Phenomena that characterize international law in the XXI century

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Abstract: From the second half of the twentieth century and with more force in the XXI century, the emergence of global problems and new international factors paves a more complex international order. The state no longer has the monopoly of international relations and simultaneously ceased to be the sole interlocutor on issues that matter to humanity and state community, finding itself compelled to live with other actors and also to give voice to these partners. The current International Law is characterized by a few trends that are significantly changing, such as the densification of the international legal tissue, the proliferation of international organizations, the emergence of a new international normativity and the transformation of the international subjectivity, with the consequent impact of the protection of human rights on state sovereignty.

Keywords: International Law; Global problems; Human rights; Sovereignty.

Introduction

The decline of the "classical international society" happens after the occurrence of the two World Wars, and more especifically since the end of World War II, largely because of the tragic human consequences of this great conflict. At that moment, the classical forms of the exercise of power by states exhausted, emerging from then on the need for new forms of international cooperation and peaceful ways of resolving conflicts between sovereign states. The means for the reconstruction of the post-Westphalian international law was opened.

The United Nations (UN) is created in 1945, and in 1948 the Universal Declaration of Human Rights is adopted by the General Assembly of the Organization. The UN and the Universal Declaration can be considered new benchmarks for a renewed, more concerned with multilateralism, more institutionalized and, therefore, more cooperative international society. From that time, it is noted the emergence of a post-modern[2] or post-Westphalian international society.

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2 CASELLA, Paulo Borba. Fundamentos do Direito Internacional Pós-Moderno. São Paulo: Quartier Latin, 2008, 1523 p.

With the creation of the UN, the use of force in international relations is prohibited for the first time in history3. In parallel, the peaceful settlement of international disputes appears as a mandatory principle for states and logical consequence of the prohibition of war4.

Note further that the post-World War II coincided with the acceleration of economic globalization, seen by many as the catalyst for greater inequality at the international scenario. For this reason, Richard Falk entitles the globalization process as “predatory globalization”5, while Boaventura de Souza Santos talks about an “hegemonic globalization”6.

Without any intention of addressing the matter of the historical moment in which the roots of globalization are located, in this study we start from the premise that it is from the second half of the twentieth century, with the spectacular development of technology in the field of transport and communications, that the States face a new international reality, in which the simple interstate coexistence is no longer sufficient, and the cooperation becomes a necessary imperative in relation to the interdependence in international relations.

In this context arises the term “global village”7, which seeks to portray reality in which the globe is perceived as minor, because of the increasing, frequent and closer contacts between the various global cultures. Signing up from now on, the understanding that problems which begin to challenge the state can no longer be solved with the instruments of national law and, therefore, states are obligated to seek international regulations for problems that become global. The emergence of various global problems caused the progressive and radical transformation of international law. The international law of the XXI century is radically different from the one from less than a century ago. The various phenomena that characterize these developments will be highlighted below.

I. Densification of international law

The first major transformation of international law refers to its densification, a quantitative increase and qualitative transformation of its norms. The quantitative increase of international legal norms brings a phenomenon, especially concerning institutional and multilateral treaties, ie, those which are opened for signature and ratification by all member States of the international community, and are driven

3 UN Charter, Article 2. “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. CHARTER OF THE UNITED NATIONS. Available at: https://www.un.org/en/documents/charter/chapter1.shtml

4 UN Charter, Article 2. “The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. CHARTER OF THE UNITED NATIONS. Available at: https://www.un.org/en/documents/charter/chapter1.shtml, accessed Abril 2, 2014.

5 FALK, Richard. Globalização predatória. Uma crítica. Lisboa: Instituto Piaget, 2001, 303 p.

6 SANTOS, Boaventura de Sousa, "El foro social mundial: hacia una globalización contra-hegemónica", in Sen, Jai; Anand, ANita; Escobar, Arturo e Waterman, Peter (org.), El Foro Social Mundial: Desafiando Imperios. Mataró: El Viejo Topo, 2004, pp. 459-467; SANTOS, Boaventura de Sousa, "Por uma concepção multicultural de direitos humanos", in Santos, Boaventura de Sousa (org.), Reconhecer para libertar. Os caminhos do cosmopolitismo multicultural. Porto: Edições Afrontamento, 2004. Personal translation.

7 The concept of “global village” was created by the Canadian educator and philosopher Marshall McLuhan, considered the first philosopher of the social changes brought about by the technological revolution in telecommunications. The term “global village” sought to portray the idea that technological progress was reducing the planet to the situation of a village. The leitmotif of this concept is an interconnected world, with close economic, political and social relations, that result of evolution of telecommunications, and especially the internet, depleting distances and misunderstandings between people and promoting the emergence of a global interplanetary consciousness, at least in theory. This profound link between all regions of the globe originate a powerful web of mutual dependencies and thereby promote solidarity and fight for the same ideals, eg in ecology and economy for sustainable development of the Earth, surface and habitat of this “global village” . MARSHALL MCLUHAN. Global Village. Available at: http://www.marshallmcluhan.com/, accessed Abril 2, 2014.

by international organizations. Moreover, international law, that by the end of the Second World War was essentially a spontaneous, customary law, shall be a law in positivization boiling process, with the transformation of customary norms in many conventional norms inserted in treaties, hence their qualitative change. On the other hand, the process of progressive development of international law, laid down in the UN Charter, is also in turmoil[8]. However, there are still important areas of international law that are governed by international customs, including areas where there is no incidence of the international norms, such as the issue of capital mobility.

Therefore, there is a diverse use of treaties, classical instruments of international law, which become more and more multilateral and institutional, tending to constitute a set of objective norms, which will be ever more subtracted from the State Parties'will. The old contractarian or voluntary approach that prioritizes state sovereignty gives way to a more normative approach, in which states lose in much the availability of these norms. This phenomenon results from the creation of international courts or administrative bodies authorized by treaties to take care of their implementation, as well as trends of negotiating perennial treats, such as the Charter of the United Nations.

II. Proliferation of international organizations and their impact on the theory of international law sources

The second phenomenon that characterizes international law in contemporary times is the proliferation of international organizations, which, since the establishment of the UN in 1945, have been multiplying at an amazing rate, causing the progressive institutionalization of the international community, together with the increasing complexity of these international organizations, along with the increase of its regulatory powers. In the present context, it seems no longer possible to deny that the practice of international law also covers the practice of international organizations, recognizing the creative power of the international law. The discussion often involves the status of unilateral acts of international organizations as sources of international law; even if the character of "new source" of international law is denied, it is, at least, recognized its contribution to the formation and crystallization of customary international law, or even to the general principles of law, as well as diversity of its legal effects and heterogeneity of unilateral acts of these organizations. Consequently, Article 38 does not reflect the complexity of the creating process of international law caused by the expansion of the international community today. The consent of individual States ceased to be regarded as the ultimate source of an international obligationproviding guidance on the *opinio juris sive necessitatis* of the international legal community. Today we turn to the widespread doctrine that considers Article 38 of the Statute of the International Court of Justice, if not anachronistic, incomplete, for silencing about the

8 UN Charter, Article 13.1 "The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". CHARTER OF THE UNITED NATIONS. Available at: https://www.un.org/en/documents/charter/chapter1.shtml, accessed Abril 2, 2014.

resolutions of international organizations, even taking into account the, in favor of consensus as “an expression of legal conscience of the international community”9.

Antonio Augusto Cançado Trindade3 draws attention to the fact that issues related to international organizations tend to be a legal system itself – beyond a mere chapter of contemporary international law - that will enable the study of the “sources” of the “Law of International Organizations”10.

The number of international organizations that make up the onusian system is already impressive, not to mention regional international organizations that proliferate in various regions of the globe. Meanwhile, the American continent is the region with the largest number of regional groupings, at the continental, regional and sub-regional levels, revealing an almost obsessive goal of regional integration. Since the Latin American Free Trade Association - LAFTA, which became the Latin American Integration Association - LAIA, through the Central American Common Market - CACM and the Central American Integration System - SICA , the Caribbean Community - CARICOM , the Andean Community of Nations - CAN , for the Bolivarian Alternative for the Americas - ALBA to Southern Common Market - MERCOSUR , Union of South American Nations - USAN and the brand new Pacific Alliance. The formation of blocs of states causes a similar trend in other states in order to create blocs of equal sizes to face the first. In parallel, international organizations have increased their power relative to their Member States, causing the weakening of national sovereignty.

When the winners of World War II - United States , UK, France, Russia and China - current permanent members of the UN Security Council, sat down at the negotiating table to establish the new international order, they departed for an institutional solution, with the creation of institutional pillars in the political, financial, monetary and trade plans. Thus, the United Nations, the International Bank for Reconstruction and Development - IBRD or simply the World Bank, the International Monetary Fund - IMF were created, and there was still the attempt to create the International Trade Organization – ITO. Only Part IV of ITO survived; it was known as GATT (General Agreement on Tariffs and Trade) 1947 , which only became institutionalized in 1994, and was only possible with the end of the Cold War and the establishment of the World Trade Organization - WTO by the Marrakesh Agreement.

This modification, which refers to the creation of international organizations, is also a result of the finding of incapacity of the state, with a structure inherited from many generations in order to maintain international peace and security. The establishment of international organizations is the result of awareness of the need for cooperation11.

It is interesting to note that although the UN has been designed to theoretically support itself in the foundations of peace, development and human rights, as it is evident by the Preamble to the UN Charter and its first articles, the protection of human rights did not count on a specific organ among the principal organs of the Organization, and a specific international organization, such as a World Organization for Human Rights Protection, was not created.

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9 CANÇADO TRINDADE, Antonio Augusto. *A Humanização do Direito Internacional*. Belo Horizonte: Del Rey, 2006, p. 75-80. Personal translation.

10 CANÇADO TRINDADE, Antonio Augusto. *A Humanização do Direito Internacional*. Belo Horizonte: Del Rey, 2006, p. 78-79. Personal translation.

11 MAGALHÃES, José Carlos de. O Mundo no século XXI. In: BAPTISTA, Luiz Olavo; RAMINA, Larissa; FRIEDRICH, Tatyana (Org.). Direito Internacional. Temas Contemporâneos. Curitiba: Juruá, 2014.

III . Emergence of new forms of international regulation and its impact on the theory of international law sources

Nevertheless, as a third phenomenon, it is worth noting the emergence of new forms of international regulation in the twentieth century, along with the classical sources of international law, which are treaties, customs and general principles of law, as provided in the celebrated Article 38 of the Statute of the International Court of Justice12. It is admitted today that the classical theory of sources, reflected on the above-mentioned article, cannot intend to exhaust the sources of international law. At least two types of this new international normativity can be identified, namely, the norms of *jus cogens* and *soft law*, whose legal status is discussed, but whose practical importance is indisputable.

These new forms of normativity in terms of international law require a critical reassessment of its traditional sources13. Norms of *jus cogens* have their inspiration in Kant and his Perpetual Peace Project (1795), in which he explains that a true cosmopolitan and universal law is effective when the violation of rights in one place on Earth is felt in all the other places. According to Kant:

> "Since the narrower or wider community of the peoples of the earth has developed so far that a violation of rights in one place is felt throughout the world, the idea of a law of world citizenship is no high-flown or exaggerated notion. It is a supplement to the unwritten code of the civil and international law, indispensable for the maintenance of the public human rights and hence also of perpetual peace. One cannot flatter oneself into believing one can approach this peace except under the condition outlined here14".

This notion shall be discussed in international scenes from the sixties, when the number of states in the international society increases significantly due to the process of decolonization in Africa and Asia. They consist of mandatory rules, so their higher hierarchy, which overlap the autonomy of the will of the states, which are non-derogable by the will of the same, as opposed to the old *jus dispositivum*. There is a gradual abandonment of the outdated dogma of voluntarist doctrine, which saw in the will of the states the sole ground of validity of international law, to give rise to the modern tendency to consider certain mandatory international standards that are not issued directly from the expression of the will of States. Tatyana Scheila Friedrich points out that

> "in fact, *jus cogens* causes some changes in the structure of international law. It rescues elements of the old natural law and shifts the focus from the decisions of the individual consent of the state to the collective will of the international community. In addition, it inserts in the system the idea of protection of superior rights15".

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12 Article 38. 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. STATUTE OF THE INTERNATIONAL COURT OR JUSTICE. Available in http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&

13 CANÇADO TRINDADE, Antonio Augusto. *A Humanização do Direito Internacional*. Belo Horizonte: Del Rey, 2006, pp. 3-96.

14 KANT, IMMANUEL. Perpetual Peace: A Pholosophical Sketch. Available at: https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm, accessed December 12, 2013.

15 FRIEDRICH, Tatyana Scheila. As Normas Imperativas de Direito Internacional Público. *Jus Cogens*. Belo Horizonte: Fórum, 2014, p. 182. Personal translation.

The anarchy of the classic international law and the equivalence of their sources give way to the hierarchy and verticalisation integration of international law, which now recognizes as superior the norms of *jus cogens*. Results of this new normative setting the possibility of making use of hierarchical criterion for the solution of conflicts involving norms of *jus cogens.*

The concept of *jus cogens*, however, is inaccurate. There is no precise definition of what it means, although there is a general agreement that these are precepts of universal character which ensure, among others , respect for human rights (although the rules of *jus cogens* norms do not coincide with the protection of human rights). And considering that international law regulates dynamic relationships, new legal concepts may be included in the list of rules of *jus cogens*. It is precisely this dynamic that made the state's role change with the entry of other actors, among which international organizations, to assist in this process, such as the International Court of Justice through its jurisprudence16.

The concept of *jus cogens* has come to limit the autonomy of the will of the sovereign state in the international legal order, to ensure public order (*ordre public*) on the world stage, consisting of the main limit to the consent of the States. The concept of *jus cogens* or international public order has been the main impetus for the great progress of international law, prohibiting states to conclude treaties that favor private interests over the common interests of the entire international society17.

Moreover, the concept of *jus cogens* is not merely theoretical, unlike the term was explicitly provided for in international legal instruments of great importance, which comes to be the 1969 Vienna Convention on the Law of Treaties, in Articles 53 and 6418, and have already been covered by the case of major international tribunals, such as the famous *obter dictum* of the International Court of Justice in the 1970 Barcelona Traction Case, when the Court makes the distinction between obligations of states vis-à - vis other States and obligations of States in relation to the entire international community, which would be the *erga omnes* obligations19.

Today, it is perceived that there is an increasingly closer relationship between *jus cogens* norms and standards of human rights protection, where stand the most common examples of peremptory rules, such as self-determination, prohibition of aggression, prohibition of genocide, prohibition of slavery, prohibition of racial discrimination and prohibition of apartheid.

The recognition of *jus cogens* in the 1969 Vienna Convention on the Law of Treaties impacted the voluntarist dogmas, and caused a rethinking of the very foundations of international law.

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16 MAGALHÃES, José Carlos de. O Mundo no século XXI. In: BAPTISTA, Luiz Olavo; RAMINA, Larissa; FRIEDRICH, Tatyana (Org.). Direito Internacional. Temas Contemporâneos. Curitiba: Juruá, 2014.

17 FRIEDRICH, Tatyana Scheila. As normas imperativas de Direito Internacional Público. *Jus Cogens.* Belo Horizonte: Editora Fórum, 2004.

18 Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS") A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general in ternational law having the same character. Article 64. EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS") If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.1969 VIENNA CONVENTION ON THE LAW OF TREATIES. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

19 Although the International Court of Justice has failed to establish the conceptual parameters approaching or differentiating the norms of *jus cogens* and *erga omnes* obligations.

In respect of the standards of *soft law*, the *Institut de Droit International* - IDI under the Rapporteur Michel Virally, at its meeting of Cambridge 1983, analysed the distinction between "international juridical texts and international texts devoid of that character"20:

> "Noting that states often adopt, under different names, texts by which they accept in their mutual relations, commitments that were explicitly or implicitly conceived as devoid of legal character, or whose character or extent is difficult to determine"21.

Therefore, the IDI has found the practice of adoption of international texts that, despite generating obligations for States, are not of a legal nature, being in a gray area between the legal universe and non-legal universe. The *soft law* rules are opposed to the *hard law* rules, and those are characterized as a flexible or plastic law. It is a sort of non mandatory regulation, which leaves a margin of discretion in relation to the fulfillment of its contents. The relation between *soft law* and *hard law* is one of the most complex problems of the political point of view, because those are usually removed from the controls of parliaments and courts, both national and international. At the same time, its flexibility is indispensable for the ability to disciplinary situations in which lack the political will to conclude international treaties22.

Salem Hikmat Nasser highlights the need for easing of international law, "afflicted with shortcomings adequacy"23, in which the rules of *soft law* would be:

> "normative rules whose value would be limited, either because the instruments containing them would not be legally binding, either because the provisions in question, even appearing in a constraining instrument, would not create obligations of positive law, or would create little constricting obligations"24.

The same author adds the existence not of a single concept of soft law, but of a multifaceted concept, plural, in that "what lends itself to questions is the belonging of the phenomenon of *soft law* to the legal universe of international normativity25". The author concludes that *soft law* is not a new autonomous source of international law, but that "international law is subject to transformations, and the *soft law* is part of these transformations", being "the legal order challenged and possibly changed by less rigid legality phenomena of international law or pre–legality26".

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20 "Textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus". Available at: http://www.idi-iil.org/idiF/resolutionsF/1983_camb_02_fr.PDF

21 "Constatant que les Etats adoptent fréquemment, sous des dénominations diverses, des textes par lesquels ils acceptent, dans leurs relations mutuelles, des engagements dont il est convenu, expressément ou implicitement, qu'ils ne sont pas de caractère juridique, ou dont le caractère ou la portée est difficile à déterminer". Available at: http://www.idi-iil.org/idiF/resolutionsF/1983_camb_02_fr.PDF.

22 Hubert Thierry, apud MAZZUOLI, Valério de Oliveira. Curso de Direito Internacional Público. 5ª Ed. rev., at. e ampliada. São Paulo: Revista dos Tribunais, 2011, 1104 p., p. 157.

23 NASSER, Salem Hikmat. Fontes e Normas do Direito Internacional. Um estudo sobre a Soft Law. São Paulo: Atlas, 2005, p.19. Personal translation.

24 SALMON, Jean. Les notions à contenu variable en droit international public. In: PERELMAN; VAN DER ELST (Org.). Les notions à contenu variable en droit. Apud NASSER, Salem Hikmat. Fontes e Normas do Direito Internacional. Um estudo sobre a Soft Law. São Paulo: Atlas, 2005, p. 25. Personal translation.

25 NASSER, Salem Hikmat. Fontes e Normas do Direito Internacional. Um estudo sobre a Soft Law. São Paulo: Atlas, 2005, p. 26. Personal translation.

26 NASSER, Salem Hikmat. Fontes e Normas do Direito Internacional. Um estudo sobre a Soft Law. São Paulo: Atlas, 2005, p. 29. Personal translation.

The *soft law* norms are more common in some areas, namely international economic area, for example, the documents adopted by the G827 (Group of 8), the G2028 (Group of 20), the BRICS29 group as well as in the international protection of human rights (UN General Assembly resolutions) and in the international protection of the environment, such as Agenda 21 and the Statement entitled "The Future We Want30", adopted at the UN Conference on Sustainable Development RIO +20. In the latter case, negotiations were difficult to get to the drafting of an international instrument of *soft law*, which tried to accommodate the conflicting interests of developed and developing countries, which in itself demonstrates the importance of that statement - even though it's a text of *soft law*. The adoption of this sort of documents reveals the need for flexibility of normativity inherent in contemporary international relations.

Despite all the questions directed to the design of a non-binding law, or "relativized" norms, it is true that *soft law* instruments matter for contemporary international law because "they influence behaviors, organize society and result from the combination of social needs, values and power relations", although "unlike law, the rules created by *soft law* instruments do not result from processes considered by international law as able to create legal norms31".

IV. The overrun of state-centrism in international law

The most striking transformation of the post-Westphalian international law, however, lies in overcoming the state-centrism that characterized it throughout the classical period.

The overrun of state-centrism is proven in the transformation of the international subjectivity. Many international law scholars have been addressing to unveil this transformation, among which are, in Brazil, Antonio Augusto Cançado Trindade, Flávia Piovesan, André Ramos de Carvalho and Paulo Borba Casella, for whom the main issues to be faced by international law include "insertion of the individual as a subject of international law and, also, the establishment of limits to the sovereignty of states, in favor of

27 The symbol corresponds to the G-8 group of eight richest and most influential countries in the world, which comprises the United States, Japan, Germany, Canada, France, Italy, UK and Russia. Formerly called G-7, the acronym has changed with the inclusion of Russia, which joined the group in 1998. Explicitly, the function of the G-8 is to decide on the future of the global economy because these countries have established economies and their political forces exert great influence on institutions and global organizations such as the UN, IMF, WTO. The discussion revolves around the process of globalization, open markets, environmental issues, financial assistance to economies in crisis, among others.

28 The G20 is a group of emerging countries created on August 20, 2003, under the command of Brazil, and whose work focused on agriculture. At the Fifth Ministerial Conference of the WTO, the main objectives of the Group were the defense of results in the Agricultural Negotiations that reflect the level of ambition of the Doha mandate of the Round Negotiations and the interests of Developing Countries. The G20 members, which may vary, amounted on the occasion twenty-four countries. G-20 member countries accounted for 60% of world population, 70% of the rural population in the world and 26% of world agricultural exports. Since its inception, the G20 has floating members, but its representatives form the G-4 (China, India, Brazil and South Africa), which together account for 60% of world population and 26% of world agricultural exports. From the African continent are included South Africa, Egypt; Nigeria; Tanzania and Zimbabwe. From Asia, it includes China; Philippines; India; Indonesia; Pakistan and Thailand. From Europe, are participating Turkey; Czech Republic and Hungary. Finally, Latin America countries are Argentina; Bolivia; Brazil; Chile; Cuba; Guatemala; Mexico; Paraguay; Uruguay and Venezuela. G20, available at: www.g20.org , accessed August 20, 2012.

29 The acronym BRICS refers to a group of countries formed originally by Brazil, Russia, India and China, which later joined South Africa. This is a group of countries at a similar stage of economic development, which has sought ways of cooperation for greater geopolitical influence. Since the year 2009, the group's leaders hold annual summits.

30 UNITED NATIONS. Available at: http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf , accessed February 13, 2014.

31 NASSER, Salem Hikmat. Fontes e Normas do Direito Internacional. Um estudo sobre a Soft Law. São Paulo: Atlas, 2005, pp. 160-161. Personal translation.

a common interest[32]". It is a true historical rescue, of the position of the human being in international law, as even the very historical origins of the discipline, it is sufficient to remember some considerations of the so-called "founders of international law". The Francisco De Vitoria's *jus communicationis* was conceived as a right for all human beings. Thus, already in the sixteenth and seventeenth centuries, according to Francisco De Vitoria and Francisco Suárez's doctrine, the state was not the exclusive subject of the law of nations, which included individuals and also people. In the seventeenth century, Hugo Grotius took into consideration before humanity, and then States. By understanding the international legal order as necessary and not only voluntary, Hugo Grotius appealed to the *recta ratio* to support its position[33].

It should be remembered that an important discussion has been waged in 1929 by the *Institut de Droit International*, through its 22nd Commission, which led to the adoption of a resolution containing the "*Déclaration des droits internationaux de l'homme*", whose first *considerandum* affirms that "the legal conscience of the civilized world requires recognition of the individual rights subtracted from any attack by the State[34]".

Beside the classical subjects of international law, States first and then international organizations (which somehow did not break with the state monopoly, since they are defined as "associations of States"[35]), the individual reappears as a subject of international law, with the emergence of rights and obligations for them at the international level, and even the creation of international mechanisms to ensure these rights and obligations, from the construction of an international human rights law.

This is the phenomenon called by Cançado Trindade as the "humanization of international law[36]", in which international society ceases to be interstate, harboring new subjects, and especially individuals.

The construction of international human rights law imposes itself as an obstacle to the idea that the treatment that the State reserves to its own citizens fell in the protection of domestic jurisdiction, also called "*domaine reservé*" in the sphere of national sovereignty, within which no other state could meddle, under penalty of violation of the sacred principle of non-intervention and non-interference in the internal affairs of States.

The relativity of the concept of sovereignty in this context is inevitable. Sovereignty, of course, is still a political symbol invoked to emphasize the power of the state. However, Member States are subject to international organizations in which they participate, and they are subject to rules of general international law, among which outweigh the customs and general principles of law, not to mention the treaties to which they are parties. Otherwise, they are compelled to respect human rights, which does not always happen, but most of them do not dare to affirm that, within its borders, they are free to act on their own discretion.

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32 CASELLA, Paulo Borba. Direito internacional – A Abordagem pós-moderna dos clássicos e os novos desafios. In: RAMINA, Larissa; FRIEDRICH, Tatyana. Direito Internacional: Leituras Críticas. In press. Personal translation.
33 CANÇADO TRINDADE, Antonio Augusto. *A Humanização do Direito Internacional*. Belo Horizonte: Del Rey, 2006, p. 8.
34 Available at: www.idi-iil.org , accessed December 11, 2013.
35 United Nations 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Available at: http://legal.un.org/ilc/texts/instruments/english/conventions/5_1_1975.pdf , accessed April, 02.
36 CANÇADO TRINDADE, Antonio Augusto. *A Humanização do Direito Internacional.* Belo Horizonte: Del Rey, 2006, p. 8. Personal translation.

On the other hand, it is important to register that in the nineteenth century in Italy, Pasquale Stanislao Mancini (and Terenzio Mamiani and Pasquale Fiore, with some differences) discussed the concept of nation as the holder of the self-determination right, and then the right to become a state, so the nation precede the existence of the State. The idea would be to build international law primarily from the nation, and only later from the State, regarded as an artificial concept originated from the contractarian doctrines. Therefore, it should be assigned an important role to the individuals members of a corporate body, if it is intended a just international law. And here was perhaps the first embryo of the principle of self-determination under Article 1 § 2 of the UN Charter[37], which inserts that people, beyond states, are holders of rights - the right to self-determination - coming from the international legal order[38].

We must make brief mention to the intensification of the activities of major international actors, identified in non-governmental organizations and in transnational corporations. Non-governmental organizations, established in accordance with national laws where they have their origin, represent the increasingly dense civil society participation at the international level, proposing to act in defense of national and international public interest. Today, there has been a decline of the classical approach of international law based on the expressed interstate sources, also recognizing the "non-state sources", stemming from the activities of civil society organizations at the international level. Apart from individuals, today is not possible to disregard the NGOs and other civil society organizations as active in creation and effective implementation of international norms.

Moreover, the role of transnational corporations is largely responsible for the narrowing of global markets and the momentum of globalization in its economic aspect, viewed by many analysts as a negative phenomenon, due to the worsening of the abyss of social inequality in world stage.

Added to all this, is the emergence of an international public opinion, which tends to position itself for or against certain rules and international policies, like the anti-globalization movements. The use of the Internet enables the human being to interact with different regions of the planet, without state interference and without any effective control, assigning to him freedom, expanding his ability to analyze the world. The immediacy of information prevents government authorities the possibility of data manipulation and monopoly on its use. Civil society disengages increasingly the government apparatus, tending to establish a new form of political organization to coordinate this multiplicity of international actors[39].

On the other hand, we must mention the theoretical concerns of various streams of thought which are devoted to overcome the international law focused on state and sovereignty. Currently, and from the late twentieth century, are attracting interests the so-called "Third World Approaches to International Law" (TWAIL)", which have dazzled scholars not only from the "Third World" countries,

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37 Article 1. The Purposes of the United Nations are: 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". Available at: https://www.un.org/en/documents/charter/, accessed February 23, 2014.

38 MAFRICA, Chiara Antonia Sofia. *Representações do princípio de nacionalidade na doutrina internacionalista do século XIX na construção da ideia de autodeterminação dos povos: continuidades e rupturas em um discurso liberal*. Florianópolis, 2014, 234 p. Dissertação (Mestrado em Direito), Programa de Pós-Graduação em Direito (PPGD) - Universidade Federal de Santa Catarina, 2014.

39 MAGALHÃES, José Carlos de. O Mundo no século XXI. In: BAPTISTA, Luiz Olavo; RAMINA, Larissa; FRIEDRICH, Tatyana (Org.). Direito Internacional. Temas Contemporâneos. Curitiba: Juruá, 2014.

but also sympathizers authors of critical currents ("critical legal studies") of international law[40]. These approaches propose to shift the main focus of international law on the centrality of the state, based on the need to democratize international law considering the interests of the peoples of the third world. Balakrishnan Rajagopal, for example, proposes to refocus the international law from state to social movements[41].

Final considerations: the reformulation of state sovereignty

The limitation of the concept of sovereignty, as already stated, has even become positive law, to be included in the 1969 Vienna Convention on the Law of Treaties precept which considers void treaties that violate *jus cogens* norms. Although not all states have ratified the Convention, its provisions are considered customary international law and therefore oblige even countries that are not States Parties.

Luigi Ferrajoli already called attention to the fact that, after the French Revolution, there are two parallel and opposing stories of sovereignty: a progressive internal limitation of sovereignty in terms of state law, and a progressive external absolutism of sovereignty in terms of international law. According to the author, "the wild community of sovereign states reaches its peak during the hundred years ranging from the mid-nineteenth century to the mid-twentieth century, and which are also the hundred years of construction, in Europe, of the rule of law and democracy[42]".

The movement towards positivization of human rights in the international order began in the post-World War II as a reaction to the atrocities and horrors encountered in managing the totalitarian systems, which resulted in the degradation of human beings and the violation of human dignity, as Hannah Arendt showed in several of her writings.

In Luigi Ferrajoli's language, human rights can be identified as "the law of the weak" against the "law of the strongest", aimed at protecting human dignity[43]. For Antonio Augusto Cançado Trindade, it is necessary to refocus international law as an instrument for the realization of human dignity, and not more of the claims of power by sovereign states[44]. In his words,

> " ... No state is given to try to be above the law, we turn to the conceptual origins of both the nation state and international law. As to the first, we must not forget that the State was originally designed for the realization of the common good, and that it exists for human beings, not vice versa. As to the second, we must not forget that international law was not in its origins strictly an interstate law but the *jus gentium*[45]".

Nowadays, there are two phenomena that progressively erode national sovereignty on the areas of international protection of human rights, which could be identified as a quantitative increase in international instruments of protection of human rights, noting the existence of an immense list of international instruments in the area, beyond the customary rules and norms of jus cogens; and the

40 GALINDO, George Rodrigo Bandeira. A Volta do Terceiro Mundo ao Direito Internacional. Available at: www.sistemas.mre.gov.br , acessed March 13, 2014.
41 RAJAGOPAL, Balakrishnan. International Law from Below: Development, Social Movements and Third World Resistance. Cambridge: Cambridge University Press, 2003.
42 FERRAJOLI, Luigi. A Soberania no Mundo Moderno. São Paulo: Martins Fontes, 2002. Personal translation.
43 FERRAJOLI, Luigi. A Soberania no Mundo Moderno. São Paulo: Martins Fontes, 2002. Personal translation.
44 CANÇADO TRINDADE, Évolution du droit international au droit des gens. Paris : Pedone, 2008.
45 CANÇADO TRINDADE, Antonio Augusto. *A Humanização do Direito Internacional.* Belo Horizonte: Del Rey, 2006, p. 17. Personal translation.

phenomenon known by doctrine as "jurisdictionalisation of international law", with the establishment of international jurisdictions[46].

From the establishment of international courts it becomes possible to glimpse the real international active and passive capacity of the individuals. Regarding the active capacity – it can be mentioned the possibility to plead before the quasi-judicial bodies of the onusian system of protection of human rights, like the various committees established by international treaties[47], and the judicial and quasi-judicial bodies in regional systems of human rights protection in European, inter-American and African contexts, such as the European Court of Human rights, the Inter-American Court of Human rights, the Inter-American Commission on Human Rights and the African Court on Human and Peoples' Rights.

With regard to passive international capacity of the individuals, it can be mentioned the evolution from international courts imposed by winners to judge losers, like Nuremberg and Tokyo, to the *ad hoc* international courts created by the UN Security Council resolutions - International Criminal Tribunal for Rwanda (UNICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) and finally to the creation of the first permanent international court of human history, with jurisdiction to try persons accused of violations of international human rights law in times of armed conflict. This is the International Criminal Court (ICC), created in 1998 by the Rome Statute and established in 2002 in The Hague[48].

The creation of international criminal tribunals enabled the understanding that crimes against international law are committed by individuals, not by abstract entities, as States.

The jurisdictionalization of human rights indicates the strengthening of international law. In this sense, it is understood that there is an evolution of international law, or perhaps it would be better be talking about a real recovey of international law, to the ancient concept of *droit des gens*, which means the law of the human community, or the law of individuals in isolation or in groups (people). It is true that among these groups, state collectives are the most important. The law of nations thus conceived proposes a body of public law and private law, constituting an international common law. Tatyana Friedrich observes that "several international treaties dealing on private relations also refer to Human Rights[49]".

In this sense, it is identified after the consolidation of the democratic rule of law domestically, a progressive constitutionalization of international law, with the identification of ethical values considered supreme by the entire international community. We move increasingly to accept the idea of having a true international community, progressively replacing the mere international society.

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46 An interesting feature of the jurisdictionalisation of international law in protecting human rights, and that deserves to be seen, is that at the global level, the jurisdictionalisation was being operated in the criminal sphere, while at the regional level it was being operated in the civil sphere.

47 The main UN body responsible for the protection of human rights, created in 2006 to replace the old Human Rights Commission is the Human Rights Council, working with the General Assembly. Moreover, there are currently nine treaty bodies established by human rights treaties in order to oversee its implementation. They are the Human Rights Committee (CCPR); Economic, social and cultural rights Committee (CESCR); Committee for the Elimination of Racial Discrimination (CERD); Committee on the Elimination of Discrimination against Women (CEDAW); (5) Committee against Torture (CAT); Committee on the Rights of the Child (CRC); Committee on Migrant Workers (CMW); Committee on the rights of persons with disabilities (CRPD) and the Committee on Enforced Disappearances (CED). OFFICE OF THE HIGH COMMISSIONER FOR THE HUMAN RIGHTS. Available at: http://www.ohchr.org/EN/Pages/WelcomePage.aspx , accessed April 2, 2013.

48 COUR PÉNALE INTERNATIONALE – INTERNATIONAL CRIMINAL COURT. Available at: http://www.icc-cpi.int/FR_Menus/icc/Pages/default.aspx, accessed Abril 2, 2013.

49 FRIEDRICH, Tatyana Scheila. A Proteção dos direitos humanos nas relações privadas internacionais. In: RAMINA, Larissa; FRIEDRICH, Tatyana. Direito Internacional: Leituras Críticas. In press. Personal Translation.

Luigi Ferrajoli develops the theory of irreducible antinomy between sovereignty and law. For the author, the idea of sovereignty is incompatible with International Charters of Rights, including the UN Charter and the Universal Declaration of Human Rights. He proposes an international law based not on the sovereignty of states, but on the autonomy of people, ie the humanity in place of States, a global constitutionalism, including global guarantees. For that author, outside of international law none of the problems that concern the future of humanity can be solved, and none of the values of our time can be realized. Similarly, Antonio Augusto Cançado Trindade mentions:

> "Reconstruction of *jus gentium*, as the *recta ratio*, as a new and true *universal law of humanity*. Through its humanization and universalization, contemporary international law shall engage more directly the identification and realization of higher values and common goals that relate to humanity as a whole".

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