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## CAESARIST PRACTICES IN FOREIGN POLICY: THE CASES OF IRAQ AND WESTERN SAHARA

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### 1. Preliminary remarks: On the invasion of Iraq

The British-American invasion of Iraq in 2003, with the firm support of Spanish Prime Minister José María Aznar, took center stage in the national political debate between 2003 and 2004. The Spanish government's support to the US Administration translated into political cooperation both inside and outside the United Nations Security Council (UNSC), as well as into our military presence in Iraq after the invasion. As a result of these events, foreign policy (and specifically security and defense matters)<sup>1</sup> came to play an unusually relevant role in the electoral debate of that year, when general and European elections were held. Undoubtedly, this issue had a decisive influence on the electoral defeat of the Popular Party (PP). Logically, there were other contributing factors,<sup>2</sup> such as the terrorist attacks of March 11, 2004 which falls outside the scope of this paper.

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<sup>1</sup> For the sake of convenience, I will refer to “foreign policy,” although security and defense should be regarded as an integral part of foreign policy in the strict sense, providing it with civilian and military operational capacity. This was the approach followed by articles I-40(1) and I-41(1) of the 2004 Treaty establishing a Constitution for Europe, regardless of its ultimately unsuccessful ratification for reasons that are not relevant here.

<sup>2</sup> N. MICHAVILA, *Guerra, terrorismo y elecciones: incidencia electoral de los atentados islamistas en Madrid*, DT no. 13/2005, Real Instituto Elcano de Estudios Internacionales y Estratégicos, in particular section 5.

For the purposes of this work, let us concentrate on the effective aid or assistance voluntarily provided by the Spanish government to facilitate the Anglo-American invasion of Iraq. This included not only full political and legal endorsement, but also the use of military bases in Spanish territory and the deployment of an armed contingent to consolidate the invasion. This said, it goes without saying Spain's secondary and unimpressive role in this affair given our all but symbolic contribution to the military effort on the ground and our hasty withdrawal shortly afterwards.

These events led me 20 years ago to consider the decision-making process in foreign policy (including security and defense). In particular, I published a paper on the tension and contradiction between consensual and Caesarist practices<sup>3</sup>. Recent events related to the former Spanish colony of Western Sahara have encouraged me to revisit and update my reflections on this issue, again from the point of view of Spanish foreign policy. This paper delves into the field of political science and law. Indeed, the subject in question requires a legal analysis of certain aspects. In this case, I will reluctantly leave aside the interaction between the international and national systems around the concept of *consensus* which was central to my previous work. I will rather restrict myself to the empirical analysis of the tension between consensualism and Caesarism in a typical liberal democracy such as Spain.<sup>4</sup> I find such empirical approach to be lacking in certain literature, too engaged in dogmatic considerations (arguably irrelevant and of little use) in the field of international relations. I believe that no significant contribution can be made to the science of international relations and international law without an empirical analysis of the actual practice.

## 2. *The decision-making process in the foreign, security and defense policy of liberal democracies*

### 2.1. *Consensualism as the prevailing approach*

The constitution of any state that claims to be democratic represents a social contract i.e., the foundation of coexistence within a national system. In this regard, national constitutions are built upon *consensus* or a general (not unanimous) agreement. As such, they contain and reflect the essential political and legal values of a social body. Thus, domestic legal systems do not usually withstand, or do not cope well with, the infringing or disintegrating pressure of a social minority that encourages the rupture of the constitutional *consensus*<sup>5</sup>.

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<sup>3</sup> C. JIMÉNEZ PIERNAS, *La política exterior española en torno a Irak y la relevancia del consenso en los ordenamientos interno e internacional*, in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, 2004, pp. 263-290.

<sup>4</sup> In the following pages, I will refer to my work just cited, in particular pp. 277-282, with corrections. I also nuance or enrich my arguments based on the recent practice in the field and my professional experience over the last 20 years.

<sup>5</sup> The so-called Catalan secessionist process may serve as an example, culminating in 2017 with a purported declaration of independence by the regional parliament, along the lines of Kosovo's unilateral declaration of independence on February 17, 2008. The Catalan process did not have anywhere near the social majority necessary to make it politically credible. Nevertheless, it has caused a serious political upheaval in our country that continues to this day. See REDP's monographic issue (vol. LXIII-2011) dedicated to "La Opinión consultiva de la Corte Internacional de Justicia de 22 de julio de 2010 sobre la conformidad con el Derecho internacional de la declaración unilateral de independencia de Kosovo".

Consensualism has gone further in national systems. The governing bodies in liberal democracies have frequently withdrawn their *imperium* for various reasons mostly due to requests for greater participation and deliberation to shape their political will. These bodies tend to seek accommodations and negotiate with different actors and social forces (employers, unions, professional organizations, associations and diverse interest groups) in order to reach common positions and avoid conflict. Consensual solutions until recently reserved to certain spheres such as the constituent power have become an everyday governance tool. This new internal practice has developed parallel to, and independently of, the traditional legislative processes endorsed by the will of the majority, periodically expressed at the ballot box. Thus, participatory democracy<sup>6</sup> and deliberative democracy<sup>7</sup> coexist and converge more and more with the canons of representative democracy. Otherwise, how could we explain the interest of active politicians in receiving daily surveys and opinion polls?

Obviously, there is room for improvement in this democratizing process. In the case of Spain, our young democracy is undoubtedly aligned with these trends, but there are significant deficiencies in our legislation that prevent a better development. Suffice it to recall two pending issues: (i) the urgent reform of the current and obsolete Official Secrets Act, dating from 1968, as demanded by the European Commission in its reports on the rule of law in Spain; and (ii) the need for state regulation of lobbying activities, which is a legitimate form of civil society participation in public affairs, although it should be ordered and registered to ensure transparency on their potential influence and regulatory footprint (as recommended as well by the European Commission). Such deficiencies reduce the transparency and democratic quality of the decision-making processes in our foreign policy. They limit the right of access to information, which is key to reinforce our standards both within the classic realm of representative democracy and in the more innovative spheres of participatory and deliberative democracy<sup>8</sup>.

In our state, this democratizing phenomenon was originally confined to social dialogue in the field of business and labor relations: the government invites and negotiates with the relevant actors (employers and unions), sometimes through delegations; they sign social concertation agreements which are subsequently ratified by their executive bodies or, as far as the government is concerned, by the parliament itself depending on the subject matter. This has also been the case with political parties, which are fond of signing pacts, whether governmental or otherwise, including the creation of working and monitoring

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<sup>6</sup> Understood as a model of democratic participation that relies on direct political initiatives by different actors from civil society (among others, employers, trade unions, professional associations, NGOs and even citizens themselves). Article 23 of the Spanish Constitution (CE) corroborates this: "Citizens have the right to participate in public affairs, directly or through representatives, freely elected in periodic elections by universal suffrage." This would be the case, in the context of the European integration process, of the European citizens' initiative (see arts. 10(3) and 11(4) of the Treaty on the European Union, TEU). By virtue of this, "Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties."

<sup>7</sup> Understood as a model of democratic debate of different ideas and positions on an issue between different social actors. In the European Union, an example would be the divergent positions on how to conduct the immigration and asylum policy; or, in the case of Spain, the eternal debate on how to conduct relations with our neighbor Morocco. These are, of course, truly relevant issues for both political communities.

<sup>8</sup> See European Commission, *2023 Rule of Law Report--Country Chapter Spain*, SWD(2023) 809 final, 5.7.2023, recommendations on p. 2, and pp. 17-19 (interest group), and p. 24 (official secrets).

groups<sup>9</sup>. Governments seem bent on emulating the consensual formulas common in the international system<sup>10</sup>, although limiting them in principle to specific areas. Liberal-democratic governments thus restrict their power with all sorts of “diplomatic” procedures that reduce their decision-making capacity *ad intra* and *ad extra*. This, in turn, slows down and protracts decision-making, especially when it affects relevant domestic demands and interests.

Singularly enough, this phenomenon has spread and extended to areas hitherto closed to consensual practices. That is the case, for instance, of the arcana of the *raison d'état* i.e., a haven for the ruling class and senior civil and military officials, which for years restricted participation and deliberation on foreign relations, security and defense within national systems. This consensual expansion seems unstoppable in the heat of recent political events. A clear illustration of this trend beyond constitutional requirements and the risk of spurious use is the periodic calling of referendums in Europe to validate the most significant intergovernmental advances in the process of supranational integration.

A reasonable exercise of consensualism in foreign policy makes sense in relation to matters of great relevance to the state. That is, matters of a lesser importance fall outside its scope. There is no doubt that the cases analyzed in this paper have been, and are, of great relevance to Spain. However, none of the above leads to sanctify consensualism in the field of foreign, security and defense policy. It is an already common practice that deserves attention and study, considering its advantages and disadvantages. Above all, consensualism in no way guarantees the soundness and success of the resulting decisions, especially since these consensuses can be manipulated. The invasion of Iraq, a true geopolitical disaster for the region and one that has caused obvious reputational damage to the United States, could serve as an example: as is well known, that decision was taken in a consensual manner, but manifestly adulterated.

## 2.2. *The consensualist approach during the Spanish Transition*

The foreign, security and defense policy of a democratic state is usually based on an *a priori* assumption: it must be developed with the greatest possible consensus in the national interest. This requires establishing a prior consensual definition of the national interest, as the set of permanent and prevailing values and assets that a given society, its public opinion, its ruling elites and its political leaders are willing to sponsor and protect resorting if necessary to force. This comprises culture, values, interests and common and basic goods. However, the national interest by its very nature is usually at least partly intangible. Therefore, to prevent the debate from becoming sterile, rather than determining the content of “national interest,” the focus is usually placed on setting general long-term goals (or strategic guidelines) for the state’s foreign, security and defense policy. These objectives pave the way to realizing such permanent and prevailing values and interests. The specific set of short- and medium-term foreign policy goals will be subject to these guidelines. The definition and achievement of such goals will vary sometimes greatly depending on the

<sup>9</sup> There are precedents in this respect in Spain’s anti-terrorist policy (Ajuria Enea round table, anti-terrorist pact between the two main political parties, etc.).

<sup>10</sup> C. JIMÉNEZ PIERNAS, *Fundamento y concepto del Derecho Internacional Público vigente*, in J.M. BENEYTO and C. JIMÉNEZ PIERNAS (dir.), *Concepto y fuentes del Derecho Internacional*, Valencia, 2022, pp. 217-272, pp. 238-244 and pp. 247-252.

ideology and political inclinations of the government in office<sup>11</sup>. In liberal democracies, this whole process has recently been subject to negotiation and coordination mechanisms far removed from any kind of majoritarian or authoritarian imposition. Foreign action increasingly relies on a prior general (consensual) agreement regarding its major strategic guidelines<sup>12</sup>.

In the case of Spain, no one doubts the content of the consensus reached during the democratic transition regarding, if not our national interest, the major underlying strategic guidelines in hierarchical terms: (i) the primacy of the community link with our European partners, materialized in the entry and full participation in the European integration process, in a subordinate position to the Franco-German axis; followed closely, but in second place, by (ii) the transatlantic link with the United States, reflected in their use of military bases in Spanish territory, a legacy of Franco's regime.

The consolidation and reinforcement of military bases for joint use constitutes an eloquent proof of the permanent and prevailing nature of such strategic guidelines over and above the differences of political regime. President Joe Biden has neither revised nor reverted Donald Trump's decisions recognizing Morocco's sovereignty over Western Sahara and the city of Jerusalem as the capital of the State of Israel<sup>13</sup>. This has to do with the permanence and stability of the Washington establishment<sup>14</sup>.

Other strategic guidelines were agreed upon during the Spanish Transition: the special relationship with Latin America, translated into an intended stable political and economic projection into that continent; and a special attention to Mediterranean relations, particularly in the Maghreb, where the main objective is to maintain regional peace and security. It is true, however, that this consensus was based on eminently representative assumptions i.e., built only upon the will of the political class and the parties with parliamentary representation, which were only four back at that time (the Union of

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<sup>11</sup> C. JIMÉNEZ PIERNAS, *Dilemas de las relaciones con Marruecos desde una óptica europea y española: una revisión de la teoría de "la paz democrática,"* in A. DEL VALLE GÁLVEZ (dir.), *Inmigración, Seguridad y Fronteras. Problemáticas de España, Marruecos y la Unión Europea en el área del Estrecho*, Madrid, 2012, pp. 195-233, pp. 198-203.

<sup>12</sup> See, for instance, the document prepared by the Spanish Government on *Estrategia de Acción Exterior 2021-2024*, Madrid, 2021. Although the approach is neutral and bureaucratic, according to the central role of state institutions (pp. 90-93), changes can be seen in the conception of foreign action. For instance, the private sector and the civil society are considered relevant actors or agents including companies, NGOs, think tanks and citizens in general, whether they reside inside or outside the country (pp. 96-100).

<sup>13</sup> Nor was there any contradiction between the last American presidents, Republican or Democrat, about the declared and aggressive hostility that the Nord Stream 1 and 2 pipelines aroused in Washington, until their profoundly serious sabotage at the end of September 2022, even though they had been out of service for months and did not contribute to Russia's war effort. If any kind of involvement of another state or states were proven, this would be an internationally wrongful act against Germany and Russia. Significantly enough, it has gone almost unnoticed in Western governments and media.

<sup>14</sup> See for instance the case of Victoria Nuland, a senior US State Department official until the announcement of her retirement from public life in March 2024. She has been a key figure in the making and implementation of US policy towards Russia and the post-Soviet area in both Republican and Democratic Administrations for some 30 years. It is a notorious fact (as defined in the case law of the International Court of Justice) that Ms. Nuland played a leading role in the February 2014 coup against Ukrainian President Viktor Yanukovich, in violation of the most basic principles of contemporary international law in particular, the principles of sovereign equality and non-intervention in the internal affairs of a state.



Democratic Center (UCD), the Socialist Party (PSOE), the Communist Party (PCE) and the Catalan minority or *Convergència y Unió* (CU))<sup>15</sup>.

### 2.3. *A Caesarist approach*<sup>16</sup>: the case of Iraq

On the occasion of Spain's election on January 1, 2003, as a non-permanent member of the UNSC for the 2003-2004 biennium, PM José María Aznar brought a spectacular shift to our foreign policy. Aznar's alignment with the US and the UK changed the center of gravity agreed around 1978 from one continent to another. Since the 9/11 attacks on the Twin Towers, the PP government had moved considerably closer to the Republican Administration recently installed in the White House, rightly perceiving that those terrible attacks could place the fight against the terrorist group ETA in a new, more favorable international context. This was indeed the case. However, on January 1, 2003, this approach was not expected to go so far as to drastically challenge the underlying consensus on our foreign policy, undermining its very stability. As is well known, this radical change was staged within the UNSC, where Spain took the Anglo-American side against its traditional European partners (France and Germany), unsuccessfully calling for a resolution authorizing the use of force against Iraq. And it culminated in the Azores summit in March 2003,<sup>17</sup> which gave the green light to the invasion of Iraq without the mandatory UNSC resolution.

Apart from these well-known facts, I want to explore the significance of this turning point for Spain. First, the substantial reversal of the strategic priorities of Spanish foreign policy since the democratic transition was not consensual. Given its content and scope, and according to the political rationale applied so far, such radical shift should have relied on a similarly broad agreement as that of 1978. In any event, it was risky not to count on the main opposition party, as the principles of representative democracy would recommend for the most relevant decisions.

Second, this change of direction placed us on another and, for us, unusual axis of power (British-American). The understanding and sympathy of the Spanish public opinion was far from evident, especially considering a bias against the two Anglo-Saxon Protestant powers shaped by centuries of political, religious and colonial rivalry. Events such as the disaster of 1898 or the shame of Gibraltar had crystallized in our collective imagination the myth of "perfidious Albion" and our antagonism against the US. It was precisely the conservatives who had fed that myth and antagonism in Spain. In the medium term, some

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<sup>15</sup> With the exception of the landmark referendum on Spain's accession to NATO, called and won by PM Felipe González in 1986. Short-term partisan interests led certain parties to boycott the process, campaigning against Spain's accession in flagrant contradiction with their own agenda and ideology.

<sup>16</sup> By Caesarism I understand the exercise of public power concentrated in a single person. The democratic nature of the political regimes in which such practices may occur is not questioned. That is why I avoid the adjective "caudillista" (authoritarian leadership), a term more befitting of non-democratic regimes. I only intend to analyze and explain certain Caesarist expressions of public power in the field of foreign, security and defense policy.

<sup>17</sup> Concluded with two brief statements issued at the Atlantic Summit of the United States, the United Kingdom, Spain, and Portugal on March 16, 2003: a "A Vision for Iraq and the Iraqi People" and "Commitment to Transatlantic Solidarity." Incidentally, the harsh debate in Spain on the Azores summit contrasts sharply with what happened in neighboring Portugal. Portugal's participation in that summit did not spark any debate among its political class and public opinion, its adherence to the Anglo-Saxon axis being a historical constant in its foreign policy.

degree of propaganda and public pedagogy (with the collaboration of the media and other social actors) would have been needed to soften public opinion and encourage acceptance of the Anglo-American option as the principal driver of our foreign policy. All the more so if the founding act of this strategic shift consisted of collaborating with the aforementioned axis in the invasion and military occupation clearly contrary to international law of a sovereign state (Iraq) located thousands of kilometers away. Indeed, this broke another taboo of Franco's regime: i.e., the traditional Spanish-Arab friendship.

Third, the decision was ill-timed. After two decades of politically correct pacifism, social questioning of compulsory military service and its replacement by a professional army, and of defense of international law as a peace and security instrument, the government departed from these trends at a stroke of a pen. PM Aznar embarked the country in a distant military conflict by assisting the invading powers, which became unexpected allies, acting in blatant violation of international law and in flagrant disregard of the Security Council and the UN itself.

Fourth, the government was also on the brink of violating the Spanish Constitution by refusing to submit to the requirements of its article 63(3)<sup>18</sup>. However, the Spanish Constitution is not clear in this respect, and the status of our expeditionary force in Iraq was certainly ambiguous. It could thus be argued that Spain was not at war, given its late and limited involvement in the conflict.

All in all, the interested actors and the public opinion were faced with too many changes and emotions in just a few months. Moreover, there was no participation or deliberation to reach a general agreement or consensus, as the situation required.<sup>19</sup> In other words, no attempt was made to achieve a new consensus based on the intelligent and patient use of participatory and deliberative democracy mechanisms. That required a lot of time, which PM Aznar did not have.

Aznar's legitimacy to propose a drastic change of course in our foreign policy cannot be questioned. The strategic guidelines outlined above were not and are not set in stone. Nor will I speculate on his good faith in undertaking such a political adventure. Nevertheless, PM Aznar seemingly ignored that this kind of change required time in an open society. He went against well-established trends and their underlying consensus. Even if such consensus was purely representative in origin (i.e., generated from above by the political class and the main parties), it had consolidated through its assumption by the set of key stakeholders and civil society at large. In other words, it had permeated the participatory and deliberative levels.

Such a move can only be explained subjectively. PM Aznar's extraordinary decision was undoubtedly of a Caesarist nature, based on a charismatic leadership. He proved to be much more adventurous than British PM Tony Blair, another protagonist of the Azores summit. Blair had not only the sympathy of the Conservative opposition in the House of Commons but also a long tradition of fruitful special relationship with the US, including decisive aid from the American partner. Under articles 97 and 98(2) of the Spanish Constitution, in relation to art. 2(2)(b) of Government Act 50/1997, of November 27, 1997, the PM is responsible for the government's direction both in domestic and foreign

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<sup>18</sup> Which provides that "It is incumbent on the King, following authorization by the Parliament [Cortes Generales], to declare war and to make peace."

<sup>19</sup> These requirements were also lacking within the PP itself and the government. The Ministry of Foreign Affairs was not involved, and the decision was taken entirely in the Moncloa Palace, seat of the Spanish Prime Minister.

policy, determining its guidelines and overseeing their fulfillment. However, an excessively formalist interpretation leads to ignore consensus-based requirements regarding the most relevant matters for the political community. Nowadays, these requirements go beyond the strict wording of constitutional provisions in a liberal democracy such as Spain.

#### 2.4. *The risks of breaking consensualism*

In addition to its inherent features (decentralization and heterogeneity), today's international society is also characterized by the multiplicity of actors (e.g., large investment funds), economic interdependence<sup>20</sup>, technical progress led by digitalization and AI, and the prominence of social networks, among other aspects.

Domestically, we are witnessing the retreat of the state under free market logic, deregulation, privatization of public companies and services (including prisons), and globalization. In this context, foreign, security and defense policy in liberal democracies has become fragmented and sectorized. It has evolved into a multi-functional and shared activity under the responsibility of various institutions, ministries, bodies and agencies. To this we must add the growing participation of regional and local authorities in matters that fall within their competence or interest<sup>21</sup>, with the consequent disintegration of the general interest and external action. There are other actors involved: political parties, trade unions and employers' associations, churches, NGOs, large companies and media groups. Foreign action is no longer a government monopoly under a specialized administration (diplomatic and military). The perspective has changed from a state, generalist, eminently political and international framework to a participatory and deliberative but also sector-led, technical and transnational approach<sup>22</sup>. Underlying this process is the aspiration to some kind of general (even if not unanimous) agreement (i.e., *consensus*) on the strategic guidelines of foreign, security and defense policy.

Participation of civil society and its democratizing effect brings more complexity and richness to foreign, security and defense policy. Rather than a watertight and reserved domain, sometimes isolated from domestic policy, it has become its extension and translation. This has led to obvious difficulties in decision-making due to the struggle between diverse actors and centers involved in the definition of strategic guidelines and their implementation. Thus, the cumbersome complexity and the long decision-making processes required by consensualism, in addition to the risk of dispersion and lack of coordination, has resulted in the paradox of an opposite phenomenon. This can be described as “a return to the monopoly of the monarch or the executive,” in the image and

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<sup>20</sup> There is no way to achieve strategic autonomy in all sectors of the economy. The severe shortage of face masks across Europe during the first months of the COVID-19 pandemic in 2020 unfortunately made this clear. Any aspiration to full autonomy contradicts the principle of reality in a globalized, market-driven economy.

<sup>21</sup> Even if this sometimes translates into symbolic and extravagant acts, as in the case of the suspension of Barcelona's 1998 twinning agreement with Tel Aviv, decreed by Mayor Ada Colau in February 2023 in protest against the Israeli government's policy against the Palestinian people. The current mayor of Barcelona, Jaume Collboni, reversed the decision and lifted the suspension in September 2023.

<sup>22</sup> P. VILANOVA, *La acción exterior del Estado*, in M. ALCÁNTARA and A. MARTÍNEZ (ed.), *Política y gobierno de España*, Valencia, 1997, pp. 429-447, pp. 437 and pp. 441-443. While the author speaks of “foreign action” rather than “foreign policy,” I will stick to the classic term to avoid a conceptual excursus.



likeness of the absolute power exercised by sovereigns in the *Ancien Régime*.<sup>23</sup> The leader of the day intervenes to arbitrate in the frequent intra-party and ministerial disputes or to settle delicate budgetary priorities. Leaders personally and directly conduct the most important international negotiations through the now widespread system of forums and summits. In parallel, specific bureaucratic structures have developed. In the case of Spain, there is a sort of cabinet or duplicate of the Ministry of Foreign Affairs within the Presidential “Moncloa Palace”<sup>24</sup>, which informs and advises the PM, outside the scrutiny or control of the competent Ministry.

Ultimately, this process of sectorization and transnationalization has incorporated further technical and material complexity into foreign, security and defense policy now subject to broader consensual practices, both in terms of the actors involved and the subject matter. However, a paradoxical and dangerous reaction seems to be brewing across all liberal democracies. Some countries have faced a blatant contradiction between the will of their political leaders and previous consensus on certain matters<sup>25</sup>. The participation of different actors, along with the intersection of divergent interests, result in confusion and disorder. The appropriation and misuse of social networks lead to a trivialization and degradation of public debate on foreign, security and defense policy. Political leaders have reinforced and increased their arbitral functions and responsibilities, arrogating to themselves a highly personal decision-making capacity, of a Caesarist nature, in matters of great relevance to the state.

Although this is a general phenomenon, in Spain it became apparent in the participation in an illegal war, without relying on the competent Ministry, the Council of Ministers or the political party in power. The opposition in full, public opinion, and the sensitivity of at least part of PP’s voters (as evidenced by the massive demonstrations against the war supported even by the ecclesiastical hierarchy) were also ignored. Finally, the position of all interested social actors, such as NGOs, was also overlooked. All this can be seen as a bet on outdated representative formulas with charismatic overtones i.e., Caesarist practices.

Arguably, such a Caesarist decision-making process offered immediacy, speed and leadership, but lost out on reflection,<sup>26</sup> participation and deliberation, while increasing disinformation and propaganda. Suffice it to recall the fuss about weapons of mass destruction supposedly in Iraq’s possession. It caused dissent and instability in the relations with opposition forces. Another undesired outcome was greater legal insecurity, resulting from the sudden and unexpected change of key foreign policy guidelines, with normative

<sup>23</sup> A. PÉREZ GIRALDA, *La sectorialización del Derecho Internacional y de la diplomacia*, in *Comité Jurídico Interamericano, Curso de Derecho Internacional XXVI*, 1999, pp. 51-70, pp. 60-62 and p. 68, quote on p. 61. This course interestingly combines theoretical reflection and professional practice. It is well known that in absolute monarchies foreign policy was the privilege of an exclusive preserve of the sovereign. Later, in the era of liberalism, it became an exclusive competence of the executive, with little institutional control. The professionalization of diplomacy and the principle of secrecy made foreign policy for a long time an exclusive domain of the ruling class and high civil and military officials.

<sup>24</sup> Arts. 2, 3, 6 and 10 to 14 of Royal Decree 890/2023, of November 27 (BOE of November 28), on the structure of the Office of the Prime Minister. See, in this regard, J.M. BENEYTO PÉREZ, *Política exterior española*, Madrid, 2023, pp. 49-52 and pp. 319-323.

<sup>25</sup> President Trump’s foreign and security policy towards Russia was clearly disruptive i.e., it abruptly broke the consensus of the American ruling class in this regard. Without passing judgment, it is appropriate to recall it in the current context.

<sup>26</sup> Among other reasons because of its technical impoverishment, as it ignores the assistance of the competent bodies, generally made up of qualified officials and experts in the field.

consequences both in the domestic and international order. In short, it was the antithesis of consensualism in the definition and implementation of foreign, security and defense policy in a liberal democracy in relevant matters, according to the practice in recent decades<sup>27</sup>.

In this regard, PM Aznar's policy on Iraq was a real test of strength against the expansion of consensualism in our foreign, security and defense policy. Consensualism emerged triumphant in the end, albeit in an accidental way. In liberal democracies, comfortable parliamentary majorities, an iron political will and a strong personal commitment are not enough to achieve a desired goal. It is necessary to consider other factors, however problematic, taking into account the complex nature and the participatory and deliberative definition and implementation of foreign, security and defence policy at least in sensitive and relevant issues for the political community. In considering these factors, governments should be consistent with, and respectful of, democratic practices that require general agreement or consensus in national systems. Indeed, such practices are closely linked to those operating in the creation and amendment of norms in the international system<sup>28</sup>.

Given the magnitude of PM Aznar's challenge, this precedent should not go unnoticed. It provided the opportunity to work on strengthening Spain's bureaucratic and reflection structures in this area. That is, to correct the impoverishment of its human and material resources and the disintegration of the Ministry of Foreign Affairs<sup>29</sup>, as well as to consolidate prestigious foundations and institutes to act as intermediaries between public bodies and civil society. Unfortunately, 20 years later, the Ministry of Foreign Affairs still suffers from a serious budgetary and personnel deficit, and it continues to coexist with the leading role of the Moncloa Palace (the PM's Office) in the field of foreign policy. On the other hand, the Royal Elcano Institute (REI), created in 2002 under public patronage, played a sad role during the invasion of Iraq. It defended the government's position to the hilt, ignoring the technical debate among experts<sup>30</sup>. In short, it is necessary to develop stable checks and balances to the acting government (and its leader), within and outside the institutions, to help preserve consensualism at least in sensitive and relevant matters<sup>31</sup>.

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<sup>27</sup> Regarding national security, see Office of the Prime Minister, *Estrategia de seguridad nacional. Un proyecto compartido*, 2013: in a context where it is no longer possible to distinguish between external and internal security (p. 11), an integral vision of national security conceives it as a state policy that involves all government authorities and requires the collaboration of society as a whole ideally with the maximum social and parliamentary support and consensus (pp. 5-8).

<sup>28</sup> C. JIMÉNEZ PIERNAS, *El Derecho Internacional contemporáneo: una aproximación consensualista*, in *Comité Jurídico Interamericano, Curso de Derecho Internacional XXXVII*, 2010, pp. 1-64, pp. 50-57.

<sup>29</sup> *Estrategia de Acción Exterior 2021-2024*, cit., pp. 78-80.

<sup>30</sup> At the height of the Iraq war, the REI merely posted on its web page a contribution signed by a professor of Public International Law (of the more than 50 in Spain), predictably favorable to the government's position. The only hint of a debate was provided by the "Questionnaire after the Azores summit," dated March 20, 2003, addressed to expert members of the REI's scientific committee. Among the most noteworthy answers are those of professors J.A. Carrillo and C. del Arenal. See <http://www.realinstitutoelcano.org>

<sup>31</sup> See *Revista Electrónica de Relaciones Internacionales (REDRI)*, no. 18 (May 2005), a monographic issue dedicated to "Cambios y marejadas en el mundo de los *think tanks*. Relaciones Internacionales y Sociedad civil en España ("Changes and tides in the world of think tanks. International relations and civil society in Spain"). It provides useful insights into the difficulties faced by our country in articulating a response to this challenge from civil society. 20 years later, the scenario has not improved substantially.

### 3. *Back to Caesarist practices: the case of the Western Sahara*

#### 3.1. *Background*

All the above is water under the bridge. But there has been another recent striking episode of a clearly Caesarist nature, this time led by the current PM, Pedro Sánchez. An assessment and comparison with the episode just discussed is in order, both because of the time elapsed and because of the different circumstances and party affiliation of PM Sánchez. There are remarkable similarities between the behavior of both leaders in foreign policy, regardless of their divergent personality and political affiliation. Although both decisions differ greatly in terms of their content and scope, this is irrelevant for our purpose. I would like to emphasize the coincidence in the decision-making process in both instances. And both are blatant examples of unequivocally Caesarist decisions.

I am referring to the letter that PM Sánchez addressed to Alaouite King Mohammed VI on March 14, 2022, partially made public by the Moroccan Royal Household four days later, on March 18. It is a brief and rhetorical text, full of commonplaces such as the reiterated references to a “new relationship” between the two countries. It is also a statement of good intentions, including commitments to “refrain from any unilateral action,” “to avoid future crises between our two countries.” Let us recall Morocco’s recent history of unilateral actions, including some rather unfriendly moves such as the closure of the commercial customs in the autonomous city of Melilla on July 31, 2018, after 152 years of their opening<sup>32</sup>. This coincided in time with the successful motion of censure against PM Mariano Rajoy and the change of government in Spain. Others are clearly contrary to international law, such as the lack of due diligence in preventing the continuous violent and massive assaults of immigrants of various origins, but mostly sub-Saharan, against the border fences of Ceuta and Melilla; or the premeditated avalanche of more than 10,000 Moroccans (among them, more than 1,000 minors) who were invited to abruptly and illegally enter the autonomous city of Ceuta on May 17 and 18, 2021<sup>33</sup>. I do not include in this list the alleged telephone espionage against members of the Spanish government,

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<sup>32</sup> Art. 9 of the Agreement between Spain and Morocco for the establishment of a customs office on the border of Melilla, signed in Fez on July 31, 1866, ratified on February 10, 1867. Both countries agreed to the opening of a commercial customs office for three years without providing for its extension. Since that date, Spain and Morocco have weaved a remarkable network of treaties, but this commercial customs office was never formally consolidated. Not even on the occasion of the end of the Spanish-French Protectorate and the independence by Morocco in 1956. However, after more than 150 years of the opening of the commercial customs and more than 60 years since Morocco’s independence, a local custom was arguably in place, based on a uniform, constant and lasting even century-old practice, rooted on an international treaty between the parties. I am not aware that Spain has protested the closure of the commercial customs of Melilla, an essential reaction to support the existence of an international custom on the matter. Of course, the existence of a commercial customs office does not affect Morocco’s sovereignty claim over the autonomous city of Melilla, nor does it undermine it legally.

<sup>33</sup> Moreover, it was a manifest violation by Morocco of general principles 1, 2, 3 and 7 of the Treaty of Friendship, Good Neighborliness and Cooperation with Spain of July 4, 1991, in force since January 28, 1993 (BOE of February 26, 1993). Furthermore, it infringed at least articles 3 and 18 (principle of the best interests of the child) of the Convention on the Rights of the Child of November 20, 1989, in force since September 2, 1990, which Morocco ratified on June 21, 1993. See European Parliament resolution of June 10, 2021, on the breach of the UN Convention on the Rights of the Child and the use of minors by the Moroccan authorities in the migratory crisis in Ceuta ((2021/2747(RSP)).

attributed by unofficial sources to the Moroccan intelligence services (although the Spanish government has so far kept silent on the matter)<sup>34</sup>.

The third paragraph of the letter is key. Strictly speaking, it is its *raison d'être*<sup>35</sup>:

«I acknowledge the importance of the of the Sahara issue for Morocco and Morocco's serious and credible efforts within the framework of the United Nations to find a mutually acceptable solution. In this regard, Spain considers the autonomy initiative presented by Morocco in 2007 as the most serious, credible and realistic basis for resolving the dispute.»

According to the Spanish government, the letter was negotiated and finally accepted by Morocco. Hence its publication four days later, after obtaining Mohamed VI's approval. The Moncloa Palace argued that it was the same formula as that agreed for the letter of the German Chancellor, also made public, which unblocked the relationship between Rabat and Berlin (also deteriorated due to the Western Sahara issue). However, Germany did not go as far as Spain, since it merely pointed out that the Moroccan autonomy plan was a "good basis" for reaching an agreement but not necessarily the best, as can be inferred from the wording of PM Sánchez's letter ("the most..."). In short, Sánchez's letter expresses a clear preference for autonomy over independence as a way out of the Western Sahara conflict.

I will not delve into conspiratorial explanations on the letter's origin. No evidence has been provided in this regard. Nor will I speculate about the protocol followed in the negotiation and publication of the letter. The wording suggests that it could be a draft aired by Morocco ahead of time and therefore contrary to the intention of the Spanish government. It is also strange and striking that our PM addresses the Moroccan Head of State and not his counterpart, PM Aziz Akhannouch. However, Sánchez has systematically refused to explain in any forum (including the parliament) the process followed in the adoption of such a decision. Consequently, I will not speculate about PM Sánchez's true intentions<sup>36</sup>. I will also leave aside, as I did with the behavior of PM Aznar, any ideological or moral assessment. I limit myself to analyze and qualify the decision from the point of view of political science and international law. This is my modest way of honoring both sciences, avoiding any activist or sectarian temptations.

### 3.2 *Legal analysis*

Both decisions, that of PM Aznar and that of PM Sánchez, have been and are objectively relevant to Spanish foreign policy. Because of the states and actors affected,<sup>37</sup>

<sup>34</sup> See *Informe Anual de Seguridad Nacional 2023*, approved on March 19, 2024, prepared by the National Security Department of the Office of the Prime Minister, pp. 95-100, en <https://www.dsn.gob.es>

<sup>35</sup> To avoid confusion with the text disseminated by Morocco's Royal Cabinet, I refer here to the text leaked to the newspaper *El País* by the Office of the Prime Minister (*El País*, March 23, 2022, p. 14).

<sup>36</sup> Among other speculations, it has been pointed out that the date of the letter was not accidental. Not a month had passed since February 24, the date of the beginning of the military invasion of Ukraine by the Russian Federation. This was intended to mitigate the political impact of the letter. Other reasons of pure political expediency have also been suggested, to which we will return after an empirical analysis.

<sup>37</sup> In this case, I refer to Morocco; to the Polisario Front, representative of the Sahrawi people and recognized as a state by some countries, as well as a member of the African Union; and to Algeria, which recalled its ambassador to Madrid for consultations and has since reduced trade with Spain to almost nothing.

because of their content and scope, and because of their consequences. For this reason, they deserve attention. This does not prevent us from distinguishing them from a strictly legal point of view. The decision to participate in the invasion of Iraq was a serious violation of international law<sup>38</sup>, while abandoning the cause of Sahrawi independence is not contrary to international law for reasons that I will explain briefly<sup>39</sup>.

In his letter, PM Sánchez does not deny or question the holding of a self-determination referendum in Western Sahara. This is the Gordian knot of the conflict due to Morocco's refusal to hold it, but it remains for now on the UN agenda<sup>40</sup>. Nor does he question the role of the United Nations in organizing the referendum and endorsing its outcome, as the case may be. Furthermore, the letter does not exclude Spain's contribution to resolving the conflict, perhaps in its condition as *de jure* administering power. It does not follow from the letter that Spain will give aid or assistance to Morocco to maintain its occupation of the Western Sahara. PM Sánchez is merely giving a strong blow to the relatively placid position of Spain in this conflict. Until then, it was characterized by a deceptive "active neutrality", now abandoned, which always referred to the UN framework. In other words, Spain assumed a comfortable position at an equal distance from both parties.

The reference to the UN framework, even in passing, is key to save *in extremis* the legality of Spain's change of position. Fortunately for our legal reputation, on March 30, in the midst of the war in Ukraine, PM Sánchez astutely devoted to this issue the main part of his speech at the plenary session of the Spanish lower house. He emphasized that his letter in "a matter of state, which requires a state policy," should be understood as a position to be assessed "always within the framework of the United Nations and with the agreement of the parties directly involved."<sup>41</sup> PM Sánchez expressed himself in similar terms in his speech during the general debate of the 77th session of the United Nations General

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<sup>38</sup> For collaborating in the invasion and occupation of a state through the use of armed force, without cause or reason in accordance with the law. See art. 51 of the UN Charter and art. 21 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts: *Yearbook of the International Law Commission 2001*, vol. II (Part Two), pp. 74-75.

<sup>39</sup> I disagree with the "Declaración sobre el Sahara Occidental y el Derecho Internacional" (Statement on Western Sahara and International Law), published by the Spanish Association of Professors of International Law and International Relations (AEPDIRI) on March 24, 2022. I signed it out of respect for the memory of Prof. Julio González Campos, illustrious defender of the Sahrawi cause since his participation as counsel for Spain before the International Court of Justice (ICJ) in the advisory opinion on Western Sahara (1975). The last paragraph of the Statement affirms without foundation that the decision of PM Sánchez "entails international responsibility of the state, insofar as it contributes to consolidate a serious violation of a preemptory norm of international law," namely the right to self-determination of the Sahrawi people. The AEPDIRI must fulfill its social function as a scientific association, participating in the public debate on a subject relevant to our foreign policy. This is a healthy exercise of deliberative democracy. But I recommend calm and reflection in this kind of pronouncements. It would have been better to have waited at least for the appearance of the Prime Minister before the plenary session of the lower house of the Spanish parliament, which took place on March 30. No international court, in view of the wording of the letter, its context (in particular, the explanations of the PM before the Parliament), and other circumstances, would endorse such a serious accusation against our state. On the contrary, sharing the content of the "Statement" without support, see J. SOROETA LICERAS, *El conflicto saharauí, la piedra en el zapato de las relaciones hispano-marroquíes*, in *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, 2022, 441-453, pp. 442-443 and 452.

<sup>40</sup> See Resolutions 658 (1990) and 690 (1991) of the Security Council.

<sup>41</sup> Parliamentary Report, lower house of the Spanish parliament, Plenary session, XIV Legislature, no. 174, March 30, 2022, where the PM reported, among other matters, on the change of Spain's position on Western Sahara, pp. 17-18.



Assembly on September 22, 2022. Almost at the end of his speech, he stated laconically the following, sidestepping express support for the Moroccan cause and reaffirming the UN's central role<sup>42</sup>:

«We cannot carry over conflicts from the last century. And that is why in regard to an area of great importance to Spain, Western Sahara Spain supports a mutually acceptable political solution, within the framework of the United Nations Charter and the resolutions of the United Nations Security Council. And in this regard, the work of the UN Secretary-General's Personal Envoy seems to me to be fundamental, and I would like to say that he has the full support of the Government of Spain.».

I insist that this change of direction is eminently political, although it also has legal effects. It takes sides decisively for Morocco. From now on, Spain does not advocate for the independence of Western Sahara but for its autonomy within the Moroccan State. This means that Spain will defend in all forums (UN and EU, mainly) the Western Sahara autonomy proposal. In the referendum agreed at the time by the parties, the Sahrawi people had to decide between independence and integration into Morocco. Therefore, the latter is a legitimate option that can be defended in good faith by third parties. PM Sánchez does not expressly refuse to hold the referendum which is Morocco's unequivocal position. It is not too much of a stretch to say that he leaves everything in the hands of the United Nations. In view of the wording of the letter and the subsequent statements of PM Sánchez at the parliament and the UN General Assembly, it cannot be concluded that Spain is committing an internationally wrongful act by changing its position on the conflict in Western Sahara. In short, the letter is an expression of support for the Moroccan position, but it does not imply a recognition of its alleged sovereignty over that Territory nor does it entail in principle any kind of aid or assistance for that purpose.

On the other hand, the Madrid Agreement of November 14, 1975, by which Spain allowed Morocco and Mauritania to occupy militarily and divide up Western Sahara, did constitute a serious violation of the peremptory norm prohibiting the establishment or maintenance by force of colonial domination. And the international responsibility can be attributed to Spain. In recalling this infamous Agreement, I would like to reflect on the force of inertia in foreign policy. Democratic Spain seems to bear a "lingering legacy"<sup>43</sup> of Franco's regime which opted for Morocco in 1975 and abandoned the Sahrawi people to their fate. PM Sánchez has finally decided to accept such legacy without the benefit of inventory. Whether he likes it or not, his decision endorses and politically consolidates the one adopted in 1975 by an agonizing dictatorship.

It is natural to have reasonable doubts about the credibility of the promise of an autonomy statute for Western Sahara, something clearly unprecedented in Morocco's political history. Even less so in the light of the almost 50 years of military occupation and systematic violations of Sahrawi human rights on behalf of a theocratic regime like Morocco, where all power is concentrated in the King and his court (the *Makhzen*). The same applies to Morocco's promise to renounce unilateral actions against Spain, in

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<sup>42</sup> According to the transcription made by the State Secretariat for Communication, dependent on the Office of the Prime Minister. In fact, the position of PM Sánchez contrasts with that of the Moroccan government, which systematically boycotts the work of the Special Envoy of the UN Secretary-General.

<sup>43</sup> According to the felicitous expression of the "Carta abierta de la Unión Progresista de Fiscales (UPF) al presidente del Gobierno del Reino de España en relación a la posición política que mantiene con el Territorio del Sahara Occidental" (Open letter of the Progressive Union of Public Prosecutors to the Spanish Prime Minister, concerning its political position on the Territory of Western Sahara), of April 8, 2023.

particular the use of irregular immigration as a strategy of political pressure<sup>44</sup>. In any event, these considerations should not alter the legal assessment of PM Sánchez's letter.

This change of course also has unequivocal legal consequences. To quote again PM Sánchez: "In this new context, you have my assurance that Spain will act with the absolute transparency that corresponds to a great friend and ally. I assure you that Spain will always keep its commitments and its word." Strictly speaking, this is a unilateral legal act which generates obligations for Spain. Our PM, in his capacity to bind our state in international relations, freely and voluntarily assumed such obligations. In view of the text, the context and the circumstances of the letter, as well as subsequent statements ratifying its contents, there is no alternative but to honor that commitment in all its terms without revocation except in specific cases<sup>45</sup>.

There is no record of any kind of agreement or legal transaction between the two governments underlying the change in Spain's position on the Western Sahara conflict. PM Sánchez and Mohamed VI agreed on a 16-point Joint Declaration on April 7, 2022, to ratify the new stage in the bilateral relationship after the letter of March 14, especially Spain's change of position on Western Sahara (point 1). It is not a legally binding text as evidenced by the fact that two years later the commercial customs with Ceuta and Melilla remain closed despite the promise of "full normalization of the movement of persons and goods" under point 3.

Moreover, Morocco's policy towards the autonomous cities of Ceuta and Melilla goes in the exact opposite direction. It aims at the socio-economic disengagement from their Moroccan environment, their isolation and economic suffocation. To this end, Morocco has implemented severe border control measures, prohibiting even small gifts and souvenirs from travelers under its customs regime. In the same line, it rejects Spanish visas for cross-border workers valid for Ceuta and Melilla, refusing to maintain judicial and cross-border cooperation with both cities and even to receive humanitarian aid from them. These are objectively extreme measures that can by no means be justified on grounds of technical necessity to keep Morocco's claim of sovereignty over the two cities. The only explanation is political: the will and opportunity to activate and reinforce such claim.

On the other hand, in relation to points 8 and 9 of the Declaration on cooperation in migration matters, the migratory pressure on the borders of Ceuta and Melilla has improved considerably although it has now shifted to the Canary Islands. It is the sub-Saharan immigrants rather than Morocco's own population who have suffered by force of arms the hardening of its policy. Suffice it to review, for instance, the recent figures for the entry of unaccompanied Moroccan minors (MENAS), on the rise both in the Canary Islands and in Ceuta and Melilla.

Almost a year later, the Joint Declaration agreed at the XII High-Level Meeting between Morocco and Spain (RAN), held on February 1 and 2, 2023, brought no new developments on Western Sahara, the migratory phenomenon and commercial customs, to

<sup>44</sup> See, in this regard, C. JIMÉNEZ PIERNAS, *Dilemas de las relaciones con Marruecos*, cit., pp. 197-198.

<sup>45</sup> In 2006, the International Law Commission (ILC) adopted "guiding principles" on this matter, according to which unilateral declarations cannot be revoked arbitrarily. In order to assess whether a revocation is arbitrary, the ILC outlines certain criteria of common legal sense, namely: possible references in the declaration to revocability, which do not exist in this case; the extent to which those to whom the obligations are owed (i.e., Morocco) have relied on such obligations, which is very strong in this case; and the extent to which there has been a fundamental change in the circumstances, which is difficult to prove ("Conclusions of the International Law Commission relating to unilateral acts of states", Doc. A/CN.4/L.703 of July 20, 2006, in particular principles 7 and 10).

which it devotes points 8, 22 ff. and 42, respectively. Nothing has substantially changed in the bilateral relationship, beyond the important concession both political (change of position) and legal (unilateral act) made in favor of Morocco in the Western Sahara conflict.

However, the legal qualification of PM Sánchez's move could change as a result of new decisions on this issue that may significantly alter the status quo. It would be the case of transferring to Morocco the operational control of civil air traffic over the Territory of Western Sahara. Since 1976, the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations, attributes such control to Spain, which it carries out from the Canary Islands. Indeed, the Canary Islands Air Traffic Control Center, based at Gran Canaria airport, ensures the management and safety of air traffic in a geographical area that includes both the airspace of the Canary Islands and Western Sahara and the surrounding waters, covering an area of approximately 1.5 km<sup>2</sup>.

This is a long-standing Moroccan aspiration, translated into intrusions and *faits accomplis* that have tended to create a *de facto* situation that I will not address here. A new cession in this area, whatever its form, could be interpreted as a relevant fact, confirming a definite shift of the Spanish government towards a more or less explicit recognition of Moroccan sovereignty over that Territory. Thus, Spain could be regarded as collaborating with the occupying power against international and EU law<sup>46</sup>. Among the legal consequences that would follow from such recognition is the international responsibility of our state by explicitly contributing to maintain and consolidate the serious violation of the peremptory norm prohibiting the maintenance by force of Morocco's colonial domination over the Western Sahara.

### 3.2. *A new Caesarist precedent*

Everything discussed in sections 1 and 2 of this paper applies *mutatis mutandis* to this case. I will limit myself to briefly analyzing PM Sánchez's personal decision under these guidelines. It should be recalled that the position maintained by successive Spanish governments on the Western Sahara was agreed upon in the 1980s. As already explained, it consisted of an alleged and formal neutrality between the parties to the conflict, referring any solution to the UN framework. At the same time, an unsuccessful attempt was made to develop a web of shared interests with Algeria and Morocco, to their mutual benefit. The purpose was to avoid or appease confrontation and crises over this conflict.

Let us analyze the key elements to determine the Caesarist nature of PM Sánchez's decision. Neither the Ministry of Foreign Affairs nor any other ministry participated in the adoption of this decision, which was taken solely by the head of the Spanish government

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<sup>46</sup> The order of the General Court (Fifth Chamber) of November 30, 2018, case T-275/18, rules that the Euro-Mediterranean Aviation Agreement between the EU and Morocco cannot apply to the airspace of Western Sahara, because neither the land space nor the waters of that Territory are part of Morocco. In this regard, art. 41(2) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, cited above, states that "No state shall recognize as lawful a situation created by a serious breach [of a peremptory norm of general international law] within the meaning of article 40 [as is the case with Morocco's occupation of the Western Sahara], nor render aid or assistance in maintaining that situation." See *Yearbook of the International Law Commission 2001*, vol. II (Part Two), pp. 114-116. However, point 7 of the Joint Declaration of April 7, 2022, cited above, provides that talks will be initiated between Spain and Morocco on the management of airspace. Despite the fact that the legal provisions set out above discourage even the initiation of talks with Morocco in this regard.

and not even by the Council of Ministers.<sup>47</sup> The other party (Unidas Podemos, UP) of the coalition government did not participate in the decision. Neither did the parties that supported the government in parliament, and even less the main opposition party (PP). PM Sánchez did not involve in the decision the lower house of the Spanish parliament, which is particularly relevant considering that the government did not enjoy a stable majority<sup>48</sup>. There was no interaction with public opinion or other social actors such as professional associations and NGOs interested in the Western Sahara conflict<sup>49</sup>. In short, the decision was not elaborated, debated and explained according to the canons of a representative parliamentary democracy reinforced by participatory and deliberative mechanisms.

In any event, this decision has put an abrupt end to several decades of consensus, upheld by successive governments, on our foreign policy regarding the Western Sahara conflict. It is true that it was always a precarious, defensive and reactive consensus, among other reasons to avoid divisive internal debates on the self-determination of the peoples or the autonomous cities of Ceuta and Melilla. Such consensus enjoyed the blessing of the European Union and its foreign and security policy. Ultimately, PM Sánchez broke this consensus without explaining himself thus departing from the protocols of representative, participatory and deliberative democracy in a truly relevant matter for our foreign policy. Therefore, identical concerns as those raised in the case of Iraq apply here too.

How much would it have cost the government in terms of time, fatigue and turmoil to follow such protocols? And, above all, with what outcome? That dilemma that I have already raised in relation to Iraq looms again in this new case. It is far from my intention to exonerate PM Sánchez of his responsibility as the sole decision-maker. Rather, I would like to understand the tensions between the consensual and the Caesarist pole in the decision-making processes regarding such relevant matters. This is an area where prudence, confidentiality and secrecy continue to prevail over transparency despite the reference to the principle of transparency under Act 2/2014 on State Foreign Action<sup>50</sup>, which was also ignored in this case.

Once again, in the case of Western Sahara there is a strong contradiction between Caesarist inclinations versus consensual formulas based on inertias that are difficult to apply in the current reality of our foreign, security and defence policy. In 2022, PM Sánchez governed in coalition with UP and with parliamentary support of nationalist forces that would never have endorsed this shift on Western Sahara. PM Sánchez was also sailing against the wind of President Trump's decision to recognize Morocco's sovereignty over

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<sup>47</sup> PM Sánchez's decision was not submitted to deliberation by the Council of Ministers, which is responsible for establishing the state's foreign policy under the direction of its president (see art. 97 of the Spanish Constitution and arts 5 and 6 of Act 2/2014, of March 25, on State Action and Foreign Service, *BOE* of March 26).

<sup>48</sup> With only 120 seats in the lower house out of 350 and presiding over a coalition government, such a relevant political decision should have been explained at the Spanish parliament. The Socialist Parliamentary Group was left only to defend, *a posteriori*, the decision of its Secretary General. See Parliamentary Report, lower house of the Spanish parliament, cit., pp. 17-18 ff. For a reflection on this isolation and of the general state of opinion, see *El País* of March 31, 2022, p. 14, and April 6, 2022, p. 16. I cite only this newspaper for economy of means: its clearly pro-government editorial line makes it unnecessary to contrast its information with other media sources.

<sup>49</sup> Cf. the Open letter of the Progressive Union of Public Prosecutors (UPF) to the Spanish Prime Minister, concerning its political position on the Territory of Western Sahara, cit.; and Spanish Association for International Human Rights Law (AEDIDH), "Western Sahara: a letter that should never have been written," of March 22, 2022, available at <http://www.aedidh.org>.

<sup>50</sup> See arts. 3, 4 and 16 of Act 2/2014, cit.

Western Sahara adopted on December 10, 2020, in exchange for Morocco's recognition of the State of Israel<sup>51</sup>. Also part of the equation was the implicit and explicit support of the EU Council and Commission to the Moroccan thesis, only nuanced by the Court of Justice of the EU<sup>52</sup>. In other words, the general context may have contributed to PM Sánchez's Caesarist decision, putting an end to the inertia of a position of arguably little political realism<sup>53</sup>. All the above, regardless of our stance on the arbitrariness and lack of motivation of that move.

This decision is out of tune with PM Sánchez's active conduct on the conflict in the Gaza Strip, where he has unequivocally criticized and condemned the serious violations of international humanitarian law committed during the Israeli military campaign pending legal qualification by the competent international courts. In fact, his government officially recognized the State of Palestine on May 28, 2024. According to the strictest political realism to which PM Sánchez seems to have adhered in his decision on Western Sahara, this could be based on a cost-benefit assessment. The capacity of the Alawi monarchy to destabilize his government is predictably high, as has been demonstrated in recent years. On the other hand, Israel is thousands of kilometers away and can absolutely do without the support of the Spanish government in the fulfillment of its objectives in this conflict, regardless of the discomfort or irritation that this may cause in the Israeli cabinet. At the same time, such negative consequences are arguably compensated by political gain in the Arab world. Of course, there are other possible explanations for the conduct of PM Sánchez, but they are far removed from the realistic canons he has maintained in relations with Morocco since taking office. I just compare, from the standpoint of political realism, both lines of conduct.

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<sup>51</sup> In July 2023, after some hesitation, Israel also recognized Morocco's sovereignty over Western Sahara by letter signed by Prime Minister Benjamin Netanyahu: see *El País* of July 18, 2023, p. 6.

<sup>52</sup> So far, the CJEU has considered that the Territory of Western Sahara is not part of Morocco and is pending decolonization: see Judgments of December 21, 2016, case C-104/16 P; of February 27, 2018, case C-266/16; and of September 29, 2021, case T-279/19; and joined cases T-344/19 and T-356/19. The latter cases concern actions for annulment brought by the Polisario Front against Council decisions approving the conclusion of agreements between the EU and Morocco on tariff and fisheries matters. The General Court annulled the Council's decisions to exclude from these agreements both agricultural products from Western Sahara and the waters adjacent to that Territory. These rulings have been appealed before the Court of Justice, whose judgment is expected imminently.

<sup>53</sup> Parliamentary report, lower house of the Spanish parliament, cit., pp. 18-19, 64, 66 and 83, among others. Both in his first speech and in his replies throughout the parliamentary debate, PM Sánchez made clear his commitment to an evident political realism, based on Spain's national interest as he personally interprets it. At a certain point, he went so far as to affirm that "the path we have taken [in relation to Western Sahara], ...is that of real politics" (p. 18). He went no further in his explanations. Since we qualify PM Sánchez's conduct as realist, I clarify the technical scope of that term. Political realism is a powerful current of thought with philosophical roots that enjoys wide acceptance in the doctrine and practice of international relations, that is, in the chancelleries. Its main features, maintained by the different currents that comprise it, are anthropological pessimism, the pre-eminent position of the "sovereign state" in international life, and the defense of the national interest (*raison d'état*) in the power relations between them, leaving aside any ethical approach or moral principle in foreign policy. See the seminal work on political realism by H. J. MORGENTHAU, *Politics among Nations. The Struggle for Power and Peace*, Boston, 7th ed., 2005. The first edition dates from 1948.



#### 4. Concluding remarks

The appearance of new actors sparked hope in the field of international relations. In particular, the emergence of a certain world public opinion, capable of making its voice heard through various demonstrations advocating cancellation of the foreign debt of developing countries, on the occasion of international summits, or protesting against the use of violence and the recourse to war in international relations. An exemplary case would be the world-wide demonstrations held in February 2003 against the announced invasion of Iraq. These events point in the direction of a transnational society, of the individual assumption of some kind of responsibility in international relations and their regulation. In short, we are witnessing the expansion of participatory and deliberative practices in the definition and implementation of foreign policy, seeking to reach agreements beyond the limits of representative parliamentary democracy. It is no longer enough to hold elections from time to time, which is a necessary but not self-sufficient. Basic consensual mechanisms are gaining strength and spreading, at least in matters relevant to the state.

Of course, these consensual practices have shortcomings. It is highly unlikely that the extension of the Defense Cooperation Agreement with the United States and, therefore, the maintenance of joint-use bases in Spanish territory will be submitted to a referendum in Spain<sup>54</sup>. It is also unlikely that in the event of a change of government, a new administration would change its position on the Western Sahara conflict, revising the unilateral legal act adopted by PM Sánchez not only for political but also for legal reasons. It is not an easy task to reverse a unilateral legal act as clear as the one carried out and subsequently reiterated by PM Sánchez, unless contrary to a peremptory norm of general international law<sup>55</sup>.

It does not seem that the transnational forces, anticipated and longed for by Kantian universalism, will surrender the conquests made by various forms of participation and deliberation underlying basic consensus on foreign policy. But the formation of basic consensus takes time and requires multiple actors, factors and unpredictable elements that make it particularly complex. This has internal consequences, especially the difficulty and slowdown in decision-making caused by the strengthening of consensual mechanisms in foreign policy. PM Aznar (and his party), and now PM Sánchez (and his party), did not take into account these onerous consequences on the occasion of the invasion of Iraq in 2003 and the change of position on Western Sahara in 2022.

In the case of Spain, the temptation to resolve the dilemma between Caesarism and consensualism in favor of the former is understandable. Indeed, it is increasingly difficult to build, revise or change consensus in our foreign policy in a political scenario as fragmented and polarized as the current Spanish one even being aware of the risks involved in breaking with consensual practices<sup>56</sup>. Consensualism in the definition and implementation of foreign policy, at least in matters of great importance for the political community, is in line with the standards of representative democracy, reinforced by participatory and deliberative mechanisms. Meanwhile, Caesarism in highly relevant foreign policy matters is, by definition, evidence of a deficit of transparency and democratic quality to be evaluated on a case-by-case basis.

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<sup>54</sup> On the scope and content, see Ministry of Defense, *Convenio de Cooperación para la Defensa entre el Reino de España y los Estados Unidos de América (y otros documentos relacionados)*, Madrid, 2015.

<sup>55</sup> See guiding principle 8 of ICL's *Conclusions*, cit.

<sup>56</sup> See above, section. 2.4.

In the two cases analyzed, PM Aznar adopted a visionary and risky decision which failed miserably. PM Sánchez, on the other hand, adopted a decision driven by political realism. He sought to avoid new crises with Morocco that could destabilize his coalition government and his parliamentary support. In doing so, he bore with extreme prudence and imperturbability the reticence and rebuffs of the Alaouite monarch, rather unconciliatory (unlike his father) in his territorial ambitions over the autonomous cities of Ceuta and Melilla. It would seem that the annexation of Western Sahara is already taken for granted by Mohamed VI, aware of the precarious parliamentary situation of PM Sánchez since taking office in 2018 which became even greater after the July 2023 general elections. Strictly speaking, from a realistic point of view, PM Sánchez's decision does not seem as arbitrary as it might appear in the absence of explanations. On the southern flank, in the face of a neighbor as vindictive as problematic, PM Sánchez has achieved an always uncertain stability to implement his agenda without major setbacks and shocks.

Finally, it is interesting to note the influence of geopolitics on foreign policy inertia. This is the case of our alignment and subordination to the United States, which goes back a long way, to Franco's regime. None of the above decisions (PM Aznar's and PM Sánchez's) can be explained without our dependence on US foreign and defense policy. In the case of Western Sahara, Spain's complex and difficult bilateral relationship with its southern neighbour provides substantial strategic benefits for the United States on both sides of the Strait of Gibraltar. On the Spanish side, this is an eminently defensive, reactive and unbalanced relationship fortunately, counterbalanced by our EU membership.