QUESTIONS ON THEORY OF LAW IN INTERNATIONAL HUMAN RIGHTS LAW

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Abstract: The objective of this paper is to examine some specific question on the theory of law in international human rights law. International human rights law has played an important role in the evolution of International law. There are different ways of approaching and understanding International law, different schools and certain central theoretical questions. This paper tackles theoretical questions within international law in the light of International law of human rights, such as the questions of hierarchy, unity, coherence, structure, time, power, justice and legitimacy. Furthemore, analyse theoretical horizons, like the question evolution/revolution, progression/regression, justiciability, sustainability and efficacity

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1. Introduction

The relationship between State and Law has influenced jurists way of thinking (Latorre, 1968). Within the International Community, the absence of a higher power akin to that of the State means that analysis cannot be based on those same premises. Kelsen between others (Kelsen 1949, 131; Kolb, 2000, 101; Virally, 1990, 91; Campbell, 1988, 144 ss) indicates that International Law (IL) is a primitive order. Most of the doctrine puts forward a different view.

In the International Criminal Tribunal for the former Yugoslavia, the defence for the first defendant, Duško Tadić, raised the prejudicial question that the Tribunal could not judge him because it has been created after the events, which would infringe the defendant's right to be judged by a tribunal established by law, as recognised in Article 14.5 of the International Covenant on Civil and Political Rights. However, the International Tribunal ratified the legality of the decision that created it, taking into account the differences between the International Community and those of a State (Fernández Liesa, 1996, 11-44).

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This Article will examine key questions in International Law from the perspective of International Human Rights Law (IHRL), which are a specific and/or autonomous section of International Law, having played a very important role in the evolution thereof, contributing to the mitigation of their state voluntarism, without sweeping away the role of consent (Cohen-Jonathan, 2001, 307). There are many different ways of approaching and understanding International Law, different schools, and certain central theoretical questions (Bianchi, 2016, 316; Kolb, 2016, 475). Most of the doctrine does not tackle such questions, in a post-ontological position that gained ground from the latter half of the 20th Century onwards (Ago, 1965, 845). This paper tackles certain theoretical questions within International Law, in the light of IHRL. Hardly any studies have taken this angle, since most analysis of IHRL focuses on progressive development and coding, on mechanisms and systems of protection, and on current affairs.

2. International Legal Order and International Human rights

2.1. Human rights hierarchy and norms

The norms or *ius cogens* changed the meaning of international order, introducing normative hierarchy. Recognised by Article 53 of the Vienna Convention on the Law of Treaties, as well as doctrine and international jurisprudence, these are superior rules in the hierarchy given their importance for the International Community (Yasseen, 1975, 204; Schwarzenberger, G., 1965,456; MacDonald, 1987, 132). The vast majority of these rules pertain to International Human Rights Law. They express the fundamental values of the International Community, protected by rules that make up an international public order. The hierarchy established has eroded the classic, voluntarist, bilateralist and subjectivist vision, limiting relativism and favouring objectivism (Carrillo Salcedo, 1997, 596). *Ius strictum* or *preceptivum* protects the most essential interests of the International Community, unlike *erga omnes*, norms that protect collective interests.

All norms of ius cogens are erga omnes, but the reverse is not true. Relativism is overcome through the acceptance of the international community of States as a whole, which does not mean accepting an iusnaturalist approach, but rather that it exists in the legal system. Ius cogens does not entail a return to natural law. As indicated by Weil, "these are not values imposed on States by higher bodies, but legal norms inspired by ethical and sociological considerations, whose normative character is endogenous" (Weil, 1992, 267).

The apparently unsolvable contradiction exists between a conception of International Law based on the supremacy of accord and a notion of ius cogens defined as rules that defy accord. However, the consensualist foundation and origin of ius cogens does not require unanimous acceptance, only that of a majority of States (the International Community of States as a whole, as set out in the aforementioned Article 53), sufficiently representative of the IC, which recognises the imperative nature thereof. In short, there must be *consensus* (Chaumont, 1970, 370).

There is undoubtedly an *opinio iuris cogentis* regarding the imperative nature of the norm prohibiting racial discrimination and apartheid, genocide, the slave trade, or which

recognises the right not to be subjected to torture and/or inhumane or degrading treatment, the intransgressible principles of International Humanitarian Law, or the obligation to respect the law of free self-determination, among other rules that make up IHRL. There is debate regarding ius cogens but there is a hard core of laws that are included therein and that have introduced a hierarchy into International Law, as well as additional consequences in cases of serious violations, visible in the draft Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001.

2.2. Unity of International Law and Human Rights

All legal order is unitary and has a fundamental norm in which its unity resides (Bobbio, 1992, 173). However, its decentralised nature, and the reciprocity and relativism inherent to international order has raised the issue of whether it constitutes a system or, in the words of Combacau (1986, 86) a bric-à-brac. In our view, human rights are a central component of that unity. An order would lack unity if it could be considered a set of disconnected individual units (Canaris, 1998, 19). A formal approach has traditionally been taken with regard to the notion of unity (Fernández Liesa, 2002, p. 265).

Kelsen estimated that the problem of the unity of IL norms is equivalent to the problem of constituting legal order or of the International Community. It is the fundamental hypothetical rule that organises it, the ultimate source of unity in the plurality of all norms that comprise an order. Hart understands unity based on the structural assumption regarding the concept of law as the union of primary and secondary rules. The unity of the system is achieved through the combination of a structure based on primary norms, secondary norms with their rules of exchange and allocation, and a rule of recognition at the apex. Secondary norms are norms about norms, meaning that they refer to the determination, introduction, elimination, amendment and violation of primary norms. The unity of legal order is grounded in the rule of recognition, positive norm, and not a mere working hypothesis (Kelsen, 1939, 37; Hart, 1961, 99; Casanovas, 1999, 58).

If we approach unity in informal material terms, it could be viewed from the existence of universal primary norms. Some authors feel it to be unnecessary, because the unity of the legal system would imply only the existence of *injonctions* and *contraintes* (Wengler, 1975, 329). This thesis is no longer defensible, although it may be conceivable as a theoretical model. Consideration of the formal aspects (the International Community of States as a whole accepts the existence of primary and secondary norms) and material aspects of unity (the International Community of States as a whole accepts as mandatory in Law a series of principles and values that are considered universal and superior) posits the existence of primary general norms of International Law with universal scope, validity, and primacy over all other norms in the legal order.

The distinction between formal and material unity can be drawn today in IL. And, because of its content, material unity introduces a moral dimension into IL, acknowledged by the International Community. From this perspective, the *basic norm of International Law has a dual aspect, formal and material, and this latter component comprises criteria of legalised morality, which are the parameters for judging the validity of the normative*

whole. In this regard, the theory developed by Peces-Barba is very apropos, stating that the basic norm for identifying norms (norms of authority, validity criteria, norms on the production of norms, which enable a systematic construction of a legal order and are a reference for its unity) not only has the appearance of a basic norm, which encompasses moral criteria of validity.

Hence, the validity of law, the pertinence of norms with regard to the legal order, will be achieved by verifying the suitability of each norm in terms of those formal and material criteria. Whereas, within internal legal orders, the basic material norm that incorporates that dimension of morality appears in the essential core of Constitutions, in the form of values, principles of organisation and normative production, interpretation and fundamental rights, within the international legal order, it appears within the universal dimension, in obligations erga omnes, and, at its essential core, in norms of *Ius cogens*. Hence, a treaty that is contrary to a rule of *Ius cogens*, for example one that establishes the trafficking of human beings, is considered null and void.

The International Community recognises certain fundamental universal values of coexistence that are revealed in fundamental principles and developed in legal norms. From this perspective, international order has material unity, and to use Hartian terminology, contains primary universal rules, which implies that the International Community of States has recognised as universally binding a hardcore of principles and rules of IL, an international public order, in which, among other things, the rules of Ius cogens, which pertain fundamentally to human rights, could be inscribed.

2.3. Coherence and the proliferation of courts

The proliferation of courts appeared to jeopardise the coherence of international order. The autonomy of the Courts and the absence of hierarchy among them without a Supreme Court created the image of International Law as a set of autonomous subsystems equipped with jurisdictional systems that would function independently of the general international system. However, Courts are not independent of general International Law. The International Law Commission (ILC) analysed the *risks of fragmentation of International Law (Hafner, 2000)*.

Conforti (2007, 5), Rivier (2006, 304) and Fernández Liesa (2009, 25) felt that it was more a work of doctrine than of codification. The fact that codification has been fruitless does not mean this work was pointless. It emphasises the role of doctrine in the interpretation of Law in complex situations. The main conclusion is that legal certainty, predictability, and equality between subjects of law have not been compromised. The techniques of *lex specialis, lex posterior derogat prior*, *inter se* agreements and the acknowledged superiority of imperative norms as well as the notion of "obligations owed to the International Community as a whole" provide an elementary "tool box" to respond to the most fundamental problems posed by fragmentation. A transition (para. 487 ss, conclusions CDI) is effected, from a world fragmented into Sovereign States to a world fragmented into specialised regimes. Conflict is inevitable since (second conclusion, para. 492) "there is no standardised hierarchical meta-system to eliminate problems". An

increasingly complex phenomenon has developed, affecting the absolute homogeneity of legal order, which could lead to inconsistencies and conflicts.

Pluralism and coherence are in tension with one another. But the essential question is whether conflicts can be resolved through the instruments of international legal order. The ILC's central response is affirmative. States have never had a higher body to resolve their conflicts (the old adage of *par im parem imperium non habet*). The ILC states that *normative conflict is endemic in International Law and that new conflicts between regimes can be overcome with existing Law*. No response to any conflict can be given in an abstract and automatic manner, but rather must be approached in view of the rules applicable to the interpretation of Treaties.

There are dialogues and clashes between international courts. We see this between the Supreme and Constitutional Courts (in Spain), or between these (repeatedly the German Constitutional Court) and the European Court of Justice, or between the European Court of Human Rights and the European Court of Justice. The communicating vessels phenomenon and friction are inherent to any International Community, where each court is a self contained system. Underlying these clashes is the tension between sovereignty and human rights, and who is the ultimate guarantor of these rights, a role that States continue to play at this current point in the evolution of international order.

2.4. The structure of order: sources and subjects

The humanisation of International Law has changed the structure of the system, with regard to the modes of production and its subjects. Along with the appearance of categories such as *Ius cogens*, the principle of non-formalism has given a great deal of relevance to advisory *soft law*. Recent advances in human rights have been made through soft law instruments such as the Global Compact for Migration (2018), the Sustainable Development Goals (2015) or the Guiding Principles for Business and Human Rights (2011). This is also true of the past, as demonstrated by the *Universal Declaration of Human Rights* of 10 December 1948, or Res. 2625, on the Principles Guiding Relationships between States, described by R J Dupuy (1987, 265) as "codification résolutionaire".

The 1948 Declaration was a starting point that today has enabled the processes of universalisation, regionalisation and specification. Recommendations can have a declarative, incitative - of instigating a path that will lead to a subsequent norm - or crystallising effect (Jiménez de Arechaga, 1977, 381; Abi-Saab, 1968, 24). That is why soft law is highly relevant, from a legal perspective, in a nomogenetic process, in the interpretation of norms, in guiding behaviour and in transforming *opinio iuris* (Thierry, 1990, 30; Bothe, 1980, 65; Schachter, 1977, 296; Chinkin, C., 1989, 850; Eisenmann, 1979, 326; Virally, 1983, 166). The important thing is to prove the intention of States to abide (Rezek, 1996, 269). International law is formed through a stratification of successive commitments, by generations, which are not related to the nature of rights but to the point in time at which they emerged. Taking human rights seriously involves drawing a distinction between *lex lata* and *lex ferenda*.

The lack of formalism has allowed *consensus generali*s and not just express individual consent to become relevant in International law, both in relation to general custom and in categories such as Ius cogens. The recent proliferation of self-regulation mechanisms (for example in the field of multinational enterprises and human rights) raises the question of whether IL is being downgraded or whether this reflects progress in the progressive development of International Law.

There is open debate about issues such as the relevance of the international practice of non-state actors themselves in the evolution of IL and IHRL. The fact is that the relevant practice is that of state actors. However, the practices of non-state actors are increasingly invoked to confirm the existence of customary norms or to analyse the law applicable to a particular situation. Within the framework of the norms of Ius cogens, only State practice has been considered relevant. However, the ILC expressly acknowledges that the attitude of NSA could be relevant in assessing the position of States.

Other issues could be addressed on the specificities that human rights have brought to conventional law, such as those relating to the succession of States in rights treaties (and the so-called principle of automatic succession), as opposed to the tabula rasa thesis; or discussions on the reportability of human rights treaties or the scope and conditions of validity of reservations, which exceed the scope of this brief analysis, but that show the changes that have taken place in the law of treaties as a consequence of human rights.

The classic interstatism of International law is overcome through recognition of the *international subjectivity of the individual*. The recent emergence of non-state actors (Fernández Liesa, 2019, 117) has highlighted the inadequacy of classic approaches. Human rights have been built on the idea of limiting the power of the State vis-à-vis the individual, or guaranteeing a minimum level of state provision afforded to individuals. However, the State-Person dyad is insufficient to ensure the effectiveness of human rights.

The criteria of international subjectivity (Dominicé, 1996, 147) have been very restrictive, considering that personality can be an attribute of sovereignty. However, recognising the international subjectivity of a multinational company for the purpose of being bound by IHRL might fix problems without creating new ones. In the cases cited (individual, transnational company), the acquisition of international personality derives from recognition by the Community of States, at least implicitly, either through the fulfilment of State contracts (by companies), or through the recognition of human rights or responsibilities (and means of enforceability, in the case of individuals).

There are also shortcomings in the current international liability regime, which is the epicentre of any legal system There are legal loopholes in the *Recommended Principles and Guidelines on Human Rights and Human Trafficking, the Basic Principles of Justice for Victims of Crime and Abuse of Power, and the Guiding Principles on Business and Human Rights*, with regard to the bonds of responsibility between non-state actors and victims of violations, given the state-centred or interstate structure of the international system (Iñigo Alvarez, 2016, 16).

2.5. Time and Law

Historical injustices are serious human rights violations that continue to be relevant today. International order includes issues such as transitional justice, colonial domination, slavery, genocide and crimes against humanity of the past, imperialism, subjugation of peoples (such as indigenous peoples), and Nazism.

Certain transitional justice processes in Latin America (in Argentina, Brazil, Colombia, El Salvador, Guatemala, Haiti, Uruguay, Honduras, Chile, and Peru) led to important jurisprudence on the nullity of State norms contrary to international Ius cogens, including, among others, the famous cases tried in the Inter-American Court of Human Rights, *Barrios Altos v. Peru (2001), Moiwana v. Surinam (2005), Almonacid v. Chile (2006), and Julia Gomes Lund (Araguaria guerilla) v. Brazil (2010)*. The right to truth is becoming an autonomous right within the international system (Ferrer, 2016, 151).

But this new jurisprudence does not apply to historical situations, when the appearance of crimes against humanity as a concept is subsequent to the violation, in a jurisprudence that is in accordance with the interpretation of judicial bodies and international control mechanisms, in addition to concurring with any interpretation of the general principles of Law (Fernández Liesa, 2014). The *tempus regit actum* (intertemporal law) rule is applicable to IHRL, except in situations that are still ongoing, such as a community of people with the right to self-determination

On 27th March 2012, the European Court of Human Rights rejected a lawsuit presented by two relatives of a person who had disappeared in the civil war, stating, without going into detail, that the suit had been filed outside the legal period for doing so (case n 30141/09, ECHR, 27/III/2012, Gutiérrez Dorado y Dorado Ortiz). In July of 1936, Julio Dorado Duque, a Spanish MP representing the PSOE political party, was arrested by members of the Army, along with another MP and the British consul in Malaga, and later disappeared . In the eyes of the ECHR (para 35 ss), in light of the principle of legal certainty, the jurisdiction of the Tribunal, for reasons of time, with respect to the fulfilment of procedural obligations arising from events that occurred before the critical date (entry into force of the ECHR), cannot be interpreted extensively.

In such cases, historical memory or diplomacy is more relevant. This does not mean that they have no legal relevance, since there are *reparations for historical injustices* (Boisson de Chazournes, 2004, 397), as stated in the *Durban Declaration* (2001). All Western states are guilty of such historical injustices in their past. In the case of Spain, and in other countries, there are phenomena such as slavery, the treatment of minorities and the Gitano Roma people, which have still not been acknowledged, and no reparations have been made (Fernández Liesa, 2013). The major human rights violations perpetrated by Nazism are still part of the diplomacy and international politics of the present. On 1/IX/2019, Steinmeier, the President of Germany, asked Poland for forgiveness ("we shall accept the responsibility that history has imposed on us"); days later Poland called for "economic compensation", but Germany refused, indicating that reparations had been resolved in a 1953 agreement with the German Democratic Republic. These situations

give rise to measures of economic reparations, recognition of the facts, memory of the victims, *excuses or requests for forgiveness*.

The same occurred with Pope Francis in relation to the work of the Church during colonisation and with indigenous peoples; Serbia in relation to Bosnia by Srebrenica in 1995; the UN for fleeing the genocide in Rwanda; Australia and Canada with indigenous peoples. Obama (26/9/2016) chaired the White House Tribal Nations Conference and indicated that "we restored more than 428,000 acres of tribal homelands to their original owners". He also visited Hiroshima on 27/5/2016, although he did not apologise for the war decision. In 2004, Germany apologised for the massacres against the Herero tribe in Namibia. Belgium has not done enough about the genocide in the Belgian Congo, one of the most atrocious in human history, alongside the Holocaust

2.6. Power and Law

Power is the ability to influence (Fernández Liesa, 2008, 448; Cassese, 1986, 22; Peces-Barba *et al*., 1999, 100). We see this in its most brutal expression in Guantanamo Bay or in the Abu Ghraib tortures. Also in national conceptions of international law, in the dominant ideology of each historical period (balance, globalisation), in the creation and application of norms, in the relevance of the principle of effectiveness, in the settlement of disputes, in the functioning of international institutions and in the interpretation of norms.

In a democratic state, the Power-Law-Justice (ethics) relationship is structured through the constitutional organisation of powers, through the values and principles of order, and through human rights (Peces-Barba, 1993, 14). But we cannot transfer this logic to the International Community. Contents such as human rights or the right to development are part of an ideal of justice. Humanisation of international order is reflected in the penetration of values that are not part of the logic of power.

But power also influences the creation and application of International Human Rights Law. For example, the treaties concluded in the late nineteenth century between Africa and the European States and representatives of indigenous peoples (Kamto, 2007, 455) reflect the ideology of the time, colonial power, and the assumed superiority of europeans. In spite of appearances, they were not treaties between equals, but rather an act of internal organisation within a colonial territory, a manifestation of imperial power. A more current example is the assassination of Khashoggi at the Saudi consulate in Istanbul when he went to pick up the paperwork for his impending marriage. A member of a well-known Saudi family, Khashoggi was a columnist for the Washington Post who criticised the Emirate. He was assassinated by a Saudi hit team, apparently sent by the Crown Prince of Saudi Arabia, Prince Bin Salman. Should the United Nations, the European Union or the States impose sanctions against Saudi Arabia?. In the end, this matter dissolved on account of individual interests.

There are many examples of how power weakens the application of international human rights law. The suppression of *Spanish universal jurisdiction to pursue major*

human rights violations came about due to the tension between interests and values, which eventually eliminated it through the reforms of 2009 and 2014 on account of the problems it engendered in Spain's relations with China, the United States and the United Kingdom.

All of this shows that the relationship between Law and Power is complementary and dialectical. Power is not always above the law, nor is the law always above power; rather, there is a dialectical relationship between the two. In spite of these examples, Human Rights have gradually transformed the reality of international relations and place restraints on the behaviour of States.

3. Justice and International Human Rights Laws

3.1. The notion of Justice and IHRL

Is the role of justice in international society predictable in international law?. In international society, justice is not derived from the existence of a legitimate power that generates fair law (Fernández Liesa, 2006, 171) . Hence, this matter must be analysed from other perspectives, within the international system. The idea of justice has played a very important role in iusnaturalistic conceptions, in the work of authors such as Fiore, Verdross, Boegner. A. Cançado Trindade, a contemporary advocate of iusnaturalism, sees it as a child of natural law, which would be the only category that, in his view, guarantees the universality of Ius Gentium and contributes to the survival of humanity (Cançado Trindade, 2012, 49).

But Law exists regardless of the recognition of a particular conception of justice; so, morality that is not enshrined in law is not law. In the *case of South West Africa,* the ICJ found that humanitarian considerations may inspire rules of law, but that "such considerations are not in themselves rules of law. In order to generate legal rights and obligations it must have legal expression and form"(ICJ, Rec. 1966, pár 49). The name of Law cannot be denied because a current system or (unfair) norm does not embody (our) understanding of justice. Similarly, the validity and efficacy of a norm do not depend on axiological postulates, unless it has been enacted by the relevant channels in the international system, is in force, and effective.

In this regard, Kelsen's stance that the validity of norms does not depend on their content is pertinent (Kelsen, 1939, 39). Kelsen refuted the existence of values, of a formula for justice that is valid for all times and places, immutable, unique, and universal (Kelsen, 1992). International morality may constitute the ideological foundation that makes it possible to claim normative changes, as was the case with the *New International Economic Order*, but morality cannot on its own substantiate normative changes.

The vision expressed by E. Díaz, stating that *any legal order represents a perspective on the idea of justice* (Díaz, 1980, 385) and that there are criteria of justice for a given time that have rational objectivity would appear to be more accurate. The evolution of IL highlights how values have expanded beyond legal certainty and equality to encompass peace, dignity and solidarity; moreover, ius cogens has placed certain human rights at the

apex. Furthermore, the ethical dimension of the fundamental principles of contemporary international law, or the general principles of law, similarly cannot be denied within International law (good faith, abuse of law, pacta sunt servanda, obligation to repair).

In contrast to iusnaturalism, voluntarism and positivism currents moved away from values, seeking the notion of obligation in the will of States, either explicitly or implicitly. 19th Century Scientism sought to elevate Law to the dignity of science, an aspiration we have moved beyond today, not only as a result of Kirchmann's famous attacks but because the Law cannot be detached from reality (Latorre, 1992, 112). Hence, as Kirchmann points out in his famous study Jurisprudence is not science, in 1848 (regarding the lack of value of jurisprudence as science): "positive law has turned jurists into worms that only live off rotten wood, deviating from the healthy, they their make their nest in the diseased. As soon as science turns the contingent into its object, it becomes contingency itself; three rectifying words from the legislator make trash of entire libraries".

However, is it important to maintain a vision of the foundation in order to understand International human rights law. There are conciliatory theories between the extremes, such as *deontological isusnaturalism* (Fernández, 1999, 288), which is probably the most widely accepted by the doctrine of human rights, albeit unconsciously. Deontological isusnaturalism is compatible with *critical positivism.* It is possible to be positivist and defend values from that perspective, without returning to an iusnaturalist conception (Dominicé, 1997, 31). As noted by Peces-Barba (1995, 165) this *corrected positivism* is grounded in the notion that the basic norm for the identification of norms incorporates a dimension of morality into the constitution; at the essential core there are values, principles of organisation and fundamental rights.

Deontological isusnaturalism is compatible with moderate positivism, consensual theory, and the acceptance that the basis for the binding nature of the system and its principles and norms lies in the general consensus of the international community, and in consent to specific norms (treaties, customs etc..). We find this position to be the most appropriate, allowing the norms of IL to be assessed from an axiological perspective, while morality and values are not criteria of incorporation into the legal order, in the absence of consent. Hence, the principle of consent is relevant and introduces a large helping of relativism.

3.2. Justice, utopia and cosmopolitanism

International law has adopted a *finalist and transformative pro-human rights approach, as a means of overcoming the distribution of Kelsenian competences, which would be its minimum function.* It is not a neutral order in terms of its purposes. IHRL has an indebted finalist orientation from a utopian perspective and in terms of the cosmopolitan spirit. Utopia and the cosmopolitan spirit exist within many iusinternationalists.

Cosmopolitanism (Frouville 2015, 11; Rodrigo, 2016a, 29, 2016b) is a universalist mood of solidarity, arguing in favour of notions such as global citizenship. In this spirit, many peace projects have been drafted, in accordance with the ideal of peace through

law, which seeks to reach a cosmopolitan constitution, in the sense of Kant's *Essay on perpetual peace*, of 1795 (Goyard Fabre, 1994, 277).

Rodrigo (2016, 24) refers to Worldphalia (as opposed to Westphalia) as an as yet non-existent new organisational model, an analytical instrument that would describe a certain degree of sociability and a new type of law, characterised by the participation of non-state actors and NGOs and by the reduction of sovereignty. Human rights would be included within a category of global public goods, in which there is global public interest, which would have certain consequences. The notion of Worldphalia is still a hypothesis, not yet a reality; a discursive resource that helps to highlight certain aspects that are oriented toward an international public law (Bouza, García, Rodrigo, 2015, 29).

In the past, the distinction between the structures of coexistence, cooperation and community made by authors such as Reuter, Friedmann and Dupuy were encouraged in a similar way to constructive abstractions, through certain notions that seek to evoke the notion of general interest in international law. Undoubtedly, much of today's international law has been built on utopias of the past, such as international courts or organisations, so they are likely to be relevant still in the future.

Today's utopia is lege ferenda, a project yet to be realised, a driver for transformation. A good example of this is the *Universal Declaration of Human Rights* of 1948 (Dupuy, 1999, 436; Sur, 1987, 35) that pointed to a utopian horizon. There are also driving notions in the development of human rights, such as the notion of *mankind, humankind*, or *humanity*, rooted in traditional philosophical thought, which has contributed to the emergence of new fields, discourses and structures beyond the State. Humanity is not a subject of IL but rather an object of projection. According to Bedjaoui, it should be the subject *par excellence* (Bedjaoui, 1995, 441; Cançado, 2010, 281). Cançado considers it a subject. To my mind, it is a protected legal good, reflected in diverse international institutions, such as the heritage of humanity, envoys of mankind, the repression of crimes against humanity, humanitarian interventions, international humanitarian law (principle of humanity, etc..).

This notion evokes solidarity, collectivity, community, in a transtemporal sense, which supersedes the national interest of each State and consensus between them as an accommodation of interests (Carrillo, 1999, 115; Sucharitkul, 1984, 415) . It is a driving force for normative change that offers an inspiring vision of transformation towards solidarity. This notion is located in the collective imagination. The hope is that International Community Law will become the Law of Humanity. Jenks (1968) refers to the common law of humanity; Abi Saab refers to the internal law of humanity; Pureza to public order for humanity (Pureza, 2002). All sectors in which the notion of humanity is reflected are closely linked to human rights.

However this *notion has hit upon hard times*. New developments in international law on the heritage of humanity have not been carried out in a spirit of solidarity. The 2030 Agenda, the Global Compact for Migration, and the Guiding Principles for Business and Human Rights make no mention of this notion. If the agreement of 29 July 1994 regarding the seabed and ocean floor was a triumph for economic liberalism, recent developments for

the exploitation and utilisation of natural resources on the moon also sidestep the notion of the heritage of humanity. There is no consensus to push the notion forward. In this regard, Austria, Australia, Mexico and Bulgaria do consider that exploitation is compatible with the principle of the heritage of humanity, but this is not the case for Russia, or countries that, like the USA, Luxembourg or the United Arab Emirates have enacted domestic laws for exploitation (Prado Alegre, 2020); a working group, led by Greece and Belgium, is trying to reach a consensus. In relation to the Antarctic, the lack of agreement led the 1988 Convention to establish a moratorium on the possible exploitation of resources until 2048. There are other *driving utopias such as the sustainable development goals*. But alongside these driving forces, there are also other *braking forces*.

3.3. Legality and legitimacy

Is IHRL a legitimate order?. It is the historical result of an unequal and decentralised society, in which the Law is made by those who wield power, regardless of general interest. Values such as peace, dignity or solidarity do not drive the evolution of international law.

This leads us to consider *the legitimacy of the model of international International Law, and in particular IHRL.* The model for IL legitimacy cannot be like that of the State. Wheatley applies Habermas' *theory of deliberative democracy* to the international arena. He feels it is not applicable to the UN, but that it does apply to global regulatory norms that, ultimately, have been created through consensus among States. We do not believe that the assumptions of this analysis hold true, since there is no democracy in relations between members of the International Community. The fact that the legality of these norms is grounded in such a consensus is another matter. But legitimacy requires something else.

Legitimacy can also be analysed as *legitimation* (Habermas, 1991, 132), in the sense that order is an adequate response to social *needs*. In the world, there is a vast chasm between social needs and the Law. The inadequacy of the functional expansion of international order to encompass social needs generates a hunger for law (*faim du droit*). Chemillier-Gendreau (1998, 75) believes that a Copernican revolution of the current legal bases (*a global right to construct*) is necessary. But if international order did not exist, needs would be greater. In this regard, the *legitimisation of IHRL is partial.*

Legality is sometimes violated in search for *alternative legitimacy* and in the name of human rights. This was the case with NATO's humanitarian intervention in *Kosovo*, in 1999. Legality and legitimacy did not coincide. In such cases, the violation of legality is justified in the name of a new legitimacy. At the Nuremberg trial, the consensus of the victors went against the current law in force because it jeopardised the *principle of legality* and *non-retroactivity*.

In *Legal arbitrariness and supralegal law* Radbruch (1946, 1962) analyses the case of a person (Gottig) who wrote *Hitler is a mass murderer and to blame for the war* in a public lavatory, was denounced by a justice department clerk, Putfarken, and was executed for it (and for listening to foreign radio broadcasts). Even though Putfarken was acting in

accordance with the law in place at the time, he was later tried for his actions, which does not fit.. According to the prosecutor, anyone who at that time initiated legal proceedings against another should have known that the defendant would not have been given a fair trial but would instead be subject to arbitrariness; Or the case of a concentration camp guard who, when he saw the horror of what was happening, fled to neutral territory in Switzerland, and when he was about to cross the border of the camp, a guard went to stop him, and he killed the guard and fled. At the end of the war, his case would be dismissed. Such cases highlight *the relevance of power over and above the law, and in exceptional cases, of revolutionary change in Law and power*.

Something similar also happened in the context of decolonisation, where the *principle of permanent sovereignty over natural resources* would be used to nationalise companies without compensation; or in *revolutions such as the USSR, Cuba or China.* In these cases, *Alternative Law* wins, because it is supported by a new power, in a context of revolution. But in the absence of a revolutionary change, infringing the Law in the name of a new legitimacy is simply the justification for a violation.

4. Theoretical horizons of IHRL

4.1. Evolution or revolution

In the progressive development of IHRL, there has been a revolution in the pillars of international order. The values of classic international order were equality (sovereignty and non intervention) and legal certainty (a characteristic of any legal order). Values such as human dignity, peace or solidarity are typical of contemporary International Law. These values are in some cases incipient, or deficient, but they have penetrated the international legal structure. The *principle of the international protection of human rights* is the last to emerge in the International Community. It is not *expressis verbis* in the United Nations Charter, or in Resolution 2625, although it does appear in the final version of the Declaration of Helsinki. It is a principle that has not enjoyed widespread support, since it is a manifestation of international cooperation in international institutions.

The *principle of sovereignty*, which enjoys unanimous support, has been reoriented by human rights in matters such as diplomatic protection, immunities, and the right to asylum, and a classic understanding of sovereignty is no longer affirmed, now limited by human rights. Other principles have also been modified, such as the principle of non intervention (and the debate on humanitarian interference and the responsibility to protect), self-determination, the principle prohibiting the use of force in international relations, the principle of international cooperation, in dimensions that cannot be analysed here, but that are indebted to the evolution of IHRL.

Similarly, IHRL has transformed the *nature of obligations*. Whereas, within classic IL, such obligations were bilateral and reciprocal, nowadays there are erga omnes and non-reciprocal obligations. It has also led to the emergence of imperative norms or *Ius cogens*, the majority of which pertain to human rights and have introduced a hierarchy of values in contrast to the axiological relativism of classic International law. The law

of treaties has also changed, with the doctrine of nullity as opposed to ius cogens, the impossibility of making reservations contrary not only to the object and purpose of a treaty but to imperative norms (also within the European Union), the transformations that stem from the relationship between international law and domestic law, etc.

Despite these changes, some authors consider IHRL to be a "central component of subordination matrices", a "social factor of domination and exploitation", together with others such as racism, the patriarchy, capitalism or imperialism (Bachand, 2018, 183, 187). Peces-Barba said that we must be careful about brushing aside the utopia of modernity without yet having achieved it (Peces-Barba,1995, 13). Certain utopias such as those that led to communism were sustained through serious crimes against humanity such as Stalin's gulags (Applebaum, 2004, 665). More recently, attacks against modernity in Arabic countries have actually shored up theocratic dictatorships. Utopia has given way to *God's revenge* (Kepel, 2005, 24), as re-Islamisation groups in the Mediterranean have taken over from Marxist groups.

Revolutionary theses forget that, at an international level, it is more about what is missing than what has been achieved, but that there has been a small revolution that can only continue if it is based on the consensus of the international community. There is no State in which a revolutionary project can be implemented. Neo-Marxist proposals and so-called critical theory are lacking with regard to their applicability to international order. Certainly the ideas put forward by Theodor Adorno and M. Horkheimer (González Soriano, 2002, 290) in *The Dialectic of Enlightenment* could be argued today and for the International Community. Power and dominant ideology can be two sides of the same coin. The dominant ideology legitimises the oppressive reality of developed capitalism, which was the central idea expressed by these authors. Today, one might also consider the fact that communist countries like China are the best examples of capitalist market economies. Capitalism has evidently triumphed at a global level.

But even if this is the case, it is not applicable to IHRL on account of its nature. Like International Law, IHRL does not have a single author or a determining factor. However, *IHRL is a limitation to power in international society*. Domestic and international revolutions have ended up producing a new synthesis of the fundamental principles of international law, or excluding incompatible principles (Leben, 1990, 47). They adapt to the international system Both the Marxist-Leninist revolutionary State and the new States arising from decolonisation adapted to the principles of peaceful coexistence, which allowed for the universalisation of international Law between opposing States (Remiro Brotons, 1982, 59). International order has always been dogged by pathological crisis syndrome (De la Pradelle, 1974, 141).

The emanation of values such as *human dignity, peace, and solidarity* marked a *revolution in international order,* which was transformed in its pro human rights functions. A finalist or transformative international order that is reflected in the normative fabric. In this respect, the *theory of international constitutionalism*, which has been a beacon for human rights, and the idea of global public goods currently in vogue would be more accurate. Ferrajoli, in the wake of the pandemic, advocated a "constitution for Earth". We

have moved beyond the classic vision of IL by introducing the notion of*collective legal interest and a multilateral vision of IHRL*. Doctrinal positions on the idea of the International Community are varied (Dupuy, 1979, 27; García Segura and Vilariño, 2005, 194).

The idea of a Constitution relates to the features of supremacy, hierarchy, justice or values. Constitutional theories have been developed in the international order, fundamentally in the German and Italian schools of thought, which emerged as a reaction to the inadequacies of positivism and voluntarism. In contrast to law based solely on will, the pure theory of law emerges, along with social objectivism (Duguit, Scelle, Politis), the return to natural law (Piler, Le Fur, Salvioli, Verdross), and institutionalist theories (S. Romano) (Scelle, 1933, 501; Romano, 1933; Ziccardi, 1943).

A Constitution fulfils three functions: security, justice and legitimacy. Part of the international doctrine considered that the Charter of the United Nations was the Constitution for the International Community, based on Articles 1, 2, 6-2, 39, 103 and 108, which reflected certain constitutional dimensions. However, the United Nations does not represent the defence of general legal interests arising from the violation of obligations *erga omnes*, with the exception of serious human rights violations or in connection with the crime of aggression or denial of self-determination, ex chapter VII of the Charter (de Hoogh, 1996, 126). In our view, *the Charter cannot be understood as the constitution of the International community because it only partially fulfils constitutional functions*. In IL, security and certainty are not channelled through the United Nations, since creation and implementation procedures are on the margins, and the secondary IL norms that establish the procedures for the creation, change and application of the system are unofficial; similarly, in terms of the function of justice, values, ends and principles that can achieve or approach justice are not fully contained in the Charter. However, it could be said that the material Constitution of the International Community can be found in general IL and that human rights play a central role in this regard.

4.2. Justiciability and legality

Legality does not depend on justiciability. They are two different things. However, the greater justiciability of international relations, reflected in the proliferation of courts, including many human rights courts, is to be welcomed. Having moved beyond the debate on the existence of international order and accepted that it is different from domestic laws, there has been a proliferation of international human rights courts that ultimately respond to the maxim *fiat justitia ne pereat mundus*. There is a close relationship between peace, human rights, and the judicialisation of international relations. The proliferation of regional human rights courts (European, African, American) has broken apart the sovereignty-jurisdiction dyad, opening up new issues.

Each court is a self-contained system, which is not inserted into an international state structure, since there is no Kelsenian pyramid and no hierarchy between the courts. The link between the Courts is that they all pertain to the same galaxy of international order and are bound by basic rules. The turning point and centralisation of international order would be binding international jurisdiction (Leben, 1998, 291).

Courts have *consensual jurisdiction*, which introduces a large helping of *relativism*. Some international courts admit reservations and interpretative declarations (such as the European Court of Human Rights, provided they are not counter to the object and purpose of the treaty) and others do not (for example the International Criminal Court). The proliferation of Courts has broken interstatism, and *Ius standi* pertains not only to States but also to some individuals, which has greatly increased its role in human rights. In the ECHR, in UN protection bodies, and in the European Court of Justice, an individual may sue a State, which constitutes a revolution in International Law. The individual is an active subject of International Law. And an individual's passive subjectivity would come in play because, in other international courts (such as the International Criminal Court, or the ad hoc Courts for the Former Yugoslavia or Rwanda), he is internationally responsible for committing certain crimes against humanity. All of this has led to an individual being considered *subject to international* International Law.

However, there is no international court of human rights, and UN bodies and mechanisms also do not serve this purpose. *In 2008, Switzerland proposed the creation of an International Human Rights Court* (Callejón, 2015, 329), but this has not led to any significant developments. In any event, since the end of the twentieth century, there has been extraordinary development of international criminal courts, which constitutes a huge step forward in the fight against impunity for major human rights violations. *Nuremberg paved the way for an international criminal court*, but as a result of the cold war, it was not until the start of war in the former Yugoslavia that the ILC (International Law Commission) passed, in 1994, a *Draft statute for an International Criminal Court*, complemented in 1996 with another *Draft Code of Crimes against the Peace and Security of Mankind*. The 1996 Code of Crimes was very limited in the types of criminality included. In adopting the draft, the ILC made a statement indicating that "in order to reach consensus, the ILC has considerably reduced the scope of the code. In 1991, the list included twelve categories". The draft included *crimes of aggression, genocide, crimes against humanity, against United Nations personnel and war crimes.* With the exception of the penultimate one, the others were customary in nature. The others were not included because there were doubts about government support and because of the difficulties encountered with regard to their specification and elements. This was the case with *crimes of intervention, colonial domination, recruitment, use, financing and training of mercenaries, drug trafficking, terrorism or intentional and serious damage to the environment*

In this context, the ad hoc Tribunals for the former Yugoslavia and Rwanda and the ad hoc Tribunals for Lebanon, Sierra Leone, and Cambodia were established. As a result, the greatest progress came with the creation of the *International Criminal Court*, which, in the words of C Bassiouni, when the Statute was passed on 18 July 1998, ushered in *a new era in the history of international criminal justice*. It was a giant step.

4.3. Sustainability: Progression or regression of human rights

Is the legacy of IHRL consolidated*?* In contrast to the ostensible enlightened idea of progress, we are not safe from regressions in human rights. Human rights have always found it hard to forge a path. But before, there was a shared horizon. Globalisation has

called social rights into question. The doctrine takes for granted the consolidation of rights, but they are not a dogma of faith. Globalisation and the weakening of the State, the degradation of liberal democracy, nationalism, and populism have triggered a crisis in human rights. The old enlightened dream of human rights appears to be in crisis, and the meaning of human rights must be reclaimed (Dupuy, 2018).There must be *renewed consensus on human rights* without pushing it as dogma.

This requires dialogue between civilisations, taking into account the multipolar society in which we live, so that human rights can constitute a shared universal minimum. Agendas that foster human rights must also be promoted. The 2030 Agenda and the Sustainable Development Goals are extremely relevant with regard to human rights. More than half of the SDGs pertain to human rights. The 2030 Agenda sets out a great journey in favour of human dignity in which no one should be left behind, according to the UNGA (Fernández Liesa, 2017, 29). This horizon can lead to frustration if the indicators show no progress after time.

There are other difficult issues for sustainability, such as the 2008 financial crash or the current pandemic (COVID 2019). The financial crisis increased the deficit and public debt, highlighting the clash between the State's financial obligations and its human rights obligations (Soroeta Liceras, 2012, 555). In this instance, the legal bases and the various bailout programmes failed to take into account the impact on human rights. The coronavirus epidemic has also called into question many rights. The obligations of States under art 2 of the 1966 Covenants might be unfulfilled due to lack of resources, which will undoubtedly come to pass in many parts. The effectiveness of rights depends not only on norms, but also on the State having the necessary resources for proper administration of justice, democracy and public services.

There are certainly rights that cannot be suspended or restricted under any circumstances (General observation nº 4, 24-VII-2001, CPR), such as the right to life, not to be subjected to torture, the prohibition of slavery, the prohibition of imprisonment for contractual obligation, the recognition of legal personality, freedom of thought, conscience and religion, the right to humane treatment, the prohibition of hostage-taking, non-discrimination, forced transfer or deportation without grounds authorised by International Law, prohibition of war propaganda

Global consensus on the UN's enlightened idea of human rights and the 1978 Constitution could also be eroded. For Kissinger, the pandemic had led to the rebirth of a walled city at a time when prosperity depends on global commerce and the movement of people. The transition to a post-COVID order must safeguard the principles and premises of IHRL (Kissinger, 2020), from the only human rights model that has existed.

It will face the resurgence of nationalisms, populism, xenophobia, extremism, and a lack of solidarity. It will also have to deal with the fact that achieving human rights entails not only addressing the right-obligation dyad, but also channelling the best way to achieve objectives through public policies. However, reaching the best policies is not an exact science. The margin of appreciation afforded to States (Legg, 2012, 213) obscures

the best policies on human rights. In addition, the *principle of free choice of the political, social, and cultural system*, a manifestation of sovereignty, also makes it hard for policies to be precise. And even though knowledge has increased, we still face the paradox pointed out by Innerarity in *The democracy of knowledge* (2011, 68) that the knowledge society is bringing about the end of knowledge authority. Experts are instrumentalised by those in power to justify political decisions previously taken, the author says. Finally, there are many factors that condition human rights that cannot easily be turned into the subject of human rights norms, such as globalisation, the weakening of the State, the economic model, the digital revolution, poverty, sexism, nationalism, multinationals, racism, fundamentalism, the lack of international consensus, or the absence of full democracy. According to J. Sacks, the international economic dynamic represents a threat to the planet that has a very negative impact on human rights, but that does not depend on IHRL. Controlling climate change, ocean acidification, depletion of the ozone layer, the excessive use of nitrogen and phosphorus as a result of the intensive use of chemical fertilisers for agriculture, overuse of fresh water, land use etc.. are phenomena that affect human rights but that are much more far reaching, and would require a holistic approach by international society, in the general interest of all, virtually non-existent today.

4.4. Effectiveness

The war in Syria, conflicts (Libya, Ukraine, Colombia), genocides (Cambodia, Yugoslavia and Rwanda), dictatorships (URSS, Portugal, Spain, Argentina, Chile, Turkey...), torture (Guantanamo, Abu Ghraib), poverty or hunger are examples that give us cause to reflect on the effectiveness of human rights.

The ineffectiveness of human rights might lead us in some cases to ponder their invalidity. But this is not the angle of reflection. IHRL serves to guide the behaviour of States in one direction, to assume their obligations and to see that they are a limit on their behaviour, which could be subject to international supervision. But there are enduring violations. For example, trafficking in human beings is an international business that moves more than 150 million euros a year. A lack of norms is not the problem, but rather their ineffectiveness, which is also seen in national society. The Supreme Court ruling 396/2019 of 24 July 2019 (speaker Sánchez Melgar) is very enlightening in this regard:

> "Trafficking in human beings (…) once in our country, abused people are forced to practice prostitution in various hostess bars, dotted around the country, as places were human dignity is seen as insignificant, in order to profit from women who have been brought into the country, objectified, seeking to earn maximum economic returns, while these people are being exploited. We do not have to travel to distant countries to see slavery up close in the 21st Century. It is present in nearby places, by the roadside, where there are one or more hostess bars in which people are forced into prostitution, enslaved, people who are brazenly bought and sold by different establishments, as these people are abused to pay for the one-way ticket to their debasement".

Hence, one of the biggest challenges facing human rights is to achieve greater levels of effectiveness. Indicators are increasingly being used to assess whether human rights are becoming more effective. Currently, the right-obligation dyad appears to be insufficient to advance IHRL. Indicators and objectives are taking centre stage in the search to increase the effectiveness of rights through plans and programmes, and through statistical measurements. These include indicators such as those of the UNDP (life expectancy, levels of education and nutrition, together with others such as per capita income, public spending, inequality coefficients, health indicators, gender disparity, perceived wellbeing, human security), the *Democracy index* (by *The economist*), (electoral process, pluralism, freedoms, political participation...), *Rule of law index report*, drawn up by the *World justice Project* (corruption, justice system, judicial independence, powers...), *Freedom House* (free countries, semi-free countries, and countries without freedom), rankings for human rights sentencing, femicide rates, criminality, corruption, health, happiness, etc.. Many of the major issues such as the *Sustainable Development Goals (2015), the guiding principles for businesses and human rights (2011), and the Global Compact on migration (2018)* are part of *soft law*. Beyond the right-obligation dyad, it will be more important to measure progress in terms of effectiveness indicators, which would allow us to move beyond discourse and evaluate the practical relevance of IHRL.

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