White Paper 6

human rights

(by alphabetical order)

coordinator

Laurence Burgorgue-Larsen

Professor at Paris 1 Panthéon Sorbonne University (IREDIES)

assistant

Lorenzo Nencini

PhD student at Paris 1 Panthéon Sorbonne University (IREDIES)
and Florence University

authors' information

steering committee

Antal Berkes
Lecturer in International Law, University of Liverpool

Laura Clérico
Researcher at CONICET, Professor of Constitutional Law,
Buenos Aires University (Argentina)

Mamadou Hébié
Associate Professor, Leiden University,
Grotius Centre for International Legal Studies (Netherlands)

Alioune Sall
Professor, Cheikh Anta Diop University (Senegal),
Member of the International law Commission, former judge
at the Court of Justice at the Economic Community of West African States

Edoardo Stoppioni
Professor of Public Law, Strasbourg University (France),
Member of the Consultative Commission for Human Rights
of the Grand-Duchy of Luxembourg

Maria Tanyag
Lecturer in International Relations, National University of Australia

Françoise Tulkens
Emeritus Professor, Leuven CU (Belgium), Former Judge
and Vice-President of the ECHR

1. state of the art — page 7
- 1.1. The characteristics of international human rights law: between expansionism and ineffectiveness.
- 1.2. Narratives on International Human Rights: Between Universalism and Cultural Relativism.

2. challenges and possible scenarios for the future — page 25
- 2.1. Theories
- 2.2. Strategies

3. questions — page 51

annexs — page 61

1.

state of the art

> ‘We do not want freedom without bread, nor do we want bread without freedom.

From a speech
by Nelson Mandela
delivered on August 1, 1993
at Soochow University in Taiwan

'We do not want freedom without bread, nor do we want bread without freedom'[1].

Nelson Mandela, icon of the liberation of oppressed peoples, with this powerful and evocative formula pronounced in 1993, mentions a major element of what the Universal Declaration of Human Rights, as early as December 10, 1948, enshrined: the indivisibility of rights. Since this 'turning point' in 1948, international human rights law has been struck by both expansion and sophistication. The expansion of texts on a universal and regional scale; and sophistication of the control mechanisms. However, this double characteristic, revealing an unprecedented humanist expansionism, with a formidable emancipatory potential, cannot hide the congenital imperfection of this branch of law, which is supposed to reveal a change of paradigm: a flagrant deficit of effectiveness which is even more worrying as it takes place today in an unfavorable geopolitical context.

In parallel with this phenomenon of normative and institutional expansionism, a profound questioning of the human rights narrative, as promoted by the United Nations, has set up - beyond the world of ideas - at the heart of the political agendas of states. Alternative narratives have emerged, either to contest the importance of the 'turning point' or, more fundamentally, to challenge the universalism that it represents. Beyond this, history, made up of multiple singular histories - marked by the stigma of slavery and colonialism, by cultural and religious singularities - has made a dramatic entry into the universe of international human rights law to revisit its foundations as well as its orientations.

Note 1 From a speech by Nelson Mandela delivered on August 1, 1993 at Soochow University in Taiwan. The precise passage from which this quote is taken is as follows: « We must address the issues of poverty, want, deprivation and inequality in accordance with international standards which recognize the indivisibility of human rights. The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. *We do not want freedom without bread, nor do we want bread without freedom*. We must provide for all the fundamental rights and freedoms associated with a democratic society. » http://www.mandela.gov.za/mandela_speeches/1993/930801_taiwan.htm.

1.1. The *characteristics* of international human rights law: between expansionism and ineffectiveness

The major weakness of International Human Rights Law (IHRL) (its ineffectiveness) is commensurate with its major strength (its expansionism).

* In the aftermath of the Second World War, the foreign legal policies of States could not ignore the importance acquired by a consideration of the human being, revealing a change in the paradigm of international law. The state-centric approach, even if it did not disappear, was nevertheless challenged by a human-centric approach, defended both by great authors in scholarship and by (institutional and/or individual) activists. In this context, the making of international law was disrupted: the state monopoly on the creation of law was undermined, leading to impressive normative and institutional advances in favor of human rights. A small world of specialists was born between New York and Geneva: as it intended to advance the "cause" of human rights, it deployed impressive efforts to maintain its power within international organizations. In the end, it is all about power and counter-power.

The richness of the universal human rights system is undeniable. With nine major international conventions (including those on women (1979), children (1989), migrant workers (1990), persons with disabilities (2006)), important soft law documents (e.g., the 1998 Declaration on Human Rights Defenders or the 2007 Declaration on Indigenous Peoples), the creation of numerous monitoring systems (from the treaty committees to the establishment of the universal periodic review system and the creation of special procedures), the normative and institutional expansion is at its peak. In addition to the phenomenon of expansion, there is a process of sophistication on a regional scale, where three continents out of five have been seized by the phenomenon of jurisdictionalization of human rights protection. While the three regional courts have come into being under singular historical conditions - the European Court of Strasbourg, the Inter-American Court of San José and the African Court of Arusha - and their functioning reveals in many respects strong specificities (consecutive to those of their reference texts, i.e., the Convention for the Protection of Human Rights and Fundamental Freedoms; the American Convention

on Human Rights and the African Charter on Human and Peoples' Rights), they nevertheless remain the archetype of an impressive jurisdictional ambition. The essential reference of all these normative and institutional developments has been the Universal Declaration of Human Rights, whose customary value has been established over time.

Although this expansionism is in itself a major advance, it is certainly not without certain shortcomings. Beyond the variable nature of international instruments - sometimes declaratory, sometimes binding - and the extreme heterogeneity of States' adherence to the respective treaty, the unequal scope of the rights enshrined therein continues to pose a problem. While the 1948 Declaration had succeeded in highlighting the indivisibility of rights, the eruption of the Cold War changed the situation. The adoption of the two Covenants in 1966 marked this split which continues to have detrimental political, legal and social effects. Indeed, the *summa divisio* between civil and political rights on the one hand and economic, social and cultural rights on the other, continues to weaken contemporary international law. Despite the existence of important conceptual work aimed at putting an end to this binary distinction and launching a ternary approach (obligations to protect, respect and remedy), the justiciability of economic and social rights is still not politically accepted throughout the world and remains legally controversial. In this respect, Europe remains particularly timid on the issue, if one takes into consideration the progressive developments of the African and inter-American human rights systems in this area, but also of certain constitutional courts such as those of South Africa, Colombia or Taiwan.

Another stumbling block concerns the weak links that international human rights law enjoys with other branches of international law, particularly international economic law. Fears about the fragmentation of international law have been clearly expressed in this context, in the face of difficulties in ensuring that human rights are taken seriously in the practice of international economic organizations, but also of the WTO dispute settlement panels and investment arbitral tribunals. Some blame the neoliberal mechanisms of contemporary international law; others have pointed to their indifference (or complicity) with respect to poverty or inequality. While many academic and political discussions attempt to think about the links between these two branches of international law (as evidenced by the draft treaty on Business and Human Rights), the reflections are not yet sufficiently advanced.

As for the control mechanisms, whose proliferation is too often the reflection of an institutional headlong rush, they show a

heterogeneous gradation in the types of control (non-treaty control mechanisms and treaty-based control mechanisms; control by judicial and non-judicial bodies), which generates not only a particular procedural complexity, but also a dispersion that is not conducive to overall coherence. In addition, the organizations that host these mechanisms suffer from an overly technocratic functioning where political games are played with ease and cynicism to the point of hijacking the rules and procedures: the "independent experts" are less and less so, while the election of international judges still suffers from significant biases that show the will of governments to promote "their" candidate, who, in general, hardly reflects both gender and ethnic diversity. These are all stratagems of 'institutional colonization' that undermine the legitimacy of human rights institutions and bodies. Beyond the impact of Realpolitik in this situation, if one adds the atavistic criticisms of international jurisdictions that reflect an illegitimate "juristocracy" disconnected from the political and sociological realities of the States, one has a sufficiently full picture of the shortcomings of the control mechanisms. It should be emphasized that such shortcomings (followed by the same criticisms) are also apparent at the level of many constitutional courts (or supreme courts with constitutional functions). While they were for a long time the emblem of a triumphant modern constitutionalism, they have sometimes (with the increase in authoritarian regimes) become the puppet of the executive branch, which has hijacked all the selection mechanisms in order to place their political allies in them. As a result, many of the constitutional courts are now literally turning against rights and democracy.

* These deficiencies inherent in the internal functioning of human rights monitoring bodies take on a singular significance in the current geopolitical context. The promising international context, marked by the end of the Cold War that led to the 1993 Vienna World Conference, is no more existing; the era of the enthusiasm for human rights is dead, replaced by the attacks by the 'enemies of human rights', who take multiple forms (from conservative NGOs of all types, often with religious connections, to authoritarian states and media intellectuals). Multilateralism is both attacked and instrumentalized; nationalist and identity-based setbacks are the new ideological frontier of many states; liberal democracy - that horizon considered just a few years ago as irreducible - no longer arouses popular support and new regimes are deconstructing it who are proud to turn their backs on the gains of post-war reconstruction. Far worse is that the reign of force is taking over almost everywhere in the world. The "strong regimes" which dress themselves up in the guise of democracy, or military dictatorships which are not

bothered with such labels, are returning to the forefront of the international scene with the firm intention of imposing their (military) power, their (cultural) vision, and their (political and economic) interests. A redistribution of strategic cards is at this geopolitical turning point where democratic regimes find themselves isolated and weakened. They are isolated because they do not constitute the majority; they are weakened because they are undermined by their own weaknesses (low-level and/or corrupt political classes; growing inequalities among social classes that are no longer united, increasing resentment and anger).

In such a regressive context, the expansion of norms is not followed by implementation. This is a profound gap between norms and their application. Ineffectiveness has several facets. First, it can manifest itself in the inability of states to properly fulfill their international obligations; here, it is (simply) their lack of (human and technical) resources that is at fault. Ineffectiveness can then take the form of an assumed and asserted non-application of obligations under international human rights law; here we are dealing with a deliberate disregard of the basic rules of international law with devastating effects: international law is simply avoided, not to say disregarded. When such stratagems come from democratic states that undertake, or even claim, not to fulfill their international obligations, they allow authoritarian states to do the same without any doubt. It is the whole edifice of the guarantee that is undermined which leads to the loss of authority and legitimacy of the control body, whatever it may be (treaty committees, regional commissions, and courts, etc.). Finally, the extreme manifestation of ineffectiveness is the denunciation (of treaties, compulsory jurisdiction clauses, membership in international organizations). Here, states deliberately place themselves out of the game to escape international control; this has particularly dramatic effects on the populations of their territories who find themselves deprived of any international protection. This phenomenon is on the rise and shows the ultimate limits of consensualism in international law, even if some courts are trying to limit its effects[2] .

Note 2 IACHR, *The Obligations In Matters Of Human Rights Of A State That Has Denounced The American Convention On Human Rights And The Charter Of The Organization Of American States (Interpretation and scope of Articles 1, 2, 27, 29, 30, 31, 32, 33 to 65 and 78 of the American Convention on Human Rights and 3(l), 17, 45, 53, 106 and 143 of the Charter of the Organization of American States)*, OC-26/20 (November 9, 2020) and ECHR, March 22, 2022, *Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights.*

1.2. *Narratives* on International Human Rights: Between Universalism and Cultural Relativism

* Studies in political philosophy have not ceased to debate the foundations, the nature, the scope, the usefulness of human rights - to the point of having generated schools of thought at the opposite ends of the spectrum; more recently, it is the historiography of the internationalization of human rights that has been the subject of debates. A major controversy has materialized around the ontological significance of the '48 turn. Contrary to those who believe that this 'post-World War II' moment undoubtedly helped to structure the importance given to human rights at the international level, two other schools of thought have challenged what they consider to be the UN 'doxa'. Some value the emergence of large NGOs in the internationalization of civil society activism and make the 1970s - the height of the Cold War - the major decisive turning point; others consider, on the contrary, that the process of internationalization is a fundamental phenomenon that emerged as early as the 18th century and has not stopped developing. Beyond these great controversies that feed philosophical and historical debates on the evolution of human rights - and that remain essentially confined to the small circles of the academic field - it is above all the opposition between universalism and cultural specificities that undermines the symbolic power of the Universal Declaration of Human Rights.

* The elaboration, adoption and dissemination of the 1948 Declaration is indeed part of a sublimated 'discourse' on the universality of human rights: 'a narrative'. This narrative - disseminated by the United Nations and secularized international elites - placed the language of human rights above other narratives and discourses. First and foremost, it is above the stories of conquered, dominated, discriminated peoples. The use of international law to better legitimize enterprises of territorial expansion and human subjugation has long been ignored; it is only very recently that a critical doctrine on the instrumentalization of international law for hegemonic purposes has developed. For instance, the proponents of other cultures – that became invisible by the sacralization of the 1948 human rights narrative, which gave little room to cultures, traditions, habits and customs deemed 'backward' - wanted to impose another discourse: the Third World approaches to international law (TWAIL).

From now on, the ideological opposition that crosses the international political field can be summarized by the confrontation between (individual) rights versus cultures (notably religious) of individuals and groups of individuals. This *summa divisio* is manifested outside the West (in Asia and in the Arab-Muslim world in particular), as well as within it (within Western democracies which are increasingly seized by the phenomena of multiculturalism in view of the growing diversity of their populations). This opposition structures today's international relations in a multipolar world where alliances are multiple and shifting. The present, and certainly the future, belong to non-Western powers where the importance given to groups outweighs that given to individuals and where religion often holds a central place. In many cases, however, it is not so much a question of a return to religion (through a strong cultural and identity-based discourse), as a question of a recourse to religion for political purposes.[3] This blurs and complicates the picture, both within states and on the scale of geopolitical relations between states.

Note 3 We refer here to the masterly essay by Georges Corm, *La question religieuse au XXIème siècle. Géopolitique et crise de la post-modernité*, Paris, La Découverte, 2006, p.33.

2.

challenges and possible scenarios for the future

The challenges that embrace the field of human rights protection are at two levels: that of theory (and the narratives it generates); and that of strategy (and the pragmatic approaches it underlies). From a material point of view, these two challenges are underpinned by a categorical imperative: that of the inclusion of the multiple otherness that makes up human society. Put in different words, diversity must be at the heart of far-reaching psychological transfigurations on the part of those who hold political and economic power. It would be necessary to promote the invention of mechanisms that are sufficiently flexible to take the diversity of human beings seriously in the making of international law as well as in its application.

2.1. Theories

This challenge unfolds at two levels, that of the meaning of the universal (and correlatively of the universalizable character of human rights) and that of democracy (where the reconciliation of the schools of thought on the manufacture and implementation of human rights is at stake).

The challenge of the Universal

The discourse on the universal is at the center of many confusions and instrumentalizations; it is therefore imperative to give it a meaning that is acceptable and beneficial to all. Here, two possible scenarios confront each other: one progressive, and another more pessimistic.

1st scenario

The reflections of intellectuals of the Global South demonstrate that a large part of states, groups and peoples perceive the concept of "Universal" as an imposition of the West. In this context, the "Universal of overhang" (Merleau-Ponty) - which testifies to the will of a "province" of the world to secrete and impose the universal - is being replaced by a "horizontal Universal". Everywhere in the world everyone agrees to recognize the value of human life and manages to build the Universal from the plurality of each culture and each society. The Universal is transformed into an ideal to be built through dialogue, which manifests itself through the channels of multilateralism. The latter becomes a "space for negotiation" from a vision of "common humanity".

In this positive context, multilateralism manages to think of the universalizable character of human rights, that is to say, their effective existence and enjoyment everywhere in the world and by all (i.e., by those who are at the center or at the 'margin' of human societies). Thus, the vital requirements in terms of health and the environment, in particular, push the essential actors (civil society, companies, states, international organizations) to think and make effective the global distribution of vaccines (for all), while the imperatives of economic sobriety are integrated into states' public policies in order to limit the detrimental effects of climate change. This implies a major economic refoundation where the neo-liberal matrix that governs the world is discarded in favor of a cooperative and solidary approach: profit is no longer at the heart of actions, but the well-being of humanity that has a vital need to survive on borrowed time on the planet. Shortly, capitalism is no longer the compass that governs all (authoritarian, democratic, theocratic) states and the clubs they have created (e.g., G20) to better defend their purely economic interests. The dissociation between power and unbridled capitalism is the order of the day in this scenario.

2nd scenario

The "tribal thinking" trend which is now spreading all over the world and which is generating "cultural wars", is gaining momentum. The frenzy of identity - where the use of religion for political purposes is omnipresent - prevails over a universal approach to the relationship with others. Humanity is compartmentalized by modes of thought that divide it; human society does not exist anymore but is replaced by that of "tribes", or "groups" whose only software for thinking is their (cultural, religious, ethnic, sexual, political) identities. This phenomenon is amplified and aggravated by the infernal mechanics of new technologies,

creating "bubbles" of ready-to-think. The whole tendency is conducive to disruptions, splits, not to mention wars.

In this context, the 'law of the market' continues to be deployed with force; the neo-liberal approach to economic relations on a global scale does not dry up, but is exacerbated. No reorientation is on the agenda of the large multinationals, the States and the international organizations in the functioning of the planetary market. As economic rivalries are added to political and identity rivalries, the world is becoming increasingly unstable and dangerous.

3rd scenario

The notions of universality, humanity and common dignity, which are not operational in practice, are abandoned. The ambition of texts and noble ideas is discarded in favor of a realistic approach based on anthropology where the concept of trans-locality prevails. It is about encouraging and building links and alliances between people at the local level, while going beyond national borders in order not to fall into the trap of exclusion. This makes it possible to reinvent the (complex) relationship between pluralism and diversity since each alliance for a better life is the result of using the habits and customs of each local society, while always promoting inclusion. In other words, from being 'victims'; from being 'left behind', people and groups that were previously marginalized, invisible and depreciated, become the actors of their own destinies, the ones through whom change and, beyond that, transfiguration of societies, happen.

*The democratic challenge

Many voices are raised to oppose democracy and human rights, either to 'idealize' human rights (considered to be very precious as they would constitute the Alpha and Omega of any society); or to consider them 'minor' compared to democratic mechanisms understood in the strict sense. Yet, the democratic challenge consists in thinking about the harmonious balancing between these two extremities (and moreover in a context where, for the last fifteen years, many new constitutions have been designed by constitutional consultants). How can this be achieved?

Several schools of thought have regularly permeated the intellectual field of human rights in order to identify precisely the mechanics of their manufacture and use within the *Cité*: that of natural law, social struggles, double language, concertation,

Critical Legal Studies, and even - more recently - the 'anti-rights' trends. The question at this stage is whether they can or should be 'balanced', not to say 'reconciled'? This is a democratic question in the strongest sense of the word, insofar as it determines the way of approaching, within each society, the relationship to the rights of the individual and of groups; as well as to their appearance, adoption, protection.

1st scenario

The first scenario is an act of balancing: the point of view of each school of thought deserves to be taken into consideration (including, in the worst scenario, the point of view of the 'anti-rights' trend), knowing that the starting point of this balancing is based on the idea that every life matters. In this perspective, no school of thought should, at least a priori, take precedence over another. This implies a capacity for self-criticism for the proponents of each school of thought, each of which has its own flaws and analytical blind spots. It also implies that they must all be on the same page in order to be able to think of 'balancing'.

In any case, all actors must be taken seriously: those at the national and international levels, courts, committees, parliaments, executives, civil society, etc. Balancing must generate a synergy of all actors without one having greater legitimacy than the other: they all count.

2nd scenario

The dialogical approach of the Deliberation school of thought prevails. Since human rights are a human creation, each society should discuss and deliberate on what a human right is and how it should be defined and protected. This implies several changes. First of all, at the state level, it is necessary to reconcile, in the drafting of constitutions, the part relating to the organization of public powers and that relating to the enumeration of rights. It is a mistake to distinguish between them: no matter how many rights are proclaimed, if the democratic functioning of the constitution's "engine room" is not ensured, the government will prevent their realization. Similarly, it is important to give credit to the fact that the heart of deliberation is first and foremost the parliamentary forum, but also, possibly, the street, where people can participate in making their voices heard through peaceful protests.

3rd scenario

Finally, one can point to the dominant problem since the 'Westphalian moment', the state. Indeed, it is agreed that its centrality is a major structural problem: it is the first to violate human rights and then finds itself at the center of the structure of international organizations (or of the 'clubs' it creates, G8, G20) in order to better direct, manipulate and 'colonize' them, weakening the legitimacy of international institutions and jurisdictions. Therefore, it is the human and social structures within states that decide for themselves and create synergies beyond state structures. The state is powerfully bypassed and no longer appears as the basic legitimate political unit. Therefore, in what constitutes an immense transnational network where individuals are at the center of the reflection and acting, the cosmopolitical approach is settling in a perennial way.

2.2. Strategies

Strategies must be deployed at the level of actors and of norms.

Actors' level

The organization of inter-state relations since the end of the Second World War is made up of multiple universal and regional organizations that ensure cooperation through the mechanisms of multilateralism. It is in this abundant and complex institutional framework that the mechanisms for the protection of human rights are evolving. How should we envisage the future? Should we broaden the spectrum by considering the integration of other actors who participate in the society, and more particularly the economic giants who, in their own way, direct the world's economy as opinion leaders (the GAFAM)?

1st scenario

The structuring of the international order cannot be changed, the status quo takes precedence over the need for change. Therefore, we must act within the framework of what exists at the international and regional levels in coordination with the actors on the ground. Shortly, we think and act with what exists, making the best use of all operational mechanisms and procedures and thinking about their complementarity. With authoritarian states increasingly taking the reins of global governance, and democratic states becoming weaker and weaker (undermined from within by their own shortcomings and weaknesses) and forced to "dialogue" with the former (Realpolitik), while the regulation of GAFAMs remains precarious, no level of action is seen as more adequate and relevant than the other. In a word, neither international nor national law is a panacea: we must therefore go on with their strengths and weaknesses. In doing so, one multiplies efforts, actions and tactics: one enters into what could be called an 'active resistance'.

In this respect, the strategic mobilization of youth in the context of climate litigation is a good example to follow (actions at all levels, national and international, whatever the type of control mechanism, committees and/or jurisdictions), mixed with large national and transnational campaigns of contestation. The same type of legal actions throughout the world, combined with manifestos of social struggles, are also needed on issues such as health - especially as pandemic phenomena will multiply - and even data that were thought to be "acquired". Indeed, disturbing and violent regressions are taking place all over the world concerning the right of women to dispose of their bodies (abortion); of homosexuals to live without stigmatization and discrimination; of indigenous peoples to preserve their lands; of judges to exercise their profession in full independence etc...

2nd scenario

The international order is completely redesigned to be more democratic, by introducing more separation of powers within international organizations and by integrating new actors, by making them subjects of international law. To do so, we can imagine 'citizens' conventions' - everywhere in the world - which will think of the new international organizations whose representativeness is entirely recast by taking seriously the actors on the ground: there would be equal representation of the 3 constituted powers (the executive, legislative and judicial) alongside other types of non-statutory-centered legitimacy. Thus, the three powers would coexist with "virtuous" economic forces (notably the "small" farmers and artisans), with the legitimacies

of civil society representing all the vulnerable who have long been on the "margins" (i.e. in alphabetical order: persons of African descent, the elderly, LGBTQIA+, women, youth), as well as groups as such (such as indigenous communities, the Roma). The current Chilean 'constituent moment', marked by a strong inclusiveness that gives substance to the challenge of diversity, could thus be transposed to think about the 'refoundation' of international organizations.

In the wake of this innovative approach, international justice, and more specifically human rights justice, is also being completely restructured so that it is free from state manipulation (in both UN and regional mechanisms). The nomination and election processes are disconnected from the state matrix: states are no longer the ones who choose and elect, but bodies composed in a transnational way where competences coupled with the care given to the representativeness of diversity, are the first cursor of the choices. This new configuration is all the more necessary as it is imperative to take on the ever more complex present and future challenges, which manifest themselves in highly technical fields (climate change; artificial intelligence in the digital field, among other things), which could eventually give rise to the setting up of specialized jurisdictions (i.e., Internet jurisdictions; climatic jurisdictions).

Normative level

Many themes are at the heart of current and future normative challenges. They require, in themselves, a profound transformation of perceptions and regulations. Let us give a few examples in the areas of health, new technologies and the environment.

Access to medical treatment (in the face of major risks of future pandemics) as well as the establishment of balanced and fair working conditions and remuneration (in the face of major inequalities in the context of 'globalized' supply chains) are two areas in which equity should take over, or at least be reconciled with purely commercial interests. In the same vein, and in terms of dignity, the treatment of the elderly (whose numerical increase is inevitable in many societies) will have to take into consideration the philosophy of care.

In the same way, the irruption of new technologies via the Internet generates an important need to regulate a space where the best as well as the worst are mixed. Several issues coexist: that of access to the Internet (which is not yet fully guaranteed not only within States, but also in the heart of large continents such as Africa); that of the preservation of privacy (in the face of the development of massive surveillance tools, set up by States and sold by private companies); that of the fight against

discrimination and digital harassment (which affect vulnerable communities in particular).

Finally, environmental degradation on a planetary scale due to human activity will continue to accentuate the process of climate change: to environmental vulnerability will be added extreme human vulnerability, accentuating the forced migration of populations around the world (the 'climate-displaced persons').

In this context, how can ensure that the economic forces change their approach? How can we convince all stakeholders to be bold, both in the development and the application of standards?

*The challenge of norm creation

1st scenario

The first scenario takes note of Reality: this realistic approach takes into consideration the current unfavorable geopolitical context; therefore, states should not be counted on to elaborate new treaties in new areas in order to grant new rights and impose new obligations. In doing so, only innovative interpretations can adapt international instruments to evolving social, societal and environmental realities (as the case law of the Inter-American Court has already demonstrated).

When it comes to one of the most worrisome issues for the stability of societies - socio-economic inequalities - strategic litigation techniques are to be taken seriously. In addition to demonstrating that the multiple branches of civil society are becoming central and inescapable drivers of the evolution of law, strategic litigation generally knows how to be technically innovative. One example will suffice: by using the equal protection (Art.26 ICCPR, Art.24 ACHR, Art.3 ACHPR) and non-discrimination (Art.2(2) ICESCR; Art.14 ECHR and Art.1 P12; Art. 28 ACHPR) clauses, in multiple competent fora (at the national and international level), it could be envisaged to challenge public policies that would not have social justice in mind, including for non-nationals (who are particularly affected by the economic and health crises). In other words, nationality is radically and permanently dissociated from the effective enjoyment of rights, which has the advantage of being deeply inclusive.

Concerning the obligations imposed on States, in addition to the now classic trilogy of 'respect, protect and fulfill' human rights, a fourth branch should be imposed: the obligation to cooperate. Indeed, global challenges (the fight against pande-

mics; the fight against environmental degradation, etc.) require global responses in which solidarity deserves to be at the heart of the action of international organizations, States, but also companies. Alongside the creation of this new obligation, it would be fundamental that the first three obligations be imposed on all contemporary "actors" who participate, directly or indirectly, in the violation of human rights: States, but also international organizations, economic actors and armed groups. However, it should be emphasized at this point that such a broadening of obligations raises the question of the dilution of the responsibilities of the primary (States) and secondary (IOs) subjects of international law.

2nd scenario

States, international organizations, and multinational corporations (under pressure from social mobilization movements that have taken on major proportions) understand that new international instruments are needed to deal with the political, climatic, and social upheavals of the present and future. This means the creation of new treaties, by new actors, to face new challenges.

The new treaties, whatever their field, systematically integrate the articulation (the linkage) with human rights, which are becoming a transversal concern (Business *with* Human Rights climate with HR and no longer Business *and* Human Rights etc.). Similarly, the principles structuring the elaboration of these new instruments are the indivisibility of rights on the one hand (justiciability is no longer politically rejected), but also intersectionality. In other words, it is a multidimensional approach that is systematically developed in the process of creating new norms.

When new treaties or additional protocols to existing treaties are created, they must systematically be elaborated with the presence, with the right to vote, of those who are primarily concerned (indigenous people, human rights defenders, climate-displaced persons, children, women, LGBTQIA+, older persons, migrant workers, migrants etc.). The voice of the "voiceless" must make a major inroad into the domains reserved for state governments.

Generally speaking, in order to take note of the evolutions of world governance - where international organizations greatly influence the economic and financial policies of States; where multinational corporations have acquired exorbitant powers as powerful as State structures and where, finally, armed groups

have the power to destabilize and destroy entire societies -, a convention on human rights applicable to international organizations, private companies and armed groups would allow to set clear rules on their rights and duties.

*The challenge of application

The legal, sociological and political analyses of recent years all point to the same problem: the non-application or very defective application of treaties, judgments, 'recommendations' and other soft law texts in the area of human rights. How can we get out of this spiral that affects both the effectiveness and the legitimacy of international human rights law?

At this stage, only a realistic approach seems conceivable: it would involve improving what already exists, which would make it possible to obtain the agreement of States. This requires two complementary steps: anticipation and reaction.

National structures would have to take the measure of the interest of anticipating declarations of violation. In other words, prevention should become a major issue. Instead of waiting for their international responsibility to be called into question, states should systematically anticipate adherence to the international standards set by the protection bodies. At this stage, while most legal scholars focus on deciphering how judges anticipate (or fail to anticipate) considering obligations under international law, they too often neglect the role of other important stakeholders, and in this respect national parliaments should be the object of more attention. In the preparation of legislative proposals, they should be more knowledgeable about international law by taking seriously all existing standards (deriving from treaties but also and especially from international and regional case law). In other words, a preventive conventionality control, carried out by the representatives of the people, would have two advantages: firstly, it would avoid declarations of violations; secondly, it would enhance the value of national democratic forums that could take into consideration the specificities of each society. In other words, it is a political subsidiarity that would be in action.

The preventive approach must be combined with a remedial approach, which must be drastically improved. Without strong and committed national structures and actors, obligations under international law can easily remain a dead letter. The implementation of the judgments and various recommendations of human rights monitoring bodies could be achieved through a reorganization of the internal structures of the States, in

partnership with all the stakeholders who are able to provide significant added value. This could involve the creation of 'Human Rights Implementation Committees' capable of assessing the full range of reparation measures to be adopted, not only for the purpose of executing a judgment but also and more generally for the purpose of implementing the standards set by human rights monitoring bodies. A global and multidimensional approach would be at the heart of the work of these 'Implementation Committees', which would be composed of members of the executive, the legislative, the judiciary, representatives of National Human Rights Institutions (NHRIs) as well as representatives of civil society and victims' representatives. It would have a decision-making capacity that would be supported by financial autonomy. Indeed, it would be endowed with a budget, determined each year, in order to be able to effectively implement the obligations derived from international human rights law (following the example of military alliances).

If it is not possible to set up such committees in all states, then the dynamics of the implementation should be comprehensive in a more informal way. At this stage, the National Human Rights Institutions (NHRIs), in close association with civil society organizations and victims' representatives, should encourage the rapid and full execution of judgments declaring violations (through major mobilization campaigns if necessary) but could also, in a more global way, consider the impacts of obligations under international human rights law. The notion of impact is becoming increasingly important in the field of social sciences, and legal scholars should give it a more central place in their analysis.

Here again, NHRIs, civil society organizations, and victims' representatives, in association with academics, could set up 'impact observatories' in connection with those that could be created at the level of international and regional organizations. The indicators for measuring the impact of treaties and the case law would be numerous and would go beyond the strict legal field.

***

Several important transversal elements have emerged in the context of the challenges of the elaboration and application of international law: that of articulation (of the local with the global), that of solidarity (through the reconfiguration of cooperation), that of balancing (between the different conceptual approaches as well as the different socio-economic interests) and above all,

that of inclusion (by associating all the central and marginal sectors of societies).

Articulation, solidarity, balancing and inclusion: strong and loaded words, which must guide the actions of all actors (intellectuals, politicians, activists) in the years to come in order to build better international human rights law.

Beyond these transversal elements, it will be fundamental to analyze, whether the proposals recommended in this White Paper will succeed in changing the international legal order: will the State still be central? Will the classical approaches to the sources and subjects of international law be overcome (taking into consideration the human person as the existential pivot in the elaboration of law; imposing rights and obligations on non-state actors)? Will international human rights law continue to be reduced to a specialized branch of international law (lex specialis) or will it be able to cross-fertilise the other branches to the point of being integrated and/or complementing the others? These are the questions that will be at the heart of the challenges to come for building tomorrow's world.

3.

questions

Question n°1

Can Human Rights law be more inclusive?

Inclusion is a major requirement for the years to come otherwise one would perpetuate discrimination, resentment and the revolt of human beings against international law considered as perpetuating the hegemonies and unfairness of the past. It is therefore not an option, but an obligation.

The obligation of inclusiveness can be supported by the progressive case law of the Inter-American and African Regional Courts, which have demonstrated that it is possible to take all aspects of diversity seriously. If they have succeeded in what appears to be a necessary paradigm shift, it is because, significantly, their members have grasped it psychologically. Their personal and professional experiences, as well as the realities of their continents, have made them sensitive to the requirement of inclusiveness. Through the circulation of case law, such approaches must be promoted within all existing monitoring bodies, both within States and within other international human rights systems.

In the long run, a mental and psychological big-bang must occur so that the legal actors of the transformation have all taken the measure of the imperative of inclusion. Numerous studies in cognitive sciences have demonstrated the influence of psychology on decision-making mechanisms: international law is no exception; changing mentalities is therefore crucial. It requires awareness campaigns as well as powerful educational systems that train future leaders (intellectuals, politicians, activists).

Question n°2

Does Human Rights law have the tools to reduce the wealth gap between human beings?

The conceptual tool exists since 1948 and the adoption of the Universal Declaration of Human Rights: This is the principle of indivisibility. It is therefore necessary to put it seriously into action in order to put pressure on the political and legal actors, who are still pusillanimous, to make it effective.

In order to do so, it is necessary to generalize the knowledge and dissemination of progressive examples from some national (Colombian, Indian), regional (Inter-American) and international (Human Rights Committee) case law, in order to succeed coupling public policy-making with the requirement of social justice. To rely on weak economic resources to avoid tackling the reduction of wealth gaps within states is no longer worthwhile.

Question n°3

How can Human Rights law cope with its lack of application?

Getting states to assume their obligations – stemming both from treaties and case law - in a concrete and effective way can be achieved through two phenomena: flexibility in implementation, coupled with a strengthening of (internal and external) control.

Flexibility implies that states, on the basis of clear principles set out at the international level, both on the content of the rights and on the permissible restrictions to them, can find the best means to implement them (with regard to the specificities of each society). It is not a question of accepting a reduction in the level of protection as established at the international level, but of applying international law in consultation, in each state, with all the stakeholders: the victims, but also the perpetrators of the violations [e.g., the state authorities or companies or individuals], so that the application process is both flexible and inclusive.

Second, the control mechanisms on the obligation to implement must be increased within the states themselves. National actors must be given back their rightful place through two types of control mechanisms.

In the first place, internal control is essential, thanks to the independent commitment of National Human Rights Institutions (NHRI) which are nothing less than the essential watchdogs of effective human rights protection within states. Their scope of action, their organization and their financing should be profoundly improved.

In addition, external control, through the powerful commitment of civil society which must take up the fundamental task of monitoring the compliance of states with their obligations.

Question n°4

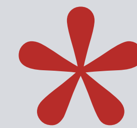
Can International Human Rights Law fulfill its potential to emancipate individuals in the face of economic globalization? Do human rights lead us to obliterate the foundations of capitalism?

The question of the place of human rights in the face of economic globalization is a central issue of our time. It leads us to question the ins and outs of liberalism: does the liberal political philosophy behind rights inevitably lead to economic (neo)liberalism?

The question has arisen as to the usefulness of integrating human rights logic into international economic organizations and their ability to take it into account. At the one end of the spectrum, some consider that the structures of global economy could be truly transformed to promote human rights. They will be able to become "forces for good" and put their power in the service of people. At the other end of the spectrum, the most critical observers consider that the omnipotence of the market would in any case succeed in erasing the individual.

Several solutions have been devised in order to find the right equation: from conditionality clauses (making financial aid subject to the respect of rights) to flexibility techniques in the

analysis of economic situations (following the example of the notion of 'macro-criticality', which consists in qualifying a situation as critical in order to trigger any structural action by the IMF). Some proposals have not been without generating strong criticism, particularly from Marxist currents; the best known has been the insertion of social clauses in international organizations: would this not be a new neo-imperialist posture, another way of imposing a classical doxa, that of free trade, on the weakest? At a time when debates are taking place on the structures of the tug-of-war between business and human rights, the diversity of these positions deserves to be taken more seriously in the years to come.



annex 01

persons interviewed

- Marie-Bénédicte Dembour, Professor of Anthropology and Law at Gent University
- Souleymane Bachir Diagne, Professor of Philosophy at Columbia University
- Roberto Gargarella, Professor of Political Science at Buenos Aires University
- Mark Goodale, Professor of Anthropology at Lausanne University
- Hanna Lerner, Professor of Political Science at Tel-Aviv University
- Samuel Moyn, Professor of History at Yale University
- Flavia Piovesan, Professor of Law at Sao Paulo CU, Former Member of the IACHR
- Olivier De Schutter, Professor of International Law at Leuven CU, Special Rapporteur on Extreme Poverty and Human Rights

IN THE SAME COLLECTION

Food / Agriculture

Anthropocene

Fight Against Corruption

Mass Crimes and Impunity

Law In Support of Democracy

Human Rights

Energy

Business and Human Rights

Outer Space

Civil Status

International Finance

Taxation

Global Governance / Multilateralism

International Investments

Migration

Digital Challenges for International Law

Ocean

Sdgs beyond 2030

Cultural Heritage

Intellectual Property

Dispute Resolution

Health

Labour

Cities in International Law

White Paper n° 6 - Human rights
realisation: September, 2022
graphic design: clémence hivert - *bluclemence@gmail.com*

www.ilaparis2023.org/en

Public consultation from September 1 to December 31, 2022.

adi.ila2023.dph@gmail.com