

## The protection of intangible values of humanity and its impacts on the development of new international law

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**Summary:** 1. Introduction; 2. The new international law and the identification of universal human values founded by the UDHR; 3. A new international law? 4. Final considerations. 5. Bibliography.

**Abstract:** Although international law has origins that go back to the old law of the people, it can be said that its modern facet, which places the individual at the center of its protection spectrum, is born in a later period. If the first roots of the new international law begin to emerge at the end of the 19th century, with the emergence of international humanitarian law, it can be stated, on the other hand, that the second post-war is a milestone for new paradigms of international law, especially because of the entry on stage of a new institution: humanity. This is the historical moment in which the United Nations protection system is inaugurated and a normative construction initiated with the Universal Declaration of Human Rights, from which emerges a whole jurisprudential construction coming from the International and Regional Courts. In this context, the following research aims to analyze the system of protection of human rights inaugurated by the creation of the United Nations and the Universal Declaration of Human Rights, as well as to extract from it the most important values belonging to the human community as a whole. To reach the proposed objective, the historical procedure method will be used, by an evolutionary analysis of conventional constructions and jurisprudential. The hypothetical-deductive method of approach will also be used, which is based on the hypothesis that humankind has absolute and universal values to be protected by this system.

**Keywords:** New international law, Universal Declaration of Human Rights, Universal values of humanity, International humanitarian law, International human rights law.

### 1. INTRODUCTION

From the historical context of the end of the 18th century, from which perpetual peace projects emerge, movements of the following century join, inspiring

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the (re) birth of a people's right erected on bases that have the individuals and the links that they formed in the center of their protection, which will gain even greater strength with the arrival of international humanitarian law.

Although international law has origins that go back to the old law of the people, it can be said that its modern facet, which puts the individual in the center of its protection spectrum, is born later to this context. If the first roots of the new international law begin to emerge at the end of the 19th century, with the emergence of international humanitarian law, it can be said, on the other hand, that the second post-war is a milestone for new paradigms of international law. This is the historic moment in which the United Nations protection system is inaugurated and a whole new normative construction initiated by the Universal Declaration of Human Rights.

The Universal Declaration of Human Rights and the creation of the entire protection apparatus founded by the United Nations system are two pillars of the second post-war that give birth to a new international law<sup>3</sup>, which has as main arms the international human rights law and international criminal law.

This new system starts to develop from the adoption of a series of international conventions in inaugurate a kind of universal human society (opposed to the archaic model of sovereign States) which, as such, is based on the respect for the human being.

The doctrine of international law and, in particular, of international human rights law, begins to relate to other fields of law and embodies aspects of international criminal law, for example, which relates to the defense of a universal human society<sup>4</sup> order and impregnate content into it. This notion applies perfectly to the construction of the concept of crime against humanity and the crime of genocide, since they are crimes that affect what is human in all human beings without exception - the irreducible human - and this common definition of humanity is precisely what international human rights law more easily disengage to identify. It does so both through international human rights conventions and through decisions from international jurisdictions that apply them, assisting on the task of identifying universal values, the so-called intangible values of humanity.

In this sense, this new international law starts to build a series of values to promote, having in the normative construction founded by the Universal Declaration of Human Rights a fundamental stone that allows it to identify human values to promote without any kind of relativization.

This identification happened both by force of the international conventional human rights law and by the construction of jurisprudence on the matter.

## **2. THE NEW INTERNATIONAL LAW AND THE IDENTIFICATION OF UNIVERSAL HUMAN VALUES FOUNDED BY THE UDHR**

A new configuration of international law, which will allow the identification of the fundamental values of humanity, gains a great wealth of outlines from the great production of international conventions of human rights that begins to occur

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<sup>3</sup> "(...) traditional international law developed various doctrines and institutions that were designed to protect different groups of human beings: slaves, minorities, certain native populations, foreign nationals, victims of very massive violations, combatants, etc. That law and practice provided the conceptual and institutional underpinnings of contemporary international human rights law. The most important feature of that law is that it recognizes that individuals have rights as human beings and that these rights are protected by international law". In: BUERGENTHAL, T. *International Human Rights*. St. Paul, West Publishing Co., 1988, p. 16.

<sup>4</sup> « [...] il y a une autre dimension des droits de l'Homme qui correspond à une définition fonctionnelle : ceux-ci sont aussi l'expression la plus directe du modèle de la Société humaine universelle, face au modèle de la Société des Etats souverains. "L'introduction des droits de l'Homme dans l'ordre juridique international signifie en effet que le droit international, comme le droit interne, devrait être fondé sur le respect de la liberté et de la dignité de l'être humain. Cela signifie aussi que le seul vrai sujet de droit est l'individu ». FROUVILLE, O. *Droit international pénal. Sources. Incriminations. Responsabilité*. Paris, Pédone, 2012, p. 8.

especially after the second postwar period, driven by the Universal Declaration of Human Rights, the creation of the United Nations and the emergence of regional systems for the protection of human rights.

The creation of the United Nations inaugurates what can be called the universal system of protection and, from its very first foundation, this building expresses what it considers as an essential value to protect: the preamble to the Charter of Saint Francis contains in its initial lines a declaration of faith in the fundamental rights of man and in the dignity and worth of the human being<sup>5</sup>, apparently erecting human dignity as the underlying basis of these fundamental rights.

The value of human dignity will be, from this point on, believed to be the touchstone of subsequent normative construction. Detailing the content of the Universal Declaration of Human Rights, the International Pact on Civil and Political Rights<sup>6</sup> and the International Pact on Economic, Social and Cultural Rights recognize in their preamble the inherent dignity of all members of the human family and their equal and inalienable rights, understanding that this dignity constitutes the foundation of freedom, justice and peace in the world.

The first instrument, broadening the list of civil and political rights contained in the Declaration, as well as creating for the States a positive obligation to respect and promote them, enumerates rights that are not subject to such restrictions, which gives some indications about which of these rights have the connotation of absolute prerogatives, since they cannot be relativized in the area of domestic law.

These are the rights provided for in the Pact in its articles 6 (right to life), 7 (interdiction of torture and cruel, degrading or inhumane treatment), 8 (interdiction of slavery), 11 (interdiction of imprisonment for breach of contractual obligation), 15 (prohibition of being prosecuted for a fact that is not foreseen as a crime or that is not considered criminal in accordance with the principles recognized by the community of nations), 16 (right to recognition of legal personality for all persons) and 18 (right to freedom of thought, conscience and religion), according to the restrictive provision of article 4.

The impossibility of relativizing these rights seems to be linked to the value underlying them. When the preamble affirms that human dignity is the foundation of freedom, justice and peace, one can think that it is this value of dignity that is inherent to the impossibility that the rights attached to it are excepted.

Although the International Pact on Economic, Social and Cultural Rights does not create immediate obligations for the States to comply, but with the same goal of enforcing these rights, the Pact determines to the States the commitment to take measures to satisfy them, and that they should do so progressively, including through the adoption of legislative provisions.

The substratum of human dignity as the foundation of universal and absolute rights continues to serve as a catalyst for the normative construction subsequent to the creation of the United Nations and in texts such as the Universal Declaration of Human Rights of 1948.

Although the declaration does not have the value of an international treaty<sup>7</sup>, it is understood that its content is an attempt to express the main values of the

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<sup>5</sup> Preamble to the United Nations Charter, San Francisco, June 26, 1945.

<sup>6</sup> Preamble to the International Covenant on Civil and Political Rights of December 16, 1966 and the International Covenant on Economic, Social and Cultural Rights of December 19, 1966.

<sup>7</sup> "En la práctica de las Naciones Unidas, una declaración es un instrumento solemne, que se utiliza sólo en casos muy especiales, en cuestiones de grande y verdadera importancia y cuando se espera obtener el máximo de observancia por parte del mayor número de Estados posible. Así pues, son las declaraciones actos solemnes por las cuales representantes gubernamentales proclaman su adhesión y apoyo a principios generales que se juzgan como de gran valor y perdurabilidad, pero que no son adaptados con la formalidad ni con la fuerza vinculante de los tratados". VENTURA-ROBLES, M. "El valor de la Declaración Universal de Derechos Humanos" en Cañado Trindade, A. (Org.), *The modern world of human rights – El mundo moderno de los derechos humanos: Essays in honour of Thomas Buergenthal/ Ensayos*

human community, bringing a body of principles and individual and collective prerogatives that raise it to the category of customary international law.

Symbolizing some of society's most dear values contemporaneously with its proclamation, as a model of what the international community and universal legal consciousness mean by more fundamental rights, the Universal Declaration of Human Rights gains normative force or legal value insofar as it serves to measure how much the States promote or disrespect the rights of the individuals that are under its care.

These rights are proclaimed in the form of two categories: on one side the civil and political rights and on the other one the economic, social and cultural rights.

As part of the first group we have the right to life, liberty, personal security, freedom of expression, religion, association and locomotion, to not be arbitrarily detained, the prohibition of slavery, torture, cruel, degrading, and inhuman treatments, as well as civil procedural rights such as the due process of law, the presumption of innocence and also political rights, like electing representatives and being eligible, for example.

As part of the second group we have the right to social assistance, to work, to an adequate standard of living, to education and access to culture.

There is, however, a difference between the fact that these rights are universal, which means that they are recognized by all human communities, and the fact that they are absolute, which would be the impossibility of imposing limitations on them. The declaration itself recognizes that many of them are relative, and thus allow the States, within certain limits that don't end up on its suppression, to impose regulations on them.

These rights should be analyzed in comparison with the rules of *jus cogens*, allowing one to investigate in which hypotheses these restrictions are not possible, to the point of actually attributing to it the character of universal and absolute rights.

Therefore, once again the value of dignity must serve as a value to check the nature of these rights, understanding them as absolute and universal rights when their limitation is in violation of human dignity. This analysis seems even more consistent if the violation of one of these rights, in violation of human dignity, characterizes a crime of genocide or a crime against humanity, insofar as these crimes aim at the protection of rights that do not allow limitation. This is the case, for example, of the impossibility of the exceptionalization of torture. The creation of exceptions to the right of all persons not to be tortured does not include national discretion. The prohibition of torture is a rule that belongs to the core of *jus cogens*.

This same tone that emerges from human dignity appears in the Convention on the Elimination of All Forms of Racial Discrimination of 1965. It solidify in the form of an international treaty on equality of all races and creates a legal system guided by the principle of non-discrimination, in a way to prohibit any act of racial discrimination consisting in the distinction, exclusion, restriction or preference adopted for reasons of race, color, descent, national or ethnic origin.

The right to non-discrimination is also a consequence of the general postulate of the dignity of all human beings, proclaimed in previous texts, such as the Charter of the United Nations and the Universal Declaration of Human Rights<sup>8</sup>. It confirms the idea that human dignity serves as the underlying value of the protection of rights that are understood as universal and impassible for relativization.

The instrument consists in a source of negative and positive obligations for the States, insofar as it obliges them to practice non-discrimination through the interposition of their agents and to adapt their respective legal systems to make them compatible with the international law. This aspect seems to demonstrate a certain

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*en Honor de Thomas Buergenthal*. San José, Instituto Interamericano de Derechos Humanos, 1996, pp. 257-258.

<sup>8</sup> SUDRE, F. *Droit européen et international des droits de l'homme*. Paris, Presses universitaires de France, 2016, p. 427.

supremacy of international law over domestic law in that where it legitimately protects a universal value, since it imposes for the States the obligation to carry out the conventionality control of their domestic law and takes from them a significant portion of the national margin of appreciation.

The International Convention on the Elimination and Suppression of the Crime of *Apartheid* from 1973, which establishes it as a crime against humanity, is under the same principle. The Convention defines it as racial segregation practices and policies that took place in southern Africa and create a parallel accountability system in the same way as the genocide convention. In this sense, it attributes responsibility both to the States and to the individuals, with provision, in relation to these ones, for universal competence.

Analyzing other international conventions that have similar intentions, elaborated following the creation of the United Nations, parallel to the value of human dignity, another value of a negative nature emerges, that is the one related to the human suffering.

The purpose of protecting human dignity, a positive value to be promoted in conjunction with the aim of preventing human suffering, a negative value to be interdicted, will be the touchstone of the normative construction orchestrated by the United Nations' universal system, composed not only of international conventions but also by the praxis of the organization that consists in the elaboration of a series of resolutions<sup>9</sup>.

The protection of these values seems to be clear, for example, in the text of the convention about the prevention and punishment of the crime of genocide from 1948, which had as a determining factor the extermination practices of Jews and national, ethnic and religious minorities during the II World War, and it was adopted from the construction created by Raphaël Lemkin<sup>10</sup> and then from the work driven by Resolution 96 (I) of the General Assembly of December 11, 1946. The Resolution started by making explicit the concept of genocide and described it as the denial of the right to the existence of whole human groups, a refusal that affects human conscience, inflicts great losses to humanity, which is thus deprived of cultural contributions or other contributions of these groups and is contrary to the moral law, to the spirit and finality of the United Nations.

The General Assembly has classified genocide as a crime of international law that the civilized world condemns and for which its perpetrators, whoever they are (private persons, civil servants or statesmen), should be punished. It also invited member States to adopt legislative measures necessary to prevent and repress this crime, by instructing the Economic and Social Council to undertake the necessary studies to draft the convention.

Subsequently, the Resolution 260 (III) from December, 9<sup>th</sup>, 1948 of UN's General Assembly adopted the text of the convention and defined genocide as the act committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious affliction, by means of murder of members of the group, serious injury to the physical or mental integrity of members of the group, subjection of the group to conditions of existence capable of leading to physical or psychic destruction, birth impediment within the group or forced transfer of children from the group to another group.

The convention imposed on States an obligation to adopt the necessary legislative measures to ensure the application of the provisions contained therein and determined that States should provide for effective sanctions against those

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<sup>9</sup> CANÇADO TRINDADE, A. *Princípios do direito internacional contemporâneo*. 2a. edição. Brasília, Fundação Alexandre de Gusmão, 2017, p. 359.

<sup>10</sup> Lemkin created the word genocide from the union of the Greek term *genos* (race) with the Latin term *caedere* (kill), which generates the suffix *cide*. The Polish jurist coined the term in response to Churchill when referring to the nameless crimes committed by the Nazis. In: *AXIS RULE IN OCCUPIED EUROPE*. Carnegie Endowment for International Peace: Washington D.C., 1944.

responsible for a crime of genocide by expressly stating that it can not be considered a political crime by national law<sup>11</sup> and that it is not subject to immunity<sup>12</sup>.

The Convention also foresees two types of jurisdiction as a result of the practice of the crime of genocide: the International Court of Justice has jurisdiction to settle disputes between States, including the civil responsibility of the State, as well as the interpretation, application and execution of the Convention<sup>13</sup>; for personal accountability, which means criminal responsibility, the convention provides that the subjects will be held accountable before the competent courts of the territory of the State where the act was committed or before an international criminal Court<sup>14</sup>.

At the time when the convention's text was drafted, there was no International Criminal Court, since the two Courts created at that time (Nuremberg and Tokyo) were *ad hoc* Courts competent only to judge the events of World War II. That is why the convention's end was devoted to the provision of a study, to be carried out by the International Law Commission, on the matter of an international criminal jurisdiction. In any case, the text invokes the evolution of the international community and the growing need for an international judicial body to prosecute certain crimes under the law of nations.

Initially, it was thought that this International Law Commission, when doing this study, should consider the possibility of creating a criminal chamber in the International Court of Justice itself, which is known to have been a plan that was hampered by the Cold War, since a new international tribunal was only established after the massacres in the former Yugoslavia and Rwanda.

The protection of human dignity and the prohibition of human suffering are equally underlying in international conventions such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment and the United Nations Convention for the Protection of All Persons against forced disappearances, published in 2006.

The prohibition of torture, based on the terms of the Convention, assumes a character of universal and absolute law as it declares that there is no circumstance, even of extreme exceptionality, that can justify its commission<sup>15</sup>.

In its Article 2, the Convention establishes a positive obligation for the States to adopt legislative, administrative and judicial measures to prevent all kinds of acts of torture in their respective territories, as well as the positive obligation of protection and prevention<sup>16</sup>. It also creates for the States, in addition, a specific

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<sup>11</sup> Article 7 of the Convention for the Prevention and Suppression of the Crime of Genocide, adopted by the United Nations General Assembly on December 9, 1948.

<sup>12</sup> Article 4 of the Convention for the Prevention and Suppression of the Crime of Genocide, adopted by the United Nations General Assembly on December 9, 1948.

<sup>13</sup> Article 9 of the Convention for the Prevention and Suppression of the Crime of Genocide, adopted by the United Nations General Assembly on December 9, 1948.

<sup>14</sup> Article 6 of the Convention for the Prevention and Suppression of the Crime of Genocide, adopted by the United Nations General Assembly on December 9, 1948.

<sup>15</sup> Article 2 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984.

<sup>16</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Slimani c. France. Requête n. 57671/00. Arrêt du 27 juillet 2004. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-66499"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 31 mar. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Riad et Idiab c. Belgique. Requêtes n. 29787/03 et 29810/03. Arrêt du 24 janvier 2008. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-84678"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 31 mar. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Mubilanzila Mayeka et Kaniki Mitunga c. Belgique. Requête n. 13178/03. Arrêt du 12 octobre 2006. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-77445"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 31 mar. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Popov c. France. Requêtes n. 39472/07 et 39474/07. Arrêt du 19 janvier 2012. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-108708"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 31 mar. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Placi v. Italy. Requête n. 48754/11. Arrêt du

negative obligation that consists in ensuring the prohibition of torture, which monitoring is entrusted to a supervisory system consisting of the requirement of reporting by States, the use of complaints and individual petitions<sup>17</sup>.

The same spirit of protection of human rights seems to have governed the elaboration of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006. It is an international human rights convention, the very title of which expressly refers to the objective of protection of the people - that is why we see no other path but the adoption of the doctrine of the dignity of the human being as a mark of international law of human rights and protection of humanity as a whole. The Convention is at the same time a source of criminal law born under the international law in the face of a major gap in domestic legal systems with regard to the criminalization of enforced disappearances. It is therefore the source of a downward movement that will progressively make this crime integrate the national rights<sup>18</sup>.

In addition, the Convention is the result of a joint codification effort by the United Nations and the Organization of American States.

In 1978, the UN was already concerned about the disappearance of people in all regions of the world and the excesses committed by the authorities allegedly responsible for their protection, as well as their awareness of the risk that such practices pose to life, freedom and security of the people and the anguish and sadness caused in the relatives of the disappeared persons<sup>19</sup>.

It is important to highlight the role of the Organization of American States in the construction of the notion of absolute prohibition of enforced disappearances, since it was through the regional system of inter-American protection that emerged the first Convention on the forced disappearance of persons, in 1994, expressly providing for the crime of forced disappearance.

Moreover, the Convention constitutes a source of positive obligations on the States related to the duty of incrimination: it promotes at the same time the mentioned downward movement of regional law towards the respective domestic rights, which gradually integrate them, in addition to an upward movement that inspired the elaboration of another convention at the international level.

Its origins date back to Resolution 666 (XIII - O/83) of the Organization of American States, which is based on the affirmation that the practice of forced disappearance of persons in America is an affront to hemispheric consciousness and constitutes a crime against humanity, understanding that will be based on the jurisprudence of the Inter-American Court of Human Rights, which on several

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21 janvier 2014. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-140028"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 31 mar. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Hurtado c. Suisse. Requête n. 17549/90. Décision du 28/01/1994. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"fulltext":\["17549/90"\],"display":\[2\],"languageisocode":\["FRE"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER"\],"itemid":\["001-62425"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 31 mar. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Levinta c. Moldova. Requête n.17332/03. Arrêt du 16 décembre 2008. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-90304"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 31 mar. 2019.

<sup>17</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Pretty c/ Royaume-Uni, Requête n. 2346/02. Arrêt, Strasbourg, 25 avr. 2002, § 50. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-65003"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 3 avr. 2019.

<sup>18</sup> MARTIN-CHENUT, K. "Le renforcement des obligations positives de nature pénale dans la jurisprudence interaméricaine : l'exemple des graves violations des droits de l'homme commises pendant les dictatures des pays du Cone-Sud", *Revue de Science Criminelle et de Droit Pénal Comparé*, 3, pp. 705-725.

<sup>19</sup> NATIONS UNIES. Assemblée générale. Résolutions adoptées par l'Assemblée Générale au cours de la trente-troisième session. Résolution 33/173 : Personnes disparues. New York, 20 décembre 1978. Disponible sur : <[http://www.un.org/french/documents/view\\_doc.asp?symbol=A/RES/33/173&Lang=F](http://www.un.org/french/documents/view_doc.asp?symbol=A/RES/33/173&Lang=F)>. Access on: 4 apr. 2019.

occasions will use concepts of international criminal law, describing the practice of forced disappearance as a kind of crime against humanity<sup>20</sup>.

This adoption symbolizes the extent to which a convergent movement takes place within the framework of regional protection systems, sometimes pushing the creation of international conventions, raising them from a regional level to a universal level – which is the case of the American Convention on the Forced Disappearance of Persons –, and other times confirming the normative system previously established by the United Nations.

In this sense, the three main regional systems of protection, European, American and African, deal with this same normative construction.

The European system of human rights protection established by the Council of Europe has in the European Convention on Human Rights its main normative instrument to guarantee rights, protecting both rights of an absolute nature and the ones of a relative nature.

Stopping into rights considered impassible for relativization, it is found that the Convention consecrates in its article 1 the right to non-discrimination, raising it to a general principle based on the equal dignity of all human beings; its article 3 establishes the imposition of an absolute prohibition on torture insofar as it declares that it is not subject to restrictions and derogations<sup>21</sup>; it also does so in its Article 4 in that it prohibits slavery (and not the forced labor).

In its turn, the Inter-American system for the protection of human rights was established by the Organization of American States, whose main instruments are the OAS Charter, the American Declaration of the Rights and Duties of Man, both adopted in 1948, and the American Convention on Human Rights Human Rights, or Pact of San José, adopted in 1969.

The American Declaration on the Rights and Duties of Man subsequently gave rise to the creation of the Inter-American Commission on Human Rights in 1959, which ensures the mandatory force of the declaration, since it is competent to ensure in practice respect for and promotion of rights and guarantees provided for therein.

Likewise, the American Convention contains a list of absolute rights, such as Article 5, which prohibits all forms of torture, cruel or degrading treatment or punishment, relating the prohibition directly to the right to physical integrity and expressly mentioning the duty of respect for the dignity of the human being. Slavery is also erected to the level of absolute prohibition in its Article 6. Unlike the European Convention, the American Convention expressly provides protection against honor and recognition of the dignity of the human person, without exception<sup>22</sup>.

The African human rights system, established by the Organization of African Unity, has in the African Charter on Human and Peoples' Rights its main instrument of conventional law in the matter of the protection and promotion of human rights at the regional level, proclaiming rights of both nature individual and collective, and also

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<sup>20</sup> CORTE INTERAMERICANA DE DERECHOS HUMANOS. Caso Velásquez Rodríguez Vs. Honduras. San José, Costa Rica: Sentencia (Fondo), 29 de julio de 1988. Available on: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_esp.pdf)>. Access on: 4 apr. 2019 ; CORTE INTERAMERICANA DE DERECHOS HUMANOS. Caso Goiburú y otros Vs. Paraguay. San José, Costa Rica: Sentencia (Fondo, Reparaciones y Costas), 22 de septiembre de 2006. Available on: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_153\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_esp.pdf)>. Access on: 4 apr. 2019.

<sup>21</sup> SUDRE, F. *Droit européen et international des droits de l'homme*. Paris, Presses universitaires de France, 2016, p. 479.

<sup>22</sup> Article 1 - 1. 1. Everyone has the right to respect for his honor and the recognition of his dignity. AMERICAN CONVENTION ON HUMAN RIGHTS. San Jose, Costa Rica, November 22, 1969. Available on: <[https://www.cidh.oas.org/basicos/portugues/c.convencao\\_americana.htm](https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm)>. Access on: 14 apr. 2019.



being a source of positive obligations to the States insofar as it establishes the duty to adopt legislative measures in order to give effect to the stated prerogatives<sup>23</sup>.

The Charter expressly refers to dignity as an essential objective of achieving the aspirations of the African peoples and to the need for international protection of the fundamental rights of the human being<sup>24</sup>, bringing the right to equality before the law as an absolute right, which can be interpreted as a right to non-discrimination<sup>25</sup>, the right to life and physical integrity<sup>26</sup>, as well as the right to dignity and to the prohibition of slavery, of human trafficking, of torture and cruel, inhuman or degrading treatment<sup>27</sup>.

The African Charter still innovates by erecting what it calls the rights of the peoples, proclaiming their equal dignity, their right to self-determination, their right to respect for their identity and freedom, and the equal enjoyment of the common patrimony of humanity, as well as the right to peace, this last one in parallel with the Charter of the United Nations.

### 3. A NEW INTERNATIONAL LAW?

The question that arises at the beginning of the twenty-first century is whether the Universal Declaration of Human Rights and, with it, the whole system of universal protection of human rights erected by the United Nations, inaugurated a new phase of international law.

At first, it seems that a first change that took place was effectively placing the individual in the position of subject of rights and duties, at the same time that international law began to legally protect a new entity, now nominated humanity. This apprehension of humanity by international law may have produced a double-dimension phenomenon: on the one hand, the judicialization of the concept of humanity is transforming of the concept itself - from a philosophical and metaphysical concept to a legal concept; on the other hand, international law begins to undergo a process of humanization brought about by the breaking of some of its bases inherited from the pillar of the conception of State sovereignty - from a classic international law to a new international law.

The changes in the concept of humanity and the very conception of international law are the work of all these social events contemporary to the process, which now demand the protection of the human being on the international scene and the imposition of limits on the reason of the State. The atrocities that marked the end of the nineteenth century and the first half of the twentieth century have finally awakened "the universal legal consciousness of the need to re-conceptualize the very foundations of the international legal order"<sup>28</sup>.

This international law arises from a body of principles and customs and is gradually transformed into a conventional legal order, finding an unprecedented development triggered by the Universal Declaration of Human Rights.

Although the conventional construction centralized by the UN does not have protecting human rights as its only goal, since it has also been responsible to deal with matters relating to international peace and security, as the protection of human

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<sup>23</sup> Article 1 of the African Charter on Human and Peoples' Rights of 28 June 1981. AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLE. Nairobi, 1981.

<sup>24</sup> Preamble to the African Charter on Human and Peoples' Rights of June 28, 1981. AFRICAN CHARTER OF HUMAN RIGHTS AND PEOPLE. Nairobi, 1981.

<sup>25</sup> Article 3 of the African Charter on Human and Peoples' Rights of 28 June 1981. AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLE. Nairobi, 1981.

<sup>26</sup> In its Article 4, unlike the European and American Conventions, the African Charter makes no relativization of the right to life.

<sup>27</sup> Article 5 of the African Charter on Human and Peoples' Rights of 28 June 1981. AFRICAN CHARTER ON HUMAN RIGHTS AND PEOPLE. Nairobi, 1981.

<sup>28</sup> CANÇADO TRINDADE, A. *A humanização do direito internacional*. Belo Horizonte, Del Rey, 2006, p. 111.

rights is not the sole object of protection of some regional systems, together with it followed a whole jurisprudential construction that gave hierarchical primacy to what can be called intangible human values, from which equally universal and absolute rights flow.

On the entire construction created by the jurisprudence on the matter of interpreting and enforcing the international human rights law there is a certain convergence of understanding and even a reciprocal influence on the part of one Court over another, and it is not uncommon to find the intersection of decisions that can be understood as a true dialogue between the Courts, both between the Courts of Human Rights among themselves, as well as from those with the International Criminal Courts, and also with the Constitutional Courts.

All this jurisprudential construction in the field of human rights is developed in two main lines that intersect, being the universal system of protection coordinated by the United Nations on one hand and, on the other hand, the regional systems of protection born from the institution of international organizations such as the Council of Europe, the Organization of American States and the African Union.

The jurisprudential construction based on the universal system of protection of the United Nations finds its pillar in the International Court of Justice, whose contentious jurisdiction can be exercised on the States in three different hypotheses: by the acceptance of the States involved in the case of the existence of a specific dispute in the matter of international law; by the determination of an international treaty stating the Court to be competent to settle the dispute (as is the case with the Convention on the prevention and punishment of the crime of genocide); or by the application of the optional clause, in which the States issue a unilateral declaration accepting the jurisdiction of the Court, being applicable to all States that do so, and is therefore called a reciprocity clause.

Consolidated the jurisdiction of the Court, its decision has the consequence of creating an obligation on the States concerned to observe it, only being possible to review the decision in case of the discovery of a new decisive fact and that at the time of the decision was unknown, as predict Articles 59 to 61 of its statute<sup>29</sup>.

In regard to the protection of the values of humanity, there were numerous occasions when the International Court of Justice was called to manifest. It is specially important its understanding about *jus cogens* and State's obligations deriving from international law, as well as the changes of understanding which have taken place over time, notably as to the nature of international law. In this last aspect, it seems to have been an advance that starts from a voluntarist conception of international law and flows into a teleological vision focused on the protective purpose.

The jurisprudence of the International Court of Justice will serve as basis for the delimitation of the concept of *erga omnes* obligations that reach the entire international community. These are different from obligations under international

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<sup>29</sup> Article 59. La décision de la Cour n'est obligatoire que pour les parties en litige et dans le cas qui a été décidé. Article 60. L'arrêt est définitif et sans recours. En cas de contestation sur le sens et la portée de l'arrêt, il appartient à la Cour de l'interpréter, à la demande de toute partie. Article 61. La révision de l'arrêt ne peut être éventuellement demandée à la Cour qu'en raison de la découverte d'un fait de nature à exercer une influence décisive et qui, avant le prononcé de l'arrêt, était inconnu de la Cour et de la partie qui demande la révision, sans qu'il y ait, de sa part, faute à l'ignorer. La procédure de révision s'ouvre par un arrêt de la Cour constatant expressément l'existence du fait nouveau, lui reconnaissant les caractères qui donnent ouverture à la révision, et déclarant de ce chef la demande recevable. La Cour peut subordonner l'ouverture de la procédure en révision à l'exécution préalable de l'arrêt. La demande en révision devra être formée au plus tard dans le délai de six mois après la découverte du fait nouveau. Aucune demande de révision ne pourra être formée après l'expiration d'un délai de dix ans à dater de l'arrêt. COUR INTERNATIONALE DE JUSTICE. Statut de la Cour International de Justice. Disponible sur : <<http://www.un.org/fr/documents/icjstatute/pdf/icjstatute.pdf>>. Accès : 15 mai. 2019.

treaties whose purpose is the creation of obligations limited to signatory States. In this sense, the Court will have to distinguish between what are principles of international law with mandatory application, as they arise from *jus cogens*, from those that are not. At the occasion of the trial of the Barcelona Traction, Light and Power Company case between Belgium and Spain<sup>30</sup>, the Court distinguished between the obligations of States related to the international community as a whole and those born for the States within the framework of diplomatic protection.

Regarding the obligations arising from the norms of *jus cogens*, with *erga omnes* reach, the Court's decision refers to acts of aggression, genocide and the rules concerning the fundamental rights of the human person. Such standards include protection against slavery and racial discrimination, which would be integrated into an international law that it characterizes as being of a universal or semi-universal character. It thus declares *jus cogens*, or *peremptory rules*, as an autonomous source of rights, which go beyond mere conventional law, once they are international standards of vital importance to the entire international community.

This jurisprudence will serve as a parameter for international criminal jurisdictions, especially in what regards the inclusion of the prohibition of torture, enforced disappearances and genocide as norms arising from *jus cogens*, of an absolute nature and therefore impassible for relativization by national States.

The body of the Convention for the Prevention and Punishment of the Crime of Genocide was expanded by the jurisprudence of the International Court of Justice, initially by the Advisory Opinion of May 28<sup>th</sup>, 1951 (reservations to the Genocide Convention<sup>31</sup>), in which treaty law was analyzed in depth, especially in the matter of the possibility for States to make reservations to the text of multilateral international conventions.

Also, the Court understands that the right to make reservations can not jeopardize the superior purposes of the Convention, in which it states that the basic principles of the Convention are those recognized by civilized nations as obliging States, even those States which are outside of the conventional link<sup>32</sup>.

The Court recognized as a principle that any multilateral agreement is the result of a freely stipulated agreement on clauses and that it is therefore not for the contractors to destroy or compromise, through unilateral decisions or particular agreements, what is the purpose and reason of being of the convention. However, it is not prohibited for the parties to have reservations, which will depend on their nature. In this aspect, the Court has relativized the concept of the absolute integrity of multilateral conventions, in order to preserve the principles of humanity that rule a convention for the rights of nations.

The reserves should therefore not misconstrue the purpose of a multilateral convention. In the case of the genocide convention, the United Nations' intention to suppress a crime of the law of nations should be taken in consideration. This crime implies the denial of the right to the existence of certain entire human groups, inflicting great losses on humanity. The Court thus recognized principles that are at

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<sup>30</sup> COUR INTERNATIONALE DE JUSTICE. Affaire de la Barcelona Traction, Light and Power Company, Limited. (Belgique c. Espagne). Recueil des Arrêts, avis consultatifs et ordonnances. Deuxième phase. Arrêt du 5 février 1970. §§ 33-34. Disponible sur : <<http://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-FR.pdf>>. Accès : 20 avr. 2019.

<sup>31</sup> COUR INTERNATIONALE DE JUSTICE. Avis Consultatif du 28 Mai 1951. Réserves à la Convention pour la Prévention et la Répression du Crime de Génocide. Layde : Société D'Éditions A. W. Sijhoff, 1951. Disponible sur : <<http://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-FR.pdf>>.

<sup>31</sup> COUR INTERNATIONALE DE JUSTICE. Avis Consultatif du 28 Mai 1951. Réserves à la Convention pour la Prévention et la Répression du Crime de Génocide. Layde : Société D'Éditions A. W. Sijhoff, 1951. Disponible sur : <<http://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-FR.pdf>>.

<sup>32</sup> COUR INTERNATIONALE DE JUSTICE. Avis Consultatif du 28 Mai 1951. Réserves à la Convention pour la Prévention et la Répression du Crime de Génocide. Layde : Société D'Éditions A. W. Sijhoff, 1951. Di Disponible sur : <<http://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-FR.pdf>>.

the basis of the Convention, and that are recognized by civilized nations and that compel States even outside the conventional link. In addition, it attributed a universal character both to the condemnation of genocide and to the cooperation necessary to liberate mankind from a scourge that it called hateful.

As for the purposes of the convention, the ICJ has emphasized its human and civilizing character, which aims to safeguard the existence of human groups and to confirm elementary moral principles. For that reason, the States that are part of the Convention do not have their own interests but only a common interest, which is to preserve the higher ends and the reason to be of the Convention. That understanding demonstrates that in certain matters there would be a consensus of the international community on the interest of protection arising from the essential character of some norms for the international legal order<sup>33</sup> or the fundamental interests of the international community<sup>34</sup>.

Subsequently, during the trial of the armed activities in Congo, the obligation *erga omnes* of States with regard to the prevention and repression of genocide was recalled by the International Court of Justice<sup>35</sup>.

In matters closely related to the fact that certain norms belong to the nucleus of *jus cogens*, the International Court of Justice faces a number of occasions to express its opinion on their effect on imposing obligations on States.

The conception of the supremacy of international law in which it protects human beings from the practice of grave breaches, such as the practice of the crime of genocide, is also evidenced in the decision of the International Court of Justice in the case concerning armed activities in the territory Congo, which expressly states that the basic principles of the Convention are principles recognized by the civilized nations, which oblige the states even in the absence of any conventional link, due to the universal condemnation of genocide and to the cooperation that is necessary among all members of the international community, especially the States, in order to free humanity from such a hateful scourge. The decision adds that as a consequence of that postulate, the rights and obligations established in the Convention have *erga omnes* nature<sup>36</sup>.

The absence of a voluntarist character of international law is evidenced in this decision, in the aspect that international law protects superior human values, with goals of preventing and repressing violations of rights that have these values as underlying. By noting that the basic principles of the Convention oblige States outside the conventional link, which are principles connected with the preservation of humanity against an odious practice such as genocide, the Court raises the material content of the Convention to the status of customary international law, possible to be enforced on the States regardless of their will.

The reason why the principles contained in conventions such as that of genocide compel States beyond any conventional link is further elaborated by the ICJ

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<sup>33</sup> DIACONU, I. *Contribution à une étude sur les normes impératives en droit international (jus cogens)*. Bucarest, Impr. Institut international de Technologie et d'économie Apicole d'Apimondia, 1971, pp. 106-107.

<sup>34</sup> DANILENKO, G. *Law-Making in the International Community*. Dordrecht/ Boston/ London, Martinus Nijhoff, 1993, p. 234.

<sup>35</sup> COUR INTERNATIONALE DE JUSTICE. Affaire de des Activités Armées sur le territoire du Congo (République Démocratique du Congo C. Ouganda). Recueil des arrêts, avis consultatifs et ordonnances. Arrêt du 19 Décembre 2005. Disponible sur : <<http://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-FR.pdf>>. Accès : 23 avr. 2019.

<sup>36</sup> COUR INTERNATIONALE DE JUSTICE. Affaire de des Activités Armées sur le territoire du Congo (République Démocratique du Congo c/ Rwanda). Nouvelle requête. 2002. Compétence de la Cour et Recevabilité de la Requête. Arrêt du 3 février 2006, § 64. Disponible sur : <<http://www.icj-cij.org/files/case-related/126/126-20060203-JUD-01-00-FR.pdf>>. Accès : 23 avr. 2019.

in the Bosnia-Herzegovina case against Serbia and Montenegro, in the case concerning the application of the Convention for the Prevention and the repression of the crime of genocide.

The decision states that, in order to determine the nature of the obligations imposed on the States, it is necessary to analyze the purposes of a convention, and in the case of the Genocide Convention, the crime it treats constitutes an offense against the law of nations, since it implies the denial of the right of existence to entire human groups, constituting a refusal that greatly disturbs human consciousness and inflicts losses on humanity. Consequently, according to the Court, this postulate has two consequences: the imposition of obligations upon States, regardless of their consent, endowed with the nature of impassive reservations, and the universal character of the condemnation of genocide arising from the human and civilizing purpose of the convention<sup>37</sup>.

The Genocide Convention and its broad interpretation by the International Court of Justice will be of even greater value for the drafting of the statutes of international criminal jurisdictions, and the jurisprudence of such courts will on several occasions remind us of the seriousness of the offense.

Although the International Court of Justice has at times oscillated and taken restrictive positions on the extent of imperative norms<sup>38</sup> and the imposition of *erga omnes* obligations on some rights<sup>39</sup>, on the other hand some bold positioning were decisive for the advancement of international law, which refers to the fight against impunity for serious and massive violations against the human community.

This is the case of the Belgium-Senegal decision on questions concerning the obligation to prosecute or extradite, which had the request for Senegal to extradite or to initiate criminal proceedings against former dictator Hissène Habré as a subject, which is anchored in the International Convention against Torture.

On the assumption that the prohibition of torture derives from customary international law as a peremptory norm, relying on a broad international practice on the legal opinion of States and appearing in numerous international instruments with a universal vocation, the Court decided in favor of forcing Senegal to prosecute for the practice of torture. But the decision also backed down in the sense that it understands that this obligation arises only after the ratification of the Convention by that country<sup>40</sup>.

The final outcome of the decision was one of the milestones for the repression of crimes against humanity committed under torture, that is because the Court's understanding of the obligation to prosecute (or to extradite) was one of the factors which triggered the creation of the Extraordinary Chambers of Senegal that culminated in the condemnation of the former dictator to life imprisonment<sup>41</sup>.

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<sup>37</sup> COUR INTERNATIONALE DE JUSTICE. Affaire relative à l'application de la Convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c/ Serbie et Monténégro). Arrêt du 26 février 2007, §§161-162. Disponible sur : <<http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-FR.pdf>>. Accès : 24 avr. 2019.

<sup>38</sup> COUR INTERNATIONALE DE JUSTICE. Affaire relative aux Immunités Juridictionnelles de l'État (Allemagne c/ Italie; Grèce intervenant). Arrêt du 3 février 2012. Disponible sur : <<http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-FR.pdf>>. Accès : 24 avr. 2019.

<sup>39</sup> COUR INTERNATIONALE DE JUSTICE. Affaire relative au Timor Oriental. Portugal c/ Australie. Arrêt du 30 Juin 1995, §29. Disponible sur : <<http://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-FR.pdf>>. Accès : 27 avr. 2019.

<sup>40</sup> COUR INTERNATIONALE DE JUSTICE. Questions concernant l'obligation de poursuivre ou d'extrader. Belgique c. Sénégal. Arrêt du 20 juillet 2012, §§ 99-105. Disponible sur : <<http://www.icj-cij.org/files/case-related/144/144-20120720-JUD-01-00-FR.pdf>>. Accès : 27 avr. 2019.

<sup>41</sup> CHAMBRE AFRICAINE EXTRAORDINAIRE D'ASSISES. Ministère Public c/ Hissein Habré. Jugement rendu le 30 mai 2016. Disponible sur : <[http://www.forumchambresafriaines.org/docs/JugementCAEd'Assises\\_Penal&Civil\\_.pdf](http://www.forumchambresafriaines.org/docs/JugementCAEd'Assises_Penal&Civil_.pdf)>. Accès : 28 avr. 2019.

In any case, even though there have been setbacks in the historical course of its jurisprudential construction, the opinion of the International Court of Justice generally shows that respect for the most valued rights of human beings is a goal for the development of a right which gradually abandoned its classical postulates towards the construction of an international law more adapted to the needs of protection of universal values.

This protective profile is reflected in trials such as that of the before mentioned Nicaragua case against the United States of America<sup>42</sup>, in a tone that is repeated, for example, in the advisory opinion on the lawfulness of the threat or use of nuclear weapons<sup>43</sup>, as well as the opinion consultative process related to the legal consequences of the construction of a wall in the Palestinian territory, with the Court reporting to the most fundamental obligations of humanitarian law and to the fact that elementary considerations of humanity are imposed on all States, whether or not they have ratified conventional instruments<sup>44</sup>.

In these cases, the Court reiterated that the rules of humanitarian law has as its main goal the respect for the human person and that, in the face of elementary considerations of humanity, they impose on all States, creating on them imperative and *erga omnes* obligations, whether they have or not ratified conventional instruments, since they constitute intransigent principles of customary law. Decisions of this nature demonstrate a change in the focus of international law insofar as the interests of States are placed on a secondary level, and the center of attention is to safeguard human beings and humanity as a whole.

The obligations of States in breach of international human rights law were also demarcated by the International Court of Justice in the trial of the case of armed activities in the territory of Congo, moved by the Democratic Republic of Congo against Uganda<sup>45</sup>. Among other facts, the Court considered the allegation of violation of international human rights law as well as international humanitarian law on that the grounds that Ugandan's armed forces had committed massive violations of human rights in Congolese territory, in order to bring the respondent State the legal consequences arising from the breach of its international obligations, including the obligation to make full reparation for the damages caused by an internationally wrongful act.

The Court had the opportunity to examine the claims of the claimant State that the Ugandan armed forces would have caused loss of life within the civilian population, committed acts of torture and other forms of inhumane treatment, also the destruction of villages and housing belonging to civilians and incitement of ethnic conflicts. The decision concludes by characterizing Uganda's international liability for its responsibility for violating international human rights law and humanitarian law. According to the Court, the non-compliance with international obligations results

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<sup>42</sup> COUR INTERNATIONALE DE JUSTICE. Affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique). Arrêt du 27 juin 1986. C.I.J. Recueil 1986, p. 114.

<sup>43</sup> COUR INTERNATIONALE DE JUSTICE. Licéité de la Menace ou de L'emploi D'armes Nucléaires. Avis Consultatif du 8 Juillet 1996, §79. Disponible sur : <<http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-FR.pdf>>. Accès : 23 avr. 2019.

<sup>44</sup> COUR INTERNATIONALE DE JUSTICE. Conséquences Juridiques de L'édification d'un Mur dans Le Territoire Palestinien Occupé. Avis Consultatif du 9 Juillet 2004, §157. Disponible sur : <<http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-FR.pdf>>. Accès : 30 avr. 2019.

<sup>45</sup> COUR INTERNATIONALE DE JUSTICE. Affaire des Activités Armées sur le territoire du Congo (République Démocratique du Congo C. Ouganda). Recueil des arrêts, avis consultatifs et ordonnances. Arrêt du 19 Décembre 2005. Disponible sur : <<http://www.icj-cij.org/docket/files/116/10454.pdf>>. Accès : 23 avr. 2019.

come from the immense suffering of the Congolese population resulting from the atrocities committed during the conflict<sup>46</sup>.

In all these constructions, the International Court of Justice made important contributions on issues such as the application of international treaties, the value of customary international law, and the general principles of international law, as well as the international responsibility of the State, thereby assisting in delimitating the existence and the outlines of certain fundamental norms of the international community<sup>47</sup>.

The binding nature of certain principles deriving from international law and the obligation of States arising from their non-compliance will also be mentioned in the jurisprudence of the Inter-American Court of Human Rights, especially in the reasoned opinions of Judge Antônio Augusto Cançado Trindade.

In the case of *Blake vs. Guatemala*, where the State was convicted for the crime of forced disappearance, Judge Cançado Trindade refers to the consecration of *erga omnes* obligations of protection as being a manifestation on the emergence of imperative norms of international law, which would also represent the overcoming of the own autonomy of the will of the State, that could not be evoked by the existence of norms of *jus cogens*. It is, according to the jurist, an evolution of the universal juridical conscience in benefit of all human beings<sup>48</sup>.

In the same line of thought, in his reasoned opinion in the *Barrios Altos v. Peru* case, regarding the violation of the right to life, to physical integrity and the practice of forced disappearance that were, in this case, protected by an auto amnesty law, Judge Cançado Trindade states that such laws violate universally recognized non-derogable rights that fall within the scope of *jus cogens*. It also refers to the building of principles erected since the advent of the Martens Clause and its contribution to the construction of humanitarian principles, which should be used as a source of interpretation in order to prevent the existence of rules that are not created for the benefit of the whole human race, given the character of *jus cogens* which the clause contains, understanding, therefore, that auto amnesty laws, for example, are nothing more than an inadmissible affront to the legal conscience of humanity<sup>49</sup>.

The reference to the practice of crimes against humanity as the most serious violations of rights that aim for the protection of universal values is reflected in many other decisions of the Inter-American Court of Human Rights.

In the case of *Goiburú*, which deals with the practice of forced disappearance in the context of Operation Condor<sup>50</sup>, the Court recalls, through a reasoned vote of Judge Cançado Trindade, that the international legal system has gradually begun to criminalize serious human rights violations and that such norms have attained the highest rank in so far as they embody prohibitions of *jus cogens*, in order to prevent

<sup>46</sup> COUR INTERNATIONALE DE JUSTICE. *Affaire des Activités Armées sur le territoire du Congo (République Démocratique du Congo C. Ouganda)*. Recueil des arrêts, avis consultatifs et ordonnances. Arrêt du 19 Décembre 2005, §§ 206, 211, 220-221. Disponible sur : <<http://www.icj-cij.org/docket/files/116/10454.pdf>>. Accès : 23 avr. 2019.

<sup>47</sup> CARREAU, D. MARRELLA, F. *Droit international*. Paris, Pédone, 2012, p. 690.

<sup>48</sup> CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso Blake vs. Guatemala*. San José, Costa Rica: Sentencia (Fondo), 24 Enero 1998. Voto razonado del juez A. A. Cançado Trindade. § 28. Disponible sur : <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_36\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_36_esp.pdf)>. Access on: 10 dec. 2018.

<sup>49</sup> “[...] en el dominio del Derecho Internacional de los Derechos Humanos, las llamadas ‘leyes’ de autoamnistía no son verdaderamente leyes: no son nada más que una aberración, una afrenta inadmisibles a la conciencia jurídica de la humanidad”. CORTE INTERAMERICANA DE DERECHOS HUMANOS. *Caso Barrios Altos Vs. Peru*. San José, Costa Rica: Sentencia (Fondo), 14 de março de 2001. Voto concurrente del juez A. A. Cançado trindade. §§ 10-11; §§ 22-29. Disponible sur : <[http://www.corteidh.or.cr/docs/casos/articulos/Seriec\\_75\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_75_esp.pdf)>. Access on: 30 apr. 2019.

<sup>50</sup> DINGES, J. *The Condor Years: How Pinochet and his allies brought terrorism to three continents*. New York, The New Press, 2004.

such kind of offenses from recurring. This process, which promotes the evolution of contemporary international law, is accompanied by the establishment of an international criminal jurisdiction that relies on a principle of protection of higher values. This process, according to the Judge, is due to the intensification of the cry of all humanity, called universal legal consciousness, against the atrocities that have victimized millions of human beings<sup>51</sup>.

On the trial of the Almonacid Arellano case, which has as one of its central points the invalidity of the amnesty granted in respect of serious human rights violations, once again with even greater clarity as to the content of Judge Cançado Trindade's reasoned opinion, stands out the understanding that offenses that constitute crimes against humanity are governed by prohibitive norms belonging to the area of *jus cogens* and that the choice of punishing or not punishing is therefore outside the scope of national law<sup>52</sup>.

Similar positionings are discernible in the jurisprudential construction of the European Court of Human Rights, beginning with the treatment regarding torture, consecrated by the Court as an absolute prohibition.

In the paradigmatic trial of the Soering case against the United Kingdom, which is the hallmark in matter of extradition prohibition in the case of death penalty use the ECHR classifies the prohibition of torture and inhuman or degrading treatment as an absolute prohibition and decides by the impossibility of extraditing, regardless of hateful the crime committed was, in view of the possibility that the extradited person may be subject to capital punishment (or torture in other cases) - understood by the Court as inhuman or degrading treatment<sup>53</sup>.

This decision of the European court, which considers that in any case the execution of the death penalty constitutes inhuman or degrading treatment, will become stoned jurisprudence in respect of which the Court will not retreat. This position represents a step forward in relation to the other regional protection systems, in view of the inadmissibility of the death penalty in all member countries of the Council of Europe<sup>54</sup>.

The European Court of Human Rights, through its jurisprudence, conceives an extension of the concept of torture and qualifies it not only as the fact that one suffers physical violence, but also because it is subject to the absence of medical

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<sup>51</sup> CORTE INTERAMERICANA DE DERECHOS HUMANOS. Caso Goiburú y otros Vs. Paraguay. San José, Costa Rica: Sentencia (Fondo, Reparaciones y Costas), 22 de septiembre de 2006. Voto razonado del Juez A. A. Cançado Trindade, §§6-8. Available on: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_153\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_esp.pdf)>. Access on: 4 apr. 2019.

<sup>52</sup> CORTE INTERAMERICANA DE DERECHOS HUMANOS. Caso Almonacid Arellano y otros Vs. Chile. San José, Costa Rica: Sentencia 2006 (Excepciones Preliminares, Fondo, Reparaciones y Costas), 26 de septiembre de. Voto razonado del Juez A. A. Cançado Trindade, §§22-23. Available on: <[http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_154\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_esp.pdf)>. Access on: 02 may. 2019.

<sup>53</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Soering c/ Royaume-Uni. Requête n°14038/88. Jugement rendu le 07 juillet 1989, § 88. Disponible sur : <[https://hudoc.echr.coe.int/eng#{"itemid":\["001-62176"\]}](https://hudoc.echr.coe.int/eng#{)>. Accès : 03 mai. 2019.

<sup>54</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Öcalan c. Turquie. Requête n. 46221/99. Arrêt, Strasbourg, 12 mai 2005, § 165. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-69023"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 04 mai. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Al-Saadoon et Mufdhi c. Royaume-Uni. Requête n. 61498/08. Arrêt, Strasbourg, 2 mars 2010, § 120. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-97620"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 04 mai. 2019.



care<sup>55</sup> and brings human dignity as a vector in what condemns the use of physical force against individuals<sup>56</sup>.

It is precisely in the analysis of the concept of inhuman treatment that the European Court of Human Rights reports on several occasions to the matter of human suffering and human dignity. In the case of *Chember v. Russia*, the Court expressly refers to the disciplinary sanction inflicted for the purpose of causing physical suffering and resulting in the invalidity of the victim<sup>57</sup>; in the *MSS v. Belgium* case, it considers inhuman and degrading treatment when it humiliates the individual, disrespecting his dignity, imposing feelings of fear, anguish or inferiority, in order to break his moral and physical resistance<sup>58</sup>.

Regarding the protection of human dignity, the ECHR jurisprudence is lavish in terms of conditions of detention, understanding that, as such conditions violate human dignity, they also violate Article 3 of the European Convention on Human Rights<sup>59</sup>, stating, for example, that the placing of a detainee in a metal cage during his public trial constitutes an affront to human dignity<sup>60</sup>, it also expressly consecrate the right of every prisoner to remain detained under conditions compatible with respect for human dignity<sup>61</sup>.

The same relation between human dignity and the prohibition of inhuman or degrading treatment is applied in the matter of the application of the sentence of life imprisonment, in relation to which the ECHR has interpreted evolutionarily, understanding that in order to be compatible with Article 3 of the European Convention on Human Rights, it should be subject to re-examination, under penalty of being considered a violation of rights. In this aspect, the European Court also presents a development in relation to the other regional systems, as it creates a limitation on the imposition of a life sentence, clearly demonstrating its concern with the preservation of human dignity<sup>62</sup>.

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<sup>55</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Algür c. Turquie. Requête n. 32574/96. Arrêt, Strasbourg, 22 octobre 2002. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-65259"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 04 mai. 2019.

<sup>56</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Ribitsch c. Autriche. Requête n. 18896/91. Arrêt, Strasbourg, 4 décembre 1995. § 38. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-62521"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 05 mai. 2019.

<sup>57</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Chember c. Russie. Requête n. 7188/03. Arrêt, Strasbourg, 3 Juillet 2008. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-87355"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 05 mai. 2019.

<sup>58</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire M.S.S. c. Belgique et Grèce. Requête n. 30696/09. Arrêt, Strasbourg, 21 janvier 2011, § 220. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-103293"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 05 mai. 2019.

<sup>59</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Kotälla c. Pays-Bas. Requête n. 7994/77. Décision du 6 mai 1978 sur la recevabilité de la requête. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"fulltext":\["Kot%C3%A4lla"\],"display":\[2\],"languageisocode":\["FRE"\],"itemid":\["001-73601"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 10 août. 2019.

<sup>60</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Svinarenko et Slyadnev c. Russie. Requêtes n. 32541/08 et 43441/08. Arrêt, Strasbourg, 17 juillet 2014. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-145835"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 9 mai. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Ashot Harutyunyan c. Arménie. Application n. 34334/04. Judgement, Strasbourg, 15 juin 2010. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-99403"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 10 août. 2019.

<sup>61</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Kudla c. Pologne. Requête n. 30210/96. Arrêt, Strasbourg, 26 octobre 2000, § 94. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-63471"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 9 mai. 2019.

<sup>62</sup> COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Bodein c. France. Requête n. 40014/10. Arrêt, Strasbourg, 13 novembre 2014. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-147880"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 15 mai. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Vinter c. Royaume-Uni. Requêtes n. 66069/09, 130/10 et 3896/10. Arrêt, Strasbourg, 9 juillet 2013. Disponible sur : <[https://hudoc.echr.coe.int/fre#{"itemid":\["001-122694"\]}](https://hudoc.echr.coe.int/fre#{)>. Accès : 13 mai. 2019 ; COUR EUROPÉENNE DES DROITS DE L'HOMME. Affaire Murray c. Pays-Bas. Requête n. 10511/10.

#### 4. FINAL CONSIDERATIONS

The adoption of a series of international human rights conventions leveraged by the creation of the United Nations and the subsequent adoption of the Universal Declaration of Human Rights are inaugural acts of a new international law that puts the individual at the center of its protection. It is, at this point, that international human rights law is born, alongside to international criminal law, the latter created by the Statute of the Nuremberg Tribunal.

From this context mankind emerges as a new entity, object of legal protection, although with outlines not yet so well defined. Humanity becomes subject of rights, so many are the conventional texts that put it as an object of protection. Humanity also becomes a victim, *vis a vis* the new legal figure of crime against humanity, which is also provided by international law.

The concept of humanity begins to be improved, based on a casuistic construction, dependent on the identification of conducts that on a case-by-case basis are understood as violating universal values that belong to the human community, also bringing new reflections that point to the search for a response on which must be the object (s) of international law.

This humanity-subject also becomes a carrier of values to be protected, but values of difficult identification. If, on the one hand, the law did not neglect to typify on a case-by-case basis what was understood as a grave offense against humanity, on the other hand it neglected to establish the substance of a hierarchy of human values that would serve as a substrate for the protection of its rights.

This identification seems to be possible only from an accurate dissection of the building constructed by all the international conventions and by the jurisprudential construction in the matter of international human rights law.

Understanding the meaning of grave breach, based on the analysis of the most serious conduct that has already devastated humanity - crimes against humanity and the crime of genocide -, has made it possible to identify two values that are thought to occupy the top of the hierarchy of a set of legal norms: the protection of human dignity and the interdiction of suffering. These are values that legitimize the existence of rights of a universal and absolute nature that are part of a small intangible nucleus: the right to life, the right to physical integrity, the right to liberty, the right to sexual freedom, the right to non-discrimination and the right to non-submission to inhuman, cruel or degrading treatment.

From the jurisprudence of the international and regional Courts in charge of rendering effectiveness to the conventional construction, from the content of decisions of this nature human dignity seems to emerge as an underlying value, occupying, alongside the interdiction of suffering, the apex of the hierarchy of universal and absolute values which safeguard is the ultimate goal of an international right focused on the centrality of the individual.

Especially since the creation of the United Nations and its respective universal system of protection, both normative and jurisdictional, international human rights law now gives an important value to this notion of offenses that affect what is human in the human being . The normative construction catalysed by this new structure seems to make human dignity emerge as a value underlying the

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Arrêt, Strasbourg, 26 avril 2016. Disponible sur : [https://hudoc.echr.coe.int/fre#{"itemid":\["001-162615"\]}](https://hudoc.echr.coe.int/fre#{). Accès : 17 mai. 2019.

fundamental rights whose protection it seeks to guarantee. Human dignity appears as the touchstone of the norms created by international human rights law and of that construction also emerge rights that are not subject to restrictions or relativizations. The notion of absolute human right arises from this composition that has its source mainly in the core conventions that are pillars of this universal system of protection, which inaugurates a new international law, no longer anchored in classical postulates based on the principle of the sovereignty of the States, but rather, based on the first protection of the individual.

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