



THE UNITED NATIONS CONTRIBUTION TO THE PROCESS OF GLOBAL CONSTITUTIONALIZATION

HELENA INÁCIO

Mestranda em Direito Internacional e Europeu

NOVA School of Law

RESUMO

Na segunda metade do século XX, o mundo assistiu a uma mudança de paradigma com a criação de uma nova ordem jurídica internacional caracterizada pela ascensão de uma organização internacional universal, as Nações Unidas. Sob os seus auspícios, observou-se a criação de um número crescente de instrumentos internacionais de direitos humanos. Paralelamente, foram também desenvolvidos instrumentos regionais com vista a promover e proteger os direitos humanos numa área geográfica específica. Analisarei este fenómeno à luz da teoria do constitucionalismo global do direito internacional. Parto do pressuposto de que o constitucionalismo global é um projeto desejável e viável, a fim de questionar a forma como as Nações Unidas contribuíram para o processo de constitucionalização global. Dado que a literatura sobre constitucionalismo global é bastante eclética, construo o meu próprio conceito de constitucionalização global, que caracterizo pelas suas dimensões de universalização, centralização e juridificação. Os indicadores para cada dimensão podem ser encontrados no trabalho desenvolvido através dos tribunais. Por conseguinte,

concentrar-me-ei na jurisprudência do Tribunal Europeu dos Direitos Humanos a fim de realizar o teste de verificação à minha hipótese de que as Nações Unidas contribuíram para o processo de constitucionalização global através dos instrumentos de direitos humanos que desenvolveu ao longo dos anos.

PALAVRAS-CHAVE

Teoria Jurídica Internacional, Constitucionalismo Global, Direitos Humanos, Nações Unidas, Tribunal Europeu dos Direitos Humanos

ABSTRACT

In the second half of the 20th century, the world saw a change of paradigm with the creation of a new international legal order characterised by the rise of a universal international organization, the United Nations. Under its auspices, a growing number of international human rights instruments were born. In parallel, regional instruments were also developed in view of promoting and protecting human rights in a specific geographical area. I am going to analyse this phenomenon in light of the global constitutionalism theory of international law. I will depart from the assumption that global constitutionalism is a desirable and feasible project in order to question how the United Nations has contributed to the process of global constitutionalization. Because the literature on global constitutionalism is a very eclectic one, I will build my own concept of global constitutionalization, which I will characterize by its universalization, centralization and juridification dimensions. The indicators to each dimension can be found in the work developed through courts. Therefore, I will focus on the European Court of Human Rights jurisprudence in order to carry out the verification test to my hypothesis that the United Nations has contributed to the process of global constitutionalization through the human rights instruments it has developed over the years.

KEYWORDS

International Legal Theory, Global Constitutionalism, Human Rights, United Nations, European Court of Human Rights

1. State-of-the-art

a. Human rights protection at the global level

This year, we will celebrate the 76th anniversary of the United Nations Organization (UN)¹. This para-universal international organization, with headquarters in New York City, and currently composed by 193 Member States, came into existence in the aftermath of World War II, in 1945. The Charter of the United Nations (UN Charter) is its organizational and constitutive document and, under Art. 1, establishes that two of the principal purposes of the UN are to promote and encourage respect for human rights and fundamental freedoms for all and harmonize state actions in attaining this common goal³.

Nevertheless, the UN Charter does not specify what human rights it actually refers to. Thus, in 1946, the Commission on Human Rights (CHR) was created by the Economic and Social Council of the UN (ECOSOC). The CHR was meant to promote and set human rights standards, whereby it was the author of the Universal Declaration on Human Rights (UDHR) of 1948. In spite of being soft law, this declaration is still considered the most authoritative statement of international human rights in the world, up to this day⁴.

Moreover, the United Nations provided the stage for the draft and ratification of 10 human rights conventions, as well as their additional protocols, with binding force upon its

¹ UNITED NATIONS, *Overview*, 2020, Available at: <https://www.un.org/en/sections/about-un/overview/index.html> [last accessed: 26/11/2020, at 16h00]

² UNITED NATIONS, *History*, 2020, Available at: <https://www.un.org/en/sections/history/history-united-nations/index.html> [last accessed: 26/11/2020, at 16h30]

³ Art. 1(3) and Art. 1(4) Charter for the United Nations (1945)

⁴ SUSAN PARK, “Protecting Human Rights” in *International Organizations and Global Problems – Theories and Explanations*, Cambridge University Press, 2018, p. 64

parties⁵. These are the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention, 1948), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965), the International Convention on Civil and Political Rights (ICCPR, 1966), the International Convention on Economic, Social and Cultural Rights (ICESCR, 1966), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984), the Convention on the Rights of the Child (CRC, 1989), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW, 1990), the International Convention for the Protection of All Persons from Enforced Disappearance (CPED, 2006) and the Convention on the Rights of Persons with Disabilities (CRPD, 2006).

Together, the UDHR, the ICCPR and the ICESCR are frequently referred to as the International Bill of Human Rights, since they share common elements of inspiration and content⁶. Most importantly, about 80 per cent of UN Member States have ratified four or more of the ten treaties mentioned above⁷. It should be noted that nine of those international conventions have specific treaty bodies responsible for maintaining and enforcing their provisions, whereas the International Criminal Court (ICC) is the institution that guarantees the enforcement of the Genocide Convention. Most of those treaty bodies are supported by reporting or monitoring mechanisms which make sure to verify state compliance with their human rights duties⁸.

After 60 years of existence, in 2006, the Commission on Human Rights was replaced by the Human Rights Council, in an effort to improve the efficiency and reputation of the

⁵ *Idem*, p. 65

⁶ MATEUS KOWALSKI, *A Carta das Nações Unidas como 'Constituição' da comunidade internacional*, *Negócios Estrangeiros*, nº 15, Lisboa, Instituto Diplomático do Ministério dos Negócios Estrangeiros, 2009, pp. 48-49

⁷ S. PARK, "Protecting Human Rights", *cit.*, p. 66

⁸ PAMMELA SAUNDERS, *The Integrated Enforcement of Human Rights*, *International Law and Politics*, vol. 45 (97), New York University, 2012, p. 100

work done by the UN on human rights matters. With it, came a new monitoring system, called Universal Periodic Review (UPR), with the aim of conducting a review of all Member States' compliance with their obligations, every four years⁹.

b. Human rights protection at the European level

Besides universal human rights instruments, there are also regional institutions aiming to ensure their respect. The European Court of Human Rights (ECtHR), based in Strasbourg, is one such example. It is a regional court created in 1959 by the Council of Europe and guarantees the application of the civil and political rights established under the European Convention on Human Rights (ECHR), which came into force in 1953. Under Protocol No. 11 to the ECHR, the ECtHR has sat as a full-time court since 1998 and, under Protocol No. 16, it has provided advisory opinions on request of Contracting States since 2018. The court accepts both individual and inter-state applications and its judgements are binding on the concerned Contracting State. There have been 47 Council of Europe Member States ratifying the ECHR, which means the ECtHR exercises its jurisdiction over 830 million Europeans¹⁰.

The ECtHR, however, is a subsidiary body. That is, cases first must go through national courts and only after being appealed can they go to Strasbourg¹¹. When claims are filed in the court, they are first reviewed so that the court may understand whether they are admissible or not. If a claim is considered to be worthy of adjudication, then the procedure moves on to the stage when both the claimant and the state respondent,

⁹ P. SAUNDERS, *The Integrated Enforcement*, cit., pp. 101-102

¹⁰ EUROPEAN COURT OF HUMAN RIGHTS, *General presentation*, 2020, Available at: <https://www.echr.coe.int/Pages/home.aspx?p=court&c=> [last accessed: 26/11/2020, at 21h30]

¹¹ MAGDALENA FOROWICZ, *The Reception of International Law in the European Court of Human Rights*, New York, Oxford University Press, 2010, pp. 3-4

represented by legal counsel, present evidence and defend their own point of view. Cases are adjudicated by a panel of judges with the authority to decide whether a human rights violation has occurred or not and to award sanctions in such cases where it has¹².

As the years passed, the ECHR has been amended by Contracting Parties in order to update, expand and strengthen the convention's scope. As a consequence, the ECtHR is considered to be one of the most experienced and efficient human rights enforcement bodies in the world. Moreover, the court has also resorted to more and more external sources in order to complement and sustain its work and decisions. Currently, the court interacts with four different outer systems, comprising: the Council of Europe itself, all Contracting States, the European Union (EU) and the broader international legal order¹³.

For all the reasons mentioned above, it is common that states are liable for the same human rights violation under a variety of international human rights treaties. Particularly, the majority of European States assume human rights responsibilities not only under the ECHR, but also under several UN instruments developed with similar aims¹⁴. Therefore, all human rights treaties form part of a highly interconnected web of similarly oriented instruments which end up overlapping and impacting each other¹⁵. There is, however, one very important element distinguishing between the different treaties. While the ECHR is connected to a court empowered with sanctioning authority to apply its norms, the majority of UN human rights instruments relies only on non-binding reporting and/or monitoring mechanisms to compel state compliance¹⁶.

c. Theoretical background

¹² P. SAUNDERS, *The Integrated Enforcement*, cit., p. 110

¹³ M. FOROWICZ, *The Reception of International Law*, cit., pp. 1-3

¹⁴ P. SAUNDERS, *The Integrated Enforcement*, cit., p. 100

¹⁵ *Idem*, p. 105

¹⁶ *Ibidem*, pp. 110-113

i. Global constitutionalism in the theory of international law

There are several theoretical schools developing over the field of international law. One of these schools is that of global constitutionalism (also known by the names of world constitutionalism and international constitutionalism). It is best described in the words of Anne Peters, who states that “Global constitutionalism is an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order”¹⁷. In other words, it envisages an idealistic endeavour to shape international law into an ethical and universal institution in the form of a constitution at the global level¹⁸.

It must be noted that constitutionalism is not the same as constitutionalization or constitution. The last two are simply the terms used in order to explain the meaning of the first. The term constitutionalization, however, acts as an “all-encompassing umbrella”¹⁹, to use the expression employed by Tzevelekos and Lixinsky, in the sense that it carries a wide range of definitions and perceptions with it. Notwithstanding, it is certain that constitutionalization refers to an emerging phenomenon, that is, a changing and dynamic process²⁰.

¹⁷ ANNE PETERS, *The Merits of Global Constitutionalism*, Indiana Journal of Global Legal Studies, vol. 16 (2), Maurer School of Law - Indiana University, 2009, pp. 397-398

¹⁸ DOUGLAS JOHNSTON, “World Constitutionalism in the Theory of International Law”, in *Towards World Constitutionalism - Issues in the Legal Ordering of the World Community*, eds. RONALD MACDONALD and DOUGLAS JOHNSTON, Leiden and Boston, Martinus Nijhoff Publishers, 2005, p. 15

¹⁹ VASSILIS TZEVELEKOS and LUCAS LIXINSKY, *Towards a Humanized International ‘Constitution’?*, Leiden Journal of International Law, 29, Cambridge University Press, 2016, p. 350

²⁰ *Idem*, p. 345

The theory of global constitutionalism is connected to other international events. Some say it is associated with the rise of globalization, since more and more subject areas are being regulated by international law, thus increasing the need of the State to adapt its internal norms to its international commitments. This has been especially observed since the second half of the 20th century, with the UN conception, and, particularly, after the fall of the Soviet Union and the rise of liberal democracies, in the early 1990s²¹.

Others link the ideals of global constitutionalism to the rising importance given to democracy and the rule of law all over the world²². Most visible, though, is the connection established between this theory and the increasing advocacy for human rights protection. Not only has the individual person recently become an official subject of international law²³, human rights can also be seen as part of the fundamental norms which serve to set up the international legal order. Defenders of this position sometimes claim the internationalization of national constitutions is the main reason explaining the constitutionalizing effect of human rights in international law²⁴. In the words of Martti Koskenniemi: “The use of the constitutional vocabulary (...) transforms individual suffering into an objective wrong that concerns not just the victim, but everyone”²⁵.

The theory of global constitutionalism is also very much connected to the idea of an erosion of state sovereignty. In the eyes of Chevallier, the contemporary era has originated the post-modern state, thus breaking with the old Westphalian paradigm which had originated the modern state²⁶. Post-modern state borders are not as rigid as they used to

²¹ LEONAM LIZIERO, *A Constitucionalização do Direito Internacional como Efeito da Globalização*, Revista Húmus, vol. 8 (24), Universidade Federal do Maranhão, 2018, pp. 94-100

²² D. JOHNSTON, “World Constitutionalism”, cit., p. 18

²³ V. TZEVELEKOS and L. LIXINSKY, *Towards a Humanized*, cit., pp. 343-344

²⁴ *Idem*, p. 357

²⁵ MARTTI KOSKENNIEMI in ANNE PETERS, *The Merits of Global Constitutionalism*, Indiana Journal of Global Legal Studies, vol. 16 (2), Maurer School of Law - Indiana University, 2009, p. 410

²⁶ CHEVALLIER in LEONAM LIZIERO, *A Constitucionalização*, cit., p. 91

be, allowing juridical nationalization to become more flexible²⁷. Moreover, for Anne-Marie Slaughter, state sovereignty has been progressively disaggregated by the centrifugal forces of transnational networks which exercise functionally based exchange relations among nations and, therefore, achieve a certain independence to the point that they start gaining predominance over state-centred power relations²⁸.

Other authors claim that global constitutionalism has emerged as an answer to the need to complement national constitutionalism, which has become less and less efficient due to globalization²⁹. Finally, one last bond must be established between this international law theory and global government. Traditionally, constitutions were created in view of establishing political authority. However, according to Habermas, it is possible to have a global constitution without having a world government, because constitutions may simply aim at constraining existing powers, without creating new ones³⁰.

ii. Various forms of global constitutionalism

The theory of global constitutionalism can be seen through different lenses, that is, it can take different shapes and authors might disagree as to the ways in which it can be achieved. One author of reference for those who study this theory is the Prussian

²⁷ L. LIZIERO, *A Constitucionalização*, cit., p. 94

²⁸ ANNE-MARIE SLAUGHTER in JÜRGEN HABERMAS, *A Political Constitution of the Pluralist World Society?*, *Journal of Chinese Philosophy*, 40 (S), 2014, pp. 234-235

²⁹ M. KOWALSKI, *A Carta das Nações Unidas*, cit., p. 34

³⁰ J. HABERMAS, *A Political Constitution*, cit., p. 228

philosopher Emmanuel Kant. Already in the 18th century, he conceived the idea of a cosmopolitan order by extending the concept of constitution from the national to the global arena and by envisaging a kind of international law as a law focused on individuals, as opposed to states³¹.

Habermas, however, criticises Kant's conceptualization by stating that there are other ways of achieving global constitutionalism other than through a "world republic", and which would adapt better to the present-day reality. One of them would be to invest on "the temporal pattern of incremental advances in the constitutionalization process, initiated and backed by governments rather than by citizens"³².

Another theoretical strand sees in the UN Charter a foundational set of norms with the potential to become an official global constitution. The first authors presenting this perspective were Alfred Verdross and his disciple, Bruno Simma. According to them, the constitution of the universal state community would be found on a set of organizing principles agreed as valid by all states. Because the United Nations is an international organization which includes almost every state in the world, and because even those which are not parties to it still recognise its founding principles, the Charter of the United Nations can perfectly be seen as the global constitution³³.

Following the same logic, Mateus Kowalski claims the more universal an international organization is and the bigger its functionality scope, the more it is able to fit into a global institutional basis regarding the achievement of a global constitution. Therefore, as of today, the UN is the best candidate for this position³⁴.

Another very well-known author who theorized on this matter is the Austrian jurist and philosopher Hans Kelsen. He advocated for what he called a "thin" global constitutionalism,

³¹ Idem, pp. 227-229

³² Ibidem, p. 229

³³ M. KOWALSKI, *A Carta das Nações Unidas*, cit., p. 34

³⁴ Idem, p. 53

that is, an international legal order characterised by constitutional judicial review both at national and supranational levels. Kelsen idealized an international judiciary body with similar functions to that of a traditionally conceived constitutional court. It could be developed in the form of a world constitutional court responsible for exercising the judicial review of the conformity of national laws with public international law, and not with the settling of private inter-state disputes³⁵.

In the eyes of Kelsen, constitutional courts need to expand from the domestic to the international sphere. He was a legal formalist and, therefore, established three principles which should be observed when the stage of “thin” global constitutionalism is attained. The first is that any legally regulated issue can be juridically addressed, whether it is linked to highly politicised questions or not. The second is that every subject-area can be legally regulated and, consequently, every subject-area can not only be regulated by domestic law but also by international law. The third and last principle is that constitutional law is hierarchically superior to regular law and, in turn, international law is hierarchically superior to domestic law³⁶.

Many other authors theorise over the shape and steps of global constitutionalism. They include Hermann Mosler, Christian Tomuschat, Bardo Fassbender and Gomes Canotilho³⁷. However, for reasons of space, we will not be looking into these theoretical strands in this article.

iii. Critical perspectives

³⁵ TOMER BROUDE, *The Constitutional Function of Contemporary International Tribunals, or Kelsen's Visions Vindicated*, Goettingen Journal of International Law, vol 4 (2), 2012, pp. 521-528

³⁶ *Idem*, pp. 521-528

³⁷ To get a clearer idea of the theoretical perspective defended by each author, see M. KOWALSKI, *A Carta das Nações Unidas*, cit., p. 34-36

No theory goes without its critics and global constitutionalism is not an exception. One major piece of criticism against it is that it raises illegitimate expectations by resorting to inflated and unrealistic terms which lead people to assume possible what are, in fact, artificial constructions of the imagination. This way, advocates of global constitutionalism disseminate a deceitful idea of some kind of legitimacy in global governance. In other words, global constitutionalists abuse the meaning of constitution by uselessly trying to dignify the international legal order³⁸.

Another objection comes from those who claim that the meaning of a constitution lies in the historical sacrifice a certain people have made. People own their constitution because they fought for it in a revolutionary manner and attributed to it a special symbolism. The international community, on the other hand, has never gone through such a process. Thus, it makes no sense to try to see in it a constitutionalizing force³⁹.

A piece of criticism coming from the field of international relations, particularly, from the realist school of thought, is that which claims the theory of global constitutionalism emerged in an overly optimistic era, characterized by the illusion of a free world, right after the fall of the socialist bloc. The truth is there is no common political will, power structure or enforcement capability at the international level. Consequently, the global constitutionalism agenda is too much of an idealistic endeavour and it disappears once real-life problems are on top of the table⁴⁰.

Scepticals of global constitutionalism allege that it tries to build a simplistic and legalist version of constitutionalization, instead of taking into account its political factors. From this perspective, popular sovereignty and democratic institutions should be the main forces guiding any constitutional project. These critics fear the rise of an unrepresentative

³⁸ ANNE PETERS, *The Merits*, cit., p. 400

³⁹ *Idem*, p. 400

⁴⁰ *Ibidem*, p. 401

global juristocracy guided by the erroneous principle that society can be governed simply by securing people's basic rights through courts⁴¹.

Other critical perspectives include the assertion that global constitutionalism advocates are mainly scholars, as opposed to political actors. It is said they present a simplified and compact version of the world, when it is, in fact, highly complex and heterogeneous. Concern is raised over the fact that its advocates propose an anti-pluralist debate which hides a uni-civilizational project in its core, particularly shaped by a European vision of the world. Besides, the definition of global constitutionalism is problematic for being too vague and for mixing in different fields of expertise, making the concept quite unclear and unhelpful⁴².

Finally, it must be noted that the two main counter-narratives regarding global constitutionalism in the theory of international law are that of fragmentation and that of pluralism. While the first objects at every attempt to pursue a normative project, the latter presents a more moderate perspective by envisioning a fragmented plurality of sovereign centres of power interacting in an interdependent and multi-level legal order, while having no world unification agenda⁴³.

2. How has the UN contributed to the process of global constitutionalization?

As we have seen, the global constitutionalism school of thought is a highly eclectic one. There is little consensus as to what its true meaning is, what shape it takes and how to

⁴¹ Ibidem, pp. 407-408

⁴² Ibidem, pp. 401-405

⁴³ V. TZEVELEKOS and L. LIXINSKY, *Towards a Humanized*, cit., pp. 352-354

achieve it. And there are also those who remain sceptical regarding its possibility or even its desirability. My work is going to be based on the normative assumption that global constitutionalism is a morally desirable project.

By bringing nations and its peoples together, this agenda contributes to the formation of commonly accepted principles which assure stability and certainty in international relations. Moreover, by allowing for the harmonization of both domestic and global interests, global constitutionalism will enhance national aspirations⁴⁴. This will, however, forcefully alter the current international paradigm marked by a largely anarchic state of affairs, that is, one that remains “horizontal, decentralised, state-centric, sovereigntist and (...) voluntarist”⁴⁵.

Notwithstanding, it is crucial to take a position regarding the way this agenda may be implemented. Does it come from “below” or does it come from “above”? In other words, does constitutionalization depart from global citizens or does it depart from governmental negotiations? Is it necessary for a grassroots revolution to happen at the international level to achieve something like a global constitution?

Related to this issue, is the question of understanding whether constitutional elements at the global level may originate from those common elements found in national constitutions all over the world or, on the contrary, national constitutions are shaped by supranational constitutional forces impacting every domestic order.

It is also important to analyse the shape this ideology might take. Does it come in the form of a universal international organization, such as the United Nations? If so, what would be the constitutionalizing elements of the organization: its Charter? the laws emanated from its organs? the concerted action of its Member States?

⁴⁴ ANNE PETERS, *The Merits*, cit., pp. 402-407

⁴⁵ V. TZEVELEKOS and L. LIXINSKY, *Towards a Humanized*, cit., p. 361

Then, what about regional organizations, such as the ECtHR, which work in parallel to the United Nations and share some of its main goals? What is the role of regional organizations in the constitutionalizing process? Do they take any credit in the unifying process of the formation of a global constitution or do they hinder this process by contributing to the fragmentation or pluralization of international law?

Moreover, if international organization is not the answer, then, does global constitutionalism come in the form of a global court, vested with the powers to perform judicial review over state actors in accordance with public international law? Must a hypothetical global constitution necessarily be associated to a world government? Or is there any other possibility?

Another noteworthy concern is about the essential elements of the constitutionalizing process. One might question what such common interests to the global society are that justify the creation of a global constitution. Is it the importance attributed to democracy? Is it the necessity of the rule-of-law? Is it the need to forestall the use of force and ensure peace? Is it the interest in protecting human rights? Is it all of these?

The last and most pressing issue regarding this school of thought is whether it is actually feasible. Indeed, we have seen this theory has been frequently attacked for describing an abstract idea not yet sufficiently present in real-life politics, being much more well-received among academics instead. Therefore, it is important to question whether present day international law and politics show any real sign pointing towards a constitutionalizing process. Is global constitutionalism the way forward or is fragmentation and/or pluralism to persist?

Bearing in mind all of the above, this article focuses on exploring the possibility of developing global constitutionalization through a universal international organization, particularly, the United Nations. As a constitutionalizing element, I will take into special

consideration international human rights instruments, because I believe there is a clear universal interest in protecting them.

I delve into the way the United Nations has contributed to the dissemination of the several types of human rights instruments mentioned earlier and question whether they have had any impact on the protection of the human person in recent years. The main question this article proposes is, therefore, the following: “How has the United Nations contributed to the process of global constitutionalization?”.

It must be noted that the UN is not a source of law in the formal sense. As explained above, it is, instead, a forum or an arena from where international law initiatives emanate. Its constitutive organs are responsible for drafting the law and then proposing it to states, who will decide whether to commit to those laws or not. Strictly speaking, the aforementioned 10 human rights conventions and the UDHR do not form part of “United Nations law”, they are the law of the states. It is precisely under this condition that I wish to understand how the UN has shaped the domestic sphere.

For this reason, it matters to look into the likelihood of having a global constitution being developed from “above”. Thus, the way human rights instruments developed by the United Nations are received in national jurisdictions must be taken into account. Particularly, it is relevant to analyse whether the work done by the ECtHR in protecting human rights clashes or enhances the work done by the United Nations in the same vein.

This topic must be situated in the debate related to the enforcement capabilities of those human rights treaties attached to reporting or monitoring bodies and those attached to courts with actual adjudicative competences. While most UN human rights treaties are not connected to any particular international court, the ECtHR exercises jurisdiction over the rights established under the ECHR. However, the rights contained in the regional convention overlap with those contained in the international conventions. Moreover, the ECtHR does refer to international treaties developed under the UN umbrella.

It is, therefore, important to understand what the relationship between the two types of instruments is. Particularly, if the existence of a *lex specialis* regional court thwarts the development of global constitutionalism by developing its own human rights regime or if, on the other hand, it can actually strengthen this ideal by contributing to the implementation of common interests to the whole international society, thus enhancing the international human rights regime instead.

It must also be noted that this article focuses on the “process of global constitutionalization”. Constitutionalization is not the same as constitution, because the former refers to a process, that is, a logical sequence of steps taken to achieve an end result, while the latter refers to the final outcome of that process. Constitutionalization is also a different concept from that of constitutionalism, for the latter refers to the ideology we have been discussing before.

My endeavour is of additional value for scientific research because global constitutionalism advocates rarely conduct empirical research in order to verify their assertions. They tend to limit their work to the normative sphere, identifying constitutionalizing factors in international law or idealizing constitutionalizing institutions. This article, however, takes a more empirical basis. By looking at constitutionalization from both sides of the process, the constitutionalizing and the constitutionalized sides, I will be able to draw a clearer picture of the way constitutionalizing forces act in real life, and not only inside the academic sphere.

a. Defining global constitutionalization

There is no consensus among authors regarding the meaning of global constitution, much less regarding the meaning of global constitutionalism⁴⁶. Indeed, not even the

⁴⁶ V. TZEVELEKOS and L. LIXINSKY, *Towards a Humanized*, cit., pp. 348-349

definition of national constitution is unanimous⁴⁷. This is problematic because it precludes the establishment of a coherent and cohesive school of thought and creates several obstacles to those like me who are interested in pursuing investigation in this field of studies. Therefore, it is crucial to establish a common ground among those who advocate in favour of this theory regarding what are the constitutionalizing elements of international law.

For this reason, I wish to develop my own concept of global constitutionalization. Because I will focus my attention on the process leading to the formation of a global constitution, I might as well clarify what my conception of the latter is. I agree with Kowalski when he gives a wide-ranging definition of constitution, stating that it corresponds to the fundamental organizing law of any society⁴⁸. Moreover, making use of Johnston's heterogeneous propositions, which he listed in order to describe the complexity of the concept of constitution, I will add that it must also reflect the customary law of the people, that it must restraint political powers by assuring an ethical core of rights and freedoms of individuals, and that it must be associated to a judicial power authorised to exercise judicial review over ordinary legislation⁴⁹. My conception of constitution in general also applies to my conception of global constitution.

Furthermore, I agree with Anne Peters when she states that global constitutionalization refers to the "continuing, but not linear, process of the gradual emergence and deliberate creation of constitutionalist elements in the international legal order by political and judicial actors, bolstered by an academic discourse in which these elements are identified and further developed"⁵⁰. I will be focusing on the UN as a possible constitutionalizing force. Therefore, I plan to study the way it might have contributed to this emerging phenomenon.

⁴⁷ M. KOWALSKI, *A Carta das Nações Unidas*, cit., p. 36

⁴⁸ *Idem*, p. 36

⁴⁹ D. JOHNSTON, "World Constitutionalism", cit., p. 17

⁵⁰ ANNE PETERS, *The Merits*, cit., pp. 397-398

Furthermore, I will be focusing on human rights by considering them as a constitutionalizing element of international law. This is due to several reasons, the first being the seemingly universal acceptance of human rights by global society, which is shown in the widespread ratification of human rights related multilateral treaties. In addition, as asserted by Anne Peters, promotion and protection of human rights and fundamental freedoms of individuals is the main reason for the formation of a public order, be it in the form of a nation state or at the global level. International law has, thus, become a system centred on individuals⁵¹.

Bearing in mind all of the above, I idealize the definition of global constitutionalization in three dimensions: universalization, centralization and juridification. It must be highlighted all these dimensions correspond to processes, similarly to the concept they delineate. I further explain each of them below.

Here, universalization refers to the opposite of fragmentation or pluralization. It refers to the assertion that the protection of human rights and fundamental freedoms of the individual is a common interest to the global population. This way, it denies that there is the possibility of having multiple human rights regimes, since there is only one possible regime: the universal.

Christina Binder tells us that human rights have always been at the centre of the debate over the harmonization or fragmentation of international law. This is because, by striving to harmonize the application of human rights with general international law, courts fear they may be neglecting the necessary specificity of human rights law⁵². I argue that courts could never neglect the specificity of human rights law by harmonizing it with general

⁵¹ Idem, pp. 398-399

⁵² CHRISTINA BINDER, *El Tribunal Europeo de Derechos Humanos y el Derecho de los Tratados - ¿Fragmentación o Unidad?*, Anuario Español de Derecho Internacional, vol. 31, 2015, pp. 298-299

international law, since human rights have a universal value and, thus, must be interpreted equally in any part of the world.

The indicators to this dimension are the principle of validity of jus cogens and the principle of validity of erga omnes. Art. 53 of the Vienna Convention on the Law of Treaties (VCLT, 1969) defines jus cogens as a peremptory norm of general international law which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. Yet, no hard law instrument specifies what norms may actually be perceived as jus cogens.

Nonetheless, doctrine has been developed around this concept and several authors theorize about the content of jus cogens. They all share the common premise that human dignity, peace, equality and freedom are values accepted and recognized by the international state community as worthy of protection. Some authors, such as André Gonçalves Pereira and Fausto de Quadros, go as far as asserting that unilateral or conventional sources of general international law related to human rights, like the UDHR, are included in jus cogens⁵³.

Erga omnes, in turn, is a more comprehensive concept. The ILC norms on state responsibility define it as being obligations which, if violated by a state, justify that a non-directly injured state may invoke the responsibility of the violating state in relationship to those obligations. Even though they do not share the same privilege as jus cogens, these norms actually encompass it, since every peremptory norm of international law is owed erga omnes⁵⁴. Interestingly, Kelsen defended a kind of international constitutional judicial review based on the idea that all international law is erga omnes⁵⁵.

⁵³ PEREIRA AND QUADROS in M. KOWALSKI, *A Carta das Nações Unidas*, cit., pp. 42-43

⁵⁴ V. TZEVELEKOS and L. LIXINSKY, *Towards a Humanized*, cit., pp. 358-360

⁵⁵ T. BROUDE, *The Constitutional Function*, cit., p. 528

Both erga omnes and jus cogens norms are distinguished by their content and not by their form. Moreover, they establish a normative hierarchy and contribute to the verticalization of international law⁵⁶. Therefore, I argue that reference to jus cogens and erga omnes in human rights related jurisprudence of courts indicates a universalization of these norms.

I consider centralization to be another characteristic of global constitutionalization. With centralization, I mean the process that leads international human rights instruments developed under the United Nations framework to become a global point of reference. This way, I disagree with Tzevelekos and Lixinsky when they claim international law remains a decentralized system because there is no centralized international authority similar to the kind existing at state level⁵⁷. I believe international authority does not necessarily have to take the same shape as national authority.

In turn, I agree with Kelsen⁵⁸ when he claims that constitutionalization of international law results from its centralization. I also subscribe to Saunders' logical conclusion that international human rights treaty bodies and regional human rights courts vested with adjudicative powers work in interconnection and enhance the enforcement capabilities of each other. In addition, the author holds that regional courts have been successfully making use of reporting and monitoring mechanisms associated with overlapping human rights treaties in order to improve their decision-making efficiency⁵⁹. Consequently, I argue that reference to those international human rights instruments developed under the United Nations paradigm, as well as participation of their treaty bodies in the adjudicative process of human rights related case law of courts indicates a centralization of these norms.

⁵⁶ V. TZEVELEKOS and L. LIXINSKY, *Towards a Humanized*, cit., pp. 349-360

⁵⁷ *Idem*, pp. 358-359

⁵⁸ T. BROUDE, *The Constitutional Function*, cit., p. 528

⁵⁹ P. SAUNDERS, *The Integrated Enforcement*, cit., p. 125

The last dimension I associate with global constitutionalization is that of juridification, that is, the process which leads to a more and more efficient application of human rights law in the daily life of people, who are and will always be its main beneficiaries. Juridification, from my point of view, involves not only the increasing legalization of international law through the establishment of a growing number of international courts with adjudicative powers over a variety of international matters⁶⁰, but also a stronger capacity for judicial review according to public international law and more efficient compliance with the principle of due diligence.

I agree with Broude when he asserts that, nowadays, several international courts present those constitutionalizing characteristics idealized by Kelsen⁶¹. In other words, international courts, be they regional or universal, have been juridically addressing more and more questions, regardless of how politicised those issues are; they have been adjudicating over an increasing number of matters which are also regulated by domestic law; and they have been exercising their powers based on the premise that international law is hierarchically superior to domestic law. I will, however, disagree with Kelsen⁶² and follow the idea developed by Tzevelekos and Lixinsky⁶³ by admitting that human rights have a positive effect. That is, there is a tendency to create positive legislation instead of simply creating negative legislation in order to better protect human rights and guarantee their effective application. This corresponds to the principle of due diligence. For these reasons, I argue that decisions made by courts, be they domestic or international, in accordance with judicial review and with the principle of due diligence, regarding human rights, contribute to the juridification of these norms.

⁶⁰ ANNE PETERS, *The Merits*, cit., p. 399

⁶¹ T. BROUDE, *The Constitutional Function*, cit., p. 528

⁶² *Idem*, p. 546

⁶³ V. TZEVELEKOS and L. LIXINSKY, *Towards a Humanized*, cit., pp. 361-362

b. Inter-relationship between the ECtHR and the UN

Human rights instruments developed under the UN framework have been increasingly adopted in court's jurisprudence in recent years. Especially from the beginning of the 21st century, courts have been looking much more often to external sources in order to justify their decision-making regarding human rights. Particularly, courts have been incorporating in its jurisprudence the 10 international human rights conventions described above, besides the UDHR itself.

In adopting these instruments, courts have been referring much more often to the principles of validity of *jus cogens* and *erga omnes* regarding the application of human rights. This shows that such norms have been undergoing a process of universalization, since judges recognize the existence of a hierarchical normative order in international law in which human rights occupy the top position. Furthermore, reference to international human rights instruments developed under the UN framework and the intervention of their treaty bodies in the adjudication mechanism allows the UN to be seen as having a standardizing function on human rights matters. This proves that those norms have been undergoing a process of centralization. Such norms have also been undergoing a process of juridification, because those courts vested with powers to perform judicial review make decisions bearing in mind those human rights rules developed under the UN paradigm, and because courts in general comply with the principle of due diligence regarding these norms.

In this light, it is interesting to look into the work developed by the ECtHR. Even though I could have chosen any other court, examples need to be restricted in space and time. Therefore, I restrict my analyses to the European region and I limit the time span to the 21st century. This is because, as mentioned above, the ECtHR only started to work as a permanent court in 1998, and because the UN work started to gain much more relevance in the early 1990s. It is relevant to note, however, that, by extrapolating observations made

after analysing ECtHR's jurisprudence to the rest of the world, I am making an induction, that is, I am assuming the same phenomenon can be observed in other courts.

In analysing ECtHR's jurisprudence, one must consider those indicators to each dimension I associated to global constitutionalization. Notably, in order to prove the correctness of the universalization dimension, one should question whether the court has made any reference to the principles of validity of jus cogens and erga omnes in judgements where it also makes reference to international human rights instruments developed under the UN umbrella. Afterwards, in order to prove the correctness of the centralization dimension, it must be verified whether judges make any reference to such human rights instruments in order to justify their decision, as well as whether any of those international human rights conventions' treaty body, or even the UPR, has been involved in proceedings leading to the final decision of the court. Finally, in order to prove the correctness of the juridification dimension, it is important to step way from the court's jurisprudence for a moment in order to analyse the ECtHR's functioning. Particularly, one must take into consideration the fact that the court's decisions are binding upon its Contracting Parties, as well as the fact that the court sees itself as a guarantor of the European public order⁶⁴. This involves analysing the ECHR's text, looking into the court's advisory opinions and reading the jurisprudence itself. It allows us to find elements indicating the judicial review function of the court, as well as elements showing that judges comply with the principle of due diligence.

Moreover, Forowicz's book, entitled "The Reception of International Law in the European Court of Human Rights", allows us to get a clearer picture of the way the ECtHR formulates its jurisprudence and interprets the sources it has at its disposal. Even though the author takes a sceptical view regarding the theory of global constitutionalism, she explains two tendencies have been observed in the court over the years, one that is more restrictive to the reception of international law, which she designates by the "closed

⁶⁴ CHRISTINA BINDER, *El Tribunal Europeo*, cit., p. 310

paradigm”, and another which is more receptive, which she designates by the “open paradigm”⁶⁵.

According to Forowicz, interpretation practices hindering the reception process include margin of appreciation, consensual interpretation, autonomous interpretation and judicial restraint, whereas interpretation practices enhancing the reception process include evolutive and dynamic interpretation, the effectiveness principle, systemic integration and judicial activism⁶⁶. A thorough analysis of all these practices would allow us to better understand how the ECtHR receives external sources in its case law. Interestingly, the author claims that “as the Strasbourg case law evolved, international law started to penetrate into (...) the Court’s reasoning”⁶⁷.

3. Conclusion

In answering the main question this article proposes, I suggest that the processes of universalization, centralization and juridification of international human rights instruments developed under the UN umbrella have contributed to the process of global constitutionalization. In other words, we can conclude the UN has contributed to the process of global constitutionalization through the promotion of the universalization, centralization and juridification of human rights norms through the work developed in courts. Because my answer is directly correlated to the work developed in courts, it matters to look into their jurisprudence. The ECtHR’s work provides a very good example. By analysing it closely, we may conclude that the court has been more and more receptive to the adoption of those human rights instruments in formulating its reasoning.

⁶⁵ M. FOROWICZ, *The Reception of International Law*, cit., pp. 2-5

⁶⁶ *Idem*, pp. 7-14

⁶⁷ *Ibidem*, pp. 17-18

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A special thank you to Prof. Soraya Nour Sckell, to Prof. Mateus Kolwaski and to PhD Candidate Anabela Brízido for helping me during the construction of this article.

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