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Ad Aprile 2020, in una delle ore più buie che la storia recente ricordi, la *Trento Student Law Review* presentava il suo Volume 2 Numero 1, un numero difficile e insieme coraggioso, in grado di opporre la normalità all'anormalità del presente. Oggi, ad un anno esatto di distanza, la Rivista torna con una nuova pubblicazione, inaugurando così il Volume 3 in un momento ancora delicato, pieno di incertezze, ma in cui si assiste anche – e finalmente – al manifestarsi di piccoli segnali di ripresa.

In un anno tanto difficile, con una vita quotidiana ed accademica in perdurante stato di incompiutezza, per la nostra Redazione è un risultato davvero importante essere riusciti a garantire la continuità ed il buon esito di un lavoro che vive in funzione della migliore dimensione universitaria. Questa stessa dimensione oggi ci è ancora negata, ma con il nostro lavoro intendiamo celebrarla e difenderla. Vogliamo quindi ringraziare professori, ricercatori, studenti, e tutti coloro che, con il loro contributo, hanno reso possibile mantenere vivo il mondo dell'università e della ricerca, accettando come noi la sfida di affrontare le difficoltà con spirito di adattamento, con sacrificio e anche con un pizzico di caparbietà. A Tutti Voi dedichiamo questo Volume 3 Numero 1.

Questo periodo ha permesso di riscoprire l'importanza della ricerca e di considerare quanta umanità, sensibilità e tenacia siano necessarie per un'attività che non si ferma e che non può fermarsi, né tantomeno può essere impedita o strumentalizzata. Ciò deve avvenire non tanto in virtù di un astratto "bene comune" da perseguire, quanto piuttosto per permettere un coniviso senso di crescita, di progresso, di elevazione culturale e spirituale, così da raggiungere traguardi concreti e nuove sicurezze per la comunità, riaffermando ogni giorno il

più alto valore della libera circolazione del sapere e del libero accesso alla conoscenza.

Mi piace pensare che, davanti alle avversità e all'inspiegabile, ognuno abbia più o meno consapevolmente declinato nella propria vita la massima socratica secondo cui «una vita senza ricerca non è degna di essere vissuta»[1], sia essa la ricerca scientifica dei laboratori, o la ricerca di chi indaga se stesso per trovare risposte alle proprie insicurezze, o anche quella di chi interroga l'altro, il diverso, per attribuire un senso a quanto gli accade intorno.

Questa è la ricerca che la *Trento Student Law Review* vuole oggi celebrare, la ricerca di Tutti, offrendo simbolicamente un contributo nell'ambito che più le appartiene e presentando gli articoli di Autori che hanno fatto della ricerca una vocazione. Vorremmo così riaffermare ancora una volta il nostro impegno sia nel valorizzare il ruolo dei giovani in quella ricerca scientifica di cui la Rivista si rende tramite, sia nel promuovere quel dialogo e quel confronto sempre necessari in ambito giuridico, auspicando l'attivo contributo ed il sostegno di tutta la comunità accademica.

La realizzazione di tutto questo non sarebbe possibile senza una squadra unita dalla condivisione di un medesimo ideale e ben salda nella difesa degli stessi valori. Per questo voglio innanzitutto ringraziare i miei più stretti collaboratori: il Vicedirettore Matteo Maurizi Enrici, e le *Managing Editors* Angela Maria Aromolo De Rinaldis, Emma Castellin e Lucrezia Di Renzo; senza il loro prezioso aiuto, il loro supporto e la loro costanza, niente sarebbe stato fatto. E un sentito ringraziamento va ad ogni singolo membro di questa Redazione: insieme abbiamo scelto di affrontare contingenze ed aspettative, lo abbiamo fatto come una vera squadra, dimostrando solidità e grandi potenzialità. Sia questo un nostro punto di arrivo, ma anche e soprattutto il punto di ripartenza verso nuovi obiettivi di crescita.

Ad maiora semper.

1. Plato., *Apologia*, 38a.

Preface

Maria Grazia Torresi
Direttrice

In April 2020, during one of the darkest hours for the recent history, the *Trento Student Law Review* presented its Volume 2 Number 1, a difficult and brave issue, which was able to ordinarily face the extraordinary present moment. Today, exactly one year later, our Journal returns with a new issue, thus inaugurating the Volume 3 in a still delicate moment, full of uncertainties, but in which we are also – and finally - witness of small signs of recovery.

In such a hard year, with an everyday and academic life in a persistent state of incompleteness, it is a very important result for our Board being able to assure continuity and success to a work that lives in function of the best university dimension. Today, this same dimension is still denied, but with our work we intend to celebrate and defend it. Therefore, we would like to thank professors, researchers, students, and all those who have made it possible to keep the world of university and research alive, accepting our same challenge of fighting the present difficulties with a spirit of adaptation, with sacrifice, and even with a hint of stubbornness. To All of You we dedicate this Volume 3 Number 1.

This period has allowed to rediscover the importance and value of research, and to consider how much humanity, sensitivity and tenacity are necessary for an activity that does not stop and cannot stop, nor can it be prevented or exploited. This should be not so much for pursuing an abstract "common good", but rather to foster a shared sense of growth, progress, cultural and spiritual elevation, and so as to achieve new goals and certainties for the community, reaffirming every day the highest value of free circulation of ideas and free access to knowledge.

I like to think that, in front of the adversity and the inexplicable, everyone has more or less consciously declined in their life the Socratic

principle according to which: "a life without research is not worth living"[1], regardless of whether it is the scientific research of the laboratories, or the research of those who investigate themselves to find answers to their own insecurities, or even that of those who question the other, the different, to give meaning to what is happening around.

Today, the *Trento Student Law Review* wants to celebrate this research, the research of Everyone, offering a symbolic contribution in its field with the articles of Authors who have made research a real vocation. Thus, we would like to affirm once again our commitment both to enhancing the role of young people in that scientific research of which the Journal intends to be a vehicle, and to promoting that open discussion which is always necessary in the legal field, hoping for the active contribution and support of the whole academic community.

The realization of all this would not be possible without a team united by the sharing of one same ideal and firmly lined up in defense of common values. So, first of all, I want to thank my closest collaborators: the Vice Editor-in-Chief Matteo Maurizi Enrici, and the *Managing Editors* Angela Maria Aromolo De Rinaldis, Emma Castellin e Lucrezia Di Renzo; without their invaluable help, support and perseverance, nothing would have been done. A heartfelt thanks goes also to each member of this Board: together we chose to face odds and expectations, and we did it as a real team, showing solidity and great potential. May this be an arrival point for us, but also the start of a path towards any future goal.

Ad maiora semper.

1. Plato., *Apology*, 38a.

The Role of Independent Non-Executive Directors in Resolving Corporate Governance Disputes: A Framework of Conciliation for Effectively Addressing Controversies Within Shareholders, Stakeholders and the Board of Directors

Rodrigo Quintero Bencomo*

Abstract: Independent non-executive directors are key corporate governance officers who deserve a prominent role in the corporate form, given their multiple and beneficial attributes. From our perspective, it is because of those attributes that independent non-executive directors can play an outstanding role in the company's response to corporate governance-related disputes within shareholders, stakeholders and the Board of Directors, as well as Boardroom disputes. Conciliation, for that purpose, can be an efficient method for resolving corporate governance disputes, and, in this sense, independent non-executive directors can serve as conciliators, providing their appropriate judgement to the corporate governance-related controversy. This article has the purpose of studying the role of independent non-executive directors in successfully addressing corporate governance disputes and to create a constructive framework based on conciliation for these figures to play a role as conciliators for the amicable resolution of corporate governance disputes over the company's decision-making that may arise between the groups listed above.

Keywords: independent non-executive directors; beneficial attributes; amicable resolution of corporate governance disputes; conciliation; conciliators.

1. Introduction

Decision-making is not exempt from the possibility of disputes. Recent studies surrounding corporate governance agree that the company's ownership and management, this is, shareholders and directors, are not the only individuals interested in the economic success of the corporate form[1]. Investors, employees, consumers, users, customers, creditors, even government agencies, and, definitely, a considerable number of parties have a reasonable interest in the company's positive

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1. See Dr. Vikas Bairathi, *Corporate Governance: A Suggestive Code*, 2 International Research Journal 753, 754 (2009), available at https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.392.6274&rep=rep1&type=pdf (last visited April 20, 2021). See also Victoria Baurnfield, *Stakeholder theory from a management perspective: Bridging the shareholder/stakeholder divide*, 31 Australian Journal of Corporate Law 187, 191 (2016); Virginia Harper Ho, *"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide*, 36 The Journal of Corporation Law 61, 69 (2010).

outcome, which may be achieved through implementing an effective governance system, and embracing good corporate governance practices disciplined in multiple voluntary, rather than statutory, codes along the world.

Therefore, all those parties previously mentioned are entitled to "satisfy themselves that an appropriate governance structure is in place"[2], in words of the Cadbury Report. Given the importance of their stakes in the company, the roles of shareholders and stakeholders in corporate governance rapidly transcended from a somehow neutral and uncaring behavior towards the company's decisions, to guaranteeing the accountability, transparency and liability in the decisions of the Board and, even further, to an effective and sometimes determinant influence on how the company is, or should be, directed to their best interests[3].

Harmony in finding a balance between all those concurring interests in corporate governance is not easily attained, and this tends to elicit controversies between these parties and the members of the Board of Directors in every governance system. Indeed, the relevant parties listed above serve only their own interests, aiming to condition the company's day-to-day to its fulfillment, and, it has to be said, even if that means undermining other group's interests and rights that disagree with each other; shareholders, stakeholders or groups of interests, and the Board, even every director, all have an economic project for the company that not necessarily coincide with that of the counterparts, and they all exert their pressure mechanisms to ensure its realization.

Disputes, given that the stakes are so high, are imminent. However, codes of good governance in the United Kingdom, in the United States, in Germany, and in various important countries where commercial institutions have sponsored or developed a code of good

2. See The Committee on the Financial Aspects of Corporate Governance and Sir Adrian Cadbury, *The Financial Aspects of Corporate Governance* *14 (Gee 1992), available at https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf (last visited April 18, 2021).

3. See Dr. Vikas Bairathi, *Corporate Governance: A Suggestive Code* at 753 and n 3 (cited in note 1) (L.V.V. Iyer, quoted by Bairathi, defines corporate governance as 'a set of systems and processes which ensure that a company is managed to the best interests of all the stakeholders', which highlights their importance for corporate governance).

corporate governance, have omitted to design a mechanism intended to resolve its disputes: an observation which leads us to believe that all codes rely on the effectiveness of negotiation and other dispute resolution methods, amicable or not.

Nevertheless, the reality is that corporate governance disputes tend to escalate to significant degrees, which could seriously threaten the very existence of the corporate form itself or, at least, endanger the ordinary operations and the economic value and trust of the company. Litigation and arbitration, no matter how cost-effective and prompt the second one might be, are even more disruptive to the company's day-to-day when a conflict escalates to those contentious procedures[4].

The imminent disruption of the company caused by eventual disputes between shareholders, stakeholders and the Board highlights the need for an internal mechanism for an amicable resolution of disputes. Nonetheless, this would not be enough: in fact, effectively addressing corporate governance disputes requires individuals with sufficient professional probity and ethical aptitude, familiarized with the company's concurring interests, but necessarily independent from all those groups of interests in order to have a clear judgement on how to approach the controversy successfully.

Independent non-executive directors can provide the controversy with the professional rectitude and ethical adequateness, both necessary to resolve corporate governance-related disputes. Their multiple attributes in the company are the basis for which they are considered a reference of good corporate governance by shareholders, stakeholders and their fellow directors[5], and it can be of utility for resolving conflicts that may arise in the company's decision-making.

Furthermore, we believe independent non-executive directors' background and importance in corporate governance allows to develop a constructive framework for them to assume the delicate mission

4. See Alexander R. Rothrock, *Special Litigation Committees and the Judicial Business Judgment Morass – Joy v. North*, 32 DePaul Law Review 933, 964 (1983), available at https://via.library.depaul.edu/cgi/viewcontent.cgi?article=2291&context=law-review. (last visited April 20, 2021).

5. See Indrajit Dube and Aparup Pakhira, *Role of Independent Director in Corporate Governance*, 9 Corporate Board: Role, Duties & Composition 50, 55 (2013), available at https://virtusinterpress.org/IMG/pdf/10-22495_cbv9i1art5.pdf (last visited April 18, 2021).

of addressing the disputes or controversies that arise between shareholders, stakeholders and the Board of Directors, and between the executive directors in the performance of their managerial functions, without the need to appeal to litigation, arbitration, or any contentious mechanisms aimed at the heteronomous resolution of corporate governance controversies. Instead, we submit independent non-executive directors have the attributes and the ability to serve as conciliators for resolving corporate governance disputes.

Therefore, this article has the purpose of studying the role of independent non-executive directors in successfully addressing corporate governance disputes and to create a constructive framework of conciliation for these figures to play a role as conciliators for the amicable resolution of internal corporate governance-related controversies.

2. Independent Non-Executive Directors: Brief Considerations on the Reasons for their Significance in Corporate Governance, and the Reasons for their Role in resolving Corporate Governance Disputes

The rise of independent non-executive directors as significant Board members and as important officers for corporate governance relates to the articulation of those principles that justify and guide the theoretical conception of corporate governance. Among them there is the need to held the executive branch of the company accountable for their managerial functions and actions; to guarantee a check and transparency in its performance; to secure internal mechanisms of checks and balances within the Board; and to reassure that their exercise of power is oriented to serve the best interest of every stakeholder.

Independent non-executive directors can be defined as non-managerial corporate officers and independent Board members called to discharge various functions and responsibilities in corporate governance and to serve in crucial committees.

Since the first report on corporate governance was published in the United States by the American Bar Association's Subcommittee on the Functions and Responsibilities of Directors in 1976, and followed by the widely known Cadbury Report in 1992, the Hempel Report

in 1998, and the Higgs Report in 2003[6], independent non-executive directors are generally regarded as highly significant corporate governance officers, and occupy a fundamental position on the Board of Directors in every governance system.

The significance that lies behind independent non-executive directors is in their multiple attributes for which they are considered benchmark figures: indeed, they are regarded as the officers that truly embody good corporate governance practices. Among them it can be highlighted their independence, background, knowledge and experience, service to accountability, integrity and ethical adequateness, and service to key committees for corporate governance[7]. Each of these reasons deserve a separate study.

In addition, we submit that independent non-executive directors have the ability to play a constructive role in effectively resolving corporate governance disputes, given the free, impartial, detached, wise, comprehensive, fair, credible and honest judgement they can provide. And this is thanks to the three attributes (i.e. independence; background of knowledge and experience; integrity and ethical adequateness) which will be further explained in the next paragraphs in order to give basis to the framework of conciliation that we intend to propose afterwards.

2.1. Independence: a Free, Impartial and Detached Judgement

This type of non-executive directors is mainly characterized by the independence with which they enter the Board of Directors, as they are hired by the company on a part-time basis and maintain no working relationship nor business partnership with the corporate form and related parties.

6. See Brian R. Cheffins, *The History of Corporate Governance* *19 (Law working papers No 184, January 2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975404 (last visited April 18, 2021) (In this article, Cheffins does a chronological line on the history of corporate governance departing from its American origins, and notwithstanding the landmark importance of UK reports on the subject).

7. See Dube and Pakhira, *Role of Independent Director in Corporate Governance* at 58 (cited in note 5).

Independent non-executive directors can be considered as such from various perspectives. First, they are independent from the company, as they are not linked with it on a permanent working relationship basis. Moreover they are required by various codes of good corporate governance like the German *Deutscher Corporate Governance Kodex* to have sufficient independence from the corporate form[8], and "not having sustained, not even indirectly, with the company or related parties, relations that condition their independence of judgement", as disciplined by the *Definizioni* of the Italian *Codice di Corporate Governance*[9]. In addition, they are independent from the company's ownership, as they should not be related in any form to the existing shareholders' nuclei[10], and tend to exclude themselves from their sphere of influence when it comes to their individual judgement, as will be studied further. Finally, they are independent from the company's management (i.e. from executive directors) as these managerial officers play no part in the appointment and remuneration of independent non-executive directors; this premise is fundamental, as the main reason for hiring independent non-executive directors in the light of corporate governance reports and codes is to held executive directors accountable for their stewardship.

Furthermore, the independence of non-executive directors is usually measured by criteria or standards of independence determined by the codes of good corporate governance or by mandatory legislation, or both, and even by the company's annual report. In general terms, to

8. See Regierungskommission, *Deutscher Corporate Governance Kodex* C(II) (March 20, 2020), available at https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf (last visited April 18, 2021). Recommendation C(II)(6) *in fine* of this Code, states: "Within the meaning of this recommendation, a Supervisory Board member is considered independent if he/she is independent from the company and its Management Board, and independent from any controlling shareholder". Recommendation C(II)(7) implements the standards by which that independent is measured.

9. See Il Comitato per la Corporate Governance, *Codice di Corporate Governance* *3 (Borsa Italiana 2020), available at https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020.pdf (last visited April 18, 2021). Article 1 of the *Codice*, indicates: "gli amministratori non esecutivi che non intrattengono, né hanno di recente intrattenuto, neppure indirettamente, con la società o con soggetti legati a quest'ultima, relazioni tali da condizionarne l'attuale autonomia di giudizio".

10. See Manuel Olivencia, *El buen gobierno de las sociedades* 21 (ETNOR 1999).

measure the level of independence of a non-executive director, certain practical conditions of relevance concur; for instance, in Spain, according to article 529 of the *Ley de Sociedades de Capital* (the Corporate Enterprises Act)[11], the independence of a non-executive director will be seriously compromised, *inter alia*, if they were previously employed by the company as executive directors and a reasonable time has not elapsed since the working relationship was terminated; if they receive any remuneration other than their fee as non-executive directors; if they have a material business relationship with the company, among others.

In other countries, like the United Kingdom, Recommendation 10 of the *UK Corporate Governance Code* sets standards of independence, but allows companies to create their own criteria and to determine which of their non-executive directors they consider independent in their annual statements[12]. This recommendation is also regarded as a good practice by the Organization for Economic Cooperation and Development (henceforth, OECD), agreeing in its Principles that "it is desirable that boards declare who they consider to be independent and the criterion for the judgement"[13].

The independence required to non-executive directors is crystallized through the judgement they are called to exercise on diverse corporate matters. As pointed by the Cadbury Report, those corporate officers "should bring an independent judgement to bear on issues of strategy, performance, resources, including key appointments, and standards of conduct"[14]. Indeed, given their independence, the judgement which this type of non-executive directors offer to the company's

11. Art. 529 co. 4 (a) Real Decreto Legislativo 02 July 2010, no. 1.

12. See The Financial Reporting Council, *The UK Corporate Governance Code* art. 10 (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF (last visited April 19, 2021).

13. See Organization for Economic Cooperation and Development, *G20/OECD Principles of Corporate Governance*, 54 (OECD Publishing 2015), available at https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1618823180&id=id&accname=guest&checksum=9DAF903594A6F4EEDB3C6A8BAD71C3DF (last visited April 19, 2021).

14. See The Committee on the Financial Aspects of Corporate Governance and Sir Adrian Cadbury, *The Financial Aspects of Corporate Governance* at 21 (cited in note 2).

affairs is reputed to be reasoned and cautious for the delicacy of their own standing within the Board of Directors. On one hand, they have to contribute to the achievement of a certain degree of Board effectiveness through their wise advice, and their ability to identify business opportunities, weighing risks and predicting possible scenarios for the decisions taken by the Board; but, on the other hand, they must guarantee a check on the company's stewardship, and controlling that resources are being well-administered to the best interest of the company[15].

Independence of judgement is the attribute which justifies the preponderant role that independent non-executive directors play in corporate governance, thus leading stakeholders and shareholders to trust these members of the Board on various corporate issues[16]. In addition, several codes of good corporate governance have included on their principles and recommendations the presence of a reasonable number of independent non-executive directors in the Board[17].

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15. See Gavin J. Nicholson and Geoffrey C. Kiel, *Can directors impact performance? A case based test of three theories of corporate governance*, 15 Corporate Governance: An International Review, 585, 588 (2007), available at https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1467-8683.2007.00590.x (last visited April 19, 2021). See also Renée Adams, et al., *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey**1 (National Bureau of Economic Research Working Paper No 14486 November 2008), available at https://www.nber.org/system/files/working_papers/w14486/w14486.pdf (last visited April 19, 2021) (A question on whether independent non-executive directors can really contribute to the effectiveness of the Board of Directors was raised by empirical studies coming mainly from economy scholars, such as Adams, Hermalin and Weisbach, Nicholson and Kiel, among others. Both of these studies arrived at inconclusive results).

16. See Derek Higgs, *Review of the role and effectiveness of non-executive directors* *9 (The Department of Trade and Industry 2003), available at https://ecgi.global/sites/default/files/codes/documents/higgsreport.pdf (last visited April 20, 2021). Some reports on corporate governance embrace the idea of summoning this type of non-executive directors to the Annual General Meeting. In this report, Higgs affirms that all non-executive directors should attend the Annual General Meeting "to discuss issues that are raised in relation to their role".

17. See, for example, Regierungskommission, *Deutscher Corporate Governance Kodex* C(II)(6) (March 20, 2021); Il Comitato per la Corporate Governance, *Codice di Corporate Governance* art. 2 (Borsa Italiana 2020); The Financial Reporting Council, *The UK Corporate Governance Code* principle G (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF (last visited April

Hence, for those reasons, independence can be regarded as the most important attribute for which they are considered a reference of good corporate governance, and it has led to calls for "strengthening the role of independent directors"[18].

Moreover, in the process of resolving corporate governance disputes, independence constitutes an essential pillar for independent non-executive directors to constructively address the disputes that arise, because it allows them to exercise a free, impartial, and detached judgement.

Since they are not linked with the company on a permanent working relationship basis, nor linked with shareholders or stakeholders, they will be free to express their opinions and judgement on the dispute with liberty and without influence, pressure or coercion by the parties involved, or those interested in a determined outcome. For the same reason, they will be able to render an impartial and unbiased judgement; in words of the Higgs Report, "these individuals bring a dispassionate objectivity that directors with a closer relationship to the company cannot provide"[19].

Finally, independent non-executive directors can provide a detached judgement, because they are not involved in the controversy as parties and have no interest whatsoever in the outcome of the controversy, other than securing its amicable resolution.

2.2. Background of Knowledge and Experience: a Wise and Comprehensive Judgement

Independent non-executive directors are preceded by their background of knowledge and experience on corporate affairs, as they require particular expertise, know-how, practice and awareness to

19, 2021); Recommendation 8 *in fine* of The Norwegian Corporate Governance Board *the Norwegian Code of Practice for Corporate Governance* *31 (October 17, 2018), available at https://nues.no/wp-content/uploads/2018/10/NUES_eng_web_okt2018_2.pdf (last visited April 20, 2021).

18. Gérard Charreaux and Peter Wirtz, *Corporate Governance in France**4 (Cahier du FARGO No 1070201 Université de Bourgogne February 2007), available at https://crego.u-bourgogne.fr/images/stories/wp/1070201.pdf (last visited April 20, 2021).

19. See Higgs, *Review of the role and effectiveness of non-executive directors* at 35 (cited in note 16).

understand issues of significant complexity regarding the various scenarios that surround the company's day-to-day, in order to deliver the best proficiency in the performance of their functions and responsibilities.

Indeed, the reports that followed the Cadbury Committee's labour in the world, particularly in the United Kingdom, insisted on the "high professional qualification" of independent non-executive directors[20]. Hence, various reports deemed essential that suitable candidates to an independent non-executive directorship gather exceptional corporate skills and experience. Companies, on the other hand, should weigh more heavily a possible applicant with a commendable background to be nominated to the position, as a result of a transparent and merit-based procedure.

Higgs affirms that "(i)dentifying individuals of suitable quality and background is essential for a high performing board", and recommends that the nomination committee "should evaluate the balance of skills, knowledge and experience on the board and, in the light of this evaluation, should prepare a description of the role and capabilities required for a particular appointment"[21]. Similarly, the Tyson Report, following Higgs, upholds that "(d)iversity in the backgrounds, skills, and experiences of (non-executive directors) enhances board effectiveness by bringing a wider range of perspectives and knowledge to bear on issues of company performance, strategy and risk", and recommends companies to encourage and actively support further training of their non-executive officer's skills and knowledge[22].

In the light of experience, primarily in the United Kingdom, a study conducted by Pass exposed that the recommendations of a background

20. See Olivencia, *El buen gobierno de las sociedades* at 22 (cited in note 10).

21. See Higgs, *Review of the role and effectiveness of non-executive directors* at 39 (cited in note 16).

22. See Laura Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* *1–2 (London Business School July 2003), available at http://facultyresearch.london.edu/docs/TysonReport.pdf (last visited April 20, 2021) (In this report, Tyson highlights the importance to harmonize non-executive director's training offers by the market with the general needs of every company, and, for that, it is recommended "an initiative to bring together companies and training providers to establish guidelines to ensure that training programmes for directors are providing what is needed, and that useful information about such programmes is easily accessible on a timely basis").

of experience and expertise have, for instance, furthered the hiring by large companies of former executive directors as independent non-executive directors, given their corporate trajectory, which is largely reputed to be abundant in experience, knowledge, skills, and interpersonal abilities beneficial to communications between the members of the Board[23].

The previous tendency highlighted by Pass brings us mixed opinions: on one hand, former executive directors can be the foremost suitable candidates for independent non-executive directorships; but, on the other hand, this would raise questions on their true independence or links with the company, if they served as executive officers in the company that now hires them as independent non-executive directors. The issue can be easily addressed by preventing former executive officers from being hired as independent non-executive directors by the same companies in which they previously served.

However, it has to be noted that according to Pass' study, there are also other backgrounds of knowledge and experience that are also appropriate for serving as independent non-executive directors[24], such as those involved in politics, government departments and academia.

In addition to the importance of this attribute for their daily corporate functions, we believe that these qualities allow independent non-executive directors to play a constructive role as conciliators in corporate governance-related disputes resolution. Indeed, they can provide a wise judgement on the dispute since their knowledge, experience and expertise allows them to assess the controversy very carefully and judiciously, and provide their objective view on how the dispute may be resolved to the best interest of the parties involved and of the company, rather than siding with one of the parties. For that purpose, and given that background, they will balance the interests and needs of the

23. See Christopher Pass, *Corporate Governance and The Role of Non-Executive Directors in Large UK Companies: An Empirical Study* *4 (University of Bradford School of Management Working Papers Series No 25, 2002), available at https://www.researchgate.net/publication/235271160_Corporate_Governance_and_the_Role_of_Non-executive_Directors_in_Large_UK_Companies_An_Empirical_Study (last visited April 20, 2021) (Indeed, Table 6 of the paper, which examines the background of non-executive directors, observed that 165 out of 317 current non-executive directors surveyed for the study were former executives).

24. See Pass, *Corporate Governance and The Role of Non-Executive Directors in Large UK Companies* at 25 (cited in note 23).

parties involved with those of the company, and the economic reality, in order to give, besides their wise judgement, a clear and feasible solution to the dispute. Lastly, independent non-executive directors will provide a comprehensive judgement to the dispute, assessing every scenario and procuring broad and effective solutions.

2.3. Integrity and Ethical Adequateness: a Fair, Honest and Credible Judgement

In corporate governance, ethical adequateness and integrity are concepts responding to the need of directing the Board's doings to serve only the greater good of the company and of its groups of interests, in order to prevent malpractices and the eventual failure of the corporate form, triggered by directors' wrongdoings[25]. Integrity and ethical adequateness in corporate governance also entail that the members of the Board of Directors are able to provide their judgement, compromise and honesty to the company, and to grant a decision-making process free of any purpose other than the company's benefit[26].

The importance of ethics in corporate governance was first underlined by the Olivencia Report. That landmark report on corporate governance in Spain acknowledged that ethics is "an index of quality", without which "there can be neither value nor worth" of any corporate form, public or private[27]. Major scandals triggered the failure of large companies across the world due to unethical and dishonest practices of executive directors. This, and the recognition of the need for ethical standards in corporate governance as a proxy for quality (based on the

25. See Nobuyuki Demise, *Business Ethics and Corporate Governance in Japan*, 44 Business & Society 211, 214 (2005), available at https://journals.sagepub.com/doi/abs/10.1177/0007650305274914 (last visited April 18, 2021).

26. See Financial Reporting Council, *The UK Corporate Governance Code* Principles A–B (July 2018), available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF (last visited April 19, 2021). In particular, the last paragraph of Principle "B." states: "All directors must act with integrity, lead by example and promote the desired culture".

27. Olivencia, *El buen gobierno de las sociedades* at 7 (cited in note 10).

very origins of Commercial Law)[28], gave rise to the need to introduce in corporate governance a figure that complies with ethical standards, with the ability to impose them in their judgement and conduct over corporate affairs.

Independent non-executive directors can be regarded as the response to the ethical necessity in corporate governance. The Tyson Report considers that there is "no doubt that integrity and high ethical standards are essential for effective (non-executive directors)"[29]; in other words, every non-executive director, outside independent director or inside non-executive officer, should embrace integrity and ethics in the discharge of their functions. Furthermore, independent non-executive directors, as they are not permanently linked with the company, and given their independence of judgement, assume a higher ethical role in corporate governance.

Certainly, the particular attributes of independent non-executive directors have led authors García-Sánchez, Frías Aceituno and Rodríguez Domínguez to believe such non-managerial officers have an "ethical commitment" to the company's governance system, and also that their ethical compromise crystallized with the assumption by independent non-executive directors of a "responsibility to safeguard the interests of shareholders and investors", since they "supervise the senior management and ensure that business ethics form part of the organizational culture" and are "less reluctant to investigate / prevent cases of fraud"[30].

Indeed, as previously noted, the independence, background and service to the accountability of independent non-executive directors may guarantee that these officers will detect, uncover and warn

28. See Lodovica de Stefano, *Contrarre con l'impresa: profili soggettivi ed oggettivi* 9 (unpublished PhD dissertation, Università degli Studi di Milano-Bicocca 2010) (The author highlights the historical importance of morality and ethics as the basis of modern Commercial Law, given their standing as a primal regulation for the commercial phenomenon during feudalism, a historical period on which farm-dependent economies and incipient markets were regulated by a body of "moral, rather than scientific, norms", which prevailed over a statutory regulation of commerce).

29. Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* at 4 (cited in note 22 .

30. Isabel María García-Sánchez, José Valeriano Frías Aceituno and Luis Rodríguez Domínguez, *The ethical commitment of independent directors in different contexts of investor protection*, 18 Business Research Quarterly 81, 84 (2014).

shareholders and stakeholders of possible irregularities or acts that may constitute fraud and other unethical and sometimes criminal practices on which the executive branch may incur.

Besides, we believe that integrity and ethics also provide the capacity to independent non-executive directors for playing a constructive role as conciliators in the resolution of corporate governance-related disputes.

Indeed, as highlighted by the Tyson Report, non-executive directors and, above all, independent non-executive directors need to embody "integrity" and obey "high ethical standards", in order to discharge their functions and responsibilities in the company[31]. Furthermore, Nordberg recognizes independent non-executive directors as those "who increasingly act as the moral compass for the enterprise", which has led to a "new emphasis" on their role in the company[32].

This emphasis on the independent non-executive directors' role in the company, to which the author refers due to their moral and ethical standards, can justify, in fact, their inclusion in the resolution of corporate governance disputes, as they will be able to provide, from our point of view, a fair, honest and credible judgement.

We submit independent non-executive directors can give a fair judgement because, besides their detachment and professionalism, they will be able to assess the controversy and determine which may be the best solution for the conflicting parties and the company. Also, independent non-executive directors will provide an honest judgement, since the ethical standards they are compelled (and committed) to follow[33], will encourage them to bring a real, truthful evaluation and solution for the dispute. Finally, they can also give a credible judgement, because their ethical standards, combined with their background (both for which they are considered a reference of good corporate governance) will make their judgement trustworthy

31. See Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* at 4 (cited in note 22).

32. Donald Nordberg, *The Ethics of Corporate Governance*, 33 SSRN Electronical Journal 1, 2 and 11 (2007), available at https://ssrn.com/abstract=1004038 (last visited April 20, 2021) .

33. See García-Sánchez, Frías Aceituno and Rodríguez Domínguez, *The ethical commitment of independent directors in different contexts of investor protection* at 84 (cited in note 30).

and reliable for shareholders, stakeholders, executive directors, and for the parties in conflict.

2.4. Service to Board Accountability and Checks and Balances

In corporate governance, Board accountability and checks and balances within the Board are related: "Board accountability", although a very disputed notion, is a process by which the members of the Board of Directors provide transparent, accurate and honest financial statements and accounts to the shareholders on the company's economic performance[34]. Whereas "checks and balances" within the Board is a notion consisting of a structure of internal mechanisms destined to guarantee a convenient distribution of corporate power among the members of the Board of Directors[35].

These notions of Board accountability and checks and balances, particularly when it comes to the measures taken by executive directors in the discharge of their managerial responsibilities and faculties, are the strongest pillar and the essence of corporate governance. Indeed, corporate governance is built on the basis that the company's executive branch should exercise their power to the best of their ability and with sufficient liberty to secure the economic success of the corporate form. However, this liberty is not absolute, and executive directors should be held accountable for their actions[36], guiding their conduct to attend the interests of shareholders and stakeholders, and to allocate corporate functions to the different members of the Board.

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34. See Andrew Keay and Joan Loughrey, *The Framework for Board Accountability in Corporate Governance*, 35 Legal Studies 252, 258 (2018).

35. See María Gutiérrez Urtiaga and María Isabel Sáez Lacave, *El mito de los consejeros independientes*, 2 Revista para el Análisis del Derecho 4, 9 (2012).

36. See The Committee on the Financial Aspects of Corporate Governance and Cadbury, *The Financial Aspects of Corporate Governance* at 9 (cited in note 2) (As said by the Cadbury Report, "(t)he country's economic success depends on the drive and efficiency of its companies. Thus the effectiveness with which their boards discharge their responsibilities determines Britain's competitive position. They must be free to drive their companies forward, but exercise that freedom within a framework of effective accountability". In other words, a balance should be reached between the necessary freedom for executive directors to discharge their functions and responsibilities, with a corporate structure of accountability and transparency.)

Thus, those notions studied above require two structures: one to effectively guarantee a check and accountability of the executive branch's decisions, and another one to secure checks and balances in order to prevent arbitrary exercise of power given its concentration on the hands of a single executive director or group of managerial officers. Independent non-executive directors serve both.

On one hand, independent non-executive directors serve the corporate structure of accountability. Indeed, their independence and background allow them to evaluate the financial statements, statements of compliance, and the information submitted to them, as well as to vigilantly monitor the company's performance. For enhancing the results of accountability, it has been recommended in the United Kingdom, a country with a shareholder-oriented governance system and a unitary board, the appointment of a senior independent director with direct access to the company's owners[37]. Whereas in Germany, a country with a stakeholder-oriented governance system and a dual board, it was suggested the appointment of independent non-executive directors to the *Aufsichstrat*, the Supervisory Board, in which are represented major stakeholders, such as the employees[38]. This direct contact between independent non-executive directors, shareholders and stakeholders increases the effectiveness of accountability, as it allows independent non-executive directors to satisfy themselves that groups of interests will be informed of any possible irregularity detected by them, avoiding censure by the executive branch.

On the other hand, independent non-executive directors serve the corporate structure to secure checks and balances on the powers of executive directors. As affirmed by Urtiaga and Sáez Lacave, "corporate law is traditionally based on the fact that the wide managerial powers of administrators can only justify themselves if there is any kind of

37. See James Kirkbride and Steve Letza, *Can the Non-Executive Director be an Effective Gatekeeper? The Possible Development of a Legal Framework of Accountability*, 13 Corporate Governance: An International Review 541, 542 (2005). The authors also highlight that the figure of a senior independent non-executive director faced criticism on the grounds that "(i)t would create a dualist position of a dual chairmanship and a dual board", at p. 543.

38. See Víctor Manuel Martín-Martínez, *Tendencias actuales de gobierno corporativo: Comparativa de los consejos de administración de Alemania, EE.UU., Japón y España*, 24 Revista Universitaria Europea 95, 102 (2015).

check and balances that guarantees administrators' accountability to shareholders"[39]. Independent members of the Board guarantee such checks and balances, because, given their ability to report irregularities to stockholders and stakeholders, they encourage those groups of interests to take action against the executive directors' wrongdoing by exercising their pressure mechanisms, in order to control, demote, or even depose the managerial officer accused of misconduct.

In summary, independent non-executive directors are officers serving in both major corporate structures of accountability by holding executive directors liable for their actions, evaluating the reports on the company's performance, and by denouncing irregularities directly to groups of interests in the company.

2.5. Service in Key Committees

Independent non-executive directors, given their corporate skills and aptitudes, are called to serve in various key committees in the corporate form.

Despite the differences between the normally shareholder-oriented, unitary Board system adopted by companies from the United States, the United Kingdom and from other European and Latin-American countries, and the stakeholder-oriented, dual Board structure adopted by companies of countries like Germany, Poland, and others, both systems agree in recommending independent non-executive directors' service in three key committees: the nominations committee, the remuneration committee, and the audit committee[40].

Also, countries that have a shareholder-oriented, unitary Board governance system, reports on corporate governance and codes of

39. Gutiérrez Urtiaga and Sáez Lacave, *El mito de los consejeros independientes* at 9 (cited in note 35).

40. For example, the 2003 Combined Code of corporate governance in the United Kingdom, as highlighted by Mallin, observes that "(i)n all of these committees, the independent non-executive directors are very important as they should bring their objective judgement to these roles", encouraging companies to appoint independent non-executive directors to those key committees. Christine A. Mallin, *Corporate governance developments in the UK*, in Christine A. Mallin (ed.), *Handbook on International Corporate Governance* 3, 6 (Edward Elgar Publishing Limited 2006).

good practices recommend a sufficient number of independent non-executive directors serving in the Board of Directors.

The Cadbury Report suggests requiring "a minimum of three non-executive directors" as members of the Board, two of which "should be independent"[41] according to the standards of independence established in every code. Likewise, the Brazilian *Código das Melhores Práticas de Governança Corporativa* highlights the "especial importance" of independent non-executive directors in companies with dispersed capital, "on which the predominant role of the Board must be counterbalanced"[42].

On the other hand, in countries with a stakeholder-oriented, dual Board governance system, like Germany, the *Deutscher Corporate Governance Kodex* recommends that the *Aufsichstrat*, the Supervisory Board, "shall include what it considers to be an appropriate number of independent members from the group of shareholder representatives, thereby taking into account the shareholder structure" and that "a Supervisory Board member is considered independent if he/she is independent from the company and its Management Board, and independent from any controlling shareholder[43].

In summary, independent non-executive directors, notwithstanding the different orientations and tendencies of corporate governance systems across the world, serve and play a significant role on key committees, enhancing good corporate governance.

3. Identifying Corporate Governance Disputes

We previously identified the independent non-executive directors' attributes that justify their preponderant role in corporate governance,

41. The Committee on the Financial Aspects of Corporate Governance and Cadbury, *The Financial Aspects of Corporate Governance* at 21 (cited in note 2).

42. Instituto Brasileiro de Governança Corporativa, *Código das Melhores Práticas de Governança Corporativa* *45 (2015), available at https://edisciplinas.usp.br/pluginfile.php/4382648/mod_resource/content/1/Livro_Codigo_Melhores_Praticas_GC.pdf (last visited April 20, 2021).

43. See Regierungskommission, *Deutscher Corporate Governance Kodex* C(II) (March 20, 2020), available at https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf (last visited April 18, 2021).

as well as those attributes which, in particular, give them the ability to serve as conciliators for resolving corporate governance-related disputes. In this chapter, we will delimit our conciliation framework by identifying on which of the controversies surrounding corporate governance may the independent non-executive directors discharge their service as conciliators.

Corporate governance disputes may arise for various reasons, and many factors are to be considered when identifying a possible controversy. Our study, however, will identify three kind of disputes on corporate governance which may arise between relevant parties, and around which our framework may be *prima facie* circumscribed: first, disputes between shareholders and the Board of Directors; second, intra-stakeholder disputes and disputes between the stakeholders and the Board of Directors; and third, disputes between the member of the Board, i.e, Boardroom disputes.

3.1. Between Shareholders and the Board of Directors

Prior to the publication of the first reports on corporate governance and codes of good practices in 1976 and 1992, the role of shareholders in corporate governance was limited, but that restraint or moderation of the ownership's involvement in their own companies was due to a somehow uncaring behavior of shareholders towards corporate affairs; in fact, in the United States, according to Livingston, shareholders in public companies were "known for their indifference to everything about the companies they own except dividends and the approximate price of the stock"[44].

However, the aftermath of notorious scandals of corporate fraud, misconduct and other wrongdoings by executive directors that affected several large companies across the world and that deeply damaged shareholders' value and investors'[45] trust brought the need to procure

44. See generally Joseph Livingstone, *The American Stockholder* (J. B. Lippincott Company 1958).

45. Cases like Enron and Parmalat were deemed as grave cases of corporate fraud and wrongdoing by those companies' executive officers at the expense of its shareholders, which triggered a crisis of confidence in executive directors worldwide. Jeffrey Cohen, Yuan Ding, Cédric Lesage and Hervé Stolowy, *Corporate Fraud and Managers´ Behavior: Evidence from the Press*, 95 Journal of Business Ethics 271, 279 (2010).

shareholder's direct involvement in corporate governance, or "shareholder activism", a tendency which, according to Ingley and van der Walt, "(s)hareholder activism has emerged over the past two decades as a growing force to be reckoned with by management and boards of corporations"[46].

The notion of shareholder activism is a vindication to the shareholdership status in their own companies[47] that recognizes the importance of their role in the corporate form as owners and which gives shareholders, whether individually or in coordinated groups, the ability to present and enforce their own initiatives oriented to enhance the company's performance in the Annual General Meeting[48]; in fact, as noted by Goranova and Verstegen, corporate governance and company's performance are the target of shareholder activism, which has caused "an evolution from a market-based to a political model of corporate governance"[49].

Enhanced shareholder activism gave way for institutional shareholders or investors to involve more profoundly in corporate governance issues. Gillan and Starks observe that "(a)s institutions' ownership has increased, their role as shareholders has also evolved"[50] and, rather than selling their shares when a company underperforms, they prefer to be directly involved in corporate governance to enhance the company's performance and also to prevent further economic harm to the company by massively selling large holdings.

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46. C.B Ingley and N.T van der Walt, *Corporate Governance, Institutional Investors and Conflicts of Interest*, 12 Corporate Governance: an International Review 534, 535 (2004).

47. Tulio Ascarelli, *Principios y Problemas de las Sociedades Anónimas* 48 Imprenta Universitaria (1951) (Ascarelli affirms that the shareholder's relationship with the company creates a "status" for them; this "status" recognizes rights and duties for shareholders to exercise, and that they must be free to exercise those rights and discharge their duties within the company; thus, shareholder activism can be recognized as the corporate governance response to the general need to enhance shareholder's status within the company).

48. Daniel Bouton, *Promoting Better Corporate Governance In Listed Companies*, 5 Mouvement des Entreprises de France (MEDEF 2002).

49. Maria Goranova and Lori Verstegen Ryan, *Shareholder Activism: A Multidisciplinary Review*, 40 Journal of Management 1230, 1231 (2013).

50. Stuart L. Gillan and Laura T. Starks, *Corporate governance proposals and shareholder activism: the role of institutional investors*, 57 Journal of Financial Economics 275, 279 (2000).

Moreover, in the United States, the direct involvement of institutional shareholders in corporate governance as a measure to avoid selling their shares by enhancing the company's performance, supposed the progressive disregard of the well-known "Wall Street Walk" or "Wall Street Rule", i. e. selling shares of underperforming companies[51]. Instead, activist institutional shareholders will be determined to influence the firm's decision-making by using their shares' power.

Nevertheless, shareholder activism and, in particular, institutional shareholders' activism tends to raise disputes or conflicts of interests between the institutional ownership and the company's management. Indeed, in the Annual General Meeting, shareholders, institutional or not, extend their initiatives and proposals in order to enhance the company's performance. If the initiative receives the approval of the majority of the shareholders, the Board of Directors will be obliged to enforce it, by their duty of loyalty to the company and its shareholders[52].

Despite being approved, the proposals can be disregarded by the Board of Directors, and particularly by executive directors. Various forms of disregard can be identified: for instance, the initiative approved in the Annual General Meeting can suffer changes by the same executive branch of the company that deviate from the initial plan of the shareholders, and, also, can be completely omitted by the executives. Naturally, shareholders will raise their protests over the executive directors' reluctance to deliver the proposal. However, relevant circumstances may concur, and their reticence might have proper grounds: for example, the proposal may be impossible in the company's current situation, or at least impracticable in the terms it was formulated.

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51. See Anat R. Admati and Paul Pfleider, *The "Wall Street Walk" as a Form of Shareholder Activism*, 315 Working Paper Stanford Law School 1, 1 (2005) (the cited authors affirm that the "Wall Street Walk seems to be an alternative to activism", but actually "appears to be inconsistent with it", thus recommending the study of the "Wall Street Walk", instead, as "a form of shareholder activism").

52. See generally Vicenç Ribas Ferrer, *Aproximación al estudio del deber de lealtad del administrador de sociedades* (tesis doctoral, Universidad Autónoma de Barcelona 2004), available at https://www.tesisenred.net/bitstream/handle/10803/5206/vrf1de2.pdf?sequence=1&isAllowed=y (last visited April 18, 2021). Ribas Ferrer even believes that, if directors breach their duty of loyalty by disregarding a shareholder-approved initiative, their acts against that initiative will be void.

The previous example is one of the many situations which may occur in the company's relationship between activist shareholders and the Board. The conclusion that has to be noted is that, in fact, shareholder activism, and, in particular, institutional shareholder activism, widens the scenario of possibilities of eventual conflicts between activist institutional owners and the Board of Directors, and especially with the executive directors.

Yet, even with those possibilities, a framework for an effective dispute resolution between activist shareholders (institutional or not) and the Board of Directors has not been developed by mandatory laws or codes of good corporate governance. Instead, it has sparked the use by activist shareholders of contentious mechanisms such as derivative actions against executive members of the Board, which threaten the company's value and trust by investors[53].

Hence, in the following chapters, recommendations will be made to develop a framework of conciliation to effectively address corporate governance-related dispute resolution, based on independent non-executive directors' role as conciliators to the dispute.

3.2. Intra-Stakeholders' Disputes and Disputes between Stakeholders and the Board

Both mandatory laws and codes of good corporate governance across the world, even in countries with a shareholder-oriented corporate governance system, have embraced the stakeholder theory. Explained by Ansoff, the stakeholder theory "maintains that the objectives of the firm should be derived by balancing the conflicting claims of the various "stakeholders" in the firm" [54]. Two consequences have derived from the admission of the stakeholder theory in the regulatory framework of corporate governance. On the one hand, the notion of stakeholder is wide in both voluntary codes and statutory or mandatory laws. On the other hand, it has led corporate governance to adopt the objective of serving the best interest of every stakeholder,

53. See also Zhong Zhang, *The shareholder derivative action and good corporate governance in China: Why the excitement is actually for nothing*, 28 Pacific Basin Law Journal 174, 189 (2011).

54. Igor Ansoff, *Corporate Strategy* 33 (McGraw-Hill 1965).

or, at least, finding a balance between them all. Both consequences, given their relevance to our following study, deserve to be analyzed separately.

Indeed, the notion of stakeholder has been widened in order to include in the company's governance structure "(a)ny identifiable group or individual on which the organization is dependent for its continued survival" according to Freeman and Reed[55]. Thus, many voluntary codes regard various groups of interests as "stakeholders", and give them a preponderant influence in corporate governance. The Japan's Corporate Governance Code is particularly instructive concerning the notion of stakeholder: in its General Principles, it states that companies should recognize "that their sustainable growth and the creation of mid- to long-term corporate value are brought as a result of the provision of resources and contributions made by a range of stakeholders", and includes in its notion of stakeholder the "employees, customers, business partners, creditors and local communities"[56].

Moreover, authors like Freeman and Reed highlight that "from the standpoint of corporate strategy, stakeholder must be understood in the wide sense", given that this will allow the corporate form to analyze "all external forces and pressures whether they are friendly or hostile"[57]. Therefore, the stakeholder theory demands a progressive widening of the notion of stakeholder, in order to identify every external force with the power to influence corporate strategy and analyze the scales of their power, including stockholders, employees, consumers, customers, suppliers, creditors, business partners, government agencies, communities, among others.

Moreover, the stakeholder theory guides corporate governance to serve the best interest of every stakeholder. This entails that the Board of Directors' disposition to act and decide on behalf of the company to the "benefit of its members"[58], according to Section 172 of the United

55. See R. Edward Freeman and David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 3 California Management Review 88, 89 (1983).

56. Tokyo Stock Exchange, Inc., *Japan's Corporate Governance Code* art. 2 (2018), available at https://www.jpx.co.jp/english/news/1020/b5b4pj000000j-vxr-att/20180602_en.pdf (last visited April 20, 2021).

57. Freeman and Reed, *Stockholders and Stakeholders* at 91–92 (cited in note 55).

58. *Companies Act 2006*, Ch. 46, Sec. 172.

Kingdom's Companies Act. This is also a very illustrative example of the presence of the notion of stakeholder in shareholder-oriented corporate governance systems. In fact, the same Section 172 of the Companies Act, disciplines the "(d)uty to promote the success of the company" which falls on every director and requires them to regard as important issues a set of matters in their managerial actions, such as "the interests of the company's employees", the "need to foster the company's business relationship with suppliers, customers and others", and "the impact of the company's operations on the community and the environment". Thus, every director and the Board as a whole must act in the way that could best serve the interests of every stakeholder, and not only shareholders.

However, the wide notion of stakeholder and the preponderant role given to them in corporate governance can spark disputes, which can occur within the different stakeholders (intra-stakeholder disputes) or within stakeholders and the Board.

First, disputes can arise between different stakeholders because of their heterogenic and divergent interests, which they demand the company to satisfy. As highlighted by Carney, Gedajlovic and Sur, far from trying to reach consensus, stakeholders "are frequently in conflict", and "jealously divided against another"[59]. Hence, if stakeholders' interests collide, disputes could arise among them in order to decide upon which interests shall prevail in the company. For instance, if employees demand their wages to be increased, they can face the opposition of creditors, who will support a more financially-conservative strategy for the company; furthermore, while business partners may discourage the company from considering an environmentally friendly policy in order to promote their industrial projects, local communities may resist such actions and plans.

Second, and finally, disputes can occur between the stakeholders and the Board of Directors. Certainly, if executive directors deviate from the proposed initiatives of an individual or a group of stakeholders, affected stakeholders will exert their pressure abilities to constrain the executives to fulfill their interests. Such a conflictual context can threaten the stability of the company. For instance, if the

59. See Michael Carney, Eric Gedajlovic and Sujit Sur, *Corporate Governance and Stakeholder Conflict*, 15 Journal of Management and Government 483, 489 (2013).

workforce demands a pay rise and the Board of Directors goes against it, employees might refuse to resume their job and enact a work stoppage. Moreover, if a dispute arises between the executive branch and the customers, these parties may refrain from purchasing or requiring the company's products or services, *ergo*, harming the company's economic position.

3.3. Boardroom Disputes

As noted before, decision-making is not exempt from the possibility of disputes, and those disputes may also arise between the directors within the Board. The sources of those disputes are various, but in general Boardroom disputes may be caused by disagreements between its members when defining the agenda or the corporate strategy, in the light of the preponderant role given to shareholders and stakeholders in corporate governance[60].

The corporate context implies that directors have to balance and ponder the interests of shareholders and stakeholders while guaranteeing the company's stability and economic success. Therefore, disputes may arise between directors within the Board. This is the place where the initiative, proposal or strategy raised by a director has to be approved or enacted. Every internal debate will revolve around the shareholders' interests, as well as balancing the stakeholders' interests or deciding which of them should prevail. Moreover, directors may be more inclined to disagree and defend their initiatives and proposals, rather than engaging in a constructive dialogue. This is due to their liability in the case they don't satisfy the interests of the shareholdership, and also because of the economic harm that stakeholders' disputes can cause to the company, Even more alarming, and despite their liability, disputes can also occur when behind an initiative or

60. See International Finance Corporation, *Boardroom Disputes: How to Manage the Good, Weather the Bad, and Prevent the Ugly* 8 (2015), available at https://www.ifc.org/wps/wcm/connect/4d816348-7c63-48ba-95a2-849574020d0a/Boardroom_Disputes_Practical_Guide_for_Directors.pdf?MOD=AJPERES&CVID=kHGE-9QV (last visited, april 2021).

proposal of a director underlies the satisfaction of its own interests, to the detriment of the company[61].

4. Board Effectiveness and Corporate Governance Dispute Resolution

Given the heterogeneity of corporate governance, scholars have exhaustively insisted on the need to enhance the Board of Directors' effectiveness in the company, by questioning its actual role and importance for the corporate form. Many theories have been developed to explain how the managerial function of the Board determines the company's economic success.[62] Nevertheless, scholars endorsing these theories were unable to conclude whether the Board tells the difference in the company's performance[63]. The idea of enhancing the Board effectiveness, however, remains intact, and this notion creates a prism of pursuing a progressive improvement of the Board of Directors' value.

Cossin argues that the notion of Board effectiveness is based on four pillars: the first being the "people and builds on their quality, focus and dedication"; the second being "information architecture"; the third being, "structures and processes"; and the fourth being "group

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61. See Biserka Siladi, *The role of non-executive directors in corporate governance: an evaluation* * 9 (master thesis, Faculty of Business and Enterprise Swinburne University of Technology 2006), available at https://researchbank.swinburne.edu.au/file/9609a3bd-fb2d-48ec-bd73-bd533a1f6065/1/Biserka%20Siladi%20Thesis.pdf (the author highlights that conflicts of interests are a main concern for the agency theory, as this theory also "suggests that professional managers can, by virtue of their superior knowledge and expertise, gain advantage of the firm's owners").

62. See also G. Tyge Payne, George S. Benson and David L. Finegold, *Corporate Board Attributes, Team Effectiveness, and Financial Performance*, 542 Journal of Management Studies 1, 5 (2008).

63. See Nicholson and Kiel, *Can directors impact performance? A case based test of three theories of corporate governance* at 15 (cited in note 16). See also Adams, Hermalin and Weisbach, *The Role of Boards of Directors in Corporate Governance* at 2 (cited in note 15) (in their introduction, Nicholson and Kiel direct the reader's attention to the many articles and papers guided to determine if the Board of Directors actually play a positive role in the company's performance, and highlight the fact that every author or paper quoted failed to achieve a conclusive result. Also, Hermalin, Adams and Weisbach argue that people question the importance of the corporate boards, since "their day-to-day impact is difficult to observe").

dynamics"[64]. Regarding the third pillar, i.e., structures and processes, the same author highlights that "there are many processes beyond the straight running of the Board", including "evaluation processes, the strategy process, the risk process"[65], among others. However, the notion of "structures and processes", *prima facie*, does not seem to include an internal, amicable dispute resolution process. Structures and processes should be intended to direct immediate attention to corporate governance disputes which may arise within the members of the Board, or between the Board of Directors and shareholders or stakeholders.

An internal amicable dispute resolution process oriented to resolve the previously identified corporate governance disputes is necessary, as a result of the combination between the notion of Board effectiveness and corporate governance disputes resolution. Cossin himself admits that Board effectiveness is enhanced if potentially disruptive disagreements and disputes "are minimized while discussions remain rich and challenging"[66]. In fact, we believe that the effectiveness of the Board of Directors can also be measured both by the presence of an appropriate, efficient and operational internal, amicable corporate governance disputes resolution process or structure in the company. Indeed, a Board of Directors and, in general, every company must be able to assume the resolution of their own disputes, with their own mechanisms, structure and processes.

For that purpose, we submit that conciliation is a suitable process of internal and amicable corporate governance dispute resolution and that, given their ability to provide a free, impartial, detached, wise, comprehensive, fair, credible and honest judgement, independent non-executive directors can play a prominent role as conciliators in that appropriate process. We will further elaborate on that proposal; nevertheless, this premise intends to highlight, in summary, that the notion of Board effectiveness entails that a company must be able to resolve their own corporate governance disputes, by designing an

64. See Didier Cossin, *The Four Pillars of Board Effectiveness* 4 (Institute for Management Development 2014).

65. *Ibid.*

66. *Id.* at 6.

appropriate, efficient and operational internal, amicable dispute resolution process or structure.

5. Avoiding Litigation for resolving Corporate Governance Disputes: preventing the Paralysis of Corporate Governance Bodies

In corporate governance, litigation appears to be the most frequent consequence of an escalated dispute, mainly in controversies between shareholders and executive directors. The deviation from the shareholders' agreed initiatives in the Annual General Meeting by the executive branch, or infringements to the fiduciary duty falling on the directors creates an internal dispute which will result in shareholder litigation, if that controversy escalates.

Indeed, shareholder litigation appears to be oriented primarily to a shareholders' condemn of every deviation or violation of the fiduciary duty by the directors. For this purpose, case law and scholars have comprehensively studied the "shareholder derivative action", which can be defined in the words of Loewenstein as "a means for shareholders to redress a breach of fiduciary duty by an officer or director"[67]. Notwithstanding, Appel believes that shareholder derivative action, or, more generally, shareholder litigation rights "have a complementary relationship with alternative governance mechanisms", and that "(t)his relationship is driven, in part, by settlements"[68]. This means that a derivative action is not only destined to condemn any deviation from the fiduciary duty of directors (or even not destined at all to that purpose), but to implement changes in corporate governance, with settlements between the directors and the litigant shareholder.

Shareholder litigation, however, from our point of view, brings more harmful than positive consequences for the company. Empirical data, according to Rizzo, have found that shareholder litigation and even the sole threat of lawsuits or claims results in economic harm to the company along with "negative economic consequences on

67. Mark J. Loewenstein, *Shareholder Derivative Action and Corporate Governance*, 24 Delaware Journal of Corporate Law, 1, 1 (1999).

68. See Ian Appel, *Governance by Litigation* 26 (Social Sciences Research Network 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532278 (last visited, April 20, 2021).

shareholders"[69]. In other words it is counterproductive for shareholders to litigate against the directors on behalf of the corporation because they actually damage their own economic standing as shareholders.

In addition to the economic harm litigation causes to both parties involved, a company immersed in shareholder litigation tends to suffer negative consequences on its reputation and image. In fact, litigation entails a serious risk of breach of the company's confidential information and a potential loss of trust of its partners. Moreover, in foreign corporations, shareholder litigation worsens its disadvantages, as problems of jurisdiction and governing laws may arise[70].

Notwithstanding the several problems and disadvantages of shareholder derivative litigation, which have sparked an interesting debate between many scholars on how to reduce corporate contention[71], the consequence of shareholder derivative litigation that deserves our main attention at this point is the imminent paralysis of the corporate governance bodies in detriment of the company's stability.

Authors like Ramsay highlight that "shareholder litigation may involve a role for a number of bodies"[72], mainly for directors. In this regard, Rizzo affirms that derivative litigation entails that "shareholders sue directors or officers on behalf of the corporation"[73]. The corporate governance structure itself, thus, is compromised, since the directors or managers sued for their alleged managerial misconduct will direct their complete attention to provide a response against the lawsuit[74]. Moreover, they will refuse to comply with shareholder requirements,

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69. See A. Emanuele Rizzo, *Afraid to Take a Chance? The Threat of Lawsuits and its Impact on Shareholder Wealth* * 32 (Center for Economic Research 2018), available at https://business.uc3m.es/seminarios/filesem_1516902182.pdf (last visited April 20, 2021).

70. See Yaad Rotem, *The Law Applicable to a Derivative Action on Behalf of a Foreign Corporation – Corporate Law in Conflict,* 46 Cornell International Law Journal 321, 326 (2013). See also Minon Myers, *Fixing Multi-Forum Shareholder Litigation*, 2 Brooklyn Law School Review 467, 468 (2014).

71. See generally G. Richard Shell, *Arbitration and Corporate Governance*, 67 North Carolina Law Review 518, 519 (1989). See also Jared I. Wilson, *The Consequences of Limiting Shareholder Litigation: Evidence from Exclusive Forum Provisions*, 47 Journal of Corporate Finance 2, 49 (2020).

72. See Ian Ramsay, *Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action*, 15 UNSW Law Journal 149, 151 (1992).

73. See Appel, *Governance by Litigation* at 6 (cited in note 68).

74. See Rizzo, *Afraid to Take a Chance?* at 1 (cited in note 69).

furthering managerial misconduct. This situation could also cause division within shareholders, directly threatening the paralysis of the company's governance bodies, and harming its stability. In addition to this risk of paralysis of the corporate governance bodies, some legal systems allow very invasive precautionary injunctions on corporate governance to be petitioned by the plaintiff shareholder. For example, the judicial suspension or removal of directors[75], a judicial overseeing of the Board by appointing an overseer or supervisor[76], or a co-administration regime[77]. These precautionary measures or injunctions are particularly invasive and disruptive of corporate governance (as corporate governance is their main target), and Courts have the ability to provide them, if it is the plaintiff shareholder demand, to the detriment of the company's stability.

All those factors and negative consequences lead us to believe that, as a general premise, litigation should be avoided to resolve corporate governance disputes, as it will potentially result in the company's paralysis, or, at least, will harm the stability of the corporate form. This premise, however, from our point of view, cannot be satisfied without an internal, amicable dispute resolution process or structure, as previously recommended. Hence, an internal and amicable corporate governance dispute resolution process or structure is needed to avoid corporate litigation. For that purpose, we regard independent non-executive directors serving as conciliators, as an appropriate answer to provide a free, impartial, detached, wise, comprehensive, fair, honest and credible judgement (henceforth referred to as "an effective judgement") and solution to corporate governance disputes that may arise between relevant parties, thus eschewing any form of litigation.

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75. See Olga N. Sirodoeva-Paxon, *Judicial Removal of Directors: Denial of Director's License to Steal or Shareholders' Freedom to Vote*, 50 Hastings L J 97, 102 (1998).

76. See Hugo A. Aguirre, *Acerca de la conveniencia de nombrar un veedor de parte en las veedurías societarias*, 9 Congreso Argentino de Derecho Societario 127, 128 (2004). See also Marta Alicia Toledo, *Medidas Cautelares Societarias: En especial suspensión provisoria de los derechos sociales e intervención judicial*, 9 Congreso Argentino de Derecho Societario 781, 785 (2004).

77. See generally Art. 113, *Texto Ordenado de la Ley de Sociedades Comerciales* 1894, Ley n. 19.550 (it is a possible judicial precautionary injunction existing mainly in Latin-American countries).

6. Our Framework: Independent Non-Executive Directors as Conciliators

We previously reviewed the notion of Board effectiveness applied to corporate governance disputes resolution and the need to avoid any form of litigation, thus preventing the risk of paralysis of corporate bodies and company's instability. The common conclusion we have reached on both subjects is that an internal and amicable dispute resolution process or structure is needed to provide the necessary attention and solutions to controversies arising within the company's previously identified relevant parties.

In addition to those conclusions, we proposed independent non-executive directors to serve as conciliators for resolving corporate governance disputes. Being conciliation that internal and amicable dispute resolution process, independent directors should serve as conciliators.

Therefore, in the next point, we will develop our framework for that proposal by elaborating two fundamental aspects: first, some criticism to the so-called "special litigation committees", arbitration and mediation, as methods considered for resolving corporate governance disputes by scholars and institutions; second, conciliation in corporate governance, the reasons for which we regard this method as appropriate to resolve corporate governance disputes and the role of independent non-executive directors as conciliators.

6.1. Criticism to Some Methods Considered for Corporate Governance Dispute Resolution: Special Litigation Committees, Arbitration and Mediation

Methods like special litigation committees, arbitration and mediation have been regarded as appropriate procedures or mechanisms to resolve corporate governance disputes. According to Murdock, since landmark cases like Zapata Corp. v. Maldonado[78] and Auerbach v. Bennet[79], special litigation committees emerged as important mechanisms to shareholder derivative actions in many states of the United

78. *Zapata Corp v. Maldonado* 430 A 2d 779 (Del Sup 1979).
79. *Auerbach v. Bennett* 93 N.E.2d 994 (N.Y. 1979).

States such as Massachusetts, North Carolina, Alabama and Iowa[80]. In addition to special litigation committees, the OECD has developed a Work Programme on corporate governance and dispute resolution, emphasizing arbitration and mediation as potential alternatives to address corporate governance disputes[81].

Special litigation committees deserved the interest of several scholars in Corporate Law. Indeed, these figures are committees appointed by the Board of Directors mainly as a "defensive strategy in response to shareholders' derivative suits" according to Steinberg, composed by independent non-executive directors, and directed to exercise their judgement on the merits or grounds of the shareholder's lawsuit[82]. The main issues surrounding special litigation committees are their relationship with the so-called "business judgement rule"[83], and, notably, the committee's ability to terminate the shareholder derivative action[84]. In particular, the last issue raises many pros and cons, because the committee's ability to dismiss shareholders' derivative lawsuits entails a conflict between the "business judgement rule" and the right of shareholders to pursue a sanction against a breach of the fiduciary duty of directors. Subject which remains controversial within scholars and case law[85].

On the other hand, arbitration and mediation have also emerged as alternatives to resolve corporate governance disputes. Indeed, according to Shell, arbitration is an alternative dispute resolution mechanism

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80. See Charles W. Murdock, *Corporate Governance: The Role of Special Litigation Committees*, 68 Wash L Rev 79, 89 (1993).

81. See Organization for Economic Cooperation and Development, *The Quality of Corporate Law and the Role of Corporate Law Judges* 10 (OECD Publishing 2015).

82. See Marc. L. Steinberg, *The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits*, 35 U Miami L R 1, 2 (1980).

83. See Mary A. Lopatto, *Hasan v. Clevetrust Realty Investors The Business Judgement Rule and Procedural Review of the Special Litigation Committee*, 34 Cath U L Rev 790, 792 (1985) (according to Lopatto, the business judgement rule "is based on the notion that directors, in the course of performing their duties on behalf of a corporation, take risks and make mistakes for which they should not be held legally accountable", unless the shareholders are able to prove the director's wrongdoing).

84. See George W. Dent, *The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?*, 75 Case Western University School of Law Faculty Publications 96, 97 (1981).

85. See Steinberg, *The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits* at 35 (cited in note 82).

of high reputation in corporate governance, given its "equity and efficiency above strict observance of legal norms", its cost-effectiveness, rapidness, and the reduced "judicial involvement in the arbitration process" and the limited "judicial review of arbitration awards"[86]. Moreover, mediation, defined as "a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, but with the parties in ultimate control of the decision to settle"[87], has gained scholars attention not only for "helping solve corporate governance disputes in a more efficient and effective way", but to "help manage conflicts" and "prevent disputes"[88].

However, although these methods are widespread in the companies' conflict management policy on corporate governance, we believe that they may not be convenient nor sufficient to address the different identified disputes related to the company's governance.

From our perspective, special litigation committees are irreconcilable with the enhanced role of shareholders and the liability of directors as pillars of the modern conception of corporate governance. First, we believe special litigation committees undermine shareholders' role in corporate governance and weaken directors' liability[89] because, since Zapata Corp. v. Maldonado,[90]special litigation committees (displacing the Courts) can dismiss the shareholder's lawsuit, thus preventing shareholders from holding a director that breached its fiduciary duty accountable for its wrongdoings, to the detriment of their rights as shareholders. Additionally, a special litigation committee is not oriented to solve the dispute between the plaintiff shareholder and the directors, but to judge and decide on the merits of the shareholders' lawsuit. For those reasons, we believe special litigation

86. See Shell, *Arbitration and Corporate Governance* at 519 (cited in note 71).

87. Centre for Effective Dispute Resolution, *The CEDR Mediator Handbook: Effective Resolution of Commercial Disputes* at 47 (CEDR ed. 2004).

88. See Eric M. Runesson and Marie-Laurence Guy, *Mediating Corporate Governance Conflicts and Disputes* 24 (Global Corporate Governance Forum 2007).

89. See The Committee on the Financial Aspects of Corporate Governance and Cadbury, *The Financial Aspects of Corporate Governance* at 9 (cited in note 2).

90. See Steinberg, *The Use of Special Litigation Committees to Terminate Shareholder Derivative Suits* at 35 (cited in note 82).

committees are not appropriate for resolving corporate governance disputes.

In this context, we also consider that arbitration is neither an appropriate method to resolve corporate governance disputes. Parties in conflict normally appeal to arbitration as an alternative to avoid the elevated costs and delay in the ordinary justice system. However, as highlighted by López de Argumedo Piñeiro, "despite the notorious idea of the brevity of the arbitration proceeding, the truth is that their length is longer than what is normally thought"[91], and, additionally, their considerable length reduces their cost-effectiveness. This is why, in an article previously quoted, Shell himself warns that arbitration "is not without risk, and it is unlikely to be a panacea for the complexities and expense of public shareholder litigation"[92]. Moreover, the same risks to the company's image persist in corporate governance arbitration. Thus, in corporate governance-related disputes, arbitration equals litigation in its pernicious effects and, in consequence, we also regard arbitration as an inadequate method to provide a solution to corporate governance disputes.

Also, while mediation may be a more suitable method for corporate governance disputes than special litigation committees and arbitration, it requires a third party's intervention as mediator, which brings us three reasons to argue against this mechanism: first, mediation for corporate governance disputes is normally institutionalized or carried outside the company, rather than conducting those proceedings internally within the corporate form, thus imminently decontextualized from the company's day-to-day; second, the third party serving as mediator, albeit skilled, is strange to the company, and will probably lead the parties to produce an all but comprehensive solution; third, the mediator understands its role limited to assisting the parties to reach a bilateral solution between them, being proscribed from issuing any judgement or concrete feasible solution to the dispute[93].

91. See Álvaro López de Argumedo Piñeiro, *Medidas Cautelares en Arbitraje Internacional y Nacional* 1 (Uría y Menéndez 2003).

92. See Shell, *Arbitration and Corporate Governance* at 574 (cited in note 71).

93. See Ursula Caser and Nuno Ramos, *The Institutionalization of Mediation: Reflections from an expert panel,* 9 Oñati International Institute for the Sociology of Law 516, 526 (2019).

Finally, and notwithstanding the previous reasons, all those methods, whether special litigation committees, arbitration and mediation, have been studied by scholars mainly as mechanisms that would work only to solve disputes between shareholders and the Board of Directors, thus inapplicable to intra-stakeholders disputes and disputes between stakeholders and the Board, and to Boardroom disputes.

Therefore, a more adequate or appropriate method for resolving those corporate governance disputes previously identified is required. For that purpose, we will elaborate our reasons on why we regard conciliation as the appropriate method and, more importantly, how independent non-executive directors can successfully serve as conciliators for corporate governance dispute resolution.

6.2. Conciliation as an Internal, Amicable Process or Method to resolve Corporate Governance Disputes: Independent Non-Executive Directors as Conciliators for Corporate Governance Dispute Resolution

Conciliation can be defined in the words of the Law Reform Commission as "an advisory, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement"[94]. Often wrongly confused with mediation, conciliation is an amicable dispute resolution mechanism that entails a third party acting as conciliator, whose role is not limited to facilitate the parties' encounters (like in mediation[95]), but to provide advice and solutions to the disputes, from its independent and neutral point of view.

Furthermore, the active role trusted to the conciliator on the dispute, which comprises its judgement, advice and solutions to the controversy, is not to be confused with a judge or arbitrator-alike decisional power. In conciliation both parties only intend to have the conciliator's intercession, advice, judgement and possible solutions to the dispute, not the final word on it[96]. Thus, the reader should bear

94. See Law Reform Commission, *Alternative Dispute Resolution: Mediation and Conciliation* 17 (LRC 2010).

95. See *ibid.*

96. See Alberto Blanco-Uribe Quintero, *La conciliación, el arbitraje y la transacción como métodos de resolución de conflictos administrativos*, 57 Revista de la Facultad de Derecho 13, 17 (2002).

in mind that the word "judgement" here used is to be interpreted as "assessment" or "evaluation" of the conciliator on the controversy, and not as "rule" or "decision". Therefore, conciliation is an autonomous, consensual and bilateral dispute resolution mechanism, oriented to have the parties settling their own differences with the advisory role of the conciliator.

Therefore, and based on the previous definition and considerations, we may define conciliation as an amicable, autonomous, consensual, bilateral and confidential process, through which the conflicting parties select an independent and neutral person (or persons), a conciliator, whose role is to provide his judgement and advise to the parties, in order to guide them to settle their dispute, and, if required, to propose the solutions regarded as adequate for the resolution of the dispute.

In this sense, conciliation has been considered as a mechanism to resolve disputes related to corporate governance by Runesson and Guy[97]; but, in fact, Runesson and Guy's article, albeit very profound and illustrative, interchanges the words "mediation" and "conciliation", thus mistakenly overlapping two distinct concepts. Therefore it can be inferred that conciliation has not been duly considered for corporate governance dispute resolution, since it has not been individualized nor studied apart from mediation.

Instead of recommending mediation given our previous arguments, we regard conciliation as a better mechanism for corporate governance dispute resolution and as an internal and amicable process to settle all the previously identified corporate governance-related disputes, and between the company's relevant parties.

The previous claim is based mainly on three reasons. We will address them separately. First, conciliation is a practical and comprehensive method to address corporate governance disputes; second, conciliation distances itself from the problems inherent in litigation, arbitration and mediation; third, the active role of the conciliator enhances the effectiveness of conciliation to settle corporate governance disputes. We will address them separately.

97. See Runesson and Guy, *Mediating Corporate Governance Conflicts and Disputes* at 24 (cited in note 88).

First, from our point of view, conciliation is a practical and comprehensive method to address corporate governance disputes, because is capable of being conducted inside the company, this is, as an internal corporate governance dispute resolution process or structure, and also because, different from litigation and arbitration, conciliation is not primarily circumscribed to disputes between shareholders and the Board of Directors, instead can be conducted to resolve governance-related intra-stakeholder controversies, disputes between stakeholders and the Board, and Boardroom disputes.

Indeed, conciliation can be regarded or listed within the corporate organization as the internal and amicable method by which corporate governance disputes that may arise between the company's relevant parties are addressed, thus offering the parties in conflict an internal, amicable and autonomous alternative to outside, contentious, institutionalized and heteronomous processes like litigation, arbitration and mediation. In addition, contrary to litigation and arbitration, an internal conciliation process is more inclusive and comprehensive with stakeholders, since stakeholders have no general, derivative action-alike legal remedy against the directors' wrongdoings; hence, stakeholders will be able to urge the company to conduct a conciliation process to provide immediate and effective attention to potential stakeholders' claims against the Board. The same alternative is offered to executive directors disagreeing with their colleagues within the Board of Directors on corporate affairs: with conciliation, conflicting executive directors will have an alternative to settle their disputes internally, without harming shareholders nor stakeholders, employing independent non-executive directors' services as conciliators, as it will be further elaborated.

All these reasons lead us to regard conciliation as a more practical and comprehensive method to address corporate governance disputes.

Second, conciliation distances itself from the problems inherent in litigation, arbitration and mediation. Litigation and arbitration imply a dispute is submitted to a judiciary court or an arbitral tribunal and mediation is normally conducted by an alternative dispute resolution institution. Therefore, as every institutionalized dispute, litigation, arbitration and mediation, all three entail elevated costs, delays and risks. Instead, since the idea of conciliation we submit in this article is conciliation as an internal mechanism or process within the corporate

form oriented to resolve corporate governance disputes, the costs, further delays and risks of will be substantially reduced or dispensed with.

Third and final, we believe that the active role of the conciliator enhances the effectiveness of conciliation to settle corporate governance disputes. Corporate governance disputes can be very disruptive of the company's day-to-day and they can represent a threat to the life of the corporate form; hence, they require a prompt solution. While in mediation the third party serving as mediator is compelled to refrain from issuing any judgement or solution to the controversy and litigation and arbitration require a procedure to be conducted for the judge or the arbitrators to decide on the controversy, an internal conciliation process entails an active conciliator, able to express its judgement, opinions, advice and solutions to the parties, prompting a rapid response to the dispute.

The third reason for which we regard conciliation as a better mechanism to resolve corporate governance disputes finally leads us to the main premise of this article: independent non-executive directors as conciliators.

Our framework starts from the idea of conciliation as an internal and amicable method. However, conciliation, solely or merely, is not enough. Instead, an internal corporate officer, familiarized with the company but distanced from the conflict, with the necessary attributes and skills, will be the adequate person (or persons) to serve as conciliator, without which the conciliation process will not successfully address the controversy.

Independent non-executive director agrees with such characteristics: first, they serve the company, albeit not attached to it on a permanent working relationship basis; second, they are familiarized with the company, since, as directors, they receive information and discuss corporate strategy; third, they should be necessarily distanced from the conflict in order to serve as conciliators; and fourth, they have the sufficient attributes and skills to, as previously explain, provide an effective judgement on the controversy, oriented to procure a solution to corporate governance-related disputes.

In addition to their ability and adequateness to serve as conciliators, we find that independent non-executive directors are also suitable conciliators in the light of the United Nations Commission

on International Trade Law (henceforth, UNCITRAL) rules on conciliation[98].

Indeed, Article 7 of the 1980 UNCITRAL Conciliation Rules indicates that a "conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their disputes", being these type of directors, in fact, independent and impartial, as previously explained.

Moreover, the same Article 7 of the UNCITRAL Conciliation Rules institutes that a conciliator "will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things (...) the usages of the trade concerned and the circumstances surrounding the dispute"; at this point, it has to be remembered that, as directed in the Tyson Report[99] and recognized by Pass[100], independent non-executive directors have sufficient ethical probity and aptitude and are considered a reference of those standards by many relevant parties in the corporate form, thus contributing to guide themselves as conciliators by the principles of objectivity, fairness and justice. Furthermore, their background of knowledge and experience, as well as their professionalism, give them the ability to assess the circumstances surrounding the dispute, and recommend a wiser and more comprehensive solution.

7. Conclusion

Prior to developing our framework, we found it necessary to analyze the different attributes of independent non-executive directors which deserved them their prominent role in the corporate form. We found that from three of them, their independence, background of knowledge and experience, and integrity and ethical adequateness, derives independent non-executive directors' ability to serve as conciliators for resolving corporate governance disputes.

98. UN Commission on International Trade Law, *UNCITRAL Conciliation Rules* (1980).

99. See Tyson, *The Tyson Report on the Recruitment and Development of Non-Executive Directors* at 2 (cited in note 17).

100. See Pass, *Corporate Governance and The Role of Non-Executive Directors in Large UK Companies* at 25 (cited in note 3).

In addition to the analysis of independent non-executive directors' relevant attributes, we identified three categories of corporate governance-related disputes to which our framework may be applied: first, intra-stakeholders' disputes, and disputes between the different stakeholders and the Board of Directors; second, disputes between the shareholders and the Board of Directors; third, Boardroom disputes.

Furthermore, two theoretical points were addressed: Board effectiveness and corporate governance dispute resolution, and the need to avoid litigation in order to prevent the paralysis of corporate bodies. When studying the first point, we found that the notion of Board effectiveness applied to corporate governance dispute resolution entails an internal and amicable corporate governance dispute resolution structure or process. Moreover, we determined the need to avoid any form of litigation, whether judicial litigation or arbitration, since judicial injunctions and precautionary measures combined with the elevated costs, delay and risk these contentious procedures entail, make both litigation and arbitration harmful to the company's life and standing, as well as to the shareholders' wealth.

We regarded all these previous points as necessary to develop a theoretical basis for the constructive framework we proposed. We also intended to display sufficient empirical evidence to support this basis, mainly when addressing independent non-executive directors' attributes and the different corporate governance-related disputes we identified, to which we believe our framework may offer a constructive alternative resolution method. It is worth noting that the reader may want to direct its attention to the authors to whom we refer throughout this article for more empirical evidence.

Although further work is needed to bring a more exhaustive and comprehensive framework for conciliation and the role of independent non-executive directors in resolving corporate governance disputes, our main conclusion at this point is that, independent non-executive directors can serve as conciliators for resolving corporate governance disputes, given their prominent role in the corporate form and their beneficial attributes, which, applied to that kind of controversies, translate into their ability to provide an effective judgement on the controversy.

Our framework can be summarized as it follows. Conciliation has proved itself to be a practical internal and amicable process to address

corporate governance-related disputes. On the one hand, this is due to the combination between the notion of board effectiveness applied to corporate governance dispute resolution. On the other hand, it has to be considered the need to avoid any form of litigation in order to prevent the paralysis of corporate bodies. Independent non-executive directors, given their beneficial attributes, have the ability to serve as conciliators and provide an effective judgement, aimed at advising the parties in conflict on the best solutions to address and settle their disagreements

Universal Jurisdiction and Cooperation between ICC Member States in Prosecuting Nationals of non-Member States

Shuvra Dey*

Abstract: With the advent of universal jurisdiction, member States of the ICC can bring the perpetrators of non-member States to justice or prosecute crimes that would have otherwise been inadmissible under the Rome Statute. A bystander state with no territoriality or nationality link when prosecuting under universal jurisdiction relies on the cooperation of another state where the suspect is residing or any other state where the crime took place. The cooperation takes place in multiple forms, including, but not limited to, the extradition of the suspect or the sharing of facts and evidence with the bystander state. This article scrutinizes how the existing ICC system facilitates inter-states cooperation, stressing the need for an effective mechanism that can foster a cooperative relation. It starts with examining the scope of the principle of complementarity, with particular attention to how the principle can withstand competing jurisdiction claims and promote a system of cooperation under which the ICC and the domestic jurisdictions positively complement each other through mutual support and assistance. Finally, it analyzes the resonance of the procedures adopted by the Assembly of the State Parties that can possibly be used to promote inter-state interactions and encourage the requested state to comply with the cooperation request of the bystander state.

Keywords: Subsidiary universal jurisdiction; horizontal complementarity; positive complementarity; obligation to cooperate; non-Member States.

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1. Introduction: Universal Jurisdiction and the Prosecution of Nationals of non-Member States

The International Criminal Court (ICC) is a permanent court established by the Rome Statute to prosecute international crimes committed in the territory of a State Party (*ratione loci*) or by a person who is national of a State Party (*ratione personae*)[1]. The ICC can only prosecute nationals of non-State Party if that state accepts the jurisdiction of the Court with respect to the crime in question under Article 12(3) of the aforementioned Statute, or the situation is referred to the Court by the Security Council[2], or at least part of the conduct takes place in the territory of a State Party[3]. On the contrary, if there is

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Disclaimer: for the purpose of this article, the expressions "Member State", "State Party" and the word "State" (with the capital letter) are used to refer to States which are parties of a particular institution (being it, for example, the International Criminal Court or the European Union, as infra specified), while the word "state" (with the lowercase letter) refers either to a country which is not part of such institution or to countries in general.

1. The International Criminal Court (ICC) is founded through the adoption of a treaty which took effect in 2002, upon ratification by 60 states; see the Rome Statute of the International Criminal Court, 17 July 1998, No.38544 (entered into force on 1 July 2002) [*hereinafter* Rome Statute].

2. Id, art. 13 (b).

3. The Pre Trial Chamber III observed that "...at least part of the conduct (i.e. the *actus reus* of the crime) must take place in the territory of a State Party. Accordingly, provided that part of the *actus reus* takes place within the territory of a State Party, the Court may thus exercise territorial jurisdiction within the limits prescribed by customary international law." See the *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of*

no territorial or nationality link or the state does not accept the jurisdiction and there is no Security Council referral, the perpetrators of a non-State Party remain immune from the prosecution of the ICC[4].

A number of scholars stressed that, had the ICC been granted universal jurisdiction, it is possible that this would have externalized its jurisdiction far beyond State Parties and enabled the Court to prosecute crimes irrespective of the place of occurrence or the nationality of the perpetrator[5]. Although the universal jurisdiction was not granted to the ICC, the drafters of the Rome Statute did not restrict the right of its member states to utilize such jurisdiction; rather it is provided that every state has the duty to "exercise its criminal jurisdiction over those responsible for international crimes" and take measures at the national level to ensure "effective prosecution" of such crimes[6]. Furthermore, the Preamble of the Statute clearly stated that "the most serious crimes of concern to the international community as a whole must not go unpunished", meaning that such crimes must be punished no matter where they take place.

The territoriality and the nationality principle that limit and shape the jurisdictional apparatus of the ICC, cannot motivate the restriction

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Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, 27, para 61 (14 November 2019).

4. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction,* in Antonio Cassese, Paula Gaeta, and John RWD Jones , *The Rome Statute of the International Criminal Court: A Commentary,* 583, 612 (Oxford University Press 2003). Olympia Bekou and Robert Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*, 56 International and Comparative Law Quarterly 49, 51 (2007), available at https://corteidh.or.cr/tablas/R06755-2.pdf (last visited April 19, 2021).

5. Bekou and Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?* at 52 (cited in note 4); Hans-Peter Kaul considered the rejection of universal jurisdiction as a 'painful weakness' of the ICC regime; see Kaul, *Preconditions to the Exercise of Jurisdiction,* at 613 (cited in note 4). Likewise, Leila Nadya Sadat stressed that, due to the jurisdictional provisions of the Statute, 'many of the most egregious cases will not be prosecuted by anyone'. See also Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* at 118 (Martinus Nijhoff 1st ed. 2002).

6. See the Preamble of the Rome Statute (cited in note 1). However, the obligation to prosecute international crimes (e.g. war crimes) can be traced back to customary international law, and therefore existed even before the adoption of the Rome Statute; see Jean-Marie Henckaerts and Louise Doswald-Beck, 1 *Customary International Humanitarian Law* (Cambridge University Press, 2005). See also Art. 49,Geneva Convention (I) 1949.

of the national criminal jurisdiction when it comes to the prosecution of international crimes; the states can actually investigate and prosecute under the authority of universal jurisdiction which allows any state "to bring criminal proceedings in respect of international crimes irrespective of the location of the perpetration of the crimes and the nationality of the perpetrator or the victims"[7]. The principle of universal jurisdiction, therefore, can be used as a strong basis to prosecute crimes committed even by the nationals of a non-State Party or the crimes which are otherwise inadmissible under the Statute of the Court. It is particularly worth mentioning here that the jurisdiction of the States to prosecute crimes committed by non-nationals (in the territory of another State) "must be governed by clear rules" and the standards recognized under international law[8]. So, when a State wants to prosecute a crime on the base of universal jurisdiction, international law requires that the alleged offender must be present in its territory[9]. In the absence of the alleged offender (non-national), the prosecuting State can only initiate investigation and request for extradition[10].

However, a number of states not party to the Rome Statute have experienced, or have been experiencing, serious violation of human rights and humanitarian abuses during the armed conflicts which the ICC has manifestly failed to address, due to the lack of its jurisdiction. For instance, the ICC could not start an investigation into the crimes

7. Zdzislaw Galicki, *Preliminary Report of the Special Rapporteur on the Obligation to Extradite or Prosecute,* International Law Commission U.N. A/CN.4/571, 6 (2006), available at https://digitallibrary.un.org/record/578129 (last visited April 19, 2021); see also Evelyne Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* at 278 (Cambridge University Press, 2015).

8. See Institute of International Law - Krakow Session *Universal criminal jurisdiction with regard to the crime of genocide,crimes against humanity and war crimes* (Aug 26, 2005). available at https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf (last visited April 19, 2021).

9. Id. paragraph 3(b).

10. Id. It is highly contentious whether the universal jurisdiction *in absentia* is prohibited under international law or not. It is suggested that a state must not exercise universal jurisdiction *in absentia* "where there is a "general" prohibitive rule under international law to that effect"; see Mohamed El Zeidy, *Universal Jurisdiction In Absentia: Is It A Legally Valid Option for Repressing Heinous Crimes?* (Oxford University Comparative Law Forum (2003), available at https://ouclf.law.ox.ac.uk/universal-jurisdiction-in-absentia-is-it-a-legally-valid-option-for-repressing-heinous-crimes/ (last visited April 19, 2021).

taking place in Syria as it is not a party to the Rome Statute, and a referral to the Court by the UN Security Council was blocked by Russia and China[11]. But the non-membership to the ICC or the non-referral of a situation is not, or should not be the ground for impunity. The states frequently exercise universal jurisdiction and initiate measures at the national level to bring an end to such impunity. With respect to the situation in Syria, the German Federal Public Prosecutor (*Generalbundesanwalt*), on the basis of the principle of universal jurisdiction, opened investigations focusing on Jamil Hassan as one of the Syrian officials responsible for committing international crimes in Syria, and on 8 June 2018, the Federal Court of Justice (*Bundesgerichtshof* – BGH) issued an arrest warrant against him[12]. Also the Higher Regional Court in Koblenz (*Oberlandesgericht* Koblenz) recently charged two former members (Anwar R. and Eyad A.) of the Syrian General Intelligence Service for crimes against humanity[13]. The trial started on 23 April 2020 and it is the first trial initiated under the authority of the principle of universal jurisdiction against the officials of President Assad's regime, who are suspected to be complicit in the torture of many people in Syria[14]. Up until now, the Court has convicted one accused, Eyad A., and sentenced him to four and a half years in prison due to his role in aiding and abetting the torture of detained protesters in Damascus.

Complaints against Syrian officials have also been filled in some other states (i.e. Lebanon, United States, France and Spain). These complaints were filled in either for the assassination of the citizen of

11. Security Council, Department of Public Information, *Referral of Syria to International Criminal Court fails as negative votes prevent Security Council from Adopting Draft Resolution,* SC/11407, (May 22, 2014), available at https://www.un.org/press/en/2014/scl1407.doc.htm (last visited April 19, 2021).

12. *German Authorities Issue Arrest Warrant Against Jamil Hassan, Head of the Syrian Air Force Intelligence* (ECCHR, August 2019) available at https://www.ecchr.eu/en/case/german-authorities-issue-arrest-warrant-against-jamil-hassan-head-of-the-syrian-air-force-intelligence/ (last visited April 19, 2021).

13. Elisabeth Baier, *A puzzle coming together – The henchmen of Assad's torture regime on trial in Germany,* Völkerrechtsblog (April 22, 2020), available at<https://voelkerrechtsblog.org/a-puzzle-coming-together/> (last visited April 19, 2021).

14. *First criminal trial worldwide on torture in Syria before a German Court,* ECCHR (2021) Available at <https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/> (last visited April 19, 2021).

those states or on the basis of universal jurisdiction. There are also instances where two states issued separate arrest warrants against the same official of the Syrian Air force Intelligence[15]. In such circumstances, when multiple authorities assert jurisdiction over the same case, a question always remains as to which state will have the priority to prosecute.

Since the State Parties enjoy vast discretion in terms of initiating criminal proceedings based on universal jurisdiction, there is always the possibility that multiple institutions will have con icting, competing, or concurrent jurisdiction over the same disputes[16]. Hence, in order to minimize this kind of competing claims, it is essential to increase mutual respect and cooperation between the State Parties. In fact, from a practical standpoint, a success of universal jurisdiction mostly depends on the cooperation of the states where the crime has taken place or of any other state where the suspect is residing[17]. The territorial state plays an important role in this activity, since it has direct access to the facts and evidence, and it can substantially contribute to the forum state's investigation by sharing that evidence. Moreover, for the execution of international arrest warrants and extradition of the suspect, a forum state highly relies on the assistance of the custodial state. What this article mainly aims to do is to discuss how these cooperative interactions between the State Parties are being facilitated within the ICC system, analyzing the topic from a normative ground, while also searching for effective mechanisms that can further facilitate inter-state cooperation.

2. Universal Jurisdiction and the Obligation to Cooperate

The legal principle of universal jurisdiction may either allow or require a state to bring criminal proceedings in respect of international

15. In October 2018, right after four months of the issuance of arrest warrant by the German Federal Court of Justice, French authorities also issued the same against Jamil Hassan (head of the Air Force Intelligence Directorate) and two other officials of the Syrian security services.

16. Brandeis Institute for International Judges, *The International Rule of Law: Coordination and Collaboration in Global Justice,* Brandeis University (2012).

17. Bekou and Cryer at 61(cited in note 4).

crimes, [18]"regardless of the location of the crime and the nationality of the perpetrator or the victim"[19]. The rationale behind the principle is profound: certain crimes are so grave and harmful to the international interest that the perpetrators must not go unpunished[20]. In order words, the principle requires every state to exercise its criminal jurisdiction over those responsible for such heinous crimes.

It is generally true to say that the implementation of the principle of universal jurisdiction mostly depends on the cooperation of other States. Since the crimes are generally committed with no nexus to the forum state - to carry out the preliminary investigation - the forum state itself relies on the cooperation of "the State where the alleged crime was committed or of any other State where complaints have been filed in relation to the case"[21]. The authorities of those States generally conduct the preliminary inquiry and collect facts and evidence, e.g. documents and witness statements[22]. To frame charges and prosecute the perpetrator, the judicial institutions of the forum State need to have access to those facts and evidence.

Based on these facts and evidence, if the prosecuting authority of the forum State finds a reasonable basis to proceed, and the alleged

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18. To constitute international crime, as has been reflected in the views of Evelyne Schmid, "international law must either directly establish criminal liability at the international level or require states to criminalise conduct in domestic criminal law"; see Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* at 63 (cited in note 7).

19. Kenneth C. Randall, *Universal jurisdiction under International law*, 66 Texas Law Review 785–8 (1988); See also International Law Association Committee on International Human Rights Law and Practice, *Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences* (ILA London Conference, 2000). See further, Mary Robinson, '*Foreword,*', in *The Princeton Principles on Universal Jurisdiction* 16 (Princeton University Press, 2001), available at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf (last visited April 19, 2021).

20. Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?* 88,(862) International Review of the Red Cross 375, 378 (2006).

21. Final Report of the International Law Commission,International Law Commission, *The obligation to extradite or prosecute* (*aut dedere aut judicare*) - *Final Report of the International Law Commission*, in 2 *Yearbook of the International Law Commission* vol. II Final Report of the International Law Commission, Yearbook of the International Law Commission 9 (2014), available at https://legal.un.org/ilc/texts/instruments/english/reports/7_6_2014.pdf (last visited April 19, 2021).

22. Id at 9.

perpetrator is not present in their territory, the prosecuting authority normally issues an international arrest warrant; or, if the perpetrator happens to be in the custody of any other State, the forum state requests to the custodial state to extradite him[23]. Extradition of the perpetrator is thus one of the fundamental aspects that influence much of the success of universal jurisdiction.

The obligation to extradite or prosecute (*aut dedere aut judicare*) is one of the recognized principles of international law that entails the responsibility of the state to either prosecute or extradite the perpetrator[24]. This principle is intrinsically connected to and supportive of the principle of universal jurisdiction and shares with it a common goal, which is to fight against impunity. Practically speaking, a considerable amount of cooperation between the states is a necessity for the effective implementation of both of the principles[25].

2.1 The ICC and the Application of the Principle of Universal Jurisdiction

The statute of the ICC adheres to the principle of complementarity, which states the priority to exercise jurisdiction, meaning a "functional principle" aimed at granting jurisdiction first to the

23. To read about universal jurisdiction and its relationship to the obligation to extradite or prosecute, see Matthew Garrod, *Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and Universal Jurisdiction in the Light of the Habre Case*, 59 Harvard International Law Journal 1, 125 (2018), available at http://sro.sussex.ac.uk/id/eprint/70382/1/UNRAVELLING%20THE%20CONFUSED%20RELATIONSHIP%20BETWEEN%20TREATY%20OBLIGATIONS%20TO%20EXTRADITE%20OR%20PROSECUTE%20AND%20UNIVERSAL%20JURISDICTION.pdf (last visited April 19, 2021).

24. *The obligation to extradite or prosecute* at 9 (cited in note 21). Also see International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ Reports 2012, available at https://www.icj-cij.org/en/case/144 (last visited April 19, 2021).

25. The relation between *aut dedere aut judicare* principle, and the obligation to cooperate can be indentified in the Preamble to the ICC Statute: 'Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'; see the Preamble of the Rome Statute (cited in note 1).

member States[26]; only when the member States are "unwilling or unable genuinely to carry out the investigation or prosecution", the ICC will intervene to carry out the proceedings[27]. In other words, the ICC empowers its State Parties to investigate and prosecute first, whereas, it only works as a Court of last resort. Taking this aspect into consideration, Xavier Philippe implies that the principle of complementarity the ICC follows is based on "a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction"[28]. To put it another way, the principle of complementarity confers the State Party the right to exercise universal jurisdiction and to take effective measures at the national level. Under both principles, the "national justice systems have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws"[29].

Nonetheless, unlike the principle of complementarity, universal jurisdiction offers unprecedented discretion to the states, enabling them "to prosecute international crimes independently from any link to their territory or nationals"[30]. As a result, there is a likelihood that multiple states would simultaneously assert jurisdiction over the same case. Thus, universal jurisdiction is a much debated concept as "it has the capacity to infringe state sovereignty and cause positive jurisdiction conflicts"[31].

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26. Bartram S. Brown, *Primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals,* 23 Yale Journal of International Law 386 (1998) available at https://digitalcommons.law.yale.edu/yjil/vol23/iss2/3/ (last visited April 19, 2021); See Philippe, *The Principles of Universal Jurisdiction and Complementarity* at 380 (cited in note 20).

27. Rome Statute art.17 (cited in note 1).

28. Philippe, *The Principles of Universal Jurisdiction and Complementarity* at 380 (cited in note 20).

29. See *ibid.*

30. Christopher K. Hall, *The Role of Universal Jurisdiction in the International Criminal Court Complementarity System*, in Morten Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes* at 205 (FICHL Publication, 2010) available at https://www.toaep.org/ps-pdf/7-bergsmo (last visited April 19, 2021).

31. Jo Stigen, *The Relationship between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core Crimes*, in Morten Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes* at 13 (FICHL Publication 2010) available at https://www.toaep.org/ps-pdf/7-bergsmo (last visited April 19, 2021); George Fletcher, *Against Universal Jurisdiction*,1 Journal of International

To avoid possible conflicts, and ensure an effective implementation of universal jurisdiction, a small number of states have enacted a subsidiarity system, pursuant to which the prosecuting authorities can only initiate criminal proceedings if the territorial state does not genuinely prosecute itself[32]. According to this principle of subsidiary universal jurisdiction, "the priority of prosecution should be given to the states having a direct link to the crimes due to the territoriality or nationality of the perpetrator"[33]. A third state can only proceed if the

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Criminal Justice 580 (2003) available at https://watermark.silverchair.com/mqg039.pdf?token=AQECAHi208BE49Ooan9kkhW_Ercy7Dm3ZL_9Cf3qfKAc485y-sgAAApswggKXBgkqhkiG9w0BBwagggKIMIIChAIBADCCAn0GCSqGSIb3D-QEHATAeBglghkgBZQMEAS4wEQQMH3ZL9PqavRF6f2mWAgEQgIICT-s7TK1mtNJgUmiKrXTrldTKxkWuyaLrau4pjgOTFYlY-am8FJgB9Jz7lMteTX-QiF-kaoJ6oTNqPgXBeKzoaSJoFLZ00FJtZ8wyVD-CHAymTuGFT15D8BR-ZIWdC5YyOlXXmyQvwVQ69oqyYiGE0G4-CO6Ozcdp8RIIpTgwvTqK6dq-gj6ki6rlKG5VSWnOAmRXSJKN6Muk5gbvvBzPwYD5B0mrluRN6krkbjG51kIR-5CleC6O7rbfAdCkjOLbshfqsAKNWVLPGvgVNPp0gVeIbmFgcp_uM7K-1Dlje-p5MX5g00YI0lKEXlsTAEaajtzKgv566uU9m4dVz-qrHEaXYSnGw3Q0Lt-dlpueY_FQ0uaRb839-EN3MGcpspjNRnr5S_nCVygrC0PPa5VcUw04FIeq2oPtY-boGxL8vGMYOfZdgZnbqfe27uyN2g6f96OJw1B0jvweecYSPHxsLocnK-MFzvr-l29nDTHbFmzArRWoq_Hqg5zdc917szweLbz2bwckLbWeFF6o1x8chURA_AH-2qoJntsmOaiblfWbW9PFKPkI8QX8Sl575RY5b3j7xlPZhk7UzL3QUzCwkbgPfIl-f-cPxIOsEZ8mhdsHJYReHtx18kvC5fc5b8uDPfp9XIILA-vvsfEJmgYipvc0pEllZ-VaOsw22Uct0OuC8-c7CvyEQ7pzhLwZ7yN_n-q91eyUG3w8QEMssdFSN-4Cs2LwJAsy6ik8DKfLlR-raA5spyJ-s5kaGx3_9pGcKlDIxqh_mFA4ItbYG-4Va2-Da8ZsUXzf3h (last visited April 19, 2021); See further Cedric Ryngaert, *Complementarity in Universality Cases: Legal-System and Legal-Policy Considerations,* in Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes,* at 197 (FICHL Publication 2010) available at https://www.toaep.org/ps-pdf/7-bergsmo (last visited April 19, 2021); Laura Burens, *Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International Criminal Court*, Criminal Law Forum 76 (2016), available at https://link.springer.com/content/pdf/10.1007/s10609-016-9272-9.pdf (last visited April 19, 2021).

32. To read about Spanish, Belgium and German subsidiarity principle, see Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 Michigan Journal of International Law 932, 949 and 954 (2008-9) available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1137&context=mjil (last visited April 19, 2021); See Rosa Ana Alija. Fernández, *The 2014 Reform of Universal Jurisdiction in Spain,* 13 at 717 (Zeitschrift für Internationale Strafrechtsdogmatik 2014); See also *Burens* at 77 (cited in note 31).

33. To read more about the idea of subsidiarity, see K. Hall (cited in note 30); Claus Kreß, *Universal Jurisdiction over International Crimes and the Institut de droit*

territorial state or the state of nationality is "manifestly unwilling or unable" to prosecute the perpetrator[34].

It seems that the principle of subsidiary universal jurisdiction and the principle of complementarity have conceptual similarities since both of the principles deal with the priority among several authorities in terms of exercising jurisdiction. But they cannot be equated so easily since, on the one end, the subsidiary universal jurisdiction deals with a horizontal relationship between the states and, on the other hand, the complementarity principle of the ICC system regulates a vertical relation between the State Parties and the ICC. Essentially, the vertical complementarity as prescribed by the Rome Statute cannot fix the horizontal jurisdiction conflicts between the State Parties. But if the ICC's vertical complementarity system could be turned into a horizontal one, this would minimize much of the clashes and help ensure a coherent application of the principle of subsidiary universal jurisdiction.

2.2 Subsidiary Universal Jurisdiction and Horizontal Complementarity

Since universal jurisdiction entails a non-binding duty of states to prosecute international crimes, naturally, a question would arise about which of the member States will perform the duty and which of the other states will have the duty to cooperate in that process. Here comes the relevance of the concept of subsidiary universal jurisdiction according to which the priority of prosecution should be given

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international, 4 JICJ 561, 580 (2006), available at https://academic.oup.com/jicj/article-abstract/4/3/561/814320?redirectedFrom=PDF (last visited April 19, 2021); Antonio Cassese, *Is the Bell Tolling for Universality? A plea for a Sensible Notion of Universal Jurisdiction*, 1 JICJ 589, 593 (2003), available at https://academic.oup.com/jicj/article-abstract/1/3/589/2188870?redirectedFrom=fulltext (last visited April 19, 2021); Fannie Lafontaine, *Universal Jurisdiction—the Realistic Utopia*, 10 JICJ 1277, 1280 (2012) available at https://academic.oup.com/jicj/article-abstract/10/5/1277/817161 (last visited April 19, 2021); See also *Burens* at 77 (cited in note 31).

34. Florian Jeßberger, Wolfgang Kaleck and Andreas Schueller, *Concurring Criminal Jurisdictions under International Law*, in Bergsmo,), *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes,* at 239 (FICHL Publication 2010) available at https://www.toaep.org/ps-pdf/7-bergsmo (last visited April 19, 2021); See also *Burens* at78 (cited in note 31).

to the states with a direct connection to the crime[35]. Intriguingly, the notion of subsidiary universal jurisdiction is nothing but corollary to the principle of horizontal complementarity, which also entails the priority of nexus states to prosecute international crimes. The principle of horizontal complementarity implies that the jurisdiction of the bystander state that has no link to the alleged crime is complementary to the jurisdiction of the territorial or national state[36]. Accordingly, the bystander states shall exercise jurisdiction only if the territorial or national state (nexus state) is unwilling or unable to carry out its duty to prosecute[37].

However, the fundamental concern that is likely to be encountered is the normative basis of this concept since international law is still evolving in terms of recognizing the principle of horizontal complementarity. Although there is hardly any codified law, the Resolution of the Institute of International Law adopted in 2005 seems to be the core legal basis that endorsesd the applicability of the complementarity principle on the inter-state level[38]. According to Paragraph 3 (c) of the Resolution, any State having custody of the alleged perpetrator, before commencing the trial based on universal jurisdiction, asks the territorial or nationality State "whether it is prepared to prosecute that person". Only if "these States are manifestly unwilling or unable to do so", the custodial State commences the trial[39].

This clause of the resolution is unique and peculiar to the general understanding of international law because, under classic international law, the inter-state jurisdictions are mainly concurrent and not

35. The presence of the suspect on the territory of a state may also help to prove certain amount of connection to the alleged crime which may provide a basis to exercise universal jurisdiction, see Julia Geneuss, *Fostering a Better Understanding of Universal Jurisdiction*, 7 JICJ 945, 956 (2009).

36. Carsten Stahn and Mohamed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, at 857 (Cambridge University Press, 2011).

37. Stigen at 133 (cited in note 31); see also Burens, *Universal Jurisdiction Meets Complementarity* at 85 (cited in note 31).

38. See Institute of International Law - Krakow Session, *Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes* (cited in note 8).

39. Id at para 3(c).

complementary to each other[40]. It is due to the sovereign power and equal rights of every state to exercise its national jurisdiction independently of the interference or claims of another state. Practically speaking, any state can assert jurisdiction over a specific case and is not bound to defer that case to the nexus state unless there exists any other treaty obligation between them.

At this juncture, it seems important to rethink whether the classic understanding of inter-states relationships might have changed based on the fact that the states have become members of the ICC[41]. Simply put, one may wonder whether the member States by ratifying the Statute have also indirectly accepted the complementarity regime on the inter-state level. It is worth mentioning here that the Rome Statute is non-self-executing and "does not lead to an automatic transformation of the vertical complementarity system into a horizontal one"[42]. But, of course, the Statute can provide a solid basis for the states to incorporate the principle into their national laws and apply in shaping horizontal (inter-state) relations.

A small number of states have already enacted a subsidiarity system that equally serves the goal of horizontal complementarity[43]. Germany is one of the few countries that introduced a subsidiarity system in terms of applicability of universal jurisdiction. The Code of Crimes against International Law (Volkerstrafgsetzbuch) in conjunction with the relevant provisions of the Code of Criminal Procedure (Strafprozessordnung, 'StPO') offers a comprehensive framework and empowers the German courts to investigate and prosecute based

40. Ryngaert, *Horizontal Complementarity* at 858 (cited in note 36); see also Rod Rastan, *Complementarity: Contest or Collabortion?* in Morten Bergsmo, *Complementarity and the Exercise of Universal Jurisdiction for Core Crimes,* at 98 (FICHL Publication 2010) available at https://www.toaep.org/ps-pdf/7-bergsmo (last visited April 19, 2021); see further *Burens*, *Universal Jurisdiction Meets Complementarity* at 81 (cited in note 31).

41. See *ibid.*

42. See *ibid;* Ryngaert, *Legal-System and Legal-Policy Considerations* at 177 (cited in note 31).

43. Belgium, Spain and Germany are at the forefront of introducing a subsidiary system; see Preliminary Title of the Belgian Code of Criminal Procedure, Art. 10, 1bis, and Art. 12bis.

on universal jurisdiction[44]. But the StPO provides that "the federal prosecutor (Generalbundesanwalt) can renounce the prosecution of an act under the Volkerstrafgesetzbuch if that act is prosecuted by a state on whose territory the offence was committed (the territoriality principle), whose national is suspected of having committed it (the nationality principle), or whose national was harmed by it (the passive personality principle)"[45]. The federal prosecutors are therefore vested with the discretion to renounce the prosecution of an act if it does not have any connection with the interest of Germany, meaning that the priority of the prosecution has been given to the state with a direct link to the crime. In doing so, Germany appears to implement the complementarity principle of the Rome Statute at the state level and to give it a horizontal effect[46]. Likewise, in 2014, Spain adopted a new law that limits the extent of universal jurisdiction under which Spanish courts can prosecute international crimes committed abroad. A prosecution can only take place if the suspect is a Spanish citizen, a foreigner residing in Spain (habitual residence) or a foreigner whose extradition has been denied by Spain[47]. It means that the Spanish authority will not initiate any proceeding, or defer the case if the foreign suspect has no connection with its territory, or resides in the territory of other states. However, one thing that is common to these legislations is that the priority of prosecution has been given to states having a direct connection to the crime; in doing so, the states uphold the principle of subsidiarity, demonstrating commitment to complement other states with a closest link to the crimes. The concern here is whether the states adopting the subsidiarity system are actually obliged to perform the complementarity role, since the very decision as to whether the forum state should be required or only advised to proceed is highly

44. Code of Crimes against International Law (*Volkerstrafgesetzbuch*) (2002). Ryngaert, *Horizontal Complementarity* at 869 (cited in note 36).

45. German Code of Criminal Procedure section 153(f)(2)(4); Ryngaert, *Horizontal Complementarity* at 869 (cited in note 36). For a general overview of the universal jurisdiction in Germany, see Cedric Ryngaert, *Universal Jurisdiction over Violations of International Humanitarian Law in Germany*, 47 (The Military Law and the Law of War Review 2008) available at http://www.ismllw.org/REVIEW/2008%20ART%20Ryngaert.php (last visited April 19, 2021).

46. Ryngaert, *Horizontal Complementarity* at 869 (cited in note 36).

47. Art. 23 § 4 (LO 1/2014). For more, see Fernández at 717 (cited in note 32).

discretional[48]. As discussed above, the federal prosecutor holds enormous discretion to renounce the prosecution. Therefore, in the absence of any territorial or nationality link, a mere unwillingness or inability of the nexus state does not create any binding obligation on the part of the prosecutor and courts of forum state to prosecute the alleged crime. So the complementarity principle appears to provide only a non-binding guideline for the judicial institutions of third state[49] and the benefit it brings in terms of inter-state relations is more nuanced.

2..3 Positive Complementarity and a System of Cooperation

At this point, what is relevant for our purposes is to find out whether the complementarity principle can provide a basis to ensure cooperation between the national authorities of the member States. First of all, it is important to mention that the system of cooperation under part 9 of the Rome Statute is not construed in a one-sided fashion, rather based on the premise that the ICC and the domestic authorities will mutually support each other in the process of ending impunity[50]. This idea of mutual support is grounded on the principle of positive complementarity, meaning that the Court and the States will complement each other in a positive manner through mutual assistance and cooperation[51]. "Positive' complementarity requires the Court and the domestic jurisdictions to work together, share burden and cooperate with a view to facilitate effective investigations and prosecutions[52]. In Carsten Stahn's words, it provides "a means to institutionalize a multidimensional system of cooperation under which the ICC and domestic jurisdictions operate as part of a joint network"[53]. Intriguingly, this multidimensional system of cooperation does not only include

48. Stigen at 148 (cited in note 31).

49. Ryngaert, *Horizontal Complementarity* at 872 (cited in note 36).

50. Id at art. 93(10). Carsten Stahn, *Taking complementarity seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity* in Carsten Stahn and Mohamed M El Zeidy, 2 *The International Criminal Court and Complementarity: From Theory to Practice* 249 (Cambridge University Press, 2011).

51. Stahn, *Taking complementarity seriously at* 260 (cited in 50).

52. Ryngaert, *Legal-System and Legal-Policy Considerations* at 175 (cited in note 31).

53. Stahn, *Taking complementarity seriously at* 263 (cited in note 50).

cooperation between the ICC and the State, but also involves inter-state interactions and assistance[54]. It is also suggested that the actual assistance should "as far as possible be delivered through cooperative programmes between states themselves, as well as through international and regional organisations and civil society"[55]. Such mutual co-operation and assistance are crucial for enabling domestic courts to ensure effective prosecution based on universal jurisdiction[56].

The modalities of inter-state assistance of which may include, but are not limited to the sharing of information and evidence, the transfer of criminal proceedings, or other forms of assistance. There are some instances of bystander states requesting information about investigation and prosecution which the nexus states have conducted. For instance, in 2009, Spain, asked Israel to inform it about any investigations carried out by Israel in relation to a number of senior Israeli military officers against whom a Spanish human rights group had filed a case[57]. After investigating, Judge Andreu later determined that the documents forwarded by the Israeli embassy in Madrid made it clear

54. The concept of 'positive complementarity' was significantly developed after the Review Conference took place in Kampala, Uganda. During the 8th Session of the Assembly of States Parties to the Rome Statute (ASP), the Bureau presented a report, providing that the State Parties may "even better, more targeted and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions"; See Resolution ICC-ASP/8/Res.9, Review Conference, at 21 (adopted on March 25, 2010). Also see Resolution RC/Res.1 (adopted on 8 June 8, 2010).

55. ICC Assembly of States Parties, *Report of the Bureau on Stocktaking: Complementarity, Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap*, at 4, (ICC-ASP/8/51, 2010) available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf (last visited April 19, 2021); see also Stahn, *Taking complementarity seriously at* 264 (cited in note 50).

56. Rastan, *Complementarity: Contest or Collaboration?* at 125 (cited in note 40), where he stressed that, "interaction between and within competent national authorities augments the scope for complementary support for the ICC"s own investigative efforts. International cooperation between different jurisdictions may also increase the efficiency and viability of launching criminal proceedings on the basis of universal jurisdiction".

57. Ryngaert, *Horizontal Complementarity* at 865 (cited in note 36). For a discussion about the *Shehadeh* case, see S. Weill, *The Targeted Killing of Salah Shehadeh. From Gaza to Madrid,*7 JICJ 617 (2009) available at https://academic.oup.com/jicj/article-abstract/7/3/617/864382 (last visited April 19, 2021).

that Israel was not willing to prosecute the officers[58]. There are also instances of nexus states cooperating with the request of bystander states that have launched criminal proceedings based on universal jurisdiction. For example, in prosecuting Rwandan *Génocidaires*, bystander states, such as Belgium, have greatly benefited from the assistance of Rwanda. But it is not always the case that the nexus state responds positively, as sometimes it shows unwillingness or refuses to assist. Such lack of cooperation and collaboration has been evident in the attempts to prosecute former Chadian dictator Hissène Habré[59]. The Belgium Court asserted universal jurisdiction over the case, and requested Senegal to extradite him to Belgium. Senegal, which has been Habré's place of residence since 1990, refused[60]. Later, he was prosecuted by the Extraordinary African Chambers (EAC) and sentenced to life in prison. However, had there been the applicability of complementarity principle at the inter-state level, this kind of conflicting claim could have been resolved in an amicable manner.

Legal Basis: Although the 'positive complementarity' is not expressly regulated, it is "embedded in the structure of complementarity" rooted in the provisions of the Rome Statute[61]. It was mainly formulated as one of the fundamental principles of Prosecutorial Strategy[62]. The Office of the Prosecutor (OTP), as a part of the prosecutorial strategy, adopted "a *positive approach* to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation"[63]. The main goal of OTP's participation

58. Ryngaert, *Horizontal Complementarity* at 865 (cited in mote 36). To read the original Order, see *Preliminary Report 157/2.008-G.A.*, Audencia Nacional, (29 January 2009).

59. Brandeis Institute for International Judges (cited in note 16).

60. See *ibid*.

61. See Rome Statute, Art 17 and Art. 53, they may offer a normative space for positive complementarity; see Stahn, *Taking complementarity seriously at* 265 (cited in note 50).

62. *Report on Prosecutorial Strategy,* at 4-5 (Office of the Prosecutor, (September 2006) available at https://www.icc-cpi.int/nr/rdonlyres/d673dd8c-d427-4547-bc69-2d363e07274b/143708/prosecutorialstrategy20060914_english.pdf (last visited April 19, 2021).

63. Id at 5; see The Office of the Prosecutor, *Prosecutorial Strategy (2009-12),* at 5 (Office of the Prosecutor, February 2010) available at https://www.icc-cpi.int/nr/

in a system of cooperation is to promote national proceedings as it is the national authority that bears the primary responsibility to conduct investigation and prosecution.

However, the *positive approach* to complementarity, that formed part of the prosecutorial strategy, received a new dimension during the Review Conference held in Kampala, Uganda[64]. Throughout the conference, the term was used "to refer to the involvement of States, international organisations and civil society in strengthening justice at the national level"[65]. The outcome was reflected in the Resolution adopted by the Review Conference, which recognizes "the desirability for States to assist each other in strengthening domestic capacity to ensure" effective investigations and prosecutions of international crimes[66].

This Resolution was a formal recognition of how the principle of positive complementarity encourages inter-state cooperation, aiming to support the national jurisdictions to conduct genuine investigations and trials of the core international crimes. Interestingly enough, the Rome Statute also facilitates a positive form of cooperation. Preambular paragraph 4 of the Statute provides : "effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". The Statute, by introducing the term "international cooperation", seems to have widened the scope, encouraging both vertical and horizontal forms of cooperation between the Court and State Parties, and other stakeholders, including international organizations and civil society.

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rdonlyres/66a8dcdc-3650-4514-aa62-d229d1128f65/281506/otpprosecutorialstrategy20092013.pdf (last visited April 19, 2021).

64. The foundations for the Review Conference discussion on complementarity can be found in the 8th Session of the Assembly of States Parties to the Rome Statute (ASP); see Resolution ICC-ASP/8/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, (adopted on November 26, 2009).

65. Bergsmo, ì Bekou and Jones, *Complementarity after Kampala: Capacity Building and the ICC's Legal Tools*, 2 Goettingen Journal of International Law 791, 793 (2010) available at https://www.legal-tools.org/doc/067928/pdf/ (last visited April 19, 2021).

66. See Resolution RC/Res.1, para 5 (cited in note 54).

3. Cooperation between the ICC Member States

In the absence of ICC jurisdiction over the nationals of non-Member States, the Member States often invoke universal jurisdiction and, thus, use their domestic judicial systems to prosecute these perpetrators. However, a domestic court naturally faces challenges in conducting a fair trial in an extraterritorial case if the alleged perpetrator is in the custody of another state which is unwilling to extradite him. A lack of cooperation in collecting and sharing the evidence on the part of the territorial state would also make prosecutions difficult. Therefore, a strong cooperation regime within the member states is essential for the prosecution of nationals of non-member states[67].

The Rome Statute introduces a sophisticated regime of cooperation, underpinned by Article 86, which entails an obligation on the part of the state authority to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court"[68]. The Statute encompasses general provisions on how requests for cooperation should be made[69]; provisions on arrest and surrender as a form of cooperation[70]; and provisions on cooperation with respect to waiver of immunity and consent to surrender[71], as well as other forms of cooperation[72].

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67. For an in-depth analysis of the importance of cooperation between the ICC and the states, see Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 European Journal of International Law, 2, 13, (1998), available at http://ejil.org/pdfs/9/1/1477.pdf (last visited April 19, 2021); James Crawford, *An International Criminal Court?*, Connecticut Journal of International Law, 12, 1997, pp. 255-256.

68. Seventeen provisions of the Rome Statute deal with cooperation and they are included in Part 9 of the Statute. See Bekou and Cryer, *The International Criminal Court and Universal Jurisdiction: A Close Encounter?*at 63 (cited in note 4); Dire Tladi, *When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic*, 7 African Journal of Legal studies 381, 386-390 (2014) available at https://brill.com/downloadpdf/journals/ajls/7/3/article-p381_5.pdf (last visited April 19, 2021).

69. *Rome Statute*, Art. 87 (cited in note 1).

70. See *ibid.,* Art. 89, 90, 91 and 92.

71. See *ibid*., Art. 98.

72. See *ibid*, Art. 93(1). Article 93(1) provides: "States Parties shall...provide the following assistance in relation to investigations or prosecutions: (a) The identification and whereabouts of persons or the location of items; (b) The taking of

It is worth mentioning that the ICC's cooperation mechanism is limited to State Parties to the Statute. There are two exceptions: the first, when a non-party state accepts the jurisdiction of the Court pursuant to Article 12(3) and, this way, it also agrees to cooperate under Part 9 of the Statute; the second, based on an 'ad hoc agreement', any non-party State may provide assistance to the Court[73]. Another possibility would be for the Security Council - acting under Chapter VII of the UN Charter - to require any state to cooperate with the Court[74].

Practically speaking, the above-mentioned cooperation regime regulates a vertical relationship between the states and the ICC, and not an orizontal one among the member States. It is thus a matter of concern whether or not a State Party is under an obligation to comply with the cooperation requests of other State Parties.

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evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court; (c) The questioning of any person being investigated or prosecuted; (d) The service of documents, including judicial documents; (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court; (f) The temporary transfer of persons as provided in paragraph 7; (g) The examination of places or sites, including the exhumation and examination of grave sites; (h) The execution of searches and seizures; (i) The provision of records and documents, including official records and documents; (j) The protection of victims and witnesses and the preservation of evidence; (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court".

73. See *ibid.*, Art. 87(5). Under Article 87(6) of the Rome Statute, the ICC may also ask any International Organization to cooperate. See *ibid.,* Art 87(6). For instance, the ICC has entered into an agreement on cooperation with the EU. See *Agreement between the International Criminal Court and the European Union on Cooperation and Assistance,* ICC Press Release (ICC-PRES, April 2006) available at https://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf (last visited April 19, 2021); Bekou andCryer, *The International Criminal Court and Universal Jurisdiction,* at 61 (cited in note 4).

74. United Nations Security Council Resolution 1593, which referred the situation of Darfur, Sudan, to the ICC, provided for an obligation to cooperate. This obligation, however, was limited only to the 'Government of Sudan and all other parties to the conflict in Darfur'. United Nations Security Council Resolution 1373, S/RES/1373 (2001) (adopted on March 31, 2005), available at https://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf (last visited April 19, 2021).

Anyway, the Rome Statute provides certain guidelines on how a State Party should deal with the competing requests and claims from any other state concerning the extradition of any suspect or any other form of cooperation[75]. If a State Party receives competing extradition requests from another State Party and from the Court, and if the case in respect of which the surrender is sought is admissible, "the requested State shall give priority to the request from the Court"[76]. On the contrary, if the Court determines that the case is inadmissible, the requested State may proceed to extradite the person to the requesting state[77].

Further, if a State Party receives a request from any state for the extradition of a person "for conduct other than that which constitutes the crime for which the Court seeks the person's surrender" and it is under "an existing international obligation to extradite the person to the requesting State", the requested state shall determine "whether to surrender the person to the Court or to extradite the person to the requesting State"[78]. In making its decision, the requested State shall consider all the relevant factors, *inter alia*, "the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought"[79]. However, if a State Party receives competing requests for other forms of cooperation (as prescribed by Article 93), it "shall endeavour ... to meet both requests"[80].

What if a state is unwilling to fulfill the requests of other states or refuses to extradite the alleged perpetrator? The Statute does not explicitly impose on the State Parties any obligation in terms of extradition to, or cooperation with, the other member States[81]. In the absence of any existing international obligation (e.g., extradition treaties), it is more of the state's discretion whether or not to comply with the request for extradition from other states. The following section deals with issues that may arise out of non-cooperation.

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75. Rome Statute, Art. 90 and 93 (cited in note 1).
76. See *ibid.*, Art. 90(2).
77. See *ibid.*, Art. 90(3).
78. See *ibid.*, Art. 90(7).
79. See *ibid.*, Art. 90(6).
80. See *ibid.*, Art. 93(9).
81. See *ibid.*, Art. 90(3), 90(5), 90(6) and 90(7).

4. Non-Cooperation and a Need for an Effective Mechanism

One of the most striking issues the ICC is now facing is the need for an effective enforcement mechanism against recalcitrant states that refuse to comply with the cooperation requests[82]. In the event of non-compliance, what the Court can do is only to make a finding to that effect and to refer the matter to the Assembly of State Parties (hereinafter the 'Assembly') or to the Security Council[83]. The Court itself does not have any sanctioning capacity except the power of reporting non-compliance[84]. Owing to the growing trend of non-cooperation, the Assembly attempted to address the matter. In 2011, the Assembly adopted the *Assembly Procedures Relating to Non-Cooperation* (hereinafter the 'Procedures')[85]. The Procedures identify two possible scenarios of non-cooperation. The first one relates to those cases, where the Court has made a judicial determination of non-cooperation and referred the matter to the Assembly[86]. The second scenario relates to those exceptional cases where the Court has not made a judicial determination of non-cooperation but "there are reasons to believe that a specific and serious incident of non-cooperation in respect of an arrest and surrender ... is about to occur or is currently ongoing and urgent action by the Assembly may help to bring about cooperation"[87].

The Assembly follows *formal procedure* to address the first scenario. The President of the Assembly, on behalf of the Bureau, sends an open letter to the state concerned, reminding the state of the

82. See William A. Schabas, *An Introduction to the International Criminal Court,* at 130, (Cambridge University Press 2nd ed. 2004).

83. Rome Statute, Art 87(7) (cited in note 1).

84. Rod Rastan, *Testing Co-operation: The International Criminal Court and National Authorities*, 21 Leiden Journal of International Law431, 439 (2008) available at https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/testing-co-operation-the-international-criminal-court-and-national-authorities/D11922DB41676CE8A0E390282259BCAF (last visited April 19, 2021).

85. Assembly Procedures Relating to Non-Cooperation (ICC-ASP, Resolution RC/Res.6, The Crime of Aggression (2010)).

86. See *ibid*., para. 7(a); see *also* Tladi, *When Elephants Collide it is the Grass that Suffers: cooperation and the Security Council in the context of the AU/ICC dynamic*, at 387 (cited in note 68).

87. See *ibid*., para. 7(b); Tladi, *When Elephants Collide it is the Grass that Suffers: cooperation and the Security Council in the context of the AU/ICC dynamic*, at388 (cited in note 68).

obligation to cooperate and requesting its views on how it would cooperate with the Court[88]. The Bureau then facilitates open dialogue with the requested state based on which it provides recommendation as to whether the matter requires action by the Assembly. The Bureau could also appoint "a dedicated facilitator to consult on a draft resolution containing concrete recommendations on the matter"[89]. On the other hand, the second scenario involves the use of regional focal points in order to "raise the issue [of non-cooperation] with officials from the requested State and other relevant stakeholders, with a view to promoting full cooperation"[90].

However, the Assembly adopted these Procedures mainly with an aim to facilitate the state's compliance with cooperation requests from the ICC. There is no record of using these procedures on the inter-state level. Practically speaking, there is no effective measure available to member states to impose a cooperation obligation upon another state's authorities in case of non-compliance. In the views of Laura Burens, the inter-state scenario will usually be followed by diplomatic conflicts[91].

It is a matter of high appreciation that some mechanisms to facilitate interactions between the domestic authorities have been developed at the regional and intergovernmental levels. For instance, the EU Members States have established an *European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes*[92]. Under this framework, the contact points may exchange information concerning investigations and facilitate cooperation among national authorities. Likewise, at the intergovernmental level, the INTERPOL has established a system of national focal points. Each of the Member States hosts an INTERPOL National Central

88. Assembly Procedures Relating to Non-Cooperation, at 425 (cited in note 85).

89. See *ibid*., para 14(f).

90. See *ibid*., para 19; Tladi, *When Elephants Collide it is the Grass that Suffers: cooperation and the Security Council in the context of the AU/ICC dynamic*, at 388 (cited in note 68).

91. Burens,*Universal Jurisdiction Meets Complementarity: An Approach towards a Desirable Future Codification of Horizontal Complementarity between the Member States of the International Criminal Court,* at 84 (cited in note 31).

92. EU Council Decision 2002/494/JHA (13 June 2002) available at https://eur-lex.europa.eu/eli/dec/2002/494/oj (last visited April 19, 2021).

Bureau (NCB), which connects their national law enforcement agencies with other the ones of countries and facilitates support and communications in the process of global investigations[93]. The ICC Member States, when investigating under universal jurisdiction, can certainly seek the help of the INTERPOL.

What is important for our purpose is to find out how an effective mechanism can be developed within the ICC framework to foster inter-state cooperation. From a practical viewpoint, when it comes to the matter of non-cooperation and the need to adopt normative guidelines or procedures, it is the Assembly of State Parties who can perform a critical role[94]. The Assembly already adopted Procedures relating to non-cooperation[95]. However, the concern here is whether these Procedures can be used to facilitate a cooperation request from another state since they mainly aim to promote the execution of the requests coming from the Court. More specifically, paragraph 5 provides that a situation where there is no specific Court request would remain beyond the scope of the Procedures. Consequently, the Procedures cannot be invoked to ensure compliance with the request of a bystander state. Nonetheless, in the event that measures related to inter-state cooperation are adopted, these Procedures can be used as a valid point of reference.

What is more relevant here is to take into consideration the *informal response procedure* prescribed by the Assembly. Paragraph 15 of the Procedures suggests institutionalizing the good offices of the President of the Assembly. Thus, it is necessary to consider whether the President's good offices can be triggered to advance the issue of non-cooperation with officials from the requested state in order to encourage full cooperation. The Procedures provide for the appointment of regional focal points to assist the President in his or her good offices[96]. These focal points can also play a vital role in promoting inter-state interactions. They can share "relevant information ... with members

93. Available at <https://www.interpol.int/en/Who-we-are/What-is-INTERPOL> accessed 22 May 2020.

94. Rome Statute, Art. 112(2)(f). It provides that "the Assembly shall consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation".

95. Assembly Procedures Relating to Non-Cooperation (cited in note 85).

96. See *ibid*., para. 16

of their respective regional group" and enable the States Parties to take appropriate actions against the perpetrators of non-member States[97].

5. Concluding Remarks

The principle of universal jurisdiction provides the member states with the necessary authority to prosecute even the nationals of non-member states. Two main aspects need to be considered to ensure a smooth application of universal jurisdiction.

At first, the priority in prosecuting should be given to the state (or states) having a direct connection to the crime or the victim (s*ubsidiary universal jurisdiction*). A bystander state shall only exercise jurisdiction if the nexus state is manifestly unwilling or unable to carry out its duty to investigate or prosecute. Accordingly, the jurisdiction of a bystander state would be complementary to the jurisdiction of the nexus state (*horizontal complementarity*). In any case, it is worth mentioning that state jurisdictions are mainly concurrent, and not complementary to each other. In other words, a mere unwillingness or inability of the nexus state does not create any binding obligation on the part of prosecutors and courts of a bystander state to initiate criminal proceedings. However, if a state wants it, it can bring proper legislation to incorporate a subsidiarity system and/or to give effect to the principle of complementarity at the domestic level.

The second crucial aspect is to ensure an effective mechanism to facilitate inter-state cooperation. Although the ICC Statute does not expressly regulate this issue, it provides a sufficient basis to institutionalise a system of cooperation under which the ICC and domestic jurisdictions can complement each other and cooperate as part of a joint network. Paragraphs 4 of both Article 90 and Article 93, and the positive complementarity as a principle, encourage and provide

97. ICC Assembly of States Parties, *The Toolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation* in *Report of the Bureau on non-cooperation,* at 17 (November 28, 2018) provides that: "each non-cooperation focal point will share relevant information (without disclosing the source of information unless authorized to do so) with members of their respective regional group to enable States Parties to take any action that they may deem appropriate." available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-31-ENG.pdf

authority to the ICC and its state parties to facilitate cooperation on the inter-state level.

Were there ICC-based mechanisms to ensure cooperation among member states, they would increase the flow of inter-state interactions, improve reciprocal assistance and turn the latter into constructive tools. Given this context, there is a legitimate ground to take seriously the Procedures adopted by the Assembly of State Parties and to explore how the Assembly President's good offices and the focal points can assist in encouraging full cooperation.

Unnecessary Burdens to Post-Conviction DNA Testing: New Mexico's Post-Conviction DNA Relief Statute and Suggestions for Improvement

Samantha Catalano*

Abstract: Post-conviction DNA testing is often the last option a convicted person may have to establish that they are not guilty of a crime. New Mexico's post-conviction DNA statute requires convicted persons who seek DNA testing to claim innocence and establish that the identity of the perpetrator was an issue at trial. These requirements are currently included in many state post-conviction DNA statutes; however, some states have amended their statutes to remove these unnecessary requirements. Convicted persons who claimed self-defense, or another affirmative defense may be denied post-conviction DNA testing because of inability to claim "innocence" and because the identity of the perpetrator may not have been an issue at trial. This Article argues that New Mexico's post-conviction DNA statute should be amended to remove these requirements, as they are unnecessarily burdensome and can prevent exonerations of "no crime" wrongfully convicted persons. This Article first discusses how post-conviction DNA testing may be used to exonerate wrongfully convicted persons. Second, it provides an analysis of post-conviction DNA testing statutes and their application in jurisdictions outside of New Mexico. Third, it discusses New Mexico's current post-conviction DNA statute and proposes amendments. Finally, it addresses potential concerns to lessening the burden on access to post-conviction DNA testing.

Keywords: Wrongful Convictions; Conviction DNA; Post-conviction Statute; No-crime Wrongful Conviction; New Mexico's Post-Conviction DNA Testing Statute.

1. Introduction

On June 15, 2012, Gregory Marvin Hobbs got into a physical altercation with Ruben Archuleta, Jr. and Ruben Archuleta, Sr.[1] During this close physical altercation, Gregory Hobbs shot and killed both his opponents[2]. The state, on the one hand, determined that the shooting of Ruben Archuleta, Jr. was legally justifiable; on the other, it charged Gregory Hobbs with voluntary manslaughter for the shooting of Ruben Archuleta, Sr.[3]

Gregory Hobbs maintains that he shot Ruben Archuleta, Sr., in self-defense[4]. He described that after the shooting of Archuleta, Jr., Archuleta, Sr. grabbed for the gun in Hobbs' hand, attempting to shoot Hobbs[5]. Hobbs tried to back up and get away, but Archuleta, Sr. grabbed him once again The two men struggled over the gun, and Hobbs stated that he was in fear for his life when he fired the gun and shot Archuleta, Sr.[6]

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1. See *State v. Hobbs*, 2020 NMCA 44, para. 2, *cert. granted* (Sept. 8, 2020).
2. *Id.*
3. *Id.*
4. *Id.* at para. 3.
5. *Id.*
6. *Id.*

Two separate eyewitnesses to the shooting, including Archuleta, Jr.'s wife Teresa, testified that Hobbs and Archuleta, Sr. had been wrestling before the gun went off[7]. One of the witnesses corroborated Hobbs' version of events by testifying that it appeared Archuleta, Sr. was trying to get the gun from Hobbs before being shot[8]. At trial, the state argued that the evidence did not support Hobbs' description of events[9]. Despite being given an instruction on Hobbs' theory of self-defense[10], the jury rejected Hobbs' theory, and convicted him of voluntary manslaughter[11]. Hobbs was consequently sentenced to seven years in prison for the death of Ruben Archuleta, Sr.[12]

At trial, no forensic testing (including DNA testing) was ordered by the state or by Roswell's Police Department[13]. It is unclear why DNA testing of the evidence obtained pre-trial was not tested at the time of trial. In 2015, Hobbs petitioned the 5th Judicial District Court for post-conviction DNA testing of the gun used in the shooting and of the t-shirt Hobbs wore at that time[14]. Although the statutory requirements within New Mexico's post-conviction DNA relief statute would have seemed to prevent Hobbs from obtaining DNA testing[15], the state did not oppose Hobbs' motion, and the petition was granted[16].

In Hobbs' case, the testing resulted in finding of Ruben Archuleta, Sr.'s DNA on the ejection port of the handgun[17]. Hobbs' defense team argued that the finding of Archuleta, Sr.'s DNA on the handgun supported Hobbs' assertion of self-defense at trial. Specifically, a finding that Archuleta, Sr. came into contact with the gun supported Hobbs' description of a struggle over the gun, and his claim that at the time

7. *Id.* at para. 4.
8. *Id.*
9. *Id.* at para. 5.
10. *Id.*
11. *Id.* at para. 6.
12. *Id.*
13. *Id.* at para. 11.
14. *Id.* at para. 8.
15. N M Stat. Ann. § 31-1A-2 (West 2019); see discussion *infra* (regarding petitioners who claim self-defense being unable to assert innocence and prove that identity was an issue at trial).
16. *Hobbs*, 2020 NMCA 44, at para. 9.
17. *Id.* at para. 16.

of the shooting, he was in fear of death or great bodily harm from Archuleta, Sr.[18]

Inasmuch as post-conviction DNA statutes were initially drafted in order to offer relief to individuals who can prove "actual innocence" (that someone else was the perpetrator), they tend to exclude individuals who may be able to prove they are not guilty (by reason of affirmative defense), or "legally innocent"[19]. Black's Law Dictionary defines innocence as "[t]he absence of guilt; esp., freedom from guilt for a particular offense"[20]. It further differentiates between "actual" and "legal" innocence by defining "actual innocence" as "[t]he absence of facts that are prerequisites for the sentence given to a defendant" and "legal innocence" as "[t]he absence of one or more procedural or legal bases to support the sentence given to a defendant"[21]. In fact, individuals may be wrongfully convicted if they acted in self-defense; out of necessity; when involuntarily intoxicated; or, under conditions of duress or insanity, because in these cases no crime actually occurred[22]. For this reason, these kinds of convictions are termed "no crime" wrongful convictions, as one of the fundamental elements for criminal liability is lacking[23]. "No crime" wrongful convictions may also occur when an alleged victim's reputation for violence is excluded at trial; when flawed jury instructions are given; and when the prosecutor misrepresents the self-defense justification[24].

New Mexico's post-conviction DNA statute, in conformity with several other states' statutes[25], requires a person who seeks

18. See *Hobbs*, 2020 NMCA 44 (the state has appealed the 5th Judicial District Court's grant of a new trial for Gregory Hobbs, and the case has been granted certiorari by the New Mexico Supreme Court).

19. For the purposes of this Article, actual innocence and innocence will not be differentiated, and the terms legal innocence and not guilty will likewise be treated equally, to avoid confusion based on semantics.

20. See *Innocence,* Black's Law Dictionary (Thomson Reuters 2019).

21. *Id.*

22. James R. Acker and Sishi Wu*, "I did it, but. I didn't": When Rejected Affirmative Defenses Produce Wrongful Convictions*, 98 Neb. L. Rev 578, 579 (2020).

23. *Id.*; see also Jessica S. Henry, *Smoke but No Fire: When Innocent People Are Wrongly Convicted of Crimes That Never Happened*, 55 Am. Crim. L. Rev 665, 666 (2018) (defining "no crime" wrongful convictions as convictions that occur when no crime ever occurred, "for events that were never criminal or that never even happened.").

24. Acker and Wu, *"I Did It, but … I Didn't"* at 621-622 (cited in note 22).

25. See *Analysis* in Part 3.

post-conviction DNA testing to claim innocence and establish that the identity of the perpetrator was an issue at trial[26]. An individual who has killed another person in self-defense, like Gregory Hobbs, may be unable to claim innocence, but at the same time may be not guilty because no crime was committed[27]. Jurisdictions are divided on whether to grant post-conviction DNA testing motions for individuals who asserted self-defense at trial, specifically due to the issue of identity[28]. Since jurisdictions are divided on this issue, and there is no case precedent in New Mexico, district courts should be provided with a clear direction. New Mexico's legislature should provide the courts with clarity: either courts will allow convicted persons who asserted affirmative defenses to petition for post-conviction DNA testing, or prohibit this category from seeking testing.

This article argues that New Mexico's post-conviction DNA statute should be amended to remove both requirements that petitioners claim innocence, and that petitioners establish that the identity of the perpetrator was an issue at trial. This amendment would conform with the otherwise liberal statutory requirements of New Mexico's post-conviction DNA statute and prevent the exclusion of a category of wrongfully convicted persons. Other states, such as Maryland[29], have already rectified the exclusion of individuals who claimed self-defense by removing these statutory requirements. Removing these limitations would allow wrongfully convicted inmates who claimed self-defense at trial to attempt to exonerate themselves through DNA evidence.

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26. See N M Stat Ann § 31-1A-2 (West 2019).

27. Acker and Wu, *"I Did It, but ... I Didn't"* at 624 (cited in note 22); see also *No Crime* in *Glossary* (The National Registry of Exoneration), available at https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited April 20, 2021) (defining "no crime" wrongful convictions); see also *Guilty*, Black's Law Dictionary (Thomson Reuters 2019) (defined as "having committed a crime; responsible for a crime").

28. Compare *Davis v. State*, 11 So. 3d 977, 978 (Fla. Dist. Ct. App. 2009) (holding that persons who claimed self-defense cannot claim that identity was an issue at trial), with *State v. Braa*, 410 P.3d 1176 (Wash. Ct. App. 2018), *review denied*, 424 P.3d 1225 (Wash. 2018) (holding that persons who claimed self-defense can claim that identity was an issue at trial).

29. See *Gregg v. State*, 976 A.2d 999, 1005 (Md. 2009).

Part 2 of this article's analysis section explains how post-conviction DNA testing can be used to exonerate "no crime" wrongfully convicted persons[30]. Part 3 further explores how different states' DNA testing statutes have been interpreted and applied in criminal cases. Part 4 examines New Mexico's legislation on the matter and proposes amendments to the statute. Part 5 finally discusses potential concerns to the proposed amendments and explains why lessening the statutory burden on access to post-conviction DNA testing will not result in a flood of overturned convictions.

1.1. Background

Wrongful convictions have recently become a topic of increased concern and public outcry, partly due to media attention following the publication of *Just Mercy* by Bryan Stevenson[31]. The term "wrongful conviction", as commonly understood, describes when the wrong person is charged and convicted of a crime.[32] The wrong person may be convicted of a crime for many reasons, including false identification by witnesses and false confessions[33]. The Innocence Project's mission is to exonerate these individuals, and to date it has succeeded in exonerating 375 "wrong person" wrongfully convicted individuals[34].

This kind of wrongful convictions account for some, but not for all wrongful convictions[35]. Cases where no crime has actually occurred may result in "no crime" wrongful convictions[36]. This type of convic-

30. Jessica S. Henry, *Smoke but No Fire* at 666 (cited in note 23) (defining "no crime" wrongful convictions as convictions that occur when no crime ever occurred, "for events that were never criminal or that never even happened.").

31. Bryan Stevenson, *Just Mercy,* (Spiegel and Grau, 2014).

32. Acker and Wu, *"I Did It, but ... I Didn't"* at 579 (cited in note 22).

33. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020) (for further data on wrongful convictions, see Appendix 1).

34. *Id.* The Innocence Project was founded in 1992 by Peter Neufeld and Barry Scheck at the Cardozo School of Law. It aims to exonerate wrongfully convicted persons through DNA testing and acts to reform the current criminal justice system to prevent further wrongful convictions (further information available at https://innocenceproject.org/about/) (last visited 20 April, 2020).

35. Acker and Wu, *"I Did It, but ... I Didn't* at 578-581 (cited in note 22).

36. *Id.* at 581-582 (2020); see also S. Henry, *Smoke but No Fire* at 666 (cited in note 23).

tion may occur when a person kills in self-defense, and the trier of fact convicts the individual of a homicide charge[37]. These wrongful convictions are linked to failed self-defense claims[38]. "No crime" and "wrong person" wrongful convictions result in the same unjust outcome: a person who has not committed a crime is sent to prison, or even executed, erroneously[39].

DNA testing, which first became viable in 1985[40]. has enabled wrongfully convicted persons to exonerate themselves in quite a few cases[41]. Deoxyribonucleic acid, known as DNA, contains the genetic makeup, often described as a blueprint, of a person, animal, plant, or microbe. DNA testing is thus an incredibly powerful tool, which can be used to both identify criminal suspects and exonerate wrongfully accused or convicted persons[42]. Identification of suspects in criminal cases is done by comparing DNA evidence taken from a crime scene with either an identified suspect's DNA, or by running it through DNA databases, such as the Combined DNA Index System (CODIS)[43]. The same methodology can exonerate suspects and wrongfully convicted individuals[44], either by proving that someone

37. Acker and Wu, *"I Did It, but ... I Didn't"* at 581-582 (cited in note 22). See also *Hobbs,* 2020 NMCA 44 (citedi in note 1).

38. Acker and Wu, "I Did It, but ... I Didn't" at 621-622 (cited in note 22).

39. DNA Exoneration in the United States (*The Innocence Project*), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020).

40. Randy James, *A Brief History of DNA Testing*, (Time, Jun. 19, 2009), available at http://content.time.com/time/nation/article/0,8599,1905706,00.html (last visited April 18, 2021).

41. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/, (last visited April 20, 2020).

42. *Advancing Justice Through DNA Technology: Using DNA To Solve Crime* (March 7, 2017) (The U.S. Department of Justice Archives), available at https://www.justice.gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes (last visited April 20, 2020).

43. *Id.* (CODIS is an FBI tool, allowing federal, state, and local forensic laboratories to link forensic evidence to stored DNA profiles of known offenders). See *Combined DNA Index System (CODIS)* (FBI, Laboratory Services), available at https://www.fbi.gov/services/laboratory/biometric-analysis/codis (last visited April 20, 2020).

44. *Advancing Justice Through DNA Technology: Using DNA To Solve Crime* (March 7, 2017) (The U.S. Department of Justice Archives), available at https://www.justice.

else committed the crime, or, as seen in the *Hobbs* case, supporting a theory of defense[45].

A retrospective study funded by the U.S. Department of Justice investigated the percentage of wrongful convictions which could have been overturned by post-conviction DNA testing[46]. Researchers conducted a survey of an unbiased sample of 715 homicides and sexual assaults, which resulted in convictions, between the years 1973 and 1987[47]. This survey determined that among its sample of convicted offenders, 8% were eliminated as contributors of probative evidence (evidence related to the conviction), and 5% were eliminated as contributors of any evidence, supporting exoneration[48]. Given the advent of DNA testing technology in 1985, it is likely that these percentages may be lower today, due to its application[49]. However, these statistics have already demonstrated that DNA testing is an effective tool that can be used to overturn wrongful convictions.

In response to the realization that wrongfully convicted individuals may be exonerated through post-conviction DNA testing, all fifty states as well as the federal government have enacted statutes regarding the subject[50]. These statutes allow convicted individuals to petition a court for DNA testing of evidence that was not previously subject to

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gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes (last visited April 20, 2020).

45. *Hobbs*, 2020 NMCA 44 (cited in note 1).

46. John Roman, et al., *Post-Conviction DNA Testing and Wrongful Conviction*, Urban Institute Justice Policy Center, at 5 (Research Report, funded by the U.S. DOJ, Jun. 2012).

47. *Id.*

48. *Id.*

49. See *Exonerations By Year And Type Of Crime* (The National Registry of Exonerations), available at https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx (last visited April 20, 2021). As of April 5, 2021 there have been 2,760 exonerations in the U.S., with an increase in exonerations of "all types of crime" since 1991 (41 exonerations) to a height in 2016 (181 exonerations). The rate of exonerations decreased in 2020 to 129 exonerations for "all crimes," which may indicate that fewer wrongful convictions have occurred since application of DNA forensics in criminal cases.

50. *Access To Post-Conviction DNA Testing* (The Innocence Project), available at https://www.innocenceproject.org/causes/access-post-conviction-dna-testing/ (last visited April 20, 2021) (stating that all 50 states now have post-conviction DNA statutes).

DNA testing, that was not previously subject to the current forensic method of DNA testing, or that was either tested or interpreted incorrectly at trial.[51] If an individual is granted post-conviction DNA testing, a district court will consider what relief, if any, may be sought.[52]

State legislatures are not alone in their attempts to proactively address the nationwide problem of wrongful convictions. Some state prosecutors have created their own protocols to seek DNA testing for inmates convicted prior to the early 1990s[53], to determine whether exonerating evidence could be provided using current technology[54]. However, other prosecutors believe exonerations based on this technology may expose police and prosecutorial misconduct as well as systemic flaws and thus threaten the credibility of the criminal justice system[55].

Notably, the Attorney General's office in Virginia prevented testing of DNA which might have exonerated two men who had already been executed, for fear of the public discovering that the state had sentenced to death innocent men[56]. In 1997, then Texas Governor George W. Bush pardoned Kevin Byrd, a man convicted of sexually assaulting a pregnant woman[57]. The pardon was a result of exculpatory DNA testing, which could not have been performed prior to Byrd's trial in 1985[58]. Because the Harris County Clerk's Office had stored the biological evidence taken during the rape kit, Mr. Byrd was successfully exonerated[59]. Bush predicted that the re-examination of biological evidence in Harris County would lead to more exonerations[60]. However, the Harris County Clerk's Office began "systematically destroying" rape kits in its possession, thus ruling out the possibility

51. See, e.g., N M Stat Ann § 31-1A-2(D) (West 2019).

52. N M Stat Ann § 31-1A-2(I) (West 2019).

53. DNA testing was unavailable prior to 1985, so inmates convicted prior to 1990 may have DNA evidence that was not previously tested.

54. Seth F. Kreimer and David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 Univ. Pa. L. Rev. 547, 557-58 (2002).

55. *Id.* at 562.

56. *Id.*

57. Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 Am. Crim. L. Rev. 1239 (2005).

58. *Id.*

59. *Id.*

60. *Id.*

of further exonerations based on old evidence[61]. State post-conviction DNA statutes effectively mitigate undue prosecutorial intervention by enabling convicted individuals who meet specific criteria to seek DNA testing[62].

For inmates who have newly discovered evidence, or whose DNA evidence was previously unable to be tested[63], post-conviction DNA testing statutes are often the only gateway to seeking justice. However, post-conviction DNA testing statutes vary widely among the states in terms of their requirements for petitions[64]. At the outset, the majority of states limit post-conviction DNA testing categorically by case type[65]. For example, both Kentucky and Nevada bar access to post-conviction DNA testing to all convicted prisoners except those convicted of a capital offense ("a crime for which the death penalty may be imposed"[66]).

The majority of states, including New Mexico, require that the convicted individual claim innocence[67]. In addition, many states, again including New Mexico, require individuals to establish that the identity of the perpetrator was at issue at trial[68]. As we will discuss further below, these overly burdensome statutory limitations on access to post-conviction DNA testing should be removed in order to prevent the exclusion of a specific category of convicted persons. A person convicted after a failed self-defense claim (such as Mr. Hobbs) may be wrongfully convicted, as no crime has been committed. The fundamental question is whether a person who has been wrongfully

61. *Id.* at *1240.*

62. See, e.g., N M Stat Ann § 31-1A-2 (West 2019).

63. Post-conviction DNA testing may also be conducted when new technology is available. See, e.g., N M Stat Ann § 31-1A-2 (West 2019).

64. See generally, Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev.1629 (2008) (for further discussion, see *Analysis* in Part 2 and Appendix 2).

65. *Id.* at 1679–80.

66. See, e.g., Ky. Rev. Stat. Ann § 422.285 (West 2017); Nev. Rev. Stat. Ann. § 34.724 (West 2020). See also *Offense*, Black's Law Dictionary (Thomson Reuters 2019).

67. See *infra*, Analysis in Part 2 and note 124. See also, Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1680–81 (2008) (some states require an affidavit claiming innocence in the petition for post-conviction DNA testing). See, e.g., Cal Pen Code § 1405 (West 2015).

68. See *infra* note 124. See also N M Stat Ann § 31-1A-2 (West 2019).

convicted should be prevented from seeking justice only because they cannot claim innocence or prove that another perpetrator was at fault.

2. Analysis. Post-Conviction DNA evidence

2.1. Exoneration through Post-Conviction DNA Testing

An individual can be wrongfully convicted when they are actually innocent of the alleged criminal act[69]. This type of conviction generally occurs when the wrong person was accused and convicted of a crime[70]. An individual may also be wrongfully convicted when they asserted a self-defense claim at trial which failed[71]. Erroneous convictions based on a failed self-defense claim (where a convicted person actually acted in self-defense) are "no crime" wrongful convictions[72] as an individual who acts in self-defense has committed no criminal act and is therefore not guilty[73].

"No crime" wrongful convictions occur for many reasons, including: erroneous exclusion of an alleged victim's reputation for violence at trial; flawed jury instructions; and prosecutorial misrepresentation

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69. See Colo. Rev. Stat. Ann. § 18-1-411 (West 2003) (defining actual innocence as "clear and convincing evidence such that no reasonable juror would have convicted the defendant"); see also *Innocent*, Black's Law Dictionary (Thomson Reuters 2019) (cited in note 20) (defined as "Someone who has not, in a given situation, committed any harmful act; a person who is blameless in a particular setting") (for the purposes of this Article, requiring a petitioner to assert or establish actual innocence is not differentiated from requiring a petitioner to establish innocence in petitions for post-conviction DNA testing).

70. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020).

71. Acker and Wu, *"I Did It, but … I Didn't"* at 624 (cited in note 22).

72. *Id.*; see also *Glossary* (The National Registry of Exonerations), available at https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx (last visited April 20, 2021) (defining "no crime" wrongful convictions). See also S. Henry, Smoke but No Fire at 666 (cited in note 23).

73. See *Guilty*, Black's Law Dictionary (Thomson Reuters 2019) (defined as "having committed a crime; responsible for a crime"). See also S. Henry, *Smoke but No Fire* at 666 (cited in note 23).

of the self-defense justification[74]. Scholarly literature on the subject of self-defense claims and wrongful convictions is limited; however, James Acker and Sishi Wu discussed nineteen cases of exoneration of persons that had been wrongfully convicted due to failed self-defense claim[75].

The advent of DNA testing in 1985 resulted in both convictions based on biological evidence and exonerations[76]. The combined sentence served by individuals who were later exonerated through post-conviction DNA testing result in 5,284 years of imprisonment[77].

The first wrongfully convicted person exonerated through post-conviction DNA evidence was Gary Dotson, who in 1989 was exonerated after serving ten years for rape and aggravated kidnapping.[78] The DNA testing conclusively assessed that the semen found in the victim's underwear could not have come from Gary Dotson[79].

Because of its unequivocal accuracy and reliability in producing valid identification of perpetrators, DNA evidence is admissible in all United States courts[80]. New York became the first state to pass a post-conviction DNA statute in 1994, with 32 additional states and the federal government enacting statutes by 2004[81]. Currently, all states apply statutes that allow inmates to prove innocence[82] through post-conviction DNA testing[83]. although the limitations and barriers to testing vary substantially from state to state[84].

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74. Acker and Wu, *"I Did It, but ... I Didn't"* at 621-622 (cited in note 22).
75. *Id.*
76. James, *A Brief History of DNA Testing* (cited in note 40).
77. *DNA Exoneration in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 20, 2020) (see Appendix 1 for further discussion of exonerated individuals).
78. Nicholas Phillips, *Innocence and Incarceration: A Comprehensive Review of Maryland's Postconviction DNA Relief Statute and Suggestions for Improvement*, 42 Univ. Balt. L.F. 65, 65 (2011).
79. *Id.*
80. *Id.* at 66.
81. *Id.*
82. Or lack of guilt in cases of "no crime" wrongful convictions.
83. (stating that all 50 states now have post-conviction DNA statutes).
84. For further analysis, see Appendix 2.

2.2 Post-Conviction DNA Testing Petitions

Post-conviction DNA testing may be utilized in cases where DNA testing of evidence obtained from the scene has never been conducted, and in cases where previously inconclusive DNA evidence can be re-analyzed to potentially obtain a more probative result due to the advent of newer technology.[85] Newer technology enables DNA testing to produce more conclusive proof of identity than DNA testing in the early 1990s, when many tests may have yielded inconclusive results[86]. Courts are no longer divided on the issue of admissibility of DNA testing in criminal cases[87]. However, determining the correct standard for granting petitions for post-conviction DNA testing is still an issue[88].

A petition to a court for post-conviction DNA testing or other post-conviction relief is filed as a separate motion with the court, not as part of the original case[89]. Procedurally, post-conviction relief petitions act as "expansion[s] of habeas corpus"[90], expanding a convicted individual's ability to seek relief in a limited number of cases.

The specific procedures and policies for petitioning a court for post-conviction DNA testing vary between the federal government and the states. Under the federal standard, an individual sentenced to imprisonment or death for a federal offense may petition the court for DNA testing of "specific evidence" if many requirements are met[91]. These include an assertion of "actual innocence;" that any and all state remedies have been first exhausted; that the DNA evidence was either not previously tested; or that it was tested using outdated testing methods; and that at trial the identity of the perpetrator was at issue.[92]

85. Anna Franceschelli, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 Cap. Univ. L. Rev 243, 244 (2003).
86. *Id.*
87. *Id.*
88. *Id.*
89. *State v. Allen*, 283 P.3d 114, 117 (Idaho Ct. App. 2012).
90. *Id.*
91. 18 U.S. Code § 3600 (West) (federal post-conviction DNA testing code).
92. *Id.*

Because post-conviction DNA testing can result in overturned convictions[93], states are wary of granting post-conviction DNA testing when that testing has the potential to exonerate a convicted felon[94]. States have different requirements for granting post-conviction DNA testing petitions[95]. By requiring petitioners to assert claims of innocence and/or establish that identity was an issue at trial, many states, including New Mexico[96], exclude petitioners who claimed to have acted in self-defense. Defendants who assert self-defense claims at trial have the right to DNA testing of biological evidence as part of the trial process[97]. Although convicted individuals do not have equal due process rights after conviction, asserting a self-defense claim at trial should not preclude a person from requesting post-conviction DNA testing.

Because there is presently no case law interpreting New Mexico's current statute (which includes the requirements of asserting innocence and establishing that the identity of the perpetrator was an issue) it is likely that courts will refer to other jurisdictions for guidance. However, New Mexico courts will not find a clear answer by looking at other jurisdictions, due to a lack of concurrence[98]. New Mexico should consider amending the statute in order to provide the courts with clarity on whether individuals who asserted affirmative defenses may seek post-conviction DNA testing.

2.3. When Relief May be Granted

When a petitioner has been allowed to obtain post-conviction DNA testing, the results of the test must meet additional standards for any relief to be granted[99]. Post-conviction DNA test results may

93. See, e.g., N M Stat Ann § 31-1A-2(I) (West 2019) (stating that if the DNA results are exculpatory, a district court may set aside the charges and sentencing, order a new trial, or grant other relief).

94. Franceschelli, *Motions for Postconviction DNA Testing* at 247 (cited in note 85).

95. See *Analysis* in Part 3.

96. See Part 2, Section 2.

97. See, e.g., *Adams v. State*, 387 P.3d 153, 164 (Idaho Ct. App. 2016) (where defendant who claimed to have stabbed victim in self-defense was entitled to seek DNA testing of evidence before trial).

98. See Part 3.

99. See, e.g., N M Stat Ann § 31-1A-2(I) (West 2019).

exclude a convicted person as a source, create reasonable doubt as to guilt, or may be inconclusive[100]. State and federal courts in the United States generally require that the results "prove innocence"[101]. Additionally, many states impose time restrictions for introduction of newly discovered evidence after conviction and sentencing, thereby limiting access to relief in order to "ensure the integrity of the trial process"[102]. Certain states, including Oregon, avoid potential injustices by allowing judicial discretion, so that a judge may waive the time restriction in the interest of justice[103].

In addition to statutory limitations that restrict a person's ability to seek relief, cost also may prohibit some indigent convicted persons from petitioning the court[104]. Convicted individuals often rely on innocence or justice projects, such as The Innocence Project, or The New Mexico Innocence and Justice Project, or other state equivalents for legal and financial support in post-conviction proceedings[105]. The state funded projects, such as The New Mexico Innocence and Justice Project, are often limited by financial restrictions which may reduce the number of cases the projects can take on[106].

The Innocence Protection Act, codified in part under Chapter 18 of the United States Code, provides differing procedures for relief, dependent on the results of post-conviction DNA tests[107]. If the testing produces inconclusive results, a court may order additional testing, or

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100. Franceschelli, *Motions for Postconviction DNA Testing* at 247 (cited in note 85).

101. *Id.* Citing National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 10 (1996).

102. *Id.* at 28.

103. *Id.* at 29.

104. *Id.*

105. *Exonerate the Innocence* (The Innocence Project), available at https://www.innocenceproject.org/exonerate/ (last visited 20 April, 2020).

106. *New Mexico Innocence and Justice Project* (The University of New Mexico School of Law), https://lawschool.unm.edu/ijp/index.html. Explaining that funding comes from state grants and requesting private funding by donors to continue its services.

107. 18 U.S. Code § 3600 (West 2016). The Innocence Protection Act has been cited in state court cases involving post-conviction DNA testing; see, e.g., *In re Towne*, 195 Vt. 42, 86 A.3d 429, 432 (2013).

deny any relief[108]. In the event testing produces inculpatory results, the government may: (1) deny relief; (2) hold the applicant in contempt if the application included a false claim of "actual innocence;" (3) assess charges for the DNA testing; (4) deny good conduct credit through the Director of the Bureau of Prisons; and (5) deny parole if the prisoner is under jurisdiction of the United States Parole Commission[109]. If the results produce exculpatory results, "exclud[ing] the applicant as the source of the DNA evidence," the applicant may file a motion for a new trial or resentencing[110]. Courts shall grant motions for new trial or resentencing if the DNA test results (considered in addition to all other evidence in the case) "establish by compelling evidence" that a new trial would result in acquittal of the federal offense[111], or they shall grant a motion for resentencing if the DNA evidence was first admitted during a federal sentencing hearing, and exoneration of the offense entitles the applicant "to a reduced sentence or a new sentencing proceeding"[112].

The federal courts have analyzed the due process rights of convicted persons in relation to post-conviction relief. The United States Supreme Court in *Brady v. Maryland* set a standard for post-conviction relief when it held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment[113][...]". In *Brady*, Justice Douglas stated, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly"[114]. The Court agreed that suppression of evidence by the prosecution at trial deprived the defendant of their due process rights under the

108. 18 U.S. Code § 3600(f) (West 2016).

109. 18 U.S. Code § 3600(f) (West 2016).

110. 18 U.S. Code § 3600(g) (West 2016).

111. 18 U.S. Code § 3600(g)(2)(A) (West 2016).

112. 18 U.S. Code § 3600(g)(2)(B) (West 2016).

113. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (the Supreme Court in *Osborne* (Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009)), held that the *Brady* framework should not be applied to post-conviction cases).

114. *Id.* at 87.

Fourteenth Amendment[115]; however, it declined to declare Maryland court's denial of a new trial a Due Process Clause violation[116].

The Court in *U.S. v. Laureano-Salgado* recently considered the *Brady* standard as more "defendant-friendly." The Court noted that, although a motion for a new trial requires that (1) the evidence was unknown or unavailable at trial; and (2) the evidence could not have been discovered at trial through due diligence, the *Brady* standard amended the third and fourth requirements of *Peake*[117] to require that petitioners demonstrate "a reasonable probability that [...] the result of the proceeding would have been different"[118]. The Supreme Court held in *Osborne* that the *Brady* standard should not be applied to post-conviction proceedings, because convicted individuals do not enjoy the same liberty interests as free men[119]. The Court held that once a person is convicted, there is no longer a presumption of innocence[120]. It also held that a convicted person must no longer be afforded due process by the state, and deemed state post-conviction relief procedures as a "choice" not dictated by due process[121].

The federal courts have held that claims of "actual innocence" are not themselves constitutional claims afforded due process, but that in some cases act as "gateways" for petitioners to pass through to have "otherwise barred" claims considered[122].

States differ in their requirements for relief based on post-conviction DNA testing, due to varying statutory rules. For example, in Maryland, favorable post-conviction DNA test results may allow a petitioner to have a post-conviction hearing; or, if the results show a "substantial possibility" that the original jury would not have convicted the petitioner at trial, a court may order a new trial instead of

115. *Id.* at 86.

116. *Id.* at 90.

117. *U.S. v. Peake*, 874 F.3d 65 (1st Cir. 2017) (holding that "(3) is material, not just cumulative or impeaching; and (4) is sufficiently compelling that it would probably produce an acquittal at a retrial").

118. *U.S. v. Laureano-Salgado*, 933 F.3d 20, 28-29 (1st Cir. 2019).

119. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 68 (2009).

120. *Id.*

121. *Id.*

122. *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

the hearing[123]. Delaware permits motions for post-conviction DNA testing only within three years of the date of conviction, and requires the DNA test results establish "actual innocence"[124]. A petitioner may be granted a new trial in Delaware only if the petitioner establishes by clear and convincing evidence that no reasonable jury, when considering the DNA test results with the other evidence at trial, would have convicted the petitioner[125].

New Mexico requires the results of the DNA testing be "exculpatory" in order for a district court to either: (1) set aside the judgement and sentence; (2) dismiss charges with prejudice; (3) order a new trial; or (4) order other appropriate relief[126].

3. Analysis of state post-conviction dna testing statutory requirements

3.1. States Requiring Petitioners Assert Innocence

At least twenty-six states and the District of Columbia require petitioners, under state statute, to assert a claim of "actual innocence"[127] or establish innocence, on a petition to the court for post-conviction DNA testing[128]. Among these state statutes requiring claims of in-

123. Nicholas Phillips, *Innocence and Incarceration: A Comprehensive Review of Maryland's Postconviction DNA Relief Statute and Suggestions for Improvement*, 42 Univ. Balt. L. Forum 65, 73-74 (2011).

124. Del. Code Ann. tit. 11, § 4504(b) (West 2000).

125. *Id.*

126. N M Stat Ann § 31-1A-2(I) (West 2019).

127. *Innocence*, Black's Law Dictionary (Thomson Reuters 2019) (actual innocence is defined as: "The absence of facts that are prerequisites for the sentence given to a defendant") (for the purposes of this Article, requiring a petitioner to assert or establish actual innocence is not differentiated from requiring a petitioner to establish innocence in petitions for post-conviction DNA testing).

128. See, e.g., Ala. Code § 15-18-200 (2020); Ark. Code Ann. § 16-112-202(6)-(7) (West 2005); Cal. Penal Code § 1405(b) (West 2015); Colo. Rev. Stat. Ann. § 18-1-411 (West 2003); Del. Code Ann. tit. 11, § 4504(a) (West 2000); D.C. Code Ann. § 22-4133 (West 2001); Fla. R. Crim. P. 3.853(B)(2)-(3) (2010); Idaho Code Ann. § 19-4902 (West 2012); 725 Ill. Comp. Stat. Ann. 5/116-3 (West 2014); Iowa Code Ann. § 81.10(d) (West 2019); Me. Rev. Stat. tit. 15, § 2137 (2019); Mass. Gen. Laws Ann. ch. 278A, § 3(d) (West 2012); Minn. Stat. Ann. § 590.01 (West 2005) (held unconstitutional by Reynolds v. State (Reynolds v. State, 888 N.W.2d 125 (Minn. 2016), on time

nocence, much variation is found both in the specific wording of the statutes[129] and in the judiciary application of those statutes.

At least fourteen state statutes which require claims of innocence also require the identity of the perpetrator of the crime to have been an issue at trial[130]. Arkansas' post-conviction DNA testing statute has some of the strictest requirements, requiring a petitioner to: (1) include a theory of defense establishing petitioner's "actual innocence" and (2) requiring that the identity of the perpetrator must have been an issue at trial[131]. Arkansas additionally requires that petitioners did not plead guilty at trial, this because the state has determined that if a petitioner pled guilty, identity could not have been an issue at trial[132].

Requiring petitioners to assert innocence excludes petitioners who claimed self-defense and other justification defenses from successfully petitioning a court for post-conviction DNA testing, which may absolve them of guilt[133]. Petitioners whose failed self-defense claims resulted in "no crime" wrongful convictions are at risk of having their petitions denied because of semantics. A petitioner who asserted a self-defense claim at trial claims to be not guilty by reason of affirmative defense. Not guilty in this context is not equivalent to an assertion of innocence as required by statute[134].

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limit of 2 years, has not been revised as of Oct. 19, 2020); Mo. Ann. Stat. § 547.035 (West 2018); N M Stat Ann § 31-1A-2(I) (West 2019); N.Y. Crim. Proc. Law § 440.30 (McKinney 2020); N.D. Cent. Code Ann. § 29-32.1-15 (West 2019); Ohio Rev. Code Ann. § 2953.74 (West 2010); Okla. Stat. Ann. tit. 22, § 1373.2 (West 2020); Or. Rev. Stat. Ann. § 138.692 (West 2020); 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(6) (West 2018); Tex. Code Crim. Proc. Ann. art. 64.03 (West 2017); Utah Code Ann. § 78B-9-301 (West 2018); Vt. Stat. Ann. tit. 13, § 5566(a)(1) (West 2020); Va. Code Ann. § 19.2-327.3 (West 2020); Wis. Stat. Ann. § 974.07 (West 2011).

129. See *supra* note 124.

130. See, e.g., Iowa Code Ann. § 81.10(d) (West 2019) (the 14 states statutes are found in footnote 124 and include: Arkansas; California; Delaware; Florida; Idaho; Illinois; Iowa; Maine; Minnesota; Missouri; North Dakota; Ohio: Oregon; and Texas).

131. Ark. Code Ann. § 16-112-202(6)-(7) (West 2005).

132. See *Leach v. State*, 580 S.W.3d 871, 872 (Ark. 2019) (for further analysis of post-conviction DNA testing statutes by state, see Appendix 2).

133. See *Hobbs*, 2020 NMCA 44 (cited in note 1).

134. See N M Stat Ann § 31-1A-2 (West 2019).

3.2. Identity at Issue and Lesser Requirements

Several states, which do not require petitioners to assert claims of innocence in petitions for post-conviction DNA testing, still require the identity of the perpetrator to have been an issue at trial[135]. Of these states, New Jersey additionally requires petitioners to show that if the DNA testing results are favorable, a new trial would likely be granted[136]. New Jersey also established the Truth Project in 2001, which allows inmates to attempt to prove innocence through post-conviction DNA testing at the expense of the state[137]. Michigan also requires petitioners to show that the DNA evidence itself is material to the issue of identity[138]. Hawaii has perhaps the most inclusive statute[139]. In fact, although it requires identity to have been an issue, the standard is significantly less restrictive than many of the previously described state statutes, requiring petitioners to show only that there exists a reasonable probability of a different verdict[140]. Washington imposes a higher standard than Hawaii, requiring petitioners to show there is a likelihood that the post-conviction DNA testing will demonstrate innocence, based on a standard of more probable than not[141]. States requiring identity to have been an issue at trial tend to exclude petitioners who claimed self-defense or other affirmative defenses at trial[142].

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135. See, e.g., N.J. Stat. Ann. § 2A:84A-32a (West 2016); Ga. Code Ann. § 5-5-41(E) (West 2015); Haw. Rev. Stat. Ann. § 844D-[123](A)(1), (B)(1) (West 2020); Mich. Comp. Laws Ann. § 770.16 (West 2015).

136. *State v. Armour*, 141 A.3d 381, 391 (N.J. Super. App. Div. 2016).

137. Franceschelli, *Motions for Postconviction DNA Testing* at 266 (cited in note 85).

138. Mich. Comp. Laws Ann. § 770.16 (West 2015).

139. Based on close evaluation of thirty-three state statutes and the District of Columbia. See Haw. Rev. Stat. Ann. § 844D-123(A)(1), (B)(1) (West 2020).

140. Haw. Rev. Stat. Ann. § 844D-123(A)(1), (B)(1) (West 2020).

141. Wash. Rev. Code Ann. § 10.73.170 (West 2005).

142. See e.g., *State v. Donovan*, 853 A.2d 772, 776 (Me. 2004) (holding that identity cannot be an issue when a defendant raises a consent or justification defense); see also *People v. Urioste*, 736 N.E.2d 706, 714 (Ill. App. Ct. 2000) (holding that when a defendant raises an affirmative defense, identity ceases to be an issue); but see *Davis*, 11 So. 3d 977, 978 (Fla. Dist. Ct. App. 2009) (holding that self-defense claims do not preclude identity to have been an issue for post-conviction DNA testing) (cited in note 28).

Some statutes do not include clauses requiring identity to be an issue, but rather concentrate on issues such as reasonable probability of different outcomes[143] or producing exculpatory results[144]. Maryland has a similar statutory requirement to Delaware[145], requiring a court to determine, before granting motions for post-conviction DNA testing, whether there is a reasonable probability that the DNA testing can scientifically produce exculpatory or mitigating evidence[146]. Maryland further defines "exculpatory" as "tends to establish innocence"[147]. Likewise, Arizona's statute requires petitioners to show that a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory DNA results had been available at trial[148].

3.3. Further State Imposed Restrictions Based on Timely Filing

Several states and the federal government additionally burden petitioners with time limitations on filing petitions for post-conviction DNA testing. The federal courts impose on petitioners a one year statute of limitations for post-conviction DNA testing, unless a court is persuaded by petitioner's claim of "actual innocence" that no reasonable juror could find petitioner guilty with the newly discovered evidence[149]. The majority of states, including New Mexico, allow petitions for post-conviction DNA testing at any time after sentencing, provided that the evidence is still available for testing[150]. Some states, including Pennsylvania, require that petitions shall be filed in a "timely

143. See, e.g., Ariz. Rev. Stat. Ann. § 13-4240 (2000).

144. See, e.g., *Givens v. State*, 188 A.3d 903, 912 (Md. 2018).

145. Del. Code Ann. tit. 11, § 4504(a) (West 2000).

146. *Givens*, 188 A.3d 903, 912 (cited in note 144).

147. *Id.* at 914.

148. Ariz. Rev. Stat. Ann. § 13-4240 (2000).

149. *Carter v. Klee*, 286 F. Supp. 3d 846, 853 (E.D. Mich. 2018), *certificate of appealability denied*, 14-14792, 2018 WL 10440862 (E.D. Mich. Feb. 5, 2018).

150. See, e.g., 725 Ill. Comp. Stat. Ann. 5/116-3 (West 2014); Ariz. Rev. Stat. Ann. § 13-4240 (2000); Haw. Rev. Stat. Ann. § 844D-123 (West 2020); Okla. Stat. Ann. tit. 22, § 1373.2 (West 2020); Idaho Code Ann. § 19-4902 (West 2020); Utah Code Ann. § 78B-9-301(West 2018); 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(4) (West 2018); Tenn. Code Ann. § 40-30-303 (West 2012); Fla. Stat. Ann. § 925.11(1)(b) (West 2007); N M Stat Ann § 31-1A-2 (West 2019).

manner" but ultimately allow for post-conviction DNA testing motions to be filed at any time[151].

Other states impose additional restrictions on petitioners' ability to request post-conviction DNA testing by limiting the time available for petitioners to submit motions[152]. Georgia has one of the most exclusionary policies, requiring all post-conviction motions to be filed within 30 days from sentencing or conviction[153]. Michigan's procedural requirement is similar to that of Georgia; a petitioner convicted after January 8, 2001, must file a motion for post-conviction DNA testing within 60 days of the conviction; however, a petitioner convicted before January 8, 2001 may file a motion at any time[154]. Maine, Delaware and New York also impose time limits for petition filing[155].

The Innocence Project lists many proposed amendments to the fifty state statutes which contain excessive burdens on access to post-conviction DNA testing[156]. The list includes the removal of "sunset provisions," which the project describes as "absolute deadlines" such as those provided in the statutes of Georgia, Michigan, Maine, Delaware, and New York[157].

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151. See, e.g., 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(4) (West 2018).

152. See, e.g., N.Y. Crim. Proc. Law § 440.30 (McKinney 2020); Me. Rev. Stat. tit. 15, § 2137 (2019); Del. Code Ann. tit. 11, § 4504 (West 2000); Mich. Comp. Laws Ann. § 770.2 (West 2015); Ga. Code Ann. § 5-5-41(E) (West 2015).

153. Ga. Code Ann. § 5-5-41 (E) (West 2015).

154. Mich. Comp. Laws Ann. §§ 770.16(1), 770.2 (West 2015).

155. Me. Rev. Stat. tit. 15, § 2137 (2019) (requiring petitions be filed two years after date of conviction, or if testing is requested due to newly available DNA testing technology, within two years of the time the new technology is available); Del. Code Ann. tit. 11, § 4504 (West 2000) (imposing a statute of limitations for post-conviction remedies of three years); N.Y. Crim. Proc. Law § 440.30 (McKinney 2020) (imposing a five-year statutory limitation unless "extraordinary circumstance[s]" made it impossible to test the DNA evidence within the five years after conviction).

156. *Access to Post-Conviction DNA testing* (The Innocence Project), available at https://www.innocenceproject.org/causes/access-post-conviction-dna-testing/ (last visited 20, April 2020).

157. N.Y. Crim. Proc. Law § 440.30 (McKinney 2020); Me. Rev. Stat. tit. 15, § 2137 (2019); Del. Code Ann. tit. 11, § 4504 (West 2000); Mich. Comp. Laws Ann. § 770.2 (West 2015); Ga. Code Ann. § 5-5-41 (E) (West 2015) (for further discussion of state statutes, see Appendix 2).

4. Analysis of New Mexico's Post-Conviction DNA Testing Statute

4.1. New Mexico's Statutory Requirements for Post-Conviction DNA Testing

The state of New Mexico allows any person convicted of a felony, who claims that DNA evidence will establish their innocence, to petition the district court of the convicting jurisdiction for DNA testing[158]. The statute requires that a petitioner show by a preponderance of the evidence that the evidence was not previously subject to DNA testing (or to the current DNA testing available)[159]; that the DNA testing will likely produce admissible evidence[160]; and that the identity of the perpetrator was at issue[161]. The New Mexico statute includes allowances for petitioners who meet the above-mentioned requirements to be appointed counsel[162] and provides that no petitioners shall be denied access to post-conviction DNA evidence due to inability to pay[163]. In addition, the statute grants petitioners the right to appeal a court's denial of the requested DNA testing[164]. Importantly, New Mexico's statute requires the state to preserve all evidence from investigations and prosecutions which could potentially be subject to DNA testing for the entire period of incarceration, including probation or parole[165]. New Mexico's statute does not include a time limit nor does it impede petitioners who pled guilty from petitioning the court[166].

New Mexico's statutory requirements match those of the many states requiring claims of innocence and that the identity of the perpetrator had been an issue at trial[167]. This presents a problem for petitioners who claim to be not guilty, by reason of affirmative defense,

158. N M Stat Ann § 31-1A-2(A) (West 2019).
159. N M Stat Ann § 31-1A-2(D) (West 2019).
160. *Id.*
161. *Id.*
162. N M Stat Ann § 31-1A-2(E) (West 2019).
163. N M Stat Ann § 31-1A-2(J) (West 2019).
164. N M Stat Ann § 31-1A-2(L) (West 2019).
165. N M Stat Ann § 31-1A-2(M) (West 2019).
166. N M Stat Ann § 31-1A-2 (West 2019).
167. See *supra* note 124 (the states include: Arkansas; California; Delaware; Florida; Idaho; Illinois; Iowa; Maine; Minnesota; Missouri; North Dakota: Ohio; Oregon, and Texas).

and who cannot claim that identity was an issue. These statutory requirements undermine the possibility of exonerating wrongfully convicted persons, convicted of crimes that they were not responsible for.

4.2. New Mexico Courts' Interpretation and Application of the Post-Conviction DNA Relief Statute

New Mexico courts have only recently been presented with cases where interpretation and application of the post-conviction DNA statute is at stake[168]. The *Hobbs* case presented an opportunity for the New Mexico Court of Appeals to analyze the post-conviction DNA statute when the prosecutor appealed the defendant's grant of a new trial based on post-conviction DNA testing[169]. In *Hobbs,* the defendant was convicted of voluntary manslaughter and sentenced to seven years[170]. The incident resulting in the victim's death from gunshot wounds involved a physical altercation, where the defendant alleged that the victim grabbed the gun in his hand, and attempted to use it against the defendant[171]. The defendant raised a claim of self-defense at trial[172].

The Court of Appeals rejected the state's argument that Section A[173] of the post-conviction DNA relief statute requires petitioners to prove that the results of DNA testing "will establish their innocence"[174]. Instead, the court determined that the innocence standard listed in Section A of the statute only requires petitioners to *claim* that the DNA evidence will establish their innocence[175]. The court ruled that criminal defendants have a "fundamental interest" in avoiding wrongful conviction[176] and that New Mexico courts when deciding whether relief should be granted under the statute, should balance the interest

168. See, e.g., *Hobbs*, 2020 NMCA 44 (cited in note 1); *State v. Duran*, 2020 WL 3440537 (N.M. Ct. App. June 22, 2020) (Both cases have been granted certiorari by the New Mexico Supreme Court and are thus pending review).

169. *Hobbs*, 2020 NMCA 44 at para. 20 (cited in note 1).

170. *Id.* at para. 7.

171. *Id.* at para. 2-3.

172. Id. at para. 3.

173. N M Stat Ann § 31-1A-2(A) (West 2019).

174. *Hobbs*, 2020 NMCA 44 at para. 32; N M Stat Ann § 31-1A-2(A) (West 2019).

175. *Hobbs*, 2020 NMCA 44 at para. 32 (*emphasis added*).

176. *Id.* at para. 37.

of the defendant in avoiding wrongful conviction with the "public's interest in the finality of a conviction" and the interests of the victim[177].

The Court of Appeals reviewed *de novo* the issue of when relief should be granted based on post-conviction DNA evidence[178]. The court held that the DNA evidence must be material to the issue of innocence of the petitioner and that it must raise a reasonable probability that had the evidence been available at trial, the petitioner would not have pled guilty or been convicted[179]. The court explained that the New Mexico legislature when drafting the statute, "expected" that DNA evidence, which is exculpatory, would have led to a different outcome at trial[180]. The court defined the term "exculpatory" in *Hobbs* as "evidence reasonably tending to negate guilt"[181]. The court announced a novel standard that New Mexico courts shall apply when deciding whether to grant post-conviction relief based on exculpatory DNA evidence[182].

The Court of Appeals had an additional opportunity to review the post-conviction DNA relief statute in *State v. Duran*[183], the companion case to *Hobbs*. The *Duran* case also involved a district court's denial of the defendant's motion for relief based on the results of post-conviction DNA testing[184]. The defendant in *Duran* filed a petition for post-conviction DNA testing under the statute twenty-eight years after his conviction in 1987 for murder and armed robbery[185]. The defendant in *Duran* requested post-conviction DNA testing of evidence found on the victim; specifically, DNA recovered underneath the victim's fingernails, and multiple hairs found on the victim[186]. The results of the post-conviction DNA testing eliminated the defendant as a contributor to the DNA evidence[187]. The Court of Appeals reversed the district

177. *Id.* (quoting *Montoya v. Ulibarri*, 2007 NMSC 35, 29, 142 N.M. 89).
178. *Id.* at para. 24.
179. *Id.* at para. 38.
180. *Id.* at para. 41.
181. *Id.* at para. 1 (quoting Buzbee v. Donnelly, 1981-NMSC-097, para. 45, 96 N.M. 692).
182. *Id.* at para. 42.
183. *Duran*, 2020 WL 3440537 at para. 1 (cited in note 168).
184. *Id.* at para. 1, 12.
185. *Id.* at para. 1, 7.
186. *Id.* at para. 11.
187. *Id.*

court's denial of the defendant's motion for post-conviction relief based on the DNA testing, and remanded the case for reconsideration according to the new standard announced in *Hobbs*[188].

Because both *Hobbs* and *Duran* have been granted certiorari by the New Mexico Supreme Court[189], it is currently unknown how the Supreme Court will decide the outcome of these cases. However, because these cases are the first to examine the post-conviction DNA statute, the Court may set a clear standard for the lower courts to apply. The *Hobbs* case may help bring to light problems with the statute, importantly the exclusion of petitioners who claimed self-defense at trial and may be wrongfully convicted.

4.3. The Problem with the Requirement of Identity as an Issue and Claims of Innocence

New Mexico is not an outlier of states requiring identity to be an issue at trial, or in requiring petitioners to state a claim of innocence within their petitions for post-conviction DNA testing[190]. However, several states' post-conviction DNA statutes do not include a requirement for petitioners to assert innocence[191]. Only a few states' statutes do not include the requirement of identity as an issue at trial[192].

The problem with states requiring claims of innocence[193] from petitioners who seek to exonerate themselves from potentially erroneous convictions or sentences is that some petitioners may be unable to meet the heavy burden of proving that no reasonable juror could have convicted them given the evidence. For example, in cases like *Hobbs*[194],

188. *Id.* at para. 23; see also *Hobbs*, 2020 NMCA 44 at para. 42 (cited in note 1).

189. *Hobbs*, 2020 NMCA 44 (cited in note 1); *Duran*, 2020 WL 3440537 (cited in note 168).

190. See, e.g., Ark. Code Ann. § 16-112-202 (West 2005); Cal. Penal Code Ann. § 1405 (West 2015).

191. See, e.g., Ariz. Rev. Stat. Ann. § 13-4240 (2000); Ga. Code Ann. § 5-5-41 (E) (West 2015); Haw. Rev. Stat. Ann. § 844D-123 (West 2020); Mich. Comp. Laws Ann. § 770.16 (West 2015); N.J. Stat. Ann. § 2A:84A-32a (West 2016); Wash. Rev. Code Ann. § 10.73.170 (West 2005).

192. See, e.g., Md. Code Ann., Crim. Proc. § 8-201 (West 2018); Ariz. Rev. Stat. Ann. § 13-4240 (2000).

193. Or actual innocence.

194. *Hobbs*, 2020 NMCA 44 (cited in note 1).

because the defendant raised a claim of self-defense, it is possible that a "reasonable juror" could convict because no other perpetrator was implicated.

Convicted individuals who claim self-defense or other affirmative defenses may be preempted from petitioning the court for post-conviction DNA testing based on the stringent requirement for claiming innocence. The requirement for claiming innocence seems to be interpreted by the courts to mean that petitioners must claim that someone else was responsible, like in the *Duran* case, where DNA testing conclusively eliminated the defendant as the source of DNA evidence found on the victim[195]. Requiring all petitioners to, under oath, claim innocence under penalty of law seems unnecessarily burdensome, and may exclude petitioners who claim to be not guilty based on self-defense.

States are widely divided on whether petitioners who claim to be not guilty of a crime based on an affirmative defense, such as self-defense, are entitled to post-conviction DNA testing. Some states are of the opinion that identity is no longer an issue after petitioners state affirmative defense claims, while other states hold that these petitioners may not be summarily denied post-conviction DNA testing[196]. For example, Maine courts have held that identity is always at issue in criminal trials unless a defendant admits to an act by asserting an affirmative defense[197]. Illinois has a similar rule, holding that when a defendant claims any affirmative defense, identity is no longer at issue.[198] In *People v. Urioste*, an Illinois court held, "[i]t would make no sense to allow DNA testing in cases where identity was not the issue at the trial"[199]. By holding that convicted individuals who asserted an affirmative defense are unable to claim that identity was an issue at trial,

195. *Duran*, 2020 WL 3440537 at para. 11 (cited in note 168).

196. See, e.g., *State v. Donovan*, 853 A.2d 772, 776 (Me. 2004) (holding that identity cannot be an issue when a defendant raises a consent or justification defense); see also *People v. Urioste*, 736 N.E.2d 706, 714 (Ill. App. Ct. 2000) (holding that when a defendant raises an affirmative defense, identity ceases to be an issue); but see *Davis*, 11 So. 3d 977, 978 (Fla. Dist. Ct. App. 2009) (holding that self-defense claims do not preclude identity to have been an issue for post-conviction DNA testing) (cited in note 28).

197. *State v. Donovan*, 853 A.2d 772, 776 (Me. 2004).

198. *People v. Urioste*, 736 N.E.2d 706, 714 (cited in note 196).

199. *Id.*

these states prevent these individuals from seeking post-conviction DNA testing.

By contrast, some states, including Florida and Washington, have held that it is inappropriate to summarily deny post-conviction DNA testing to petitioners who claim to have acted in self-defense based on the issue of identity[200]. In *Davis,* the Florida District Court of Appeals reversed the trial court's denial of petitioner's motion for post-conviction DNA testing, where the denial was based on petitioner's assertion of self-defense.[201] The trial court had denied the petition because it felt the petitioner's self-defense claim negated the possibility that the identity of the perpetrator had been an issue at trial[202]. The court of appeals, however, held that petitions for testing should not be summarily denied because the defendant did not deny the act which was alleged to be criminal[203]. The court ruled that the correct standard to apply when determining whether to grant a petition, is considering whether the DNA testing would have had a reasonable probability, if available at trial, of resulting in an acquittal or lesser sentence[204].

Similarly, Washington courts have held that individuals who claimed self-defense can state that identity was an issue at trial, because it is the identity of the perpetrator, which the court differentiates from the commissioner of an act[205]. In *Braa*, the court rejected the state's proposition that because the defendant's identity as the shooter was not at issue at trial, the DNA evidence would be immaterial to the issue of identity. The court explained that the evidence must be relevant to the identity of the perpetrator[206]. The court held that a person who kills another in lawful self-defense is "not a perpetrator" and that if convicted, the person is "misidentified as the perpetrator" making the identity of the perpetrator an issue within the meaning of the statute[207]. The court further established that petitioners who claim self-defense should not be denied post-conviction DNA testing,

200. See, e.g., *Davis*, 11 So. 3d 977, 978; *Braa*, 410 P.3d 1176 (cited in note 28).
201. *Davis*, 11 So. 3d 977, 978 (cited in note 28).
202. *Id.*
203. *Id.*
204. *Id.*
205. *Braa*, 410 P.3d 1176 (cited in note 28).
206. *Id.*
207. *Id.*

when that testing may establish innocence of the alleged crime[208]. In addition, the court held that if the legislature intended to restrict post-conviction DNA testing for individuals claiming self-defense, this would be evidence of "perverse legislative intent" where a statute is enacted "to free some-but not all-innocent persons"[209].

4.4. Proposed Resolution to the Exclusion of Petitioners

New Mexico's post-conviction DNA testing statute, when considered in relation to other states' statutes, could be described as somewhat liberal[210]. However, New Mexico's statute still requires the petitioner to assert innocence and that the identity of the perpetrator be an issue at trial[211]. As described above, requiring identity to have been an issue at trial has been interpreted both to include and to exclude individuals who claim self-defense[212]. This ambiguity in jurisdictional authority, seems to exclude such individuals without good cause. As the discussion above shows, there is no clear precedent for New Mexico to follow. Without direction from the legislature, petitioners who are wrongfully convicted (for "no crime" wrongful convictions), may be unable to access post-conviction DNA testing.

Many states have recognized that certain requirements of post-conviction DNA testing statutes are unfair when applied to some categories of individuals. For example, several states including New Mexico and Texas have allowed individuals who pled guilty at trial to petition the court for DNA testing, in order to allow those individuals who may have been coerced into confessing or conceded guilt, to avoid more lengthy sentences, and establish their innocence[213]. This type of statutory allowance aims to prevent individuals seeking

208. *Braa*, 410 P.3d 1176 (cited in note 28).

209. *Id.*

210. See, e.g., Mo. Ann. Stat. § 547.035 (West 2018) (requiring a claim that DNA testing will yield evidence of actual innocence); Ala. Code § 15-18-200 (2020) (only allowing petitioners convicted of Capital offenses who are awaiting execution to petition for post-conviction DNA testing).

211. N M Stat Ann § 31-1A-2 (West 2019).

212. *Braa*, 410 P.3d 1176 (cited in note 28).

213. See, e.g., D.C. Code Ann. § 22-4133 (West 2001); Fla. Stat. Ann. § 925.11(1)(a) (West 2007); Haw. Rev. Stat. Ann. § 844D-123(b)(1) (West 2020); Mass. Gen. Laws Ann. ch. 278A, § 3(d) (West 2012); N M Stat Ann § 31-1A-2 (West 2019); Or. Rev. Stat.

post-conviction DNA testing from being summarily denied such possibility based on a technicality. The need for revision of the New Mexico post-conviction DNA statute is apparent when considering cases such as *Hobbs*[214]. In *Hobbs*, the defendant argued that his post-conviction DNA testing was exculpatory because it weakened the state's argument that the defendant was not under threat of death or bodily harm at the time of the shooting, thereby supporting his self-defense claim[215]. If individuals like Mr. Hobbs are summarily denied DNA testing which could establish their claims of self-defense, thereby proving that they are not guilty of the alleged crime, a grave injustice is done[216].

This Article does not aim to resolve the issues discussed in the New Mexico post-conviction DNA statute but does propose a potential resolution for purposes of promoting discussion. A revision of the New Mexico statute could potentially assist petitioners overturn "no crime" wrongful convictions. An example of a state finding issue with its post-conviction DNA testing statute and amending said statute is found in Maryland.

In 2003, Maryland amended its post-conviction DNA testing statute towards a more liberal approach[217]. The Maryland post-conviction DNA statute formerly contained both the requirement that petitioners claim "actual innocence" and show that identity had been an issue at trial[218]. The statute was amended in 2003 to provide for a new standard as to r whether a petitioner should be granted post-conviction DNA testing. Such a standard requires considering whether there is a reasonable probability for the DNA testing to produce exculpatory or mitigating evidence related to a wrongful conviction or sentence[219].

Ann. § 138.692(3) (West 2020); 42 Pa. Stat. and Consol. Stat. Ann. § 9543.1(5) (West 2018); Tex. Code Crim. Proc. Ann. art. 64.03(b) (West 2017).

214. *Hobbs*, 2020 NMCA 44 (cited in note 1).

215. *Id.* at para. 10.

216. *Id.* (Mr. Hobbs was granted post-conviction DNA testing, however it seems likely the current statutory requirements will allow for ambiguous determination by the district courts when reviewing petitions by individuals convicted after a failed self-defense claim).

217. See *Gregg*, 976 A.2d 999 at 1005 (cited in note 29).

218. *Id.* at 1006.

219. *Givens*, 188 A.3d 903, 912 (cite in note 144); Md. Code Ann., Crim. Proc. § 8-201(c) (West 2018).

This change in statutory language results in a more lenient approach to allow for post-conviction DNA testing when appropriate[220].

Maryland's statute could be improved upon by removing a requirement that limits indigent petitioners, as it demands all petitioners to pay the cost of post-conviction DNA testing[221]. The state reimburses petitioners if the results are favorable[222]. This type of cost-based limitation may function to exclude petitioners who cannot afford DNA testing, providing an unjust barrier to potential relief from wrongful conviction.

5. Addressing Concerns to Amendment

There is a profound moral imperative in our society to not condemn the innocent. Our criminal justice system has determined that by requiring a standard of proof beyond any reasonable doubt, innocent people should not be incarcerated for crimes they did not commit[223]. However, innocent people who had previously been convicted, were later on exonerated through the advent of DNA testing[224]. The moral imperative of not convicting, sentencing, or executing innocent people[225] is, in the United States , balanced against the societal interest in "the finality of convictions"[226]. The numerous limitations on access to testing discussed in this Article support a theory that as a general rule states are more invested in maintaining the finality of convictions than exculpating wrongfully convicted individuals. New Mexico courts have stated the importance of "ensuring accuracy in

220. *Exonerate the Innocence* (The Innocence Project), available at https://www.innocenceproject.org/exonerate/ (last visited April 15, 2021) (to date, 375 people have been exonerated through post-conviction DNA testing).

221. Md. Code Ann., Crim. Proc. § 8-201(h)(1) (West 2018).

222. Md. Code Ann., Crim. Proc. § 8-201(h)(2) (West 2018).

223. See *In re Winship*, 397 U.S. 358, 364 (1970) (stating that "it is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

224. *Exonerate the Innocence* (The Innocence Project), available at https://www.innocenceproject.org/exonerate/ (last visited April 15, 2021).

225. In addition to people who are not guilty by reason of affirmative defense.

226. *Ex parte Smith*, 444 S.W.3d 661, 666 (Tex. Crim. App. 2014).

criminal convictions in order to maintain credibility"[227]. Maintaining credibility of the New Mexico court system, although of obvious importance, does not seem to require excessive limitation on access to post-conviction DNA testing.

Some individuals may balk at the concept of reducing procedural limitations on access to post-conviction DNA testing, fearing that either a multitude of inmates will rush to file petitions; or that numerous convictions will be overturned. A quick look at the statistics of exonerations, and more specifically at, exonerations due to post-conviction DNA testing, should assuage any fears that additional access to testing will open such a floodgate. In the United States, only 2,679 people have been exonerated since 1989[228]. This indicates that since the advent of DNA testing in 1985, it is likely that fewer people are being wrongfully convicted based on the availability of DNA testing at trial.

For an inmate to request post-conviction DNA testing, there must be a viable piece of evidence, containing non-degraded biological material which has been kept by the state[229]. This requirement itself limits inmates' ability to seek testing, because the evidence may no longer be viable, or because it was lost or destroyed by the state. The Innocence Project notes that 29% of its cases were closed due to lost or destroyed biological evidence[230].

Post-conviction DNA testing in New Mexico is not the last procedural barrier between an inmate and freedom[231]. It would be more appropriate to describe it as the first barrier after all appeals have been denied. The New Mexico post-conviction DNA testing statute also

227. *Hobbs*, 2020 NMCA 44 at para. 37 (quoting *Montoya v. Ulibarri*, 2007-NMSC-035, 142 N.M. 89) (cited in note 1).

228. See about *DNA* (The National Registry Of Exonerations), available at https://www.law.umich.edu/special/exoneration/Pages/DNA.aspx (last visited April 15, 2021).

229. See, e.g., N M Stat Ann § 31-1A-2(D) (West 2019); Keith A. Findley, *New Laws Reflect the Power and Potential of DNA*, 75 Wis. Law 20.20 (2002) (explaining that Wisconsin's new law requires the state to preserve biological evidence for postconviction DNA testing).

230. *DNA Exonerations in the United States* (The Innocence Project), available at https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 15, 2021).

231. N M Stat Ann § 31-1A-2 (West 2019).

serves as the relief statute and includes instructions to the district courts on how to address petitions for DNA testing[232]. Section F states that when a district court reviews a petition for post-conviction DNA testing, "the district court may dismiss the petition, order a response by the district attorney, or issue an order for DNA testing"[233]. Through this language, a district court may dismiss a petition outright for post-conviction DNA testing if it deems the petition lacks merit. Any concern that a flood of petitions for post-conviction DNA testing would overwhelm the judicial system , or present a substantial judicial cost, should be reduced by the fact that the statute does not require a preliminary hearing, and in fact allows for outright dismissal of petitions at the discretion of the district courts[234].

Whenever a New Mexico district court orders post-conviction DNA testing as a result of a petition being granted, the court is still precluded from granting any relief to petitioners unless the results are deemed "exculpatory"[235]. If the district court finds that the results are exculpatory, it may either (1) set aside the petitioner's conviction and sentence; (2) dismiss the charges with prejudice; (3) grant a new trial; or (4) order other relief[236]. In order for a district court to determine whether DNA results are considered exculpatory under the statute, a multistep analysis must be conducted[237]. In *Hobbs*, the Court of Appeals recently reviewed the interpretation as to whether a post-conviction DNA test should be considered exculpatory[238]. It held that DNA evidence is exculpatory when the evidence: "(1) is material; (2) is not merely cumulative; (3) is not merely impeaching or contradictory; and (4) raises a reasonable probability that the petitioner would not have pled guilty or been found guilty[239]. [...]". This standard of proof for determining whether DNA results are exculpatory, such that a district court could grant a new trial or other relief is a high standard.

232. N M Stat Ann § 31-1A-2(F) (West 2019).

233. *Id.*

234. *Id.*

235. N M Stat Ann § 31-1A-2(I) (West 2019).

236. *Id.*

237. *Hobbs*, 2020 NMCA 44 (cited in note 1) (the standard announced by the court to determine the exculpatory nature of evidence could be overruled in the pending review by NMSC).

238. Id. at para. 42.

239. *Id.*

The risk of any person serving a prison sentence or being executed due to a wrongful conviction is too high to restrict access to post-conviction DNA testing to situations where someone else may be at fault. Because New Mexico has a high standard for granting a petitioner's relief based on the results of post-conviction DNA testing, it is unnecessary for the state to require such a high burden for inmates to request testing. Specifically, other states have successfully implemented changes to their post-conviction DNA testing statutes, removing the claim of innocence and identity requirements[240]. As it currently stands, the New Mexico post-conviction DNA statute may entirely prohibit wrongfully convicted individuals who asserted self-defense claims at trial from petitioning for testing, based upon the state's identity requirement. By removing the unnecessary restrictions on access to post-conviction DNA testing, the state could more equitably grant petitions for post-conviction DNA testing[241]. without fear of overturning many convictions. The New Mexico post-conviction DNA relief statute contains enough procedural burdens to ensure that only those inmates whose test results are exculpatory may be granted relief[242].

6. Conclusion

Individuals wrongfully convicted after asserting self-defense claims are prohibited from seeking relief based on unnecessary statutory restrictions. States such as New Mexico, which require petitioners to claim innocence and prove that identity was an issue at trial, prohibit individuals who may have valid claims of self-defense from seeking justice. These statutory limitations upon petitioners who seek post-conviction DNA testing are unnecessarily burdensome because after a petitioner is granted DNA testing, there are further statutory limitations before any relief is granted. The New Mexico legislature should follow the example set by Maryland and remove these statutory restrictions on DNA testing. This would ensure that individuals

240. See, e.g., Md. Code Ann., Crim. Proc. § 8-201 (West 2018).
241. Innocent or not guilty due to justification.
242. N M Stat Ann § 31-1A-2(I) (West 2019).

who may be wrongfully convicted are not excluded based on an assertion of self-defense.

Appendix 1(Wrongful conviction statistics)

The demographic makeup of the exonerated includes 60% African American, 31% Caucasian, 8% Latinx, 1% Asian American, and less than 1% Native American or self-identified "Other."[243] Misidentification by eyewitnesses resulted in 69% of the wrongful convictions, and 29% involved false confessions[244]. While the 375 wrongfully convicted persons were sitting in jail, 154 additional violent crimes were committed by the 165 actual assailants later identified[245]. While free, these assailants committed 83 sexual assaults; 36 homicides, and 35 "other violent crimes"[246]. Out of the 104 people who were convicted based on false confessions, 22% had exculpatory DNA evidence available at trial[247]. In a study of 10,060 cases where DNA testing was performed during criminal investigations by FBI labs, more than 25% of the cases resulted in exclusion of suspects (pre-trial) based on the DNA testing[248].

Appendix 2 (States requiring assertions of innocence)

California has a similarly strict statutory requirement (to Arkansas) for post-conviction DNA testing petitions[249]. It requires that petitioners include motions for testing a statement that (1) petitioner is not the perpetrator of the crime, and (2) an explanation detailing how the DNA testing is relevant to the petitioner's claim of innocence[250]. In

243. See *DNA Exonerations in the United States* (The Innocent Project), available at: https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 17, 2021)

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. Cal Penal Code §1405(b), (West 2015).

250. *Id.*

a California death penalty case, the court upheld a trial court's decision to deny post-conviction DNA testing, even though the petitioner satisfied the requirement that the DNA testing would be relevant to the issue of identity, due to there being other categories of evidence making it less probable that petitioner was innocent[251].

The state of Delaware requires petitioners to sign affidavits, under threat of perjury, asserting that the petitioner is actually innocent and explain how the DNA testing requested *will establish* innocence[252]. Interestingly, the Delaware courts have interpreted the statute to require that the DNA testing to be conducted has the scientific potential to yield a favorable result, but that the statute does not require petitioner to show that the test will likely produce favorable results[253].

The post-conviction DNA testing statute in Florida contains strict requirements regarding the assertions to be made by petitioners seeking DNA testing[254]. For example, the statute requires petitioners to make "a statement that the movant is innocent" along with the assertion of identity being an issue at trial[255]. Florida courts have also applied the statute strictly, finding that denial of post-conviction DNA testing to petitioners who alleged self-defense at trial is proper, because identity is not determined to be a disputed issue when the petitioner has testified to being physically present at the scene[256].

Under the Idaho post-conviction DNA testing statute, petitioners must present a prima facie case that identity was an issue at trial, and the trial court shall only grant testing where the results of that testing has the scientific potential of producing evidence demonstrating that it is more probable than not that the petitioner is innocent[257]. The Idaho courts have interpreted the post-conviction DNA testing standard as requiring that the DNA testing has the scientific potential of

251. See *Richardson v. Super*. Ct., 183 P3d 1199, 1206 (Cal 2008), as modified (July 16, 2008)

252. Title 11 Del Code Ann § 4504(a) (West 2000) (emphasis added).

253. See *Anderson v. State*, 831 A2d 858, 867 (Del 2003).

254. Fla Rule Crim Proc 3.853(B)(2)-(3) (2010).

255. *Id.*

256. See *Scott v. State*, 75 S3d 392, 392-93 (Fla App 2011).

257. Idaho Code Ann. § 19-4902(c), (e)(1) (West 2012).

demonstrating a greater than 51% chance that the petitioner is in fact innocent[258].

The Illinois post-conviction DNA testing statute also requires petitioners to state a prima facie case that identity was an issue at trial and assert "actual innocence"[259]. However, the standard for when a court should allow post-conviction DNA testing differs from the previously mentioned statutes because it limits the courts to approve testing to when the testing is capable of producing relevant evidence supporting the petitioner's claim for "actual innocence," or when the testing will raise a reasonable probability that the petitioner would have been acquitted if the evidence had been available at trial[260]. The Illinois courts, similar to the Florida courts, have upheld a strict interpretation of the identity requirement for post-conviction DNA testing[261]. Specifically, the Illinois Court has held that convicted individuals who pled guilty at trial are unable to seek post-conviction DNA testing because they are unable to claim that identity was a disputed issue at trial.

The state of Iowa has seemingly lenient statutory requirements for petitioners to obtain post-conviction DNA testing[262], but the courts, by contrast, have held petitioners to extremely high standards when determining whether petitioners should have access to testing[263], The Iowa court defined its "demanding actual innocence standard," as requiring petitioners who request DNA testing to demonstrate by clear and convincing evidence that, despite their conviction, no reasonable fact-finder could convict the petitioner in light of the DNA test results[264], The court explained that this demanding standard is required in order to balance the liberty interests of a factually innocent petitioner to be free against the state's interest in finality, and conservation of resources[265].

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258. See *Johnson v. State*, 395 P3d 1246, 1253 (Idaho 2017).

259. 725 ILCS 5/116-3 (West 2014).

260. *Id.*

261. See *People v. O'Connell*, 879 NE2d 315, 319 (Ill 2007).

262. Iowa Code Ann § 81.10(d) (West 2019).

263. See, e.g., *Dewberry v. State*, 941 NW2d 1, 5 (Iowa 2019), rehearing denied (Jan. 16, 2020).

264. *Id.*

265. *Id.*

Maine's post-conviction DNA testing statute requires petitioners to: (1) state claims of "actual innocence," (2) demonstrate that the identity of the perpetrator of the crime was an issue at trial, and (3) requires that the DNA evidence petitioner seeks to be tested be material to the issue of identity[266]. Maine courts have held that a court shall allow post-conviction DNA testing when the testing could either exonerate the petitioner, or significantly advance the petitioner's claim of actual innocence[267].

Both Minnesota and Missouri have similar statutory requirements for post-conviction DNA testing to Illinois and Maine[268]. However, Missouri's statute requires petitioners to state a claim that the DNA testing will yield results of the petitioner's "actual innocence"[269]. North Dakota's post-conviction DNA statute likewise requires petitioners to establish a claim of "actual innocence," and present a prima facie case that identity was an issue at trial[270].

The state of Ohio requires a more enhanced requirement than the above described statutes, requiring petitioners to show that no reasonable juror could have convicted the petitioner if the results of the post-conviction DNA testing had been available at trial[271]. The statute defines this standard as "outcome determinative"[272] and additionally requires that identity had been an issue at trial, and that petitioner must demonstrate that the DNA testing will exclude the petitioner as a source[273].

Oregon and Texas have similar statutory requirements for post-conviction DNA testing, as both states impose a requirement that in light of the DNA results, the petitioner would not have been prosecuted or convicted[274]. The Oregon statute, besides the requirements

266. Title 15 Me Rev Stat Ann § 2137 (2019).

267. See *State v. Donovan*, 853 A2d 772, 776 (Me 2004).

268. Minn Stat Ann § 590.01 (West 2005) (held unconstitutional by *Reynolds v. State*, 888 NW2d 125 (Minn 2016), on time limit of 2 years, has not been revised as of Oct. 19, 2020); Mo. Ann. Stat. § 547.035 (West 2018).

269. Mo Ann Stat § 547.035 (West 2018)

270. ND Cent Code Ann § 29-32.1-15 (West 2019).

271. See *State v. Prade*, 930 NE2d 287, 291 (Ohio 2010).

272. *Id.*

273. Ohio Rev Code Ann § 2953.74 (West 2010).

274. Ohio Rev Code Ann § 138.692 (West 2020); Tex Crim Proc Code Ann § 64.03 (West 2017).

that petitioner claim "actual innocence" and show that identity was at issue, also requires petitioners to demonstrate that if the DNA results had been available at trial, (1) no prosecution would have occurred, or (2) there would have been a more favorable outcome to the petitioner[275]. The Texas statutory requirements are similar to that of the Oregon statute; however, the standard specifically requires petitioners to establish by a preponderance of the evidence, that he or she would not have been convicted if the DNA results had been obtained during trial.[276] Texas courts have interpreted this preponderance of the evidence standard to mean that there must have been a greater than 50% chance of petitioner being acquitted if the DNA results were admitted at the time of trial.[277]

Several of the states which require claims of innocence by petitioners seeking post-conviction DNA testing also include additional rules or burdens of proof. For example, the Alabama statute, which seems to be the most exclusionary statute[278], only permits individuals convicted of Capital offenses who are awaiting execution to file petitions[279]. Additionally, Alabama requires petitioners to show that the DNA test result "on its face" would demonstrate factual innocence of the crime[280].

Two states, Florida and Colorado, require petitioners to demonstrate, in petitions for post-conviction DNA testing, that the DNA test will produce definitive results of "actual innocence"[281]. The Colorado statute defines "actual innocence" as "clear and convincing evidence such that no reasonable juror would have convicted the defendant"[282]. At least six state statutes require petitioners demonstrate that if the DNA results had been available at trial, there is a reasonable probability that no juror could have found the petitioner guilty, or that trial

275. Ohio Rev Code Ann § 138.692 (West 2020).

276. Tex Crim Proc Code Ann § 64.03 (West 2017).

277. See, e.g., *Leal v. State*, 303 SW3d 292, 302 (Tex Crim App 2009).

278. Based upon analysis of the 26 state statutes and the District of Columbia which require innocence claims.

279. Ala Code § 15-18-200 (2020).

280. *Id.*

281. Fla Rule Crim Proc 3.853(B)(2)-(3) (2010); Colo Rev Stat Ann § 18-1-413(1) (West 2003).

282. Colo Rev Stat Ann § 18-1-411 (West 2003).

would not have resulted in conviction.[283] In addition, Illinois includes a requirement that petitioners demonstrate a reasonable probability that they would have been acquitted at trial had the evidence been available[284]; Ohio includes the Outcome Determinative standard previously examined[285]; and Delaware requires the DNA to have the scientific potential to yield a favorable result to the petitioner[286].

283. See, e.g., Or Rev Stat Ann § 138.692 (West 2020); Tex Crim Proc Code Ann § 64.03 (West 2017); Ohio Rev Code Ann § 2953.74 (West 2010); Iowa Code Ann § 81.10(d) (West 2019); 725 ILCS 5/116-3 (West 2014); Wis Stat § 974.07 (West 2011).

284. 725 ILCS 5/116-3 (West 2014).

285. Ohio Rev Code Ann § 2953.74 (West 2010).

286. Title 11, Del Code Ann § 4504(a) (West 2000).

Il principio di irretroattività in malam partem alla luce della saga Taricco: oggetto di dialogo o di "scontro" tra Corti?

Guido Casavecchia*

Abstract: L'obiettivo di questa ricerca è evidenziare alcune ambiguità riguardanti il principio di irretroattività delle leggi sfavorevoli in materia penale, così come statuito ex art. 25, comma 2 Cost., ciò nonostante esso rappresenti un tradizionale principio costituzionale e penale, nonché sia considerato un'imprescindibile garanzia di civiltà giuridica in quanto consente la corretta prevedibilità delle conseguenze giuridico-penali delle proprie condotte. Tuttavia, talvolta, può subire lesioni prima facie non evidenti, così come nella c.d. saga Taricco. Il caso prende avvio da un rinvio pregiudiziale alla Corte di Giustizia dell'Unione Europea, da cui deriva l'obbligo di non applicare l'istituto della prescrizione qualora ciò pregiudicasse gli interessi dell'Unione Europea in un numero considerevole di casi di frode grave. Hanno fatto successivamente seguito due questioni di legittimità costituzionale che hanno lamentato la lesione dei principi di determinatezza-tassatività e del divieto di applicazione retroattiva sfavorevole in materia penale, oltre che un rinvio pregiudiziale della Corte Costituzionale alla Corte di Giustizia, in un'ottica di dialogo, ma anche di frizione, poiché è stata paventata la possibile attivazione dei c.d. contro-limiti. La vicenda si è conclusa con una sentenza dei Giudici di Lussemburgo che ha escluso l'applicazione della regola precedentemente richiamata nei casi in cui ciò comporti una violazione del principio di legalità dei reati e delle pene, a causa dell'applicazione retroattiva di una normativa che impone un regime di punibilità più severo di quello vigente al momento della commissione del reato. Tali effetti retroattivamente sfavorevoli sono un monito a che il principio di irretroattività sfavorevole sia fatto oggetto di una costante analisi, sia per conoscerne in anticipo tutte le possibili implicazioni, sia per evitare parziali regressioni in tema di diritti quando vengano introdotte innovazioni legislative o giurisprudenziali.

Oltre al necessario recupero della centralità del principio di irretroattività in malam partem, sullo sfondo si staglia lo scenario dei rapporti tra organi nazionali e sovranazionali in cui si contrappongono forze interne ed esterne che, nel caso Taricco, hanno in particolare riguardato la discussione del "da quando e fino a quando" punire.

Abstract: The aim of this research is to highlight some ambiguities that still exist around the principle of non-retroactivity of unfavorable laws in criminal matters (art. 25, p. 2 Constitution), although it represents a traditional constitutional and criminal principle, and it is a guarantee of legal civilization which is essential for the correct predictability of the juridical-criminal consequences of our conducts. However, sometimes and as in the so-called "Taricco saga", the principle can suffer some lesions. The "Taricco saga" started with a preliminary reference to the Court of Justice of the European Union, which stated not to apply the prescription when it affects the interests of the European Union in a considerable number of cases of serious fraud. Two issues of constitutional legitimacy have followed, complaining about the infringement of the principles of determinacy nature of criminal law and the prohibition of unfavorable retroactive application in criminal matters. Then, there was a preliminary reference from the Constitutional Court to the Court of Justice of the European Union, in order to dialogue, but also threatening the activation of the so-called counter-limits. In the end, Judges of Luxembourg excluded the application of the previous rule in cases that violate the principle of legality of crimes and penalties, due to the retroactive application of a law that imposes a more severe punishment regime than that in force at the time of the commission of the offense. These retroactively unfavorable effects suggest the opportunity of a constant analysis of the non-retroactivity principle, in order to estimate all the possible implications, as well as to prevent from partial regressions in terms of rights when legislative or jurisprudential innovations are introduced. In addition to the necessary recovery of the centrality of the non-retroactivity in malam partem principle, it must be considered the scenario of relations between legal systems, where internal and external forces face each other and show different interests about the issue of the punishment extent.

Parole chiave: irretroattività legge penale; divieto di retroattività; contro-limiti; prescrizione; Taricco.

Keywords: non-retroactivity of criminal law; prohibition of retroactivity; counter-limits; prescription; Taricco case.

1. Introduzione

Il principio di irretroattività delle leggi sfavorevoli in materia penale, benché sia considerato una garanzia fondamentale dello Stato di diritto e un presidio di civiltà giuridica avverso l'abuso del potere statuale, può comunque presentare delle zone d'ombra e delle ambiguità che questa analisi si propone di evidenziare.

Dietro alle poche e limpide parole dell'art. 25, comma 2 Cost., secondo il quale "nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso", si nasconde una Babele di effetti più o meno diretti, voluti o non voluti, che fanno sì che il principio di irretroattività *in malam partem* necessiti di uno studio costante affinché si possano prevedere tutte le possibili implicazioni.

La c.d. Saga Taricco costituisce una vicenda paradigmatica per l'analisi giuridica dei seguenti aspetti: del principio di legalità in materia penale (nelle due declinazioni dell'irretroattività *in malam partem* e determinatezza); della sua attitudine a ergersi quale c.d. contro-limite; dell'evoluzione storica del dialogo tra Corti nazionali e sovranazionali, talvolta resosi scontro; del ruolo dei giudici comuni degli Stati Membri dell'Unione Europea nella loro opera interpretativa, immersa nelle tensioni tra garanzie costituzionali e primato comunitario; della contrapposizione del principio di separazione dei poteri e di riserva di legge in materia penale con la crescente opera interpretativa delle giurisdizioni nazionali ed europee.

2. *La vicenda Taricco*

La vicenda Taricco prese avvio da un rinvio pregiudiziale del Tribunale di Cuneo alla Corte di Giustizia dell'Unione Europea, proposto con ordinanza il 17 Gennaio 2014. Il rinvio fu proposto incidentalmente ad un processo penale per evasione del pagamento dell'Imposta sul Valore Aggiunto (I.V.A.), chiedendo alla CGUE l'interpretazione degli artt. 101[1], 107[2] e 119[3] TFUE, nonché dell'art. 158 della Direttiva 2006/112 in relazione alla disciplina italiana in materia di prescrizione.

Secondo il Tribunale di Cuneo, poiché tra le risorse proprie dell'Unione Europea rientrano anche le entrate provenienti dall'applicazione di un'aliquota uniforme ai beni imponibili I.V.A., la Corte di Giustizia dell'Unione Europea avrebbe competenza a giudicare in materia di reati fiscali commessi al fine di evadere il pagamento dell'I.V.A., come quelli contestati nel caso di specie.

La costante giurisprudenza europea (ex art. 267 TFUE) consente al giudice nazionale di valutare, alla luce delle particolari circostanze

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1. Vedi Art. 101, TFUE (la disposizione tutela la libera concorrenza all'interno del mercato unico europeo, vietando condotte illecite o accordi tra imprese che possano pregiudicare il commercio tra Stati membri e che abbiano per oggetto o per effetto di impedire, restringere o falsare la concorrenza. Il giudice italiano, dunque, riteneva, con un'interessante operazione interpretativa, che il regime nazionale della prescrizione, considerato sistematicamente elusivo della punibilità per le c.d. frodi carosello in materia di I.V.A., costituisse anche una violazione alla lecita concorrenza tra imprese nel mercato unico europeo, poiché le stesse sarebbero state più favorite in Italia, meno negli altri Stati membri).

2. Secondo un'interessante interpretazione, il giudice *a quo* riteneva che la disciplina italiana in tema di prescrizione costituisse una forma indiretta di aiuto concesso dallo Stato alle aziende ivi operanti, idonea a incidere sugli scambi tra Stati membri in modo incompatibile con il mercato interno, poiché minaccerebbe o falserebbe la concorrenza. Ciò è appunto vietato dall'art. 107, TFUE.

3. Vedi art. 119, TFUE (la disposizione sancisce che l'azione degli Stati membri e dell'Unione comprende l'adozione di una politica economica condotta conformemente al principio di un'economia di mercato aperta e in libera concorrenza e fondata su uno stretto coordinamento tra gli Stati membri, su un mercato interno e sulla definizione di obiettivi comuni).

del caso di specie, sia la necessità di una pronuncia pregiudiziale ai fini dell'emanazione della propria sentenza, sia la rilevanza delle questioni che sottopone alla Corte di Giustizia.

Nel caso in esame, dato il collegamento tra la disciplina fiscale italiana e le materie di competenza dell'Unione, tali criteri sarebbero integrati.

La Grande Sezione della Corte di Giustizia dell'Unione Europea, con sentenza dell'8 settembre 2015 (c.d. Taricco 1)[4], ha dichiarato la disciplina italiana in materia di prescrizione del reato (artt. 160, ultimo comma[5] e 161[6] c. p.)

> idonea a pregiudicare gli obblighi imposti agli Stati membri dall'art. 325, paragrafi 1 e 2, TFUE7 nell'ipotesi in cui detta normativa nazionale impedisca di infliggere sanzioni effettive e dissuasive in un numero considerevole di casi di frode grave che ledono gli interessi finanziari dell'Unione europea, o in cui preveda, per i casi di frode che ledono gli interessi finanziari dello Stato membro interessato, termini di prescrizione più lunghi di quelli previsti per i casi di frode che ledono gli

4. C-105/14, *Procedimento penale a carico* di *Taricco e altri,* EU:C:2015:555

5. Art. 160, Codice penale italiano («Il corso della prescrizione è interrotto dalla sentenza di condanna o dal decreto di condanna. Interrompono pure la prescrizione l'ordinanza che applica le misure cautelari personali e [...] il decreto di fissazione della udienza preliminare [...]. La prescrizione interrotta comincia nuovamente a decorrere dal giorno della interruzione. Se più sono gli atti interruttivi, la prescrizione decorre dall'ultimo di essi; ma in nessun caso i termini stabiliti nell'articolo 157 possono essere prolungati oltre il termine di cui all'articolo 161, secondo comma, fatta eccezione per i reati di cui all'articolo 51, commi 3-bis e 3-quater, del codice di procedura penale»).

6. Art. 161, Codice penale italiano: «La sospensione e l'interruzione della prescrizione hanno effetto per tutti coloro che hanno commesso il reato. Salvo che si proceda per i reati di cui all'articolo 51, commi 3-bis e 3-quater, del codice di procedura penale, in nessun caso l'interruzione della prescrizione può comportare l'aumento di più di un quarto del tempo necessario a prescrivere [...]».

7. Art. 325, TFUE («L'Unione e gli Stati membri combattono contro la frode e le altre attività illegali che ledono gli interessi finanziari dell'Unione stessa mediante misure adottate a norma del presente articolo, che siano dissuasive e tali da permettere una protezione efficace negli Stati membri e nelle istituzioni, organi e organismi dell'Unione. Gli Stati membri adottano, per combattere contro la frode che lede gli interessi finanziari dell'Unione, le stesse misure che adottano per combattere contro la frode che lede i loro interessi finanziari (...)»).

> interessi finanziari dell'Unione europea, circostanze che spetta al giudice nazionale verificare[8].

Per questi motivi, la disciplina nazionale contrastante con il diritto comunitario andrebbe immediatamente disapplicata dai giudici nazionali, senza bisogno di ulteriori interventi legislativi o interpretativi[9].

La Saga Taricco ha successivamente assistito a due differenti attuazioni di tale principio presso le Corti italiane[10], nonché a due questioni di legittimità costituzionale sollevate rispettivamente dalla Corte d'Appello di Milano (ordinanza del 18 settembre 2015) e dalla Corte di Cassazione (ordinanza dell'8 luglio 2016). In particolare, si chiedeva alla Corte Costituzionale di dichiarare l'incostituzionalità dell'art. 2 della L. 130/2008 – che ratifica e dà attuazione al Trattato di Lisbona – nella parte in cui rende immediatamente esecutivo l'art.

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8. Vedi C-105/14, *Procedimento penale a carico* di *Taricco e altri* (citato in nota 5).

9. Lo schema della "disapplicazione" (o meglio della "non applicazione") di una normativa nazionale che contrasti con quella comunitaria immediatamente applicabile è il frutto di un lungo percorso giurisprudenziale che verrà riassunto trattando dei c.d. contro-limiti.

10. Vedi Cassazione penale, 15 Settembre 2015, no. 2210 (la Terza Sezione penale della Corte di Cassazione ha dato un primo e immediato seguito avallando l'*iter* logico-giuridico della Corte di Giustizia. Ha ritenuto integrati i requisiti individuati ai fini della disapplicazione delle disposizioni *ex* artt. 160 e 161 c.p., ossia la soglia di rilevante gravità delle frodi agli interessi finanziari dell'Unione e la determinazione di una situazione di impunità *"in un numero rilevante di casi"*. Di conseguenza, è stato richiamato l'argomento della natura processuale della prescrizione, tacitando i relativi dubbi di legittimità costituzionale e sottraendola alle garanzie del principio di legalità). Vedi anche Cassazione penale, 25 gennaio 2016, no. 7914 (la Quarta Sezione della Cassazione ha invece ritenuto non operante nella fattispecie esaminata l'obbligo di disapplicare gli artt. 160 e 161 c.p. Ha vagliato, senza confutarli, ma solo reputandoli insussistenti nel caso di specie, il requisito della *"determinazione della soglia minima di gravità delle frodi in relazioni alle quali andrebbe disapplicata la disciplina nazionale sulla prescrizione"* e il diverso atteggiarsi dell'obbligo di disapplicazione a seconda che, al momento della pubblicazione della sentenza Taricco, la prescrizione sia già maturata o ancora pendente). Confronta Matteo Losana, *Il caso "Taricco" e la funzione "emancipante" della nostra Costituzione*, 2 Osservatorio costituzionale, Associazione Italiana Costituzionalisti 535, 538 (Maggio-Agosto 2017), disponibile a: https://www.osservatorioaic.it/images/fascicoli/Osservatorio_AIC_Fascicolo_02_2017.pdf (ultimo accesso 23 Aprile 2021); Cristiano Cupelli, *Il caso Taricco e il controlimite della riserva di legge in materia penale*, 3 Rivista Associazione Italiana Costituzionalisti, 4 (2016), disponibile a: https://www.rivistaaic.it/images/rivista/pdf/3_2016_Cupelli.pdf (ultimo accesso 23 Aprile 2021).

325, paragrafi 1 e 2, del TFUE così come interpretato dalla sentenza c.d. Taricco I, poiché contrasterebbe sia con i principi di determinatezza-tassatività delle fattispecie legali in materia penale, sia con il divieto di una loro applicazione retroattiva sfavorevole (nel caso di specie inattesa per gli imputati poiché non ragionevolmente prevedibile ex art. 25, comma 2 Cost.)[11]. Secondo i remittenti, queste garanzie si ergerebbero a principi supremi dell'ordinamento costituzionale italiano e, in quanto tali, sarebbero inviolabili da parte di atti od organi sia nazionali sia sovranazionali in virtù della dottrina dei c.d. controlimiti, pur ribadendo il primato dell'U.E. ex art. 117, comma 1 Cost.

La Corte Costituzionale si è pronunciata decidendo di non "attivare" direttamente i c.d. contro-limiti, e ha sollevato, in qualità di giudice nazionale, un ulteriore rinvio pregiudiziale alla CGUE[12], teso a scongiurare gli effetti lesivi dei principi di irretroattività *in malam partem* e determinatezza delle fattispecie penali che sembravano irrimediabilmente scaturire dalla prima interpretazione della Corte. Si è in questo modo instaurato un dialogo costruttivo con la CGUE, evitando fratture immediate, ma nello stesso tempo paventando chiaramente la possibile opposizione dei c.d. contro-limiti.

La dottrina dei contro-limiti[13] consiste in un peculiare congegno di garanzia che la Corte Costituzionale ha introdotto quale

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11. Losana, *Il caso "Taricco" e la funzione "emancipante" della nostra Costituzione*, p. 539 (citato in nota 11) (*"Secondo i giudici remittenti, la disapplicazione della disciplina interna sulla prescrizione anche per condotte precedenti la pubblicazione della sentenza* Taricco violerebbe il principio di legalità sotto un duplice punto di vista: per un verso produrrebbe un "inasprimento del regime di punibilità di natura retroattiva"; per altro verso, lascerebbe al giudice, chiamato ad applicare alla fattispecie concreta la sentenza Taricco, eccessiva discrezionalità nel valutare la gravità della frode e il numero considerevole di casi che impongono la disapplicazione della disciplina nazionale sulla prescrizione").

12. Vedi Corte Costituzionale, 26 Gennaio 2017, ordinanza no. 24. Vedi anche Matteo Losana, *La Corte costituzionale e il rinvio pregiudiziale nei giudizi di legittimità costituzionale in via incidentale: il diritto costituzionale (processuale) si piega al dialogo tra le Corti*, 1 Rivista Associazione Italiana Costituzionalisti (2014), disponibile a: https://www.rivistaaic.it/images/rivista/pdf/1_2014_Losana.pdf (ultimo accesso 17 Aprile 2021) (lo scritto consente di analizzare le recenti aperture del nostro Giudice delle Leggi circa l'ammissibilità di un proprio rinvio pregiudiziale).

13. Vedi Corte Costituzionale, 18 Dicembre 1973, n. 183; Corte Costituzionale, 5 Giugno 1984. n. 170; Corte Costituzionale, 15 Dicembre 1988 n. 1146; Corte Costituzionale, 13 Aprile 1989, n. 232; Corte Costituzionale, 11 Aprile 1989 n. 203; Corte

"contropartita" alle limitazioni di sovranità sofferte dall'ordinamento interno davanti a quello sovranazionale, al fine di preservare l'identità costituzionale fondamentale del nostro Stato. Si ritiene, infatti, ex art. 11 Cost., che le limitazioni alla sovranità possano essere riconosciute nella misura in cui non intacchino i principi fondamentali dell'ordinamento stesso o i diritti inviolabili della persona umana. I contro-limiti, quindi, riguardano il nucleo intangibile dei principi supremi dell'ordinamento costituzionale, che non può essere sovvertito o modificato nel proprio contenuto essenziale, neppure da leggi di revisione costituzionale o da altre leggi costituzionali. Si riserva allora all'esclusivo sindacato dello Stato Membro la protezione di questo nucleo essenziale, delineando un contrappeso al primato e all'effetto diretto del diritto sovranazionale.

La Grande Sezione della CGUE si è pronunciata con sentenza il 5 dicembre 2017 (c.d. Taricco 2), compiendo un "passo indietro" tale per cui la disciplina nazionale non sembrerebbe più pregiudizievole rispetto alle supreme garanzie penalistiche dell'ordinamento italiano. Essa ha infatti statuito che

> l'articolo 325, paragrafi 1 e 2, TFUE dev'essere interpretato nel senso che esso impone al giudice nazionale di disapplicare [...] disposizioni interne sulla prescrizione, rientranti nel diritto sostanziale nazionale, che ostino all'inflizione di sanzioni penali effettive e dissuasive in un numero considerevole di casi di frode grave [...] a meno che una disapplicazione siffatta comporti una violazione del principio di legalità dei reati e delle pene a causa dell'insufficiente determinatezza della legge applicabile, o dell'applicazione retroattiva di una normativa che impone un regime di punibilità più severo di quello vigente al momento della commissione del reato[14].

Ne è conseguita, da parte della Corte Costituzionale, una dichiarazione di infondatezza delle questioni di legittimità costituzionali

Costituzionale, 8 Aprile 1991, n. 168; Corte Costituzionale, 11 Dicembre 1995, n. 509; Corte Costituzionale, 15 Dicembre 1995, ordinanza n. 536; Corte Costituzionale, 19 Marzo 2001 n. 73; Corte Costituzionale, 13 Dicembre 2006, ordinanza n. 454; Corte Costituzionale, 4 Luglio 2007, n. 284, Corte Costituzionale, 22 Ottobre 2007, n. 348.

14. C-42/17, *Procedimento penale a carico di M.A.S. e M.B.*, EU:C:2017:936.

sottopostele. In virtù della loro sopravvenuta mancanza di rilevanza, alla luce dell'interpretazione correttiva della CGUE, la disciplina così interpretata non sarebbe più idonea a pregiudicare le supreme garanzie dell'ordinamento italiano in materia penale, in particolare con riguardo a tutti i fatti di reato commessi precedentemente alla sentenza Taricco I, tra cui quelli delle questioni in oggetto.

Di seguito si offrirà un'analisi delle numerose questioni giuridiche sollevate da questa complessa vicenda e si procederà secondo due linee di lettura: da un lato la differente qualificazione penalistica, processuale o sostanziale della disciplina della prescrizione operata dalla giurisdizione italiana e sovranazionale, con il conseguente regime delle garanzie costituzionali applicabili (tra cui l'irretroattività *in malam partem*); dall'altro la teoria dei contro-limiti nel rapporto tra le Corti e l'idoneità del principio di legalità a ergersi come tale.

3. Non applicazione della prescrizione e irretroattività sfavorevole

Alla base della vicenda "Taricco e altri", vi è l'imputazione di aver costituito e organizzato un'associazione per delinquere allo scopo di commettere vari delitti in materia di I.V.A. nel corso degli esercizi fiscali dal 2005 al 2009. Gli imputati avrebbero compiuto operazioni fraudolente (note come "frodi carosello"), costituendo società interposte ed emettendo falsi documenti che avrebbero consentito l'acquisto di beni in esenzione da I.V.A.

Nell'ordinanza di rinvio pregiudiziale alla Corte di Giustizia[15], il giudice rimettente sottolinea come il regime italiano in materia di prescrizione, nonostante tutte le ipotesi di sospensione o interruzione che costituiscono prolungamenti tesi a concludere utilmente il processo, sarebbe costruito in modo tale da consentire agli evasori di I.V.A. di beneficiare di una sorta di impunità di fatto, grazie al sistematico scadere del termine di prescrizione. Infatti, "la durata del procedimento (cumulati tutti i gradi di giudizio) sarebbe tale che, in questo tipo di casi, l'impunità di fatto costituirebbe in Italia non un'evenienza rara, ma la norma. Inoltre, sarebbe spesso impossibile

15. Vedi Tribunale di Cuneo (Italia), 17 Gennaio 2014 (ordinanza di rimessione).

per l'amministrazione tributaria italiana recuperare l'importo di imposte che abbiano fatto oggetto del reato considerato"[16].

Per questi motivi, il giudice nazionale ha ritenuto che fossero violate le norme comunitarie a tutela della concorrenza (art. 101 TFUE), che fosse stata introdotta una forma indebita di aiuto di Stato (art. 107 TFUE), che si fosse indebitamente aggiunta un'esenzione a quelle dell'art. 158, Direttiva 2006/112, e che fosse stato violato il principio delle finanze sane (art. 119 TFUE). Dunque, soltanto la disapplicazione delle disposizioni nazionali in materia di prescrizione avrebbe potuto garantire una effettiva applicazione del diritto dell'Unione Europea.

Con la sentenza c.d. Taricco 1[17], la Corte di Giustizia ha ritenuto che tali garanzie comunitarie fossero state violate a causa dell'inadeguatezza del sistema penale italiano in materia di prescrizione dei reati. La conseguente "non applicazione" delle disposizioni nazionali incompatibili con il diritto dell'Unione, procedendo a prescindere da una previa rimozione di dette disposizioni in via legislativa o con altro procedimento costituzionale, sarebbe quindi coerente con lo schema del "dialogo tra Corti", tema complesso che costituirà il secondo nodo problematico della presente trattazione.

Il primo profilo critico, però, riguarda il dubbio se nel caso di specie, al fine di perseguire il principio del primato dell'Unione, si possano verificare lesioni delle garanzie costituzionali degli interessati, in particolare del loro diritto a non vedersi applicata retroattivamente una disciplina penale più sfavorevole. La Corte di Giustizia era ben conscia di tale eventualità, tant'è che ai punti 53 ss. della sentenza c.d. Taricco 1 riflette preventivamente su questo aspetto, così da evitare una possibile successiva censura da parte dei giudici nazionali. La CGUE si è così espressa:

> Se il giudice nazionale dovesse decidere di disapplicare le disposizioni nazionali di cui trattasi[18], egli dovrà allo stesso tempo assicurarsi che i diritti fondamentali degli interessati siano rispettati. Questi ultimi, infatti, potrebbero vedersi infliggere sanzioni alle quali, con ogni probabilità, sarebbero

16. Vedi C-105/14, *Procedimento penale a carico* di *Taricco e altri* (citato in nota 5).
17. Vedi C-105/14, *Procedimento penale a carico* di *Taricco e altri* (citato in nota 5).
18. Il riferimento è agli artt. 160 e 161, Codice penale italiano.

> sfuggiti in caso di applicazione delle suddette disposizioni di diritto nazionale[19]. [...] Tuttavia, con riserva di verifica da parte del giudice nazionale[20], la disapplicazione delle disposizioni nazionali di cui trattasi avrebbe soltanto per effetto di non abbreviare il termine di prescrizione generale nell'ambito di un procedimento penale pendente, di consentire un effettivo perseguimento dei fatti incriminati nonché di assicurare, all'occorrenza, la parità di trattamento tra le sanzioni volte a tutelare, rispettivamente, gli interessi finanziari dell'Unione e quelli della Repubblica italiana.
>
> Una disapplicazione del diritto nazionale siffatta non violerebbe i diritti degli imputati, quali garantiti dall'articolo 49 della Carta dei diritti fondamentali dell'Unione Europea[21]. Infatti, non ne deriverebbe affatto una condanna degli imputati per un'azione o un'omissione che, al momento in cui è stata commessa, non costituiva un reato punito dal diritto nazionale[22], né l'applicazione di una sanzione che, allo stesso momento, non era prevista da tale diritto. Al contrario, i fatti contestati agli imputati nel procedimento principale integravano, alla data

19. L'effetto pregiudizievole a cui ci si riferisce è quello dell'irretroattività *in malam partem*, massimamente vietato dal nostro ordinamento, sia a seguito di un intervento legislativo, sia di un'opera interpretativa-giurisprudenziale (come nel caso in esame della decisione della CGUE).

20. Tale *"riserva di verifica"* lasciata, in modo ossequioso, al giudice nazionale è sembrata più una tecnica argomentativa di stile, rispettosa dei rapporti istituzionali tra Corti, che un'effettiva libertà di calare gli effetti eventualmente pregiudizievoli della decisione nel caso concreto. Subito dopo, in effetti, la CGUE esclude che tali effetti pregiudizievoli sussistano.

21. L'art. 49 della Carta dei diritti fondamentali dell'Unione Europea (Carta di Nizza) sancisce i principi di legalità e di proporzionalità dei reati e delle pene, ponendo garanzie paragonabili a quelle poste ex art. 25 della Costituzione italiana. Nessuno può essere condannato per un'azione o un'omissione che, al momento in cui è stata commessa, non costituiva reato secondo il diritto interno o il diritto internazionale. Da tale percorso argomentativo della Corte si dovrebbe, dunque, desumere che la disapplicazione della disciplina della prescrizione non contrasterebbe con le "supreme garanzie" in materia penale, né sovranazionali né nazionali.

22. Vedi C-457/02, *Procedimento penale a carico di Antonio Niselli*, EU:C:2004:707.

> della loro commissione, gli stessi reati ed erano passibili delle stesse sanzioni penali attualmente previste[23].

Per rinvigorire la sua argomentazione, la Corte di Giustizia richiama l'interpretazione in materia data da un'altra autorevole Corte sovranazionale in materia di diritti fondamentali: la Corte EDU. *"Secondo tale giurisprudenza*[24], infatti, la proroga del termine di prescrizione e la sua immediata applicazione non comportano una lesione dei diritti garantiti dall'articolo 7 della suddetta Convenzione, dato che tale disposizione non può essere interpretata nel senso che osta a un allungamento dei termini di prescrizione quando i fatti addebitati non si siano ancora prescritti"[25].

Secondo parte della dottrina[26], tali argomentazioni si sono basate su un "comodo alibi", frutto di un fraintendimento della reale natura della disciplina italiana della prescrizione e del conseguente regime di garanzie costituzionali applicabili. La sua supposta natura processuale (e non sostanziale) consentirebbe di sottrarre agevolmente la disciplina alle garanzie del *nullum crimen sine lege (praevia)*[27].

Nella tradizionale ottica penalistica italiana, invece, è scorretto leggere le disposizioni prescrizionali unicamente secondo l'art. 49 Carta di Nizza, e cioè nel senso che non sia ravvisabile (in ambito CEDU o europeo) un diritto fondamentale dell'individuo a non essere

23. Vedi C-105/14, *Procedimento penale a carico* di *Taricco e altri* (citato in nota 5).

24. Vedi *Coëme e altri c. Belgio*, ECHR 32492, 32547, 32548, 33209, 33210 (1996); *Scoppola c. Italia (n. 2)*, CEDU 10249/03 (2009); *OAO Neftyanaya Kompaniya Yukos c. Russia*, CEDU 14902/04 (2011).

25. C-105/14, *Procedimento penale a carico* di *Taricco e altri* (citato in nota 5).

26. Vedi Cupelli, *Il caso Taricco e il controlimite della riserva di legge in materia penale*, p. 6 (citato in nota 11).

27. Dalla ricostruzione della natura dell'istituto prescrizionale quale processuale oppure sostanziale, discendono effetti diametralmente opposti. Nel primo caso, la prescrizione esulerà dallo statuto delle garanzie dell'imputato ex art. 25, comma 2 c.p., essendo, invece, sottoposta all'opposto principio *tempus regit actum*. Il principio di irretroattività *in malam partem* concerne, infatti, soltanto le disposizioni penali sostanziali. Viceversa, agli atti processuali si applica la legge in vigore al momento in cui sono compiuti, anche quando la stessa comporti un regime più sfavorevole per l'imputato rispetto a quella su cui faceva precedentemente affidamento.

sottoposto a termini di prescrizione non previsti al momento della commissione del fatto[28].

Tradizionalmente, la dottrina[29] e la giurisprudenza[30] italiane riconoscono la natura sostanzialistica della prescrizione. Tale lettura risiede nelle ragioni relative al "punire o non punire", al problema della rilevanza del tempo trascorso rispetto alle esigenze di risposta al reato, agli indissolubili legami con le istanze di prevenzione generale positiva e alla strumentalità al perseguimento della funzione rieducativa della pena[31].

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28. Vedi Francesco Viganò, *La prima sentenza della Cassazione post Taricco: depositate le motivazioni della sentenza della Terza Sezione che disapplica una prescrizione già maturata in materia di frodi IVA*, 1 Diritto Penale Contemporaneo, 2 (2016), disponibile a: https://archiviodpc.dirittopenaleuomo.org/d/4421-la-prima-sentenza-della-cassazione-post-taricco-depositate-le-motivazioni-della-sentenza-della-terz (ultimo accesso 17 Aprile 2021); Dario Micheletti, *Premesse e conclusioni della sentenza Taricco. Dai luoghi comuni sulla prescrizione al primato in malam partem del diritto europeo*, La Legislazione Penale (3 febbraio 2016), disponibile a: http://www.lalegislazionepenale.eu/wp-content/uploads/2016/02/approfondimenti_Micheletti_2016.pdf (ultimo accesso 24 Aprile 2021); Gabriele Civello, *La prima attuazione della sentenza Taricco della C.G.U.E.: il principio di legalità nell'epoca del minimalismo penale*, in 1 Archivio penale, p. 6 (2016).

29. Vedi Giovanni Fiandaca e Enzo Musco, *Diritto penale. Parte generale*, p. 830 (Zanichelli, 7 ed. 2014); Alfredo Molari, *Prescrizione del reato e della pena (diritto penale)*, in Antonio Azara e Ernesto Eula (eds.), in 13 *Novissimo digesto italiano*, p. 679 (UTET 1966); Salvatore Panagia, *Prescrizione del reato e della pena*, in 9 *Digesto delle discipline penalistiche*, p. 659 (UTET 1995); Paolo Pisa, *Prescrizione (diritto penale)*, in 35 *Enciclopedia del diritto*, p. 78 (Giuffrè 1986); Fausto Giunta e Dario Micheletti, *Tempori cedere. Prescrizione del reato e funzioni della pena nello scenario della ragionevole durata del processo*, p. 63 (Giappichelli 1 edizione 2003).

30. Vedi Corte Costituzionale, 14 Gennaio 2015, no. 45; Corte Costituzionale, 19 Maggio 2014, n. 143; Corte Costituzionale, 11 Febbraio 2013, n. 23; Corte Costituzionale, 30 Luglio 2008, n. 324; Corte Costituzionale, 23 Ottobre 2006, n. 393.

31. Poiché l'istituto della prescrizione incide sulla punibilità del reo, determinando l'estinzione o meno del reato, ad esso è stato tradizionalmente attribuito un carattere sostanziale, con conseguente assoggettamento al principio di legalità, nei suoi profili di riserva di legge, tassatività-determinatezza e irretroattività in *malam partem*. Dunque, rispetto a tale disciplina, non è applicabile in modo retroattivamente sfavorevole alcuna variazione della legge penale, intervenuta *ex post facto,* che abbia effetti pregiudizievoli sulla situazione giuridica dell'imputato, il quale si era correttamente autodeterminato sotto la vigenza della disciplina per lui più favorevole. Inoltre, la non retroattività *in malam partem* concerne non soltanto la disciplina del tempo necessario a prescrivere, ma anche quella delle interruzioni e delle sospensioni del decorso del

Dunque, la *ratio* della prescrizione sarebbe legata all'interesse di non perseguire reati rispetto ai quali il lungo tempo decorso dopo la loro commissione abbia fatto venir meno (o abbia notevolmente attenuato) l'allarme della coscienza comune. Inoltre, sussisterebbe un diritto all'oblio dei cittadini quando il reato non sia così grave da escludere tale tutela[32].

L'esclusivo richiamo della Corte di Giustizia all'art. 49 Carta di Nizza e alla giurisprudenza della Corte EDU rappresenterebbe un "disinteressamento"[33] rispetto alla consolidata giurisprudenza costituzionale italiana e diametralmente opposta. Inoltre, il richiamo alla giurisprudenza CEDU sembra scarsamente persuasivo, sia perché i precedenti non sarebbero privi di equivoci[34], sia perché l'esclusione

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relativo termine, poiché anch'essa concorre a determinare il limite temporale entro il quale è possibile per lo Stato far valere la propria pretesa punitiva.

Tuttavia, secondo i giudici rimettenti, questo è l'effetto determinatosi nei giudizi sottoposti alla loro attenzione, a causa della richiesta della Corte di Giustizia dell'Unione Europea di "non applicare" la disciplina della prescrizione rispetto a fatti commessi sotto la vigenza di un differente regime che, viceversa, la contemplava.

32. Vedi Carlo Piergallini, *Il fondamento della prescrizione nel diritto penale (ancora una volta) all'esame della Consulta*, 59 Giurisprudenza costituzionale, pp. 2371, 2372 (2014).

33. Vedi Vittorio Manes, *La svolta Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti* (Diritto Penale Contemporaneo, 6 Maggio 2016, disponibile a: https://archiviodpc.dirittopenaleuomo.org/upload/1462376539MANES_2016a.pdf (ultima visita 24 Aprile 2021) (secondo l'Autore vi sarebbe addirittura un'intrinseca contraddittorietà nell'impostazione seguita dalla pronuncia, *"che prima imputa alla disciplina italiana della prescrizione il deficit di effettività/adeguatezza della tutela, e poi nega che essa sia parte della legalità sostanziale"*). Si veda anche Massimo Luciani, *Il brusco risveglio. I controlimiti e la fine mancata della storia costituzionale*, 2 Rivista Associazione Costituzionalisti Italiani, 15 (2016), disponibile a: https://www.rivistaaic.it/images/rivista/pdf/2_2016_Luciani.pdf (ultima visita 24 Aprile 2021).

34. In via generale, va osservato che la Corte EDU muove sempre dal rispetto delle ricostruzioni giuridiche di singoli istituti già operate dalla dottrina e dalla giurisprudenza nazionali. Ciò, soprattutto in materie di difficile armonizzazione e tradizionalmente lasciate alla discrezionalità politica-statuale di ogni singolo sistema giuridico, quale, ad esempio, la materia penale. In tale ottica, può spiegarsi la pronuncia *Coëme e altri c. Belgio*, CEDU 32492/96, 32547/96, 32548/96, 33209/96, 33210/96 (2000), la quale rileva che «la soluzione adottata dalla Corte di cassazione [belga] si fonda sulla giurisprudenza secondo la quale le leggi che modificano la disciplina della prescrizione sono ormai considerate, in Belgio, leggi di competenza procedurale». Per tale motivo, è stata ritenuta ammissibile, e non contrastante con l'art. 7, Carta EDU, la scelta del regime tradizionalmente applicato dallo Stato in questione, ossia il *tempus*

della prescrizione dalla sfera dell'art. 7 Carta EDU non può determinare mutamenti peggiorativi delle garanzie affermate a livello nazionale-domestico[35]. Il concetto di "materia penale" va inteso nell'esclusivo senso di estendere le garanzie interne, mai ridurle, e ciò sarebbe in linea con la clausola di salvaguardia prevista dall'art. 53, Carta EDU[36].

Anzi, tale criterio utilizzato dalla Corte di Giustizia potrebbe portarla a una eterogenesi dei fini rispetto a come esso è tradizionalmente utilizzato dalla Corte EDU[37]. L'approccio sostanzialistico che caratterizza la giurisprudenza della Corte EDU considera rilevante, al di là delle qualificazioni formalistiche e dogmatiche, il fatto che una determinata modifica della disciplina abbia avuto ripercussioni negative in capo al singolo che non fossero prevedibili al momento della commissione del fatto. Quando la mutazione riguardi il regime della prescrizione (come nel caso Taricco), l'effetto peggiorativo, qualunque ne sia la natura, sembrerebbe invece innegabile[38].

Tale diversa interpretazione data dalla CGUE rispetto ai fondamenti penalistici italiani permette di riflettere sul fatto che, talvolta, le

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regit actum (immediata applicabilità ai processi in corso). Viceversa, nel nostro ordinamento, tale lettura sarebbe contrastante con la tradizionale ricostruzione sostanzialistica dell'istituto, come tale rientrante nella garanzia dell'irretroattività *in malam partem*. Vedi Manes, *La svolta Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti*, p. 13 (citato in nota 34).

35. Vedi Manes, *La svolta Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti*, p. 14 (citato in nota 34).

36. Art. 53, Carta EDU («Nessuna disposizione della presente Carta deve essere interpretata come limitativa o lesiva dei diritti dell'uomo e delle libertà fondamentali riconosciuti, nel rispettivo ambito di applicazione, dal diritto dell'Unione, dal diritto internazionale, dalle convenzioni internazionali delle quali l'Unione, la Comunità o tutti gli Stati membri sono parti contraenti, in particolare la convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali, e dalle costituzioni degli Stati membri»).

37. Cupelli, *Il caso Taricco e il controlimite della riserva di legge in materia penale*, p. 8 (citato in nota 11).

38. Vedi Vittorio Manes, *La svolta Taricco e la potenziale "sovversione di sistema": le ragioni dei controlimiti*, in Diritto Penale Contemporaneo, p. 14 (6 Maggio 2016), disponibile a: https://www.penalecontemporaneo.it/upload/1462376539MANES_2016a.pdf (ultimo accesso 24 Aprile 2021). Vedi anche Marco Gambardella, *Il caso Taricco: obblighi di disapplicazione in malam partem e compatibilità con i principi costituzionali della riserva di legge e di irretroattività*, 4 Rivista Associazione Italiana dei Costituzionalisti, p. 55 (2016), disponibile a: https://www.rivistaaic.it/images/rivista/pdf/4_2016_Relazioni%20Taricco%20def.pdf (ultimo accesso 24 Aprile 2021).

supreme garanzie di civiltà giuridica (quale ad esempio l'irretroattività *in malam partem*) possono essere insidiate da innovazioni o regressioni in diversi settori dell'ordinamento, in gioco anche nella vicenda Taricco: la natura sostanziale o processuale; la più o meno corretta interpretazione giurisprudenziale; la ricostruzione della *ratio* degli istituiti coinvolti.

Inoltre, tale "incomprensione" euro-comunitaria circa la natura penalistica di alcuni istituti e le loro garanzie deriva da una composizione multiforme della giurisprudenza e dei componenti stessi della CGUE. La compresenza di numerosi ordinamenti nazionali, con differenti tradizioni legislative e giurisprudenziali (sussumibili nel binomio dei sistemi di *common* e *civil law*, ma con sensibilità giuridiche ancor più ampie di sole queste due) fa sì che l'interpretazione sovranazionale possa essere più variegata di quella offerta dalle Corti interne. Ciò, come si vedrà, è essenziale per accompagnare il processo di integrazione europea ed evitare fratture istituzionali, ma non è scevra da rischi di compromissione delle identità nazionali[39].

Tutte queste eccezioni rispetto alla supposta natura processuale della disciplina della prescrizione sono state portate all'attenzione della Corte Costituzionale in un giudizio differente dal caso Taricco, ma ad esso intrinsecamente legato[40].

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39. Vedi Cristiano Cupelli, *Il caso Taricco e il controlimite della riserva di legge in materia penale*, p. 421 (citato in nota 11) ("*I dirompenti effetti in* malam partem di una diretta disapplicazione - portato della consacrazione del primato a tutti i costi del diritto europeo - non ci può sorprendere soprattutto tenendo in considerazione il contesto attuale nel quale la decisione è maturata: quello in cui, da un lato, l'incidenza esercitata dall'Unione europea anche sulle determinazioni di politica criminale degli Stati membri - seppure mascherata dietro il paravento di una potestà punitiva solo indiretta - è quanto mai stringente e, dall'altro, si sono ampliati, con il Trattato di Lisbona, i margini di influenza in materia penale, senza che tuttavia si siano parallelamente resi davvero conformi a standard di garanzia democratica i relativi meccanismi decisionali, ancora rimessi al ruolo egemone di organi privi di effettiva rappresentatività").

40. Vedi Antonella Massaro, *La risposta della Corte costituzionale alla (prima) sentenza Taricco tra sillogismi incompiuti e quesiti retorici*, Giurisprudenza Penale, 16 (Marzo 2017), disponibile a: https://www.giurisprudenzapenale.com/2017/03/07/la-risposta-della-corte-costituzionale-alla-prima-sentenza-taricco-tra-sillogismi-incompiuti-e-quesiti-retorici/ (ultimo accesso 17/04/2021); vedi anche Francesco Rossi, *La Cassazione disapplica gli artt. 160 e 161 c.p. dopo la sentenza Taricco (nota a Cass. Terza Sez. penale, sent. n. 2210 del 2015)*, 4 Giurisprudenza Italiana, 966 (2016), disponibile a: https://www.academia.edu/37156816/

Con l'ordinanza 24 del 2017[41] la Corte Costituzionale ha accolto favorevolmente i rilievi critici della Corte d'Appello di Milano e della Corte di Cassazione che le avevano sottoposto, a partire dai casi M.A.S. e M.B., dubbi di legittimità costituzionale riguardanti l'art. 2, L. 130/2008 nella parte in cui rende esecutivo l'art. 325, paragrafi 1 e 2, del TFUE, così come interpretato dalla sentenza Taricco. I giudici *a quibus* dubitavano che la disapplicazione del regime di prescrizione fosse «compatibile con i principi supremi dell'ordine costituzionale italiano e con il rispetto dei diritti inalienabili della persona, espressi dagli artt. 3, 11, 24, 25, secondo comma, 27, terzo comma, e 101, secondo comma, della Costituzione, con particolare riguardo al principio di legalità in materia penale»[42].

Questo principio comporterebbe che

> le scelte relative al regime della punibilità siano assunte esclusivamente dal Legislatore mediante norme sufficientemente determinate e applicabili solo a fatti commessi quando esse erano già in vigore. Secondo i giudici rimettenti, invece, la disapplicazione degli artt. 160, ultimo comma, e 161, secondo comma c. p. (che concerne anche le condotte anteriori alla data di pubblicazione della sentenza resa in causa Taricco), determina un aggravamento del regime della punibilità di natura retroattiva[43]. Mancherebbe, inoltre,

La_Cassazione_disapplica_gli_artt_160_e_161_c_p_dopo_la_sentenza_Taricco (ultimo accesso 24 Aprile 2021).

41. Vedi Corte Costituzionale, 23 Novembre 2016, 2017, n. 24.

42. Corte Costituzionale, 2017, n. 24 (citata in nota 42).

43. Come già detto, questo supposto effetto retroattivo sfavorevole, in realtà, era già stato esplicitamente escluso dalla sentenza Taricco 1 nel caso della disapplicazione della disciplina italiana in tema di prescrizione. Il fatto che, invece, la Corte Costituzionale ne dubiti e "suggerisca" già la soluzione che ritiene più conforme secondo il nostro ordinamento ha fatto proprio parlare di "minaccia" e non automatica "attivazione" dei contro-limiti. La Corte Costituzionale si pone (benché auspichi già la risposta "corretta") in un atteggiamento di dialogo, sollevando rinvio pregiudiziale alle CGUE. Esemplificativo di ciò è la netta formula contenuta nell'ordinanza di rinvio (n. 24 del 2017): *"La regola tratta dall'art. 325 del TFUE con la sentenza resa in causa* Taricco interferisce con il regime legale della prescrizione dei reati, che il giudice sarebbe tenuto a non applicare nei casi indicati in quella decisione".

> una normativa adeguatamente determinata[44], perché non è chiarito, né quando le frodi devono ritenersi gravi, né quando ricorre un numero così considerevole di casi di impunità da imporre la disapplicazione degli artt. 160, ultimo comma, e 161, secondo comma c. p., cosicché la relativa determinazione viene rimessa al giudice[45].

Per suscitare un *revirement* interpretativo della CGUE in punto di effetti retroattivi *in malam partem*, la Corte Costituzionale ricostruisce la tradizione giuridica italiana circa il regime legale della prescrizione.

> Nell'ordinamento giuridico nazionale il regime legale della prescrizione è soggetto al principio di legalità in materia penale, espresso dall'art. 25, secondo comma, Cost., come questa Corte ha ripetutamente riconosciuto. È perciò necessario che esso sia analiticamente descritto, al pari del reato e della pena, da una norma che vige al tempo di commissione del fatto. Si tratta, infatti, di un istituto che incide sulla punibilità della persona e la legge, di conseguenza, lo disciplina in ragione di una valutazione che viene compiuta con riferimento al grado di allarme sociale indotto da un certo reato e all'idea che, trascorso del tempo dalla commissione del fatto, si attenuino le esigenze di punizione e maturi un diritto all'oblio in capo all'autore di esso[46].

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44. Secondo la dottrina maggioritaria, nel caso di specie il principio di determinatezza delle fattispecie legali (ex art. 25 Cost.) è intrinsecamente legato al principio di irretroattività e costituirebbe il principale nodo critico della saga Taricco. A bene vedere, dalla mancanza di determinatezza con cui si esprime il dispositivo della Taricco 1 discende proprio l'effetto retroattivo sfavorevole, non prevedibile poiché non era espresso né chiaramente né previamente. Infatti, l'individuazione del "numero considerevole di casi di frodi gravi" in virtù dei quali disapplicare la disciplina della prescrizione, rappresenta un criterio tanto elastico e indeterminato da consentire un eccessivo margine interpretativo ai giudici comuni (minacciando anche i principi di riserva di legge, ripartizione dei poteri e soggezione del giudice soltanto alla legge, ex artt. 25 e 101 Cost.).

45. Corte Costituzionale, 2017, n. 24 (citata in nota 42).

46. Corte Costituzionale, 11 Febbraio 2013, n. 23.

> È noto che alcuni Stati membri, invece, muovono da una concezione processuale della prescrizione, alla quale la sentenza resa in causa Taricco è più vicina, anche sulla base della giurisprudenza della Corte europea dei diritti dell'uomo, ma ve ne sono altri, tra cui la Spagna, che accolgono una concezione sostanziale della prescrizione non differente da quella italiana. Pare utile osservare che su questo aspetto, che non riguarda direttamente né le competenze dell'Unione, né norme dell'Unione, non sussiste alcuna esigenza di uniformità nell'ambito giuridico europeo. Ciascuno Stato membro è perciò libero di attribuire alla prescrizione dei reati natura di istituto sostanziale o processuale, in conformità alla sua tradizione costituzionale.

In particolare, quest'ultima considerazione permette alla Corte Costituzionale non solo di spiegare la non corretta interpretazione giuridica fornita dalla CGUE, ma anche di svincolarsi da obblighi legali che impongano a uno Stato Membro di mutare lo statuto di un diritto fondamentale del proprio ordinamento, quale la disciplina della prescrizione.

Di conseguenza,

> sulla base della giusta premessa che il principio di legalità penale riguarda anche il regime legale della prescrizione, questa Corte (quella Costituzionale) è chiamata dai giudici rimettenti a valutare, tra l'altro, se la regola tratta dalla sentenza resa in causa Taricco soddisfi il requisito della determinatezza, che per la Costituzione deve caratterizzare le norme di diritto penale sostanziale. Queste ultime devono quindi essere formulate in termini chiari, precisi e stringenti, sia allo scopo di consentire alle persone di comprendere quali possono essere le conseguenze della propria condotta sul piano penale, sia allo scopo di impedire l'arbitrio applicativo del giudice[47].

La Corte Costituzionale, comunque ossequiosa del proprio ruolo all'interno della ripartizione degli ambiti ordinamentali, ha

47. Corte Costituzionale, 2017, n. 24 (citata in nota 42).

riconosciuto che non le spetta «attribuire all'art. 325 del TFUE un significato differente da quello che gli conferisce la Corte di Giustizia; [ma che] è invece suo dovere prendere atto di quel significato e decidere se esso fosse percepibile dalla persona che ha realizzato la condotta avente rilievo penale»[48].

Inoltre, la Consulta ha rinsaldato la sua tesi servendosi dell'autorevolezza della Corte EDU, con una tecnica argomentativa, che, benché utilizzi la stessa giurisprudenza, conduce a esiti diametralmente opposti rispetto a quella utilizzata dal CGUE in Taricco 1. Infatti,

> preoccupazione [analoga a quella della Corte Costituzionale] è peraltro condivisa dalla Corte di Strasburgo in base all'art. 7 della CEDU e alla necessità, costantemente affermata, che reato e pena siano conoscibili dall'autore di un fatto fin da quando esso è commesso. E può essere utile osservare che, pur non negando che lo Stato aderente possa riconoscere alla prescrizione carattere processuale49, ugualmente la Corte EDU si riserva di sanzionarlo quando, in materia penale, non vi sia una base legale certa e prevedibile a sorreggere l'estensione del potere punitivo pubblico oltre il limite temporale previsto al tempo del fatto[50-51].

Date tali premesse, la Corte Costituzionale si è domandata se la regola c.d. Taricco fosse prevedibile e dunque se avesse base legale[52]. La Corte è però «convinta che la persona non potesse ragionevolmente pensare, prima della sentenza resa in causa Taricco, che l'art. 325 del TFUE prescrivesse al giudice di non applicare gli artt. 160, ultimo comma, e 161, secondo comma, cod. pen. ove ne fosse derivata l'impunità di gravi frodi fiscali in danno dell'Unione in un numero considerevole di casi, ovvero la violazione del principio di assimilazione»[53].

48. Corte Costituzionale, 2017, n. 24 (citata in nota 42).
49. Vedi *Coëme et al. c. Belgio* CEDU 32492/96 (2000).
50. Vedi *Oao Neftyanaya Kompaniya Yukos c. Russia* CEDU 14902/04 (2011).
51. Corte Costituzionale, 2017, no. 24 (citata in nota 42).
52. Vedi *Del Rio Prada c. Spagna* CEDU 42750/09 (2013).
53. Corte Costituzionale, 2017, n. 24 (citata in nota 42).

Inoltre, per smarcarsi da uno scontro aperto con la soluzione diametralmente opposta che era già stata preventivamente prospettata nella Taricco 1 con riguardo all'eventuale violazione delle garanzie degli artt. 49 Carta di Nizza e 7 Carta EDU, derivante dalla sua immediata disapplicazione, la Corte Costituzionale ha utilizzato un interessante percorso argomentativo. Ha sostenuto infatti che

> la decisione [Taricco 1] ha escluso, ma solo con riferimento al divieto di retroattività della sanzione penale, che la regola così enunciata sia in contrasto con l'art. 49 della Carta di Nizza e con l'art. 7 della CEDU. La sentenza europea prescinde dalla compatibilità della regola con i principi supremi dell'ordine costituzionale italiano, ma pare aver demandato espressamente questo compito agli organi nazionali competenti. [...] Il convincimento di questa Corte, del quale si chiede conferma alla Corte di giustizia, è che con tali asserzioni si sia inteso affermare che la regola tratta dall'art. 325 del TFUE è applicabile solo se è compatibile con l'identità costituzionale dello Stato membro, e che spetta alle competenti autorità di quello Stato farsi carico di una siffatta valutazione. [...] La sentenza resa in causa Taricco ha escluso l'incompatibilità della regola lì affermata rispetto all'art. 49 della Carta di Nizza con riguardo al solo divieto di retroattività, mentre non ha esaminato l'altro profilo proprio del principio di legalità, ovvero la necessità che la norma relativa al regime di punibilità sia sufficientemente determinata[54].

Dunque, la Corte Costituzionale cerca di limitare la portata della Taricco 1 al solo scrutinio dell'eventuale irretroattività *in malam partem*, per lasciare maggiore margine di dialogo e di eventuale ripensamento alla Corte di Giustizia sul lato del principio di determinatezza. Come detto, però, i due profili non sono scindibili, poiché logicamente e giuridicamente legati da una intrinseca consequenzialità. Tale argomentazione è comunque utile a favorire il ripensamento della CGUE nella c.d. Taricco 2, addirittura consentendo alla Corte di Lussemburgo di recuperare tali principi nella propria tradizione,

54. Corte Costituzionale, 2017, n. 24 (citata in nota 42).

nonostante ciò conduca ad un esito contrario alla decisione della Taricco 1. Questa raffinata tecnica di giustificazione da parte della Corte Costituzionale, nel tentativo di limitare le statuizioni di Taricco 1 a solo uno dei due profili del principio di legalità in materia penale, potrebbe suscitare una più generale riflessione sul modo in cui essi si debbano correttamente intersecare[55].

Le considerazioni della Corte Costituzionale hanno suscitato la risposta della Corte di Giustizia dell'Unione Europea che si è pronunciata sul caso M.A.S. e M.B. (c.d. Taricco 2) il 5 dicembre 2017[56]. In punto di irretroattività sfavorevole o meno, la CGUE risponde affermativamente al primo quesito[57] che le era stato sottoposto pregiudizialmente.

55. Vedi Massimo Luciani, *Diritto penale e Costituzione*, in Diritto Penale Contemporaneo, 10 (25 Ottobre 2018) (l'Autore sostiene che *"sebbene la questione della retroattività e dell'indeterminatezza fossero state poste entrambe dal giudice remittente, è alla seconda che la Corte costituzionale dedica la maggiore attenzione. Il motivo è duplice: per un verso, l'erroneità della prima sentenza* Taricco della Corte di giustizia era già stata riconosciuta - pur senza dirlo - dalla seconda, sicché non c'era bisogno di ritornarci; per l'altro, la cogenza del principio di irretroattività in materia penale sembra ormai compiutamente acquisita, mentre sulla questione della determinatezza la discussione è tuttora aperta, sicché era opportuno svolgere qualche riflessione supplementare").

56. Vedi C-42/17, *procedimento penale contro M.A.S. e M.B.*, ECR 2017 936.

57. La Corte Costituzionale, 2017, ordinanza n. 24 dispone di sottoporre alla Corte di giustizia dell'Unione Europea, in via pregiudiziale ai sensi e per gli effetti dell'art. 267, TFUE, le seguenti questioni di interpretazione dell'art. 325, para. 1-2, TFUE:

se l'art. 325, para. 1-2, TFUE debba essere interpretato nel senso di imporre al giudice penale di non applicare una normativa nazionale sulla prescrizione che osta in un numero considerevole di casi alla repressione di gravi frodi in danno degli interessi finanziari dell'Unione, ovvero che prevede termini di prescrizione più brevi per frodi che ledono gli interessi finanziari dell'Unione di quelli previsti per le frodi lesive degli interessi finanziari dello Stato, anche quando tale omessa applicazione sia priva di una base legale sufficientemente determinata;

se l'art. 325, para. 1-2, TFUE debba essere interpretato nel senso di imporre al giudice penale di non applicare una normativa nazionale sulla prescrizione che osta in un numero considerevole di casi alla repressione di gravi frodi in danno degli interessi finanziari dell'Unione, ovvero che prevede termini di prescrizione più brevi per frodi che ledono gli interessi finanziari dell'Unione di quelli previsti per le frodi lesive degli interessi finanziari dello Stato, anche quando nell'ordinamento dello Stato membro la prescrizione è parte del diritto penale sostanziale e soggetta al principio di legalità;

se la sentenza della Grande Sezione della Corte di giustizia dell'Unione europea 8 settembre 2015 in causa C-105/14, Taricco, debba essere interpretata nel senso di imporre al giudice penale di non applicare una normativa nazionale sulla prescrizione che osta in un numero considerevole di casi alla repressione di gravi frodi in danno

> Alla data dei fatti di cui al procedimento principale, il regime della prescrizione applicabile ai reati in materia di IVA non era stato oggetto di armonizzazione da parte del legislatore dell'Unione[58], armonizzazione che è successivamente avvenuta, in modo parziale, solo con l'adozione della direttiva (UE) 2017/1371 del Parlamento europeo e del Consiglio, del 5 luglio 2017, relativa alla lotta contro la frode che lede gli interessi finanziari dell'Unione mediante il diritto penale. La Repubblica italiana era quindi libera, a tale data, di prevedere che, nel suo ordinamento giuridico, detto regime ricadesse, al pari delle norme relative alla definizione dei reati e alla determinazione delle pene, nel diritto penale sostanziale e fosse a questo titolo soggetto, come queste ultime norme, al principio di legalità dei reati e delle pene [...] In particolare, per quanto riguarda l'inflizione di sanzioni penali, spetta ai giudici nazionali competenti assicurarsi che i diritti degli imputati derivanti dal principio di legalità dei reati e delle pene siano garantiti. Orbene, secondo il giudice del rinvio, tali diritti non sarebbero rispettati in caso di disapplicazione delle disposizioni del codice penale in questione, nell'ambito dei procedimenti principali, dato che, da un lato, gli interessati non potevano ragionevolmente prevedere, prima della pronuncia della sentenza Taricco, che l'articolo 325 TFUE avrebbe imposto al giudice nazionale, alle condizioni stabilite in detta sentenza, di disapplicare le suddette disposizioni. [...] A tale riguardo, si

degli interessi finanziari dell'Unione europea, ovvero che prevede termini di prescrizione più brevi per frodi che ledono gli interessi finanziari dell'Unione europea di quelli previsti per le frodi lesive degli interessi finanziari dello Stato, anche quando tale omessa applicazione sia in contrasto con i principi supremi dell'ordine costituzionale dello Stato membro o con i diritti inalienabili della persona riconosciuti dalla Costituzione dello Stato membro.

58. Vedi Vittorio Manes, *La Corte muove e, in tre mosse, dà scacco a Taricco*, in Diritto Penale Contemporaneo, p. 6 (13 febbraio 2017), disponibile al https://archiviodpc.dirittopenaleuomo.org/upload/MANES_2017a.pdf (ultimo accesso 24 Aprile /2021) (*"La Corte* Costituzionale, dunque, non contesta la vorace "auto-attribuzione di competenze" che pure, come noto, non ha mancato di suscitare reazioni di rigetto da parte di autorevoli tribunali costituzionali; né disputa in punto di "effetti diretti" [...]; si limita, piuttosto, a lavorare per sottrazione, eccettuando la prescrizione dal magnetismo centripeto dell'armonizzazione").

> deve ricordare l'importanza, tanto nell'ordinamento giuridico dell'Unione quanto negli ordinamenti giuridici nazionali, che riveste il principio di legalità dei reati e delle pene, nei suoi requisiti di prevedibilità, determinatezza e irretroattività della legge penale applicabile[59].

Infine, coerentemente con la tradizione costituzionale italiana, la CGUE è arrivata ad affermare che

> [i]l [p]rincipio di irretroattività della legge penale osta in particolare a che un giudice possa, nel corso di un procedimento penale, sanzionare penalmente una condotta non vietata da una norma nazionale adottata prima della commissione del reato addebitato, ovvero aggravare il regime di responsabilità penale di coloro che sono oggetto di un procedimento siffatto. A t*ale rigua*rdo, i requisiti di prevedibilità, determinatezza e irretroattività inerenti al principio di legalità dei reati e delle pene si applicano, nell'ordinamento giuridico italiano, anche al regime di prescrizione relativo ai reati in materia di IVA60.

Alla luce del chiarimento interpretativo offerto dalla sentenza Taricco 2, la Corte Costituzionale ha ritenuto che tutte le questioni

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59. C-42/17, *M.A.S. e M.B.* (citata in nota 57) (Come detto, per "recuperare" un ruolo più centrale nella disputa circa la presunta scorretta lesione del principio di legalità che deriverebbe dalla disapplicazione del regime italiano della prescrizione, la CGUE cerca di inserirsi su questa scia di valorizzazione dei criteri fondamentali del principio di legalità. Statuisce, infatti, che «il principio di legalità dei reati e delle pene appartiene alle tradizioni costituzionali comuni agli Stati membri ed è stato sancito da vari trattati internazionali, segnatamente all'articolo 7, paragrafo 1, della CEDU». Ciò è certamente vero, ma nella Taricco 1 aveva portato a un "abbassamento" delle garanzie fondamentali, con una lettura diametralmente opposta a quest'ultima). Vedi anche Lupo, *Introduzione al Convegno "Aspettando la corte costituzionale": Il caso taricco e i rapporti tra diritto penale e diritto europeo*, in Redazione Rivista A.I.C. (ed.), *Atti del Convegno "Aspettando la corte costituzionale. Il caso taricco e i rapporti tra diritto penale e diritto europeo"*, p. 44 (4 Ottobre 2016), disponibile a: https://www.rivistaaic.it/it/rivista/ultimi-contributi-pubblicati/redazione/atti-del-convegno-aspettando-la-corte-costituzionale-il-caso-taricco-e-i-rapporti-tra-diritto-penale-e-diritto-europeo?fbclid=IwAR1UxtO1WWJYqbXyF82sdvWJRCk_kZ3PiZZ161QDnx8plAlHDW7N5c-v3U9g (ultimo accesso 24 Aprile 2021).

60. C-42/17, *M.A.S. e M.B.* (citata in nota 57).

sollevate dai giudici rimettenti[61] non fossero fondate, perché la "regola Taricco" doveva ritenersi inapplicabile nei rispettivi giudizi. Si procedeva, infatti, per reati commessi *prima* dell'8 settembre 2015 (data della sentenza Taricco 1), sicché l'applicabilità degli artt. 160, terzo comma, e 161, secondo comma, del Codice penale e la conseguente prescrizione dei reati oggetto dei procedimenti a quibus erano riconosciute dalla stessa sentenza M.A.S. È però interessante notare che, secondo la Corte Costituzionale, indipendentemente dalla collocazione dei fatti, prima o dopo l'8 settembre 2015, i giudici rimettenti non avrebbero potuto applicare la "regola Taricco", in quanto intrinsecamente in contrasto con il principio di determinatezza in materia penale, data anche la sua riconducibilità nell'alveo costituzionale del principio di legalità penale sostanziale, ex art. 25 Cost.

Alla Corte è parso evidente che, anche dopo la Taricco 2, permanesse quel deficit di determinatezza che caratterizza sia l'articolo 325, paragrafi 1 e 2, TFUE, nella parte da cui si evince la "regola Taricco", sia la "regola Taricco" in sé. Quest'ultima è stata ritenuta irrimediabilmente indeterminata nella definizione del "numero considerevole di casi" in presenza dei quali può operare, poiché il giudice penale non dispone di alcun criterio applicativo della legge che gli consenta di trarre, da questo enunciato, una regola sufficientemente definita. Né a tale giudice può essere attribuito il compito di perseguire un obiettivo di politica criminale svincolandosi dal governo della legge al quale è invece soggetto, ex art. 101, secondo comma, Cost.[62].

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61. Quelle che le sono state rimesse in via incidentale dalla Corte d'Appello di Milano e dalla Corte di Cassazione.

62. Vedi Antonella Massaro, *Taricco 2. Il ritorno (sui propri passi?). I controlimiti come questione che "spetta ai giudici nazionali": cambiano i protagonisti, ma la saga continua*, in Giurisprudenza Penale, p. 3 (Dicembre 2017), disponibile al https://www.giurisprudenzapenale.com/wp-content/uploads/2017/12/Massaro_taricco2_gp_2017_12.pdf (ultimo accesso 18/04/2021) (Tale conclusione della Corte Costituzionale sembra, dunque, eliminare ogni dubbio circa il fatto che la saga Taricco, seguendo esclusivamente l'ottica della Corte di Giustizia, potesse minare il granitico principio della separatezza dei poteri e della soggezione del giudice solo alla legge (art. 101 Cost.). Da tali affermazioni, invece, sembra che la Corte Costituzionale escluda "fughe interpretative" rimesse ai singoli giudici nazionali - come nel caso dell'applicazione della regola di Taricco 1 - e riporti al centro la sacralità del principio di legalità in materia penale, anche quale riserva di legge). Vedi anche Cristiano Cupelli, *Il problema della legalità penale. Segnali in controtendenza sulla crisi della riserva di legge*, in Giurisprudenza Costituzionale, pp. 181, 196 (Gennaio-Febbraio 2015).

Il nodo problematico circa gli effetti retroattivi sfavorevoli della Taricco 1 è stato così ricomposto, soprattutto grazie a un atteggiamento costruttivo e teso al dialogo[63] da parte di entrambe le Corti, ma che ha comunque visto delinearsi la possibile e concreta attivazione dei c.d. contro-limiti.

4. I contro-limiti

Nell'ordinanza di rinvio pregiudiziale alla CGUE n. 24 del 2017, la Corte Costituzionale ha fatto propri i dubbi dei giudici a quibus sulla

63. Vedi Federico Sorrentino, *Le fonti del diritto italiano*, 98 (CEDAM sec. ed. 2015) (secondo l'Autore il "cammino" di dialogo europeo intrapreso dalla Corte Costituzionale può essere suddiviso in tre fasi: I. 1964-1973: il fondamento del carattere derogatorio dei Trattati comunitari rispetto alla Costituzione, si rinviene nell'art. 11 Cost., concepito come norma permissiva che comporta "limitazioni di sovranità". Queste, però, non determinano una rinuncia definitiva alla sovranità e non incidono sulla pienezza della potestà legislativa parlamentare; sul punto si veda Corte Costituzionale, 7 Marzo 1964, n. 14. La distinzione tra gli ordinamenti - nazionale ed europeo - impedisce che le norme dell'uno siano raffrontate con quelle dell'altro, così come statuito in Corte Costituzionale, 17 Aprile 1965, n. 98. II. 1973-1984: Corte Costituzionale, 27 Dicembre 1973, n. 183 conferma la sua impostazione dualistica nei rapporti tra ordinamenti, ma sottolinea il carattere vincolante per i Paesi membri dei regolamenti europei, i quali non devono essere oggetto di provvedimenti statali a carattere riproduttivo, integrativo o esecutivo che possano differirne o condizionarne l'entrata in vigore, sostituirvisi, derogarli o abrogarli. Vi è, dunque, una maggiore consapevolezza della portata degli impegni europei e delle loro modifiche al sistema costituzionale, fino ad escludere la possibilità di sottoporre degli atti normativi comunitari sia a *referendum* abrogativo sia a un sindacato di legittimità costituzionale. Le limitazioni di sovranità ex art. 11 Cost., però, non consentono l'ingresso nel nostro ordinamento di quegli atti che possano violare i principi fondamentali della nostra tradizione giuridica o i diritti inalienabili della persona umana, ossia i c.d. contro-limiti. III. 1984-presente: l'art. 11 Cost. rimane sullo sfondo, individuandosi direttamente nei Trattati europei le norme costituzionali di conflitto, autorizzate a definire l'ambito di applicazione delle fonti europee rispetto a quelle interne e viceversa. Lo schema della sospensione dei giudizi *a quibus* e rinvio alla Corte Costituzionale per l'ottenimento di una dichiarazione di incostituzionalità viene sostituito dalla diretta e immediata applicabilità della norma europea (con conseguente non applicazione di quella nazionale) da parte dei giudici comuni; sul punto vedi Corte Costituzionale 8 Giugno 1984, n. 170. Abbandonate le premesse dualistiche, la Corte Costituzionale accetta senza riserve - salvo i contro-limiti - la diretta applicabilità, oltre che dei Regolamenti, anche delle Direttive c.d. *self executing* e delle sentenze della Corte di Giustizia).

compatibilità della "regola Taricco" con le garanzie fondamentali del nostro ordinamento, e ha posto al centro del suo ragionamento il principio di legalità in materia penale. Lo ha definito «principio supremo dell'ordinamento, posto a presidio dei diritti inviolabili dell'individuo, per la parte in cui esige che le norme penali siano determinate e non abbiano in nessun caso portata retroattiva»[64]. In virtù del fatto che l'interpretazione comunitaria del regime di prescrizione contrasterebbe con quella italiana, la Corte ha ritenuto che «se l'applicazione dell'art. 325 del TFUE comportasse l'ingresso nell'ordinamento giuridico di una regola contraria al principio di legalità in materia penale, come ipotizzano i rimettenti, questa Corte avrebbe il dovere di impedirlo [...] Qualora si verificasse il caso, sommamente improbabile»[65], che in specifiche ipotesi normative tale osservanza venga meno, sarebbe necessario dichiarare l'illegittimità costituzionale della legge nazionale che ha autorizzato la ratifica e resi esecutivi i Trattati, per la sola parte in cui «essa consente che quell'ipotesi normativa si realizzi (già Corte Cost. sent. nn. 232/1989, 170/1984 e 183/1973)"[66]. Perciò, dopo aver spiegato le incompatibilità esistenti tra la "regola Taricco" e i principi e i diritti sanciti dalla Costituzione, secondo la Corte è "necessario chiedersi se la Corte di giustizia abbia ritenuto che il giudice nazionale debba dare applicazione alla regola anche quando essa confligge con un principio cardine dell'ordinamento italiano. Questa Corte pensa il contrario, ma reputa in ogni caso conveniente porre il dubbio all'attenzione della Corte di giustizia"[67].

Tale schema di dichiarazione di incostituzionalità della legge di conversione del TFUE, nella parte in cui consenta l'ingresso nel nostro ordinamento di una disciplina contrastante con le supreme garanzie costituzionali italiane, è ciò che la dottrina ha definito come

64. Corte Costituzionale, 2017, n. 24 (citata in nota 42).

65. L'inciso *"sommamente improbabile"* è stato interpretato dalla dottrina come una sorta di dubbio retorico dello Corte. Come emerge dalla sentenza Taricco 1, infatti, la disapplicazione immediata e automatica comporta certamente l'ipotesi che qui la Corte definisce quel caso eventuale o ipotetico, che viceversa sarebbe proprio la conseguenza degli effetti voluti dalla CGUE.

66. Corte Costituzionale, 2017, n. 24 (citata in nota 42).

67. Anche in tale caso, i dubbi della Corte (meramente apparenti perché la sentenza Taricco 1 voleva ottenere proprio tali effetti) servono per "ricucire" i rapporti con la giurisprudenza europea che, sennò, rischierebbero di porsi sulla scia di uno scontro frontale a causa della seguente "minaccia" di attivare i contro-limiti.

"minaccia" di attivazione dei contro-limiti, eventualmente successiva alla conferma della precedente sentenza nella Taricco 2[68].

In ogni caso, la dottrina dei controlimiti non esclude il riconoscimento del primato del diritto dell'Unione, considerato ormai dato acquisito nella giurisprudenza costituzionale. Viceversa, nell'ottica del c.d. dialogo tra le Corti, il nostro Giudice della Legge ha adottato a tal proposito una tecnica argomentativa interessante.

Quale sorta di captatio benevolentiae, la Corte Costituzionale ricorda alla Corte di Giustizia che

> il primato del diritto dell'Unione non esprime una mera articolazione tecnica del sistema delle fonti nazionali e sovranazionali. Esso riflette piuttosto il convincimento che l'obiettivo della unità, nell'a*mbit*o di un ordinamento che assicura la pace e la giustizia tra le Nazioni, giustifica una rinuncia a spazi di sovranità, persino se definiti da norme costituzionali. Al contempo la legittimazione e la forza stessa dell'unità in seno ad un ordinamento caratterizzato dal pluralismo nascono dalla sua capacità di includere il tasso di diversità minimo, m*a n*e*cessario per* preservare la identità nazi°nale insita nella struttura fondamentale dello Stato membro. In caso contrario i Trattati europei mirerebbero contraddittoriamente a dissolvere il fondamento costituzionale stesso dal quale hanno tratto origine per volontà degli Stati membri. Queste considerazioni sono sempre state alla base dell'azione, sia di questa Corte, quando ha rinvenuto nell'art. 11 Cost. la chiave di volta dell'ordinamento europeo, sia della Corte di giustizia, quando, precorrendo l'art. 6, p[a]ragrafo 3,

68. Vedi Antonio Ruggeri, *Ultimatum della Consulta alla Corte di giustizia su Taricco, in una pronunzia che espone, ma non ancora oppone, i controlimiti (a margine di Corte cost. n. 24 del 2017)*, Consulta online, 81 (Gennaio-Aprile 2017), disponibile al https://www.giurcost.org/studi/ruggeri66.pdf (ultimo accesso 24 Aprile 2021). Vedi anche Cristiano Cupelli, *La Corte costituzionale ancora non decide sul caso Taricco, e rinvia la questione alla Corte di giustizia*, in Diritto Penale Contemporaneo, 199 (30 Gennaio 2017), disponibile al https://archiviodpc.dirittopenaleuomo.org/pdf-viewer/?file=%2Fpdf-fascicoli%2FDPC_1_2017.pdf#page=199 (ultimo accesso 24 Aprile 2021).

> del TUE, ha incorporato nel diritto dell'Unione le tradizioni costituzionali comuni agli Stati membri[69].

Tale iter argomentativo è, in effetti, risultato persuasivo nei confronti della Corte di Giustizia. Quest'ultima, con la sentenza M.A.S. e M.B. del 5 dicembre 2017, ha segnato una svolta epocal[e] nei rapporti con le Corti di tutti gli Stati Membri: ha compiuto un ripensamento circa la "regola Taricco", evitando di imporla quando produca

69. Corte Costituzionale, 2017, n. 24 (citata in nota 42). Vedi Giorgio Repetto, *Una ragionevole apologia della supremacy. In margine all'ordinanza della Corte costituzionale sul caso Taricco*, in Diritti comparati, (20 Febbraio 2017), disponibile al https://www.dirittocomparati.it/una-ragionevole-apologia-della-supremacy-in-margine-allordinanza-della-corte-costituzionale-sul-caso/?fbclid=IwAR2dw4qtBvCPoiWgOBV5cZ71BZ4tjjXSAtDxQBcohPMBFbtqo1km3EPMcHs (ultimo accesso 24 Aprile 2021) ("L'idea è di far generare già dall'interno del diritto dell'UE quei dispositivi idonei a rendere l'utilizzo dei controlimiti a livello nazionale qualcosa che non incrina il paradigma dell'uniforme applicazione del diritto eurounitario, ma al contrario contribuisce a rafforzare la possibile continuità di valore tra i diversi sistemi").

effetti retroattivi in malam partem,[70] ed è sembrata "intimorita"[71] dall'eventualità che, per la prima volta, la nostra Corte Costituzionale applicasse quella dottrina dei contro-limiti, fino ad ora rimasta puramente teorica. Va comunque osservato che, anche in questo caso, tale dottrina è rimasta meramente ipotetica, poiché solo "minacciata". Ciò ha deluso le aspettative di chi, in dottrina, desiderava una pr[e]sa di posizione più forte da parte della Corte, in virtù del suo compito di vigilare

70. Vedi C-42/17, *Procedimento penale contro M.A.S. e M.B.*, ECR:2017:936 (in cui si legge che:

«Spetta quindi ai *giudici nazionali competenti dare piena efficaci*a agli obblighi derivanti dall'articolo 325, paragrafi 1 e 2, TFUE e disapplicare disposizioni interne, in particolare riguardanti la prescrizione, che, nell'ambito di un procedimento relativo a reati gravi in materia di IVA, ostino all'applicazione di sanzioni effettive e *dissuasive per combattere le frodi lesive degli interessi finanziari dell'Unione. [...] Spetta al giudice nazionale verificare se la condizione richiesta dal punto 58 della sentenza Taricco, secondo cui le disposizioni del codice penale in questione impediscono di infliggere sa*nzioni penali effettive e dissuasive in un numero *considerevole di casi di frode grave che ledono gli interessi finanziari dell'Unione, conduca a una situazione* di incertezza nell'ordinamento g*iuridico italiano quanto alla determinazione del reg*ime di prescrizione applicabile, incertezza che contrasterebbe con il principio della determinatezza della legge applicabile. Se così effettivamente fosse, il giudice nazionale non sarebbe tenuto a di*sapplicare le disposizioni del codice penale in questione. I requisiti menzionati* al punto 58 della presente sentenza ostano a che, in procedimenti relativi a persone accusate di aver commesso reati in materia di IVA prima della pronuncia della sentenza Taricco, il giudice nazionale disapplichi le di*sposizioni* del codice penale in questione. Infatti, la Corte ha g*ià sottolineato* che a dette persone potrebbero, a causa della disapplicazione di queste disposizioni, essere inflitte sanzioni alle quali, con ogni probabilità, sarebbero sfuggite se le suddette disposizioni fossero state applicate. Tali persone potrebbero quindi essere retroattivamente assoggettate a un regime di punibilità più severo di quello vigente al momento della commissione del reato. Se il giudice nazionale dovesse quindi essere indo*tto a ri*tenere che l'obbligo di disapplicare le disposizioni del codice penale in questione contrasti con il principio di legalità dei reati e delle pene, esso non sarebbe tenuto a conformarsi a tale obbligo, e ciò neppure qualora il rispetto del medesimo consentisse di rimediare a *una situazione nazionale incompatibile con il diritto dell'Unione)».*

71. Grazia Vitale, L'attesa sentenza Taricco bis: brevi riflessioni, 3 European Papers, pp. 445, 446 (2018), disponibile a: https*://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2018_I_006_Grazia_Vita*le_00185.pdf (ultimo accesso 24 Aprile 2021) (secondo parte della dottrina, la maggiore ripercussione da segnalare sarebbe proprio "l'atteggiamento di "resa" totale nei confronti della Corte costituzionale, rispetto alla *quale ha* dimostrato una "generosità" inaspettata e francamente ec*cessiva, in qua*nto foriera di riverberazioni potenzialmente devastanti sull'intera impalcatura dell'integrazione europea").

a presidio del*le garanzie cos*tituzionali[72]. In ogni caso, lo strumento del rinvio pregiudiziale è stato invece, nell'ottica dei futuri rapporti tra Corti, più efficace, poiché ha rinforzato la tradizione di dialogo istituzionale, ha evitato fratture, ed ha pure dimostrato che la Consulta sarebbe disposta ad un'applicazione pratica dei contro-limiti[73].

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72. A questo proposito, la Corte sostiene che "bene hanno fatto i rimettenti a investirla del problema, sollevando una questione *di legittimità costituzionale". Sul punto vedi Vittorio Manes, La Corte muove e,* in tre mosse, dà scacco a Taricco, in Diritto Penale Contemporaneo, 3 (13 Febbraio 2017), disponibile al https://archiviodpc.dirittopenaleuomo.org/upload/MANES_2017a.pdf (ultimo accesso 24 Aprile 2021) (secondo l'Autore *si tratta* di "un significativo momento di cesura nel processo di *irradiazione in* sede diffusa - ormai pienamente dispiegato - del controllo accentrato di costituzionalità, che ha un suo catalizzatore essenziale proprio nella diretta applicabilità del diritto UE e nel correlativo potere/dovere di disapplicazione "per saltum" del giudice comune - così come più in generale nella "domestification" del diritto sovranazionale - in rapporto di interlocuzione diretta con le alte Corti". Di fronte alle questioni di *legitti*mità costituzionali della Corte d'Appello di Milano e della Corte di Cassazione, oltre al rinvio pregiudiziale, vi sarebbero state due ulteriori possibilità per la Corte Costituzionale, sebbene ognuna con scarsi margini di manovra: una dichiarazione di inammissibilità, ad e*sempio sostenendo che i giudici a quibus avrebbero dovuto previamente sollevare un* nuovo rinvio pregiudiziale, secondo l*o schema della doppia pregiudizialità; una dichiarazione di infondatezza, ad esempio operando un'interpretazione della Tar*icco che fosse costituzionalmente orientata). Vedi anche Luigi Daniele, La sentenza Taricco di fronte alla Corte Costituzionale: come deciderà la Consulta?, in Redazione Rivista A.I.C. (ed.), Atti del Convegno "Aspettando la corte costituzionale. Il caso taricco e i rapporti tra diritto penale e diritto europeo", p. 44 (4 Ottobre 2016), disponibile a: https://*www.rivistaaic.it/it/rivista/ultimi-contributi-pubblicati/redazione/atti-del-convegno-aspettando-la-corte-costituzionale-il-caso-taricco-e-i-rapporti-tra-diritto-penale-e-diritto-europe*o?fbclid=IwAR1UxtO1WWJYqbXyF82sdvWJRCk_kZ3PiZZ161QDnx8plAlHDW7N5cv3U9g (ultimo accesso 24 Aprile 2021).

73. Vedi Francesca Bailo, *Il principio di legalità in materia penale quale controlimite all'ordinamento eurounitario: una decisione interlocutoria (ma non troppo!) della Corte Costituzionale dopo il caso Taricco*, Consulta online, pp. 95, 99 (Gennaio-Aprile 2017), disponibile al https://www.giurcost.org/studi/index.html (ultimo accesso 24 Aprile 2021) (con particolare riguardo circa il c.d. *self restraint* della Corte Costituzionale per evitare tale *impasse* e scongiurare uno "strappo" con la Corte di Giustizia) (secondo parte della dottrina, la risposta della CGUE in Taricco 2 rappresenterebbe, in realtà, una estromissione della Corte Costituzionale dal meccanismo dei contro-limiti. Rimettendo, infatti, la decisione se seguire o meno la "regola Taricco" ai giudici nazionali, la Corte di Lussemburgo muterebbe la natura dei contro-limiti: originariamente concepiti come usbergo della statualità, starebbero divenendo un meccanismo progressivamente "esternalizzato" all'Unione europea. Sarebbero inglobati nel diritto eurounitario e più che rappresentarne contro-limiti, ne individuerebbero limiti interni. Sarebbe un'esternalizzazione in virtù della quale la competenza sui controlimiti,

Benché il rinvio pregiudiziale della Corte Costituzionale contenesse uno specifico quesito sul riconoscimento della dottrina dei controlimiti, la Corte di Lussemburgo non ha fornito una risposta

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tradizionalmente parte del diritto nazionale, sarebbero affidati alla Corte di Giustizia, estromettendo la Corte Costituzionale). Vedi anche Antonella Massaro, *Taricco 2. Il ritorno (sui propri passi?). I controlimiti come questione che "spetta ai giudici nazionali": cambiano i protagonisti, ma la saga continua*, in Giurisprudenza Penale, 3 (Dicembre 2017), disponibile a: https://www.giurisprudenzapenale.com/2017/12/06/taricco-2-ritorno-sui-propri-passi-controlimiti-questione-spetta-ai-giudici-nazionali-cambiano-protagonisti-la-saga-continua/ (ultimo accesso 24 Aprile 2021); Massimo Luciani, *I controlimiti e l'eterogenesi dei fini*, in Questione giustizia, pp. 84, 89 (Gennaio-Marzo 2015), disponibile a: https://www.questionegiustizia.it/data/rivista/pdf/11/qg_2015-1.pdf (ultimo accesso 24 Aprile 2021). In senso parzialmente contrario vedi Losana, *Il caso "Taricco" e la funzione "emancipante" della nostra Costituzione*, in Osservatorio Associazione Italiana Costituzionalisti, p. 545 (citato in nota 11) (secondo Losana:

«Ritenere che l'"europeizzazione dei controlimiti" abbia introdotto (per quanto riguarda la garanzia dei diritti fondamentali) una sorta di margine di apprezzamento, liberamente esercitabile dai singoli Stati membri, ci sembra una soluzione difficilmente accettabile dalla Corte di giustizia. Vorrebbe dire, infatti, ammettere che gli Stati membri, in deroga alle norme del Trattato sul diritto di recesso, possano, di volta in volta (e, nel nostro caso, con decisione giurisdizionale, anziché politica), sottrarsi a specifici obblighi sanciti dall'ordinamento dell'Unione europea. A nostro avviso, le disposizioni del Trattato contenenti il riferimento alle "tradizioni costituzionali comuni" e all'"identità costituzionale nazionale" dovrebbero avere un significato molto più limitato: l'arricchimento del diritto primario dell'Unione europea. Infatti, sembra ragionevole ritenere che il sindacato della Corte di giustizia sulla legittimità degli atti delle Istituzioni dell'Unione europea non potrà più svolgersi con esclusivo riguardo ai principi fondamentali ma dovrà, necessariamente, coinvolgere anche i principi irrinunciabili delle Costituzioni nazionali (oramai incorporati nel testo dei Trattati). In questa prospettiva, il compito di portare davanti alla Corte di giustizia questioni riguardanti la violazione dell'identità costituzionale nazionale non potrebbe che ricadere sui giudici nazionali, i quali sarebbero tenuti: (i) a sollecitare, tramite un rinvio pregiudiziale interpretativo, un'interpretazione del diritto dell'Unione europea conforme ai principi fondamentali della propria Costituzione; (ii) a censurare, tramite un rinvio pregiudiziale di validità, gli atti delle Istituzioni dell'Unione europea contrari alle tradizioni costituzionali comuni, oppure ai principi supremi del proprio ordinamento costituzionale nazionale. È dunque innanzi alla Corte di giustizia che i principi costituzionali fondamentali degli Stati membri dovrebbero trovare la loro prima (e ordinaria) garanzia. Quanto detto, peraltro, non significa ritenere la dottrina dei controlimiti definitivamente superata. Qualora la verifica della Corte di giustizia in merito al rispetto dei principi fondamentali nazionali non risultasse adeguata, gli Stati membri (ciascuno secondo le proprie regole) potrebbero sempre attivare (senza, però, la necessità di una previa autorizzazione) la dottrina dei controlimiti)»

esplicita. Ciò, nell'ottica dell'integrità della normativa e della giurisprudenza europea, è stato un bene: se la Corte avesse utilizzato formule esplicite che a*vessero ric*onosciuto la possibilità per gli Stati Membri di individuare ambiti sottratti al diritto sovranazionale, secondo la loro tradizione costituzionale e, in fondo, anche a loro "discrezione"[74], si sarebbe certo potuta verificare nel tempo una progressiva erosione della primazia della CGUE.

5. Conclusioni

La vicenda in commento rappresenta uno snodo centrale della dottrina costituzionale recente per numerosi motivi. In primo luogo, essa ha dimostrato che la natura dell'istituto prescrizionale, pur alla luce di una ricca tradizione giurisprudenziale e dottrinale in proposito, continua a essere oggetto di interpretazioni controverse, anche alla luce di più o meno latenti spinte verso un maggiore o minore esercizio della pretesa p[u]nitiva statuale.

Inoltre, la c.d. saga Taricco rammenta come alcuni temi classici e tradizionali del diritto costituzionale e penale, tra cui appunto *il principio d*i irretroattività, possano essere posti di fronte a sfide inaspettate, o quantomeno prima facie non evidenti. Infatti, taluni profili costituzionali assumono oggi una nuova dimensione, ponendo il giurista, sia quale creatore, sia quale interprete del diritto, davanti a nuove dinamiche, oltre che a possibili esiti "estremi" rispetto alla sistematica complessiva dell'ordinamento, come ad esempio la minacciata attivazione dei c.d. contro-limiti.

È estremamente rilevante, dunque, che proprio il principio di legalità in materia penale, declinato nell'irretroattività qui in esame,

74. Vedi Vitale, *L'attesa sentenza Taricco bis: brevi riflessioni*, p. 449 (citato in nota 72) ("se si fossero create le condizioni per l'attivazione dei controlimiti nel caso italiano, il probabile scenario futuro sarebbe stato caratterizzato da possibili proliferazioni di atteggiamenti di "ribellione" delle varie corti costituzionali nazionali - alla luce di una riscoperta valorizzazione dei principi fondanti l'identità costituzionale - in tutte le ipotesi, anche quelle marginali, in cui i valori strutturali nazionali siano messi potenzialmente in discussione dall'appartenenza all'ordinamento dell'Unione. Sono evidenti le conseguenze negative che ciò produrrebbe sulla salvaguardia del principio di uniformità nell'interpretazione ed applicazione del diritto dell'Unione presso tutti gli Stati membri").

segni nuovamente non soltanto la propria centralità, così come anche la sua ambiguità, presso le Corti nazionali e sovranazionali, ma anche la sua attitudine ad essere utilizzato quale contro-limite, quale principio supremo di civiltà giuridica[75].

Inoltre, il fatto che il primo caso di avvicinamento alla concreta opposizione dei contro-limiti ruoti attorno alla garanzia dell'irretroattività in malam partem deve indurre ad una riflessione su quante e quali siano ancora le ar*ee realmente a*mbigue e quali invece siano frutto di mala interpretazione del principio in questione, soprattutto quando siano messi a rischio i rapporti tra ordinamenti e le loro supreme garanzie costituzionali.

Scendendo ad un livello più profondo, tale vicenda fa emergere un ulteriore ed importante aspetto: il soggetto maggiormente assente in questi fatti sembra essere il Legislatore, ossia proprio quel soggetto a cui il principio di legalità primariamente si rivolge, in quanto massima tutela del cittadino contro gli abusi del potere legislativo. Quel Legislatore che potrebbe approvare norme penali con un'efficacia retroattiva, o modificarne il contenuto in senso peggiorativo rispetto a fatti posti in essere nel momento in cui la norma non era ancora in vigore, cosicché i consociati non siano in grado di conoscere previamente le conseguenze giuridico-penali delle proprie condotte, sembra essere stato posto ai margini delle discussioni coinvolgenti i diritti fondamentali.

La vis expansiva dell'opera giurisprudenziale, non soltanto nazionale della Corte Costituzionale o della Corte di Cassazione, ma anche sovranazionale, dimostra come la sovranità statuale-parlamentare in materia penale ceda sempre di più il passo alle Corti, anche quando

75. Vedi Gambardella, *Il caso Taricco: obblighi di disapplicazione in malam partem e compatibilità con i principi costituzionali della riserva di legge e irretroattività*, pag. 60 (citato in nota 39) (parte della dottrina non era concorde sulla necessità di attivare i contro-limiti o l'attitudine del principio di legalità a ergersi quale tale). Vedi anche Losana, *Il caso "Taricco" e la funzione "emancipante" della nostra Costituzione*, p. 15 (citato in nota 74) (la Corte Costituzionale avrebbe anche potuto *"prima, sollevare davanti a se stessa una questione di legittimità sulla vigente disciplina in materia di prescrizione dei reati fiscali; successivamente*, verificata l'inadeguatezza del vigente regime della prescrizione dei reati fiscali rispetto alle esigenze istruttorie, pronunciare una sentenza additiva - magari, vista la delicatezza della materia penale, di principio - che, per un verso, sottraesse i giudici alla "tagliola" della prescrizione, per altro verso, lasciasse il legislatore libero di trovare un più ragionevole punto di equilibrio tra i contrapposti principi costituzionali").

siano coinvolte materie di tradizionale rilevanza nazionale, quale la garanzia della legalità in materia penale.

Infine, la varietà di posizioni e sfumature applicative della "regola Taricco" ha lasciato trapelare un involontario merito della Corte di Giustizia. Essa ha contribuito ad alimentare gli interrogativi riguardanti la natura forse inutile ed anacronistica di un principio di legalità in materia penale, che è però coerente con le proprie origini e che risulta importante per la tutela della divisione dei poteri, del principio democratico e della rappresentatività delle opzioni politico-criminali[76] .

76. Vedi Cupelli, *Il caso Taricco e il controlimite della riserva di legge in materia penale*, in *Associazione Italiana dei Costituzionalisti*, pag. 5 (citato in nota 11). Vedi anche Cupelli, *"Il problema della legalità penale. Segnali in controtendenza sulla crisi della riserva di legge"*, p. 196 (citato in nota 63); Federico Febbro, *Sentenza Taricco e post Taricco: art. 25, co. 2 Cost. come controlimite?*, in Adelmo Manna (ed.), *Il principio di stretta legalità tra giurisprudenza nazionale e comunitaria*, p. 113 (Pacini Editore 2016); Filippo Sgubbi, *Il principio di stretta legalità tra giurisprudenza nazionale e comunitaria*, in Adelmo Manna (ed.), *Il principio di stretta legalità tra giurisprudenza nazionale e comunitaria*, p. 133 (Pacini Editore 2016).

Cyber Violence against Women and Girls: Gender-based Violence in the Digital Age and Future Challenges as a Consequence of Covid-19

Roser Almenar*

Abstract: Gender-based violence and discrimination against women and girls is a widespread practice that has been affecting society for a long time. With the advent of new technologies and the huge success of social networks as new means of socialization, this gendered violence has expanded from the 'real world' to the digital sphere in a very brief time. Online gender violence has thus become a new problem with respect to the safety and inclusion of the female gender in the cyber space, which sometimes even becomes an extension of the intimate partner violence many women are faced with. The current COVID-19 pandemic has only aggravated this situation, as the figures indicate, and has demonstrated the pressing need to combat these emerging abuses, which will only be satisfied through the adoption of specific laws and the legal acknowledging of cyber violence against women and girls for what it is: an increasing menace to the feminine gender that must be prevented and progressively eradicated.

Keywords: Violence against women and girls; Women's rights; Cybercrime; Social networks; Covid-19 pandemic.

1. *Introduction*

The health crisis derived from the expansion of the virus denominated Covid-19, with which the whole world is still coping with, has already had many catastrophic consequences for those countries largely ravaged by it, and for the international community as a whole.

If we pay attention to the mainstream news and communication media talking about this phenomenon, we will hear about the future economic crisis we will have to deal with –and we are already somehow dealing with–, the number of new infections that take place every day and, amongst all, the relevant data regarding the healthcare system, either about the development and distribution of the long-awaited vaccines or the tireless and admirable labor our healthcare workers are performing -70% of them potentially being women[1]. All

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this information is necessary, of course, for citizens to be apprised about how the situation is being handled and to be able to adapt to the new circumstances. Nevertheless, it is less common to witness the media addressing other relevant issues which affect almost half the world's population, being these related to women's reality on a day-to-day basis.

According to UN Women[2], violence against women and girls is conceived as a ubiquitous problem which occurs at alarming rates – it is estimated that 1 in 3 women worldwide have experienced physical or sexual violence at some point in their lifetime[3]. Since its outbreak, the COVID-19 pandemic has proved to intensify violence against women and girls (which from now on we may also call VAWG)[4], especially intimate partner violence, which has led UN Women to refer to this

1. See Mathieu Boniol et al., *Gender equity in the health workforce: analysis of 104 countries*, 1 Working paper Geneva (WHO, 2019), available at: https://www.who.int/hrh/resources/gender_equity-health_workforce_analysis/en/ (last visited April 24, 2021) (the World Health Organization estimates that women make up the 70 per cent of the health and social care workforce on a global basis, and therefore, as pointed out by UN Women in its report "From Insights to Action: Gender Equality in the wake of COVID-19", they are more likely to be front-line health workers, especially nurses, midwives and community health workers).

2. See María-Noel Vaeza, *Addressing the Impact of the COVID-19 Pandemic on Violence Against Women and Girls*. UN Chronicle (2020), available at: https://www.un.org/en/addressing-impact-covid-19-pandemic-violence-against-women-and-girls (last visited April 24, 2021).

3. See World Health Organization, *Violence against women*, Fact sheet (March 9, 2021), available at: https://www.who.int/news-room/fact-sheets/detail/violence-against-women (last visited April 24, 2021).

4. See Phumzile Mlambo-Ngcuka, *Gender-based violence: We must flatten the curve of this shadow pandemic*. Africa Renewal: November-December 2020, available at: https://www.un.org/africarenewal/magazine/november-december-2020/gender-based-violence-we-must-flatten-curve-shadow-pandemic (last visited April 24, 2021) (calls to helplines increased up to five-fold in some countries - e.g. Tunisia - during the first weeks of the coronavirus outbreak, while in others decreased or no boost was appreciated due to a greater difficulty for women to seek help through the regular channels in fear of potential repercussions or given a lack of privacy at home to make such calls, UN Women asserts). See also UN Women, *Impact of COVID-19 on violence against women and girls and service provision: UN Women rapid assessment and findings*, EVAW COVID-19 Briefs Series (2020), available at: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/impact-of-covid-19-on-violence-against-women-and-girls-and-service-provision-en.pdf?la=en&vs=0 (last visited April 24, 2021).

gender-based violence concern as the "shadow pandemic"[5]. Likewise, cyber violence against women and girls has risen to disturbing levels, even though before the pandemic it was already a growing preoccupation as reports[6] suggest that 73% of women had already been exposed to or had experienced some form of online violence. As an illustration, in a German survey conducted to more than 9,000 national Internet users aged 10 to 50 years[7], it was found that women were significantly more likely than men to have been victims of online sexual harassment and cyber stalking, which constitute two of the multiple forms in which cyber violence against women and girls can be exerted. In this regard, the UN estimates that 95 percent of aggressive behavior, harassment, abusive language and denigrating images in online spaces are aimed at women, most often by a current or former partner[8].

While the world's –and the States'– attention is focused on restraining the rapid spread of Covid-19 and its economic and societal implications, this other menacing pandemic –which includes cyber VAWG as one of its manifestations– continues to grow exponentially, largely exacerbated by the measures put in place all over the world with this aim, namely lockdowns, social distancing and other forms of restrictions on movement[9]. For instance, reports of online abuse

5. See UN Women, *The Shadow Pandemic: Violence against women during COVID-19* (2020), available at: https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19 (last visited April 10, 2021).

6. See European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey – Main results*. Luxembourg: Publications Office of the European Union (2014), available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf (last visited April 24, 2021).

7. See Frithjof Staude-Müller, Britta Hansen and Melanie Voss, *How stressful is online victimization? Effects of victim's personality and properties of the incident*, 9(2) European Journal of Developmental Psychology (2012), available at: https://www.tandfonline.com/doi/abs/10.1080/17405629.2011.643170 (last visited April 24, 2021).

8. See UN General Assembly, *In-depth study on all forms of violence against women: report of the Secretary-General*, 6 July 2006, A/61/122/Add.1, available at: https://www.refworld.org/docid/484e58702.html (last visited July 11, 2020).

9. See María-Noel Vaeza, *Addressing the Impact of the COVID-19 Pandemic on Violence Against Women and Girls* (cited in note 2).

and bullying in Australia have increased by 50% since social distancing started[10].

The idea of writing this article therefore sprouted into my mind when I realized that many women's needs had receded into the background, sunk in everyday pandemic-related news. Almost no State is paying attention to the specific demands women and girls could come up with in the future[11], perhaps because politics ignored that this group of people will need specific financing and policies to overcome all those obstacles the female gender still has to endure; and which are being even more intensified by the current pandemic situation.

Yet, reality makes it imperative for us to become cognizant of the particular needs women will require in the not-too-distant future, and provide for the necessary measures and attention. The gender perspective has in many occasions been neglected –and still is–, but I strongly believe it is time to act in this regard. Even with the advent of the vaccine, Covid-19 has produced and will produce serious harms; in this scenario, manifested abuses against women and girls, especially in the digital environment, must not be considered something to be discussed 'in due course'. As I will display throughout this article, online gendered violence is not a minor problem, not to be concerned about. It has affected millions of women and girls all over the world and not enough has been done in this respect. My prime objective is to raise awareness, for this issue needs to be addressed as soon as possible.

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10. See Ginette Azcona et al., *From insights to action: Gender equality in the wake of COVID-19*, UN Women Headquarters (2020), available at: https://www.unwomen.org/en/digital-library/publications/2020/09/gender-equality-in-the-wake-of-covid-19 (last visited April 24, 2021).

11. See UN Women, *COVID-19 Global Gender Response Tracker*, UN Development Programme (2020), available at: https://data.undp.org/gendertracker/ (last visited April 24, 2021)(Data released by September 2020 by UN Women and the UN Development Programme (UNDP) taken from the COVID-19 Global Gender Response Tracker, launched by them, reveal that most of the world's countries are not doing enough to protect women and girls from the economic and social fallout of the COVID-19 crisis as they have not taken a comprehensive approach in this regard yet. The results signal that one-fifth of the 206 countries analyzed - this is, 42 States - have not adopted any gender-sensitive measure in response to the pandemic at all. Only 25 countries, 12 per cent of the world, introduced measures aimed at tackling violence against women and girls, support unpaid care and strengthen women's economic security).

In line with this premise, the article will be structured in the following way. First, I will provide for a framework in order to better understand the phenomenon of cyber violence against women and girls as another fundamental form of gender-based violence. Within, I will go through how the international and regional institutions define and conceive it, paying special attention to the overall impact these abuses have on the feminine gender, and taking a brief look at one of the groups most affected by cyber violence: women holding public positions. Alongside, a recent case of online gender violence brought before the European Court of Human Rights will be analyzed and will show how this Court tackles technology-related violence against women and girls in its case law. Concluding this part, I will make a strong criticism on the current, inadequate legislation to combat online violence, and suggestions for improvement will be made as well. Second, I will focus on the existing inequalities Covid-19 is showing and exacerbating, and the present and future effects it will have on the way women and girls are assaulted on the net. Finally, by summarizing the thesis exposed during the whole essay, I will conclude with some final remarks about what could be done to prevent and considerably reduce this kind of gender violence, so that women and girls can feel safe and secure in the digital environment.

My intention with the writing of this article is not only to highlight this aspect of gender-based violence and to spread the idea that strong legislation is needed to combat this issue. Until now, much scholarship and literature have mostly focused on online harassment received by school-aged female teenagers, as they are allegedly the ones who make use of social networks and other online platforms the most. However, adult women also suffer these abuses significantly, and only few seem to be aware of it, resulting in a disproportionate representation of the phenomenon. My core purpose with this article is therefore to broaden the scope of research to those adult women that have experienced or are experiencing forms of cyber violence, so that all the real victims of this disgraceful and increasing[12] phenomenon can be encompassed.

12. See European Institute for Gender Equality, *Cyber violence against women and girls*, EIGE's Publications (June 23, 2017), available at: https://eige.europa.eu/publications/cyber-violence-against-women-and-girls (last visited July 26, 2020) (As the EIGE observes, given the current lack of research and data available at the EU level, we cannot adequately quantify the prevalence or impact of cyber VAWG in

2. *Cyber Violence against Women and Girls as a New Form of Gender-based Violence*

Violence against women and girls is regarded nowadays as a major public health problem and a violation of women's human rights, especially intimate partner violence and sexual violence[13]. However, even if intimate partner violence is one of the most common and prevalent forms of violence against women and girls[14], gender-based violence can be exercised in a variety of contexts and by many different means. Actually, the increasing use and integration of digital technologies in both our private and professional lives have resulted in new ways to perpetrate violence against women[15].

Cheekay Cinco[16], of the Association for Progressive Communications (APC), asserts that "violence against women is mutating because

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Europe. However, the mounting evidence suggests that it is a growing phenomenon indeed which is disproportionately affecting women and girls. This assertion can, furthermore, be supported by the data provided throughout the section dedicated to the impact of COVID-19 on online gender violence which clearly shows a surge in this aspect of gender-based violence). See also UN Women, *Online and ICT facilitated violence against women and girls during COVID-19*, EVAW COVID-19 Briefs Series (2020), available at: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/brief-online-and-ict-facilitated-violence-against-women-and-girls-during-covid-19-en.pdf?la=en&vs=2519 (last visited April 24, 2021)(Technology-related offences committed against women and girls are also "likely to increase even after the emergency phase due to weakening enforcement and the percentage of individuals using the internet is sustained").

13. See World Health Organization, *Violence against women* (cited in note 3).

14. See World Health Organization and Pan American Health Organization, *Intimate partner violence*. WHO/RHR/12.36 (2012), available at: https://www.who.int/reproductivehealth/publications/violence/rhr12_36/en/ (last visited April 9, 2021).

15. See Katrin Lange and Sarah Molter, *Digital violence against women: new forms of violence and approaches to fight them in Europe*. 2 Newsletter of Observatory for Sociopolitical Developments in Europe (2019), available at: https://beobachtungsstelle-gesellschaftspolitik.de/f/27427e6a47.pdf (last visited April 9, 2021). See also European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey – Main results* (cited in note 6) (Additionally, research by the European Union Agency for Fundamental Rights shows that, despite the relatively recent and growing phenomenon of internet connectivity, it is estimated that one in ten women within the European Union have already experienced some form of cyber violence since the age of 15).

16. Cheekay Cinco is a feminist and human rights advocate, specialized in information and communication technologies for non-profit organizations and in

of technology", and remarks that "the Internet has opened up private lives into new avenues of potential violence"[17]. Therefore, as the usage of new digital technologies has become more ubiquitous, their use as a tool to inflict harm on women has also increased[18]. For example, the emergence of the Internet and social networks as new ways of relating to others has made it easier for abusers to maintain contact and continue to harass women after they leave abusive relationships – albeit in almost half of the cases this cyber harassment already started during the relationship[19] –; moreover, perpetrators search online to locate and stalk women without leaving a trace, thereby creating an ambience where women and girls will feel unsafe and constantly threatened. Hand et al. echo this concern, so that for women "feeling safe from an abuser no longer has the same geographic and spatial boundaries as it once did. Because ICTs can locate, communicate with and contact people globally, women's sense of safety can be further eroded, despite what was once considered a safe distance"[20].

Internet right.

17. Kara Santos, *Women fight assault over the Internet,* Inter Press Service (January 03, 2011), available at: https://www.globalissues.org/news/2011/01/03/8086 (last visited July 7, 2020).

18. See Jessica West, *Cyber-violence against women.* Prepared for Battered Women's Support Services (2014), available at: http://www.bwss.org/wp-content/uploads/2014/05/CyberVAWReportJessicaWest.pdf (last visited April 9, 2021).

19. See Clare Laxton, *Women's Aid report into online abuse, harassment and stalking*, Women's Aid (2014), available at: https://www.womensaid.org.uk/wp-content/uploads/2015/11/Women_s_Aid_Virtual_World_Real_Fear_Feb_2014-3.pdf (last visited April 11, 2021) (In 2013, Women's Aid – a British domestic violence charity – carried out an online survey of 307 women survivors of domestic violence. It was found that 45% of them had experienced some form of abuse online during their relationship, including through social networking sites or over email, while other 48% reported having been harassed or abused online by their ex-partner once they had left the relationship, and a further 38% reported online stalking once they left the relationship as well). See also Paul E. Mullen, Michele Pathé and Rosemary Purcell, *Stalkers and their Victims* (Cambridge University Press 2nd ed. 2008) (It has been estimated that in 50% of the cases when a woman was stalked by her ex-partner, the stalking started while they were in the relationship).

20. Tammy Hand, Donna Chung and Margaret Peters, *The Use of Information and Communication Technologies to Coerce and Control in Domestic Violence and Following Separation,* Newsletter of Australian Domestic & Family Violence Clearinghouse 1-16 (January 2009), available at: https://ipvtechbib.randhome.io/pdf/Hand2009TheUO.pdf (last visited July 26, 2020).

The possible practices of gender-based violence to be carried out online are countless; yet, they have been grouped and given the generic denomination "cyber violence against women and girls", so as to make all these abuses manifest as concrete forms of violence committed online and specifically directed and inflicted on women. In accordance with a report of the UN Secretary-General report on violence against women, "Evolving and emerging forms of violence need to be named so that they can be recognized and better addressed"[21].

As the report from the Special Rapporteur on Violence against women presented to the Human Rights Council in June 2018[22] outlines, "terminology is still developing and not univocal". The Special Rapporteur, for instance, uses the definition "ICT-facilitated violence against women" but also employs the more generic terms "online violence against women", "cyberviolence" and "technology-facilitated violence". Similarly, other terms[23] have been employed to refer to this gender violence, noteworthy the one coined by West Coast LEAF[24]: "cyber misogyny". This is certainly a denomination of interest, for it acknowledges that women and girls suffer online violence and harassment because of their gender, and thus as a consequence of being women, emphasizing the aversion towards the female gender these types of acts are characterized by.

Following this line of argumentation, cyber VAWG has been explained in the already mentioned report of the Special Rapporteur as

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21. See UN General Assembly, *In-depth study on all forms of violence against women: report of the Secretary-General*, A/61/122/Add.1 (July 06, 2006), available at: https://www.refworld.org/docid/484e58702.html (last visited July 11, 2020).

22. See A/HRC/38/47, para. 15.

23. See Karla Mantilla, *Gendertrolling: Misogyny Adapts to New Media*, 39(2) Feminist Studies 563-570 (2013), available at: https://www.jstor.org/stable/23719068?seq=1#metadata_info_tab_contents (last visited March 14, 2021) (The author Karla Mantilla makes use of the term '*gendertrolling*' when speaking of violence exerted against women in the online environment, emphasizing as some of its characteristics the use of gender-based slurs, rape threats, death threats and "doxing", amongst others, in response to women speaking out in traditionally male-dominated arenas, with the purpose of preventing women from competing with their male counterparts and playing significant roles in public spaces).

24. The West Coast Legal Education and Action Fund (LEAF) is a Vancouver-based women's advocacy group that works to advance equality for women by delivering legal education programs, advocating for law reform and conducting equality rights litigation.

"gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of ICT, such as mobile phones and smartphones, the Internet, social media platforms or email, against a woman because she is a woman, or affects women disproportionately", stressing the misogynistic connotation these abuses present. For its part, the CEDAW General Recommendation 35 extends the definition of gender-based violence enshrined in the General Recommendation 19 by adding that "gender-based violence against women occurs in all spaces and spheres of human interaction, whether public or private [...] and the redefinition of public and private through technology-mediated environments, such as contemporary forms of violence occurring online and in other digital environments"[25], thereby broadening the traditional scope of offline violence against women and girls to include the abuses committed in the digital sphere, and recognizing cyber VAWG as another manifestation of violence on the basis of gender.

At the European Union level, although the European Commission has incorporated the terms "cyberviolence and harassment using new technologies" into its definition of gender-based violence[26], it should be noted that this problem has not been directly tackled in any of the existent European Union's legal documents yet[27], nor has a specific statutory text been created to address the issue, as it should deserve. Thus, in the absence of a consensual delineation by the EU institutions, we must resort to the definitions established in the Council of Europe treaties, in UN resolutions and ultimately to the definitions provided for by certain Member States[28].

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25. See CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, C/GC/35 (July 14, 2017), available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf (last visited April 24, 2021).

26. See European Commission, *What is gender-based violence?* (2018), available at https://bit.ly/2mzqjPc (last visited April 24, 2021).

27. See Adriane Van der Wilk, *Cyber violence and hate speech online against women*, PE 604.979 48 (Policy Department for Citizen's Rights and Constitutional Affairs, 2018) (requested by the European Parliament's Committee on Women's Rights and Gender Equality), available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604979/IPOL_STU(2018)604979_EN.pdf (last visited April 24, 2021).

28. See *ibid.*

Experts have cautioned that conceptualizing cyber VAWG as a completely separate phenomenon from physical violence against women denotes the non-understanding of the true nature and origin of this sort of abuses: in fact, cyber violence often represents a continuation of the violence starting offline. Cyber stalking by a partner or ex-partner, for instance, follows the same patterns as "real life" stalking and thus corresponds to an intimate partner violence simply facilitated by technology[29], as digital violence is used to exert control on women[30]. As per EIGE's calculation from FRA Survey Data 2014[31], 70% of cyber stalking victims have also experienced intimate partner violence. Hence, it is evident that online and offline violence are deeply linked, and must therefore be jointly regulated and fought against.

Accordingly, cyber VAWG, understood in the context of gender-based violence, shares features with other types of violence against women, inasmuch as violence is wielded as a tool to maintain and reinforce the prevalence of the male position over the female one in societal structures[32]. Nevertheless, various aspects may be identified to highlight the uniqueness of this type of violence against women and girls. First, the anonymity[33] readily available due to the expanded use of digital devices is to be noted. Secondly, any person, either an acquaintance or a stranger, can commit abuses without having to be physically present to do so. Thirdly, the ease of committing these digital offences is remarkable, as there is no need for abusers to have any technical knowledge or skills to, for instance, access the victims' personal information by checking their mobile phones (if they have personal contacts with them) or monitoring their activity in social media, violating thus their right to privacy. Another aspect concurring to the simplicity of cyber harassing women is the possibility of attacking

29. See European Institute for Gender Equality, *Cyber violence against women and girls* (cited in note 12).

30. See Jessica West, *Cyber-violence against women* (cited in note 18).

31. See European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey – Main results* (cited in note 6).

32. See Jessica West, *Cyber-violence against women* (cited in note 18).

33. See Flavia Fascendini and Kate ina Fialová, *Voices from Digital Spaces: Technology Related Violence Against Women,* Association for Progressive Communications, (December 2011), available at: http://www.apc.org/en/system/files/APCWNSP_MDG3advocacypaper_full_2011_EN_0.pdf (last visited April 24, 2021).

them from a long distance, which allows perpetrators to carry out violent actions online with lesser probabilities of being identified by the victim and of being taken action against than if these were committed on-site[34]. Furthermore, spreading misogynist and hazardous information about women is also simple and often does not present particular risks for perpetrators[35]. The last characteristic of this new type of violence is the digital permanence[36]: as the saying goes, "the Internet records everything and forgets nothing", meaning that the erasure of unwanted content online is practically out of question, as well as the identification and blockage of further circulation. Moreover, the complexity of achieving permanent deletion of abusive content from the Internet entails long-lasting consequences for these women, as their current and future personal and professional status is likely to be compromised by the information released online[37].

Even though there is no agreed compendium of all possible manifestations of digital violence against women and girls, neither at a EU level nor on the international scene, we understand that cyber VAWG can be exerted in various forms: cyber stalking, non-consensual distribution of intimate images[38] (also known as cyber exploitation or 'revenge porn'), sexting[39], gender-based slurs and online harassment, un-

34. See *id.*

35. See Jessica West, *Cyber-violence against women* (cited in note 18).

36. See *id.*

37. See European Institute for Gender Equality, *Cyber violence against women and girls* (cited in note 12).

38. See *id.* (the European Institute for Gender Equality – EIGE – provides for the following definition: "Also known as cyber exploitation or 'revenge porn', *non-consensual pornography* involves the online distribution of sexually graphic photographs or videos without the consent of the individual in the images. The perpetrator is often an ex-partner who obtains images or videos in the course of a prior relationship, and aims to publicly shame and humiliate the victim, in retaliation for ending a relationship". Nevertheless, it is necessary to specify that some instances of non-consensual distribution of intimate images may also occur through hacking or unwarranted images being taken by someone else than partners or ex-partners, and the motive may not always be revenge, but, for instance, making someone be redundant from work).

39. The Cambridge Dictionary defines *sexting* as "the activity of sending text messages that are about sex or intended to sexually excite someone".

solicited pornography and exposure to rape culture[40], "sextortion"[41], rape and death threats, "doxing"[42] and electronically enabled trafficking, amid others.

Predictably, not all forms of online violence against women and girls are already defined and known, since the rapid development of digital spaces and technologies, including artificial intelligence, "will inevitably give rise to different and new manifestations of online violence against women"[43].

2.1. *Main Effects and Consequences of Cyber Violence Against Women and Girls*

Although more research is needed to assess and discern the overall impact cyber violence may prospectively produce on women and girls, it is currently maintained that these online forms of gender violence

40. See Ana J. Bridges et al., *Aggression and sexual behavior in best-selling pornography videos: a content analysis update*, 16(10) Violence against women 1065–1085 (2010), available at: https://doi.org/10.1177/1077801210382866 (last visited April 24, 2021) (Albeit many people ignore it, women are exposed to a constant rape culture on social media. The Internet is permeated with rape culture, which can be manifested by means of a rape or sexist joke or a misogynistic comment in some post. It can also be found in the advertising and clickbait that appear on social networks websites, as well as in the most popular pornography websites. Bridges' research reveals that 88.2% of top-rated porn scenes contain aggressive acts and 94% of the time such acts are directed towards a woman).

41. See FBI, *What is sextortion?*, available at: https://www.fbi.gov/video-repository/newss-what-is-sextortion/view (last visited April 24, 2021) (According to the FBI, "sextortion is a serious crime that occurs when someone threatens to distribute your private and sensitive material if you don't provide them images of a sexual nature, sexual favors, or money. The perpetrator may also threaten to harm your friends or relatives by using information they have obtained from your electronic devices unless you comply with their demands". So, it can be considered as a type of revenge porn, whose main instrument to obtain what requested is coercion).

42. See A/HRC/38/47, para. 36 (cited in note 22) (the UN Special Rapporteur on Violence against women defines *doxing* as the publication of private information, such as contact details, on the Internet with malicious intent, usually with the insinuation that the victim is soliciting sex researching, and broadcasting personally identifiable information about an individual without consent, sometimes with the intention of exposing the woman to the "real" world for harassment and/or other purposes).

43. *Ibid.*

do not differ in repercussions from real life violence against women and girls[44].

As regards intimate partner violence, cyber VAWG imposes a cost on women's emotional and psychological bandwidth[45]. Emotional distress is recognized as a significant consequence of digital violence, and may lead to psychological and emotional trauma, ranging from the most common psychological problems, like anxiety and damaged self-image, to the most extreme, such as suicidal tendencies and self-harming behavior[46]. It can also induce insomnia, panic attacks, an overwhelming fear of leaving home, social anxiety and depression, among others[47]. Moreover, the harms of cyber VAWG may also be of social, economic and physical nature. With regard to the latter, we must not forget that online violence is in some cases a prolongation of the already existing violence in the physical world[48], and if it is not, it may nevertheless exacerbate or lead to sexual and other forms of physical violence against women[49], particularly if online violence does not fulfil the abuser's goal – that is, the victimization of the woman towards whom the attack is perpetrated. Therefore, the potential for violence in the digital sphere to manifest physically should also not be discounted[50].

As already mentioned above, the public image of the victim and her present and future labor status can also be ended up tarnished as a result of this technology-related violence, thus deriving in considerably severe and detrimental economic consequences[51]; especially when it

44. See Adriane Van der Wilk, *Cyber violence and hate speech online against women* (cited in note 27).

45. See UN Broadband Commission for Digital Development, *Cyber Violence Against Women and Girls: A World-Wide Wake-Up Call* (2015), available at: http://www.unwomen.org/~/media/headquarters/attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259 (last visited April 24, 2021).

46. See Jessica West, *Cyber-violence against women* (cited in note 18).

47. See *id.*

48. See Clare Laxton, *Women's Aid report into online abuse, harassment and stalking* (cited in note 19).

49. See Jessica West, *Cyber-violence against women* (cited in note 18).

50. See European Institute for Gender Equality, *Cyber violence against women and girls* (cited in note 12).

51. See Adriane Van der Wilk, *Cyber violence and hate speech online against women* (cited in note 27).

comes to non-consensual distribution of images and 'revenge porn'. Due to the impossibility of ever being able to entirely wipe out unintended content released online, women can be forced to leave their current jobs, or the opportunity to promote in them, and even be prevented from getting new jobs in the future[52].

In consequence of the ubiquity of the many forms of violence and harassment women and girls may experience online, cyber VAWG pushes them, in many cases, away from using and benefitting from the numerous advantages the Internet can offer, because of fear. In fact, this kind of violence generates concern in women as for the possibility of both known and unknown people using their personal information available online to their detriment. "Research indicates that 28 per cent of women who had suffered ICT-based violence intentionally reduced their presence online"[53]. Yet, withdrawing from online activity to be safe also entails staying out of social media and all the resources provided on the net, and giving up all the socializing and networking activities that are held online in contemporary society, ultimately resulting in social isolation[54]. In fact, as highlighted above, women's resignation to use the Internet to keep themselves safe, owing to fear of victimization or retaliation, can also result in economic losses for those women relying on the internet for a living[55]. Isolation can also affect the victims' relationships with friends and family, since the threat of exposing intimate or sexual information that could potentially cause a victim-blaming response in women's beloved ones is concrete[56]. Ultimately, "an unsafe Internet arena will mean that women will frequent the Internet less freely, with costly societal and economic implications for all"[57].

Furthermore, cyber VAWG certainly undermines and hinders women's core fundamental rights[58] such as dignity, gender equality,

52. See Jessica West, *Cyber-violence against women* (cited in note 18).

53. See A/HRC/38/47, para. 26 (cited in note 22).

54. See Jessica West, *Cyber-violence against women* (cited in note 18).

55. See Adriane Van der Wilk, *Cyber violence and hate speech online against women* (cited in note 27).

56. *Id.*

57. See UN Broadband Commission for Digital Development, *Cyber Violence Against Women and Girls: A World-Wide Wake-Up Call* (cited in note 45).

58. *Id.*

physical and psychical integrity. Distressing is the impact this online violence has on women's full participation in society and digital inclusion, which is recognized as a key objective in the EU's Digital Single Market Strategy[59], because it prevents women from being active digital citizens and using digital tools to reach their full potential[60]. They are withheld from joining and interacting in significant social and/or political media debates, and this has an adverse impact on the advocacy and exercise of their freedom of expression and other fundamental human rights. What is more, online gender violence may even result in a violation of their right to life. According to UNICEF, the risk of suicide attempt is 2.3 times higher for victims of cyber harassment[61], as has been shown by the media in several cases of online violence leading to the victim committing suicide[62].

In conclusion, cyber VAWG disproportionately affects women not only with respect to their physical and psychological health or their economic stability, but also impacts on their sense of safety, their dignity and their human rights, and consequently has a heavy cost for society as a whole.

2.2. *The Phenomenon of Victim Blaming as an Aggravating Factor of Online Gender Violence*

Research in legal decision-making has demonstrated the historical and current prejudiced tendency to blame the victim and exonerate

59. The Digital Single Market strategy was adopted on May 6, 2015 as part of the Digital Agenda for Europe 2020 program of the European Union, becoming one of the European Commission's 10 political priorities. It aims, among other goals, to ensure an inclusive e-society where everybody can contribute to and benefit from the digital economy and society, including women..

60. See Adriane Van der Wilk, *Cyber violence and hate speech online against women* (cited in note 27).

61. See UNICEF France, Écoutons *ce que les enfants ont à nous dire*, Consultation nationale (2014), available at: https://www.unicef.fr/sites/default/files/userfiles/Consultation_2014.pdf (last visited April 24, 2021).

62. See *Amanda Todd case: Accused Dutch man jailed for cyberbullying*, BBC News (2017), available at: https://www.bbc.com/news/world-us-canada-39295474 (last visited April 24, 2021) (It is internationally known the case of Amanda Todd, a Canadian student of 15 years old who was victim of sextortion, one of the manifestations of cyber violence, and ended up with her life due to the restless psychological harassment she received for that).

the perpetrator when speaking of sexual assault crimes and intimate partner violence[63]. With the advent of social networks, a new realm where this victim-blaming[64] attitude can also take place has emerged[65]. This has mainly translated into the re-victimization of assaulted women and girls through abuses committed against them through social media, by shifting the blame from the perpetrator to the victim in an attempt by certain social strata to justify and legitimate the so-called "rape culture"[66]. Additionally, some authors refer to this phenomenon as a form of secondary victimization[67], arguing that this latter can also take the shape of anonymous victim blaming and insensitive and harassing comments on images and videos that have gone viral[68].

Some examples may be cited to illustrate how this digital blaming of the victim has developed. The most widespread manifestation is related to abuses like sextortion or revenge porn. In these cases, some sort of preconceived notion often exists that if the girl or the woman

63. See Steffen Bieneck & Barbara Krahé, *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?*. 26(9) Journal of Interpersonal Violence 1785–97 (2011), available at: https://publishup.uni-potsdam.de/frontdoor/index/index/docId/40290 (last visited April 24, 2021).

64. Victim-blaming is understood to occur when the victim of a crime or abuse is held partly or entirely responsible for the actions committed against them. See Julia Churchill Schoellkopf, *Victim-Blaming: A New Term for an Old Trend*, Paper 33 (LGBTQ Center, 2012). Available at: https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1032&context=glbtc (last visited April 24, 2021).

65. See Ashima Suvarna and Grusha Bhalla, *#NotAWhore! A Computational Linguistic Perspective of Rape Culture and Victimization on Social Media*, ACL (2020), available at: https://www.aclweb.org/anthology/2020.acl-srw.43.pdf (last visited April 24, 2021).

66. See Emilie Buchwald, Pamela R Fletcher and Martha Roth, *Transforming a Rape Culture* (Milkweed Editions 2005) (rape culture has been defined as "the complex of beliefs that encourages male sexual aggression and supports violence against women. It is a society where violence is seen as sexy and sexuality as violent. [...] women perceive a continuum of threatened violence that ranges from sexual remarks to sexual touching to rape itself").

67. See Rebecca Campbell and Sheela Raja, *Secondary victimisation of rape victims: Insights from mental health professionals who treat survivors of violence*, 14(3) Violence and Victims 261–75 (1999) (in the field of criminal justice, there is a concept called "secondary victimization" which refers to instances where a victim is further victimized or traumatized through negative experiences during the criminal justice process and/or by support organizations).

68. See Flavia Fascendini and Kate ina Fialová, *Voices from Digital Spaces: Technology Related Violence Against Women* (cited in note 33).

allows someone to take nude photos of her, or she decides to take them herself and then sends them to another person, she must to be held to some extent accountable if the receiver then decides to distribute such images on the net. To this regard, an Australian study on revenge pornography[69] found that 70% of those surveyed agreed that "People should know better than to take nude selfies in the first place, even if they never send them to anyone", and 62% of the respondents agreed that "if a person sends a nude or sexual image to someone else, then they are at least partly responsible if the image ends up online". Henceforth, the responsibility for the resulting abuse is placed on the victim's failure to prevent such victimization, owing to their greediness and/or naivety[70]. This tendency of finding a victim of non-consensual distribution of images liable for taking and sending an image to someone in the first place[71] can be explained by the so-called victim precipitation theory[72], which suggests that a crime may be initiated by the behavior or actions of the victim. In this way, and as evidence shows, victims are likely to take responsibility, partially at least, for the distribution of their intimate pictures[73].

Another route that leads to re-victimization involves the use of technology both during the sexual assault, to record or take pictures of the aggression, and after the abuse, as a way to humiliate and, in certain circumstances, to intimidate survivors[74]. In this way, the vic-

69. See Nicola Henry, Asher Flynn and Anastasia Powell, *Responding to 'revenge pornography': Prevalence, nature and impacts*, Australian Research Council (2019), available at: https://www.aic.gov.au/sites/default/files/2020-05/CRG_08_15-16-FinalReport.pdf (last visited April 24, 2021).

70. See Cassandra Cross, *No laughing matter: Blaming the victim of online fraud*, 21(2) International Review of Victimology 187–204 (2015), available at: https://doi.org/10.1177/0269758015571471 (last visited April 24, 2021).

71. See Tegan S. Starr and Tiffany Lavis, *Perceptions of Revenge Pornography and Victim Blame*, 12(2) International Journal of Cyber Criminology 427–438 (Jul-Dec 2018), available at https://www.cybercrimejournal.com/Starr&Lewisvol12issue2IJCC2018.pdf (last visited April 24, 2021).

72. See Doug A. Timmer and William H. Norman, *The ideology of victim precipitation*. 9(2) Criminal Justice Review 63–68 (1984), available at: https://doi.org/10.1177/073401688400900209 (last visited April 24, 2021).

73. See Tegan S. Starr and Tiffany Lavis, *Perceptions of Revenge Pornography and Victim Blame* (cited in note 72).

74. See Nicole Bluett-Boyd, Bianca Fileborn, Antonia Quadara and Sharnee Moore, *The role of emerging communication technologies in experiences of sexual*

tim is doubly assaulted: physically and digitally. The Steubenville rape case[75] is an example of this re-victimization on the social media, as the aggression was recorded through photographs and video footage taken by both the perpetrators and witnesses to the assault, and which were afterwards disseminated online[76]. In these cases, as a Canadian expert on cybercrime explains, "the victim/survivor not only has to deal with the aftermath of having been sexually victimized or raped in this case, but must also live with the knowledge that the images are out there, circulating online, without an opportunity to know who's viewed them, or how many people have viewed them, or with an opportunity to get them back"[77]. The following statement of the father of a rape teenager survivor, whose images were shared on Facebook, contributes to illustrate what digital victim-blaming entails: "the rape continues with all the photos and comments on Facebook"[78]. In fact, as happened in the Steubenville case, although some residents supported the victim, others posted comments on the social media blaming the girl by arguing that "she put herself in a position to be violated"[79], due to her intoxicated condition at the time of events. This reinforces the aforementioned theory according to which victims are seen as responsible for not being able to avoid these results.

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violence, 23 Research Report of Australian Institute of Family Studies (2013), available at: https://aifs.gov.au/sites/default/files/publication-documents/rr23.pdf (last visited April 24, 2021).

75. See Juliet Macur and Nate Schweber, *Rape Case Unfolds on Web and Splits City*, The New York Times (December 16, 2012), available at: https://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html?_r=1&pagewanted=all (last visited April 24, 2021) (This case surrounds the sexual assault to an intoxicated sixteen-year-old girl by two high school football players after a party in Steubenville, Ohio on August 12, 2012. It garnered special attention for the role played by social media in the initiation of the prosecution, as the victim was aware of the perpetrated abuse due to the content which was subsequently uploaded in online platforms).

76. See Rosemary Pennington and Jessica Birthisel, *When new media make news: Framing technology and sexual assault in the Steubenville rape case*, 18(11) New Media & Society 2435-2451 (2016).

77. See Flavia Fascendini and Kate ina Fialová, *Voices from Digital Spaces: Technology Related Violence Against Women* (cited in note 33).

78. *Id.*

79. See Juliet Macur and Nate Schweber, *Rape Case Unfolds on Web and Splits City* (cited in note 76).

Finally, the post-aggression discrediting of women's version of events on social media constitutes another remarkable example of this victim-blaming phenomenon that takes place online. In these last years, there has been a very controversial case in Spain about gang-raping (the "Wolf Pack case"[80]), in which the defense of the accused presented a report of a private detective as evidence which displayed how the victim had been posting pictures and songs on Facebook after the assault occurred, using the victim's post-rape activity on social media as one of their arguments to claim that the sexual act was indeed consented and did not result in a trauma[81]. Therefore, making use of digital technologies and the content uploaded to social networks to discredit the version of the assaulted victim.

What can be inferred from these cases and reports is the existence of a special kind of victim-blaming solely manifested when it comes to sexual forms of violence, abuse or harassment[82], which is transposed to the digital environment to perpetuate this victimization. "No-one ever told a victim of identity fraud that they should never have stored their money electronically in the first place, or how silly they were to make purchases online"[83], but we do hear the fallacious "she should

80. See Ana Garcia Valdivia, *'Wolf Pack' Case: Spain's Supreme Court Finds The 5 Men Guilty Of Rape*, Forbes (June 22, 2019), available at: https://www.forbes.com/sites/anagarciavaldivia/2019/06/22/wolf-pack-case-spains-supreme-court-finds-the-5-men-guilty-of-rape/?sh=34f7b5d45fb9 (last visited April 10, 2021) (the events occurred on July 2016 when five men –known as the "wolf pack" after their WhatsApp group name– dragged an 18-year-old girl into the hallway of a residential building during Pamplona's annual bulls' festival San Fermín, and repeatedly penetrated her. Moreover, in relation to the previous example, this aggression was also recorded by the abusers with their phones and subsequently posted on porn websites).

81. See *El juez de la violación de San Fermín acepta un informe de detectives privados sobre la víctima* días *después del suceso*, El HuffPost (November 15, 2017), available at: https://www.huffingtonpost.es/2017/11/15/el-juez-de-la-violacion-de-san-fermin-acepta-un-informe-de-detectives-privados-sobre-la-victima-dias-despues-del-suceso_a_23277797/?ncid=other_huffpostre_pqylmel2bk8&utm_campaign=related_articles (last visited April 24, 2021).

82. See Anastasia Powell, *'Be careful posting images online' is just another form of modern-day victim-blaming*, The Conversation (August 19, 2016), available at: https://theconversation.com/be-careful-posting-images-online-is-just-another-form-of-modern-day-victim-blaming-64116 (last visited April 24, 2021).

83. *Id.*

have known better" argument[84] too often put forward when referring to cyber violence acts committed against women and girls, the most typical example being: "if you don't want your private photos circulating over the Internet, do not take photos of yourself". As a matter of fact, this need to regard victims as responsible for their acts can also be explained by what Lerner denominates the "theory of just-world beliefs"[85]. Following this approach, the world is perceived as a fair and just place where people who are good or behave well will be safe from harm, leading to the conviction that people get what they deserve. Accordingly, if something bad happens to a person (i.e., being a victim of non-consensual distribution of images), it must be because this person has done something that brought such a consequence upon themselves. Nonetheless, this sort of fallacious reasoning, suggesting not to perform certain activities in order to avoid certain risks, is nothing but a means of rationalization and legitimation of an abusive conduct performed by someone else; as it is expected from victims to avoid their own victimization by "being good" and not acting dangerously, insinuating thus that it is the abused, rather than the abuser, who is required to modify and adapt their behavior.

Furthermore, as Bluett-Boyd et al. argue, paradoxically "there is a gendered expectation for girls to provide nude images that draws on already existing social norms and scripts about heterosexuality, male entitlement and female attractiveness"[86]. In this perspective, online victim-blaming is found to be based on the way power relations are in many instances gendered: whereas our culture expects, but at the same time shames and punishes women for taking nude pictures of themselves and sending them to others (trusting they would respect their privacy), men do not receive this social forfeit but rather feel empowered and confident to do that[87]. In a survey conducted in 2019 in the

84. See Samantha Bates, *Revenge Porn and Mental Health: A Qualitative Analysis of the Mental Health Effects of Revenge Porn on Female Survivors*, 12(1) Feminist Criminology 22–42 (2017).

85. See Melvin J. Lerner, *The Belief in a Just World: A Fundamental Delusion* (Plenum Press, 1980).

86. See Nicole Bluett-Boyd, Bianca Fileborn, Antonia Quadara and Sharnee Moore, *The role of emerging communication technologies in experiences of sexual violence* (cited in note 75).

87. See Jessica West, *Cyber-violence against women* (cited in note 18).

UK, it was recorded that 73% of callers to the Revenge Porn Helpline were female, 97% of whom reported intimate image abuse[88]. Accordingly, the hazardous conclusion given is very clear: women ought not share their intimate photos with men – in most cases their partners –, not even take them in the first place, because these photos at some point will be released on the net, either by being hacked or as a manifestation of cyber gendered violence. This is what the female gender is made to believe, but the real bias here is against women's right to sexual expression: for the fact that they are the ones found "guilty" for exercising this right is not only gendered, but also discriminatory.

This phenomenon of blaming it on the woman is therefore utterly dangerous, since it prevents women in many cases from reporting what has happened to them[89] and also aggravates their abuse by being harassed and shamed on social networks. Henceforth, victim-blaming shall be also considered as another form of technology-facilitated violence against women because of the heavy impact and misogynistic nature it is characterized by; and must be indispensably taken into account as another fundamental component of cyber violence against women and girls.

88. See Joe Clarke, *Research reveals gendered trends in revenge porn crimes*, SWGfL Magazine (2019), available at: https://swgfl.org.uk/magazine/revenge-porn-research-2019/ (last visited April 24, 2021).

89. See Nicola Henry, Asher Flynn and Anastasia Powell, *Responding to 'revenge pornography': Prevalence, nature and impacts* (cited in note 70); and see Sarah Bothamley and Ruth J. Tully, *Understanding revenge pornography: Public perceptions of revenge pornography and victim blaming*. Journal of Aggression, 10(1) Conflict and Peace Research 1–10 (2017), available at: https://doi.org/10.1108/JACPR-09-2016-0253 (last visited April 24, 2021) (Victim-blaming attitudes contribute to the underreporting of sexual and cybercrimes to the police, as the harassment carried out against them makes the victims of, for instance, revenge porn to back down as they feel they may be judged for their initial action of taking those intimate pictures. Drawing on several of her clients' experiences, Kate (legal expert) claimed, "they don't think anyone's going to believe them and they're worried that the police are just going to turn around and say, "well you shouldn't have taken those photos in the first place"". By the same token, the participants of the Australian survey conducted on revenge pornography, also identified victim-blaming as a challenge which hindered victims from reporting to police).

2.3. *Cyber-violence Against Women and Girls as a Form of Political Gendered Violence Aimed at Preventing Women from Joining the Public Sphere*

In 1995, at the Fourth World Conference on Women, the Beijing Platform for Action[90] called on states, media systems and associations, and NGOs to increase the participation and access of women to expression and decision-making positions in and through media and new communication technologies. Unfortunately, a research[91] indicates that women in public roles as professionals – such as journalists, politicians and human rights activists – are one of three categories of women most targeted by gender-based cyber violence. Actually, in contexts where political opinions are expressed, for example during election campaigns or while holding political office, the gender abuse phenomenon increases, especially if the targeted woman is a member of a minority group[92]. Women candidates and elected officials are thus twice as likely to be targeted compared to their male counterparts, as confirmed by a study conducted in the United States, Australia and the United Kingdom, by the social media analytics company Max

90. The Fourth United Nations World Conference on Women held in Beijing in 1995 represented a turning point for the global agenda for gender equality as resulted in the adoption of the Beijing Declaration and the Platform for Action, adopted unanimously by 189 countries at the said Conference. This document is considered to be the most comprehensive global policy framework with concrete measures designed to achieve equality between women and men and protect women rights. The objectives are divided in 12 inter-related areas of concern where a need for urgent action was identified, having among them, violence against women and girls and power and decision-making. The Beijing Declaration and the Platform for Action is available at: https://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf (last visited April 24, 2021).

91. See Association for Progressive Communications, *Online gender-based violence: A submission from the Association for Progressive Communications to the United Nations Special Rapporteur on violence against women, its causes and consequences* (November 2017), available at: https://www.apc.org/sites/default/files/APCSubmission_UNSR_VAW_GBV_0_0.pdf (last visited April 24, 2021).

92. See Diana McCaffrey, Rebecca Bonner and Angeline Lee, *How gender-based cyberviolence infects politics*, inGenere (May 14, 2020), available at: http://www.ingenere.it/en/articles/how-gender-based-cyberviolence-infects-politics (last visited April 24, 2021).

Kelsen[93]. An important example worth mentioning attributable to this analysis is how Hillary Clinton received close to twice as much abuse on Twitter as did Bernie Sanders, her main opponent, during their campaigns for the 2016 Democratic Party nomination for presidential elections. The same occurred to Julia Gillard in comparison to Kevin Rudd, when she deposed him as the leader of the Australian Labor Party and at the same time as Australian prime minister in June 2010, until he was reelected three years later.

This can be explained by the recently IPU study on Gender-Sensitive Parliaments, which it is emphasized the fact that, by entering the political domain, women are shifting away from a role that confined them to the private sphere, and therefore their legitimacy in this 'new-entered world' is sometimes contested[94] due in most cases these women challenge and transgress patriarchal stereotypes and social expectations.

Cyber violence against women in politics has been seen to have a majority tendency to manifest itself in gender-related ways: while the abuse directed towards men in politics has to do with their professional duties, the online harassment received by political women is far more focused on women's physique appearance and tends to include threats of sexual assault and other violent insults. In one case from 2017, harassers posted fake nude photos of Diane Rwigara, the only female presidential candidate running for the 2017 Rwandan election, just days after she made the announcement, which provoked, together with other efforts, the decision to Rwigara to abandon the race As Caroline Spelman, former Member of the British Parliament and Conservative Party politician, wrote in *The Times* of London, "sexually charged rhetoric has been prevalent in the online abuse of female MPs, with threats to rape us and referring to us by our genitalia. It is therefore not surprising that so many good female colleagues have

93. See Elle Hunt, Nick Evershed and Ri Liu, *From Julia Gillard to Hillary Clinton: online abuse of politicians around the world*, The Guardian (June 27, 2016), available at: https://www.theguardian.com/technology/datablog/ng-interactive/2016/jun/27/from-julia-gillard-to-hillary-clinton-online-abuse-of-politicians-around-the-world (last visited April 24, 2021).

94. See Inter-Parliamentary Union, *Sexism, harassment and violence against women parliamentarians*, Issues Brief (October 2016), available at: http://archive.ipu.org/pdf/publications/issuesbrief-e.pdf (last visited April 24, 2021).

decided to stand down at this election"[95]. The same happened in Iraq in 2018, when a woman entirely withdrew her candidacy for parliament after a fabricated video of her in bed with a man was posted online[96].

As cyber violence against political women threatens moreover to undermine their credibility and limit their electoral success, whereas it also hinders their ability to govern effectively. According to the National Democratic Institute, violence against women involved in politics in Asian and Latin American democracies has led the in many cases to serve fewer terms, on average, than their male colleagues[97].

Other manifestations of this online violence towards women in politics can also be detected, such as the case of some hackers that broke into the private email account of vice-presidential candidate Sarah Palin, during the 2008 US presidential campaign, and posted afterwards some of her messages and many of her contacts online[98].

It is imperative to also mention in this regard the way women who are left out of the norm - due to their skin tone or sexual preferences, amid others - are multiply targeted in the public arena, because of their gender and these other personal traits. A woman interviewed by Jessica West's survey for the Battered Women's Support Services in Canada, provided examples of "how Asian women who are outspoken are targeted for not fitting into the stereotype of a 'submissive Asian woman', and black women bloggers are compared to non-human primates by their online attackers when they experience

95. See Megan Specia, *Threats and Abuse Prompt Female Lawmakers to Leave U.K. Parliament*, The New York Times (November 01, 2019), available at:https://www.nytimes.com/2019/11/01/world/europe/women-parliament-abuse.html (last visited April 24, 2021) (The situation Spelman is referring to is the group of eighteen female members of the British Parliament who decided not to seek re-election in 2019 as a result of the unremitting sexual assaults they received almost every day).

96. See Jamille Bigio and Rachel Vogelstein, *Women Under Attack: The Backlash Against Female Politicians*, Foreign Affairs, (January-February 2020), available at: https://www.foreignaffairs.com/articles/2019-12-10/women-under-attack (last visited April 24, 2021).

97. *Id.*

98. See Michael Falcone, *Palin's e-mail account hacked*. The New York Times (September 17, 2008), available at: http://thecaucus.blogs.nytimes.com/2008/09/17/palins-e-mail-account-hacked/?_r=0 (last visited April 24, 2021).

online harassment"[99]. The case of Zerlina Maxwell[100] appeared on a Fox News televised debate taking the position that women should not have to arm themselves in order not to be raped, but rather it should be on men and society at large who make sexual violence unacceptable and untenable in our culture. After this appearance, a barrage of violence directed towards her was released on Twitter, calling her racialized slurs, threatening her, and even suggesting that she should be raped so that she will know why white women need to carry around guns, and some also manifested their desire to see her killed by "an out-of-control black man". Maxwell, who is African American, testified that "Clearly this is gendered and it has to do with the fact that I'm black... Because the rape threats I received are not the same as the rape threats and death threats Lindy West got. Mine had the N-word all over them"[101].

Nowadays, more women than ever take up a position in the public sphere and still are exposed to physical and online violence due to the deep-rooted misogyny of our society. The UN Security Council (UNSC) and different United Nations agencies, such as UN Women and the UN Population Fund (UNFPA) have identified this gender-based violence as a crucial factor that deters women from joining the political and public life, acting as a structural barrier to women's fully and free participation in politics. This not only leads female representatives to have a limited or marginal role in substantial discussions, but also develops into a terrific under-representation of the female gender in the political field, consequently having particular implications for diversity and inclusion in politics, such as women's scarce visibility. Furthermore, this digitally-exercised violence undermines democracies while it reinforces the status quo of white, heterosexual and cisgender patriarchal power and increases inequality within the political system[102].

99. See Jessica West, *Cyber-violence against women* (cited in note 18).

100. Zerlina Maxwell is an American political analyst, commentator, speaker and writer, that tackles issues such as gender inequity, sexual consent, racism, and other similar topics.

101. See Karla Mantilla, *Gendertrolling: Misogyny Adapts to New Media* (cited in note 23).

102. See McCaffrey et al., *How gender-based cyberviolence infects politics* (cited in note 92).

All these abuses are nothing more than a manifestation of the deeply gendered nature of political engagement. Women are perceived as a threat to men's superior status, and thus are forced to be relegated to the private and family sphere[103].

3. *Buturugă v. Romania: How the ECtHR Approaches Cyber Violence against Women and Girls*

It is broadly acknowledged that the European Court of Human Rights (the Court, hereinafter) constitutes a substantive instrument in the protection of fundamental rights in the European field and that is why there is a need to keep updated the European Convention on Human Rights what is an effective tool for tackling new challenges and menaces for the essential values of the rule of law and democracy in Europe.

An example worthy of mentioning about this theme is the Buturugă v. Romania case[104], what is the first case denouncing cyber violence as a continuation of violence by a partner discussed by the Court.

Summarizing the main facts of the case, the applicant, Gina-Aurelia Buturugă (Ms. Buturugă, hereinafter), a Romanian national, lodged in December 2013 a complaint against her husband, alleging that she had been the victim of domestic violence. She alleged that he had threatened to kill her and presented a medical certificate describing her injuries. The following month, Ms. Buturugă lodged a second complaint stating that she had received new threats and suffered further violence at her husband's hands aimed at inducing her to withdraw her first complaint. At the end of January 2014 the couple divorced and, in March 2014, Ms. Buturugă requested an electronic search of the family computer, alleging that her former husband had unfairly consulted her electronic accounts –including her Facebook account– and had copied her private conversations, documents and

103. See Kate Millett, *Sexual Politics* (Doubleday 1970) (the term '*politics*' is defined as "power-structured relationships [and] arrangements whereby one group of persons is controlled by another". This delineation explains the traditional power exerted by men in the public arena and their unjustified fear of women to fit out this scale or even reverse it).

104. See *Buturugă v. Romania*, ECHR 56867/15 (2020).

photographs. Then, in September 2014, Ms. Buturugă filed a third complaint for breach of the confidentiality of her correspondence. In February 2015, the prosecutor's office discontinued the case on the grounds that although Ms. Buturugă's former husband had threatened to kill her, his behavior had not been sufficiently serious to be designated as a criminal offence. It also decided to dismiss, as out of time, Ms. Buturugă's complaint concerning the violation of the confidentiality of her correspondence. Finally, it imposed an administrative fine of 250 euros on the applicant's former husband. Ms. Buturugă unsuccessfully appealed to the prosecutor's office against the order issued by the prosecutor, before appealing to the court of first instance.

According to these facts and with regard to the alleged violation of Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment), the Court found in particular that the national authorities did not address the criminal investigation as raising the specific issue of domestic violence, nor did they take into account the specific features of domestic violence as recognized in the Istanbul Convention, failing therefore to provide an appropriate response to the seriousness of the facts complained of by Ms Buturugă. As for the alleged breach of Article 8 of the Convention (right to respect for private and family life), the Court also considered that the investigation into the acts of violence was defective and that no consideration was given to the merits of the complaint regarding violation of the confidentiality of correspondence, which was closely linked to the complaint of violence. The authorities had therefore been overly formalistic in dismissing any connection with the domestic violence which Ms Buturugă had already reported.

From an initial perspective, we can acknowledge an intimate partner violence case including, as one of its manifestations, a form of digital violence on the plaintiff. She alleges that "her former husband had wrongfully consulted her electronic accounts, including her Facebook account, and that he had made copies of her private conversations, documents and photographs". In this respect, the Court makes the suitable appreciation of the problem, as it identifies this as a case of gender-based violence with the performance of cyber violence as a recognized aspect of this specific violence against women. Besides, the Court accepts "Ms. Buturugă arguments that acts such as illicitly monitoring, accessing or saving one's partner's correspondence could

be taken into account by the domestic authorities when investigating cases of domestic violence". Nonetheless, the approach it takes does not appear as sufficiently accurate as it should be, and therefore lacks the gender-sensitive angle this issue certainly requires.

First of all, the Court addresses the digital violence aspect as a "breach of confidentiality of the applicant's correspondence", and consequently examines it under Article 8 of the European Convention on Human Rights, which enshrines the right to private life. This is a problem insofar as the intimate partner violence also denounced by the plaintiff is being assessed on a separate basis under Article 3 of the same Convention which recognizes the freedom from torture, inhuman and degrading treatment. The Court cannot assert and identify the digital violence of the case as another dimension of the exercised gender-based violence by the applicant's former husband, and at the same time adjudicate upon both issues individually, not approaching cyber violence with the proper gender-sensitive approach required and referring to the violation of the confidentiality of correspondence as being "closely linked" to the complaint of violence.

Henceforth, reviewing the crime of cyber violence under Article 8 of the Convention is not the appropriate decision, as online violence against women has to be considered as another extent of gender-based violence but on the digital sphere, and thus it seems to be more appropriate evaluating that tunder Article 3, as well as intimate partner violence, since both of them constitute an "inhuman and degrading treatment"[105].

Furthermore, this shows that the notion and the framework of protection of cyber violence against women and girls seem to be not still clear. Access to the Internet and social networks is rapidly becoming a major necessity for both economic and social welfare, in a way that is being increasingly cherished as a fundamental human right to which everyone is (or should be) entitled to. The Court has a great

105. Cyber violence against women and girls is considered as a continuum of the gender-based violence perpetrated in the physical world. Therefore, if intimate partner violence is protected under Article 3 which enshrines the prohibition of inhuman and degrading treatment, it seems reasonable to assert that technology-related violence should also be comprised within this provision, since, as argued until now and recognized by this same Court, it constitutes another aspect of the intimate partner violence condemned by the Court and suffered by the victim in this case.

power in its hands to take a big step towards the effective and coherent recognition and safeguarding of the feminine gender against any gender-based abuses, having the opportunity to make this a secure and encouraging place for women and girls.

4. *Current Legal Framework and Suggestions for Further Legal Development*

In March 2013, the UN Commission on the Status of Women adopted at its 57th session the agreed conclusions on the elimination and prevention of all forms of violence against women and girls[106], in which it urged governments and relevant stakeholders to: "develop mechanisms to combat the use of information and communications technology and social media to perpetrate violence against women and girls, including the criminal misuse of information and communications technology for sexual harassment, sexual exploitation, child pornography and trafficking in women and girls, and emerging forms of violence, such as cyberstalking, cyberbullying and privacy violations that compromise the safety of women and girls".

In these agreed conclusions, the Commission recalls the Convention on the Elimination of All Forms of Discrimination against Women, the Declaration on the Elimination of Violence against Women, and the Beijing Declaration and Platform for Action, as they constitute the core and most powerful international women's human rights instruments. As cyber VAWG is another widespread form of gender violence, it is maintained that these frameworks could be used in order to protect and eradicate forms of violence against women and girls, including those undertaken in the cyber space. Despite

106. The Commission on the Status of Women (CSW) is a functional commission of the UN Economic and Social Council (ECOSOC) and the principal global intergovernmental body exclusively dedicated to the promotion of gender equality and the empowerment of women. The principal output of the Commission on the Status of Women is the agreed conclusions on priority themes set for each year, which contain an analysis of the priority theme and a set of concrete recommendations to be implemented at the international, national, regional and local level.

pre-dating the extensive use of digital technologies in our day-to-day lives[107], and consequently the multiple forms of gender violence that may arise from these, the Convention on the Elimination of All Forms of Discrimination against Women has been progressively updated by the Committee on the Elimination of Discrimination against Women according to the circumstances, addressing the current problem of cyber VAWG in several general recommendations and concluding remarks.

To begin with, in 2015, its general recommendation No. 33 on women's access to justice recognized the important role of digital spaces and ICT for women's empowerment, and to then clarify in its general recommendation No. 35[108] (2017) on gender-based violence against women that the Convention is fully applicable to technology-mediated environments, such as the Internet and digital spaces, as settings where contemporary forms of violence against women and girls are frequently committed in their redefined form. In addition, it highlighted the important role of ICT in transforming social and cultural stereotypes about women, as well as its potential in ensuring effectiveness and efficiency of women in their access to justice. Last but not least, in its general recommendation No. 36[109] (2017) on the right of girls and women to education, the Committee also recognized how girls are affected by cyberbullying, particularly in relation to their right to education[110].

Yet, the problem in using these instruments to address cyber VAWG is that they are too broad and general, and do not discuss specifically the issue of technology-related harassment to women but only recognize the importance of digital technologies for the empowerment of women and the potential tool they may constitute as well for their victimization. Even if the CEDAW updates the content of

107. The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the United Nations General Assembly on 18th December 1979.

108. See Committee on the Elimination of Discrimination against Women (CEDAW), *General Recommendation No. 35 on gender-based violence against women*, CEDAW/C/GC/35 (2017), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en (last visited April 24, 2021).

109. See *id*.

110. See A/HRC/38/47, para. 50 (cited in note 22).

the said Convention understanding online gender violence as a current problem impairing the feminine gender, these recommendations are still soft law that does not have an actual impact on States' obligations and therefore translates into a non-legally punishability of these offenses.

The Istanbul Convention[111], in turn, which has been signed by all EU Member States and other Council of Europe members, targets all the 'real-life' aggressions widespread committed against women and girls, but fails to tackle the abuses perpetrated online in a comprehensive manner, becoming therefore an insufficient and unspecialized instrument to combat this specific type of violence. It contains some provisions which may be applied to online gendered violence and hate speech online against women, namely Articles 3, 33, 34 and 40. Article 3 contains generic definitions as those of violence against women and gender-based violence against women, but no definition of cyber violence against women is provided. For its part, Article 33 makes reference to psychological violence "through coercion or threats", which constitutes one of the main effects that technology-related abuses cause to victims, but still no mention to the commission of these threats or coercion by means of ICTs is foreseen. Article 34 enshrines the offense of stalking without a reference to the digital realm, showing once more the inadequacy of these provisions with relation to cyber VAWG as they only display criminal conducts that take place offline with a complete lack of realization that these mentioned sorts of attacks are increasingly being carried out on the cyber sphere. Last but not least, sexual harassment is contained in Article 40, criminalizing "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment", forgetting in its wording to acknowledge that the creation of this environment is not limited to the physical world but occurs regularly on social networks too.

The Explanatory Report of the Convention, however, outlines apropos of Article 34 that the threatening behavior may consist of

111. The Council of Europe Istanbul Convention is a human rights treaty to prevent and combat violence against women and domestic violence. It has been signed by all EU Member States.

repeatedly following the victim in the virtual world (chat rooms, social networking sites, instant messaging, etc.), and that engaging in unwanted communication involves the pursuit of any active contact with the victim by means of any available communication tools and ICTs[112]. Accordingly, it has been argued that the offense of cyberharassment and cyberbullying may be protected under Article 33 on psychological violence and Article 40 on sexual harassment of the Istanbul Convention[113], although its protection as presented in this legal instrument seems deficient.

The same applies to the Budapest Convention[114], for although regulating the crimes committed on the net, it also fails to identify the gender element of offences such as cyber harassment or doxing, which are perceived in a general manner, when the subjects who amply suffer these abuses in the digital environment are women and girls. These may be found within the Budapest Convention's substantive criminalization section ranging from Articles 2 to 11, among which Articles 4, 5 and 9 show a higher direct connection to online gendered violence[115], insufficient nevertheless as they are related to data (art. 4) and system (art. 5) interference in a critical system leading to the possibility of causing death or physical or psychological injury, and Article 9 criminalizes child pornography in a generic way. Therefore, this instrument also proves to be non-adequate to address cyber VAWG as the offences contained are too vague with regard to the so important gender element.

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112. See Cybercrime Convention Committee, *Mapping study on cyberviolence*, Council of Europe, T-CY(2017)10 (July 09, 2018), available at: https://rm.coe.int/t-cy-mapping-study-on-cyberviolence-final/1680a1307c (last visited April 24, 2021).

113. See Cybercrime Programme Office of the Council of Europe, *Council of Europe Action on Cyber Violence: Initial steps to understand and tackle the issue*, C-PROC (2019), available at: https://inau.ua/sites/default/files/file/1909/igf-ua-2019._jokhadze_giorgi._initial_steps_to_understand_and_tackle_the_issue.pdf (last visited April 24, 2021).

114. The Budapest Convention on Cybercrime is a Council of Europe convention which constitutes the first international treaty on crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security.

115. See Cybercrime Convention Committee, *Mapping study on cyberviolence* (cited in note 112).

Just as the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; online violence against women needs to be recognized and materialized in a legal text, either in a new one or included in one of the already existents regarding the prohibition and prevention of violence against women. It is not enough with the aforementioned recommendations on the Convention on the Elimination of All Forms of Discrimination against Women, or the recommendation of the Committee of Ministers to member States on preventing and combating sexism adopted in 2019 that barely addresses cyber VAWG. What we actually need is its acknowledgement and criminalization in strong hard legally binding legal texts for it to be really taken seriously.

As per the EU, there is no specific legal instrument to combat online violence yet, although the European Parliament has already called for the recognition of cyber violence and hate speech against women[116] through different resolutions and the General Data Protection Regulation[117], as well as the Directive on electronic commerce[118] and both the Directive on preventing and combating trafficking in human beings and protecting its victims[119] and the Directive on combating the sexual abuse and sexual exploitation of children and child pornography[120], may cover some issues on these forms of violence[121].

116. See Adriane Van der Wilk, *Cyber violence and hate speech online against women* (cited in note 27).

117. See EU reg. 27 April 2016, no. 2016/679 (regarding the protection of natural persons with regard to the processing of personal data and on the free movement of such data); and see EU dir. 24 October 1995, no. 95/46/EC (General Data Protection Regulation).

118. See EU dir. 8 June 2000, no. 2000/31/EC (regarding certain legal aspects of information society services, in particular electronic commerce, in the Internal Market).

119. See EU dir. 5 April 2011, no. 2011/36/EU (on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA).

120. See EU dir. 13 December 2011, no. 2011/93/EU (on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA).

121. See Adriane Van der Wilk, *Cyber violence and hate speech online against women* (cited in note 27).

It is important to address this problem from other regional organizations too, like the Organization of American States (OAS) and the African Union, and provide for its recognition and condemn in their officially adopted texts, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ('Convention of Bélem do Pará'), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol'), respectively. These documents cover specifically the problem of gender-based violence in their corresponding areas, advocating for women's rights and providing for a number of measures to combat and eradicate these forms of discrimination. Therefore, it is necessary that these texts foresee also the aspect of gender violence that can be manifested in the digital sphere, and condemn it as another way of exercising violence against women and girls.

In addition, as noted by the Special Rapporteur on Violence against Women on her report, "in the past decade, there have been significant soft law (non-binding) developments in the understanding and recognition of online gender-based violence in the international human rights framework on women's rights and violence against women"[122]. This way, in its resolution 20/8, the Human Rights Council clearly stated that the same rights that people have offline must also be protected online. The view of the Internet and digital technologies as enablers of rights and the digital space as an extension of rights held offline paved the way for discussions on how digital technologies had an impact on women's and girls' rights, specifically with regard to gender-based violence. Later on, in 2015, the Human Rights Council, in its resolution 29/14, recognized that domestic violence could include acts such as cyberbullying and cyberstalking –thereby reinforcing the framing of online gender-based violence as part of the continuum of violence against women– and that States had a primary responsibility for preventing and promoting the human rights of women and girls facing violence, including those coping with domestic violence. In 2016, the General Assembly, in its resolution 71/199, recognized that women were particularly affected by violations of the right to privacy in the digital age, and called upon all States to further develop preventive measures and remedies; and in 2017, the Human Rights Council,

122. See A/HRC/38/47, para. 43 (cited in note 22).

in its resolution 34/7, reaffirmed this call, noting that abuses of the right to privacy in the digital age may affect all individuals, including particular effects on women, as well as children and persons in vulnerable situations, or marginalized groups[123].

The UN High Commissioner for Human Rights also stated in his report on ways to bridge the gender digital divide from a human rights perspective that "online violence against women must be dealt with in the broader context of offline gender discrimination and violence", and that "States should enact adequate legislative measures and ensure appropriate responses to address the phenomenon of violence against women online"[124].

4.1. *States' Legislative Responses to Address Cyber Violence Against Women and Girls*

Hitherto, abuses committed on the digital sphere have been tackled by several states in their domestic legal frameworks. Some states have merely resorted to already existing national laws to condemn these crimes, while others have enacted specific legislation to address ICT-related offences such as the unauthorized modification of or access to data and communications[125]. As regards the abuses committed on the basis of gender – that is, cyber VAWG –, the response we can expect is the same, or even worse. If we look for particular laws that cover this issue with the suitable approach, we will see our expectations go down the drain. Albeit some countries have developed legislation to address crimes as cyberstalking, online harassment and the non-consensual distribution of intimate images, the reality is that in general there is not a holistic legal framework on adequately combating and preventing digital violence against women and girls.

To begin with, we have the example of countries like Pakistan and the Democratic Republic of Congo, where the legislation tackles general violence against the female gender as a violation of women's modesty and a breach of good and public morals, respectively[126]. In Myan-

123. See A/HRC/35/9, para. 45, 48 and 49.

124. *Id*, para. 56.

125. See A/HRC/38/47, para. 83 (cited in note 22).

126. See Namita Malhotra, *Good questions on technology-related violence*, Association for Progressive Communications (2014), available at: https://www.apc.org/

mar, they even go so far as to use the criminal provision penalizing obscene publications along with offences for "outraging the modesty of women" in order to prosecute 'revenge porn'[127]. This legal framework, closely tied with morality, is not only improper but inconvenient if we want to divest the preconceived idea of how a woman shall behave according to certain moralities from the achieved reality that women's behavior has nothing to do with modesty anymore.

The situation of these countries is unfortunate for women and shows the further problem of these nations as they tend to undershoot the provisions established by the UN Declaration on the Elimination of Violence Against Women and/or by the General Recommendation 19 of CEDAW[128]. This demonstrates that even today in most countries the generic law for violence against women is not adequate, and thus what is needed first is to review the current legislation relating to violence against women and girls, so that it can truly protect women from any kind of attack or discrimination, and then be able to advocate for this legislation to include online gender-based violence within, for only then it would cover the complete range of violence women and girls are unfortunately used to face.

On the other hand, if we focus on European countries, we will see that mostly, the aspect of digital violence is left aside. There is the example of Finland, where there is no evidence of legislation aimed at preventing not even cybercrimes in general. There are no domestic policies, strategies or other specific responses that tackle this issue at all, so these online abuses are said to be covered mainly by Criminal Code provisions, although their coverage is to some degree still unclear[129]. Other EU countries like Austria, Spain and Belgium, do have some minimum provisions covering cyber offences, albeit those based on the gender are primarily faced as all the others: they do not

sites/default/files/end_violence_malhotra_dig.pdf (last visited April 24, 2021) (this research paper is part of the APC "End violence: Women's rights and safety online" project).

127. *Id.*

128. *Id.*

129. Council of Europe, *Domestic legislation on cyberviolence*, Legislation on cyberviolence, available at: https://www.coe.int/en/web/cybercrime/domestic-legislation (last visited April 24, 2021).

have laws that specifically address and counter digital violence against women and girls.

It is noteworthy to dwell on four particular cases, which I consider of interest in this regard. The first one is the case of Italy[130]. If we take a look at Italian legislation addressing cyber offences, we will find Law No. 71/2017, the so-called 'anti-cyberbullying law'.

The first specific law in Italy targeting cyberbullying, which introduces measures to prevent the cyberbullying phenomenon, especially by emphasizing the role of schools. This Law entitled "Regulation for the safeguarding of minors and the prevention and tackling of cyberbullying" was passed after some tragic cases of cyberbullying and violence against women in which victims committed suicide[131].

The first article of this Law provides us with a specific legal definition of cyberbullying for the first time in Italy –the importance can be acknowledged–, defining it as "whatever form of psychological pressure, aggression, harassment, blackmail, injury, insult, denigration, defamation, identity theft, alteration, illicit acquisition, manipulation, unlawful processing of personal data of minors and/or dissemination made through electronic means, including the distribution of online content depicting also one or more components of the minor's family whose intentional and predominant purpose is to isolate a minor or a group of minors by putting into effect a serious abuse, a malicious attack or a widespread and organized ridicule"[132].

What we can infer from this legal measure is, firstly, the great step the Italian government made to combat cyber harassment. Despite enacting this law for those girls who suffered –and still do– cyber misogynistic and sexist abuses, there is no reference to the feminine gender in the whole legal text. Victims are addressed as minors in general –even in its definition, there is no sign of the gendered nature of these abuses–, when teenage girls are significantly more likely to have experienced cyberbullying in their lifetimes, especially when it comes to 'revenge porn' and nonconsensual pornography. This is why, after having voted for its passing, Chamber speaker Laura Boldrini said:

130. *Id.*

131. See Cybercrime Convention Committee, *Mapping study on cyberviolence* (cited in note 112).

132. *Id.*

"We dedicate this law to Carolina Picchio and all the other victims of cyberbullying"[133], because as indicated, women and girls are the most largely affected by technology-related violence.

The second relevant case is the Norwegian action against cybercrimes[134]. In Norway, there are no specific laws covering these abuses –albeit some offences like hacking and phishing are foreseen in the Criminal Code[135]. As regards online harassment and other digital abuses of this kind, according to Norwegian legal practices, legislation is not necessarily required as these cases of cyber violence towards adults online are generally followed up by the police in individual cases. There was a Norwegian Supreme Court case (HR-2016-2263-A)[136], for instance, where a man pulled from social networks a vast number of intimate images to aid in their subsequent dissemination via BitTorrent. These images had been posted in the majority of cases by the women themselves, trusting that they would not be distributed or misused. This man was convicted indeed, but by wielding the Copyright Act Section 45 c, a provision regulating consent for use of photos, as the legal tool.

Nonetheless, the following case will show why it is not. In another not-too-distant case (HR-2017-1245-A)[137], a 16-year-old boy was

133. See Gavin Jones, *Italy passes law to fight cyber bullying*, Reuters (May 17, 2017), available at: https://www.reuters.com/article/us-italy-cyberbullying/italy-passes-law-to-fight-cyber-bullying-idUSKCN18D2GP (last visited April 24, 2021).

134. See Council of Europe, *Domestic legislation on cyberviolence* (cited in note 129).

135. See Ásta Jóhannsdóttir, Mari Helenedatter Aarbakke and Randi Theil Nielsen, *Online Violence Against Women in the Nordic* Countries, The Nordic Gender Equality Fund (NIKK, 2017), available at: https://www.lokk.dk/media/drblmypg/online_violence_against_women_in_the_nordic_countries.pdf (last visited April 24, 2021). See also Christopher Sparre-Enger Clausen and Uros Tosinovic, *Norway: Cybersecurity Laws and Regulations 2020*, International Comparative Legal Guide (Global Legal Group, 2019)

136. See Supreme Court of Norway, HR-2016-2263-A, November 03, 2016 (as in Supreme Court of Norway, *Summaries of the Judgments* (2016), available at: https://www.domstol.no/en/Enkelt-domstol/supremecourt/rulings/2016/summaries/ (last visited April 24, 2021)).

137. See Supreme Court of Norway, HR-2017-1245-A, June 26, 2017 (as in Supreme Court of Norway, *Summaries of the Judgments* (2017), available at: https://www.domstol.no/en/Enkelt-domstol/supremecourt/rulings/2017/summaries/ (last visited April 24, 2021)).

found guilty of Section 201, subsection 1, letter b, of the Penal Code of 1902 (sexually offensive or otherwise indecent behavior in the presence of or towards any person who has not consented). He had taken photos of a young woman during sexual intercourse, without her consent and which had a sexually offensive content. Afterwards, he shared these pictures with two of his friends, to be later distributed among the youth community. The Court of Appeal convicted him for distribution of private photos of sexual nature, but the judgment was overturned by The Supreme Court on the basis of incorrect application of the law. It was pointed out that the photos in question were not shared "towards" the victim, and thus the violation had not been committed "against" her, so the facts of the case were not covered by the charges. Here is where we find the problem. As there is no specific legislation tackling cyber VAWG, in the case the offence does not explicitly suit within the existing regulation, the issue is left unpunished. And this only perpetrates the impunity of abusers while makes the victims even more vulnerable to this sort of violence, for attackers will continue to do the same unless these abuses are adequately regulated and prosecuted.

Going to the other end, we finally found good –although not sufficient– practice on the part of the German authorities[138]. With the adoption in 2017 of the Act to Improve Enforcement of the Law in Social Networks, Germany introduced compliance obligations for social networks which are now prompted for removing the content deemed unlawful within a specific period of time after having been informed of it, according to certain provisions of the German Criminal Code. This requirement exists with regard to content fulfilling, for instance, section 130 (incitement to hatred), section 241 (threatening the commission of a felony), section 185 (insult), section 186 (defamation), section 187 (intentional defamation), and section 201.a (violation of intimate privacy by taking photographs) of the Penal Code. As a consequence of their failure to comply with this obligation, the Act foresees moreover a fine up to 50 million euros. In addition to this, the Act also amends section 14 para. 3 to 5 of the German Telemedia Act ("Telemediengesetz") and grants service providers –such as these

138. See Council of Europe, *Domestic legislation on cyberviolence* (cited in note 129).

social networks– permission, from a data protection perspective, to disclose the personal data relevant for the purposes of enforcing civil law claims related to the existence of illegal content in such platforms. This is a very good approach, for it very-well addresses the importance of service providers in cases of online harassment and other abuses, and breaks this myth that cyber attackers are protected by their anonymity in social media. The problem we face in Germany, though, is the same as in many countries: the lack of a set of specific laws targeting digital abuses and that take into account the gender perspective.

Another encouraging legislative enactment, the most advanced at the moment with regard to cyber VAWG, is the recently passed Romanian Law which modifies and completes Law 217/2003 for preventing and combating domestic violence (PL-x 62 / 17.02.2020)[139]. This Law was adopted following the ruling against Romania by the European Court of Human Rights in the Buturugă v. Romania case, discussed upon in the previous section of the article, where it was found that that Romania had failed to take into consideration the various forms that domestic violence can take referring to cyber gender-based violence. Accordingly, this new Law amends the country's 2003 legislation on domestic violence by recognizing 'cybernetic violence' as another manifestation of domestic violence, intended to "shame, humble, scare, threat, or silence the victim" by means of online threats or messages, including also the non-consensual distribution of intimate graphic content by a partner. Moreover, the illegal access to communications and private data via computers, smartphones, or devices that can connect to the internet will also be criminalized and encompassed within this type of violence. As a first step to make a public declaration of the relevance of online gender abuses and of the need to understand them within the existent framework of violence against women, it can be considered a very positive beginning. However, it is not completely adequate yet, as it only frames cyber gender-based violence within domestic violence, thereby leaving out the online attacks received by women and girls on the part of men who are not their

139. See The Cube, *Romania criminalises cyber harassment as a form of domestic violence*, Euronews (2020), available at: https://www.euronews.com/2020/07/09/romania-criminalises-cyber-harassment-as-a-form-of-domestic-violence (last visited April 24, 2021).

partners or ex-partners. In this regard, even if the gender perspective has been legally materialized[140] for the first time as regards cyber VAWG in a domestic legislation, the scope of application should be broadened to cyber violence offences committed against the feminine gender by any person, independent of whether or not there is a sex-affective relationship between them.

On the other hand, this non-homogeneity of legislation that we find to address cybercrimes in general –and of course cyber VAWG specifically – in the countries pertaining to the European Union makes us reflect on the important role the EU legislation plays and on the legal vacuum there is with respect of this issue. If there was a consolidated and strong EU legislation concerning cyber abuses, and remarking the gendered-based character of these latter, all Member States would have to abide by it and therefore we would obtain not only a uniform legal framework in Europe but also a strong legislation to combat this increasing type of gendered violence. As this cannot entirely happen with international treaties for they have to be signed and ratified in order to be binding, it is essential to make usage of this valuable tool that can improve the situation of many women suffering these digital abuses by enacting one single text that will be incorporated in 27 different countries.

Moving on to non-European countries, some authors have argued that several states have developed specific laws to deal only with technology-related violence against women, such as the Philippines, Nova Scotia (Canada), South Africa, India, New Zealand and the United States[141], amid others. Let's take a brief look at each one of them so as to come to a further conclusion about how cyber VAWG is addressed.

South Africa, in the first instance, provides for a remedy against online and offline harassment under the Protection from Harassment

140. See Niombo Lomba, Cecilia Navarra and Meenakshi Fernandes, *Combating gender-based violence: Cyber violence*, EPRS (March 2021), available at: https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU(2021)662621 (last visited April 24, 2021).

141. See Carly Nyst, *Technology-related violence against women: Recent legislative trends*, Association for Progressive Communications (May 2014), available at: https://www.genderit.org/sites/default/files/flowresearch_cnyst_legtrend_ln_1.pdf (last visited April 24, 2021) (this research paper is part of the APC "End violence: Women's rights and online safety").

Act 2010 ('the Harassment Act'), whereby victims can apply to court for a protection order lasting up to five years. The Harassment Act also contains provisions requiring electronic communications service providers to assist the court in identifying the harassers, and creates the offence of failure of one of these service providers to provide the information requested. Similarly, the Canadian province of Nova Scotia adopted in 2013 the 'Cyber Safety Act', which provides for the possibility of applying for a protection order before court in the case of an individual being subject to cyber bullying, including punishment through a fine. The Act also creates the tort of cyber bullying, enabling individuals to sue the offender for damages arising out of the cyber bullying. In the same year, Senate Bill 255 was passed in the US state of California, which amended the Penal Code to create a new misdemeanor of disorderly conduct by way of distribution of intimate photographs with the intent to cause serious emotional distress to the victim, that is, to mainly deal with instances of revenge porn. Following on 2013, New Zealand also adopted a gender-neutral law to deal with all harmful digital communications –including any text message, writing, photograph, picture or recording– with both civil and criminal remedies, the Harmful Digital Communications Bill. This Act created a new civil enforcement regime for harmful digital communications and new criminal offences in cases of serious harm. Lastly, the Philippines amended the colonial Spanish Law on sexual assault and violence in 2004, and subsequently passed the Anti-Photo and Video Voyeurism Act in 2010, which deals with voyeurism and revenge porn. And so did India, by including some provisions on voyeurism and stalking in a recent amendment to criminal law[142].

After analyzing this, the first reflection could be involved about how this exactly approaches *gendered* online violence. It is true that these laws constitute a great step towards the fight against cybercrime, but the gender approach cannot be appreciated anywhere. The provided legislation concerns online harassment or revenge porn, but it doesn't make specific reference to the gender issue.

Hence, two main problems emerge. First of all, there are still many countries that lack any minimum legislation on cybercrime and online

142. See Namita Malhotra, *Good questions on technology-related violence* (cited in note 126).

harassment, like Norway and Finland, which creates in consequence a great legal gap as regards the correct approach and prosecution of these online abuses, for it may lead to unclear and non-consensual steps taken by third parties. And second, cyber VAWG is not a mere online abuse committed using digital technologies, it is not the same to cyber harass sporadically someone than to do it systematically on the grounds of gender, and therefore the legal measures to prosecute it shall not in any case be gender-neutral, because this type of violence neither is[143].

This is why we need a strong specialized legislation, both at the international and domestic levels, and effective policy measures and mechanisms in order to combat and prevent cyberviolence against women and girls. Generic cybercrime legislation is not enough, neither a stricter protection of the right to privacy and to data protection. Just as intimate partner violence is not the same as domestic violence[144], online gender violence is not the same as generic digital violence. We need legislative reforms that include not only the adoption of specific laws on technology-related gendered violence that provide avenues of redress for victims, but that also emphasizes the role of Internet and electronic communications service-providers with respect to the protection of the user's privacy and security and their accountability as to the further identification of online abusers.

Moreover, these service providers, as well as the law enforcement and police officers, are to receive gender-sensitive training so that

143. See A/HRC/38/47, para. 42 (cited in note 22) (Research conducted on the gender dimension of online violence points out that 90 per cent of those victimized by non-consensual distribution of intimate images and 'revenge porn', among other cyber abuses, are women).

144. See World Health Organization and Pan American Health Organization, *Intimate partner violence* (cited in note 13) (The term "domestic violence" is used in many countries to refer to partner violence but the term can also encompass child or elder abuse, or abuse by any member of a household. This type of violence, therefore, includes all types of family violence, included those committed by former or current partners; however, intimate partner violence is only limited to acts of aggression between intimate spouses). See also Carol B. Cunradi, *Neighborhoods, Alcohol Outlets and* Intimate Partner Violence: Addressing Research Gaps in Explanatory Mechanisms, 7(3) Int J Environ Res Public Health 799-813 (March 2010), available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2872327/ (last visited April 24, 2021).

they can understand the root of the problem and effectively implement the legal measures provided by the systems[145].

As a conclusion, this is not a gender-neutral issue, as per the data collected, and consequently the enacted legislation cannot be gender-neutral either, but has to specify that we are before a gender-based problem which must be addressed by international and domestic authorities with the gender-sensitive perspective it requires.

5. *A Proposal for a Specific Regulatory Framework*

Having analyzed how cyber VAWG, as a problematic phenomenon which needs to be handled through the law, has been treated in the international framework, in EU law and in the domestic law of States, I shall now turn my efforts to formulating a number of proposals and recommendations, which aim to improve the current legal situation. In fact, the flaws and the deficiencies which can be spotted at various levels can be specifically addressed through multiple legal instruments, which can deal with different aspects of cyber VAWG. As these instruments are distributed at different levels, first, the international legal framework shall be addressed; secondly, European Union legislative and non-legislative policies call for particular attention, with a special focus towards some options, which will be outlined; and finally, it is of utmost importance that I also address the domestic level, which is fundamental in order to put in practice all the principles and the guidelines given by the levels above.

5.1. *International Framework*

In the international arena, two different options seem to be the most suitable.

I would firstly propose the enactment of an international convention, which deals with cyber violence against women and moves beyond the Istanbul Convention, becoming a comprehensive instrument specifically addressing the matter.

145. See A/HRC/38/47, para. 85 (cited in note 22).

Such convention may follow the pattern established within both the Istanbul Convention and the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, beginning with a detailed harmonized definition of cyber VAWG[146]. It may then specify the fundamental rights which are sought to be protected and a comprehensive enumeration of all the existing manifestations of online gender violence.

For this hypothetical convention to be actually useful to the matter, explicit obligations for signatory States would be needed. Specifically, States shall be urged to take with due diligence all the necessary legislative and non-legislative measures in order to prosecute, condemn, prevent and punish these abuses, as well as to provide for reparation and support mechanisms. An indication to undertake relevant policies from a gender-sensitive approach may also be helpful; a suggestion may be to deliver a suitable training on the matter to the relevant professionals (mainly justice and police officers, who are in charge of enacting those policies).

Additionally, adequate financial and human resources shall be destined for the implementation and achievement of these policies, and in general are to be allocated so as to guarantee effective measures to prevent and fight against cyber VAWG[147]. More particularly, such instrument may, eventually, encourage States to gather statistical data in order to be able to assess the frequency with which this violence is perpetrated and acknowledge if the legislation adopted to combat it is being effective.

The second possible legislative measure would be to enact an Additional Protocol to the Istanbul Convention on preventing and combating violence against women and domestic violence, concerning, in this case, the criminalization and prosecution of technology-facilitated gender-based violence, as it was already done with the Additional Protocol to the Convention on Cybercrime. This Protocol would

146. See Lomba, Navarra and Fernandes, *Combating gender-based violence: Cyber violence* (cited in note 144) (It is argued that the establishment of a common legal definition could raise the probability of victims of online gender violence to seek legal resources and mitigate the degree of victimization, on account of the deterrent effect on perpetrators).

147. See European Institute for Gender Equality, *Cyber violence against women and girls* (cited in note 12).

constitute an extension of the Istanbul Convention's scope, thereby harmonizing the substantive law elements of gender-based violence and including also the procedural and international cooperation provisions. As regards the content, the recommendation would follow the one aforementioned.

Thus, in either of the two proposals, cyber VAWG would be explicitly addressed by means of specific policies towards the eradication of these abuses and a clear depiction of what can be understood as embracing the scope of this sort of violence would be shown, making it easier for both States and other stakeholders to recognize and tackle this problem.

A step could also be made to regulate the role played by social media providers in the prevention and control of cyber VAWG and in the protection of victims, as until now it has been considered insufficient, and therefore mechanisms to establish accountability for these providers becomes imperative.

5.2. *The European Union Level*

A very recent European added value assessment on cyberviolence[148] has proposed a set of policy options, both legislative and non-legislative, for the European Union level. Among the legislative policy options, the following ones can be encountered:

- Policy option 1: secure EU accession to the Istanbul Convention and/or develop similar EU legislation.
- Policy option 2: develop a general EU directive on (gender-based) cyber violence.
- Policy option 3: develop EU legislation on the prevention of gender-based cyber violence.
- Policy option 4: strengthen the existing legal framework.

Accordingly, I will now analyze these policy options suggested to the European Union and will provide what would be, in my estimation, the most suitable approach to take in this regard.

In light of this analysis, the first option which would entail the ratification of the Istanbul Convention and/or the development of

148. See Niombo Lomba, Cecilia Navarra and Meenakshi Fernandes, *Combating gender-based violence: Cyber violence* (cited in note 144).

similar legislation seems to be the one offering the major benefits. This option would consider both online and offline gender-based violence and would adjust to the international legislation. Nevertheless, it is unclear to which extent the suggestion of making the ratification of the Istanbul Convention a conditional obligation to access the European Union will contribute to address cyber VAWG. Putting online gender violence into the equation seems, in my opinion, to deviate from the main issue without directly tackling this problem. For this reason, the enactment of new EU legislation dealing with cyber gender-based violence more explicitly would be recommended. Moreover, this policy option would potentially have a considerable impact on costs – an estimated 6 to 12 % reduction in costs – by increasing the rate of prosecution and thus deterring perpetrators, leading to a lower prevalence[149]. This option addresses specifically the topic, but seems to have just a temporary character, and may sound too excessive if there exists already the possibility of passing EU legislation, as suggested in the following policy option. Furthermore, details on how this "similar legislation" would cope with cyber VAWG and the form it would take have not been provided.

Policy option 2, accordingly, proposes the drafting of either a general directive addressing cyber violence and making an explicit reference to gender-based cyber violence or an EU directive exclusively focused on gender-based cyber violence, based on Article 83(1) TFEU according to which minimum rules could be established regarding the definition of criminal offences and sanctions, i.e. cyber violence as part of computer crime.

Among these two options, the most suitable approach seems to be that of enacting a specific EU directive on cyber violence against women and girls, providing for an encompassing definition, condemning all the already-known online gender abuses and leaving an option for potential ones, emphasizing the need to consider it as part of gender-based violence and making a clear reference to the misogynist element that is considered to trigger them. However, a desirable input would also be to include within the current legislation on cybercrime a section dedicated to technology-facilitated violence against women and girls, again, from a gender-sensitive approach.

149. *Id.*

As regards policy option 3, which foresees the development of EU legislation on the prevention of gender-based cyber violence, the proposal consists of promoting and supporting crime prevention action at national level, grounded on Article 84 TFEU. This could be done either on gender-based violence with explicit reference to cyber violence or by means of a new initiative on gender-based cyber violence, and it is argued that this measure could mitigate the risk of victims developing mental health disorders and other resulting consequences. Nonetheless, this option can only be regarded as complementary to the above-mentioned, as it would not itself be capable of enforcing compliance of Member States, and therefore without a previous hard and binding legal decision, this would constitute just another soft measure which would go unnoticed. Nonetheless, it would be interesting to consider this proposal within an action plan to strengthen domestic policies combating cybercrime, implying, as a suggestion, a campaign to sensitize and raise awareness among European citizens.

The last legislative option that is portrayed advocates for an amendment of the existing EU legislation in order to incorporate a set of defining forms of cyber violence and the corresponding gender dimension. This could be done for directives on cybercrime and by introducing an online perspective to existing EU legislation. The Victims' Rights Directive (Directive 2012/29/EU) is chosen as an example, arguing that an amendment could be undertaken so as to include gender-based cyber violence and its specific characteristics. This option would, therefore, be insufficient and inefficient as cyber VAWG would not be addressed in a holistic way by providing an institutional harmonized definition and there would be a risk that it may end up being submerged among generic topics where it could not be highlighted.

With regard to the non-legislative policy options, we find:

- Policy option 5: facilitate EU and national-level awareness raising.
- Policy option 6: back national-level victim support and safeguarding services.
- Policy option 7: conduct research into gender-based cyber violence.
- Policy option 8: expand existing EU collaboration with tech companies on illegal hate speech.

As highlighted by the report itself, all non-legislative policies would have a positive impact on the quantitative aspect. Nonetheless, it is also pointed out that relying only on soft measures and facilitating EU and national level action would constitute a weaker approach[150].

Therefore, it would be advised to implement policy option number 2, more specifically the adoption of an EU directive on cyber violence against women and girls, and not on cyber violence in generic terms with a subsequent reference to technology-related gender abuses. The drafting of the directive should also follow the guidelines aforementioned concerning the submission of a holistic agreed EU definition of the concept of cyber violence of women and girls, Member States' obligations to prevent and prosecute cyber VAWG and the implementation of methods such as sensitivity campaigns for citizens and suitable training for criminal justice authorities, with special emphasis on the data collection disaggregated by gender. Alongside, policy option number 3 could also be implemented as a subsidiary tool together with all the non-legislative policy proposals, as it is estimated that a strongest impact would be achieved through the combination of both legislative and non-legislative legislative actions[151].

5.3. *Domestic Legislation*

At a domestic level, the adjustment of the legal framework in order to properly face the phenomenon of cyber VAWG will necessarily have to follow different routes, depending on whether the State is part of the European Union or not. In the case of EU Member States, they will have to abide by this new EU legislation through the enactment of a national law transposing the objectives set forth by the directive, therefore incorporating these provisions into their legal system following the corresponding procedure and deadlines.

The main question is now how States which are not Members of the European Union should legally address cyber VAWG. Following the example of the recent law adopted in Romania, which was commented on the previous section of the article, the first step in the drafting of this law should be to provide for a comprehensive

150. See *id.*
151. See *id.*

definition of cyber violence against women and girls framing it within the concept of gender-based violence. A list of all existing and potential manifestations will have to be provided as well, so that the victims may become familiar with the many ways in which this violence can be inflicted. As regards the rest of material and procedural aspects, the aforementioned would be advised for domestic legislation too, including a suitable legal framework encompassing gender-sensitive campaigns and training, disaggregated data collection and particular provisions for the accountability of Internet service providers in relation to the commentaries and content displayed in their websites or social media applications.

It is noteworthy to also remark the need to conceptualize these abuses not only within the intimate relationship sphere, as the Romanian Act does, but encompassing all possible victims and perpetrators of cyber VAWG, which range from partners or ex-partners to unknown people and acquaintances who make use of communication tools in order to benefit from the anonymity social media facilitates for the commitment of gender-based slurs and online harassment, the sending unsolicited pornography or rape and death threats.

6. *Covid-19 as an Indicative Factor of the Urgent Need for Measures to Combat Technology-related Gendered Violence*

Many people assert COVID-19 has changed our lives forever. Since the lockdown statement made in almost all countries across the world, there is no doubt that everyone has had to alter their lifestyle to adapt to this "new normality" which is apparently going to continue for quite a while. As a consequence of the health crisis, countries have asked citizens to stay at home and undertake all their current activities online, in order to continue their professional activities. In such a way, the coronavirus pandemic has driven much of our daily life – work, school, socializing – to the digital sphere, leading technology to be even more involved in our lives.

Previous modern pandemics or epidemics, such as Ebola and Zika, which affected a large territory of our world, have shown that multiple forms of violence against women and girls are exacerbated in these disturbing contexts. Violence includes trafficking, child marriage,

sexual exploitation and abuse[152]. The current COVID-19 crisis is most likely to follow the same line, as evidence shows all around the world[153]. The measures put in place to address the pandemic, mainly lockdowns and social distancing, have increased the risk of women and girls experiencing violence. First of all, if a woman is suffering intimate partner violence, being confined with her abuser will not only worsen the abuse for extended periods of time relentlessly, but will amongst all isolate the woman from her acquaintances and potential sources of support, as the control and dominance will increase at home[154]. As a result, a surge in intimate partner violence and gender-based abuses has been reported during the lockdown period by law agents, women shelters and the media outlet. Spanish helplines have registered a 47 percent increase in calls in the first two weeks of April. In France reports of physical and sexual violence have boosted by more than 30 percent since the beginning of the coronavirus outbreak[155].

152. See UN Women, *COVID-19 and Ending Violence Against Women and Girls*, EVAW COVID-19 Briefs Series (2020), available at: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/issue-brief-covid-19-and-ending-violence-against-women-and-girls-en.pdf?la=en&vs=5006 (last visited April 24, 2021).

153. See María-Noel Vaeza, *Addressing the Impact of the COVID-19 Pandemic on Violence Against Women and Girls* (cited in note 2) (Furthermore, as provided for by a rapid analysis conducted in mid-April by UN Women, 80% of the countries who provided information/data reported a surge in calls to helplines/hotlines after the pandemic outbreak. As examples, we find a 40% increase in Malaysia, a 50% increase in China and Somalia, a 79% rise in Colombia, and a 400% rise in Tunisia. Even though the data delivered shows that in some other countries there has been no boost, or these calls have even decreased, UN Women observes that it may not be due to a non-increase of violence as a result of the pandemic, but because of the potential repercussions seeking for help would entail or due to a lack of privacy at home to make such calls. What is more, projections reveal that for every three months the lockdown continues, an additional 15 million women are expected to be affected by gender-based violence). See also Phumzile Mlambo-Ngcuka, *Gender-based violence: We must flatten the curve of this shadow pandemic* (cited in note 4).

154. See Alison J. Marganski and Lisa Melander, *Domestic abusers use tech that connects as a weapon during coronavirus lockdowns*, The Conversation (2020), available at: https://theconversation.com/domestic-abusers-use-tech-that-connects-as-a-weapon-during-coronavirus-lockdowns-139834 (last visited April 24, 2021).

155. See Elena Sánchez Nicolás, *Coronavirus exposes increase in violence targeting women*, EUobserver (2020), available at: https://euobserver.com/coronavirus/148221 (last visited April 24, 2021).

Just as offline gendered violence, cyber violence against women and girls has also been on the rise these last months[156], with more people confined at home and spending their time on the Internet. Quarantine measures and self-isolation policies have enhanced internet usage from 50% to 70%. This led perpetrators of violence against women and girls to increasingly use technology and digital devices to commit their abuses.

In April, UN Women published a report stating that "before COVID-19, one in 10 women in the European Union reported having experienced cyber-harassment since the age of 15 (including having received unwanted, offensive and sexually explicit emails or SMS messages, or offensive, inappropriate advances on social networking sites)"[157]. Although in-depth studies on cyber VAWG during the coronavirus lockdown have not been yet conducted, the FBI indicates that cybercrime has quadrupled and experts warn that there may even be more cases of online gendered violence as the pandemic keeps spreading[158]. The French minister for equality, Marlène Schiappa, has reported a surge in cyber VAWG, often with sexual suggestions[159]. In the Philippines, peer-to-peer online violence against women and girls has exacerbated amid the quarantine as stated by the Commission on Human Rights.[160]In the UK, the traffic to the Revenge Porn Helpline website nearly doubled in the week beginning on March 23rd, according to the BBC[161].

156. See UN Women, *Impact of COVID-19 on violence against women and girls and service provision* (cited in note 4) (In Morocco, for instance, it has been reported an increase in cyber violence against women as dangerous messages on gender stereotypes have been circulated on social media).

157. UN Women, *COVID-19 and Ending Violence Against Women and Girls* (cited in note 152).

158. See McCaffrey et al., *How gender-based cyberviolence infects politics* (cited in note 92).

159. See Elena Sánchez Nicolás, *Coronavirus exposes increase in violence targeting women* (cited in note 155).

160. See UN Women, *Online and ICT facilitated violence against women and girls during COVID-19* (cited in note 12).

161. See Hannah Price, *Coronavirus: 'Revenge porn' surge hits helpline*, BBC News (2020), available at: https://www.bbc.com/news/stories-52413994 (last visited April 24, 2021).

With more than half of the world's population under lockdown conditions by early April, millions of people have been using the Internet with greater frequency to conduct their work and pursue their studies, mainly through video conferences and digital platforms. The increased use of online platforms has been seized by some to attack and cyber harass women and girls. Communication media and women's rights organizations have documented specific cases of unsolicited pornographic videos showcased during online social events in which women were involved. Moreover, reports also show threats of violence and harmful sexist content, sex trolling and hacking video calls[162]. These are considered to be new emerging forms of online gender-based violence.

The most renowned case is the teleconference hijacking, most popularly named "zoom-bombing" after the virtual meeting platform 'Zoom'. Zoom-bombing occurs when people join online social events in order to post racist, sexist or pornographic content to shock and disturb viewers[163]. This form of hacking specifically targets women, among other groups, as research from Ryerson University's Infoscape Research Lab has revealed that most Zoom-bombings involved misogynistic, racist or homophobic content[164]. "Sending unsolicited pornographic or otherwise offensive images or video is an attack on our right to privacy and freedom from harassment", says Tsitsi Matekaire, Global Lead of the End Sex Trafficking program at Equality Now[165]. Moreover, perpetrators have shown a great interest in targeting

162. See UN Women, *Online and ICT facilitated violence against women and girls during COVID-19* (cited in note 12).

163. See Suzie Dunn, *Technology-Facilitated Gender-Based Violence: An Overview*, 1 Paper of Centre for International Governance Innovation (2020), available at: https://www.cigionline.org/publications/technology-facilitated-gender-based-violence-overview (last visited April 24, 2021).

164. See Greg Elmer, Anthony Glyn Burton and Stephen J. Neville, *Zoom-bombings disrupt online events with racist and misogynist attacks*, The Conversation (2020), available at: https://theconversation.com/zoom-bombings-disruptonline-events-with-racist-and-misogynist-attacks-138389 (last visited April 24, 2021).

165. See Sophie Davies, *Risk of online sex trolling rises as coronavirus prompts home working*, Reuters (March 18, 2020), available at: https://www.reuters.com/article/us-women-rights-cyberflashing-trfn-idUSKBN2153HG (last visited April 24, 2021).

university courses on gender and race-related topics[166], over others. In response to these cyberattacks, we must say that Universities and Zoom are tightening security measures, and the FBI has categorized zoom-bombing as a federal offense[167].

As these new forms of digital violence are on the rise, existing forms of gender-based cyber violence like sextorsion and non-consensual distribution of images and video sharing have scaled-up. For instance, pornographic sites have received more audience during the quarantine period, in comparison to pre-pandemic figures, and thus the risk of sextortion has exponentially risen[168]. In addition, there are some concerns that the closure of establishments offering legal sex work may increase the number of incidents of sexual exploitation[169], as well as it is distressing the risk of such exploitation of becoming more likely in exchange for health care services and social safety net benefits[170].

Other technology-facilitated forms of exerting control and abuse, like disabling phone or internet services and monitoring electronic communications, are being particularly damaging during the coronavirus pandemic as well[171]. Moreover, some perpetrators have sought to

166. See McCaffrey et al., *How gender-based cyberviolence infects politics* (cited in note 92).

167. See *id.*

168. See UNODC Cybercrime and Anti- Money Laundering Section, *Cybercrime and COVID-19: Risks and Responses*, UNODOC (2020), available at: https://www.unodc.org/documents/Advocacy-Section/UNODC_-_CYBERCRIME_AND_COVID19_-_Risks_and_Responses_v1.2_-_14-04-2020_-_CMLS-COVID19-CYBER1_-_UNCLASSIFIED_BRANDED.pdf (last visited April 24, 2021).

169. See European Union Agency for Law Enforcement Cooperation, *Pandemic profiteering: how criminals exploit the COVID-19 crisis*, EUROPOL (March, 2020), available at: https://www.europol.europa.eu/sites/default/files/documents/pandemic_profiteering-how_criminals_exploit_the_covid-19_crisis.pdf (last visited April 24, 2021).

170. See UN Women and WHO, *Violence Against Women and Girls: Data Collection during COVID-19*, EVAW COVID-19 Briefs Series (2020), available at: https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/vawg-data-collection-during-covid-19-compressed.pdf?la=en&vs=2339 (last visited April 24, 2021).

171. See Alison J. Marganski and Lisa Melander, *Domestic abusers use tech that connects as a weapon during coronavirus lockdowns* (cited in note 154).

make use of technology and the current health crisis to cover up their crimes.

On another note, the "keyboard warriors", as they are commonly known, have also popularized during this quarantine for attacking female victims of coronavirus on social media. One example was when the first COVID-19 patient in Kenya, a young girl named Brenda, was released from hospital after her recovery and decided to attend an on live TV interview. Kenyans on Twitter (KOT) used the platform to bash her online, to the extent that even private pictures of her and personal conversations were released. Some even went as far as to claim that she was not sick but had been paid by the government for advertising purposes. Few days later, she was invited on Citizen TV for another interview, and the online harassment resurfaced again, to the detriment of the hostess as well[172]. In the same vain, in Kenya, as in other parts of the world, some attackers have been hacking into and gaining control over women's and activists' accounts. Kenyan broadcast journalist and gender digital safety specialist Cecilia Mwende Maundu stated that in her country they have been "experiencing more requests for support due to attacks on feminist websites and social media pages"[173]. We can therefore appreciate how the usage of social media by women to advocate for their rights and express their opinions implies a higher risk for them to be targeted by abusers.

In light of the above, it is clear that the number of cyberattacks carried out against women and girls is improving along with the health crisis. Yet, while several UN agencies, the European Union and some governments have warned against the exploding increase in intimate partner violence and have provided for a set of measures to assist and protect victims, little has been done in relation to cyber VAWG. The fact that digital technologies are increasingly used to perpetrate abuse shall be given the outstanding importance it has. "The pandemic will have long-lasting consequences on women and girls, on their exposure

172. See Cecilia Maundu, *Online gender-based violence in times of COVID-19*, KICTANet (2020), available at: https://www.apc.org/en/news/kictanet-online-gender-based-violence-times-covid-19 (last visited April 24, 2021).

173. UN Women, *Take five: Why we should take online violence against women and girls seriously during and beyond COVID-19* (July 21, 2020), available at: https://www.unwomen.org/en/news/stories/2020/7/take-five-cecilia-mwende-maundu-online-violence (last visited April 24, 2021).

to violence, and only commitments that are part of governments' sustained and long-term planning policies can effectively address this"[174].

As for the corporate world, numerous companies triggered by the pandemic have decided to take profit of this "new normality", developing work tasks from home, and many are planning to make it permanent. Firms are adjusting their location strategies and making allegations such as that of Barclays boss, Mr. Staley, who told BBC reporters that "the notion of putting 7,000 people in the building may be a thing of the past"[175]. Facebook founder and chief executive Mark Zuckerberg also assessed that he expects half of their workforce to work outside Facebook's offices over the next five to ten years, following moves by other tech firms, which have declared that employees can work from home "forever", if they wish[176].

All this demonstrates that things will no longer be as we knew them, and we must be prepared for it. That is why tackling cyber gendered violence is not only necessary for today, but also for tomorrow.

Many companies are already planning teleworking to be a permanent measure and, as we have witnessed during this lockdown period, this will only increase the already high figures of online abuses on the female gender all around the world.

If before the pandemic, cyber VAWG was already existing and exponentially rising, after COVID-19, with all the added incorporation and use of digital technologies in our professional lives, the threat of these digital abuses for women and girls is even higher, and the pressing need for measures to be taken becomes dormant. The world is entering into a "new and uncharted territory with so many people suddenly working remotely, which gives abusers new ways to target both

174. Assertion made by Sarah Hendriks, Director of Programme, Policy and Intergovernmental Division at UN Women, at a launch event for the COVID-19 Global Gender Response Tracker, organized by UN Women and the UN Development Programme. Available at: https://www.devex.com/news/new-tool-tracks-how-policies-are-protecting-women-during-covid-19-97778 (last visited August 2, 2020).

175. See *Barclays boss: Big offices 'may be a thing of the* past', BBC News (2020), available at: https://www.bbc.com/news/business-52467965 (last visited April 24, 2021).

176. See Justin Harper, *Coronavirus: Flexible working will be a new normal after virus*, BBC News (2020), available at: https://www.bbc.com/news/business-52765165 (last visited April 24, 2021).

strangers and acquaintances online", says Heather Barr, co-director of women's rights at Human Rights Watch[177].

On top of that, the number of justice officers specialized on cyber VAWG will be reduced during 2020[178], and this will result in the weakening of enforcement mechanisms when they are needed the most. In this context, everything points to the fact that if action is not taken in a near future, online gendered violence will become an even bigger problem. The already existing need for strong legislation and effective policy measures is made even more indispensable with a view to what is to come. What is mainly required to solve this situation and prevent further digital gendered violence is, amid other measures, to develop gender-sensitive specialized national and international binding legal texts, which effectively condemn and prosecute cyber VAWG recognizing it as another hazardous aspect of violence against women and girls.

There is no doubt that this COVID-19 pandemic has made a lot of changes during the last months, especially with respect to the spike of violence perpetrated against the feminine gender on the digital sphere. But we can also make the difference. With the adequate gender-sensitive approach and the enactment of the required legislation, we can put an end to one of the multiple manifestations of gender-based violence in the 21st century as a great step towards the eradication of any discrimination and abuse on the basis of gender, before it becomes an even more difficult threat to fight against.

7. *Conclusion: Recommendations to Properly Handle Cyber Violence against Women and Girls*

As the UN General Assembly (UNGA) 2013 Consensus Resolution on protecting women human rights defenders asserts, "information-technology-related violations, abuses and violence against women, including women human rights defenders, such as online harassment,

177. See Sophie Davies, *Risk of online sex trolling rises as coronavirus prompts home working* (cited in note 165).

178. See UN Women, *Online and ICT facilitated violence against women and girls during COVID-19* (cited in note 12).

cyberstalking, violation of privacy, censorship and hacking of e-mail accounts, mobile phones and other electronic devices, with a view to discrediting them and/or inciting other violations and abuses against them, are a growing concern and a manifestation of systemic gender-based discrimination, requiring effective responses compliant with human rights"[179]. This summarizes very clearly the central thesis of this article: the gender discrimination element of this kind of violence and the lack of forceful legislation and policy measures.

In this section, I will gather all the suggestions previously introduced on how to legally regulate technology-facilitated gender-based violence by furthering the explanation of why these constitute indispensable measures to be incorporated into a legal instrument for the attainment of a proper approach to address cyber VAWG.

First of all, the concept of cyber violence against women and girls remains ill-defined, which results in the non-criminalization and non-prosecution of lots of offences this concept embraces as they are not recognized as such by domestic legislations. According to the European Institute for Gender Equality (EIGE), given that in most EU Member States cyber VAWG is not condemned (or, in some cases, only one of its many aspects is), the available data on this phenomenon is quite scarce. Moreover, in those countries where data is collected, it lacks the proper disaggregation by gender of both victims and abusers, and the relationship between them, which reduce the usefulness and efficacy of the figures garnered[180]. Accordingly, the overall impact this technology-related violence may have on victims cannot be properly quantified or estimated, as per the current limited and poor research it has been carried out regarding this issue. A solution would be, first and foremost, to provide an agreed international institutional definition of cyber VAWG including all its possible manifestations, so that domestic actors can identify and collect valuable gender-disaggregated data as a first approach to legislate upon and combat gender-based violence on the digital sphere.

This lack of both a comprehensive global definition and a sufficient amount of data on online gender violence leads most women to

179. See A/RES/68/181.

180. See European Institute for Gender Equality, *Cyber violence against women and girls* (cited in note 12).

be still unaware of these crimes. Following a 2014 survey in the U.S., for instance, more than half of cyber stalking victims did not acknowledge their own experience as a crime[181], nor did they take action on this matter.

Therefore, my first suggestion to tackle this issue is enhanced public sensitization, following the key recommendations given by the United Nations[182]. Information about what cyber VAWG is and what it entails is crucial to prevent women and girls from being victims of online violence –although a joint definition is obviously necessary to be agreed on first. As Cheekay Cinco points out, 'technology can victimize you, but it can also be the solution to your victimization. If you understand how to use it, the potential to be victimized is lessened'[183]. There is a need for public education: firstly, for potential female victims – awareness-raising campaigns educating women and girls about cyber VAWG, their legal rights and available support services are absolutely necessary[184] –, and secondly for law enforcement agents. Gender-sensitive training, as already noted, must be given to the police and service-providers staff so that they can integrate this gender perspective to their daily responses to cybercrime.

Online gender-based violence is not considered to be a priority for police in many countries, and this derives in improper responses on the part of the criminal justice sector to women victims of cyber VAWG[185]. In the UK, for example, research reveals that 61% of the 1160

181. See Matt R. Nobles, Bradford W. Reyns, Kathleen A. Fox and Bonnie S. Fisher, *Protection against pursuit: A conceptual and empirical comparison of cyberstalking and stalking victimization among a national sample*, 31(6), Justice Quarterly 53-65 (2014).

182. See UN Broadband Commission for Digital Development, *Cyber Violence Against Women and Girls: A World-Wide Wake-Up Call* (cited in note 45) (According to the UN Broadband Commission for Digital Development, "best practice should be based on 3 'S's – Sensitization, Safeguards and Sanctions").

183. See Kara Santos, *Women fight assault over Internet* (cited in note 17).

184. See European Institute for Gender Equality, *Cyber violence against women and girls* (cited in note 12).

185. See Namita Malhotra, *Good questions on technology-related violence* (cited in note 126) (to some extent, cyber VAWG cases are trivialized in certain countries in such a way that when women report them to the police officers, the responses obtained tend to be unaccommodating or dismissive, and sometimes cases do not even get to reach the stage of filing a police report because of this failure of authorities to recognize online threats and harassment as either gender-based violence or as possible criminal offences. To put an example, a public prosecutor in Mexico told two victims

incidents of revenge porn reported during the first six months after its domestic criminalization did not pursue further action against the alleged perpetrator[186]. This, in most cases, is a consequence of the inadequate and ineffective approach of criminal justice authorities as they tend to treat each individual online abuse case as "incidents" and to minimize their prejudicial impact[187], which is usually due to the false dichotomy between online and offline gender-based violence that leads them to consider cyber VAWG as a minor matter.

This needs to change. "Rigorous oversight and enforcement of rules banning cyber VAWG on the Internet is going to be a *conditio sine qua non* if it is to become a safe, respectful and empowering space for women and girls, and by extension, for boys and men"[188]. That is, the role these agents play in the prevention and prosecution of crimes is fundamental and therefore they must do so from a gender-sensitive perspective that allows them to understand the seriousness of the problem and how to approach it. In this manner, the common social attitudes towards gendered violence will gradually change, and so will the way cyber VAWG is understood and the frivolity with which it is treated and handled. "Violence is not new, but cyber violence is, and the public needs to recognize this and address it as a priority issue"[189]. Only in this way, technology-related gender violence may be successfully prevented.

The second referral the UN suggests is the "promotion of safeguards for online safety and equality on the Internet for women and girls". To this extent, the problem is that, even though there are women's shelters and help lines specifically devoted to providing assistance to gender-based violence victims, cyber VAWG is so relatively 'new' and unknown that only a few mechanisms are made available in this respect. However, services that take these forms of digital gendered

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of online direct threats and defamation that they could not file a complaint because no crime had been committed, even though this is punishable under the Mexican Penal Code).

186. See *Revenge porn: More than 200 prosecuted under new law*, BBC News (2016), available at: https://www.bbc.com/news/uk-37278264 (last visited April 24, 2021).

187. See European Institute for Gender Equality, *Cyber violence against women and girls* (cited in note 12).

188. See UN Broadband Commission for Digital Development, *Cyber Violence Against Women and Girls: A World-Wide Wake-Up Call* (cited in note 45).

189. *Id.*

violence into account must be provided, so that women suffering from gender violence can refer to them when in need.

Another way of safeguarding the digital environment for women is to implicate service providers. The UN Guiding Principles on Business and Human Rights state that businesses must "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur" and "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships"[190]. Accordingly, intermediaries – which in this case are internet companies who host, transmit and index content – must be held accountable for the content displayed and the activities carried out by third parties. It is imperative that enhanced systems for cooperation with the law enforcement are legally foreseen, as well as measures such as more effective takedown procedures for abusive and hazardous content. There is also a pressing need for considering the possibility of account termination due to misconduct for the purpose of further development[191], which should be framed within self-regulatory standards to avoid sexually degrading content and the reinforcing gender stereotyping. Finally, Internet service providers should also collect and publish data on abusive content on their platforms, and produce transparent reports specifying how and when they have undertaken specific action against cyber VAWG[192]. We must recall again the major role played by service-providers in all this. The prevention and eradication of this digital violence will, therefore, also be achieved if both states and private actors work closely together to put an end to this manifested online gender-based violence against women and girls[193].

190. A/HRC/17/31 (where the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" are annexed. Particularly, these recommendations are enshrined in the 13th principle. Final report available at: https://www.ohchr.org/documents/issues/business/a-hrc-17-31_aev.pdf (last visited April 24, 2021)).

191. *Id.*

192. *Id.*

193. See OHCHR, *UN experts urge States and companies to address online gender-based abuse but warn against censorship*. Press release (March 08, 2017), available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21317 (last visited April 24, 2021).

Last but not least, the UN provides for a sanctioning enforcement system "through courts and legal systems to define and enforce compliance and effective punitive consequences for perpetrators". It is to be noted that, in certain countries, there is a culture of impunity and male power so deep-seated in the criminal judiciary system that hinder the prosecution of violence against the feminine gender. According to the UN Broadband Commission for Digital Development report[194], one in five female Internet users live in countries where online gender violence cases are extremely unlikely to be punished, which is not surprising taking into account that only 26% of law enforcement agencies in the 86 countries surveyed take legal measures to combat cyber VAWG. We can acknowledge thus the lack of (proper) legislation in most countries –already evidenced in previous sections– and the resulting mistrust in the legal system entailed. It is true, nonetheless, that we can find some international recommendations and domestic recognition of some gendered cyber abuses as an aspect of gender-based violence committed against women. However, this legislation is not only poor and scarce but is also not well approached, for it fails to incorporate the gender perspective of these offences. Thereby, gender mainstreaming policies should be formulated, recognizing the fact that cyber VAWG is another form of gender-based violence and tackling the full spectrum of violence perpetrated against women and girls by including strategies that counteract violence in digital spaces.

"Gender inequality in the tech sector also reverberates on platforms and algorithms are not immune to gender biases and can contribute to creating toxic "technocultures", where anonymity, mob mentality and the permanence of harmful data online lead to women being constantly re-victimized"[195]. That is why cyber VAWG needs to be addressed and combated against now. The increase we have witnessed in cases of cyber VAWG during the pandemic is just an indicator of what is to come and should not fall through the cracks. If before the health crisis, research[196] shows that 73% of women had experienced

194. See UN Broadband Commission for Digital Development, *Cyber Violence Against Women and Girls: A World-Wide Wake-Up Call* (cited in note 45).

195. See Adriane Van der Wilk, *Cyber violence and hate speech online against women* (cited in note 27).

196. See UN Broadband Commission for Digital Development, *Cyber Violence Against Women and Girls: A World-Wide Wake-Up Call* (cited in note 45).

some form of gender-based violence online; with this new indefinite situation where everything is being conducted through the Internet, cyber VAWG will exponentially increase. We must therefore reflect on the inevitable future challenges we will be forced to face as a result of the COVID-19 pandemic, remembering that this is a problem that needs to be urgently addressed, by means of gender-sensitive approaches and strong legislation, in order to make the Internet a more open and safer empowering space.

Sciurus Carolinensis goes to Europe. A Case Study of Italy's legal management of invasive alien species.

Giulia Petrachi*

Abstract: The last decades have seen a notable growth in the number of legal sources dealing with the matter of biodiversity at large. Most of the time, the main concern in issues regarding environmental protection revolves around the harm that human beings can cause to ecosystems. As a matter of fact, the management of invasive alien species is concerned with the damages that flora and fauna subjects can cause to an ecosystem. This paper describes the development that took place in the management of invasive alien species at a European Union level, with an eye to the reflection it had at a national level, by analyzing the case of the Sciurus Carolinensis and its invasion of Italy. The paper can be of interest to several different targets. Indeed, the jurisprudential evolution in the field of allochthonous species is fairly new and papers that pronounce on the matter are still fairly rare.

Keywords: invasive alien species, Sciurus Carolinensis, Italian law, threatened species, IAS Regulation.

1. *Introduction*

The European Union embraces a large territory characterized by rich biodiversity and a heterogeneous morphology. The characteristics of the territory of the Union, comprising islands and other isolated areas due to their morphological conformation, lead to a quite inhomogeneous distribution of fauna.

This paper analyses the issues that arise when an invasive alien species is introduced into a new ecosystem, in particular when the alien species presence proves to be harmful and there is a high chance that it spreads to neighboring countries.

The present paper analyses the options available to EU Member States when faced with the challenge of managing an invasive alien species, whose presence is potentially damaging for the economy and a threat to endemic species.

In particular, the paper considers the case of the introduction of the grey squirrel in Italy, which represents an economic damage for Italian forests and a threat for the red squirrel endemic to Italy[1].

The Italian case is interesting because it encompasses a variety of concerns, both legal and not. Namely, the risk of extinction because of the introduction of the invasive alien species, the pressing danger of cross/border contamination, and the ethical issues that have been risen by environmentalist NGOs regarding the eradication of the grey squirrel.

This paper is structured in four parts: first, it will provide an ecological explanation of the facts at issue, which will then be followed by a more specific description of the general legal framework for the protection of endemic species and then more specifically the legal status of the two species of squirrel concerned in the Italian case. Finally,

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1. See Sandro Bertolino, et al., *The Management of Grey Squirrel Populations in Europe: Evolving Best Practice,* in Craig M. Shuttleworth, Peter W.W. Lurz and John Gurnell (eds.), *The Grey Squirrel: Ecology & Management of an Invasive Species in Europe* 495 (European Squirrel Initiative 2016).

it will analyze the legal conflicts that arose during the trial eradication of the invasive species, to conclude by evaluating the benefits that may derive from a more harmonized approach to the management of biodiversity issues at a European Union level.

2. *The Grey Squirrel: recipe of an adorable catastrophe*

This paper revolves around a very specific biodiversity issue: the Eurasian squirrel, also known as red squirrel or *Sciurus Vulgaris*, whose preferred habitat is Europe and West Asia, has been assessed to be vulnerable or decreasing in population in the past years[2].

While part of the reason for its precarious condition is neglectful degradation of habitats, as argued by Verbeylen et al.[3], the present paper focuses on its interaction and competition with the grey squirrel, also known as *Sciurus Carolinensis*, and how its presence in the same area as the *Sciurus Vulgaris* might have damaged the livelihood of the latter[4].

2.1. *How the grey squirrel can be damaging to biodiversity*

As previously said, the grey squirrel can damage the red squirrel population due to the competition between the two species when sharing the same habitat. This competition arises for a number of reasons.

In the first place, the grey squirrel is bigger and can survive on a more varied diet, which does not only depend on coniferous products, but which also includes them. On the other hand, the red squirrel, naturally smaller sized, feeds on a mostly coniferous diet. These

2. See Sandro Bertolino and Piero Genovesi, *Spread and Attempted Eradication of the Grey Squirrel (*Sciurus Carolinensis*) in Italy, and Consequences for the Red Squirrel (*Sciurus Vulgaris*) In Eurasia,* 109 Biological Conservation 351 (2003).

3. See Goedele Verbeylen, Lucas Wauters and Erik Matthysen, *Effects of habitat fragmentation on red squirrels (*Sciurus vulgaris *L. 1758)*, 4th Benelux Congress of Zoology (Utrecht 1997).

4. See Bertolino and Genovesi, *Spread and Attempted Eradication of the Grey Squirrel (*Sciurus Carolinensis*) in Italy, and Consequences for the Red Squirrel (*Sciurus Vulgaris*) In Eurasia,* at 352 (cited in note 2).

characteristics may be already sufficient in order to make the grey squirrel fitter for survival and more inclined to exploit resources in the area it inhabits, in a way that could damage the habitat and the existence of the red squirrel. Moreover, the two species experience scarcity of resources in the same period of the year, which causes them to struggle and fight for food[5].

Furthermore, as Kenward highlighted, grey squirrels also represent a disturbance and a possible detriment for humans, resulting from their competition with humans for nuts and crops, the damage they create to commercial tree plantations, and their harmful habit of gnawing on phone cables. These damages are often committed by the red endemic squirrels as well, but due to their smaller size and diminishing population, their impact on human existence is proportionally smaller[6].

Finally, Italy is the habitat of two endemic subspecies of the red squirrel, the *Sciurus Vulgaris Italicus* and the *Sciurus Vulgaris Meridionalis*[7]. The latter represents a strain as well of the *Sciurus* family which is present exclusively in Italy. Then, in consideration of its circumscribed population, it is to be considered an extremely frail species, and could risk extinction as a result of its competition with the grey squirrel.

2.2. *Difference and similarities between Italy and the UK*

Interestingly, the takeover of the grey squirrel in an area where the red squirrel was endemic is something that already happened, and the phenomenon presented similar characteristics to the Italian case.

Indeed, the grey squirrel first arrived in Great Britain, another area where the red squirrel used to be the main squirrel population. As in the Italian case, also in Great Britain the takeover happened progressively and slowly and expanded to all the border States. Currently, the

5. See Sandro Bertolino and Piero Genovesi, *Linee guida per il controllo dello scoiattolo grigio (*Sciurus Carolinensis*) in Italia*, INFS 17 (2001).

6. See R.E. Kenward, *The causes of damage by Red and Grey squirrels,* 13 Mammal Review 159 (1983).

7. See Anna Lisa Signorile, Daniele Paoloni and Daniel C. Reuman, *Grey squirrels in central Italy: a new threat for endemic red squirrel subspecies*, 16 Biological Invasions 2339 (2014).

grey squirrel has become the main squirrel species in Great Britain, Wales, Northern Ireland, and the Republic of Ireland, with the red squirrel surviving only in smaller areas in Scotland[8].

Nonetheless, there is a main difference between the British and the Italian case. At the present moment, Italy still presents a relatively small and circumscribed area of grey squirrel takeover, with settlements of this species expanding over the border in France and Switzerland, while the takeover is almost complete in the UK[9]. This main difference should not be disregarded, since it makes it possible for eradication projects and plans to still be considered as viable solutions.

2.3. *Expansion of the grey squirrel settlement in Italy*

Some experts have argued that the Italian areas inhabited by grey squirrels seem to preclude the progression of the invasion due to their position and morphology[10]. Arguably, three factors stand in sheer contrast with this argument.

In the first place, letting that the grey squirrel will occupy more or less extended areas, trusting that the population will not expand soon, requires a blind faith in environmental factors, and this is generally not a sound policy.

Secondly, even though the morphological characteristics of the areas taken over by the grey squirrel in the North West of Italy seem to preclude the invasion to expand to the rest of the Italian territory, the proximity to the French and Swiss border represents a danger for their ecosystems[11]. The French and Swiss governments have condemned the lack of any effective action by the Italian government, as it follows a real threat both for the biodiversity of their forests and their endemic

8. See Signorile, Paoloni and Reuman, *Grey squirrels in central Italy* at 2340 (cited in note 7).

9. See Bertolino and Genovesi, *Spread and Attempted Eradication of the Grey Squirrel (*Sciurus Carolinensis*) in Italy, and Consequences for the Red Squirrel (*Sciurus Vulgaris*) In Eurasia* at 353 (cited in note 2).

10. See *id*. at 352.

11. See Nick Squires, *French and Swiss Government Fear Grey Squirrels in Italy Are 'Heading Their Way'* (The Telegraph UK, January 15, 2015), available at https://www.telegraph.co.uk/news/worldnews/europe/italy/11348769/French-and-Swiss-fear-grey-squirrels-in-Italy-are-heading-their-way.html (last visited April 24, 2021).

species of squirrels[12]. In order to give legal recognition to the emergent takeover phenomenon, and to protect the endangered red squirrel, France assigned the red squirrel the status of protected already back in 1976, through L. n. 76-629 of 10 July 1976[13] and the Decree n. 77-1295 of 25 November 1977[14], later transposed in the Environmental Code of France[15]. Nonetheless, eradication has still not been effective on the part of France.

3. *The interaction between EU instrument, national law and the Bern Convention*

To obtain a complete understanding of the legal background of this case study, it is necessary to examine the interaction of norms at the three levels involved: national, supranational (which, in this specific case, indicates the European Union level) and international.

Firstly, national law, insofar as it is relevant to the case under, has represented an interpretative obstacle, which will be further analyzed in the following chapters. Nonetheless, the application of national law is secondary to European Union law, as Simmenthal[16] and Costa v. Enel[17] have made clear in the past. This status of primacy entails that national laws which conflict with Union Laws should not be applied[18]. For the purposes of this specific case study, it is only necessary to

12. See Nick Squires, *French and Swiss Government Fear Grey Squirrels in Italy Are 'Heading Their Way'* (The Telegraph UK, January 15, 2015), available at https://www.telegraph.co.uk/news/worldnews/europe/italy/11348769/French-and-Swiss-fear-grey-squirrels-in-Italy-are-heading-their-way.html (last visited April 24, 2021).

13. See Loi 10 July 1976, no. 76-629.

14. See Art. 4, Décret 25 Novembre 1977, no. 77-1295 (Décret pris pour l'application des articles 3 et 4 de la loi n° 76-629 du 10 Juillet 1976 sur la protection de la nature et concernant la protection de la flore et de la faune sauvages du patrimoine naturel francais).

15. See Art. L. 411-1 and L. 411-2, Ordonnance 18 Septembre 2000, no. 2000-914 (Code de l'environnement).

16. See C-106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.*a., ECR 1978 I-629.

17. See C-6/64, *Flaminio Costa v E.N.E.L.*, ECR 1964 585.

18. See *id.*

consider the role of directives and regulation since the other instruments to the management of the *Sciurus Carolinensis* in Italy.

According to Art. 288 TFEU, a regulation has a general content and enjoys direct applicability, thus Member States must abide by the norms imposed by these instruments, without need of previous enclosure in their legal system[19]. By contrast, a directive binds Member States to achieve a specific result, but States must transpose it before the instrument becomes directly applicable.

Indeed, the present case study is concerned with two European Union instruments: the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and the Regulation 1143/2014 on Invasive Alien Species.

The Habitats Directive, hereinafter HD, is an instrument of the Union aimed at protecting biodiversity in different ways, be it through the protection of actual specimens of flora and fauna, or the protection of areas of interest. Moreover, the HD includes the norms of protection already enshrined by the Birds Directive, which forms the cornerstone of the Union's conservation policy alongside with the HD itself[20]. Notably, the HD is a paramount for the EU framework of natural protection thanks to its comprehensiveness, since it envisions a set of Annexes which divides animals and plants according to their situation in the wild, and assigns them to different treatments and recognition according to their status. Moreover, the HD establishes the Natura 2000 Network, which is an ecological network of protected areas, either for their ecological characteristics or for being the habitat of a protected species[21].

The HD has a relevance in this case study because if the red squirrel, endemic to Europe, was recognized by the Directive as a species deserving of institutional protection, its status would be different. In particular, the animal would enjoy further protection, which would make the presence of the grey squirrel unacceptable for ensuring the red squirrel's due conditions of existence[22].

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19. See Art. 288, TFEU.

20. See Article 7, Council Directive (CEE) 21 May 1992, no. 43 (on the conservation of natural habitats and of wild fauna and flora) (so called "Habitat Directive").

21. See *id.*

22. See Bertolino and Genovesi, *Spread and Attempted Eradication of the Grey Squirrel (*Sciurus Carolinensis*) in Italy, and Consequences for the Red Squirrel (*Sciurus

Conversely, the Regulation, hereafter mentioned as the IAS Regulation, belongs to the framework of environmental protection of the EU. It focuses specifically on the introduction of new animals and plants into an allochthonous natural environment and on what should be done in order to reduce the negative effects that they may cause to the habitat[23]. For the purpose of this paper, the IAS Regulation is relevant since it is addressed to cases such as the one examined in this paper, moreover it sets the guidelines that Member States should follow in this kind of situation. However, the case at hand takes place largely before the implementation of the Regulation, which creates a conflict in practice: the previous Italian legal framework regulating the management of the *Sciurus Carolinensis* differs greatly from the regime applicable in the aftermath of the IAS Regulation adoption. The nature of this conflict will be further analyzed in the next chapters.

It is now necessary to consider the international law instruments that relate with the case at hand. Undoubtedly, the most relevance belongs to the Bern Convention on the Conservation of European Wildlife and Natural Habitats. This Convention is a specific legal instrument of the Council of Europe in the field of natural conservation and presents a fully international character[24]. The Bern Convention is concerned with the protection of natural habitats and endangered species, and it was adopted in the early '80s to enhance the cooperation between States in matters regarding vulnerable ecosystems. The requirement of protection of flora and fauna enshrined in the Convention is binding on Member States, however, a certain specimen can be "strictly protected" or simply "protected", according to the Appendix it falls into.

It needs to be remarked, and it will be given further consideration, how the Bern Convention was included in the regulatory framework of the EU, thus automatically binding on the Union Member States, when the EU ratified it in 1982.

Vulgaris*) In Eurasia* at 355 (cited in note 2).

23. See Preamble, Regulation (EU) 22 October 2014, no. 1143 (on the prevention and management of the introduction and spread of invasive alien species) (so called "IAS Regulation").

24. See Bern Convention on the Conservation of European Wildlife and Natural Habitats of the Council of Europe (1979).

Furthermore, the Rio Convention on Biological Diversity is also worth mentioning as an instrument of international law. The Convention is part of the three Rio Conventions (the other two focusing on Climate Change and Desertification) and has as its objectives "the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising from commercial and other utilization of genetic resources"[25], with a specific focus over ecosystems and genetic resources. This Convention is relevant for the case study because it contains one of the few explicit mentions of eradication of invasive alien species and was one of the earlier ones at that[26].

4. *The near threatened, the decreasing and the protected*

In this section, some issues already mentioned in the third chapter will be the subject of a more in-depth analysis. First of all, it must be clarified why the status of the *Sciurus Vulgaris* is of any relevance to the European Union, even though the species is not expressly mentioned in the Habitats Directive. This can be explained, first and foremost, by the fact that the red squirrel falls within the category of protected fauna according to the Bern Convention[27].

Moreover, the preamble of the Habitats Directive claims that its provisions concerned the protection of threatened species, thus encompassing the red squirrel as a threatened species as well. Once determined that a species falls under the scope of the Directive, Member States must comply with the obligations of Article 12 of the Directive. Primarily, they should establish a system of strict protection of the species, prohibiting deliberate capture or killing, disturbance, destruction or taking of eggs and deterioration of breeding sites or resting places, while prohibiting keeping, sale and transport of said species[28].

The second notion that should be pointed out is the status of vulnerability of the red squirrel. According to Article 1, paragraph g, of

25. Art. 1, Rio Convention on Biological Diversity (1992).

26. See *id.* at Art. 8(h) ("Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species").

27. See Appendix III, Bern Convention (1979) (cited in note 24).

28. See Art. 12, para. 1 (a-d) and 2, Council Directive 43/1992 (cited in note 20).

the Habitats Directive, a species is vulnerable when it is "believed likely to move into the endangered category in the near future if the causal factors continue operating"[29]. Therefore, broadly speaking, labelling the Eurasian squirrel as vulnerable means to assume that the persistent presence of the *Sciurus Carolinensis* could cause it to receive the status of endangered.

The third concept that must be addressed is the status qualified as "vulnerable" and where it is derived from. A mention of the red squirrel being vulnerable has been made by the IUCN[30], the global authority that collects data regarding the status of the natural world and establishes measures for the safeguard of biodiversity. However, it is at national level that the recognition of the status of a species has its greater impact its protection. Indeed, different national legislations recognize a special status for the red squirrel, e.g., in the UK it is included in Schedules 5 and 6 of the Wildlife & Countryside Act 1981 (amended by the Countryside & Rights of Way Act 2000)[31]. Accordingly, under Italian law the red squirrel is endangered and not huntable, thus protected according to L. 27/12/1977, n. 968 on wild fauna[32], and, more recently, to L. n.157/92 on hunting operations[33]. An analysis of how these norms practically applied in Italy is possible through the observation of the management of the grey squirrel case.

5. *The proceeding of 1996*

In 1996 the grey squirrel population of Italy occupied a small area of Piedmont. To solve the situation quickly, directions were given to begin a progressive eradication of the animal. This seemed to be the best solution to contain the invasion, also in consideration of the relatively small effort needed for intervening against a population which

29. *Id.,* Art. 1, para. g (ii).

30. See Steven Stan, et al., Sciurus Vulgaris *Eurasian Red Squirrel (The IUCN Red List of Threatened Species 2016)*, available at https://www.iucnredlist.org/species/20025/115155900 (last visited April 24, 2021).

31. See Part 3, Countryside and Rights of Way Act 2000 (Conservation of biological diversity).

32. See Title IV, L. 27 December 1977, no. 968.

33. See Art. 2, 19 and 20, L. 11 February 1992, no. 157.

was still very circumscribed at the time. Moreover, the eradication process would have prevented, once and for all, both the risk of expansion of the species to the rest of Italy and France, and the dangerous contribution to the decrease of the red squirrel population[34].

In the 90's the IAS Regulation had not been drawn up yet, so the project was implemented in compliance with national norms. In particular, plans for controlling the invasive population were drafted in accordance with Article 19 of L. 157/92, which requires approval by the National Wild Fauna Institute (hereafter NWFI)[35]. However, at that time the L. 157/92 did not include norms regarding the control of the population or eradication of invasive species, hence leaving the project in a grey legislative area[36]. Nevertheless, the L.157/92 mentioned the temporary capture of invasive species, which seemed to grant a way to intervene[37], despite not explicitly allowing the project. The L. 157/92 interpretations with regard to actions of eradication are still debated and inhomogeneous[38].

In addition, when enacting a project, it was also necessary to comply with regional legislation. In this specific case, which happened in the provincial area of the city of Cuneo, the law of reference was the one of Piedmont region. In particular, the Regional law, 4 September 1996, n. 70 specifies in its Article 30 that actions of control of wild fauna are delegated to the administration of provinces[39], thus allocat-

34. See Bertolino and Genovesi, *Spread and Attempted Eradication of the Grey Squirrel (*Sciurus Carolinensis*) in Italy, and Consequences for the Red Squirrel (*Sciurus Vulgaris*) In Eurasia* at 355 (cited in note 2).

35. See Art. 19, L. 157/1192 (cited in note 33) (Nowadays, the National Wild Fauna Institute in Italy does not exist anymore as it has converged in the "Istituto Superiore per la Protezione e la Ricerca Ambientale", which is an institution of the Italian government that is concerned with conservation of wild fauna, and the study of the status, evolution and relationship between the environmental components through research in the field of ecology, veterinary and genetics, collaborating with Universities and research organs both at a national and international level).

36. See Bertolino and Genovesi, *Linee guida per il controllo dello scoiattolo grigio (*Sciurus Carolinensis*) in Italia* at 23 (cited in note 5).

37. See Art. 4, L. 157/1992 (cited in note 33).

38. See Unione Zoologica Italiana, *Documento dell'Unione Zoologica Italiana in relazione all'intervento preliminare di eradicazione dello scoiattolo grigio in Piemonte* (January 22, 2000), available at http://www.uzionlus.it/documenti/eradicazione-scoiattolo.pdf (last visited April 24, 2021).

39. See Art. 30, Regional Law 4 September 1996, n. 70.

ing the decisional power on whether and how the project was to be carried out in the hands of one of the twenty local administrations present in Italy[40].

The provision that came closer to addressing the action that was going to take place was the Bern Convention, which in its Article 11 specifies how the contracting parties should strictly control the introduction of non-endemic species. Nonetheless, the disposition does not explicitly address plans for the eradication of said species[41]. On the other hand, the Rio Convention on Biodiversity of 1992 demands governments to prevent the introduction, or the control or the eradication of allochthonous species that could threaten endemic species. However, this Convention was a recent legal instrument, whose implementation and interpretation on a national level were still unclear, as it has been shown by the following proceeding in court.[42].

The trial eradication started in April 1997 and it was directed and approved by the NWFI, but the operation quickly interrupted in June of the same year. Actually, a radical animal rights group (i.e., Legambiente) brought legal action against the project of eradication and the NFWI, bringing charges of animal cruelty, damage of state property and illegal hunting[43].

The issue had to be further litigated in court, since Legambiente's members had previously discussed the terms of the eradication with the NWFI, in order to establish an eradication project that was carried out with as little pain and distress for the specimens of grey squirrel as possible. However, during the execution of the project, the animal rights group considered that the Institute was not respecting the agreement terms, since the placed poisonous traps accidentally caused the death of a female squirrel who was still nurturing her offspring. This fact appeared to Legambiente members as unjustifiably and needlessly cruel to the animals[44].

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40. See Art. 4, L. 157/1992 (cited in note 33).

41. See Art. 11, para. 25, Bern Convention (1979) (cited in note 24).

42. See Bertolino and Genovesi, *Spread and Attempted Eradication of the Grey Squirrel (*Sciurus Carolinensis*) in Italy, and Consequences for the Red Squirrel (*Sciurus Vulgaris*) In Eurasia* at 355 (cited in note 2).

43. See Dan Perry, *Animal Rights and Environmental Wrongs: The Case of the Grey Squirrel in Northern Italy*, 5(2) Essays in Philosophy 335 (2004).

44. See *ibid.*

In court, it was debated whether the project could be classified as a research project, thus legally falling under the jurisdiction of the NWFI, or as a pest control project, which is not part of the jurisdiction of the NFWI and would have classified the action as illegal hunting[45].

During the trial, the Ministry of the Environment, the superior Italian authority on matters of biodiversity, held that the act of eradication was aimed at protecting the endemic red squirrel, recognized as state property, contrarily to the grey squirrel which does not benefit from the same title[46].

In November 1999, the trial concluded, and the Court stated that the NFWI was not responsible for damage to state property. Accepting the argument proposed by the Ministry of the Environment, the project was rather recognized as a protection measure for state property. Nonetheless, the Court found the NFWI to be culpable of the other two charges, namely animal cruelty and illegal hunting[47].

This decision has been then reversed by the Appellate Court in June 2000[48]. Part of the argument against the charge of animal cruelty was that the action had been led using anesthetizers, has it had been explicitly requested by one of the environmentalist organizations[49], in accordance both with what had been previously agreed with Legambiente and with the guidelines of the Panel of Euthanasia of 1993[50].

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45. See Bertolino and Genovesi, *Spread and Attempted Eradication of the Grey Squirrel (*Sciurus Carolinensis*) in Italy, and Consequences for the Red Squirrel (*Sciurus Vulgaris*) In Eurasia* at 355 (cited in note 2).

46. See *ibid*.

47. See Unione Zoologica Italiana, *Documento dell'Unione Zoologica Italiana in relazione all'intervento preliminare di eradicazione dello scoiattolo grigio in Piemonte,* P. 3, (January 22, 2000), available at http://www.uzionlus.it/documenti/eradicazione-scoiattolo.pdf (last visited April 24, 2021).

48. See Bertolino and Genovesi, *Linee guida per il controllo dello scoiattolo grigio (*Sciurus Carolinensis*) in Italia* at 23 (cited in note 3).

49. See Unione Zoologica Italiana, *Documento dell'Unione Zoologica Italiana in relazione all'intervento preliminare di eradicazione dello scoiattolo grigio in Piemonte,* P. 3, (January 22, 2000), available at http://www.uzionlus.it/documenti/eradicazione-scoiattolo.pdf (last visited April 24, 2021).

50. See Dan Perry, *Animal Rights and Environmental Wrongs: The Case of the Grey Squirrel in Northern Italy* at 335 (cited in note 43).

6. *Evolution in norms after the proceeding*

Following the proceeding, another strategic plan of control was proposed in 2000. This proposal did not involve eradication but was mostly aimed at the protection of the red squirrel and at the attempt to prevent the expansion of the grey squirrel in the neighboring countries[51]. However, the action plan was still under consideration in 2010[52].

After 1997, the drafting and implementation of the IAS Regulation represented a sensible improvement for the legal approach to the management of invasive species for several reasons. In the first place, it introduced a binding set of obligations regarding the actions employable in order to manage allochthonous species, which harmonized the approaches of the Member States. Furthermore, the Regulation shed a new light over the proceeding of 1997, since it describes projects of eradication as a crucial mean to prevent reproduction and spread, so it should be the first option to be considered[53].

More specifically, eradication measures are the subject of the entirety of Chapter III of the Regulation, and they are imposed as an obligation in Article 17[54]. Their derogation can be conceded only in case of technical infeasibility, disproportionate cost, and serious impact on human health or on other species[55].

Three years after the drafting of the IAS Regulation, the Italian Government incorporated it in its own legal system through the Legislative Decree n. 230 of 2017. This Decree not only recognizes the legitimacy of the process of eradication, but it also establishes that a quota drawn from the fund created through administrative sanctions should be used for financing projects of eradication[56].

Moreover, after the conclusion of the 1997 proceeding, the Standing Committee of the Bern Convention and the Council of Europe issued many recommendations regarding the case of the *Sciurus*

51. See *ibid.*

52. See United Nations Environment Programme-World Conservation Monitoring Centre (UNEP-WCMC), *Review of the Grey Squirrel* 10 (Cambridge 2010).

53. See Preamble, para. 24, Regulation (EU) 1143/2014 (cited in note 23).

54. See *id.,* Art. 17 para. 1.

55. See *id*., Art. 18 para. 1 (a-c).

56. See Legislative Decree, 15 December 2017, n. 23.

Carolinensis. First and foremost, the Recommendation n. 77/1999 of the Council of Europe insists that Member States hosting allochthonous species that are threatening endemic biodiversity should act to a feasible extent to eradicate said species. Concurrently, the Standing Committee has openly addressed Italy and the management of the grey squirrel in three recommendations (Recommendation 78/1999, Recommendation 114/2005 and Recommendation 123/2007), where it repeatedly called for the eradication of the grey squirrel in the confining areas with Switzerland[57]. Finally, in 2008 the Standing Committee of the Bern Convention issued a case file directed at Italy for not complying with the three previous recommendations.

The Italian government, conscious of the lack of clarity of L. 157/92 about the eradication of invasive alien species, issued a new law on matters of biodiversity and environmental protection. It declared that allochthonous species should be controlled even through projects of eradication, thus, clearing any possible conflict that could arise between national law and European law[58].

Despite the judicial odyssey that the first eradication attempt got caught in, in May 2020 another management plan for the grey squirrel population has been drafted. The plan included a risk assessment regarding the presence of the *Sciurus Carolinensis* in different administrative regions of Italy, as required by the IAS Regulation. Furthermore, methods of eradication are included in order to avoid inflicting cruelty and pain onto the animals, again in compliance with the IAS Regulation[59].

57. See Standing Committee of the Bern Convention on the Conservation of European Wildlife and Habitat, *Recommendation no. 78 on the conservation of the Red squirrel (*Sciurus vulgaris*) in Italy* (December 3, 1999); Standing Committee of the Bern Convention on the Conservation of European Wildlife and Habitat, *Recommendation No. 114 on the control of the Grey squirrel (*Sciurus carolinensis*) and other alien squirrels in Europe* (December 1, 2005); Standing Committee of the Bern Convention on the Conservation of European Wildlife and Habitat, *Recommendation No. 123 on limiting the dispersal of the Grey squirrel (*Sciurus carolinensis*) in Italy and other Contracting Parties* (November 29, 2007) (the three recommendations are calls to action for Italy that specifically address the issue of the eradication of the grey squirrel).

58. See Art. 7, co. 5, L. 28 December 2015, no. 221.

59. See Art. 17, para. 2, Regulation (EU) 1143/2014 (cited in note 23).

7. *Conclusions*

By the beginning of 2021, the 2020 plan has not yet been implemented. Beside what the practical results of this new management plan will be, it transpires from the previous chapters that the process of dealing with invasive species is lengthy and burdensome, mostly due to conflicts of law, cross-border disagreements, and misinformed but well-intentioned ethics struggle. The situation is not made any easier by the biological fact that, in a disposed environment with suitable conditions, the expansion of an allochthonous species can spread like an avalanche with great damages for the economy and the biodiversity of a State.

Harmonization of norms under the regime of the IAS Regulation certainly simplified the solution of transboundary issues and resolved some ethical aspects. Moreover, having a harmonized legislation allows to have some extent of predictability for what regards the management of invasive alien species and its results. This could enhance the communication and the exchange of management directives among the government and the environmentalist organizations, also by speeding up the decision process.

However, it is not enough taking into consideration harmonization on management of such environmental transboundary issues - which are highly damaging for biodiversity - and the potential fast spreading. It is as well mostly important to have applicable international law instruments that span beyond the European Union legal system. So, instruments like the IUCN Watch, the Bern Convention and the Rio Convention become extremely relevant, because the strict and mere application of national law may become a potential obstacle for effective solutions.

Today, the case of the grey squirrel is still unsolved, and the IAS Regulation is still a new legal instrument. Nevertheless, management of invasive alien species seems to be growing in importance and improving its effectiveness, so the positive result of a more effective harmonization will possibly become more evident in the next years.

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