International law and humans rights

Dr. Galo Larenas Serrano

INTRODUCTION

The establishment of the International Criminal Court has raised special interest not only among experts in legal or international matters, but also among the public at large. Common citizens, horrified by genocide, crimes of war, and crimes against humanity, have demanded justice and punishment for the persons responsible for these atrocities.

These reactions, I believe, are revealed as a manifestation of the civilized feeling of society as a whole as a perhaps unconscious act of legitimate defense of the social body against the encroachment of barbarism. It could be interpreted as a warning cry given by the legally structured international community to call to mind the transcendental significance of the human being that, as God's image, has become the central axis of History.

This is the reason for this brief essay, which somehow seeks to express what I perceive as the profound feelings of men, women and even children, if at their young age they had sufficient reason, regarding the serious events that are taking place nowadays that compromise the future of all of us, even our own survival.

Starting from the fundamental role played by Law in the civilized life of the nations, this study begins with a retrospective vision of the evolution of international laws concerning the subjects of law.

In this perspective, we identify several relevant elements that reveal a certain direction in the evolution of International Law, aimed towards acknowledging the capital importance of persons, placing them above the State itself. In this part of the study, I would like to express some ideas regarding the contribution of Latin American thinkers to the noble cause of the international juridical protection of persons.

Then I will make a brief analysis of the procedural aspect, and I will focus on the critical question of the predominance of the international

jurisdiction over national jurisdiction, in the defense of the fundamental rights of human beings. This, in turn, will lead us by necessity to the question of the relativity of the orthodox concept of the sovereignty of the State.

Regarding these premises, and without intending to make a comprehensive analysis of the historical background of the International Criminal Court, about which many well-documented studies have already been published, I will analyze it, focusing on its nature and structure, to arrive finally to an examination of the complex subject of the competence of the Court.

To conclude, I will propose several reflections aimed at the future development of what will have to become a new International Law, with men and women at its core.

2. THE ROLE OF LAW IN THE LIFE OF THE PEOPLES

Law is a reflection and, in turn, a testimony of an important stage of the existence of humans beings during their passage through this Earth, which gathers the most profound of their life experiences as a social conglomerate, materializing them in laws.

Thus, the juridical conscience of the peoples has become structured and it has been embodied in laws, based on often tragic and bitter experiences resulting from social phenomena like the political systems of exploitation of men, and revolutionary processes in their extreme phases.

This phenomenon is especially evident at international level, as the interrelation of individuals, which internally within the States develops at personal level, structuring an already quite complex situation, is projected outside the states in a new, even more complex dimension. It is precisely this complexity that is evidenced at the moment of drafting laws that tend towards an increasingly supra-state empire.

Within this retrospective vision of International Law, we can appreciate that the subject of law par excellence has been the State. We can appreciate this from the earliest notions of International Public Law in the courageous thinking of Francisco de Vittoria in the 15th century, with his humanistic conception of "Orbis", with certain characterizations that will be explained in greater detail below.

Afterwards, this perspective continues with the juridical contributions of Hugo Grotio, who already structures this discipline with definitions such as ¨Mare Liberum¨, and later on within the ideas of the Spanish theologian Francisco Suarez

regarding the controversial notion of "Just War".

In the complex subject of the treatment of war, we will admit that the basic reasoning, although it takes into consideration the so-called offense to the prince, also considers the proportion of damages that may be caused by war and the damages caused by the situation that leads to it. Within the appreciation of the so-called damages, we suppose that Suarez was talking basically of human suffering.

On the other hand, and with respect to the thinking of Vittoria, I should emphasize that in his proposals he speaks of the great **human family,** that is, the Orbis, to which all the peoples on Earth belong in equal conditions. That is to say, it is an essentially humanistic conception. His notion of equality is basically derived from the notion of **brotherhood**, of men belonging to the same species.

From this approach we must infer that **the nature of the members of the human species constitutes the rationale of the equality proposed.** It is not then a conception based on the notion of State, which is attributed as a stereotype to Hegel, and from which sovereignty derives as one of the powers of the State.

It was, as it was evident at that time, an approach free from abstractions, following the style of German philosophy. The proposal of Vittoria shares indeed a spiritual vision with Hegel concerning the fact the State is the realization of freedom, but as I understand it, it has a less abstract nature, it is more human, and that is precisely what gives strength to the approach to human rights at universal level.

Since then, in a slow but persistent evolution of International Law, we can appreciate a continuous conceptual approach to the central figure of Man, already as a subject of Law at international level.

Thus it is evident, and not at all the result of chance, that Human Rights are precisely the branch that in international matters has experienced one of the most vertiginous transformations at international level, particularly during the last century.

It is evident that historical events have had a determining role in all these phenomena. History reveals the abysmal depths human malice can reach and the bitter lessons left by it.

There are the increasingly more serious physical, as well as psychological and moral violations suffered by the most vulnerable human beings, women, children and the elderly, who claim for effective protec-

tion. We verify that these violations generally take place in situations of abuse of force either by the State, without it necessarily being at war, or by the social conglomerate during great social upheavals.

As stated by Isabel Lirola and Magdalena Martin[1], with analytical depth, although human malice has led to atrocious crimes, such as genocide, crimes of war and against humanity, it is human kindness that has led us to the establishment of the International Criminal Court. Personally, I would like to add that the establishment of this Court restores the reason and the dignity of human beings.

We see then that the social conglomerate, in this case at supra-state level, makes its voice heard through norms, that is, through Laws. This is a means of social expression in a given historical moment and within specific conditions to which human beings are subjected.

Without launching into a Marxist analysis of what, according to this method of interpretation of History, constitutes the Law, that is, the expression of the dominant class to maintain its privileges, we could affirm that within a given society, national laws gather the feelings of society regarding different aspects of their coexistence. In this sense, laws become to a certain degree a point of reference of what that social conglomerate is, of what the values of that people are.

If we take the analysis to the international level, it would seem logical to find that International Law reflects – also to a certain degree - the feeling of the international community regarding a specific subject in a given historical moment. On the other hand, as human condition is essentially changing and even contradictory, the international norm cannot escape the limitations of those who create it.

Therefore, and if we look at the branches of International Law, such as treaties, we have to reach the conclusion with much disappointment that many of those instruments are the testimony of injustice, of violations, of dishonor, that is, of the negation of Law itself. We have then to consider the role that Law has played in the life of the peoples at international level.

Law has been and continues to be a catalyst for the progress or retreat of civilization. There are periods of History where obscurantism reigned, and others were the evolution of mankind towards higher levels of coexistence are evident.

The Italian poet Hugo Foscolo gives us a sample of these lights and

[1] Lirola Isabel and Magdalena Martin. "La Corte Penal Internacional". Editorial Ariel Derecho, Barcelona 2001.

shadows of History when he sarcastically refers to the 18th century, called the age of enlightenment, in the following terms: "at the time of the barbarian nations / thieves hung from crosses / but now, at the age of enlightenment / crosses hang from the necks of thieves". However, without impairing his thinking, we have evidence of clear humanistic advances over time.

One of them can be seen at the beginning of the new millennium with the awakening of the legal conscience of mankind, which fosters the evolution of International Law by turning it to face its creator: the human being, and by putting it in the place it deserves.

3. EVOLUTION OF INTERNATIONAL LAW WITH RESPECT TO HUMAN RIGHTS

The humanistic postulates of the French Revolution are the first appeal in contemporary history to return to the path of the fundamental rights of men and citizens. This in spite of the fact that, even during the revolution, extreme violations of these same rights were committed.

Within this retrospective vision of the 18th century to our days, this calling of the French Revolution is a first element of what in the future would progressively become an increasingly more defined process of approach to Men, as the true principal subject of International Law.

In this context, idiosyncratic factors that converge with other profound elements of the sociology of the peoples, including cultural roots and a tendency towards intellectual creation of humanistic style, have fostered the starring role of Latin America.

Indeed, our subcontinent has taken the lead of this positive evolution of international law, and has marked clear milestones in International Law in favor of the fundamental rights of human beings.

4. THE CONTRIBUTION OF LATIN AMERICA

By the early 19th century, in the 1889 Montevideo Treaty on International Penal Law, Latin American jurists were already structuring the basis of the juridical protection of persons against the State. Later on, through the Inter-American conferences of Havana in 1928 and Caracas in 1954, Latin American plenipotentiaries devised the institution of asylum. The first conference addressed asylum in general, and the second established the institution of Diplomatic Asylum.

All of this speaks of a process that I would call "homocentrism" in

the evolution of International Law, at least at American level. Seemingly, Latin American peoples, in their continuous struggle to launch their economies towards development, have conserved in their social imagination underlying moral values, foreign to material goods, that give sense to human existence and which survive in spite of the economic serfdom imposed by some industrialized countries.

That explains why, while Latin America was already talking of protecting humans rights as an obligation of the State in the early 19th century, other latitudes had to suffer the bitter experiences of two world wars to reach similar conclusions. Thus, a whole century had to elapse before those countries were able to "discover" these rights and embody them in international conventions.

That is the case of the Geneva Convention of 1951 on the Statute of Refugees. This international instrument had the merit of proposing a solution to the serious problem of the persecuted and displaced people of Europe as a result of World War II. Its approach, however, was too short as it maintained a geographical and a time limitation in relation to the phenomenon, an issue that, as everybody knows, was remedied with the Protocol of 1967.

Within this evolution of International Law in its process of return to Men, we detect a clear trend in the multilateral field towards fully identifying the fundamental rights of the person and later on, to their reinforcement. The first step taken in this direction in the 20th century was precisely the Charter of the United Nations.

Indeed, the second objective of the peoples of the United Nations in the Preamble of the Charter is "reaffirming a faith in fundamental human rights, in the dignity and worth of the human person..." [2]

By placing this subject in the second paragraph of the historical Preamble of the Charter, that is, immediately after the paragraph referring to the preservation of future generations from the scourge of war, which is the primary objective of the UN, reveals the transcendence of the humanitarian subject. That is so "because the peoples resolve to avoid war not for philosophical or juridical considerations implicit in the condemnation of violence, but fundamentally for humanitarian considerations, as they do not wish to live again the indescribable suffering brought by organized killings among men".[3]

This approach is reinforced by the third Purpose of the UN Char-

[2] UN Charter, Edit Press 1980, New York, p. 3

[3] Larenas Serrano Galo. "Los Nuevos Objetivos de la Organización de las Naciones Unidas." Edit. Casa de la Cultura Ecuatoriana 2001, Quito, p. 83.

ter, which states: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.."[4]

However, although the subject of human rights is already raised to the category of one of the Purposes of the UN, their own individuality has not been recognized yet. As I have stated in a previous study, maintaining the transcendental subject of the fundamental rights of men, the creators of International Law, as a mere stage of international cooperation, is an anachronism.

In fact, an anachronism that borders in the absurd, if we consider the degree of development that International Law has experienced to our days. The creation of the International Criminal Court constitutes, precisely, one more step, and a very significant one at that, in this process of acknowledgement of the individuality of the subject of human rights.

In this evolutionary process and within the same framework of the United Nations, member countries subsequently arrived at the significant Universal Declaration of the Rights of Men.[5] Later, in 1967, the United Nations Convention on Territorial Asylum was signed.

Up to this point, we see that the juridical conscience of the peoples has awakened, focusing its attention on the protection of human beings, on the defense of their fundamental rights, as well as in guaranteeing the free exercise thereof.

On the other hand, one might say that that same juridical conscience identifies the threats and dangers faced by persons in their life, their freedom, their religious beliefs, their political ideas and their fundamental aspirations to maintain a decent standard of living.

Paradoxically, the State emerges within this process of identification of these adverse factors, and its power, when it is not submitted to the Law, and therefore does not have obligations with the international community, can become the executioner of men. A similar phenomenon is evidenced in revolutionary movements and other sociological manifestations seeking structural changes, which can turn against the same ideals that inspired them.

4 UN Charter, Chapter I, Art. 1, para. 3.
5 Universal Declaration of Human Rights, Res 217ª (III), December 10. 1948

5. HUMANS RIGHTS AND THE SOVEREIGNTY OF THE STATE

Accordingly, the innumerable victims of the abusive power of totalitarian States or of social processes that have spun out of control have led legislators to become aware of the pressing need to punish the authors of atrocious crimes, war crimes, crimes against humanity and genocide. We thus find ourselves witnessing the birth of international criminal liability.

A lot has been debated about this aspect at doctrine. Isabel Lirola and Magdalena Martin affirm that "although human persons are not the normal subject of the relations governed by International Law, they can become so exceptionally, when international rules grant them rights and obligations".[6]

The same authors add that "significantly, some of these norms, related to the passive dimension of that subjectivity, attribute international consequences to the offenses of the human person individually considered, that is, they establish the international liability of the individual."[7]

Personally I disagree regarding the exceptionality of the subjectivity of men in International Law. I believe that when an individual has rights that he may enforce internationally, even against a State, **he becomes a full subject of law at international level.**

Precisely for this reason, men exercise the rights they are entitled to, but at the same time and reciprocally they must assume obligations and responsibilities. In this point of the reasoning, I agree with Lirola and Martin regarding the emergence of the international criminal liability of the individual.

6. TOWARDS A SUPRASTATE JURISDICTION FOR THE PROTECTION OF MEN: THE INTERNATIONAL CRIMINAL COURT

Based on the foregoing, the difficult situations that collectivity has had to endure due to the actions of political powers established reveal the danger of a misconceived sovereignty of the State, when its only limit is the sovereignty of another State.

We raise then the need to make a full reformulation of the relations between the persons and the State within the international context. In this sense, we have to redefine the concept of state sovereignty as an attribute of a political juridical entity that must be at the service of men, and not men at the service of the State.

6 "La Corte Penal Internacional" Isabel Lirola and Magdalena Martin. Editorial Ariel, Barcelona 2001, p. 7

7 Ibid.

In this sense, the views of treaty expert Alberto Luis Zuppi are worth noting. When commenting the exaltation of state sovereignty in the inter-war period, he says that "at that time, States in general were not interested in what other States were doing with their own citizens: to that end, the link of nationality was understood as unassailable..."[8]

The same author, quoting other sources,[9] states that "International Law did not prevent the exercise of what was understood as the natural law of each sovereign of – as graphically expressed in a recent study – becoming a monster towards their own subjects."

Since then, times have fortunately changed and new paths have been laid in a positive sense in the evolution of International Law, until the development of international criminal liability, both of the individual and of the State.

We should note that the Preamble of the Statute of Rome expresses unequivocally that State Parties create the International Criminal Court, "resolved to guarantee lasting respect for and the enforcement of international justice".[10]

The existence of **international justice** against which there are no legal, political or any other kinds of barriers is therefore recognized. This leads us to confirm the supremacy of human values, including their dignity, over the classical conceptions of jurisdiction in territorial terms, proper of state sovereignty to the extreme.

We face then a new reality, the supremacy of Human Rights over the notion of the unlimited sovereignty of the State. There are no longer territorial or legal borders that inhibit the exercise of justice and reinforce the validity of the Law in the terms of inhibition claimed by Kelsen to implement the rule of law.

Indeed, the acknowledgement of an international jurisdiction as the basis for the International Criminal Court leads us to this conclusion.

On the other hand, the acknowledgement of domestic jurisdiction, that is, of national courts to judge these atrocious crimes in first instance, reinforces the principle of the rule of Law in its power to punish crime. We will emphasize that this punishment takes place regardless of the possible military hierarchy of the perpetrator, or of his possible belonging to the political apparatus of the State.

[8] Zuppi Luis Alberto: "Jurisdicción Universal para Crímenes contra el Derecho Internacional. El camino hacia la Corte Penal Internacional". Buenos Aires, Argentina, 2002. P. 47

[9] Farer Tom and Gaer Felice: The United Nations and Human Rights: At the end of the beginning. Oxford 1993. Pages 240-241

[10] Statute of Rome of the International Criminal Court: Preamble: last recital.

We find this explicitly stated in Article 27 of the Statute of the Court, which determines that it shall apply equally to all persons without any distinction based on official capacity.

The International Criminal Court emerges as a subsidiary or complementary element of the internal jurisdiction of the States, which puts into execution the international criminal jurisdiction. Now then, coupled with the capacity of the international community, legally organized to resort to public outcries for justice, in this international case, we must focus on the basic issue of the international criminal liability of the individual.

In this sense, it has been said that, currently, as a "consequence of the process of humanization experienced by contemporary International Law, especially after World War II, a certain subjectivity of the individual at international level is recognized."[11]

As stated above, we do not agree with the idea that we are facing a "certain subjectivity" of the person with respect to International Law. We believe that human beings are already a subject of this Law, as we have seen, and in the hypothetical case they weren't, it is imperative that they should be.

Then, as stated by the same analysis that is the basis of this comment, the fact of recognizing an international dimension to the liability of individuals serves to confirm their full legal personality under International Law.

Indeed, according to Lirola and Martin, some international norms "referred to the passive dimension of this subjectivity attribute international consequences to crimes committed by persons individually considered, that is, they establish the international liability of the individual."[12]

On the other hand, and to conclude on this important question, Article 1 of the Statute of the Court provides that the Court is empowered to exercise its jurisdiction over persons for the most serious crimes of international concern.[13]

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About the author:

Doctor in Law and Lawyer. Former Legal Adviser of the High Commissioner for Refugees. Author of several works on International Law, including "El Tribunal Andino de Justicia", "El Asilo Político y el Refugio", "Los nuevos Objetivos de

11 Lirola Isabel and Martin Magdalena. "La Corte Penal Internacional," Barcelona 2001. P. 7
12 Lirola Isabel y Martin Magdalena. "La Corte Penal Internacional," Barcelona 2001. P. 7
13 Statute of Rome of the International Criminal Court, Art. 1

la ONU". A career diplomat, he has also worked as Alternate Representative of Ecuador to the UN in Geneva, and he is currently Ecuadorian Ambassador to El Salvador.