

REVISTA

IIDH

INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS
INSTITUT INTERAMÉRICAIN DES DROITS DE L'HOMME
INSTITUTO INTERAMERICANO DE DIREITOS HUMANOS
INTER-AMERICAN INSTITUTE OF HUMAN RIGHTS

55



Enero-Junio 2012



REAL EMBAJADA DE NORUEGA

REVISTA IIDH

Instituto Interamericano de Derechos Humanos
Institut Interaméricain des Droits de l'Homme
Instituto Interamericano de Direitos Humanos
Inter-American Institute of Human Rights

© 2012 IIDH. INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS

Revista
341.481

Revista IIDH/Instituto Interamericano de Derechos
Humanos.-Nº1 (Enero/junio 1985)
-San José, C. R.: El Instituto, 1985-
v.; 23 cm.

Semestral

ISSN 1015-5074

1. Derechos humanos-Publicaciones periódicas

Las opiniones expuestas en los trabajos publicados en esta Revista son de exclusiva responsabilidad de sus autores y no corresponden necesariamente con las del IIDH o las de sus donantes.

Esta revista no puede ser reproducida en todo o en parte, salvo permiso escrito de los editores.

Coordinación editorial, corrección de estilo y diagramación: Marisol Molestina.

Portada y artes finales: Producción Editorial-Servicios Especiales del IIDH.

Impresión litográfica: Imprenta y litografía Segura Hermanos.

La Revista IIDH acogerá artículos inéditos en el campo de las ciencias jurídicas y sociales, que hagan énfasis en la temática de los derechos humanos. Los artículos deberán dirigirse a: Editores Revista IIDH; Instituto Interamericano de Derechos Humanos; A. P. 10.081-1000 San José, Costa Rica.

Se solicita atender a las normas siguientes:

1. Se entregará un documento en formato digital que debe ser de 45 páginas, tamaño carta, escritos en Times New Roman 12, a espacio y medio.
2. Las citas deberán seguir el siguiente formato: apellidos y nombre del autor o compilador; título de la obra (en letra cursiva); volumen, tomo; editor; lugar y fecha de publicación; número de página citada. Para artículos de revistas: apellidos y nombre del autor, título del artículo (entre comillas); nombre de la revista (en letra cursiva); volumen, tomo; editor; lugar y fecha de publicación; número de página citada.
3. La bibliografía seguirá las normas citadas y estará ordenada alfabéticamente, según los apellidos de los autores.
4. Un resumen de una página tamaño carta, acompañará a todo trabajo sometido.
5. En una hoja aparte, el autor indicará los datos que permitan su fácil localización (Nº fax, teléf., dirección postal y correo electrónico). Además incluirá un breve resumen de sus datos académicos y profesionales.
6. Se aceptarán para su consideración todos los textos, pero no habrá compromiso para su devolución ni a mantener correspondencia sobre los mismos.

La Revista IIDH es publicada semestralmente. El precio anual es de US \$40,00. El precio del número suelto es de US\$ 25,00. Estos precios incluyen el costo de envío por correo regular.

Todos los pagos deben de ser hechos en cheques de bancos norteamericanos o giros postales, a nombre del Instituto Interamericano de Derechos Humanos. Residentes en Costa Rica pueden utilizar cheques locales en dólares. Se requiere el pago previo para cualquier envío.

Las instituciones académicas, interesadas en adquirir la Revista IIDH, mediante canje de sus propias publicaciones y aquellas personas o instituciones interesadas en suscribirse a la misma, favor dirigirse al Instituto Interamericano de Derechos Humanos, A. P. 10.081-1000 San José, Costa Rica, o al correo electrónico: s.especiales2@iidh.ed.cr.

Publicación coordinada por Producción Editorial-Servicios Especiales del IIDH

Instituto Interamericano de Derechos Humanos

Apartado Postal 10.081-1000 San José, Costa Rica

Tel.: (506) 2234-0404 Fax: (506) 2234-0955

e-mail:s.especiales2@iidh.ed.cr

www.iidh.ed.cr

Índice

Presentación.....7

Roberto Cuéllar M.

Doctrina

Los espacios invisibles en América Latina:
análisis del hacinamiento penitenciario en Costa Rica,
para la inversión estructural de la pirámide kelsiana
como modelo de tutela efectiva de los derechos humanos 13

Norberto E. Garay Boza

In Search of the Standards of Proof Applied by the
Inter-American Court of Human Rights..... 57

Álvaro Paúl

Human Rights as an Essential Element of Contemporary
International Community 103

Renato Zerbini Ribeiro Leão

Temas en Derechos Humanos

El Banco Mundial entre el apoyo a grandes inversiones
y la protección de los derechos humanos: estudio
sobre el *Ombudsman* y Asesor en Materia de Observancia
de la Corporación Financiera Internacional 123

Björn Arp

The Necessity for Establishing a Truth Commission
in Colombia within its Disarmament, Demobilization
and Reintegration Process..... 165

Paula S. Cuéllar

Efectos de la sentencias de la Corte Interamericana
y del Tribunal Europeo de Derechos Humanos,
con especial referencia a Uruguay y España 207
Nils Helander Capalbo

El derecho a satisfacción de las víctimas de violaciones
de derechos humanos en la jurisprudencia
de la Corte Interamericana de Derechos Humanos
y su ejecución por parte del Estado colombiano..... 233
Gina Kalach

Principales desafíos respecto de la protección internacional
de los refugiados 271
Juan Manuel Medina Amador

Retos y avances de la educación en derechos humanos
en la educación básica: el camino recorrido en Brasil..... 295
Aida Maria Monteiro Silva y Celma Tavares

Estrategias de litigio de interés público en derechos humanos ... 319
Paola Pelletier Quiñones

El anencefálico como donante de órganos y el bioderecho
constitucional 351
Adriano Sant'Ana Pedra

Recensión

*Contribuciones regionales para una Declaración Universal
del Derecho Humano a la Paz*, Carlos Villán Durán
y Carmelo Faleh Pérez (editores) 369
Juan Manuel de Faramiñán Gilbert

Presentación

El Instituto Interamericano de Derechos Humanos (IIDH) se complace en presentar el número 55 de su Revista IIDH, correspondiente al primer semestre de 2012, que en esta ocasión ofrece artículos de variados temas en la materia. Con este número de su revista académica, el IIDH renueva el interés por fomentar la discusión de temas de relevancia para la comunidad internacional de derechos humanos, con miras a seguir encontrando formas novedosas para enfrentar los desafíos que en esta materia supone el actual contexto regional e internacional, apuntando a que se comprendan los factores históricos y se conozcan los nuevos elementos en el panorama de los derechos humanos de las Américas.

En ese sentido, la Revista IIDH ha recibido en esta ocasión los aportes de once autores y autoras que, desde diferentes ámbitos, se relacionan con el tema de los derechos humanos: algunos desde la academia, otros desde la práctica cotidiana de su quehacer profesional. Rescata así la importancia de dar voz y espacio a los distintos actores que construyen día a día el significado y alcances de los derechos humanos.

La presente edición de la Revista IIDH está dividida en dos secciones: *Doctrina y Temas en derechos humanos*. En la primera sección se han incluido tres artículos. El primero, de Norberto E. Garay Boza (Costa Rica), titulado *Los espacios invisibles en América Latina: análisis del hacinamiento penitenciario en Costa Rica para la inversión estructural de la pirámide kelsiana como modelo de tutela efectiva de los derechos humanos*, presenta un interesante y novedoso análisis, dirigido a propiciar una mejor garantía de los derechos humanos mediante la superación de las incompatibilidades de las legislaciones internas con el derecho internacional y constitucional. En el segundo, Álvaro Paúl (Chile), *In search of the Inter-American Court of Human Rights Standards of Proof*, revisa exhaustivamente la práctica de la Corte Interamericana de Derechos Humanos con respecto al aspecto probatorio o normas de la prueba en los casos

ante este tribunal. La sección se cierra con el artículo *Human Rights as an Essential Element of Contemporary International Community*, de Renato Zerbini Ribeiro Leão (Brasil).

La segunda sección contiene nueve artículos, presentados de acuerdo al orden alfabético. Björn Arp (Alemania) analiza la práctica del CAO (Compliance Advisor Ombudsman), de la CIF (Corporación Financiera Internacional, siglas en inglés) y de la MIGA (Agencia Multilateral de Garantía de Inversiones, siglas en inglés), cuando se producen violaciones a la normas internacionales de protección de los derechos humanos en el marco de las grandes inversiones del Banco Mundial (*El Banco Mundial entre el apoyo a grandes inversiones y la protección de los derechos humanos: estudio del Ombudsman y Asesor en materia de observancia de la corporación financiera internacional*). Paula S. Cuéllar (El Salvador), propone un repaso del proceso de desarme, desmovilización y reintegración en Colombia, a modo de argumentar a favor de la necesidad de una comisión de la verdad en ese país sudamericano (*The Necessity of a Truth Commission in Colombia within its Disarmament, Demobilization and Reintegration Process*). En su artículo *Efectos de la sentencias de la Corte Interamericana y del Tribunal Europeo de Derechos Humanos, con especial referencia a Uruguay y España*, Nils Helander Capalbo (Uruguay) presenta una reseña de los rasgos relevantes de las sentencias de estos tribunales internacionales con el objeto de responder a una pregunta central: ¿pueden aplicarse esas sentencias en los ordenamientos internos de dichos Estados? En su artículo *El derecho a satisfacción de las víctimas de violaciones de derechos humanos en la jurisprudencia de la Corte Interamericana de Derechos Humanos y su ejecución por parte del Estado colombiano*, Gina Kalach (Colombia) describe y analiza el alcance de cuatro tipos de órdenes de satisfacción efectuadas por la Corte Interamericana: las medidas tradicionalmente ordenadas en casi todas las sentencias de reparación de la Corte al Estado colombiano, las que tienen una importancia capital en materia de repercusión pública y del deber de memoria, las que ostentan un vínculo estrecho con los derechos a la justicia y la verdad, y aquellas que tienen particularidades en lo que

respecta a la ejecución efectuada por el Estado. Juan Manuel Medina Amador (Costa Rica), reflexiona acerca de la importancia de llevar a cabo una revisión del andamiaje jurídico sobre el que se sustenta la protección de las y los refugiados, con la intención de mejorar su implementación en el terreno (*Principales desafíos respecto a la protección internacional de los refugiados*). Aida Maria Monteiro Silva y Celma Tavares (Brasil) presentan en su artículo, titulado *Retos y avances de la educación en derechos humanos en la educación básica: el camino recorrido en Brasil*, los avances, limitaciones y retos de la educación en derechos humanos en ese país, en consideración que ésta es necesaria para el desarrollo de una formación humanista y el fortalecimiento de las estructuras democráticas de la sociedad. Paula Pelletier Quiñones (República Dominicana) propone propiciar un cambio en la forma de pensar de las personas profesionales en derecho en la República Dominicana, y en otros países y contextos similares, para honrar la profesión como un servicio social, mediante el diseño de estrategias propias de la naturaleza del litigio de interés público (*Estrategias de litigio de interés público en derechos humanos*). Adriano Sant'Ana Pedra (Brasil) se refiere al progreso que la medicina viene desarrollando, y que ha ampliado las oportunidades de éxito en la realización de trasplantes de órganos, tejidos y otras partes del cuerpo humano, lo que lleva inevitablemente a una serie de cuestiones ético-jurídicas respecto al tema. El autor analiza una de ellas, relativa a la posibilidad de que una persona anencefálica sea la donante (*El anencefálico como donante de órganos y el bioderecho constitucional*).

Por último, esta edición de la Revista IIDH presenta la recensión del libro *Contribuciones regionales para una Declaración Universal del Derecho Humano a la Paz*, editado por Carlos Villán Durán y Carmelo Faleh Pérez, a cargo de Juan Manuel de Faramiñán Gilbert (España).

Agradecemos a las autoras y autores por sus interesantes aportes y perspectivas; dejamos abierta la invitación a todas aquellas personas que deseen enviar sus trabajos a la consideración del Comité Editorial de la Revista IIDH, y aprovechamos la oportunidad para

agradecer, asimismo, a las agencias internacionales de cooperación, agencias del sistema de Naciones Unidas, agencias y organismos de la Organización de Estados Americanos, universidades y centros académicos.

Roberto Cuéllar M.
Director Ejecutivo, IIDH

Doctrina

Human Rights as an Essential Element of Contemporary International Community

*Renato Zerbini Ribeiro Leão**

The preamble of the Universal Declaration of Human Rights reflects the spirit of the contemporary international community:

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
to save succeeding generations from the scourge of war, which twice in
our lifetime has brought untold sorrow to mankind, and
to reaffirm faith in fundamental human rights, in the dignity and worth
of the human person, in the equal rights of men and women and of
nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,
AND FOR THESE ENDS

to practice tolerance and live together in peace with one another as good neighbours, and

to unite our strength to maintain international peace and security, and
to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and
to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.¹

*

Ph.D. in International Law and International Relations. University Professor of Public International Law, International Politics and the Three Pillars of the International Protection of the Human Person in Brasília. General Coordinator of the National Committee for Refugees (CONARE). Member of the United Nations Committee for Economic, Social and Cultural Rights.

¹ Charter of the United Nations: Preamble.

1. The Spirit of the Contemporary International Community

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

The preamble of the Universal Declaration of Human Rights is characterized by existential logic. From the proclamation of the Universal Declaration of Human Rights, on 10 December 1948, all the countries of the world, including those that have not undergone the long historical process of formation of the modern democratic and liberal State, have at their disposal an international code to decide how to proceed and how to judge one another. This code is not only universally applicable but also encloses precepts that have value in areas previously not taken into account in the Constitutions of Western States.² Unlike other periods, currently the international norms forbid any type of "inhuman or degrading treatment." There was a time in which any indictment was limited to citing particular governments that were careless of the interests of its population, nowadays these governments can be indicted for violation of international norms which state, for instance, the right to food, to a dignified dwelling, to a healthy environment, etc.³ At the beginning of the twenty-first century the principle of affirmation of human dignity prevails.

² de Albuquerque Mello, C. D., *Curso de Direito Internacional Público*. Renovar, RJ/SP, 2000, p. 823. ("The Universal Declaration of Human Rights has no mandatory value for the nation States. It is not a treaty, but rather a simple declaration as its name indicates. Its value is simply a moral one. It indicates the directives to be followed by the nation States on this matter. [...] Anyhow, it can be affirmed that currently there is a kind of consensus about considering it an international system, and therefore mandatory.") [As per free translation.]

³ Cassese, Antônio, *Los derechos humanos en el mundo contemporáneo*. Ariel, Barcelona, 1993, pp. 7-57.

Recognition of Human Rights in the world scene developed discreetly at times, effusively at others, along with the development of International Relations. Between the seventeenth century and the beginning of the twentieth century, international relations were substantially kept among the entities of the sovereign governments in a relatively wide territory and upon the population established therein. Cassese points out what were the three main characteristics of the international community at the time:⁴

The States lived in a state of nature.

A setting moved by a principle that constituted the necessary consequence of the individualistic relations existing among members of that anarchic society: the principle of reciprocity. Said principle means fundamentally that norms among associates were governed mainly by bilateral agreements or, in particular cases, multilateral ones; nevertheless all were based on mutual advantages for the contractors.

The peoples and the individuals lack influence. Individuals appear as passive subjects of international law, meaning they were only subjects of international obligations whom sovereigns could and should fight against with all their power.⁵

At that time, Human Rights were confined within the borders of the States by the principle of State sovereignty; nevertheless, when they are no longer considered matters of exclusive jurisdiction of sovereign States and “become inserted among the prerogatives of the international community, [human rights’] defense begins to take place independently of territorial limitations imposed by the States.”⁶ The characteristics aforementioned were basically kept without great transformations until the middle of the nineteenth century, when a small flame would cast a new perspective upon the political and juridical setting of the time: the

⁴ Ibid., pp. 17-21.

⁵ de Albuquerque Mello, C. D., *Curso de Direito Internacional Público...* pp. 766-767. (“A reaction against the individual’s subjectivity began since the twentieth century. Currently, the absolute sovereignty of the State prevails. What was previously called an aristocracy of the nation States appears in International Law. The individual affects the juridical international world only if he acts through the State.”) [As per free translation.]

⁶ Rodrigues, Simone Martins, *Segurança Internacional e Direitos Humanos – a prática da intervenção humanitária no pós-guerra fria*. Renovar, RJ/SP, 2000, p. 61.

theory of nationalities passionately advocated by Pasquale Stanislao Mancini. This theory expressed the importance of the various nations, “human clusters united by a common language and culture, by common traditions and costumes.”⁷ It impersonated, moreover, the ideals of the leading classes of particular European countries and remitted its consequences to a metajuridical sphere as an ideal of political action.⁸

The rights of man are based not only on “invariable natural law theory-formulated values,” for “its connection with social-historical configurations is patently obvious.” Canotilho teaches that “all theorists of rationalist natural law concerned themselves with the State’s justification and with dominion legislation,” forgetful that “the bourgeoisie’s lack of political freedom would constitute one of the main incentives to the fight for the rights of man.” He remembers, moreover, that a careful historical and juridical study connecting those two threads of analysis is capable of showing that “Locke’s doctrine, along with Rousseau’s, saw freedom as freedom within the State-society – these combined as undifferentiated political bodies – contrary to physiocratic doctrines of the natural order, conducive to the exclusive understanding of a freedom before the State” and it was the evolution of “this doctrine that would end in a sort of “Statuslehre” of G. Jellinek, in which freedom rights practically were no longer the ones of Rousseau or Locke, but juridical self-ties of the State now seen as a juridical person.”⁹

2. Positivation of Human Rights in the Post Second World War

Human Rights, as currently conceived, meet a true turn of historical direction at the setting staged first in 1917 and, later on, in 1945, with the end of the First World War and the conclusion of the Second, respectively. During the post Second World War period another phenomenon of the international community is apparent: a natural

⁷ Cassese, Antônio, *Los derechos humanos en el mundo contemporáneo...* p. 21.

⁸ Mancini saw a few European States rule over various nationalities, whereas other nationalities were dispersed among various States. A few examples are the Austrian Empire, on the one hand, and on the other, Germany and Italy.

⁹ Canotilho, J. J. Gomes, *Direito Constitucional e Teoria da Constituição*. Renovar, Coimbra, 1999, pp. 359-361.

law theory of human rights is launched, its content aiming to take into account the relations between each State and its citizens.¹⁰

The origin of the United Nations Organization¹¹ is strongly intertwined with and influenced by the ending of the Second World War and by its winners' ideologies. As a consequence, the Security Council, UN's supreme body of decisions, had been under the influence of the winners of the aforementioned global armed conflict's ideals since its creation. The Council, represented by the five countries who won the Second World War – the United States, the United Kingdom, France, China and the former USSR –¹² mirrored the political, social, economic and military ideals of each one of those powers. Fundamentally, it was the arena for a duel among the great Western democracies and the countries of Socialist Europe.

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

¹⁰ To Guido Fassò “natural law dawned again after the Second World War as a reaction to the stillness of the totalitarian regimes. Majorly, this phenomenon was verified in the scope of catholic culture, but also in the German protestant environments and, at an extraordinary measure, in the secular world, the idea of Natural Law was once again present, above all as an embankment and limit to State power.” [As per free translation.] In: Bobbio, N. et alii, *Dicionário de Política*. Edunb, Brasília, 1992, p. 659.

¹¹ The United Nations Organization was established on 26 April 1945, at the Conference of San Francisco.

¹² At the time the USSR was the Union of Soviet Socialist Republics. The USSR came apart with the Perestroika in 1982 and its assigned seat at the Security Council has belonged, since then, to Russia.

The Soviet Union was contrary to the discussion on human rights not only because of the Stalinist government's authoritarianism, but also due to the weight of Marxist thought. The traditional concept of human rights based on natural law tradition is founded on three pillars:¹³

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

According to Cassese, Marx simply rejects these three principles and supports that the human rights acclaimed by the Capitalist society were a mere manifestation of the bourgeoisie, a mere expression of the demands of said class.¹⁴ In this sense, rights and freedoms have only instrumental value and are useful to more swiftly subvert the existing order. Contrarily, these values are no longer useful in a Communist society because it carries out integration between the individual and society. Marx proclaimed that social justice and human dignity brought elements that transcended the States' borders, such as the social conscience of being part of a working class wherever one may be,¹⁵ meaning that the Human Rights doctrine was in conflict with the going ideology and practice in the USSR.¹⁶

¹³ Cassese, Antônio, *Los derechos humanos en el mundo contemporáneo...* p. 39.

¹⁴ Ibidem, p. 39. Nevertheless, the early Marx particularly emphasizes the notion of "human emancipation," compatible in itself with the philosophical notion of human freedom encompassed by the philosophy of Natural Law. The following passage of "The Jewish Question" is an example of it: "Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relations, he has become a species-being." In: Tucker, Robert C. (coord.), *The Jewish Question. The Marx-Engels Reader*. W. W. Norton, New York, 1978, p. 46.

¹⁵ Rodrigues, Simone Martins, *Segurança Internacional e Direitos Humanos – a prática da intervenção humanitária no pós-guerra fria...* p. 63.

¹⁶ Cassese sustains that, despite the ideological debate of the powers of that time, the enormous freeing contribution of Marx's thought in the field of economic and social rights cannot be forgotten, as well as the general contribution lent by Marxist "revisionism" to the theory of human rights.

Therefore, the international setting in 1945, time of the establishment of the United Nations Organization, showed the USA's domination in the West, both in the military and economic fields, as well as on the confirmation of a vigorous cultural model that gained impressive world diffusion. In Eastern Europe, Stalin in harvesting the fruits of victory makes the USSR the second power on the planet, expanding the Soviet regime to the countries on that region.¹⁷ On the other hand, decadence of colonial empires and the emergence of new superpowers established the roots of decolonization and the appearance of the then called Third World.¹⁸

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

This historical reality causes the preamble of the Universal Declaration of Human Rights (UDHR) to defend the affirmation of the individual as a subject of Public International Law (PIL). Therefore, it is a factual and jusphilosophical structure consolidated on an idea

17 Kennedy, Paul, *The Rise and Fall of the Great Powers – Economic Change and Military Conflict from 1500 to 2000*. First Vintage Books Edition, United States of America, 1989, p. 372. “Thus, the foreign and domestic requirements of the Cold War could feed off each other, mutually covered by an appeal to ideological principles. Liberalism and Communism, being both universal ideas, were “mutually exclusive”; this permitted each side to understand, and to portray, the whole world as an arena in which the ideological quarrel could not be separated from power-political advantage. One was either in the American-led bloc of the Soviet one. There was no middle way; in an age of Stalin and Joe McCarthy, it was imprudent to think there could be. This was the new strategical reality, to which not merely the peoples of a divided Europe but also those in Asia, the Middle East, Africa, Latin America, and elsewhere would have to adjust.”

18 Kennedy thus explained the third world: “The shattering of those empires in the Far East after 1941, the mobilization of the economies and the recruitment of the manpower of the other dependent territories as the war developed, the ideological influences of the Atlantic Charter, and the decline of Europe all combined release the forces for change in what by the 1950s was being called the Third World. [...] But it was described as a “third” precisely because it insisted on its distinction both from the American- and the Russian-dominated blocs.”

sprung from sequential logic sustained on the contemporary subjects of PIL: the States, the international organizations and the individuals. That is, through the celebration of an international treaty, States create international organizations that under their sponsorship, and in whose bosom, do facilitate the dawning of international treaties on human rights, which the individual emerge from as a subject of PIL, being entitled to arraign his country for violating one of the norms of an international treaty on human rights. This is also a self-feeding process. Therefore, one can state that the Preamble of the UDHR is the political consecration of the passage of an international community, especially under the standpoint of PIL – State-centered – into an international community that replaces the individual at the epicenter of its discussions.¹⁹

The great documents and international treaties on human rights emerge with this replacement. Moreover, starting from the consolidation of the UNO and of the International Bill of Human Rights, all national Constitutions promulgated since then contained the norms, principles and values included in these international instruments for the safeguarding of human dignity. Thus the great majority of human rights were being materialized. Is it important to say that a large measure of human rights were consolidated into fundamental rights, for, in the light of the voluntarism-based rigor of Public International Law, fundamental rights are no more than human rights molded into the norms of international treaties and the Constitutions of the nation States.²⁰

3. The Affirmation of Human Rights in the United Nations Organization

The United Nations Organization was brought into being during the San Francisco Conference, held from April 25 to June 26, 1945, in the

¹⁹ See: Cançado Trindade, Antônio Augusto, *“A Recta Ratio nos Fundamentos do Jus Gentium como Direito Internacional da Humanidade”*. Inaugural speech at the Juridical Brazilian Academy of Letters, Cadeira No. 47. Del Rey, Belo Horizonte, 2005.

²⁰ Leão, Renato Zerbini Ribeiro, *La construcción jurisprudencial de los Sistemas Europeo e Interamericano de Protección de los Derechos Humanos en materia de Derechos Económicos, Sociales y Culturales*. Núria Fabris, Porto Alegre, 2009, pp. 37-39.

USA. The treaty that comprises the statement referred to as the Charter of the United Nations (or UN Charter of San Francisco) was signed on June 26, 1945, and came into force of October 24 of that same year, at the moment that it was ratified by the USSR, the USA, China, the United Kingdom and France – the Five Big Powers – and by the majority of the founder-States of the international organization, which attended the Conference.²¹

The formation of four sharply defined clusters that maintained a strong influence in the discussions, development and shaping of the human rights doctrine at the core of the UNO²² was noted since its foundation. A group of Western countries – that swiftly took over the political lead of the Institution and had the United States, France and England as its political and ideological mentors – followed by various other countries of the political West, among which was Australia. A second group constituted by the Latin American countries that, from the beginning, seized the human rights cause, frequently making significantly more advanced decisions in this field than the more developed countries of that hemisphere themselves. The bloc of Socialist countries – in conformity with their principles and ideas – endowed with extreme political caution and generalized mistrust accepted to cooperate in the advancement of human rights. And the Asian countries, except for those Moslem nations ruled by Saudi Arabia and Pakistan, had little to do with the initial conversations on the subject.²³

In spite of the four above-mentioned clusters, the majority of the political and ideological confrontation took place between the West and Socialist Europe. Such fact can be verified through the conversations held throughout the years under study (1945-1966) and confirmed by the composition in charge of reconciling and elaborating the different

21 Those nation States that signed and ratified the Charter of the United Nations soon after attending the San Francisco Conference, or at least signed the Declaration by United Nations, of 1942, are considered originating members of the UNO.

22 At that moments there were 58 members of the UN: 14 Western, 20 Latin American, six Socialists, four Africans and 14 Asians.

23 About this subject, read Cassese, Antônio, *Los derechos humanos en el mundo contemporáneo...* pp. 40-46.

proposals and thesis that emerged from the discussions. The Drafting Committee was consisted mainly of members of the Western chain and by the USSR, as follows: Australia, Chile, the USA, France, Great Britain, Lebanon and the USSR.

The conversations then held at the United Nations embodied the political and diplomatic context of the Cold War.²⁴ The Charter of the United Nations, in regards to human rights, contemplated norms far removed from the expectations and hopes stirred by President Roosevelt's declaration, in 1941. In fact, each one of the Big Powers victorious from the Second World War was bringing problems to the moment of the Charter's drafting in the human rights field: racial discrimination in the USA, and lack of freedom and political expression in the USSR.

The articles of the UN Charter of San Francisco do not allow for a clear and accurate definition of human rights. The document is limited to mentioning the promotion and development of those rights, which were considered one of UN's goals, alongside with its other main goal: the maintenance of international peace and security.²⁵

The paramount and historical relevance of the Charter of San Francisco – from the perspective of Public International Law – stands out in the positivation of the general principles that direct friendly relations among States. These are enlightened throughout its Articles 1 and 2: sovereign equality of the States; autonomy, non-intervention in matters within domestic jurisdiction of any State; refrainment from the threat or use of force; peaceful settlement of international disputes; international cooperation; respect for human rights; and good faith in fulfilling international obligations.²⁶ The United Nations Charter is the first great universal international document that registers those

24 Political-ideological atmosphere instituted by the two greatest Powers of the time – the USA and the USSR – in the world scene immediately after the end of the Second World War.

25 See Article 1 of the Charter of the United Nations.

26 For these subjects please consult: Cançado Trindade, A. A., *O Direito Internacional em um Mundo em Transformação*. Renovar, Rio de Janeiro, 2002, pp. 91-140.

principles in such explicit fashion. Those are the seven general principles of contemporary Public International Law.

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

The USA were leading the Western Capitalist countries that defended liberal democracy as the only political regime capable of promoting respect towards the fundamental freedoms and rights, and the full development of individuals, under both economic and political viewpoints. The USSR commanded the Socialist bloc that held – in social or real democracy –²⁷ the key to the elimination of social inequalities and the means for the establishment of universal peace, as Socialist countries did not engage in war against one another.²⁸

4. UDHR Preamble contrasted with current International Relations

In this context, the Preamble of the UDHR registers the ethical, historical, moral, political, social and juridical realities that culminated in its proclamation. Thus it consummates the general principles of Public International Law²⁹ clearly stipulated in articles 1 and 2 of the Charter of San Francisco. The conjunction of the latter with records of the former consolidates the Preamble as the source of enlightenment of the international community's contemporary law. The Preamble

²⁷ Regarding the discussion on “democracy and socialism” read the heading “Democracy,” in: Bobbio, N. et alii, *Dicionário de Política...* pp. 324-325.

²⁸ For the themes discussed in this paragraph read Wight, Martin, *Power Politics*. Continuum, London, 1978, pp. 175-192.

²⁹ They are: sovereign equality of States; autonomy, non-intervention in matters within the domestic jurisdiction of any State; refrainment from the threat or use of force; peaceful settlement of international disputes; international cooperation; respect for human rights, and good faith in fulfilling international obligations.

was constituted, then, as a cogent consideration of historical, political, social and juridical developments that characterize contemporary human civilization.

As taught by Cançado Trindade:

[...] the principles of International Law shed light on the interpretation and application of International Law as a whole, pertain to the very substratum of this latter, and are identified with the very foundations of the international legal system. They permeate every legal system. Their continuing validity is beyond question. Principles of International Law are essential to humankind's quest for justice, and of key importance to the endeavours of construction of a truly universal International Law.³⁰

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

Sublimely, contemporary democracies lack an urgent updating before current society's characteristics: more informed, educated and closer. Winning back the representational legitimacy of its political classes is

³⁰ Cançado Trindade, A. A., *International Law for Humankind: towards a new Jus Gentium (I). General Course on Public International Law*, vol. 316. Hague Academy of International Law, The Hague, 2005, p. 110.

urged to the States. It is a social clamor: people are “politically full” and give off dangerous signs in this regard, including in countries where threats to democracy appeared to be out of the question. For instance, if in Latin America people once lived under coup d’états sponsored by dictatorships, currently they experience coups perpetuated by civil institutions, theoretically democratic (for example, the case of Honduras), and the virus of possible indefinite reelections. In the human rights association it is impossible to speak of democracy where fundamental rights are crushed, the State of Law is despised, and politics and citizenship are deprecated. Contemporary States, rooted in the principles of human rights, are dependent on ethics, moral and social justice to, apart from the principles of contemporary history (freedom, equality and fraternity), be consecrated as legitimate in front of its citizenship. The previous affirmation is an indisputable condition of the contemporary State.

As a consequence, moving these ideas into the set of States or into the international scene, and confronting as well the affirmation of various theorists and jurists guardians of the status quo, I count myself among those who, like Ash³¹, defend the fact that we are immersed in a new order, or better said, a global multipolar disorder in which is noted the end of the unipolar moment where supremacy of the hegemon – that puts effort into diminishing the precepts of international law and of international relations’ multilateralism – had seemed invincible. This new multi-polarity is a product of, at least, four tendencies:

1. The ascension or reappearance of series of States that prosper or are re-born and whose energy resources compete against that of the traditional powers of the West.
2. The growing power of non-State actors. These can be very distinct. They include from NGOs, to pharmaceutical and energy companies, from the so-called “autonomous” regions and religious groups, and land on movements such as the Hamas, Hezbollah and the Al-Qaeda. They are actors who, despite still lacking official appointment or

³¹ Ash, Timothy Garton, “El mundo, siete años después,” Section Crónica: Opinión, *El País Newspaper Sunday edition*, 14 September 2008.

capacity, are perfectly capable of changing or transforming the agenda of one or many States, as well as that of other subjects of International Law.

3. The transformations on power's exchange currency. Advancements in technologies that can be used for violence offer small groups of people the capacity of defying powerful States. It is a fact that progress in information technology and in globalized mass media cause the most powerful army in the history of mankind to lose a war, if not on the battle field – it being full of blood and lies – then on the field of public opinion. This fact can also be proven by researches carried out in those countries traditionally in favor of the recent deceptive wars.
4. The challenges of International Law themselves. Those perhaps come from the human mind, clothed in the interests of the more powerful States. Who knows? However, we accurately observe three great challenges of the International Law:
 - a. Its fragmentation in light of its frenetic growth and division into sectors;
 - b. The proliferation of international jurisdictions as a consequence of the previous challenge;
 - c. The creation of specific international regimes, such as the environment, human rights, law of the sea, international commerce, and more currently, as it all points towards, action to counter terrorism.

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

Nevertheless, the important role that the individual begins to perform in the international community starting from the second half of the twentieth century has to be pointed out. He becomes not only a subject of Public International Law, but also an indisputable actor transformer of the international community. Organized civil society takes on a hegemonic role in the international agenda. The World Social Forum can be cited as an example. When it began, the status quo made all effort to discredit it, labeling it with various adjectives – rabble of utopians, hippies’ legacy movement, heirs to an outdated Socialism, etc. – among many other denominations they came up with. Fundamentally, all this was due to the Porto Alegre meeting’s motto, which self-fed off a romantic and necessary ideal: “Another world is possible!” Such perspective echoed from Guaíba’s riverside – reverberating through Bamako, Caracas, Karachi, Nairobi and Belém – and reached a significant portion of the planet.

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

What is interesting in this parallel is that, for this current financial crisis’s root, the elegantly-dressed attending Davos are considering to take the remedies prescribed by those poorly-dressed from Porto Alegre, or, at least, the costumes from Porto Alegre enlightened the runways of Davos. This is the understanding grasped from the manifestation carried out by the main European Union leaders, dated February 22, 2009. On that day, a plan exalting immediate combat to tax havens through the creation of direct sanctions to the States who shelter them was celebrated. The problem of tax havens, frequently believed to be postponable, is now vitally considered in facing the financial component

of the crisis. Furthermore, the IMF will need to move faster and more efficiently when aiding economies facing difficulties in order to consolidate possible assistance. Even so, regulation of financial markets and supervision of its functioning in a truly global manner is urgently necessary. And all that heartily tied to the strict control of credit rating agencies. Protectionism was also strongly condemned. The European Union as a whole claims for solidarity and coordination. Porto Alegre had often said all of this numerous times, which means that, if from the beginning Davos had given ear to the thunders reverberating from the Guaíba, we would have spared nearly a decade in developing strategies to fight and bypass the current financial crisis.

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

That the current world scares us is a fact. Societies seem lost in regards to their values and habits. Human solidarity is punctual and occasional. Families disintegrate with an easiness never seen before. States give off more and more signs of their incapacity to answer the chief demands of the majority of their citizens. More laws are proposed each day to close frontiers between States and keep people from different races and social standing apart; and the States, the richest ones above all, toughen their existing norms of the kind regularly. From a multilateral point of view, the positive agenda of the second half of the past century has been going out of breath at the beginning of the twenty first century, as all the room given to more humble States shrink daily. All this does not happen simply because international relations nowadays are

becoming more complex than at other times because each period has its own specific complexity. The big theme is that international relations at this beginning of century are covered up with contemporaneous reality – a reality the political, economic, social, juridical, strategic and military symptoms of which reveal their chief characteristics of individual and little-sympathetic interest. In the contemporary global disruptive multilateralism, ethics and common moral fade in the midst of exacerbated individualism. The pillars of this observation contribute to the strength of the current crisis. A strong and present State, rooted in the principles of ethics, social justice, moral, indivisible and universal human rights is, thus, the only possible perspective.

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

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

As a consequence, Human Rights will not vanish for making themselves be respected by their principles originated from Public International Law and multilateralism. The risk of deprecating the principles of International Protection of the Human Person³² resides exactly at the opposite end of the previous affirmation, that is, it will be the softening of the precept coming from Public International Law and from the rules of harmonious and peaceful living among States in front of the armed and unilateral false rhetoric – the latter being deposed of any human reasonability – the fact that will be capable of making Human Rights to retrocede.

³² Comprises the Rule of Law in Armed Conflicts (Humanitarian Law), Human Rights and Refugee Law.