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FUTURE OF INTERNATIONAL LAW
Ukrainian war

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Abstract: International law is a specific branch of law that, perhaps more than others, is confronted with geopolitical reality. Furthermore, despite the undeniable advance of dogmatics and the realization of paradigms of respect for human rights after the formation of the United Nations and the establishment of several rights and the creation of numerous international organizations, the war in Ukraine raises questions about the limitation of the right international law to avoid violating universal rules. Certainly, Russian action is contrary to international law, it vilifies Ukrainian sovereignty, the self-determination of peoples, human rights, the United Nations Charter and the 1949 Geneva Conventions. However, the crucial question arises for international law, what consequences can come in the face of such Russian mockery against the principles of law. In this sense, international law institutes and their possible consequences will be analyzed.
Keywords: Right; International; Human rights; ukrainian war.

INTRODUCTION

On February 24, 2022, Russian Ambassador to the United Nations, Vasily Nebenzya, justified the invasion of his country in Ukraine based on the preservation of the human rights of Russian minorities residing in the invaded country and to combat Ukrainian Nazi nationalism.

However, in fact, there was aggression by Russia against Ukraine in clear violation of international law and jus cogens. It is true, therefore, that under contemporary international law, members of the Russian government may be held accountable by the International Criminal Court, and any treaty between Ukraine and Russia signed to end the conflict will certainly be considered null and void, for expressly violating the 1969 Vienna Convention on the treaties. To reach these conclusions, it is important to study and investigate, now, some important institutes and concepts of public international law in order to understand the relationship between this branch of law and national law.

PUBLIC INTERNATIONAL LAW.

Certainly, in contemporary times, there are several types of international law rules to consider, for example, military, commercial, financial, humanitarian and environmental law (VARELLA, 2018).

These different types of norms each have a different treatment in relation to national law, but it is certain that in the current stage of development there is a movement of internationalization of law with the influence of national law by the logic of international law (VARELLA, 2018).

In a later topic, the privileged role of human rights treaties in relation to others is discussed, but it is important to highlight that States differ in the treatment of this overlap between national and international law.

Two currents that are not antagonistic, but complementary, deal doctrinally with the subject that is at the center of this hermeneutics. First, dualism indicates the separation of these two branches of law as distinct and independent systems (PORTELA, 2018).

The Brazilian system, as observed in the Constitution of the Republic in articles 49, I, and 84, VIII, would follow the moderate dualism "[…] since the Brazilian State effectively incorporates into the domestic order, through a presidential decree, the treaty already in force. force in the international order and which was ratified by Brazil" (PORTELA, 2018, p. 51).

From this perspective, international law and domestic law never conflict because they are autonomous and independent systems and international law treaties, by the dualist

theory, become part of domestic law, which is why there is no conflict between national and international law.

Having, by this logic, submission of international law to domestic law and total separation of these systems, as the doctrine highlights:

> Domestic Law is elaborated by the sovereign will of States, and International Law in the accommodation of these wills; moreover, the internal order obeys a system of subordination, and the international one, of coordination. The international norm can only be applied to the life of the State when transformed into an internal norm, by incorporation into national law, this because state legal orders have absolute autonomy. In other words, there is no conflict between the orders: the internal one prevails in its sphere of action (HUSEK, 2017, p. 57).

Secondly, there is the monistic view in which both systems, National and International, are part of a whole and:

> [...] international norms can be effective conditioned to the harmony of their content with domestic law, and the application of national norms can require that they do not contradict the precepts of the Law of Peoples to which the State is bound (PORTELA, 2018, p. 51).

This doctrinal discussion, which would seem to have little relevance and practical realization, is interesting because it tries to organize in a didactic way the always existing conflict between national and international law.

Brazil, recently, in a decision of the STF, overcame the aspect of its sovereignty and apparently indicates a dualist position by stating that International Treaties only apply in the domestic sphere after the incorporation of domestic law carried out by Presidential Decree, as explained in the judgment of the Precautionary Measure of Petition 7.848/ DF which highlighted: "Imdispensability of the presidential decree for the purpose of definitive incorporation of the international act to the positive internal order of Brazil".

However, it is quite certain that the current stage of globalization requires national States to be increasingly integrated and to limit their actions, as highlighted by Husek (2017, p. 57):

> Internally, it is the sovereign State, but it cannot do everything, in a globalized world, in which human beings, legal entities, international organizations interpenetrate, communicate and relate to each other. The current state is no longer the same old state, impregnable and strong, which responded to an aggression with another aggression, to an annoyance with revenge, to a gnashing of teeth with another gnashing of teeth, unless it was weaker, when retreating. and waited for the best moment. The current State has, whether it wants to or not, to cooperate, to commit itself, to act, to participate in major events, in the legal organizations created, in criminal, administrative, commercial, political courts, under penalty of being left on the sidelines of international life. and, as such, to reveal itself more fragile, to make its people suffer and to succumb to its own Law.

In this view, the internal sovereignty of States is not enough to bar international law that is based on equity and "cooperation among peoples for the progress of humanity" (Article 4, item IX, of the CRFB88).

Traditional doctrine of Brazilian law, written by an ambassador, born in the year of the abolition of slavery, who served as Minister of Foreign Affairs of Brazil after World War II, highlights that international law has natural law as one of its foundations because the The legal logic of a State cannot override justice:

> [...] Public international law rests on an objective foundation, that is, on the feeling of justice that exists in the human conscience, which is imposed on men as a normative rule superior to their will. This feeling of justice is acquired by man thanks to his reason. International law thus conceived

> does not depend, therefore, on the arbitrary will of States: it has an objective foundation, which is the natural law, common to all men (ACCIOLY, 1991, p. 2).

As it can be seen preliminarily, this interrelationship between national and international law is not peaceful and definitive, being a constant construction between States and the international community.

This is precisely the puzzle of the present work, to identify this overlap, for that, it is necessary to describe what the treaties are and how the powers of the Republic, especially the Judiciary, deal with the matter.

It must be noted that jusnaturalism, or natural law, is always invoked as a product of human reason and superior to the legal systems that may be flawed. In this vein, from Antigone, Sophocles' central character, to modern international law with imperative and universal rules (jus cogens), human reason, justice and equity are always placed above arbitrariness and tyrannical laws.

SOURCES OF INTERNATIONAL LAW

Treaties, international customs and general principles of law are the primary sources of international law (MAZZUOLI, 2018). Nevertheless, after World War II with the creation of the UN, the States started to have a space for permanent dialogue, at the same time many treaties were celebrated and customs were transformed into treaties.

Regarding customs, there are practices accepted by international actors over time as being law (Article 38, 'b', of the Statute of the International Court of Justice, annex to the UN letter, internalized in Brazil by Decree nº 19.841/ 1945), on the other hand, a treaty "[…] is any formal agreement concluded between legal entities governed by public international law, and intended to produce legal effects" (RESEK, 2015, p. 38).

For this reason, treaties, despite having no hierarchical relationship with customs, are the main source of international law today because they bring security and certainty about the legal rule, as highlighted by Mazzuoli (2018, p. 68):

> International treaties are undoubtedly the main and most concrete source of public international law today, not only in terms of the security and stability they bring to international relations, but also because they make the law of peoples more representative and authentic, insofar as that are embodied in the free and combined will of States and international organizations, without which they would not survive. In addition to being drawn up with the direct participation of States, in a democratic way, international treaties bring with them the special normative force of regulating the most varied and most important matters.

Another characteristic of treaties is that for their formation there is a need for negotiation between international actors, which is why there is a contractual character in their genesis and these actors (sovereign States and International Organizations) create these legal norms based on consent and respect. to sovereignty.

It must also be noted that these treaties "[…] prove to be another very important source of production of legal norms, because they express the will of the States, normally appearing as treaties-contracts, treaties-laws and treaties-Constitution" (HUSEK, 2017). , p. 51).

This is the limit of international law, consent, the free will of States, respecting state autonomy to acquiesce, or not, with these legal rules, there is no imposition of international norms, but freedom and negotiation. Varella (2018, p. 38), on this power of States, points out:

> [...] no State is forced to adopt an international norm or to participate in a process of expansion of international law,

> ceding its spaces of internal competence. However, States are constantly subjected to a set of choices, regarding which, in order to obtain some legal, political, economic, environmental or other benefits, they need to give in, cooperate, and participate in a progressively more internationalized legal and political regulation.

The United Nations Charter, also, in its first article, has as its main foundation the principle of self-determination of peoples (article 1, 1), such a cornerstone that is also inscribed in our Constitution (article 4, III) and guarantees that each people have the freedom to choose their destiny and historical paths, commenting on the provision, an important legal work defines:

> This principle connotes the freedom that all peoples (apart from States) have to self-determine, that is, to conduct themselves and establish, per se, the directions of their destiny (political, economic, social, cultural) and the conditions for exploiting their wealth and natural resources. […] It is certain that the affirmation of the principle of self-determination of peoples in the 1988 Constitution demonstrates Brazil's concern in respecting this foreign activity, that is, for other States to decide their own destinies, the directions of their future, etc. Added, however, to the international obligations of any State to promote and protect human rights (MORAES, 2018, p. 33).

Thus, despite the evolution of international law for the preservation of human rights with the use of the pro persona principle and the elevation of some rights to the erga omnes and higher status (jus cogens), it is certain that the treaties respect the will of the States and in the consensus between the parties, as expressed by Accioly (1991, p. 124):

> Since the treaty is an agreement of wills, it is clear that it cannot exist without the mutual consent of the contracting parties. This consent, or agreement of wills (consensus), must be express and unequivocal. Consent must be freely given.

Consent is exercised by the Brazilian state, in the first place, because all treaties go through the negotiation and signature phase, which are prerogatives of the Executive Power (President of the Republic, Minister of Foreign Affairs, or persons authorized by the former) according to article 84, VIII, of the Constitution.

Secondly, the Legislative Power (National Congress) must approve the signed treaty and, if approved, the treaty returns to the President of the Republic, who will officially communicate the other sovereign States or interested International Organizations, at which point, with this formal act called ratification, Brazil will be committed to complying with the treaty at the international level.

After that, the Chief Executive publishes a Decree in which the treaty is translated into Portuguese and incorporated into the Brazilian legal system, as described by the Federal Supreme Court:

> The procedural item for the incorporation of international treaties - once the previous stages of the conclusion of the international convention, its congressional approval and ratification by the Head of State have been overcome - ends with the issuance, by the President of the Republic, of a decree, from which three basic effects inherent to it: (a) the enactment of the international treaty; (b) the official publication of its text; and (c) the enforceability of the international act, which then, and only then, becomes binding and obliging at the level of domestic positive law (BRASIL, 2001).

Thus, international law treaties must respect the independence of States and even if the Chief Executive negotiates and signs a certain international commitment, such an agreement will only compromise the State if the Legislative Power acquiesces with such legal rule, always respecting national sovereignty, according to Varella (2018, p. 37):

> International law is built on the fundamental notion of states' consent. States or International Organizations are not required to sign or ratify treaties. They do so as a manifestation of their sovereign power. Likewise, they can denounce treaties that have already been signed, from the moment the treaties will no longer affect them.

In this light, in fact, international law only converges with national law after state acceptance and, after that, they are integrated, in the words of Resek (2015, p. 25):

> An autonomous legal system, where relations between sovereign states are ordered, public international law – or the law of nations, in the sense of the law of nations or peoples – rests on consent. National communities (…) naturally tend towards self-determination, the rule of their own destiny. They organize themselves, as soon as they can, under the formula of independent States, and join an international community lacking a centralized structure. Such the circumstances, it is understandable that the States subordinate themselves only to the law that they freely recognized or constructed.

However, it is possible that States are constrained at the international level to comply with norms or changes in treaties, even without their consent. There are at least two cases in which this occurs: when there is approval of a modification in treaties to which the State is already a party or if a new jus cogens rule supervenes (VARELLA, 2018).

The expression single undertaking, for example, is recent in international law and defines a clause already provided for in some international treaties that obliges States parties to the treaty to comply with future changes in this treaty even against their will (VARELLA, 2018).

Of course, there is always the possibility for the State to denounce the treaty, withdrawing from its application, according to article 42, 2, of the Vienna Convention of 1969.

This way, state sovereignty is always respected, which, upon accepting a certain treaty, undertook in plan that the subsequent modifications would oblige it by virtue of the single undertaking clause.

However, as there is today another form of limitation to state sovereignties, jus cogens, already presented in the text and exposed in the following topic.

JUS COGENS

Another way of imposing international law, as said, is the existence of jus cogens norms that "[…] configure, therefore, a direct restriction of sovereignty in the name of the defense of certain vital values" (PORTELLA, 2018, p. 71) .

Jus cogens rules are not provided for in a single legal document, but express essential and most important values of international law on, mainly, "[...] human rights, protection of the environment and promotion of sustainable development, peace and international security, Law of War and Humanitarian Law [...]" (PORTELLA, 2018, p. 73).

Such norms are hierarchically superior to other sources of international law and are imposing "[...] because they are absolutely imperative and non-derogable, they are opposed to the ancient Roman jus dispositivum - composed of rules emanating from the free expression of the parties - which palsied the structure of the International Law for many years" (MAZZUOLI, 2018, p. 112).

In this specific case, States are obliged to respect such jus cogens norms because these, universal and superior to other sources of International Law, "[...] are not subject to derogation by the will of the parties." (MAZZUOLI, 2018, p. 113)

This is a historic moment when sovereign States, in order to participate in the international community, cede part of

their sovereignty and commit themselves to the unrestricted respect of certain legal, non-negotiable and non-derogable rules, which even limit the creation of treaties, as highlighted by Mazzuoli (2018, p. 114):

> Therefore, what the theory of jus cogens did was to limit the autonomy of will of sovereign entities (jus dispositivum) in the international sphere, doing so with a view to ensuring public order (ordre public) on the world stage. Public order, known, finally, as a synonym for jus cogens, then configures the most complex limit to the sovereignty and free consent of States, as can be seen in article 53 and 64 of the Vienna Convention of 1969. It has been the master key to the great progress of Public International Law, precisely because it contains provisions that prohibit States from concluding treaties that privilege individuals to the detriment of common interests of the whole international society, which certainly threatens the steady development of peaceful relations between States.

Slavery, piracy, genocide, torture and racial discrimination are prohibited, religious freedom, protection of civilians, prisoners and wounded during war (Geneva Conventions of 1949), prohibition of the use of military force except for self-defence, free determination of peoples, All this, in addition to the principles of the United Nations Charter for the maintenance of peace and the Universal Declaration of Human Rights of 1948, are the rules considered as imperative in international law (MAZZUOLI, 2018) and binding on all States.

The violation of these rights, even if the State does not submit to any international process, generates difficulties in accessing loans and unwillingness from foreign investors (HUSEK, 2017).

Even so, this interpretation of the imperative rules of international law is not free from criticism and Resek (2015, p. 154) highlights that "the theory of jus cogens, as applied by the Vienna Convention on the law of treaties, is frankly hostile to the idea of consent as a necessary basis of international law".

Of course, international law is based on the agreement between sovereignties, but the particular interests of certain States, or momentary governments, today do not override the fundamental rights of people, the rights of the entire international society.

Thus, the international community will not tolerate violations of jus cogens, so much so that, given the war crimes and genocide committed in the former Yugoslavia and Rwanda, in the 1990s, the UN acted to punish agents of these States and created two exceptional tribunals, similar to what happened with Nuremberg, which punished Nazi agents and its correlate of war crimes in the east by the Tokyo Court.

UN Security Council Resolution 808 of 1993 created the former Yugoslavia tribunal (HUSEK, 2017), a specific international jurisdictional body in response to "ethnic cleansing" and "massive killings" by members of the Serbian army (RESEK, 2015, p. 190/191).

On the other hand, Resolution 995 of 1994 (HUSEK, 2017), also of the UN Security Council, served as a response to the ethnic genocide that took place in Rwanda when about one million people were murdered in less than three months. A special court was created to try these crimes of genocide (RESEK, 2015).

In short, similar to what happened in Nuremberg, the courts for the former Yugoslavia and Rwanda served to ensure that the agents of genocide did not go unpunished.

INTERNATIONAL CRIMINAL COURT

The international community has always lacked a universal court. If, on the one hand, it acted to punish violators of jus cogens in

the above cases, creating courts of exception, that is, specific courts to judge certain crimes, it lacks a mandatory jurisdiction capable of judging serious crimes against humanity.

In this sense, the International Criminal Court, established by treaty in 1998 and ratified by Brazil (Decree 4,388/2002), tries to be such a solution in the fight against recurrent atrocities because it has the competence to process and judge in a universal way the crimes of genocide, crimes against humanity, war crimes and aggression.

The creation of this permanent and specialized court matured precisely because of nazi barbarism, the need to break the paradigm of sovereignty, which allows criminals to hide under the canopy of nationalism and the narrow path of positivism. In this sense, Mazzuoli (2018, p. 883) points out:

> The Racial State in which Nazi Germany became in the dark period of the Holocaust - considered the definitive mark of disrespect and rupture with the dignity of the human person, due to the barbarities and atrocities committed to thousands of human beings (mainly against Jews)) during the Second World War – ended up giving rise to debates involving the more than pressing need to create a permanent international criminal instance with the capacity to prosecute and punish those criminals who barbarously violate the rights of all humanity .

In addition, this court has been working for almost two decades and has residual competence to judge the serious crimes above, as Varella (2018) highlights, even a criminal of nationality who is not part of the ICC can be tried and convicted by it, with an order of capture and imprisonment to be carried out by the member states of the International Criminal Court, as in the case of Sudanese President Omar Al-Bashir, indicted for war crimes, genocide, crimes against humanity and murders against populations in the Sudanese region of Darfur (BBC, 2021).

Now the principle of sovereignty gives way and is overcome by the fight against crimes against humanity because even those sovereign States that do not ratify the Rome Statute will not be able to hide criminals who, regardless of nationality, can be tried by the ICC, as the doctrine highlights:

> Given, however, the relevance of the topics dealt with by the ICC for the maintenance and promotion of international peace and security and for the protection of human rights, values whose protection is a priority for international society, can the Court extend its competence to acts committed in non-member States of the Rome Statute regardless of their consent, provided that there is proper representation of the UN Security Council (PORTELLA, 2018, p. 575).

The International Criminal Court is the only body with a universal vocation and erga omnes effect today and has a privileged position, including in our Federal Constitution which, amended by the derived constituent, provides, in paragraph 4 of article 5, that Brazil submits itself to the International Criminal Court. This is a clause included in the list of fundamental rights and guarantees ensuring Brazilians and foreigners in Brazil the protection of the ICC.

Nevertheless, the United States is refractory to the ICC and tries, through bilateral agreements (Mazzuoli, 2018) and by acts of its rulers, to exclude US citizens from the jurisdiction of the universal court (UN, 2018). Even so, the paradigm of sovereignty gives way, little by little, to the protection of human rights.

DECISIONS OF INTERNATIONAL ORGANIZATIONS

It is important to highlight that the decisions of international organizations do not, as a rule, have binding force because, in

the Brazilian case, it collides with article 49, I, of the Federal Constitution[1]. Even so, it is an important source of international law as highlighted by Varella (2018, p.77):

> Most of the more comprehensive multilateral treaties are governed by resolutions. Resolutions have, as a rule, few concrete effects, but they are mandatory legal norms. It must be noted that many States do not even participate in international negotiations on resolutions; nevertheless, they are approved and automatically take effect for all parties.

The resolutions of international organizations, however, have a unilateral character because they are issued by a subject of public international law with the aim of having an effect on the international legal order. They are norms created by a democratic procedure foreseen in the statutes of the international organizations in which the member states participate.

State sovereignty is observed because "such decisions do not express the will of the States directly, but of the organization itself, not being signed or ratified (as with treaties), but voted on" (MAZZUOLI, 2018, p. 100).

The question about the obligation and binding of States starts with organizations. The resolutions issued come from the acceptance of States prior to the treaty creating international organizations that provide for the eventual obligatoriness of their resolutions.

An example of this is article 25 of the Charter of the United Nations that defines as binding the resolutions of the UN Security Council.[2] Another important point is when the resolution has a jus cogens character, in which case there is obviously an erga omnes link due to the content of the rule issued by the international organization.

THE PRIVILEGED ROLE OF HUMAN RIGHTS TREATIES

Human rights treaties have a central and prominent role in international law and the federal constitution highlights, in paragraph 2 of article 5, that these treaties are incorporated into the Brazilian legal system and expand rights and guarantees to citizens.

The following paragraph, inserted by constitutional amendment 45 of 2004, goes further and gives the status of a constitutional norm to human rights treaties approved with 3/5 of the votes by parliament.

In this, human rights treaties sometimes have a confrontational effect between the national citizen and their own legal system, as highlighted by Varella (2018, p. 46):

> Many States consider human rights treaties to be of differentiated importance, sometimes of a higher hierarchy. The basis of the highlight would be the meaning of the norm. The treaty would not be an obligation towards the other States, but an obligation towards the individuals of each State.

For this reason, today human rights treaties are mandatory and international norms on the subject have a privileged and mandatory status on these characteristics. Accioly (1991, p. 175) well highlights when commenting on the human rights provided for in the United Nations Charter: "[…] the provisions of the Charter in this regard do not constitute a mere declaration of principles. In fact, they impose on the Member States of the United Nations the duty to respect and observe them".

CONCLUSION

At the beginning of the 20th century, the jurist and professor Luís Maria Drago formulated a theory by which he prohibited the use of military force by States so that other

1. "Art. 49. It is the exclusive competence of the National Congress: I - definitively resolve on international treaties, agreements or acts that entail burdens or burdensome commitments to the national patrimony; (...)"
2. "Article 25. The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

States could pay their debts, as happened in 1902, when Germany, Italy and England made naval threats to force the Venezuela to pay off obligations. (ACCIOLY, 1991).

Furthermore, it can be seen that the use of force was common to demand compliance with agreements, contracts and treaties, however, as highlighted in the previous topics with the creation of the UN and, concomitantly, of the International Court of Justice, once a treaty was violated an international judicial solution must be sought.

As is the case now with Russia, which already invaded part of Ukraine in 2014 and is now trying again, by force of arms, to annex an important part of its neighboring country.

In the event that a treaty is made in which Ukraine cedes part of its territory, such document will be null, as there is coercion on the State, in clear violation of article 52 of the Vienna Convention.

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