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The philosophy of international law in contemporary scholarship: overcoming negligence through the global expansion of human rights
A filosofia do direito internacional no estudo contemporâneo: a superação negligência através da expansão global dos direitos humanos

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ABSTRACT

This paper aims to analyze the relative neglect often given to international law under philosophy of law studies. Within this context, the relationship between law and reasoning, in the light of the international realm, is taken in a broader level to understand the role played by this field of knowledge in H.L.A. Hart's *The Concept of Law*, among other works of reference. With the consolidation of normative and jurisprudential work of several international fora, such as the United Nations, its affiliate agencies, and many international courts other than the International Court of Justice, international law has given rise to several legal phenomena worth understanding through a philosophical perspective. Regardless of the field of study, whether humanitarian law, international economic law, or transnational justice, the social and political role international law plays nowadays has been growing exponentially. Notwithstanding its importance, there is a current negligence to the philosophy of international law among authors from all over the world. Despite researching fields such as distributive justice, group justice and transnational justice, not enough thought is put into understanding current legal theories behind international law, neither into the possibility of conceiving a moral theory in the context of legal pluralism. In view of these main issues, the article aims not only to examine international law as a viable field of study for the philosophy of law in the context of legal pluralism, but also to further understand its developmental consequences for the international order. Therefore, this article analyzes with remarkable concern the importance of the global expansion of human rights in order to better examine the role that international human rights can play in the definition of a international legal order.

Keywords: Legal pluralism. Transnational justice. Human rights.

RESUMO

Este trabalho tem como objetivo analisar a relativa negligência, muitas vezes do direito internacional estudos de filosofia direito. Dentro deste contexto, a relação entre direito e do raciocínio, à luz do domínio internacional, é tomada em um nível mais amplo para entender o papel desempenhado por este campo de conhecimento a luz de “O Conceito de Direito”, de Hart, entre outras obras de referência. Com a consolidação do trabalho normativo e jurisprudencial de vários fóruns internacionais, como a família onusiana, o direito internacional deu origem a vários fenômenos jurídicos que podem ser compreendidos através de uma perspectiva filosófica. Independentemente do campo de estudo, se direito humanitário, direito econômico internacional, ou a justiça transnacional, o direito internacional desempenha um crescente papel social e político. O artigo tem como objetivo não só para examinar o direito internacional como um campo viável de estudo para a filosofia do direito no contexto do pluralismo jurídico, mas também para entender melhor as suas consequências para o desenvolvimento para a ordem internacional. Portanto, este artigo analisa com notável preocupação a importância da expansão global dos direitos humanos, a fim de examinar melhor o papel que os direitos humanos internacionais podem desempenhar na definição de uma ordem jurídica internacional.

Palavras-chave: Pluralismo jurídico. A justiça transnacional. Direitos humanos.

1. INTRODUCTORY REMARKS

Scholarly circles in international law and philosophy of law have been experiencing the very striving task to revive the foundations of the philosophical thought and explain what may be considered the core concerns of both subjects nowadays: power, authority, moral, justice, adjudication, coercion, enforcement, and obligations¹. This necessary approximation is not only a

1 See, for instance, BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 868 et seq; FINNIS, John. Natural law: the classical tradition. In: COLEMAN, Jules L., HIMMA, Kenneth, SHAPIRO, Scott. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 1-39; TESSON, Fernando R. Philosophy of in-

matter of academic convenience, but it is rather an extraordinary opportunity for scholars to critically reflect on the main contemporary theories involving the nature and philosophical justification of conceptual and normative issues of international law and its institutions.

A first methodological concern appears to be the investigation of the main existing concepts and understandings of normativity and how they are associated to international legal order and the main roles of the international regulatory, law-making and adjudicatory institutions. Secondly, philosophy of international and its theoretical proponents would be very prepared to design theoretical proposals for analysis of the key interactions between law, morality and politics within the international legal order, challenging, for instance, the mainstream approach of global governance in international law.

Further, philosophy of international law could be better adjusted to formulate critical inputs to the current state of art of the academic debate surrounding legal positivism, realism in international relations, natural law and new non-positivist circles in international legal scholarship². The potential merger between two traditional subjects in legal studies can overcome the outdated plain discussions about the relationship between international law and municipal law (usually based on a voluntary return to the Manichaeism of monism vs. dualism), or about the decentralized nature of international legal order, often conceived as the main constraint for legitimacy and enforcement.

Any sound criticism would then be justified by the impetus of a theory sufficient to explain the foundations of international law and able to ascertain the normative parameters for their proper interpretation of normative issues (e.g. justice, moral, adjudication, legitimacy) in international law and enforcement of international rules by the existing institutions (international organizations, international courts and national courts themselves). In doing so, philosophy of international law (and revisited

international law. In: MAY, Larry; BROWN, Jeff (Ed.). *Philosophy of law: classic and contemporary readings*. Chichester: Wiley-Blackwell, 2010, p. 187-199. p. 187; BESSON, Samantha; TASIIOULAS, John. Introduction. In: _____ (Ed.). *The philosophy of international law*. New York: Oxford University, 2010. p. 1-32. p. 1 et seq;

2 Critically, see the opposing views in GOLDSMITH, Jack L.; POSNER, Eric A. *The limits of international law*. New York: Oxford University, 2005; and DWORKING, Ronald. ‘A new philosophy for international law. *Philosophy and Public Affairs*, v. 41, n. 1, p. 2-30, Winter 2013.

proposals for the philosophical foundations of international law) will constitute a very important key for the comprehension of the dynamics of the more interdependent international community.

It may assist us to deviate from the old risks (and obsession) to associate the existing international legal order to a set or bundle of national legal orders, based on voluntarism and state-centered perspectives, both taken as core arguments for the justification for the functioning of a rudimentary international system of states

This paper is an attempt to tackle some of the pending issues related to contemporary research agenda of philosophy of international law. It is based on the analysis of Jeremy Waldron's paper, entitled "International Law: a Relatively Small and Unimportant Part of Jurisprudence"³, and Allen Buchanan and David Golove's "*The Philosophy of International Law*"⁴, in which various aspects of the current scholarly international legal debate are addressed. This subject is particularly relevant with regard to the parallels Waldron establishes with the work of H.L.A. Hart, *The Concept of Law*⁵, in which he questions the analysis that Hart develops about the validity of international law as a systematic and singular branch of law.

Buchanan and Golove, on the other hand, agree that there is a certain neglect of the philosophy of international law, thus remarking in their paper some issues that are currently discussed in academic circles in the field of political philosophy, but not of philosophy of international law, such as distributive justice and transnational justice, for example.

In this context, rather than simply understand the reasons why there is some theoretical negligence in relation to the study of the philosophy of international law, this paper investigates the current trends on the analysis

of the nature of international law, admitted as a legal theory for international law, and the possibility of conceiving a moral theory in the context of international law.

Our proposal of analysis for these core issues of research is presented in five sections. In addition to this first introductory item, the second item analyzes the problem of neglect of the philosophy of international law, from the perspective of authors such as Buchanan and Golove, and by contextualizing their work with the authoritative work of other theorists on the subject. The third item explores the criticism proposed by Waldron with regard to Hart, the so-called opportunity costs involved in the lack of analyzing international law throughout in his work. In section four, we analyze the key aspects of the challenges faced by Buchanan and Golove within the domain of international law nowadays. In our concluding remarks, we stress the importance of the recent changes occurring in the field of international law, as well as trends for its future development.

2. THE PROBLEM OF NEGLECT OF THE PHILOSOPHY OF INTERNATIONAL LAW

In *The Philosophy of International Law*, Buchanan and Golove argue what they call a "curious neglect" conferred on the philosophy of international law. According to the authors, contemporary political philosophers already tend to neglect international relations in their studies, having even less to say about the philosophy of international law. Most contemporary philosophers of law sometimes even act as if there were not an international legal system to be theorized⁶.

Samantha Besson and John Tasioulas also raise this neglect with regard to the philosophy of international

3 WALDRON, Jeremy. International law: 'a relatively small and unimportant' part of jurisprudence? *NYU School of Law, Public Law Research Paper* n. 13-56, p. 209-223, Oct. 2013. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326758>. Accessed on: 5 apr. 2015.

4 BUCHANAN, Allen; GOLOVE David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934.

5 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p. 213-237. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

6 According to Buchanan and Golove: "Contemporary political philosophers trend to neglect international relations. Contemporary philosophers of law usually have even less to say about the philosophy of international law. Rawls's work has dominated political philosophy for more than a quarter of a century, but only recently has he extended his theory to the international sphere, and then only in the rather skeletal fashion. The contemporary major philosophers of law largely proceed to if there were in legal international system to be theorized about". BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 868.

law, which ended up being left behind at a period to which the authors refer as the rebirth of the philosophy of law (since 1960, through the works of Hart and Rawls)⁷. Previously to the current scholarship discussing philosophical foundations of international law, some authors contended that the fundamental neglect was associated to the way how legal education spread a vague and flat approach on the role of international law and international institutions: instruments to commerce and diplomacy⁸.

The main criticism is also consistent with observations that Jeremy Waldron makes with regard to Hart's work, *International Law: a Relatively Small and Unimportant Part of Jurisprudence*. Among the remarks made by Waldron in relation to Hart's ideas in Chapter X of *The Concept of Law*, one could notice the neglect in relation to international law. To Waldron, Hart's omission impaired international law's theoretical appeal, particularly because he could have better contributed to the debate on the interface with legal philosophy.

According to Hart, with regard to his conception of the theorization international law:

It resembles, as we have said, in form though not at all in content, a simple regime of primary or customary law. Yet some theorists, in their anxiety to defend against the skeptic the title of international law to be called 'law', have succumbed to the temptation to minimize these formal differences, and to exaggerate the analogies, which can be found in international law to legislation or other desirable formal features of municipal law⁹.

Therefore, the author then made an effort to address the "issue" of an emergent field of study in the philosophy of law. Despite Hart's efforts, his assertions were based on a considerably different international scenario than the one existing by the time Buchanan and Golove published their research.

To further exemplify Hart's contention, the author

7 According to Besson and Tasioulas: "Yet it is the case that, until comparatively recently, the post-1960 revival of cool philosophy has tended to neglect international law". BESSON, Samantha; TASIIOULAS, John. Introduction. In: _____ (Ed.). *The philosophy of international law*. New York: Oxford University, 2010. p. 1-32. p. 17.

8 DUMBAUD, Edward. The place of philosophy in international law. *University of Pennsylvania Law Review*, Philadelphia, v. 83, n. 5, p. 590-606, 1935.

9 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p. 232. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

points out that:

[...] Though it is consistent with the usage of the last 150 years to use the expression 'law' here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists.¹⁰.

In addition, there is even a more problematic fact, which is that the minority of political philosophers that seek to extend their normative vision to the field of international relations, for the most part, have ceased to be explicit about the role of positive theory in this attempt. According to Buchanan and Golove, the way is clear even for the development of a moral theory of international law. According to the authors, the structure of a moral theory of international law would consist of the following elements, basically comprising moral grounds, accomplishment of goals, legitimacy and enforcement:

The fundamental structure of a normative theory of international law, the ideal theory, would consist of the following elements: (1) an account of the moral point, or goals of the institution of international law, the most fundamental moral values it ought to serve, (2) an articulation of the moral reasons for supporting the institution of international law as a means of achieving those goals or serving those values, (3) the specification of the conditions under which the international legal system would be legitimate, at least in the sense of there being an adequate justification for the processes of creating and enforcing the rules of the system, (4) a statement of and justification for the most important substantive principles of the system.¹¹

Buchanan and Golove listed three factors responding for this relative underdeveloped state of the philosophy of international law. First, the fact that scholars neglect institutional moral theory. This means that the core moral principles of international law would necessarily be difficult to be institutionalized due to the fact that their eventual abandonment (to implement other institutional principles case by case, for example) is pro-

10 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p. 214. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

11 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 881-882.

hibitive and too restrictive¹².

The second factor would be directly related to the realist theory of international relations¹³, to which the moral theoretical approach of international relations and, therefore, of international law, would be futile. More recently, even though realism has been challenged by several critics regarding its most important assumptions, and, more systematically, by liberal positivist theories, it is precisely its pessimistic implications for normative initiative that persist. This is particularly relevant with regard to political philosophers and legal philosophers who are not intimate with the main weaknesses of this theory (realism).¹⁴

Finally, many authors tend to project a disparaging perspective of the philosophy of international law in their works. Buchanan and Golove assert that, in the very least, this field of law is described only as a pale shadow of what we call a legal system¹⁵. The most extreme form of this point of view, the *legal nihilism*¹⁶, even

12 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 870.

13 According to Amado Luiz Cervo, the fundamentals of realistic theory of international relations may be rejected by the very honor student of the area: "Realism, for example, paved the way to success in intellectual universities and media from around the world, so incomparable. Disqualification this theoretical current begins with the evidence of its origin in the United States at the beginning of the Cold War, for this reason establishing the State as the main agent of international relations and security as primary motivation of external action. Realism suggests the world interests, values and Western standards of conduct. Realism is not free nor explains international relations as you want. Sometimes you may agree to certain nations face the realism teaches Parola. He adds that his morale was excluded from the beginning. Why would international relations not move against realism, which is capable of producing the unjust order?" CERVO, Amado Luiz. Concepts in International Relations. *Journal of International Politics*, Basingstoke, v. 51, n. 2, p. 8-25, 2008. Available at: <<http://www.scielo.br/pdf/rbpi/v51n2/v51n2a02>>. Accessed on: 5 apr. 2015.

14 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 871.

15 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 871.

16 According to Buchanan and Golove: "There are two ways the legal Nihilist view can be understood: as an analytic claim about the features a system of rules must have if it is to constitute the legal system, paired with the assertion that what we call international law does not satisfy those conditions; or as a claim that a system of rules is not a legal system unless its rules effectively constrain or

denies the existence of international law as a field of law.

3. HART AND THE OPPORTUNITY COST OF HIS ANALYSIS OF INTERNATIONAL LAW

In a similar fashion to Buchanan and Golove's critique, Jeremy Waldron focuses his analysis on the ideas supported by Hart in Chapter X of *The Concept of Law*. The title of Waldron's article is a prelude of the criticism made against Hart, who would have lost an opportunity to effectively contribute to theoretical foundations of the legal nature of the international order. Hart could have explored the differences between the so-called *municipal legal systems* and *international legal systems*¹⁷. According to Jeremy Waldron:

The real harm lies in the opportunity costs of Hart's negligence. What we miss is what might have been done. [...] It is a pity that the author of *The Concept of Law* ran out of steam or inclination before doing this in his last chapter, for it deprived us not only of comparable insights, but of an example that might have inspired some of Hart's followers in jurisprudence to take up and pursue this challenge¹⁸.

Addressing the foundations of a legal system, Hart asserts the existence of two minimum conditions necessary and sufficient for the existence of a legal system. First, the rules of behavior valid according to the ultimate criteria of validity must be generally obeyed. Second, its officials must effectively accept the rules of change and adjudication as common public standards

determine the behavior of those to whom the rules are directed, along with the assertion that international law is not effective." BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 877.

17 Waldron also explains this distinction, defining municipal legal systems such as those belonging to a particular state, such as France or New Zealand, as opposed to an international legal system (WALDRON, Jeremy. International law: 'a relatively small and unimportant' part of jurisprudence? *NYU School of Law, Public Law Research Paper* n. 13-56, p. 209-223, Oct. 2013. p. 209. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326758>. Accessed on: 5 apr. 2015.)

18 WALDRON, Jeremy. International law: 'a relatively small and unimportant' part of jurisprudence? *NYU School of Law, Public Law Research Paper* n. 13-56, p. 209-223, Oct. 2013. p. 222-223. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326758>. Accessed on: 5 apr. 2015.

of official behavior¹⁹. According to Hart, what would then be the status of international law? That is the question he does not answer in *The Concept of Law*. According to the author, international law does not have secondary rules, an organized legislature and courts with compulsory jurisdiction²⁰.

The absence of these Institutions means that the rules for states resemble that simple form of social structure, consisting only of primary rules of obligation, which when we find it among societies of individuals, we are accustomed to contrast with a developed legal system²¹.

In this sense, Hart asserts that international law lacks the secondary rules of change and adjudication which provide for legislature and courts and also a unifying rule of recognition specifying sources of law, with a general criteria for the identification of its rules²².

Although the author affirms that we must free ourselves from the assumption that international law must necessarily contain a fundamental norm, Hart rejects the commonly made analogies between international law and domestic law. For him, the rules on operation of international law do not form a system, but a simple set of rules²³.

According to Hart, the international legal order would be considered primitive:

Both forms of doubt arise from an adverse comparison of international law with municipal

law, which is taken of the clear, standard example of what law is. The first has its roots deep in the conception of the law fundamentally as matter of orders backed by threats, and contrasts the character of the rules of international law with those of municipal law. The second form of doubt springs from the obscure belief that States are fundamentally incapable of being the subjects of the legal obligation, and contrasts the character of the subjects of international law with those of municipal law²⁴.

More than criticism, the text of Jeremy Waldron appears to be, in reality, an expression of regret regarding the superficiality with which Hart depicted the international legal system in 1961. Much of the critical appraisal formulated by Waldron is explained by the fact that he is a contemporary author, who may refer to theories published and events occurred after Hart's work to base his assumptions. Amongst the examples, one could remark the operation and own life of Vienna Convention on the Law of Treaties (1969) or even a more outstanding performance of the International Court of Justice in recent decades. The complex processes leading to the emergence of other standing international courts after the 1960s at multilateral and regional levels are also plausible evidences to excuse Hart's arguable negligence or missing opportunity²⁵.

19 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p.116. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

20 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p.216. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

21 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p. 213-237; p. 214. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

22 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p.214. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

23 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p.236. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

24 HART, H. L. A. *The concept of law*. 2. ed. New York: Oxford University, 1994. p. 216. Available at: <<http://nw18.american.edu/~dfagel/Class%20Readings/Hart/International%20Law%20Chapter%20From%20Concept%20of%20Law.pdf>>. Accessed on: 3 apr. 2015.

25 Previous to Hart, the old scholarship dealing with the foundations of philosophy of international law was inevitably influenced by monists and dualists. For instance, Eduard Dumbaud (DUMBAUD, Edward. The place of philosophy in international law. *University of Pennsylvania Law Review*, Philadelphia, v. 83, n. 5, p. 590-606, 1935. p. 606-607), resorted to Hans Kelsen and Dionisio Anzilotti to formulate his main claims: "International law is international; it is not the internal law of a super-state or of a multitude of states, a composite structure like "criminal law" or "contracts", a conglomeration of rules prevailing in many jurisdictions with respect to a common subject-matter. It is a universal unity, having its own constitution and community, made up of independent states. (2) That the fundamental norm is binding must be shown upon moral or political extra-legal grounds.' Here may be considered the facts of 'international intercourse, the pressure of commercial needs and humanitarian desires'; (3) What the content of the fundamental norm is must be ascertained by observation. It includes the rule *pacta sunt servanda*; (4) The fundamental norm prescribes how law is to be made. Sources so referred to are convention, custom and general principles of law.' (5) International law sets the orbit within which states may exercise their jurisdiction. The doctrine that the jurisdiction of states is not unlimited, embracing the whole world, but has definite boundaries is one of the chief contributions of Anglo-American legal thought to the science of international law."; (6) International law is not the source of state law and power, but a limitation on it; just as states in the American union derive authority from their own constitutions but are curbed by the federal Constitution." If the monistic construction

Hart recognizes that the analogies between domestic law and international law may in the future become more consistent. In his words:

Perhaps international law is at present in a stage of transition towards acceptance of this and other forms, which would bring it nearer in structure to a municipal system. If, and when, this transition is completed the formal analogies, which at present seem thin and even delusive, would acquire substance, and the skeptic's last doubts about the legal 'quality' of international law may then be laid to rest.

In his paper, Waldron argues against this perspective of absence of primary and secondary rules, stating, for example, that international law would comprise secondary rules, in line with Hart's concept of secondary rules. The difference is that these rules would not be exactly the same as those of municipal legal systems. Still, the very definition of secondary rules by Hart would nowadays be adjusted to international law²⁶.

Waldron refers to the International Court of Justice as a basis to challenge Hart's assertion, sustaining that the court does not act as sole an arbitrator in its current decisions. The Court has a deep-rooted role in public international law, it has a continuous participation to the international norm setting, it achieved prestige among States and international organizations, and it passes significant decisions and is composed fairly evenly²⁷.

Furthermore, Waldron mentions the distinct nature of law making in the international legal system, in comparison to municipal legal systems. Even though they operate differently and not in centralized manner, i.e., in a single body of legislative power, contractual and

bringing international law and the internal law of every state within the same legal system is to be preserved, it must be on the basis of common dependence upon a higher norm."

26 "Hart's basic idea is quite simple. Primary rules are rules of conduct; they tell you what you are legally obligated to do (or refrain from) and what consequences attach to obedience or disobedience. Thus, the criminal law rules that prohibit theft, forbid certain conduct and provide for penalties for violating the prohibition. Technically, the class of secondary rules includes everything except primary rules. The category of secondary rules includes legal rules that allow for the creation, extinction, and alteration of primary rules; these secondary rules are power-conferring rules. Thus, contract law empowers individuals LEGAL theory lexicon. primary and secondary rules. Available at: <http://lsolum.typepad.com/legal_theory_lexicon/2004/06/legal_theory_le_2.html>. Accessed on: 5 apr. 2015.

27 WALDRON, Jeremy. International law: 'a relatively small and unimportant' part of jurisprudence? *NYU School of Law, Public Law Research Paper* n. 13-56, p. 209-223, Oct. 2013. p. 216. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326758>. Accessed on: 5 apr. 2015.

voluntary creation of obligations are also present in the negotiation and conclusion of treaties:

Individuals in the municipal order may enter into contracts, so states in the international order may enter into treaties and vary their obligations to one another accordingly. Such powers would be unintelligible if the international order were just the system a primary rules. So Hart is not entitled to infer - as he does - that the international order is just a system of primary rules (so far the legal change is concerned) from the fact that it has no parliament.²⁸

Ruti Teitel also refutes the international law negative sustained by Hart. In her own words:

International law has been changing in directions that arguably bring it closer, in its forms and ways of operation, to domestic law. For example, this can be said of international law's development of processes and institutions of judicialization and of the centralization of its sanctions. Even more important, this can be said with regard to the degree to which international law has emergent potential for the kind of applicability and direct effect on individuals that domestic law routinely displays. It follows, therefore, that around the world, courts are engaging more often with foreign sources in their constitutional jurisprudence²⁹.

Some conclusions can be drawn from these premises. Despite relying on different structures and forms of systematization for the creation and enforcement of obligations, this aspect does not imply that the international order and the internal order are necessarily disparate, neither impossible to complement one another. In fact, as it occurs in municipal law, the international order is comprised by rules produced by international agents, is shaped by previously determined and existing jurisdictions and by critical jurisprudence, either by a voluntary inclination or by consensus.

Another point argued by Waldron is that systemic legal orders are an element present in greater or lesser degree in any order entity, even in municipal legal systems³⁰. According to the author's claims in *Human Rights*:

28 WALDRON, Jeremy. International law: 'a relatively small and unimportant' part of jurisprudence? *NYU School of Law, Public Law Research Paper* n. 13-56, p. 209-223, Oct. 2013. p. 217. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326758>. Accessed on: 5 apr. 2015.

29 TEITEL, Ruti G. *Humanity's law*. New York: Oxford University, 2011. p. 187-188.

30 WALDRON, Jeremy. International law: 'a relatively small and unimportant' part of jurisprudence? *NYU School of Law, Public Law Research Paper* n. 13-56, p. 209-223, Oct. 2013. p. 220. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326758>. Accessed on: 5 apr. 2015.

a *Critique of the Raz / Rawls Approach*³¹, one could acknowledge a greater development of the international systematization of issues pertaining to fundamental rights, in particular with regard to a “human concern” approach, such as sustained by Joseph Raz and John Rawls³²:

The human concern approach’, rights are designated as human rights because they are rights whose violation is the proper concern of all humans. [...] For some adherents of the human concern approach, the relevant human concern about rights is not just a matter of disapproving of their violation. It is practical political concern: these theorists say that human rights are rights whose violations appropriately elicits action on the part of the rest of humanity against the violators. More specifically, views of this kind focus on the response of governments and international agencies. The idea is that we can define a class of rights such that no government, nor any other human agency or organization, is even required or permitted to say that the violation of one of these rights is none of their business, no matter where it occurs³³.

This approach can be criticized due to other reasons, although it is reasonable to agree with Waldron’s belief that it can provide an interesting basis for the definition of human rights³⁴.

Scott J. Shapiro and Ona A. Hathaway, in their paper entitled *Outcasting: Enforcement in Domestic and International Law*³⁵, address the neglect of international law in Hart’s theory and the question of whether or not international law is law.

31 WALDRON, Jeremy. Human rights: a critique of the raz/rawls approach. *NYU School of Law, Public Law Research Paper*, N. 13-32, June 2013. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745>. Accessed on: 5 apr. 2015.

32 According to Waldron: WALDRON, Jeremy. Human rights: a critique of the raz/rawls approach. *NYU School of Law, Public Law Research Paper*, N. 13-32, June 2013. p. 3. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745>. Accessed on: 5 apr. 2015.

33 WALDRON, Jeremy. Human rights: a critique of the raz/rawls approach. *NYU School of Law, Public Law Research Paper*, N. 13-32, June 2013. p. 2. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745>. Accessed on: 5 apr. 2015.

34 The author appears to be sympathetic, however, with the “human carrier approach” which purports human rights as those carried by and belonging to all individuals by virtue of their humanity. WALDRON, Jeremy. Human rights: a critique of the raz/rawls approach. *NYU School of Law, Public Law Research Paper*, N. 13-32, June 2013. p. 2. Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745>. Accessed on: 5 apr. 2015.

35 HATHAWAY, Oona A.; SHAPIRO, Scott J. *Outcasting: enforcement in domestic and international law*. *Yale Law Journal*, Connecticut, v. 1, n. 2, p. 252-349, Nov. 2011.

Shapiro and Hathaway support that the traditional critique of international law is based on a limited and inaccurate understanding of law enforcement. Critics assume that a regime is law if this system relies on internal enforcement mechanisms of its own rules employing force and intimidation through violence to enforce their own rules. The authors call this conception of Modern State Conception³⁶.

Shapiro and Hathaway assert the necessity to overcome this conception. In their words:

We are able to see that allowing the Modern State Conception to set the terms of the debate over international law leads us to ask and answer the wrong questions. Yes, very little of international law meets the Modern State Conception of international law—very little (if any) of it is enforced through brute physical force deployed by an institution enforcing its own rules. But what is interesting is not so much what international law is not, but *what it is*. And that is law that operates almost entirely through outcasting and external enforcement.³⁷

The authors recognize the importance to overcome the Modern State Conception in order to conceive an international legal order, and the concept of outcasting is fundamental in this attempt. Addressing the human rights field, they affirm that:

Human rights scholarship, in particular, has highlighted the ways in which states are sometimes publicly singled out for their violations of human rights laws as a nonviolent means of discouraging law-breaking behavior³⁸.

4. THE REALISTIC CHALLENGE FACED BY BUCHANAN AND GOLOVE: A RESPONSE THROUGH THE GLOBAL EXPANSION OF HUMAN RIGHTS

In an attempt to discuss the possibilities of contemporary conception of a moral theory of international law, Buchanan and Golove face the challenges presented by the criticism already settled by realism. In his

36 HATHAWAY, Oona A.; SHAPIRO, Scott J. *Outcasting: enforcement in domestic and international law*. *Yale Law Journal*, Connecticut, v. 1, n. 2, p. 252-349, Nov. 2011. p. 258.

37 HATHAWAY, Oona A.; SHAPIRO, Scott J. *Outcasting: enforcement in domestic and international law*. *Yale Law Journal*, Connecticut, v. 1, n. 2, p. 252-349, Nov. 2011. p. 302.

38 HATHAWAY, Oona A.; SHAPIRO, Scott J. *Outcasting: enforcement in domestic and international law*. *Yale Law Journal*, Connecticut, v. 1, n. 2, p. 252-349, Nov. 2011. p. 309.

analysis, Buchanan and Golove maintain that realism in its pure positivist facade is a descriptive and explanatory account of the nature of the international relations. The authors draw an implication called “meta-ethics” of the descriptive-explanatory theory, namely, that morality would not apply to international relations³⁹.

However, most authors who are affiliated to a descriptive and explanatory approach assert an important moral inference, even when denying the application of moral principles to international relations in general - the inference that State leaders should act on their own interests without regard to any moral constraint.

According to the views of two prominent theorists of legal realism who sought to analyze the international context, Jack L. Goldsmith and Eric Posner, States would act from political choices, thus being guided by a prudential bias. In line with this thought, international law could be seen by means of the states’ self-interest, corroborated by political decision-making activities in a rational fashion. These choices represent a specific type of policy, which is based on precedent, tradition, interpretation and other practices and concepts that are familiar to domestic law⁴⁰.

Buchanan and Golove maintain that, for realism, the nature of international relations excludes morality in this sphere. Hence, a moral theory of international law would be an exercise of futility⁴¹.

The authors distinguish a positive variant of realism, called “fiduciary realism”, which describes the international relations as a Hobbesian state of war. Along with this view, responsible state officials should act only in order to maximize the survival prospects of their States, regardless of any moral constraints. Fiduciary realists are not moral, neither skeptical nihilists. They believe

that State officials have obligations to their people, but to obey these obligations they require the rejection of any moral restraint in relation with other States. Fiduciary realists disregard other moral principles besides the fundamental moral obligation, that is, to serve the interests of the State itself⁴².

Under this Hobbesian context, described by positive realism, international relations include the following features, according to the analysis of Buchanan and Golove:

- a. There is no global sovereign, no supreme arbiter capable of enforcing rules of peaceful cooperation.
- b. There is (approximate) equality of power, such that no one state can permanently dominate all others;
- c. The fundamental preference of states is to survive;
- d. Given conditions (a) and (b), what is rational for each state to do is to strive by all means to dominate others in to avoid being dominated (to rely on what Hobbes calls ‘the principle of anticipation’);
- e. In a situation in which each party rationally anticipates that it is rational for others to dominate, without constraints on the means they use to do so, moral principles are inapplicable.⁴³

Indeed, Goldsmith and Posner argue that the best explanation to understand when and why States obey the rules of international law would not be because the States internalized this law, or because they have the habit of acting in a specific way, or even supported by moral reasons, but simply because they act according to their own interests.⁴⁴

According to Buchanan and Golove, the positivist realism assumes questionable empirical generalizations about the international sphere, while the fiduciary realism takes into account these empirical generalizations and concludes that the State authority will disregard any moral restraint in order to achieve the interests of the State.⁴⁵

39 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 873.

40 According to Goldsmith and Posner: “It is politics, but a special kind of politics, one that relies heavily on precedent, tradition, interpretation and other practices and concepts familiar from domestic law”. GOLDSMITH, Jack L.; POSNER, Eric A. *The limits of international law*. New York: Oxford University, 2005; and DWORKING, Ronald. A new philosophy for international law. *Philosophy and Public Affairs*, v. 41, n. 1, p. 2-30, Winter 2013. p. 202.

41 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 873.

42 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 873.

43 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 872.

44 GOLDSMITH, Jack L.; POSNER, Eric A. *The limits of international law*. New York: Oxford University, 2005. p. 225.

45 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 874.

Buchanan and Golove assert that most of the interesting work in international relations over the past two decades indicates that the international relations are not, in fact, a Hobbesian context of war of one against all. According to recent studies, there are stable patterns of peaceful cooperation and effective supranational regimes, some bilateral, some regional and some genuinely global in scope - including military alliances defense, financial systems, trade agreements, structures for scientific, environmental agreements and international media to human rights, economic development and disaster relief.

Furthermore, the ability to make credible commitments for peaceful cooperation is a valuable asset to the states and individuals. The techniques for building trust are varied and ubiquitous. According to Buchanan and Golove, survival is not an issue, not the only question, in various contexts of state interaction. States are also not equal in power and, as a result, their vulnerability is a concrete factor. Powerful states can take risks in an effort to build cooperation and they can minimize the risks acting in a cooperative manner, as the costs of betraying their trust may be great.

The moral minimalism, in turn, argues that the distinction between international law and national law is that the latter is comprised of a framework of rules for those who share the same purposes, while the former does not. However, as generally observed elsewhere, in a liberal society domestic public order cannot be based on shared purposes other than security and justice. So the moral minimalism must answer for what reason the lack of shared purpose precludes the normative theory of international law, but not a liberal domestic society.

The claim that there is a nuclear concept of justice capable of providing the basis for a theory of morally robust international law is an empirical claim about the extent of moral disagreement beyond the borders of States. It is possible to argue, however, that there is, in fact, a global culture expanding human rights, reflecting a growing consensus on a conception of justice based on the recognition of equality and freedom of all people and a fair conception of sovereignty susceptible to limitations.⁴⁶ According to this view, the notion

46 In this sense, it is worth mentioning the Article 1 of the Universal Declaration of Human Rights: Art. 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. UNITED NATIONS. *The Universal Declaration of*

of equality and freedom expressed in the main human rights conventions may provide the basis for the development of a moral theory of international law, whose content is substantial.

In fact, the international legal system already includes principles, practices and institutions that are contributing to the emergence of a greater consensus on the content of human rights standards. For example, the various processes and mechanisms by which the enforcement of human rights has been monitored, including the operation of the UN Human Rights Council and Committees covering the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights⁴⁷. These processes contribute to the formation of broadly shared beliefs and certainty about the content of human rights.

On the other hand, it is important to notice that the emergence of a culture in the global expansion of human rights has flowered in the context of the consolidation of human rights in states constitutions. In this sense, United States constitution had a profound impact upon the development of international human rights law. Besides assisting in the clarification of these rights, the American constitution has helped to shape the norms found in the principal international human rights instruments⁴⁸.

However, it is remarkable the differences between the provisions of the constitution and the international human rights instruments. Some rights expressly included in the international instruments are not found in the text of the American constitution and many others have far wider scope than their United States consti-

Human Rights. Available at: <<http://www.un.org/en/documents/udhr/>>. Accessed on: 20 jan. 2015. In the 1930s, the scholarship recognized the emergent landscape for "humanitarian and social legislation" in international law and how this trend would be linked to the "end of law", such as contended by Edward Dumbaud, DUMBAUD, Edward. The place of philosophy in international law. *University of Pennsylvania Law Review*, Philadelphia, v. 83, n. 5, p. 590-606, 1935. p. 605: "Self-assertion and clinging to abstract legal rights can find no better illustration than that afforded by the dominant doctrine of state sovereignty in international law. Yet a growing mass of social and humanitarian legislation in the international field shows that the world is awake to the necessity of protecting social interests by means of legal machinery".

47 UNITED NATIONS HUMAN RIGHTS. *United Nations Human Rights Council*. Available at: <<http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx>>. Accessed on: 20 jan. 2015.

48 LILLICH, Richard B. The United States constitution and international human rights law. *Harvard Human Rights Journal*, London, v. 3, p. 53-81, Spring 1990. p. 56.

tutional counterparts⁴⁹. The argument advocated by Buchanan and Golove about the existence of a culture in global expansion of human rights is also evident in the transconstitutionalism theory addressed by Marcelo Neves⁵⁰. He argues that the human rights claim to be valid for the system legal world of multiple levels, so to any existing legal order in world society.

In this sense, the field of human rights, which was once seen as a domestic issue, today is addressed under multiple overlapping orders not only concentrated at the state level, but also at international, supranational, transnational and local levels.

James Griffin, writing about the autonomy of international law of human rights, argues that the transition process from human moral rights to positivized human rights is still ongoing and entails a return to the original ideas of lack of separation between law and moral.⁵¹

Marcelo Neves discusses the theory called by him “multidimensional transconstitutionalism of human rights” and places them on the border of the legal system, binding it to a moral inclusion and dissent:

It should be noted that the conditions for the emergence of human rights in modern society is related to the emergence of a structural dissent, concerning not only the plurality of communicational spheres with pretense of autonomy (systemic complexity), but also the heterogeneity of expectations, interests and values of individuals and groups. In this sense, it is defining the concept of human rights, to set it as normative expectations of generalized legal inclusion under conditions of structural dissent of society worldwide. Therefore, human rights are located on the border of the legal system, binding it to a moral of inclusion and dissent, which circulates with relevance in the global society of the present, in competition with other moral standards⁵².

In order to explain the multidimensional nature of human rights and the emergence of what Buchanan

and Golove call an expansion of the global culture of human rights, Marcelo Neves analyses an array of judicial cases that demonstrated that human rights issues permeate various legal systems.

In 2005, the U.S. Supreme Court ruled on *Roper v. Simmons*⁵³, a case which discussed the possibility of applying the death penalty to a juvenile, taking into account the prohibition to cruel and unusual punishments established at Eighth Amendment of the American Constitution.⁵⁴ After being sentenced to death by the jury, the Supreme Court, in a tight scrutiny (5-4), the death penalty was removed, having been argued in the vote of Justice Anthony Kennedy that the United States were alone in a world that has turned against the death penalty for juveniles. The decision, demonstrated the possibilities of coordination between national law and established practice outside the domestic sphere in the context of constitutional dialogue⁵⁵.

At this point, it is worth mentioning that the Supreme Court decision had a great reverberation, resulting in the revocation of dozens of death sentences directed to individuals who committed crimes when they were still juveniles. This approach reveals how moral values conceived by the international community are penetrating domestic legal orders and rejects the critique of realist theory about the supposedly little exogenous influence of the human rights on state behavior⁵⁶.

Marcelo Neves, discussing this case, also mentions the analysis of Jeremy Waldron on the issue. Waldron sees the decision of the American judges from the reconstruction of the old concept of *ius gentium*, indicating the formation of a set of knowledge that can be referenced each other. In the words of Marcelo Neves in a free translation:

From this argument, Waldron argues that the citation of foreign and international law by the US Supreme Court should not be seen as a random practice in pieces unrelated, but as a model for

49 LILLICH, Richard B. The United States constitution and international human rights law. *Harvard Human Rights Journal*, London, v. 3, p. 53-81, Spring 1990. p. 57.

50 NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: M. Fontes, 2009. p. 253.

51 GRIFFIN, James. Human rights and the autonomy of international law. In: BESSON, Samantha; TASIOLAS, John. (Ed.). *The philosophy of international law*. New York: Oxford University, 2010. p. 339-356.

52 NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: M. Fontes, 2009. p. 255. (free translation).

53 UNITED STATES. Supreme Court of the United States. *Roper, Superintendent, Potosi Correctional Center vs. Simmons*. n. 03-633. Available at: <<http://www.deathpenaltyinfo.org/u-s-supreme-court-roper-v-simmons-no-03-633>>. Accessed on: 20 jan. 2015.

54 NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: M. Fontes, 2009. p. 257.

55 NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: M. Fontes, 2009. p. 258.

56 POSNER, Eric; GOLDSMITH, Jack. L. *The Limits of International Law*. Oxford: Oxford University, 2005; and DWORKING, Ronald. A new philosophy for international law. *Philosophy and Public Affairs*, v. 41, n. 1, p. 2-30, Winter 2013. p. 133.

action in connection network between various legal systems, for the solution common problems.

Another practical example that illustrates the expansion of global culture of human rights is the case *Hazel Tau x Glaxo and Boehringer*⁵⁷, related to the claim access to medication to combat HIV before the Commission of the South African Competition. In this case, the decision of the South Antitrust Commission, based on national law, was favorable to the applicants, arguing that the excessive price of antiretroviral drugs is directly responsible for premature, predictable and avoidable deaths of people living with HIV, including both children and adults.⁵⁸

It is clear, thereby, that in a matter of intellectual property, which brings elements of national, international and transnational law, it becomes even more clear the need to elevate the discussion to a point where they do not opt for a simple solution based on the prevalence of a particular legal system over another. Marcelo Neves treats this issue as follows, in a free translation:

In addition to lead to discussion of the problem of the horizontal effects of fundamental rights in the transnational context, surpassing the national level, this discussion points to the intertwining issues between regulatory orders. The simple internationalist appeal to a generous interpretation of the TRIPS agreement, or exclusive reliance transnational model of self-regulation and, finally, the argument by a final state solution based on the sovereignty of the people, appear not complex enough in such cases. The respective orders legitimacy limits may not also be the last argument to exclude them from the process of finding a consistent solution and socially adequate. Without the *ultima ratio* present in any of the orders, the solution regarding the transnational human rights, in the case mentioned, shows that the key is to restrict the expansive nature of certain legal orders over others (avoid the danger of the dedifferentiation), as well how to limit the expansion of regulatory orders and their organizations working towards the expansion of the exclusion and the destruction of the chemical the person biopsychic support

Therefore, the distinction that Buchanan and Golove present about transnational justice principles - that

would be related to the rights and duties between members of the same state or between the government and the members of state should be recognized by international law as universal – it is possible to recognize that the progress of international law involves the expansion of transnational justice and the expansion of global culture of human rights has a decisive role⁵⁹ and ⁶⁰.

Facing the humanity Law as an emerging transnational legal order, Vicki Jackson argues “we now live in a world of multiple legal orders where there is not centralization, or monopoly, or a hierarchy of interpretative authority, and where interpretative legitimacy is a concept that pertains to non-state actors as well”⁶¹.

5. FINAL REMARKS

As it can be seen, the architecture of international law and the philosophy of law still have room for further development. The institutionalization of principles, the expansion of human rights and the case law of sedimentation in international courts have raised more reflection and discussion on this topic.

Increasingly, contemporary authors like Jeremy Waldron, Allen Buchanan and David Golove, among others, have been contributing to a review of juridical

59 BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 887.

60 According to Buchanan and Golove, the justification of human rights can be presented as (1) principles whose effective institutionalization maximizes overall utility, (2) as required for the effectiveness of other important rights, (3) as needed to satisfy basic needs that are universal to all human beings, (4) as needed to nurture fundamental human capacities that constitute or are instrumentally valuable for well-being or human flourishing, (5) as required by respect for human dignity, (6) as the institutional embodiment of a ‘common good conception of justice’ according to which each member of society’s good counts, (7) as required by the most fundamental principle of morality, the principle of equal concern and respect for persons, (8) as principles that would be chosen by parties representing individuals in a ‘global original position’ behind a ‘veil of ignorance’, and (9) as necessary conditions for the intersubjective justification of political principles and hence as a requirement for political legitimacy BUCHANAN, Allen; GOLOVE, David. Philosophy of international law. In: COLEMAN, Jules L.; HIMMA, Kenneth Einar; SHAPIRO, Scott J. *The Oxford handbook of jurisprudence and philosophy of law*. Oxford: Oxford University, 2002. p. 868-934. p. 889.

61 TEITEL, Ruti G. *Humanity’s law*. New York: Oxford University, 2011. p. 187.

57 UNITED STATES. Supreme Court of the United States. *Hazel Tau vs. Glaxo and Boehringer*. Available at: <<http://www.tac.org.za/Documents/DrugCompaniesCC/HazelTauAndOthersVGlaxo-SmithKlineAndOthersStatementOfComplaint.doc>>. Accessed on: 20 jan. 2016.

58 NEVES, Marcelo. *Transconstitucionalismo*. São Paulo: M. Fontes, 2009. p. 267.

and philosophical theories in vogue on the nature of international law. Whether due to State interests, whether to the advancement of the international organizations' agenda, this debate has also increased its attention to the issue in main international forums.

Although there is still the need for better understanding of the relationship between the various currents of international law and international relations, it is possible to understand that the expansion of human rights indicates from the outset the possibility of designing a moral theory within the framework of international law. The existence of a global culture expanding human rights is directly related to convergence towards a nuclear common conception of justice, and moral progress of international law through the improvement of institutionalization of the principles and by forming mechanisms that enable its effective application.

The international human rights are currently much more integrated with the consolidation of institutions as the Human Rights Council and the European Court of Human Rights. To the extent that it increases forms of access to international courts, converging regulatory regimes transnational in nature and advancing the performance of subjects and actors in the international order, there are also new conflicts and contradictions to the theorists of the philosophy of law, which comes to contribute to the determination of these concepts and inconsistencies.

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