

АКТУАЛЬНЫЕ ВОПРОСЫ МЕЖДУНАРОДНОГО ПРАВА

HUMAN RIGHTS AS AN ESSENTIAL ELEMENT OF CONTEMPORARY INTERNATIONAL COMMUNITY

Renato Zerbini Ribeiro Leão

The Department of Juridical Sciences and Social Sciences
University Center of Brasilia
SEPN 707/907 - Asa Norte Brasília - DF - CEP: 70790-075

These are the main challenges to be faced by Law and, above all, by human rights at this beginning of century. It is due to this reality and to the challenges resulted from it that we believe in the prevalence of reason of humanity over the reason of State. If there is a universal crisis, it is not only one of the State or its values, but a crisis of the human being himself.

Key words: human rights; international public law; United Nations Organization; contemporary international community; global multipolar disorder.

I — The Spirit of the Contemporary International Community

The preambles of international treaties are ethical, historical, moral, political and social justifications of these international normative documents' need for existence. They are the source of civilizational inspiration of the constituent norms of a Public International Law juridical document. As a consequence, they humanize the cold letter of an international norm and show, succinctly, to the international society of that time the way of understanding the subject on the agenda for a treaty.

The preamble of the Universal Declaration of Human Rights is characterized by existential logic. From the proclamation of the Universal Declaration of Human Rights, on 10 December 1948, all the countries of the world, including those that have not undergone the long historical process of formation of the modern democratic and liberal State, have at their disposal an international code to decide how to proceed and how to judge one another. This code is not only universally applicable but also encloses precepts that have value in areas previously not taken into account in the Constitutions of Western States [1]. Unlike other periods, currently the international norms forbid any type of "inhuman or degrading treatment". There was a time in which any indictment was limited to citing particular governments that were careless of the interests of its population, nowadays these governments can be indicted for violation of international norms which state, for instance, the right to food, to a dignified dwelling, to a healthy environment, etc [2]. At the beginning of the twenty-first century the principle of affirmation of human dignity prevails.

Recognition of Human Rights in the world scene developed discreetly at times, effusively at others, along with the development of International Relations. Between the seventeenth century and the beginning of the twentieth century, international relations were substantially kept among the entities of the sovereign governments in a relatively wide territory and upon the population established therein. Cassese points out what were the three main characteristics of the international community at the time [2. P. 17–21]:

1. The States lived in a state of nature.
2. A setting moved by a principle that constituted the necessary consequence of the individualistic relations existing among members of that anarchic society: *the principle of reciprocity*. Said principle means fundamentally that norms among associates were governed mainly by bilateral agreements or, in particular cases, multilateral ones; nevertheless all were based on mutual advantages for the contractors.
3. The peoples and the individuals lack influence. Individuals appear as passive subjects of international law, meaning they were only subjects of international obligations whom sovereigns could and should fight against with all their power [1. P. 766–767; 3].

At that time, Human Rights were confined within the borders of the States by the principle of state sovereignty; nevertheless, when they are no longer considered matters of exclusive jurisdiction of sovereign States and “become inserted among the prerogatives of the international community, [human rights’] defense begins to take place independently of territorial limitations imposed by the States” [4. P. 61]. The characteristics aforementioned were basically kept without great transformations until the middle of the nineteenth century, when a small flame would cast a new perspective upon the political and juridical setting of the time: the theory of nationalities passionately advocated by Pasquale Stanislao Mancini. This theory expressed the importance of the various nations, “human clusters united by a common language and culture, by common traditions and costumes” [2. P. 21]. It impersonated, moreover, the ideals of the leading classes of particular European countries and remitted its consequences to a metajudicial sphere as an ideal of political action [5].

The rights of man are based not only on invariable natural law theory-formulated values. Canotilho teaches that “all theorists of rationalist natural law concerned themselves with the State’s justification and with dominion legislation”, forgetful that “the bourgeoisie’s lack of political freedom would constitute one of the main incentives to the fight for the rights of man.” He remembers, moreover, that a careful historical and juridical study connecting those two threads of analysis is capable of showing that “Locke’s doctrine, along with Rousseau’s, saw freedom as freedom within the State-society — these combined as undifferentiated political bodies — contrary to physiocratic doctrines of the natural order, conducive to the exclusive understanding of a freedom before the State” and it was the evolution of “this doctrine that would end in a sort of “*Statuslehre*” of G. Jellinek, in which freedom rights practically were no longer the ones of Rousseau or Locke, but *juridical self-ties* of the State now seen as a juridical person” [6. P. 359–361].

II — Positivation of Human Rights in the Post Second World War

Human Rights, as currently conceived, meet a true turn of historical direction at the setting staged first in 1917 and, later on, in 1945, with the end of the First World War and the conclusion of the Second, respectively. During the post Second World War period another phenomenon of the international community is apparent: a natural law theory of human rights is launched, its content aiming to take into account the relations between each State and its citizens [7; 8. 659].

The origin of the United Nations Organization [9] is strongly intertwined with and influenced by the ending of the Second World War and by its winners' ideologies. As a consequence, the Security Council, UN's supreme body of decisions, had been under the influence of the winners of the aforementioned global armed conflict's ideals since its creation. The Council, represented by the five countries who won the Second World War — the United States, the United Kingdom, France, China and the former USSR [10] — mirrored the political, social, economic and military ideals of each one of those powers. Fundamentally, it was the arena for a duel among the great Western democracies and the countries of Socialist Europe.

The five great countries, that represented clearly two opposing ideological chains diametrically rooted at the core of the UNO, would mark the precipitated and imprudent division of human rights into civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand. One applauded freedom of expression, thought and religion, and individual rights in general but worshipped liberalism as the unquestionable path of the world economic scene; the other, though contrary to human rights at first, as it defended Socialist pillars, proposed extremely important rights, as are the cases of the principle of equality (that is, the prohibition of prejudice based on race, color, gender, language, religion, political opinion, nationality, property, etc), the right to association, the right of self-determination of the colonial peoples, among others.

The Soviet Union was contrary to the discussion on human rights not only because of the Stalinist government's authoritarianism, but also due to the weight of Marxist thought. The traditional concept of human rights based on natural law tradition is founded on three pillars [2. P. 39]:

1. These rights are inherent to the human person and spare any positive recognition (they exist even when negotiated by the State).
2. The natural order sustaining them is wholly valid and immutable, sparing the individual's social context.
3. These rights are intrinsic to the individual as such, not of social groups.

Marx simply rejects these three principles and supports that the human rights acclaimed by the Capitalist society were a mere manifestation of the bourgeoisie, a mere expression of the demands of said class [2. P. 39; 11]. In this sense, rights and freedoms have only instrumental value and are useful to more swiftly subvert the existing order. Contrarily, these values are no longer useful in a Communist society because it carries out integration between the individual and society. Marx proclaimed that social justice and human dignity brought elements that transcended the States'

borders, such as the social conscience of being part of a working class wherever one may be [4. P. 63], meaning that the Human Rights doctrine was in conflict with the going ideology and practice in the USSR [12].

Therefore, the international setting in 1945, time of the establishment of the United Nations Organization, showed the USA's domination in the West, both in the military and economic fields, as well as on the confirmation of a vigorous cultural model that gained impressive world diffusion. In Eastern Europe, Stalin in harvesting the fruits of victory makes the USSR the second power on the planet, expanding the Soviet regime to the countries on that region [13]. On the other hand, decadence of colonial empires and the emergence of new superpowers established the roots of decolonization and the appearance of the then called Third World [14].

In this context, the setting of the diplomatic-political discussions at the heart of the UN was being formed, as was the path for the development, the coming into being and the approval of the Universal Declaration of Human Rights, and of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which altogether comprise the International Bill of Human Rights.

This historical reality causes the preamble of the Universal Declaration of Human Rights (UDHR) to defend the affirmation of the individual as a subject of Public International Law (PIL). Therefore, it is a factual and jusphilosophical structure consolidated on an idea sprung from sequential logic sustained on the contemporary subjects of PIL: the States, the international organizations and the individuals. That is, through the celebration of an international treaty, States create international organizations that under their sponsorship, and in whose bosom, do facilitate the dawning of international treaties on human rights, which the individual emerge from as a subject of PIL, being entitled to arraign his country for violating one of the norms of an international treaty on human rights. This is also a self-feeding process. Therefore, one can state that the Preamble of the UDHR is the political consecration of the passage of an international community, especially under the standpoint of PIL — State-centered— into an international community that replaces the individual at the epicenter of its discussions [15].

The great documents and international treaties on human rights emerge with this replacement. Moreover, starting from the consolidation of the UNO and of the International Bill of Human Rights, all national Constitutions promulgated since then contained the norms, principles and values included in these international instruments for the safeguarding of human dignity. Thus the great majority of human rights were being materialized. Is it important to say that a large measure of human rights were consolidated into fundamental rights, for, in the light of the voluntarism-based rigor of Public International Law, fundamental rights are no more than human rights molded into the norms of international treaties and the Constitutions of the nation States [16. P. 37–39].

III — Human Rights in the Large Conferences Preceding the Creation of the United Nations

Some of the political personalities of the time attended the preparation conferences for the production of the UNO and contributed to the historical development of human rights of that supranational institution. Thus the speech of USA president, F. Roosevelt, on January 26, 1941, before the American Congress represented one of the promptest constructive and nominative precedents of human rights international law, which would serve to set the pace for, and inspire other UN treaties and international documents — including those that consolidate the International Bill of Human Rights. This speech exhorts the construction of a world based upon four fundamental freedoms: freedom of speech and expression; freedom of cult and religious belief; freedom of want, of being free from poverty and need; and the right to be free from fear, meaning a world-wide reduction of armaments [17. P. 35–36].

In the field of Human Rights, reflections of the speech were so striking that during the Sixth Session of the United Nations Human Rights Commission, on May 9, 1950, the representative of Yugoslavia pointed out that for Roosevelt there could not be a free society without economic rights. Likewise, the Rapporteur of the General Assembly's Third Commission highlighted before the plenary session of the organization held on December 9, 1948, at the moment of the UDHR's approval, that Roosevelt's words "sincerely and clearly translated the aspirations of the twentieth-century man" [18. P. 853].

Another document, which the preceding history of human rights in the UNO specially harbors, is the Atlantic Charter [19], signed by Roosevelt and Churchill on August 14, 1941, and whose principles would come to be interpreted as being the first official formulation of the war's goals and the fundamentals of peace to the Allies [20]. It is important to point out the place reserved to individual freedoms and to human rights, and — definitely — the four fundamental freedoms mentioned by Roosevelt that were contemplated therein. The Charter's Article six states:

After the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all lands may live out their lives in freedom from fear and want [21].

It is important to emphasize that this article was also defended by the representative of Australia: at the moment of his country's adhering to the document, he sustained that the right to living "free from need" should be recognized. The intervention of the representative of Cuba treaded the same path, as he proposed the inclusion of another norm regarding the right to food to the text.

The Declaration of Philadelphia [22] is also a document of crucial importance to the shaping of the international human rights forum in the UN, and although proclaimed in the preceding history of said supranational organization, it intensely reflected on the success of the International Bill of Human Rights. The Declaration proclaimed, among other topics, the imperative of social justice; established a new listing of the workers' rights, including the conditions that allowed his employment; and

foresaw the duty of carrying out a wider and more complete use of the world's productional resources [23].

The main goal of the Conferences sponsored by the world's powers in the period imminently prior to the conception of the UN surely was the maintaining of peace and international security, nevertheless the thread of human rights never ceased to feature as part of the essence of such documents. The previous statement can be proven once the Dumbarton Oaks Conference [24], held in October 1944, is analyzed for throughout its duration the creation of an organization that would come to fairly ensure the keeping of the peace and of international security was proposed. Independently of the ideological conflict sponsored by the powers of that time and present at the Conference, the North-American delegation obtained the necessary support of the participants to include in the Charter of the United Nations an explicit mention of the promotion of human rights as a means for "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations" [25]. As a consequence, chapter nine of the Dumbarton Oaks Proposals provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms. Responsibility for the discharge of this function should be vested in the General Assembly and, under the authority of the General Assembly, in an Economic and Social Council [17. P. 41–42; 26].

The importance of Dumbarton Oaks is fundamental for the current state of human rights in the UN: the ideas that would give origin to the Human Rights Commission — as conceived today and under the supervision of the Economic and Social Council (ECOSOC) — emerged then. The Council had a deciding role in the drafting and codification of the articles that comprise the documents of the international charter. The proposal stated that [27]:

The Economic and Social Council should set up an economic commission, a social commission, and such other commissions as may be required.

The United Nations Commission on Human Rights is not explicitly mentioned in the text; however a norm leaves room for the possibility of it coming into being in the future. Hence, the document approved in Dumbarton Oaks, explicitly and for the first time, established an international commitment towards the promotion of human rights.

The Yalta Conference, held from 4 to 11 February, 1945, at Crimea (USSR), also had capital relevance on the historical bringing about and solidification of human rights in the UN. At the Conference, the United States, the United Kingdom and the USSR [28] published a declaration in which they complimented the resulted achieved in Dumbarton Oaks and called for a United Nations conference, to take place in San Francisco, from April 25, 1945, with the main goal of maintaining peace and international security.

Particularly with regards to human rights, the Yalta Conference determined — through an adopted document denominated “Declaration of Free Europe” — the establishment of democratic institutions and the commitment that, whenever possible, free countries would implement — by way of democratic elections — governments which would be the expression of their peoples’ will, thus building an international order inspired by the laws of peace, security, freedom, and the well-being of humanity as a whole.

The future of human rights had the Inter-American Conference of Chapultepec [29] as of one of its most outstanding precedents. The goals of the assembly were to deal with issues regarding war and peace. The Conference staged a deeply crucial historical fact for the theme under discussion: the adoption of a final act including a series of pilot resolutions on the matter of human rights. After mentioning that the Declaration by United Nations, signed in 1942, had sanctioned the necessity of establishing an international protection of human rights, the Act stated that it was necessary to not only to list and/or define these rights, but to also list its corresponding rights in a declaration to be adopted by the nation States under a Covenant or a Treaty. Its Resolution 41 is highlighted, for it stipulated that world peace could not be consolidated while man was prevented from exercising his fundamental rights, without racial or religious prejudice; moreover, it proclaimed the principle of equality of rights for all human beings, regardless of race or religion [30].

The inter-American contribution to the affirmation of human rights in the UN was also mounted on the repercussion of the right to an effective means before the national courts. From a material normative perspective, this was extracted from Article 18 of the American Declaration of the Rights and Duties of Man (dated April 1948) to Article 8 of the Universal Declaration of Human Rights (dated December 1948), the former precursory to the latter [31. P. 17].

As there was no longer war on European ground, from July 17 to August 2, 1945, the Potsdam Conference took place in Berlin. The new leaders of the great Powers attended it: Harry Truman succeeding Roosevelt (deceased on April 12, 1945), Clement Attlee representing the United Kingdom (Churchill would come to lose the British elections) and Stalin representing the USSR. There it was established that the Allies would give another opportunity to the German people to prepare for the reconstruction of their lives on a foundation of democracy and peaceful cooperation to the international living.

IV — The Affirmation of Human Rights in the United Nations Organization

The United Nations Organization was brought in to being during the San Francisco Conference, held from April 25 to June 26, 1945, in the USA. The treaty that comprises the statement referred to as the Charter of the United Nations (or UN Charter of San Francisco) was signed on June 26, 1945, and came into force of October 24 of that same year, at the moment that it was ratified by the USSR, the USA, China, the United Kingdom and France — the Five Big Powers — and by the majority of the founder-States of the international organization, which attended the Conference [32].

The formation of four sharply defined clusters that maintained a strong influence in the discussions, development and shaping of the human rights doctrine at the core of the UNO [33] was noted since its foundation. A group of Western countries — that swiftly took over the political lead of the Institution and had the United States, France and England as its political and ideological mentors — followed by various other countries of the political West, among which was Australia. A second group constituted by the Latin American countries that, from the beginning, seized the human rights cause, frequently making significantly more advanced decisions in this field than the more developed countries of that hemisphere themselves. The bloc of Socialist countries — in conformity with their principles and ideas — endowed with extreme political caution and generalized mistrust accepted to cooperate in the advancement of human rights. And the Asian countries, except for those Moslem nations ruled by Saudi Arabia and Pakistan, had little to do with the initial conversations on the subject [2. P. 40–46].

In spite of the four above-mentioned clusters, the majority of the political and ideological confrontation took place between the West and Socialist Europe. Such fact can be verified through the conversations held throughout the years under study (1945-1966) and confirmed by the composition in charge of reconciling and elaborating the different proposals and thesis that emerged from the discussions. The Drafting Committee was consisted mainly of members of the Western chain and by the USSR, as follows: Australia, Chile, the USA, France, Great Britain, Lebanon and the USSR.

The conversations then held at the United Nations embodied the political and diplomatic context of the Cold War [34]. The Charter of the United Nations, in regards to human rights, contemplated norms far removed from the expectations and hopes stirred by President Roosevelt's declaration, in 1941. In fact, each one of the Big Powers victorious from the Second World War was bringing problems to the moment of the Charter's drafting in the human rights field: racial discrimination in the USA, and lack of freedom and political expression in the USSR.

The articles of the UN Charter of San Francisco do not allow for a clear and accurate definition of human rights. The document is limited to mentioning the promotion and developments of those rights, which were considered one of UN's goals, alongside with its other main goal: the maintenance of international peace and security [35].

The paramount and historical relevance of the Charter of San Francisco — from the perspective of Public International Law — stands out in the positivation of the general principles that direct friendly relations among States. These are enlightened throughout its Articles 1 and 2: sovereign equality of the States; autonomy, non-intervention in matters within domestic jurisdiction of any State; refrainment from the threat or use of force; peaceful settlement of international disputes; international cooperation; respect for human rights; and good faith in fulfilling international obligations [36. P. 91–140]. The United Nations Charter is the first great universal international document that registers those principles in such explicit fashion. Those are the seven general principles of contemporary Public International Law.

V — The International Bill of Human Rights

The International Bill of Human Rights is formed by a set of documents consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and its two Optional Protocols. In 1945, the world was distinctly split in two political-ideological threads that directed the international system towards spinning around a bipolar nature led by the USA, on the one hand, and the USSR on the other.

The USA were leading the Western Capitalist countries that defended liberal democracy as the only political regime capable of promoting respect towards the fundamental freedoms and rights, and the full development of individuals, under both economic and political viewpoints. The USSR commanded the Socialist bloc that held — in social or real democracy [8. P. 324–325; 37] — the key to the elimination of social inequalities and the means for the establishment of universal peace, as Socialist countries did not engage in war against one another [38. P. 175–192].

The briefing of the United Nations Preparatory Commission of 1945 originally recommended the creation of a human rights commission to draft an international declaration of rights. The completion of this document, the fourth and last step in the masterpiece of creating the UN, obtained, as it did in the three previous stages [17. P. 69]:

1. Approval of the Proposals of Dumbarton Oaks (adopted in 1944) completed by decisions made at the Yalta Conference (February 1945).

2. Signing of the Charter of the United Nations in San Francisco that created the UN and institutes the Preparatory Commission (on June 26, 1945).

3. London Conversations (from August 16, 1945) sponsored by the Executive Committee of that Commission, in charge of elaborating the briefing.

The document made by the Preparatory Commission regarding the Economic and Social Council (ECOSOC) established in its chapter III, section 4, paragraphs 14 and 16, the creation of the *United Nations Commission on Human Rights* (UNCHR), whose activities would be oriented by and international declaration on human rights.

The Nuclear Commission on Human Rights was founded at the First Session of the Economic and Social Council, by way of the Resolution 5 (I), dated February 16, 1946, and it consisted of nine members appointed based on their individual capacity [39].

After various argumentations and political opinions about the subject, the Commission on Human Rights met for the first time from January 27 to February 10, 1947, at Lake Success, and it comprised the following members: Chairman, Mrs. Roosevelt (USA); Vice-Chairman, P. C. Chang (China); Rapporteur, Ch. Malik (Lebanon), W. R. Hodgson (Australia), O. Ebeid (Egypt), R. Cassin (France), H. Metha (India), G. Ghani (Iran), T. Kaminsky (Belarus), C. P. Romulo (the Philippines), Ch. Dukes (the United Kingdom), V. F. Tepliakov (USSR), J. A Mora (Uruguay), Ribnikar (Yugoslavia), Lebeau (Belgium), and Guardia (Panama).

At this session, the elaboration of a preliminary project of the International Declaration of Human Rights was assigned to the chairman, the vice-chairman and the rapporteur, to be submitted for discussion and approval by all the members of the Commission at the following Session, in December 1947. Due to the lack of adopting a proper geographic division for the election of the Drafting Group's members, this decision was targeted by criticism from ECOSOC, and the procedure for elaborating the project was modified according to ECOSOC Resolution 46 (IV), dated March 28, 1947.

A new Commission, based on a more equitable geographic division, was appointed and met in Lake Success from June 11 to July 5, 1947, initiating the drafting works. It was comprised of the following members: Chairman, Eleanor Roosevelt (the USA); Vice-Chairman, P.C. Chang (China); Rapporteur, Ch. Malik (Lebanon), Ralph L. Harry (Australia), M. Santa Cruz (Chile), Renй Casin (France), Geoffrey Wilson (the United Kingdom) and V. Koretsky (the USSR).

As per solicitation of its chairman, the Commission adopted a project proposal of the declaration on human rights prepared by the UN Secretariat (Human Rights Division in the UN Secretariat, directed by Canadian jurist John P. Humphrey) as its first preliminary draft, which comprised a preamble and 48 articles [40].

According to members of the Human Rights Division, the document's main quality was the attempt to "provide the questioner with an affirmative answer as to whether reaching an agreement about a universal precept on matters of human rights was possible" [17. P. 76].

A lengthy and controversial discussion surrounded the atmosphere of the UNCHR and the Drafting Committee. International jurists and social scientists broadened the scope of discussions basing on distinct ideological thinking that were laying foundation on the world scene — and were arousing enquiries and questionings about the individual's freedom before the forces of collectiveness, about moral judgments in the industrial society, about the natural law principle of consecrated rights, about the inclusion of economic and social rights in the upcoming declaration of rights, and even about the relations among individual and social rights, and their differences in implementing each category of rights [41. P. 35–37].

The drafting work of the future declaration was uninterrupted: starting from a first preliminary draft consisting of a preamble and 43 articles prepared by R. Casin and other Commission members, the Drafting Committee submitted two project proposals to the Second Session of the UN Commission on Human Rights for considerations and alterations into a final version.

During the Second Session of the Commission on Human Rights [42] it was decided [43] to name the first document *Declaration*, the second, *Covenant*, and the combination of those, *Bill*; henceforth the title "International Bill of Human Rights" would designate the set of three documents being prepared. Three working groups to examine separately the documents were formed, and from their reports the Commission on Human Rights prepared two texts — one for the declaration, and the other for

the covenant — which were sent to the governments for due consideration and suggestions.

The two documents — the Declaration and the Covenant — with the governments' proper proposals were, then, edited at the Second Session of the Drafting Committee [44]. The methodology used was the initial appreciation of the Covenant, followed by analysis of the two other documents that would comprise the International Bill. Such process lacked support from the USSR and Lebanon representatives, as they favored to firstly analyze the Declaration, that is, to start with the fundamental principles, and then proceed to study the Covenant and the measures for its execution [45].

During the Second Session of the UN Commission on Human Rights, held at Lake Success, from May 24 to June 18, 1948, only the Declaration proposal was reviewed and the amendments suggested by the various representatives were taken into consideration. Therefore, there was not reasonable time to review the Covenant and the execution measures. The CHR informed ECOSOC in its report [46] that the Commission had not fully completed its obligation, that is, it lacked appreciation of the Covenant and of the execution and/or application measures, and it suggested this task be completed at the Fourth Session of the Commission, in 1949.

ECOSOC sent the declaration project to the General Assembly, the Third Committee — in charge of social, cultural and humanitarian issues (SOCHUM) — of which was assigned to analyze it and formulate suggestions. The Third Committee concluded it best to edit only the Declaration, as it understood itself not to be in condition to carry out a deeper study of both documents. Moreover, the Committee approved the initiative of the Haiti representative, which established the universal character of the document, as well as the amendment from France, changing the word “international” for the term “universal”.

Thus the UN General Assembly while gathered in Paris (at the Palais de Chailot), on December 10, 1948, for its Third Ordinary Session adopted the Universal Declaration of Human Rights through its Resolution 217 A (III), by 48 in favor, 8 abstentions and none against [47]. The Universal Declaration legitimized the international community's concern about the promotion and protection of human rights by condemning concrete and persistent violations, including those in armed conflicts, and selecting out the elimination of extreme poverty and social exclusion as international priorities. Thus, having contracted these obligations in front of the international community, the States could not then, as currently they also cannot, affirm that the subject is exclusive to domestic jurisdiction [4. P. 70].

VI –UDHR Preamble contrasted with current International Relations

In this context, the Preamble of the UDHR registers the ethical, historical, moral, political, social and juridical realities that culminated in its proclamation. Thus it consummates the general principles of Public International Law [49] clearly stipulated in Articles 1 and 2 of the *Charter of San Francisco*. The conjunction of the latter with records of the former consolidates the Preamble as the source of enlightenment of the

international community's contemporary law. The Preamble was constituted, then, as a cogent consideration of historical, political, social and juridical developments that characterize contemporary human civilization.

As taught by Canzado Trindade: “(...) *the principles of International Law shed light on the interpretation and application of International Law as a whole, pertain to the very substratum of this latter, and are identified with the very foundations of the international legal system. They permeate every legal system. Their continuing validity is beyond question. Principles of International Law are essential to humankind's quest for justice, and of key importance to the endeavours of construction of a truly universal International Law*” [50. P. 110].

In view of a brief but not careless historical review, at the beginning of the twenty-first century the ideological pressure of the past — expressed by the political-economic thinking and the military power of the Big Powers that won the Second World War during the period promptly after the outcome of that sad episode in the history of humankind — no longer exists. For this reason the catalyzing phenomenon for the inconsequent division of the two threads of human rights vanished. Nowadays, the global and harmonious character of human rights takes the center of discussions of the international agenda. However, in spite of so much being spoken about a supposedly globalized world, we are found precisely in the middle of the fight of the reason of humanity's primacy over the reason of State. The indisputable fact that knowledge is perhaps the most effective form of human emancipation, and that comprehension of the world we inhabit — so complex and dissimulated — is intimately connected to human knowledge abounds. The limits of said human knowledge will foster the sense of human solidarity, of careful attention to someone else's condition, for ultimately we are all interdependent and one's fortune is inexorably connected to other's.

Sublimely, contemporary democracies lack an urgent updating before current society's characteristics: more informed, educated and closer. Winning back the representational legitimacy of its political classes is urged to the States. It is a social clamor: people are “politically full” and give off dangerous signs in this regard, including in countries where threats to democracy appeared to be out of the question. In the human rights association it is impossible to speak of democracy where fundamental rights are crushed, the State of Law is despised, and politics and citizenship are deprecated. Contemporary States, rooted in the principles of human rights, are dependent on ethics, moral and social justice to, apart from the principles of contemporary history (freedom, equality and fraternity), be consecrated as legitimate in front of its citizenship. The previous affirmation is an indisputable condition of the contemporary State.

As a consequence, moving these ideas into the set of States or into the international scene, and confronting as well the affirmation of various theorists and jurists guardians of the *status quo*, I count myself among those who, like Ash [51], defend the fact that we are immersed in a new order, or better said, a global multipolar disorder in which is noted the end of the unipolar moment where supremacy of the *hegemon* — that puts effort into diminishing the precepts of international law and of

international relations' multilateralism — had seemed invincible. This new multipolarity is a product of, at least, four tendencies:

The ascension or reappearance of series of States that prosper or are re-born and whose energy resources compete against that of the traditional powers of the West.

The growing power of non-State actors. These can be very distinct. They include from NGOs, to pharmaceutical and energy companies, from the so-called “autonomous” regions and religious groups, and land on movements such as the Hamas, Hezbollah and the Al-Qaeda. They are actors who, despite still lacking official appointment or capacity, are perfectly capable of changing or transforming the agenda of one or many States, as well as that of other subjects of International Law.

The transformations on power's exchange currency. Advancements in technologies that can be used for violence offer small groups of people the capacity of defying powerful States. It is a fact that progress in information technology and the in globalized mass media cause the most powerful army in the history of mankind to lose a war, if not on the battle field — it being full of blood and lies — then on the field of public opinion. This fact can also be proven by researches carried out in those countries traditionally in favor of the recent deceptive wars.

The challenges of International Law themselves. Those perhaps come from the human mind, clothed in the interests of the more powerful States. Who knows? However, we accurately observe three great challenges of the International Law:

Its fragmentation in light of its frenetic growth and division into sectors;

The proliferation of international jurisdictions as a consequence of the previous challenge;

The creation of specific international regimes, such as the environment, human rights, law of the sea, international commerce, and more currently, as it all points towards, action to counter terrorism.

In summary, what all these tendencies so distinctly combined produce is a reduction of the relative power of Western States. And, if we add the terrible environmental destruction at global scale and the waste of natural resources to these tendencies the setting becomes even more despairing; and, at the center of it all, immersed in the widest dimension of its diversity, is the human being: lost, delusional, mislead, yet endowed with a reasoning that has allowed him to survive for thousands of years. Hope resides in this: the human reason; in the fact that man and woman will, at last, find that human eternity can only be achieved through human beings themselves.

Nevertheless, the important role that the individual begins to perform in the international community starting from the second half of the twentieth century has to be pointed out. He becomes not only a subject of Public International Law, but also an indisputable actor transformer of the international community. Organized civil society takes on a hegemonic role in the international agenda. The World Social Forum can be cited as an example. When it began, the *status quo* made all effort to discredit it, labeling it with various adjectives — rabble of utopians, hippies' legacy movement, heirs to an outdated Socialism, etc — among many other denominations they came up with. Fundamentally, all this was due to the *Porto Alegre* meeting's motto,

which self-fed off a romantic and necessary ideal: “Another world is possible!” Such perspective echoed from Гуанба’s riverside — reverberating through Bamako, Caracas, Karachi, Nairobi and Белым — and reached a significant portion of the planet.

Concomitantly, at icy Switzerland, the *status quo* discussed the world’s economy or, at least, that which they said to be the real one, at the Davos World Economy Forum. For them it was very appropriate that those gathered at the *Porto Alegre* forum, the expounders of the organized civil society and potential contestants of the hegemonic situation, chose to carry forth such conspiring, contextual extension in the Tropics: a nook that exudes sin, lust, but also creativity. From the *Davosian* viewpoint that would be a more appropriate extension for those carnivalesque ideas and hence lacked any scientific, political and social seriousness.

What is interesting in this parallel is that, for this current financial crisis’s root, the elegantly-dressed attending *Davos* are considering to take the remedies prescribed by those poorly-dressed from *Porto Alegre*, or, at least, the costumes from *Porto Alegre* enlightened the runways of *Davos*. This is the understanding grasped from the manifestation carried out by the main European Union leaders: a plan exalting immediate combat to tax havens through the creation of direct sanctions to the States who shelter them was celebrated. The problem of tax havens, frequently believed to be postponable, is now vitally considered in facing the financial component of the crisis. Furthermore, the IMF will need to move faster and more efficiently when aiding economies facing difficulties in order to consolidate possible assistance. Even so, regulation of financial markets and supervision of its functioning in a truly global manner is urgently necessary. And all that heartily tied to the strict control of credit rating agencies. Protectionism was also strongly condemned. The European Union as a whole claims for solidarity and coordination. *Porto Alegre* had often said all of this numerous times, which means that, if from the beginning *Davos* had given ear to the thunders reverberating from the Гуанба, we would have spared nearly a decade in developing strategies to fight and bypass the current financial crisis.

When globalizing this analysis, the fact the human being (or the great majority of the world’s political and financial elite), despite so much economic, scientific and technological progress achieved, still despises education as a necessary tool for social inclusion, for combating poverty and for wealth generation. A high-quality universal education is the fastest and most efficient way to combat any economic and humane crisis. In this sense, our generation is already capable of leaving the legacy of a more harmonious and sustainable future for our children and grandchildren. To persist on intentionally allowing the possibility of a socially fair, environmentally-safe and harmoniously-civilized future for all humankind to go unnoticed is a flawed act in human reasoning that this and the previous generations insist upon perpetrating.

That the current world scares us is a fact. Societies seem lost in regards to their values and habits. Human solidarity is punctual and occasional. Families disintegrate with an easiness never seen before. States give off more and more signs of their incapacity to answer the chief demands of the majority of their citizens. More laws are proposed each day to close frontiers between States and keep people from different

racism and social standing apart; and the States, the richest ones above all, toughen their existing norms of the kind regularly. From a multilateral point of view, the positive agenda of the second half of the past century has been going out of breath at the beginning of the twenty first century, as all the room given to more humble States shrink daily. All this does not happen simply because international relations nowadays are becoming more complex than at other times because each period has its own specific complexity. The big theme is that international relations at this beginning of century are covered up with contemporaneous reality — a reality the political, economic, social, juridical, strategic and military symptoms of which reveal their chief characteristics of individual and little-sympathetic interest. In the contemporary global disruptive multilateralism, ethics and common moral fade in the midst of exacerbated individualism. The pillars of this observation contribute to the strength of the current crisis. A strong and present State, rooted in the principles of ethics, social justice, moral, indivisible and universal human rights is, thus, the only possible perspective.

As to the current crisis that corrodes us, it all indicates that in the diagnostics and in the proposition of possible solutions to defeat it, *Porto Alegre* superposed *Davos*. It does not matter: may they both commune and conspire in favor of a better world! The sum of efforts and ideas turns out to be fundamental to overcome this fragile moment of humankind. At last, when it comes to the human being, the fortune of each and every one of us is inextricably linked to the other. Defeating this crisis is a task bestowed upon all the actors of the world community (above all, civil society, States and the international organizations), who will have to work in unison to overcome it, building a more positive setting (just, sympathetic and sustainable) as legacy for the coming generations.

These are the main challenges to be faced by Law and, above all, by human rights at this beginning of century. It is due to this reality and to the challenges resulted from it that we believe in the prevalence of reason of humanity over the reason of State. If there is a universal crisis, it is not only one of the State or its values, but a crisis of the human being himself and one that we alone can conquer, because though many may have forgotten, we have created the State as a form of social organization, not the other way around. To seek for new times and new directions means to find ourselves, human beings, at the time and atmosphere of the affirmation of human dignity by the universal, the indivisible, and the complementary Human Rights.

As a consequence, Human Rights will not vanish for making themselves be respected by their principles originated from Public International Law and multilateralism. The risk of deprecating the principles of International Protection of the Human Person [52] resides exactly at the opposite end of the previous affirmation, that is, it will be the softening of the precept coming from Public International Law and from the rules of harmonious and peaceful living among States in front of the armed and unilateral false rhetoric — the latter being deposed of any human reasonability — the fact that will be capable of making Human Rights to retrocede.

LITERATURE

- [1] *Albuquerque Mello, C. D. de. Curso de Direito Internacional Público (RJ/SP: Renovar, 2000), 823.* “The Universal Declaration of Human Rights no mandatory value for the nation States. It is not a treaty, but rather a simple declaration as its name indicates. Its value is simply a moral one. It indicates the directives to be followed by the nation States on this matter. (...) Anyhow, it can be affirmed that currently there is a kind of consensus about considering it an international system, and therefore mandatory.”
- [2] *Cassese, Antônio. Los derechos humanos en el mundo contemporáneo (Barcelona: Ariel, 1993), 7–57.*
- [3] “A reaction against the individual’s subjectivity began since the twentieth century. Currently, the absolute sovereignty of the State prevails. What was previously called an aristocracy of the nation States appears in International Law. The individual affects the juridical international world only if he acts through the State.”
- [4] *Rodrigues, Simone Martins. Segurança Internacional e Direitos Humanos — a prática da intervenção humanitária no pós-guerra fria (RJ/SP: Renovar, 2000), 61.*
- [5] Mancini saw a few European States rule over various nationalities, whereas other nationalities were dispersed among various States. A few examples are the Austrian Empire, on the one hand, and on the other, Germany and Italy.
- [6] *Canotilho, J.J. Gomes. Direito Constitucional e Teoria da Constituição (Coimbra: Renovar, 1999), 359–361.*
- [7] To Guido Fassò “natural law dawned again after the Second World War as a reaction to the stillness of the totalitarian regimes. Majorly, this phenomenon was verified in the scope of catholic culture, but also in the German protestant environments and, at an extraordinary measure, in the secular world, the idea of Natural Law was once again present, above all as an embankment and limit to State power.”
- [8] *Bobbio, N. et alii. Dicionário de Política (Brasília: Edunb, 1992), 659.*
- [9] The United Nations Organization was established on 26 April 1945, at the Conference of San Francisco.
- [10] At the time the USSR was the Union of Soviet Socialist Republics. The USSR came apart with the Perestroika in 1982 and its assigned seat at the Security Council has belonged, since then, to Russia.
- [11] Nevertheless, the early Marx particularly emphasizes the notion of “human emancipation”, compatible in itself with the philosophical notion of human freedom encompassed by the philosophy of Natural Law. The following passage of “The Jewish Question” is an example of it: “Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relations, he has become a species-being...” In: *Tucker, Robert C. (org.). The Jewish Question. The Marx-Engels Reader (New York, W. W. Norton, 1978), 46.*
- [12] Cassese sustains that, despite the ideological debate of the powers of that time, the enormous freeing contribution of Marx’s thought in the Field of economic and social rights cannot be forgotten, as well as the general contribution lent by Marxist “revisionism” to the theory of human rights.
- [13] *Kennedy, Paul. The Rise and Fall of the Great Powers — Economic Change and Military Conflict from 1500 to 2000 (United States of America: First Vintage Books Edition, 1989), 372.* “Thus, the foreign and domestic requirements of the Cold War could feed off each other, mutually covered by an appeal to ideological principles. Liberalism and Communism, being both universal ideas, were “mutually exclusive”; this permitted each side to understand, and to portray, the whole world as an arena in which the ideological quarrel could not

- be separated from power-political advantage. One was either in the American-led bloc of the Soviet one. There was no middle way; in an age of Stalin and Joe McCarthy, it was imprudent to think there could be. This was the new strategical reality, to which not merely the peoples of a divided Europe but also those in Asia, the Middle East, Africa, Latin America, and elsewhere would have to adjust.”
- [14] Kennedy thus explained the third world: “The shattering of those empires in the Far East after 1941, the mobilization of the economies and the recruitment of the manpower of the other dependent territories as the war developed, the ideological influences of the Atlantic Charter, and the decline of Europe all combined release the forces for change in what by the 1950s was being called the Third World. (...)But it was described as a “third” precisely because it insisted on its distinction both from the American- and the Russian-dominated blocs.”
- [15] *Cançado Trindade, Antônio Augusto*. A Recta Ratio nos Fundamentos do Jus Gentium como Direito Internacional da Humanidade. Inaugural speech at the Juridical Brazilian Academy of Letters — Cadeira N. 47 (Belo Horizonte: Del Rey, 2005).
- [16] *Leão, Renato Zerbini Ribeiro*. La construcción jurisprudencial de los Sistemas Europeo e Interamericano de Protección de los Derechos Humanos en materia de Derechos Económicos, Sociales y Culturales (Porto Alegre: Núria Fabris, 2009), 37–39.
- [17] *Quintana, Fernando*. La ONU y la exégesis de los derechos humanos — una discusión teórica de la noción (Porto Alegre: UNIGRANRIO, 1999), 35-36.
- [18] Documents Officiels de la Troisième Session de l’Assemblée Générale. In: Séances Plenières de l’Assemblée Générale, Comptes Rendus Analytiques des séances. Première Partie: 180 séances plenières. Paris, Palais de Chaillot, 21Septembre — 12 Décembre, 1948. p. 853.
- [19] According to Quintana the Atlantic Charter establishes, moreover, the need for a more complete collaboration among all nations — great and small alike — aiming to guarantee to all of them better conditions for the working class and social security. Thus, the Declaration by United Nations, which was signed in Washington on January 1, 1942, by twenty six countries at war with the Axis countries and adheres to the principles described in the Atlantic Charter, elevates the stipulations of the latter document to the level of international law.
- [20] This was a, outstanding historical moment, for at the time Roosevelt proposes a new international order, and for the first time the post-war world, still undergoing conflict, is discussed.
- [21] The Atlantic Charter, Article 6.
- [22] Adopted unanimously on May 10, 1944 by the members of the International Labour Organization.
- [23] This affirmation can be extracted from the considerations of the Declaration of Philadelphia.
- [24] It resulted from the agreement reached by the four Powers present at the Moscow Conference (1943). The conversations of Dumbarton Oaks took place in two different phases: the first one, from August 28 to September 28, with representatives from the USA, the United Kingdom and the USSR; and the second, from September 29 to October 7, with representatives from China, the USA and the United Kingdom.
- [25] Charter of the United Nations. Chapter 1, Article 1, Paragraphs 1, 2 and 3.
- [26] Déclaration de Dumbarton Oaks. Documents Nations Unies. In: Journal du Droit International 1940-1945. Tome 67-72, n. 1, Paris, 1945.
- [27] Chapter IX, section D of the Proposals of Dumbarton Oaks.
- [28] A historical and political fact of the Yalta Conference was the decision about the USSR’s participation in the UN: besides veto power as a permanent member, it would have three more seats in that supranational Organization — those of Russia, Ukraine and Belarus.
- [29] Held in Mexico from February 21 to March 8, at which twenty-one American nations were present, except for Argentina.
- [30] Resolution XLI of the Inter-American Conference of Chapultepec.

- [31] *Cançado Trindade, Antônio Augusto*. O legado da Declaração Universal e o futuro da Proteção Internacional dos Direitos Humanos. In: *Amaral Júnior, Alberto e Perrone-Moisés, Cláudia* (orgs.). O Cinquentenário da Declaração Universal dos Direitos do Homem (São Paulo: Edusp, 1999), 17.
- [32] Those nation States that signed and ratified the Charter of the United Nations soon after attending the San Francisco Conference, or at least signed the Declaration by United Nations, of 1942, are considered originating members of the UNO.
- [33] At that moments there were 58 members of the UN: 14 Western, 20 Latin American, six Socialists, four Africans and 14 Asians.
- [34] Political-ideological atmosphere instituted by the two greatest Powers of the time — the USA and the USSR — in the world scene immediately after the end of the Second World War.
- [35] See Article 1 of the Charter of the United Nations.
- [36] *Antônio Augusto Cançado Trindade*. O Direito Internacional em um Mundo em Transformação (Rio de Janeiro: Renovar, 2002), 91–140.
- [37] Regarding the discussion on “democracy and socialism” read the heading “Democracy”, in: BOBBIO et alii. Dicionário de Política (Brasília: Edunb, 1992), 324-325.
- [38] For the themes discussed in this paragraph read WIGHT, Martin. Power Politics (London: Continuum, 1978), 175-192.
- [39] Its original members were Paal Berg (Norway), René Casin (France), Fernand Dehousse (Belgium), Victor Raúl Haya de la Torre (Peru), K.C.Neogi (India), Mrs. Roosevelt (the USA), Jhon C.H. Wu (China), and also individuals that the ECOSOC members representing the USSR and Yugoslavia would indicate to the UNO Secretary-General. Later, C. L. Hsia substituted C. H. Wu as China representative; and D. Brkish and A. Borisov represented Yugoslavia and the USSR, respectively.
- [40] The document contained almost all the rights mentioned in various national Constitutions and other articles present in the text of the international declaration in possession of the Secretariat.
- [41] *Trindade, Antônio A. Cançado*. Tratado de Direito Internacional de Direitos Humanos. Vol. I (Porto Alegre: Fabris, 1997), 35-37.
- [42] Held in Geneva, 12 to 17 December, 1947.
- [43] Decided from a Syrian-Lebanese proposal.
- [44] Held at Lake Success, from 3-21 May, 1948.
- [45] The result of the internal election held in the Drafting Committee to decide on the methodology mentioned in the text was 5 votes in favor, 1 against and 2 abstentions.
- [46] The rapporteur was Mr. Malik, representative of Lebanon.
- [47] Voted in favor: Afghanistan, Argentina, Australia, Belgium, Burma, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iraq, Iran, Lebanon, Liberia, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Nicaragua, Pakistan, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey, the United Kingdom, the United States of America, Uruguay, and Venezuela.
- [48] Abstentions: Belarus, Czechoslovakia, Poland, Saudi Arabia, Ukraine, South Africa, the Union of Soviet Socialist Republics, and Yugoslavia.
- [49] They are: sovereign equality of States; autonomy, non-intervention in matters within the domestic jurisdiction of any State; refrainment from the threat or use of force; peaceful settlement of international disputes; international cooperation; respect for human rights; and good faith in fulfilling international obligations.

- [50] *Cançado Trindade, Antônio Augusto*. International Law for Humankind: towards a new Jus Gentium (I). General Course on Public International Law (The Hague: Hague Academy of International Law, 2005), vol. 316, p. 110.
- [51] ASH, Timothy Garton. "El mundo, siete años después." Section Crónica: Opinión. El País Newspaper Sunday edition, 14 September 2008.
- [52] *Comprises the Rule of Law in Armed Conflicts (Humanitarian Law), Human Rights and Refugee Law*.

ЗАЩИТА ПРАВ ЧЕЛОВЕКА КАК ВОПРОС ПЕРВОСТЕПЕННОГО ЗНАЧЕНИЯ ДЛЯ МЕЖДУНАРОДНОГО СООБЩЕСТВА

Ренато Зербини Рибейро Лео

Департамент юридических и социальных наук
Университет Бразилии
SEPN 707/907 - Asa Norte Brasília - DF - CEP: 70790-075

Вопрос защиты и поощрения прав человека является важнейшим вызовом для международного сообщества в начале XXI в. Это связано с реальностью сегодняшнего дня, которая позволяет нам надеяться, что интересы личности возобладают над интересами государства. Однако есть и другие тенденции в современном мире, которые указывают на разрастание всеобщего кризиса, причем этот кризис касается ни одного и ни группы государств, он может коснуться всех государств мира, поскольку причины его лежат в человеке, который отказывает себе в праве на человечность.

Ключевые слова: права человека, международное публичное право, Организация Объединенных Наций, международное сообщество