, but rather the public interest. They require the administration to verify whether the decision taken, the measure adopted or the contract concluded remains suitable for the public purpose pursued. For this reason, the updating of the investigative record, the statement of reasons and proportionality become

30 Tar Veneto, Sez. II, 11/12/2024, n. 2946.

central criteria.

Public contracts illustrate this evolution with particular clarity. The new Code does not treat supervening events solely as a pathology, but also as an occasion for regulated adaptation. The aim is not to protect the economic operator as such, but to preserve the public result where the relationship remains useful and legally capable of being maintained.

The principle of result is the key to this approach. It allows the law to move beyond paralysing formalism and requires attention to be focused on the effective public utility pursued. Yet it is not a general curative clause: it cannot sacrifice legality, competition, *par condicio*, transparency or mandatory tender requirements. The result guides the administration among lawful alternatives; it does not make lawful what infringes the rules of the procedure.

Supervening events therefore reveal a new conception of stability. Stability no longer means immobility, but a regulated capacity for adaptation. A stable contract is not necessarily an immutable contract; it is stable if it preserves its function through proportionate remedies. Stable administrative action is not action that ignores change, but action capable of reassessing the public interest in light of the changes that have occurred.

In conclusion, in private law supervening events measure the appropriateness of maintaining the contract over time; in administrative law, they measure the continuing adequacy of public action to its purpose.

The Geopolitical Function of Tariffs between Customs Law and Economic Warfarer

BY VINCENZO DELLI PRISCOLI

The central argument of this article is that customs duties are undergoing a profound functional transformation. Traditionally conceived as fiscal instruments designed to generate public revenue and regulate international trade, tariffs are increasingly assuming a multidimensional regulatory function. They now operate simultaneously as instruments of industrial policy, economic security, environmental protection, technological competition, and geopolitical influence. This evolution challenges the traditional distinction between customs law, tax law, and international trade law, requiring a more integrated legal approach capable of addressing the growing interdependence between economic governance and strategic public interests. Consequently, contemporary customs law should no longer be interpreted exclusively through the traditional paradigms of border taxation or trade liberalization, but rather as an evolving legal framework through which States and supranational organizations pursue broader objectives of economic sovereignty and global governance[1].

The institution of customs duties represents one of the oldest forms of taxation connected with trade and commercial exchanges. Since the earliest organized civilizations, political authorities have felt the need to regulate the movement of goods across territories and borders, both for purposes of economic control and to secure fiscal revenues for the state apparatus.

In this context, one of the earliest historical examples of a taxation system

1 Douglas Alan Irwin, *Clashing over Commerce: A History of US Trade Policy*, The University of Chicago Press, Chicago, 2017; John Howard Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd ed., MIT Press, Cambridge (Massachusetts), 1997; Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Hart Publishing, Oxford, 2012.

linked to commercial activities can be traced back to the *Pentekoste*, a term in ancient Greek tradition referring to a levy amounting to one-twentieth of the value of goods, corresponding to a tax rate of five percent[2].

The function of the *Pentekoste* was not merely fiscal; it also served regulatory and supervisory purposes, as the obligation to declare goods upon their entry into or exit from the port enabled authorities to monitor commercial activities and prevent fraud or illicit trade.

Thus, even in the earliest forms of customs taxation, a dual dimension can be identified: on the one hand, the objective of revenue collection; on the other, the function of supervising economic activities and trade flows.

During the Middle Ages, the political fragmentation of Europe led to the proliferation of customs barriers and tolls imposed on the movement of goods. Cities, lordships, and principalities commonly levied duties on merchandise passing through their territories, with the aim of increasing revenues and protecting local economic activities[3].

Beginning in the early modern period, with the emergence of nation-states and the rise of mercantilist economic policies, customs duties assumed a central role in economic development strategies[4]. European monarchies employed tariffs as instruments to protect domestic industries and promote the accumulation of wealth within their borders. The prevailing belief was that a state's economic strength depended on its ability to export more than it imported, thereby accumulating precious metals and strengthening its productive capacity. Within this framework, tariffs became a key instrument of economic policy aimed at restricting the entry of foreign goods and supporting domestic production. Following the Great Depression of 1929, many states adopted protectionist policies, significantly increasing tariff barriers in an attempt to shield their national

2 In ancient Greece - and specifically in the *polis* of Athens - the *Pentekoste* was a levy applied to goods entering or leaving the port of Piraeus. This tax served as a crucial instrument for financing public activities and supporting the city's commercial infrastructure. Indeed, the Athenian port was a major Mediterranean trade hub, attracting merchants from numerous regions.

3 Medieval duties were often associated with so-called passage rights or tolls, which were collected along roads, bridges, or rivers. However, this system contributed to significantly increasing trade costs, hindering the movement of goods and fostering smuggling.

4 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, W. Strahan and T. Cadell, London, 1776; David Ricardo, *On the Principles of Political Economy and Taxation*, John Murray, London, 1817.

economies. However, these measures contributed to a contraction of international trade and exacerbated the global economic crisis. In order to prevent the recurrence of such dynamics, the international community initiated a process of progressive trade liberalization after the Second World War, culminating first in the creation of the General Agreement on Tariffs and Trade (GATT) and subsequently in the establishment of the World Trade Organization (WTO)[5].

The objective was to promote tariff reductions and ensure stable conditions of market access, thereby fostering the growth of international trade. Despite this evolution toward greater economic openness, customs duties continue to represent an important instrument of trade policy.

In recent years, in particular, tariffs have regained prominence in the context of geopolitical tensions and the so-called "tariff wars." Indeed, the emergence of geopolitical rivalries, the reconfiguration of global economic power structures, and increasing technological competition among major powers have led to a return to trade policies characterized by defensive and, at times, openly protectionist approaches. The so-called "tariff war"[6] has become the most visible symbol of this paradigm shift. The large-scale introduction of additional tariffs, the adoption of retaliatory measures, and the invocation of safeguard clauses or national security exceptions have once again placed customs borders at the center of economic sovereignty.

This phenomenon has not been limited to bilateral disputes but has generated systemic effects across the entire international trading system. Global value chains, built over decades on assumptions of tariff stability and regulatory predictability, have come under significant strain. In this scenario, customs law has ceased to be a marginal variable and has become a central factor in the strategic planning of productive and commercial activities[7]. For the European Union, or-

5 Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement).

6 An expression referring primarily to the trade conflict between the United States and China.

7 The customs union is grounded in Article 28 of the TFEU; it was given concrete form by the Single European Act of 18 February 1986—ratified by Italy via Law No. 909 of 23 December 1986. Article 13 of that Act set a deadline of 31 December 1992 for the Community to adopt measures aimed at the progressive establishment of the internal market—defined as an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of the Treaty. By that date, Member States had eliminated tariff and non-tariff barriers to trade within

ganized as a customs union and founded upon a common external tariff, the tariff war has raised particularly sensitive issues. On the one hand, there is the need to protect the internal market and ensure fair competitive conditions; on the other, there is the necessity of preserving multilateral commitments and maintaining consistency with the principles of the common commercial policy. The system established by the Union Customs Code has therefore been required to operate within an environment characterized by tariff instability and the increasing politicization of trade decisions. Consequently, customs administrations have been called upon to promptly implement tariff modifications, apply trade defense measures, and intensify controls concerning the origin and value of goods in order to prevent circumvention practices and triangular trade schemes.

From a fiscal perspective, the resurgence of tariffs has reopened the debate concerning the function of customs duties. Within the legal framework of the European Union, customs duties constitute, to a large extent, one of the Union's own resources; consequently, significant variations in tariff rates and trade volumes directly affect the overall financial balance of the EU budget. At the same time, increases in customs duties may generate distortive effects on domestic prices, influence corporate sourcing decisions, and affect the competitiveness of finished products[8]. Furthermore, the tariff war has demonstrated how the boundary between trade policy and industrial policy is becoming increasingly blurred, as tariff measures are frequently justified by the need to protect domestic industries, counter dumping practices, or safeguard sensitive technologies. As a result, customs law is increasingly intertwined with State aid regulation, foreign investment screening mechanisms, and export control rules.

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the Community and adopted a common customs tariff applicable to third countries. As a result of the single market and the common customs tariff, customs duties do not apply to goods moving within EU countries (the Treaty on the Functioning of the European Union prohibits Member States from maintaining or introducing customs duties and charges having equivalent effect), but rather to non-Community goods imported into the customs territory.

8 For an overview of the subject, see Claudio Sciancalepore, *Rimborso, sgravio e non contabilizzazione a posteriori dei dazi doganali: una prova di forza tra la primazia del diritto europeo e il principio del giudicato interno*, in Diritto e pratica tributaria iternazionale no. 2/2012, pp. 492; noting that the European Union budget is funded primarily by own resources such as national contributions - which include VAT and the general contribution derived from applying a rate to the Member States' Gross National Product (GNP) - and traditional own resources, which include customs duties.

Tariff wars do not merely affect trade relations between States; they also have a profound impact on the structure and functioning of national and supranational tax and customs systems. In a context characterized by geopolitical tensions and frequent changes in tariff policies, these systems are required to develop a capacity for institutional and regulatory adaptation that may be described in terms of administrative and regulatory resilience[9].

Traditionally, the customs function has been conceived as an instrument for revenue collection and for controlling the flow of goods entering and leaving national territory.

In the current historical context, however, customs administration assumes a much broader role, encompassing objectives such as economic security, protection of the internal market, and safeguarding strategic supply chains. Customs authorities are no longer limited to verifying the correct payment of border duties; they play an essential role in the implementation of States' trade and industrial policies. The introduction or tightening of customs duties requires the rapid adaptation of information systems, tariff classification procedures, and control mechanisms in order to ensure that new measures are applied effectively and uniformly. The adoption of a Common Customs Tariff and uniform rules regarding the classification of goods, origin, and customs valuation ensures homogeneous conditions of access to the European Union's internal market. However, tariff wars pose new challenges even to this integrated system, as measures targeting specific countries or economic sectors require continuous coordination between European institutions and national administrations in order to avoid divergent applications that could generate distortions within the functioning of the Single Market.

The resilience of tax and customs systems is manifested, first and foremost, in their ability to rapidly update the regulatory framework. Tariff amendments, safeguard measures, and trade defense instruments must be incorporated promptly and translated into clear operational provisions for economic operators.

A second key element concerns the evolution of the technologies used in customs procedures. The digitalization of declaration and control processes constitutes a fundamental tool for ensuring the effectiveness of tariff measures in

9 Anna Rita Ciarcia, *L'obbligazione doganale (Alla luce del D.Lgs. n. 141 del 26 settembre 2024*) 2025.

an increasingly complex environment. Information systems make it possible to process large volumes of data relating to import and export operations, facilitating the identification of anomalies or attempts to circumvent tariff measures.

The adoption of advanced technologies is linked to a broader transformation of the customs administration model. Whereas customs controls were once primarily based on physical inspections of goods, they are now increasingly founded on a risk-management approach, in which information collected throughout the supply chain is used to assess the likelihood of violations of commercial or fiscal regulations.

The resilience of tax and customs systems is also reflected in their ability to counter opportunistic behavior by economic operators. Higher customs duties may encourage avoidance and circumvention practices, such as false declarations of origin, undervaluation of goods for customs purposes, or the use of triangulation schemes through third countries. To address such phenomena, administrations must strengthen international cooperation and information-sharing mechanisms while developing increasingly sophisticated investigative methodologies.

Another important dimension of resilience concerns the relationship between public authorities and economic operators. In a context characterized by frequent changes in trade rules, businesses require instruments that enable them to plan their activities with an adequate degree of legal certainty. Customs authorities therefore perform a crucial role not only as supervisory bodies but also as institutional partners capable of providing interpretative guidance and technical assistance to businesses. Instruments such as advance rulings on tariff classification and rules of origin help reduce uncertainty and promote voluntary compliance among operators.

Finally, the resilience of tax and customs systems must also be assessed in light of their impact on public revenues. Customs duties constitute a relatively limited component of overall tax revenues in advanced economies, yet they continue to play a significant role, particularly within the framework of the European Customs Union, where they represent one of the so-called “own resources” of the common budget. Consequently, fluctuations in tariff policies and trade flows may affect revenue stability, making it necessary to continuously monitor the fiscal effects of the measures adopted[10].

10 Tariff wars test the capacity of tax and customs systems to adapt to a rapidly changing

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The intensification of international trade tensions has led to a profound evolution in the legal instruments employed by States and supranational organizations to regulate trade flows and safeguard their economic systems. One of the principal areas in which this evolution is evident concerns trade defence instruments. Anti-dumping, countervailing, and safeguard measures are provided for under the multilateral trading system and are grounded in the agreements negotiated within the framework of the World Trade Organization (WTO).

Within the European context, the adoption of trade defence measures takes place at the supranational level and involves the institutions of the European Union, which are required to strike a balance between protecting European industries and complying with the international obligations arising from multilateral trade agreements. At the same time, the escalation of tariff conflicts has encouraged the emergence of new forms of trade regulation that lie at the intersection of customs policy and industrial policy. Increasingly, tariff measures are complemented by regulatory instruments that indirectly affect international trade. The tariff war has also underscored the growing importance of economic security as a guiding principle of contemporary trade policy[11].

The increasing reliance on tariff measures justified by national or economic security concerns has also revived the legal significance of Article XXI of the General Agreement on Tariffs and Trade (GATT 1994), commonly referred to as the "security exception". Originally conceived as an exceptional provision to preserve States' essential security interests in extraordinary circumstances, Article XXI has progressively assumed a much broader role in contemporary international trade law. The resurgence of geopolitical conflicts, technological competition and strategic rivalry among major economic powers has considerably expanded the practical relevance of this provision.

For many years, Article XXI was generally regarded as a self-judging clause, leaving States substantial discretion in determining the existence of security interests capable of justifying trade restrictions. However, the WTO Panel Re-

economic and political environment.

11 In recent years, the Union has strengthened its regulatory arsenal by introducing faster procedures for imposing anti-dumping and anti-subsidy duties, as well as innovative tools designed to counter competition practices deemed distortive. Of particular importance among these are mechanisms for screening foreign investments in strategic sectors and initiatives aimed at ensuring fairer competitive conditions within the internal market.

port in *Russia – Measures Concerning Traffic in Transit* (2019) clarified that although Members enjoy a wide margin of appreciation in identifying their essential security interests, the invocation of Article XXI is not entirely immune from legal scrutiny[12]. The Panel recognised that the existence of an emergency in international relations constitutes an objective condition subject to review, thereby preventing purely arbitrary or protectionist recourse to the security exception.

This interpretation has significantly influenced the legal debate surrounding recent tariff measures adopted by several States, including the United States' tariffs on steel and aluminium introduced under Section 232 of the Trade Expansion Act of 1962[13]. These developments illustrate the growing convergence between customs law, international trade law and national security regulation, confirming that customs duties are increasingly employed not only to regulate international commerce but also to pursue broader geopolitical and strategic objectives[14].

Against a backdrop of technological competition and geopolitical tensions, many States have begun to regard certain productive sectors—such as digital technologies, energy, and critical raw materials—as strategic areas of national interest. This has prompted the adoption of measures designed to reduce dependence on foreign suppliers and strengthen domestic production capacities. In this context, customs and trade policies have become integral components of broader economic security strategies. From a legal perspective, these developments raise significant questions regarding the compatibility of the new measures with the multilateral trading system. Although international trade agreements recognize exceptions based on national security or environmental protection, an expansive interpretation of these clauses risks undermining the predictability and stability of international trade rules. The increasing convergence of trade policy, industrial policy, and economic security makes it progressively more difficult to distinguish legitimate regulatory measures from protectionist practices.

12 World Trade Organization, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, Panel Report, adopted on 26 April 2019.

13 World Trade Organization, *United States – Certain Measures on Steel and Aluminium Products*, WT/DS544/R et al., Panel Reports, 9 December 2022.

14 Jennifer Anne Hillman, *The United States' National Security Trade Restrictions: The Legal Framework and the Future of Article XXI GATT*, Council on Foreign Relations Discussion Paper, Washington D.C., 2020.

Within this evolving framework, customs law assumes an increasingly central role as an instrument for implementing the economic policies of both States and supranational organizations. Customs administrations are now required to enforce an ever more complex body of legislation that extends well beyond the collection of customs duties to encompass compliance with technical, environmental, and social standards. This development necessitates the continuous updating of professional expertise and operational procedures, together with the adoption of advanced technological tools capable of supporting the monitoring and analysis of international trade flows.

Among the clearest examples of the evolving function of customs borders is the European Union's Carbon Border Adjustment Mechanism (CBAM)[15]. The mechanism seeks to address the risk of carbon leakage by ensuring that certain imported products bear a carbon cost comparable to that imposed on EU producers under the Emissions Trading System (ETS). In its initial phase, the CBAM applies to a limited number of carbon-intensive sectors, including steel, cement, aluminium, fertilizers, hydrogen and electricity.

From a legal perspective, the CBAM is particularly significant because it is not technically a customs duty. Unlike a conventional tariff, it does not impose a border tax based on the customs value of imported goods. Instead, it establishes a regulatory obligation requiring importers to declare the greenhouse-gas emissions embedded in their products and to surrender corresponding CBAM certificates. The mechanism therefore operates at the intersection of environmental regulation, customs administration and international trade law[16]. This institutional evolution also reflects the broader transformation of customs administrations under the Union Customs Code, which increasingly assigns customs authorities responsibilities extending beyond the collection of customs duties to include market surveillance, risk management, regulatory compliance and the protection of the Union's financial and non-financial interests[17].

15 Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a Carbon Border Adjustment Mechanism, OJ L 130, 16 May 2023, pp. 52-104.

16 European Commission, Guidance Document on CBAM Implementation for Importers of Goods into the EU, Brussels, 2024.

17 Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, OJ L 269, 10 October 2013, especially

The importance of the CBAM for the present analysis lies less in its environmental rationale than in what it reveals about the transformation of customs policy. The border is increasingly used as a point of enforcement for objectives that originate outside traditional customs law, namely climate policy and industrial competitiveness. Customs authorities become essential actors not because they collect a new tariff, but because they verify origin, product scope, emissions data and compliance with the CBAM reporting system[18]. At the same time, the mechanism raises significant questions under WTO law. Although the EU presents the CBAM as an environmental measure designed to prevent competitive distortions, several trading partners have argued that it may function in practice as a form of disguised protectionism. The future legal debate will therefore focus on whether the mechanism satisfies the principles of non-discrimination and proportionality while remaining genuinely linked to the Union's climate objectives.

For these reasons, the CBAM should be understood not as a departure from the broader argument of this article, but as its most concrete illustration: contemporary customs borders increasingly serve regulatory and geopolitical functions that extend well beyond the traditional collection of customs duties[19].

The foregoing analysis demonstrates that the contemporary "tariff war" can no longer be interpreted solely through the traditional lens of protectionism. Rather, it must be understood within the broader context of the evolving functions of customs taxation and global economic governance. In this framework, instruments such as the European Union's Carbon Border Adjustment Mechanism (CBAM) represent a significant turning point, marking the transition from a static conception of customs duties to a dynamic and multifunctional one. Customs duties are no longer confined to protecting domestic markets or generating fiscal revenue. Instead, they increasingly operate as instruments of strategic regulation, serving environmental, industrial, and geopolitical objectives while influencing international trade flows and production decisions on a global

Arts. 3, 5, 46-48.

18 Jennifer Anne Hillman, *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?*, German Marshall Fund, Washington D.C., 2021.

19 Joost Pauwelyn and David Kleimann, *Trade-Related Aspects of Carbon Border Adjustment Mechanisms: WTO Compatibility and Policy Design*, Brussels School of Governance Working Paper, 2023.

scale.

Nevertheless, this transformation is not without challenges. First, there is a risk of fragmentation of the international trading system should mechanisms similar to the CBAM be adopted in an uncoordinated manner by different economic regions. Such developments could generate new tensions among States and increase litigation within the framework of the World Trade Organization (WTO), thereby testing the capacity of the multilateral trading system to adapt to the emerging demands of environmental sustainability. Secondly, concerns arise regarding fairness towards developing countries, which may face disproportionate adverse effects due to their more limited capacity to comply with increasingly stringent environmental standards.

From a legal perspective, the principal challenge lies in ensuring an appropriate balance between the legitimate protection of the environment and compliance with the fundamental principles of international trade[20]. In this respect, the role of international institutions is of paramount importance in promoting coordination and preventing the new regulatory instruments from becoming forms of disguised protectionism. Moreover, the increasing complexity of customs duties calls for a fundamental rethinking of the role of customs authorities, which are now required to operate within a regulatory framework that is increasingly integrated with environmental and industrial policies. This development necessitates substantial investment in technical expertise, digitalization, and international cooperation to ensure the effective and consistent implementation of the new regulatory measures.

In conclusion, the resilience of customs and tax systems in the face of the contemporary "tariff war" will depend on their ability to adapt to a rapidly evolving environment in which economic borders increasingly serve as points of convergence between multiple, and often competing, public interests. The future of international trade policy appears to be moving towards a deeper integration of economic governance and sustainability, whereby customs duties—once regarded primarily as traditional instruments of trade protection—are evolving into strategic policy tools[21] for managing the major global transitions of the twenty-first century, foremost among them the transition towards climate neutrality.

20 In particular, the principles of non-discrimination and proportionality.

21 Ernst-Ulrich Petersmann, *International Economic Law in the 21st Century*, Hart Publishing, Oxford, 2012.

Economic Conflicts and Legal Instruments in the New Global Order

by Amelia Fiore

1. The Changing Role of Trade Instruments in the New Global Scenario

In April 2017, President Trump instructed Secretary of Commerce Wilbur Ross to investigate whether imports of steel and aluminium posed a threat to national security, thereby authorising the imposition of tariffs under Section 232 of the Trade Expansion Act of 1962. In March 2018, US administration imposed tariffs of 25 per cent on steel and 10 per cent on aluminium imports, invoking national security grounds and declaring that "trade wars are good and easy to win"[1].

Following President Trump's announcement, the then President of the European Commission, Jean-Claude Juncker, announced a series of retaliatory measures in response to the US tariffs.[2]

What President Trump was signalling—and what the subsequent trade disputes between the United States and China would soon confirm—was the beginning of a new phase of trade conflict, characterised by the increasing use of trade measures and tariffs justified on grounds of national security.

In the current historical context, the use of economic levers and legal instruments for security purposes has become increasingly common. The new strategic framework governing trade relations between States has, in turn, evolved to the point where it increasingly justifies the adoption of aggressive measures against trading partners on grounds of national security.

The complexities of the contemporary global landscape, shaped by economic and financial crises as well as the emergence of new geopolitical conflicts—including Russia's full-scale invasion of Ukraine in 2022 and the renewed esca-

1 Katie Martin 'Trade wars are good, and easy to win' says Trump' *Financial Times* 2.3. 2018.

2 'Juncker responds to Trump's trade tariffs: 'We can also do stupid' *Euronews* 3.3. 2018.

lation of tensions across the Middle East—have had a profound impact on the stability of financial markets and international trade routes, thereby affecting the resilience of the global economy and, consequently, the stability of the international order.

This reflects a profound transformation of the international system, resulting in the gradual erosion of the post-war international order. As emerging economies and new centres of power have gained prominence on the global stage, the institutions established in the aftermath of the Second World War to underpin the liberal international order have progressively lost their centrality. The current crisis of multilateralism and the gradual decline of institutions such as the UN and the WTO are therefore no coincidence, nor can they be explained merely as part of the natural evolution of historical cycles.[3] Rather, they reflect the exhaustion of a particular conception of international relations, together with the gradual erosion of the post-war international order established in the aftermath of the Second World War.[4]

The intertwining of geopolitical tensions, economic crises, financial instability, and the contraction of the global economy has become increasingly evident. However, it is important to recognise that, although the current international landscape conveys the image of a world once again divided into opposing blocs, this does not necessarily imply a reversal of the process of globalisation, contrary to what is often assumed. Rather, the contemporary international order is characterised by a high degree of structural complexity. The world remains deeply interconnected through markets and global value chains, while at the same time becoming increasingly divided politically and fragmented in its international relations, giving rise to what has been described as the fracturing of the global economy.[5]

3 Jelena Bäumler 2020 ‘The WTO’s Crisis: Between a Rock and a Hard Place’ *European Yearbook of International Economic Law Springer (2020) pp. 321 – 357*.

4 Mohammed Abu Saleh 2025 ‘Can the WTO be Saved from Its Existential Crisis?’ *Harvard International Law Journal Harvard (December 2025)* online at the site journal.law.harvard.edu.

5 Neil Shearing ‘World economy is fracturing, not deglobalizing’ *Chatham House February 2023*; Norbert Gaál, Lars Nilsson, José Ramón Perea, Alessandra Tucci and Beatriz Velázquez ‘Global Trade Fragmentation. An EU Perspective’ *European Commission Economic Brief 075 Luxembourg: Publications Office of the European Union, (2023)*; Rodolfo G. Campos Julia Estefania-Flores, Davide Furceri, Jacopo Timini 2023 ‘Geopolitical Fragmentation and Trade’ *Journal of Comparative Economics 51 (2023) pp. 1289–1315*.

These profound geopolitical and economic changes appear to be closely linked to the escalating tensions in international relations, further exacerbated by the fracturing of the global economy, and have led to a significant shift in the political and legal framework governing state action. While the financial crisis and growing economic instability have contributed to the adoption of protectionist policies, many states, including the United States and China, have also pursued increasingly assertive foreign economic policies.

These policies are implemented through a combination of legal instruments and economic levers, contributing to the emergence of trade conflicts and the growing use of lawfare tactics.

In this context, states' outward-looking development strategies and measures aimed at expanding their presence in foreign markets have taken different forms, shaped by the legal, administrative, and cultural frameworks underpinning them. These strategies have also differed according to whether state intervention adopted an offensive orientation, targeting foreign markets, or a predominantly defensive one (which, as will be seen, has been the approach adopted by the European Union). Economic and commercial development programmes have been implemented through regulatory packages and legal instruments designed to support public intervention in the economy. Over time, these legal and economic instruments have increasingly become tools in an ongoing trade war, effectively evolving into instruments of 'lawfare'.

However, despite the profound differences in the strategies pursued by states within opposing political and economic blocs—varying depending on whether they are adopted by China, the US, or the EU—they share a key common feature: the growing role of state intervention in the economy. This has taken place not only through more protectionist policies, but also through the strategic use of legal instruments such as subsidies and tariffs as tools of geopolitical competition.

This paper analyses the foreign economic policies implemented by China, the United States, and the European Union through the use of targeted legal instruments. In the current economic context—which, as noted above, is characterised by a combination of fragmentation into economic blocs and ongoing economic interdependence—an examination of these legal instruments provides a clearer understanding of contemporary trade conflicts and broader patterns of international tension.

2. Economic Instruments and Chinese State Capitalism

For China, state intervention in foreign investment has been a predominant strategy since the 1980s.[6] On 18 December 1978, Deng Xiaoping, then leader of the Chinese Communist Party (CCP), during the Third Plenary Session[7] launched the "Reform and Opening-up" policy, which led China to abandon its previous economic model and gradually embrace a form of 'state capitalism'.[8] This process involved opening up to the global economy from a strategic perspective and directing outbound investment and capital flows according to a coherent strategic rationale.[9]

The combination of political expansion strategies and foreign commercial investment has been consolidated since the shift in the Chinese economy marked by the 19th CPC Congress.[10] President Xi Jinping's vision of the "Chinese Dream" (*zhongguo meng*) has fostered a new international orientation in Chinese economic policy, reinforcing the state-led dimension of strategically driven foreign investment.[11]

In the words of President Xi Jinping, "socialism with Chinese characteristics has entered a new era. This is a new historical orientation for China's development".[12] This new era has been characterised by renewed industrial and technological development, as well as by a strengthened strategy of state investment,

6 European Court of Auditors, 'Review No 03/2020: The EU's response to China's state-driven investment strategy', 10.09.2020 online at the site eca.europa.eu.

7 Beijing Review 'Communique of the Third Plenary Session of the 11th Central Committee of the Communist Party of China' Source: no.52 December 29, 1978.

8 Alessandro Aresu *Le potenze del capitalismo politico. Stati Uniti e Cina.* Milano, La Nave di Teseo 2020. [*The Powers of Political Capitalism. The United States and China.* Translations of titles originally published in Italian are provided by the author]

9 Marcus Vinicius De Freitas 2019 'Reform and Opening-up: Chinese Lessons to the World' *Policy Center for the New South PP-19/05 Morocco (2019) pp. 7 – 29*; Alejandra Peña 2018 'China's Assertive Foreign Policy Strategy. Insights from the 19th Party Congress' *Tempo exterior Nº 36 Vol. XVIII (II) (2018) pp. 39 – 53*; Ahana Roy, Siddhant Nair *1978 Reforms and the Four Modernisations Organization for Research on China and Asia (September 22, 2022*) online at the site orcasia.org.

10 Our China History 2024 *18 October 2017 19th National Congress of the Communist Party of China (2024*) online at the site ourchinahistory.com; Merics *China's 19th Party Congress Setting the Agenda and Choosing the Team (May 04, 2017)* online at the site merics.or.

11 Peña p. 39.

12 Report of the 19th National Congress of the Communist Party of China, 18 October 2017.

both domestically and internationally.

As part of this broader strategic framework, in the fall of 2013 China launched a new policy of commercial and industrial expansion: the “Silk Road Economic Belt” and the “21st Century Maritime Silk Road”, subsequently referred to as the “Belt and Road Initiative” (BRI), setting out an ambitious set of objectives.

The Beijing plan aimed to integrate the infrastructure of partner countries, encouraging the opening of their markets to China and facilitating trade through a network linking their domestic financial markets with that of China.

Beyond the historical land and sea routes between China and Europe, the BRI has steadily expanded its geographical scope, opening up to markets in Latin America, Africa, and Asia. Trade routes have thus been used as a strategic tool for the promotion and implementation of Chinese foreign policy.[13]

Chinese interventionism, despite the long-standing policy of ‘keeping a low profile’[14] aimed at avoiding the exacerbation of international tensions, has inevitably affected the market economies of other countries. These have become the targets of a strategy of external economic expansion based on the mobilisation of capital supported by the Beijing government.

Furthermore, since the early 2000s, as part of its ‘Going Out’ policy, China has pursued an extensive programme to promote the international expansion of Chinese companies, particularly state-owned enterprises, through a range of government support and subsidy programmes.[15]

Outward expansion and industrial development programmes were subsequently reinforced through policies such as “Made in China 2025”, further boosting China’s global outreach.[16]

13 Merics *Mapping the Belt and Road initiative: this is where we stand (June 07, 2018)* online at the site merics.org.

14 Peña p. 41.

15 Victor Crochet and Vineet Hegde 2020 ‘China’s ‘Going Global’ Policy: Transnational Production Subsidies Under the WTO SCM’ *Agreement Journal of International Economic Law 20 (2020) pp. 841–863*; See also the author’s doctoral thesis, Amelia Fiore 2024/2025 ‘Le sovvenzioni estere e le misure compensative alle distorsioni statali nel diritto internazionale’ [*Foreign Subsidies and Countervailing Measures against State Distortions in International Law.* Translation of the Italian title provided by the author], PhD Thesis, University of Trento, academic year 2023/2024 (unpublished).

16 Jost Wübbeke, Mirjam Meissner, Max J. Zenglein, Jaqueline Ives and Björn Conrad 2016 ‘Made in China 2025. The making of a high-tech superpower and consequences for industrial countries’ *Merics Report (12. 08. 2016)* online at the site merics.org.

The extensive use of state-sourced capital—ranging from subsidy programmes to foreign direct investment (FDI)—has resulted in increasing scrutiny of China's policies in international economic relations.

Subsidies and outward investment have channelled strategically oriented capital into the economic structure of target countries, facilitating China's penetration of sectors of strategic importance.

Over time, this has raised concerns not only with regard to the protection of competition in markets affected by significant state subsidies, but also in relation to national security, given the penetration of state- related foreign capital into sectors and enterprises deemed strategic for the security of host countries.[17] This dynamics reflects Chinese state capitalism and China's broader project of reasserting its role on the global stage.

Chinese expansion, therefore, has reshaped global trade relations over the past four decades. However, the current geopolitical context and ongoing trade tensions have contributed to a gradual reorientation of Chinese policies.

In fact, following the trade tensions with the United States, China has gradually stepped up its security measures, enacting significant legislation—including in the area of trade—to safeguard national security.[18] In the 14th Five-Year Plan (2021–2025), approved in March 2021 and building on the earlier phase of China's outward expansion, the Chinese government has sought to redefine its approach to national security through specific measures relating to foreign investment and trade. In particular, China has aimed to exert greater control over global value chains through market-restrictive policies and the strategic use of infrastructure and investment facilitated by the BRI.[19]

This reflects a broader shift in approach, aligning with increasingly restrictive policies adopted globally and signalling the intensification of ongoing trade tensions.

In addition to the new Export Control Law, passed in October 2020 and de-

17 See among others James McBride, Andrew Chatzky 2019 'Is 'Made in China 2025' a Threat to Global Trade?' *Council on Foreign Relations (May 13, 2019)* online at the site cfr.org.

18 FEI Xiuyan 2022 *'National Security Considerations in China's Trade Legislations: Offensive or Defensive?' US-China Law Review 19 4 (April 2022) pp. 186-198.*

19 Karen M. Sutter 2021 'China's Recent Trade Measures and Countermeasures: Issues for Congress' *Congressional Research Service (December 10, 2021)* online at the site everycrsreport.com.

signed to counter US export controls—particularly on dual-use technologies—in January 2021 China, acting in accordance with the National Security Law, adopted a package of measures aimed at countering sanctions and the economic effects of tariffs imposed by foreign governments.[20]

Moreover, in response to US tariffs, Beijing has adopted a range of retaliatory measures, including targeted trade restrictions, regulatory instruments, and legal tools. It has also sought to leverage global value chains for geopolitical advantage, while combining these actions with diplomatic initiatives and soft power instruments. In this context, China has sought to portray itself as a defender of the multilateral trading system, which it argues is under strain, and as a key economic and political interlocutor for the European Union.[21]

Notably, China lodged a complaint with the WTO on 9 April 2018 concerning US tariffs on aluminium and steel.[22]

It should also be noted that China's retaliatory tariffs have reduced both the volume and variety of imports from the United States. Such measures are typically reflected in final consumer prices, thereby increasing import costs. As is generally the case, the bulk of the impact of tariffs is borne by consumers and firms.[23]

This makes Beijing's diplomatic efforts and its work to strengthen international relations particularly significant. Once again, within the context of bloc

20 Karen Sutter p. 13.

21 Andrew K. McAllister, Robert A. Friedman, Jonathan M. Epstein, Peter Tabor, Sophie Jin, Molly B. O'Casey, Anna Vizniak 2015 'China's Retaliatory Measures in Response to Trump Tariffs' *Holland & Knight Alert* 4.2.2025 online at the site hklaw.com.; Joe Cash, Xiuhao Chen and Liz Lee 2025 'China Urges US to Immediately Lift Tariffs, Vows Retaliation' *Reuters Economy* 2025; Claudia Wessling, Bernhard Bartsch 2016 'Executive Summary: Fragmented Europe: Dealing with China as a technology and innovation power' *Merics Report (30. 6. 2026)*; Merics 'China in 2026' *Merics Briefs (27. 12. 2025)* online at the site merics.org.; Helena Legarda 2026 'China sees opportunities in global disorder' *Merics (2026)* online at the site merics. org.

22 Weihuan Zhou, Huiqin Jiang and Zhe Chen 2023 'Trade vs. Security: Recent Developments of Global Trade Rules and China's Policy and Regulatory Responses from Defensive to Proactive' *World Trade Review 22 (2023) pp. 193–211*; WTO 'China initiates WTO dispute complaint against US tariffs on steel, aluminium products' 4. 9. 2018 online at the site WTO.org.

23 Hong Ma, Jingxin Ning, Mingzhi (Jimmy) Xu 2021 'An eye for an eye? The Trade and Price Effects of China's Retaliatory Tariffs on U.S. exports' *China Economic Review 69 2021 pp. 1-18*.

confrontation, China appears to be acting strategically, positioning itself as a balancing force and, consequently, as a preferred partner for other actors.

Chinese investment in the European market has, in fact, risen steadily following the downturn caused by the pandemic and the broader economic crisis. By 2025, Chinese capital had reached a peak, particularly in greenfield investments and in the high-tech and automotive sectors.[24] This trend suggests the continued effectiveness of Beijing's strategy, which appears to be capitalising on the volatility of the international political environment.

3. The Assertive Turn in US Trade Policy

The rhetoric adopted by the United States in a context of political and economic tensions is particularly significant, as it reflects a broader narrative of economic confrontation. In addition to President Trump's aforementioned statement on "trade wars"—which, he claimed, are not only "good" but also "easy to win"—the imposition of unilateral tariffs on a range of trading partners was described by the White House as a new "Liberation Day" (LD).

Tariffs on metals and essential goods had already been imposed in 2018. Tariffs on aluminium and steel were imposed on Canada, Mexico, and the EU starting in May 2018. In July of the same year, a 25 percent tariff was applied to 818 categories of Chinese imports.[25]

However, it was with the LD that US trade policy took a decisive turn, described by former US Treasury Secretary Larry Summers as "the most radical trade policies and probably the most radical, rapid change in economic policies that the United States has announced since the Second World War".[26]

US tariffs are imposed under two separate pieces of legislation. The first is the IEEPA (International Emergency Economic Powers Act), a 1977 federal law that allows the US President to block or reshape trade and commercial relations on the grounds of national security concerns. For this reason, IEEPA-based tar-

24 Agatha Kratz, Andreas Mischer, Gregor Williams, Armand Meyer 2026 'Chinese Investment Rises To 7-Year High Chinese FDI in Europe: 2025 Update' *Merics Report 5. 2026*; LSE Blog 'EU-China relations in the Trump era with Noah Barkin | The Ballpark podcast' 6. 8. 2026.

25 Thiemo Fetzer and Carlo Schwarz 2020 'Tariffs and Politics: Evidence from Trump's Trade Wars' *The Economic Journal 131 (5, 2021) pp. 1717–1741.*

26 John Lee Assessing 'Trump's Trade and Tariff Policies: The Basics' *Hudson Institute Policy Memo (2025)*.

iffs are often characterised as retaliatory measures, amounting to 15 per cent on imports from Europe. On the other hand, the US administration also relied on Section 232 of the Trade Expansion Act of 1962 to impose additional tariffs on imports of steel and aluminium between 2018 and 2020. On 10 February 2025, Section 232 tariffs were reinstated by President Trump, resulting in an additional 50 per cent duty on imports of steel, aluminium, and related products from the EU.[27]

Furthermore, in 2018, President Trump relied on Section 301 of the Trade Act of 1974 as the legal basis for the imposition of the first round of tariffs, particularly those directed at China, which provided the legal authority for the United States to impose additional duties of 25 per cent on certain Chinese imports.[28]

Section 232 was invoked on the grounds that steel and aluminium production is essential to the US industrial base and could therefore be considered a matter of national interest. However, even if the invocation of national security in this context appears difficult to justify, trade restrictions based on national security grounds are becoming increasingly common, and the United States is no exception in this regard.[29]

In this context, in fact, the use of trade policy to pursue political and national security objectives, rather than purely economic ones, is increasingly seen as essential for maintaining national strategic autonomy.[30]

On Liberation Day, 2 April 2025, President Trump announced the introduction of “reciprocal tariffs” within the broader framework of emergency economic powers, including measures based on the International Emergency Economic Powers Act (IEEPA). On that occasion, thus, President Trump described the

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27 Lucio Miranda ‘Norme americane in materia di dazi’ *ExportUsa* online at the site exportusa.us [*US Tariff Regulations*. Italian title translated by the author]; European Commission ‘Trade barriers - Section 232 Tariffs on Steel and Aluminum Imports’ *Access2Market Report* last update 2. 23. 2026 online at the site trade.ec.europa.eu. Tariffs established under Section 232 were effective from March 12, 2025; ‘Section 232 of the Trade Expansion Act of 1962’ online at the site Congress.gov.

28 Costas Siriopoulos, Anastasia Spyridou and Efstathios Polyzos 2026 ‘Trump’s Liberation Day tariffs: a framework for economic impact and policy assessment’ *Studies in Economics and Finance 43 (1. 11. 2026) pp. 224 – 238*.

29 Bernard M. Hoekman and Petros C. Mavroidis and Douglas R. Nelson 2023 ‘Non-economic Objectives, Globalisation and Multilateral Trade Cooperation’ *Centre for Economic Policy Research Press* London 2023.

30 Jeroen Klomp 2025 ‘Trump tariffs and the U.S. defense industry’ *PLoS ONE 20 (2025) pp. 1-30.*

tariffs as "reciprocal", presenting them as an attempt to rebalance perceived asymmetries in the tariffs allegedly applied by other countries to US exports. However, the methodology used to calculate these duties differed substantially from the traditional understanding of reciprocity. The US administration calculated the duty by using the bilateral trade deficit with each trading partner, dividing it by the value of total imports from that country, and then halving the resulting percentage. This mechanism was presented as reflecting the principle of "reciprocity".[31] The terminology adopted by the US administration therefore appears to conceal a broader departure from the conventional principles governing tariff policy.[32]

In any case, the negative reaction from the markets led the US administration to partially reverse its initial position, after having threatened to impose tariffs on countries that failed to reach a trade agreement within ninety days. Despite this, and the partial exemptions introduced under the "Potential Tariff Adjustments for Aligned Partners" in September 2025, these measures have undergone numerous revisions.[33]

Beyond market reactions, the measures adopted by President Trump raise important legal questions concerning their domestic constitutional basis. In particular, compared with established trade policy procedures, these measures substantially reduce the role of Congress in the trade policymaking process.[34]

On 28 May 2025, following the case brought on 14 April by the Liberty Justice Centre, the United States Court of International Trade — in *V.O.S. Selections, Inc. v. Trump* — held that the blanket tariffs imposed under a declared "national emergency" lacked a sufficient legal basis. The Court found that the International Emergency Economic Powers Act (IEEPA) does not provide a clear statutory authorization for the imposition of broad-based tariffs. It further noted that the Act had not previously been used as a basis for tariff measures, and that its statutory language does not explicitly contemplate tariffs or duties.

31 Gabriel DeLuca Vinocur 'Fact Check: Are the Trump 'Liberation Day' tariffs reciprocal?' 4. 4. 2025 online at the site EconoFact.org.

32 Wto 'Tariffs' Glossary Term; Wto 'Tariffs' online at the site wto.org.

33 Inu Manak, Allison J. Smith 'Tracking Trump's Trade Deals' *Council on Foreign Relations* 17. 3. 2026 online at the site cfr.org. For a complete and updated chronology of US tariffs, see Chad P. Bown 'Trump's trade war timeline 2.0: An up-to-date guide' *Peterson Institute for International Economics (PIEE)* online at the site piee.com.

34 Inu Manak, Allison J. Smith 'Tracking Trump's Trade Deals'.

In addition, the Court rejected the argument that the existence of a trade deficit, in itself, could constitute the type of "unusual and extraordinary threat" required to justify the invocation of emergency powers under the IEEPA. Overall, the decision concluded that the statute did not provide the President with adequate legal authority for the imposition of the tariffs in question.[35]

Finally, the Supreme Court of the United States, in its decision of 20 February 2026, held that the International Emergency Economic Powers Act (IEEPA) does not provide a sufficient statutory basis for the President to impose general tariffs through executive action.[36]

Therefore, the tariff system developed by the US administration under President Trump cannot be analysed without considering the peculiar nature of these measures. Some of these considerations have already been made. In particular, attention has already been drawn to the unusual use of US legislation as a tool for implementing a specific trade policy, with extensive reliance on the concepts of national interest and national security beyond their conventional meaning.[37] This type of instrumentalization of the concepts of national security and national interest goes beyond a mere broadening of their scope, resulting in an expansion so extensive as to raise concerns regarding the exercise of powers beyond their traditional legal boundaries. Such an approach has been subject to scrutiny by the US judicial system.

Moreover, US actions appear aimed at pursuing political objectives through economic instruments, even where these measures raise questions of ultra vires action. This approach reflects the broader transformation of the global economic order, which is increasingly shaped by geopolitical competition and by the emergence of new centres of economic power.[38]

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35 V.O.S. Selections, Inc. v. Donald J. Trump.

36 Inu Manak, Allison J. Smith 'Tracking Trump's Trade Deals'; Learning Resources, Inc., Et Al. V. Trump, President of the United States, et al.' Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit - No. 24–1287. Argued November 5, 2025—Decided February 20, 2026 - Together with No. 25–250, Trump, President of the United States, et al. v. V.O.S. Selections, Inc., et al., on certiorari to the United States Court of Appeals for the Federal Circuit.

37 Jeroen Klomp p. 26.

38 Ibid.

4. The EU's Shift Towards Economic Security

In this complex world scenario, characterized by the implementation of rather assertive politics by US and China, the position taken by the EU can only by described as a defensive one.

After the application of President Trump tariffs, the EU response was, as a measure of fact, a diplomatic rather than a retaliatory one.

In July 2025, following extensive negotiations, the EU and the United States reached the so-called Turnberry Deal, a non-binding political understanding on trade and tariffs signed by the President of the European Commission, Ursula von der Leyen. The understanding covers four main areas: tariff and non-tariff measures, investment, and public procurement.[39]

The understanding envisaged the application of a single 15 per cent tariff to all export-oriented product sectors, including strategic industries such as pharmaceuticals and semiconductors. It also stipulated that sectors already subject to a 15 per cent Most Favoured Nation (MFN)[40] tariff treatment would be exempt from any further increases.[41]

Beyond the reduction of non-tariff barriers, market liberalisation, and access to critical resources and energy, the Deal notably includes provisions on cooperation in the area of economic security.[42]

In any case, as commentators have already pointed out, the Turnberry Deal places the EU in a difficult position in seeking to reconcile competing strategic interests. On the one hand, responding to US tariff policy through diplomatic channels appeared essential; on the other, the agreement was immediately perceived as being unilaterally tilted in favour of the United States, thereby weak-

39 The Agreement is not subject to the Art. 218 TFEU. Philipp Reinhold 'Avoiding the Turnberry Trap. The Renewed EU–US Trade Relationship and What to Expect from Its Implementation' 1. 5. 2026 online at the site VerfBlog; European Commission Press Release 'EU and US publish Joint Statement on transatlantic trade and investment' Brussels 21.8. 2025.

40 For an overview of the MFN Treatment, please refers to WTO 'Basic Purpose and Concepts Most-Favoured-Nation Treatment' online at the site wto.org; Esmé Shirlow and Kabir A.N. Duggal 'Most Favoured Nation Treatment' Updated 10. 3. 2026 online at the site JusMundi.com.

41 European Commission 'The EU-US trade deal: Restoring stability and predictability' online at the site Commission.europa.eu Page was last updated 1. 7. 2026.

42 Ibid.

ing the EU's credibility and legitimacy.[43]

From this perspective, it is therefore necessary to consider not only the legal and economic dimensions of tariffs, but also their geopolitical implications. In contemporary trade relations, tariffs are no longer merely instruments of economic policy; they have become tools of economic statecraft, employed by states to pursue strategic objectives, influence other actors, and exert pressure on third countries. The strategic use of tariffs as instruments of trade and foreign policy therefore raises the question of whether, in this context, the EU's response should have been more assertive and less accommodating of US demands. Within the framework of a trade tension, where tariffs are increasingly weaponised, global credibility emerges as a strategic factor in ensuring the effectiveness of trade defence instruments.

This broader shift in the nature of trade relations has also influenced the EU's approach to economic security, leading to the adoption of Regulation (EU) 2023/2675 on protection against economic coercion (ACI).[44] The Regulation was conceived precisely within a context of growing trade tensions, as an instrument aimed at protecting the Union against mechanisms of economic coercion by third countries, which exert pressure on the EU to alter its policies in essential areas through the application, or threat of application, of measures affecting trade or investment.[45]

The existence of a mechanism of economic coercion, which may take various forms and may also manifest itself through legislative acts adopted by third countries, is examined by the Commission either upon request or, significantly, on its own initiative. The procedural obligations, established to ensure the correctness of this assessment, provide for a dialogue between the Commission and the Council.

Following the Commission's formal proposal and the adoption of an implementing act by the Council, the Commission is empowered to engage in consultations with the third country. The Commission gives priority, where the third country acts in good faith, to diplomatic instruments such as negotiation,

43 Philipp Reinhold 'Avoiding the Turnberry Trap. The Renewed EU–US Trade Relationship and What to Expect from Its Implementation'.

44 Regulation (EU)2023/2675 was significantly renamed the "trade bazooka".

45 European Parliament Topics 'EU anti-coercion instrument: what exactly is the "bazooka"?' Published: 20-09-2023, Last updated: 21-04-2026, Brussels, online at the site europarliament.europa.eu.

mediation, good offices, and arbitration. Nevertheless, as a last resort, the Commission is authorised to adopt response measures against the economic coercion exercised by the third country, including restrictions on access to the internal market or the imposition of economic disadvantages, with the aim of bringing such coercion to an end or mitigating its effects.[46]

Beyond economic coercion, the EU faced numerous challenges arising from the transformation of the global landscape and from the trade and economic policies pursued by its trading partners.

The significant increase in direct and indirect subsidies and state-backed financing from third countries has required the EU to reinforce its trade defence framework, notably through enhanced screening mechanisms and regulatory instruments governing foreign direct investment (FDI) and foreign subsidies.

In particular, as noted above, countries such as China extensively rely on foreign subsidies to support companies operating in the EU internal market. These subsidies are often provided through government-linked entities, state-owned enterprises (SOEs), or sovereign wealth funds (SWFs).

This phenomenon has generated new challenges and raised two main sets of concerns. First, it has affected the protection of competition by creating unequal conditions between undertakings benefiting from foreign subsidies granted by third countries and those operating without such advantages. This competition-distorting mechanism was not addressed by the existing EU legal framework, as Articles 107–109 TFEU regulated only State aid granted by Member States to undertakings, rather than subsidies provided by third-country governments. This regulatory gap resulted in instances of unequal treatment and unjustified competitive advantages for companies benefiting from foreign financial support.[47]

46 European Commission ‘Protecting against coercion’ online at the site policy.trade. ec.europa.eu. See also Christian Freudlsperger and Sophie Meunier 2024 ‘When Foreign Policy Becomes Trade Policy: The EU’s Anti-Coercion Instrument’ *Journal of Common Market Studies University Association for Contemporary European Studies and John Wiley & Sons Ltd. (2024) pp. 1063–1079*; Kornel Olsthoorn 2024 ‘The EU’s Anti-coercion Instrument: A Return of Unlawful Unilateral Trade Countermeasures in Disguise?’ *Legal Issues of Economic Integration (2024) pp. 47- 86*.

47 Filiep De Beule, Dieter Somers, Haifeng Zhang 2018 ‘Who Follows Whom? A Location Study of Chinese Private and State-Owned Companies in the European Union’ *Int Rev 58 (2018) pp. 43–84*. The issue has also been discussed in my doctoral thesis: Amelia Fiore ‘Le sovvenzioni estere e le misure compensative alle distorsioni statali nel diritto inter-

Furthermore, foreign subsidies raise concerns regarding national and EU security, as state-backed capitals has often been channelled towards the acquisition of significant stakes in companies operating in sectors critical to EU security interests or involved in strategic public procurement contracts.

This has increased the risk of foreign influence and control over key strategic assets and companies providing essential infrastructure.

To address these concerns, the EU adopted Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (FSR). Significantly, the Regulation is based not only on Article 114 TFEU but also on Article 207 TFEU, hereby confirming its character as an instrument of the Common Commercial Policy. Its objective is to ensure a level playing field between EU and non-EU undertakings, as well as between undertakings benefiting, directly or indirectly, from subsidies granted by third countries and those that do not.[48]

The FSR fills a gap that also exists in international trade law by introducing, for the first time, a definition of a foreign subsidy that distorts the internal market. It provides that

> a foreign subsidy shall be deemed to exist where a third country provides, directly or indirectly, a financial contribution which confers a benefit on an undertaking engaging in an economic activity in the internal market and which is limited, in law or in fact, to one or more undertakings or industries.[49]

A foreign contribution that may be regarded as a subsidy distorting the internal market can take various forms, ranging from transfers of funds and loans to the supply of goods and services.

Particular attention should be given to the ‘anti-circumvention clause’, which extends the scope of the Regulation by clarifying that the financial contribution may also originate from private entities whose conduct is attributable to the government of a third country. This provision is clearly intended to capture subsidies granted through SOEs — enterprises that are formally private but are, in practice, closely linked to the governmental authorities of non-EU countries.[50]

Nevertheless, significant concerns remain regarding the assessment of for-

nazionale’ pp. 17 ff.

48 Regulation (EU) 2022/2560 Recital 4.

49 Regulation (EU) 2022/2560 Article 3.

50 Regulation (EU) 2022/2560 Article 3.

eign financial contributions that may qualify as foreign subsidies capable of distorting the internal market. Under the FSR, such financial contributions must be assessed not only on the basis of their specific characteristics, but also in light of broader contextual factors, including the economic environment in which the granting entity operates and the role of the State in the economy of the granting country. These factors may prove difficult to establish in practice, thereby granting the Commission a considerable degree of discretion in determining whether a foreign financial contribution constitutes a distortive foreign subsidy.

Moreover, Article 6 of the FSR grants the Commission a significant degree of discretion by introducing a "balancing test" that requires the weighing of the negative effects of a foreign subsidy on competition against its potential positive effects in relation to the achievement of relevant EU policy objectives. Given the broad scope of this assessment and the discretion it entails, the provision raises several strategic concerns. In particular, the balancing exercise may allow a foreign subsidy that has potentially distortive effects on competition to be considered compatible with the internal market where its perceived benefits are deemed to outweigh its negative impact. However, this mechanism may also reinforce a broader trend already emerging within EU economies, whereby foreign investment — including investment originating from third-country state-owned enterprises (SOEs) — is increasingly sought to support strategic sectors such as public housing, healthcare, and infrastructure, particularly in the aftermath of recent economic crises. Ultimately, this raise concerns that the FSR could, under certain circumstances, facilitate the entry of capital influenced by foreign governments into critical areas of the EU's economic and social infrastructure.[51]

From a procedural point of view, the FSR confers on the Commission the power to investigate foreign subsidies distorting the internal market through a three-pronged mechanism based on two *ex ante* notification procedures and one *ex officio* procedure.

Ex ante notification applies to acquisitions, mergers, and public procurement procedures. Regarding concentrations, notification is mandatory where at least one of the undertakings concerned generates a turnover of at least €500 million and has received financial contributions from third countries amounting to €50

51 For a comprehensive case study on the subject, see Mark Thatcher and Tim Vlandas *Foreign states in domestic markets: sovereign wealth funds and the West*. Oxford University Press 2021.

million or more over the preceding three years.[52]

In the case of public procurement contracts, prior notification is required where the value of the contract is at least 250 million euros and the tender involves a foreign financial contribution of at least 4 million euros per non-EU country.[53]

Furthermore, the Commission is empowered to conduct *ex officio* investigations into foreign financial contributions that fall below the notification thresholds where such contributions are likely to distort competition in the internal market.[54] The Commission is empowered to conduct in-depth investigations and to assess foreign financial contributions. Where such contributions are found to distort competition in the internal market, it may impose appropriate redressive measures.[55]

During 2025, the Commission received 99 notifications under the FSR. However, the Regulation has so far been applied with a relatively cautious approach. For instance, in its review of the acquisition of PPF Telecom Group B.V. (“PPF”), an Eastern European telecommunications company, by Emirates Telecommunications Group Company PJSC, a telecommunications operator established in the United Arab Emirates and receiving financial support from the sovereign wealth fund Emirates Investment Authority, the Commission identified potential distortive effects on competition within the internal market. Nevertheless, it approved the transaction subject to commitments offered by the UAE sovereign wealth fund. These commitments included *inter alia* a prohibition on providing the acquired company with unlimited or non-repayable financing.[56]

Similarly, in the case of the acquisition of the German multinational chemical company Covestro AG (“Covestro”) by Abu Dhabi National Oil Company PJSC (“ADNOC”), the UAE’s state-owned oil producer, the Commission identified potential distortions of competition arising from the operation, which benefited

52 Regulation (EU) 2022/2560 Article 20.

53 Regulation (Eu) 2022/2560 Article 28.

54 Regulation (Eu) 2022/2560 Article 9.

55 Regulation (Eu) 2022/2560 Article 7.

56 European Commission Press Release ‘Commission conditionally approves the acquisition of parts of PPF Telecom by e&, under the Foreign Subsidies Regulation’ Brussels 24. 9. 2024; Lena Hornkohl and Pierfrancesco Mattiolo 2025 ‘Learnings from the first FSR Phase II merger decision: The Commission publishes a provisional public version of the commitment decision in e&/PPF’ *Kluwer Competition Law Blog 15.4. 2025.*

from an unlimited State guarantee granted to ADNOC. On 14 November 2025, the Commission adopted a decision accepting commitments offered by ADNOC, including the removal of the unlimited State guarantee. Furthermore, likely in recognition of the strategic importance of the chemical sector concerned, the Commission required Covestro's sustainability-related patents to be shared within the internal market on transparent and pre-established terms and conditions.[57]

The FSR has so far adopted a balanced approach, seeking to reconcile the protection of the internal market with the need to preserve an open investment environment, despite the inherent risks associated with acquisitions by foreign sovereign wealth funds in strategic sectors such as telecommunications and chemicals. Anyway, given the strategic importance of the sectors concerned, the Commission's decisions may raise questions as to whether the current approach is sufficient to safeguard the EU's strategic interests effectively.

Despite this relatively cautious approach, the instrument has exacerbated international tensions. Following the Commission's investigation into the Chinese state-owned enterprise Nuctech,[58] , in fact, China interpreted the measure as an instrument of economic protectionism.

In response, in April 2026, China's State Council adopted the Regulation on Countering Unjustified Extraterritorial Jurisdiction by Foreign States. The Regulation aims to address the effects of foreign legislation with extraterritorial application by authorising the Chinese government to prohibit the implementation of extraterritorial measures deemed unjustified and by providing legal remedies and compensation to Chinese parties that have suffered harm as a result. In particular, it allows for the adoption of countermeasures, including trade restrictions and asset freezes.[59]

Security-related concerns had already been addressed at EU level through Regulation (EU) 2019/452, which established a common framework for screen-

57 European Commission 'Commission Staff Working Document Accompanying the Document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on Competition Policy 2025' pp. 33 – 34.

58 European Commission 'Commission Staff Working Document Accompanying the Document Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Report on Competition Policy 2025' p. 33.

59 'China Designates EC FSR Measures during EC Investigation of Nuctech as "Unjustified' 22. 5. 2026 online at the site ClearlyGottlieb.com.

ing foreign direct investments (FDI) entering the Union. The Regulation has recently been repealed by Regulation (EU) 2026/1386, adopted by the European Parliament and the Council on 17 June 2026, which will enter into force on 17 January 2028.

The need for a regulatory framework to protect the EU's strategic assets had already emerged in February 2017, when the Ministers for Economy and Finance of France, Germany and Italy addressed a letter to the European Commission calling for the adoption of rules capable of ensuring a level playing field and protecting key economic infrastructures within the Union, while maintaining the fundamental principle of openness and market access at the core of the Single Market.[60]

Regulation (EU) 2019/452 thus marked, for the first time, a departure from the traditional principle of openness of the internal market by establishing a framework for screening foreign direct investments that may give rise to concerns regarding security or public order within the Union.[61]

On this basis, Regulation (EU) 2019/452 was based on a cooperation mechanism between Member States and the Commission for the identification of foreign investments potentially affecting security or public order. Nevertheless, the final decision concerning the admission, restriction, or prohibition of an FDI remained within the competence of Member States, in accordance with Article 4(2) TEU, which recognises that national security remains the sole responsibility of each Member State.

The mechanism, however, differed depending on whether the FDI was subject to an ongoing screening procedure. Where such a procedure was already underway, the Member State concerned was required to notify the Commission and the other Member States of the review in progress. Conversely, where no screening procedure had been initiated, the Commission or any Member State considering that the investment could affect its security or public order could submit comments and observations. In any event, the Commission retained the power to issue an opinion, irrespective of the views expressed by other Member

60 Reuters 'France, Germany, Italy urge rethink of foreign investment in EU' 14.2.2017.

61 See also Steffen Hindelang and Andreas Moberg 'A Complex Setting of Cooperation and (Potential) Conflict: Regulation (EU) 2019/452 in a Doctrinal Perspective' in Steffen Hindelang and Andreas Moberg eds. *YSEC Yearbook of Socio-Economic Constitutions 2020* Springer Switzerland 2021, pp. 837 – 852.

States.[62]

The key element of the repealed Regulation was the possibility of considering, when determining whether a foreign direct investment was likely to affect security or public order, its potential impact on certain critical factors, including critical infrastructure (such as electoral infrastructure, energy, water, health and transport), critical technologies, access to sensitive information, and the security of supply, while also taking into account food security, media freedom and pluralism.[63]

Despite the broad scope of its provisions, Regulation (EU) 2019/452 presented several shortcomings, which ultimately led to its replacement by Regulation (EU) 2026/1386. The Commission had already identified the need to revise Regulation (EU) 2019/452 in light of evolving political and economic security challenges, beginning with the adoption of the new Economic Security Strategy.[64] As early as 20 June 2023, the EU's new approach to economic security envisaged a revision of the FDI screening Regulation based on a more proactive framework.[65] In particular, there was a need to establish a mechanism requiring all Member States to introduce effective screening instruments for foreign investments, given that the 2019 Regulation did not impose such an obligation. This regulatory gap created potential systemic risks and procedural uncertainties.

Regulation (EU) 2026/1386 also sought to broaden the scope of the previous framework by extending screening requirements — including in Member States that already operate a review mechanism — to particularly sensitive investments that were not previously subject to scrutiny.

Most notably, Regulation (EU) 2026/1386 introduces a strategically significant innovation by extending screening to so-called "intra-EU investments", previously excluded from the regulatory framework, whereby a third-country

62 Regulation (EU) 2019/452 Articles 6 and 7.

63 Regulation (EU) 2019/452 Article 4.

64 European Council 'European economic security' online at the site Consilium.europa.eu.

65 Luca Picotti 'Il nuovo regolamento europeo sugli investimenti esteri (Reg. 2026/1386)' *Osservatorio Golden Power, pp. 2 – 5 July 2026* [*The New European Regulation on Foreign Investment (Regulation (EU) 2026/1386)*. Translations of titles originally published in Italian are provided by the author]; European Commission Press Release 'An EU approach to enhance economic security' Brussels, 20. 6. 2023.

entity acquires or provides capital to a subsidiary established within the Union.[66]

In this way, the EU also seeks to scrutinise foreign capital that, through the financing of a subsidiary established within the Union, could circumvent the screening mechanism intended to identify potentially harmful foreign investments.

Moreover, the Regulation significantly broadens the scope of strategic protection against inward investment. It establishes minimum requirements that Member States must incorporate into their national screening mechanisms, including a requirement for prior authorisation where an inward FDI finances an undertaking established within the Union and operating in strategic sectors, such as semiconductors, transport, energy, and critical infrastructure, including digital, electoral, and financial infrastructure.[67]

From the perspective of safeguarding the Union's key strategic assets, the framework establishing the criteria for the assessment of FDI is particularly significant, as it provides the basis for determining whether a given investment may pose a threat to the Union's security or public order. In conducting this assessment, due consideration must be given to the potential impact of the investment on projects and programmes of Union interest, the continuity of supply of critical inputs, including services, the integrity and resilience of critical infrastructure, the protection of electoral processes, food security, and other comparable interests.[68]

Similarly, in assessing whether a foreign investment is likely to have an adverse effect on security or public order, Member States and the Commission must also take into account the origin of the investment and its links with the public authorities of the third country from which it originates. In particular, they must consider whether the foreign investor, the entity exercising control over the foreign investor, its beneficial owner, any of its subsidiaries, or any other entity owned by the foreign investor maintains such links.

The most significant aspect of the Regulation in question, however, lies in the criteria to be taken into account when determining whether an investor, or a subsidiary controlled by it, may pose a risk to the Union's security and public order, as well as in the relevance attributed to the concept of "likelihood".

66 Regulation (EU) 2026/1386 Recital 7.

67 Regulation (EU) 2026/1386 Article 4; Luca Picotti p. 2.

68 Regulation (EU) 2026/1386 Article 19.

Member States and the Commission will, in fact, be empowered to intervene in relation to a foreign investment even where the investment is merely "likely" to advance the strategic objectives of a third country, including through mechanisms of economic coercion aimed at compelling Member States or the Union to adopt specific measures. Furthermore, an FDI may be considered of potential concern where it is "likely" to be used for purposes such as internal repression or human rights violations, or where it may contribute to the development of a third country's military capability.[69]

The same criteria are also relevant when determining the regulatory measures that Member States may, where necessary, adopt with regard to foreign investments that are likely to adversely affect security or public order. In such cases, Member States may impose appropriate mitigation measures or, alternatively, prohibit the foreign investment or require its divestment.[70]

A textual interpretation of the legislation therefore reveals a significant expansion of the margin of discretion afforded to Member States and the Commission in determining whether an FDI poses a threat to security or public order. This is particularly relevant given that, in accordance with the competence conferred upon Member States in this field, the final decision ultimately remains within their discretion.

On the other hand, such broad wording may be justified by the specific nature of the subject matter being regulated. Indeed, where security and public order are at stake, it is inherent that considerations relating to Member States' national security strategies must be taken into account. By their very nature, these considerations lie at the intersection between administrative decision-making and the political sphere, thereby giving rise to assessments that may involve a degree of ambiguity. Such discretion is not unlimited, as it remains constrained by the general principles governing administrative action, including the requirement that decisions not be manifestly unreasonable.

On the other hand, in accordance with the reservation concerning national security set out in Article 4(2) TEU, recalled by the Regulation, decision-making power remains with the Member States.[71] This principle, which constitutes an absolute requirement laid down by the Treaties, limits the progressive role assumed

69 Regulation (EU) 2026/1386 Article 19.
70 Regulation (EU) 2026/1386 Article 20.
71 Regulation (EU) 2026/1386 Recital 13.

by the Commission, which may, where appropriate, issue a duly reasoned opinion in addition to the notifications submitted by Member States and propose mitigation measures. Similarly, in formulating observations and issuing opinions, as prescribed by the Regulation, a form of dialogue is established between the Member States and the Commission, whereby the latter is empowered not only to issue opinions but also to inform the other Member States that it has done so.[72]

There is no doubt, therefore, that Regulation (EU) 2026/1386 represents a step forward in the effort to protect national and Union security and defence, albeit subject to the limitations and safeguards arising from the separation of powers established by the Treaties.

The issue, thus, concerns the nature assumed by the instruments of the common commercial policy, which, in the current context, are being deployed as instruments of common trade defence.

However, there is a structural weakness in the implementation of a policy of "common" trade defence, stemming from the fact that the national interests of Member States and the interests of the Union do not always coincide.

5. From Trade Interdependence to Economic Security: An Ongoing Dilemma Between Openness and Protection

The current geopolitical landscape is characterised by increasing tensions that challenge the traditional foundations of international trade and economic cooperation. Unlike previous historical periods, in which geopolitical rivalries often resulted in a clearer separation between political and commercial spheres, today's global economy is defined by an unprecedented degree of interdependence. Political competition is increasingly structured around rival blocs and strategic alignments, yet global value chains remain deeply interconnected.[73]

Consequently, the fracturing of the global economy does not necessarily correspond to a process of full deglobalisation. The interconnection and interdependence of markets and supply chains have by no means disappeared. Rather, this very interdependence exacerbates geopolitical tensions and makes them

72 Regulation (EU) 2026/1386 Articles 5 and 11; Luca Picotti, pp. 4 – 5.

73 See also *ex multis* Henry Farrell and Abraham L. Newman 2019 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' *International Security 44 (2019) pp. 42 – 79*; Neil Shearing *The Fractured Age: How the Return of Geopolitics Will Splinter the Global Economy*. London, John Murray Business, 2025.

more dangerous, giving new significance to the ongoing fracturing of the global economy.

In this system of communicating vessel, control over the strategic nodes of the global economy has become increasingly important as a means of gaining an advantage in commercial competition. It is therefore unsurprising that China has pursued a strategy aimed at leveraging the infrastructure network developed through the Belt and Road Initiative (BRI) to enhance its influence over global value chains.

In this complex economic and political scenario, trade policy instruments are therefore becoming increasingly sophisticated, while at the same time evolving into tools of commercial defence. Alongside the Chinese strategy, which, as we have seen, is multifaceted, other actors, such as the United States and the European Union, are adopting entirely different approaches.

The Chinese government appears, in fact, to be increasingly pursuing a threefold strategy, combining regulatory instruments, diplomatic engagement, and economic influence. In addition to adopting specific legislative measures, such as the Regulation on Countering Unjustified Extraterritorial Jurisdiction by Foreign States, China relies on diplomatic engagement and international cooperation while simultaneously promoting outward investment.

Similarly, it appears possible to identify different trends in the current political and economic approaches adopted by the United States and the European Union. While the US administration has maintained an assertive strategy, using tariffs as a genuine economic lever to pursue geopolitical objectives, the EU has reaffirmed a predominantly defensive approach. These perspectives are, in fact, fully consistent with the ideological foundations underlying the different actors involved in this context of political—and consequently commercial—tensions.

The strategic use of trade tariffs against other countries has led some scholars to suggest that, today, tariffs represent a new form of sanction,[74] serving as instruments to pursue objectives that extend beyond purely commercial strategies. The weaponisation of trade instruments is naturally less compatible with the economic and liberal framework of the European Union, which has historically regarded openness to markets and the free movement as fundamental elements of its institutional and economic model.

74 Hana Attia ‘Are Tariffs Becoming the New Sanctions?*’Fiker Institute Plicy Brief December 2025.*

The European Union, rather, has found itself facing a complex scenario in which its openness to markets and the attractiveness of foreign capital—one of the key strengths of the Eurozone economy—have become channels for the strategically oriented entry of foreign investments linked to third-country governments. This has created challenges both in terms of safeguarding internal competition and in terms of national and Union security. On the one hand, companies benefiting from such financing have enjoyed unjustified advantages, thereby distorting the internal market. On the other hand, foreign financial contributions have resulted in the acquisition of significant stakes in strategic assets of fundamental importance to the EU.

The Union has therefore, through the new instruments examined, integrated the common commercial policy with a defensive component, seeking to shield itself from mechanisms of economic coercion by third countries and from potentially harmful foreign capital A significant development in this context is the progressive expansion of the strategic scope of the interests considered worthy of protection. These now include, alongside critical infrastructure, electoral and financial systems, semiconductor supply chains, and the provision of essential services, including those related to food security.

At the same time, however, as observed in the case of the FSR, the EU allows the entry of foreign capital linked to the governments of third countries where there are substantial economic benefits, or where the commercial operations under scrutiny are resolved through a decision involving commitments undertaken by the company connected to the foreign government. This approach, although economically essential for the EU, may nevertheless present limitations from the perspective of the strategic protection of fundamental assets and the safeguarding of national and Union interests.

On the other hand, the most significant limitation faced by the EU at this historical juncture derives precisely from the heterogeneous meaning attributed to the concept of national interest. Not only does this concept differ among Member States, but it is also not always aligned with the interests of the Union as a whole. The EU's economic security strategies, which nonetheless constitute the basis for the recent development of the trade defence instruments currently being established, encounter here a structural limitation.

At the same time, and quite legitimately, Article 4(2) TEU, as repeatedly highlighted throughout this work, entrusts Member States with the protection of their respective national interests. The issue, therefore, is not to circumvent the limits imposed by the Treaties through indirect means, as the Commission appears to be attempting to do through the gradual expansion of its powers within these Regulations. Rather, the key to overcoming this challenge is not legal but political; more precisely, it lies in the creation of a common political, social, and strategic interest-based foundation among the Member States.

Only such an alignment, in fact, will enable the EU to develop a genuinely common trade defence policy.

Beyond this assessment of the current state of affairs, the complexity of the global and trade environment suggests that existing tensions—both economic and otherwise—should ideally be addressed and overcome through diplomatic and mediation channels, with a view to strengthening institutional relations and revitalising multilateralism.

Right to Repair and Deglobalization: Legal Pathways Toward Resilient and Decentralized Economies

by Isabelle Ablas; Carl Dalhammar; Flávio Ribeiro

1. *Introduction*

The legal architecture of global economic integration, built with considerable effort over the three decades following the Uruguay Round, rested on a largely unexamined premise about the direction of regulatory influence. Standards would converge; convergence would proceed from north to south and from advanced to developing economies; and the resulting framework would treat intellectual property protection as a floor below which states could not legislate rather than as a ceiling above which legitimate public interest regulation could rise. The TRIPS Agreement was the most complete legal expression of this premise, and its enforcement through the WTO dispute settlement mechanism was intended to make it durable.

That premise has come under pressure from two directions simultaneously, and this article is about both of them. The first pressure is European. Supply chain failures during the COVID-19 pandemic, the semiconductor crisis of 2021–2022, and the energy consequences of Russia's invasion of Ukraine demonstrated that an economy organized around global efficiency had also organized itself around global vulnerability. The EU's legislative response included the Ecodesign for Sustainable Products Regulation and the Right to Repair Directive, both adopted in June 2024. These instruments require manufacturers to design for reparability, make spare parts and diagnostic information available to independent repairers, and submit to a public interest logic that the intellectual property regime had for thirty years resisted. They do not ask permission from TRIPS; they assert, in the terms of Dani Rodrik's framework, that a democratic polity has the right to make regulatory choices that the discipline of global integration had previously foreclosed.[1]

1 Dani Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy

The second pressure comes from the Global South, and it has been present for longer than the EU's recent assertiveness. Informal repair economies across sub-Saharan Africa, South Asia, and Latin America have operated for decades in a legal environment that renders their core activities technically infringing: accessing diagnostic software without manufacturer authorization, sourcing spare parts through non-official channels, and transmitting technical repair knowledge that manufacturers treat as proprietary. These economies are not peripheral to the question of the right to repair. They are its most important constituency, because for them repair is not a consumer preference or an environmental good but a condition of access to technology that would otherwise be financially inaccessible.

This article argues that the EU model, notwithstanding its origins in European industrial and environmental policy, provides precisely the legal template and normative argument that developing countries have needed to challenge the intellectual property architecture governing product maintenance. The argument is not that the EU framework should be transplanted wholesale. Institutional conditions differ too fundamentally for that to work, and a candid assessment of the Brussels Effect must acknowledge that regulatory diffusion exports compliance costs along with standards. The argument is rather that the EU's insistence on making intellectual property rights yield to legitimate public interest regulation, and its willingness to assert that insistence against the framework of international trade law, creates a precedent and a doctrinal foundation on which a genuinely global right to repair can be built, if developing countries, international organizations, and legal scholars choose to build it.

The article is organized to follow the argument rather than survey the field. It begins with the political economy of post-globalization, because without that context the EU legislation looks like consumer policy when it is actually industrial strategy. It then reads the legislative framework closely enough to identify the specific provision — Article 5(6) of the Right to Repair Directive — that does the doctrinal work the rest of the argument depends on. The comparative section on the United States and Brazil is not decorative; the US material establishes that patent exhaustion already operates as a limit on IP exclusivity in a major common law jurisdiction, and the Brazilian material shows both the legal argument and its political cost when made without collective support. The analysis of TRIPS and WTO adjudication confronts the obstacles honestly before arguing they are surmountable. The Global South section is the article's nor-

(W. W. Norton 2011) 200.

mative centre: it explains why the argument matters beyond Europe and what an international framework would need to look like to actually serve the people who most depend on repair. The final section asks what institutions exist to build that framework and what the political conditions for doing so would require.

2. *Post-Globalization and the Reassertion of Regulatory Authority*

Post-globalization, as used here, names the exhaustion of a specific regulatory project rather than a decline in trade flows. The WTO agreements of 1994 placed the burden of justification firmly on states that wished to regulate in ways departing from market-opening norms. Intellectual property protection was raised to the status of a trade obligation. Environmental and social regulations were tolerated as exceptions, surrounded by procedural requirements designed to minimize their trade-distorting effect. The premise was that regulatory diversity was a problem to be managed and, ideally, eliminated through progressive harmonization on terms set by the major trading economies.

Zygmunt Bauman identified the distributional logic of this system before it had fully consolidated.

> The really existing globalization is a stratified phenomenon, in which the winners are those who can move — capital, information, commodities — while the losers are those who cannot.[2]

Rodrik's trilemma formalized what Bauman described: deep economic integration, democratic governance, and national sovereignty cannot all be fully realized simultaneously. Accepting the discipline of global markets requires surrendering the capacity to make different economic choices at the national level.[3] For most of the 1990s and 2000s, the dominant response was to treat the surrender as necessary and to manage its distributional consequences through other means. The crises of 2020–2022 ended that accommodation.

The EU's response took legal form. The European Industrial Strategy of 2020, the European Chips Act of 2023, and the right to repair framework adopted in 2024 are not deregulatory instruments; they are deliberate interventions in market structure, using law to assert public choices about production organiza-

2 Zygmunt Bauman, Globalization: The Human Consequences (Columbia University Press 1998) 12.

3 Rodrik (n 1) 200.

tion, product design, and the distribution of aftermarket value.[45] Susan Strange's analysis of the displacement of state authority to private firms provides the conceptual frame for what these instruments reverse: for two decades, manufacturers exercised private regulatory authority over who could service their products and on what terms.[67] The EU legislation is a direct challenge to that authority.

The question this article addresses is whether the reversal the EU has undertaken is available to others, and on what legal foundations. The answer matters because the EU's market power makes its regulatory choices effective regardless of their international legal status. States without that market power need legal arguments that can stand independently. The right to repair framework, properly understood and properly adapted, can provide those arguments.

3. The EU Legislative Framework

The EU right to repair framework rests on two instruments adopted on 13 June 2024 and published in the Official Journal in late June and early July of that year. Regulation (EU) 2024/1781 establishes substantive design and information obligations; Directive (EU) 2024/1799 governs the aftermarket relationship between manufacturers, consumers, and independent repairers. They are complementary but operate through different legal mechanisms.[89]

4 European Commission, 'An Industrial Strategy for Europe,' COM(2020) 102 final, 10 March 2020.

5 Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem (European Chips Act), OJ L 229, 18 September 2023.

6 Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (Cambridge University Press 1996) 4.

7 Ibid.

8 Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC, OJ L 2024/1781, 28 June 2024 (Ecodesign Regulation).

9 Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, OJ L 2024/1799, 10 July 2024 (Right to Repair Directive).

3.1 Regulation (EU) 2024/1781

The Ecodesign Regulation replaces Directive 2009/125/EC, which covered only energy-related products, with a framework applicable in principle to all physical goods placed on the EU market. It does not impose uniform requirements directly but empowers the Commission to adopt delegated acts for specific product categories, with parameters covering durability, reparability, recyclability, upgradability, and the availability of spare parts, repair information, and repair-related software. Product-specific requirements are to be phased in from 2025 onward, beginning with iron and steel, aluminium, textiles, and information technology goods.[10]

Article 5(2) directs ecodesign requirements to address the conditions that produce premature obsolescence, listing as examples design choices that reduce product durability below what is technically achievable, the impediment of key component disassembly, unavailability of repair information, and software updates that disable products before physical wear requires replacement.[11] The provision defines planned obsolescence as a regulatory problem. That definition has consequences for international law: a manufacturer who designs a product to fail prematurely is, under this framework, making an anticompetitive market choice that domestic regulation may correct. The intellectual property rights that protect the design are not a defence against that correction but a factor to be weighed in its design.

Recital 14 states the industrial policy objective plainly: the Regulation aims to foster economic models that prolong product lifetime by establishing local repair and reuse networks.[12] 'Local' is doing substantive work in that formulation. A local repair network is a network that retains value in the jurisdiction rather than exporting it to the manufacturer's headquarters. A prolonged product lifetime reduces demand for replacement goods. These effects are not incidental to the environmental rationale; they are consistent with it, and they constitute the industrial policy logic that the Regulation's preamble makes explicit.

10 Ecodesign Regulation (n 2) arts 4 and 7(1); the Regulation requires the Commission to adopt a pluriannual working plan establishing a list of product groups to be prioritised for ecodesign requirements, with the first working plan covering iron and steel, aluminium, textiles, furniture, tyres, detergents, paints, lubricants, chemicals, and information and communication technology products.

11 Ecodesign Regulation (n 2) art 5(2).

12 Ecodesign Regulation (n 2) recital 14.

3.2 Directive (EU) 2024/1799

The Right to Repair Directive addresses the aftermarket directly. Member States must transpose it by 31 July 2026. Its principal obligations require manufacturers of goods listed in Annex II to repair those goods on request outside the statutory guarantee period at a price that does not deter consumers from exercising the right, and to make spare parts, tools, and repair information available to independent repairers and owners. Contractual arrangements and technical measures obstructing repair by non-authorized parties are prohibited.[13]

Article 5(6) qualifies the prohibition: technical obstruction remains permissible where justified by 'legitimate and objective factors, including the protection of intellectual property rights under Union and national law.'[14] This qualification is the provision's most important legal feature, and not because it limits the right to repair. It is important because of what it says about the hierarchy of norms: intellectual property protection is a justification for restricting repair access, not an automatic override of it. The Directive treats IP rights as relevant considerations in a proportionality assessment rather than as absolute entitlements. That treatment is precisely what TRIPS's critics have argued the international regime should adopt, and the Directive demonstrates that such treatment is legally workable within a major jurisdiction.

National courts and eventually the Court of Justice of the European Union will determine how that proportionality assessment operates in specific cases. The outcomes will vary across Member States during the transposition period, and the fragmentation will generate litigation that produces, over the next decade, a European doctrine of repair rights. That process of doctrinal elaboration will itself be a resource for developing countries seeking to construct analogous frameworks: the reasoning that justifies requiring a smartphone manufacturer to make firmware accessible to independent repairers in Germany is legally transferable to a jurisdiction that chooses to use it.

3.3 Enforcement

The market surveillance framework of Regulation (EU) 2019/1020 underpins both instruments, requiring Member States to designate national enforcement

13 Right to Repair Directive (n 3) art 5(3).

14 Right to Repair Directive (n 3) art 5(6).

authorities and conduct product conformity checks.[15] The Ecodesign Regulation adds a digital product passport requirement that will make machine-readable sustainability data, including reparability scores, available for each product on the market. Enforcement capacity across Member States is uneven, and the Commission's evaluations of the original Ecodesign Directive acknowledged persistent gaps between nominal compliance and substantive enforcement. The new framework is more precise in its requirements, which helps, but building credible enforcement infrastructure will require investment that the legislative timetable does not address.

4. Comparative Legal Landscape: The United States and Brazil

4.1 The United States

The right to repair in the United States has developed without comprehensive federal legislation, through a combination of litigation, administrative rule-making, and state statutes. Patent law, copyright law, and competition law are simultaneously in play, and their interaction has not been rationalized by any overarching instrument.

On the patent side, the Supreme Court's 2017 decision in *Impression Products Inc v Lexmark International Inc* confirmed that patent exhaustion operates upon the first authorized sale, regardless of post-sale restrictions and regardless of the location of the sale.[16] A manufacturer cannot use patent infringement claims to control repair of a product it has already sold. Contractual restrictions survive exhaustion but must be enforced as contract claims without the patent's exclusivity remedy. For the global right to repair, the significance of this decision is doctrinal: a major jurisdiction's highest court has held that the intellectual property interest of the manufacturer is spent upon sale, and that what follows is governed by property law, not by IP exclusivity.

Copyright law is more resistant, and this is the central legal battleground in the United States context. The Digital Millennium Copyright Act's anti-circumvention provisions (17 U.S.C. § 1201) prohibit the circumvention of techno-

15 Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products, OJ L 169, 25 June 2019.

16 Impression Products Inc v Lexmark International Inc, 581 US 360 (2017) (Roberts CJ) 365–366.

logical protection measures independently of whether the underlying act would infringe copyright. Manufacturers embed diagnostic software and firmware in consumer goods protected by both copyright and technological measures; independent repairers who access these systems to perform repairs face potential liability even where no copying occurs. The Copyright Office's triennial exemption process has expanded the categories of protected repair activity, but the exemptions are narrow, temporary, and subject to industry challenge at each renewal cycle. The structural problem is that copyright law was not designed to govern access to functional software in the context of product maintenance, and its application to that context produces outcomes that are difficult to defend as either efficient or equitable.

The Federal Trade Commission's 2021 report *Nixing the Fix* documented that manufacturers' stated justifications for repair restrictions — safety, data security, quality control — were not supported by the available evidence, and recommended both legislative action and enhanced antitrust enforcement.[17] Executive Order 14036 of July 2021 directed the Commission to prioritize this area.[18] *Apple Inc v Pepper* removed a procedural barrier to antitrust claims against platform-based aftermarket monopolies.[19] New York's Digital Fair Repair Act of 2022 requires manufacturers to provide independent repairers with the same diagnostic and repair information available to authorized service providers. The federal preemption questions it raises under copyright law have not been resolved, but its existence demonstrates that the legislative path is available.

4.2 Brazil

Brazil's experience is the most instructive comparator for the argument this article develops. Law No 9.279 of 14 May 1996 established in Article 68 a working requirement for patents: where a patent holder does not manufacture the patented product in Brazil or use the patented process domestically, the patent is subject to compulsory licensing on grounds of non-exploitation.[20] The United States challenged this provision at the WTO in 2000. The dispute was

17 Federal Trade Commission, Nixing the Fix: An FTC Report to Congress on Repair Restrictions (FTC, May 2021) 3–4, online at the Federal Trade Commission site.

18 Executive Order 14036, 'Promoting Competition in the American Economy,' 86 Fed Reg 36987 (9 July 2021) s 5(n).

19 Apple Inc v Pepper, 587 US 513 (2019) (Kavanaugh J).

20 Brazil, Law No 9.279 of 14 May 1996 (Lei de Propriedade Industrial) art 68.

resolved bilaterally before a panel was constituted, with Brazil committing not to invoke Article 68 without prior US consultation.[21]

The episode is instructive not as a story of Brazilian failure but as a demonstration of the legal argument that is available and the political conditions required to make it stick. Brazil had the right analysis: domestic law can require that patents be worked locally, and TRIPS Article 31 provides flexibilities that developing countries can use to support domestic technological capacity. What Brazil lacked was the market power to maintain its regulatory choice against US pressure. The EU demonstrates that the regulatory choice is legally sustainable when backed by market power sufficient to impose compliance costs on manufacturers who wish to access the world's largest consumer market. The lesson for the Global South is not that the argument is wrong but that it requires either collective action or a legal architecture that does not depend on individual market power to function.

Brazil has drawn on TRIPS flexibilities more assertively in the pharmaceutical domain, and that experience is directly relevant to the repair context. In May 2007, the Brazilian government issued a compulsory licence for efavirenz, the antiretroviral drug produced by Merck, after negotiations failed to produce a price reduction acceptable to the Brazilian Ministry of Health.[22] By importing generic versions from Indian manufacturers at US$170 per patient per year rather than Merck's price of US$760, Brazil projected savings of US$237 million through 2012 and maintained the sustainability of its universal HIV treatment programme. The US Trade Representative subsequently placed Brazil on its Priority Watch List, and the response from industry and government in Washington was severe. Brazil maintained its position. The episode demonstrates two things simultaneously: that the legal argument for using TRIPS flexibilities to override IP exclusivity for public interest purposes is sound and sustainable, and that the political cost of making that argument without sufficient external support or market leverage is substantial. A multilateral framework for the right to repair

21 WTO, Request for Consultations by the United States, Brazil — Measures Affecting Patent Protection, WT/DS199/1, 30 May 2000.

22 Brazil, Decree No 6.108 of 4 May 2007 (declaring efavirenz of public interest and authorizing its compulsory licensing for public non-commercial use). On the price differential and projected savings, see WC Rodrigues and O Soler, 'Compulsory Licensing of Efavirenz in Brazil in 2007: Contextualization' (2009) 26 Revista Panamericana de Salud Pública 553. On the US Trade Representative's response, see N Ford et al, 'Sustaining Access to Antiretroviral Therapy in the Less-Developed World: Lessons from Brazil and Thailand' (2007) 21 AIDS S21.

— one that embeds the proportionality logic of the EU model in internationally agreed standards rather than leaving each developing country to assert it alone — would reduce that political cost by distributing it collectively.

5. TRIPS, WTO Adjudication, and the Space for Repair Regulation

5.1 The TRIPS Framework and Its Conflicts with Repair

The TRIPS Agreement was designed to make minimum intellectual property protection a condition of WTO membership and its violation actionable through the dispute settlement mechanism. For the right to repair, Articles 27 and 28 are the primary instruments of manufacturer exclusivity: they require patent protection in all fields of technology and grant patent holders exclusive rights against making, using, selling, or importing the patented product without authorization.[23] Article 39(2) protects undisclosed information (repair manuals, diagnostic protocols, firmware source code) against commercial use by parties who have not received authorization.[24]

Against these protections, Articles 13 and 30 permit limited exceptions to exclusive rights where they do not unreasonably conflict with normal exploitation or unreasonably prejudice the right holder's legitimate interests.[25] Article 31 permits compulsory licensing subject to procedural requirements.[26] The WTO Panel in *Canada - Patent Protection of Pharmaceutical Products* (WT/DS114/R, 17 March 2000) interpreted Article 30 restrictively, requiring that exceptions be genuinely limited and that the cumulative three-step test be taken seriously rather than treated as a formality.[27] That panel report was never formally adopted by the Dispute Settlement Body - Canada and the European Communities reached a bilateral settlement before the adoption stage, so its precedential status is qualified. It nonetheless represents the most sustained WTO analysis of Article 30 available, and its restrictive reading has been treated in subsequent

23 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C to the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299, arts 27–28.

24 TRIPS (n 22) art 39(2).

25 TRIPS (n 22) arts 13, 30.

26 TRIPS (n 22) art 31.

27 WTO Panel Report, Canada — Patent Protection of Pharmaceutical Products, WT/DS114/R, 17 March 2000, para 7.20.

scholarship as the operative interpretive framework. A measure requiring manufacturers to provide independent repairers with access to proprietary diagnostic software would face a credible argument on that basis that it conflicts with the normal exploitation of the relevant copyright and trade secret protections. This is a real legal obstacle. It is also surmountable, and the pharmaceutical experience shows how.

5.2 The Doha Declaration and the Right to Repair

The Doha Declaration on TRIPS and Public Health, adopted unanimously on 14 November 2001, affirmed that the Agreement 'can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health.'[28] Its drafting history makes clear that the Declaration was not creating a new exception. It was confirming that existing flexibilities — Articles 30, 31, and the general interpretive principle that TRIPS must be read in light of its objectives and context — are available and intended to be used when intellectual property protection conflicts with legitimate regulatory objectives.

This article argues that the Doha logic applies to the right to repair, and that the argument is strongest precisely where the stakes are highest: in developing countries where access to repair knowledge is a condition of technology access, not a consumer preference. The Doha Declaration succeeded because it articulated an interpretive principle that was legally sound and politically difficult to oppose: a treaty designed to promote trade cannot be read to prohibit the regulation of intellectual property for legitimate public purposes. That principle does not become unavailable because the public purpose in question is technological access rather than pharmaceutical access. The structure of the argument is identical, and the TRIPS text supports it no more or less in one context than the other.

The risk in invoking this analogy is overstating its force. Health emergencies mobilized political pressure that repair policy is unlikely to replicate. The Doha Declaration was secured through a coalition of developing countries acting collectively around a vivid and sympathetic cause. A right to repair agenda would need to build a comparable coalition around a cause that is less dramatic but structurally equivalent. That is a political challenge, not a legal deficiency in the argument. The legal case is sound: TRIPS flexibilities are real, they are available

28 Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, adopted 14 November 2001, para 4.

for purposes beyond health, and Article 66(2)'s technology transfer obligation creates a positive duty on developed-country Members to facilitate access to the technical knowledge that developing countries need to build local technological capacity, including repair capacity. The WIPO Development Agenda, adopted in 2007, reinforces this reading: its Recommendations 19, 25, and 26 address technology transfer and the obligation to assess how intellectual property protection affects access to knowledge, establishing within the international IP system itself the normative foundation for exactly this argument.[29]

5.3 WTO Adjudication and the Ecodesign Regulation

A WTO challenge to the EU's right to repair framework would be litigated primarily under the Agreement on Technical Barriers to Trade and GATT, with TRIPS claims available for provisions directly affecting intellectual property rights.[30]

The TBT Agreement requires that product regulations pursue legitimate objectives and create no unnecessary obstacles to trade. The Appellate Body's analysis in *European Communities — Measures Affecting Asbestos* (WT/DS135/AB/R) confirmed that Member States may adopt product regulations excluding goods on health and environmental grounds, and its reading of 'likeness' under GATT Article III:4 integrated risk factors and consumer preferences into the analysis.[31] The EU would have a credible argument that products designed for planned obsolescence are not 'like' products designed for reparability and that differential treatment between them is non-discriminatory. GATT Article XX(b) and XX(g) provide further legal cover: the Appellate Body in *United States — Shrimp* (WT/DS58/AB/R) confirmed that Article XX(g) extends to the conservation of exhaustible natural resources including non-biological ones.[32]

29 WIPO, 'Development Agenda for WIPO,' adopted by the General Assembly, 45 Recommendations, September 2007 (WIPO Development Agenda). Recommendations 19, 25, and 26 specifically address technology transfer obligations and the need to assess the impact of intellectual property protection on access to knowledge. The parallels with the repair information access argument are direct.

30 Agreement on Technical Barriers to Trade, Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, art 2.2.

31 WTO Appellate Body Report, European Communities — Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, paras 101–103, 172.

32 WTO Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, para 129.

Reparability requirements are a defensible measure for conserving the materials and energy embedded in manufactured goods.

The institutional crisis of WTO appellate review compounds these legal uncertainties. The Appellate Body has lacked the three-member quorum required to hear appeals since December 2019, meaning that a panel ruling adverse to the EU could be appealed into a procedural vacuum.[33] The EU's 2021 Trade Policy Review acknowledges this tension, asserting simultaneously the EU's commitment to WTO consistency and its right to regulate in the public interest.[34] The gap between those commitments is not merely procedural. It raises the question of what WTO-consistency means when the body that authoritatively determines consistency cannot function. This institutional failure, combined with the EU's market power, creates a de facto space for regulatory experimentation that formally WTO-consistent states with smaller markets do not have. An international right to repair framework, by creating multilaterally agreed standards, could provide developing countries with the legal cover that the EU currently provides for itself through market power alone.

6. The Right to Repair in the Global South: From European Model to Global Framework

6.1 Repair as a Development Imperative

The right to repair debate in Europe is framed around consumer preferences and environmental outcomes. In the Global South, the frame is different because the material conditions are different. Consumer electronics in use across much of sub-Saharan Africa are predominantly second-hand goods that have already passed through one lifecycle in a high-income economy. Agricultural machinery across South Asia is maintained by informal repair technicians who work without manufacturer authorization, using knowledge developed outside official training programmes, sourcing parts through channels the manufacturer has not sanctioned. Medical equipment in under-resourced health facilities across Latin America and sub-Saharan Africa remains in service because local techni-

33 Gregory Shaffer, Manfred Elsig and Mark Pollack, 'The Slow Killing of the World Trade Organization: The Future of International Trade Adjudication' (2020) 25 Minnesota Journal of International Law 1, 4.

34 European Commission, 'Trade Policy Review — An Open, Sustainable and Assertive Trade Policy,' COM(2021) 66 final, 18 February 2021, 5.

cians have learned to improvise repairs that the manufacturer's service network would not provide — a phenomenon documented in depth in the biomedical engineering literature, which estimates that up to 40% of medical equipment in low- and middle-income countries is out of service at any given time, with lack of spare parts availability and absent service documentation among the principal causes.[35][36] In all of these cases, repair is not an alternative to replacement. It is the only viable option for maintaining access to technology that populations cannot afford to replace.

UNCTAD's Technology and Innovation Report of 2023 documents the scale of this dependency and its implications for technology diffusion in developing economies.[37] The legal architecture of global intellectual property, calibrated for the interests of manufacturers in technology-exporting economies, treats the knowledge on which local repair depends as private property to be licensed. The practical effect is that the informal repair sector operates in systematic legal jeopardy. Technicians who circumvent technological protection measures to access diagnostic functions, who source spare parts outside official distribution networks, or who train other technicians using proprietary technical information are technically infringing intellectual property rights whose owners are headquartered in jurisdictions with no interest in enforcing them for the benefit of local repair markets. The legal framework does not prohibit repair; it simply makes repair legally precarious in a way that disadvantages those who most depend on it.

35 Robert A Malkin, 'Design of Health Care Technologies for the Developing World' (2007) 9 Annual Review of Biomedical Engineering 567, 570 (estimating that up to 96% of medical equipment in some developing-country settings is out of service, and that lack of service manuals and spare parts availability is among the three principal causes); PATH, 'Strong Health Systems Require Resilient Biomedical Engineering' (PATH, 2022) (noting that around 40% of medical equipment in low- and middle-income countries ends up in equipment graveyards due to lack of maintenance and repair capacity).

36 iFixit, 'Introducing the World's Largest Medical Repair Database, Free for Everyone' (iFixit, 19 May 2020), online at the iFixit site. The project was launched in response to the COVID-19 pandemic and built with the help of over 200 librarians and archivists. iFixit noted that many manufacturers refused to share service documentation even during the crisis, confirming that IP-based restriction of repair information was an active obstacle to hospital maintenance rather than a theoretical one. The database has been maintained beyond the pandemic and now covers thousands of devices used in health facilities worldwide, including in low- and middle--income countries.

37 UNCTAD, Technology and Innovation Report 2023: Opening Green Windows — Opportunities for Clean Technology (UN 2023) ch 3.

Mariana Mazzucato's analysis of the entrepreneurial state is directly applicable here.[38] The technological knowledge embedded in a smartphone was not produced by Apple or Samsung alone. It was produced in university laboratories funded by public investment, by standards bodies whose work is publicly financed, and by engineering communities whose accumulated knowledge is not commercially owned. A legal regime that treats repair information as the exclusive property of the device manufacturer, immune from domestic regulation that would require its disclosure for legitimate maintenance purposes, systematically transfers the returns from that shared public investment to private manufacturers in high-income economies. That transfer is not a natural consequence of innovation incentives; it is a political choice, and it can be made differently.

6.2 The Structural Asymmetry of TRIPS and the Case for Correction

Antony Anghie's analysis of the colonial foundations of international law identifies the structural feature of the TRIPS Agreement that is most relevant to the right to repair.[39] TRIPS was negotiated by the industrialized economies, primarily in response to lobbying from their pharmaceutical, software, and entertainment industries. It committed the rest of the world to regulatory standards that, in the short to medium term, transferred rents from technology-importing to technology-exporting economies and foreclosed the industrial policy tools that the now-industrialized economies had themselves used freely during their development phases. The parallel with the right to repair is precise: intellectual property protections over diagnostic software, spare part specifications, and repair manuals systematically transfer value from local repair economies to manufacturers in high-income countries.

> International law has always served the interests of those who made it. The question is whether it can be remade to serve others.[40]

Boaventura de Sousa Santos's concept of epistemicide names a dimension of this asymmetry that economic analysis misses.[41] The global IP system does

38 Mariana Mazzucato, The Entrepreneurial State: Debunking Public vs Private Sector Myths (Anthem Press 2013) 54.

39 Antony Anghie, Imperialism, Sovereignty and the Making of International Law (Cambridge University Press 2005) 3.

40 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 3.

41 Boaventura de Sousa Santos, Epistemologies of the South: Justice Against Epistemicide

not merely reallocate rents; it determines which forms of knowledge receive legal recognition and protection. The codified, formalized knowledge of large manufacturers is intellectual property. The tacit, locally developed knowledge of repair technicians — knowledge of how to adapt, improvise, and maintain goods in conditions the manufacturer did not design for — is unprotected, and where it requires access to proprietary information, legally endangered. Vandana Shiva documented this process in the agricultural domain, where seed patents displaced traditional crop knowledge; the structural parallel in the electronics repair sector is direct.[42]

Article 66(2) of TRIPS imposes on developed-country Members an obligation to provide incentives for technology transfer to least-developed countries.[43] This obligation is real, legally binding, and systematically under-enforced. A right to repair agenda that took development seriously would treat Article 66(2) as the legal foundation for requiring concrete measures: access to diagnostic software on non-discriminatory terms as a condition of technology export, mandatory licensing of spare parts specifications to local manufacturers in developing countries, and training programmes for repair technicians financed by intellectual property rents. None of these measures would require amending TRIPS. They would requ.ire reading Article 66(2) as the binding obligation it is rather than as a hortatory statement that states may satisfy through marginal gestures.

6.3 Adapting the EU Model for the Global South

The Brussels Effect — the tendency of EU regulatory standards to diffuse globally because the cost of maintaining dual product lines exceeds the cost of universal compliance — is a real mechanism. If Regulation (EU) 2024/1781 requires publishable reparability scores and accessible spare parts for EU market access, manufacturers will in many cases apply those requirements globally rather than maintain separate product lines. This is a genuine benefit and should not be dismissed.

The problem is that the Brussels Effect transfers standards without transferring institutional capacity. The EU framework assumes formal repair markets,

(Paradigm Publishers 2014) 21.

42 Vandana Shiva, Monocultures of the Mind: Perspectives on Biodiversity and Biotechnology (Zed Books 1993) 130.

43 TRIPS (n 22) art 66(2).

enforceable spare parts access rights, judicial systems capable of adjudicating IP-repair conflicts, and consumer complaint mechanisms that can be used by individuals without specialized legal knowledge. The African Union's Digital Transformation Strategy for Africa explicitly identifies the need to develop technology governance frameworks adapted to African institutional conditions rather than adopted wholesale from other regions.[44] This is the correct analytical point, and it does not argue against using the EU model; it argues against using it without adaptation.

What adaptation requires, concretely, is the following. First, an international right to repair framework must recognize informal repair practices as legally legitimate economic activity, not as activity to be formalized out of existence through compliance requirements calibrated for European workshop standards. The informal technician is not a problem; the legal architecture that makes their work precarious is the problem. Second, the framework must operationalize TRIPS Article 66(2) in the repair domain, requiring measurable technology transfer obligations — disclosure of diagnostic protocols, licensing of spare parts specifications at non-discriminatory prices, support for technical education — as conditions of developed-country compliance with the provision. Third, it must address the pricing of repair information access as a development question. The cost of a manufacturer's authorized repair kit, denominated in euros or dollars and priced for European or American markets, is not an incidental barrier to repair in Nairobi or Dhaka. It is a structural one.

None of the existing international instruments approach this design. The EU's legislation provides the normative foundation — intellectual property rights must yield to legitimate regulatory objectives — and the doctrinal elaboration that will follow from European litigation will provide the detailed legal reasoning. The institutional architecture through which that reasoning could be translated into an international standard already has a partial foundation: ISO Technical Committee 323 on Circular Economy, currently developing standards on product circularity data sheets, provides a methodological platform for harmonizing repairability metrics that does not depend on formal treaty negotiation. A model of graduated regulatory convergence, in which jurisdictions at different stages of institutional development commit to methodological alignment before assuming identical legal obligations, offers a realistic pathway that

44 African Union, 'Digital Transformation Strategy for Africa (2020–2030)' (AU Commission 2020) 18.

avoids both the over-ambition of formal legal unification and the inadequacy of simple mutual recognition between methodologically incompatible schemes.[45]

7. Toward an International Right to Repair

The preceding analysis generates a specific institutional question: what would an international right to repair framework actually look like, and through what mechanisms could it be built? The EU's legislation answers part of the question. It establishes that the proportionality logic — IP rights are legitimate interests to be weighed in a regulatory assessment, not absolute entitlements that override public interest objectives — is legally workable in a major jurisdiction. It generates, through litigation before national courts and the Court of Justice of the European Union, a body of doctrinal reasoning that any jurisdiction choosing to adopt the same approach can cite and build on. And it creates, through the Brussels Effect, market pressure on manufacturers to make reparability information more broadly available as a condition of the global compliance strategies they adopt to serve the EU market. None of this is nothing. But it is also not an international framework, and it should not be mistaken for one.

Joost Pauwelyn's argument that the WTO system has evolved from a regime of trade liberalization into one of regulatory governance identifies the institutional space in which an international right to repair could be constructed.[46] On that reading, the question the multilateral system must now answer is not whether goods containing IP-protected repair information may be traded freely, but under what conditions their aftermarket governance is internationally permissible. Developing countries have the most to gain from a clear answer to that question, because an internationally agreed proportionality standard would give them the legal cover that the EU currently generates for itself through market power alone. The WTO's Technical Barriers to Trade Committee provides a

45 ISO Technical Committee 323 on Circular Economy, established 2018, has developed standards including ISO 59004:2024 (Circular Economy — Framework and Principles) and is developing ISO 59040 on product circularity data sheets, which provides a potential methodological platform for international harmonization of repairability metrics. See Ablas, 'Repairability Indices and Lifecycle Disclosures as Environmental Consumer Communication Tools' (forthcoming 2025) sec 4 (proposing Graduated Regulatory Convergence as the appropriate harmonization model).

46 Joost Pauwelyn, Rethinking the Global Trade Order: A Retrospective on the World Trade Organization's First Quarter Century (Georgetown Law 2022) 34.

forum; the TRIPS Council provides another; the WIPO Development Agenda provides the normative foundation. What is missing is not legal infrastructure but political coordination.

Ernst-Ulrich Petersmann's argument that international economic law derives legitimacy from its capacity to protect individual rights offers a test against which any proposed framework can be evaluated.[47] The test cuts both ways. The EU framework passes it for European consumers and repairers. It fails it, at least in its current form, for the Kenyan biomedical technician who needs firmware access to keep a ventilator running, or the Indian farmer whose tractor is immobilized because diagnostic software is accessible only through an authorized dealer three days' travel away. An international right to repair framework worth building must pass the test for both. That means recognizing the informal repair economy as legally legitimate, operationalizing the technology transfer obligations of TRIPS Article 66(2) in the repair domain, and pricing access to repair information as a development question rather than a commercial one.

Rodrik's trilemma clarifies the political economy of the path forward.[48] The EU's resolution, deep integration within the single market, regulatory sovereignty at the external border, works for the EU precisely because the EU has the market power to set the terms of its interaction with trading partners. Developing countries acting individually cannot replicate that resolution. Acting collectively, through the Doha Declaration model, they demonstrated in 2001 that a different resolution is available: multilateral affirmation that the international IP regime accommodates domestic regulatory choices made for legitimate public purposes, which changes the baseline for every state that invokes it, regardless of individual market power. The right to repair is a smaller and less urgent cause than the HIV/AIDS crisis that produced Doha. It is also a cause for which the evidentiary foundation is now far more developed, because the EU has just spent several years building it. The task is to use that foundation.

47 Ernst-Ulrich Petersmann, 'How to Reform the 21st Century WTO System for Trade in Goods, Services and Ideas' (2018) 21 Journal of International Economic Law 579, 582.

48 Rodrik (n 1) 241.

8. *Conclusions*

The EU's right to repair framework is, among other things, a proof of concept. It demonstrates that the intellectual property architecture governing product aftermarkets can be subjected to public interest regulation without the trading system collapsing, without manufacturers abandoning the EU market, and without the TRIPS Agreement being formally amended. The framework does this by applying a principle that has been legally sound for thirty years but politically unavailable to most states: that intellectual property protection is an instrument of public policy whose scope is legitimately determined by the same democratic processes that determine the scope of other policy instruments, and that the appropriate weight of IP protection in any given regulatory context is a matter for proportionality assessment rather than categorical immunity.

That principle is exportable. The doctrinal elaboration that will accumulate from European litigation over the next decade. The Court of Justice's interpretations of Article 5(6) of the Right to Repair Directive, the proportionality assessments in national courts, the reparability index jurisprudence, will produce legal reasoning that any jurisdiction can use. The legal argument for why a manufacturer of agricultural equipment must disclose diagnostic information to independent repairers in Germany is the same argument for why the same manufacturer must do so in India or Kenya, if a domestic legal framework adopts the same proportionality approach. The Brussels Effect can transfer the standard; what it cannot do is transfer the institutional capacity to enforce it, or the legal security that enforcement provides for the informal technicians who most need it.

The Global South dimension of the right to repair requires explicit and substantive attention, not optimism about positive externalities. The informal repair sector in developing economies is not a transitional form of economic organization waiting to be upgraded to European standards; it is a sophisticated economic and social formation that has maintained access to technology for hundreds of millions of people under conditions of genuine resource scarcity. An international right to repair framework that treated it as a compliance problem rather than a model of resource efficiency would have the causality backwards. The formal repair markets the EU framework assumes are, in many respects, less ecologically rational than the informal repair networks that already exist across much of the Global South.

TRIPS Article 66(2), the Doha Declaration's interpretive methodology, and the precedent the EU has now established together provide the legal foundation for a development-oriented international right to repair. Whether that foundation is used depends on political choices that scholars, civil society organizations, and developing-country governments have the capacity to influence. The EU has demonstrated that the legal argument works. The task now is to make it work for everyone.

Postface

Back to Westphalia? Old Legal Paradigms and New Global Challenges

by Filippo Ruschi

1. Painting Peace

The curator of a hypothetical catalogue devoted to the iconography of international law could hardly fail to assign particular prominence to *The Ratification of the Spanish-Dutch Treaty of Münster, 15 May 1648*, the work of an outstanding portraitist, Gerard ter Borch, long regarded as "second only to Rembrandt in the pantheon of seventeenth-century Dutch artists"[1]. The painting, probably conceived with reproduction in print in mind – and indeed reproduced many times – became widely celebrated[2]. Long retained by the painter's family, it subsequently travelled across Europe, passing through the picture gallery of Prince Talleyrand – *pour cause*, one is tempted to say – before finding a home in Florence in the collection of the Demidoff princes and, finally, entering the National Gallery in London in 1870 through the generosity of Sir Richard Wallace, one of the foremost art collectors of his generation.

In more recent times, the painting's fortunes have taken a highly distinctive turn, one that would probably not have displeased the author of *The Ratification of the Spanish-Dutch Treaty of Münster*: as has been observed, ter Borch's masterpiece "can be found illustrating countless scholarly political histories,

1 Christopher Brown, 'Gerard ter Borch at The Hague and Münster', in *The Burlington Magazine* 116 (1974), 854, pp. 288–292, especially p. 288. For a biographical overview, see Diana Carrió-Invernizzi, 'Gerard ter Borch, un pintor holandés al servicio de la diplomacia Española', in Alexandra Merle, Éric Leroy du Cardonnoy, eds., *Les Habsbourg en Europe: circulations, échanges et regards croisés*. Éditions et Presses Universitaires de Reims, Reims 2018, pp. 251–265.

2 Alison McNeil Kettering, *Gerard ter Borch and the Treaty of Münster*. Mauritshuis/Waanders Publishers, The Hague/Zwolle 1998, p. 37.

not to mention schoolbooks"[3]. Indeed, despite its relatively modest dimensions, the painting possesses remarkable visual force. The chamber of Münster's town hall – immediately rechristened with the grand title *Friedenssaal* – that forms the setting for the ratification of peace between the Netherlands and Spain is crowded with no fewer than seventy-seven figures. Each is portrayed with the clarity and sensitivity to psychological nuance that, as Goethe had already noted in *Die Wahlverwandtschaften*, distinguish ter Borch's painting. The representation of so solemn a moment rests on a carefully constructed composition. On the right stand the elegant Spanish dignitaries – their satin *jubones* adorned with silver buttons and their exquisitely crafted *golillas*. Among them towers the august figure of Gaspar de Bracamonte y Guzmán, Count of Peñaranda, one of the architects of peace with the United Provinces, a role that fully justifies his placement at the centre of the composition[4]. On the left, by contrast, the Dutch delegation is gathered in the monochrome sobriety of dress consonant with the Reformation's anti-sumptuary ethos. This division is mirrored in the form of the oath sealing the agreement: while the Spaniards recite the formula with their right hands touching a silver crucifix laid upon an open Gospel, the Reformed delegates invoke Trinitarian symbolism by raising three fingers in accordance with the practice of the *Schwurhand*. Ter Borch's decision to include himself in the crowded oath-taking scene was likewise deliberate, signalling to the viewer his status as a direct witness to the ceremony[5].

Yet, however considerable its artistic merits, these alone do not explain why historians, political scientists, and legal scholars have chosen *The Ratification of the Spanish-Dutch Treaty of Münster* to adorn the covers of their books[6]. Ful-

3 McNeil Kettering, p. 8.

4 On the Spanish diplomat, who would shortly thereafter become Viceroy of Naples, see most recently Ana María Carabias Torres, 'Saber y poder para la paz. Semblanza de Gaspar de Bracamonte y Guzmán, plenipotenciario en las paces de Westfalia (1648)', in Maria de la Paz Pando Ballesteros, Elizabeth Manjarés Ramos, eds., *El derecho a la paz y sus desarrollos en la Historia*. Tirant, Valencia 2022, pp. 30–59.

5 McNeil Kettering, pp. 11–18.

6 See, for example, the English-language edition of the monumental *Epochen der Völkerrechtsgeschichte*: Wilhelm Georg Grewe, *The Epochs of International Law*. De Gruyter, Berlin–Boston 2000; Laura Manzano Baena, *Conflicting Words: The Peace Treaty of Münster (1648) and the Political Culture of the Dutch Republic and the Spanish Monarchy*. Leuven University Press, Leuven 2011; Derek Croxton, *Westphalia: The Last Christian Peace*. Palgrave Macmillan, London 2013. In Dutch, see Els Kloek, *Verzameld Verleden. Veertig gedenkwaardige momenten en figuren uit de vaderlandse geschiedenis*.

ly deserving a place among the foundational works of *peinture d'histoire*, the painting owes much of its fame to the event it depicts: the treaty that brought the Eighty Years' War between Spain and the United Provinces to an end in May 1648. Rather unusually, however, the painting became the conventional image of the entire Westphalian peace process, formally concluded only in the following October with the treaties of Münster and Osnabrück[7]. It was thus symbolically associated with the instrument that ended the catastrophic Thirty Years' War, of which the conflict between the Spanish and the Dutch had first been a bloody precursor and later only one theatre of what has, not without good reason, been described as the first total war[8].

The Peace of Westphalia – with which ter Borch's work was associated somewhat hastily, though by no means naively from a communicative standpoint, especially in the absence of an iconographic repertoire for the event – did in fact constitute a genuine turning point in European history. It did so, most obviously, by bringing to an end a long period of widespread, protracted, and, above all, intense conflict: the peaks of violence that marked the Thirty Years' War remain shocking even today. With regard to the German lands – the principal theatre

Verloren, Hilversum 2004, and Arnout van Cruyningen, *De Vrede van Münster het einde van de Tachtigjarige Oorlog*. Omniboek, Utrecht 2022. In German, see Stephanie Schoger, *Gerard ter Borch und der westfälische Friedenskongress 1648 in Münster*. Böhlau, Köln 2020. For French-language publications, see Arnaud Blin, *1648, La paix de Westphalie*. *Le nouvel ordre européen*. Tallandier, Paris 2025.

7 As is well known, the Peace of Westphalia had a complex gestation and a multifaceted outcome. On 24 October 1648, the *Instrumentum Pacis Osnabrugensis*, ending hostilities between the Empire and Sweden, was signed at Osnabrück. On the same day, at Münster, the Empire and France signed the *Instrumentum Pacis Monasteriensis*. The treaty that had ended the Eighty Years' War five months earlier was therefore not technically part of the Peace of Westphalia, although it may be situated within the same historical process. Moreover, hostilities had not completely ceased: France and Spain concluded a separate peace only in 1659 with the Treaty of the Pyrenees; on this point, see Daniel Séré, *La paix des Pyrénées: vingt-quatre ans de négociations entre la France et l'Espagne (1635-1659)*. Honoré Champion, Paris 2007. The Dutch–Portuguese War ended with the Treaty of The Hague concluded in 1661 and definitively consolidated in 1669: Cátia Antunes, 'Dutch-Portuguese Diplomatic Encounters, 1640-1703: Exchanges, Sovereignty and "World Peace"', in *Journal of Early Modern History* 23 (2019), 5, pp. 458–474.

8 On the strengths and limitations of this interpretation, see at least Peter H. Wilson, 'Was the Thirty Years' War a "Total War"?', in Erica Charters, Eve Rosenhaft, Hannah Smith, eds., *Civilians and War in Europe 1618-1815*. Liverpool University Press, Liverpool 2012, pp. 21–35.

of military operations – the imperials complained that the Swedish army alone had plundered and severely damaged, if not destroyed, 2,000 castles, 18,000 villages, and 1,500 urban centres: approximately one-third of the entire housing stock[9]. Were these figures inflated by Habsburg propaganda? Perhaps; yet historians agree that it took at least fifty years to repopulate the countryside and repair the devastation[10]. Human losses were commensurate with the destruction. Günther Franz estimated that in the German lands alone one-third of the population – nearly six million people – perished through military violence as well as war-related famine and disease[11]. Although these estimates were subsequently revised, the sack of Magdeburg in 1631 remains a sombre emblem of the violence that marked the conflict. Otto von Guericke – otherwise known as one of the pioneers of pneumatics, and at the time of the sack one of the city's four burgomasters – reported that only one-fifth of its 25,000 inhabitants survived the violence of the Imperial forces[12]. A census conducted a few months later recorded only 449 inhabitants, and the rebuilding of the city took a century[13].

2. The Peace of Westphalia between Historical Event and Interpretive Model

Beyond this singular iconographic "generalization", there can be no doubt that the Westphalian settlement marked a genuine turning point in Western history – one that, in several respects, inaugurated modernity. During the negotiations, as Stefano Mannoni has written, "the method of the comprehensive

9 Herbert Langer, *Thirty Years' War*. Hippocrene Books, New York 1980, p. 8.

10 Langer, p. 9.

11 Günther Franz, *Der Dreißigjährige Krieg und das deutsche Volk: Untersuchungen zur Bevölkerungs- und Agrargeschichte*. De Gruyter, Berlin 1979. For a critical reassessment of Franz's figures, which bear a heavy ideological burden, see D. Lederer, 'The Myth of the All-Destructive War: Afterthoughts on German Suffering, 1618-1648', in *German History* 29 (2011), pp. 380–403.

12 Otto von Guericke, *Geschichte der Belagerung, Eroberung und Zerstörung Magdeburg's*. Baensch, Magdeburg 1860, pp. 82–87.

13 Max Dittmar, *Beiträge zur Geschichte der Stadt Magdeburg in den ersten Jahren nach ihrer Zerstörung 1631. Erster Theil: Magdeburg unter kaiserlicher Herrschaft; vom 10. Mai 1631 bis 8. Januar 1632*. Niemeyer, Halle 1885, p. 127. On the memory of the sack, see Michael Kaiser, ''Excidiu Magdeburgense': Beobachtungen zur Wahrnehmung und Darstellung von Gewalt im Dreißigjährigen Krieg', in Markus Meumann, Dirk Niefanger, eds., *Ein Schauplatz herber Angst: Wahrnehmung und Darstellung von Gewalt im 17. Jahrhundert*. Wallstein, Göttingen 1997, pp. 43–64.

conference for ensuring stability on the continent" emerged. This option "constituted in itself a significant innovation, immediately perceived as such", with the result that "from then on no major diplomatic negotiation began without a search for Westphalian precedents"[14].

The impetus imparted by Westphalia, however, ran deeper still, transcending the purely diplomatic and protocolary dimension. By the beginning of the twentieth century, the Peace was already being commemorated as the founding act of a horizontal and polycentric political order, radically opposed to the hierarchical and inclusive universalism that had characterised medieval institutional experience. As the fervent positivist Lassa Oppenheim wrote, in 1648 "the theory of the unity of the civilized world under the German Emperor and the Pope as its temporal and spiritual heads was buried for ever". At the same time, "A multitude of recognized independent States formed now a community on the basis of equality of all its members"[15].

The most elaborate legal conceptualisation of the Westphalian settlement, however, was the work of an Italian: Andrea Rapisardi Mirabelli, a scholar of international law distinguished by his particular historical sensitivity. The fullest expression of this sensitivity is *Le Congrès de Westphalie*, published in 1929, a volume whose subtitle – *Ses Negociations et ses Résultats au point de vue de l'Histoire du Droit des Gens* – already proclaims its chosen perspective[16]. The

14 Stefano Mannoni, *Da Vienna a Monaco (1814-1938). Ordine europeo e diritto internazionale*. Giappichelli, Turin 2019, pp. 26–27 (my translation).

15 Lassa F. L. Oppenheim, *International Law. A Treatise*, vol. I. Longmans, London 1905, p. 60. On Oppenheim, see Mathias Schmoeckel, 'Lassa Oppenheim (1858-1919)', in Bardo Fassbender, Anne Peters, eds., *The Oxford Handbook of the History of International Law*. Oxford University Press, Oxford 2012, pp. 1152–1155.

16 Andrea Rapisardi Mirabelli, *Le Congrès de Westphalie. Ses Negociations et ses Résultats au point de vue de l'Histoire du Droit des Gens*. Brill, Leiden 1929. His scholarly output was indeed extensive and his research interests were wide-ranging: on the need for the legal regulation of air warfare see the timely Andrea Rapisardi Mirabelli, 'Appunti sulla illiceità del bombardamento aereo senza distinzione', in *Rivista di diritto aeronautico* 13 (1935), pp. 8–13; in the field of global administrative law see Id., *Il diritto internazionale amministrativo*. CEDAM, Padua 1939; once again from a historiographical perspective Id., *Storia dei trattati e delle relazioni internazionali*. Istituto per gli Studi di Politica Internazionale, Milan 1940. For a biobibliographical overview, see Stefano Brugnatelli, 'Rapisardi Mirabelli, Andrea', in Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletti, eds., *Dizionario biografico dei giuristi italiani (XII-XX secolo)*, vol. II, Lev–Z. Il Mulino, Bologna 2013, pp. 1655–1666; Giulio Bartolini, 'Italian Legal Scholarship of International Law in the Early Decades of the Twentieth Century', in Giulio

book offers a legal-historical reconstruction that, by placing territorial sovereignty and the legal equality of states at the centre of the international order, contributed decisively to the elaboration of the “Westphalian paradigm”, understood as an interpretive model of the European order gradually consolidated in the modern era – that is, a theoretical model capable of identifying the fundamental features of the international society that emerged after 1648[17].

If Rapisardi Mirabelli supplied the conceptual apparatus required to construct the paradigm, it was Leo Gross – one of Hans Kelsen’s most brilliant pupils[18] – who definitively consolidated it epistemically and disseminated it throughout the broad field of Anglophone international legal scholarship[19]. Drawing extensively on Rapisardi Mirabelli’s volume, as Peter Stirk has aptly emphasised[20], Gross treated the two treaties in *The Peace of Westphalia* as the founding act of an entirely new international system, characterised by “a law operating between rather than above states and a power operating between rather than above states”. This “horizontality” was confirmed by the fact that each state was “sovereign within its territory, equal to one another, and free from any external earthly authority”[21]. Moreover, Gross observed that this transformation was in no sense contingent, but rather the mature product of a long reflection, firmly rooted in the natural-law tradition, whose most sophisticated exponents included Francisco de Vitoria, Alberico Gentili, and Hugo Grotius[22]. In short, once the Thirty Years’ War had definitively – and bloodily – rendered every imperial and hierocratic claim untenable, the Westphalian order answered a specific histori-

Bartolini, ed., *A History of International Law in Italy*. Oxford University Press, Oxford 2020, pp. 127–167; on his reception across the Atlantic see Paolo Palchetti, ‘Uno sguardo d’oltreoceano: la dottrina italiana di diritto internazionale nelle pagine dell’American Journal of International Law (1907-1960)’, in *Rivista italiana per le scienze giuridiche* 5 (2015), pp. 269–284.

17 Peter M. R. Stirk, ‘The Westphalian Model and Sovereign Equality’, in *Review of International Studies* 38 (2012), 3, pp. 641–660, especially p. 655.

18 On Gross, see Johannes Feichtinger, *Wissenschaft zwischen den Kulturen: Österreichische Hochschullehrer in der Emigration 1933-1945*. Campus, Frankfurt am Main 2001, pp. 283–286, and Jörg Kammerhofer, ‘Leo Gross’, in Robert Walter, Clemens Jabloner, Klaus Zeleny, eds., *Der Kreis um Hans Kelsen: Die Anfangsjahre der Reinen Rechtslehre*. Manz, Vienna 2008, pp. 115–133.

19 Leo Gross, ‘The Peace of Westphalia, 1648-1948’, in *The American Journal of International Law* 42 (1948), pp. 20–41.

20 Stirk, p. 655.

21 Gross, p. 29.

22 Gross, pp. 31–39.

cal need: the establishment of a new international order. In this sense, one can only agree with Gross that "Westphalia, for better or worse, marks the end of an epoch and the opening of another. It represents the majestic portal which leads from the old into the new world"[23].

The image of the Peace of Westphalia as a watershed between a disturbing past – strewn with immense massacres, marked by protracted theological-political conflicts, and exposed to aggressive hegemonic claims – and a new legal order founded on the law of nations, may not be entirely convincing to a historian attentive to the *longue durée* and the diachronic dimension of phenomena. For a lawyer accustomed to reasoning through concepts and categories, however, this image possesses a heuristic force that is exceedingly difficult to resist. The view that Westphalia marked a decisive turning point in the emergence of modern international law has thus acquired the status of a veritable *topos* in international legal scholarship. It is sufficient here to invoke the highly authoritative names of Richard Falk and Antonio Cassese, both of whom devoted particularly significant pages to the Westphalian paradigm and its underlying logic[24].

3. Respublica superiorem non recognoscens

What are the defining features of this paradigm? As already noted, its cornerstone was the principle of sovereignty, enshrined in the formula *respublica superiorem non recognoscens*. In sharp contrast to the medieval *ordo*, this conception operated on two levels. Internally, within the *res publica*, it affirmed the sovereign's supremacy over every other political and social body. Externally, it established a horizontal order in which holders of sovereign power interacted under conditions of mutual independence and formal equality. A long series of corollaries followed from the postulate of state sovereignty. The first was that the Westphalian model was informed by a rigorously state-centric logic. The sovereign state was the exclusive subject of the law of nations, a choice that nullified both the spiritual primacy of the Roman pontiff and the temporal primacy of the emperor. At the same time, this state-centric orientation denied any role

23 Gross, p. 28.

24 Richard A. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in Cyril E. Black, Richard A. Falk, eds., *The Future of the International Legal Order*, vol. I, *Trends and Patterns*. Princeton University Press, Princeton 1969, pp. 32–70, especially pp. 43–45; Antonio Cassese, *International Law in a Divided World*, Oxford, Clarendon Press, 1986, pp. 34–38.

to the constellation of intermediary bodies, *communitates*, and social formations that in previous centuries had relied on their *iurisdictio* to pursue autonomous normative strategies and distinct political relations.

The primacy of sovereignty also profoundly shaped the morphology of the Westphalian law of nations, since its exclusive source was plainly the sovereign state itself: the possibility that rules might emanate from a superior legislator was simply unthinkable. As early as fifty years before, Alberico Gentili's *silete theologi in munere alieno* constituted a stern warning to those who asserted the primacy of *Lex Divina* over the law of nations[25]. Instead, the international order arose from interactions among state actors. Its basis might be customary, deriving from practices widely observed by the members of what Hedley Bull would later call the European International Society[26]. Alternatively, the *ius gentium* emerged from the dense web of agreements, treaties, and conventions through which states autonomously chose to regulate their relations and reciprocally conferred obligations and prerogatives. Given this dual foundation of the Westphalian law of nations, it is hardly surprising that it consisted almost exclusively of primary rules, or rules of conduct, whereas secondary, organisational rules were unknown. In other words, as Danilo Zolo observed, this scenario not only categorically excluded the possibility of a legislator standing above states, but also precluded the establishment of a judicial body competent to resolve disputes between them or a police force charged with suppressing international wrongs. It was the state that determined the existence of legal rules, and the state that decided whether and how to implement them. Even recourse to third-party mediation to resolve a dispute merely confirmed the primacy of the state, which voluntarily conferred that authority on the third party[27].

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25 'Keep silence, theologians, in matters which concern others!' See Alberico Gentili, *De iure belli libri tres*. *The Translation of the Edition of 1612*, vol. I. Clarendon Press, Oxford 1933, p. 57. See also Rafael Domingo, Giovanni Minnucci, 'Alberico Gentili and the Secularization of the Law of Nations', in Rafael Domingo, John Witte Jr., eds., *Christianity and Global Law*. Routledge, Abingdon–New York 2020, pp. 98–111; Benedict Kingsbury, Benjamin Straumann, eds., *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*. Oxford University Press, Oxford 2010. More generally, on Gentili and his legacy, see Valentina Vadi, *War and Peace*. *Alberico Gentili and the Early Modern Law of Nations*. Brill Nijhoff, Leiden/Boston 2020.

26 Hedley Bull, *The Anarchical Society*. *A Study of Order in World Politics*. Macmillan, London 1977.

27 Danilo Zolo, *Cosmopolis*. *Prospects for World Government*. Polity Press, Cambridge 1997, pp. 94–95.

The fact that every state – that is, the prince who ruled it, consistently with the personalistic logic informing absolutism – possessed the same measure of sovereignty regardless of its actual political, economic, and military weight entailed a further consequence: the absolute inviolability of the domestic sphere. Breaking with the practices of the *respublica Christiana*, the Westphalian paradigm reveals that the law of nations did not extend beyond relations among states and excluded any interference in their internal organisation or intervention in their political choices. Although voices in favour of such a possibility had not been entirely absent – Gentili, for example, had posited a kind of *ius interventionis*, inseparably linked to the notion of *societas humana*[28] – intervention in the domestic sphere of a sovereign state was implausible[29].

The primacy accorded to state sovereignty had one final major corollary concerning the legitimacy of war. Even in the sixteenth century, the Augustinian and Thomistic legacy remained substantial. It amounted to a genuine theology of war, under which *auctoritas principis*, *iusta causa belli*, and *recta intentio* were the criteria for determining whether the use of military force was truly legitimate[30]. Such force pursued a specific purpose: a response to an injury. Yet this response was conceived not as a brutal act of vengeance, but as the means of carrying out the divine will and restoring the *tranquillitas ordinis*. This conception of war, so deeply indebted to theology, presupposed a societas Christiana that Luther's Ninety-Five Theses — traditionally said to have been posted on the door of the Castle Church in Wittenberg — had irreparably undermined. The rupture was devastating, as witnessed by the conflicts that swept through what

28 Gentili, pp. 132–133. For further bibliographical references, see Ruschi, *L'aurora del diritto internazionale*. *Guerra, umanesimo giuridico e "ius gentium"*. Satura, Naples 2024, pp. 254–255.

29 Zolo, p. 95.

30 The reference is to Thomas Aquinas, *Summa Theologiae*, IIa-IIae, q. 40, a. 1, co. For a general overview, see Gregory M. Reichberg, *Thomas Aquinas on War and Peace*. Cambridge University Press, Cambridge 2016; Peter Nickl, 'Der "gerechte Krieg" bei Thomas von Aquin', in Rolf Schönberger, ed., *Die Bestimmung des Menschen und die Bedeutung des Staates*. *Beiträge zum Staatsverständnis des Thomas von Aquin*. Nomos, Baden-Baden 2017, pp. 117–130; Vincenzo Serpe, 'La subordinazione della guerra alla giustizia in Tommaso d'Aquino', in *Hermeneutica*. *Annuario di filosofia e teologia* VI (2023), pp. 155–170. From a legal perspective, see at least Aldo Andrea Cassi, *Santa giusta umanitaria*. *La guerra nella civiltà occidentale*. Salerno, Rome 2015; Roger Campione, *El nomos de la guerra*. *Genealogía de la "guerra justa"*. Tirant lo Blanch, Valencia 2009, pp. 99–106.

has aptly been called the "Iron Century"[31].

The response to the unfolding crisis came from humanist jurists who, drawing extensively on the Roman-law tradition, advanced a radically different paradigm. From the mid-sixteenth century onwards – from Pierino Belli and Balthazar de Ayala to Alberico Gentili – the voices advocating the transformation of *bellum* into a kind of *duellum*, or even its assimilation to a procedure for resolving disputes, grew steadily louder. From this perspective, the fundamental question was no longer the legitimacy of war – its justification in light of a sophisticated casuistry no longer consonant with the spirit of the age – but rather its legality. War was just insofar as military practices complied with specific protocols that limited its intensity by imposing precise subjective, objective, and territorial constraints[32]. From this standpoint, *bellum iustum* no longer had to be conceived as the legitimate response to an injury suffered. Rather, it was a manifestation of reason of state, which asserted its claims through force of arms. This point bears emphasis: under Gentili's well-known formula, conflict was *publicorum armorum iusta contentio* and, as such, had to comply with clearly defined protocols[33]. War, indeed, "is no more a secret contest than is a legitimate contest of the forum and of the courts"[34]. This position rested on a particular ritualisation of force. As a preliminary step, for example, the other party had to be served with a formal notice and warning, "just as is done in an unarmed dispute. We make a civil demand, before we go to court, for that which is owed to us or is our own"[35].

Gentili's analogy between war and judicial proceedings was indeed destined to receive important confirmation. Viewed through the Westphalian paradigm of Rapisardi Mirabelli and Gross, military conflict assumed a precise character: that of a legitimate instrument for resolving international disputes. Within this framework, Zolo emphasised, every state had "the full right to resort to war or to analogous coercive measures to protect its own rights or interests"[36]. The use

31 The reference is, of course, to Henry Kamen, *The Iron Century: Social Change in Europe, 1550-1660*. Praeger, London 1971.

32 See the classic Carl Schmitt, *The "Nomos" of the Earth in the International Law of "Jus Publicum Europaeum"*. Telos, New York 2003, pp. 140–147.

33 Gentili, p. 16.

34 The passage alludes to the requirement of *indictio belli*: Gentili, p. 124. On the legal implications of *indictio belli*, see Ruschi, *L'aurora del diritto internazionale*, pp. 289–299.

35 Gentili, p. 124.

36 Zolo, p. 95.

of force thus answered to a specific legal logic that each state was free to pursue: it was a "private" matter from which any interference by the international community was excluded.

4. Historical Comparison and Legal Imagination

Let us draw together the threads of what might otherwise appear to be merely an exercise in erudition. As was already observed in the introduction to this volume, we are living through a particularly turbulent historical moment: new fault lines are opening across the geopolitical landscape, while older ones, far from closing, are being displaced. Powerful flows of energy are thus released, generating widespread entropy – a condition of instability that calls enduring hegemonic arrangements into question and inevitably produces a high degree of insecurity. This entropy also reflects the opening of new spaces to humanity: cyberspace, with its ambiguous nature suspended between artificial reality and the material world, and, even more so, outer space. While these domains encourage hegemonic positioning, their unprecedented character renders obsolete the categories ordinarily used to construct legal spaces. Finally, this entropy is inseparably linked to the advent of new military technologies destined to alter the character of war, to the point of transforming it into a fully post-human practice. The reference is particularly to the vertiginous proliferation of unmanned systems and the increasingly pervasive influence of AI on military operations[37].

If so, revisiting the Westphalian experience is far from a mere exercise in legal-historical erudition. Rather, it offers an opportunity to adopt a comparative perspective and to recognize that the challenges confronting us today are not entirely unprecedented. The historical parallel of 1648 may offer valuable insights for thinking about the present and deciphering its complexity without being overwhelmed by contingency. This must, of course, avoid the opposite error: attributing to history a cyclical character it does not possess[38]. If this comparative

37 On this subject, see James Patton Rogers, James Wesley Hutto, eds., *Rethinking Remote Warfare: AI, Drones, and Future War*. Springer, Cham 2026; Bérénice Boutin, Taylor Kate Woodcock, Sadjad Soltanzadeh, eds., *Legal, Ethical, and Technical Dilemmas in Military Artificial Intelligence*. T.M.C. Asser Press–Springer, The Hague 2026; Alena Vysotskaya Guedes Vieira, Arshin Adib-Moghaddam, Mohammad Eslami, eds., *Artificial Intelligence and International Security: Redefining Arms Races and Contemporary Warfare*. Manchester University Press, Manchester 2026.

38 The reference is to Oswald Spengler, *Der Untergang des Abendlandes. Umrisse einer Morphologie der Weltgeschichte*. Beck, Munich 1923. For an English-language study,

perspective is accepted, the Peace of Westphalia was, above all, a response to a protracted crisis caused by a plurality of deeply interconnected factors. From a genealogical perspective, therefore, the Westphalian settlement assumes paradigmatic value: the factors of crisis may change, as may the historical and political context, yet the underlying questions recur.

There can be no doubt that the crisis was linked first and foremost to the demise of a spatial order, to use Carl Schmitt's categories: geography, no less than politics, dealt a devastating blow to the edifice of the *respublica Christiana*. As already noted, this development involved the completion of the process by which the *communitates perfectae* achieved autonomy and national kingdoms emerged – that is, territorially defined aggregates increasingly impervious to external interference. The process had admittedly begun in the late Middle Ages, but reached maturity only in the early modern period, generating entirely new political spaces. Fragmentation was accelerated by the dissolution of the powerful bond of confessional unity, a dissolution that affected the institutional dimension as much as the symbolic and cultural ones and categorically negated every universalist claim[39].

Continuing to approach the subject from a perspective attentive to the relationship between law and geography, we may identify an equally powerful impetus arising beyond Christian Europe and associated with the discovery of new spaces.. As Schmitt suggested, this development produced a different representation of the world and a relocation of every legal and political category. The *Raumrevolution* associated with the Columbian discoveries not only opened up spaces that were quantitatively "other" – the boundless expanses of the Americas – but had a much broader reach, rendering it incommensurable with every previous imperial project founded on the "occupation of land". It bears emphasising that the spatial revolution set in motion in 1492 also encompassed a qualitatively different kind of space: the ocean. Formerly the limit of human experience – as attested by medieval *chartae*, in which Ocean encircles and closes the *oikoumene* – it became the gateway to boundless riches and to a scale of power hitherto unimaginable[40]. Still other forces contributed to the end

see at least John Farrenkopf, *Prophet of Decline: Spengler on World History and Politics*. Louisiana State University Press, Baton Rouge 2001.

39 Schmitt, *The "Nomos" of the Earth*, pp. 62–66.

40 See Filippo Ruschi, *Questioni di spazio. La terra, il mare, il diritto secondo Carl Schmitt*. Giappichelli, Turin 2012.

of the *respublica Christiana* and the emergence of a new spatial order. These heterogeneous impulses were connected variously with economic factors, the increasingly pervasive and insistent presence of administrative and bureaucratic apparatuses, and sudden technological and scientific developments. Together they helped produce what Michael Roberts aptly termed a Military Revolution[41] – a notion that, from a lawyer's perspective, is intertwined through mutual resonances with Schmitt's concept of *Raumrevolution*[42].

The transformation remains striking even today. Medieval military practice had highly distinctive features, expressing a particular catalogue of values, a clearly defined socioeconomic system, and even a strongly marked aesthetic of war. As Geoffrey Parker succinctly put it: "For most of the Middle Ages, the principal arm in any military force was the heavy cavalry, made up of fully armed knights on horseback, three hundred weight of mounted metal apiece, moving at speed". Yet, notwithstanding their undoubted tactical value, "the knights were clumsy, expensive, and scarce"[43]. In other words, this military instrument was subject to severe logistical and operational limitations and, above all, to obligations of loyalty that, as an expression of the feudal order, were strictly personal in nature. This inevitably distorted both military practice and the conduct of war.

Modernity imposed a radical transformation whose effects extended far beyond warfare. In a justly celebrated passage from *Economy and Society*, Max Weber defines the modern state as "a compulsory political organization with continuous operations" that, through a powerful process of centralisation, "successfully upholds the claim to the monopoly of the legitimate use of physical force in the enforcement of its order"[44]. Otto Hintze, one of Weber's finest pupils, was even more explicit in recognising that this institutional enterprise originated with a precise character: that of a military organisation[45]. Or, as another

41 Michael Roberts, 'The Military Revolution, 1560-1660', in Id., *Essays in Swedish History*. Weidenfeld & Nicolson, London 1967, pp. 195–225. For a reinterpretation of Roberts's theses attentive to their legal dimension, see Virgilio Ilari, '"Imitatio, restitutio, utopia": la storia militare antica nel pensiero strategico moderno', in Marta Sordi, ed., *Guerra e diritto nel mondo greco e romano*. Vita e Pensiero, Milan 2002, pp. 269–381.

42 Carl Schmitt, *Land and Sea: A World-Historical Meditation*. Telos Press, New York 2015.

43 Geoffrey Parker, 'The "Military Revolution", 1560-1660—a Myth?', in *The Journal of Modern History* 48 (1976), 2, pp. 196–214, especially p. 207.

44 Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. I. University of California Press, Berkeley–Los Angeles–London 1978, p. 54.

45 Otto Hintze, 'Military Organization and the Organization of the State', in Felix Gilbert,

attentive reader of *Economy and Society*, Charles Tilly, famously summarised it: "War made the State, and the State made War"[46]. This centripetal dynamic plainly presupposed the allocation of immense resources: as historians have shown, military expenditure would long retain an unchallenged primacy in the budgets of European states. No less important, however, was the creation of a bureaucratic apparatus capable of administering public finances.

In short, Westphalia should not be understood merely as the instrument by which a thirty-year conflict was resolved. Rather, it was the response to a profound crisis generated by a radical transformation in the categories of space, political institutions, and war – a transformation that brought about the collapse of one spatial order while producing protracted and widespread conflict. The Westphalian solution belongs squarely within the domain of law: to use Schmitt's vocabulary, it embodied a new *nomos* capable of governing violence and regulating the new spaces.

In the face of a global landscape displaying unmistakable signs of fragmentation and traversed by ever more pronounced lines of tension, recovering the spirit of Westphalia may therefore constitute a valuable exercise in legal imagination. As the contributions of this volume collectively suggest, there is an urgent need to rethink the conceptual apparatus of international law, to imagine alternative paradigms, and to develop a legal syntax capable of addressing contemporary challenges. The identification of new shared rules can only rest on recognition of political pluralism, the polysemy of cultures, and a specific historical awareness. In a fragmenting world that releases violent flows of energy, it is not enough to shore up the noble edifice of the international legal order and seal its cracks. A deeper intervention is required – one that reaches its foundations and regenerates them, while unflinchingly removing unstable and dangerous elements produced by accretions incompatible with the original structure. Such an intervention is all the more valuable and necessary when undertaken preventively, so as to avert the abyss of anomie and the violence of post-human warfare.

ed., *The Historical Essays of Otto Hintze*. Oxford University Press, Oxford 1975, pp. 175–215.

46 Charles Tilly, 'Reflections on the History of European State-Making', in Charles Tilly, ed., *The Formation of National States in Western Europe*. Princeton University Press, Princeton 1975, pp. 3–83, especially p. 42.

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Law in a Divided World

Geolegal readings of post-globalisation

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In a historical period of general redefinition of geopolitical fault lines, law is breaking down into unilateral theories that convey divergent horizons of meaning, which are at the same time destined to intersect. In this book, scholars from various disciplines examine the underlying characteristics and structural contradictions of the epochal transition currently underway, adopting a historical-comparative perspective aimed at investigating the genesis, developmental trends and points of friction between the various visions on the rules governing the relationships and balances between geopolitical entities.

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In copertina: Gaetano Gandolfi (1734-1802), Allegoria della Giustizia. Paris, Musée du Louvre (Wikimedia Commons)

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