

STATE SOVEREIGNTY AND THE INTERNATIONAL LAW OF HUMAN RIGHTS

R. G. Paraschiv

Ramona-Gabriela Paraschiv

Faculty of Law, "Dimitrie Cantemir" Christian University, Bucharest, Romania

*Correspondence: Râmnicu Vâlcea, 30 General Magheru St., Vâlcea, Romania

E-mail: ramonaparaschiv@rocketmail.com

Abstract

Promoting human rights at an international level implies state cooperation for establishing agreements concerning the improvement of measures which are imposed in this field, as well as adopting certain conventions related to the new dimensions of rights or even with the new human rights.

Human rights represent an extraordinarily complex branch of law, which embodies both internal order as well as international order, defining and adding up a set of rights, liberties and obligations of people- some against the other, of the states to defend and promote these rights, of the entire international community to survey the observance of those rights and liberties in each country – which permits the intervention by means of public international law in those situations in which these right would have normally been breached in a certain state. Thus, the principle of state sovereignty may not be opposed to the necessity of protecting human rights, in order to justify to the international community the infringement of these rights inside states.

Keywords: *sovereignty, international law, human rights, international protection of the human rights, subsidiarity*

Introduction

From the beginning of mankind and over its evolution, scientists, wisemen, clairvoyant, have contributed to affirming some rights of the individual in his relation with power¹, formulating realistic law principles such as: liberty, equality, solidarity, which, gradually led to the attenuation of brute force in social relations, in favour of emancipating man.

Consecrating at an international level the defense of human rights is based on the state acceptance of the fact that protecting these rights can not be left to the discretion of every individual state, as the sovereignty of the state represents the grounds for protecting the rights of their own citizens² and other persons from its territory or that enter in contact with the state, and not by breaching them.

¹ In China, Confucius considered man to be the center of his thinking system, indicating justice and humanity as main virtues.

² "It is an elementary principle of international law which authorises the state to protect its prejudiced citizens by means of contrary acts to the international law committed by another state and for which they could not obtain any redress using ordinary means of appeal. By embracing the cause of one of its citizens and setting in motion the diplomatic or international legal action in its favour, this state is valuing his own right, the right to be observed in the person of its citizens, the international law" (The International Permanent Court of Justice, Mavrommatis Concessions in Palestina, Greece against the United Kingdom of Great Britain, Decision from 30th of August 1924 – in Miga-Besteliu R.& Brumar C., *Protecția internațională a drepturilor omului*, 4th edition reviewed, Universul Juridic Publishing, Bucharest, 2008, p. 14).

Human rights and state sovereignty

The idea that the human being possesses, by its nature, certain valid rights even if they do not meet or partially meet dispositions of positive legal laws – has appeared from ancient times, being affirmed and argued by the stoic religion, as well as by the scholars who lived in all the historic times, sometimes being inspired from the religious dogma, and other times only from the light of ration.

Transposed in the legal framework, the concept of „human rights” firstly designates “man’s subjective rights”³ which define its position in relation to public power, but it also represents a veritable legal institution, a set of internal and international legal norms which target as regulatory aim the promoting and ensurance of human rights and liberties, his defense against the abuses of the state and perils of any nature⁴.

By means of the international conventions in the field of human rights the states principally are compelled, not towards other states, but to individuals, who are the beneficiaries of the international regulations. Thus, we are not facing a contractual issue, but an objective one that is a part of the international public order. Nevertheless, some rights are not exclusively consacrated by international conventional regulations, but also by regulation embodying a customary character, and the most important rights (the right to life, repression of genocide) have a *ius cogens* value, the obligation of observing them being imperative⁵.

Initially, human rights have been considered to form a legal *institution* of the public international law, but in the present one may affirm that a distinct branch of the international law already exists and the international regulations in this field, forming the *international law of human rights*⁶.

The international law of human rights represents a *distinct* legislative assembly (such as the Law of Treaties, Law of the Sea, Diplomatic Law, etc) being governed by the fundamental principles of international law, even if it also presents certain specific characteristics⁷.

As a distinct branch of public international law, international law of human rights *embodies all the international legal regulations that target the protection of the human being, its aim being the defense of human rights*⁸, and the date of 10 December 1948, when the Universal Declaration of Human Rights was proclaimed, marks the moment of birth of the modern law of human rights⁹.

The idea that the international law of human rights, as a set of principles and norms that govern state cooperation regarding the promotion of human rights evidenced in the doctrine does not reflect an universal consensus, with a unitary, immutable model which is generally¹⁰. The axiological process generating human rights is developed in an expanded or narrowed framework, as in each historical period, the valorisation processes at a national level coexists and is mutually influences with what is achieved at the international level; the important fact is that when such a process has acquired an international validation, the respective values cannot be any longer „denied” on the local level¹¹.

The axiological „conglomeration achieved around a fundamental value is legally expressed by a set of norms which define at the veritable international level *juridical*

³ Năstase A., *Destinul contemporan al dreptului internațional. Reflecții dintr-o perspectivă europeană*, Universitatea “Nicolae Titulescu” Publishing, Bucharest, 2004, p. 210.

⁴ Scăunaș S., *Dreptul internațional al drepturilor omului*, All Beck Publishing, Bucharest, 2003, pp. 3-4.

⁵ See also Craven M., “Legal Differentiation and the Concept of the Human Rights Treaty in International Law”, *11 European Journal of International Law*, 2000, pp. 500-504.

⁶ Sieghart P., *The International Law of Human Rights*, Oxford, 1983, p. 13-17.

⁷ Năstase A., [3], p. 213.

⁸ Scăunaș S., [4], p. 4.

⁹ Cloșcă I., Suceavă I., *Tratat de drepturile omului*, Europa Nova Publishing, Bucharest, 1995, p. 38.

¹⁰ Năstase A., [3], p. 211.

¹¹ Conforti B., *Diritto internazionale*, 3rd Edition, in Editoriale Scientifico, Naples, 1987, p. 203.

institutions. Thus, an initial legal consecration is accomplished at an international level, the rational norm adopted by the states, subsequently forms what is called “human rights with variable contents”¹². By means of these contents which are differenced from the specific of every state, thus achieving the guarantee and effective protection of rights¹³.

Embodying principles, mechanisms, procedures which are related to the domestic legal order, but also to the international order, the branch of human rights presents a divalent character, being in the same time an institution of domestic law, integrated in constitutional norms, but also a branch of the international law, that configures the characteristics of a juridical principle applicable in state relations¹⁴.

In the domain of human rights, we have the subsidiarity rule of consecrating and international guaranteeing of rights, compared to consecrating and guaranteeing them in the domestic plan, the international level of human rights protection representing a minimal standard for states that can guarantee an insured protection of human rights at a national level. Thus, the international protection structure intervenes only in a subsidiary manner, when state mechanisms are unsatisfactory – observing the domestic remedies, before the intimation of a body, being mandatory.

The relation between public international law and domestic law has concerned the legal system even since the 19th century, in the doctrine two currents being formulated: *the monistic theories* that, considering the domestic law and the international law as components of a unique legal system, affirms whether the primacy of the first or of the latter¹⁵ and *the dualistic theory* which states that both the domestic and the international law are legal and independent phenomena.

In internal systems that adopted the monistic conception with the primacy of the international law, the international norms concerning human rights may be applied directly, on the condition that they embody a precise and complete content, without the necessity of subsequent acts of transposition or application. Moreover, the states participating to international conventions concerning human rights must observe the commitments undertaken by these conventions regarding the defense of persons and guaranteeing the above-mentioned rights, as well as referring to the cooperation with international bodies they adhered to (reports, notifications, enforcements of judgements, etc.)¹⁶.

International regulation concerning human rights are not relation to the subordination law as, like every regulation of public international law, it is developed in the framework of international society, the coordination law being specific to the later¹⁷.

However, it can be stated that they *are not exclusively related to the coordination law* either, as it targets to form a protection law of the individual. The incapacity of general public international law to ensure this defense function, leads to the formation of *specific international regulations*, in the case of *international protection of human rights*, regulations which impose to exceed the classical conception of international law.

Taking into consideration the enormous importance for humanity to observe the rights of all humans, in the specialized legal literature there are ample debates referring to the relations among state sovereignty and „internationalization” of human rights, two main

¹² Ruiz G.A., *The UN Declaration on Friendly Relations and the System of the Sources of International Law*, Sijthoff, Alphen, 1979, p. 277.

¹³ Năstase A., [3], p. 208.

¹⁴ Duculescu V., *Protecția juridică a drepturilor omului*, Lumina Lex Publishing, Bucharest, 2008, p. 24.

¹⁵ See also Hegel, *Principes de la philosophie du droit*, 6th edition, Dalloz Publishing, Paris, 1970, pp. 216 and fol. and *Enciclopedia științelor filosofice. Filosofia spiritului*, Academia Publishing, Bucharest, 1966, p. 359. The superiority and primacy of the international law of international legal order compared to the domestic law is sustained among others by Kelsen H., *La théorie pure du droit*, II-eme edition, Paris, 1962, p. 444, as well as by Rousseau Ch., *Droit international public*, Dalloz Publishing, Paris, 1970, pp. 16 and fol.

¹⁶ See Barre J., *L'integration politique externe*, Université Catholique, Louvain, 1969, p. 82.

¹⁷ See Sudre F., *Drept european și internațional al drepturilor omului*, Polirom Publishing, 2006, p. 33.

tendencies being evidenced: on the one hand that of diminishing the significance and importance of sovereignty in international contemporary relations, and on the other that of finding legal solutions to „avoid” the effects of sovereignty in the domain of human rights. Nevertheless, some authors claim that sovereignty represents an outdated political and legal phenomenon, a residue of competence left to the states by the international law, a perilous, unacceptable dogma.

In the doctrine¹⁸, the theory according to which sovereignty is the one that created international rights was stated, and it “recognizes sovereignty as its fundament and basic principle”.

In opposition with this theory, there is also an opinion¹⁹ that pleads in favour of redefining the relation between state sovereignty and international law, showing that it possesses an originating status having existed prior to state sovereignty and international law, whose source of legal qualification is not pre-existent to certain international regulations.

By analysing the international realities we are led to the conclusion that, in fact, state interdependence cannot be contrasted to sovereignty, which does not represent an obstacle for international cooperation, including the domain of human rights defense, but an „avouchment of what could bear the name of state dignity”²⁰. International contemporary life evidences the necessity of sovereign states having to coexist; however, sovereignty cannot be absolute in the frame of international relations, just because it must ensure tolerance and observance for the sovereignty of other states. Nevertheless, *the right to observance* was considered by the classical doctrine as being one of the fundamental state.

The existence of international treaties in the field of human rights does not stand for a limitation of state sovereignty²¹, as the latter are considered the expression of the state’s will to develop cooperation in this domain. By the conclusion of agreements in the sphere of human rights, states aim to determine *the frame and forms of their cooperation* in this domain, and not to abandon their sovereignty²²; in this way, “the state independence is not compromised, or the sovereignty achieved by undertaking certain international obligations”²³.

In respecting the regulations of public international law concerning the promoting and protection of human rights, there is nothing to affect sovereignty of the states in cause or the distinction between international and domestic law²⁴.

The question whether human rights are excluded from the domestic state jurisdiction to joint the international jurisdiction is not justified, as there is a functional separation between the domestic legal order and the international one, in the sense that some aspects concerning human right protection and promotion remain in the competence of the state – even in the cases in which the states have become parties to international treaties in the domain – while other aspects are a part of the international order²⁵.

It cannot be contested that every states decide upon its internal issues, but in the same time the right and obligation of the United States to supervise international policies when they can *affect the global community* is recognized, in these policies being also included the issue

¹⁸ Arand R. P., “Sovereign Equality of States in International Law”, in *Recueil des Cours de l'Académie de Droit International*, vol. 197, 1986, p. 42.

¹⁹ Dinh N.Q., Pellet A., Dailier P., *Droit international public*, Librairie générale de droit et de jurisprudence, Paris, 2003, p. 76.

²⁰ Colliard, C.A., *Institutions des relations internationales*, Dalloz Publishing, Paris, 1974, p. 108.

²¹ See Titulescu N., “Dinamica păcii”, in the volume *Documente diplomatice*, Politic Publishing, Bucharest, 1967, p. 298.

²² Ruize D., *Droit international public*, Dalloz Publishing, Paris, 1987, p. 62.

²³ Dinh N.Q., Pellet A., Dailier P., [19], pp. 385 and fol.

²⁴ Ruiz G.A., “Human Rights and Non-intervention”, in Helsinki Final Act, vol. 157, in *Recueil des Cours de l'Académie de Droit International*, 1977, p. 291. Van Boven Th., *United Nations and Human Rights. A critical Approach*, New York, 1985, p. 122, quoted by Năstase A., [3], p. 189.

²⁵ Ermacora F., “Human Rights and Domestic jurisdiction”, vol. 124, in *Recueil des Cours de l'Académie de Droit International*, 1968, p. 431.

of human rights. As a result, a state that does not fulfil its international obligations undertaken cannot invoke the principle of national sovereignty to justify having not fulfilled the above-mentioned obligations, even if the liabilities are referring to the rights of its own citizens²⁶.

The principle of sovereignty, of non-intervention etc, cannot be invoked as a ground for non-observance of human rights, as not observing human rights cannot ultimately lead to the contesting of state sovereignty²⁷, even if these must comply to the norms they have conventionally accepted, being obligatory on the basis of the principle *pacta sunt servada*, or on the grounds of international customary law or *ius cogens*²⁸.

States have not lost their jurisdictional attributions concerning human rights²⁹, but these are more and more receptive to the decisions of international bodies. The application of international courts and bodies founded by treaties continuously influences the states' jurisprudence, including the American one³⁰, even if legal remedies of these international courts, against breaching human rights, are subsidiary³¹.

Conclusions

Although the authority of the state is clearly recognized – reflected in the condition of those who claim the infringement of human rights to international courts, to exhaust the internal ways of attack³² before addressing an international body, but also in the attention that bodies for implementing treaties from the domain of human rights defense is granted to the possibility of appreciating the national legal system – the application of international bodies clearly influenced the content of the national law of the majority of democratic states, concerning human rights.

The evolution of limitations brought to sovereignty also generates obligations to undertake, according to which, states internationally respond not only for the acts accomplished against individuals, but also for not ensuring the adequate protection or reaction in cases of human rights infringement. Thus, the sovereignty concept has not become in any way *obsolete*, but it evolved to a point where states are liable for their subjects, for other persons, as well as towards the international community³³. Nevertheless, when governments are convinced that certain national values or traditions are threatened by the extending application of standards concerning human rights and are restricting certain rights by means of normative acts which are clear and predictable for the one affected, such limitations are generally accepted if they are justified by the necessity of ensuring public order or other similar reasons³⁴.

²⁶ Micu D., *Garantarea drepturilor omului*, All Beck Publishing, Bucharest, 1998, p. 11.

²⁷ Duculescu V., [14], p. 63.

²⁸ Orlin Th. S., "Evoluția limitărilor suveranității pentru o nouă comunitate globală «Limitarea Leviathanului prin dreptul internațional»" (Second part), *Romanian Journal of International Law*, no. 9, 2009, p. 8.

²⁹ Cassin R., *Père de la Déclaration Universelle des Droits de L'Homme*, Librairie Académique Perrin, Mensul-sur-l'Estrée, 1998, p. 230.

³⁰ See Janis M.W., *International Law*, Fifth Edition, Aspen Publishers, Walter Kluwer Law&Business, 2008, p. 106, who quotes the case *Filartiga v. Pena-Irala*, 630 F.2 d 876 (2 d Civ. 1980), this constituting an important example of applying international law of human rights in the American jurisprudence; international customary law is used in applying Alien Torts Statute to a victim of torture. Judge Kaufman decided that „from the examination of the sources of international and customary law, the state application, the jurisprudence and doctrine – we conclude that torture accomplished by the authorities is presently prohibited in the nation law”.

³¹ See Nowak M., *Introduction to the International Human Rights Regime*, Bill Academia Publishers (Martinus Nijhoff Publishers) Leiden, 2003, pp. 63-64.

³² In conformity with the art. 35 from the European Human Rights Conventions, „The Courts cannot be notified until after the exhaust of domestic remedies, as it is understood from the principles of international laws generally acknowledged”...

³³ See Glendon M.A., *A World made New; Eleanor Roosevelt and The Universal Declaration of Human Rights* Random House, New York, 2002, pp. 59-60.

³⁴ Nowak M., [31], pp. 59-60.

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