



Helena Maria Reis Gomes Barreiras Inácio

**The United Nations contribution to global constitutionalization
through the international human rights regime**

Dissertation for the purpose
of the achievement of the
Master's Degree in Law with
specialization in International
and European Law

Supervisor:

Dr Soraya Nour Sckell, Professor at Nova School of Law

September 2022



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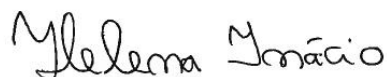
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Helena Maria Reis Gomes Barreiras Inácio
September 2022

To all those who dare to think outside the box.

This dissertation was developed within the context of the project “Cosmopolitanism: justice, democracy and citizenship without borders”, in the shape of the Permanent Seminar on Cosmopolitanism. This is a project that brings together an international and interdisciplinary group of researchers who have been conducting investigation on the subject of cosmopolitanism in its various dimensions, while endorsing the United Nations Sustainable Development Goals. In particular, I have been presenting multiple parts of my research in the online international conference “Cosmopolitan Justice”, in which I participate since July 2022. PTDC/FER-FIL/30686/2017, FCT – Fundação para a Ciência e a Tecnologia, I.P., Portugal. URL: <https://cosmopolites.wixsite.com/cosmopolitanism>

Acknowledgements

My special gratitude goes to the professors who accompanied and guided me throughout the elaboration of this dissertation, namely: my dear supervisor, Dr Soraya Nour Sckell, as well as, also Nova School of Law professors, Dr Jeremy Sarkin, Dr Francisco Pereira Coutinho and Dr Mateus Kowalski. My deep appreciation goes to my university friends and colleagues, who were there to support each other in this engaging and fulfilling journey, which was the accomplishment of our Master's Degree. A warm thank you goes to my family, who provided me with the conditions to pursue higher education. My heartfelt esteem goes, as well, to UNESCO, where I have had the unique opportunity to apply in practice the theoretical knowledge I have acquired throughout my studies, and where I have witnessed, first-hand, the daily functioning of an important UN specialized agency, thus becoming even more enthusiastic about this research. Finally, my acknowledgement goes to Nova University of Lisbon, for providing the institutional basis which made this endeavour possible.

Quoting and other conventions

- a. I have decided to write this dissertation in English, not only for the fact that its topic is inserted in the fields of international law and international relations, but also because English is currently the most widely spoken language in the world (when combining native and non-native speakers) and, for this reason, I believe that the message I aim to transmit reaches more people if written in this language.
- b. Because I have mainly learned English with professors native of the United Kingdom, I have opted for writing this dissertation in its British variant; nonetheless, certain words may be spelled differently in the titles of consulted bibliographical sources, in order to preserve their integrity.
- c. The italics format is used to highlight Latin terminology commonly used in the field of Law, common expressions in a language other than English, titles of other author's chapters and books, as well as to highlight my main research question, within the text.
- d. Quotation marks are used to highlight a term being introduced for the first time or to indicate an expression which is employed as a figure of speech, within the text.
- e. The terms "she", "her", "he" and "him" include all forms of gender identity and expression, therefore not being limited by a person's sex.
- f. The index is presented before the beginning of the dissertation's body since I believe it serves its ultimate purpose much better this way rather than it would in case it would appear in the last pages.
- g. Throughout this dissertation's body, quotes took the shape of in-text references and included the following elements presented within parentheses: author's surname or entity's name responsible for the source's elaboration, year of publication and pages (the latter were included when it was considered relevant).

- h. Where footnotes are added to the text and where textboxes are used to describe an image or a graphic, references are presented in the same way as described above but are not contained within parentheses.
- i. The reference style of the bibliography follows numbers 405-1 and 405-4 of the Portuguese Norm of the Portuguese Institute of Quality, as recommended by Nova School of Law.
- j. The bibliography was automatically made with the Mendeley Reference Manager system and its respective Microsoft Word plugin.
- k. The model of representation of the Kelsen's pyramid, presented in Figure 1, is of my authorship and I hereby authorise its free reproduction.

“Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

Eleanor Roosevelt, 1958

List of Abbreviations

AU – African Union

Charter – Charter of the United Nations

CoE – Council of Europe

ECOSOC – United Nations Economic and Social Council

HRC – Human Rights Council

HRMI – Human Rights Measurement Initiative

ICCPR – International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICJ – International Court of Justice

LOIPR – List of Issues Prior to Reporting

NGO – Non-governmental organization

OAS – Organization of American States

OHCHR – Office of the High Commissioner for Human Rights

Secretariat – United Nations Secretariat

TNC – Transnational corporation

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNGA – United Nations General Assembly

UNSC – United Nations Security Council

UPR – Universal Periodic Review

URG - Universal Rights Group

I declare that the body of this dissertation, including spaces, occupies a total of 198.443 characters. It begins with the chapter “Introduction”, ends with the chapter “Final remarks and new perspectives”, includes all references, footnotes and textboxes, and does not include the “Bibliography”. That number was obtained by using the Microsoft Word tool “Word Count”.

Abstract

Global constitutionalism has always been an international law theory revolved in controversy, which is precisely what makes it such an attractive topic of debate. Jean Cohen is one of its most pressing critics. The author claims that global constitutionalists have hidden imperialistic goals, that the international legal order remains segmentally differentiated, that they hold a wrong interpretation of sovereignty and points out to the lack of clarity about what kind of political form would its agenda take. I disagree with Cohen and, for this reason, I begin by assuming that the process of global constitutionalization has already started taking place, while I view in the United Nations a constitutionalizing force and in the international human rights regime a constitutionalizing element. Therefore, the ultimate goal of this dissertation is to assess how this organization has been contributing to global constitutionalization. In order to reach that objective, and because this school of thought is particularly heterogeneous, I elaborate my own concept of global constitutionalization, which is based on the theories developed by both Hans Kelsen and Anne Peters. I synthesize and bring together these two authors' distinct work because I consider they complement each other. While Kelsen has established the foundations of the current international legal order, Peters envisages a more modern conception of international law through her own perspective of global constitutionalism. My analysis takes into account the complex institutional structure of the United Nations system and evaluates the functioning of its Charter-based bodies and its treaty-based bodies directly working in the field of human rights, as well as their interactions with non-governmental organizations. I show that respect for and compliance with human rights have been gradually improving over time, and that this phenomenon is essentially thanks to the actions and initiatives carried out by that organization, since it enjoys a special legitimacy and authority in the creation and implementation of the international human rights legal framework. As a result, I demonstrate that the United Nations has been contributing to global constitutionalization through the juridification, universalization and centralization dimensions associated to its central role in the safeguarding of the international human rights regime, throughout the world.

Keywords: Hans Kelsen; Anne Peters; Global Constitutionalization; United Nations; International Human Rights Regime.

Résumé

Le constitutionnalisme mondial a toujours été une théorie du droit international entourée de controverses, ce qui en fait précisément un sujet de débat si attrayant. Jean Cohen en est l'un de ses critiques les plus pressants. L'auteur affirme que les constitutionnalistes mondiaux ont des objectifs impérialistes cachés, que l'ordre juridique international reste segmenté, qu'ils ont une interprétation erronée de la souveraineté et souligne l'absence de clarté quant à la forme politique que prendrait leur agenda. Je ne suis pas d'accord avec Cohen et, pour cette raison, je commence par supposer que le processus de constitutionnalisation mondiale a déjà commencé, alors que je vois dans les Nations Unies une force constitutionnalisant et dans le régime international des droits humains un élément constitutionnalisant. Par conséquent, le but ultime de cette dissertation est d'accéder à la manière dont cette organisation a contribué à la constitutionnalisation mondiale. Afin d'atteindre cet objectif, et parce que cette école de pensée est particulièrement hétérogène, j'élabore mon propre concept de la constitutionnalisation globale, qui est basé sur les théories développées par Hans Kelsen et Anne Peters. Je fais la synthèse et je rassemble les travaux distincts de ces deux auteurs car je considère qu'ils se complètent. Alors que Kelsen a établi les fondements de l'ordre juridique international actuel, Peters envisage une conception plus moderne du droit international à travers sa propre perspective du constitutionnalisme mondial. Mon analyse tient compte de la structure institutionnelle complexe du système des Nations unies et évalue le fonctionnement de ses organes fondés sur la Charte et de ses organes fondés sur les traités qui travaillent directement dans le domaine des droits humains, ainsi que leurs interactions avec les organisations non gouvernementales. Je montre que le respect et l'application des droits humains se sont progressivement améliorés au fil du temps, et que ce phénomène est essentiellement dû aux actions et initiatives menées par cette organisation, puisqu'elle profite d'une légitimité et d'une autorité particulières dans la création et la mise en œuvre du cadre juridique international des droits humains. Par conséquent, je démontre que les Nations unies ont contribué à la constitutionnalisation globale à travers les dimensions de juridification, d'universalisation et de centralisation associées à son rôle central dans la sauvegarde du régime international des droits humains, partout dans le monde.

Mots-clés : Hans Kelsen ; Anne Peters ; Constitutionnalisation mondial ; Organisation des nations unies ; Régime international des droits humains.

Resumo

O constitucionalismo global tem sido sempre uma teoria do direito internacional envolvida em controvérsia, sendo precisamente isto que a torna um tema de debate tão atrativo. Jean Cohen é uma das suas críticas mais prementes. A autora afirma que os constitucionalistas globais têm objetivos imperialistas ocultos, que a ordem jurídica internacional permanece segmentada, que têm uma interpretação errada de soberania e aponta a falta de clareza relativamente ao tipo de forma política que a sua agenda assumiria. Não concordo com Cohen e, por esta razão, começo por assumir que o processo de constitucionalização global já é uma realidade observável, ao mesmo tempo que vejo nas Nações Unidas uma força constitucionalizante e no regime internacional dos direitos humanos um elemento constitucionalizante. Deste modo, o objetivo último desta dissertação é determinar a forma como esta organização tem vindo a contribuir para a constitucionalização global. De modo a cumprir com esse propósito, e pelo facto desta escola de pensamento ser particularmente heterogénea, elaboro o meu próprio conceito de constitucionalização global, que se baseia nas teorias desenvolvidas tanto por Hans Kelsen como por Anne Peters. Sintetizo e conjugo o trabalho distinto destes dois autores por considerá-los complementares entre si. Enquanto Kelsen estabeleceu os fundamentos da atual ordem jurídica internacional, Peters visualiza uma conceção mais moderna do direito internacional através da sua própria perspectiva de constitucionalismo global. A minha análise tem em conta a complexa estrutura institucional do sistema das Nações Unidas e avalia o funcionamento dos seus órgãos baseados na Carta e dos seus órgãos baseados em tratados que trabalham diretamente no domínio dos direitos humanos, bem como as suas interações com organizações não-governamentais. Demonstro que o respeito e o cumprimento dos direitos humanos têm vindo a melhorar gradualmente ao longo do tempo, e que este fenómeno se deve essencialmente às ações e iniciativas levadas a cabo por esta organização, uma vez que esta detém uma legitimidade e autoridade especiais na criação e implementação do quadro jurídico internacional dos direitos humanos. Como resultado, demonstro que as Nações Unidas têm vindo a contribuir para a constitucionalização global através das dimensões de juridificação, universalização e centralização associadas ao seu papel central na salvaguarda do regime internacional dos direitos humanos, em todo o mundo.

Palavras-chave: Hans Kelsen; Anne Peters; Constitucionalização Global; Organização das Nações Unidas; Regime Internacional dos Direitos Humanos.

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1. Introduction¹

International public law has undergone an evolution during the last decades. It has been adapted and modernized in accordance with the reality experienced by people in every corner of the world. Several theoretical schools have been elaborating over the field of international law and, for this reason, we are able to find authors with which we agree and authors with which we do not identify so much. Each of them plays a role in the development of this juridical strand, allowing us to better understand the functioning of international affairs.

Hans Kelsen was one of the most influential “fathers” of modern law. He elaborated, during the first half of the 20th century, a refined theory of positive law, characterized for its normativism, formalism and clearly structured hierarchy, in view of developing a legal science. Kelsen's doctrine consisted of a true scientific revolution among scholars, since it overcame the jusnaturalism school of thought to establish the juspositivist one. He formulated his theory by clearly separating legal knowledge from everything that does not belong to its study object, in view of giving law a scientific character (Cerqueira and Passos, 2016, pp. 163-168). In his work, he asserts that law regulates its own creation, and that it does so by establishing a relationship between the so-called superior and inferior norms, the latter being created through the application of the former. We may, therefore, visualise the “chain of validity” of a normative system as a pyramid of hierarchical and overlapping norms. The two principal sources of international law are custom and treaties, customary international law being the original one and deriving its validity from the basic norm (Kelsen, 1952, p. 303-314).

Kelsen's concept of the basic norm is particularly relevant since it consists in a fundamental assumption on which rests the reason for the validity of every norm belonging to a certain legal order and which provides the necessary explanation for the unity and normativity of any legal system. The basic norm was created by no-one, it is a norm of non-positive law. It is nothing more than a presupposition made by jurists interpreting the legality of the conduct of states. The basic norm may be justified from the point of view of the hypothetical legal man, who adopts all norms belonging to a certain legal system as his personal morality, as if every norm corresponds to what is right and good to him (Raz, 1974, pp. 95-109).

¹ Note: Several chapters of this dissertation partially result from a reformulation of a working paper of my authorship, specifically elaborated for the course “Methodology of Juridical Research”, supervised by Professor Dr Soraya Nour Sckell, in the context of my Master's Degree. This working paper was later published by CEDIS and is the following: Inácio, 2021a

A relatively recent school of thought dwelling over the field of international law is that of global constitutionalism. This is a theoretical strand that includes many different authors, with varied views on what exactly global constitutionalism consists in, such that there is, indeed, little consensus regarding its true meaning, shape and goals. Nonetheless, one of its most well-known authors, Anne Peters, affirms her point of view very clearly. In her eyes, global constitutionalism is an academic and political agenda aiming to enhance the righteousness of the international legal order. Global constitutionalization, in turn, consists of the gradual development and emergence of constitutionalist elements in the international system, in accordance with global constitutionalist principles (Peters, 2009a, pp. 397-398).

Peters tells us that the idea advocated by global constitutionalism is related to the observance of an erosion in state sovereignty, the basis upon which the international paradigm traditionally rests. The author defends that the nation-state is an abstract construction whose essential function is the realization of people's needs, that is, that it is responsible for the promotion and protection of human rights. International law, therefore, has increasingly become a system centred on individuals, or humanity itself (Peters, 2009a, pp. 398-399). Peters also asserts that certain basic values, such as the respect for human rights, environmental preservation and free trade, seem to have acquired universal acceptance, for they are issues that do not look upon borders.

I will base my research on the theories elaborated by both Kelsen and Peters, because I consider them to complement each other, instead of standing at opposite ends. I believe that, while Kelsen has established the foundations of the current international legal order, Peters further develops on it by envisaging a more modern conception of international law, one which undergoes a global constitutionalization process. After reflecting on it, one understands that both authors base their theories on the same premise of the existence of a higher position in the legal hierarchy, composed of fundamental norms which must not be disrespected and, therefore, must be interpreted as pre-conditions of the actions of those institutions finding themselves in lower positions of that same hierarchy.

It is perfectly possible to establish a connection between the international legal order, global constitutionalism and the rising advocacy for human rights promotion and protection. The individual person has recently become an official subject of international law and human rights may be considered a part of the fundamental norms structuring the international legal order. Today, the most wide reaching and most influential international organization focused on the development of the international human rights regime is the United Nations (UN). Built in the aftermath of World War II in order to protect humankind from the scourge of war, one

of its principal purposes is to promote and encourage respect for human rights and fundamental freedoms for all (Art. 1(3) Charter of the United Nations², 1945).

The UN has led the way in the creation and implementation of international human rights law all over the world. It is, therefore, seen as the paramount organization in this field, which gives it legitimacy and authority in the development of human rights standards, as well as power to impact global governance and international order (Alston and Mégret, 2020, p. 5). The organization is constituted by organs and bodies that, together, form an arena from where normative initiatives arise. They are designed to facilitate the achievement of the organization's wider objectives, as well as to guide member states in the same direction.

Alston and Mégret provide us with a clear distinction between the two main types of UN human rights organs. They identify the "Charter-based organs" and the "treaty-based organs". Essentially, the former correspond to organs established according to the provisions of the UN Charter, they are much more concerned with human rights policy, are usually intergovernmental bodies, and are characterized for having a broader mandate. The latter, in turn, correspond to organs established according to the provisions of specific treaties, they are much more concerned with human rights law, are usually composed of experts, and are characterized for monitoring and encouraging compliance with a particular treaty regime (Alston and Mégret, 2020, pp. 13-14).

It was the Commission on Human Rights, later succeeded by the Human Rights Council (HRC), that has provided the stage for the elaboration of the Universal Declaration of Human Rights (UDHR)³, in 1948, still considered nowadays as the most authoritative statement of international human rights law, at the global level. It has also been at the heart of the adoption of the nine core human rights conventions (Park, 2018, pp. 64-66). The evolution of the international human rights regime has been noticeable as well, especially since the 1980s. Today, more than half of UN member states have ratified at least six international human rights conventions, and around three-quarters have ratified the International Covenant on Civil and Political Rights (ICCPR)⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵. Together with the UDHR, these three international instruments are known as the "International Bill of Human Rights" (Weiss and Daws, 2018, p. 12). The majority of

² Charter of the United Nations, 1945

³ UNGA Resolution A/RES/217(III), 1948

⁴ International Covenant on Civil and Political Rights, 1966

⁵ International Covenant on Economic, Social and Cultural Rights, 1966

these conventions are associated with specific treaty bodies responsible for encouraging the enforcement of their provisions in their respective states parties (Saunders, 2012, p. 100).

In the international human rights framework, civil society also plays a fundamental role in the promotion and protection of human rights. During the last decades, an increasing number of non-governmental organizations (NGOs) have been attributed consultative status in order to participate in and support the work of the UN. These organizations help drafting international law, and, at the same time, contribute to their enforcement, by carrying out research, influencing domestic policy, lobbying for human rights, engaging in state-reporting processes, among many other ways. All in all, through grassroots mobilization, NGOs are there to hold states to account regarding their human rights duties (McGaughey, 2021a, pp. 1-4).

It is important to note, however, that individuals are frequently exposed to a pessimistic discourse regarding their fundamental rights and freedoms, thus being given the impression that there has been a broad renouncement to universal values in relationship to previous times. The truth, nevertheless, is that it is hard to know exactly whether the goal of promoting and protecting human rights advocated by the current international order has improved over the years or not, because there is not yet any globally comprehensive system tracking and measuring data trends in human rights performance. This is quite problematic, since that type of narrative may threaten the credibility of the international human rights regime (HRMI and URG, 2019, pp. 7-9).

In addition, the UN belongs to a wider and even more complex international system composed of regional organizations and other international actors committed to reinforcing the respect for and compliance with the international human rights regime. These institutions are not part of the UN family and their work differs from that of this organization. In my perspective, however, all the various types of institutions aiming to promote and protect human rights, whether at the local, national, regional or global level, turn out to be complementary, since one allows more certainty and coherence to the performance of the other (Alston and Mégret, 2020, p. 4). Nonetheless, it is true that the UN does enjoy a special legitimacy and authority in this field, when compared to other organizations.

As we have seen, the global constitutionalism school of thought is a highly eclectic one. Besides, there are also those who remain sceptical regarding its possibility or even its desirability. A piece of criticism coming from the field of international relations, particularly, from the realist school of thought, is that which claims the theory of global constitutionalism emerged in an overly optimistic era, characterized by the illusion of a free world, right after the fall of the socialist bloc. Realists argue that there is no common political will, power structure

or enforcement capability at the international level, such that the global constitutionalist agenda is too much of an idealistic endeavour and it disappears once real-life problems are on top of the table (Peters, 2009a, p. 401). In turn, coming from the field of international law, the most pressing criticism against global constitutionalism is associated to those schools which advocate the fragmentation or pluralism of the international legal order. While the first branch objects at every attempt to pursue a normative project, the latter presents a more moderate perspective, by envisioning a fragmented plurality of sovereign centres of power interacting in an interdependent and multi-level legal order, while having no world unification agenda (Tzevelekos and Lixinsky, 2016, pp. 352-354).

Jean Cohen, specifically, is one of the greatest sceptics of Anne Peters's work. Cohen's main criticism against Peters is that she sees global constitutionalism as a disguised, merely symbolic, discourse with imperialistic aims, which serves only self-interested goals. She claims that the international legal order remains a segmentally differentiated international society, based on the consent of sovereign states. Moreover, she asserts that global constitutionalism advocates are in opposition to the classical institution of the nation state because they hold a wrong interpretation of sovereignty, and defends, instead, the idea of a dualistic sovereignty regime (Cohen, 2010a, pp. 262-264). The author also affirms that the theory developed by Peters has considerable shortcomings regarding the answer to the question about what kind of political form would the international community take, in case the global constitutionalist agenda would ever reach its ultimate aspiration (Cohen, 2010b).

Because I strongly disagree with the criticism coming from these theoretical strands, and, in particular, with Cohen's point of view, my research aims at specifically addressing it. It is, indeed, essential to take a position regarding the way this agenda may be implemented: does global constitutionalization start with civil society or does it start with governmental negotiations? Would such a process necessarily be imposed by only some states over all others or, instead, would it be a universally desired phenomenon? A noteworthy concern relates to the rationale of that process: what could be such common interests to the international community that would justify the elaboration of a global constitution?

By the same token, it matters to analyse the shape this ideology might take: could an international organization be its main constitutionalizing force? And, if that was the case, what would be its constitutionalizing element or elements? Another pressing issue relates to the actual feasibility or unfeasibility of this ideology: is global constitutionalism currently being reflected in political practice? Or do we solely find its advocates among scholars? Therefore, it is important to question whether present day international law and politics show any real sign

pointing towards such a phenomenon. Furthermore, one cannot ignore the question of whether or not the traditional perception of sovereignty, marking today's international order, is somehow challenged by the global constitutionalism agenda.

My research is going to be based on the normative assumption that global constitutionalism is a morally desirable project. This is because it is an agenda aiming to bring nations and its peoples together, therefore contributing to the formation of commonly accepted principles which assure stability and certainty in international law and in international relations. Moreover, global constitutionalism allows for the harmonization of both domestic and global interests, thus enhancing the aspirations of the international community, as a whole (Peters, 2009a, pp. 402-407).

Nonetheless, because the global constitutionalism theory is quite heterogeneous, it is no surprise that there is no common agreement about the definition of global constitutionalization (Tzevelekos and Lixinsky, 2016, pp. 348-349). This creates, however, several obstacles hindering the establishment of a coherent and cohesive school of thought. For this reason, it matters to establish clarity among the authors who theorize over it, regarding the constitutionalizing forces and elements characterizing the international legal order. This way, in view of providing accuracy to my research subject, I put forward my own concept of global constitutionalization.

Based on Kelsen's international law theory, as well as on Peter's global constitutionalism theory, I elaborate a definition of global constitutionalization based on three dimensions: juridification, universalization and centralization of international law. I argue that juridification is related to the notion of a positive international legal order, consisting of hierarchically superior and inferior legal norms, as well as to the idea of a multi-level governance, which includes domestic and international actors in the same global constitutionalization framework. I argue that universalization is related to the notion of a basic norm, which gives rise to the unity and normativity of any valid legal system, as well as to the idea of an international community, which recognizes the existence of common interests, such that there is a greater humanization of the international legal order. And I argue that centralization is related to the need to rethink the notion of sovereignty, since the state is becoming increasingly accountable in relation to the international community and to its own population, as well as to the idea that civil society cooperation in the international processes of law-making and -enforcement is increasingly relevant, such that it supports a uniformized implementation of international law emanated through specific globally administered mechanisms.

With this background, I focus my research on the analysis of the global constitutionalization process developed through an international organization, namely, the UN, and I specifically look at the organization's goal of promoting and protecting human rights. That is, I analyse the UN as a constitutionalizing force and I study the way it has been contributing to this emerging phenomenon, focusing on the international human rights regime as a constitutionalizing element. Therefore, my research question is going to be the following: *How has the United Nations been contributing to the process of global constitutionalization?*. Put simply, I assume that the UN has been contributing to the process of global constitutionalization, and I intend to examine in what way this has been taking place.

Particularly, I am interested in evaluating how the organization's Charter-based bodies, treaty-based bodies and its interactions with NGOs have been engaged in these endeavours. Further, and in view of solidifying my research, I am interested in determining whether the global situation of human rights – that is, the real impact of human rights promotion and protection on-the-ground – has improved in the last decades and, if that is the case, whether this evolution may be essentially attributed to the actions and initiatives carried out by the UN. As a result of my analysis, I come to the conclusion that, in the decades after the end of World War II, and especially after the end of the Cold War, the UN has been gradually contributing to the process of global constitutionalization, through the juridification, universalization and centralization of the international human rights regime. In addition, this phenomenon is observable in the institutional structure of the organization, as well as in its interactions with civil society.

It must be noted that, in academia, it is particularly difficult to find an author who establishes a relationship among the works of Kelsen and Peters. The literature is also feeble regarding the examination of the UN performance in the field of human rights, and, subsequently, regarding the role it plays in the governance of the international human rights regime. Moreover, it is rare to find an author who establishes a link between the idea of a global constitutionalization process and the work undertaken by the UN, as a para-universal international organization. Therefore, it is precisely by building a complementarity between the different theories developed by those two authors, corresponding to a synthesis which exists nowhere else; by offering an original concept of global constitutionalization in order to point towards finding a common ground among advocates of this ideology; and by revealing and explaining the existing connection between the global constitutionalist agenda, the actions and initiatives carried out by the UN, and the promotion and protection of human rights throughout the world; that this dissertation contributes with additional value for scholarly research.

In the chapter “Global constitutionalization in theory”, I analyse the theories developed by both Hans Kelsen and Anne Peters, and I interpret these authors’ theoretical perspectives in a complementary way in order to develop my own definition of global constitutionalization, as a solution to the lack of conceptual clarity found in the eclectic global constitutionalism school of thought and provide further accuracy to the subject of my research.

In the subchapter “Dialogue with Hans Kelsen”, I explain Kelsen’s philosophical theory of law. In order to do it, I, firstly, present a brief biography of the author. Then, I proceed to a detailed analysis of my main text of reference, a chapter of his book entitled “Principles of International Law”, where Kelsen clarifies his view of the rationale and functioning of international law, notably, the reason for the validity of any legal system, the existence of custom such as norms of *jus cogens*, the advocacy for the monist interpretation of international law, and his opposition to the natural-law doctrine. Afterwards, I provide an overview of the Pure Theory of Law elaborated by the author, in particular, the idea of the basic norm and I offer a schematic representation of Kelsen’s pyramid, based on his idea of chain of validity.

In the subchapter “Dialogue with Anne Peters”, I explain Peters theory of global constitutionalism. I start by showing the variety of strands and authors we may find in this diverse school of thought. Then, I focus my analysis on Peters’ perspective, for considering her one of the greatest authors of reference in the field. In order to do it, I present a brief biography of the author. Afterwards, I provide an overview of the characteristics that define global constitutionalism according to her, namely, the recognition of an international community, the inclusion of non-state actors in international fora, the existence of *erga omnes* norms, the decentralization of the state, the emergence of a global civil society and the recognition that individuals and local communities are the principal beneficiaries of international law.

In the subchapter “The concept of global constitutionalization”, I elaborate my own definition of this phenomenon. I consider the UN as a possible constitutionalizing force and the international human rights regime as a possible constitutionalizing element. Thereafter, I inspire myself on both Kelsen and Peters in order to clarify the concept of global constitutionalization that I base my research on, and which is defined by the juridification, universalization and centralization dimensions of international law.

In the chapter “Global constitutionalization in practice”, as the name suggests, I apply the theoretical foundation referred above to the UN institutional structure and its relationship with civil society, in view of evaluating in what way the process of global constitutionalization has been observed in the safeguarding of the international human rights regime, which is translated in the actions and initiatives undertaken by the organization in this domain.

In the subchapter “The United Nations in a nutshell”, I show that the functioning of the UN as a para-universal international organization matches the juridification dimension of my concept of global constitutionalization. I demonstrate this relationship by explaining the UN’s origins, its constitutive and foundational treaty, its purposes and objectives, as well as its complex organizational structure, composed of its various organs, specialized agencies, funds, programmes, among others. I further point out that, even though it was not initially foreseen, it is widely recognized, today, that the UN holds international legal personality.

In the subchapter “Safeguarding the international human rights regime”, I show that the governance of this regime, which has been essentially carried out within the UN framework, matches the universalization dimension of my concept of global constitutionalization. I demonstrate this relationship by explaining the current mainstreaming of the promotion and protection of human rights into the agenda of every UN organ and body. I further point out that the UN system enjoys a special legitimacy and authority in human rights related actions and initiatives, and I explain that there are mainly two types of human rights bodies in the organization, the Charter-based and the treaty-based bodies.

In the subchapter “The rise of new international actors”, I show that the participation of global civil society within UN organs and bodies matches the centralization dimension of my concept of global constitutionalization. I demonstrate this relationship by explaining that NGOs, especially those which have been attributed ECOSOC accreditation, have been playing an expanding role in treaty bodies and in HRC mechanisms by contributing to the creation and implementation of international human rights law. I further point out that NGOs actions and contributions do not leave the notion of state sovereignty unchallenged.

In the subchapter “Human rights strengths and weaknesses”, I show, not only that a gradual progress in the global performance of human rights has been observed throughout the years, but also that this positive change is mainly due to UN’s endeavours, instead of any other entity or phenomenon. I demonstrate this relationship by resorting to Kathryn Sinkkink “empirical comparison” methodological paradigm. I further point out to the institutional developments within the UN as a system, as well as to its evolving empirical relationship with civil society, during the previous decades.

Lastly, in the chapter “Final remarks and new perspectives”, I provide an answer to my research question by precisising the result of my analysis, that the UN has been contributing to global constitutionalization through the juridification, universalization and centralization of the international human rights regime. And I explain that my research may serve as a starting point from where further academic investigation may be developed.

2. Global constitutionalization in theory

2.1 Dialogue with Kelsen⁶

I. Kelsen's social and theoretical context⁷

Before we move on to analyse it, it matters to take into consideration the socio-theoretical context of Hans Kelsen's reflections. The emergence of his doctrine consisted of a true scientific revolution among those who study Law. He was able to overcome the previous paradigm of jusnaturalism by establishing the, at the time new, juspositivist order (Cerqueira and Passos, 2016, p. 163). The author was born in 1881, in Prague, in the former Austro-Hungarian Empire, and died in California, United States of America, in 1973. He studied in Vienna, Austria, where he obtained his PhD in Law. In 1919, he was awarded the chair of Constitutional and Administrative Law at the University of Vienna and participated in the drafting of the Austrian Constitution, which came into force in 1920. In 1925 he published his General Theory of the State, where he synthesized his global thought on Legal Science. Because Kelsen was Jewish, he was persecuted by the Nazi regime, the reason why he was forced to emigrate to the United States in 1940 (Mesquita and Vellasco, 2010, pp. 126-127). There, he carried out research in the field of Public International Law, at both Harvard and Berkeley Universities. He was subsequently appointed adviser to the United Nations Commission on War Crimes (Lourenço, 2017, p. 49). Throughout his life, Kelsen wrote about 400 different types of work pieces, among books and articles. Today, his *Pure Theory of Law*, published in 1934, is still considered the most important theory of legal knowledge (Mesquita and Vellasco, 2010, pp. 126-127).

⁶ Note: This chapter partially results from a reformulation of a working paper of my authorship, specifically elaborated for the course "Social Philosophy", supervised by Professor Dr Soraya Nour Skell, in the context of my Master's Degree. This working paper is the following: Inácio, 2021b

⁷ To go further in depth on Kelsen's contribution to the field of law and philosophy see: Bernstorff, 2010; Kammerhofer, 2012; Telman, 2016; Vinx, 2007

II. Creation and application of legal norms

In the chapter *The Creation (Sources) of International Law*, of his book *Principles of International Law*, Kelsen provides a detailed theoretical construction of the rationale and functioning of international law. He refers to "sources" of law to indicate both the methods of creating law and the methods of applying law, as well as to characterise the reason for the validity of the law. According to him, "every legal norm is a source of that other norm the creation of which it regulates" (Kelsen, 1952, pp. 303-304). Law regulates its own creation and it does so by establishing a relationship between the so-called "superior" and "inferior" norms. The norm which regulates the creation of another norm is superior to it, whereas the norm that emerged according to the provisions of another is inferior to it. This way, any superior legal norm is the source of the inferior legal norm. Particularly, it is the national constitution which regulates the creation of general norms inside the state's territory. The community constituted by general international law is also regulated by a "constitution", which might be characterized by a set of rules of international law regulating its own creation.

According to the author, "Creation and application of law are only relatively, not absolutely, opposed to each other" (Kelsen, 1952, p. 304). Traditional jurisprudence asserts that creation and application of law are two different and opposing functions. Typically, it attributes the function of the application of law to judicial organs, while the function of the creation of law is attributed to legislative organs. However, Kelsen tells us the creation of an inferior norm corresponds simultaneously to the application of a superior norm. An effective way to illustrate this relationship is by making use of the three main organs of the state. Judicial organs create individual norms, implied in their decisions, by applying general norms contained in statutes, which were created by the legislative organ, which, in turn, has created them by applying the national constitution. Thus, by regulating its own creation, law regulates its own application (Kelsen, 1952, pp. 303-304).

The two principal methods of creating national law are custom and legislation, while the two main ways of creating international law are custom and treaties, custom being the older and the original source of international law. International customary law is, as the name suggests, law created by custom, i.e., a long-established practice of states, an unconscious and unintentional conduct – whether it be through actions or abstentions – repeatedly performed for a certain period of time by actors which are convinced that they are fulfilling a duty, or that they exercise a right. By assuming the character of a norm, custom creates law. However, the new rule of law is the result, instead of the purpose of their conduct. Moreover, custom is a

decentralized law-making process, and those who create such law are those who become subject to it (Kelsen, 1952, pp. 304-308).

Some authors claim that custom requires the common consent of the states forming the international community, and which are bound by it, whether such consent is expressed or tacit. States would have to demonstrate their consent through their conduct, by participating in the creation of customary law. However, according to Kelsen, consent is not a requirement for states to obey customary law. This is because some states have never had the opportunity to participate in these law-creation actions, new-born states being a relevant example. Kelsen claims that a long-established practice of a great number of states, particularly the most powerful states, is sufficient to establish custom. International customary law does not need to be recognized by a state to be binding upon it. Such an assertion will, naturally, undermine the principle of state sovereignty (Kelsen, 1952, pp. 312-317).

A treaty, in turn, would be equivalent to a contract in national law. It is conscious and deliberate law-making, even though it is not created by special organs. The states that elaborate the treaty are its contracting parties. Therefore, just like in custom, also in treaties those who create it are the same as those who become subject to it. A treaty is an agreement, a manifestation of the will of two or more states, whereby their common consent regarding the imposition of obligations and conferral of rights upon the contracting parties relating to their mutual behaviour is laid down. To affirm that a treaty has binding force means that the contracting parties are legally obliged to behave in conformity with the norms established by it and, if they do not, they may be exposed to sanctions (Kelsen, 1952, pp. 317-319).

The reason for the validity of treaties lies in a rule of customary international law, known as the principle of *pacta sunt servanda*, which provides that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith” as defined by Art. 26 of the 1969 Vienna Convention⁸. Moreover, the content of the treaty must not conflict with norms of *jus cogens*, i.e., peremptory norms of general international law, defined by Art. 53 of the VCLT as norms “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. In other words, conventional international law is inferior to customary international law, which is superior to the former, seen through the lens of the hierarchical structure of the positive international legal order (Kelsen, 1952, pp. 322-323).

⁸ Vienna Convention on the Law of Treaties, 1969

Those who claim that international treaties concern only their contracting parties, instead of their subjects, also claim there is the need to transform a treaty into national law, so that private individuals may also be covered. However, according to Kelsen, every treaty imposing an obligation upon a state establishes an action to be directly applied by the competent organ of the state, since, logically, the latter can only manifest its existence through the actions performed by its organs, be it through the enactment of a legislative act or in another way. As a result, the author tells us that no transformation of international into national law is necessary for the former to be valid in relationship to its subjects, since, from the moment a particular treaty enters into force, it automatically exercises a binding legal effect covering both the ratifying nation states and their peoples (Kelsen, 1952, pp. 351-352).

It should be noted that Kelsen's theory competes with the natural-law doctrine, dominant during the seventeenth and eighteenth centuries, to which the author is opposed. According to it, there is a perfectly just law which can only be deduced from nature, and it is from this natural law that all positive law derives its validity. Therefore, custom, treaties, and all other human-made sources of law cannot produce true law, they only reproduce the law of nature. Kelsen, however, affirms that the natural law doctrine is based on nothing but the fallacious dogma that it is possible to infer from our factual wisdom a knowledge of what is right and wrong. The author advocates that such a theory is based on an illogical assumption since the notions of "right" and "wrong" will differ from person to person, according to their individual moral and political beliefs. Basically, it is impossible to deduce what "ought to be" simply from observing what "is" (Kelsen, 1952, pp. 310-311).

We have seen that the source of law of judicial decisions made by international courts are the treaties which implemented them, and that the reason for the validity of those treaties are the norms of customary international law, in particular the principle of *pacta sunt servanda* and the norms of *jus cogens*. Now, we should ask ourselves: where does customary international law derives its validity from? Kelsen provides a very interesting explanation to this question. He asserts that the reason for the validity of the law rests, above all, on a fundamental assumption, on a hypothesis called the "basic norm" (or "grundnorm"). The basic norm is not a norm of positive law, since it was not created by people. It simply consists on a presupposition made by jurists interpreting the legality of the conduct of states (Kelsen, 1952, p. 314). In order to better understand the concept of the basic norm, one should analyse other works developed by Kelsen, as well as the connections established between them.

III. The reason for the validity of the legal order

The concept of the basic norm is developed in *Pure Theory of Law*, a general theory of positive law which aims to study the true nature of law, to determine its structure and forms, by comparing the various legal phenomena, independently of its content (Kelsen, 1941, p. 44). This way, the *Pure Theory of Law* claims to be able to deduce those fundamental principles which characterise any legal order. The adjective "pure" was added to its name since this theory removes from its subject everything that cannot be considered law. Kelsen insists on the idea that the study of the law should follow a scientific methodology, the discipline known as jurisprudence, which should be clearly separated from other disciplines such as the philosophy of justice, or the social sciences, like sociology. The object of the science of law proposed by Kelsen is simply the legal norm. His definition of law is centred on the idea of the legal norm. Thus, jurisprudence moves away from facts or social events. It can, at most, offer a normative interpretation of the human conduct, i.e., whether it is licit or illicit (Santos, 2018, pp. 2657-2658).

“As it is the task of natural science to describe its object — reality — in one system of natural laws, so it is the task of jurisprudence to comprehend all human law in one system of norms (...) the pure theory of law, imperfect and inaccurate though it may be in detail, has gone a measurable distance toward its accomplishment.” (Kelsen, 1941, p. 70)

The *Pure Theory of Law* is based on the principle of imputation, while the social and natural sciences are based on the principle of causation. The latter describes a connection between two facts, based on an endless chain of cause-and-effect relations, describing reality. In turn, the former is related to the connection between two facts produced by the legal norm, that is, a normative connection, one that depends upon the human will. Unlike causality, a normative link may or may not be effectively realized in a given case. However, even if the consequence foreseen in the norm in relation to a given fact is not observed on-the-ground, the normative connection does not cease to exist. Moreover, Kelsen's methodological formalism is governed by the principles of coherence and non-contradiction. In other words, jurisprudence describes legal norms as if there were no contradiction between them, solving what are only apparent normative conflicts. Thus, a subsequent legal norm defeats the previous one with

which it contradicts, and a special norm defeats the general one. Furthermore, an inferior norm can only be valid if it is in agreement with the superior norm (Santos, 2018, pp. 2657-2658).

For all the above reasons, jurisprudence must express the propositions through which it describes its object of study in "ought", instead of "is" statements. Nonetheless, it must be noted that such propositions are not norms, for they establish neither duties nor rights, they result from the scientific study of the norms. The legal scientist, also known as the jurist, must present the norms in propositions that have a purely descriptive meaning. As a result of the fact that the *Pure Theory of Law* is more concerned with form than with content, it is incapable of providing an answer to the question of whether a given law is just or unjust, or, in other words, the question of what constitutes justice. Naturally, such questions cannot be answered in a scientific manner. Therefore, Kelsen uses the concept of "justice" only in the sense of the conscientious application of a legal framework to reality (Kelsen, 1941, pp. 45-51).

Kelsen believes the positive legal order is dynamic since it regulates its own creation. The unity of the legal order is achieved by a characteristically dynamic principle, peculiar to positive law, that a legal norm is valid simply because it has emerged in a way that was prescribed by another norm (Kelsen, 1941, pp. 61-63). According to the *Pure Theory of Law*, to affirm that a norm exists is equivalent to affirm that it is valid for those individuals whose conduct it regulates. Different, however, is to affirm that the individual's behaviour necessarily corresponds to the conduct that the norm prescribes. If it actually does, it is said the norm is efficacious. Validity and efficacy, in the end, are related to each other, because only if a norm belongs to a mostly efficacious legal order does jurisprudence regard it as valid (Kelsen, 1941, pp. 50-51).

Once it is conceded that national and international law are both positive law, both must be considered as valid from the perspective of jurisprudence, i.e., it must be recognized that they belong to the same system of norms, that they supplement each other. The author sees the state as a very specific union of individuals, and it is the rationale behind the statist order that regulates their mutual behaviour. It is a political community since it detains the coercive monopoly in order to attain its regulatory end. Importantly, the *Pure Theory of Law* asserts that the coercive order we call a state is a legal order. The element of coercion is seen as an essential characteristic of the law. The obedience of individuals in relationship to a certain norm is safeguarded by means of a sanction in case of disobedience. In other words, the sanction is prescribed to those instances where the law fails to achieve its purpose. The commission of a delict is one of those instances (Kelsen, 1941, pp. 57-67).

The idea of the basic norm provides the necessary explanation for the unity and normativity of legal systems, advocated in the *Pure Theory of Law*. Norms may only form a system when they are interrelated in a special way. In order to explain how this connection works, Kelsen formulates what Joseph Raz designates by “axioms” of his theoretical construction. The first axiom asserts that “two laws, one of which directly or indirectly authorizes the creation of the other, necessarily belong to the same legal system” (Raz, 1974, p. 95). The second axiom asserts that “all the laws of a legal system are authorized, directly or indirectly, by one law” (Raz, 1974, p. 95). The last and third axiom asserts that “norms cannot derive their existence from facts” (Raz, 1974, p. 96), i.e., that there is an insuperable divergence between the “is” and the “ought”.

It is important to note that, in a legal system, certain laws are authorized by the customary constitution, while others are authorized by the enacted constitution, i.e., the human-made constitution. There will be no positive law authorizing both constitutional laws. Instead, and as a logical necessity, every system possesses one nonpositive law, hierarchically superior to all the fundamental constitutional laws, independent of any law-creating organ of the state, in relationship to which both the customary and the enacted constitutions owe their validity. Fundamentally, all positive laws derive their validity from this nonpositive law, which is nothing else but the basic norm. The basic norm is an essential concept to explain the notion of the “chain of validity”, which, in turn, is necessary for the comprehension of the normativity of the law (Raz, 1974, pp. 95-97).

It is this “chain of validity” that allows us to visualise the *Pure Theory of Law* as a pyramid of hierarchical and overlapping norms. In fact, this schematic representation is usually known as the “Kelsen’s pyramid”. The structure of the legal system can start from the representation of the basic norm at the top of the hierarchy, moving through the set of rules that form international law, which are superimposed on domestic law, where the national constitution is found, this one guiding the creation of statutory law by the legislative organ, and which will outline the elaboration of judicial decisions by the courts. In other words, the system expands as the rules are developed, giving rise to new branches of the law with their own goals and methods. The creation of rules at a lower level naturally results from the application of rules at a higher level, giving rise to a legal order which is characterised for being dynamic (Lourenço, 2017, p. 67). Figure 1 is a model that I put forward for the representation of the just-described system.

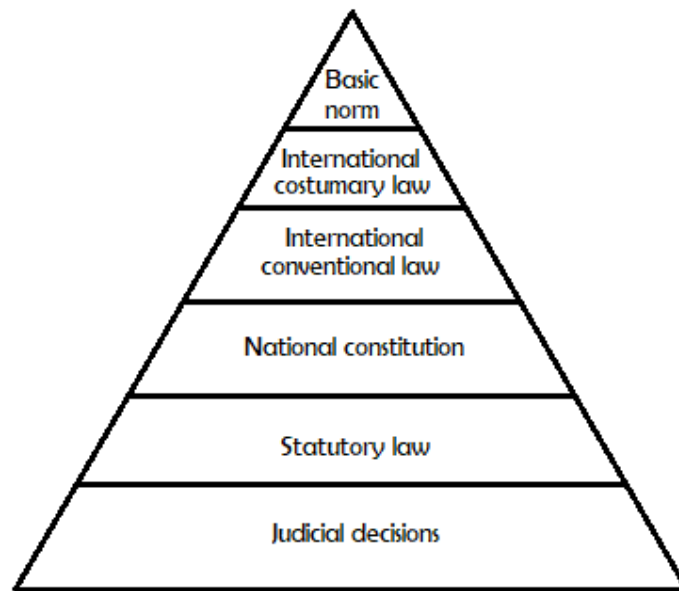


Fig. 1: Model of representation of the Kelsen's pyramid

No attitude of the population towards the law is assumed by the *Pure Theory of Law*, i.e., there is no need for the population to regard the law as morally just for it to be considered valid and efficient by jurisprudence. Joseph Raz affirms that an acceptable explanation for the idea of the basic norm developed by Kelsen is that it may be justified from the point of view of the “hypothetical legal man”, that is, the point of view of a not necessarily real individual who accepts from his own perspective every norm of a certain legal system. The hypothetical legal man adopts this system as his personal morality, as if every norm corresponds to what is right and good to him. What is more, jurisprudence is not committed to regard the law as just, instead, it regards the law in a special sense. As Raz explains, “It is professional and uncommitted adoption” (Raz, 1974, p. 109). The general population, on the other hand, might not adopt the basic norm as its elected moral ideal. More likely, people would appeal to God or to nature in order to find their own sort of “basic norm”. Nonetheless, the *Pure Theory of Law* is not concerned with whether the population accepts the true basic norm in a moral sense or not (Raz, 1974, pp. 108-109).

Interestingly, Kelsen refers to the basic norm as a natural law. In other words, the basic norm is an absolutely just and good norm. Consequently, in the end, positive law derives its validity from natural law. One would not expect so, after acknowledging that the author has conceived his theory as an alternative to the natural law doctrine. After all, there are several reasons that justify Kelsen's rejection of this school of thought. He believes it is loaded with

questionable metaphysics, that it is conceptually confusing, that it succeeds only upon a moral illusion, and that it does not follow a scientific methodology. Once again, Kelsen goes to great lengths to ensure that legal theory is value free, that the normativity of law is independent of its moral value. Yet, the basic norm is and will always be the ultimate reason for the validity of the law in the legal sense of validity, and it is a nonpositive legal norm (Raz, 1974, pp. 99-101).

Building on the concept of the basic norm, Kelsen also develops an interesting point of view on the concept of sovereignty. Even though he recognizes it as an essential feature of the modern nation state, he is known for arguing that sovereignty, as it was traditionally construed, should be abandoned. The classical sovereignty thesis advocates the idea that a state's constitutional order recognizes no higher authority than its own, that is, it needs no source of validity legally or politically limiting its behaviour. This way, a state's legal order would be considered the only universal legal order, to the point that it would not be able to recognize the sovereignty of any other state, since the acceptance of the existence of an equivalent authority elsewhere would invalidate its own validity source. Because Kelsen sees in this reasoning a logical fallacy, he argues that the sovereignty thesis hinders the formulation of international law as an autonomous and valid legal order, and that it forestalls the possibility of applying the principle of equal sovereignty to other states (Cohen, 2010a, pp. 265-267).

Consequently, Kelsen advocates in favour of the monist interpretation, considering national and international law to be integrated in the same system, even if claiming the international legal order to be superior to the national. According to the author, this is the only way which permits us to logically recognize the validity of the principle of equal sovereignty. Indeed, international law provides the reason for the validity of the various national legal orders, thus enabling states to coexist as equal legal subjects in its different spheres of validity and ensuring the protection of the principle of equal sovereignty. As a result, sovereignty as a concept should be revised in order to always be connected to the idea of the wider international community (Cohen, 2010a, pp. 265-267).

2.2 Dialogue with Anne Peters

I. The eclectic school of global constitutionalism

There are several theoretical schools developing over the field of international law. One of these schools is that of global constitutionalism (also known by the names of world constitutionalism and international constitutionalism). This is a theoretical body thoroughly positioned between law and politics. Constitutionalism is not the same as constitutionalization or constitution (Wiener et al., 2012, pp. 2-6). The last two are simply the terms used in order to explain the meaning of the first. The term constitutionalization, however, acts as an “all-encompassing umbrella” (Tzevelekos and Lixinsky, 2016, p. 350), to use the expression employed by Tzevelekos and Lixinsky, in the sense that it carries a wide range of definitions and perceptions with it. Notwithstanding, it is certain that constitutionalization refers to an emerging phenomenon, that is, a changing and dynamic process (Tzevelekos and Lixinsky, 2016, p. 345).

Global constitutionalism is a highly eclectic school of thought, meaning various strands are included in it. Nonetheless, Wiener et al. distinguish three main schools, namely the normative, functionalist and pluralist theories. All of these are characterized for claiming an evolution in international relations and law, which they say has evolved from a stage of globalization and into a stage of constitutionalization. The normative school affirms global constitutionalism to be a “legal or moral conceptual framework that guides the interpretation, progressive development or political reform of legal and political practices beyond the state to reflect a commitment to constitutional standards” (Wiener et al., 2012, p. 7). In turn, the functionalist school focuses on the analysis of processes of constitutionalization generated through bargaining and negotiations in the context of international organizations, particularly on new standardized procedures and regulatory agreements. Lastly, the pluralist school criticises universalist beliefs and claims constitutional change to be dependent on its context, while some of its defenders try to reconcile constitutionalism with traditional universalistic ideals. It should be noted, however, that the circumscribing lines defining each of these theories are frequently unclear (Wiener et al., 2012, pp. 6-9).

In other words, the theory of global constitutionalism can be seen through different lenses, that is, it can take different shapes and authors might disagree as to the ways in which it might be observed. One author of reference for those who study this theory is the Prussian philosopher Emmanuel Kant. Already in the 18th century, he conceived the idea of a

cosmopolitan order by extending the concept of constitution from the national to the global arena and by envisaging a kind of international law as a law focused on individuals, as opposed to states (Habermas, 2014, pp. 227-229). Habermas, however, criticises Kant's conceptualization by stating that there are other ways of achieving global constitutionalism other than through a "world republic", and which would adapt better to the present-day reality. One of them would be to invest in "the temporal pattern of incremental advances in the constitutionalization process, initiated and backed by governments rather than by citizens" (Habermas, 2014, p. 229).

Another theoretical strand sees in the UN Charter a foundational set of norms with the potential to become an official global constitution. The first authors presenting this perspective were Alfred Verdross and his disciple, Bruno Simma. According to them, the constitution of the universal state community would be found on a set of organizing principles agreed as valid by all states. Because the United Nations is an international organization which includes practically every state in the world, and because even those which are not parties to it still recognize its founding principles, the Charter of the United Nations can perfectly be seen as the global constitution (Kowalski, 2009, p. 34). Following the same logic, Mateus Kowalski claims the more universal an international organization becomes and the bigger its functionality scope gets, the more it is suited to be associated with a global constitution. Therefore, as of today, the UN is the best candidate for this position (Kowalski, 2009, p. 53).

Many other authors theorize over the shape and steps of global constitutionalism. They include Hermann Mosler, Christian Tomuschat, Bardo Fassbender and Gomes Canotilho⁹. However, looking into these diverse theoretical strands is not included in the scope of this dissertation. Instead, I will focus my analysis of the theory of global constitutionalism on the perspective undertaken by Anne Peters, because I identify myself with most of her work and for considering her to be one of the greatest authors of reference in the field. Even though Peter's theoretical focus differs significantly from that of Kelsen, in my view, both authors complement – instead of contradicting – each other in their research endeavours. In addition, it is interesting to bear in mind that, despite not necessarily basing her theory on Kelsen's, Peters has naturally studied his work in order to carry out her own.

⁹ To get a clearer idea of the theoretical perspective defended by each author, see: Kowalski, 2009, pp. 34-36.

II. Peters' social and theoretical context¹⁰

As it was the case above, it is relevant to consider in what socio-theoretical context Anne Peters' reflections took place before we start analysing them. In my eyes, Peters represents the modern vision of the global constitutionalism school of thought, one with which I strongly identify. The author was born in Berlin, in 1964, and pursued her academic studies at various universities, including those of Harvard and Basel. In 2000, she obtained her Habilitation-qualification at the Walther-Schücking-Institute of Public International Law, on the basis of her Habilitation-Thesis, entitled *Elements of a Theory of the Constitution of Europe* (Basel Institute on Governance, 2022). Today, she is professor and associate professor at several universities, including those of Heidelberg, Berlin, Basel, Michigan, Beijing, and Sciences Po. Some of her areas of expertise are international law, human rights law, the law of international organizations, European Union law, comparative constitutional law, and constitutional law and theory. Her list of publications on the subjects of global constitutionalism and of supranational global governance is particularly extensive. Peters exercises the role of Director at the Max Planck Institute for Comparative Public Law and International Law, of president of the German Society of International Law, of member of the Permanent Court of Arbitration, and was the president of the European Society of International Law (Max Planck Institute, 2021). Peters has been involved in various research articles and books dedicated to the study of global constitutionalism, where I have found solid ground to develop this investigation.

III. An original academic and political agenda

Peters describes the theory of global constitutionalism as “an academic and political agenda that identifies and advocates for the application of constitutionalist principles in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order” (Peters, 2009a, pp. 397-398). In other words, it envisages an idealistic endeavour to shape international law into an ethical and universal institution in the form of a constitution at the global level (Johnston, 2005, p. 15).

According to Peters, global constitutionalism is characterized by several aspects, including the recognition of an international community whose relationships are governed by law, instead of the use of force. One that shares a common identity and common aspirations,

¹⁰ To go further in depth on Peters' contribution to the school of thought of global constitutionalism see: Fassbender and Peters, 2012; Peters, 2016; Peters et al., 2009; Suami et al., 2018

that is inclusive and tends to accept the participation of non-state actors, as well as that of states. And one that agrees and settles the rules of interaction between its participating members. Peters tells us that a global constitutionalization involves the existence of *erga omnes* norms, that is, the fact that non-affected parts, simply because they are part of the international community, are able to raise claims and even apply countermeasures in relationship to particular obligations associated to certain rights or interests, in view of promoting and protecting common interests in a ‘horizontal’ manner, when hierarchical enforcement is not possible (Peters, 2009b, pp. 153-154).

Another characteristic of global constitutionalism in the eyes of Peters is the decentralization of the state, associated to the widening of the diversity of the international community members, in view of including “international organizations, individuals, non-governmental organizations (NGOs), transnational corporations (TNCs), hybrid actors such as public–private partnerships and quasi-governmental organizations (quangos), or even terrorist groups” (Peters, 2009b, p. 155). For this reason, the author affirms the gradual abolishment of the separation between “original and full” and “derivative and partial” international legal subjects. In other words, it no longer makes sense to establish a dichotomy between states and all other non-state actors in the international community, because international organizations, NGOs, TNCs and others are not only subjects, but also actively participate in the international arena, and, subsequently, in international law-making and -enforcement mechanisms. Moreover, Peters recognizes the emergence of a global civil society consisting, essentially, of NGOs and TNCs (Peters, 2009b, pp. 154-156).

Peters highlights that, in this school of thought, individuals, or humanity, are seen as the ultimate normative source of international law, as well as its actual beneficiaries, replacing the traditional role of sovereign states as the material source of international norms. Strictly speaking, the integration of individuals has become the basic principle determining the current international legal order, leading experts to identify more and more the so-called “humanization of international law” (Peters, 2009b, pp. 155-158). The idea that individual rights can only be enacted through states has been gradually put aside. By the same token, the recent expansion of international human rights, as well as the increase in its circle of addressees, can be interpreted as an expression of the constitutionalization of international law, since the author considers international human rights to be international constitutional rights, in relation to which states are not the only bound global actors (Peters, 2009b, p. 167).

Constitutionalists, such as Peters, affirm the emergence of a trend in the direction of individual empowerment in the context of global governance, what she describes as an

evolution towards transnational citizenship, revealing Kantian cosmopolitan features. In addition, the author asserts that the international legal system has been resembling more and more a universal constitutional democracy, in the sense that the global population is represented and participates more frequently in international institutions' processes of creation and application of international law, while sharing rights and obligations at the same time (Peters, 2009b, pp. 178-179).

Moreover, in her perspective, states have a diminishing capacity to be autonomously in charge of the distribution of prerogatives traditionally attributed to sovereignty, such as basic goods, social security, democracy and peace. Naturally, this raises some concerns within international organizations and other transnational institutions, which see themselves with the duty to improve their own capacity to perform such functions. As a result, and in view of preserving the legitimacy of the international system, legal certainty and democratic self-determination are required from such institutions. In Peter's words, "Global constitutionalism with its potential to compensate for the hollowing out of constitutional guarantees on the national level is apt to furnish at least a toolbox for remedies" (Peters, 2009b, p. 198).

Peters goes on by stating that, as international legal subjects, states are constituted by international law, and that sovereignty exists only within the limits of international constitutional law. Moreover, states' international constitutional legitimacy is dependent on their level of representativeness and well-functioning towards their own population. According to the author, even though the acknowledgement of the international legal personality of states is based on a decentralized recognition system, states have testified an evolution from the principle of effectiveness – i.e. that a certain political entity should satisfy criteria such as territory, people, government and diplomatic relations to be recognized as sovereign – which has been complemented by the principle of international legality and legitimacy – i.e. that a certain political entity should satisfy criteria such as the respect for human rights and democracy to be considered sovereign – in international recognition practice. Peters is particularly concerned with the accountability of states, not only in relation to their population, but also in relation to the larger international community. She advocates a shift from the focus on sovereign rights and in the direction of sovereign obligations (Peters, 2009b, pp. 179-186).

Furthermore, the author tells us that states are not the only actors participating in the creation of international law. More and more often, non-state actors make their voice be heard in international formal legal processes, even if it takes a different shape, when compared to states. Such participation has an impact on subsequent state behaviour due to the recognition of a new form of global governance, what Peters designates as "multi-level governance", as we

will see below. One cannot ignore, however, the clear formal distinction observed between states and non-state actors in international fora. Whereas the former have a vote in international law-making processes, the latter do not. In other words, usually, states are active, while non-states are passive participants. Nonetheless, there is still a certain blurriness between these two types of international actors in these mechanisms (Peters, 2009b, pp. 198-199).

Nevertheless, Peters advocates the vision that states exercise the most relevant functions of international law-enforcement and should continue to do so. Because states generally own the essential resources and the monopoly on the use of force, it is logical to see them as the centre of political power and authority. In fact, Peters admits that, today, there is no political institution with nearly the same enforcement capacity as the state, thus, making states indispensable in a global constitutionalized order (Peters, 2009b, pp. 199-201). Even though states are not ends in themselves, they play an instrumental role in the protection of individual rights and needs. Interestingly, the author notes that “Overall, the specific power and authority of a state is the reason for its ambivalent role as the most important protector, but also as the most important potential threat to human security” (Peters, 2009b, p. 200). For this reason, there is a certain ambiguity in the role of a state, which cannot be ignored.

The concept of multi-level governance is also related to the notion of “sector constitutionalization” developed by the author, which she describes as a nascent development of constitutional elements within the primary and secondary law of a given organization (Peters, 2009b, pp. 202-203). The basic idea is that, even though different states and international organizations have their own sectoral constitution, they are all nested in a bigger global constitutional order, because the several processes of constitutionalization on various levels are not mutually exclusive. In her own words, “there is no international constitution in a formal sense, codified in one constitutional document, but rather a body of global constitutional law, dispersed in numerous instruments” (Peters, 2009b, p. 203).

According to Peters, one of the main features of sector constitutionalization in international organizations is their accountability. Specifically, she identifies two types of accountability, the legal type and the political type. The former is associated to judicial review, whereas the latter is linked to the democratic process. Whatever the shape it takes, it is ultimately directed towards individuals, breaking with the traditional view that citizens are exclusively mediated by their respective states in international organizations’ fora. Related to this idea, is the concept of autonomy. The author affirms that the “level of sovereignty” of an international organization is often analysed with recourse to its level of autonomy. Nonetheless, she also tells us that autonomy is not a required characteristic of an international organization’s

sector constitutionalization. Instead, autonomy should prompt the pursuit for accountability and, therefore, for constitutionalization, because the greater its level of autonomy is, the bigger its need to be constitutionalized becomes (Peters, 2009b, pp. 210-212).

In view of improving the level of accountability of an international organization towards the population it represents, Peters claims it is essential to guarantee that it is subject to the rule of law, that it is bound to respect human rights, and that individuals enjoy some level of participation in law-making procedures, since her idea of global constitutionalization is connected to the idea of a democratization of the international system. Global constitutionalism principal goal is to establish boundaries in political power. Consequently, it requires international organizations powers to be contained within legal principles, their secondary law to be in conformity with their primary law, and their internal law to form a hierarchy. Furthermore, and in order to increase the accountability of an international organization, its activity must be subject to at least a functionally similar procedure to that of a judicial review, whether it be provided by international or domestic courts (Peters, 2009b, pp. 212-213).

Peters also recognizes the progressively more significant role played by non-governmental organizations in global governance. As the name suggests, NGOs are independent from governmental influence and are dispossessed of any governmental power. Nonetheless, these organizations represent the global civil society in its various forms, be it at local, national, regional or international levels. Additionally, the author tells us the most important tasks performed by NGOs are their cooperation in the international processes of law-making and -enforcement (Peters, 2009b, pp. 219-220). She also affirms that their participation has been increasingly interpreted as a parameter of good governance and constitutional legitimacy of international organizations (Peters, 2009b, pp. 239-240).

Taking into account the fact that these civil society organizations have been transitioning from a mere passive observer to an increasingly active participant in this kind of fora, Peters suggests a change in the formal designation of their accreditation status, from “observer” to “participatory”, with the aim of properly reflecting the recent paradigm shift. She also acknowledges the emergence of a “general legal principle of openness”, related to the more and more regular practice of admission of NGOs on international institutions’ bodies through the accreditation procedure, based on the belief that these organizations provide useful input. Even though we may still observe *ad hoc* participation in some processes, global governance fora are not free to completely block NGOs access on an arbitrary basis, instead, they feel the responsibility to, at least, provide an explanation for their non-participation, if that would be the case (Peters, 2009b, pp. 219-222). Other ways in which NGOs prove to be an added value

to global governance are their involvement in treaty monitoring and verification processes, as well as in judicial or quasi-judicial proceedings (Peters, 2009b, pp. 227-228).

The requirement of accreditation imposed on NGOs, however, may generate some controversy. This is because states are usually the main decision-makers of civil society participation, thus risking compromising NGOs' independence. Indeed, Peters affirms the current accreditation processes are often jeopardized by the issue of needless politicization in international fora. Because, not so rarely, the codified criteria for NGO accreditation are neglected in view of imposing certain national interests, Peters advocates for the removal of this function from the hands of states and towards the desks of international institutions staff (Peters, 2009b, pp. 222-223). The author defends, however, the necessity of reconciliation between the "conflicting objectives of inclusiveness and transparency on the one hand with the preservation of the authority and ultimate responsibility of states" on the other (Peters, 2009b, p. 227). Thus, she agrees with giving NGOs the opportunity to be involved in international law-making and -enforcement processes, while reserving the right to vote only to member states, which possess the ultimate authority over international law and order, even if contained by global constitutionalization mechanisms (Peters, 2009b, pp. 227-239).

The author recognizes yet another type of non-state actors influencing global governance activity. They are business actors, particularly in the form of transnational corporations or multinational enterprises. She tells us that nowadays TNCs frequently carry out tasks traditionally viewed as constituting public functions, mirroring the privatization trend undergone both by domestic and global governance mechanisms in the last decades. Based on the belief that business values and interests often converge with those of international institutions, and since business activity has an impact on all individuals and groups involved in the process, global fora have been progressively recognizing TNCs as political actors and, consequently, have been looking forward to including them in their activities (Peters, 2009b, pp. 243-246).

Related to this issue, Peters notes that, in spite of the persistence of ideological divisions concerning national economic models – particularly between some states advocating market economy and others defending planned economy, as well as the differing interests between developed and developing states, marking the north-south divide – para-universal international organizations such as the World Trade Organization and the World Bank, have been upholding national reforms pointing towards market economy and liberalization, thus promoting the establishment of an international regime based on free trade (Peters, 2009b, pp. 240-242).

In addition, from her perspective, international law should echo a three-sector model constituted by state, civil society and business actors. Ideally, there should be an investment in “trilateral public-private-private partnerships”, composed of each of these three sectors, in view of overcoming each other’s weaknesses, and in order to acquire mutual legitimacy (Peters, 2009b, pp. 258-259). Still, one cannot close their eyes to the fact that NGOs and TNCs will always be very different. Whereas the latter is essentially profit-driven, the former is not. For this reason, Peters claims that accreditation requirements should remain more rigorous for TNCs than for NGOs, in view of preventing corruption (Peters, 2009b, pp. 250-251).

On a final note, Peters affirms that her theory of global constitutionalism does not necessarily entail the creation of a formal world constitution, much less the establishment of a world state. Further, national and international constitutionalism are two distinct theoretical strands, such that it is impossible to automatically transform a national constitution into an international one. Global constitutionalism’s main goal, once again, is not necessarily to build a centralized government. Instead, it aims, above all, to constitutionalize global multi-level governance. Moreover, such an agenda requires the international community to pay more attention to the needs and interests of developing countries and their respective populations (Peters, 2009c, p. 346).

2.3 The concept of global constitutionalization

Despite mainly focusing on Anne Peters perspective, I have shown there is wide heterogeneity in the global constitutionalism school of thought. Indeed, the various authors theorizing over it have reached little consensus regarding its true meaning, what shape it takes or how to materialize it. This creates several obstacles hindering the establishment of a coherent and cohesive theory of international law. Thus, it is imperative to find clarity among those who sympathize with this theoretical strand regarding the constitutionalizing elements characterizing the international legal order. This way, in order to provide accuracy to my research subject, I will build my own concept of global constitutionalization. It is relevant to remember, nevertheless, that global constitutionalization corresponds to the process which may eventually lead to attaining the final stage of the recognition of the existence of a global constitution. It does not correspond, therefore, to the final stage of the global constitutionalist agenda.

Some authors remain sceptical in relationship to the possibility or even the desirability of a global constitutionalism agenda. Nonetheless, my research is going to be based on the normative assumption that global constitutionalism is a morally desirable project because it aims to bring nations and its peoples together, thus contributing to the formation of commonly accepted principles which assure certainty, trust and accountability in the international system. I agree with Peters when she affirms that global constitutionalism allows for the harmonization of both domestic and global interests, this way enhancing the aspirations of the international community, in general (Peters, 2009a, pp. 402-407). However, it cannot be denied that pursuing such a vision would completely alter the current, rather sovereigntist, paradigm of international affairs (Tzevelekos and Lixinsky, 2016, p. 361).

My research focusses on the examination of the development of global constitutionalization through an international organization, namely, through the UN. In order to narrow down my research, I particularly consider the international human rights regime its principal constitutionalizing element, inasmuch as I believe that there is a fairly universal interest in promoting and protecting human rights, in general. I analyse the work carried out by the UN in this specific field by considering the organization the main constitutionalizing force, and I study the way in which it has contributed to the emerging phenomenon of global constitutionalization.

It is important to note that international human rights law form part of the fundamental norms structuring the current international legal order. Moreover, one of the most relevant

features of global constitutionalism, present in all of the above-mentioned theoretical branches, is its strong commitment to human rights, democracy and the rule of law, the so-called “trinitarian mantra” or “legitimatory trinity”. Indeed, every modern constitutionalist setting makes reference to its adherence to each of these three concepts, in light of which all political and legal authority are legitimized. Interestingly, it was the American Revolution (1765-1791) and the French Revolution (1789-1799) which gave birth to this ideology, one that came alive again after World War II, reaching global proportions in the last thirty years (Kumm et al., 2014, pp. 3-4).

We should not turn a blind eye to the fact that the UN is not a formal source of law in itself. Rather, it is a forum or an arena from where international law initiatives arise. Its constitutive organs are responsible for drafting the law and then proposing it to states, who subsequently decide whether to commit to the new legal instruments or not. In other words, there is no “United Nations law”, instead, there is international human rights law emanated from the United Nations (White, 2002, p. 6). It is in this quality that I intend to question how the UN has been shaping the compliance with and respect for human rights as it is experienced by individuals and local communities, all around the world.

My concept of global constitutionalization is defined based on three dimensions: the juridification, the universalization and the centralization of international law. This definition draws inspiration from the theories of both Kelsen and Peters, the two authors analysed above. As explained before, I consider that both authors complement each other, particularly because a general theory of international law always provides a solid background to interpret a theory of global constitutionalism, which is, in itself, a theoretical branch of international law. By considering the international human rights regime a constitutionalizing element, I will evaluate the way the UN has been contributing to the process of global constitutionalization by looking at the juridification, universalization and centralization dimensions of the activities it undertakes in the human rights field, and which turn it into the main global constitutionalizing force. It must be noted that these three different dimensions correspond to processes, similarly to the concept that, together, they define.

We have seen that Kelsen affirms there are various sources of international law validating its existence, and that they correspond not only to the methods of creating that law, but also to the methods of applying it. Essentially, a legal norm is the source of another if it regulates its creation, such that a superior legal norm is the source of validity of an inferior legal norm. International law is generally created either through custom or treaties. However, treaties’ validity is based on custom, particularly on the principle of *pacta sunt servanda* and

on norms of *jus cogens*. This way, and in accordance with the hierarchical structure of the positive international legal order advocated by the author, customary international law is superior to conventional international law, such that customary law legitimates the creation of conventional law. Therefore, the international community is also regulated by some form of constitution which corresponds to a set of international legal norms regulating its own creation (Kelsen, 1952, pp. 303-323).

In turn, Peters claims we are observing more and more a form of multi-level governance, that is, the fact that there are various processes of constitutionalization interrelated to each other and happening at the same time, both within state and non-state actors, at the domestic and international levels. Even though there is not exactly one formally codified international constitution, there is a framework of global constitutional law that is widespread in various legal instruments, which are not mutually exclusive. The author also asserts that the notion of multi-level governance is associated to the idea of sector constitutionalization, which corresponds to the emergence of constitutional features within the primary and secondary law of an international organization. In turn, as the level of autonomy of that organization increases, the greater becomes the desirability of establishing systems for its accountability and, therefore, the more pressing is the need to ensure its sector constitutionalization (Peters, 2009b, p. 202-212).

As a result, the juridification dimension is related to the notion of a positive international legal order characterized for having a hierarchical structure, consisting of superior and inferior legal norms, the former being the source of validity of the latter and therefore justifying the way creation and application of international law function. This mechanism is also associated with the existence of a multi-level governance that includes both domestic and international actors in the same global constitutionalization framework. Consequently, indicators of the juridification dimension include the creation of international treaties, by way of application of international custom, through a dialogue between domestic and international actors.

We have also seen that Kelsen develops his concept of the basic norm in his Pure Theory of Law, whereby he advocates that, ultimately, customary international law derives its validity from a fundamental assumption, which he calls the basic norm. Being a presupposition made by jurists only, and thus not having its origins in the people, it is also a nonpositive legal norm (Kelsen, 1952, p. 314). The basic norm could be explained from the point of view of a hypothetical legal man, who accepts from his own perspective every norm of a certain legal system, since every norm corresponds to what is right and good to him (Raz, 1974, pp. 108-109). The author considers it to be a natural law, that is, an absolutely just and good norm, such

that positive law ends up deriving its validity from natural law (Raz, 1974, pp. 99-101). He tells us that each system must have one nonpositive law, hierarchically superior to any other normative source, and legitimating the validity of positive law. Essentially, the basic norm is the first step of the positive chain of validity, justifying the unity and normativity of any legal system (Raz, 1974, pp. 95-97). On another note, Kelsen also asserts there is no need to transform international into national law for the former to be valid in relationship to its subjects, i.e., the people. This is because it would make no sense if international law would apply only to state-actors, since these exist only through the performance of their organs' functions and are responsible to serve their own population (Kelsen, 1952, pp. 351-352).

In turn, Peters claims that a constitutionalized international legal order is composed by an international community, characterized for being inclusive, for sharing a common identity and common aspirations, and for the fact that its relationships are governed by commonly agreed norms. For this reason, *erga omnes* norms are recognized among the international community. In other words, non-affected parts are able to raise claims and even apply countermeasures against parties who are considered to have violated certain norms, in order to protect common interests in a 'horizontal' manner, while hierarchical enforcement is not possible (Peters, 2009b, pp. 153-154). In addition, the author highlights that the actual beneficiaries of international law are individuals, or humanity, instead of sovereign states. She asserts that international human rights law has undergone a remarkable growth, especially in its circle of addressees, which now include, not only states, but also, and increasingly, individuals and local communities (Peters, 2009b, p. 167). Indeed, the international legal order has undergone a certain humanization, such that the idea that individual rights can only be enacted through states has slowly been abandoned (Peters, 2009b, pp. 155-158).

As a result, the universalization dimension is related to the notion of a basic norm, of a non-positive legal norm, a morally just, right and good norm based on natural law, from which customary international law derives its validity. The basic norm legitimizes the existence of different types of constitutional frameworks, essentially giving rise to the unity and normativity of a certain legal system. This dimension also considers the process of elaboration of new sources of international law to dispense their own transformation into national law in order to become valid in relation to the general population, thus being in accordance with the notion of the humanization of international law. Moreover, an international community which recognizes *erga omnes* norms in view of protecting its common interests is envisaged in this definition, for the existence of *erga omnes* norms makes more sense in light of the acknowledgement of a basic norm, establishing a chain of validity among what is considered to be an international

community governed by multiple and interrelated constitutionalizing processes. Consequently, indicators of the universalization dimension include the rising importance given to the participation of individuals in the enforcement of their own human rights, as well as the establishment of mechanisms which allow non-affected parties to point out human rights abuses committed by other international actors, such that universalization is observed not only among states but also inside their borders.

Lastly, we have seen that, while Kelsen asserts that sovereignty is a fundamental characteristic of the modern nation state, he also advocates that, in its traditional formulation, the concept should be abandoned. The classical sovereignty thesis is based on a logical fallacy since, if a state's constitutional order considers itself to be the highest recognizable authority, it would be impossible for it to recognize the sovereignty of another state. In other words, by accepting the existence of similar authority in another political entity, the state's own validity source would become invalid. This way, international law could never be interpreted as an autonomous and valid legal order, and the principle of equal sovereignty would not make any sense. Therefore, Kelsen opts for supporting the monist interpretation, which sees national and international law as two parts of the same integrated normative system, despite acknowledging that the international legal order is superior to the national. Moreover, he claims that, from this perspective, we can infer that international law provides the reason for the validity of simultaneous national legal orders and enables them to coexist as equal legal subjects. The author sees this as the only way to ensure logic and coherence in the principle of equal sovereignty, which must always be connected to the idea of a wider international community (Cohen, 2010a, pp. 265-267).

In turn, Peters claims that one of the main features of global constitutionalism is the decentralization of the state, accompanied by the enlargement of the international community. New international non-state actors now include NGOs and TNCs, and they contribute to the processes of international law-making and -enforcement (Peters, 2009b, pp. 154-156). Further, NGOs and TNCs engagement in these matters constitutes the reason behind the gradual emergence of a global civil society, partly responsible for shaping the current paradigm of multi-level governance. The author asserts, however, that a significant difference between state and non-state actors is that, while the former are usually active, the latter are passive participants in international fora (Peters, 2009b, pp. 198-199). In fact, the author affirms it is usually states that own the essential resources, as well as the monopoly on the use of force and, therefore, they are still at the centre of political power and authority in international relations. However, the international community has been rendering states gradually more accountable regarding

the fulfilment of human rights, thus shifting from the focus on sovereign rights and towards sovereign obligations (Peters, 2009b, pp. 179-186). Furthermore, states are becoming less autonomous regarding the performance of certain prerogatives traditionally associated with sovereignty. Thus, other domestic and international institutions increasingly see themselves as responsible for improving their own capacity in the performance of similar functions (Peters, 2009b, pp. 198-201).

As a result, the centralization dimension takes into account a much-needed reformulation of the idea of sovereignty, one that, while recognizing the political power and authority of states, also acknowledges the emergence of new and varied actors in the international community, participating in the works of international fora. It considers that there is a growing expectation for national governments to respect human rights duties, this way becoming gradually more accountable to the international community and to their own population. In addition, this dimension recognizes the increasingly relevant functions performed by NGOs in global affairs, where they cooperate in the international processes of law-making and -enforcement. This way, the loss of autonomy on the part of states and the growing shift of responsibility towards international organizations and the global civil society, all contribute to the idea that the centralization of the international human rights regime corresponds to the decentralization of the nation state. Consequently, indicators of the centralization dimension include the establishment of specific global mechanisms administered by an international organization, acting in collaboration with NGOs, in view of supporting a uniformized implementation of international law throughout the world.

3. Global constitutionalization in practice

3.1 The United Nations in a nutshell

In the previous chapter, I analysed the theoretical part of this research, such that now is the moment to examine the more practical side of it. Thus, in this chapter, I apply my definition of global constitutionalization, built on the basis of the theoretical contributions of Kelsen and Peters, to the human rights related activities carried out within the UN framework.

The suffering caused by World War I motivated the adoption of the Treaty of Versailles, in 1919¹¹, through which a special international organization was born. It is known by the name of League of Nations. Even though it was unable to stop the scourge of another World War, thirty years after, its initial goal, connected to the need to seek the prevention and peaceful resolution of conflicts by way of international cooperation, has been kept very much alive (United Nations, 2017, p. 3). As its successor, the UN was thought and planned before World War II was even over. In fact, great power conversations on post-war para-universal international organization had their start already in 1941. The so-called “Big Three”, i.e., the leaders of the most powerful nations at the time – United States, Great Britain, and Soviet Union – were essential in guiding and giving legs to this project. One common ground shared between them was the fact that the experience acquired throughout the existence of the League of Nations made them realize that properly planning in advance what the future of the international community would become after the cessation of hostilities was essential in order to ensure long-term peaceful relations among states (Morris, 2018, pp. 1-8).

The Charter of the United Nations (hereinafter “the Charter”), its constitutive instrument, entered into force on the 24th of October 1945, officially giving birth to the UN, and established its seat in New York. The Charter declares the organization’s purpose, defines the rights and obligations of member states, and enacts its organizational structure. It affirms that the UN’s main goals are to maintain international peace and security, to tackle international economic, social, cultural and humanitarian problems, to promote and protect human rights and fundamental freedoms in all parts of the world, and to serve as a forum for the harmonization of its members’ actions in view of reaching these common ends (Art. 1 of the Charter). The Charter also asserts that, while the UN has six principal organs – consisting in the General

¹¹ Treaty of Peace between the Allied and Associated Powers and Germany, 1919

Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council (which suspended its activities in 1994), the International Court of Justice and the Secretariat – the organization is composed of a much larger family, including several specialized agencies, funds, programmes, and other entities (United Nations, 2017, pp. 3-5). While each of these organizations is connected to the main UN organs in different ways, all of them are interlinked between and among one another, such that together they create a great and complex system (United Nations, 2017, pp. 30-31).

The United Nations General Assembly (UNGA) – Arts. 9 to 22 of the Charter – is the competent organ regarding deliberation, policymaking and representation inside the organization. According to the Charter, its functions and powers include discussing any issue fitting within its scope or affecting the powers and functions of any UN organ, as well as making recommendations on such matters. It is the representatives of all its member states that compose the UNGA, each one holding the right to one vote in its processes. The resolutions and decisions adopted by this UN organ, therefore represent the will of the majority of its members, and its mandate greatly influences the work of the wider organization. It should be noted that, even though there is no legally binding force in the law enacted by the UNGA, its resolutions and decisions are a reflection of the global public opinion and, as such, essentially diffuse the moral authority of the international community (United Nations, 2017, pp. 5-7).

The UNGA enjoys a broad mandate, such that its competence to tackle human rights matters is specifically foreseen in the Charter. Pursuant to its Arts. 10 and 13(1), it is within the scope of this organ to discuss, initiate studies and make recommendations regarding human rights and fundamental freedoms with the aim of promoting and protecting their full realization. Both its Social, Humanitarian and Cultural Committee and its Legal Committee, where every member state has the right to be represented, are particularly engaged on the drafting of human rights related international instruments. About a fifth of UNGA resolutions adopted every year are human rights related, the most widely disseminated so far being the UDHR. In fact, this declaration is still considered the most authoritative statement of international human rights in the world, up to this day (Park, 2018, p. 64). UNGA resolutions bring attention to pressing issues and may prove to have a significant influence on international politics. Indeed, such resolutions may provide a solid ground to further develop a future legally binding treaty, or may even be considered customary international law, one day (Mertus, 2009c, pp. 39-40).

The United Nations Security Council (UNSC) – Arts. 23 to 32 of the Charter – is the main organ in charge of maintaining international peace and security. It is composed of fifteen members, the five permanent members – the People's Republic of China, the French Republic,

the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America – and other ten members elected by the UNGA to exercise two-year mandates. While every member enjoys the right to one vote, the five permanent members may also exercise their veto privilege. According to the Charter, the UNSC's main functions include investigating any dispute or situation which may result in international tension, and thereafter recommend methods of adjustment or terms of settlement to the parties involved. It also has the power to enforce strict measures, such as economic sanctions, arms embargoes and severance of diplomatic relations, in view of preventing either the emergence or the escalation of a conflict (United Nations, 2017, pp. 7-9).

Since the last decade of the 20th century, the international community has progressively realized that there is a link between the guarantee of respect for human rights and the maintenance of a peaceful international conjuncture. For this reason, the UNSC has been facing increasing pressure to make the best use of its authority in order to respond to serious human rights violations, in particular, in countries that have undergone violent conflict, through its peacekeeping and peacebuilding actions, for example (Mertus, 2009e, pp. 98-100). It should be noted that Art. 2 (7) of the Charter has been frequently used by states in view of dissuading the UN from evaluating the human rights situation inside their borders, often resorting to the principle of non-interference within domestic affairs. However, the same article clearly establishes that the principle of non-interference must not be used in view of creating obstacles to the actions sanctioned by the UNSC (Mertus, 2009c, pp. 38-39).

The United Nations Economic and Social Council (ECOSOC) – Arts. 61 to 72 of the Charter – is the principal organ with competence to coordinate the economic, social and environmental work of the UN's organs and bodies. According to the Charter, ECOSOC's functions include helping to achieve a balanced integration of those three dimensions of sustainable development. It plays an essential role in identifying emerging challenges, in promoting innovation, as well as in coordinating the complex UN system. It also serves as a meeting point for partnerships and participation of civil society in the organization, therefore being able to establish an important multidisciplinary network (United Nations, 2017, pp. 12-13). Moreover, ECOSOC is authorized by Art. 62 of the Charter to carry out studies and reports, to make recommendations, as well as to establish commissions, in view of ensuring respect for and compliance with the international human rights regime.

The International Court of Justice (ICJ), also known as the "World Court" – Arts. 92 to 96 of the Charter – is the main judicial organ of the organization and it seats in The Hague. Its

functions and constitution are established in its Statute¹², which is annexed and forms an integral part of the Charter. All UN member states have the right to submit disputes to this organ and only states can participate in contentious cases before it. Today, the ICJ is the only court of a universal character with general jurisdiction, such that it covers every issue set forth in international law. According to Art. 38 of its Statute, when deciding on its cases, the ICJ shall apply “international conventions”, “international custom”, “general principles of law”, as well as “judicial decisions and the teachings of the most highly qualified publicists of the various nations”. The two main functions of the ICJ are to settle legal disputes submitted to it by states, its judgments being binding upon the parties, as well as to give advisory opinions on legal questions posed by the competent UN organs and agencies (United Nations, 2017, p. 16). In accordance with Art. 34 (1) of its Statute, it has competence to interpret international human rights instruments to which the disputing states are parties, as well as competence to analyse state conduct regarding these issues (Mertus, 2009c, pp. 46-48).

The United Nations Secretariat – Arts. 97 to 101 of the Charter – is composed of staff from all member states, is distributed through several duty stations located around the globe and its principal headquarters are in New York. It provides wide-ranging administrative support and services to the programs and policies developed by the main organs of the UN, contributing to their feasibility and functioning. This organ also bears responsibilities regarding transparency and information sharing with the rest of the world, including through the interpretation and translation of speeches and documents, and it frequently organizes international conferences on issues of universal relevance (United Nations, 2017, pp. 17-18). The head of the Secretariat is the Secretary-General of the United Nations, who is the chief administrative officer of the organization. Based on the recommendations of the UNSC, the Secretary-General is appointed by the UNGA. She/he is a symbol of the values and moral authority of the UN and represents the interests of all nations. Premised on the principles of independence and impartiality, she/he performs duties that are entrusted to her/him by other UN organs and bodies, with substantial freedom for action. The Secretary-General is supposed to make use of her/his good offices with the aim of ensuring international peace and security. Since 2017, this high-level post is occupied by former Prime-Minister of Portugal and former United Nations High Commissioner for Refugees, Mr António Guterres (United Nations, 2017, pp. 17-19).

Weiss and Daws make an interesting division of this para-universal international organization in “three United Nations”. The “first UN” corresponds to the member states,

¹² Statute of the International Court of Justice, 1945

whose national interests still play a prominent role in the organizational decision-making processes. In turn, the “second UN” consists of the whole secretarial apparatus, which is essential to the smooth running of the organization’s operations. Lastly, the “third UN” or the “complementary UN” is composed of independent experts and consultants who collaborate with other non-state actors, such as NGOs, the private sector and the media, and who usefully contribute to forum debates and field operations by carrying out research and analysis activities (Weiss and Daws, 2018, p. 16). Indeed, international deliberations have become characterized for being increasingly inclusive and diversified, for reflecting more and more pluralistic interests advocated by actors other than member states (Weiss and Daws, 2018, p. 5).

Interestingly, it was not foreseen by the creators of the Charter that the UN would hold an international legal personality. However, today it is widely recognized that the organization has transformed the typical sources of international law, as established in Art. 38 of the ICJ Statute, through the development of new substance, new structures, and new targets of international law, such as the creation of a wide range of soft or informal sources of law, able to impact the interpretation of treaties and even to identify new rules of custom. The ICJ’s advisory opinion in the *Reparation for Injuries* case, of 1949¹³, was the first instrument officially affirming that the UN does enjoy an international legal personality, justifying such an assertion by explaining that, while such a status is not equivalent to that of states, it is essential for the organization to pursue its main goals (Alvarez, 2018, pp. 2-4). Indeed, one of the most important functions performed by the UN is foreseen under Art. 13 of the Charter, which establishes that the organization must contribute towards the development of international law, as well as towards its progressive codification.

White tells us that, because the UN system has the capacity of generating sources of law and to act as an important arena for the deliberation on and enforcement of international legal instruments, we are able to talk about a “United Nations legal order”. For this reason, the author makes frequent use of the expression “UN law” which, according to him, stands for the collection of norms with origin in the organization’s system. Further, he asserts that most international law sources have originated within the UN family organs and bodies, from where an increasing number of more and more complex norms emanate. These norms are generally respected by member states because the UN is understood by the international community to be constituted in a legitimate and authoritative way (White, 2002, pp. 18-19).

¹³ *Reparation for injuries suffered in the service of the United Nations*, 1949, p. 174

Bearing in mind all of the above, one may logically infer that the UN, as an international organization, fits perfectly within the notion of a positive international legal order characterized for having a hierarchical structure, just as Kelsen advocates. In fact, the UN has been shaped to serve as a forum for the elaboration and development of conventional law on the basis of customary law and with the agreement of member states. We see, therefore, a practical translation of the principle that the application of a superior norm – custom – is the source of validity for the creation of an inferior norm – a treaty, for instance.

Further, some of the UN organs and bodies, namely, the UNGA, its Social, Humanitarian and Cultural Committee, and its Legal Committee, count with the representation and participation of practically every state in the world in their workings. This high participatory rate is in accordance with the notion of multi-level governance described by Anne Peters, since it is fundamental for the effective functioning of the international human rights regime, which includes its member states and the UN as a para-universal international organization. In other words, this mutually beneficial interaction between and among the UN and its member states presents itself as a framework of differentiated and simultaneous constitutionalizing and constitutionalized mechanisms at both the domestic and the international levels, which become interrelated and exercise influence over one another.

We have seen that, even though the UN was not initially meant to have an international legal personality, the organization does, in fact, enjoy legal powers and the ability to effectively exercise them. Therefore, the UN has been able to change the traditional sources of international human rights law through the creation of new informal legal sources – such as declarations, resolutions and decisions – through the interpretation of international conventions, as well as through the work it carries out on the identification of customary law and on its progressive codification. What is more, today we can undoubtedly affirm that the majority of international legal norms have originated within the UN system, such that a very significant part of international human rights instruments has emanated from within this framework, which the international community considers to have been legitimately created and implemented.

We also know that one of the UN's principal objectives, as established in the Charter, is the promotion and protection of human rights and fundamental freedoms everywhere in the world. Therefore, every time the UNGA discusses, initiates studies or makes recommendations related to human rights, by taking into account the perspectives of each and every participating member state; every time the UNSC investigates a dispute, recommends terms of settlement, or enforces strict measures in view of maintaining a peaceful international conjuncture; and every time the ECOSOC coordinates the economic, social and environmental work of the

organization or establishes a multidisciplinary network of partnerships and civil society, in view of contributing to the states' respect for and compliance with international human rights law; the UN is applying customary law and turning it into conventional law.

It does so because the validity of the Charter is, precisely, based on custom and, in particular, on the principle of *pacta sunt servanda*, but also because the validity of all other norms emanated from the UN is derived, in turn, from the Charter itself, since it is, in fact, the constitutive framework of the organization. Moreover, human rights norms originated from within the UN do not go against the customary legal norms of *jus cogens*. Indeed, some authors do consider certain international human rights norms to constitute peremptory norms of international law already, such that their translation into an international treaty or into a soft law instrument is automatically validated by that same source of customary law (Kowalski, 2009, pp. 42-43).

By the same token, we have seen that the ICJ enjoys a universal character and a general jurisdiction, fundamental characteristics which allow it to decide upon human rights related cases, everywhere in the world. Therefore, every time the ICJ settles legal disputes by enacting binding judgments upon the parties, and every time it provides advisory opinions on legal questions posed by UN organs or bodies, the court is creating inferior legal norms by applying superior ones. To be more precise, by applying the law established in international human rights custom and treaties, among other legal sources, the ICJ creates new human rights legal norms, corresponding to its enacted judicial decisions.

As a result, one may logically conclude that the functioning of the UN as a para-universal international organization is very much in accordance with one of the dimensions of my concept of global constitutionalization, the juridification dimension. The UN has conceived a legitimate and authoritative framework for the elaboration and implementation of international human rights law. This way, its organizational foundation corresponds to a positive international legal order, whereby the application of customary law validates the creation of conventional law, and the application of conventional law validates the creation of judicial decisions. Further, the UN provides a global platform for the permanent dialogue between the organization itself and its member states, that correspond to virtually all states in the world, and that, in certain organs and bodies, are fully represented. The fact that its working methods are based on state participation and agreement is associated with the observance of a functioning multi-level governance, through which both the UN and national governments have an impact on the human rights norms emanated from each other.

3.2 Safeguarding the international human rights regime

The importance and role attributed to human rights within the UN have undergone an interesting evolution over time. Whereas, for many years, such issues were circumscribed by few bodies designed specifically to address them, nowadays, there is no UN organ nor body which does not find a way to consolidate the promotion and protection of human rights into their agenda (Mertus, 2009a, pp. 3-4). In fact, the UN system enjoys a special legitimacy and authority in related actions and initiatives, such that Philip Alston and Frédéric Mégret affirm that “the UN has by most standards succeeded in making itself the major hub of the international human rights regime” (Alston and Mégret, 2020, p. 5). The authors also point out that, from the UN’s human rights historical record, one may conclude that the organization has been evolving from simple standard-setting to promoting and, later, protecting human rights, noting that all such tasks have not been mutually exclusive, but parallel to one another, instead. This phenomenon is clearly linked to international politics and, consequently, to the political will of member states to focus on these matters. This is why the international community saw the end of the Cold War, marked by the World Conference on Human Rights, which took place in Vienna, in 1993, as an opportunity to truly invest on the promotion and protection of human rights, globally (Alston and Mégret, 2020, pp. 8-10).

One should note that there are mainly two types of human rights bodies in the UN, the Charter-based and the treaty-based bodies. The former owe their existence to the Charter provisions, are generally more intergovernmental and policy-oriented in nature, enjoy a broader human rights mandate, therefore, being able to respond to a wider range of violations, and every state may be their respondent. In turn, the latter have their origin on the provisions of their respective constitutive treaties, are essentially expert-focused and juridical, and their main purpose is to monitor and report a state’s compliance with a particular treaty regime. In other words, while Charter-based bodies are mostly concerned with human rights policy, treaty-based bodies are mostly focused on human rights law. It must, nonetheless, be highlighted that both types of bodies exercise thoughtfully interrelated responsibilities, designed to mutually complement one another. Moreover, it is indispensable to be aware that there are also other bodies which do not fit in neither of the descriptions of Charter-based or treaty-based bodies presented above (Alston and Mégret, 2020, pp. 13-14). My main focus, however, is on both of them, because I consider these two types of bodies to be largely relevant for my research.

Included in the Charter-based bodies category is the Office of the High Commissioner for Human Rights (OHCHR), established in 1993, through the UNGA Resolution 48/141. The

OHCHR has come to replace the previous Centre for Human Rights, which no longer exists (Alston and Mégret, 2020, p. 2). It is headquartered in Geneva, and, as the name suggests, is led by the High Commissioner for Human Rights, a high-level UN official ranking Under-Secretary-General. The OHCHR was conceived as the UN human rights system coordinating body, and its mandate essentially aims to mainstream human rights into the different organs and bodies agendas, to engage in dialogue with governments and to enhance international cooperation, in view of preventing the violation of human rights at the global level. It pays special attention to serious human rights violations and to vulnerable social groups (Mertus, 2009b, pp. 8-13).

In carrying out its functions, one of OHCHR's principal activities consists in the provision of advisory services, technical and financial assistance to states and other entities, whereby human rights specialists share their expertise in order to support and guide institutions in the implementation of international human rights standards. Moreover, the OHCHR has built field offices in cases where it believes that its continued presence is adequate and is solicited by a certain state. Field offices are intended to facilitate the OHCHR integration into the cultural, political, and legal contexts of the specific countries where they are found, in view of providing more efficient solutions to address human rights abuses (Mertus, 2009b, pp. 16-23).

In 2006, the UNGA decided to replace the former Commission on Human Rights with the new Human Rights Council, which holds the status of a subsidiary body and is also included in the Charter-based bodies category. Such a replacement consisted in an attempt to clean the widely deteriorated image of the Commission which, even though has had an accumulated 60 years of experience, had been criticized for including well-known human rights violators in its membership, as well as for its politicized and inefficient working methods. One cannot affirm, however, that the new Council is involved in a lesser reputational crisis than its predecessor (Mertus, 2009c, pp. 41-42). The former Commission was entrusted with an especially relevant function, that of developing standards on an extensive list of human rights issues, particularly through the draft of international legal instruments. In fact, it was the Commission that was behind the draft of the 1948 UDHR, just as it was behind almost all the legally binding international human rights treaties emanated from the UN system, which we will look at below. Before entering into force, such instruments must first be adopted by the UNGA. The Commission's mandate was, naturally, inherited by the HRC (Mertus, 2009c, pp. 51-52).

Since 2008, the Council is also charged with undertaking the Universal Periodic Review (UPR), which presents itself as a unique peer-review mechanism, where the international community holds its members accountable regarding each and every state human rights record.

It is a mechanism that aims to put in place the revision of all countries in the world, independently of their status of ratification of a certain human rights treaty (Mertus, 2009c, pp. 42-43). Its reports are also intended to cover the entire scope of human rights obligations recognized in the various UN human rights treaties (Saunders, 2012, p. 173). The UPR objective is to guarantee that all states benefit from equal treatment, the final goal always being to promote and protect the human rights situation globally, particularly by avoiding that abuses go unseen (HRC, 2022). Further, this review is based on several sources of information, namely on a report from the state on its own performance, on a compilation of data collected from UN records, as well as on a so-called “stakeholder summary report” (McGaughey, 2021c, pp. 69-70).

In turn, since 1967, pursuant to ECOSOC resolution 1235, the Commission on Human Rights, and now the Human Rights Council, has the competence to investigate serious human rights abuses that come to its attention and, since 1970, pursuant to ECOSOC resolution 1503, it has the competence to process human rights complaints (Mertus, 2009c, pp. 53-57). As a result, today, the Council receives complaints in two different ways. Through the Special Procedures mechanism, complaints must be submitted by or on behalf of individuals, they are confidential, the exhaustion of all domestic remedies is not a mandatory requirement and it may be particularly useful in situations where an urgent appeal is necessary. A Special Procedure corresponds to the mandate of a Special Rapporteur, also known as a representative or an independent expert, or to the mandate of a working group, either of whom is tasked with carrying out detailed research into a human rights thematic or a country-specific mechanism (Mertus, 2009c, pp. 53-57). The recommendations following the Special Procedures, however, are not legally binding in relation to the states addressed. Regarding the Human Rights Council Complaint Procedure, even though it is also confidential, it is not designed to receive individual complaints. It is managed by the Working Group on Situations, whose function is to highlight consistent patterns of gross violations of human rights, observed in any state and under any circumstances, and which have been reliably attested (McGaughey, 2021c, pp. 82-84).

In addition, the UN human rights regime is composed, as well, by a set of treaty-based bodies. One of the ways the international community has found to promote and protect human rights globally has been through the adoption of international human rights conventions, whereby states commit to ensure the observance of certain specific human rights obligations. Furthermore, pursuant to the ratification of these conventions and in view of guaranteeing their efficient application, states are expected to establish an updated domestic legal and policy framework on the same vein. Importantly, all such conventions so far have created their own

enforcement mechanisms, known as treaty bodies, which can be described as committees of experts who work in their individual capacity and who are specialized on the issues covered by the convention. Even though every treaty body is different from the others, the purpose of its existence is to ensure compliance and oversight over the application of its respective convention, and to hold states accountable whenever human rights violations are observed (Mertus, 2009d, pp. 64-65).

Among the many tasks and activities carried out by the numerous treaty bodies, state monitoring and reporting are some of the most common. Every state party to a treaty must submit periodic reports where it describes the steps it has taken in order to ensure the effective application of the treaty provisions. Afterwards, the treaty body will adopt its concluding observations, where it synthesises its most relevant concerns and makes respective suggestions and recommendations. Certain treaty bodies go as far as setting up follow-up procedures with the aim of encouraging states to comply with their duties (Mertus, 2009d, pp. 66-69).

Moreover, treaty bodies may also be prepared to receive interstate communications, individual and group communications, or both. While interstate communications correspond to a procedure where a state party wishes to complaint about human rights violations committed by another state party to a certain convention, individual or group communications correspond to complaints submitted by either individuals or groups – such as NGOs – in relation to human rights abuses committed by a state party to the convention. These mechanisms may be included within the framework of the convention itself or may be established by an additional agreement, such as an optional protocol. Importantly, before the treaty body accepts to consider an individual or group communication, it is mandatory to prove that every available domestic remedy has already been exhausted (Mertus, 2009d, pp. 73-76).

Another tool frequently used by treaty bodies is the procedure of inquiry, which serves to launch investigations into grave and systematic treaty violations. This mechanism remains confidential and is activated when information leading to related suspects is submitted to the treaty body. As a result, one of its experts is mandated to conduct an inquiry, which may involve a visit to the suspected state's territory, as well as to report urgently on that matter. The treaty body will make use of the expert's work in order to issue its own general recommendations (also known as general comments) to the state under examination. On another note, treaty bodies general recommendations are all made public on the OHCHR's website, therefore, contributing to the development of the interpretation of human rights treaty obligations. Finally, another one of the vast functions carried out by treaty bodies is that they support states parties in developing their own national plans of action in view of guaranteeing a more efficient

implementation of the human rights duties foreseen in their respective conventions (Mertus, 2009d, pp. 77-79).

It is consensually agreed that, besides the UDHR, nine specific international conventions create the foundation of the UN-led international human rights regime, such that, associated to them, we have nine treaty bodies. The ICCPR of 1966 is, according to its Art. 28, overseen by the Human Rights Committee. The ICESCR of 1966 is, according to ECOSOC Resolution 1985/17 of 28 May 1985, overseen by the Committee on Economic, Social and Cultural Rights, which was established to support part of the work carried out by ECOSOC. It is curious to note that, together, the UDHR, the ICCPR and the ICESCR are frequently referred to as the International Bill of Human Rights, since they share common elements of inspiration and content (Kowalski, 2009, pp. 48-49).

The Race Discrimination Convention of 1966¹⁴ is, according to its Art. 8, overseen by the Committee on the Elimination of All Forms of Racial Discrimination. The Women's Convention of 1979¹⁵ is, according to its Art. 17, overseen by the Committee on the Elimination of Discrimination Against Women. The Torture Convention of 1984¹⁶ is, according to its Art. 17, overseen by the Committee Against Torture. The Children's Convention of 1989¹⁷ is the most widely ratified international convention in the history of international law and is, according to its Art. 43, overseen by the Committee on the Rights of the Child. The Migrant Workers Convention of 1990¹⁸ is, according to its Art. 72, overseen by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families. The Convention on the Rights of Persons with Disabilities of 2006¹⁹ is, according to its Art. 34, overseen by the Committee on the Rights of Persons with Disabilities. Finally, the Convention for the Protection of All Persons from Enforced Disappearance of 2006²⁰ is, according to its Art. 26, overseen by the Committee on Enforced Disappearances.

Today, most international human rights treaty bodies are prepared with a mechanism dedicated to the review of individual or group complaints regarding their respective conventions. The only treaty bodies which do not yet have such a system in place are the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All

¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination, 1966

¹⁵ Convention on the Elimination of All Forms of Discrimination against Women, 1979

¹⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

¹⁷ Convention on the Rights of the Child, 1989

¹⁸ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990

¹⁹ Convention on the Rights of Persons with Disabilities, 2006

²⁰ International Convention for the Protection of All Persons from Enforced Disappearance, 2006

Migrant Workers and Members of Their Families. Even though the Migrant Workers Convention does foresee an individual communications system, its Art. 77(8) establishes that this mechanism shall only “come into force when ten States Parties to the present Convention have made declarations under paragraph 1”. As of today, however, only four of the states parties to this treaty have made such a declaration (United Nations Treaty Collection, 2022).

Interestingly, Georges Minet observes that the international human rights paradigm has shifted around 2015, and the adoption of the 2030 Agenda for Sustainable Development proves it. The latter corresponds to a plan of action, that is, a compromise among all states and stakeholders to join forces and to act in partnership to eradicate poverty in a sustainable development perspective, as well as to guarantee the respect for the human rights of every individual. The 2030 Agenda consists of integrated and indivisible 17 Sustainable Development Goals (also known as SDGs) and 169 targets, and may, therefore, be considered a para-universal and ambitious project. By adopting it, the UN member states “pledge that no one will be left behind” (United Nations, 2022). The 2030 Agenda aims to build on, as well as to fix the shortcomings, of the former Millennium Development Goals. This plan of action has been recognized for presenting a more substantive human rights approach, and its authors claim that it has been inspired by the UDHR, as well as by the nine core international human rights conventions (Minet, 2020, pp. 720-726).

Bearing in mind all of the above, one realizes that there is a special legitimacy and authority attributed to the UN system by the international community, regarding, in particular, the safeguarding of the international human rights regime. Therefore, the UN is largely considered to be at the centre of the promotion and protection of human rights in the world, not only through the work carried out by its – more intergovernmental and policy-oriented – Charter-based bodies and its – more expert-focused and juridical – treaty-based bodies, but also through a holistic approach focused on mainstreaming the organization’s human rights agenda throughout its various organs’ and bodies’ mandates. Indeed, this approach has been marked by the adoption of the 2030 Agenda for Sustainable Development, and it is essentially coordinated by the OHCHR.

I consider this phenomenon to be associated with the notion of the basic norm developed by Kelsen. As the author describes, each system must have one basic law that is hierarchically superior and that legitimates the validity of every other norm in a legal system. Thus, I believe that the trust attributed to the UN in the guidance and development of the international human rights legal framework means that the objectively just and good fundamental assumption that human rights must be promoted and protected has been legitimately enacted through the

organization. In other words, the participation of its member states in the common endeavour of the planning and structuration of the international human rights regime is justified by the existence of that non-positive legal norm which allows the UN to subsequently establish unity and normativity within this legal system.

Moreover, this fundamental assumption corresponds to the first step of the positive chain of validity which is the international human rights regime. Therefore, when the OHCHR enhances international cooperation on human rights issues, when the HRC develops new human rights standards, and when treaty bodies carry out reporting and monitoring of a state's compliance with its human rights obligations, the UN is activating a legal system whose normative validity is legitimated by the basic norm, a benchmark that is endorsed by the UN as a whole. This way, the organization has been able to identify sources of customary law, notably human rights norms of *jus cogens*. These norms serve as a basis for the adoption of international human rights treaties or other sources of conventional law. We have seen that, currently, the UN human rights machinery is composed of nine core international conventions. However, the UDHR is the most authoritative international declaration in this field, such that it might have an even wider impact than certain binding treaties.

The next step after adoption would be the update of domestic legal and policy frameworks, in view of ensuring an efficient application of those conventions. Nonetheless, Kelsen has also mentioned that the transformation of international into national law is not a mandatory requirement for the former to be valid in relationship to its actual subjects, who are, indeed, individuals and local communities, instead of simply the nation state. This idea matches the notion, advocated by Peters, that international law has been going through a humanization process, in which humanity is seen as the ultimate normative source of international law, replacing the traditional role of sovereign states in it.

Certain UN mechanisms do, indeed, provide people with greater and more efficient powers when it comes to the affirmation and enforcement of their individual and collective human rights. We have seen that the HRC's Special Procedures mechanism is prepared to receive complaints submitted by or on behalf of individuals – and, consequently, to carry out thematic or country specific investigations related to them – and that treaty bodies also foresee individual or group communications regarding human rights abuses committed by a state party to their respective convention. These constitute only some examples of the various ways in which individuals and local communities may be actively empowered by the UN in view of defending the human rights which they have been legitimately attributed and should be able to enjoy.

In turn, the UN does provide an inclusive platform where all existing countries are invited to share common aspirations, such that the result of these interactions is the formation of a common identity, characterized for sharing a universal interest in respecting human rights. This is in accordance with Peters, when she affirms that it is possible to observe the formation of an international community. I believe this phenomenon has been taking place through the UN, when acting in the capacity of a global forum, for building an adequate space for states to communicate and exchange their visions of the world.

Moreover, the author also tells us that the development of an international community is associated with the acceptance of the idea of *erga omnes* norms, which constitute international custom. This is because the stronger the recognition of common human rights aspirations within the UN member states is, the more legitimate the idea that non-affected states may raise claims and apply countermeasures against others who are known for being human rights abusers becomes. In addition, the application of *erga omnes* norms may be interpreted as the will of the international community of making its own members accountable for human rights violations. Important to note, nonetheless, is that human rights may constitute both norms of *erga omnes* and norms of *jus cogens*, at the same time, a fact that illustrates even more the necessity of ensuring state accountability in relation to them.

The undertaking of the UPR, the HRC's complaint procedure, state monitoring and reporting carried out by treaty bodies, their interstate communications and their procedure of inquiry, all correspond to the acceptance of the stance that international human rights law correspond to norms of *erga omnes* and, therefore, must be protected by the international community, which has the responsibility of overseeing its member states conduct on such issues. We have seen, indeed, that the UPR is a special peer-review system which enhances states' accountability regarding their human rights record by putting in place a global and equative revision mechanism. The UPR makes every state vulnerable to the possibility of being exposed for its misbehaviour, thus, encouraging other international actors to pressure that specific government into complying with its human rights duties.

The HRC is also prepared with its complaint procedure, which aims to underline consistent patterns of serious and accurately substantiated violations of human rights, no matter in what part of the world. In turn, treaty bodies carry out state monitoring and reporting, along with their resulting general recommendations and possible follow-up procedures. Further, treaty bodies also foresee the procedure of interstate communications and they may resort to the procedure of inquiry, the latter aiming to launch investigations into grave and systematic treaty violations. Once again, these mechanisms contribute to the attribution of responsibility

to the international community in relation to states fulfilment of their human rights obligations, based on the recognition that they constitute *erga omnes* norms.

As a result, one may logically conclude that the international human rights regime developed within the UN framework is very much in accordance with one of the dimensions of my concept of global constitutionalization, the universalization dimension. The organization gives life to the positive chain of validity whose normativity is legitimated by the basic norm that human rights must be promoted and protected. This fundamental assumption allows the UN to identify custom, such as *erga omnes* and *jus cogens* norms of human rights, which have then served to adopt the UDHR, as well as the nine core international human rights treaties. It also contributes to the shifting paradigmatic perception that the real beneficiaries of international human rights law are, indeed, the people, instead of the state. Moreover, the UN provides a platform where every state is represented and may participate in the elaboration and enforcement of international human rights law, thus, allowing the emergence of an international community which shares the common interest of respect for human rights. Therefore, the basic norm has also allowed the UN system to establish human rights compliance mechanisms, undertaken by the HRC and by treaty bodies, wherein both interstate and individual or group complaints are envisaged.

3.3 The rise of new international actors

Never have NGOs been so involved in human rights discourse and governance as they are today. These organizations, which do not fit in neither the public nor the private sector, increasingly affirm themselves as dynamic participants in international fora. In particular, NGOs role in the several UN organs and bodies has been expanding and considered more and more relevant with time (Marcinkutė, 2011, p. 54). The proliferation of this alternative sector, however, was much more considerable after the end of the Cold War period (McGaughey, 2021a, pp. 15-16). One evidence of this phenomenon is Art. I (38) of the 1993 Vienna Declaration²¹, which highlights, for the first time, the importance of the actions and initiatives undertaken by NGOs “in the promotion of all human rights and in humanitarian activities at national, regional and international levels”.

It is relatively difficult to reach a consensual definition of NGO, since the concept in itself may include a wide range of organizations whose scope may, as well, be very broad. We will see below, nonetheless, that ECOSOC offers a generic description of what these organizations may consist of. In any case, NGOs are included in the even broader term civil society, which welcomes other types of organizations as well, such as National Human Rights Institutions (McGaughey, 2021a, pp. 6-8). Some examples of influential NGOs that cooperate with the UN are Amnesty International, Fédération Internationale des Droits de l’Homme, CARE International, Oxfam International, Human Rights Watch, the International League for Human Rights, International Save the Children Alliance and Action Aid Alliance (Martens, 2005, pp. 33-34).

The UN Charter provides opportunities for consultation with NGOs as per its Art. 71, which establishes that the ECOSOC “may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence”. The consultative status allows these organizations to participate in several UN related forums, namely in treaty bodies and in the HRC mechanisms, among many others. As a result of the growing recognition attributed to NGOs in the international arena, as well as the more pressing need to standardise and regularise them, in 1996, ECOSOC adopted Resolution 1996/31, which not only proposes a definition of NGO, but also describes the eligibility requirements that must be met for these organizations to be able to enjoy consultative status. According to Art. 12 of ECOSOC Resolution 1996/31, an NGO “shall have a representative structure and possess

²¹ Vienna Declaration and Programme of Action, 1993

appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes”.

This same resolution also established that, for ECOSOC to attribute accreditation to NGOs, certain conditions associated to them must be observed before-hand, such as the possession of a “recognized standing within the particular field of its competence” (Art. 9 of ECOSOC Resolution 1996/31), the verification of “appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights” (Art. 12 of ECOSOC Resolution 1996/31), and the maintenance of resources which are “derived in the main from contributions of the national affiliates or other components or from individual members” (Art. 13 of ECOSOC Resolution 1996/31).

Furthermore, it must be noted that ECOSOC attributes one of three different categories of consultative status to each NGO. Those with “general consultative status” are relatively large international NGOs, which enjoy a broad geographical reach in several fields of activity. Those with “special consultative status” are recognized as having an expertise on specific domains of activity. And those in the “roster category” do not really identify with neither of the above two classifications. It is, nonetheless, important to be aware that, even if a certain NGO is not able to receive accreditation and, thus, is not allowed to participate in formal meetings, there is always the possibility of participating in UN organs and bodies in multiple other informal ways (Mertus, 2009c, p. 62).

NGOs’ role next to UN human rights forums has been two-folded, in the sense that they contribute to both the creation and the implementation of international law. From the inception of this para-universal international organization, NGOs have played an active role in the development of international human rights standards through their involvement in the drafting of international treaties, as well as of other legal instruments and interpretive texts. They did it by acting essentially as experts in specific human rights related fields (Marcinkutė, 2011, pp. 55-56). Among many other examples, it matters to note that NGOs have influenced the drafting of the Charter, of the UDHR, of the ICCPR and of the ICESCR. It must, as well, be noted that NGOs presence and contribution in these processes has become much stronger throughout the years (McGaughey, 2021b, p. 51). Furthermore, besides being involved in the elaboration of international human rights law, NGOs work is also guided and supported by these legal instruments, for it is upon them that they find the legal foundation and legitimacy to carry out their fundamental activities (Marcinkutė, 2011, pp. 54-55).

Human rights treaty bodies are institutional arrangements where NGOs perform some of their most relevant functions. A List of Issues Prior to Reporting (“LOIPR”) is elaborated before the periodical review to a certain state party to a particular international treaty is undertaken. These organizations engage and have an impact in the selection of the LOIPR. After states parties submit their periodical reports to the treaty body, NGOs are, not only able to have access to these reports, but they can also provide their own “shadow reports” (also known as “alternative reports”) in order to provide clearer and more accurate information on the real human rights situation experienced in the everyday lives of a certain population. They also enjoy the prerogative of influencing the approach chosen by the treaty body to apply during its constructive dialogue with a particular state party, following the submission of its report. NGOs do contribute, as well, to the last step of this mechanism, the drafting of general comments by the treaty body, the implementation of which is, afterwards, analysed in the follow-up procedure (McGaughey, 2021b, pp. 54-56).

One other way in which NGOs are present in treaty body mechanisms is through the implementation of the individual communication procedures, that were described above. Here, these organizations may choose among acting as representatives of the petitioner, as an entity submitting the communication on behalf of the victim, as an entity submitting the communication on its own behalf, or acting as *amicus curiae* during litigation (McGaughey, 2021b, pp. 65-66). As a reminder, the petitioner or victim may correspond to either an individual or a group of people.

The HRC is another institutional arrangement where NGOs invest great efforts. Here, they are able to attend formal and informal meetings, to make oral and written statements, as well as to organize side events. One of the most relevant HRC mechanisms is the stakeholder summary report associated to the UPR, in which these organizations make their voices be heard through their written submissions. Before the publication of the UPR, NGOs also engage in important international lobbying activities next to member states. In fact, the strategy employed to this end is quite different since, instead of only resorting to their expertise and to the juridical side of the subject, as they most often do, they are aware of the necessity to use political and diplomatic strategies in order to have a greater impact on member states decisions. There are several ways for NGOs to exercise lobbying, such as engaging with their own state’s embassies, engaging with HRC missions, and engaging in UPR preparation sessions (McGaughey, 2021c, pp. 69-74).

One other way of participating in the HRC mechanisms is through its Special Procedures, that were also described above, where NGOs enjoy the prerogative of being able

to nominate candidates to occupy the position of Special Rapporteur. Moreover, Special Rapporteurs themselves do recognize the usefulness of the work carried out by these organizations and frequently incorporate the information provided by them in their own reports. Finally, NGOs are also prepared to support individuals in the submission of complaints to the HRC Special Procedures (McGaughey, 2021c, pp. 78-83).

It cannot be denied, however, that certain NGOs enjoy more opportunities, as well as higher probabilities, of seeing their contributions reflected in treaty bodies and in HRC activities. Notably, those which are larger, have access to more resources, have a transnational network and/or benefit from ECOSOC accreditation will surely have a greater impact on those mechanisms. Nonetheless, more privileged organizations may also help giving voice to their humbler counterparts, namely, domestic and non-accredited NGOs, particularly by speaking on their behalf or by forming coalitions where they are included (Marcinkutė, 2011, p. 62).

In the end, it is coherent to affirm that the greatest value UN bodies get from NGOs participation is the provision of practical and realistic information collected from reliable and accurate sources. This happens because NGOs are the first to reach victims of human rights abuses and their witnesses, but also the fact that they are premised (or have the ability to move to) the place where abuses occur allows them to see with their own eyes the physical criminal evidence, to observe litigations first-hand, as well as to contact face-to-face with relevant networks, such as other NGOs working in the field. This authentic knowledge allows the various treaty bodies and the HRC to paint a clearer and wider picture of the situation experienced on the ground. Indeed, it is considered that NGO sources offer an alternative solution to an old problem found in the UN system: that governmental reports might simply present one distorted, more appealing, side of the story (McGaughey, 2021b, pp. 60-61).

As a result, data collection and publication undertaken by human rights NGOs not only have an impact on public opinion, on court procedures and on international affairs, they are also embedded in one of these organizations' most efficient strategies, known as "naming and shaming". Through the latter, a state whose behaviour does not comply with its human rights duties is going to be put on the spotlight, to the point that it will be pressured by other international actors to respect international human rights norms. This way, NGOs also contribute to encouraging state accountability regarding their human rights obligations. As perfectly explained by Julie Mertus, "only the states that are disciplined to follow international human rights precepts and that work cooperatively with other states on human rights promotion will have the moral authority to lead" (Mertus, 2009f, p. 151). UN bodies, thus, openly acknowledge that they are dependent on NGO support (Marcinkutė, 2011, pp. 56-58).

Bearing in mind all of the above, it is deducible from NGOs active participation in the formulation and ratification of human rights norms, from their work on the collection and dissemination of information on human rights violations under the national flag, and from their efforts in holding countries accountable to their international human rights duties, that they naturally risk defying the government's reputation, not only among its citizens, but also among the international community members. NGOs' purpose, therefore, may be interpreted as shaping the *raison d'être* of sovereignty onto the responsibility to promote and protect the human rights of its own population. In fact, the UN system is greatly dependent on support provided by these organizations, and, in particular, on the collection and publication of first-hand and on-the-ground information. This is viewed as an alternative solution to potentially distorted governmental reports, which are constantly challenged by the "naming and shaming" strategy employed by NGOs.

States, nonetheless, continue to play what could probably be considered the most important role in the functioning of the UN system, and we keep observing several limitations to the contributions of NGOs in its various organs and bodies (Marcinkutė, 2011, pp. 64-67). In other words, despite the expanding role played by these organizations in UN fora, one may verify the significant difference, acknowledged by Peters, between the prerogatives attributed to states and those attributed to non-state actors in both treaty bodies and Charter-based bodies. While states are active participants in these international fora, NGOs are simply passive participants, such that one may verify that sovereignty still marks the basic structure of the current international relations paradigm.

We have seen, therefore, that international relations are being governed by new and more international actors, other than sovereign states. The gradual emergence of a global civil society and, in particular, the emergence of NGOs in UN fora, contributes to the decentralization of the nation state. This reality is in accordance with Peters' interpretation of a shifting international paradigm, increasingly diversified and more inclusive. In fact, and especially in the last three decades, the various UN organs and bodies have seen NGO roles expanding and getting greater recognition over time. The Charter, and in particular its Art. 71, establishes that this para-universal international organization may benefit from consultation with them in view of pursuing its goals, namely the promotion and protection of human rights. Moreover, ECOSOC's Resolution 1996/31 has set out the eligibility requirements allowing NGOs to be attributed consultative status, a label that has allowed them to take part in certain formal mechanisms, where they have essentially contributed towards international human rights law-making and -enforcement.

We have also seen that two of the institutional arrangements where NGOs perform some of their most relevant functions regarding the upholding of the international human rights regime are the above-mentioned treaty bodies and the HRC. Every time these organizations provide treaty bodies with their own shadow reports and every time they nominate candidates to occupy the position of Special Rapporteur through the Special Procedures of the HRC, NGOs are collaborating with specific para-universal mechanisms developed within the UN framework, in view of contributing to a more wide-reaching and homogeneous enforcement of the international human rights legal framework. What is more, by increasingly contributing to the well-functioning of the treaty bodies and of the HRC, these organizations are recognizing in the UN a greater responsibility regarding the elaboration and implementation of international human rights norms, when compared to their own member states. Here, it is interesting to recall Peters, when the author mentions that NGOs participation in an international organization serves as a parameter of its good governance and constitutional legitimacy.

As a natural consequence, NGOs participation and impact in the activities carried out by UN organs and bodies does challenge the historical notion of sovereignty. Competence over human rights issues has traditionally been considered a matter of internal policy and concern, exclusively. In contrast, by undertaking those same functions, these organizations do contribute to either the erosion or to the transformation of the concept of sovereignty (Marcinkutė, 2011, pp. 64-67). In particular, NGO engagement in the elaboration and subsequent implementation of international human rights norms may well challenge state's autonomy and legitimacy in this domain.

This is in accordance with Kelsen, who affirms that, even though the concept of sovereignty is a fundamental characteristic of the modern nation state, its traditional formulation should be abandoned, since it is based on a logical fallacy. The author explains us that, if a state's constitutional order were to consider itself the highest recognizable authority, it would not be possible to recognize another state as being equally sovereign, such that international law could never be interpreted as an autonomous and valid legal order, and the principle of equal sovereignty would be impossible to be acknowledged. For this reason, Kelsen advocates for the monist interpretation of international law, which sees national and international law as two parts of the same integrated system, where the international legal order is superior to and is the source of validity of simultaneous national legal orders, enabling them to coexist as equal legal subjects, this being the only way the author believes one can ensure the coherence of the principle of equal sovereignty.

In fact, one of the main purposes of NGOs' activities, and especially of the collection and dissemination of information on human rights abuses committed by states, is to hold them accountable towards their people and towards the international community. As a result, NGOs endeavours are shaping the notion of sovereignty as we know it, turning it into a status that is conditional on the state's fulfilment of its responsibility to promote and protect human rights. In the same vein, and just as Peters argues, not only are states becoming less autonomous in the performance of certain traditionally sovereign functions – such that other domestic and international institutions have increasingly become responsible for undertaking similar tasks – one may also observe a gradual paradigm shift from the focus on sovereign rights and towards sovereign duties.

One may logically conclude that the participation of the emergent global civil society within UN organs and bodies is very much in accordance with one of the dimensions of my concept of global constitutionalization, the centralization dimension. Even though the idea of sovereignty is still at the centre of its foundation, the UN system embodies and benefits from the emergence of new actors in the international arena, notably NGOs, which play an essential role in the supervision of the international human rights regime, through the support they provide in the creation and application of human rights standards. These organizations contributions next to human rights treaty bodies and the HRC allow us to conclude that the centralization of the international human rights regime corresponds to the decentralization of the nation state, in the sense that the responsibility for the elaboration and enforcement of international human rights norms is increasingly attributed to specific organs and bodies created within the UN framework. This way, their functioning also relies on the work carried out by NGOs, instead of that of states only, in view of attaining a more efficient and uniformized respect for and compliance with human rights at the global level. Furthermore, the increasing pressure exercised by civil society and by the international community on national governments to respect their human rights obligations, together with states gradual loss of autonomy regarding the promotion and protection of human rights, all contribute to a greater and more efficient governmental accountability and to an increasing perception of the need to reformulate the idea of state sovereignty.

3.4 Human rights strengths and weaknesses

In order to link the process of global constitutionalization with the UN work on international human rights law, it does not suffice that I base my thesis on the institutional and legal frameworks of this para-universal international organization and on the functioning of the international community. It is indispensable that I prove that there has been a general improvement in the global situation of human rights, i.e., that countries have tended to respect and comply with them more. And it is indispensable that I show how the global constitutionalization of human rights has been mainly promoted by the UN, instead of any other entity or phenomena. In other words, I must prove that an observable global improvement in human rights is mainly due to UN endeavours on this domain.

Today, we may easily perceive that the international human rights regime is becoming less effective and less legitimate. Several sources, including academia, governmental institutions, news platforms and even civil society, do seem to transmit a discouraged and fatalistic discourse on the current situation of human rights in the world. Indeed, one cannot ignore news of human rights abuses coming from authoritarian, repressive and/or populist regimes and areas ravaged by conflict, such as the genocide of the Uyghur population in China (BBC, 2022), Israel's apartheid against the Palestinians (Amnesty International, 2022), the denial of women's rights following the Taliban invasion of Afghanistan (Human Rights Watch, 2022), and the attacks on children in the context of the Russian invasion of Ukraine (Save the Children, 2022), to name but a few examples. As a result, the general public might be led to believe in an increase in human rights violations worldwide and, therefore, in a growing lack of faith on human rights institutions and movements. Furthermore, there are also those who criticize the international system as being feeble and toothless in the face of human rights abuses (Sinkkink, 2017a, pp. 3-8).

In order to be able to make a clearer evaluation of the above-described picture, one cannot escape the inevitable question of how to draw a credible account of the recent evolution of human rights in the world. In fact, to acquire knowledge about whether or not respect for and observance of human rights and individual freedoms has been either improving or deteriorating globally, it is necessary to apply a concrete methodology which allows us to properly measure this phenomenon. Nonetheless, despite all the international efforts invested in the promotion and protection of human rights, global and systematic measurement of human rights performance has frequently been put aside and is, today, almost non-existent. The most widely

disseminated universal measuring framework so far is the OHCHR's 2012 proposed guidelines (OHCHR, 2012), whose purpose is to track progress – or retrogress – in human rights patterns through “indicators”. Yet, besides the application of these methodology not being mandatory, states can choose from among the different proposed “indicators” in order to assess compliance with their human rights duties at the national level. As a result, OHCHR's guidelines do not allow for a global and systematic review on this subject. Further, there are relatively few states that have took notice of the existence of this methodology, such that it is natural to conclude that even less states have ever made use of it in their respective periodic reports (HRMI and URG, 2019, pp. 7-10).

It is important to understand that there are certain specificities associated with human rights making them very difficult to measure. One of their characteristics is that improvements in human rights are often imperceptible, that is, are translated into small steps and may take a long time to become common practice. The same is observable in relation to human rights abuses, which frequently are not highlighted and, therefore, go unnoticed. Moreover, the real impact of certain human rights violations, of which civil and political rights are an example, is impossible to evaluate immediately, since their effects might be multiple and extended over time (HRMI and URG, 2019, pp. 11-13). Another particular property of human rights is that advocates and institutions dedicated to their promotion and protection do raise expectations regarding states' responsibility to respect and comply with them, such that international standards have tended to become more demanding in the last decades (Sinkink, 2017c, pp. 228-229).

What is more, the less we are able to extract such empirical evidence, the more we are challenged with inaccurate and sensationalist accounts of the real impact of the international human rights regime, and the more we risk having the wider perception of its effectiveness and legitimacy undermined. Subsequently, and as an alternative to overcome these obstacles, the UN has been investing on a more optimistic approach based on the collection and dissemination of successful case studies in which the organization is shown to have contributed to the improvement of human rights on the ground. The need for an empirical approach, nonetheless, will always persist (HRMI and URG, 2019, pp. 9-11).

Realizing the need to come up with a solution to the lack of a systematic approach to the effective measurement of human rights, Kathryn Sinkink proposes a useful methodological paradigm. She develops the concept of the “empirical comparison” which she vehemently distinguishes from the “comparison to the ideal”. Those who believe the international human rights regime is weak and yields little or no positive results, are used to focus on observable

human rights violations and compare them only to the promotion and protection responsibilities established on both international human rights instruments and discourses. According to Sinkkink, whenever reality is compared to the idea of perfect justice, its most natural consequence is that analysts become disappointed. Therefore, the author gives preference to putting current reality against an ancient one, or to put the reality lived in a certain part of the world against the one lived in another (Sinkkink, 2017b, pp. 26-33).

In other words, Sinkkink believes the best way to explore the evolution in human rights is to compare how the respect for these norms differs between different time periods or between different places, along what she calls a “compliance continuum”. Only such an approach allows researchers to form a clearer idea about what has been the real change in human rights adoption and implementation, as well as what may be so far considered the world’s best practices (Sinkkink, 2017b, pp. 26-33). In sum, and in her own words, the “single biggest unrecognized and unnamed source of disagreement among human rights scholars and within human rights movements is a matter of measurement” (Sinkkink, 2017b, p. 31).

The Human Rights Measurement Initiative (HRMI) has been successfully applying Sinkkink’s “empirical comparison” approach. Headquartered in New Zealand and having initiated functions in 2015, HRMI is the first global initiative to follow and record the evolution in the performance of states, regarding the fulfilment of their human rights duties, in a comprehensive and systematic fashion (HRMI and URG, 2019, p. 5). At the moment, HRMI’s goal is to collect data related to eight civil and political human rights and five economic and social human rights, as defined by the International Bill of Human Rights and aiming to expand the number of rights under analysis in the future (HRMI, 2022b). It employs two different methodologies in order to measure each one of these two kinds of human rights (HRMI and URG, 2019, p. 23). Subsequently, the data obtained is filtered, managed and made public in HRMI’s “rights tracker”, which is designed in an accessible reading format, in view of its dissemination to all types of publics, from governmental actors to international civil servants, to academia, to the media, or anyone else interested in obtaining this information (HRMI, 2022a).

In her research, Sinkkink points out that human rights are not a feature exclusively present in Western countries internal and external policies. History tells us that human rights principles have origins in both the Global North and the Global South. In fact, besides Europe, there are other parts of the world with associated regional institutions focusing essentially on the advancement and enforcement of human rights. As of today, we have the Council of Europe (CoE, 2022), the African Union (AU, 2022) and the Organization of American States (OAS,

2022), which are institutions that, together, cover at least three regions of the world. Moreover, the author affirms that public opinion keeps on being favourable regarding the trustworthiness of the work carried out by human rights organizations, which shows that human rights principles do not only originate from governmental sources, but also at the grassroots level. Furthermore, and by basing her analysis on her own “empirical comparison” approach, Sinkkink also demonstrates that human rights performance in the world can be described as having, at the same time, some worsening and some improving areas. In other words, respect for human rights has been slow and relatively unsynchronized, such that, while progress in certain rights has been observed, progress in others has been hindered (Sinkkink, 2017a, pp. 11-14).

According to the author, the fact that, these days, we are more aware of our own human rights, together with the fact that we have access to more information on the occurrence of human rights violations in all of the approximately 200 countries of the world, are two of the main reasons why we are easily prompted to create a fatalistic image of the international scenario. Indeed, human rights movements themselves frequently resort to an advocacy strategy that is very much focused on highlighting the most serious human rights abuses, thus contributing to a more pessimistic public opinion (Sinkkink, 2017a, p. 14). Cooperation between human rights movements and organizations, however, has been extremely important in the development and implementation of these rights (Sinkkink, 2017c, pp. 234-235). What is more, Sinkkink explains that the oppression exercised by some authoritarian regimes in view of fragilizing human rights advocacy simply demonstrates that states actually believe that such movements have a real impact on-the-ground (Sinkkink, 2017a, p. 6).

The author tells us that, as a rule, the world has actually witnessed a general improvement on human rights performance. Her research has proved that high-level human rights prosecutions have been increasing when contrasted to the past, and that countries that carry out more prosecutions tend to be responsible by less human rights abuses (Sinkkink, 2017b, p. 44). Data collected and analysed by HRMI corroborates Sinkkink’s conclusions by explicitly showing that, even though there has been some retrogress, the general results of its research have corresponded to the observance of a gradual progress in the global performance of human rights (HRMI and URG, 2019, pp. 27-28). Such a positive change, nonetheless, has not emerged as a “natural evolution” of civilizations, but rather as a continued effort on the part of human rights advocates, whether in the form of individuals or institutions. As a result, Sinkkink tells us that a real “social change requires anger, hope, and the belief that we can make a difference” (Sinkkink, 2017c, p. 226).

Now, even after reaching the conclusion that one may be hopeful about the recent positive change towards more respect for and compliance with human rights norms throughout the world, it is still necessary to explain in what way the UN, as a complex system, may be credited as the principal entity at the basis of this phenomenon. In other words, in order to show that global constitutionalization has been undertaken by the organization through its contribution towards the juridification, universalization and centralization of the international human rights regime, it is essential to establish an empirical link between this process and the real impact of UN-led human rights activities on-the-ground, that is, at the grassroots level, represented by the civil society.

We have seen that the UN is part of a wider human rights network established in different normative sources and at different geographical and political levels, such that they all culminate in one single global regime. Certain regional human rights organizations do enjoy considerable power and influence, since they are able to exercise judicial adjudication and carry out their activities in a more homogeneous context. Nonetheless, we have also seen that the UN is considered the principal safeguard of that human rights system, since it includes the greatest geographical reach and covers the widest range of human rights norms, while creating and enforcing international law, or providing an adequate space for it, thus exercising an incredible impact on global governance (Alston and Mégret, 2020, pp. 4-5).

What is more, even though we sometimes are faced with news such as the United States withdrawal from the HRC – after having its practice of forcibly separating undocumented families that have entered the country criticized by the UN High Commissioner for Human Rights (The American Journal of International Law, 2018) – there is, indeed, a widely recognized legitimacy in the work of the UN, allowing it to exercise a special authority over human rights matters, one that becomes even more relevant in the case of those member states whose jurisdiction does not fall into any regional human rights institution (Alston and Mégret, 2020, p. 36).

I agree with Alston and Mégret when they affirm that institutional developments within the UN must be consciously distinguished from the real impact of this para-universal international organization on-the-ground (Alston and Mégret, 2020, pp. 23-24). Even though these two aspects may very well be paired with one another, it does not necessarily prove that, for example, an increase in the number of states ratifying the Children's Convention will automatically convert into less violations of children's human rights. However, it is important to bear in mind that practical change often is connected and dependent on institutional initiatives to be observable, since, as we have analysed above, both the elaboration and application of

human rights norms are part of the same positive chain of validity. Accordingly, in order to explain the real impact of the UN global constitutionalization of human rights on-the-ground, I will now focus, not only on the institutional evolution of the organization, but also on its empirical relationship with civil society.

It matters to note that there has been a substantial raise in the UN budget dedicated specifically to the undertaking of human rights activities, from the 0.7% attributed in the 1992 budget to the 3.7% attributed in the 2018–19 budget (Alston and Mégret, 2020, p. 2). Most importantly, though, UN history is marked by a progressive success in the negotiation and adoption of a sweeping umbrella of human rights legal instruments that include, not only the UDHR and the above-mentioned nine core conventions, but also several complementing resolutions, principles, decisions, etc., which have already reached thousands in number. This means that states explicitly agree with the human rights norms they have been elaborating. It is also important to recall that there is no state in the world which does not belong to at least one organ or body of the UN system, a fact which undoubtedly contributes to strengthen the legitimacy and authority of the norms produced through this organization.

Furthermore, there has been an exponential growth in the number of states that either ratified or acceded to the international human rights conventions elaborated under the auspices of the UN and, thus, on the number of governments that, bindingly, committed themselves to the standards established in them. Figure 2 illustrates this phenomenon by showing the evolution on the number of states that recognized the right held by certain treaty bodies to oversee their national human rights conduct, after they ratified or accessed their respective international treaties (HRMI and URG, 2019, pp. 9-10). States parties become, therefore, increasingly accountable in relation to those norms, as explains Marcinkutė when she affirms "The voluntary acceptance of international human rights conventions makes governments more vulnerable to the pressures for political change regarding the issues of human rights" (Marcinkutė, 2011, p. 66).

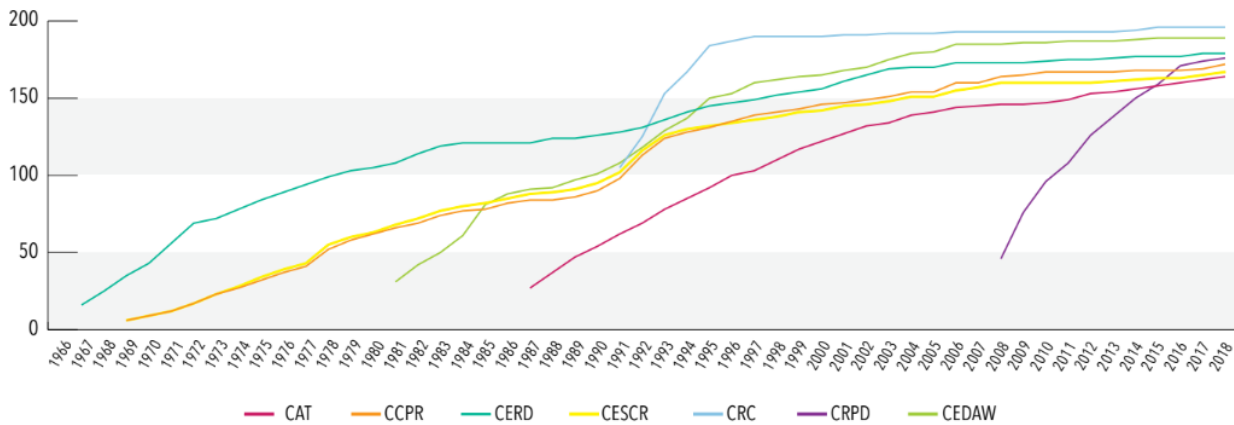


Fig. 2: States' authorization for certain treaty bodies to oversee their national conduct regarding the issues covered in their respective human rights treaties

Label:

CAT – Committee Against Torture

CCPR – Human Rights Committee

CERD – Committee on the Elimination of All Forms of Racial Discrimination

CESCR – Committee on Economic, Social and Cultural Rights

CRC – Committee on the Rights of the Child

CRPD – Committee on the Rights of Persons with Disabilities

CEDAW – Committee on the Elimination of Discrimination Against Women

Source: HRMI and URG, 2019, p. 10

On the other hand, there are more obstacles to the assessment of states willingness to cooperate with the UN's human rights compliance mechanisms, namely, regarding the uniformization of domestic laws and policies in accordance with international norms, as well as to the assessment of progress on the implementation of the recommendations of those same compliance mechanisms at the national level (HRMI and URG, 2019, pp. 9-10). As a result, I believe an alternative way of measuring the real impact of UN-led human rights endeavours next to its actual beneficiaries, i.e., individuals and local communities, is to analyse how civil society – and, in particular, NGOs – have engaged with the organization over time. This is because civil society may, sometimes, represent the interests of a country's population more accurately than their own governments, especially in the case of authoritarian, repressive and/or populist regimes and in the case of failed states.

We have seen before that NGOs principal point of access into the UN system is through ECOSOC's accreditation framework. Thus, it is interesting to compare the numbers and realize that, in 1946, that UN organ had granted consultative status to 41 NGOs, in 1992, there were more than 700 NGOs with it, in 2018, that number already overcame 4900 NGOs (United Nations, 2018, p. 2) and, today, there are officially 5451 NGOs enjoying consultative status (ECOSOC, 2022). It is not difficult to reach the conclusion, therefore, that the number of NGOs interested in accessing the UN system by gaining consultative status through that mechanism has greatly increased since the inception of this para-universal international organization. One could also point out that the number of NGOs in itself, whether they have been granted ECOSOC accreditation or not, has also grown in the second half of the 20th century, and especially after the end of the Cold War, such that this phenomenon may also have played a role in the increasing numbers of those which were accredited (Mertus, 2009b, p. 11). However, I consider that, even if the "normal" growth in the number of NGOs might be related to the rising numbers of those which are interested in gaining such a status, the investment in time and energy on the part of civil society in order to reach several UN organs and bodies does not come as a coincidence.

In other words, if NGOs keep on trying to be granted consultative status, it is because they believe in the efficiency of the UN in promoting and protecting human rights, it is because they identify with the purposes of the organization and find them legitimate, it is because they are aware that their own performance is more effective when they work in tandem with the UN, and it is because they know that the international human rights regime has a real impact on-the-ground. For these reasons, I interpret the rising numbers of NGOs able to formally interact with the UN as a sign of a positive evolution in the real impact of the organization's human rights work next to individuals and local populations. One additional note should be made regarding the fact that civil society's influence on governmental decisions and actions does contribute to a more effective enforcement of international human rights norms at the domestic level. This is well observed in the case of the UPR, for instance, where research has found that states will more likely accept recommendations to which NGOs have contributed, such that 74% of all UPR recommendations are, indeed, accepted by governments (McGaughey, 2021c, p. 76).

As a result, one may logically conclude that there has been a recognizable global improvement in human rights thanks to the work carried out by the UN in this field. Even though we might easily be discouraged by fatalistic discourses on the occurrence of human rights violations throughout the world, there has actually been a general amelioration in the respect for and compliance with human rights, in the last decades. Such progress is observable

when applying a global and systematic measurement of human rights performance, and, in particular, one which fits within Sinkkink's "empirical comparison" paradigm. Moreover, it is the UN system that is at the centre of that improvement, instead of any other institution or movement. The exponential growth in the number of states ratifying or acceding to the conventions elaborated under the initiative of the UN and the great increase in the number of NGOs interested in being accredited with consultative status next to the UN system, show that the organization enjoys a special legitimacy and authority allowing it to be considered the greatest champion of the international human rights regime.

4. Final remarks and new perspectives

As a result of my analysis, I demonstrate the validity of the answer I propose to my initial research question. The hypothesis I put forward regarding the question *How has the United Nations been contributing to the process of global constitutionalization?* is that, in recent years, the UN has been progressively contributing to the process of global constitutionalization through the juridification, the universalization and the centralization of the international human rights regime, as its most important safeguard.

I observe this emerging phenomenon in the actions and initiatives undertaken by this para-universal international organization and, in particular, in the work carried out by its Charter-based and treaty-based bodies, as well as in its interactions with NGOs. I further corroborate the validity of my hypothesis by arguing that respect for and compliance with human rights globally has been gradually improving over time and that the UN has been the principal driver of this evolution.

This way, I assumed the UN has been contributing to the process of global constitutionalization, and I analysed in what way it has been doing so. I undertook my research by considering the UN a global constitutionalizing force and by considering the international human rights regime a constitutionalizing element. Essentially, I focused on how the UN has been contributing to the creation and implementation of the international human rights legal framework, as well as on investigating whether its institutional structure, goals and activities have been having a real impact on-the-ground.

After identifying the characteristic heterogeneity of the school of thought of global constitutionalism and the obstacles it raises to academics interested in this legal branch, I decided to clarify the concept of global constitutionalization that I refer to during my research by elaborating one “from scratch”. I drew inspiration from both Hans Kelsen’s philosophical theory of international law and Anne Peter’s theoretical perspective of global constitutionalism, which, from my point of view, are authors whose theories complement very well one another.

My own definition of global constitutionalization is, thus, composed of three dimensions that I described in further detail: the juridification, the universalization and the centralization of international law. Subsequently, I applied the theoretical basis I analysed before to the practical functioning of the UN on promoting and protecting human rights throughout the world, in order to show the adequacy of my proposed hypothesis.

I clarified that the juridification dimension is related to the idea of a positive international legal order characterized for having a hierarchical structure as well as with the existence of a multi-level governance that includes various types of actors who participate in the same global constitutionalization framework, such that its indicators include the creation of international treaties, by way of application of international custom, through a dialogue between domestic and international actors.

After analysing the human rights work undertaken by the core active UN organs – i.e., the UNGA, the UNSC, the ECOSOC, the ICJ and the Secretariat – I demonstrated that the UN has been shaped to serve as a forum for the elaboration and development of conventional law on the basis of customary law, with the agreement of member states. Therefore, through this complex system, there is a practical translation of the principle that the application of a superior norm – custom – is the source of validity for the creation of an inferior norm – a treaty, a declaration, a resolution, among others.

I also noted that some of the institutions belonging to the UN family count with the representation and participation of every existing state in their actions and initiatives. For this reason, I inferred that the organization provides a global platform for the establishment of a permanent dialogue among the various members of the international community. Indeed, since its working methods are based on state participation and agreement, both the UN and national governments have an impact on the human rights norms emanated from each other.

In addition, I observed that the UN enjoys legal powers and the ability to effectively exercise them, such that it has been able to change the traditional sources of international human rights law through the creation of new legal sources, through the interpretation of international conventions, and through the work it carries out on the identification of customary law and on its progressive codification. This happens because the validity of the Charter is based on the principle of *pacta sunt servanda*, because the validity of all other norms emanated from the UN is derived from the Charter, and because human rights norms originated from within the organization are validated by the customary legal norms of *jus cogens*.

One of the main purposes of the organization is the promotion and protection of human rights and fundamental freedoms in all parts of the world. This way, the creation of conventional law by way of application of customary law carried out by its different organs and bodies is aimed at ensuring its member states' respect and compliance regarding the international human rights regime. Consequently, I conclude that the functioning and composition of the UN are in accordance with the juridification dimension of my definition of global constitutionalization.

In turn, the universalization dimension is related to the notion of a basic norm that legitimates any chain of validity. It is connected to the idea of the dispensability of international law's transformation into national law as a prerequisite for it to become valid, and to the notion of the humanization of international law. And it is linked with the idea of the existence of an international community which shares common interests among its members. This way, indicators of this dimension include the participation of individuals in their own human rights enforcement, as well as the existence of *erga omnes* norms implementation tools.

I explained that, as the guardian of the international human rights regime, the UN enjoys a special legitimacy and authority. For this reason, I argued that the trust attributed to the organization in the guidance and development of the international human rights legal framework means that the objectively just and good basic norm that human rights must be promoted and protected has been legitimately enacted through it. I also asserted that the UN is at the centre of this regime due to those Charter-based and treaty-based bodies whose work essentially focuses on the subject of human rights.

I looked closely at the, more intergovernmental and policy-oriented, Charter-based bodies, as well as at the, more expert-focused and juridical, treaty-based bodies. In particular, I analysed the work of the OHCHR, of the HRC, and of the treaty bodies associated to the nine core international human rights conventions. I have also observed the current holistic approach being undertaken by the UN, which aims at mainstreaming the organization's human rights agenda throughout its various organs' and bodies' mandates, and which has been marked by the adoption of the 2030 Agenda for Sustainable Development.

Further, I argued that the emergence of an international community, sharing a common identity and characterized for a universal interest in respecting human rights, is taking place through the UN, such that there is a shifting paradigmatic perception that the real beneficiaries of international human rights law are, indeed, the people, instead of the state. This way, it is widely recognized that international human rights law corresponds to norms of *erga omnes* and, thus, the idea that non-affected states may raise claims and apply countermeasures against human rights abusers has been increasingly accepted.

What is more, I noticed the transformation of international into national law is less and less perceived as a requirement for it to be valid in relationship to individuals and local communities. Therefore, more interstate and more individual and/or group complaint mechanisms are provided by different UN organs and bodies. Consequently, I conclude that the international human rights regime developed within the UN framework is in accordance with the universalization dimension of my definition of global constitutionalization.

Lastly, the centralization dimension is related to the need to reformulate how we perceive sovereignty by acknowledging the increasing accountability of national governments regarding their human rights duties. It is also associated with the ever more important functions performed by civil society in global affairs, where they cooperate in the processes of law-making and -enforcement. As such, indicators of the centralization dimension include specific mechanisms administered by an international organization which collaborates with NGOs to work towards a more efficient implementation of international law worldwide.

I observed that the UN greatly benefits from the support offered by NGOs, notably, from the publication of data collected on-the-ground, to which these organizations can have first-hand access to. They are, therefore, considered to provide an alternative solution to a classical problem found in international fora, that of distorted reports presented by national governments, trying to ameliorate their reputation by hiding potential human rights violations from the rest of the international community.

Nonetheless, NGOs participation in UN human rights organs and bodies do challenge our perception of sovereignty. Even though they are the foundational building block of the current international paradigm, states are becoming less autonomous in the performance of certain functions traditionally associated with sovereignty, such that other domestic and international institutions have become increasingly responsible for undertaking similar tasks. What is more, an increasing pressure towards greater governmental accountability regarding the fulfilment of human rights duties is also observed, breaking with the old cycle of plainly associating sovereignty with state's rights and prerogatives.

I demonstrated that the international community has become more diversified and more inclusive over the last few decades and, for this reason, the roles undertaken by NGOs in the various UN human rights institutions have been expanding, as well. In fact, the ECOSOC established the eligibility requirements that allow these organizations to be attributed consultative status, a pathway for them to take part in certain formal UN mechanisms, this way exercising greater influence on their decisions and activities.

In addition, I analysed the functions performed by NGOs when working in tandem with treaty bodies and with the HRC, in view of promoting and protecting human rights at different geographical levels. This way, I showed, not only that these organizations contribute extensively to the well-functioning of UN activities, but also that their own work is guided by the legal instruments and mechanisms developed within that framework. Consequently, the constant interaction between NGOs and UN human rights organs and bodies is in accordance with the centralization dimension of my definition of global constitutionalization.

In view of bringing further strength to the hypothesis I propose as an answer to my research question, I added to the analysis summarized above an investigation on whether the global situation of human rights has been improving or deteriorating. In order to do it, I took into consideration that the most difficult obstacle to overcome in analysing the evolution of human rights in the world is the lack of a systematic approach to its effective measurement. In the face of this, I found a solution in the “empirical comparison” methodology developed by Kathryn Sinkkink.

Through the theoretical lenses advanced by the author, researchers must either compare the reality lived in current times with the one lived in the past, or compare the reality experienced in a certain part of the world with the one experienced in another. I explained that, nowadays, because the general public is more aware of its own human rights, and because it has access to more information on the occurrence of human rights violations anywhere in the world, it is more easily prompted to draw a pessimistic opinion of the efficacy of the international human rights regime.

However, based on the work carried out by Sinkkink, I was able to affirm that, despite some retrogress, the world has observed a gradual progress in the global human rights performance. Moreover, I corroborate this information by showing that HRMI reaches the same conclusion by undertaking research which is also premised on the methodology advocated by the author. After reaching this rather optimistic conclusion, nevertheless, it still mattered to demonstrate that the general amelioration of the respect for and compliance with human rights has been essentially due to UN efforts.

To this end, I focused, not only on the institutional evolution of the organization, but also on its empirical relationship with civil society. I indicated that an impressive amount and variety of human rights legal instruments have been emanated from the UN system, with the participation and agreement of its member states, and that there has been an exponential growth in the number of states that either ratified or acceded to the international human rights conventions elaborated under the organization’s auspices.

Moreover, I observed that the number of NGOs that gained consultative status through the ECOSOC in order to access UN organs and bodies has exponentially increased over time and I interpreted this phenomenon by inferring that these organizations are more and more interested in participating in such mechanisms because they believe that the international human rights regime has a real impact on-the-ground. Consequently, I interpret these facts as a sign of a positive change on the lives of individuals and local communities, thanks to the human rights endeavours carried out by the UN.

Bearing in mind all of the above, I have been able to demonstrate why I disagree with realists, fragmentalists, pluralists and most notably, why I disagree with Jean Cohen. The author claims that global constitutionalism acts under a disguised imperialistic goal, which serves only some states' interests. I have shown, however, that the process of global constitutionalization has been happening all around the world, since all existing states have been participating in it, through the different available forms of engagement with the UN. Cohen also asserts that international society is marked by a segmentally differentiated international order, instead of a rather uniformized one. I have shown, in turn, that an international community is composed, not only of states, but also of other international actors, such as NGOs and individuals, and that they all share one same common interest, the promotion and protection of human rights.

The author remains sceptical regarding the interpretation of sovereignty proposed by global constitutionalists. I have demonstrated, however, that the traditional idea of sovereignty is challenged by the process of global constitutionalization, since states tend to be held more accountable regarding their human rights duties. Cohen further points out to the lack of clarity regarding the question of what kind of political form would the international community take should a global constitution ever be attained. I have provided greater clarity on this specific aspect by answering my main research question. I believe that the UN, in its capacity of a para-universal international organization, could, in the future, provide the space for such an institution, since this process has already been observable in the case of its role on the safeguarding of the international human rights regime.

Furthermore, the analysis I have undertaken allows me to highlight a few shortcomings in existing literature within this field of studies. Most notably, I have identified a clear lack of homogeneity among scholars who advocate and carry out research on global constitutionalism. This lack of agreement does install considerable problems to the development of this theoretical branch. Therefore, I believe academics should make efforts in the direction of finding a common ground on their diverse perspectives, as I endeavoured to do when creating a more embracing concept of global constitutionalization. Another gap is the relatively limited scholarly research on the UN's goal to promote and protect human rights worldwide. In other words, authors have more frequently focused on studying specific aspects of the international human rights regime itself, instead. This is why I have made clear that, even though the UN is part of a wide ranging and complex system composed of several international actors with similar objectives, the organization has, in fact, been at the centre of the safeguarding of the international human rights legal framework, such that it enjoys a special legitimacy and authority in this regard.

In turn, a worrisome shortcoming in academia is the virtual absence of a comprehensive system that tracks data trends in the human rights performance of countries all over the globe. Even though they are, by nature, especially hard to measure, the inexistence of a measuring mechanism that allows us to have an accurate idea of how the respect for and compliance with human rights have been changing does hinder our capacity to develop a logical interpretation of their evolution over time and between different regions. This way, it matters to invest in more and in better human rights tracking systems. Moreover, such a lack of clarity may cause, among the general population and the international community, a distorted vision of the global situation of human rights, namely, one that is rather hopeless. Currently, various sources of information do seem to transmit the idea of a disempowerment in the international human rights legal framework. This is quite problematic because it simply does not correspond to the truth. Thus, more research should be done, proving that there has been a progressive improvement in real people's lives, all over the world, regarding their human rights experiences.

Finally, it is important to carry on investigation on the link between the process of global constitutionalization and the UN system's functioning and impact. One should pursue this goal by premising their research on the belief that global constitutionalism is a morally desirable agenda. I have made one more step towards a deeper acknowledgement of this phenomenon, through the analysis of the creation and implementation mechanisms of the international human rights legal framework. Nevertheless, there are many more aspects of the international legal and political order through which it is possible to explore such a link.

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