UNIVERSIDADE DE BRASÍLIA
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TESE DE DOUTORADO

Gazes at the monster: Courts, NGOs, and the UN Security Council

Maurício Palma Resende

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Tese apresentada como requisito parcial para a obtenção do título de Doutor em Direito, Estado e Constituição pelo Programa de Pós-Graduação em Direito da Faculdade de Direito da Universidade de Brasília.

Orientador: Professor Doutor Marcelo da Costa Pinto Neves

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Uniceub - membro suplente

À memória de minha mãe

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RESUMO

Ancorada na teoria dos sistemas, a tese apresenta, em um primeiro momento, o contexto legal no qual se insere o Conselho de Segurança da ONU. Argumenta-se que tal órgão é fonte de expectativas normativas da sociedade mundial, bem como, ao mesmo tempo, um ator da política mundial que bloqueia a aplicação do direito e o viola em diversos eventos. No segundo capítulo, a tese aborda os meios legais de restrição do arbítrio de tal órgão através da análise de decisões de tribunais em âmbitos estatais e não estatais, e mostra que o Conselho de Segurança pode auxiliar no processamento de expectativas normativas em certos casos. Em sua terceira parte, por fim, a tese apresenta organizações não governamentais (ONGs) como fontes perturbadoras do regime do Conselho de Segurança, atores que lutam para a contenção da racionalidade política de tal corpo da ONU, participando na formação de normas de segurança internacional. Problematiza-se a atuação de tais ONGs, bem como se aborda a apropriação estratégica do vocabulário dos direitos humanos, o que também pode ser notado em decisões judiciais. Ao fim, indaga-se sobre a paradoxal busca por formas constitucionais nessa esfera. A tese possui o argumento de que Tribunais, ONGs e o Conselho de Segurança são âmbitos tecnocratas da sociedade mundial em conflito e em diálogo, bem como esferas que terão de passar por mudanças se quiserem ser observadas como responsivas.

Palavras-chave
Movimentos sociais, constitucionalismo global, organizações internacionais, cortes internacionais, segurança internacional

ABSTRACT

Anchored in the perspective of the systems theory, the dissertation presents, first, the legal arrangement in which the United Nations Security Council (UNSC) is inserted. It is argued that UNSC can be observed as a source of normative expectations of the world society and, at the same time, as a global actor that blocks the application of the law and violates legal parameters in several events. In the second Chapter, the dissertation examines court's decisions in state and nonstate spheres that review or assess UNSC's acts, also showing that the UNSC might perform in some instances as an actor that contributes to the processing of normative expectations. In the third Chapter, the dissertation presents non-governmental organizations (NGOs) as actors struggling for the restriction of UNSC's political rationality and as actors that participate in the formation of international security norms. The dissertation investigates problems concerning NGOs' performances and discusses the strategic appropriation of the human rights vocabulary by these social movement organizations, a fact that might also be perceived in the courts' decisions. Lastly, the dissertation put the problem of the paradoxical struggles for the formation of constitutional arrangements in this nonstate arena. The dissertation shows that court, NGOs, and the UNSC are technocrat areas of world society in conflict and in conversation, as well as organizations that have to change to be seen as responsive spheres.

Keywords

Social Movements, Global Constitutionalism, International Organizations, International Courts, International Security.

CONTENTS

Introduction: Gazes at the Monster

Demons, aliens, and fiends are rooted in cultural traditions, and many authors have introduced bizarre figures to comment on their shapes and on people's reactions to strange, unexpected faces. These authors include Guimarães Rosa, Kafka, Virgil, Shelley, and Goethe.

This work will examine an outlandish institution of the world society and some of society's responses to this institution. Haunted by gloomy memories of a world war, this institution's architects offered it unparalleled power. In most cases (excepting Shelley's demon), creators name their creatures, and so this institution was baptized the United Nations Security Council (UNSC).

For some, the UNSC simultaneously represents an unwise monster with the capacity to destroy its environment and an odd arrangement intended to assure an uneven status quo. For others, the UNSC is a titan that protects the world from its worst problems and from other abominations. In a way, every social construction, including a person, can be said to be a monster in certain situations. Potential institutional leviathans are indeed common, and individuals might sometimes seem like wolves to strangers or even familiar people. At the end of the day, conflict, totalitarian postures, and responses to insults are ordinary events in our society. Monsters, on the other hand, may have traces of humanity.

I might say here that no unilateral rationale can sufficiently appreciate the UNSC, as this a creature can change its temperament in accordance with its internal movements and with environmental influences. In a complex world, crucial behaviors tend to affect many other branches, triggering reactions. Many social actors gaze upon the central United Nations (UN). Unlike an observation, a gaze is an energetic, lively movement that affects both gazer and gazed.

In this dissertation, two societal arenas' gazes at this monster's movements will be tackled: the law and NGOs. Initially, after observation of the UNSC's legal side, I will demonstrate that the law touches on political rationales—reacting by constructing legal firewalls through both courts and theory. The political side, in turn,

uses legal arguments to supplement its decisions. Subsequently, I will affirm that NGOs are struggling to restrict the UNSC's activities on human rights grounds, contributing to sometimes novel shifts. All the concrete cases and NGOs activities will be presented in the next chapters.

Here lies the linkage of the three chapters: the use of law, and especially of human rights vocabularies, by societal spheres in order to restrict UNSC's political rationality. Unlike economic organizations and the so-called terrorist networks, law and social movement organizations (NGOs) address communications to limit political rationality of the UNSC based on human rights. Unlike private enterprises, law and social movement organizations do not use the structure of the UNSC to corrupt it for the purposes of achieving economic goals. In a sense, this dissertation represents a theory of societal resistance and norm creation, and a theory of political and legal contention.

I will show that all these societal reactions have their own problems and that the UNSC already moves almost freely (in legal terms) in many situations. No teleological approach is found here, given that the societal evolution swings according to complex information and unplanned, random episodes.

In a sentence, this dissertation demonstrates that the global social pressures fundamentally related to human rights claims are pushing the UNSC to adopt legal structures similar to what we usually observe in state constitutional configurations, while also contributing actively to such outcomes in some cases, restricting the political rationality.

The demands urge transformations that resemble the rule of law, political restriction, and even democracy. They are (trans)constitutional claims. Any real change takes place only as a result of a major crisis complicated by social pressure and conflict. Human rights are the strongest reasons to stimulate modifications in this arena. It seems evident that the achievement of such an alignment is not only very improbable (since historical state presuppositions placed in a municipal sphere cannot be reproduced artificially in a global sphere) but also a paradox because the claims observe international configurations as if they were (or could be) capable of reaching such a goal. This dissertation asserts that all these constitutional-like features can be noted currently, but it is obviously impossible to state that the changes will actually happen due to the inherent contingency of societal evolution. This dissertation concludes that no constitution exists in this area, not by virtue of the

absence of rigid, statal settings, but because the social claims do not urge the formation of a constitution, which cannot be merely functionally conceived.

I will present some theoretical and methodological grounds in order to illustrate this work's central rationale.

This dissertation is grounded on systems theory, assuming a transdisciplinary approach, while drawing together legal, theoretical, and sociological perspectives to show pivotal, different spheres of the world society such as law, economy, politics, and social movements. In this sense, it is not a classic, dogmatic work of public international law, but a theory of the UNSC based on legal, political, sociological, and philosophical frameworks.

Unraveling interwoven arrays demands multidisciplinary efforts, which is why Luhmannian systems theory gives appropriate theoretical backing to the accomplishment of such a task, although without recognizing the concurrence of various system codes in concrete constellations. Numerous influxes can be analyzed appropriately by taking into account their relevance and their influence over a given regime, as the relationship between the developments of an arrangement can always be investigated observing the environment.

What constitutes the systems, regimes, and other arrays of world society? This question must be answered with the help of numerous gazes from diverse angles of a given arrangement and by developing tangible ways of resolving these solid problems. If one looks only to the legal texts, one neglects political communications; if one regards only political violence, one misses the struggles of social movement actors; if one observes social movements, other social environmental pressures may be ignored. Politics does not constitute law, economics does not constitute the system of the treatment of diseases, and education does not constitute politics.

Concretely, each global system struggles to constitute itself with the help of communicational influxes from several sources. A system tries to shape or maintain its integrity through its own processes. Political sociology meets law, as it is a sociological task to explore the formation of these intricate, strange structures. As can be noted in the majority of state constellations, social systems are not fully differentiated in the global arena. Many other types of differentiation exist alongside functional differentiation; by dint of this fact, many types of communicative arrangements might be identified beyond systems. The mixing of different social

arrangements and the colonization of some regimes, mainly by stronger political and economic communicative changes, must be faced carefully.

No social array is insulated from society, and no organism exists by and for itself. We can only speak with sense about society's politics, states, laws, universities, and so on. The UN is part of society, and, therefore, the UNSC can only be adequately understood if observed as an organ of society—as the security council of society. This means that this body is surrounded by very different actors, some of them causing irritation. In a sense, we might say that the UNSC is under attack by various spheres of world society, such as social movements and the law—areas that will be tackled in this work.

Law and politics are immersed in a society that is made up of several other arrangements (constituting a system or not) that can be scrutinized. If the reader is coming from the traditional international relations debate, which is fundamentally split into the schemes of realism and idealism, systems theory's semantics can appear to be complicated at first, but this theory helps one to understand the phenomena in its whole complexity, as will be shown.

World society is primarily a functionally integrated arrangement that faces seemingly insurmountable difficulties in forming a global democracy, or global regimes based on the rule of law. One the other hand, global society observes the presence of highly exclusive, nondemocratic movements of global or international organizations, which can theoretically affect everyone. Such dynamics are connected to the fact that society is trying to find new alignments to respond to problems of both state and global nonstate movements. Simultaneously, social pressures demand the development of more responsive forms of exercising authority, gazing with concern at hierarchical arrangements in which the maintenance of institutional privileges is presented as a matter of fact. Along these lines, a global democracy has many controversial points, and the ideas of a global state or a world republic can be formulated only in a highly problematic way (Maus, 2002, p. 243f.; see also Fischer-Lescano, 2005, p. 247). It is an uncertain, transitional time when novel legal and political forms are being shaped in ongoing, running, unfinished processes with no predetermined end.

UN bodies such as the UNSC solve highly specific problems in world society. They cannot be considered functional systems, nor are they exclusive organizations of a given functional system; rather, they are central loci where many types of

communications (coming from different worldwide actors) operate to rule some spheres of the world in economic, environmental, legal, and/or political terms. They are thus part of both global governance[1] and global law. The UN's actions are connected, in this sense, to the modern functional differentiation in systems theory terminology, as UN development is related to a function that cannot be executed by states or by other types of social organizations such as businesses, universities, and hospitals. However, functional differentiation is only one form of social differentiation; other forms, including center/periphery and exclusion/inclusion, exist.

The approach of traditional systems theory asserted that law is a global social system that is regionally segmented into states. This means that, all around the world, law has developed based on the legal/illegal differentiation, which temporally orients human conduct and stabilizes counterfactual expectations; however, system operations are made by internal state inputs. Politics is also a territorially segmented system that operates through its power/no-power differentiation (the democratic coding of power is opposition/government), bearing the function of imposing collective decisions. Economics and science, as social systems, operate (for example) diversely, as their operative reproductions are neither conditioned nor restricted only by communications connected to state boundaries.

Some authors, for instance Neves (1992), have defied the primacy of the functional differentiation, proving that particular, regional contexts block the

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[1] Teubner conceived of governance as:

> English version: "'Governance' is regarded as the result of social-political-administrative interventions through which public and private actors solve social problems (…) "prominence is given to the constitutional limitation of political power, whose particular feature is that it is partially 'socialized'" (Teubner, 2012, p. 9; the

> English version: "'Governance' is regarded as the result of social-political-administrative interventions through which public and private actors solve social problems (…) "prominence is given to the constitutional limitation of political power, whose particular feature is that it is partially 'socialized'" (Teubner, 2012, p. 9; the original verion may be found at p. 23f.).

achievement of functional differentiation (of a differentiated legal system, for instance) in specific areas due to strong dedifferencing pressures from some other spheres, which have led to the corruption of a system's code. This is the case of world politics and global law: side by side with globally functional differentiated systems (of which the economy is the best example), other arrays exist that have no fully differentiated systems but that do have other types of communicative formations. The communication fluxes shaping these alignments may be explained through center/periphery schemes, hierarchical patterns, or network theories; for instance, arrangements may depend on the observer's perspective or on the given point. Neves (like the present work) did not state that functional differentiation does not exist. On the contrary, complex forms of social differentiation, including functional differentiation, coexist in concrete events and are observed in the combination of system codes.

Other approaches claim, in a different direction, that in some spheres over the past few decades, law has also passed through a transition from a national legal structure to a global arrangement, thus following the pressures of the functional differentiation in some societal loci, as new global problems (mostly based on cognitive expectations) need legal logic in order to be solved. The world is being confronted by the formation of new, nonstate legal regimes with partial self-rationalities such as lex mercatoria and lex digitalis, which produce communications that affect other regimes (Fischer-Lescano & Teubner, 2006, p. 7ff.). A regime's notion is linked with a kind of nonautopoietic law.[2] Although bearing other roots, as

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[2] Legal regimes are indeed inserted in the context regarding criticisms towards Luhmannian conception of autopoietic systems. Luhmann asserted that there are three dimensions related to the system's self-description and its self-reference. First, there is the basal self-reference, which refers to the very basic interconnection of elements in a system, such as the linking of economic communications in the sales process. Second, there is reflexivity (*Reflexivität*), understood as the application of a process to itself or to other processes of the same kind, fortifying systemic selectivity, such as research about other research in the system of science. This recursive procedure modifies a given system in temporal terms, as future processes will have to take into account how the past process occurred—in other

the broad discussion in international relations field may show, legal regimes can be conceived in this context as global societal arenas capable of processing normative expectations and arranged in a center/periphery schemes, with courts at their centers and sectorial, societal subjects of law—who have close connections with autonomous social segments—on their peripheries (Fischer-Lescano & Teubner, 2004, p. 1012f.).

Some recent legal arrangements would thus be products of new social sectors, combined with the transition from normative to cognitive expectations. Law would also be transformed to help sectorial nonstate regimes to better develop

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words, refer to themselves (Luhmann, 1975b esp. 73ff.; 1992, p. 333ff.). Third, systemic reflection (*Reflexion*) would exist based on the nonidentification of system and environment; this concept is understood as a form of concentrated systemic self-reference that touches on the system's identity. Through this reflection, the processing of information is restricted to central questions such as which resolutions the system recognizes as pertaining to itself, finding key points of support for the system through these developments. Legal theories are examples of this process, as they constitute ways of theorizing about a system inside the same system (Luhmann, 1999, p. 421ff.). As stated by Luhmann (1992, p. 335f.), these categories can be regarded as mechanisms that help both systemic inner ways of controlling and systemic inner cybernetic therapy (in parallel with human psychological therapies). To verify the presence of an autopoietic system, Teubner (1987, esp. pp. 100ff.) described a complex evolutionary development in which the elements, structures, and processes of a system gradually differentiate themselves, allowing the system to establish a different system or environment through self-regulation related to its specific function; only with the hypercyclic connection of systems components will autopoiesis occur (for the presentation of this discussion between Luhmann and Teubner, see Bachur, 2009, p. 139). When observing the historical movements of law, Teubner stipulated a kind of gradation among different legal forms, identifying, in addition to autopoietic law, the presence of two nonautopoietic legal forms: diffuse law and partially autonomous law. The latter would exist in cases in which self-referring system components (e.g., legal processes, acts, norms, and dogmas) are found, but not in cases in which a hypercycle is among the system's apparatuses. An example of cybernetic self-description in law (i.e., legal communications on legal communications) of this type is the Hartian secondary rules.

themselves—an instrument of partial rationalities. Law would still hold its unity, as it would apply the legal/illegal distinction. Although such positions, in general, are correct, the assertions of Fischer-Lescano and Teubner are based on Luhmann (1975a), who was dealing with neither legal differentiation in varied functional sectors nor legal fragmentation, which will be explained in more detail later. From a traditional Luhmannian perspective, these cognitive influxes would weaken law because it is primarily led by normative expectations.

It seems that global regimes do not bear unitary rationalities as if operating rigidly as if set in stone, as Teubner and Fischer-Lescano (2004) seemed to suggest. On the contrary, internal dynamics can briskly change their specific rationalities, reworking the range and focus of their operations when internal struggles transform their decision centers. What is more, since these centers are not fully shaped and are pursuing several sources (much like the global enterprises that created lex mercatoria), one cannot talk about regime *rationality*, but only about regime *rationalities*. Recognizing that the authors' inner regime conflicts are sometimes a kind of operational (not embodied) rationality, the identification of a single rationality may be seen as an attempt to homogenize a social field through a very selective employment of cases.

Observing UNSC's legal and political forms, one can only perceive a public regime constituted by several rationalities, as states and other social spheres composing this regime have different rationalities. Teubner is laconic with regard to the notion of public regimes, which can be understood as zones where political arrangements that are linked to states or other types of political centers play pivotal roles. Nearly the same rationale (related to the fluctuating of rationality pointed out above) can be applied to political organizations such as states or international institutions. The UNSC's rationality varies depending on its formations and environmental presuppositions, oscillating based on its problems, interests, and aims. For example, its pre-1989 and post-1989 actions are quite different, although the P5 states (the permanent five members, who bear the veto power), especially the United States, have always played a central role. Semantic and operational uncertainty is the mark of this multiple-state organism, as it must define ambiguous or vague terms such as "breach of peace" and guarantee the UN Charter's purposes, such as the maintenance of international peace and security. these purposes are always based on highly controversial and nebulous states of affairs,

such as war, genocide, or global disease (see, in this sense, Goede, 2014, p. 82ff.). The logic of the strongest entity cannot always explain this legal and political constellation, and there is also often more than one powerful actor.

On many occasions since 1989, the UNSC has presented an expansive rationality, tending to annihilate its social and natural environments to fulfill its targets. The inner regimes of the UNSC, such as its economic sanctions regimes and military performances, display distinct methods and goals.

Considering this post-1989 formation, and since the UNSC's performances potentially endanger the very existence of any other social fragment (systemic or not), the reactions are varied. The communications addressed to the UNSC come from military (e.g., Blackwater) and nonmilitary enterprises; regional security organizations; states; supranational, domestic, and international courts; and other UN bodies, such as the General Assembly and the ECOSOC (Economic and Social Council).

The UNSC is also facing responses from other sectors of society that aim to (a) from a political perspective, restrict its rationality, which may resemble constitutionalism; (b) conduct legal proceedings on its acts, which may resemble the rule of law; and (c) safeguard individual and social rights under a broader viewpoint. This work sheds light on some such demands that aim to create more responsiveness in the UNSC regimes while primarily analyzing the movements of nongovernmental organizations (NGOs) and courts.

UNSC's political rationality observes dynamics of contention, which here is a notion inspired by Tilly (1978), in a nonstate area, contributing also nonstate actors to the formation of global decisions and legal acts, as the last chapter will demonstrate. Again, this explains why the following chapters are interconnected.

This work revolves around second-order observation. In the context of the many gazes being directed to the UNSC, transnational NGOs (the most prominent examples of nonstate actors with access to this arena) are urging the consideration of global human rights. I will show that such organizations are progressively grasping a specialized vocabulary to communicate in a relevant manner with this regime. Their performances bring into question their representativeness vis-à-vis local groups and their technocratic ways of acting, as will be expounded upon in this work. Legal courts, which in this regime are linked to states and international organizations, provide decisions grounded in many legal sources aside from human

rights. Courts and social movement organizations are placed at the periphery of the UN security regime.

One can only talk with sense about factual openings and responsiveness when proving that a given organ, regime, or other arrangement can be confronted and changed, thus contributing to nondespotic actions. For that reason, the legal milieu in which the UNSC exists, including court decisions, will be presented. This shows a face that is not absolute or omnipotent, which goes against many assumptions regarding the UNSC's legally and politically unbounded views, which will be further detailed in this dissertation. This is the second thesis's core.

These strategies urge the formulation of an adequate way of theorizing about the knotty situation related to the many observations directed toward the UNSC. It may be said that social gazers, including not just NGOs and courts but also states, networks, enterprises, and universities, address their processed communications to several sectors of global society. The UNSC is being gazed at in an unprecedented, piercing sense, and the interplay between the expected gaze and the actual observation is complex.

Considering the contingency of gaze, the UNSC had to develop new forms to adapt to its environment and to others' observations, as otherwise, it would have difficulties. Once the self perceives the gaze, it cannot behave in an insulated manner, and it cannot continue to be imprisoned in its own consciousness (i.e., for systemic arrangements, it cannot be cognitively closed); it cannot merely recognize influxes as an evidence of its own external existence, as when it faces a mirror. The observed has no power over the gazer, nor can the observed remain indifferent. Though it could simply try to ignore the gaze or pretend that the gaze is not happening (as it did previously), some portion of autonomy would be lost, or it would have to develop mechanisms to block its domains from external influxes. However, this new construction of barriers denotes responses to the irritations, meaning that the gazer has succeeded in irritating. The notion of social gaze expounds upon the simultaneity of observation and irritation that occurs in certain cases.

Investigating the contacts involving NGOs, courts, and the UNSC entails a turning point in comparison with other theoretical approaches regarding the analysis of the UNSC's legal regime, especially those that have examined the limitation of political movements (on the one hand) and skeptical observations concerning the generalized protection of human rights in the face of strong societal organizations

that constantly disrespect them (on the other hand). With regard to the first theoretical stream, many impressive works have investigated the legal regime of the UNSC and made a profound interpretation of the central legal human rights texts, arguing that this organ must be bound to its norms by respecting such legal sources.

Many of these studies, which will be expounded in the next chapters, were attached to a formal debate concerning norms and courts. However, they did not show the impacts of nonstate actors in these processes or provide deeper theoretical arguments to explain the UNSC's legal regime or its actions that, for instance, violate (rather than implement) human rights grounds. In respect of the second approach, valued questions were raised regarding the problems touching on the determination of organic competence, material domain, and the mechanisms grounded on the rule of law and on due process. These mechanisms protect human rights, in this case referring to the setting of judicial powers to protect and enforce human rights vis-à-vis the strong world powers, such as North Atlantic Trade Organization (NATO) and the United States, determining the apparatus to produce viable legal ways to generalize their protection (Neves, 2007b, p. 432). Nevertheless, the investigation of extant legal apparatuses reveals, even in the current transitional phase, forms of processing normative expectations linked with human rights at judicial centers that are placed in the global center states and in nonstate courts.

To ascertain that an international political body is legally bound, arguments that the legal side of the UN organ must be considered, and the meaning of global human rights must be taken seriously. The force of social pressures on global, central organisms appears to uncover principles of legal boundaries outside a state's territory, disentangle the role played by diffuse social organizations, and perhaps discover fragments of constitutionalism, the rule of law, and democracy—even in an alignment hierarchically structured organization without *demos* or an express constitution. This understanding engenders a differentiation between legal rules and commands, to bring into play terms used by Hart (1994), which at the end reveals restraints on political authority, shows the significance of global social movements, and demonstrates the normative force of human rights. Again, the confluence of these features points to pieces of constitutional forms in interwoven arrangements by comprising a body of norms that not only creates legal conditions for the public exercise of power (if one takes the normative side) but also is related to both the

functioning of the organ and the allocation of power—as the power of an authority possessing supremacy in comparison to political or other legal elements.[3]

The present work deals with the challenge of describing still-unnamed political and legal forms in which the interplay between law—and politics and, within politics, between arbitrariness and limitation—are placed as centerpieces. All these factors are included in an organization connected with diverse sectors of society and experiencing a transitional phase. Describing the close, complex relationships among these notions is not, however, a recent task. In the modern age, even before the loss of a personal, supreme authority (represented by the king) during the French Revolution (after which the sovereign was conceived of as an organization of decisions) the notion of arbitrariness always played an important, paradoxical role with regard to theories of sovereignty. The paradox faced by Hobbes (1998), for example, was how arbitrariness could be avoided and at the same time have a binding effect. Arbitrariness requires its opposite: limitation. The paradox of the sovereign's theories lies in the fact that the restriction of arbitrariness always implies a situation in which one can only limit arbitrariness through another form of arbitrariness—such as through a contract (Luhmann, 2000, p. 341ff.). Those struggling with the legal limitation of politics in the present global constellation have to be aware of this paradox and must try to find their own unfolding solutions.

The term to describe new, global movements related to the restriction of global arbitrariness has not been yet coined, nor are there complete processes (related to normative structures) that can limit it. Present theories face the difficult task of describing the phenomenon of global authority are being constructed semantically under the weight of state theories, just as occurred with modern political thinking, which was influenced by old religious terms (Luhmann, 2000, p. 341ff.). The dispute involving dissimilar semantics—named constitutionalism, democracy, or

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[3] Although presented in a state context, see this notion of constitution in (Thornhill, 2011, p. 9 ff.). Although correct in this excerpt, Thornhill's developments go against the view of this work concerning the features of a constitution because he ultimately reduces law to the political dimension.

human rights—is also a piece of this constellation.

The problem here is related to the question of whether new semantics can be sustained when faced with the normative structures on which they are based. Political and legal semantics related to normative structures are historically dependent on territorial presuppositions that, in many situations, subvert the original worldwide semantics; for instance, this occurred with liberalism in terms of political and legal semantics in non-European states. In this sense, because we are talking about legal and political movements that are not confined to state territories, it seems to be expected that semantic constructions will reproduce themselves globally. States usually have limited questions that are important to their own specific development, although each state is represented as only one member among many, just as has been observed in the semantic evolution of other areas related to this worldwide unfolding, such as economics and science (Luhmann, 1980) (Luhmann, 2008b; Neves, 2015).

Global legal and political terms (such as socialism and human rights) have changed function in many states when facing concrete normative structures related to those states' specific realities. In the global sphere, a contrast is seen involving state- and territory-confined ideas linked to political and legal developments (such as the semantics of the rule of law and constitutionalism). These ideas are being used to describe world dynamics, side-by-side with worldwide semantics, which were the states previously grasped. If such an undertaking is reasonable, or if it constitutes more than a simple mimic of older semantics to bring back past forms of dominance, as argued by Maus (2010), will be discussed in the next sections.

Chapter 1: The Peculiar Legal Form of the UNSC and its Legal Limits

1.1 The Security Council Surrounded by Politics, Law, and Social Movements

In this chapter I will expound UNSC's legal face–as well as why the UNSC may be observed as bound by law–in order to demonstrate that law is one of the social spheres capable of restricting its political rationality. This assertion will be complemented by the developments of Chapter 2, which will show the relationship between the UNSC and adjudicatory dynamics. Composing this dissertation's core arguments, NGOs will be presented in the Chapter 3 as social entities struggling to restrict the rationality of the UNSC.

To understand social gazers[4] and the legal form of the UNSC, the UN's relationship with other spheres must be considered. The UN Charter is a fragment of

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[4] Let me now unfold some theoretical considerations, which inspired this approach. A major, noteworthy type of social observation points to explanations of the UNSC's actions with an impure, wild, cybernetic reading of the Lacanian gaze (*le regard*; Lacan, 1979). The Lacanian gaze must be here used only as an inspiration, as Lacan's theory as a whole can lead to misunderstandings if considered on the grounds of the present work. For example, in contrast with systems theory's fundamental assumptions, the Lacanian view of the split subject, in which language is observed as the Other, is somehow still attached to the philosophy-of-mind tradition, because the subject is not observed as being part of a signifying process (Fink, 1995, p. 44ff.). According to systems theory, language is the structural coupling between mind and communication; communication is nevertheless viewed as external to conscience. Furthermore, the tension between the subject and the object is recurrent in Lacan, but in systems theory, this conflict was, if not eliminated, very altered by the cybernetic thesis of communication autonomy, which is more radical than Lacan's diagnosis. Zizek (1989, p. 137) states that the Lacanian subject alienates itself in the signifier; in other words, is divided in the moment when the signifying chain occurs, bearing the symbolic order (the big Other) a lack, a fissure—a space in which the subject can construct its identification. The subject is distinct not only from the object but from the Other, being the Other distinct from the object, and the Other's lack emerges precisely in this milieu of diversity. The Lacanian gaze is inserted in the context of the subject's desire, which is interconnected with the Other's desire, a dynamic that has no parallel with the societal spheres. In any event, the Lacanian notion has similarities with the Luhmannian view

a multifaceted legal and political world, and it processes some of the diverse demands of social movements. Social pressures on international institutions touch

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concerning the observation chain, and it has the merit of unveiling the transformation of the relationship between observed and observer both during and after the gaze, thus contributing to the idea that will be presented in this dissertation. When handling the notion of gaze, while also taking into account the physical optic aspects, Lacan (1979) describes the "strange contingency" (p. 72) existing in the continuous interplay between light and opacity—the fact that being observed or even potentially being observed triggers anxieties, as the original, primary aspirations never fit with what has been experienced:

> The gaze is presented to us only in the form of a strange contingency, symbolic of what we find in the horizon, as the thrust of our experience, namely, the lack that constitutes castration anxiety . . . [3] - In our relation to things, in so far as this relation is constituted by the way of vision, and ordered in the figures of representation, something slips, passes, is transmitted, from state to stage, and is always to some degree eluded in it—that is what we call the gaze. (Lacan, 1979, p. 72f.)

There is no kind of absolute observation, as the vision always misses something. Lacan understands that the gaze observes itself, which means that the subject under gaze see it as a gaze (Lacan, 1979, p. 84). On the one hand, an object facing us arouses the sensation that the object is looking back at us in whatever way it pleases. In a cybernetic way, Lacan (1979) narrates a true life history, presenting a relationship between a can in the sea and a person. On the other hand, the idea of being hypothetically observed (when perceiving traces of another person's presence) causes the observed to recognize the existence of unseen areas in his or her own visual field (Lacan, 1979, p. 94ff.). There is no correspondence between the eye and the gaze; on the contrary, there is a lure, as one always wishes to be observed in a different way than how one was in fact observed, and what one looks at is never what one would like to see. The "*objet a*" is recognized as separated and has some relation with this lack. The subject must understand that he or she is being confronted with other observers in many situations and that, at the same time, he or she cannot control who is observing (Lacan, 1979, p. 102f.) (see also Newman, 1990). Again, Lacanian assumptions must be viewed merely as an inspiration for this work's rationale, not as a philosophical or theoretical groundwork.

on theories of politicization underlying those movements. Systems theory would see politicization differently, and so I assume some of its criticisms.

Zürn (2013, p. 13f.) assumed that the theory of the primacy of functional differentiation is plausible as a prerequisite for some of his points. Zürn asserted that functionally differentiated systems are involved in the responsibility of making decisions, and that all that enters in the political arena is politicized. Zürn (2013, p. 19) defined the politicization of international political institutions as the process through which the decision-making powers and the linked, authoritative interpretations of states of affairs are transported to the political arena. This means transference to the political system (observed broadly, based on a systems theory standpoint) or to the political space (comprehended through debates over the adequate functional logic for a given problem). There would be a reflection concerning the decision-making process (politics) and the content of a given decision (policy) related to whether the observed decision would be adequate vis-à-vis the problem's circumstances. This process also involves, operationally, public resistance to international institutions and a growing public mobilization related to the growth of international organizations' functions and their new ways of exercising authority (Zürn, Binder, & Ecker-Ehrhardt, 2012, p. 71).

From this frame of reference (Zürn et al., 2012, p. 70), the international institutions that bear authority would be those accepted by their addressees as competent enough to make judgments and provide binding decisions; the international institutions exercise regulatory functions while implementing related tasks such as ruling and enforcing. The recognition of societal pressures in this milieu would go directly against traditional theories, according to this author, as mainstream international relations perspectives see international institutions as areas of executive and technocratic governance that are not affected by social demands, as if they bear authority uniquely by themselves. Neorealism sees international institutions as a byproduct of the international system that, despite prescribing patterns of conduct to states, having almost no effect on state behavior (Mearsheimer, 1994). Rationalists who deal with intergovernmental cooperation observe international institutions as not exactly exercising authority. They are too closely linked to states because they are regarded as having a causal role (Keohane, 2005), not as possessing authority independent of their constitutive states (Kahler, 2004). When power and authority are recognized at this sphere,

international institutions are still regarded as technocratic sites—areas in which democratic claims and the people's interests are not taken into account, as Moravcsik (2004, p. 353; 356ff.) claimed in a very optimistic article concerning the European Union and Europe. Assuming that, in the European Union (EU), democratic legitimacy counts in some areas but not in others, such as the European Court of Human Rights (as this court is not, in fact, an EU organization) and the European Central Bank. In addition, the EU is highly attached to its member states. The skeptical approach of Dahl (1999) might also be appropriate in this milieu.

Most of this rationale is presented by Zürn et al. (2012), but at least since the 1970s, international relations theories have given attention to the roles of social organizations in the transnational sphere (see Keohane and Nye (1972), but they do not fully explain the function and responsibility of social movement actors in the shaping and enforcing of international institutions' decisions. What is more, Zürn and colleagues' view is, from the beginning, not very accurate; as the systems are not fully differentiated in the worldwide dimension, politicization may also be understood based on destructive influxes coming from the stronger global political powers, which are trying to assert that the status quo shall be maintained. An adequate understanding must take into account that politicization can be destructive or constructive, depending on the case.

Bringing transconstitutional grievances into the debate, social pressures show signs of vindicating the transformation of the current state of affairs into something similar to a constitutional arrangement at the UN sphere; in an orbit where legal parameters already exist, this arrangement seems to be linked with societal, transconstitutional pretensions. What Zürn and others do not see with their notion of politicization are the normative effects that emerge by dint of social demands, as legal logic affects the core of political institutions when it is not serving as a mere instrument of the expansive rationality of politics.

Derrida (1992, p. 28) argued that, through politicization (the term in a different way than the above-presented authors did), emancipation could be achieved; with politicization, which is expressed in particular battles such as the abolition of slavery, law is compelled to review its very foundations. What seems to be happening in this moment is that, with the juridification (and, for some such as Fischer-Lescano (2005), the constitutionalization) of global politics, politics is being pressured to review its own structures; this also involves the formation of legal norms and

participation in the process, with a particular logic that can restrain political measures and help the political arrangements be more responsive. This logic also corresponds to the social demands of the world society, resembling Thornhill (2011). Thus, the normative expectations of the world society, shaped with the participation of social movement actors and mass media, provide a legal basis to insistent and peremptory requests that are linked with social struggles. Law can assume such a task, but that does not mean that it will do so at all times. The emancipatory potential of a renewed legal regime is, furthermore, difficult to see in a global arena. It seems that the emancipatory potential of human rights, if it exists, would be in the realm of politics, because the social praxis of social movements may change the status quo—a position that is against the views of Fischer-Lescano and Möller (2012, p. 57ff.; 84.), who gave the ultimate credit to law in this sphere. The emancipatory acquisition of global social rights would have the potential, as argued by Fischer-Lescano and Möller (2012, p. 57), to reunify the split dimensions of human rights. Again, the traditional position of systems theory in this milieu would be the refusal of interference of a given system into another, as this could lead to the code's corruption—politicization could mean merely the corruption of the powerful system vis-à-vis the weak system.

Law, as a social gazer, in any case, struggles to find ways to provide answers to novel arrangements, in both the structural and semantic arenas. As the semantic force of constitutionalism in the global political arena is still weak, human rights entail a kind of vocabulary strong enough to warn the world society of grave violations, scandalizing many social realms with the help of global media.[5] Beyond this,

[5] Some perceptions that are related to scandalizing processes—and to the structures that select and enable their publicity in world society—can be observed in the unfinished, unpublished PhD. dissertation of Pedro Henrique Ribeiro.

however, many social actors' demands relate to typical constitutional problems and, although in fewer cases, even to classic democratic difficulties.

Areas without constitutions have constitutional problems, such as those involving human or fundamental rights and legal limitations of power, as argued by Neves (2013, p. 2). These areas also have constitutional claims, as social movement actors perceive the problems and urge constitution-like solutions in realms where no typical constitution can be found. Besides invoking constitutional grounds in nonconstitutional spheres, this kind of societal claim, which comes from crucial observers and gazers, can be conceived of as paradoxical because a constitution is an evolutionary achievement linked historically to modern states, presupposing (inter alia) democracy. This paradox must, however, be unfolded. If any constitutional form can be found in such a legal regime, it is very unlike that of the state.

In Teubner's terms, this phenomenon, if present, would express a functional constitution of a particular legal regime (Teubner, 2003), even when considering that the discussion here is not about exclusive civil developments; this is also related to Teubner's vagueness with regard to the characteristics of public regimes. In any event, these events are relatives of state constitutions, as they present a complex network of overlapping and crossing correspondences with state constitutions, much like family resemblances.[6] There might be resemblances in terms of the problems, forms, institutions, and subjects of distinct terrains. To verify whether this is the case or whether it is merely a case of polysemy or an inadequate example of nominalism, the basic shapes, necessities, and conditions that led to the existence of the arrangement must be investigated. The discussion here is not about the presence of a constitution. Instead, we are presenting pieces that resemble constitutional forms, claims, and problems in a constellation that is facing constitutional battles.

This work will investigate not only the legal boundaries of the UNSC's actions but also the shape of its legal form through an examination of its internal features and its relationship with global politics, human rights, and the global public sphere,

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[6] For the notion of family resemblance (*Familieänlichkeit*), see (Wittgenstein, 1999, §66, b)).

all of which consist of various types of social gazers (e.g., UN bodies, courts, and social movement actors)—observers who sometimes also contribute to the molding of the legal and political spheres.

The UNSC is one of the organizations that compose the security regime in the global arena, along with the UN General Assembly (GA), states, and other interstate organizations that will not be addressed in this work, such as the North Atlantic Treaty Organization (NATO) and the Collective Security Treaty Organization (CSTO). Nonstate, transnational actors, such as security armed networks and organizations (viz., Al Qaeda, and the Islamic State, as well as past groups such as A.Q. Khan's network, and Aum Shinrikyō), and nongovernmental organizations (NGOs) have also contributed to the global security arrangement, making it possible to place, in theoretical terms, some of these actors at the regime's periphery.[7]

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[7] This work, following Neves (2013, p. 55f.), uses the expression *international* when observing orders and problems that arise from relations between states, with *international organizations* being those grounded and ruled by states. *Supranational*, according to Neves, stands for broad arrays that directly affect both citizens and state bodies, having as their source a founding treaty that affects the people's everyday life, the European Union being the clearest example thereof. As I see it, transnational developments might also affect individuals and states, albeit not by having a positive treaty; the bindingness of jus cogens and obligations erga omnes is discussed by Neves merely as a matter to be questioned, primarily linking states. Neves, inspired by Teubner (2003, 2012), also understood that, in international milieus, the primary bound actor is the state, while in transnational spheres the primary bound actor is of a private or quasi-public nature. *Transnational*, a very generic term, will be used in this text when observing relations in fora not fully controlled by states, which comprise not only private or quasi-public normative orders, as presented by Teubner (2012), but also eventually constellations having state actions involved, as may be observed in the Basel Committee. The difference between the terms *supranational* and *transnational* is thus the existence of a treaty norming a wide range of everyday conducts in the former. However, global legal customs may be faced as norms binding politically crucial actions, although not as effective as in domains ruled by a supranational treaty. Not following Neves and Teubner precisely, in this work I will also use the expression *nonstate* in order to denote loci, problems or relations beyond state borders.

In this work, I will only secondarily mention General Assembly (GA) acts; the GA represents an organization that has a role in the UN security field and is able to address security questions to the UNSC, having already actively acted in this sphere, fundamentally through the Uniting for Peace Resolution (UNGA Resolution 377, 1950). The Uniting for Peace case, as the principal event involving the effective participation of the GA in this field, was widely criticized (see Martii Koskenniemi, 1995, p. 340) and must be explained. In Cold War times and in the context of great tension during the Korean Peninsula conflict, the GA recalled its own Resolution 290 (IV) of 1 December 1949, which affirmed that the disrespect of the Principles of the Charter of the United Nations was largely responsible for the persistence of strained international relations, and edited Resolution 377, grounded not in the Charter's Articles 10 and 11 but in the two first purposes presented in Article 1, stating that the GA could take enforceable measures in cases when the Security Council does not exercise its main responsibility of sustaining peace and international security. For Falk (1994, pp. 623, n. 628), the Uniting for Peace Resolution altered the Charter at its very core by giving constitutional ground for turning the General Assembly into a residual security council; like Falk, many scholars seem to follow Verdross's (1953) view, who stated that the Security Council has the primary responsibility in security themes, while the General Assembly would have a residual competence in these matters, noting the GA's competence to analyze any questions about the Charter's ambit, with the exception of Article 11 (2), and mentioning, debating the opinions of Kelsen against Goodrich and Hambro, the excerpt of this Charter's norm, which states that "any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion" (Article 11 (2)). Verdross (1953) concluded that the GA may make recommendations on certain matters in the case of UNSC lethargy, [8] with the nonbinding GA

[8] In the words of Verdross (1953) concerning Article 11 (2):

> Apparemment, cette phrase veut simplement dire que l'Assemblée ne peut pas ordonner ou prendre des mesures de contrainte et que, par conséquent, elle doit renvoyer toute question qui appelle une telle action au Conseil de Sécurité. Mais

recommendations being almost equivalent to UNSC Resolutions, since there is no UN force pursuant Article 43 (Verdross, 1953, p. 63ff.), which constitutes a fragile rationale. In fact, Uniting for Peace was a very particular case, when the United States, then fighting in Korea, saw the use of the UNSC to espouse the cause of its actions as impossible and recurred to the GA to legitimate its measures, going against the Charter's legal provisions; since, as I see the matter, vetoing constitutes a way of dealing with a question, Article 12 should thus also be applicable when a veto exists. In any event, other situations followed the growing participation of the GA in security themes, when emergency sessions with concrete effects on the UNSC were promoted by the GA.

The UNSC called, through its Resolution 462 (1980), for an emergency special session of the General Assembly to assess the situation in Afghanistan in view of the lack of unanimity in the UNSC (an earlier draft resolution had been barred by the Soviet Union). The GA then adopted Resolution 35/37 (1980) on this matter. Similar events can also be seen in UNSC Resolutions 120 (1956), 129 (1958), 157 (1960), and 303 (1971). Also remarkable in this area are other resolutions, such as the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations (GA Resolution 2625) and the 1974 Definition of Aggression (GA Resolution 3314), in which the General Assembly dealt with tangible security themes that reflect in other United Nations realms. An example of the recognition of the Uniting for Peace Resolution by the Security Council can be found in UNSC Resolution 119 (1956):

> The Security Council,
>
> Considering that a grave situation has been created by action undertaken against Egypt,
>
> Taking into account that the lack of unanimity of its permanent members at

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> cette phrase n'exclue nullement la faculté de l'Assemblée de faire des recommandations en la matière, si le Conseil ne s'occupe pas de la question ou cesse de s'occuper d'elle. (Verdross, 1953, p. 65f.)

> the 749th and 750th meetings of the Security Council has prevented it from exercising its primary responsibility for the maintenance of international peace and security,
>
> Decides to call an emergency special session of the General Assembly, as provided in General Assembly resolution 377 A (V) of 3 November 1950, in order to make appropriate recommendations.
>
> Adopted at the 751st meeting by 7 votes to 2 (France, United Kingdom of Great Britain and Northern Ireland), with 2 abstentions (Australia, Belgium). (UNSC Resolution 119 (1956))

The GA's role is also noteworthy in other events wherein this organ has officially given, through arguments, assistance to UNSC decision formation. As an illustration thereof, the UNSC requested the opinion of the Secretary General in order to establish ad hoc courts, named the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as will be detailed later. Almost every formal report on human rights issues is eventually directed to the General Assembly, normally via the Economic and Social Council; hence, this body can analyze cases involving violations of human rights that could potentially affect global peace and security and channel the information to the Security Council.

As the participation of the GA, among other UN agencies, demonstrates, highly specific types of communication shape the UN security regime, which is responsible for managing political and legal problems regarding events of global security in the orbit of the UN Charter's mandate and bearing a particular vocabulary in order to securitize issues. Political authority engages itself in fields related to classic security themes, such as the designation of an act as a breach of peace or an aggression against a state; the invoking of the right to war (jus ad bellum); and the labeling of organizations, networks, or persons as enemies.

Political rationality does not, however, ambulate self-sufficiently around these questions, as in the Security Council's reasoning processes it uses legal foundations to bring legitimacy to its decisions. Law orientates normative expectations when fixing the parameters to legitimate the actions of political agents and when processing the disappointment of such expectations. Human rights, for example, are gradually operating as a normative element of the decisions of the UNSC (i.e., the legal system code is progressively becoming a topic relevant to the political decision-

making process). Thereby, the UNSC is recognizing such norms as related to security themes and, consequently, as parameters of its actions, which is not an ordinary observation if one takes the commonplace view of an uncontrolled UNSC. Resolutions concerning women's rights—for example, Resolution 1325 (2000), adopted after the urging of the NGO Working Group on Women, Peace, and Security—and those based on the protection of civilians—for instance, the very problematic Resolution 1970 (2011) on the Libyan situation (invoking the "Responsibility to Protect" motto)—are examples thereof. Furthermore, some courts, created by the Security Council or not, have been developing jurisprudences that establish limitations on the UNSC acting and that connect its actions to human rights bases, thus prescribing the organ legal parameters that must be followed or affixing conditions to the full implementation of its political decisions.

The use of law not only proves legal fundamentals' need for the approval and enforcement of resolutions but also emphasizes the relations between law and politics in a global sphere or, in other words, the intermittent linkage involving *global governance* and *global law*. For example, political agents viewed UNSC resolutions on the Iraq–Kuwait quarrel at the beginning of the 1990s as an unprecedented event in the realm of the UNSC. It became obvious from the beginning that the resolutions needed legal grounds to approve the political resolutions. For them, previous resolutions consisted of legal precedents; political authority could not act without such sources in order to have legitimacy.[9] Falk (1994) claimed that understanding the role of law in the context of peace and security operations indirectly touches on the question involving effectiveness and legitimacy because it offers the public a "litmus test of the effectiveness" (Falk, 1994, p. 613) of the UN concerning the defense of people's interests, asserting that the reactions of the Security Council with regard to the Iraq invasion in Kuwait generated dissimilar feedbacks: "Those preoccupied with short-run effectiveness tended to be indifferent to rule of law

[9] These discussions were related to me by Koskenniemi during his time as a visiting professor at the University of Brasília. During the Iraq–Kuwait conflict, he was working as an ambassador of Finland, then a member of the UNSC, in the Security Council.

considerations, while those more concerned with long-term effectiveness were generally distressed by this indifference." (Falk, 1994, p. 613).

Although legal fragments of the UN security realm can be perceived, it is still not possible to find an autonomous legal system at this sphere, as security themes vary between law and politics (Fischer-Lescano & Meisterhans, 2013, p. 372). The UNSC is an organization that acts politically and is subjected to rules, but its political side blocks any pretense of the self-reproduction of law; law and politics are undifferentiated, law being, in many situations, a mere political tailpiece, contributing numerous technocratic rationales to the formation of legal/political parameters. For instance, the Security Council itself constantly modifies its own rules on the individuals bearing "terrorist" stamps on the sanction's list related to Resolution 1267 (1999), which has created a specific subregime. This colonization of the legal system by politics is faced by many sectors of global society such as NGOs as a hurdle to the development and implementation of human rights. Additionally, an approved resolution confers legal grounds capable of legitimizing forceful measures (Hurd, 2007); (Voeten, 2005). At the same time, however, the Sanctions Committee legal subregime has already changed its own rules in order to fit global legal claims, such as those coming from state and nonstate courts, as will be shown in Chapter 2, which shows constraints and boundaries on arbitrary political acting.

The UNSC is immersed in a legal province wherein human rights and other legal limitations to its actions are law. Being law, any eventual abuse of the political competencies and attributions that go against its confines can be viewed as a problem, a breach of law that must be faced as such. The claims made by nonstate actors against P5 or UNSC actions in respect to human rights violations are examples of possible ways to face such occurrences. The absence of more effective mechanisms of judicial review and the lack of punishment of actors coming from powerful states can hence be regarded not as natural, immutable facts but as problems of the world society related to the debasement of legal regimes (such as human rights) by politics.

Global security is entangled in a broader context of new, nonstate political and legal relations that have highly unresolved theoretical stamping difficulties. Many rigid semantics have established the relationship between law and politics in the global arena. *State sovereignty*,[10] a typical semantic dogma, represents probably the most common place where discussions gravitate: Equal sovereignty for all UN members, and, at the same time, the P5 veto power, is the recurrent problem here. Realist thinkers, in general, affirmed that states, once inserted into an anarchical constellation (an arena without a central, definitive sovereign), have to continuously fight against other states in order to survive. For this reason, no durable global norm could ever exist because any norm would change following strong political winds. This helps to explain why Waltz (1979), for example, described the international system with the *balance of power theory*.[11] Luhmannian observation concerning a tribal order at the worldwide sphere is also related to the international sovereignty paradigm, in which new forms of unfolding paradoxes may be found (Luhmann, 1995a, p. 234).

First, *anarchy*, in realism, does not mean that the international terrain is chaotic or disordered but merely identifies the absence of a central sovereignty over states (Mearsheimer, 1994, p. 10). Second, Luhmannian *tribal order* does not denote an order that is unable to impose sanctions, on the contrary. However, both realism and systems theory should be criticized. World politics operate with their own particular logic, imposing decisions and ruling and managing the expectations of the world political realm. The absence of a clear sovereignty does not immediately turn a given arrangement into anarchy because historical parameters of regular performances can be found, with some actions being faced as shortcomings of the political sphere or as normal events. The states follow the rules in the vast majority of situations and may modify their actions, all in a world society based on complexity

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[10] Regarding the Hegelian concept of sovereignty and the problem with a nonstate constitution, see (Fischer-Lescano, 2005, p. 199ff.).

[11] For a discussion on this matter, see (Zürn, 2009, p. 20).

and communication. Anarchy and tribalism are not the best terms to understand such experiences.

In general, a center/periphery relationship can be found in the international terrain, as strong powerholders (usually rich, strong, military-armed states and suprastate organizations) coerce weaker states in order to impose their will. Sovereignty, as a classical notion linked with states, cannot be applied to nonstate organizations because the differences between state arrays and global constellations are not different in merely quantitative terms but are constituted of qualitatively different parts. In this case, structures are so factually distinct that they cannot be described with the same semantics. They are not even relatives due to the absence of basic structures such as central power, day-pace linking by politics and law, a tax system, formation based on people, etc. Henceforth, there are no family resemblances involving these constellations.

Moreover, mainstream post-1989 semantic approaches can lead to misunderstandings concerning the mutual information fluxes of law and politics in a global sphere. The *globalization* rhetoric would, for many, adequately describe the present global security realm—for example, (Kaldor, 2007), (Mittelman, 2010), and (Münkler, 2011). In this milieu, connecting strictly economic globalization to (in)security matters, Mittelman (2010) identified in the 2008 economic crisis a new phase for world security developments. The present terrorism phenomenon could also be explained by globalization (not observed here in terms of the systems theory), as many of actors from right, secular, left, or religious tendencies—such as the IRA, ETA, EZLN, Ya Basta!, and the Unabomber—have, among their fundamental motivations, *antiglobalization* claims (Laqueur, 2003, p. 316ff.). Along with perspectives fixed on globalization, theories such as the multipolar or unipolar distribution of power, both of which would be fundamentally determined by norms or power, are also attempts intended to explain the configuration of new global movements (Zürn, 2009, p. 20).

Although these diagnoses bear some problems due to the point that globalization, in fact, has its roots in the Iberian expansion of the 15th century (Luhmann, 1998, p. 806ff.), and although power cannot be seen as a good that can be transported or divided but, instead, as a medium related to the implementation of events with improbable chances of occurring (Luhmann, 2000, p. 18ff.), it is not wrong to say that after 1989 a series of new events affected the global security

realm. On the one hand, political organizations have reacted with unprecedented measures to implement their decisions. On the other hand, municipal, regional, international, and global law systems have had to develop a wide range of new mechanisms to legitimate the political decisions of the central organs, to contest them (when trying to be more than mere political instruments), and even to implement or to deny the implementation of UNSC resolutions in the range of their respective jurisdictions. Other events that can be described as genuinely new when considering security issues can also be identified.

First, the participation of new actors and the changing of traditional organizations' actions seem to be clear. States, with or without the allowance or warrant of international organizations, are combatting nonstate networks located in different parts of the world, such as Al Qaeda and the Islamic State of Iraq and the Levant (ISIL), with drones and other ancient combat procedures, raising forms of conflict far removed from classic state wars, events without any kind of territorial goal. The role of nonstate organizations such as the UNSC and NATO has also changed since the fall of the Berlin Wall, and the participation of new players coming from institutionalized provinces—by way of illustration, several legal courts—and from social movement actors (for example, NGOs) pressures the central organs to change what has already occurred.

Second, the presence of new actors results in a different form of war and in a novel definition of conflict, threats or breaches of peace, in which state limits are not the centerpiece of security events. The differences between global, international, transnational, and state security are being mixed: The presented latent risks are connected to the existence of human life, not fundamentally to state boundaries, since Al Qaeda, ISIL, the Tsarnaev brothers, given environmental catastrophes, pandemics, human trafficking, child labor, etc., are not problems pressing the change of state limits. Furthermore, the nationality of the person or entity posited as a risk is not that relevant, a fact that can be evidenced by observing the high number of Europeans targeted by the UNSC sanctions committees, especially the UNSC committee linked with Al Qaeda pursuant to Resolution 1267 (1999).

Third, new themes are being considered as related to security, such as human rights, the environment, and the health sphere (see, for instance, the Security Council resolutions regarding AIDS at the beginning of the 2000s and Resolution 2177 (2014) concerning the Ebola pandemic). The UN Charter comprises, in several

senses, the relationship between states, excluding, with exceptions, nonstate bodies or networks (Oeter, 2008, p. 35); *peace* and the *breach of peace*, as presented in UN Charter Chapter VII, are notions linked with state performances, at least as they were originally conceived (Zangl & Zürn, 2003, p. 219). These characteristics can be also seen in the human rights context due to state responsibility, pursuant to Articles 1, §§ 3, 55, and 76 of the UN Charter. Be that as it may, the risk posed against human life on account of several risk sources represents not only a rhetorical speech but also a difficulty to global politics and to global law; the interpretation of the Charter has changed over the years—for example, in Resolution 808 (1993), which attached human rights violations to international security (see also Oeter, 2008, p. 36ff.). The UNSC and other UN bodies have had to produce new interpretations in order to adequately process the new cases, giving both political and (fundamentally) legal grounds to their actions. I shall come to this again in the third chapter.

If the formation of international organizations does not represent a uniqueness of the present times, the UN, following the attributions conferred to the League of Nations, can be seen as a completely novel entity in modern history due to (a) the range of attributions delegated to this organization by hundreds of states, (b) the wide territorial area in which the UN is able to act, and (c) its autonomy to achieve its purposes in some areas. With regard to the UN Security Council, the expansion of its performances and the mushrooming of resolutions adopted under UN Chapter VII in the last decades have their roots in the end of the Cold War, mainly because the power of veto given to the P5 states was not used as before.

The political discourse after 1989 has been related mainly to risks[12]—for example, those coming from terrorists, organized crime, and environmental destructions—while the pre-1989 rhetoric was concentrated on concrete threats—for instance, the “clear and present danger” of a Soviet attack, in accordance with American speech, being the radicalization of this process represented by

[12] Concerning the social selection of risks from a systemic perspective, see Luhmann (1991). Luhmann understood that *risk* cannot be presented merely as a technical calculation since calculations have their roots in broader causal complexities (Luhmann, 1991, p. 98).

McCarthyism (Daase, 2013, p. 32). The notion of a risk has been enlarged in four fundamental dimensions, according to Daase (2010, p. 2): (a) the *material* dimension, related to the question concerning the sphere of political security dangers: nowadays, risk, besides military themes, also comprises economic, environmental, and human focal points; (b) the *reference* dimension, referring to the persons addressed by security, as individuals and not just states are now taken into account; (c) the *territorial* dimension, which is linked to the question concerning the spaces within which security sees as acceptable for acting (security's focus was only state territories, then regional and international areas, and lastly, the whole globe); and (d) the fourth dimension, related to the *danger aspect* regarding the conceptualization of the problem (i.e., whether something constitutes a concrete threat or merely diffuses risks to be dealt with by security politics). What is more, risk signifies a change in the temporal dimension of security. That is, it is oriented toward a future, possible event (Beck, 1986; Luhmann, 1991); there are scarce references to concrete and specific dangers in comparison with potential, fluid dangers. For this reason, security must identify the risk sources and anticipate them, with, from the point of view of researchers, it being crucial to observe the social requisites that must be fulfilled for the notion of risk to be constituted (Kessler & Albert, 2013, pp. 348, 352ff.). What is more, several distinct groups aim to exert influence over the definition of risk in order to delineate its degree, its possible damages (Kessler & Albert, 2013, p. 349).

Nevertheless, the political rhetoric nowadays, as before, maintains the fear discourse, since the current quasi invisibility and volatility of risk sources can serve as support for the political control mechanisms, even if we consider Barack Obama's pronouncement of May 23, 2013, in which he stated that there were a quasi equivalency between external and internal risk when he also tried to identify not global but, rather, specific and concrete war targets. However, the possibility of attacking weak states that are not able to destroy terrorists remains, and at the same time, the blurred perpetuity, and the perpetual blurriness of terrorist actions in the political agenda continues. In his discourse, Obama created a new type of argument for national self-defense (and also to kill the intelligence behind the agents preventively) in correlating "continuing" and "imminent" threats to legitimate preventive attacks (Obama, 2013). For this reason, politicians in central states have

since evoke not only a permanent situation of war against internal and external latent enemies—that is, a continuous war—but also a continuous *just war* (bellum justum).

In this post-1989 milieu, by means of the expansion of UN bodies' performances, combined with their enlarged territorial and functional competencies, kickbacks and learning processes that come from multiple social spheres and regions have arisen.

Dictatorships and democracies entrust essential features of their obligations (for example, in security, social, and economic fields) to this asymmetrical, nondemocratic organ based on two fundamental political bodies: the General Assembly and the UNSC. This means that a nonstate, undemocratic actor is assuming traditional state responsibilities, possibly because the lack of democracy and rule of law makes the accomplishment of some tasks, especially those related to security issues, simpler at first glance. In this sense, state democratic control does not regulate security movements, with some states perceiving in their own nonstate organizations perfect alibis for the accomplishment of some measures that would be declared illegal within their boundaries. It is clear that the UNSC is able to take measures in realms where states cannot act. For example, the UNSC can prescribe duties to foreign nonstate actors, such as has already occurred with the Bosnian–Serbian Party (Resolutions 1004 [1995] and 1010 [1995]), the União Nacional para a Independência Total de Angola (UNITA; Resolution 1127, 1997), and entities and individuals linked to Al Qaeda and the Taliban (Resolution 1267 [1999] and others). In these cases, the delegation of responsibilities or the implementation of sanctions implies the formation of an organism with a particular logic that is disconnected from the classic state rationality while it produces decisions and norms that must be followed by states, other organizations, and persons globally, that is, without state limits, a fact that can also be observed by dint of the unrestricted obligations created by Resolution 1373 (2001).

Formed by a treaty signed by many states, the United Nations is an organization that has its own processes and structures, in some cases both inspired by and dissimilar to the states' configurations; in other cases, it is inspired by past international organizations' experiences, which were established in very different political and legal backgrounds in comparison to the post-1989 world. In this sense, the process of delegating needs that were at first connected with states to international organizations signifies not simply a functional dimension of

internationalization (Kessler & Albert, 2013, p. 80f.), as the international organization assumes its own functional tasks (i.e., the international organization's logic cannot be reduced to the sum of state claims). This means that the international constellation's movements, which can be observed in some events as independent of state inputs, exert high influence on inner-state politics, fundamentally on states that cannot respond properly by dint of their minor role in nonstate provinces. However, they currently bear their own functional charges.

This constellation can be adequately observed in the arrangement of human rights. It has been established in the UN Charter and in other international treaties that the promotion of human rights is one of the most central state charges. When acting globally, the political global authority of the United Nations plays one of the most important roles in the promulgation and enforcement of global norms, such as the ones concerning human rights, at a sphere without demos, without parliament, and, frequently, without judicial review.

At the same time, many nonstate political organizations are also responsible for severe human rights violations, as can be seen in embargoes authorized or implemented by the UNSC, humanitarian interventions, and target sanctions.[13] In any case, human rights norms—for example, those presented in the UN Charter—bind the performances of international organizations, which must act in order to implement them; any human rights violation is currently being seen by unlike sectors, being social movement actors or not, as a violation and not as a normal, regular, common practice. More than a linkage to its duties, human rights are one of the most significant functional tasks of the UN. Concomitantly, human rights grounds can be the invoking reason, considered legitimate, to start actions that lead to human rights violations, as the cases of Libya and Haiti, among many others, also show.

By this functional interpretation, the UNSC, in addition to bodies such as the Food and Agriculture Organization (FAO) and the United Nations High Commissioner for Refugees (UNHCR), assumes the duty of protecting and promoting human rights, even if it uses them in a grim way. But promoting human

[13] For more details concerning actions in Haiti and Libya, see my article (Palma, 2014).

rights does not come without problems: The UNSC's actions are linked with ambition regarding the implementation of human rights in the sense of homogenization without any specific criteria to conduct such homogenization (Maus, 2002, p. 243). Koskenniemi (1995, p. 341ff.), in a time when the recent UNSC performances involving the expansion of the notion of a threat to peace were a huge novelty for scholars, critically pointed out that the Security Council was making efforts to become involved with *international justice* dilemmas, which should be the General Assembly's task, using Chapter VII power to deal with "soft" international justice problems, such as those related to democracy. Koskenniemi, however, did see human rights' binding effect over the UN system as it is nowadays understood, given that the texts, as well as those linked with the norms and constitutions of organizations, are subjected to changes by interpretation (of courts, of scholars, of legal experts, of other social sectors, etc.) over time.

The contact between norms and political authorities in the global arena indeed expresses a multifaceted, asymmetrical game. Scholars such as Morgenthau (1948), Kelsen (1950) have observed the UNSC as an almost unbounded organ. Arcari (2012, p. 243f.) has argued that the UNSC is not bound by international law when coercively acting for the maintenance or restoration of peace. Tomuschat (2015) affirmed recently that "Only very few voices have argued, mostly in a distant past, that the SC has no legal restrictions to observe" (p. 49). The question of the judicial review of its actions, particularly by the International Court of Justice (see Akande, 1997; Alvarez, 1996; Reisman, 1993), seems to be still very relevant. UNSC's political attributions are indeed very broad, and its alignment is in many ways an exclusionist, hierarchical, arcane way of exercising authority; thus, it demands deep reforms with regard to its actions and structures. Nevertheless, an analysis that recognizes the quasi-despotic face of an arrangement can go further and try to understand the relations between law and politics. Scholars such as de Wet (2004a) have argued that the UN Charter and other norms constitute a limitation to the actions of the UN Security Council. The discretion of the UNSC is limited by international law, the UN Charter, jus cogens, obligations erga omnes, and its own resolutions. It is, accordingly, a political body that produces legal documents but also has legal limitations**.** The relationship between state and global information fluxes in the legal orbit is a complex interplay of the production of legal texts, adjudications, and communications coming from several organizations in dissimilar spheres. In this

sense, the legal restrictions cannot be based merely within texts but also have to do with continuous legal practices (e.g., state compliance, court decisions, everyday conducts) that construct text senses in order to consider normative expectations as generalized.

More than viewing international law as really law (for an exposition of the debate on the nature of international law, see Hathaway, 2005, p. 486ff. This author, however, disregards in her analysis customary international law), the assumption of the existence of law at a nonstate sphere, and, in the present case, the notion of the Security Council as both a legal actor and a political actor immersed in a legal area, has led to the conclusion that this kind of law, as law, has the potential to block the expansive rationality of politics due to its inner logic: "Denn selbst ein hegemonial produziertes Recht lässt sich nicht umfassend politisch kontrollieren. Im Gegenteil, es kann aufgrund seiner funktionalen und normativen Eigenlogik die rechtsimmanente Fiktion einer allgemeinen Gleichbehandlung aufrechterhalten und im Sinne rechtlicher Autonomie zurückschlagen" (Meisterhans & Fischer-Lescano, 2013, p. 375).[14]

Global law is already countering, for example, through courts linked with municipal or regional legal regimes that are facing UNSC performances vis-à-vis global human rights protected by domestic or nonstate norms. To treat similar cases similarly is one of the consequences of using law to ground political decisions. Basing security resolutions on human rights brings back the need to respect these same rights. Even if human rights grounds or due process of law bases are strategically integrated into some decisions or broader arrangements in order to react to external demands (from courts or NGOs, for example), future decisions

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[14] Translated by me as "So even a law that was produced in a hegemonic fashion does not let itself be completely controlled. On the contrary, it can, due to its functional and normative inner logic, sustain the fiction, immanent to law, of a general equal treatment and to hit back in sense of its legal autonomy." At the end of the sentence Meisterhans and Fischer-Lescano cited Kelsen (1992) and (Meisterhans, 2010). This kind of legal *hit back* on its original grounder can be also found in (Neves, 2007b, p. 415)

might be forced to observe previous legal settings.

Politics needs law and can use its features to lay the foundation for rulings but can also be simultaneously caught by its logic. The opposite diagnosis would be the conception of a world similar to the Rex I realm projected by H. L. A. Hart (1994); i.e., it would be tailored to the understanding of a legal vacuum responsible for commanding the transnational sphere).[15] More than operating as an instrument of politics, and more than exercising its function with regard to specific realms, law struggles to restrict the UNSC's expansive rationality through human rights and norms related to the rule of law, which come from several sectors of the global society.

Aiming to show the UNSC as immersed in a global, legal arrangement, as well as to understand its legal form, I will initially expound the limits to the UNSC's actions and the legal arena in which it is located. After that, I will analyze its judicial relations, since this organ can act to settle disputes and have part of its own actions analyzed by courts. Finally, I will demonstrate its executive side to explain the reasons why resolutions of the UNSC can themselves be described as legal acts, thus presenting this UN body as an unusual legal source.

1.2 UNSC Legal Regime

There are many ways of reading the gap between an illegitimate, brutal order and an obligation arising from a legal source. The difference between a gunman's command and a legal act might be unclear. H. L. A. Hart, John Austin, Bentham, Luhmann, Machiavelli, Locke, and Hobbes can be thought of as representatives of different views on this deep contrast, which seems to also be the specter haunting this work.

More than the understanding of moral standards in contrast with law, however, the question in the global sphere must be formed in respect to the existence of law itself in a realm where only political power seems to exist, at least at

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[15] For a response to a hypothetical constitutional vacuum (*konstitutionelle Leere*) in a transnational arena, see Teubner (2013, p. 14).

first glance. This is the case of the legal regime of the UNSC. Understanding this regime is crucial to the development my main argument, that is, the capacity of law and NGOs to restrain UNSC's political rationality, in processes related to dynamics of contention.

The fundamental difficulty in understanding the cleavage between a legal act and a mere powerful act springs from the identification of the legal form of the modern, global authority of a UN central organ. Using a license, it can be stated that the UNSC has an unfamiliar legal form, meaning that its features, structures, and elements are not as common or regular as the historical legal form related to the nation-state, but they do exist and must be narrowly explored. Real state legal systems cannot be properly conceived as regular or constant since they vary among states, but they share the same basic legal form—that is, dissimilar—since regionally differentiated, legal systems have equivalent elements and structures. Identifying the Security Council's legal form is a challenge addressed in this work at many points but concentrated in this section.

Like a modern anthropomorphic idol, the Security Council fascinates thinkers and politicians due to its powers and hybrid nature, as it is composed of both law and politics at a arena without any of the classic, historical state requirements that formed such systems and, therefore, without the structures that thinkers commonly identify in the strained relationship between these two diverse arrangements. However, mainly due to the influence of Kelsen (1953) and Morgenthau (1948), who have convergently defended the UNSC's unboundness, this idol is viewed by some [(Arcari, 2012; Martii Koskenniemi, 1995); Oosthuizen (1999)] as politically omnipotent, disregarding in this sense the tension between law and politics as a battle already finished.

For Kreuder-Sonnen and Zangl (2014, p. 17ff.), the UN security system can generally be considered a partially dictatorial legal order, whereas some of its suborders can be evaluated as more similar to typical dictatorial orders. Two of these suborders are of particular relevance because they are firmly institutionalized and appear to be not just transitional episodes: the UNSC counterterrorism regime and its regime for the nonproliferation of nuclear weapons (see Joyner, 2012). Kreuder-Sonnen and Zangl (2014) have not, however, detailed the differentiation between the legal and political sides of the UNSC, a problem shared by many other studies.

From a normative perspective, the UN's legal security regime, which can be

understood as the regulations regarding events of war and peace in which the UN may become involved, is constituted by a complex network formed by the UN Charter, specific determinations of its own resolutions' mandates, resolutions passed concerning related issues, jus cogens, obligations erga omnes, and multilateral agreements, such as the Treaty on the Non-Proliferation of Nuclear Weapons and the Geneva Conventions. It is important to note that the UN itself is not a party of any specific treaty concerning human rights, but this does not mean that it can act independently of human rights and humanitarian grounds, most of them established in treaties. The United Nations Security Council, as a UN body, must act coherently with these legal sources, having, in this way, limitations to its actions.[16] These questions seem to be related to the notion of rule of law. Although this concept can also be viewed by some as a part of the legitimacy (and, thus, political) problem,[17] I will not focus primarily on questions concerning the legitimacy of the UNSC in this section.

Furthermore, UNSC regime is also an internally fragmented order, as it is possible to identify distinct subregimes, such as the cited counterterrorism regime (of which several sanctions' regimes are part) and the nonproliferation regime, along with the peacekeeping and peace-building regimes. Inside these subregimes severe

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[16] Herdegen (1994) stated:

> The deference to political choices taken by the Security Council under authority of Chapter VII and the concretization of this power cannot be tantamount to allowing the Security Council to define its own powers, a "Kompetenzkompetenz." The Security Council clearly is bound by procedural and substantive rules, any disrespect of which would taint its resolutions with illegality. (p. 154)

Kreuder-Sonnen and Zangl (2014) offered a normative criterion when characterizing the actions of the UNSC: "According to our criteria, the constitution of authority in the UN security system is normally neither democratic nor autocratic but 'neutral'" (p. 17). Other than in a completely arbitrary order, though, the Council does not stand above the law entirely.

[17] For the conception of legitimacy as the contingency formula of politics, in contrast with the Habermasian vision related to values, see Luhmann (2000, p. 125 f.).

problems can be found related to lack of legal control of the authority, the legality of procedures, and, on the political side, legitimacy. For instance, through Resolutions 1267 (2001) and 1390 (2002), the Security Council included hundreds of people on a UN terrorist list, which implied, for instance, grave restrictions on their freedom of movement of assets without the possibility of effective reviewing at the beginning. Several states have suggested names that should be on the list, but the procedures that led to such inclusions were, primarily, both arbitrary and secret. As will be shown in the next chapter, individuals with no relation to terrorism have had their lives complicated by the list, but they could do practically nothing inside the Security Council to remove their names. Critics toward these events and judicial decisions condemning Council's quasi-despotic measures have triggered the establishment of an *Ombudsperson*, an officer tasked with evaluating delisting requests, for the Al Qaeda sanctions regime through Resolution 1904 (2009).

To deal with rule of law and its relationship with nonstate actors does not mean transposing a historical notion connected with national law to a nonnational horizon through a simple intellectual exercise. On the contrary, the application of rule of law principles in the global sphere is one of the main normative aspirations of the world society, manifested by many governments, nonstate organizations, and scholars from diverse perspectives. The claims coming from the periphery of the political world system, from adjudications made by courts around the world (check the Chapter 2), and from social movement actors' demands (check the Chapter 3) also seem to demonstrate the importance of a paradoxical rule of law arrangement in the global sphere.

In this sense, it seems important for this work to take into account the fact that, mainly after the Cold War's end, the demands concerning the application of rule of law clauses to the UNSC have become more and more clear and manifest, as well as to analyze the possibilities and limitations of such an affirmation. This means that the normative expectations of global society have changed, including recently the formation of a global legal formation in diverse fields that appears less similar to dictatorial arrangements. This can be proved, mutatis mutandis, by observing the

rule of law as a principle guiding dissimilar organizations around the world, as can be noted in documents such as the Charter of the Organization of American States (1948),[18] the Constitutive Act of the African Union (2000), the Statute of the Council of Europe, the Treaty of Maastricht (1992), and even the North Atlantic Treaty (1949), NATO's foundation document.

Any evaluation with regard to the uneasy relationship between law and politics at an international sphere faces the problem of a rule of law formation in an arena without its classic, state requirements. In this sense, semantic evolution on this horizon tries to find state equivalents to label nonstate processes. Thus, it seems to be a paradoxical tendency of the world society (of the academic, legal, and political provinces) to talk about phenomena such as global rule of law and global constitutions. Paradoxes can be unfolded, but the semantic consequences of such developments and the adequacy of such statements are highly uncertain.

Definitions of rule of law are also characterized by a large discrepancy, depending on the source from which a notion originates. Indeed, notwithstanding the emergence of the notion in several treaties, sentences, and books, states often understand rule of law at the international sphere as strongly connected with the creation and respect of the law among each other, on the one hand, or with the settlement of particular international disputes, on the other hand, rather than with the submission to a judicial review of issues concerning the application or enforcement of international law. Furthermore, for some theoretical approaches, at the same time that they constitute international organisms anchored in the rule of law paradigm, states often use the rule of law notion in a way not related to international organs like the UNSC (Mausama, 2006, p. 17). If the vagueness and ambiguity of some legal notions that give rise to further long discussions in several legal provinces do not represent something new for trained lawyers, the lack of steady dogma in this realm is still a problem greater than in other spheres.

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[18] The preamble of this charter states that it is the "desire of the American peoples to live together in peace [. . .] and under law".

Zangl (2005) remarked, in this sense, that rule of law, a within-state concept[19] based on the equality of all members before the law, and sovereignty, a notion concerning interstate relations, are both central legal notions to modern states' identity, albeit very contradictory, since the use of sovereign powers theoretically allows the justification of a state act beyond international law.

The tension between these two notions embraces the main difficulty of describing the emergence of an international rule of law. Indeed, the absence of formal equality among UN members, represented by the existence of the P5 states, is the main source for critics regarding the existence of rule of law in the UN orbit (Zolo, 2007, p. 41ff.). As I see the debate, this view is more concerned with producing quarrels against universal, almost idealistic theories like the Habermasian, missing the point that international law is a highly fragmented area. In these environs, the question regarding the existence of rule of law must not be faced as related to a general international law but to particular fields or regimes of the global constellation. Regimes may be observed as capable of developing rule of law schemes.

Zangl (2005) showed, for example, that the formation of an international rule of law has been occurring in some areas following the example the European Court of Human Rights, where both small and great powers (for instance, Germany and Greece) alike will probably have their cases adjudicated. Zangl also discussed levels of advancing the rule of law concerning international zones such as trade, labor, and security, arguing that elements of rule of law can be noted in these regimes. In the security realm, there are several problems blocking the implementation of rule of law, as will be better shown later.

Also involving rule of law aspects, modern, liberal political theories and modern constitutionalism have shaped the idea of the separation among legislative, administrative, and judicial powers, an assumption related to state checks and balances mechanisms, which are necessary to assure the independence and proper

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[19] In the same direction, conceiving of rule of law as related to citizens and state constitutions, see (Zolo, 2007, p. 40).

functioning of different state realms, excluding the possibility for despotic uses of the power by a singular state body. The semantics have many differences, depending on the author. For Locke (2003), who did not consider the judiciary as a distinct power, all powers (executive, legislative, and federative) should be separate, but all should also be subordinated to the legislative (Locke, 2003 for instance, §§ 143ff.; 149ff.). To prevent despotism and to grant individual political liberty, Montesquieu (1989) conceived, bearing the English experience in mind, the idea of a separate magistracy power, which was, however, regarded as a secondary and subordinate flat in comparison with the other state powers (executive and legislative), all of them parts of the state political power, establishing thus the basis of an arrangement based on checks and balances among the different branches (Montesquieu, 1989, p. 156ff.). For Locke (2003), as well as, for instance, Rousseau, however, there is a close relationship between a particular people and their ruler, even if considering his/her great underlining of civil rights. The liberal semantics entail many dated presuppositions that do not fit with current legal and political states of affairs, as politics and law within states must, side by side, accomplish their respective functional tasks in different state spheres, the constitutional relationship between them being more complex than presupposes the traditional separation of powers theory. In many cases, it is hard to distinguish pure legislative from pure executive bodies—for instance, when considering parliamentary constellations. Furthermore, the corruption of a given system, fundamentally that of law in the face of strong political or economic pressures, is the leading cause of tribulations for many states, as it blocks the respective operational system's closure.

The translation of this matter into a global or international arena only makes the notions even more problematic to be regarded as valid or applicable. The United Nations system does not correspond, vis-à-vis, to traditional state apparatus, bearing the particular UN organs' specific functional tasks, without the possibility for reviewing some acts of other bodies. What is more, the UN arrangement, based on the agreement of states, is not merely diverse in size in comparison with states but also in form. There is no rudimentary separation of powers in this realm. As it was state conceived, there is simply no separation at all within the UN, a political and normative fact that must be faced in order to channel information and demands toward the United Nations. For instance, there is no clear institutional mechanism that could enforce an eventual International Court of Justice's (ICJ) decision against

the Security Council. Checks and balances could be presented here merely as a metaphor regarding some mechanisms related to different bodies that provide information to each other, rarely effectively controlling other UN organs' decisions. Some resolutions of the General Assembly to embrace security themes (such as GA Resolution 377/1950, GA Resolution 2625/1970, GA Resolution 3314 (1974), and some ICJ decisions, such as that of Lockerbie's case, are examples thereof. The UNSC veto power can be seen as the most important gadget at the UN sphere concerning the possibility of controlling a given decision within or beyond the Council in situations that usually affect the whole UN constellation and other international bodies. Substantive Security Council resolutions taken under Chapter VII also affect many other arrays without possibilities for clear comebacks. For instance, Resolutions 1422 (2002) and 1487 (2003), both of which shall be detailed in the next topics, are related to ICC (International Criminal Court) performances, having as their basis Article 16 of the Rome Statute. This does not mean, however, that similar forms might not have family resemblances, as already mentioned.

As I see it, the state and international institutions are not close relatives. Nevertheless, in a sphere without precise division of powers, there are, paradoxically, remnants of checks and balances instruments because other UN bodies can assess the Security Council's resolutions or provide information aiming at the better grounding of resolutions; the limits to the actions of the Security Council, even under UN Charter Chapter VII, echo a nondespotic constellation. They might, thus, have similar forms and problems. In any case, if dynamics based on checks and balances can be found, they are located precisely in the relationships involving several, distinct organs, not among separate powers, as the classical, state-based liberal doctrine puts it. Furthermore, outlandish signs of a global people or of a public sphere, also resembling what exists in classic state spheres, can also be perceived if the participation of social movement language in Security Council and United Nations terrains is considered.

Aspiring to analyze such issues, and especially to cast light on the puzzle that set up the legal form of the United Nations Security Council—which is related to its legal restraints, its social environment, and its norm-creation ability—this segment is composed of three subsections. After an analysis concerning the lawmaking force of the UNSC, the characteristics of post-Cold War resolutions will be examined, showing what could be understood as global legislature. Then, the legal boundaries

of UNSC actions will be investigated. The second part is further divided into two parts: First, the relationship between the UNSC's and the UN Charter's purposes and principles will be observed. Second, an investigation will be conducted regarding other human rights sources beyond the UN Charter that can be viewed as connected to the Security Council's legal arrangements. Finally, a conclusion comprising the involved themes will be presented.

1.2.1 Executive–Legislative Side: The UNSC as a Global Legislator?

In this section I will discuss two main aspects. First, I will investigate whether UNSC resolutions related to factual worldwide situations can be conceived, in general, as legal acts (i.e., as norms responsible for law creation in specific cases and to particular actors and, sometimes, in hypothetical cases involving a broader sphere of acts). Second, I will address the question of whether resolutions such as 1373 (2001), related to the financial supporting of terrorism, and 1540 (2004), concerning the mushrooming of weapons of mass destruction, among others, can be thought of as typical legal acts that have created general obligations to all actors in the realm of the UN (and beyond) for an unlimited time. As will be argued, recognizing law creation in such terms means a radical change in the temporal and social dimensions of the UNSC's legal regime in the global arena.

Similar to what can be noted in other sections, dealing with such questions aims to grasp the central pieces forming the UNSC's legal form, and thus, it is crucial to understand this organ in theoretical terms in order to demonstrate other influxes affecting its legal structures and elements.

Any assumption regarding an executive power must be faced in light of the UN's constitutional limits, that is, its principles and purposes related to the specific organ, which cannot expand at its own will its range of action, affecting internal state domains arbitrarily. Hence, the Security Council cannot be regarded as the executive side of a global government because its range of actions and the reach of its norms are, by many political and legal grounds, restricted by its functional, constitutional tasks, as broad as they can be. They are, in principle, restricted to the *international*, not to the *global*, arena, albeit their effects go far beyond the United Nations realm. In fact, the effects of UNSC resolutions might be regarded as a point of discussion because, by bounding state legislations and political decisions, they disturb many other social routines.

The adoption of nonbinding resolutions under Chapter VI of the Charter is part of the international and nonstate legal milieu in the sense of enunciating and reinforcing legal parameters present in conventions and in the customary law, providing grounds to orientate the normative expectations of society. Given that law is not a static, lifeless system, every new formulation might be regarded as a creative act. Here law-declaring and lawmaking are, therefore, present. When such resolutions are made, the affected states are pressured to change their behavior in order to adapt themselves to normative, nonstate patterns. State compliance with them is not an exception. The Security Council, mainly before 1989, established some peacekeeping operations under Chapter VI, with the states' consent. Examples representing this subject include the United Nations Truce Supervision Organization (UNTSO), a military-observing group established in 1948 in Palestine, and the United Nations Emergency Force (UNEF), a peacekeeping operation established in 1956 to deal with the Suez Crisis aftermath involving Israel and Egypt. Despite bearing a strong political side, these kinds of measures were taken by virtue of the extant legal grounds, creating and interfering in state domains, aside from the reflections in other social arenas.

The Security Council's binding resolutions are a central piece of the United Nations arrangement, even when considering that there are no mechanisms molded to obligate members to implement or to provide military assistance to them (de Wet, 2004a, p. 110). In the state realm, a political authority can face institutional or factual problems regarding the imposition of legal norms within its own territory, but instruments shaped for the purpose of enforcing them can be found. In any event, the Security Council and states are constructing mechanisms in order to fulfill still-extant gaps, for instance, Resolution 1540 (2004), and the following state and suprastate normative acts.

Bearing these arguments in mind, it can be stated that UNSC resolutions, both the binding and the nonbinding ones, show a normative force. Even Kelsen (1950) argued that the resolutions of the Security Council are legal acts: "The decision enforced by the Security Council may create new law for the concrete case"

(p. 295); (see also Kelsen, 1948, p. 789). Kelsen (1950, p. 293), however, conceived the acts of the UNSC when acting under Article 39 of the Charter as practically unbounded.[20] He also could not see that the Security Council's acts are immersed in a legal sphere that comprehends other kinds of norms and legal parameters coming from several sources in order to adopt its legal measures. What is more, some resolutions cannot be regarded as simply normative acts touching merely on a specific case since they also constitute precedents for further resolutions. In this milieu, it should be noted that some recent resolutions are not even based on concrete cases.

While endorsing or creating expectancies that remain, even if not confirmed, in concrete cases, the resolutions might be conceived as texts that orientate dissimilar actors' movements and, thus, as part of the legal province. UNSC decisions are global society's source of normative expectations (of states, NGOs, enterprises, persons, etc.). Evidence of this is that any intervention or military act performed by a given state in face of another state is widely observed by dissimilar social actors as unlawful or illegitimate if not expressly authorized by a UNSC resolution. The Iraq invasion performed by the United States at the beginning of 2000 represents a sharp example thereof.

The remarks regarding legal norms in this sphere are related to traditional problems concerning the function and the enforcement of law. Law as a social system must be observed as bearing the function of assuring normative

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[20] "When, for instance, the Security Council, in a territorial conflict between two members, considers it appropriate for the maintenance of peace to recommend to one party the cession of the disputed territory or part of it to the other party, the Council may enforce its recommendation even if it is not in conformity with existing international law. Hence it is doubtful whether the enforcement actions provided for in Articles 39, 41, and 42, have the character of legal sanctions, rather than that of mere political measures to be taken by the Security Council for the maintenance or restoration of international peace. Since peace is not necessarily identical with law, the enforcement machinery established by the Charter is no guarantee for the maintenance or restoration of existing law; but it may create a new law." (Kelsen, 1948, p. 788f.).

expectations, thus implicating knowledge of the kinds of behavior that one can expect from others and also the types of behavior that one can practice, or “to put it more colloquially, to know which expectations won’t end up making one look a fool” (Luhmann, 2004, p. 163). With law, a person or an entity can orientate him-/herself or itself, pursuing mechanisms to guarantee the effectiveness of expectations when disappointed in an actual situation. Norms create a superior degree of expectation certainty in comparison with behavior; behavior and expectations have a mutual, stabilizing relationship (Luhmann, 2004, p. 163f.).

As a legal program orienting the application of the legal code (lawful/unlawful), norms stemming from Security Council resolutions can be observed only as communication, not as ideal types of atemporal or nonphysical platonic ideas. Norming demands written texts as a manner of generating communication, occurring only as operations of the given regime, and constituting moments of the regime’s reproduction (see Luhmann, 2004, p. 209 f.). The resolutions are, in this sense, the material basis of the legal communication. Although uncritically, the International Criminal Tribunal for the former Yugoslavia (ICTY) holds that “of great relevance to the formation of opinio juris to the effect that violations of general international humanitarian law governing internal armed conflicts entail the criminal responsibility of those committing or ordering those violations are certain resolutions unanimously adopted by the Security Council. Thus, for instance, in two resolutions on Somalia, where a civil strife was under way, the Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held "individually responsible" for them. (See S.C. Res. 794 (3 December 1992); S.C. Res. 814 (26 March 1993).)” (see *Prosecutor v. Tadić* [IT-94-1-AR72], Appeals Chamber of the ICTY, Decision on the Defence Motion for Interlocutory-Appeal, Oct. 2, 1995, §133).

Due to the political force of the Security Council, its decisions could be seen as merely political orders or commands, not as genuine legal acts, a question faced by many scholars, such as Hart (1994), John Austin (1861), and Bentham (2010), in other contexts. This must be better discussed, and then I shall return to the systems theory rationale.

Command, as a legal notion, has its origins in Hobbes’s *Leviathan* (1998), which observed a very close relationship between law and the sovereign. After the social contract, because the sovereign of a commonwealth (an individual or an

assembly) has the lawmaking power, including to make laws in order to repeal other norms considered undesirable, he/she or they would not be subject to the civil laws. Since only the commonwealth can make laws, and the only legislator in all commonwealths is the sovereign (Hobbes, 1998, p. 175f.), Hobbes identified the commonwealth with the sovereign and law itself with the sovereign, shaping the absolute power of the sovereign:

> For he is free, that can be free when he will: nor is it possible for any person to be bound to himself; because he that can bind, can release; and therefore he that is bound to himself only, is not bound. (Hobbes, 1998, p. 176)

Law is considered law not due to the original authority that has the norms formulated but according to the existent sovereign responsible for making law. The sovereign's force is a prerequisite for the very existence of justice and authority:

> Item, that the two arms of a commonwealth, are force and justice; the first whereof is in the king; the other deposited in the hands of the parliament. As if a commonwealth could consist, where the force were in any hand, which justice had not the authority to command and govern. (Hobbes, 1998, p. 179)

Hobbes (1998) exerted influence on the conception of commands by Austin (1861), for whom the difference between a moral command and a legal command (between a robbery's command and a king's command, for instance) was the emanatory source, that is, the sovereign. As cited by Luhmann (Luhmann, 2004, p. 173), Bentham argued that the function of law was to assure the security of expectations, which should be given by a strong political actor. A command provided by any form of authority, in terms put by Bentham, triggers the differences between obedience and disobedience. At the end of the day, it is all about politics and sovereignty. Hart (1994) questioned the simplicity of these assumptions with his notion of secondary rules as rules located at a different place vis-à-vis the primary rules and in relationship with them, stating that legal systems also have rules of adjudication, rules of chance, and the rule of recognition. International law is, according to Hart, qualitatively different from municipal law, as having a very dissimilar background, wherein the internal conscience of persons should not be taken in consideration, and the use of violence between states are public and would, in general, affect many other states. The long periods of peace among states would be the consequence of very complex regulatory norms dynamics. These rules can be observed as rules because there is

> general pressure for conformity to the rules; claims and admissions are based on them and their breach is held to justify not only insistent demands for compensation, but reprisals and counter-measures. When the rules are disregarded, it is not on the footing that they are not binding; instead efforts are made to conceal the facts. (Hart, 1994, p. 220)

The question regarding the nature of UNSC resolutions, however, remains and involves the relationship between politics and law. In systems terms, first of all, the function of law is not outlined by its enforceability capacity, as though the fundamental preoccupation of law were dealing with the deficiency of the achievement of political goals. Differentiations linked with law's enforcement, such as those conceiving law as an external force and morals as an internal force, have to do fundamentally with political, not legal, issues. If law were so closely linked to enforcement, the legal codification would be dispensable; it would have no sense of the law's enforceability in the hands of private plaintiffs, and the freedom of contracting would also be unnecessary in such a world. On the other hand, if the enforcing of binding political decisions were perfect, then law would probably have no sense to continue existing. As mentioned, the function of law is related to the orientation of expectations (expectations are not a state of conscience of individuals but, rather, the societal understanding of certain communications at a certain temporal moment) in order to avoid disappointment; expectations, however, must have at least a chance of being assured in case of disappointment to guarantee the certainty—that is, law must provide substitutes and implement them in order to treat disappointments. The social meaning of law is related to assuring expectations as stable, which is diluted over time (Luhmann, 2004, p. 143f; 164f.).

State legislations have their sources in political authorities' acts, aiming at the implementation of collective binding decisions, which represents a political task. The legal act, however, performs effects on the legal realm as programs orienting the application of the code lawful/unlawful. Like any kind of legislation, Security Council norms entail both political and legal sides. Analogically, the Security Council is a political organ that produces certain decisions based fundamentally on the UN Charter's directives, having also to consider other legal sources such as jus cogens and human and humanitarian rights, as already described.

This means that the UN security body is inserted into a legal realm that has many dissimilar sources (e.g., international agreements, international customs,

transconstitutional imperatives) and subjects (e.g., states, persons, NGOs, enterprises, networks). Once adopted, any binding Security Council resolution may affect many of these different spheres, orienting how the addressees shall act in specific situations; if these legal acts collide with some well-established normative expectation, there will be political, societal, and normative responses.

Although not being enforcement the primary characteristic for assuring the existence of law, resolutions can be enforced through the Security Council's decisions, and in this transitional moment the world society is finding modes to have its normative expectations respected (at dissimilar courts, for example) in case of disappointment related to a given Security Council act, as also already demonstrated.

The colonization of law by politics connected with usual Security Council performances (Resolutions 1422 [2002] and 1487 [2003] are clear examples thereof) has to be taken into account as a problem for the international realm, but it does not pollute the existence of law per se, merely the existence of an autopoietic law. What is more, intended despotic measures face societal comebacks from many actors of the global constellation, including from judicial and societal organizations, which shall be expounded in the two last chapters. The greatest current problem is not exactly related to the enforceability of UNSC resolutions, as this organ is encountering many ways of enforcement (e.g., freezing of assets, military interventions and wars, establishment of courts, noneconomic sanctions), but is related to the selectivity of the acting actors, targets, and themes of such resolutions.

At this province, there are neither classic executive organs, nor typical legislative bodies, nor any archetypal judicial systems, as they have been conceived as having state assemblages in regard. A hospital cannot produce art works; a fine arts auction house cannot cure patients with cancer. Likewise, the Security Council is not an organ primarily responsible for processing the disappointments of expectations related to UN security issues, though linked with normative expectations. The UNSC may merely provide legal grounds for the society or strengthen social expectations through resolutions, making it eventually possible to act vis-à-vis grave violations of law, for example, through military actions.

When it has seemed necessary to treat some normative problems related to specific situations, the Council has created specific organs for this mission; that is, it has instituted the ICTY and the International Criminal Tribunal for Rwanda (ICTR).

As Hart (1994, p. 217) stated, Chapter VII of the UN Charter did not establish any correspondent with regard to the sanctions of municipal law. The necessity of also sanctioning individuals, that is, the new sanctionist force of international law that is nowadays being witnessed, demonstrates again that the world is observing a transitional phase, when political and legal constellations related to the global arena are still being shaped. This, however, does not mean these formations have some kind of previous, teleological targets that will someday be achieved. In fact, historical movements are surrounded by random events, and this fact remains even when a social project exists (for this, check Luhmann, 1990).

1.2.2 Post-Cold War Resolutions and Global Legislature

As explained before, after the end of the Cold War, the United Nations Security Council approved an unparalleled number of resolutions. Some of them were dissimilar in shape in comparison with the old Council's practices. Fundamentally, the shift was made: (a) toward hypothetical situations (in contrast to actions concerning only actual and present events); (b) in the direction of imposing general obligations to all United Nations' states and also to nonstate actors (enterprises, persons, organizations, networks, etc.), with them thus being pointed not just at specific international situations; (c) toward issues that do not correspond to the ancient problems of security, which were mainly focused on state borders and state people; and (d) in relation to establishing typical legal structures for solving conflicts. In general, this work agrees with Rosand (2004), who argued that the norming of general events is not per se against the UN Charter.

The problem is related to the fact that, in urgent situations, the hundreds of United Nations members would hardly be able to achieve consensus over military questions. Urgency seems to be a typical political notion. In Cold War times, the already-cited GA Resolution 377 (1950; "Uniting for Peace"), GA Resolution 2625 (1970; "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With the Charter of the United Nations"), and GA Resolution 3314 (1974; concerning the definition of aggression) were approved due to the immobility of the UNSC.

The adoption of resolutions on issues concerning illegal arms trafficking (Resolution 1209, 1998), the recruitment of child soldiers (Resolution 1261, 1999), the protection of civilians during armed conflicts (Resolution 1265, 1999), the

protection of women in war (Resolution 1325, 2000), and the securitization of epidemics such as Ebola and AIDS (such as Resolution 2177, 2014) are examples of resolutions that go far beyond the decisions taken before the end of the Cold War, also now encompassing major global, societal, and sometimes nonmilitary problems.

The creation of ad hoc tribunals (i.e., the International Criminal Tribunal for the Former Yugoslavia [Resolution 827, 1993] and the International Criminal Tribunal for Rwanda [Resolution 955, 1994]) can also be pointed to as a qualitatively new measure of the Security Council.

Resolutions 1269 (1999) and 1373 (2001) are connected with the so-called War on Terror, an American stratagem to combat political and economic enemies in Middle Eastern countries in order to obtain political support and economic advantages, having as its alleged basis the response to the September 11 attacks in New York. They were not centered on states' performances endangering international peace and security but rather, on the broader actions of some nonstate actors. Resolution 1269 expressed concerns with the moves of terrorists acting in many locations, condemning them. It has, although not directed to a specific state situation, urged the states to prevent and suppress terrorists acts, bring to justice terrorists, and to "suppress in their territories through all lawful means the preparation and financing of any acts of terrorism" (Resolution 1269, 1999), which also involves private actors such as banks and enterprises. Resolution 1373, approved just after 9/11, established a committee in order to check the state steps taken in order to implement the series of counterterrorism resolutions, urging the approval of internal legal measures for the accomplishment of such a task. Resolution 1624 (2005) also guides the actions of the committee, today named the Security Council Counter-Terrorism Committee.

Here is law incarnate. All presented resolutions are legal norms. They give criteria to several actors, such as states, organizations, persons, and networks, to orientate their movements and also present concrete methods for their enforcement. Several states have, for example, approved internal legislations in order to combat terrorist movements and to dry up terrorist financing, as substantiated by several state reports, which can be seen on the Committee's webpage, http://www.un.org/en/sc/ctc/resources/1373.html. This might be conceived not merely as international politics but also as global governance in its most basic assumption (Teubner, 2012, p. 23f.).

Moreover, the resolutions provide criteria for national and international courts to apply the legal code, satisfying a hypothetical disappointment of a given normative expectation based on, for example, the combating of terrorist networks. Tangible examples will be further presented in the next chapter, but it is remarkable that national and international courts did not disqualify these UNSC resolutions as legal norms in the concrete cases.

Resolution 1540 (2004), related to the risks associated with nuclear, chemical, and biological weapons, has obligated all states to adapt their respective legislation to its directives. Curiously, the status of a given state in the face of the nonproliferation treaty was not considered, as all should observe it. The resolution also established a committee responsible for checking the level of international compliance. Thus, it was not linked to any specific, concrete fact.

Pursuant to Resolution 1737 (2006), Iran, a state that has never revoked the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), was sentenced to cease uranium enrichment and, thus, prohibited from making pacific use of nuclear energy, as ensured by Article IV (1) of the NPT. Interpreting Article 103 and Article 39 of the UN Charter, Joyner (2012, p. 244ff.) held that the Security Council extrapolated its legal authority when implementing a legal act against this multilateral treat:

> In summary, then, by trampling upon a right of states recognized in a broadly subscribed treaty to be an “inalienable right,” the Security Council in Resolution 1737 and subsequent related resolutions on Iran overstepped the bounds of its Chapter VII authority. It has at least in doing so pushed the limits of that authority to a point at which serious questions must be asked about the limits of its authority, and how international law should respond to this challenge in order to guarantee that there are legal limits placed upon the power of the Security. (Joyner, 2012, p. 246f.)

In the same context, Joyner (2012, p. 247f.) argued that, through Resolution 1929 (2010), the UNSC acted ultra vires and in a judicial-like manner because it considered and mused different legal arguments concerning the IAEA practices on the disclosure of nuclear facilities in order to define parameters for the Iran nuclear program; the same rationale was applied to analyze Resolution 1874 (2009) on the Democratic People’s Republic of Korea (DPRN). But here Joyner is not correct because political decisions also balanced different rationales from several fields in order to make and implement them, law being a present subject in the current

political way of proceeding; musing on legal grounds is, therefore, highly expected. According to my rationale, all the resolutions may be seen as legal norms imposed by the political authority, even if considering that their legality may be put into question vis-à-vis many other legal sources and instances. All the cases, including Resolution 1373 on terrorism, were presented by Joyner to prove that the Council would deem itself above the law, a “legal hegemon” (Joyner, 2012, passim). For this reason, the international legal system should develop mechanisms to limit the UNSC to prevent it from becoming a real legal hegemon (Joyner, 2012, passim; p. 257), a reasonable opinion.

Resolution 1422 (2002) ensured the absence of criminal trials by the International Criminal Court (ICC) for a 12-month period for persons from a contributing state not a party to the Rome Statute involved with actions of a United Nations-established or -authorized operation. This resolution, which was adopted under the influence of the United States, a nonsignatory of the Rome Statute that did not want to see its nationals prosecuted by the ICC, invoking then Article 16 of the Rome Statute, was renewed for 12 more months by Resolution 1487 of 2003. The cited article, which ascertained that any investigation or prosecution may not be commenced or proceeded by virtue of a UNSC resolution, represents, in fact, one more example of the complex relationship between different international bodies. The situations embraced by the article should involve cases where peace negotiations should not be blocked by processes at the ICC, but the Security Council’s interpretation of it manifests the possible high selectivity of legal international law with regard to powerful actors, which can be excused of persecution in international courts (as well as in those not part of the UN, like the ICC) simply by their own will, which does not occur for persons coming from poor, politically weak states.

The legality of this resolution is, however, doubtful, as it was not invoked by, as determined by Article 39 of the Charter, a situation that might constitute a threat to peace, a breach of peace, or an act of aggression. It merely emphasized the importance of UN peacekeeping operations to the maintenance or reestablishment of peace and security, stating that “it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the United Nations Security Council” (Security Council Resolution 1422, 2002). It is true that the constitution of the situations comprised in Article 39

are based on political considerations, as argued by Stahn (2003, p. 98) in order to refute arguments asserting the occurrence of an ultra vires decision. The thing to consider is that the situations of Article 39 were not even mentioned as the decision's grounds. Furthermore, the resolution was not based on concrete facts or on imminent situations but merely on possible, uncertain events. Ambos (2002) suggested that the Security Council oddly observed the ICC itself as a threat to peace.

This resolution was severely criticized by many states and NGOs, for example, Amnesty International, Parliamentarians for Global Action Human Rights Watch (HRW), and the Lawyers Committee for Human Rights (now Human Rights First). A compilation of the states' and the NGOs' statements and an analysis of them can be found in a book edited by the NGO Coalition for the International Criminal Court (2004). New Zealand, South Africa, Brazil, and Canada (2002) wrote an open letter on the eve of Resolution 1422's adoption, expressing concerns about its selectivity grounded on states and the possibility of providing immunity for perpetrators, urging the UNSC members not to pass the resolution.

What is interesting here is that the criticisms directed at the resolution are, in general, accurate, but the resolution remains a legal norm per se in its basic sense. It consists of an international norm's interpretation that affected future acts of a given international court, affecting several states involved in conflicts where UN operations were occurring. This by no means suggests that the resolution is in conformity with basic, global legal parameters. On the contrary, the interpretation made by the Security Council evidently went against the Rome Statute because it blocked the possibility for judgments against perpetrators without any other motive but the immunity for agents pertaining to rich, powerful states. It represents a clear example of the problems involved with the huge powers in the P5 states' hands. State laws approved by grim political grounds are, by means of comparison, still considered legal acts.

1.3 Limitations Within the Charter

1.3.1 The "Monster" and the UN Charter's Purposes and Principles

The Security Council is a normative source of world society norms and, at the same time, an organ created by the UN Charter as the centerpiece of the UN formation with regard to security issues. The presence of norms regulating its way of

exercising power can be viewed in Article 24 (2) of the Charter, which prescribes that in discharging its duties the “Security Council shall act in accordance with the Purposes and Principles of the United Nations”, purposes and principles that can be found in Articles 1 and 2, respectively.

Koskenniemi (1995) presented a skeptical view concerning the Charter’s principles and purposes and their linkage with political authority restriction, arguing that they are many, ambiguous, indeterminate (as is the notion of a threat to peace), and in disagreement. He held, furthermore, that the linkage involving domestic jurisdiction pursuant to Article 2(7) and the human rights grounds mentioned in Articles 1(2), 1(3), and 55–56 are very dependent on the existing political logic, with the textual restrictions being virtually inexistent, and, given that the competence of each organ may be stated by its respectively own decisions, the procedural restrictions would not be very important either (Martii Koskenniemi, 1995, p. 327).

Although it is true that the United Nations cannot be conceived as being the “Temple of Justice,” as Koskenniemi (1995) put it, he did not take seriously the actual legal institutions and the legal dogma surrounding the political authority when criticizing the absence of studies regarding the external relationship between justice and authority. Koskenniemi forgot that legal principles have some degree of indetermination, with the legal practice and the legal theory to embody them being important. This internal perspective may not be sufficient in cases when political authorities arbitrarily impose their will, but dogmatic, theoretical, and judicial constructions may give force to law in order to block political determinations.

Starck (2000, p. 139ff.), a thinker who frequently searched for some kind of “authentic” interpretation of the Charter through the first members’ statements during the Charter’s elaboration interpretation, argued that the states’ will that led to the promulgation of the UN Charter was a leitmotif to hold that the UNSC is limited because the regular space where the UNSC can possibly move was given as a mandate by the states when the Charter was under elaboration. The expression *shall act*, as viewed in the already-described Article 24 (2), would show a legally binding effect and a limitation of authority, which can be confirmed by examining pre-Charter discussions about the then-future Security Council power.

Checking statements, however, is neither a reliable way to explain the changeable interpretation of a legal text throughout the years nor to reveal authentic understandings, given the basic difference between text and norm (see, for example,

Friedrich Müller, 1984, p. 147ff.). Koskenniemi (1995, p. 335), investigating the roots of the UN Charter, held that it was not formerly a document conceived to be attentive to the formation of a legal and just arrangement but, rather, to make any kind of settlement that would be better than war, citing Hinsley here. The Finnish author argued that in the political documents that led to the Charter's approval (the 1941 Atlantic Charter, the 1942 Declaration of the United Nations, and the 1943 Moscow Declaration) there were no clear goals related to social, economic, or humanitarian dimensions. Subsequently, the UN would have been grounded, for Koskenniemi, in a dualistic manner: A *hard* and a *soft* UN would exist, the soft agencies being those related to humanitarian, social, and economic responsibilities, such as the General Assembly through ECOSOC, and the hard UN, meaning the part related to security issues (represented primarily by the UNSC), with this dual logic being "functionally and ideologically the most significant structuring feature of the organization" (Martii Koskenniemi, 1995, p. 336). After UN building, its practices would have been responsible for changing the focus from hard agencies to soft agencies, dislodging the Charter's textual imbalance (Martii Koskenniemi, 1995, p. 337).

There are indeed problems touching on the Charter's purposes and principles related to the sharing of attributions among UN agencies. How, in effect, could a superorgan be submitted to observe the rules of the UN if it is stronger (emphasis on this word) than any of the other agencies? Morgenthau (1948) considered the allocation of functions in the UN arrangement and the abyss between UNSC powers and the powers of the General Assembly when viewing crucial political problems of global society a "constitutional monstrosity" (p. 380). This is because the central organs of an organization can produce incompatible, contradictory statements about the same issue without any kind of balance between the positions, with the possibility of General Assembly resolutions assuming an insignificant role (Morgenthau, 1948, p. 380). The UNSC is viewed as the de facto global government. Despite being a critic of this arrangement and its practices, Koskenniemi (1995) presented the original Charter's *division of competences* in softer terms:

> The Security Council should establish/maintain order: for this purpose, its composition and procedures are justifiable. The Assembly should deal with the acceptability of that order: its composition and powers are understandable from this perspective. Both bodies provide a check on each other. The Council's functional effectiveness is a guarantee against the Assembly's

> inability to agree creating chaos; the Assembly's competence to discuss the benefits of any policy—including the policy of the Council—provides, in principle, a public check on the Great Powers' capacity to turn the organization into an instrument of imperialism. (Martii Koskenniemi, 1995, p. 339)

Maybe, as is the common view, this constitutional monstrosity has created one big monster, one single titan, the Security Council, which would have no reason to address consideration or deference to other bodies and/or social sectors. Succeeding events at the UN arena showed that Morgenthau's (1948) concerns were partially right with regard to the asymmetry between the UNSC and the General Assembly. On the one hand, the prevalence of UNSC resolutions and P5 positions with reference to other UN bodies is beyond doubt, the enforcement capacity of the UNSC has showed itself to be attainable, and vetoes have marked UN history, before and after the Cold War. On the other hand, there have been situations in which the General Assembly has played a central role with regard to global security matters. An example thereof is the already-cited Uniting for Peace Resolution (UNGA Resolution 377 A (V) of 3 November 1950), adopted by a vast majority (52 to 5, with two abstentions). Besides dealings related with the GA, there have also been situations when other UN organisms have positioned themselves against Security Council measures or pretensions, for instance, the ICJ and the UN Human Rights Committee, respectively, in Lockerbie and in Al Qaeda Sanction Committee events.

Theoretically, though being correct with respect to constitutional, attributive problems involving Security Council and General Assembly relationships, Morgenthau (1948) missed the point that the United Nations is an organization divided into functional bodies, as is somehow exposed by Koskenniemi (1995). Furthermore, the hyperunderlining of political competences and military power can produce very limited observations because the perspective of them is fixed on violence, thus reducing politics and law to mere brute force.

Morgenthau (1948) affirmed that the UN Charter does not present a single perspective concerning the relationship between its purposes and principles and the remaining articles due to its creation during Cold War times. The *principle of sovereign equality of all its Members* and the absence of intervention *in matters which are essentially within the domestic jurisdiction of any state* indeed contrast with a formation based upon the asymmetry between P5 members and other states

that can also be seen in the explicit exception contained in Article 2 (7), named by Morgenthau (1948) the *sovereignty inequality*. Morgenthau also stressed that, among what he called the five fundamental political purposes of the UN expressed in the Charter's Preamble and in its first chapter, only the "maintenance of international peace and security" and "collective security" are described in detail in other sections of the Charter, while the rest of them, namely the use of force for the "common interest" and its proscription "against the territorial integrity or political independence of any state," the conservation of "justice and respect for the obligations arising from treaties and other sources of international law," and the self-determination of states, are practically ignored in other Charter sections (Morgenthau, 1948, p. 382f.). Morgenthau is not fully correct here because even the Charter's notions related to international security (such as the maintenance of peace) are vague in the sections where they are cited. What is more, these are not the UN Charter's fundamental political purposes, as among them should be counted the respect and promotion of human rights in a global sphere.

Along with these problems, the Charter is silent with regard to what can be considered a principle of justice in connection with UNSC duties (i.e., the laconic mention of principles makes possible a wide range of interpretations, according to Morgenthau (1948). For this reason, for Morgenthau (1948), the meaning of these notions would be given case by case: "It is the concrete political situation which gives these abstract terms a concrete meaning and enables them to guide the judgment and actions of men" (Morgenthau, 1948, p. 382f.), a conception similar to Koskenniemi's (1995) above-mentioned approach.

This realistic, decisionistic approach also evokes Schmitt's (1991) legal conceptions, a parallel often noticed in Morgenthau's works. It seems that Laclau's *empty signifier* (see Laclau, 2007, p. 34ff.) might illustrate this kind of description because, for Morgenthau (1948), political authority has the capacity to decide case by case the significance of a so-called empty concept, configuring a paradoxical tension involving universalism and particularism. If one considers the Security Council as boundless, it would not, however, be Laclau's (2007) theory exactly due to the fact that the struggle to achieve the hegemonic meaning of a concept, the embodiment of its emptiness, would already be settled by a hierarchically higher organ that has inner discussions about the use of these notions, following Morgenthau's (1948) reckoning. There are, however, struggles within the United

Nations and communicational fluxes coming from several sectorial communications that affect this organism, aiming at the definition of legal and political notions. This, again, represents one of this work's key subjects that will be better presented later.

In any case, due to the related huge powers put into the hands of the UNSC by the UN Charter, many view the UNSC's political powers as legally unconstrained, including Morgenthau (1948), Koskenniemi (1995), and Oosthuizen (1999). To show why, from a legal perspective, this view is insufficiently complex, the Charter's principles and purposes related to the UNSC will now be expounded in detail. If the Security Council might indeed be observed as a monster, it must be stated that every creature, from Zeus to Lucifer, from Faust's homunculus to Frankenstein's yellow demon, has always established some kind of relationship with its creator, sometimes of an admirable form, sometimes in matricidal or patricidal manners.

With respect to its purposes, the express limitations flow from practically the entirety of Article 1, while the Charter's principles regarding this organ are contained in Article 2 (1), which prescribes the sovereign equality principle; Article 2 (2), which is related to the good faith of states when fulfilling the Charter's obligations; and Article 2 (7), which concerns the protection of inner-state issues. Next, the main restrictions regarding UNSC actions will be investigated.

Two of the principles directly related to the UNSC deserve no further in-depth considerations here because the sovereign equality principle was excluded from the formation of the P5 states and the protection of states' inner matters is expressly restricted by the measures of Chapter VII in Article 2 (7). Although all the UNSC's binding resolutions must bear the affirmative vote of nine (of the 15) members, including the votes of the permanent members (Article 27, Paragraph [3]), the support of other nonpermanent members on the resolutions has historically been an easy achievement. In fact, among all approved resolutions, only in three cases were there exactly nine supporters, whereas the number and supported rate of failed proposals are very difficult to measure, though they exist in any manner in very low numbers. The support of nonpermanent members is also a result of the strategy implemented by rich countries consisting of conditioning the financial aid of other

worldwide organizations such as the IMF, rich states, and the World Bank on political support of the resolutions, thus buying it (Dreher & Vreeland, 2007, p. 6ff.).[21]

When acting under Chapter VI, the Security Council must observe the Charter's purposes contained in Article 1 (1), related to the observance of "principles of justice and international law," due to the fact that the text is very clear with regard to this issue:

> Article 1. The Purposes of the United Nations are:
>
> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

However, for some scholars, Article 1 (1) does not limit UNSC performance under Chapter VII, as though the UNSC should adhere to principles of justice and international law when dealing with threats or breaches of peace. The idea of an organ that has no boundaries related to international law when maintaining or restoring international peace and security—assumptions related to Morgenthau's (1948) previously cited theses, taken widely, and, specifically, to Kelsen (1950, p. 293)—begins here. A reading of the article can indeed suggest that, when mentioning the principles of justice and international law, the Charter is referring only to cases that comprise international disputes that are still not a breach of peace. This article can thus be divided into two parts, one of them not related to cases concerning threats to international peace and security (Starck, 2000, p. 147).

Supporters of this view argue that the absence of a reference to principles of

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[21] For example, as a result of voting negatively on UNSC Resolution 678 (1990) against Iraq, Yemen lost $70 million in aid coming from the United States. This example of Yemen shows, as I see it, that a simple payoff explanation concerning UNSC voting cannot sufficiently account for the process due to the fact that states have reasons beyond money to behave, an opinion that is shared by Dreher and Vreeland (2007).

justice and international law in the first part of this article is related to the fact that the Charter's drafters would have removed calculatingly constraints on the UNSC when rejecting amendments regarding the mention of international law in relation to coercive measures, reasoning that terms like *justice* and *international law* were too vague. It seems to me that if consulting the original drafters' discussions does not lead to an accurate interpretation of the article, then the debates at the San Francisco Conference show concomitantly contrary indications to the understanding of the original drafters' will. Indeed, in the working of the Committee on the Structure and Procedure of the Security Council, the United States and the United Kingdom, aiming to reject Norway's amendment proposal related to UNSC enforcement measures, affirmed that a reference regarding justice and international law would be dispensable, as the UNSC was already bound by these rules (de Wet, 2004a, p. 186).[22]

De Wet's (2004a) solution to the contradiction was to say that, when its actions are related to coercive measures, the UNSC does not need to strictly adhere to international law, and thus, it is able to diverge from law to some degree in the name of peace and security. This does not mean that the Council would be completely unbounded regarding all international law fields since, when acting under Chapter VI, the organism is rigorously bound to such norms (de Wet, 2004a, p. 186). The Charter undoubtedly endowed the UNSC with great, broad powers when acting to maintain or restore international peace. In this regard, Article 1 (1) illustrates that the organ cannot be strictly restrained by all principles of justice and international law because political action does not necessarily need to be identical to principles of a wide number of legal texts and treaties. Recognizing room for political discretion does not mean, however, that the UNSC is completely legally unbounded, as I will show in this work. Furthermore, the UNSC traditionally uses norms and legal grounds as the basis for its decisions and resolutions. The parameters defined in Article 39 were historically linked to fundamental principles of international law and human rights problems, such as in the resolutions concerning Rhodesia, Haiti,

[22] See the 11th United Nations Conference on International Organization (1945, p. 378).

Somalia, and Rwanda.

Now, I will discuss human rights, because they constitute one of the fundamental legal components of the UN Charter. Their relationship with the UNSC is still under dispute. Later in this chapter, the notion of global human rights will also be dissected. From a textual, normative perspective, the fundamental nexus linking the Security Council and human rights is the UN Charter. Any UN organ has to observe the Charter's core principles, "promoting and encouraging respect for human rights and for fundamental freedoms" (Article 1 (3), and Article 55, c). These norms are hierarchically as important to the UN as the maintenance of peace in the international environment, since no kind of supernorm can be found in constitutional arrangements. For this reason, the UN's goals related to solving international problems of humanitarian character and to promoting respect for human rights and fundamental freedoms cannot be regarded as merely ideal statements, as though principles and purposes were legally less important than other rules, but as rules among others that serve to orientate actors' normative expectations.

Any performance of an UN's body that goes against UN's norms should be faced as potentially capable of being considered unlawful. The International Criminal Tribunal for Rwanda, for example, when facing the argument that the Security Council should not be responsible for the protection of human rights (because other human rights treaties had already created specific agencies for such a task), declared that the promotion of human rights is a main charge for all United Nations agencies, including the UNSC.

> The trial Chamber cannot accept the defence Counsel's argument that the existence of specialized institutions for the protection of Human Rights precludes the Security Council from taking action against violation of this body of law. Rather to the contrary, the protection of international Human Rights is the responsibility of all United Nations organs, the Security Council included, without any limitation, in conformity with the UN Charter. (*The Prosecutor v. Joseph Kanyabashi*, Decision on the Defence Motion on Jurisdiction, No. ICTR-96-15-T, June 18, 1997, para. 29).

Fassbender (2011) argued that it is counterintuitive to imagine that the UNSC, a principal organ of the UN, an organization that elected human rights as one of its crucial goals when creating its Charter in 1945, could freely disregard human rights (Fassbender, 2011, p. 79). It is, in fact, not only counterintuitive but also a clear

contradiction in terms of the realm of nondictatorial arrangements in view of the fact that a rule cannot be changed every time by the powerful actor's will. Since the question here revolves around problems, a parallel may be made concerning state formations, even considering that states have different expectations and follow different kinds of rules in comparison with persons and organizations within municipal areas. In dictatorial, Hobbesian times, the ruler can freely change every rule according to his or her will. In nondespotic arenas, within or beyond states, there are legal boundaries that constitute political authority and can block isolated, arbitrary decisions.

In the case Reparation for Injuries Suffered in the Service of the United Nations, the ICJ read UN bodies' powers in light of the purposes and functions contained in their respective constituent instruments, establishing the theory of the implicit or inherent powers. According to this construction, a given UN body would have all powers necessary to accomplish its fundamental objectives, even when no express text may be found in the UN Charter, as the given organ could not consult all UN members in every situation. The ICJ regarded the nexus between objectives and implicit powers as a necessary implication. The Charter objectives, thus, shape the powers pertinent to UN bodies (Reparation of Injuries Suffered in Service of the UN, Advisory Opinion, ICJ 174, Apr. 11, 1949, paras. 180ff.).

The implicit powers theory is not exactly confronted here since the duties of the UNSC, besides the maintenance of peace and international security, also embrace the respect and observance of human rights, as described, for instance, in Article 24 (2) of the UN Charter. For all that was presented, it can be affirmed that the Charter's purposes and principles constitute one of the pieces of the jigsaw puzzle forming the legal face of the UNSC.

1.3.2 Article 39 and Its Boundaries

Investigations concerning the limitation of UNSC performance with regard to the Charter's principles and purposes provoke questions concerning the restraints to Chapter VII of the UN Charter. The recognition of the role of international law in international affairs can be found in many theoretical developments, for instance, in authors of the New Haven School such as Reisman (1992), who also considered the participation of nonstate actors in lawmaking processes, though observing the normative face of the UN Charter in a particular way.

Again, trailing and occasionally expanding a system exhibited by de Wet (2004a, p. 135ff.), in this work I expose four main rationales of the opponents of a legally restricted UNSC in relation to Chapter VII of the UN Charter. The first argument points out that the Article 39 expressions *threat to the peace*, *breach of the peace*, and *act of aggression* have no clear definition anywhere in the UN Charter, which was also mentioned by Koskenniemi (1995), as cited above. In this regard, Gowlland-Debbas (1994, p. 61) argued that the states did not accept precise definitions for these terms due to the fact that they did not attempt to bind UNSC actions when making the UN Charter during the San Francisco Conference.

The second argument sustains that factual findings, not legal reasons, are the main factors on which to base UNSC interpretation when defining the expressions contained in Article 39. For them, these terms are not typical legal concepts, and thus, the UNSC does not have to follow legal rationality. Though not identical, this position is connected with Kelsen's (1950) view, which affirmed, regarding peace:

> The Charter does not provide that the decisions—except those of the International Court of Justice—in order to be enforceable must be in conformity with the law which exists at the time they are adopted. The purpose of the enforcement action under Article 39 is not to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law. (Kelsen, 1950, p. 294)

Having such reasons in regard, the UNSC's decisions should obey a political judgment, not a legal one, for being related predominantly to a political side (Kelsen, 1950, p. 735).

The third view to maintain the angle that the UNSC is politically unbounded is based on the veto capability of the five permanent members. The veto capacity, in fact, resembles the medieval structuration of a system of privileges. The privilege set by the Charter is evidence of an exclusive political characteristic of Article 39. The existence of only five "judges" responsible for the definition of the cited terms would, therefore, unmistakably show the inexistence of a legal structure. Reisman (1993) argued that the UN Charter has no system of checks and balances, as the veto is the only true control. Anchoring themselves in the undeniable political privilege to some states embodied by the figure of the veto power of the five permanent members, supporters of these arguments have not usually taken into account the fact that the affirmative vote of nine UNSC members is necessary to approve a

substantive resolution; hence, without the nonpermanent members' support, a resolution cannot be approved.[23] This inattention does not, however, invalidate their argument regarding the political power of the P5 states in both its structural and historical dimensions.

The fourth argument supporting a view comprising the existence of an unrestricted organ with regard to the discretion of Article 39 is connected with the selectivity of the UNSC when making decisions. Consistent with this position, the Security Council bears the capacity to freely choose situations that constitute cases of intervention, basing itself merely in its political goals; that is to say, the Council is not constrained to decide similar cases similarly.

Against such opinions, de Wet (2004a) affirmed that the UNSC's discretion in undertaking political measures when it considers them convenient does not imply unlimited powers to act. Furthermore, despite being a threshold, the veto capacity also does not mean an unlimited range of possibilities to act. Second, vagueness and imprecision are general characteristics of law, as the concretization of unclear expressions is a problem related to any legal interpretation. Here lies one of de Wet's (2004a) significant points:

> There is nothing inherently special about the terms used in Article 39 that would ab initio remove them from the ambit of legal interpretation. On the contrary, the mere fact that Article 39 distinguishes between three criteria that trigger binding resolutions of the Security Council, implies that it does not have an unbound discretion. (de Wet, 2004a, p. 136)

The Charter does not endorse the general power of the UNSC to act in all events regarding the international security field, only in specific cases, in this sense. The Security Council's competencies are therefore bounded to three situations

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[23] Article 27 (3) UN Charter states:

> Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members, including the concurring votes of the permanent members, provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

disposed in the Charter, not embracing security problems not related to a threat to peace, a breach of peace, or an act of aggression. The Article 39 criteria shown do not constitute evidence of an unlimited arrangement but, rather, a part of the UN checks and balances puzzle (de Wet, 2004a), which does not involve precisely distinct, separate powers but organs.

Lastly, following de Wet's (2004a) arguments, the UNSC does not have the authorization to act only under Chapter VII. If this organ could unreservedly make any kind of action regarding the international peace under this chapter (i.e., if the requirements of Article 39 were not a kind of legal criteria but only politically unlimited standards), the Chapter VI measures concerning the authorization of the UNSC "to recommend appropriate procedures or methods of adjustment" (Article 36 [1]), producing nonbinding resolutions at the sphere of pacific settlement of disputes, would have no reason to be in the Charter.

Article 39 bears reference to the *maintenance of international peace and security* its primary responsibility in the strength of Article 24 (1); hence, it cannot deal with security problems not related to the international sphere nor prescribe the existence of a threat to peace, a breach of peace, or an act of aggression beyond its competence range, notwithstanding the initially different view of the U.S. government at the time of Charter's approval. The Security Council's praxis since its first resolutions has confirmed that the questions must be related to *international* problems, thus interpreting Article 39 in combination with Article 24 (1), as can be viewed, for instance, in Resolution 83 (1950) concerning the Korean crisis (Lailach, 1998, p. 44f.).

1.4 Limitations Beyond the UN Charter

As presented in the last section, is not that difficult to assert that UN bodies such as the UNSC must bow to the UN Charter to some degree, at least from a formal, normative perspective. However, UN organs' obligation to follow human rights standards comprised in other treaties aside from the UN Charter is far from reaching a consensus among scholars and politicians, notwithstanding Article 1 (3) of the UN Charter.

A skeptical look could indeed assert that there are good reasons to disconnect the linkage between human rights and the United Nations. Firstly, it can be pointed out that, at the time when the UN was founded, human rights were

viewed in a nonnational sphere merely as “moral postulates and political principles” (Fassbender, 2011, p. 79), thus not as binding legal obligations. Second, other pacts are not explicitly considered as legally affecting the UN. In point of fact, albeit with the backing of the UN, the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights, for example, were made to bind states, not international organizations, as stipulated by ICCPR Article 48. In this sense, state citizenship was a fundamental requisite to an individually invoked protection against any kind of human rights violation.

Fassbender’s (2011) response to these obstacles was to note that in the European Community legal regimes are seen as sources of obligations of the EC “system treaty obligations of member states as well as constitutional traditions common to Member States” (Article 6 (3) of the Treaty on European Union of 1992, as modified by the 2007 Treaty of Lisbon). According to Fassbender, this kind of logic might also be applied to the UN sphere, as “constitutional traditions and values common to the member states of the United Nations, which include commitments to fundamental rights and freedoms” could be seen as sources of the UN law (Fassbender, 2011, p. 80). This position is fragile, however, for two main reasons. First, no kind of homogeneous legal corpus can be seen within the framework of the UN member states (i.e., no constitutional traditions or values common to the member states can be perceived because this international body is composed mainly of dictatorships that repeatedly disregard fundamental human rights). All P5 members have also played historical roles concerning the disrespect of human rights beyond their boundaries, for instance, during colonization in Africa and Asia with regard to the United Kingdom and France. In this sense, it is hard to find any kind of consensus between these countries touching on constitutional traditions. Second, in contrast with the European Union, pursuant to the cited Article 6 (3) of the Treaty on European Union (year),[24] in the United Nations’ arena there is no express mention of

[24] “Article 6 (3). Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the

common constitutional traditions as being general principles of the organization.

The appropriate answer with reference to the question about the liaising between United Nations organs and other human rights treaties must be broader and juridical. Article 1 (3) of the UN Charter prescribes a connection between human rights and the performances of UN bodies, which means that this organization was shaped to follow any kind of human rights, whether expressly ratified by the UN or not. This can also be found in the UN practices, as all of its agencies have among their main tasks and purposes the protection and promotion of human rights. Furthermore, no legal text is a prisoner of its time; on the contrary, it adapts itself to inner and environmental changes, which means that new provisions concerning human rights stipulated by UN members shall also be embraced by Article 1 (3).

Observing human rights merely as moral postulates is nonsensical, as it denies the normative force of their dispositions and ignores their use in several treaties, contracts, and judicial decisions; that is, it rejects their legal nature, which was even recognized at the time of the Charter's building. In any event, the normative force of a given legal source has to also be demonstrated by legal practices and its capacity for bounding its addressees.

The prohibition of apartheid illustrates this matter since at the time of the UN's creation there was no legal ground banning regimes such as that seen in South Africa. If the skeptical views were right, the United Nations and its Security Council would have had no reasons to construct political mechanisms aiming to enforce the end of such a type of government. However, the practices of the UN, more than simply its own legal texts, have proven that this organization and its central bodies followed post-1949 treaties concerning human rights issues, as this case shows. Among many other undertakings, the UN stimulated, for example, the signature of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. The Security Council, by its turn, made several resolutions against apartheid systems, sanctioning South Africa, as Resolution 418 (1977) illustrates.

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constitutional traditions common to the Member States, shall constitute general principles of the Union's law".

By way of conclusion, it can be affirmed that both the UN Charter and UN practices demonstrate the possibility of human rights grounds being considered inserted into the UN legal terrain. In this sense, normative expectations not related to the Charter's text are being applied in the everyday life of this organization. Likewise, other post-1949 legal sources are also linked to UN constellation, as will be subsequently shown.

1.4.1 Jus Cogens

The formation of modern jus cogens and obligations erga omnes in the 20th century constitutes central reasons to normatively and politically link United Nations bodies and human rights. Jus cogens constitutes, therefore, one of the legal pieces that limit UNSC's political rationality, along with the other legal notions described in this chapter. In this subsection I will first expound the debate on the former and, subsequently, the discussions concerning the latter.

After its use in ancient Roman law, jus cogens was a concept linked ancestrally to natural law doctrines of international law; it was therefore presented in opposition to jus dispositivum, which is understood as the express norms of an international treaty.[25] Grotius, E. de Vattel, and C. Wolff reflected on the Roman law differentiation involving jus dispositivum and jus scriptum, the former being viewed as the mutual legal agreements among states and the latter necessary compelling principles of international law, which did not have consent within its legal prerequisites. Linked with natural law, this kind of obligation could not be derogated (for this, check Criddle & Fox-Decent, 2009, p. 334).

The addressing of an international public order situated above international treaties is, in this milieu, far from being a recent approach: It can be pointed out, for instance, that already in the 19th century J. G. Bluntschli and von Martens, in the context of the prohibition of the slave trade and the promulgation of the Geneva Convention of 1864, defended such lines (Kadelbach, 2006, p. 21).

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[25] For a reflection concerning jus cogens, focusing on the debate that opposes natural law doctrines and positive law doctrines, see (Barbosa, 2009).

This jus cogens paradigm changed in the 20th century. Verdross (1937) proposed a classical jus cogens notion in 1937, sustaining then the necessity of a norm to regulate treaties between states (i.e., a norm able to equalize a possible conflict between a treaty and the general international law). As stated by Verdross, the validity of a treaty would have to be in accordance with the "ethics of a certain community" (p. 572), which would be a cogent norm. With such a strategy, Verdross connected law and morals to guarantee the "rational and moral coexistence" (p. 572) of all parts of a treaty, and jus cogens was the main foundation of this approach, as it was a norm able to adjudicate the validity of a particular treaty. [26] According to this approach, a conflict between a treaty and jus cogens would result in the voidness of the former (Barbosa, 2009, p. 50ff.).

Before the 1969 Vienna Convention, positivist perspectives assumed that jus cogens could be understood as crucial norms of the international law, such as the international custom and pacta sunt servanda rule, and such norms were generally placed at the top of a hierarchical scheme. Natural law approaches also assumed that moral norms such as these originated from human dignity as part of jus cogens (Kadelbach, 2006, p. 29). Authors such as Kelsen (2003) recognized general customary norms in the international realm as being part of jus cogens (i.e., as compelling legal grounds). The expression's original Latin meaning may help to elucidate this, as *cogens* comes from *cogent*, of the verb *cogere*, from *co-* (together) + *agere* (drive), according to the Oxford Dictionary of English (2010). Kelsen (2003,

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[26] Reminding statal, civil law approaches from the 19th Century, Verdross (1937) presented his assumption based on the differentiation morality/immorality of treaties as such:

> But apart from these and other positive norms of general international law, there is a second group which constitutes jus cogens. This second group consists of the general principle prohibiting states from concluding treaties *contra bonos mores*. This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community. (Verdross, 1937, p. 572)

p. 322) argued that a treaty might not be against jus cogens norms, here viewed in opposition to jus dispositivum (treaty law), but, at the same time, saw lots of imprecisions in the legal theory concerning the freedom of a state to make treaties.[27] For Kelsen, those who see limitations in the legal stateroom to conclude a treaty vis-à-vis jus cogens cannot specify the exact name of jus cogens. However, he suggested that some norms could be declared null and void by any court with the powers to analyze a treaty (Kelsen, 2003, p. 483; see also Tunkin, 1974, p.148).

Jus cogens is still nowadays a theoretical, disputable matter in theories on international and nonstate legal sources. The fundamental problem is that current jus cogens views have established normative hierarchies in a sphere where states are perceived as bearing the ultimate legal force.

The ghastliness committed by both the Allies and the Axis powers in the Second World War, the Nuremberg and Tokyo Tribunals, the fall of the League of Nations, and the foundation of the United Nations, which comprise both legal and nonlegal events, brought the jus cogens notion to center stage in the theoretical, legal, and political discussions. In this milieu, the validity of municipal legislations vis-à-vis international human rights and other obligations and the compatibility of international treaties with jus cogens and international customs needed a broader legal basis to be sustained.

Jus cogens was firstly cited in a UN document in the International Law Commission Report of 1953, in the Law of Treaties section of the report. This text is central to the understanding of such a notion, as many subsequent formulations have had their roots in it. Article 3 of that text stated:

THE LAW GOVERNING TREATIES. In the absence of any contrary

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[27] Kelsen (2003) stated:

> The power of the state to conclude treaties under general international law is in principle unlimited. States are competent to make treaties on whatever matter they please. But the content of the treaty must not conflict with a norm of general international law which has the character of *jus cogens*, and not that of *jus dispositivum*. (Kelsen, 2003, p. 322 f.)

> provisions laid down by the parties and not inconsistent with overriding principles of international law, the conditions of the validity of treaties, their execution, interpretation and termination are governed by international custom and, in appropriate cases, by general principles of law recognized by civilized nations.

In expressing the permanence of voluntarism in the realm of modern international law, Lauterpacht (1953), a Special Rapporteur, argued that it was crucial that the states' free will should be a central point to guide the provisions about the law of treaties but also argued in his commentary on Article 3:

> The Code is intended to a large extent to regulate matters which are not expressly provided for by treaty. But, as was perceived in the discussions of the Commission in connexion [sic] with the Code of Arbitral Procedure, there are certain rules and principles which are above and outside the scope of the jus dispositivum of the parties. An express statement to that effect is particularly necessary with regard to treaties for the reason that they themselves constitute a source of international law. (Lauterpacht, 1953, p. 106)

To observe jus cogens was then perceived as a validity criterion of international treaties. The Special Rapporteur argued that a treaty would not be binding if imposed by an "unlawful exercise of force" (Lauterpacht, 1953, p. 106).

The Vienna Convention on the law of treaties of May 23, 1969, was motivated by the 1953 report in crucial points and presented regulations about jus cogens in Articles 53, 64, and 66 (a). Article 53 is clear about what can be understood as a *peremptory norm of general international law*, Article 64 projects the possible emergence of a new jus cogens norm, and Article 66 (a) gives the ICJ the capacity to resolve disputes over such norms.

> Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")
>
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm 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.

Article 64. EMERGENCE OF A NEW PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Jus cogens was then recognized at least as an existent kind of norm able to assert the validity of an international treaty. According to the Articles 53 and 54, even with consensus among states an international mandatory norm could not be modified, and no exceptions or treaty reservations that go against jus cogens should be recognized as valid. Since they are mentioned in Articles 53 and 64 of the 1986 Vienna Convention on the Law of Treaties, international organizations are also affected by jus cogens.

Some argue that jus cogens does not go freely against the states' will, as if it were a pure, nonconsensualist norm (as was classically stated by the Permanent Court of International Justice in 1927 on international law and voluntarism[28]), due to the fact that it is a "norm accepted and recognized by the international community of States" (Article 53); i.e., a norm produced by states and, as any norm, capable of being put against a contracted part because it has enforcement capacity detached of momentary consent). The birth of a legal custom cannot be identified in a very precise historical point, and it binds future legal actors. However, it is difficult at an international arena to conciliate a wide agreement of states and a state disagreement in a specific case, and that is why the ICJ had a role in solving eventual disputes (Article 66 [a] of the 1969 Vienna Convention).

The usual, and in some cases centurial, state behavior of asserting that a norm belongs to the jus cogens category, the absence of which would make it impossible for future agreements (in the form that we are used to seeing) to be made, must be observed. In this sense, the legal past (i.e., the state acting over the years) has a binding property; in systems terms, the past operates as a horizon of

[28] See Lotus Case, Judgment, 1927 PCIJ Series A, No. 10, at 18.

possibilities for the systems' communications with sense production.[29] With Tomuschat's (1993, 2006) position, it can be affirmed that asserting the occurrence of a breach of a fundamental norm of international law in a specific situation—which can be seen, for example, in a hypothetical foundation of a genocide regime—does not lead the responsible state to a normative no-man's-land because it remains a state fully in possession of other fundamental international rights that can eventually be claimed.

The international legal realm is surrounded by rules constructed over centuries that cannot be disregarded simply by the absence of transitory consent; any new state (for instance, East Timor in 2002 and South Sudan in 2011) must bind to some basic international norms, even if it has not expressly adhered to them, which means that it may also benefit from traditional international rules—for example, that it (a given state that conquests access to the sea) has rights and may have pretensions over territorial waters and the high seas, even without having signed any treaty on this matter (Hart, 1994, p. 226).

The need to follow fundamental patterns, which was based on international legal customs regarding the observance of some fundamental norms in treaties, in this sense comprises a counterfactual, normative expectation of the political organizations called states.[30]

With the approval of the 1969 Vienna Convention, the fact that jus cogens represents a source of international law became indisputable, a statement that cannot be denied even by the antique argument used to attest the lawful character of a custom by verifying mention of a sovereign or a court (Hart, 1994, p. 44ff.) because both treaties and courts refer to it. Along with this, new developments in many legal provinces, including legal theory, connected jus cogens to human rights.

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[29] For a discussion about the consensualist (ascending) and the nonconsensualist (descending) arguments on jus cogens and on international treaty interpretation in general, see (Martii Koskenniemi, 2005, p. 324ff.; 395).

[30] On the differentiation between normative and cognitive expectations, see (Luhmann, 1993, pp. 31, 129ff.).

A question remains, however: Exactly which norms can be considered jus cogens? Specifying the rights incorporated by jus cogens is controversial. G. Tunkin (1974), for example, claimed that the *proletarian internationalism* of Brezhnev and other socialist norms were part of jus cogens, thus bearing the capacity to orientate other fundamental norms, at least in the socialist world. Indeed, for critics, to state that a certain norm is in the category of jus cogens would usually be a process made without solid criteria; that is, becoming a jus cogens norm would be an achievement that ignores the rationale to explain why certain norms are so fundamental as to be capable of receiving the jus cogens seal and why others are not.[31]

Nevertheless, this skeptical view misses both the theoretical and jurisprudential evolution of this notion. Jus cogens is presently far more than an ideal concept, as it is invoked routinely by states, courts, and academics in the realm of international legal practice and doctrine. Based on thinkers and courts,[32] the following jus cogens core may be presented as being: (a) related to classic international security matters, the banning of aggression, the right to self-defense, and the imperative of nonintervention in domestic issues of other states; (b) related to human rights, the prohibition of the slave trade and slavery,[33] the prohibition of apartheid regimes, and crimes of genocide[34] and torture[35]; and (c) related to the

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[31] For a critical, skeptical approach, see (D'Amato, 1990).

[32] For a review about the debate concerning the norms embraced by jus cogens, see the International Law Commission Report (2006, at para. 374).

[33] For research exploring the jus cogens norms concerning the prohibition of slavery and racism in the international labor law realm, stating the existence of a labor jus cogens, see (Montejo, 2008).

[34] Genocide Convention case (Preliminary Objections), ICJ Reports 1996, p. 616, para. 31.

[35] In the Barcelona Traction case (1970), the ICJ stated that jus cogens norms include the prohibition of aggression, genocide, and protection of the fundamental rights of the human person, for example, the banning of slavery. The Tribunal for the Former Yugoslavia stated that the prohibition of torture constitutes obligations erga omnes and a peremptory norm in the Furundžija case (*Prosecutor v. Anto Furundžija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, 121 ILR (2002) at 260–262, paras. 151–157). Also, about

fundamental humanitarian rights, such as the prohibition of torture in wartime and the killing of war prisoners.[36] As already stated, cardinal humanitarian rights have been considered part of jus cogens in courts' decisions (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of July 8, 1996, ICJ Reports 1996, p. 226), scholars' positions (de Wet, 2004a); (Mausama, 2006, p. 30); (Starck, 2000, p. 156ff.), and the decennial UN practices regarding its conferences—including the 1968 Tehran Conference on Human Rights that led to the Additional Protocol I to the Geneva Convention in 1977 (Starck, 2000, p. 159)[37]—and its actions in armed conflicts.

Hereafter some uses of jus cogens in the International Court of Justice will be shown, the jurisprudence of which provides few explicit examples of an express jus cogens reference, but when it has been mentioned, the concept was at the core of the decision's rationale. On many occasions, the ICJ has cited it fundamentally but indirectly (i.e., it has used the concept or eventually quoted the expression without expounding the precise meaning of jus cogens). For examples of such use in ICJ's jurisprudence, diplomatic immunity was viewed as an "essential" and a "more fundamental principle" in the Tehran hostages' case (ICJ Reports 1979, p. 4, § 38; ICJ Reports 1980, p. 1, § 88). In contrast, separate votes and dissenting opinions have elaborated attempts to define jus cogens.[38]

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torture and jus cogens, exploring the cited case, see (de Wet, 2004b); comprehending torture as a crime against humanity, and exhibiting, in this milieu, obligations erga omnes and the international role of the international sphere in the protection of human rights, as well as in the criminal prosecution of human rights violations, see (Aragão, 2007, p. 203ff.) .

[36] See, for example, the separate opinion of Judge Simma in the Armed Activities on the Territory of the Congo (ICJ Summary of the Judgment of December 19, 2005, p. 8).

[37] Examples of General Assembly resolutions related to this issue, according to this author, are 2597 (24), 2674 (25), 2675 (25), 2852 (26), 3102 (28), 3267(29), 30/21, 31/19, and 32/18.

[38] For instance, Judge Moreno Quintana, in Guardianship of Infants, ICJ Reports 1958, pp. 54, 106; Judge Fernandes, in Passage Over Indian Territory, ICJ Reports 1960, pp. 5, 135; Judge Tanaka, in South West Africa Cases, ICJ Reports 1966, pp. 2, 298, and in North Sea

In the Nicaragua case, the Court cited that many state's representatives which consider the prohibition of the use of force enshrined in the UN Charter as a cardinal principle of international law, citing also the view of the International Law Commission, which considers it a jus cogens norm (ICJ, 1986, p. 14, § 190), and in the Nuclear Weapons advisory opinion, fundamental humanitarian rights were presented by the Court as "intransgressible principles of customary law" (ICJ, 1996 (I), p. 257, § 79).[39] Other mentions can be found in the Case Concerning Armed Activities on the Territory of the Congo (2005) and in the Oil Platforms case (2003). The Court held in the former that the choosing of the rules between the parties was applicable to a treaty to resolve an eventual dispute constituting peremptory norms; in the latter case it balanced some relevant rules of international law concerning the

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Continental Shelf Cases, ICJ Reports 1969, pp. 2, 182; Judge Ammoun, in Namibia, ICJ Reports 1971, pp. 15, 77ff.; Nagendra Singh, in Nicaragua Case, ICJ Reports 1986, pp. 14, 153; Judge Sette-Cama, in Nicaragua Case, ICJ Reports 1986, pp. 199–200; Judge Weeramantry, in Gabcíkovo-Nagymaros Case, ICJ Reports 1997, pp. 7, 114. These examples were given by Kadelbach (2006, p. 32) and checked by me. President Bedjaoui, in Legality of the Threat or Use of Nuclear Weapons, 1996, Separate Opinion, para. 21, p. 273, stated that the majority of principles and rules of humanitarian law compose jus cogens, and Jugde Weeramantry, also in Legality of the Threat or Use of Nuclear Weapons, 1996, Dissenting Opinion, p. 496, held that humanitarian laws are part of jus cogens, in a decision in which the legality of nuclear weapons in face of jus cogens was balanced. In another legal realm, see the vote of Cançado Trindade, Inter-American Court of Human Rights, Almonacid Arellano y otros vs. Chile, Decision of 26 September 2006, p. 5ff.

[39] In the Gulf of Maine case, the International Court of Justice elaborated a division among diverse customary law categories, understanding that *customary law* would be "A limited set of norms for ensuring the co-existence and vital co-operation of the members of the international community, together with a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas" (ICJ, 1984, p. 246, § 111). According to this statement, these norms would not be able, in contrast with jus dispositivum, to operate as definitive, practical criteria to decide concrete cases (ICJ, 1984, p. 246, § 111).

use of force, as the 1955 Treaty of Amity between Iran and the United States had excluded military actions from its application.[40]

If one took the text of Conventions cited by ICJ literally, jus cogens could be considered simply a norm capable of voiding international treaties. In contrast to Tomuschat (1993, 2006), I do not confine jus cogens to a specific aspect, namely the capacity to void treaty norms, of cardinal rules of international law, since for me Articles 53 and 64 of the Vienna Treaty are merely exemplificative concerning jus cogens' features.

In this sense, jus cogens can also be viewed in situations not concerning treaties; that is to say, it can be understood as a norm placed at a higher degree than all other international norms. For some, it is also above a UNSC resolution, as argued by Lauterpacht, then a member of the International Court of Justice, on his separate vote in the case "Application of the Convention on the Prevention and Punishment of the Crime of Genocide":

> The concept of jus cogens operates as a concept superior to both customary international law and treaty. The relief which Article 103 of the Charter may give the Security Council in case of conflict between one of its decisions and an operative treaty obligation cannot—as a matter of simple hierarchy of norms—extend to a conflict between a Security Council resolution and jus cogens. Indeed, one only has to state the opposite proposition thus—that a Security Council resolution may even require participation in genocide—for its

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[40] *Democratic Republic of the Congo v. Uganda*, 2005; in the Oil Platforms case, it was stated:

> The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty. (*Iran v. United States*, 2003, para. 41)

unacceptability to be apparent. (Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures II. ICJ Reports (1993), p. 4 ff.).

With such an argument, jus cogens can be regarded as working under a normative higher degree in comparison with international legal customs and treaties, including the UN Charter itself. Certainly, the fact that jus cogens can be found in an international treaty does not implicate the impossibility of using it in other legal situations because it can be perceived as a set of fundamental norms of nonnational law. From this point of view, thus, jus cogens can be invoked in concrete legal situations in order to limit UNSC discretion.

This simple hierarchical view is not, however, highly precise. Saying that a given norm is placed on another plane in comparison with other legal sources cannot entail an ontological hierarchization of the legal realm or a pyramidal conception of levels and law. In fact, interpreting and making sense of a norm is a task that can be made by any legal actor, always in a creative and concrete way; a court or an administrative organ does not automatically follow a superior rule or decision, a fact commonly viewed in arrangements such as in the European Court of Human Rights and in the interplay among municipal spheres regarding legal sources. In this sense, none of the interpreters coming from a specific regime can legitimately hold the bearing of a discursive ultima ratio.[41] This does not imply, however, that the formation of secondary rules or legal hierarchization is impossible, only that judging and interpreting tasks are not as linear as the 19th-century legal positive school or Kelsenian approaches presupposed; the global legal regimes are thus not organized in a pyramidal schema, nor do they have an aprioristic legal grading. As will be further explained, the relationship among norms and regimes in a global arena can be better explained following, with critics, the approaches of transconstitutionalism (Neves, 2013).

I embrace a dual notion of jus cogens. First, it can be observed as a legal

[41] About tangled hierarchies and a multilevel world legal system, see (Neves, 2013, pp. 90, 148ff.).

custom, albeit expressly present in a convention, that serves to weight the validity of international norms when related to treaty issues in some cases.[42] In this milieu, Kolb (2015, p. 39f.) understands jus cogens, similarly, as a legal technique, not as a substantive rule. In other circumstances, jus cogens might be seen as a typical obligation that voids a given legal text. In these cases, jus cogens is not a Hartian-like secondary rule but merely a compelling, primary norm. For example, if two states conclude a treaty to occupy part of the sea in a manner against a jus cogens norm, jus cogens would operate, voiding the treaty merely by being hierarchically superior (please note the above restrictions to the notion of hierarchy) to the given treaty norm, not by being a Hartian secondary norm. The simple hierarchical, premodern legal models are not adequate to explain both the current state and nonstate legal forms. Jus cogens is immersed in a legal sea that might be better explained through the observance of overlapping instances, forming heterarchical constellations. Here, hierarchy may be regarded both as punctual and functional.

Situations can occur when obligations arising from a treaty are in contradiction to jus cogens, yet the treaty itself is not void. For example, an obligation cannot subsist if some treaty rule prescribes deporting people to a state that will carry out genocide on them. In this sense, if a treaty that is at first glance lawful bears rules that are used to make possible or easier some action in contradiction to jus cogens, the obligations are not valid, but the treaty itself is not void. If the UN Charter is considered one treaty among others, and if any kind of obligation imposed by the United Nations is considered to be originally linked with its constitutional treaty, it can be concluded that a state must not necessarily execute a binding Security Council decision if the accomplishment of such a task is against jus cogens. Even if it is assumed that the UN can act autonomously with regard to states' wills because it is an organization created by a treaty with a different personality, the fact is that if the states cannot contradict a jus cogens norm, they also cannot have constituted an organism able to do so (de Wet, 2004a, p. 188 f.).

The establishing of jus cogens as an international positive rule years after the

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[42] This is similar to (Tunkin, 1974, p. 158 f.).

constitution of the UN is not a reason strong enough to block the application of its rules to this organization. The United Nations is not a static organism that must not follow the evolution of global normative expectations. The foundation of a global security system that systematically disrespects norms such as the prohibition of apartheid or genocide, typical jus cogens norms that are based on post-1945 treaties,[43] would indeed be bizarre considering the current legal uses. De Wet's (2004a) view is that the conferral of attributions to the UNSC must be, to elude such an absurdity, understood as an ongoing interaction (i.e., a dynamic process, not a once-only event that occurred in the UN formation). Hence, the UNSC powers have to follow the evolution of jus cogens norms, also due to the fact that states cannot confer powers to an organization to have more legal permissions than they can have (de Wet, 2004a, p. 189 f.). Furthermore, the structural powers and designations of the Security Council, such as listed in the Charter, are not strictly changed; only norms open to interpretation that can restrain their performances are affected.

Focusing again on apartheid cases, it can be affirmed that the General Assembly requested several times—for instance, in Resolution 1761 of November 6, 1962 (entitled The Policies of Apartheid of the Government of the Republic of South Africa), and in Resolution 38/39 of December 5, 1983 (entitled "Policies of Apartheid of the Government of South Africa")—that the Security Council take measures against the apartheid regime of South Africa, then considered a *threat to international peace and security*. The UNSC has edited several resolutions condemning racist governments, such as 216 (1965) and 556 (1984), as well as embargoed South Africa through Resolution 418 (1977). Along with the Responsibility to Protect Resolution (Resolution 1973, 2011), these are evidence of the consideration of new legal human rights norms grounded in UNSC resolutions.

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[43] The crimes of genocide and apartheid compose jus cogens. The UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) on December 9, 1948, by Resolution 260, with the treaty coming into force in 1951, whereas the International Convention on the Suppression and Punishment of the Crime of Apartheid is from 1973, coming into force in 1976.

When recognizing performances against international peace and security, qualifying some of them as threats to the global security order, or expressing the need to implement human rights in every respect (Resolution 1325, 2000, for example), the UNSC is explicitly incorporating certain rights and duties as norms of international security because eventual violation can trigger measures to satisfy normative expectations, even considering that it is not a judicial organ. In this sense, if the Security Council condemns practices embraced by jus cogens or recognizes the necessity of promoting human rights, it must act in conformity with its own resolutions, which illustrate legal boundaries for its actions.

Two criticisms can now be directed to the jus cogens normative taxonomy. First, some approaches exhibit a naive semantic of progress (see Galindo, 2010), as if jus cogens represented some kind of natural step in legal history's evolution, in connection with fundamental human rights. Jus cogens may indeed be viewed as a supernorm, an immutable source of law able to correct all problems related to international law (for such a critic, see D'Amato, 1990). This kind of approach misses the point that a clear definition—that is, its dogmatic parameters—and a solid jurisprudence related to its implementation must be constructed. Furthermore, no norm can be considered immutable, as other norms of the same kind can emerge.

Second, jus cogens as a customary norm, despite nowadays embracing norms such as the prohibition of torture, does not take into consideration inhumane global conditions such as hunger, extreme misery, and severe environmental problems when defining jus cogens. In fact, the displayed core of jus cogens regarding human or humanitarian rights is related to a vision concerned with punctual individual rights, along with certain rules regarding interstate relationships. Even when dealing with the crime of genocide, a liberal bias is present to the extent of considering the right to life as the foundation for protecting highly specific populations. The prohibition of slavery can also be viewed as related to the typical so-called first dimension (or generation) of human rights because the prohibition of slavery was, even before Hegel (2008, §67, §57, note), a condition for the development of the self.

This means that fundamental social rights are not viewed as part of peremptory norms of the international community, maybe due to the fact that most analyses come from courts, states, or scholars dealing with arrangements related to rich states and inspired by the liberal tradition, where individual rights are

theoretically the most prominent object of protection, thus disregarding mass human rights violations on both national and nonnational spheres.[44] By way of illustration, Human Rights Watch (HRW) did not name as *rights* (but merely the *assertion of goods*) the rights linked to the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) until 1996. This occurred by dint of a mentality that observed democratic rights (i.e., political and civil rights) as truly human rights; therefore, in a very limited, Western perspective, the other rights are even today seen by HRW as an unimportant appurtenance of political and civil rights (Mutua, 2001, p. 155f.) .

The global eradication of hunger remains, to give an example, largely a rhetorical, symbolic discourse (Neves, 2007b), as it is viewed at a lower rank in comparison with other rights with regard to the definition of jus cogens. By such visions, a treaty establishing obligations that result in the extreme hunger of a population would not be void vis-à-vis jus cogens. For instance, Security Council resolutions imposing embargos that conduct several grave human rights problems (e.g., starvation, lack of education) to a given state's whole population should be viewed as in contradiction with jus cogens, a situation that has already been seen in the 1990s, for example, in Haiti.

Jus cogens can also be a set of highly symbolic norms. An example bearing on this subject is the prohibition of invading a country. This might be considered a jus cogens norm, but strong powerholders may disrespect it at their own will, maintaining the prohibition for weaker actors. Furthermore, saying that a norm belongs to the jus cogens category does not result in its automatic concretization. Indeed, law is no static, lifeless system, requiring many other instruments to process normative expectations and to make real legal promises.

As will be shown, some argue that certain political and social rights bear erga

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[44] For a liberal view of the globalization of human rights, based on the assumption that only liberty rights are truly universal, as independent from institutions and not dealing with allocation problems, see (O'Neill, 2005). Cranston (1983) denied that economic and social rights are human rights.

omnes effects, but the debate over jus cogens does not usually take these kinds of norms into consideration. Jus cogens being primarily a legal ground for states, only actors situated in this arena (fundamentally states, international courts, and international institutions) could change this reality.

This is not, however, a unidirectional pathway when considering a broader range, as other dimensions of human rights have assumed greater importance in the last few decades in many fields. The United Nations Millennium Development Goals, for example, can be viewed as part of a pressure movement aimed to universalize social rights. Even the World Bank and the International Monetary Fund, international organizations at first glance not attentive to the so-called second dimension of human rights, have manifested their concerns about the need for investments by states in sectors related to education, nutrition, and medical care, a top-down pressure that is not related to classical liberalism (Tushnet, 2008, p. 999 f.). These pressures, however, seem not to have (yet) had a relevant impact on the jus cogens debate.

Besides the problems related to the core of jus cogens' legal notion, it is true that, although jus cogens has already been mentioned many times in ICJ decisions and is part of a global legal regime of human rights, the Article 66 (a) procedure contained in the 1969 Vienna Convention[45] has never been applied. In this sense, a lack of regular and steady use regarding this notion can still be noted with respect to the ICJ. Despite that, other courts have used the jus cogens notion to adjudicate on the lawfulness of a given UNSC resolution or on the lawfulness of state measures related to its implementation, as will be detailed when the possible and the concrete judicial review are presented with regard to these resolutions (chapter 2).

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[45] "If, under paragraph 3 of article 65, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed: (a) Any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration" (Article 66 of the 1969 Vienna Convention).

To conclude, many problems still arise regarding the coherence and consistency of jus cogens' central legal notion when diverse courts apply it, thus a problem related to the dogmatic dimension of jus cogens. Furthermore, legal dogmatics should include other legal dimensions beyond liberal rights when considering jus cogens, if observing changes in some crucial international movements. Dogmatic constructions offer criteria for the resolution of cases, restricting a legal notion's volatility to orientate adjudication's process and also observe decisions to provide eventually enriched solutions. Dogmatics has the transversal function of controlling the consistency of a given decision, aiming at other cases' solutions and determining the conceivable and reliable conditions for such a task. It fixes the normative senses and determines the possible and consistent conditions legally, helping law to change, that is, to adapt itself in face of novel environmental conditions, thus being a stabilizing feature of the legal system (Luhmann, 1983, p. 31ff.; 2004, p. 257ff.). Concepts in themselves are not mere guidelines for judgments because they are inserted into a cycle involving conditional programs and practical relevance; legal doctrine is supported by a background of usages, and concepts in this context instruct reasoning by limiting its range of possible use, while legal notions define the relevant legal problem, but the decision does not carelessly follow it (Luhmann, 2004, p. 342).

Despite this fact, I have shown, also dogmatically, that UN bodies are bound to follow jus cogens norms, a category that can be considered part of the legal arrangement restricting performances of the UN agencies and that bears in its core cardinal human rights, following many other approaches. Being a very recent legal vocabulary, at least as dogmatics observes it after the 20th century, it is quite normal that courts and scholars still have problems giving this term a steady theoretical background to apply it. What is more, the difficulty of precisely defining a legal notion can be also found in many other legal theories—for example, in efforts related to outlining the notions of human rights, ownership and possession, etc.—especially when law is facing environmental changes. In this sense, if it is true that jus cogens' design still faces challenges regarding its dogmatic dimension, some imprecision and some uncertainty in law can be viewed either as a modern course to law, if one looks at its grim side, or as a perfectly normal modern condition of law, in fact a main character distinguishing it from its nonmodern forms, as I see it, following the systems theory.

It was therefore affirmed that human rights, although still experiencing some deficit in their institutionalization and in their procedural enforcement, encounter a sphere in jus cogens in which positivization and the formation of enforcement mechanisms are at least on the horizon for international public law, constituting what Brunkhorst (2005, p. 142ff.) called *strong* human rights, in contrast to *weak* human rights, a notion of Neves (2007b, p. 422), whose juridification and enforcement are still very unsettled.

1.4.2 Obligations Erga Omnes

A few months after the described emergence of the jus cogens notion, the International Court in the Barcelona Traction case shaped the obligations of the erga omnes idea. According to its understanding, there are particular obligations bounding states, international organizations, and nonstate actors that arose without their strict consent and could be claimed against any of them. In this sense, obligations erga omnes is a legal notion capable of restricting UNSC's political activities.

Although all four examples of obligations erga omnes given by the ICJ in the Traction case stem from jus cogens, not all obligations erga omnes are strictly connected with jus cogens. In any case, these obligations are mainly derived from peremptory norms consolidated as international core principles and, for this reason, should be followed by all players. Jus cogens seems to be a broader concept, as its existence in concrete circumstances also gives rise to other legal relations beyond obligations. They are also in some conditions more restrictive than obligations erga omnes. The existence of jus cogens can be claimed in certain situations only by the parts involved in a legal relationship, such as when the void of a given international treaty is being discussed in light of jus cogens; the legal rights are merely reciprocally owed by contracted states (Ragazzi, 2000, p. 190ff.).

Among obligations erga omnes can be counted the obligation to notify international shipping of the existence of a minefield (the *Corfu Channel,* 1948, and *Nicaragua*, 1984, ICJ cases), the banning of genocide (ICJ's Advisory Opinion on the Genocide Convention, 1993), the protection from slavery and the slave trade, and the protection from racial discrimination (ICJ's *South West Africa* cases, 1966; (Ragazzi, 2000). Some fundamental human rights that are crucial pillars of global law bear erga omnes effects. Hereafter, the primary sources of this discussion (i.e., crucial ICJ decisions related to states' duties) will be analyzed, and later the roles of

other actors beyond states will be shown.

The ICJ stated in the Barcelona Traction, Light, and Power Company Limited case (1970) that obligations derived from peremptory norms have an erga omnes character (i.e., are to be valid for all states and are owed to "the international community as a whole" [p. 32, para. 33]). The ICJ did not explicitly cite jus cogens, but its core arguments were closely related to this notion. According to this court's understanding related to the erga omnes effect of some rights, "all States can be held to have a legal interest in their protection" (Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain), 1970 I.C.J. (Feb. 5), p. 32, para. 33), [46] due to the fact that these norms are to be "observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" valid to every state (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of July 8, 1996, ICJ Reports 1996, p. 257, para. 79). The described extension of the binding effect to states that have not ratified the convention is also related to Article 38 of the 1969 Vienna Convention.

As framed by the ICJ, an eventual infringement by a state opens the possibility for legal claims from any other state, even from those not necessarily directly affected by the unlawful conduct, against the particular state that breached the norm. The application of this rationale, however, remains to be seen.

Reaffirming the liaison between jus cogens norms and obligations erga omnes, in consistency with the ICJ's decisions, the self-determination of peoples constitutes an erga omnes right, invoking that this right "evolved from the Charter

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[46] The complete paragraph 33 reads: "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."

and from United Nations practice" (*East Timor [Portugal* v. *Australia]*, Judgment, ICJ Reports,1995, p. 102, para. 29).[47] Concerning international humanitarian law, the ICJ affirmed in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that "a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of 'humanity'"; for this reason, they should "be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law" (ICJ, 1996 (I), p. 257, para. 79).

The consideration of the international community as a whole and the absence of the ratification's obligation mean two fundamental things. First, they indicate that the punctual, ephemeral communication between two states is not sufficient to explain the legal system in this sphere because states and other players also have obligations toward the arrangements in which they are located, which cannot be elucidated by the notion of community, by the way. Thus, legal effects go beyond state bilateral declarations comprised in treaties. Secondly, the recognition of a core of fundamental, cardinal norms in the global sphere signifies that not only states but also international organizations and private actors must observe these norms because the affected need not have necessarily endorsed such obligations.

Some differentiate obligations erga omnes and jus cogens by asserting that the former highlight the state's responsibility (Manusama, 2006, p. 28). This is not a precise approach, however. Saying that "the rights and obligations enshrined by the Convention are rights and obligations erga omnes" (see Application of the Convention on the Prevention and Punishment of the Crime of Genocide [*Bosnia and Herzegovina v. Yugoslavia*], Preliminary Objections, Judgment, ICJ Reports 1996 (II), p. 616, para. 31) suggests that these rights are to be understood toward

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[47] The same rationale was applied in the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory" (ICJ, 1994): "The obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international humanitarian law" (para. 155).

all. As it seems to me, on the one hand, the emergence of obligations erga omnes is an effect derived from jus cogens norms (i.e., all jus cogens norms have an erga omnes effect). Their fundamental characteristics are both the possibility of being invoked by any state or another actor and the fact that, since they are cardinal to the regular keeping of the relationship among states and the legal global arrangement, they do not need the express ratification of singular states or other actors. Here, and not in the affected subject, the main differentiation is placed.

On the other hand, not every obligation erga omnes originates from jus cogens, which means that other international norms with an erga omnes effect can be found. This constitutes further evidence that the realm of international law is a multilayer arrangement: For example, the human rights obligations enclosed in the International Covenant on Civil and Political Rights (ICCPR), as well as in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), cannot all be considered jus cogens norms, but they do bear an erga omnes effect because they have attained customary international law significance. They enshrine more than mere bilateral obligations to the extent that the international realm as a whole has an interest in their implementation, but they have not yet been recognized by the large majority of states as being marked with a peremptory norm status (de Wet, 2006, p. 61ff.).[48] A criticism toward the absence of their jus cogens status may be observed in the last section of this chapter.

In this sense, I recognize here three types of norms bearing erga omnes effects or almost there: (a) jus cogens norms, as all have erga omnes effects; (b) other fundamental norms that have erga omnes effects but are still not considered part of jus cogens; and (c) other norms aiming to acquire erga omnes effects (see de Wet, 2006, p. 62).

The last type is related to struggles in the world society aspiring to include norms that are seen as fundamental by their defenders as part of the cardinal rules pursuing erga omnes effects, as well as before international courts. An example is

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[48] Albeit not dealing with obligations erga omnes, O'Neill (2005, p. 431) argued that from these treaties (e.g., the ICESCR) arise obligations binding only the signatories.

sustainable development,[49] as declared in the United Nations Conference on Environment and Development (Earth Summit) in Rio de Janeiro in 1992, a notion that embraces political, economic, and social aspects and that has been increasing in importance in other international treaties, being cited, for instance, in the Treaty on Plant Genetic Resources for Food and Agriculture, as well as before international courts (de Wet, 2006, p. 61ff.).[50]

The liaison between UN bodies and obligations erga omnes seems to be very clear: While being part of the international community, any organ of the UN must obey the effects that arise from fundamental norms of the global legal sphere, as well as be able to deal with the consequences of an eventual noncompliance event. In this sense, because law can irritate political organs with such a legal figure, it may act as a social sphere capable of restricting UNSC's political movements.

1.4.3 Global Human Rights

Understanding the structure of the legal domain of the UNSC, as well as Courts and NGOs as emerging social forces that ground their demands and decisions in law, entails explaining the meaning of global human rights, the arrangements upon which the claims and rulings of such forces are based. It can be argued that global actors are identifying constitutional problems in areas without constitutions and/or urging the shaping of paradoxical arrangements similar to state constitutions in such arenas. As it is nearly impossible to exhibit all historical and current theoretical and practical proposals concerning human rights, hereinafter I present mainly the views of human rights grounded in systemic premises or by authors of systems theory.

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[49] For a defense concerning the principle of sustainable development as bearing an erga omnes norm status, see the separate opinion of ICJ Judge Weeramantry in the Gabčíkovo–Nagymaros project case ("Case concerning Gabčíkovo–Nagymaros Project (Hungary v Slovakia)," 1997 p. 115ff.). Against this opinion, see (Das, 2013, p. 57 f.).

[50] For a wide view about the legal side of sustainable development, see (Singh, 1988).

Initially, it may said that occurs a coevolutionary, ongoing process that includes a view of human rights as norms bounding several parts of world society, such as enterprises, states, international organizations, and other kinds of communicative arrays, and comprising a complex relationship between law, politics, and the public sphere—in these, the insufficient generalization of human rights law is shown, because views on human rights are still very divergent according to varying communicative spheres.

Once law, human rights can, by virtue of their own logic, constrain the performance of a political organ (Fischer-Lescano & Meisterhans, 2013, p. 375).[51] Using human rights or any kind of law seems to be a trap for politics: first, law might be used as an instrument in urgent moments: that is, in moments when political authority needs to legitimate its actions legally. In later moments, however, dynamics of legal regimes, such as those of human rights, appear to block these kinds of arbitrary political pretensions by reminding, with the help of other social actors, political actors of the bounding effect of their own previous decisions grounded in legal terms and of the existence of legal sources that must be followed. Time is a great part of the answer of unfolding paradoxical uses or misuses of the human rights notion. The limitations on the UNSC acting to promote human rights may signify the first element of demonstrating a functional legal form that could resemble a constitution of the UNSC regime, a possibility I will explore later in this dissertation.

In this sense, pieces of constitutional elements (human rights, the UN Charter, global jus cogens, and internal norms that define the functions of the UNSC appear as constitutional elements, while decisional arenas appear as structures) might be recognized, and law would not be reduced in all of its manifestations as a mere creature of politics. Thus, nonstatal constitutional questions could resemble statal constitutions. This possibility does not deter critics emphasizing *colonization* of law or the corruption of legal codes by politics. A renewed interpretation of the symbolic

[51]These authors talk about law in a general manner, not about human rights.

force of human rights—Neves' notion—can help to explain this complicated relationship since it can elucidate the dual roles of human rights. The gain of such a reading is the possibility of offering a critical view of global organizations with the paradoxical weapon of human rights and constitutional semantics, criticizing such organizations' nondemocratic, socially unwise arrangements and the absence of the rule of law within them, as well as urging reforms in their structures.

The production of human rights communications[52] is a very recent occurrence in world society, and even more recent is the global circulation of human rights themes among different social systems, their organizations, and other communicative arrays. Such communications, therefore, affect many spheres around the globe, including the UNSC.

Events linked to violations of human rights that have occurred across the world trigger global reactions: in other words, they are not observed as strictly confined to the state territory anymore. Fischer-Lescano (2005) argued for this reason that a *colère publique mondiale* existed in terms of legal prescriptions affecting the vast majority of states, the same ground for existing heterarchical remedies, which, in this dissertation's section about courts, I characterize as insufficient. This does not mean that media and institutional spheres treat human rights violations equally, as the personal or institutional attributes of the victims and offenders can be still observed as crucial for setting political and legal agendas.

Human rights can be described as responses to the risk of "societal 'dedifferentiation'" since human rights guard the autonomy of systems and discourses from the expansion of other systems. As Neves (2007b) argued, rights are able to restrain the expansion of subsystems or regimes that bear an expansive rationality from actors that can destroy other communicative fields, such as *lex mercatoria* (see Teubner, 2006). Therefore, the communication of fundamental

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[52] Segments of a presentation on human rights can been seen in our unpublished article entitled "The Performances of the UN Security Council as a Hurdle to the Transnationalization of Social Rights," presented at the 2014 Law and Society Association Conference.

social rights can reach central organs, claiming normative force, in order to stop performances of global economic or political players that, for example, could lead to the absence of basic medications or food.

Fundamental global social rights are linked to the communicative addressing of social systems to individuals and to the participation of individuals in those social systems (Neves, 1992), because only with the realization of such kinds of rights can human beings be described as more than merely “bodies” or “flesh”; in other words, only then can they develop themselves as persons (Luhmann, 2008a, p. 142). Social rights guarantee physical and social requirements, which constitute requisites to the development of a reasonable capacity for the production of systemically relevant communication.

If basic individual rights are also conditions of social rights, then there are only fundamental social rights. Stated differently, there is no absolute separation between fundamental social rights and other fundamental rights. Tough tensions may happen. Social rights require general provisions, which make it possible for conflicts with first dimension human rights, based, for instance, in distribution issues, to occur. A simplistic conflation of social and basic individual human rights may be used as a strategic of rich, powerful actors to gain statal benefits, as can be noted in peripheral states (for this, see Da Silva, 2008).

Although these approaches have questionable presuppositions, they have in any event galvanized the present work’s understanding. Teubner (2006, p. 334) states that politics as a social system have developed ways to try to physically reign over the human being, considered a psychophysical being, attempting to control human minds and bodies (p. 334). Human rights, in a strict sense would constitute, in this milieu, the historically constructed political warranties of blocking this kind of state behavior, being considered as prepolitical and prejuridical. Human rights communications would be the subject of social systems, which includes politics, through protest. The response of the expansionist greed of politics might be communicated only through protest. If so, then human rights would be nothing more than a reactive achievement of world society, bearing no possibility of providing a basis for real social changes, as already stated. Later, Teubner (Teubner, 2012, p. 141ff.) recognized the linkage between fundamental (not human) rights and inclusion (p. 141ff.), but his conception, besides not appreciating the connection between human rights and inclusion, is even now merely reactive, as I will discuss.

Teubner's (2012) perspective is, although conflicting, inspired by Luhmann, who argued that human rights in a global sphere should focus on themes related to scandalous violations of "human dignity," thus excluding fundamental social rights like access to food or water, the discussion of which could lead to an inflationary use of the term "human rights" (Luhmann, 1993, p. 577).

Although dissimilar, both Luhmann's and Teubner's angles might be observed as presenting a reactive concept of human rights, thus excluding the potential of human rights in proposing different goals and programs for politics and law beyond very strict boundaries linked with the human body and with the human mind. Operating only in very extreme cases involving monstrosities, human rights would not be capable of giving grounds for real changes to society, forgetting relatively slow global performances related to exclusion, to the production of huge social inequalities, and to the cultural extermination of local communities that may be as morally repugnant as quick, steadfast events such as genocides.

Neves (2007b), in a much more comprehensive understanding of human rights grounded in systems theory—with Marshall's (2006) classic notion of citizenship in the background—argued that human rights are linked with the full inclusion of all persons in the world society and, consequently, also in the legal system (p. 417). Neves did not dismiss the reactive, protective side of the human rights, but accentuated human rights' horizontal relationship to inclusion. This approach, which has inspired mine, embraces grave problems of world society, such as the hungry, within the human rights notion.

However, this thesis has also problematic components. Human rights would always present a symbolic, dual force in ambiences not linked with a completely differentiated legal system. Human rights in nonstate terrains, where the political and legal system are not fully differentiated, could not be satisfactorily implemented in the present global constellation (Neves, 2007b). Holmes (see also Holmes, 2012, p. 207ff.), for example, discussed inclusion and the necessity of complete legal and political differentiations as indispensable prerequisites for human rights

Although this skeptical assumption seems at first glance attractive, it is very questionable whether these kinds of rights can be wholly fulfilled, even if considered central, in European states where law and politics might perhaps be understood as differentiated. Indeed, even countries that bear a high Human Development Index (HDI) indicator still face problems associated with the implementation of human rights: for instance, those related to the allocation of scarce resources, such as food or health services, as well as those related to so-called human rights of the first dimension, such as freedom of speech, equality for people of different races and genders, and asylum and migration rights.

Given the paradoxes presented by Luhmann, symbolic force is an inherent characteristic of human rights, varying merely in the balance between their *positive* and *negative* sides from one domain to another. They might present grades of enforcement and per se represent a regime with its own presuppositions and its own historical road, which involves the participation of both law and politics. The point is that in the nonstate arenas, there may also be found strong parts of the public sphere that are mobilized to assure higher degrees of human rights enforcement. Existing in many political centers, social movement organizations can be conceived as having more, rather than less, important roles in the affirmation of human rights in comparison to state-centered societal mobilizations.

In this sense, none of these approaches deals adequately with the problem of human rights in transnational arenas—the tension between state apparatuses and global forces is still to be faced. These perspectives do not adequately consider the weight and potential of social movement organizations and of nonstate courts.

The contemporary difficulty is that nonstate forces, mainly coming from the economic and political systems, act globally and trigger global events or complications that cannot be solved within states' limits because states were historically developed to provide answers to problems addressed by their national boundaries even when they manage transnational problems or act in transnational forums. States have no adequate weapons to deal with transnational companies, world political organizations, global NGOs, and other social movement actors, for instance. Crises in sectors such as finance and food provision are exemplary cases that show the participation of multiple actors and a global arrangement (see Fischer-

Lescano & Möller, 2013, p. 9ff., especially p. 14).

Thus, the paradox is how to protect or implement human rights and social rights, as they are traditionally linked to states in a transnational configuration, where no autopoietic, differentiated system can be found. In his model, Marshall (2006) presents a strong criticism of capitalist logic, observing it as an inequality-based system as well as at war with citizenship developments (p. 29(p.), but cannot explain these nonstate conundrums.

There are some well-known events related to this impasse. It might be argued that both the Universal Declaration of Human Rights (1948, fundamentally arts. 22–27) and the 1966 ICESCR prescribe many compromising objectives to states, which massively approved them, and may also be extended to private sectors of the world society. For this reason, human social rights can be seen at first glance as applicable to the majority of the world's spaces. But many states are still unable to accomplish this task due to global economic fluctuations related to the allocation of scarce resources, a system not bound to states or aligned with the performance of state functions, as well as the absence of the political will of states to transform the states of affair in their internal constellations. Private actors, such as enterprises, also have huge problems with respect to the implementation and observance of human rights.

The universalization of human rights in heterogeneous terrains is an expectation of the world society in a context of tension between functional differentiation, because there is a primacy of this kind of differentiation, and territorial differentiation, the basis on which legal and political forms were historically built. As argued, in state spheres, there are very few examples of truly differentiated legal systems in the terms presented by Luhmann; if there are any such examples, practically all of them are in Western Europe (Neves, 1992). In the global realm, there is no autopoietic legal regime and no fully differentiated political system, the latter being still strongly linked with state and international organizations at its center.

Nonetheless, political and legal forms can be found—and here seems to be the key to understanding how human rights operate in a global arena: in other words, grasping possible legal and political forms resembling constitutional pieces in nonstate arenas. The subject here revolves around legal and political forms in delimited spaces and not around fixed structures with rigid, aprioristic requisites. Resemblances involving distinct spheres might be observed, but this does not mean that a constitution can here be found.

Fischer-Lescano (2013, p. 37) presents a perspective regarding the emancipatory potential of human rights in nonstate spheres (p. 37). Citing Gramsci, he argues that *civil society* is part of the public exercise of authority, and, with this, part of the public power; protests may contain elements of sanction in the form of power For him, in the world arena, state violence and state power, which also serve to impose legal decisions, at one side, and law and its force, which are able, among other characteristics, to produce *res judicata*, at the other side, are detached. The state monopoly of violence is thus absent in this sphere. For these reasons, Fischer-Lescano argues that social movements connected with human rights demands have the potential to constitute social forms of the socialization of the global law, bearing subversive forces—global actors may enter into the legal regime. Movements demanding global social rights struggle for a type of legal politics (*Rechtspolitik*) that presents social and ecological aspects of justice in the foreground and that profoundly explores how the potential of world society can be used in order to implement alternatives to the current social and economic relationships. According to Fischer-Lescano, subjective and trans-subjective rights must protect human rights in a strict sense; this would make possible the development of social forces. Replacing the classical division of liberal, social, and political rights related to the legal-human troika with an inseparable guarantee of development related to human, ecological, and communicative ambits, he sees the potential of law to act as a type of communication able to germinate the democratic development of social forces, returning to the Marxist notion of emancipation, which is related to the rebound of the human being to the human world.[53]

[53] Hannah Arendt is, by principle, an anti-Marxist author. Fischer-Lescano's work might be seen as a reworking of Arendt's tough conundrum linked with displaced and stateless people (related to the losing of a homeland and the impossibility of finding a new one; see p. 396) in the 20th century in the face of human rights standards connected with state presuppositions.

To aid an understanding of human rights, it may be argued that the UN and particularly the UNSC emerged in this background as fundamental players that can shed light on the issue, because the protection and implementation of human rights at a global scale is one of the main challenges faced by states that do not have the adequate mechanisms to deal with global human rights, as such states are formed primarily to fulfill a central goal: namely the production of collective, binding decisions within a very particular territory (Luhmann, 2000). In this multifaceted constellation, with many political centers, social movement organizations appear as vital elements with capacity to contribute to the affirmation and implementation of human rights.

However, the UN, at least as it was founded, has not always had the adequate legal and political apparatus to deal with many new temporal and nonterritorial challenges. The UN Charter fundamentally comprises interstate principles, rights, and obligations, and it excludes, for example, the relationship between its organs and nonstate actors, such as NGOs and social networks, with a minor exception. “Peace” or a “breach of peace” are clearly related to states’ acts, according to Chapter VII of the UN Charter (Zangl & Zürn, 2003, p. 219). Resolution 232 (1966) concerning Southern Rhodesia has its roots, for example, in the regional state situation, albeit constituting a civil war case. The UNSC’s fundamental goal was to guarantee the right of self-determination to Rhodesians and the security of the regional states. For this reason, Resolution 232 cannot be considered a precedent to the linkage between human rights and a threat to or breach of peace (Hullman, 2005, p. 38).

She found, helped by Burke’s notion related to the state liaison between rights and a political community, the fundamental right of a human being of belonging to the political sphere and the rising of the notion of “humanity” as the center of international human rights, in comparison with the 18th-century notion of “human nature,” which, by its turn, was deviating from an ancient understanding of “human history” as the main background for the guarantee of rights. Currently, human rights are being claimed as also applicable in situations and areas where no political community, at least in a state sense, can be found.

Other cases related to risks of human rights' violations have been objects of appreciation by the UNSC, thus establishing the correlation between human rights, security, and the need of UNSC itself to observe human rights grounds. Like Resolution 688 (1991) concerning the massive persecution of Kurds and Shiites by Iraq, Resolution 418 (1977) concerning South Africa's apartheid regime, is a partial precedent with regard to the consideration of vast human rights violations performed by a state as a breach of the peace since the interstate situation was the main rationale for the decision (Hullman, 2005, p. 45). Resolution 794 (1992) concerning Somalia was the first time the correlation between violation of human rights and threat to international peace was stated, a connection that can also be viewed in Resolution 808 (1993) concerning the former Yugoslavia situation (check Oeter, 2008, pp. 36ff). It seems clear that these resolutions stated a nonterritorial definition of a breach of or threat to international peace, as their rationales were strictly intrastate events. The "Responsibility to Protect" (R2P) motto elaborated by the International Commission on Intervention and State Sovereignty (2001) followed this dynamic, based on Resolution 1973/2011 and on the Libya Report of the International Commission on Intervention and State Sovereignty (2001; see also Evans, 2011). The Resolution 2254/2015, concerning the Syrian situation, mentioned the primary responsibility of a state to protect its population, which constitutes one of the R2P pillars.

The UN Millennium Development Goals program, which has surprisingly reached some of its targets, is also a good example of an attempt to actualize social rights in the global sphere, albeit with technocratic and utilitarian practices, as the social movement actors and local people were not able to access this program, which was essentially based on indicators provided by states, thus dismissing questions regarding the ways of achieving the goals and the composition of the indicators themselves.

If it is true that human rights are paradoxically affirmed at the very moment of their violation (the third Luhmannian paradox), it seems that here also NGOs play the role of invoking such kinds of rights when appealing to several fora for their validity to because the violations must be converted into communication if they are to be in the systems agenda. Courts assess cases of violation, although in a limited manner. On

the one hand, NGOs and Courts help to explain how an event might be observed as a scandal. On the other hand, grounded in normative expectations for human rights normative, social movement organizations and courts in nonstate terrains affirm and irritate the political system with regard to human rights abuses. They thus contribute to the task of unfolding human rights paradoxes in nonstate arenas, where no Bill of Rights, a development linked with the path of de-paradoxification of legal paradoxes, may be found.

The rationality of the UNSC is a representative case of the expansive rationalities that are eventually highly unwise regarding the appreciation of environmental communications and can endanger the self-existence of other regimes or persons. The problem of the world society's economic system is not its dedifferentiation in the face of other social systems but, to the contrary, its abundant functional differentiation since its own expansive logic may constitute a problem for other social sectors. Teubner (2006, p. 334) correctly asserted that politics have attempted throughout history to control human bodies and rights, a phenomena that nowadays also be noted in other social systems, such as economies, in a milieu of exposing the exploitation of men by systems—or by partial rationalities (p. 334)—and not of human beings by human beings, as Marx put it, being the greatest symbols of this exploitation the private property (Marx & Engels, 2008, p. 50) and the appropriation of another's force of labor (surplus labor), forming surplus value (Marx, 1962, p. 226ff.; 350ff.).

The UNSC, although not a functional system, is the sturdiest organization inside the strongest organization of the world political system, using very efficient mechanisms in order to accomplish its tasks and, for this reason, it represents a danger to other social sectors and also and especially to human beings, taken as physical entities of body, flesh, and mind. This is the cause of our perception that the main problem with nonstate law is not the absence of sanctions but the way in which people and societal arrangements are being affected dissimilarly.

UNSC rationales are based fundamentally on what states and other strong actors have understood as being securitizable: in other words, selecting what would constitute a *risk* or not, possibly losing, if followed strictly, the dimension of human lives. Thus, here lies another connection between human rights (such as those presented as related to persons' inclusion, and as structures protecting human

minds and bodies), the UNSC, having social movement organizations, and courts sometimes a role in legitimizing grim political actions.

Politics at a worldwide arena are dependent on powerful states and other organizations, such as worldwide enterprises. For example, the UNSC, is highly linked with the P5's will; voting power in organizations like the World Bank, the World Trade Organization, and the International Monetary Fund is related to the money that states give to their respective organizations. Along with transnational firms and NGOs, enterprises fluctuate in an area where the strict legal regulations are viewed in states to play almost no role; at the same time, however, enterprises need some kind of legal regulations for accomplishing the goals determined by their own logic (Grimm, 2004, p. 12). This kind of law is often nothing but an instrument of partial rationality, which means that the lex mercatoria improves the development of economic rationality; in a similar fashion, the UNSC's law was constructed to form the basis of its political decisions.

In Plato's *Cratylus* (1926), language is conceived as an instrument (the Ancient Greek word is ὄργανον [*organon*]; see 388a) to separate the essence of things according to their nature (388c, 390e), representing through sounds what has been captured by thought. For Plato (1926), a primordial name-maker—a lawgiver—is a specialized man with the power to name things (388e, 389c); an ideal name exists that will mold itself perfectly to nature and to its ideal form (389d, 390e). In this sense, names coalesce to an ontological structure of the world. As far as I am concerned, this is the first representation of an "instrument" in theoretical terms, a notion that seems to have been reproduced roughly untouched over the centuries (evidently, recent approaches are generally related to Weber's or Habermas' works). An instrument is only a tool or an object that serves to accomplish tasks that emanate from specialized beings. An instrument has no kind of active participation; it is a mere thing, a slave of another's will, to use Hegelian terms. Here lies the problem with Plato's conception of language (i.e., its lack of active involvement in language's dynamics)—the dialectician would be responsible for evaluating the lawgiver's works, according to Plato's *Cratylus*; language would have no function by itself (390d). Currently, this is also the problem with conceiving law merely as an

instrument of politics, since its self-dynamics are often forgotten when such commentaries are made.

In fact, global arrangements formed by political decisions based on law cannot be described merely as the collection of arbitrary acts by the dominant actors. This represents one side of the coin. Legal orders try to exert operative influence over certain regimes. By virtue of this perception, some questions that must be tackled include how the world can be ruled in political terms and what kind of role is being or can be played by communications arising, for example, from the human rights sphere, in situations where such legal orders do not act as mere instruments. Along with human rights, jus cogens, the UN Charter, and obligations erga omnes are also types of legal communications used to pressure central political organs.

The extant political structures and the precarious law structure deal with communicative variations coming from human rights, among many other fields. These spheres must answer to such challenges through the selection of the communications, which by their turn will be stabilized in the structures. The social selection of communications will form the features of the structures: This is what the theory of Luhmann (inspired by Darwinian notions), far from being a biological approach, affirms, namely, that new structural forms can be shaped in an evolutionary run when facing a variation (unexpected, random communications) that unleashes internal conflicts (Luhmann, 1998, pp. 466ff.) or when reacting to a change in its environment when processing internal irritations. Also, new systems or subsystems can be formed when considering the primacy of the differentiation's form. This work assumes that the world is in a transitional point with respect to political and legal spheres in a nonstate arena, but the future hangs on the not controlled, random social evolution.

Social structure and semantics run in parallel; thus, the problem is also related to semantics. Many scholars, for instance, Morgenthau (1948), Koskenniemi (1995), and Oosthuizen (1999), NGO activists, international lawyers, and government officers express profound skepticism with regard to changes at the UNSC realm or with regard to some kind of effective legal restrictions to its actions that are not merely related to the strategic, instrumental use of the vocabularies of law. An example thereof was provided by Koskenniemi in a round table at DISCO

(Direito, Sociedade Mundial e Constitucionalismo), a research group at the University of Brasilia. Koskenniemi (personal communication, 08 Feb. 2014) suggested that, instead of trying to empower human rights in this sphere, we should just forget about them since they have been unable to control the world's political authority and find another type of vocabulary to promote human rights. The background for the discussion was the article "Human Rights Mainstreaming as a Strategy for Institutional Power," in which the power of technical expertise in ruling over human rights themes was declared (Koskenniemi, 2010). Furthermore, the exposé presented a very skeptical view with regard to the capacity of the legal system in deciding per se conflicts, positioning law as a mere instrument of politics: for example, in this sentence: "Rights conflicts cannot be resolved by reference to 'rights'—only by reference to some policy that enables the determination of the relative power of the conflicting rights" (Martti Koskenniemi, 2010, p. 51). With such an affirmation, the dogmatic development concerning the balance and weight of dissimilar legal principles or rules (think about Dworkin, Pontes de Miranda or Alexy, among many others) is disregarded simply by means of the command of an authority that would decide law in a Hobbesian/Austinian/Schmittian manner.

With this in mind, it can be stated that the suggestion related to "forgetting" human rights is very problematic, because human rights are the main vocabulary of transnational social movements in order to irritate central political bodies, and the struggles in this direction are progressively achieving some of their goals. Semantics cannot be made in "laboratorial" milieus, that is, in spheres that ignore the social importance of other field's communications. Artistic movements, for instance, can shape vocabularies planning to influence multiple social spheres (think on the Brazilian Modern Art Week of 1922), providing information and semantics when describing their perspectives of society that can potentially affect other social loci. It is very hard to be sure that these kinds of semantics will exert influence on social texture or that the structures of society will experience changes—they will depends on the inner processes of the social subsystems and on random evolution. In this sense, a previous step made through critical observations regarding a given social practice and/or finding adequate semantics to describe unnamed processes, which are both tasks of scholars, can be made with sense, as performed by Koskenniemi, but, in this case, the suggestion was made aprioristically, for it was affirmed that a *new* grammar has to be found, without even showing clues of what kind of *new*

language that would be and forgetting the social history of the human rights, and was made in a conspiratorial way, since he has not relativized the agents' intentions, observing them as if they could change world dynamics in an asocial manner: that is, only by their own insulate purposes. It also represents a paradoxical proposition, still believing that other types of vocabularies can constrain the political authority—this seems contrary to what the author has affirmed in article cited and in other texts: that the political will cannot be stopped by vocabularies. The criticism of this Finnish author, in any event, observes that there are signs of a disconnection between human rights pretensions as presented by their semantics and the structure of society, alluding to the semantic potential of human rights.

There are no other social vocabularies outside the semantics of constitutionalism, human rights or democracy able to face strong powerholders' realms. In concurrency, human rights language is observed by social forces (courts and NGOs) as a strategically adequate basis for their decisions and pretensions: that is, their communications. These communications may also help to ground and justify actions that will violate human rights.

The relevance of human rights communications at political centers cannot be regarded simply as naïf academic thinking, as their vocabulary has already had an impact on political authority when managing grave situations. The UNSC incorporates, for example, resolutions concerning gender equality (Resolution 1325, 2000), the protection of children in armed conflicts (fundamentally Resolution 1261, 1999), and the protection of civilians during armed conflicts (Resolution 1265, 1999), which triggered concrete measures concerning elementary principles in situations of war. All peace operations after Resolution 1325 (2000), for instance, have required in the field headquarters a gender adviser, a gender unit, or a gender focal point. What is more, many courts have challenged the UNSC's Resolutions on the basis of human rights semantics, as expounded in Chapter 2 herein, although this kind of approach can be regarded as very limited and very dependent on Global North dynamics. On the other hand, the extreme deviations in the use of human rights language must be pointed out. The "Responsibility to Protect" motto is grounded on the defense of civilian populations but was only invoked by the UNSC when authorizing NATO's intervention in Libya (Resolution 1973, 2011) to legitimate hidden political goals (Tryggestad, 2009, p. 551). Hence, the possible instrumental or symbolic applications of human rights vocabulary—for instance, in these so-called

humanitarian intervention events—must come into question. In this milieu, Maus (1999) critical statement "Die Institutionalisierung einer Weltpolitik bedeutete die endgültige Isolierung und Zerstörung der Menschenrechte" 54 (p. 292) makes sense.

If, as Luhmann argued, the violation of human rights paradoxically leads to their affirmation, then the affirmation of human rights at institutionalized global political centers can also lead, paradoxically, to their annihilation.

The question revolves not around the importance of human rights, but around the investigation vis-à-vis its use in actual language-games, with a possible rhetorical use (concerning the ambivalence of the symbolic use of human rights, see Neves, 2007b). If the use of human rights at strong political centers, such as the UNSC, can be described as strategic or instrumental, such use nevertheless fails to constitute a unidirectional phenomenon since the cases in question are not merely expressed as the logic of the strongest. Using a given notion does not imply that it remains forever exactly as the original user intended, for the notion has its own requisites, meaning, historical background and possible developments, all of which may, with time, go against the original utterer's will if used by someone else. The history of language-games, of the use of communication, is dynamic and must consider time; time explains the immanent agonistic feature of all language-games because every use of a given word or expression by *ego* brings with it the possibility of being challenged by *alter* by virtue of its fundamental characters, which were historically fashioned.

The political logic of the strongest powerholder cannot explain why torture and prisoner abuse in Abu Ghraib—outrageous behaviors that were revealed by virtue of Amnesty International (2003) and Associated Press reports—have scandalized the world, leading to changes in the United States' performance. It also cannot per se clarify why, despite multiple tries, the United States could not justify its war on Iraq at the beginning of 2000s through a specific UNSC resolution. Likewise, it is not sufficient for understanding the several pressures and claims against the situation at the Guantanamo prison, a state of affairs that strongly came to light during the 2014

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[54] "The institutionalization of a global politics means the final isolation and destruction of the human rights" (translated by me).

United States presidential race. On the other hand, the logic of the strongest cannot explain why media and other social spheres drew very different attention to similar social movements and organizations coming from analogous places and related to equivalent issues—for example, the social movement Madres de La Plaza de Mayo, related to state killings and “disappearances” during the Argentinian dictatorship between 1976 and 1983, has a quite different repercussions from those of Brazilian black movements denouncing the *genocide of the black people* (a type of *black lives matter* movement) committed at the present time by the state, as both movements are linked to human rights violations of a same kind.

If human rights grounds provided by social movements organizations and courts, as will be later shown, have, on the one hand, helped to build crucial security resolutions and to denounce human rights abuses, the use of human rights vocabulary by central political spheres may, on the other hand, block social struggles linked with the channeling of crucial social demands to legal and political spheres, struggles that do not fit exactly into the strict semantic boundaries of human rights. Social movements focusing on, for example, rights not encompassed by human rights doctrine, as important as they might be, such as those related to labor law (e.g., those not involving slavery), to political rights beyond the traditionally accepted, to those related to health law (e.g, those not immediately affecting the lives of a mass of human beings), may be merely disregarded as not noble enough to be considered, as if human rights would indeed—as was commonly said during the 18th century (for example, in the preamble of the 1789 Declaration of the Rights of Man and of the Citizen)—constitute some kind of sacred legal figure in contrast with all the rest (for the use in English of "human rights" in correlation with religious vocabulary in the eighteenth, see Hunt, 2007, p. 230, n. 5; for the use of 'sacred' by many figures such as Jefferson, meaning then a kind of rights related to the secular world and reflecting their observed self-evident character, see p. 21).

A complete negation of a system within the system—a revolution (Luhmann, 2000, p. 208), is not in the horizon of social movements which channel human rights communications in political domains; therefore, the thinkable emancipatory potential of human rights, more often than not being placed at law, as held by Fischer-Lescano & Möller (2012), but eventually at politics, cannot respond to revolutionary demands of the world society. For example, the fact that eventual negations of the right to private property, a classic human right since Locke, can be observed as a

complete negation of the status quo of the current capitalistic economy that would change fundamental dynamics in several social systems, affecting many social spheres, is completely out of the human rights' movements focus.

By way of conclusion, taking the theoretical approaches and the UN case as an example, it may be affirmed that human rights are a communicative array entailing very specific normative expectations of world society related to the fundamental protection of the human being, including basic needs of existence, playing social movement organizations a central role in affirming such expectations in and/or toward several worldwide spheres. In social movements, through protests, international campaigning, expert reports etc., there is more engaged activity. Nonstate courts are also gazing with concern at these activities, contributing to human rights developments in nonstate spheres, proving to politics some tolerable grounds for acting. Human rights thus make up a kind of semantics circulating around many fields, contributing to basic social demands if considered in the context of social movement dynamics. Human rights, social movements, and security exist together in a fundamental communicative triangle, a central idea of this present dissertation.55

The blocking of the full implementation of human rights in the transnational field by central political and private actors, as well as their violations of human and humanitarian rights, are some of the actions that show the unreasonable dimension of an indiscriminately expansive rationality. For this reason, there is a normative expectation of several world society sectors, such as social movements, aiming to hinder the expansion of rationalities that are endangering other communicative fields such as human rights.

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[55] As an aside, I note that media plays a important role here, providing scatilization grounds and irritating other social spheres with these through multiple ways of selecting and sharing information.

Final Remarks: The United Nations, Jus Cogens, Obligations Erga Omnes, and Human Rights

Under a more formal perspective, the triad constituted by Article 103 of the UN Charter,56 jus cogens, and obligations erga omnes perceived at the international legal constellation illustrate the formation of an arrangement based on the interplay between primary and secondary norms in international law because they give criteria to the changing of other norms both in tribunal spheres and other legal production domains and offer standards for assessing the lawfulness of a given norm. These legal grounds can operate as sources for other legal regimes in, for example, transnational arenas, or at least affect them. I accept the rationale of Fischer-Lescano (2005), in the sense that the Article 38 of the ICJ Statute represents an important piece on the subject in the global legal realm. Fischer-Lescano was also right when asserting that judicial dynamics may form (functional) hierarchical, legal constellations, providing as an example thereof the Marbury v. Madison, 5 U.S. 137 (1803) decision in the U.S. Supreme Court. Indeed, this decision, and not the U.S. Constitution itself as a text, molded the hierarchical legal dynamic of that country.57

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[56] "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail" (Article 103 of the UN Charter).

[57] However, this author affirmed that the "global constitution" could be split into (a) jurisdiction norms, understood as global remedies rules (a network comprising international, supranational, and municipal courts), (b) jus cogens, and (c) norms forming norm validation, represented by Article 38 of the ICJ Statute. He stated that jus cogens might be conceived as the "*Formelles Verfassungsrecht*," the formal constitutional law, in the sense of Kelsen, which does not seem to correspond to the Austrian scholar's theory. I do not go so far. I affirm that jus cogens may be regarded as primary rules, in the sense of Hart, and, sometimes, as secondary rules, in a dynamic that might involve other fundamental texts, such as those mentioned in the UN Charter's Article 103, and also Article 38 of the ICJ

Legal texts are therefore live structures of legal regimes. More elements of the jurisdictional network related to the UNSC and the question on nonstate constitutions will be detailed in the next chapters, but the rationale concerning the function of courts as central legal actors may be introduced here. Jus cogens, obligations erga omnes, and any other kind of legal source may be appreciated by courts, and such appreciation will define the sources' legal significance in each case. There are indeed other legal interpreters (for instance, legal theories and lawmaking bodies), but courts are at the center of legal regimes. Although maintaining our presented position, and aware of the mentioned Lauterpacht separate opinion on Application of the Convention on the Prevention and Punishment of the Crime of Genocide, to which Fischer-Lescano also referred, jus cogens' legal character is, as any other norm, still under ongoing development following the processing of several legal spheres.

Courts have had already adjudicated international norms in the light of the jus cogens doctrine, as will be further described in the discussion hereafter regarding evaluating the lawfulness of UNSC's resolutions. This dynamic relationship represents no kind of "informal hierarchy," such as was presented by the International Law Commission led by Koskenniemi (International Law Commission, 2006, pp. p. 167, para. 327) but rather a formation derived from international legal practice and production, custom, and decisions that involves a cycling, functional relation between the two types of norms. The evaluation of the normative force of customary international law and its relationship with international positive law is absent, for example, in Hathaway's (2005) model, in the sense that she, even when thinking of a broader theory of international law, disregarded this kind of law when analyzing state commitment to and state compliance with international treaties, as well as state change by virtue of legal international obligations (Hathaway, 2005, p. 474f.)—her perspective thus does not comprehend the mutual involvement of these

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Statute.

types of nonstate law.

Jus cogens can be viewed as a standard for identifying primary rules of obligation; in other words, it operates sometimes as a secondary rule regarding the law of treaties since it gives gauges to weigh the validity of a primary rule that stipulates obligations to the parties, hence providing a standard way to define consequences related to an eventual breach of primary rules (International Law Commission, 2006, pp. p. 167, para. 327; Tomuschat, 2006, p. 430ff.). As stated before, not every jus cogens norm is representative of a secondary norm, for it is possible for a merely typical, primary legal obligation to be placed in another domain vis-à-vis treaty law.

Furthermore, jus cogens is one of the ways to heal the uncertainty "defect" of the primary rules in Hart's sense, as it amalgamates different treaties' norms in the same legal realm when asserting that they are valid—i.e., that they belong to the international law—due to the fact that they are in harmony with jus cogens. Jus cogens is an assemblage of norms for which identification works as a tool to separate what can be considered lawful from what cannot. Hence, these norms may help to identify a given rule as a legal norm among others norms. If such a norm cannot be precisely identified in the Hartian legal system—that is, if jus cogens is not itself the rule of recognition of international law because multiple sources can be found to identify a norm as belonging to the international legal realm—nonetheless, it constitutes a part of the solution for identifying valid international obligations (see Hart, 1994, p. 92).[58] In a sense, jus cogens, obligations erga omnes, and other

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[58] Obviously, this argument is merely inspired in Hart, an author who expressed a different view about international law. About validity and the rule of recognition, Hart said

> For the word 'valid' is most frequently, though not always, used, in just such internal statements, applying to a particular rule of a legal system, an unstated but accepted rule of recognition. To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition. This is incorrect only to the extent that it might obscure the internal character of such statements; for, like the

central customary legal principles form a corpus that resembles the Hartian rule of recognition.

Erga omnes effects, whether or not related to jus cogens norms, help to explain the formation of an arrangement in the global sphere where fundamental legal standards can be objects of claims against state or nonstate perpetrators; this signifies the formation of secondary norms in a global sphere to the extent that their invocation can be made even without the express agreement of a party (Fischer-Lescano, 2005, p. 230). Since such obligations arise even in the absence of express approval, and considering that the *international community as a whole* cannot be confined to states, the rules and duties of obligations erga omnes must also be observed by international organizations, as well as by nonstate actors.

In this sense, the UN and its bodies must follow basic human rights in order to fulfill the mandate originally given by the UN Charter. What is more, the formation of jus cogens and obligations erga omnes as pieces of the global legal system creating a formal normative hierarchy based on treaties, jurisprudence, and customary legal practices, places the UNSC as part of a legal international regime. The violations of such rules must be faced not as regular political acts but as illegal undertakings.

However, the mere existence of fundamental human rights, jus cogens rules, and obligations erga omnes does not automatically make judicial review practices possible, nor is it sufficient to explain the need for implementing such rights. In fact, the legal phenomenon cannot be reduced to legal texts; hence the enforcement of international norms by global actors must also be faced, as well as their grievances. For instance, the absence of an instantaneous liaison between a given state ratification of treaties concerning human rights and the onuses of implementing such duties in inner state situations led to the question of whether other players could

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> cricketers' 'Out', these statements of validity normally apply to a particular case a rule of recognition accepted by the speaker and others, rather than expressly state that the rule is satisfied. (p. 103)

In my view, jus cogens can be seen as one of the tests provided by the rule of recognition.

interfere in intrastate issues, thus constituting the basis for the “Responsibility to Protect” motto (see Kokott, 1999, p. 183; p. 187ff.). The same rationale can be applied to the UNSC’s actions: saying that it must respect human rights does not lead to automatic respect and, perhaps more importantly, does not elucidate the mechanisms to fulfill normative expectations engendered by this kind of law. In the next section, the uneasy relationship between the UNSC and the courts will be addressed, and in Chapter 3, the performances of some societal actors (NGOs) will be explored. Courts and NGOs are connected because they are using human rights vocabulary in order to communicate with the UNSC, aiming at the restriction of the UNSC’s political rationality.

Chapter 2: Dispute Settlement by the UNSC and Its Global Legal Pressures

2.1 The UNSC and Dispute Settlement

2.1.1 The UNSC and Adjudicatory Dynamics

In this chapter, UNSC will be presented as involved in the resolution of international disputes. Subsequently, I will show that courts are sending legal communications to this organ, restricting its political rationality. In these encounters, law is being screened as a social observer struggling to limit UNSC's political movements. In the next chapter, NGOs will be observed as another kind of social actor that may exert influence over UNSC's regime with the use of legal vocabularies.

Dispute settlement and judicialization at the arena of the UN international security regime can be observed from two divergent perspectives. On the one hand, the UN Security Council (UNSC) can functionally operate in some very relevant cases as an international dispute settlement body (Keohane, Moravcsik, & Slaughter, 2000, p. 834f.; Mondré & Zangl, 2005), or at least as a promoter of legal dispute settlements. The UNSC's creation of *ad hoc* criminal tribunals, as occurred on two occasions concerning the situation of Yugoslavia (Resolution 827 [1993]) and Rwanda (Resolution 955 [1994]), are part of this subject, since these organs were endowed with competences and the jurisdiction to deal with human rights violations during times of conflict, without being, when adjudging, subordinated to the Security Council's political will. The International Criminal Court (ICC) and UNSC have a peculiar relationship, which will be further mentioned, albeit in scant detail. Additionally, sanction's regimes based on the UNSC Resolution 1267, as presently shaped, resemble a judicial or "quasi-judicial" body, a feature that may be seen in other subregimes.

It may be said that the UNSC can be analyzed as an organ wherein conflicts are somehow settled because, according to the UN Charter, it is primarily responsible for smoothing over matters engendering peace that could not be resolved by states. Secondly, the UNSC is also able to deal with any dispute concerning a threat to the international peace, acting without any external request, and making recommendations to the parties involved in an affair. Thirdly, any UN member can call the UNSC's attention to investigate an event regarding a threat to peace. Finally, pursuant to Article 13, paragraph (b), of the Rome Statute, the Security Council is also empowered to, against state assent and acting under

Charter's Chapter VII, refer situations to the Prosecutor of the ICC, an independent organ vis-à-vis the UNSC. The UNSC has used its role assured by the Rome Statute in some cases: Resolution 1970 (2011), concerning the situation in Libya; Resolution 2000 (2011), regarding the situation of Côte d'Ivoire; Resolution 1593 (2005), which referred to Darfur's situation; Resolution 1497 (2003), in order to refer to the Liberian situation; and the anomalous Resolutions 1422 (2002) and 1487 (2003), which connect the UNSC and ICC. Finally, there were times when the UNSC declared the importance of the ICC in bringing justice in cases related to grave legal violations; for example, in Resolution 1998 (2011), which concerned children's rights and the end of impunity regarding crimes committed against them during times of conflict. Darfur's situation is a very relevant case because, for the first time, a non-signatory state had been brought to the ICC's jurisdiction. The cases referred by the UNSC to the ICC show the selectivity of the UNSC's actions since the UNSC has not referred situations to the ICC when rich states are involved. Rather, in instances when such states' mechanisms block the prosecution of war crimes committed by their officers, many strong powerholders, such as the United States, undermine the ICC with lots of policies in order to protect their nationals from the ICC's procedures, instead of just becoming a part of the Rome Statute (for this, check Johansen, 2006).

On the other hand, there are judicial review mechanisms related to the UNSC's actions that can be found in legal precedents of the International Court of Justice and in other tribunals' decisions around the world. Even ad hoc courts created by the UNSC are included in this orbit because they have already judged cases and matters touching on the legal domain of the UN security body.

As I see it, all of the presented distinct cases are important to show the puzzling legal form of the UNSC and demonstrate how contentious mechanisms against political will are being formed in nonstate, sometimes transnational, spheres. As contentious mechanisms of UNSC's political rationality, the courts constitute, along with NGOs, the pivotal point of this dissertation. In this sense, aside their relevancy and, sometimes, novelty, the cases were chosen in order to demonstrate how other social fields might also restrict political rationality. The decisions are mechanisms of contention and mechanisms of restriction. The cases represent, however, a small and limited segment when considered the judicial assessment of UNSC's performances, because courts generally do not face UNSC's actions.

Adjudicatory-like dynamics might be observed in the UNSC's practices.

Measuring the differences between UNSC procedures to traditional state trials, Mondré and Zangl (2005) compared SC meetings to the traditional complaints' phase, resolutions to adjudications, repeated resolutions to the implementation period, and—lastly—mandated or authorized sanctions by the UNSC to the enforcement phase. For these authors, the UNSC operates in specific events as an international dispute settlement body with political, not judicial, processes, due to the following reasons. (1) The UNSC has no *political independence*: Its decisions bear political motivations. (2) This organ has a political, thus not *legal,* mandate: It can choose the cases upon which it will act, and its decisions are not only grounded in legal rationale. (3) The *compulsory jurisdiction* is placed at a high level, but it is not applicable to the P5 and their ally states due to their veto capacity. (4) Albeit also placed at a very high level, the *authority to sanction* also has problems: Although the UNSC is categorically empowered to implement its decisions through sanctions, it is also vastly dependent on the willingness of member states to make them actually enforceable. (5) There are, finally, problems regarding *access* to the dispute settlement procedures because only states, not individuals, can participate in the process. Due fundamentally to the low degree of its legal mandate, political independence, and accessibility, the judicialization level of the UNSC proceedings is viewed as low: "Overall, no judicialization of the dispute settlement procedures of the SC has taken place" (Mondré & Zangl, 2005, p. 12ff.).[59]

The low judicialization degree was later presented by an analysis conducted by the same authors and other scholars, which investigated cases regarding the

[59]Similarly, see (Keohane et al., 2000, p. 468 ff.) Here is the table presented by Mondré and Zangl (p. 14), entitled "The Judicialization of SC Procedures."

Political Independence	Legal Mandate	Compulsory Jurisdiction	Authority to Sanction	Access
very low (political body composed of state representatives)	*low* (political decisions, but binding on member states)	*high* (resolutions can only be blocked by qualified majority or by one of the veto- powers)	*very high* (sanctions can be authorized and/or mandated; only qualified majority or veto-powers can block sanctions)	*very low* (only states can refer matters to the SC)

state members of the Organization for Economic Co-operation and Development (OECD) that were acting as both complainants and defendants before the UNSC, considering the periods of 1974–1983 and 1990–1999. This investigation has shown that the UNSC played a minor role in the dispute resolution process regarding these countries, which massively neglected to observe the UNSC procedures to settle disputes on claimed threats to international security, mostly by first following and then avoiding—or merely by avoiding without having initially followed—the UNSC procedures. When the OECD states were accused of endangering the peace, considering the indicated periods, the UNSC played an even more minor role in the disputes because no following pattern was observed. There have been cases when these countries, as complainants, disregarded UNSC proceedings. The absence of following UNSC processes is also related to the fact that the OECD countries are P5 allies, which means that P5 can block resolutions against the OECD states (see Zangl et al., 2011, p. 378 ff.).

It is evident that these works synthesize a theoretical hypothesis and an empirical study, although in a very limited way. However accurate when considering their previous self-made restrictions, these papers cannot—also because they were not intended to accomplish such a task—sufficiently elucidate two basic questions: (1) What are the consequences of disregarding the UNSC as a dispute settlement body or as a promoter, even if a strange one, of dispute settlement? The present work argues that comparing national and non-national constellations entails the necessity of possibly observing odd political and legal forms at nonstate orbits. Nonstate forms may indeed resemble state arrays, but state constellations might not be regarded as fixed parameters to the subsequent analysis of a given nonstate phenomenon. Furthermore, (2) if viewed as immersed in an international judicialization process or, in other words, as a settlement body with high political clout, how could law deal with such social and environmental influxes, and how could law retaliate against politics? The following sections deal with these questions more carefully, demonstrating that even organs created by the UNSC may bear jurisdictional characters, inserting the UNSC as a part of the puzzle involving the nonstate legal dispute settlement, aside from being a source of normative expectations.

2.1.2 Ad Hoc Criminal Tribunals: Bringing Peace Through Law?

The belief that legal institutions could also help to maintain and restore international peace and security lead to the establishment of some tribunals by the most powerful UN organ in order to judge grave violations of human and humanitarian rights. The protection of human rights and the process through which the linked normative expectations are dealt have become a security issue. Law, thus, was immersed in the political game, and politics contributed to the processing problems of a legal regime. This interesting development of the global politics illustrates that the present legal institutions on a worldwide sphere cannot adequately deal with many dissimilar events involving basic rights violations, and that responses should be given. According to another perspective, it might be said that politics selectively choose the cases to be analyzed, disregarding the violations of strong powerholders. In any event, as will be explored, law does not act as a simple, robotic political instrument by virtue of its own, internal, legal logic, as well as by virtue of the political and legal limitations of the political organizations that have shaped the courts.

As allowed by UN Charter Article 29, the UNSC created two ad hoc tribunals empowered to judge cases related to humanitarian or grave human rights violations during times of conflict, a development that has more to do with the UNSC's powers under UN Charter's Chapter VII and UN Charter's Article 103 than to the political-legal doctrine of the "universal jurisdiction": (1) the International Criminal Tribunal for the former state of Yugoslavia (ICTY), through Resolution 827 (1993), and (2) the International Criminal Tribunal for Rwanda (ICTR), through Resolution 955 (1994). In addition, the UNSC has contributed to the constitution of hybrid criminal tribunals, such as the Special Court for Sierra Leone through Resolution 1315 (2000), and the Special Tribunal for Lebanon (STL), which is also known as the Hariri Tribunal, pursuant to UNSC Resolutions 1664 (2006) and 1757 (2007). Hybrid courts will not be discussed in detail within this work.

The UNSC requested, through Resolution 808/1993, that the UN Secretary-General submit a report comprised of proposals and options for the establishment of a judicial organ, resulting in the creation of the ICTY. In this document, the Secretary-General noted that the common way to accomplish such a task would be via an international treaty, which demands a detailed, time-consuming process that would need the ratification of lots of states, including those involved directly with the conflict. By virtue of the unique, urgent situation, the Secretary-General

recommended the creation of a new tribunal by means of an UNSC Resolution, observing that UNSC had already created subsidiary bodies targeted at restoring and maintaining peace in other events, though not judicial organs, and that its creation under Chapter VII would bind every UN member. The Secretary-General stressed that the Tribunal should perform its functions impartially, free from political influxes, not being, thus, subjected to the UNSC itself when adjudicating. The Secretary-General also stated that the new body should not create new law, but only apply existing international humanitarian rules; the report also contained proposals for a statute of the new court (Secretary-General, 1993, paragraph 18 ff.).

The UN Secretary-General contributed to the establishment of the United Nations ICTR, since, again by virtue of UNSC Resolution 935 (1994), a commission that investigated human rights crimes involving the conflict between Tutsis and Hutus in Rwanda had been formed and which found evidence of genocide and grave human rights violations, recommending then the creation of a new Tribunal. In opposition to what occurred with the ICTY, the government of Rwanda, then a UNSC member, asked for a Tribunal to judge the crimes concerning the conflict, and participated in the discussions that lead to its creation. Rwanda, though, voted against Resolution 955 (1994) because it disagreed, for example, with the place where the tribunal should be located (that is, the city of Arusha, Tanzania) and with its restricted temporal jurisdiction. Complementing Resolution 955 (1994), the UNSC by not acting under the Charter's Chapter VII, approved Resolution 978 (1995), allowing any state to arrest, detain, and even prosecute persons involved with acts within the ICTR's jurisdiction by their own internal legal structures. Therefore, an example of universal jurisdiction shaped by a central UN organism was created—it can be also noted that in the Furundžija and Tadić ICTY cases, principles of the universal jurisdiction were mentioned.

In both courts' circumstances, the UNSC had previously handled the situations as a typical political organ; that is, it had approved previous resolutions and implemented forced measures concerning those conflict situations that have been observed as bearing some impact on international peace. Both courts were grounded under Chapter VII of the UN Charter. It is interesting to note that the Tribunals established by the UNSC judged powers and concrete measures of the UNSC itself, as will later be shown.

It is important to note a particular attribution. When acting under Chapter VII,

the UNSC has entrusted to the tribunals the power of taking binding rulings (see Resolution 827, para. 4, and Resolution 955, para. 2), what can be also noted in Article 29 of the ICTY Statute, which was adopted in Resolution 827 (1993) and in Article 28 of the ICTR Statute, adopted by Resolution 955 (1994), where it is stated that these courts have the power to adopt binding decisions on member states in order to assure state compliance and cooperation in the investigation and prosecution phases, including the arrest or detention of persons and their transference to the tribunals. This shows that the Charter's Article 29 has a dual function: To permit the creation of organs that perform functions which are unusual within the UNSC's primary purposes, aiming at the achievement of this UN organ's goals and to delegate the UNSC's own capacity to adopt binding decisions, on the other hand (de Wet, 2004a, p. 342).

The exercising of a judicial competence provides, to the judicial bodies, a certain degree of independence vis-à-vis the UNSC (de Wet, 2004a, p. 342). The UNSC, while not competent to adjudicate cases pursuant to the UN Charter, cannot behave as a judicial body, which means that it cannot review the decisions of the courts (even the courts created by itself) or even previously stipulate the conclusions of the judgments. In fact, this would be against the Charter's Article 1(1), since it would violate the principle of independence, one of the basic principles of justice, against Article 1(3) and 2(2), which are related to the promotion of human rights. It is also contrary to other provisions, such as Article 14 of the ICCPR, which touches on the right to a "public hearing by a competent, independent and impartial tribunal established by law" to any person in the event of criminal prosecution. This constitutes, for de Wet and some other authors, a jus cogens norm, which would block pretensions related to its derogation by the UNSC based, for example, in Article 4(1) of the ICCPR (de Wet, 2004a, p. 343ff.). It is important to note here that Article 14 of the ICCPR can be derogated in emergency times, pursuant to Article 4(1) of the ICCPR. In any event, it was not expressly derogated by any statute's provision. On the contrary, it seems to be applied all due process of law principles. The possible derogation of Article 14 of the ICCPR does not mean, however, that the right to a fair hearing before a court does not represent a jus cogens norm, since the extant legal customs at the international, and possibly also at the transnational, arenas have already recognized this norm as such.

In this context, entities such as the ICTR and the ICTY have observed its

creator and mused on its functions, duties and competencies, subjects that will be underlined with regard to other courts in the next section. Paradoxically, these courts would neither assume the very UNSC or other UN organ's functions, nor would it be exactly inferior vis-à-vis their creator, despite being grounded by the UNSC.

The ICTY, in its widely cited Tadić case espousing the rationale of ICJ 1954 Effects of Awards of Compensation case, held that the UNSC has the power to create organs such as courts in order to fulfill its own mandate, as guaranteed by Charter's Article 29. The court also emphasized in this case that UN Charter, when viewed as the basic structure supporting the United Nations, limits the UNSC, notwithstanding its vast political competencies. Therefore, this political organ cannot extrapolate its constitutional powers:

> The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as legibus solutus (unbound by law).". (*Prosecutor v Tadić* [IT-94-1-AR72), Appeals Chamber of the ICTY, Decision on the Defence Motion for Interlocutory-Appeal, 2 October 1995, at], para. 28).

The Security Council must, following these arguments, respect basic human rights. The ICTY clearly asserted here that it was competent to analyze the UNSC's Resolutions:

> 21. (…) Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.
>
> 22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council. (Prosecutor v Tadić (IT-

94-1-AR72), Appeals Chamber of the ICTY, Decision on the Defence Motion for Interlocutory-Appeal, 2 October 1995).

In the Kanyabashi case, the ICTR, facing a motion that challenged its legality and competence, stressed that the UNSC was responsible for protecting and promoting human rights, a duty that was assumed as a result of the Charter's legal framework. The fact that there are specialized bodies for the protection of human rights, created by many international treaties, does not block the UNSC's liaison with human rights in the face of the Charter's legal arrangement (*Prosecutor v. Joseph Kanyabashi*, Decision on the Defence Motion on Jurisdiction, 18 June 1997, ICTR, case No. [ICTR-96-15-T], para. 28 and 29). Furthermore, it debated the limitation of Rwandan sovereignty in the face of UNSC decisions pursuant to the United Nations' Charter, mentioning the ICTY's Tadić case (cited Kanyabashi's decision, part B1), and the possibility of the UNSC's creation of ad hoc tribunals (cited Kanyabashi's decision, part B2). The legal competences regarding the possibilities of reviewing an UNSC resolution were also evaluated, but not in a very detailed way; it seems that Tadić's reasoning concerning this matter supported the decision, but this is not explicit in its text (see Van Den Herik, 2005, p. 33).

The ICTR stated, in paragraph 20 of the cited Kanyabashi's decision, that the discretionary assessments involving UNSC competence in labeling a situation as a threat to the international security and peace under Chapter VII are not justiciable, which is not contrary to the decision's rationale. The ICTR Trial Chamber II, a court that is hierarchically lower in comparison with its Appeals Chamber, used this paragraph 20 to decide diversely. Indeed, it held in the Karemera case that it did not "have the authority to review or assess the legality of Security Council decisions and, in particular, that of Security Council Resolution 955. The Chamber further emphasizes in this regard that Article 39 of the Charter of the United Nations gives a discretionary power to the Security Council in assessing the existence of a threat to the peace" (*Prosecutor v. Kanyabashi* [ICTR-96-15-T, "Decision on the Defence Motion on Jurisdiction", 18 June 1997, at], para. 20), and in taking the measures it deems appropriate to maintain or restore international peace and security" (*Prosecutor v. Karemera*, Decision on the Defence Motion, 25 April 2001, Case No. [ICTR-98-44-T], para. 25).

The pendulum of evaluating some aspects and not others of the UNSC's resolution face the very limits of the difference between law and politics in the

nonstate arena, since wide political discretions cannot be touched by legal decisions. Karemera's decision chose the common view related to the wide, unbounded powers of the UNSC to not evaluate any of the UNSC's actions, dismissing all legal limits present in jurisprudence, in the academic world and in the legal texts. Although feebly justified, this decision proves that there are traditions that help to guide decisions in order to keep the political sphere safe from legal irritations, on the one hand, and that there is no guarantee of a clear way to legally limit the UN's strong political bodies through judicial decisions, on the other hand.

Additionally, with respect to the ICTY, if it is true that some important military commanders escaped or have not been prosecuted, some were indeed processed or are presently answering for their acts. Accused of several grave human rights and humanitarian rights violations, Ratko Mladić, for instance, a former Bosnian Serb military leader, is currently under arrest, being trialed before the ICTY. Radovan Karadžić, the former president of the Republika Srpska in Bosnia and Herzegovina (1992–1996), was accused by ICTY Prosecutors of various human rights violations (persecutions, exterminations, murder, deportation, and inhumane acts) and war crimes (murder, terror, unlawful attacks on civilians, and the taking of hostages), including the responsibility for the Srebrenica massacres. Karadžić has been condemned to 40 years' imprisonment for the genocide in Srebrenica, war crimes, and crimes against humanity (Prosecutor v. Radovan Karadžić, Judgment of 24 March 2016, Case No. IT-95-5/18-T, Trial Chamber)**.** According to an ICTY press release, as of April 8, 2015, the Court has indicted 161 persons, and the proceedings against 147 have already concluded (International Criminal Tribunal for the former Yugoslavia Media Office, 2015). Due to the extensions of this 1990s conflict, it seems that more persons could have been sued. Criticism regarding slowness is common, but in face of the delicate situations verified (such as the escape of leaders, the difficulty in obtaining trustworthy testimonials) and the need to follow the due process of the right principles, the present situation is understandable.

In any event, though shaped to assess cases related to humanitarian law, these courts were important to judge human rights violations, including those labeled as genocides, crimes against humanity, and, naturally, war crimes—all of which are related to grave situations that have gained the attention of several global entities such as media outlets, NGOs, and governments. Usually, both tribunals argue that

humanitarian law transgressions are simultaneously comprised of severe human rights violations. In this sense, the UN Security Council can be conceived as an organ of the UN that has contributed to the concretization of human rights (de Wet, 2006, p. 58). What is more, when establishing a *tertius* to make a decision on some violations related to central global human rights, the Security Council can also be understood as a part of the complex mechanisms dealing with the stabilization of worldwide legal expectation under the UN's acting range by responding to violations of global human rights. As has been shown above, the UN Secretary-General endorsed and concretely contributed to the creation of these bodies.

In times when punishment seems to be desirable for both right-wing and left-wing political positions, bringing violators into courts is certainly one of the main normative expectations of several global areas. The judgment of strong politicians and chief military officers responsible for grave violations is a practically unseen experience since the Nuremberg and Tokyo Tribunals. However, here it could be noted that none of these courts have punished abuses related to powerful states' performances or armed private companies or their officers. In the case of military enterprises, the municipal courts of their states also do not usually judge their violations vis-à-vis international or national law.

Along with ad hoc and hybrid courts, another alternatives should be better explored by the UNSC. As the Security Council's duties include the establishment and maintenance of international peace, fundamentally in cases when the consequences of some conflict extrapolate the state borders, the UN's funding and sponsorship of truth and reconciliation commissions would be productive for the involved countries or populations, as can be partially noted in cases such as those regarding Burundi (related to the investigation of the President Melchior Ndadaye's murder and another killings through Resolution 1012 [1995]) and Liberia (related to the monitoring of the Accra agreement through Resolution 1509 [2003]). If such commissions are not the typical bodies responsible for prosecution and punishment, they could shed light on the war problems in a given region, replicating some good experiences around the world in this field (e.g., in South Africa), and learning with problems related to other (e.g., the Nigerian truth commission (see Palma, 2013).

In any event, it must be stated that municipal, regional and international courts have already cited the aforementioned decisions that have adjudicated the UNSC's powers and competencies. The importance of the ICTY and the ICTR, thus, besides

its local weight, also touches on the affirmation of legal limits to the UNSC discretion, providing legal precedents in this milieu at a nonstate sphere. By virtue of the selectivity of the extant international arrangements, it might be said that the processing of normative expectations has limits in face of strong political, and sometimes economic, arrays. In this sense, it is still hard to affirm that the normative expectations are being strongly enforced and in a generalized manner within this arena, which constitutes one of its limits.

2.2 Judicial Review Mechanisms of the UNSC's Actions: Global Legal Pressure

Now the second feature mentioned in the beginning of this chapter concerning the UNSC and dispute settlement will be tackled. The fact that there exists the possibility of judicial review of UNSC's performances helps to show that law is constructing firewalls through courts in the face of UNSC's political rationality, what constitutes part of this dissertation's core argument. If the theme is law, there must be some sphere that is able to process unlawful performance, especially in instances of a specific player that has vast powers and acts on very important themes. Considering the arrangement of global security, the question is precisely what kinds of measures actors can take when facing disappointment of expectations based on the UNSC's performance. If nothing can be done in reference to an expectation that was disappointing, it cannot even be called a normative expectation and, therefore, no kind of law can be found (concerning the notion of normative expectations, see Luhmann, 1998, p. 638), maybe, at this sphere, because political expectations of the major actors (the P5 states and their allies) are prevalent. These actors might also use their powers to guard predatory private agents of some other spheres such as the economy.

Since a lack of, or confusion regarding, adequate mechanisms can be noted, dozens of proposals regarding UN reforms have been already made to embrace the possibility of judicial review of the UNSC's acts by some organ.[60] In the context of

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[60] See, for example, (Alvarez, 1996), (Watson, 1993), (Bedjaoui, 1994, p. 55ff.), (Falk, 1994, p. 639), (Fassbender, 1998, p. 326), (Roberts, 1995, p. 312ff.). Comparing the ICJ's

reform of the international law system, for example, Habermas (2005, p. 240f.) argued that the ICJ could assume responsibility for defining the elements of an international crime and controlling the UNSC resolutions. To this author, the praxis of a jurisdictional organ would have been able to enforce international law against the sovereignty claims of states with “doubtful reputation” and, at the same time, fortify the autonomy of the UN against state monopolies of force. Habermas’ approach has a prejudicial bias concerning weak or poor States, according to which rich countries appear to be immune to its proposals. It also reflects the pretensions of those who seek the stability of an unequal political status between strong and weak international actors. The argument must be, however, carefully analyzed.

Authors such as Morgenthau (1948), Kelsen (1950), and Oosthuizen (1999) point out that, when invoking Chapter VII, the UNSC is acting without the chance of being analyzed by other institutional organs, or even unbound by law. However, the global security regime has legal structures responsible for implementing human rights to some extent and for reviewing acts committed during security situations, even if one considers correctly that many violations during security events have not been analyzed. Non-judicial organs, such as the United Nations Human Rights Committee, and Courts, such as the ICJ, are examples thereof.

In any case, since the pointed perspective observes the UNSC as a modern uncontrolled leviathan, in any adjudicatory process special rationale has to be developed and the legal sources must be enriched (considering jus cogens as a legal norm, for example) in order to firmly sustain a position asserting that the UNSC is not legally unbounded. That is to say, they have to shoulder a greater argumentative burden when stressing legal limitations to the UNSC’s measures; the Courts must always overcome theoretical hurdles in order to deal with legal themes touching on the UNSC.

Lockerbie case with *Marbury v. Madison*, thus analyzing it as a landmark in ICJ’s attributions, urging but not properly proposing a reform regarding *judicial review* mechanisms, see (Franck, 1992). A compilation of UNSC reform proposals, mostly by States, can be checked at (Alvarez, 1996; Fröhlich, Hüfner, & Märker, 2005, p. 18ff.).

In any case, mechanisms and structures with regard to UNSC judicial review can be understood as unsatisfactory because they could merely control abuses, albeit it in a very eventual form. They cannot block and prevent clear illegal actions; they do not have the concrete and institutional tools to prosecute powerful states, their people, and/or their organizations (such as security enterprises). In this sense, the processing of normative expectations and their maintenance has several deficiencies.

The fact that some actions can be seen as untouchable by the courts and, at the same time, that certain courts are already balancing the legality of them shows that this regime is experiencing a transitional phase; that is to say, its programs and, fundamentally, its structures are not fully implemented, and the political or economic power of particular actors is so huge that it attempts to block the legal examination of their actions. Silence about specific topics related to political authority is not exclusive of international alignment if one takes many state functions into account, especially if considering security situations: A war is usually ordered by States, even without the local parliament's authorization, as occurred in U.S. history in Kosovo, Bosnia, Haiti, Somalia, Grenada, Lebanon, and Korea, whereas U.S. courts repeatedly refused the exercise of judicial review in this milieu (Yoo, 2003, p. 427ff.). This work does not assume a teleological approach: There is no kind of guarantee arguing that the structures related to judicial review of security performances will be fully implemented someday in a global sphere.

Theoretically, the ICJ, the International Criminal Court (ICC), domestic, regional, and even ad hoc tribunals (such as the ICTY) have conditions to deal with events related to the legal security regime and, therefore, to impose restrictions on security actions or to compensate their damages.

This work has already mentioned the UNSC Resolutions 1422 (2002) and 1487 (2003), which are related to the ICC. The ICC has the ability, according to Article 5 (2) of the Rome Statute, to prosecute individuals for genocide, crimes against humanity, war crimes, and, probably from 2017 and on, the crime of

aggression, if nothing blocks the related norm.[61] Since the ICC is a permanent tribunal, the UNSC's political winds may touch on it merely in an indirect form, given the possibility of the UNSC to refer situations to the ICC, as already stated. The ICC may judge cases when crimes took place both at nonparties' and at parties' territory (for an overview, see Marler, 1999), possibly dealing with security themes related to the UNSC. It remains to be seen whether or not military actions endorsed by the UNSC's authority will be considered by the ICC. However, the relationship between the ICC and the UNSC will not be exhausted, as will be detailed in the next topic, because until now no mechanism of judicial review by the ICC, with regard to Security Council's actions could be noted in order to contribute to an explanation of the selectivity of this tribunal—a task that is not pertinent to this work. Currently, the ICC may be observed as one of the legal pillars of the nonstate realm capable of, in the future, adjudicate abuses related to the UNSC's performances if the legal infrastructure becomes solid enough for such a task.

Hereinafter cases involving judicial review and the UNSC's measures that embrace some local and regional courts' decisions will be demonstrated.

2.2.1 The UNSC and the ICJ

Another limits imposed by law, one of the societal spheres capable of restricting UNSC's political movements, to the UNSC may be perceived in ICJ's practices. The ICJ has already pondered UNSC powers[62] in cases when Article 38

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[61] See Resolution RC/Res.6, adopted by consensus at the ICC's first review conference at the 13th plenary meeting on June 11, 2010. To its applications' restrictions concerning the UNSC, see Annex III of this Resolution, entitled "Understandings Regarding the Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression."

[62] About the debate concerning the judicial control of UNSC Resolutions by the ICJ, see Cannizzaro, E. (2006, p. 191ff.).

(1) (c) of the ICJ Statute[63] and the UN Charter were connected. The ICJ's advisory opinions include "Certain Expenses of the United Nations" (1962), "Legal Consequences for the States of the Continued Presence of South Africa and Namibia (South West Africa) Notwithstanding Security Council Resolution 276" (1970), and the Lockerbie case (1992).

I accept the rationale of Michael Fraas (1998) in the sense that the UNSC and the ICJ are UN organs positioned at the same legal height, according to Charter's Article 7 (1), which means that they have its specific *functional* tasks, following the logic of other authors presenting a functional division of UN such as Koskenniemi (1995, p. 336). The ICJ is a jurisdictional organ in which litigants have several rights in a formal process, whereas the UNSC has wide discretion to implement its political decisions without observing rigid procedures or legal justifications. The ICJ's decisions in contentious cases bind the parties, whereas UNSC Resolutions under Chapter VI and the ICJ's advisory opinions do not. The ICJ can manage any central point of the disputes, while UNSC Resolutions under Chapter VII are directed only to maintain or restore international peace and security (Fraas, 1998, p. 112ff.):

> The relationship between the Security Council and the International Court of Justice is characterized by functional parallelism. In the exercise of their competences both organs must act in consideration of each other's interest, and not impede each other in their action. (Fraas, 1998, p. 255)

Following the rationale of the ICTY's Tadić case (*Prosecutor v Tadić* [IT-94-1-AR72), Appeals Chamber of the ICTY, Decision on the Defence Motion for Interlocutory-Appeal, 2 October 1995, at], para. 14ff.), it can be asserted that this functional role can be sustained by two main and interwoven arguments, one concerning the judicial character and other regarding the possibility of self-declaring its competences. When facing the question regarding whether it would be hierarchically inferior in comparison with the UN General Assembly, the ICJ stated in

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[63] "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . c. the general principles of law recognized by civilized nations."

the 1954 Effect of Awards of Compensation case:

> [T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgments cannot bind the General Assembly which established it. (…)
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body. ("Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J.," *ICJ Reports, 47*, 1954, 60–1 (Advisory Opinion of 13 July))

The ICJ is a judicial organ that observes itself as bearing typical juridical competencies. This means that it follows internal *modus operandi* which presents its own logic and does not toe the line of political (or economic, environmental, educational, etc.) rationale when deciding. This is also related to the Kompetenz-Kompetenz principle (i.e., familiar to the autonomy of courts in asserting its own legal competences). In a realm where the judicial powers of a certain judicial body is not precise, determining its own competence has to be seen as a major task to these courts (in this sense, see Judge Cordova, dissenting opinion, "Advisory Opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J.," *ICJ Reports*, *77*, 1956, p. 163 (Advisory Opinion of 23 October).

Observing the UN's legal structure, UN norms concerning the relationship between the UNSC and ICJ are erratic. Since the UNSC and ICJ exert their functions independently and autonomously, in different realms and without presenting a hierarchy, legal principles such as *lis pendens*, the principle of related actions ("Konnexitätsprinzip") and claim preclusion (*res judicata*) are not pertinent. Notwithstanding this functional parallelism, the organs must act harmonically to fulfill the UN purposes, to maintain its independency and to avoid mutual obstructions

(Fraas, 1998, p. 145). Functionalism implies, as it seems to me, a nonhierarchical form of dealing with diverse types of problems. Martenczuk (1999, p. 532f.) contends that there are no rules that could block an eventual simultaneous appreciation of some subject by the UNSC and ICJ, not bearing the UNSC the capacity of producing *res judicata*. As stated in the UN Charter, the UNSC has primacy over issues involving peace and security, but all UN bodies may help in the accomplishment of this purpose since the functional approach offers a good point of view with which to help to explain this.

Critical approaches arguing that a typical rule-of-law structure cannot be observed in the UN (which is correct), and that an "effective supremacy of the Security Council over the International Court of Justice and the UN General Assembly" (Neves, 2013, p. 61) exists as a fact that can be indeed observed in many situations, cannot adequately explain the existent complex communicational fluxes among several legal regimes that deal with same problems at this arena. Examples include the "conversations", in Neves' (2013) terms, between the UNSC legal regime and EC law and those between various UNSC resolutions and ICJ decisions. The Lockerbie case is the greatest example thereof in the ICJ since, in this case, it has been observed, although shyly, the UNSC Resolutions' lawfulness. In sum, there is some degree of legal concretization at this arena. It is true, however, that the legal structures are still being shaped, that a great asymmetry between law and politics exists, and that the state legal force seems to be stronger in face of these nonstate arrays, than would be recognized by Neves. But it seems that these asymmetries and the differences between statal and nonstatal arrays cannot block an investigation concerning the limits and capacities of nonstate legal forms.

Regarding UNSC resolutions, no legal problem can be *a priori* excluded from a judicial review before the ICJ, although the adjudicatory analysis cannot deal with central political issues. Martenczuk (1999, p. 531ff.) argues that the UNSC has the primary responsibility to promote international peace, but other UN organs, such as the ICJ, can contribute to this matter, which can be also confirmed by the Court's rationale in the Nicaragua case (Military and Paramilitary Activities in and against Nicaragua, *Nicaragua v. United States*, *ICJ Reports*, *391*, 1984, para. 434).

What is more, both ICJ jurisdiction in contentious cases and advisory opinions are permitted. In contentious cases it can occur only when the Resolution touches the legal relationship between the parties – a random state cannot question the ICJ,

and Fraas offers some hypothetical examples thereof (Fraas, 1998, p. 177ff.). Further, the United Nations cannot participate in the process as a claimant, although it must be notified of an eventual process (Art. 34 (3), ICJ statute) and must provide information to the ICJ when requested or submit information on its own initiative (Art. 34 (2), ICJ statute). In cases related to the advisory jurisdiction of the ICJ, both the General Assembly and the Security Council itself could, according to UN Charter Article 96 (1), request that the ICJ provide an advisory opinion concerning an already adopted UNSC resolution or a hypothetical resolution. It seems clear that the UNSC would hardly request an advisory opinion regarding its own resolutions (Fraas, 1998, pp. 147 ff., 184, 249). Article 96 was invoked, for example, in 1971 Namibia and in 1962 “Certain Expenses” cases.

Even though a sentence in contentious cases bind only the parties, and even though an advisory opinion is, by definition, nonbinding, the sentences are important to United Nations arrangement because they describe the valid law (Fraas, 1998, p. 185), having, thus, legal effects over the organization, constituting a source for future legal events within it and other legal provinces.

The judicial review is, however, restricted, because when acting under Chapter VII, the UNSC has a great scope of discretion to adopt resolutions and to qualify the situations as, for example, breaches of peace. The ICJ could merely control eventual abuses concerning whether the legal requirements to legitimize an action based on concepts such as a breach of peace are present or not; concerning a given specific situation, which must be grave and urgent, eventual judicial review may be restricted to a control of plausibility (Fraas, 1998, p. 256).

The International Court’s decisions and separate votes have already held that the UNSC’s performance is bound to the UN Charter’s provisions. Some arguments can be found in the ICJ’s decision in the case “Conditions of Admission of a State to Membership in the United Nations,” regarding the analysis of the UNSC’s political character concerning limitations to its exercise of power.

> The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.” (1948 I.C.J. 57, § 64, Conditions of Admission of a State to Membership in the United Nations. (ICJ 57, § 64, 1948)

As Mausama explains,[64] in this sentence two fundamental components of the legality principle can be observed: the existence of "higher norms" and the necessity of intra vires acting.

Insofar as UN political organs such as the UNSC were created by the UN Charter, its articles serve as criteria and boundaries for their actions. The decision thus stipulates that the Charter's norms are higher than any other norm of its organs, and that all decisions must be anchored in the Charter, hence an organ cannot act beyond its powers (i.e., the political movements cannot be ultra vires). Yet it seems that the hierarchical arrangement is presented too simply here because it does not adequately see the functional parallelism among the principal UN organs and the existence of other legal regimes. In addition, the international legal dogma is moving itself to the perception of different kinds of norms at the international arena.

In the Tadić case (*Prosecutor v Tadić* [IT-94-1-AR72), Appeals Chamber of the ICTY, Decision on the Defence Motion for Interlocutory-Appeal, 2 October 1995, at], para. 21), The ICTY presented a coherent interpretation of some ICJ decisions concerning the evaluation of the UNSC's and other United Nations' bodies resolutions. It was then argued that the ICJ does not recognize the review of UN bodies' decisions when invoking its primary jurisdiction, but only as a matter of incidental jurisdiction. The apparent incompatibility of two sentences of the ICJ Namibia Advisory Opinion is resolved with this differentiation. The first phrase is related to ICJ primary jurisdiction, whilst the rest of the paragraph (beginning hence with "the question of") concerns ICJ incidental jurisdiction.

> Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any

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[64] Mausama, 2006, p. 19.

> legal consequences arising from those resolutions. (“Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970),” 1971, ICJ, para. 89)

UNSC powers were also contemplated by the ICJ in the “Certain Expenses of the United Nations” case. Here, the court responded to the legality of certain resolutions of the General Assembly authorizing expenditures in the Congo and in the Middle East. The ICJ reaffirmed then that the UN Charter should be interpreted as a multilateral treaty among others and stated that the UNSC’s performance is limited by the Charter’s principles and purposes, but its actions have a presumption of validity, as those of a UN political organ: “when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization” (“Certain Expenses of the United Nations, Advisory Opinion of July 20, 1963,” *ICJ Reports*, 1962, para. 168.). Insofar as the political acts have a presumption of validity, there can eventually be decisions that are ultra vires or, in other words, the court may admit the possibility of existence of invalid acts.

After a terrorist attack involving a Pam-Am flight and the Scottish town of Lockerbie, and UNSC Resolutions 731 (1992), adopted under Chapter VI of the Charter, as well as 748 (1992) and 883 (1993), both of which were adopted under Chapter VII of the Charter, that imposed an economic embargo on Libya, there were two disputes in the ICJ between Libya and the United States and Libya versus the United Kingdom. These conflicts all basically revolved around the application of obligations of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. As I see it, these Resolutions were adopted in disagreement with the Charter’s Article 27(3), as the United Kingdom and United States were parties within the dispute, but this will not be discussed here (for this, check de Wet, 2004a, p. 349ff.), since they received practically the same judicial decisions as the first case that was brought before the ICJ. Against the United States’ claims, the Court admitted its competence to judge the legal quarrel between the two States, since there was a dispute on the application of the Montreal Convention between the parties, as well as disputes regarding the interpretation of Article 7 of the Convention (linked with the place of prosecution) and Article 11 (involving assistance in the relationship with criminal proceedings). The ICJ affirmed

that the binding UNSC Resolution 748 (1992) was adopted after the filing of the Application by Libya on March 3, 1992, and, according to its jurisprudence, the jurisdiction of the ICJ was established on the date upon which the Application was filled. The Libyan Application was, thus, considered admissible. It is important to carefully examine the order of April 14, 1992, in which ICJ stated that:

> Whereas, the Court, in the context of the present proceedings on a request for provisional measures, has, in accordance with Article 41 of the Statute, to consider the circumstances drawn to its attention as requiring the indication of such measures, but cannot make definitive findings either of fact or of law on the issues relating to the merits, and the right of the Parties to contest such issues at the stage of the merits must remain unaffected by the Court's decision;
>
> Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention. (Questions of Interpretation and Application of the 1971 Montreal Convention Arising From The Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States) (Provisional Measures) - Order of 14 April 1992, at para. 42).

It can be argued that here the ICJ recognizes its competence to eventually evaluate a UNSC Resolution by virtue of the sentence "at the stage of proceedings on provisional measures" and by virtue of the expression "prima facie" because they open the interpretation of an eventual analysis in other legal circumstances. It seems clear, if the ICJ understood that UNSC Resolutions were in no way subjected to its jurisdiction, that other words should have been used (in the same direction, see Fraas, 1998, p. 3ff.). In fact, the American argument that the UNSC Resolutions, due to the Articles 25 and 103 of the United Nations Charter, should have precedence over all rights and obligations related to the Montreal Convention was denied in the judgment. The ICJ also denied the protection employing provisional measures as requested by Libya, which were related to the prevention of the United States in

taking action against Libya, including coercing the accused subjects into a non-Libyan jurisdiction, which would be contrary to Resolution 748 (1992, para. 43ff.).

The ICJ held a procedural, temporal argument to refuse the U.S. application. Far from being an excuse to the appreciation of a UNSC resolution, it clearly also means that UNSC acts, even those adopted under UN Charter's Chapter VII, are subject to classic legal parameters.

After this ICJ order, the UNSC adopted Resolution 883 (1993), which practically repeated the earlier resolutions. Libya has altered some of its arguments. On February 27, 1998, the ICJ judged the preliminary objections of the plaintiffs. The Court then held the same basic, previous rationale, considering itself competent within the adjudicatory process. Again, the filing application date was crucial to the Court's decision ("Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie [*Libyan Arab Jamahiriya v. United States, 1998*]," para. 24). By virtue of other external events, there was no merits stage.

The ICJ's decisions can be viewed as one type of evidence regarding a social pretension that considers the existence of an unlimited political room to UNSC's acting unreasonable. In the cases of the Aegean Sea's continental shelf, Teheran hostages and Nicaragua[65], the ICJ held that the existence of political affairs surrounding a legal case do not block the possibility of judicial review, separating thus the political side from the legal sphere. In this milieu, the fact that some UNSC actions go against the Charter's provisions does not nullify the normative pretensions that can be claimed before institutional organs such as the ICJ, even if in an incidental way.

That brings the problem of the UN Charter's interpretation by its own organisms. It seems clear that, even when the produced interpretation cannot be

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[65] "Aegean Sea Continental Shelf (*Greece v. Turkey*), Jurisdiction, I.C.J. Report 1978, *3*, 13; "United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), I.C.J. Report 1980, *3*, 20; "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Jurisdiction and Admissibility, " *ICJ Report*, 1984, *391*, 435.

considered adequate, the particular body, be it the FAO or the UNSC, will never argue that its specific decision is contrary to the Charter. Consequently, although a wide Charter' interpretation can be made in every case by the UNSC, it is very hard—if not impossible, even for its members—to affirm that the UNSC can act against the limits ordered by its constitutional creator, namely the UN Charter. It would indeed be a grim twist toward the absurd if a proclamation by the UNSC were unbounded by its own constitution at the same time that it uses the prerogatives given by the UN Charter: nemo potest venire contra factum proprium.

This work does not assume that nonstate politics can be viewed as a fully differentiated system, nor that law at this sphere moves itself autopoietically, but it is crystal-clear that some fundamental decisions and norms aim to establish a limitation to political arbitrariness, the symbol of politics as a system (Luhmann, 2000, p. 141). The ICJ attempts to establish a classic distinction between arbitrariness and limitation, and, thus, between politics and law. The decisions try to make tangible an institutionalization of the arbitrary exercise of power control; in other words, it indicates a power limitation, as if international politics were a functional and differentiated system, referring to a constitution as the source, or at least as part, of its legitimacy.

The relationship between the ICJ and the Security Council also has an area in which it lacks understanding, most related to the enforcement of its decisions toward strong international actors. The Nicaraguan case is the clearest example thereof, for the United States repudiated its mandate to observe the ICJ decision concerning its actions in Nicaragua's Sandinista government: It has refused to participate in the merits phase of the proceedings or comply with the judgment ("Military and Paramilitary Activities In and Against Nicaragua," Nicaragua v. United States). In fact, the United States argued before the ICJ, just three days before the Nicaraguan application's presentation to initiate suit, that it would not view itself as responsible for any acts before the ICJ for two years on quarrels concerning actions in Central America, an argument refused by the Court (check a discussion at Cohn, 1985, p. 699ff.; 708ff.). United States has also vetoed resolutions in the UNSC about this issue before and after the judgment, as well as those Nicaragua brought before the entity that related to the UNSC's need to enforce compliance with the judgment in conformity with the Charter's Article 94 (2). In 1986, after the adverse ruling, the United States withdrew from the ICJ's general jurisdiction.

2.2.2 Other Courts and the UNSC

Perhaps awareness of the fact that the creation of a judicial, independent entity to prosecute suspects and punish those convicted of terrorist acts would disembogue in the assurance of basic legal grounds of judgment (as those of Article 14 of the ICCPR) that must be respected. In a nonstate arena, the Security Council chose to establish political administrative bodies to take care of these events. De Wet (2004a, p. 354ff.) suggests that the creation of an *ad hoc* tribunal related to the investigation of terrorist and state-sponsored terrorist attacks, with the power of extradition, would be an appropriate measure in order to maintain or restore international peace. Instead, the UNSC created some subordinated political bodies that it inserted within its own structure.

Also by virtue of the inexistence of express basic legal guarantees within this sphere, there have been cases in which domestic and regional Courts evaluated the legality of UNSC Resolutions in the face of other legal regimes. The establishment of the Sanctions Committee concerning Taliban, Al-Qaida, and associated individuals and entities by the UNSC Resolution 1267 (1999) is the main source of this recent phenomenon, probably due to the elevated number of parties targeted in the European Union zone in comparison with other UNSC Sanctions Committees.

The adoption of the Resolution 1267 on October 15, 1999, implemented under Chapter VII of the Charter, is connected with the movement of some organizations and networks situated in Afghanistan. The UNSC stated in the resolution's preamble that the Afghan territory was being used as a place to train and shelter terrorists and to plan terrorist attacks. The resolution portrayed Osama bin Laden and its associates as terrorists, arguing that the Taliban was protecting them, and established a sanctions committee empowered to adopt travel and arms bans and asset freezes, attempting, thus, to globally cover individuals and entities linked with these groups. The UNSC had already used sanctions as a political instrument in its resolutions, but it was the first time that they were directed at a nonstate actor. It is also important to note that sanctions should cover only resources "owned or controlled directly or indirectly by the Taliban" (Resolution 1267 [1999], para. 4, b). Therefore, the Committee's measures can be viewed as "target sanctions" because they are not actions against a role country, such has occurred against Haiti in the early 1990s through many UNSC resolutions, for example.

Resolution 1267 has been revised by many other successors, such as Resolution 1333 (2000), which expanded the air and financial embargos to incorporate the freezing of Osama Bin Laden and his related allies' economic resources funds; Resolution 1390 (2002), which included Al-Qaida in the sanctions regime; and Resolutions 1455 (2003), 1526 (2004), 1617 (2005), 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), 2083 (2013), and 2161 (2014).

Many scholars and UN politicians have criticized the listing process. Kofi Annan, then the UN Secretary-General, stated vaguely in 2005 that there should be the establishment of a special human rights rapporteur who would report "the compatibility of counter-terrorism measures with international human rights law" (Annan, 2005, para. 94) because the fight against terrorism should not compromise human rights grounds. Annan also mentioned that the "future sanctions regimes must also be structured carefully so as to minimize the suffering caused to innocent third parties — including the civilian populations of targeted States — and to protect the integrity of the programmes and institutions involved" (Annan, 2005, para. 110). In the subsequent World Summit Outcome, the General Assembly mentioned that the UNSC should ensure due process standards and grant humanitarian exceptions in the listing and de-listing activities (TheUNGA, 2005, para. 109).

In 2006, the United Nations Office of Legal Affairs commissioned a study by Fassbender which stated that the UNSC should respect human rights and fundamental freedoms of individuals and entities targeted with sanctions. It also stated that the parties affected by sanctions should be able to access the council, also because a member state has no authority to review the list names due to Articles 103 and 105, para. 1, of the UN Charter. Fassbender has stated that the UNSC should respect and guarantee rights linked with due process of law, such as:

> (a) the right of a person or entity against whom measures have been taken to be in- formed about those measures by the Council, as soon as this is possible without thwarting their purpose; (b) the right of such a person or entity to be heard by the Council, or a subsidiary body, within a reasonable time; (c) the right of such a person or entity of being advised and represented in his or her dealings with the Council; (d) the right of such a person or entity to an effective remedy against an individual measure before an impartial institution or body previously established." (Fassbender, 2006, para. 12)

Some of the already-cited resolutions were adopted in order to respond to the critics and to diverse courts' decisions on this regard, which will next be presented. Resolution 1730 (2006) created a focal point with which to receive delisting requests, being open to petitioners the submissions of a delisting demand without the sponsorship of their state's citizenship or residence. Resolution 1822 (2008) determined a review procedure for all listed persons or entities within two years and the publicity of the releasable reasons for listing on the UNSC website, also improving the way of notifying the listees. Resolution 1904 (2009) created the Office of the Ombudsperson, an officer accessible simply by e-mail and responsible for helping the committee when deliberating about de-listing requirements. Resolution 1988 (2011), complemented by Resolution 1989 (2011), has differentiated Al-Qaida (officially called the "Security Council Sanctions Committee established pursuant to resolutions 1267 [1999] and 1989 [2011] concerning Al-Qaida and associated individuals and entities") and the Taliban (officially named "Security Council Sanctions Committee established pursuant to resolution 1988 [2011] concerning the Taliban and associated individuals and entities constituting a threat to the peace, stability and security of Afghanistan") sanctions regimes, creating thus two distinct Committees. The problems related with this splitting, which at a first glance could be observed as a correct undertaking due to the actual differences between Al-Qaida and the Taliban as groups, will be further discussed. Resolution 2083 (2012) specified the conditions for labeling an individual or entity linked to Al-Qaida as subject to an asset freeze, arms embargo, and/or travel ban. The Security Council Committee, by dint of para. 36 of Resolution 2161 (2014), has opened the narrative summary of reasons for all listees on its website at the same time a provision related to Resolution 1822 (2008) was added. Notwithstanding the changes, the committee still has deficiencies concerning the respect for fundamental rights and for the due process of rights.

The Sanctions Committee's listing process proves that the UNSC's resolutions are able to bind not only states, which remain crucial in the task of implementing resolutions, but also citizens, groups, and organizations, including economic enterprises. The financial sector, for example, is currently in contact with the UNSC in order to freeze the assets of specific individuals or organizations without needing a national legal basis in order to accomplish such a task. This wide binding effect can be also perceived in international treaties regarding human rights

and even the UN Charter itself. Private agents are being, hence, progressively affected by global norms coming from dissimilar entities that are connected with very diverse, specialized regimes, the presence of conflicts involving private law, state law and nonstate law being possible.

The great powers given by the UNSC to its sanctions regime has been confronted with some legal decisions. What it is interesting here is that, so long as fundamental rights—such as the right for appeal—were not in effect, the individuals recurred to regional courts to have their rights guaranteed. In this milieu, the diverse decisions foster legal problems that demand a constitutional conversation, as stated by Neves (2013, p. 144ff.). Here it is important to note that this notion also embraces conversations involving bodies other than courts. The difference here is that no kind of typical legal court can be found within the UNSC legal regime, and the overlapped decisions of different functional sectors concerning one single fact are observed.

Furthermore, the hierarchical legal pattern is complex. A state must simultaneously observe the UNSC Resolutions that were adopted under Chapter VII and the decisions of its domestic and regional courts. The UNSC cannot control courts' decisions, especially those coming from regional courts, on the one hand. On the other hand, a regional court has no power to impose changes on the legal UNSC regime. Notwithstanding these facts, there are legal entanglements here that have originated from legal problems linked with an identical state of affairs. This kind of intricate formation is not an exclusivity of this arena. The state legal orders are often presented as being rigidly hierarchical, but, given the constant presence of interwoven legal spheres, in fact they form heterarchical arrangements. A legal theory observing functional hierarchies might explain these displays.

The allegations brought before domestic and regional courts and also before UN organs normally stated that the name of the complaints were placed on the Sanctions Committee list (also known then as the "Consolidated List") in a way that violated several rights, such as the right of free movement, the principle of the legality of penalties, the principle of the presumption of innocence, and the due process of law. Representative cases that are linked with European Courts will be discussed at a later point in this dissertation.

To put into effect Resolutions 1267 (1999) and 1333 (2000), the Council of the EU implemented Council Regulation 881 (2002), which asserted that the funds owned by individuals or entities mentioned on UN Sanctions Committee list should

be frozen. Resolution 881 (2002) was based on Articles 60, 301, and 308 of the Treaty Establishing the European Community.

In this milieu, the case involving Nabil Sayadi and Patricia Vinck and Belgium within domestic courts and on the UN Human Rights Committee (UNHRC) is remarkable. Here, Vinck and her husband claimed before the UNHRC that Belgium has violated many articles within the International Covenant on Civil and Political Rights (ICCPR). The couple was included on the list mandated by Resolution 1267 after a three-month criminal investigation initiated by the Belgian Public Prosecutor's Office. It concluded that that they were director and secretary of an organization linked to an American association already listed by Sanctions Committee. In accordance with the UNSC's decision and EU and Belgian legislation regarding the implementation of UNSC resolutions, Vinck's and Sayadi's assets were frozen and were placed under an international travel ban. Until then, they have not been convicted or prosecuted of the allegations in Belgium.

Vinck and Sayadi tried to remove their names from the list administratively, contacting executive entities, including the Belgian prime minister, the European Commission, and the United Nations, without success in 2003. Since they argue that they had "relevant information" to present, they received a judicial decision from the Brussels Court of First Instance in 2005.[66] It ordered that Belgium conduct a delisting procedure within the UNSC Sanctions Committee, but it only did so after the imposition of a daily fine of € 250, because, in a first moment, Belgium remained inert. The Judge's Chambers of the Brussels Court of First Instance, in a decision on December 19, 2005, also upheld the claimants' innocence after three years of criminal investigation. As there were no appeals, both decisions are final (for this, see also UN Human Rights Committee Decision [CCPR/C/94/D/1472/2006]).

The UNHRC found itself competent to consider the case, even though it could not decide on questions concerning legal diplomas beyond its legal capabilities (e.g., the UN Charter). Hence, the analysis was about the State conduct to implement a

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[66] Tribunal de Première Instance de Bruxelles (Brussels Court of First Instance), Fourth Chamber. Nabil Sayadi and Patricia Vinck v Belgium. Judgment of February 11, 2005.

UNSC resolution in the face of ICCPR (CCPR/C/94/D/1472/2006, Para. 10.6), rather than the UNSC's conduct itself. The UNHRC concluded that Belgium was responsible for the illegal listing of the couple because the two had not been heard (i.e., they did not have the opportunity to give to the State "relevant information"), their presumption of innocence likewise being violated, breaching Article 14, Para. 2, of the Covenant (CCPR/C/94/D/1472/2006, para. 3. 4). The UNHRC also decided that Belgium should have to take all measures within its powers to contact the UNSC in order to remove their names from the list as soon as possible, as well as to publicize the removal requirements, compensate them for its action, and to prevent future illegal actions (CCPR/C/94/D/1472/2006, para. 12).

Again, Belgium was condemned by three different instances, but the decisions have no impact with regard to the UNSC list or the unfreezing of the assets in question. The UNHRC, which is not a tribunal, neither analyzed the UNSC resolutions directly nor has said something about its listing procedure. However, when a central UN entity declares the illegality of a state measure, originally taken in order to implement a UNSC resolution and in accordance with the European legislation, the event shall not be undermined. In fact, it was at that time a clear political message coming from an entity responsible for taking into account human rights violations at the UN sphere to the UNSC, in the sense that the actions concerning the war against terror during the Bush administration, which was in conflict with the UNHRC at that time, were incurring serious breaches of law. Legally, it has pointed out to states and the UNSC itself that legal parameters should be followed in order to maintain respect for human rights during security events.

The second case is different, given the fact that it involves typical legal decisions coming from courts. Cited on the "terrorist" list, Yassin Abdullah Kadi and the Al Barakaat International Foundation requested the annulment of Council Regulation 881 (2002) before the European Court of First Instance (CFI) and, subsequently, the European Court of Justice, claiming that violations regarding the right to be heard had occurred (which is cited, for example, in Article 41 of the Charter of Fundamental Rights of the European Union), the right to property in its procedural dimension, and the right to a judicial review, a case known as Kadi I, as there was another later case related to this claimant.

In the Kadi I judgment, the CFI stated that all international obligations were to be subordinated to the Charter's Article 103—thus, also, to the UNSC's resolutions,

being jus cogens the exemption. In this sense, the UN Charter was observed as hierarchically superior to the EU treaties, and the UNSC should observe jus cogens fundamental principles. This court also considered that it has no legal capacity to judge the legality of the UNSC measures vis-à-vis fundamental European rights, to check the veracity of the facts alleged by the UNSC or to control UNSC acts in general (Court of First Instance, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [Case T-315/01], 2005, paras. 219ff., 284 and 285). The CFI argued, however, that it has the jurisdiction to indirectly measure the lawfulness of a UNSC resolution in the face of jus cogens, then comprehended as "a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible" (idem, Summary of the Judgment, para. 5). Nonetheless, due to its argued capacity to evaluate the UNSC's acts, the CFI understood that no jus cogens violation could be found in the specific case.

The CFI's decision was confusing since it has not coherently defined the relationship between international law and EC law, referring sometimes to the prevalence of the UN Charter over EC law and sustaining in other passages that the community is not bound by the charter. Some sentences were related to a dualistic view of EC law and others were linked with a monist approach concerning EC law, a fact that can also be seen when it asserted jus cogens' prevalence. In this sense:

> Most of the references to the international legal order are, however, inconclusive: the conclusion that the CFI cannot review even indirectly the lawfulness of Security Council Resolutions could result from the fact that the CFI considers itself as hierarchically inferior to the UN system/international law, hence a monist view; or it could mean that it considers the legal orders simply as separate and therefore not competent to judge, even indirectly, on the lawfulness of the Security Council Resolutions. Thus the reasoning of the CFI contains an eclectic mix of dualist and monist approaches to the relationship of international and national law – possibly with regard to different sources of international law, as a differentiation between customary international law and treaty law as a part of national law is a common one among states; but the CFI is not clear in this respect. (Ziegler, 2009, p. 292)

The appellants alleged before the European Court of Justice, again, the infringement of fundamental rights and the incompetence of the EC in imposing the

cited regulation, but this last argument was dismissed. The United Kingdom also presented a cross appeal, arguing that the CFI had no jurisdiction to judge a UNSC resolution based on jus cogens.

The CFI's recognition of jus cogens as being hierarchically—in legal terms—in the face of the UN Charter and all international obligations is, according to de Wet (2008, p. 2004), of no great significance, for the small number of jus cogens norms already recognized as such has as consequence that international institutions are not inserted in a strong "cosmopolitan accountability model", and that individuals have gained very few things with such recognition. Her skeptical perspective, however, does not properly appreciate that the CFI did not take into account basic legal standards (due process of law, for example) as being part of jus cogens, precisely because De Wet herself does not understand jus cogens as encompassing this kind of fundamental legal norms. It might be said, again, that jus cogens or any other legal norm exist in extant configurations in a complex hierarchical scheme. In fact, overlapping, heterarchical arrangements in which functional hierarchies are present can be noted.

On appeal, also influenced by the Opinion of the Advocate General Maduro, the ECJ overruled the CFI's decision: It annulled Council Regulation 881 (2002), accepting the claims concerning a violation of the aforementioned fundamental rights—due to the close relationship regarding its arguments, Kadi's case was joined with another. The court, however, maintained the regulation's effects for three months, permitting a procedural correction and a subsequent re-listing process throughout this time. In a consistent dualistic approach, the ECJ understood that EC law was an autonomous legal order. Hence, an alleged prevalence of commitments of the member states within the international arena, which could dismiss internal EC judicial review, was viewed as not related to this legal regime, though the considerations mentioned that the EC must respect international law. To the ECJ, respect does not mean deference to international agreements, even when a Regulation is attempting to give an effect to an UNSC Resolution, however:

> 284. It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 73 and case-law cited).

> 285. It follows from all those considerations that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. (*Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*. Joined cases , [C-402/05 P and C-415/05 P. Judgment of the Court (Grand Chamber) of 3 September 2008,], para. 284 and 285).

By the ECJ's dualistic position, therefore, against the CFI, it was stated that the EC can review EU regulations related to the implementation of the UNSC resolutions, and that this ruling must be made in accord with fundamental and human rights of the European community law. Due to its strict dualistic approach, though, the relationship between EC law and UN law remained unclear regarding the question of whether the UN Charter's Article 103 is or is not directly applicable in EC law by virtue of Article 307 of the EC Treaty, a norm related to pre-1958 international agreements (Ziegler, 2009, p. 293).[67]

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[67] Article 307, EC Treaty:

> The rights and obligations arising from agreements concluded before January 1, 1958, or, for acceding states, before the date of their accession, between one or more member states on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this treaty.
>
> To the extent that such agreements are not compatible with this treaty, the member state or states concerned shall take all appropriate steps to eliminate the incompatibilities established. Member states shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
>
> In applying the agreements referred to in the first paragraph, member states shall take into account the fact that the advantages accorded under this treaty by each member state form an integral part of the establishment of the Community and are, thereby, inseparably linked with the creation of common institutions, the

The jurisprudence concerning the responsibility of European states in the face of obligations assumed in other legal spheres also has its roots in other European courts, even if observed that the decisions' legal basis are not identical. For example, the European Court of Human Rights (ECtHR) held in *Matthews v. United Kingdom* (Application no. 24833/94, Judgment of 18 February 1999) that, given that the European community was not a party of the treaty, it could not judge on its performances, but it was possible to assert states' responsibility even when a state transfers its duties to international entities; states are, hence, responsible for the outcomes of their actions that are linked with international organizations in the face of European human rights treaties. Other decisions developed the 'equivalent protection" doctrine; for example, *M & Co v. Federal Republic of Germany* (Application 13258/77, Decision of 9 February 1990, at para. 145).

The Kadi I case shows two forms of observing the international legal order. On the one hand, a given court can understand that there is only one single global system, thus judging any kind of rule based on fundamental grounds such as jus cogens—as previously explained, the CFI rationale was fragile when issuing it. On the other hand, a given court can observe the presence of several legal sectors that communicate with each other, and rule based on the legal sources of its regime. Both decisions remark upon the possibility of assessing the lawfulness of a UNSC resolution, and open the possible construction of a *Solange II* argument within the EC legal sphere, related with non-European entities and international treaties that have been signed by European states. In a sense, the principles and rules of a given legal order might be observed as another limit to UNSC's political and legal movements.

In *Othman v Council of the European Union* (Case T 318/01. *Othman v Council and Commission*. ECR [2009] II 1627. Judgment of 11 June 2009) and in the joined cases involving *Bashir Mohammed Al-Faqih and Others v Council of the European Union* (General Court (Second Chamber). Joined cases T 135/06 to T

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conferring of powers upon them, and the granting of the same advantages by all of the other member states.

138/06. *Bashir Mohammed Al-Faqih and Others v Council of the European Union*. Judgment of September 29 2010), the European Court of First Instance (already designated, following the change implemented by the 2009 Lisbon Treaty, as "General Court" in the *Al-Faqih and Others* case) trailed the Court of Justice's rationale in Kadi's case to declare the infringement of the right to property, the right to be heard, and the right to effective judicial review when analyzing the European Regulation 881 (2002), thus declaring void the parts of this norm affecting the applicants.

The leading case of Kadi and the other European courts' decisions must be faced carefully, however. There is, in this moment, no solid jurisprudence concerning a judicial analysis of the implementation of UNSC Resolutions in other fora than the EC and in events aside from the UNSC Sanctions Committee; furthermore, not every decision held the unlawfulness of UNSC resolutions in this milieu. There are, at this moment, several UNSC sanctions regimes, but only the "Consolidated List" (e.g., as explained, the list related to individuals and entities connected with Taliban or Al-Qaida, a regime that was split into two separate regimes pursuant to Resolutions 1988 and 1989) was attacked by European Courts in cases involving its citizens, and only this sanctions regime has an Office of the Ombudsperson (created by Resolution 1904 [2009]) responsible for helping the sanctions committee to delist requests.

An illustration thereof can be found in some other legal instances. In Behrami and Bosphorus Airlines cases, the ECtHR has decided distinctly.

In 2007, within the Bosphorus decision involving the ECtHR, the international cooperation was underlined to confirm the lawfulness of an EC regulation implementing sanctions determined by a UNSC resolution. The case is linked to the Irish government's seizure in Ireland of a Yugoslavian aircraft leased to the Turkish enterprise Bosphorus Airways. The Irish act was adopted pursuant to EC Regulation 50, a norm established in order to implement UNSC sanctions against Yugoslavia. The "equivalent protection" approach was affirmed; that is, the court stated that there should be some mechanisms at the non-Convention sphere offering similar (not identical) legal safeguards in comparison to European Convention on Human Rights (ECHR) protection standards. The equivalency of the non-ECHR protection's system would be presumed, admitting disproving. In Paragraph 157, the decision considered that the "equivalent protection" doctrine would only be applicable if states exceeded

their mandate of implementing a measure ordered by an international organization, differentiating itself here from Germany's Solange principle. Anyhow, it was considered that EC law was ruling the situation, stating that this protection's regime offer is equivalent to the one arising from the ECHR (for more, check Costello, 2006, p. 99ff.; Wildhaber, 2005). [68]

In *Behrami and Saramati v. France*, Germany and Norway joined cases[69], the ECtHR dismissed its jurisdictional competence *ratione personae* of the claimants, stating that the immediate responsibility for the actions were not the states in charge, but, ultimately, the UN since the states were merely inserted into the UN arrangement pursuant to UNSC Resolution 1244 (1999). The UNSC had control over the troops and was liable for the actions. According to the ECtHR, any time a given European state transplants its sovereignty to an international organization, there is a strong presupposition that the rights are under protection within the supra European entity. In this sense, a Solange II-like justification was proclaimed to assert that a European court should only intervene if the other legal regime revealed itself to be clearly deficient in comparison with European legal protections' system, thus a decision that trailed Kadi's rationale. According to the tribunal, the UNSC had a unique range of powers and rights pursuant the UN Charter that should be maintained in order to preserve its mission, being inadequate to establish conditions to the implementation of a resolution not present in its text. The very similar case—*Beric v. Bosnia and Herzegovina* (46 EHRR SE6)—followed this decision when negating the admissibility on *ratione personae* grounds. Behrami's decision is inconsistent in some points, however. It does not take into account the fact that a state and an international organization can be simultaneously liable for an action, and, as this author sees it, that the transference of powers to an international

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[68] European Court of Human Rights. Grand Chamber. Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland. Application no. 45036/98. Judgment of June 30, 2005, para. 156, 158 and 166.

[69] *Behrami v. France*, application no. 71412/01 and *Saramati v. France, Germany and Norway*, application no. 78166/01 (Admissibility), (2007) 45 EHRR SE10 85.

organization carry the burden of receiving an equivalent protection within the international sphere. The principle of the "effective control" of a given measure was not correctly observed, since K-FOR was indirectly responsible, if not with regard to Behrami's situation, at least with regard to Mr. Saramati's actual internment (Messineo, 2009, p. 39ff.).[70]

In 2005, Yusuf case (thus before the above-mentioned cases), also linked with UNSC sanctions against Bin Laden, Taliban and Al-Qaida, in the context of EC Regulation 881 (2002), the European CFI rejected a direct judicial review of an UNSC resolution, but stated that it could indirectly analyze its eventual lawfulness in face of jus cogens. The claimed violation of fundamental rights, however, was not observed, since the CFI understood that the measures conducted by the UNSC to dry up terrorism's financial resources respected human rights grounds[71]. In the Nada

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[70] *Behrami v. France*, application no. 71412/01 and *Saramati v. France, Germany and Norway*, application no. 78166/01 (Admissibility), (2007) 45 EHRR SE10 85, para. 145, 148, 149. For a critical exploration of the quarrel involving effective control, overall control, and "effective overall control, all of which are crucial to the debate concerning international responsibility associated with ICJ, ICTY, and ECHR decisions, check (Talmon, 2009, p. 497ff.).

[71] The court held that

> Any review of the internal lawfulness of Regulation 881/2002 would therefore imply that Court is to consider, indirectly, the lawfulness of those resolutions. None the less, the Court is empowered to check, indirectly, the lawfulness of such resolutions with regard to jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derrogation is possible. (Court of First Instance [Second Chamber, Extended Composition]. Case T-306/01. *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*. Judgment of September 21, 2005, Summary, para. 6).

It continued:

> the freezing of funds provided for by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, as amended by

case[72], the Swiss Federal Court held that, notwithstanding problems with regard to human rights involving the listing and delisting procedures in the UNSC Sanctions Committee, the name of the applicant should not be removed from the list, since the UNSC sanctions regime should not be attacked given the importance of the war against terrorism. De Wet (de Wet, 2008, p. 2003ff.) observes this decision as a copy of the CFI's rationale in the Kadi and Yusuf cases, as giving precedence to the UN Charter's Article 103, which embraces UNSC resolutions over all other international obligations, excepting *jus cogens.* On appeal, the European Court of Human Rights judged that the fundamental rights of Nada were violated.[73]

A common question pertains to asylum law and the implementation of the UNSC's Resolutions. For instance, the UK Court of Appeals dealt with the question of whether an Afghan whose life was at risk in Afghanistan should or should not receive asylum in the UK. The Secretary of State argued that the involvement of this man with Jamiat-e-Islami, the Taliban and Hizb-e-Islami was contrary to the UN Charter's purposes and principles and that acts against forces created by a UN Security Council Resolution (in case, the ISAF) also constitute acts contrary to the Charter's purposes and principles. In this sense, it can be argued that implementation measures related to the UNSC's resolution were observed as taken

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> Regulation No 561/2003, and, indirectly, by the resolutions of the Security Council put into effect by those regulations, does not infringe the fundamental rights of the persons concerned, measured by the standard of universal protection of the fundamental rights of the human person covered by jus cogens. (para. 8)

[72] *Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft*, BGE, No. 1A.45/2007, November 14, 2007, available at http://www.admin.ch/ch/d/sr/sr.html, Accessed on August 8, 2015.

[73] European Court of Human Rights. Case of *Nada v. Switzerland*. Application no. 10593/08. Judgment of September 12, 2012.

in consonance with the Charter's purposes and principles. Consequently, by the determinations of the Terrorism Act of 2000, it was claimed that the man should be excluded from the 1951 Refugee Convention under Article 1F(c). The Court decided that actions against ISAF forces could eventually not constitute acts against the UN Charter's purposes and principles, depending on the concrete situation. The case was sent to the tribunal, which should better investigate the extension of the facts (Court of Appeal, December 10, 2010, Secretary of State for the Home Department v DD (Afghanistan) [2010] EWCA Civ 1407); (Pill, 2011).

There are also some judgments outside of Europe. The case *Abdelrazik v. Canada*, judged by the Federal Court of Canada, represents an interpretation of UNSC resolutions regarding the meaning of a travel ban and the conduct of Canada in order to give applicability to the resolutions. Neither the resolutions' lawfulness nor the procedures for listing were the focus of the adjudication, notwithstanding the severe criticism directed toward them. In a monistic way, the court combined fundamental international rights to the Canadian constitution to hold that Canada infringed upon its own constitution because it did not offer conditions to the return of the claimant to its homeland, a situation that would not violate the travel ban imposed by the UNSC's 1267 List. The Canadian court compared the situation of the applicant before the UNSC to that of Josef K. in Kafka's *The Trial* (para. 54), as his inclusion on the 1267 list was made, according to the Canadian court, based only in beliefs and violations of international human rights. What is more, the Canadian Judge Zinn determined an exception to the freezing of the claimant's assets that was not literally existent within any UNSC resolution (Tzanakopoulos, 2010, p. 6). Hence, notwithstanding its competencies' limitations, this decision has shown another possibility of reviewing and judicially interpreting the terms of the UNSC's resolutions, such as Resolution 1822 (2008) (especially para. 1, b) and Resolution 1267 (1999).

U.S. federal courts have already decided on cases involving the proceedings that lead to the designation of persons or entities in the United States as supporters of terrorism, a domestic legislation related to the aforementioned UNSC resolutions. In *Kindhearts for Charitable Humanitarian Development v. Geithner,* 647 F.Supp. 2d 857 (N.D. Ohio (2009), the Court found that blocking corporate assets infringed upon a nonprofit's Fourth Amendment rights and statutory rights pursuant the Administrative Procedures Act. In *Al-Haramain v. U.S. Dept. of Treasury, 585*

F.Supp. 2d 1233 (D. Or. (2008), the court held that an Oregon regulation concerning due process rights was violated due to the way in which the state froze assets and listed an entity. In the case of *People's Mojahedin Org. of Iran v. U.S, 613 F.3d 220, 225 (D.C. Cir..* (2010), the court decided that a given organization should have the right to contradict proposed listing because the State is obligated to provide unclassified information that grounds its listing procedure to the affected organization before listing it.

According to the Monitoring Team Reports of the UNSC Al-Qaida Sanctions regime (United Nations Security Council, 2014), the Supreme Court of Pakistan did not yet decide an appeal presented by the Pakistan government to overcome a contrary decision in 2003 that related to an action brought by the Al Rashid Trust (QE.A.5.01) that challenges the application of UNSC sanctions against it. Another similar case involving Akhtar Trust International (QE.A.121.05) has not yet been judged before a lower Pakistani court.

Final Remarks: Security Council and Courts

From the presented cases before the ICJ and other courts, the question addressed must be *how* the UNSC's resolutions can be considered, instead of *if* they can be the object of settlement before tribunals.

Thus, the appreciation of UNSC resolutions and the changing of the UNSC legal system can be better analyzed. First, diverse courts gave legal arguments related to the possibility of evaluating a UNSC resolution, even if indirectly and also in the cases where the legality of UNSC resolutions was proclaimed. Concerning Al-Qaida Sanctions Committee judicial evaluations, many problems arise from these decisions to states at both municipal and nonstate arenas, since domestic executive entities cannot go against its own court's decisions without paying severe institutional and political costs with regard to its population and adjudicate bodies, nor can they firmly base a given explicit violation of its international responsibilities on its domestic tribunals' rationale. They cannot, in principle, disregard a UNSC resolution and breach its international legal obligations with the United Nations' legal regime, which may also lead to the UNSC's censuring measures–what is more, isolate states bear no legal powers and competencies to modify a given security council's decision at the UN sphere.

> In any case, potential annulment of the domestic implementing measure forces upon the state(s) a breach of their international obligations under the Charter. And of course states cannot justify their breach of an international obligation by relying on their obligation to comply with their own courts' judgments, nor can they rely on any other justification under domestic law, even if this is of constitutional rank. (Tzanakopoulos, 2010)

Secondly, at least at its Sanctions Committee, pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities, the UNSC legal system has changed due to external pressures coming from scholars and courts, as shown, and from social movements actors, as will be further detailed. If the UNSC were omnipotent, and if its legal regime were so impenetrable in the face of other types of communication, then the first, quasi-despotic rules of these target sanctions, which were clearly against the very basic fundamental rights and against procedural and material principles of due process of law, would have not been changed. This demonstrates that legal communications cognitively irritate the political side of UNSC, and its legal side was pressured to change itself in views of other juridical communications coming from arenas that was practically making some of its fundamental rules ineffective.

To refute the idea of one or more transversal constitutions in the international arena, Neves (2013, p. 61ff.) points out that international public law is subordinate to politics settled by "major world powers," a situation comparable to instrumental (semantic) constitutions, and symbolic (nominalist) constitutions. Nominalist nonstate legal orders were explored in greater detail by Fischer-Lescano (2005). Here, flowing systems theory, the international public law is a kind of law where politics rules. There are, by these views, high asymmetrical relations between law and power in a global arena. Notwithstanding the fact that a constitution of this type at this arena cannot indeed be observed, as will be afterwards discussed, Neves claims—concerning the rhetorical use of human rights by the UNSC to intervene and its political force in the face of other global or domestic arrangements—seem to hinder the fact that fundamental, global human rights placed at diverse regimes are being used to block UNSC or major states' political pretensions, leading also to changes within UNSC's legal provinces. This does not mean, however, that the simple existence of legal texts will result in the restriction of the political rationality. Quite to the contrary, this work has affirmed—from the beginning—the prevalence of political

maneuvers in many situations and aims to demonstrate societal and legal forces struggling to limit the political arbitrary.

The role of scholars is not to set out aprioristically what kinds of measures states and international entities should take in order to resolve legal and political problems, such as those described here. Inversely, we can now observe how states and nonstate actors are moving and dealing with problems and analyze the perplexities arising from these novel movements. A certain degree of uncertainty is indeed normal and supportable in a modern legal system, based on systems theory. Adjudications and relations with dissimilar legal systems, bearing them official tribunals or not, will still produce new legal communications that cannot be mechanically predicable on the basis of the current legal structures (such as the contemporary courts) and programs (domestic laws, international treaties, private agreements, etc.).

Domestic or regional courts are open to examine the measures taken in order to implement resolutions of the UNSC (possibly making the resolution ineffective) or even the resolutions themselves in some cases. What remains to be seen is how the lack of due process of rights in the regime will be appreciated and connected with Resolutions 1267 and 1989, a situation that remains in many legal domains notwithstanding the establishment of the ombudsperson. In fact, at least three clear situations with respect to problems involving fundamental rights' violations can be observed. First, the open-ended character of individual listings, severely criticized by the United Nations High Commissioner for Human Rights (Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, [UN.Doc.A/HRC/12/22]), remains. Secondly, when requesting delisting, individuals and entities have the burden to prove a negative. Finally, there is still no *judicial* mechanism within the UN arena that is manifestly empowered to judge UNSC misconduct.

What is more, whether and how domestic, international, or regional courts will deal with the outstanding shortcomings of fundamental rights related to another sanctions' regimes of the UNSC, such as the legal dispositions of the Taliban Sanctions Committee, is also something to be appreciated from now on. As shown above, Resolutions 1988 and 1989 (2011) has bisected Al-Qaida and the Taliban sanctions regimes in two diverse arrangements, thus creating two distinct committees. The greatest problem within this splitting is that, while the Al-Qaida

sanctions regime has been changed in order to follow fundamental patterns of due process of law and fundamental rights, the Taliban sanctions regime does not have many of its basic legal safeguards—for example, the figure of an ombudsperson. More than providing a response to the Afghan government when differentiating the Taliban from Al-Qaida, the inexistence of courts' adjudications concerning sanctioned persons involved with the Taliban seems to one of the explanations to the committee's division and to the legal treatment concerning both sanctions regimes. In this sense, without communicative inputting coming from protests and social movements, from political arenas, and from the fragmented world legal system, UNSC's regime does not seem to be inclined to establish crucial changes.

A monistic view of the global legal system cannot coherently deal with the idea of couplings between diverse normative regimes because it does not recognize the existence of multiple sources shaping different systems that must address with the same problems (Neves, 2013, p. 80). Theoretically speaking, the traditional dualistic perspective cannot either deal with the problem of diverse legal sources, since the normative openness is not regarded as something actually possible. Monistic views seem to, at the end of the day, understand the supremacy of domestic law in the face of other sources (Galindo, 2001, p. 28)[74] or, as shown by the ECJ decision in Kadi's case, to comprehend its own order as, if not hierarchically

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[74] This author, however, is not very precise in his understanding of Anzilotti's dualistic theory, since Anzilotti does recognize the existence of more than one single legal system at the same horizon. As a judge, he affirmed that the court might analyze a problem from the perspective of a given legal arrangement, not denying with this the existence of other legal systems or affirming that the municipal order prevails. For this, see his vote in the PCIJ Advisory Opinion on the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Series A/B, p. 63, with regard to Article 38 of the Statute. His position has been maintained throughout his life: See Anzilotti (Anzilotti, 1955, pp. 53ff., esp. 56ff.; 1957, pp. 193ff., esp. 203).

superior, in an a priori way, at least as prevalent vis-à-vis the given concrete case, notwithstanding some of the decision's sentences concerning the importance of UN law – a court's affirmation of its own identity when judging a case is plenty normal, but is not sufficient to describe the multiple, global legal phenomena.

The relationship among orders in the global arena seems to be consistently explained by the analysis of Neves. Neves (2013, p. 80) follows Luhmann (1993) when considering that there is only one functional legal system in the world society, which reproduces itself based on the lawful/unlawful code and that bears no substantial content. The configuration of this system, given that it is not grounded in a single basic norm forming a hierarchical structure, but in the unity of the difference of its contentless code, makes possible the existence of diverse criteria coming from different sources, each of which affirming its identity in the internal processing of the legal binary code. Paradoxically, as a result of the normative closure of the legal orders, they are capable of cognitive learning and of normative couplings with another order when they face other court rulings, occurring in what Neves calls "normative learning," a notion that seems to provide a better explanation of the relationship between legal orders in comparison with the concept regarding a mere collision between regimes, a notion that Fischer-Lescano and Teubner (2004) based on an accurate diagnosis of the situation concerning legal conflicts within the world society but that does not bring to light the possibility of learning and the construction of new norms within this process.

> In other words, starting simultaneously from normative texts and common cases it is possible to construct different norms considering the possible processes of concretisation that will develop in the colliding or partner order. (Neves, 2013, p. 81)

This learning process between two or more legal regimes in processes of concretization can be proved clearly within the different spheres of the European courts, as seem in Behrami, Bosphorus, Kadi, and cases related to domestic tribunals, since they cite each other constantly in similar cases; that is, in cases when the relevant legal core is quite similar; the UNHRC, a nonjudicial entity, also refers to several court decisions. This cannot be noted in other cases, however: For example, the Canadian Federal Court has mostly referred to its own jurisdiction, rather than the cited European decisions or American courts' precedents on a very similar matter. The Canadian Court, anyway, cited many international legal sources,

such as UNSC resolutions, General Assembly resolutions, and also a decision of the Permanent Court of International Arbitration concerning the effective remedy to the existent situation in Paragraph 159.

The discussion revolves around legal learning processes by regimes. The change of UNSC procedure proves that these absorptions of environmental, albeit also legal, exigencies indeed occurs not only in the relationship between different adjudicatory bodies, but it also involves a complex relationship among dissimilar parts of different legal regimes that helps the translation of seemly unmovable and inaccessible legal constellations into not-corresponding parts in comparison with the first communicative influxes. For example, legal communications coming from court's decisions affect the bodies responsible for the law making, which were not at first bound by a given final awarded judgment or sentence of conviction.

More important than the discussion concerning the existence of a constitution at international or transnational spheres is the fashioning of legal restriction mechanisms of political will and the shaping of an unconventional regime's alignment that encompasses both political and legal sides. In a word, constitutional forms. While having political entities (primarily the UNSC and, subsidiarily, the General Assembly) at its center, the UN security regime is gazing with concern at courts on its periphery, which sometimes block the achievement of political determinations through decisions that are mostly based on human rights or classic rule-of-law grounds. One of the novelties here consists of the indeterminacy of what courts are a part of this regime and of this regime, as the legal responses may theoretically come from any of the affected world territories.

Responsiveness is hardly seen, the changing of the pointed Al-Qaida sanctions subregime the clearest example thereof, while this rare exemption demonstrates, once again, the selectivity of the UNSC performances vis-à-vis other almost identical cases. It shows, in any event, the capacity of peripheral influxes of changing political actions, even if in a very limited way. In the next chapter, the role of nonstate actors in this arena will be examined, as a part of the prims of contentiousness and political shaping revolving around the UNSC.

Chapter 3. NGOs pressures on UNSC's political movements

3.1 The uses of human rights vocabulary by the UNSC, and the NGOs

In this chapter, NGOs will be presented as societal players that use human rights language in order to communicate with the UNSC's regime. First, I will analyse the relationship between human rights and NGOs, illustrating the critically important matter of the misuse of human rights by the UNSC, which may elucidate why NGOs are using a human rights vocabulary.

NGOs are private groups associated with local or global social movements (see the definition of Willetts, 1996, p. 2ff.). NGOs organize social movement semantics, being able to communicate them and to act in a stable, enduring manner. They are organizations of the social movements.

Human rights may have become in many situations an instrument to fulfill political interests, be they hidden or not. However, this fragment of law may develop, to use a Derridean term, a repugnance, a disgust, against itself, such as against how it is currently shaped and put into operation and against forces that have dominated its own forces.[75] Law cannot be conceived as static; it may change due to its internal forces and also due to external, environmental influxes.

This work has shown how human rights and law in general (take jus cogens as an example thereof) are involved in an ongoing, unfinished process of hindering some security determinations related to the UNSC. Again, here lies no teleological approach because the social evolution has to do with unexpected communications and complexity. Afterwards, it will be detailed how societal forces outside law might contribute to rewrite human rights features in order to block and/or shape security rationalities, a task that fails in several events. In this way, security, human rights, and social movements are attached.

These occurrences are connected to the politicization of world politics by

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[75] In a context involving human rights and economy, check Fischer-Lescano (2013, p. 100; this author uses Derridean conception of disgust - see Derrida, 1981).

virtue of the insertion of new themes in the political arena, to the juridification of world politics related to legal constraints and parameters and to the growth of responsiveness of this regime through law (judicial review mechanisms and legal sources), as well as through societal pressures coming from protests and social movements. Politicization of legal institutions, here, must be observed with the criticisms expounded at this work's first chapter.

An extremely interwoven picture emerges when analyzing the UNSC's many performances, which are based on a strategic use of fundamental legal and political notions in cases when well-seen conceptions are selectively brought to bear on decision's fundamentals in order to legitimate certain political goals. A strategic use is linked with a choosy observation of a given event. Regarding the social dimension, observations are made only toward certain actors, disregarding despotic or powerful others; regarding the material dimension, topics that are allied with a previously decided ruling are chosen as capable of being applied to a given question or not, depending on the chosen interests. Considering the temporal dimension, the events are only invoked when it is convenient to the execution of political tasks; in other words, there can be unnoted institutional or permanent consideration of such notions regarding a wider range of global events.

In this sense, when analyzing the facts and the acting of this organ, there can be no internal, legal coherence or social adequacy in the usage of security terms in many situations. Inspired by Luhmann's notion of risk, assessment is necessary regarding what society comprehends as risk, the decisions that led to this labeling, before analyzing a certain situation presented as capable of being securitized.

There are many examples bearing on this subject. According to Resolution 841/1993, linked to the coup d'état against J. B. Aristide in Haiti, the lack of "democracy" in this country was used by UNSC to justify interventionist actions such as embargoes, after measures of such a kind were imposed on Haiti by the United States. The number of nondemocratic countries at that time, notwithstanding, was enormous, and there were no applications of such sanctions in similar future events.

The *responsibility to protect* civilians and the *gross and systematic violation of human rights* were invoked to authorize NATO's intervention in Libya, even though human rights violations by states in nearby countries, such as Yemen and Saudi Arabia, were clear and widespread at that same moment. The Security Council's nonproliferation subregime similarly treated Iran (see Resolution 1737 of 2006) and

the Democratic People's Republic of Korea (DPRK), affected by the UNSC Resolutions 1718 of 2006 and 1874 of 2009. Iran, however, in contrast with DPRK, has never revoked the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and has notwithstanding experienced analogous penalties, being also denied use of nuclear energy in a pacific way, as guaranteed by the Article IV (1) of NPT (for this, check Kreuder-Sonnen & Zangl, 2014, p. 21f.). Joyner (2012, p. 242ff.) also pointed out the difference of treatment by UNSC when considering the common practice of the International Atomic Energy Agency (IAEA) in other countries, such as Japan, regarding uranium enrichment processes.

In contrast, though it may seem perplexing when considering the mushrooming of the UNSC's resolutions from 1989 onward, there were cases where no authorization or even no resolution condemning grave violations could be found, even when the same requirements are argued to be a sufficient base for other interventions were presented. UNSC has not acted timely in grave humanitarian catastrophes, such as those in Rwanda, Kosovo, Darfur, and in northeast Sri Lanka, which occurred during the 1990s and 2000s. The absence of opportune operations or resolutions contributed to the occurrence of some of the grimmest situations of the present times, a silence that was also partly responsible for causing in other spheres of the world society the unawareness of their gravity.

Many of the authorized actions after 1989, including the First Gulf War, the movements related to the 1995 crisis in Somalia, and the measures linked to the 1999 situation in Sierra Leone, occurred when very partial or rhetorical arguments, as well as others such as those of the United States under President George W. Bush later concerning the war on terror, were accepted by other UNSC members because the political winds at those times were more conducive to the accomplishment of such undertakings. It is a matter of dispute whether other political parties ruling the government would have made different choices regarding these matters (a skeptical view concerning the capacity of elected governments to change security politicies, mainly by dint of the technocratic power, might be found at Glennon, 2014).

What is more, instead of rebuilding countries and punishing perpetrators, actions endorsed by the Security Council might lead to violations of human rights, also when considering nonmilitary measures, because embargos and other economic sanctions have historically resulted in an increase in human rights abuses

or a decrease of social rights indicators, both during and after their implementation (Starck, 2000).[76] Such a statement can be supported also by observing the atomic weapons nonproliferation and counter-terrorism sub-regimes of the UNSC, which affects or affected people in multiple dimensions in countries such as the Democratic People's Republic of Korea (DPRK) (an analysis of these subregimes can be found at Kreuder-Sonnen & Zangl, 2014, p. 18ff.).

More than violating human rights under the banner of being a protector, the situation also is paradoxical when observing that the same body that establishes compulsory procedures invoking "democracy" or "human rights" presents an immense lack of democratic and rule-of-law structures, upon consideration of its internal arrangement. Additionally, the UNSC is not only a very undemocratic organ that selectively keeps some situations under observation; it uses its powers to exert influence on other central organizations, like the IMF and the World Bank, to orient the voting of nonpermanent members, using such tasks as lobbying strategies to do so. In this sense, providing international aid to developing countries that participate as Security Council members for two years can be viewed as a strategy to buy their political support concerning crucial security questions (Dreher & Vreeland, 2007).

These circumstances show the changes of linkages between human rights and security with regard to political justifications for going into battle. A second war against Iraq conducted by the United States during the George W. Bush-era distinctly shows the grim flexibility of classical political and legal notions to justify a war. Indeed, George W. Bush claimed on several occasions that the war's goal was to restore to Iraq's people its sovereignty by leading them to self-government, using the language of trusteeship—war would be a transitory event, with the United States merely being the trustee of this action. Democracy, a universal principle inspired by American values and political standards, was conceived as the unguent to vanquish terrorism.

At the same time, the violent intervention would be also related to the

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[76] See also my article entitled "The Performances of the UN Security Council as a hurdle to the Transnationalization of Social Rights", presented at the 2013 Law and Society Meeting.

protection of the American people, which represents the mixing of human rights arguments with national and local concerns (Anghie, 2004, p. 280ff.). The Second Gulf War was not authorized by the UNSC, but it had occurred in any way that recalls what Machiavelli has described as the attitude of some Roman officers toward the auspices.[77]

The roots of the rhetoric using human rights to ground violent actions are old and both political and legal, being nowadays a special arena in the Security Council where political goals can be legitimated through legal procedures, at least in a weak manner.

As stated by Anghie (2004, pp. 296ff.), international human rights law, democracy, and rule of law have become the vocabulary of liberal, civilized states, whereas nonliberal states are viewed self-evidently, from the beginning, as noncompliant with international law. “Uncivil” states, to use Kantian terminology, or

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[77] “Among other means of declaring the auguries, they [the Romans] had in their armies a class of soothsayers, named by them pullarii, whom, when they desired to give battle, they would ask to take the auspices, which they did by observing the behaviour of fowls. If the fowls pecked, the engagement was begun with a favourable omen. If they refused, battle was declined. Nevertheless, when it was plain on the face of it that a certain course had to be taken, they take it at all hazards, even though the auspices were adverse; contriving, however, to manage matters so adroitly as not to appear to throw any slight on religion; as was done by the consul Papirius in the great battle he fought with the Samnites wherein that nation was finally broken and overthrow. For Papirius being encamped over against the Samnites, and perceiving that he fought, victory was certain, and consequently being eager to engage, desired the omens to be taken. The fowls refused to peck; but the chief soothsayer observing the eagerness of the soldiers to fight and the confidence felt both by them and by their captain, not to deprive the army of such an opportunity of glory, reported to the consul that the auspices were favourable.” (Machiavelli, 2012, p. 46). As described by Machiavelli, the Romans had to maintain religious foundations as guides in many situations, having the warfare undertakings to be justified religiously to the soldiers. Machiavelli describes that the generals who were against the auspices were punished by the soldiers or condemned by Rome.

“rogue” states, in contemporary terms, must be persecuted by the UNSC. Anne Marie Slaughter suggested a redrawing regarding the possibility of using force by the UN, while explicitly defending that the regime change must also happen when some requirements are given in order to “finally [link] the human rights side of the United Nations with the security side.” According to her, the UNSC must act violently when three conditions are present: (a) in a case when a state bears weapons of mass destruction or is clearly engaging in activities to obtain them; (b) when human rights violations exhibit a lack of any internal limitations over political authority; and (c) in situations when aggressive intent among other states is recognized (Slaughter, 2003). Curiously, the threshold for the use of force seems to not only be applicable toward “rogue” states, because, in fact, all of the P5 states (and also some U.S. allies such as Israel) can meet the requirements, but this is not the aim of her proposal. Slaughter’s perspective only corroborates a hegemonic view of human rights in which the UN organisms can play the empire game against rogue states.

Problems like the referred rhetorical, symbolic use of human rights (Neves, 2007b) and other political and legal principles through which hidden agendas (Starck, 2000, p. 65) are put out of sight are related to political actions. Human rights and other legal regimes usually observe—as do NGOs through their actions—such performances as problems and nonconformities to powerful global movements.

This is the fundamental liaison involving social movements, organizations, and human rights with regard to international institutions’ legal and political abuses, not vague political rhetoric and not even legal texts observed as static, lifeless legal figures. Constructing political contacts with former protest targets may be conceived as one of the crucial political capacities of NGOs in transnational dynamics, along with setting the agenda of the public debate and the presence in some cases of the capacity of excluding members that do not use the appropriate, new technologies. Aside from that, marginalizing and silencing some radical voices and others that did not develop good political and media relations is one of the mainstream organization’s traditional gloomy sides (Bennett, 2005, p. 208ff.; 220ff.). We here highline the legal effects and the legal side of such organizations’ performances related to human rights demands.

Communicative arrangements, such as social movement organizations, linked with human rights semantics claim their validity in face of global political centers which process such communications, while political organizations use human rights

to embody their decisions. Social groups such as NGOs (for instance, Amnesty International and Human Rights Watch) struggle to make possible the consideration of human rights aspects when dealing with UNSC's resolutions and actions.

Moyn (2010) is wrong when asserting that the "true breakthrough" (p. 47) of human rights occurred in the middle-late 1970s with the emergence of the human rights activism of those years. While playing down historical experiences in order to prove his thesis, he neglects the fact that before that point different social spheres (states, parties, social theory, anticolonial movements, etc.) based their claims on human rights – semantics might emerge according to the set of social structures of a given time, as there exists no single "true" semantic emergence. However, Moyn is right when arguing that human rights vocabulary has a close linkage with social movement organizations, which embody its senses. Moyn (2010, p. 123 and passim) also understands correctly that NGOs learn to speak the UN language in order to communicate their demands, and that human rights semantics have become a political mechanism competing or even taking the place of older left and right disputes (p. 227).

Extant social movement organizations are grasping at human rights semantics in order to build their rationales, which are aimed at global political instances through heavily professionalized strategies. Security Council's technocrat, excluding regime, is combated with NGO technocracy. At the same time, whilst participating sometimes in the formation and implementation of global norms, these kinds of organizations are also assuming fundamental roles in the political and legal processes of the world society, which will be further and better presented. In the next few topics discussed, the many presented knots related to human rights, social movements, and security movements will be unfastened.

3.2 The Roles of NGOs in the UN Arena

3.2.1 NGOs' First Steps and Law

Human rights can be considered a central concern of the many international pacts, such as the 1993 Vienna Conference. NGOs have a significant role in the protection and promotion of human rights when perturbing central political and judicial organs through diverse mechanisms. This work focuses on NGOs because they have the highest institutionalization at the international arena and have

recognized ways of accessing and influencing political centers, including the Security Council. If human rights have any emancipatory potential,[78] then the communicative influxes from the political arena, rather than those from the legal regimes, must be investigated first, which includes the understanding of their origins.

The associations' role in international issues has historical roots that can only be presented in a nonexhaustive way. After the formation of states, the movements that were most similar to NGOs seem to be private networks that struggled to influence policy-making, such as by pressing governments to end slavery and the slave trade, and had already transnationalized themselves by that time.

For instance, the Pennsylvania Society for Promoting the Abolition of Slavery was created in 1775, the Societé des Amis des Noirs was founded in France in 1788, and the British and Foreign Anti-Slavery Society was established in 1839; these groups helped to organize meetings, such as the 1840 International Anti-Slavery Conference in London. In Brazil, the most notorious association against slavery was the *Sociedade Brasileira Contra a Escravidão* (Brazilian Society Against Slavery), a civil organization founded by Joaquim Nabuco in 1880. Peace societies, which began to propagate in 1815; free trade associations and workers' movements, both of which emerged in the middle of the eighteenth century; and societies for the promotion of international law (such as the Institut de Droit International, grounded in 1873) are also illustrations thereof. Other examples include associations aiming to promote NGOs, like the Union of International Associations, which was founded in 1910; associations claiming the independence of colonies; ethnic-rooted movements, such as organizations seeking the protection of Jews; and associations to protect what is today known as humanitarian law, among others (Charnovitz, 1996, p. 191ff.); (Nowrot, 1999, p. 582ff.). Transnational advocacy's origins can also be found in movements with linkages beyond state borders, such as the international crusade for women's suffrage between 1888 and 1928, the efforts of non-Chinese missionaries in China in order to eliminate foot binding, the maneuvers of the British

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[78] Dealing with global social rights and emancipation based on Marx, see (Fischer-Lescano & Möller, 2012, p. 57ff; 84).

colonial Empire with other missionaries to stop female genital mutilation in Kenya (Keck & Sikkink, 1998a, p. 39ff.). Activists linked with religious institutions have had a special role in many of these events.

In 1920, the League of Nations and the International Labour Organization (ILO), many NGOs, and social movements tried to exert influence on how these organizations would be designed (Charnovitz, 1996, p. 188; 200). What is more, ILO was molded in a context where transnational political organizations or networks such as the International Association for Labour Legislation and the Socialist Second International were struggling in different fronts in order to fashion labor relations internationally. ILO was a reaction to revolutionary tendencies of that age (Rodgers, Lee, Swepston, & Van Daele, 2009).

The earliest and most notorious presence of NGOs in the global arena can be seen in the actions of the International Committee of the Red Cross, which was the most important actor in the approval and enforcement of the early Geneva Conventions in the eighteenth century. According to the four Geneva Conventions of 1949 (Articles 10 and 11 of the Fourth Convention and Articles 9 and 10 of the other three conventions), this organization has rights and obligations under certain situations in international law, thus giving it, in fact, an international legal personality (Charnovitz, 1996, p. 188; 200).

Notwithstanding its roots, the world witnessed the weighty emergence of a range of nonstate organizations, a process which had its first expansion in the 1970s. Only then did international relations theories start to focus consistently on the role of international organizations at a transnational arena (for example, Keohane & Nye, 1972). The number of transnational NGOs increased dramatically after the fall of the Berlin Wall, from 23,000 in 1991 to around 47,000 in 2001 (Anheier & Themudo, 2002, p. 195). NGOs may assume very important roles in some legal and political arrangements grounded in human rights pillars, such as the African Union, the UN, and the Inter-American Human Rights system.

Some of them have observed and pressured the actions of the UNSC, following the Security Council's renewed formation and actions. Human Rights Watch, Amnesty International, Global Policy Forum, the Stanley Foundation, the International Crisis Group (ICG), and the International Peace Academy (IPA) are some of the most prominent examples.

The rise of civil organizations dealing with security themes can be explained also by the fact that a growth of civil wars and regional conflicts involving states could be observed after 1989. These organizations first helped states to support humanitarian, rebuilding, or peacekeeping missions, whereas they have usually have played an informal role at the UN sphere in security matters, which will be subsequently detailed (Wisotzki, 2008, pp. 74ff.).

Later, they have achieved transnational relevance to contact and influence the work of international organizations. It is important also to note that the Security Council's resolutions have proliferated after the end of the Cold War; in other words, its interferences have been intensely perceived in a global dimension. The focus of this work does not rely on private military and security companies, but it seems that the delegation of state use of force to enterprises such as Blackwater is part of a constellation in which private actors gain relevance far beyond traditional private roles.

This type of event seems to replicate the association forms noted at the beginning of modernity, when private companies entailed state functions, confusing private and public functions, a kind of situation clearly observed in the experiences of the British East India Company and of the Dutch West India Company, while fulfilling both private and public functions to the accomplishment of its goals (Kingsbury, Krisch, & Stewart, 2005, p. 27)

Alongside these facts, in some cases the mushrooming of regional international organizations gave people the chance of contacting policymakers, an experience that they did not have within states, promoting the establishment of international nongovernmental organizations (Kriesberg, 1997, p. 11). In this sense, the establishment of international organizations can also contribute to explain the development of this kind of civil movement.

The Conference on Security and Cooperation in Europe (CSCE), now Organization for Security and Cooperation in Europe, which at the end of its negotiations gave rise to the Helsinki Final Act, a political pact signed in 1975 by 35 states (the United States, Canada, and every European state except Albania) is an example thereof. At this event, there was large participation of national and transnational NGOs in the discussions regarding fundamentally its provisions concerning confidence-building methods and protection of human rights. These

organizations were later promoted and fortified by CSCE itself (about the Dutch company, see de Albuquerque, 2010).

The main argument of Thomas (2001) is that this agreement helps to explain the decline of the European communism. Thomas claims that the conference has created international human rights norms ("Helsinki norms," as he calls them), viewed as one of the reasons for the growth and better organization of social movements against Communist regimes, because these movements intend to implement the human rights established in the final document. The civil groups formed networks among them, conducted protests, and traced human rights violations, exposing such abuses internationally. The Belgrade follow-up meeting established a mechanism to keep violators in sight, an achievement made possible also due to the social movements' pressures (Thomas, 2001, pp. 138ff., 257ff.).

Problems regarding rule of law standards, democratic procedures, and arbitrary political actions seem to have also triggered the flourishing of NGOs. *Global administrative law* is a notion created by Kingsbury and his associate to riposte a so-called democracy deficit in nonstate law-making fields, emulating national administrative law or establishing new forms of administrative law in nonstate contexts, for example in intergovernmental regimes, hybrid public-private bodies, and also in purely private organisms (Kingsbury et al., 2005, p. 16f.). The term is thereby outlined:

> as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance. (Kingsbury et al., 2005, p. 17)

In this sense, Kingsbury (2005) argued that it exists in some fields (or should), while in others global administrative law exists, which is responsible for ruling state

and other international bodies in aspects related to the international sphere in order to satisfy normative claims for democracy in decision-making procedures and respect for fundamental rights. Global governance could be explained within the borders of such a definition. Administrative action should not be confused with typical legislation created by international treaties and traditional types of adjudications between states and other parties. It would comprise rulemaking, adjudications, and other kinds of decisions (embracing informal decisions) in a plane not shielded by treaties or traditional dispute settlements. Administrative action is also part of nonstate security regimes, counting the UNSC and its several subregimes. This kind of action can be also observed in correlated security arenas, such as the work of the International Atomic Energy Agency (IAEA) regarding the supervision and ruling on themes related to the Chemical Weapons Convention (Kingsbury et al., 2005, p. 17).

A global administrative law presupposes, according to the Kingsbury et al. (2005), the existence a global administrative space, an area which would be occupied by distinct actors that regulate or are regulated by regulatory administrative institutions, including NGOs, states, and individuals. This disruption of the domestic-international opposition means that, besides states, also nonstate actors are being subject of global administration in events beyond the implementation phase in a state instance (Kingsbury et al., 2005, p. 17ff.).

The events hereafter exposed are connected to this type of hybrid lawmaking processes at a nonstate milieu and the targeting of nonstate actors by international bodies, as can be seen in many recent Security Council decisions, for example in those of its Sanctions and Counter-Terrorism Committees.

The factual background's evaluation presented by Kingsbury is, in general, accurate, but the problem with the notion of a global administrative law lies on the fact that taking global governance in administrative terms neglects the complex struggles of unprivileged powerholders (i.e., conflict in the nonstate constellation would be reduced to administrative laws and political tasks). Though the author recognizes this possibility and argues that administrative law could also bind powerful actors (Kingsbury et al., 2005, p. 18; 23ff.), world society problems are not merely manageable in administrative fora, since current global structures linked to law and politics are still being shaped through social conflicts that run sharply athwart present constellations.

Global administrative law casts shadows over global law because social struggles and conflicts channeled to global institutions, which will be later translated into legal terms, revolve not only around administrative procedures (being as democratic and responsive as they can be), but also around the molding of the structures themselves.

Social movement organizations and social mobilizations have already contributed to the creation of norms. Rajagopal (2002) affirmed that protests occurred in Seattle, Genoa, and Washington, and the World Social Fora in Porto Alegre has boosted the flourishing of some legal standards, namely the:

> Ottawa Convention on Anti-Personnel Landmines, the establishment of the World Bank Complaints Panel, the establishment of the World Commission on Dams, the Doha Declaration regarding the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health, an advisory opinion of the International Court of Justice regarding the threat or use of nuclear weapons, and the emergence of new soft law standards for corporate social responsibility. (Rajagopal, 2002, p. 399)

A collection of other events of lawmaking with the participation of social movements organizations can be also checked at (Woodward, 2010, p. 153ff.).

The character of NGOs, as well as of other social enrollments, has to be faced in regard to their acting as part of legal dynamics while contributing to the very foundation of norms. The rationales of the next topic will help to demonstrate this thesis.

3.2.2 NGOs' Former Practices in the UN and in the UNSC

Considering the present UN environment, it might be said, first, that no simple parallelism between state and worldwide formations can be made: The UN is not the "world government," the around 500,000 NGOs around the world cannot be observed as a "world people," and the approximately 3,000 NGOs accredited by the UN do not represent other NGOs.

While some do not observe NGOs as pawns of strong states in the game of global politics and global law (Keck & Sikkink, 1998a), major NGOs with transnational activity, all of which were founded by white males, can hide genuine interests of their sponsors-foundation grants, corporations, private donations, and

even, exceptionally, government funds, which are accepted by, for example, the International Human Rights Law Group and by the International Commission of Jurists (ICJ).

These organisms have struggled against other state organization forms not linked to the American democracy and capitalism such as the Soviet bloc (i.e., most of them may be observed as in a crusade to spread basic Western values), having among their leaders important Western state officers or academics—even non-Western directors may be seen as Western-minded. Human Rights Watch, for instance, did not recognize until 1996 the economic and social rights of the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR) as rights, because political and civil rights related to democracy would be at the forefront to all other rights; a skeptical posture toward economic and civil rights may yet still be perceived, as well as focusing only on state acting (all the critics here mentioned can be checked at Mutua, 2001, passim).

Nevertheless, they are the most prominent, legitimate nonstate actors that can act at the UN arena in both informal and formal ways, pursuing United Nations' governance manners of imposing decisions and of exerting influence in many social spheres. Arguments observing NGOs as appendages of Western values may be seen as worthy, but they cannot block the analysis of how these organizations work at political milieus.

NGOs are recognized as a consultative source in Article 71 of the UN Charter (related to ECOSOC) and have a central role in organs such as the Peacebuilding Commission, while also being present in main General Assembly committees and other GA bodies. Although cited in the Article 71, UN Charter does not provide any definition of what would be an NGO. ECOSOC, by its Resolution E/RES/288(X) (para. 8) gave a negative definition of NGOs when it stated that "any international organization which is not created by intergovernmental agreement shall be considered as a nongovernmental organization for the purposes of these arrangements." This resolution was later overtaken by ECOSOC resolution 1296 (XLIV) of 1968, with minor changes.

The ECOSOC Resolution of 1996/31 of 1996 brought some conditions to establish the consultative status of NGOs, among them some that fit the purposes and principles of the UN Charter, the need of an internal constitution approved on democratic basis, with the necessary possibility of accountability; moreover, the

organization shall have a recognized headquarters with an executive officer and shall be of a representative nature and of identified international standing. This Resolution of 1996 was very similar in comparison with the text of 1950 regarding conceiving NGOs, with the main difference being the recognition of consultative status also to the national NGOs (per para. 9) albeit in very rare situations after consulting the affected state, suggesting also per para. 4 that the more international an NGO composition is, the more adequate it will be.

In practice, however, local NGOs representing specific local voices with global effects have difficulty achieving UN organs. Willets (2002) provide two examples of this: the Indian government does not permit the World Sikh Organization to obtain UN recognition; Christian Solidarity International permitted in 1999 the guerrilla leader, John Garang, to speak in its name at the Commission on Human Rights, which led to the loss of its consultative status. Despite that fact, some NGOs have been heard in very important UN events, for example, on formal occasions related to the preparation of the Assembly's 2005 World Summit.

NGOs have also participated in all steps of the negotiations at conferences, influenced governmental representatives, and taken part in official drafting committees as experts. Human rights violations were added to the international political agenda by the NGOs' information, which has also urged the implementation of human rights. To give one example among many others, Amnesty International contributed, through experts, to the drafting of the 1987 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Martens, 2002, p. 273). The same case can be found in the 1989 Convention on the Rights of the Child, which was drafted with lots of NGO contribution after the efforts at an UN ad hoc working group responsible for such a task. The Convention on the Rights of the Child assures the participation of NGOs (referred to in Article 45 as "other competent bodies") in the implementation of the convention (Cohen, 1990, p. 139; 146f.).

Although there is no express mention about NGOs' involvement in the Security Council's realm, this organ may, pursuant to Article 30 of the UN Charter, rule its own procedures. Currently, NGOs might be regarded as the strongest social, non-state mobilization that can access the Security Council (Wisotzki, 2008, p. 74 ff.), participating as regular sources of political programs in this UN body.

Many NGOs have been aggregated into the influential Working Group on the Security Council, which was originally created to enable dialogues outside official UNSC meetings, thus institutionalizing the connections between the UNSC and social movements. The working group has almost weekly meetings with Council ambassadors. There are also other relationship types, such as new diplomatic tactics, which involve the informal or permissible interference of NGOs when the UN is discussing vital security themes (Hill, 2002). In sum, the relationships between the Security Council and NGOs occur through several forms, including through Arria-formula and Samovía-formula briefings, bilateral consultations, lobbying, (Binder, 2008, p. 12ff.; 2013), and cases that will be later exposed.

More than being mere external observers, NGOs may be regarded as part of the United Nations' communicative arrangement. They possess their own measures and legal restrictions to the accomplishment of their goals, as well as set the UN agenda and important parts of the international agenda in general. In fact, as stated by Martens, since the 1990s, NGOs were central actors in the elaboration, approval, and implementation of many international pacts, including human rights treaties. This will be later detailed.

3.3 Broaching Human Rights in the UN Arena

3.3.1 Nongovernmental Actors at the UN: Grasping Specialized Vocabulary

As depicted by Tsutsui and Shin (Tsutsui & Shin, 2008) (see also Tarrow, 2009, p. 154) regarding the end of the Cold War, after 35 years of Japanese occupation in Korea, about 600,000 Koreans remained in Japan, notwithstanding the governmental announcements regarding the loss of the Japanese citizenship, which led to grave social difficulties. The situation got even worst with the split of Korea into two different nations. During the process that culminated with the end of the Cold War, more and more Koreans living in Japan started to mobilize and to demonstrate against state measures. They concentrated themselves in themes regarding civil rights, for example staying against the compulsory register of digital impressions; concerning political rights, they demanded the right of foreigners to vote; touching economic and social rights, they sought inclusion in state social security; finally, considering cultural rights, they demand ethnic education. Japanese government dealt with such strains in a lethargic manner. The turning point was the ratification of

two international treaties concerning human rights, when the resident Koreans considered their demands as pertaining to the same sphere of global human rights. The global human rights were integrated with Korean demands in order to achieve political goals. Tsutsui and Shin (2008, p. 400) point out that they grasped global human rights vocabularies to label their concerns as human rights themes instead of citizenship rights, reframing facts (such as fingerprinting) as violations of universal human rights against all local Koreans.

Sidney Tarrow (2009, p. 154) remarks that this event shows not only the internalization of human rights themes in domestic political issues, but also the appropriation of global vocabularies by internal actors, further putting on display the role played by national activists in international institutions in order to achieve social successes, without forgetting how anxious the Japanese government was at that time about its insertion in the international community, which involves external recognition of following basic human rights standards.

Grasping a specific semantic seems to be a crucial achievement of social movements, as well as finding ways to irritate centers of power. One of the most important features of the relationship between UNSC and NGOs is the fact that global social movement organizations are grasping new vocabularies in order to be able to communicate sensibly with strong international organizations, which entails a technocratic arrangement. Given that human rights constitute one of the strongest normative expectations of the world society, they are at a local arena that is strong enough to be used to urge governments to alter their actions, exerting clout over legal and political spheres ruled by constitutional principles.

Social movement organizations and networks act in this milieu, which is noted also as the boomerang effect by Keck and Sikkink (1998a, p. 12f.), in which local NGOs, when powerless to exert influence over their government, form coalitions with transnational NGOs, which will bring outside pressure on the state. Later approaches constructed a spiral model to explain NGOs' influence over states that violate norms, despite not having an adequate theory of how to conceive norms (see Risse &

Sikkink, 1999).[79] In the transnational sphere, human rights are becoming one of the languages able to give basis to rationales that try to influence political decisions, being a kind of contentious semantics and of restriction semantics. This occurs because nowadays human rights are powerful semantics in comparison with constitutionalism and rule of law at transnational ambiances. This is not, however, that simple because some constitutional claims are also being directed toward

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[79] Citing other scholars—such as Jepperson, Wendt, and Katzenstein; Kower and Legro; Thompson, Finnemore and Sikkink; and Thompson—the authors hold that

> human rights norms have a special status because they both prescribe rules for appropriate behavior, and help define identities of liberal states. Human rights norms have constitutive effects because good human rights performance is one crucial sign to others to identify a member go the community of liberal states. (Risse & Sikkink, 1999, p. 8)

It is almost ridiculous to hold that human rights have such a close link with liberal states, which might in fact be conceived as global human rights violators; furthermore, liberal rights are not the only rights comprised by human rights, nor must they be observed as distinctive, moral marks of better states, as this approach suggests. It is also very naïve to hold that "human rights norms have become consensual" (Risse & Sikkink, 1999, p. 9). While presenting, however, sociological and political views of the phenomena tackled here, such works may be helpful. Our view of human rights norms as social expectations, influenced by systems theory, can be accessed in the present dissertation.

political institutions, with the possibility of talking about transconstitutional social movements.

In this sense, the present approach is different from understanding how nonstate norms are internalized, as presented, for example, by Risse and Sikkink (1999) and described and criticized by authors such as Koh (1997) and Neves (2013), the last more interested in transconstitutional conversations. The societal processes by which domestic norms are internationalized, paradoxically, international norms are transnationalized and truly internationalized, and transnational norms are transnationalized and internationalized are main points here. These norms entail both customary and positive law, as previously mentioned in this work.

The way by which human rights grammar is being employed is also related to the fact that an ordinary, rhetorical use of human rights semantics (claiming abstractly, inter alia, that all persons are equal) has not, for a long time, been a sufficient strategy to have a voice in specialized organizations such as the WTO, the WHO, and the UNSC. NGOs have by this reason produced well-documented reports on human rights and humanitarian law violations during war, demonstrated deteriorated situations among women and children in wars' aftermath, and exhibited conflict escalations that could lead to war. They have done so using a type of grammar that is solidly grounded on human rights themes and, at the same time, can be understood in political centers as having a bearing on a relationship with the respective specialized vocabulary, which constitutes the crucial achievement of NGOs since the fall of the Berlin Wall.

According to Keck and Sikkink (Keck & Sikkink, 1998a, p. 2f.), information is the key factor of the relationship dynamics of social movements. These movements are described under a network perspective (which will be afterwards more carefully analyzed), with the authors comprehending them as important sources of new ideas, discourses, and norm of transnational fora. For the scholars, the organization and generation of information, both timely and precisely, in addition to its sharing, are central to their campaigns and to frame an issue, what may lead also to the networks' internal modification. They describe some of the tactics used:

> Our typology of tactics that networks use in their efforts at persuasion, socialization, and pressure includes (a) *information politics,* or the ability to quickly and credibly generate politically usable information and move it to

> where it will have the most impact; (2) *symbolic politics*, or the ability to call upon symbols, actions, or stories that make sense of a situation for an audience that is frequently fir away; (3) *leverage politics*, or the ability to call upon powerful actors to affect a situation where weaker members of a network are unlikely to have influence; and (4) *accountability politics*, or the effort to hold powerful actors to their previously stated policies or principles. (Keck & Sikkink, 1998a, p. 2f.)

After 1989, NGO participation in UN bodies, and especially in the UNSC, has had a trajectory with victories and frustrations. For example, their formal participation has already been assured, but has not yet been implemented. Article 39 of the Provisional Rules of Procedure of the Security Council, a 1983 norm, can be viewed as the legal pillar that legitimizes NGOs' inputs because it permits the formal participation of NGOs with regard to the UNSC's deciding procedure: "The Security Council may invite members of the Secretariat or other persons, whom it considers competent for the purpose, to supply it with information or to give other assistance in examining matters within its competence" (S/96/Rev.7, Provisional Rules of Procedure of the Security Council, 1983). From the previous sections, we know that this norm is largely ignored; "informal" participation by NGOs is the form that is mainly implemented.

NGOs gained a new window of opportunity to demand formal access to UN bodies when the United Nations Development Program (UNDP) publicized its Human Development Report in 1994, which presented the pioneering concept of "human security" linking human rights and sustainable development to security (Wisotzki, 2008, p. 74ff.). Yet, even if the 1996 ECOSOC reforms made access to national NGOs simpler and enabled the entry of southern NGOs, and if the Millennium Declaration of 2000 recognized the importance of NGOs in conflict prevention and rebuilding matters, other issues such as participation in the General Assembly or in Security Council meetings were soon blocked or became disputed (see also Wisotzki, 2008). The United States, for instance, has blocked any attempt to accept the participation of social movements within UNSC meetings. In this sense, the formal participation rights of NGOs are currently scarce, which has induced a lack of appropriate information that has led to ill-advised positions (Wisotzki, 2008, p. 74ff.).

The influence of such organizations can be seen in many research studies and documents. They act mostly in combination with the G-10 states. The Arria-formula meetings, the Savoia briefing, and the actions of Peter van Walsum, Netherland's ambassador, and of Robert Fowler, Canada's ambassador, which were both aimed at making the organizations' participation more effective, was vital to the adoption of Resolution 1296/2000 ("The Protection of Civilians in Armed Conflict"). The texts of other resolutions, such as Resolution 1209/1998 (on "Illicit Arms Flows in Africa") and Resolution 1325/2000 (on "Women and Peace and Security") prove the participation of nonstate actors in this field ((Paul, 2004a)). In the realm of UN security issues, the approval of the Ottawa Treaty of 1997 included a one-year engagement with the NGO group International Campaign to Ban Landmines (ICBL; (Martens, 2005, p. 89)). The approval of the Programme of Action on the Illicit Trafficking of Small Arms and Light Weapons in All its Aspects (PoA) between 2001 and 2006 is also a good example of the dynamics and challenges faced by the NGOs when dealing with UN bodies and other security actors (Wisotzki, 2008).

The Peacebuiliding Commission created by the General Assembly Resolution 60/180 and by the UNSC Resolution 1645/2005, an intergovernmental body already cited in this work, was crafted in order to intensify the participation of NGOs and of civil society in decision-making processes related to security issues.

There are many contact options involving nonstate actors and the Security Council. Binder (2008, p. 12ff.; 2013) relates these: (a) regular meeting processes, (b) Arria-formula and Samovía-formula briefings, (c) bilateral consultations. More indirectly, following the work of Brühl (2003), he exhibits (d) lobbying, understood as strategies related to advocacy, (e) international campaigning, and f) engagement in the implementation of international decisions. Brühl (2003, p. 75ff.) considers lobbying and international campaigning as touching upon the production of counter-summits vis-à-vis official documents of the fundamental indirect ways of NGO influencing international politics, being the nonstate equivalent to protest, as observed in state realms and an assumption that has been already criticized in this work. Not cited by Binder, Brühl (2003, p. 80f.) also stated that NGOs participate in this realm and exert influence over the construction and change of international norms.

While the indirect forms are mentioned in other parts of the text, in the next sections the more direct ways will be underlined because they show how the shaping

of political and legal structures (which are related to the last aspect pointed out by Brühl) are being constructed in a totally novel manner, beyond public reports, international campaigning, and protests. It is worthwhile to note that, while gaining important roles at this arena, NGOs conundrums related to legitimacy, representation, and so on, also gain importance.

In a text written soon after the end of the Cold War, following an underlining of the sudden effectiveness of the UNSC with regard to the authorized actions in Iraq, Reisman criticizes this activity by (1993, p. 85f.) pointing out that the secret has become the Security Council's normal way of proceeding, denouncing that crucial decisions are made by a very small group of states, and the public announced in a performable manner:

> Magnifying the disquiet is the fact that, as the Council has become more effective and powerful, it has become more secretive. Like a parliamentary matryoshka (doll), it now contains ever-smaller "mini-Councils," each meeting behind closed doors without keeping records, and each taking decisions secretly. Before the plenary Council meets in "consultation," in a special room assigned to it near the Security Council, the P-5 have met in "consultation" in a special room now assigned to them outside the Security Council; and before they meet, the P-3, composed of the United States, the United Kingdom and France, have met in "consultation" in one of their missions in New York. All of these meetings take place in camera and no common minutes are kept. After the fifteen members of the Council have consulted and reached their decision, they adjourn to the Council's chamber, where they go through the formal motions of voting and announcing their decision. Decisions that appear to go further than at any time in the history of the United Nations are now ultimately being taken, it seems, by a small group of states separately meeting in secret. (Reisman, 1993, p. 85f.)

"Consultation", thus, may be regarded as a word denoting in fact *secret* affairs until today. Discussions involving Council members are held normally in a confidential manner, involving *informal* consultations and meetings, being the only voting process public. Denouncing a body that thrives on secrecy and is contaminated by hidden interests is one of the reasons for global societal pressures on political and legal arrangements aiming at openness. In any event, secret political procedures involving UN members may also be observed as regular political

communications that serve to shape political decisions and global norms in this sphere, and it would be absurd to hold that other secret meetings encompassing non-state actors would not be part of the arrangement, as will be demonstrated.

The situation seems to have changed, identifying some authors such as Paul (2004b) that note the Council nowadays is more open in comparison with Cold War, mainly by the work of non-state actors. The NGO Security Council Report, which is part of the NGO Working Group on the Security Council, act precisely in disseminating UNSC information of decisions and processes. In any event, secret briefings still mark UNSC political processes, but publicity may be regarded as a normative requirement of UNSC legal arrangement pursuant to Rule 48 of its Provisional Rules of Procedure:

> Rule 48. Unless it decides otherwise, the Security Council shall meet in public. Any recommendation to the General Assembly regarding the appointment of the Secretary-General shall be discussed and decided at a private meeting.

Besides secretiveness, James (2004a), who was the Global Policy Forum Executive Director from 1993 until 2012, relates five trends supporting the flourishing of NGO activities at the UNSC sphere in the beginning of the 1990s. The first trend is related to post-Cold War performances of the UNSC, which have changed in frequency and nature, comprising new sanctions, election monitoring, and new forms of peace-building, peacekeeping, and post-conflict management, as already explained in the first chapter and passim. It directed the attention of major international NGOs to the UNSC actions. Secondly, as the UNSC scope grew, independent, on-time, professional information concerning classic and non-classic security issues became crucial to the non-elected members. They saw on NGOs a good source of such materials, which were fundamentally relevant by virtue of the problematic P5 communications, which were and are by nature linked with particular state interests and originated from internal security agencies. The third factor mentioned by Paul is that NGOs were spreading their influence on public opinion interested in international relations, being hard for UNSC to dismiss such communications as irrelevant, which is also explained by the fact that the NGOs kept reporting the conditions of a given place after the UNSC or the government's operations, pressuring the political centers, and also being used by them to achieve some policies. Fourthly, as the number of civil wars mushroomed at that time, the NGO expertise in the area showed itself crucial in helping the affected people,

contributing thus to building peace in post-conflict situations, and UNSC could not be against these kind of actions. Finally, Paul (2004) sees a growing understanding of international public with regard to the democratic deficit in the Security Council. Here, it is argued that the Council's decision processes became even more unaccountable and intransparent after 1990.

An example bearing on this subject would be that states with troops and personnel immersed in UNSC peacekeeping missions received no elucidation related to the Council's decisions that put citizens in risk. For example, Canada and the Nordic states claimed consultation with "Troop Contributing Countries," and the Non-Aligned Movement pressed for a reform of the UNSC's members and procedures. By virtue of these events, the General Assembly approved Resolution 48/26 of December 3, 1993, which created the Open-Ended Working Group to consider a reform in the UNSC, as an increase in the membership and an equitable representation. Then, NGOs have been seen by some states as possible, reliable contributors, along with states, to provide information in order to form the UNSC's decision, giving legitimacy and even contributing to counterbalancing P5 power. NGOs also have faced state mistrust, but the contacts between governments, and these organizations developed on both sides.

Although not properly considering the unorganized world public sphere, the diagnosis of Paul (2004) is correct, as it is concentrated both on state actions and on the struggles of the social movements, demanding more responsiveness of the UNSC, since this author narrates vigorous actions of NGOs in order to achieve contact with the Security Council, as well as their methods. Examples include the more traditional associations such as the Quaker United Nations Office, the International Committee of the Red Cross (which is, however, not considered a typical NGO), the Stanley Foundation, and the International Peace Academy, and new members such as Amnesty International, Oxfam International, and Doctors Without Borders. Hereafter, some types of NGOs participation at UNSC domain will be exposed.

3.3.2 NGO Working Group on the Security Council

Following the NGO Conference on Reform of the Security Council in May 23, 1994, which established the basis of the future group, the NGO Working Group on the Security Council was founded in 1995, aiming originally to establish a focal point

in order to contribute with propositions concerning a reform of the UNSC. The reform as a hot topic soon slowed down, and the Working Group transformed its performances, focusing on other and multiple themes.

Before January 1997, the meetings of the NGO Working Group on the Security Council were normally open to public. Thereafter, meetings were closed to the public, involving only particular NGO members.

The Working Group (2015) claimed that the closure of meetings contributed to the growth of the number of meetings and to a broader connection with member states in comparison with earlier meetings. Apart from an initial resistance of the P5 states with regard to these informal audiences, they have occurred since 1997 habitually and usually encompass talks about information over interest matters (Binder, 2008, p. 13). It is to be questioned whether the NGOs are really acting with secrecy in order to make social demands relevant at this sphere or if it constitutes one more political stratagem to maintain its realm untouched.

The number of meetings, which includes sparse workshops over a relevant theme, has indeed grown up since 1995, being nowadays stabilized on around 40 meetings per year since 2011, excepting 2015, which means about three or four meetings per month, according to the webpage of the Working Group (2015).[80] It

[80] As specified by the webpage of the Working Group (2015), this is the number of meetings per year:

Year	Number of Meetings
1995	2
1996	5
1997	15
1998	24
1999	38
2000	34
2001	45
2002	38
2003	39

seems clear that the number of meetings does not mirror the relevance of a given interaction, but instead constitutes one parcel of the big picture concerning the role of NGOs in this arena.

As argued by Binder (2008, p. 12), meetings between NGOs and UNSC regularly occur through informal briefings involving a singular Security Council's member and NGO representatives in the outer layer of the UNSC Chambers. Normally about 30 NGOs, again according to NGO Working Group on the Security Council (2015), take part in the encounters.

The meetings may be regarded as informal, as there is no type of UN regulation on the subject that link them to the decisions procedures; they are not cited in the further UNSC resolutions, for example. However, with a sociological point of view, it can be affirmed that they grant that information fluxes stemmed from nonstate actors reaching the very nucleus of this UN body, thus making them a part of this regime.

2004	47
2005	41
2006	39
2007	35
2008	33
2009	38
2010	30
2011	41
2012	41
2013	43
2014	42
2015	25
Total	695

Under a systems theory apparatus, it could be observed that, analogous to legal dogmatic jurisprudence and legal texts with regard to the legal system, and analogous to programs formulated by unions and parties with regard to the political system, all communications not formally participating in the respective regime's chain of decisions are considered segments of the corresponding system, since they provide criteria, the decisions of a given system based on its code. The criteria may diverge among themselves and may be constantly redesigned vis-à-vis the specific understandings of its claimers, which is related to the contact to the environment.

The center of a given array will elect the relevant communication of its periphery, providing a decision that closes a given issue based on the selected information. In the case of the Security Council, the formal disparity between P5 states and other states and the abysm between NGOs and states cannot be underestimated. A civil organization will very hardly see its demands satisfied if pivotal political interests of P5 states are in dispute. The political strategy to guarantee the accomplishment of NGO goals, therefore, must touch on influencing states throughout meetings to be aware of central demands of the global nonstate arena.

3.3.3 The Arria formula, the Somavía Meeting, and their Challenges

In a realm marked with political closeness and legal intransparency, Arria-formula briefing is one of the few mechanisms capable of channeling outward information flow into the Security Council directly, showing claims and problems capable of influencing the Security Council's decision-making processes, as well as those of persons or organizations directly affected by a given conflict.

The Venezuelan UN Ambassador Diego Arria, during the Venezuela's presidency in 1992, created it. Fra Joko Zovko, a Bosnian priest, had affairs to expose about violence in the former Yugoslavia as an eyewitness and sought to meet with some Security Council members, but only Arria decided to see him. The priest could not officially utter his testimony at a Security Council's session by virtue of UNSC strict procedures. Arria encountered this person in March 1992 and, impressed with his speech and wanting to share it with all other members, Arria suggested a meeting outside Council's Chamber, then inviting other UNSC members to be present. Arria organized a meeting at the Delegates' Lounge, which occurred with the a massive presence of delegates (Paul, 2003), being the meeting cited in

two UNSC documents (S/1999/286; ST/PSCA/1/Add.12).

The meetings held in the subsequent years comprised a wide range of invitees, from Alija Izetbegović, president of Bosnia and Herzegovina, to representatives of NATO, Yasser Arafat, President of the Palestinian Authority and Chairman of the Palestine Liberation Organization and Richard Goldstone, ICTY/ICTR Prosecutor. The invitees were in general representatives of governments or of international organizations. A table comprising all the meetings, showing dates, the subjects, the name of the invitees, and the convened states until 2013 can be checked at Sievers and Daws (2014, p. 78ff.), and a meetings compilation and the UN document in which the briefing was mentioned until 2015 can be accessed on the Security Council Report website. [81]

In 1996, NGOs and other kinds of non-members, backed by some UNSC elected members, also met with all Security Council members instead of meeting separately, but some states, fundamentally the P5, were against a broader use of the Arria formula (Martens, 2004b, p. 15). Widely ignored is the fact that in 1996 the Council members did hold a meeting with representatives of NGOs, as stated in the Note by the President of the Security Council of June 6, 2002 (S/2002/603). An investigation concerning the briefings of that year reveals that this 2002 mention is probably a reference to a meeting occurred that occurred on August 21, 1996, involving Burundi opposition parties FRODEBU and UPRONA. They were represented by Parliamentarians for Global Action (PGA), none of which were NGOs concerned with human or humanitarian rights, being that PGA was better understood as a network of multinational legislators—thus, if other gatherings occurred, they remain a secret. In any case, there was at that time high resistance with regard to

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[81] Available at http://www.securitycouncilreport.org/un-security-council-working-methods/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/working_methods_arria_formula.pdf.

the formation of a Council open to NGOs, having Council members obstruct NGO participation in many events.

At this time, although the original ground for the meetings' existence was to give voice to dissimilar actors who could give information to improve the comprehension of a given situation analyzed by the UNSC, as stated by Arria himself in a 1999 letter, informal discussions involving UN members and intergovernmental organizations were taken by means of Arria's formula gatherings. (Sievers & Daws, 2014)

On February 12, 1997, Juan Somavía, then the Chilean Ambassador to UN, tried to reformulate the Arria formula in order to hear central NGOs, but the P5 held that any kind of meeting should be restricted to the top officials. Samovía conducted a gathering with NGOs related to humanitarian rights (Oxfam, Médecins sans Frontières, and CARE), and the International Committee of the Red Cross, with a subject of the crisis in the African Great Lakes Region. The head of the UN Department of Humanitarian Affairs presided over the meeting, which had members of the bureaus of the ECOSOC and of the General Assembly's Second and Third Committees (Paul, 2003).

Since the UNSC's performances were on this occasion severely criticized by the NGOs through a joint statement directed to the UNSC, the permanent members rejected the use of the Somavía formula or of opener Arria formula briefings in further occasions until 2000 (Binder, 2008, p. 12ff.), when fundamentally off-record meetings with high officials and heads of intergovernmental organizations began to occur (Sievers & Daws, 2014, p. 91). A NGO representative, named the Amnesty International Secretary General, was heard by Security Council's members in September 1997, but, as some UNSC members were against the briefing, it was not considered at that time a genuine Arria-formula meeting (Martens, 2004b, p. 15; Paul, 2003), although it was listed as so in the cited compilation of Sievers and Daws (2014).

In the context comprising changes in P5 mindset, having in the foreground the existence of a more accessible government in the United Kingdom and the change of its ambassador at UNSC, the Security Council became more sensitive with regard to the participation of NGOs. In 1999, after some proposal discussions, the organ admitted the possibility of broader, flexible meetings also encompassing NGOs, occurring a briefing based on the Arria formula, involving NGO representatives, in

April 2000 (Martens, 2004b, p. 15; Paul, 2003).

At present, Arria-formula gatherings are part of the regular Council agenda and are held frequently, usually one per month and occasionally more, offering the UNSC Secretariat full interpretation; no official Security Council meetings or consultations occur at the same time of an Arria-formula meeting, but they are not publicized in the daily *Journal of the United Nations*.

They are held in a very informal, flexible basis after the necessary invitation of a given UNSC member (and very exceptionally of another UN member) to an invitee and the communication to all other members of the future occurrence of the meeting. They typically count with the presence of all Security Council members, represented by their permanent delegates or the deputies. The invitees come from a dissimilar basis, from high representatives of some governments to social movements such as NGOs, nonstate actors such as local parties, representatives of international organizations (NATO is an example thereof), representatives of the Commission on Human Rights and the Human Rights Council, UN officials, persons representing territories that are not states, such as Palestine (Paul, 2003), victims of and affected individuals of terrorism, to academic specialists.

They do not take place at an official UNSC room, and, for this, according to Sievers and Daws (2014, p. 91), a meeting in Afghanistan was suggested by Pakistan in 1997 in order to hear a Taliban leader, with Afghanistan against it. It was then argued that, given that Arria-formula gatherings are informal, the United States is not obliged to provide visas for invitees; the same rationale was used in a proposed Arria-formula meeting in Georgia in 2007.

In this sense, as occurring outside the official UNSC Chambers and in a confidential manner, the meetings usually involve an open, forthright discussion between the state representatives and the NGOs or other non-members, being possible under the social movements or other social sectors the offering of information regarding grave situations without having to be blocked by traditional state arguments, which are usually concerned with media repercussion and its internal public opinion. Its ad hoc character, by which the frequency of a meeting is dependent on the will of a UNSC member state (with very few exemptions of requests made by nonmember states), also seems to be of merit here because a given elected member of a poor world region may presumably shed light on its regional problems through the use of the Arria formula.

The meetings, their importance, and even the necessity of their continuing occurrence appeared in UNSC documents, substantiating their formal face, which will be further discussed. In a presidential statement (The Role of Civil Society in Conflict Prevention and the Pacific Settlement of Disputes, S/PRST/2005/42, of 20 September 2005), it was affirmed that the Security Council should strength its contacts with civil society, which should occur "through, inter alia, the use of Arria-formula meetings and meetings with local civil society organizations during Security Council missions." In addition, "enhancing deliberations" was the leitmotif used in the Notes by the President on working methods of 2006 and 2010 to justify the weight of this type of meeting:

> The members of the Security Council intend to utilize "Arria-formula" meetings as a flexible and informal forum for enhancing their deliberations. To that end, members of the Security Council may invite on an informal basis any Member State, relevant organization or individual to participate in "Arria-formula" informal meetings. The members of the Security Council agree to consider using such meetings to enhance their contact with civil society and non-governmental organizations, including local non-governmental organizations suggested by United Nations field offices. The members of the Security Council encourage the introduction of such measures as lengthening lead times, defining topics that participants might address and permitting their participation by video teleconference. (S/2006/507 para. 54; S/2010/507, of 26 July 2010, para. 65)

In a note by the President of the Security Council of 2013 (S/2013/515), which was adopted in order to complement the note S/2010/507, it was asserted that the Council should take measures in order to improve dialogue with non-members and bodies. The note (S/2013/515) mentioned in paragraph 2(a) that, to accomplish such a task, the UNSC members were committed to making "more effective use, as appropriate, of public meetings, informal interactive dialogues and Arria-formula meetings."

The Council's Informal Working Group on Documentation and Other Procedural Questions (IWG) outlined the mentioned laconic presidential notes on the Arria formula, deciding that the Secretariat Background Note on this matter, as well as a document detailing the common understanding of the IWG, would appear in the Handbook on the Working Methods of the Security Council, which was privately

edited and published by the Permanent Mission of Japan to the United Nations and in 2012 appeared as an official UN publication. This Handbook constitutes no legal document of the UNSC, but catalogues the organ's guidelines (Sievers & Daws, 2014, p. 75). Indeed, in the Handbook it was asserted that the Background Note on Arria formula meetings, formulated by the UNSC Secretariat in 2002, descripts the practice of Arria formula gatherings, recommending its adoption to the Security Council's members as a parameter to the next meetings.

The mentioned Background Note affirmed that the Arria formula is permitted by dint of the UN Charter's Article 30, thus subtly recognizing the meetings as part of the UNSC procedure as in this work. The Note, however, also differed the meetings from consultations in the sense that the former "do not constitute an activity of the Council and are convened at the initiative of a member or members of the Council," presenting the already mentioned characteristics of the briefings and emphasizing their flexibility (Permanent Mission of Japan to the United Nations, 2006).

Hence, even internal, official UNSC documents on Arria formula meetings swing between considering them as part of UNSC formal procedures or not. The negation of the Arria-formula as having a formal character seems to show simply the resistance of this organ with regard to the full recognition that it constitutes or may constitute not merely the Security Council of UN, but the Security Council of society, which is facing the imperatives of responsiveness. In the same direction, as include in the Security Council's official agenda and simultaneously secret, not held in the Consultation room and not cited in the UNSC official procedures, the meetings are normally described as being informal or, as Binder (2008, p.13) points out, of mixing informality with formality; Martens (2004a, p. 1059) states, in an equivalent manner, that they constitute a "semi formal channel."

Politics and law are social systems, not texts edited by a sovereign. They operate in limited spaces, called, in statal forms, territory, as well as in other societal places. Only socially unwise legal and political perspectives could describe the meeting arrangements as informal. Arguments may be found: observing official UNSC structure and legal procedures, it could be argued that this kind of meeting is not obligatory for the decision-making processes in legal and political manners. Furthermore, it might be held that the meetings depend, on almost every occasion, on a UNSC member state invitation, being that the other members not obliged to attend meetings. They took place outside the regular Chamber, though they have

already occurred at UNSC members' permanent missions (for this and other acess issues, and for the Chamber as an icon of formality, see Sievers & Daws, 2014, p. 60ff.).

However, UNSC can make its own procedures, and there is no provision prohibiting secret meetings with non-members. These gatherings are held with the massive presence of the Security Council members, in which information is able to form UNSC rationales if presented; they were cited in official UNSC documents and helped the organ to edit Presidential Statements from the Security Council and even resolutions such as the aforementioned Resolution 1296/2000.

For these reasons, the meetings may be adequately regarded as being part of the regular legal and political procedure of UNSC, because the occurrences of these meetings are nowadays shaped as a kind of legal and political custom and contribute somehow to the drafting of political and legal communications. Hence, Arria-formula briefing is as formal to the political system as any other UNSC traditional gathering, differing in its form in the way of registering and in its compulsory attendance.

In any case, even if not considered strict legal, formal events, under a standpoint that comprehends both politics and law as not strictly attached to formal, written legal mechanisms (as the UN Charter's norms or the UNSC's provisional rules of procedure), the form of a given procedure is not as important as how it contributes to the decision-making chain, as exposed in the last section. For instance, the place (the Conference Room instead of the SC Consultation Room) in which the meetings are held is clearly irrelevant here. In this sense, the actual modus operandi of Arria-formula briefings demonstrates that they contribute habitually and decisively to the composition of a UNSC resolution or to other political or legal acts.

There are still many difficulties to be faced. On the one hand, NGOs' human-rights-based claims may be simply disregarded by the powerholders when shaping their central decisions. NGOs may also operate merely as preventing major violations, for example trying to exclude from an embargo school supplies or urging the consideration of forced migrations by virtue of some Security Council's action.

On the other hand, NGOs can participate as sham political actors of the UNSC decision-making process, in order to give a curtain of legitimacy to stealth political movements. The UNSC members might, thus, disseminate the idea that they are listening to other arguments when they in fact have already made all the

decisions and are only pretending to be open.

Although secrecy may be sometimes viewed as a suitable option in order to present sincere arguments and reasons of both parties, its presence during all the meetings blocks the possibility of existing broader responsiveness. NGOs represent, here, a very problematic type of social organization communicating with other impenetrable organizations. It is very difficult for other social spheres, the legal and political theories included, to know what kinds of battles are happening. Other social arrays might, thus, contribute to their own arguments, but NGOs, including the human rights networks of which they are part, exclude lots of other social spheres, a fact that seems to not be in change.

In a sense, where arcane, excluding arrangements (both UNSC and NGOs) meet, technocracy can be observed as the expected behavior of the participants. This, however, may change, being UNSC more responsive to society, selecting the meaning of risk in the global sphere as not having only particular, technocratic, self-interested grounds of already very powerful actors, and not relegating to weak actors, which includes other social constructions beyond states, the negative side of global politics.

3.4 Understanding the Role of NGOs in the UNSC Sphere

3.4.1 Conceiving Transnational NGOs

As the crucial organ of the UN responsible for assuring international peace, remarkably little attention has been paid to the relationship involving the Security Council and social movements, if compared to the mushrooming of studies analyzing the contacts between social movements and state in the last decades. This may be explained firstly by the absence of a clear provision concerning this issue in the UN Charter, secondly by an understandable aprioristic mistrust regarding the possible ways of influence exerted by NGOs on this realm, and thirdly by theoretical misconceptions with regard to the place of social movements in the political and legal spheres.

The relation between social movements and NGOs may appear at first glance to be clear, but there are some problems concerning both definitions and, thus, their forms of contact. The literature on this issue is very large, and authors and arguments that have inspired our approach will be demonstrated—for an exposition

of dissimilar academic streams on social movements, mainly from Europe and the U.S., see (Brandão, 2001; Gohn, 1997).

Charles Tilly (1978) presents a consistent literature review of collective action of classic authors, and their influence on authors from the United States during the 19th century. In Chapter 2, Tilly exhibits the notions of Mill (an individualist, interested view, by which the state needed to preclude classist interests), Marx, Weber (which it is based on the collective belief system of a group that foster the authority's decision), and Durkheim (dissatisfaction and anxieties as the motors of conflicts, with fast social change generating nonroutine collective action). He demonstrates their influence over several authors such as on the very conservative Samuel Huntington concerning his Durkheimian approach on revolution based on the dynamics between rapid social transformation and slow institutional responses. Further examples are Coleman, Olson, and other models of collective choice and collective goods inspired by Mill and Weberian models (of Wilkinson, for instance), which use *social movement* as a label, defining it in Weber's terms as "a group of people [who] somehow orient themselves to the same belief system and act together to promote change on the basis of the common orientation" (Tilly, 1978, p. 40).

Tilly (1978) observes that Marx, in his works *The Eighteenth Brumaire of Louis Bonaparte* and *The Class Struggles in France*, examined the people through dividing them into social classes on the basis of the predominant means of production. Individuals and institutions would act according to determined class interests, if not according to their own political interest for a short period of time. Marx's analysis of the French revolution of 1848 is related to the existence, in all the revolutionary classes (the proletariat, the petite bourgeoisie, and an illustrated part of the bourgeoisie), of lots of internal communication, of an awareness of common interests, and of a collective idea. In this sense, the main categories are classes and interest, all based on productive dynamics, producing conflicts, being the lower classes fated to wait for a crisis in order to take the power from the dominant class. Marx's ideas are, according to Tilly, ideas of a rational collective action: some classes unite themselves in order to achieve common ends (Tilly, 1978, p. 12ff.). Marxists, such as Barrington Moore, even when pursuing critics toward Marxian original ideas, put material interests and the Marxian logic at the foreground of analysis (Tilly, 1978, p. 43ff.).

Tilly has trailed this theoretical pathway in order to investigate the effects of recent developments such as urbanization, state making, and capitalistic expansion on the forms of collective action. Given that this author relies on the Marxist tradition, the fundamental passages and examples of collective action (of mobilizations) are demonstrations of relevant social crisis and unrest, thus of conflict, exploring struggles for power, and state and class repression (Tilly, 1978, p. 50ff.). He presents two basic models, one concerning state dynamics with a government, contenders (those groups that try to exert coordinate influence over the government), polities (collective actions of the government and of the contenders which have regular, low-cost entrée to governmental resources), and coalition (coordination of collective action), as well as a second model describing a given contender dynamic, composed of interests, organization, mobilization, collective action, and opportunity. Tilly then offers the notion of contentious politics, which is still in an ongoing development, always having as opposite poles a challenger and a powerholder, representing mobilization against some interest a necessary substance to cause conflict. More recently, the contentious politics approach has been redesigned to include mobilization in transnational fora, fostered also by activist networks (McAdam, Tarrow, & Tilly, 2001; Tarrow, 2005). Tilly presents a quite concise definition of social movements in a more recent work, condensing his approach: “a sustained challenge to power holders in the name of a population living under the jurisdiction of those power holders by means of repeated public displays of that populations worthiness, unity, numbers, and commitment” (Tilly, 1999, p. 257).

Keck and Sikkink (1998a) talk about “insiders/outsiders coalition,” meaning that national movements are allied to transnational movements until they achieve internal successes in their demands, when transnational movement supports stay in stand-by, waiting for new political opportunities when their connections can be helpful. These approaches describe cases of grasping human rights vocabularies by social movements in order to achieve political targets, professionalizing the ways of obtaining success with the help of human rights semantic. It represents an instrumental use of human rights because this is the way by which they gain international support and can establish contacts with other social movements of dissimilar global parts. They call these linkages among several activists who have shared ideals or values “transnational advocacy networks,” a type of relationship that increases the chances of accessing international institutions through the exchange of

strategic information, also affecting national politics (Keck & Sikkink, 1998a, p. 1ff.). The authors' notion is, therefore, both based on shared values and in strategic action. Described as *communicative structures* and as *political spaces*, the authors present the idea of transnational networks in contrast to other traditional terms, searching to tie international relations to politics:

> We refer to transnational networks (rather than coalitions, movements, or civil society) to evoke the structured and structuring dimension in the actions of these complex agents, who not only participate in new areas of politics but also shape them (Keck & Sikkink, 1998a, p. 4)

Keck and Sikkink (1998a) have the merit of presenting a communicative basis to explain political trade, as well as to explain the molding of politics. They did not intend to substitute the concept of social movement, including transnational social movements, through the network approach. In another text, openly inspired by Tarrow,[82] they conceive of social movements as "sustained, organized, contentious collective action around grievances or claims" (Keck & Sikkink, 1998b, p. 217).

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[82] Tarrow (1998, p. 234), condensing Kriesi et. al., McAdam, McCarthy and Zald, Tarrow, and Tilly, held that

> If we define all forms of transnational non-governmental activity as social movement activity, then of course we will find much evidence of it in the world today. But if the term is used to signify *sustained sequences of collective action mounted by organized collective actors in interaction with elites, authorities and other actors in the name of their claims or the claims of those they represent*, then the structural and cultural conditions associated with globalization will not be sufficient on their own to produce transnational social movements. (p. 234 ;emphasis added).

However, by offering a very wide range of actors in relationship to networks, connected by shared values (a Weberian-inspired approach) and acting instrumentally in the exchange of information, they do not observe the structural differences between social movements and the governmental spheres. In fact, in the described networks, international and domestic NGOs, local social movements, the media, churches, intellectuals, sectors of regional and international intergovernmental organizations, and, finally, segments of the state executive and/or parliamentary would participate (Keck & Sikkink, 1998a, p. 4). It is clear that they do have other historical roots, goals, and structures, being the produced communications of a different kind. Furthermore, the communicative contacts are made in order to produce very diverse functions, given that the state is a political organization in the sense of Luhmann (2000), resulting in social movement irritations that are not recognized by states as their own political communications.

The authors do not only describe a certain type of relationship among dissimilar actors, a fact that may be indeed analyzed in some situations with the helping hand of the networks approach. However, when observing the material ties (shared values and common interests, for example) among them all, the authors connect them in substance, not perceiving fundamental differences of the several communicative types and of the strategic, systemic interests concerning all these actors. Identifying shared values as marks of networks is not compatible with a radical communicative theory because the contacts might be made for lots of other reasons. The example of environmental advocacy networks, which are described as not based on principles (Keck & Sikkink, 1998a, p. 121), should be expanded to others, because it seems to explain many of them.

Mario Diani (1992) published an article that exerted influence on many academics, for instance, on Rajagopal (2002, p. 409), in which he investigated shared characteristics of diverse notions of social movements. His leading work comprehends social movements as formed by lots of dissimilar actors (not only of antisystemic ones) such as individuals, informal groups, and/or organizations, including political parties, which understand themselves as part of the same side in a given social conflict via cooperative action and/or communication. They would attach isolated protests or symbolic antagonistic actions and would not be subtypes of social movements, as if it would represent a broader category. In this milieu, he conceives social movements as “networks of informal interaction between a plurality

of individuals, groups and/or organizations, engaged in a political and/or cultural conflict, on the basis of a shared collective identity" (Diani, 1992, p. 3). The key elements here are, thus, (a) network relations among different actors, mostly taken on an instrumental basis for the achievement of a certain goal; (b) conflict, comprising both socio-political and cultural forms; (c) and collective identity, because the sense of belongingness would surpass in temporal terms public actions, in contrast with protest events (Diani, 1992, passim).

The first problem arising from this definition is related to the notion of political parties as being made up of social movement actors in very particular events (Diani, 1992, p. 15). These parties have in the attainment of political power a fundamental goal, which is definitely unrelated to other social movement actors' purposes—relationships between parties and social movements may occur, absorbing the parties' social expectations, but the formers' peripheral fragments of the political system remain.

Secondly, related to the disregard of politics as a specific social system, one cannot differentiate a social movement organization or network from terrorist organizations or networks through both Diani's (1992) and Tilly's (1978, 1999) definitions, given that Tilly places terrorism as one of the forms of contentious actions. There is a paradox in terrorism: terrorist groups are products of the modern society, and they perceive global problems as caused by modernity, but at the same time they observe the society as if they would not be part of it. This fact roots their two further characteristics presented here. Firstly, they observe their victims as bodies as flesh that can serve their goals, not exactly as persons but as a social construction (Luhmann, 2008a), in a distinct manner with regard to social movements—other social arrangements might see these actions as shocking violations of human rights. Secondly, politics is understood in a complete different manner. In all forms of terrorism, politics is not gazed as a social system or as a legitimate locus to act or to channel communicative irritation, which means that terrorist activities cannot be regarded as being part of politics or as social movement communications. Given that these kinds of actors do not see in politics a regular arena of conflict or of dissent, they do not intend to change politics or to be part of the political game. In certain sense, they do not aspire to establish conflict as a regular political component, but only to act in realms not touched by politics as a social system based on the code power/nonpower (or government/opposition in

democracies), a system which is thus dependent on political struggles from the very beginning. Some terrorist movements aim for the destruction of the whole modern society as we know it, such as terrorist networks or organizations inspired by some religion that seek the transformation of the entire social texture into premodern social forms, which consist of paradise-like ideals given by a certain book regarded by terrorists as sacred. Lonely wolves and other group performances have as background a profound negation of society and especially of politics as currently organized, without necessarily presenting idyllic alternatives. None of them aim for the achievement of political power as we know it. Hence, it cannot be placed side-by-side with social movements within the political game, as McAdam et al. (2001), passim, do, considering ETA a terrorist organization

This means that, under my perspective, movements that intend to have typical political power, such as separatist groups like the Basque ETA (Euskadi Ta Askatasuna), Chilean/Argentinian Mapuches and IRA (Irish Republican Army), cannot be accurately regarded as terrorists, even if labeled by legislations, local or not, as terrorist groups. They may propagate terror in the population when using grim forms of violence, but they are still placed in the political arena where violence is not a stranger. Social movements, also those inspired by Marxism or any kind of revolutionary semantics, are quite different vis-à-vis terrorists, since politics is viewed as the main arena in which conflict may occur—the ideal of a communistic world society, for instance, means indeed the end of the present social forms, but Marxist movement performances orbit the political arena.[83]

Although Diani's and Tilly's approaches collapse by not having an adequate communicative basis, the following notion may be regarded as inspired by them. A

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[83] Under a system theory approach, a revolution may be comprehended as a total system's negation within the system (see Luhmann, 2000, p. 208).

social movement is a specific type of communication originating from very dissimilar social realms such as organizations, networks, interactions, and protest events, aiming to support or to criticize some social system or some nonsystemic spheres of society such as the moral sphere, forming a certain social semantics. Conflict, thus, is a central piece here. After this semantic development, a social movement represents a communicative network capable of mobilizing communications of the same type (i.e., those related to a same semantic theme), emerging from very dissimilar, trans-systemic actors, and in a nonephemeral manner, whence we conclude that there are latent structures able to create discourses based on given semantics, which may certainly change by the concrete acting. Not Diani's "sense of belongingness," but the semantic persistence and the temporalized conflict vis-à-vis the addresses of the criticism explain the length of social movements in comparison with transitory protest. Now, it may be said that observing social movements in a communicative manner does not lead to a conclusion that would dismiss the role of social action to a given system, because, given that also action must be taken communicatively to be understood, communication and action cannot be ontologically detached, but merely distinguished, shaping a kind of relationship related to the respective reduction of complexity. Actions are related to system observations. A system may ascribe as action the selections' synthesis (the selection of information, message, and understanding) that forms communication, being thus possible to interpret an utterance as action, establishing who has acted in a communicative form; in fact, social systems deal more easily with narratives based on actions than with communication because actions can be fixed chronologically, enchaining themselves to the order of time, as reference points that omit the high complex communicative events (Luhmann, 1995b, p. 138f.; 165ff.; 174f.).[84]

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[84] Luhmann (1995b) stated:

In this sense, a social movement amalgamates a broader complex of communications, without clearly referring only to a single system, since social movements might produce communications aimed to reach several parts of society (black movement communications might be fashioned to reach law, politics, economy, etc.). Social movements do not exist per se; in other words, their ideals must achieve concreteness; otherwise, they remain merely as social semantics. NGOs and other types of social movements are responsible for canalizing social semantics through concrete discourses and actions. For instance, feminism may be presented as a social movement involving lots of actors (networks, interactions, organizations, etc.) that establish conflicts and mechanisms of cooperation among themselves, debating on definitions and actions to be taken toward several other social arenas. This does not, however, explain what feminism is, but only one point of view concerning how this movement's fluxes are communicatively organized. Feminism, as any social movement, is a kind of semantics developed by very dissimilar actors (organizations, networks, academics, and protest events) in the past centuries, making it possible for social movements organizations, protesters, or networks to now grasp feminist semantics through discourses (i.e., through concrete language and actions involving the broader semantics).

> Actions are constituted by processes of attribution. They come about only if, for whatever reason, in whatever contexts, and with the help of whatever semantics (intention, motive, or interest), selections can be attributed to systems. Obviously, this concept of action does not provide an adequate causal explanation of behavior because it ignores the psychic. What enters into the conceptual development chosen here is that selections are related to systems and not to their environments and that addressees for further communication are thereby established as points of connection for further action, whatever the underlying basis. (Luhmann, 1995b, p. 165f.)

Organized, social movement institutions (such as NGOs) represent pieces compounding a given social movement, constituting arrays that fasten dissimilar and diffuse social expectations and struggle to canalize them during time and also through organized, institutional mechanisms, establishing points of contact vis-à-vis institutions, networks, interactions, protest events, and functional systems. They may share with other kinds of social movements (networks, interactions during protests, etc.) the same semantics during a certain time, but they are organized channels through which social movement communications can reach institutional centers in a more institutionalized, professional manner. The work of Keck and Sikkink (1998a) may help to comprehend such contacts.

To perform expertly, NGOs have had to grasp specific types of vocabularies of center organizations, as such vocabularies need to be comprehended and appreciated. This means that a given loose, theoretical rhetoric is put in a specific communicative manner by which organizations understood them and observe them as relevant. In the milieu of the world security regime, the production of several reports on human or humanitarian rights violations are one of the forms by which NGOs are found to be adequate to irritate central organs. Bilateral meetings and Arria-formula gatherings, examples of occasions in which the human rights vocabulary is communicated in the milieu of the security language, compose another communicative strategy. These organs then process the NGOs' reports or discourses, providing answers. A communicative conflict (i.e., the rejection of an argument) will probably occur; due to this specific communication, the security organs have become more responsive vis-à-vis NGOs' proposals.

As already expounded in the item 3.1, I understand NGOs as private, organized groups associated with local or global social movements, which is similar to Willetts' notion (1996, p. 2ff.), amalgamating social movements semantics in an organized manner and communicating and acting in a non-ephemeral way. They are social movement organizations. There are single-country NGOs, either related to intra-state issues or not, and transnational organizations communicating regional or global expectations, with common contact between local and global organizations under advocacy terms. They must be nonprofit organizations (what is not referred by ECOSOC Res. 1996/31), although their undertakings might comprise lobbying for commercial interests. Also, by virtue of our approach on social movements, a NGO cannot have been established by a government or bear the taking of political power

among its purposes—in this case, it will be considered a typical political party, although NGOs can support political groups' causes and vice-versa.

From my point of view, against Willetts (1996), an NGO can act violently without losing its status, which relates to the previous explanation on social movements labeled by some states as "terrorist" activities. Examples thereof include the British Animal Liberation Front, the Suffragettes in the early 20th century, and Greenpeace (for instance, through its actions against the ship Nisshin Maru). However, the UN does not accept this kind of nonpacifist behavior, or at least does not accept it openly. Intergovernmental organizations such as the United Nations claim that an NGO must support the purposes and the undertakings of the organizations that accredit them, wanting a type of relationship from which they can benefit. Theoretically, any UN members who dislike particular NGOs' actions can also block its accreditation process. The United Nations has insofar restricted the accreditation of only a small number of NGOs, but, in any event, many critiques have been made against the UN's performances by NGOs without them losing their status.

The United Nations also assumes that hybrid international organizations are NGOs. In this kind of organization, the possibility to include both NGOs and governmental units within their membership is opened up; however, the inclusion of governmental apparatuses cannot block the free expression of the organization, according to the UN's rules. Examples thereof include the World Conservations Union and the International Council of Scientific Unions (Willetts, 1996, p. 6f.). The existence of this kind of organization means that the world is experiencing a transitional phase, in which confusion still exists concerning the differentiation of public and private in an international realm. Clearly, organizations of this type can exist, but they should not be labeled as an NGO, although—since NGOs are part of the world's political periphery—their participation at international fora may be seen as legitimate. As organizations, states can build other associations, such as Mercosur and the EU. In this sense, NGOs shall be regarded as organizations of a society that are not related to states and hence not as organizations of states.

3.3.2 NGOs as Peripheral Components of the UNSC Regime

After the presentation of some particularly important notions concerning social movements and NGOs, debates on institutionalized social movements will be

assessed, situating NGOs firstly in the global sphere and at the end locating NGOs in the UNSC regime.

Goldstone (2003, p. 2ff.), introducing and commenting on chapters of a book on social movements, observes social movements as a habitual element of modern politics, notes a fuzzy and penetrable border between institutionalized and non-institutionalized politics. Rajagopal (2002, p. 405) emphasizes that mainstream theories often analyze international law through the actions of states (realist and positivist) or individuals (liberals), forgetting the role of social movements (which are not institutionalized), which for him demands a theory of resistance for international law, conceiving resistance as an analytical category. Here, international law would be a category that helps to expand the political horizon for transformative politics, a space in which social movements can act, enlarging international law to regions beyond theories on governance.

Under a communicative point of view, institutionalization may seem to be a form by which social arrangements have been found to canalized broader semantics, given their concreteness. Also, forms of relationships involving organized social movements and institutional realms (for example, global politics) have been shaped. Social movements can be, in many events, located in the public sphere. Although not thinking of non-state arenas, Goldstone, in any case, is right when arguing that the performances of social movements at institutional arenas leads to changes in the institutions themselves. In this sense, analyzing the work of a given organization must take into account how social movements exert intimate influence at this realm, helping to shape it.

Although the several ways of participation of NGOs within the UNSC regime constitute well-known events, there is still a lack of theoretical developments that can describe them with sufficient complexity. NGOs are commonly deemed as part of a worldwide public sphere, but, as I see it, they also can be placed inside some political regimes. Now, let me unfold what that means.

Public opinion was conceived by Luhmann (2000) as the internal environment of the segmented political system, whereas the public sphere is viewed as a systemic, unstructured, and internal dimension of the world society (understood as the broader social system embracing all communications with sense) where the observation of all systems by any system is made possible. It is the internal environment of the whole world society, comprising its interactions, organizations,

and systems. An internal environment is an arena where systems centers delimitate their range of action by observing the communications of other actors, a dimension where the system paradoxically understands other actors as if they were not part of the system. In this sphere, many critiques are produced that can be absorbed, yet they are not conceived as being relevant to the legitimation of the political system—only the public is considered as bearing a functional dimension to the political center (Luhmann, 2000, p. 274ff.).

Neves (2013, p. 49ff.) disagreed with Luhmann in that he regarded the "public sphere" as being relevant to the heterolegitimation of the political system, making use of Habermasian thinking to grasp such a notion. As stated by Neves, politics must have structures to process the information coming from this dimension and to absorb dissension without destroying this realm; for this reason, the public sphere is a place where political centers observe the communications of other actors in order to delimitate their range of action.

In a discussion with Fraser, Habermas, and more fundamentally with Brunkhorst, Neves (2013) distinguished a *weak* public sphere from a *strong* public sphere, affirming that the latter is capable of significantly influencing the legal and political realms, whereas the former is conceived as not being able to exert permanent or generalized impact on political and legal procedures. Consistent with this approach, there is a *strong* public sphere in constitutional states, in which it has a relevant, continuous effect on practices concerning democratic measures and rule-of-law arrangements, thus conditioning both law and political systems. The worldwide public sphere, which is just as fragmented as the worldwide regimes, is viewed as *weak*, since it is incapable of permanently and significantly influencing global political and legal procedures—hence, this kind of public sphere does not promote the heterolegitimation of specific systems in a satisfactory manner (Neves, 2013, p. 63f.).

Brunkhorst (2005, p. 158f.) tried to solve the puzzle regarding the possible identification of people in nonstate arenas by means of presenting the contrast involving a "weak public sphere-with-rights" and a "strong public sphere-with-decision-making authority," a phenomenon that can also be noted in state constellations. For Brunkhorst, a worldwide people, formed by the addressees of law, now would have to begin to demonstrate itself worldwide as an "active" and "legitimating people" (embodied by "spontaneously" associated organizations), which

would constitute the “vanguard of a slowly developing transnational people,” citing here Friedrich Müller (2003). These vanguard movements would present problems involving their democratic legitimation, being possible to speak of representing a global people merely in an advocatory sense. He asserts that engagement and inclusive openness are the only two criteria for a democratic legitimation that could be observed in the weak public sphere-with-rights. Here is how Brunkhorst exposes the engagement criterion:

> Through their *engagement*, NGOs, self-help groups, action committees, grassroots organizations, churches, international unions, feminists, single-issue movements, citizens’ protests, scholarly associations, professional networks, Doctors Without Borders, human rights organizations, Greenpeace, Amnesty, the Red Cross, and so forth fulfill the same constitutional function within a weak public sphere-with-rights that political parties already have in a strong public sphere-with-decision-making authority. They “participate in forming the will of the people” (Article 21, Paragraph 1, Clause 1, German Basic Law). The more that the parties “have entrenched themselves as oligarchies” in today’s party system and that transnational capital and international governmental organizations establish decision-making oligarchies (nearly) without democratic legitimation within the global society, the stronger is the partial democratic legitimation of the noncapitalist NGOs; “partial legitimation” should be understood here as analogous to Article 21 of the German Basic Law. (Brunkhorst, 2005, p. 158f.)

Brunkhorst (2005) compared the *constitutional function* (for contributing in the people’s will formation) in a *weak public sphere* milieu and the *partial legitimation* of NGOs and other groups to German political parties legitimation pursuant to Article 21 and its Paragraphs of the Grundgesetz. This is a questionable argument, since social movements and the related “legitimation” are very dissimilar in comparison to state parties for several reasons: (a) under a sociological perspective, these organizations, groups, and networks have within their members people with dissimilar purposes and origins when compare with typical state political organizations or networks; (b) under a legal perspective, the mechanisms and requisites to their self-establishment are not regulated by any statal constitution—“Article 21” does not exist outside basic German law; (c) within a legal and political perspective, they do not participate practically in any formal fora of the world society

with the same role and importance vis-à-vis political parties; (d) within a political perspective, they had very different goals in comparison to political organizations within states—they, for example, do not intend to assume in future elections the political power of the leading political party and, therefore, the way of understanding legitimation—even a partial legitimation involved with a weak public sphere-with-rights, should be radically different. In this sense, although expressly pointing out some of the critics here formulated elsewhere, Brunkhorst does not elaborate satisfactorily upon the *engagement* criteria of legitimation of NGOs. The recognition of familiarities urges identifying the resemblances, what did not occur.

The second proposed criterion is the *inclusive openness,* presented as "quasi-constitutional." According to (Brunkhorst, 2005, p. 159), in order to achieve legitimation, social and political center of articulation and "protest avant-garde" must work not on excluding people, not on limiting the internal free speech, and not on fashioning organizations of specialists. In such events, these centers and these protests would degenerate, inspired here by Habermas, into a falling, self-destructive *structural transformation of the public sphere*. He conceives global movements as bearing within their fundamental points of legitimation sincere engagement (the first criterion) and open discussion:

> The legitimation of the new civil-society culture of global opposition is weak, but not without verifiable criteria: "*Voi G8, Noi 6,000,000,000*" (You are G8, we are six billion). As long as the strong public-in-the-making must confine itself to the politics of appeal, to "permanent unrest," to "*obstructing actual (and undemocratic) global power [Herrschaft*]," the openness of the discussion, together with the sincerity of the engagement, is a necessary and sufficient criteria for *speaking* (in an advocatory way) even in the name of those who cannot or do not (yet) want to express themselves. (Friedrich Müller, 2003, pp. 11-12). (Brunkhorst, 2005, p. 159)

Brunkhorst's (2005) rationale is too idealistic, maybe for being a relative of the Habermasian tradition regarding the notion of sincerity. Sincerity is nothing but a psychological, thus irrefutable, argument, and this kind of perspective does not see the historical, material basis that led and still leads dissimilar people to engage in social movements, networks, protest events and so on. Openness may be perceived, if so, during the first protests related to a given demand. The labeling of something as legitimate involves the observation of movements, organizations, or

networks in time. During time, any of these communicative arrangements have historically acted excluding some people or discourses.

Stichweh presents an explanation concerning global NGOs and their relationships with a worldwide public sphere based on systems theory. For him, the public sphere constitutes a method of self-observation for systems. It is, however, a form of self-observation that he calls a second-order mirror: conversely, from what occurs with a mirror, one cannot directly look at oneself—for example, a given system receives information about itself from observing what the public sphere has said about the system. Hence, a system cannot observe its processes directly through the medium of the public sphere; rather, it uses observations of the other about itself in order to observe itself. The author regards the public sphere as a system's inner environment; he affirms that a worldwide public sphere is the inner environment of the global political system, conceived as a domain with many organizations as states, as well as international governmental organizations and NGOs. Global NGOs, finally, are regarded as not being identical to the worldwide public sphere; they address their information to a global public sphere, while claiming support through opinions (considered by them as global opinion) on its performances (Stichweh, 2005, p. 83ff.).

In the case of NGOs dealing with security issues and with the UNSC, it may be said that, if they represent a mirror to this UN body, it would be a very imperfect one. NGOs firstly process much information coming from the Security Council (and from other arrays, such as human rights demands) and then give some feedback based on their own logic, providing thus a processed, altered communication. An

adequate metaphor, in this sense, would have to consider the treating and the consequent variation of a given array image. It might be called a distorted mirror.[85]

The modus operandi of channeling this communication, in some events, also seems to be explainable by networks theory, since such organizations are able to find diverse modes to communicate, while merging different logics of acting to make contacts between formal organizations and regimes.[86] Teubner (2003, p. 17) would place interest groups and public opinion—which are located at the very borders of the organization—at a spontaneous room of such an arrangement, in contrast with the organized sector mentioned above:

> And a current example of such "neo-spontaneous" lawmaking in non-economic fields is the law of humanitarian intervention, where the persuasive role of the media in the "emerging international law" cannot possibly be overestimated. It is not the breach of law that makes the scandal, but the scandal that makes the new law. Another example are such NGOs as Greenpeace or Amnesty International, which appeal continually to the validity of human rights although these have not in any way been made positive through treaties or court judgments. A whole range of really non-legitimated private actors is involved in this peculiar invocation of law: media, professional associations, non-governmental organizations and multinational enterprises. (Teubner, 2004, p. 7 (online version))

In this text, the author is not dealing with the UN as an organization, but with the actions of NGOs in a broader context. However, Teubner's (2003) approach

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[85] This idea has come into light in a discussion with Neves, who originally proposed the expression of a "distorted mirror." A discussion embracing the distinct views of the public sphere by Habermas and Luhmann may be followed in Ribeiro (2012).

[86] For a brief review about networks theory on specialized regimes, see (Fischer-Lescano & Teubner, 2004, p. 1017 f.).

does not seem to be adequate to explain the mentioned phenomena, since this type of movement does not have grounds in such a spontaneous manner nor act spontaneously. On the contrary, NGOs may be associated with highly organized, technocrat communicative arrangements, just as the UNSC.

Social texture's spontaneity is an imprecise observation of Teubner (2003), because it appears to dismiss very complex historical and social roots that lead to the formation of NGOs, which are, as already explained, connected to the development of social movements. Humanitarian interventions were shaped, for example, by UNSC security experts, with the coalition among intellectuals, political organizations of several kinds, and mass media, as can be noted in the 2011 Libyan intervention. Nevertheless, the diagnosis made by Teubner in reference to Luhmann's approach (Luhmann, 1995a) concerning human rights seems to be correct; in other words, NGOs play an important role in the paradoxical affirmation of human rights.

The previously discussed notions can help to construct the analysis of the present work, and the way of observing systems' relationships with the public sphere can occasionally be equivalent to organizations' observations regarding some NGOs. This occurs because NGOs are not inserted into the United Nations structure, thus being part of the world public sphere or of partial public spheres. However, NGOs at the UN arena have to be placed within UN regime on some occasions when they participate as usual and as relevant as any formal, "institutionalized" UN body, not only through social mobilization and protests. The problems coming with this understanding are many and will be faced later.

Afterwards, I will provide two final basic systems theory approaches to demonstrate my argument, subsequently sustaining the distinction between two types of NGOs which are in relationship with the UN. Firstly, a central notion to the radical Luhmannian constructivism involves identifying spots of observation for particular observers, which always lead to partial descriptions of the society and putting away with that strategy any kind of ontological understanding of society or of its fragments. This means that it is crucial for identifying the observational standpoint in order to understand how a specific beholder (for example, an organization) will observe another arrangement, such as a system, an organization, a person, or a protest.

Secondly, organizations—inside of which many different systems logic can coexist—are the only type of social system capable of communicating their decisions to its environment, thus producing decisions to the outside, which means that they can establish conversations with another system or organization (organizations might easily communicate with other organizations). In this sense, if a given social actor wants to keep in touch with another organization or system, it must do it through an organization. Internally, organizations produce communications through a chain of decisions, presupposing autopoiesis on the basis of the decisions, which enables the recognition of their communications. The chain of communications is based on a hierarchical scheme that guarantees the communication of a decision given to the outside (Luhmann, 1998, p. 834f.). In this milieu, a decision is an observation in the sense of being conditioned by alternatives (types of differentiations, both sides of which are reachable) related to what has been observed by the decider. A decision marks the chosen alternative (Luhmann, 1978, p. 132f.).

Systems theory offers theoretical support for describing organizations as one type of societal system (among interactions and the whole society). Functional systems are presented as having organizations inside themselves (parties of the political system, for instance), and organizations are regarded as possibly having internal organizations (the state, for example, is a supra organization with several other organizations internally, such as its parliament and courts). In this sense, analyzing some organizations (NGOs) as components of a given organization is not something strange for this theory.

Accredited NGOs are placed in an organized, institutional room within the UN, often participating formally in the decision-making process and being a permanent and relevant part of UN political and legal procedures. When they do not act in a formal manner but play a key role during the decision-making processes, only a very limited, formalist approach would exclude them from being a significant part of the activity. To put it in Brunkhorst's terms, these relationships already entail characteristics of a "strong public sphere-with-decision-making authority."

Henceforward, accredited NGOs cannot be observed as merely being part of a worldwide public sphere, since they do not simply provide heterolegitimation to the political center at the United Nations sphere. It is clear that NGOs here can have a

consultative status in the ECOSOC sphere, according to UN Charter Article 71 and to ECOSOC Resolution 1996/31, for instance.

On the other hand, NGOs that are not accredited by the United Nations and do not participate during the decision-making processes can also be conceived as part of a worldwide public sphere, as pulverized as it can be (Stichweh, 2002, 2005), since they generate information in order to reach and create awareness in the political central organ and hence try to produce resonance for its themes in this sphere.[87] As aforementioned, as organizations, NGOs can communicate their decisions easily to other organizations or to other social arrays. Here are the approaches of Neves, Brunkhorst, and Stichweh are worthy.

In the case of NGOs and the Security Council, the present work does not affirm that these societal organizations are *part* of it, such as the permanent and non-permanent members are. NGOs are placed on the UNSC regime's periphery, thus they are inserted in the communicative game of this organization.

To make such a distinction (i.e., to conceive of NGOs as forming a public sphere or as being at the periphery of the organism), it also seems important to give thought to dissimilar observational spots among UN centers. Such observations can help to orient how a given NGO must be understood within a particular decision-making activity. In this sense, accredited NGOs can also be described as being placed within the global public sphere when its communications are not part of the decision process; in other words, on occasions when they are observed by UN centers as merely providing some kind of unemployable information or simply as a means for the organs to observe themselves in the public sphere (through the second-order distorted mirror).

Nonetheless, an NGO can be conceived as part of the UN's decision chain if its information was considered in forming the decision, regardless of whether the center observed the NGO as making no difference to its decision other than to affirm its own assumed hierarchical position or for some other reason.

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[87] "Resonance box" is a Habermasian notion. To better understand this and other presented terms, see (Parsons, 1963), (Izaias, 2010, p. 25ff.), and (Habermas, 1992, p. 435ff.).

In this sense, any academic observation must be made in respect to concrete cases in order to ascertain these delicate differences. Although not always having a formal place in the UN arrangement, NGOs can be seen as participating in the UN decision-making processes. In this sense, NGOs that have joined meetings of the General Assembly, as well as meetings of its main committees and other bodies, can be placed in this category, even if they did not bear formal consultative status in every situation.

The relationship between NGOs and the UNSC is established in a very habitual, relevant manner, as the performances of NGOs through Arria-formula briefings, of the NGO Working Group on the Security Council, and others might be regarded as including NGOs inside UNSC arrangement. Arria-formula gatherings, in particular, constitute, under both political and legal perspectives, a formal method of participation that already has been cited in some UNSC documents.

Through A/RES/60/180 of the General Assembly and UNSC Resolution 1645/2005, both organizations have together decided to institute the Peacebuilding Commission as an intergovernmental advisory body. This body was created to increase the role of NGOs and "civil society" in "decision-making with regard to conflict prevention and resolution and peacebuilding" (A/RES/60/180); here lies another clear example of formal participation by NGOs regarding security themes in a United Nations dimension. The participation of NGOs led to the approval of Resolution 1325/2000, concerning women's rights, for which the mobilization of NGOs and women from Sierra Leone, Guatemala, Somalia, and Tanzania was crucial in describing the war situation of women. In this case, the Security Council was addressed through an Arria-formula briefing.[88]

Nonetheless, NGOs have already made claims aimed at gaining participation within this organ; in other words, they are struggling in this direction (Eurostep, 2006), which proves that the current status quo cannot be observed as sufficient.

Since NGOs are conceived here as part of the UN decision's chain, occupying the periphery of UNSC arrangement, and not as merely being related to a public

[88] For an investigation of this event, see (Hill, Aboitiz, & Poehlman-Doumbouya, 2003).

sphere, let us make a second observation in order to analyze the participation of NGOs in the United Nations sphere.

The actions of accredited NGOs in the global arena can be explained using the center/periphery schema: this kind of organization is placed at the periphery of the arrangement, whereas central organizations serve as reference points to which the information fluxes direct themselves. Accredited NGOs and NGOs participating regularly in political events irritate political centers with information and aim to address previously selected themes to the official agenda through reports, experts, and regular meetings; in this sense, they also serve to guarantee some kind of "legitimacy" for the process (Tacke, 2010, p. 116ff.). This legitimation may have a grim side because social movement organizations can be taken instrumentally when a question was previously decided by the strong actors, providing a fake veil of legitimacy.

The organizations of the periphery formulate programs (i.e., rules) to orient the valuation of decisions among the central organizations, which will choose whether to implement them.[89] The center/periphery relationship operates with the help of organizations responsible for selecting and sending viable issues that are considered to be attainable by central organizations. In this sense, we are presenting a cybernetic relationship between organizations in the sphere of the some United Nations' bodies, a relationship that always depends on how different organizations observe other organizations, regardless of if they are placed at a given arrangement's center or periphery. UN is not a functional system, hence has no code or independent basis to its reproduction; in functional systems, programs give criteria to orientate the code's reproduction.

In a sense, we are providing at the same time examples and theoretical support to what Sikkink calls the insertion of "voices and ideas that were previously absent" (Sikkink, 2002, p. 301) in international institutions, communications of which

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[89] The difference between codes and programs in functional systems may be found at (Luhmann, 1998, p. 750f.).

were provided by international NGOs and transnational networks, coalitions, and movements, enhancing with such strategies political deliberation and representation.

NGOs at the UN arena deal with particular concerns of the world society. The more responsive (or democratic) an arrangement is, the more organizations at its periphery are able to send analyzable themes. The performances of NGOs were made in order to be adapted to imperfect arrangements of international institutions, and this adaptation process is constantly ongoing. Central organizations—and here, the discussion can also be related to the Security Council—usually ignores many claims and eventually selects those that seem to be workable or bear relevance for grounding its decisions. As it appears, the center/periphery schema means a highly complex type of information flux, which is reflected by the increasing complexity of the specific arrangement, since it follows the continuous information production, both from its periphery and from its center.[90]

The manifest asymmetry present in three different spheres does not block the assertion regarding a regular explanation based on a center/periphery configuration, but must be better investigated. First, there is a relevant functional prominence of the Security Council vis-à-vis other UN organs. Second, P5 states are clearly the major powerholders inside UNSC. Third, NGOs, albeit nowadays regarded as important in the decision-making procedures, still do not have all necessary conditions to be adequately heard in cases when P5 interests are considered. Information and requests given by NGOs in Arria-formula meetings are not, for example, disclosed, usually as a way to avoid challenging UNSC states' interests.

What is more, the NGOs' demands and their struggle aiming at a wider consideration of its claims of the Security Council's realm, are related to the politicization of world politics (Zürn, 2013), because the decision-making processes (politics) and the subject of a particular decision (policy) are put into question by external actors that confront decisions' rationale, offering public responses to international institutions.

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[90] For information about center/periphery schema within state boundaries, see (Luhmann, 2000, p. 244ff.).

If one not only considers states but also other societies' organizations as being components of the decision-making processes, then a further observation can be made with regard to the social dimension, since not only the presence of new actors (terror networks, global enterprises, worldwide banks, international courts related to partial regimes, etc.) in a global arena can be noted, but also changes concerning the composition of classical actors such as international organizations like the UN because they embrace other types of social organisms beside states among its formative elements, as had classically occurred.

NGOs accredited by the UN view the UN and its central organizations, such as the General Assembly and the Security Council, as loci at which to direct their communications because the UN bears the power to produce decisions and to implement them in more effective and broader ways, in comparison with NGOs' measures. Indeed, decisions produced by the UN can exert influence on governments and lead to diverse actions among its agencies, such as UNESCO and the UNHCR. NGOs do this by establishing dialogues with these agencies, producing many reports and conferences and amplifying experts' opinions in order to support their political side. These types of actions can also be viewed in NGOs' relations with the Security Council, since NGOs such as Human Rights Watch and Amnesty International bring forth annual reports analyzing the UNSC's central performances and specific reports concerning the UNSC's authorized military or nonmilitary actions, including embargoes.[91] The communications are not only directed toward

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[91] See, for instance, numerous reports concerning NATO's intervention on Libya: Amnesty International. (2011). The Battle for Libya: Killings, Disappearances and Torture. London: Amnesty International, September. Amnesty International. (2012). The Forgotten Victims of NATO Strike. London: Amnesty International, March. Amnesty International. (2013). "Barred from Their Homes - The Continued Displacement and Persecution of Tawarghans and Other Communities in Libya," 23 October 2013, http://www.refworld.org/docid/526e57a64.html (accessed 26 February 2014). Human Rights Watch. (2012a). Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign in Libya, New York: Human Rights Watch. Human Rights Watch. (2012b). Human Rights Watch World Report. New York: Human Rights Watch. Human Rights Watch. (2012c). "Libya: Displaced People Barred from Homes

other civilian organizations, but also toward the organizations that are directly involved with the military measures. NGOs intend to exert influence on ongoing and future processes that led to these kinds of measures.

This type of NGO bears the formal legal capacity to contribute to UNSC's decision-making process. However, the Security Council does not presently accept the formal participation of NGOs, although it holds many informal meetings that contribute to its decisions. This means that the Security Council observes such organizations as if they were not relevant to its own decision-making process. At the same time, due to the relationship forms already presented and whilst contributing to the formation of Council's decisions in some cases, NGOs in this sphere may be regarded as being part of the UNSC regime.

Now, NGOs, when contributing to the formation of the Security Council's rationale, do not only criticize its agenda or use its expertise to improve human rights situations in delicate zones. On the contrary, the human rights discourse may be used to ground decisions that will be later be used for fundament human rights violations. The International Crisis Group, for instance, has supported the military intervention as a solution to the conflict in Libya in 2011.[92] Human Rights Watch usually takes no position on whether "humanitarian interventions" should occur, a

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Misrata Authorities Failing to Stop Destruction of Nearby Villages," February 21, 2012, http://www.hrw.org/news/2012/02/21/libya-displaced-people-barred-homes (accessed 25 February 2014). Human Rights Watch. (2013). World Report 2013, http://www.hrw.org/world- report/2013/country-chapters/libya (accessed 25 February 2014).

[92] Albeit alerting for the risks of military measures, this NGO declared that "such talks might not succeed. More forceful measures—sanctioned by the UN Security Council and in close coordination with the Arab League and African Union—might become necessary to prevent massive loss of life. But before that conclusion is reached, diplomatic options must first be exhausted. They have not even begun." (International Crisis Group, 2011)

silence that seems to support warlord states positions, especially of the US[93]. In a sense, this kind of posture assures fragments of legitimacy that the Security Council would like to have in the face of the global public sphere and UN member states.

3.3.3 Selective Addressing Human Rights Themes

NGOs might bring to the UNSC arena a wide range of new information, demanding transformation and, according to some sources (Zürn, 2013), politicizing this sphere. I introduced the notion of social gaze in order to make visible the simultaneity of observation and irritation. However, its gaze encompassing human rights vocabularies also has its dark side.

World politics and global law are not toothless. International and transnational law conundrums revolve around the question of enforcement only in certain circumstances when strong powerholders are involved directly or indirectly, in the latter case through their companies, organizations, or political allies. Although the existence of conflicts and/or misunderstandings also inside a state decision chain that bring a model of state automatic sanctions into question is possible, the absence of traditional sanctions might indeed be seen as one of the differences between domestic law and nonstate law. However, as part of the Security Council's milieu, whilst in another form, sanction is quite present by virtue of the possible political, military, or economic sanctions.

This does not mean—even when legal displays are related to the stronger states, against whom sanctions are rare—that municipal law remains unaffected by nonstate law because legal enforcement and collateral consequences might come from inside individuals, networks, enterprises, NGOs, etc. that will use international

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[93] Even though HRW has suggested that a military intervention in Syria would have legitimacy. For this, see see https://www.hrw.org/news/2013/08/28/statement-possible-intervention-syria.

or transnational standards in order to try to reach state political centers. Pressures of other transnational organizations and of other states also are present (similarly, although dealing with enforcement at nonstate arenas under a conservative perspective, and not taking into account customary international law, see Hathaway, 2005, p. 492f.).

As it was detailed in the first two chapters, satisfying part of the world society, UN currently has dissimilar mechanisms in order to fulfill its legal and political pretensions, at least in the theme of security and peace. It is also possible that the occurrence of conflicts among strong actors may make the implementation of certain goal or rule more difficult. For instance, the United States may exert its veto power on the UNSC terrain in order to assure its political interests, which may be against Russian goals, and vice-versa. This is not exactly a question concerning enforcement, because, just as the issue occurs frequently at the national sphere, even a very strong actor does not have all the mechanisms to implement a decision by itself (the president, for instance, needs the parliament in order to make laws, and vice versa, and almost any political decision may come to courts in democracies). Furthermore, even strong actors have already faced defeat at institutional international fora, as shown by the legal interference in political affairs in the second chapter of this work.

The main problem of world politics and of global law is selectivity. This is what conservative authors such as Hathaway cannot explain when analyzing enforcement mechanisms and state compliance vis-à-vis international human rights pacts. Hathaway ignores the instrumental use of human rights related to state and nonstate political and economic clouts and misunderstands the symbolism of international human rights treaties while only seeing their “expressive” function (Hathaway, 2005, p. 2002ff.; 2007ff.).

Strong powerholders—which in the area of global security are represented by rich states, by their security organizations, and especially by the UNSC P5, aside of rich enterprises such as Blackwater—may enforce their decisions. However, weak ones—which comprise not only states, but also people, organizations, networks, and local communities without proper capacity to promote global communication and defense and, with regard to states, almost always comprise those who do not bear adequate military apparatus—do not normally can enforce their decisions.

The United States decided not to observe the ICJ decision regarding the

events during Nicaragua's Sandinista government, which were already exposed and outdrawn subsequently from ICJ compulsory jurisdiction. The United States is a curious case, as are other strong states such as Russia and China. This country plays fundamental roles in the development of transnational human, humanitarian, and criminal rights through financing the UN and helping in the shaping of international treaties such as the Rome Statute, but it also invaded Iraq, disrespecting UNSC decisions and did not ratify many crucial treaties or had to withdraw from them, such as the Kyoto Protocol, the Rome Statute itself, and the Ottawa Convention on Anti-Personnel Landmines (for this, see Varella, 2013, p. 29f.). Furthermore, as a state foreign affairs policy, it has contributed to several coups d'état in Latin America during the 20th century, supported many dictatorships, and trained foreign torturers to improve their torture practices, for example.[94]

NGOs are one of the fundamental keys to understand how and why human rights are being connected to Security Council measures, as well as how the selectivity of global politics and global law might possibly be rewritten, on the one hand, or might stay just as partial and exclusion as it is currently, on the other hand. Courts' mobilization might be pointed out as the other fundamental key.

Human rights are not pure entities, as if they could exist and become effective immediately with only their presence in international treaties, international customary law, or state constitutions. In fact, their existence depends on strategies of certain communicators that are able to irritate a central organ (or other social system or communicative arrangement), for instance a political one.

Inspired by the works of Zürn, Neves, Sikkink and Keck, and Koh, we might

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[94] Varella (2013, p. 271) provides, in a too optimistic or idealist of a manner, as example of international intervention, the former Yugoslavia. This state had, by force of international actors, its territory split, its president Slobodan Milosevic arrested, and a new constitution established by the Dayton Agreement in the Bosnian case.

say that a transnational process related to the internalization of norms in political organizations is occurring. Transnational actors claim the applicability of certain norms of nonstate terrains or the necessity of new law-making, leading sometimes to a regular pattern of norm observing. Organizations occasionally adopt norms in their procedures, documents, and decisions. The claims might be understood in some events as transconstitutional, since they are linked with transconstitutional problems, as with constitutional questions at nonstate milieus. The increasing participation of social groups, and the empowerment of human rights themes at nonstate arenas will be hereafter investigated.

Citing the NGOs Terre des Hommes, Cap Anamur, Médecins du Monde, and Amnesty International, albeit being sometimes vague and superficial, Foucault (1984) spoke about an “international citizenship” bore by private actors able to denounce any kind of abuse of power by political actors. Private actors such as the mentioned NGOs would have the right to intervene in international politics and in international strategies also because the governments are used to pay attention to these social movement organizations. However, the role of private actors should be revised in order not to be passive.

Teubner (2006, pp. 335f., 337, 346) claims that protest is the form by which human rights communication can be socially widespread, as already mentioned in our first chapter. Protests are indeed one of the best formulas found historically to challenge central powerholders, but they constitute merely one of the ways to broach human rights issues, since existing NGOs conduct high professional reports, as well as international campaigning, for example.

Far from being spontaneous, they are closer to technocratic developments. This *spontaneity* seems to be a flawed assumption of Teubner, since he dismisses the highly organized roots (think of syndicates, social movements, political parties, etc.) and the highly elaborated element of any protest, aside from not observing other societal, provocative activities. Coordination in protest might not elude the impulsiveness, the plurality, and even the misunderstandings among the protesters, but spontaneity may not be regarded as the mark of protests arranged by local institutions or by a high complex coalition of societal organizations in transnational spheres, in which new information technologies play a central role, as well as meetings such as the World Social Fora in Porto Alegre. Coordinated protest examples, as well as the presentation of globalization and antiwar mobilizations as

aliens among other social movements, can be observed in the work of Bennet (2005).

What is more, Teubner does not see that protests and communications of social actors do not merely urge the protection of the human body and mind, but also understand themselves as human rights movements. In fact, social demands connected with human rights are not confined to physical survivors while comprising themes beyond the first-dimension human rights. Occupy Wall Street, anti-war, and truth movements, as well as Movimento dos Trabalhadores Rurais Sem Terra (Brazil's Landless Rural Workers' Movement) and other peasant movements, are illustrations thereof.

Brühl (2003, pp. 77ff.) shows highly professionalized ways of communicating violations. She understands that transnational campaigning, combined with the production of counter-summits by NGOs, are equivalent activities vis-à-vis protests placed in state boundaries. This is not fully correct, however, given that street protests against nonstate institutions also can be observed (examples thereof include protests in Seattle in 1999, Davos in 2000 and 2003, and constant protests in Frankfurt against the European Central Bank since 2011) and given that a higher communicative stability of social movements in contrast with protest events (which begin and end at a faster rate) exists, even if their linkage to societal institutional spheres are considered. In any event, this approach demonstrates that this kind of campaigning serves to attract global awareness around central themes.

In any event, human rights vocabulary is being addressed to the UNSC. The liaison involving UNSC and human rights, however, has its negative side. Human rights are often used to legitimate political measures. Powerful actors often seek to varnish human rights arguments and cover its hidden interests and stealth goals.

Nonetheless, this is not a simple relationship. If the United States, the strongest military powerholder state in the present world society, intended to base its military actions on human rights grounds, it would be faced with many critics from diverse sectors of society, such as NGOs specializing in human rights and the possible assessment of its measures by courts. This country also has historically tried to ground its actions in the framework of the UN legal regime, which is highly regarded (at least formally) as providing a kind of human-rights-conformity seal. This country, additionally, counts some defeats among its attempts within the UNSC to ground its actions, as can be observed in the war against Iraq at the beginning of the

21st century. Along with these facts, the presence of strong political actors is not sufficient to explain the increasing use of human rights to ground several treaties, nor to elucidate the relevant emergence of NGOs in the global and UN spheres. These movements often went against the will of powerful actors, such as Russia, China, and the United States, also because such actors assume very dissimilar perspectives on the human rights definitions.

In any event, many NGOs might be observed as bearing the same type of argument of powerful Western actors with regard to the understanding of human rights (Mutua, 2001). Their political and legal movements lead, albeit not on every occasion, to a sea where social movement organizations are merely one more channel to disseminate the Western clout over global law and global politics. Furthermore, as already mentioned, mainstream NGOs might serve to exclude radical demands and organizations without good relations with governments and media.

Beyond the common critics with regard to the helping of liberal forces of strong powerholders, Hardt and Negri (2000) understand that NGOs have a crucial role in the current global politics. Focusing on NGOs involved with the protection of human rights and dedicated to relief work (such as Amnesty International and Mèdicins sans Frontières), Hardt and Negri argued that NGOs, conceived as outside the states and acting simultaneously against them, are actors that give publicity to their the moral mistakes of their symbolic enemies. This kind of NGO intervenes in global politics when defining previously the moral reasons an empire should intervene, thus helping in the accomplishment of imperial goals and justifying military interventions. Since they give moral rationales that prefigure the world order, NGOs are absorbed in the biopolitical framework of the constitution of empire. What is interesting is that such NGOs are dedicated to representing universal human interests, not particular or limited needs of some particular circles, for example those who could not represent themselves (many NGOs, in fact, do not claim to represent a given group). They would represent, according to the Hardt and Negri, the “vital force that underlies the people” (p. 313), converting politics into a matter of life in all its comprehensiveness, which means that they act at the biopower sphere, beyond politics, because they are occupied with the very demands of human life, being conceived in this sense “as the capillary ends of the currents networks of power” (Hardt & Negri, 2000, p. 36f.).

The problem with Hardt and Negri's approach relies on the fact that human rights cannot be confused with moral obligations. The NGO communications channeled to central political organs cannot be conceived as moral interferences—which is a kind of empire intervention among judicial and military interventions (Hardt & Negri, 2000, p. 312ff.)—because human rights are representative of normative global expectations. Thus, they also are related to law and have other roots and enforcement strategies. What is more, the symbolic constitution of a background that could legitimize military interventions does not explain why these NGOs often go against powerful actors' performances, including in cases when there are military interventions. Examples thereof are the many reports denouncing NATO abuses in Libya in 2011, a military intervention authorized by the UN Security Council. This approach misunderstood the plurality of NGOs in a transnational sphere dealing with human rights issues, a perception that might not elude the disparities among these organizations. Concerning their rigid and simplistic opposition of empire/multitude in the security arena, there is no empire, but there are lots of powerful actors with dissimilar goals and roots. China, Russia, and the United States all have veto power, but their security goals are in many ways quite different; thus, it is impossible to talk about homogeneity, which is crucial to the construction of the notion of empire. In local contexts, poor countries such as Iran, Pakistan, and India might be considered very strong actors struggling over contrary political targets in many situations.

The performances of NGOs in this sphere are, therefore, complex. They may legitimate political goals by their silence, by their façade participation in the political decision-making, and by their open support. They may also, in some events, contribute to social movement struggles and criticize the activities of strong security actors.

First Conclusion. NGOs, Representation, and Expertise: Combating Arcane Arrangements with Technocracy

Glennon (2014) argues that there are few mechanisms of accountability in the formulation and execution of U.S. national security policy, due fundamentally to the presence of technocrats, which he calls the "Trumanites," entities be against the three branches originally provided by the constitution to operate as checks on U.S. security issues (the "Mandisonian" system). Following Glennon's ideas, no matter the government in charge, the technocrats would in fact rule politically. This point of

view, aside of idealizing deliberative democracy and the U.S. constitution, cannot observe precisely the important role played by technocratic branches, as a common, expected feature of modern, differentiated society. This does not mean, of course, that technocracy may expand itself in such a way that plagues other societal spheres. As noted by Markovits in a discussion with Glennon,[95] there is a technocratic elite with some kind of charismatic legitimation that resists the elected people's will on many occasions, and we might assess how they participate in the real political system.

In a nonstate area, where there is no room for problems of the deliberative democracy, technocratic, arcane elements such as secrecy and experts shaping political decisions are the old reality, having to do also with the way by which governments shape their decisions, mentioned above. There is no coincidence that the ways by which Security Council contacts NGOs are marked by secrecy, for example, which is also connected to the technocratic way of ruling. In such an ambience, the responses of social movement organizations are part of technocracy. This represents double difficulty, thus: the technocratic governments shape a technocratic body and the counter-technocratic responses, which are provided in a technocratic manner. It is an arcane world.

Under totalitarian regimes and also under democracies, civil actors (such as civil organizations and other types of working groups) have in different forms assumed the role of social self-conducting entities, normally having effective purposes when restricting their range of acting, as shown by the principle of subsidiarity (Zumbansen, 2001, p. 59). In the field of peace-building, for example, many NGOs help in constructing new material apparatus and even reform political institutions but at the cost of blocking the access of local groups to the centers of

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[95] This event was a discussion about Glennon's book at the Faculty Lounge of Yale Law School on January 28, 2016.

powers, which inequalities instead of well-being; as Lynch (2013, p. 48), inspired by de Waal, said, here in a context of criticisms toward neoliberalism discourses, the NGO-ization of social movements in the sphere of security can act in an elitist manner, but it is also possible for the fostering of local groups to occur with the help of transnational NGOs (Lynch, 2013, p. 49f.; 59).

The apparently unbounded actions of the UNSC are gradually facing stronger global pressures aimed at changing its structures and performances, precisely due to its barely uncontainable arrangement, aside from the already existent contra-normative forces (courts, international treaties, jus cogens, etc.) that were described in the last sections. These pressures mainly come from social movement organizations or networks via protest events, reports, the Internet (blogs, social networks, etc.), traditional media (as an observer of the world society through the society), and obviously from states, mostly from new state groups such as the G-20.

As argued before, it seems appropriate to indicate that a juridification of the UNSC political authority is gradually occurring through the lessening of its arbitrariness—due to the implementation of procedural legal rules and also the normatization of the limits of allowed acts of force and the establishment of individual rights and liberties, as well as social autonomies, considering particular events (Fischer-Lescano, 2005a, p. 214) —along with the pressures coming from judicial bodies. This does not mean, however, that a typical, closed legal regime is entirely shaped at this moment. Political authority in this arena still has vast powers in order to subvert the weak legal arrangements, being able to block the achievement of legal high complexity (Luhmann, 2004, p. 404; Neves, 1992). However, opposing the position of Luhmann, who understood international law as equivalent to nonmodern forms of law, modern law can be recognized regardless, since being responsible for orienting and processing contra-factual expectations. A system does not necessarily need to be autopoietic.

Along with the increased importance of human rights, this juridification substantiates the interplay between *global governance* and *global law*, pointing to the existence of secondary Hartian rules at this realm, which some conceive as being the main functional characteristics of a constitution. Both approaches regarding the existence of constitution at international or transnational arenas, on the one hand, and the recognition of constitutional problems at a domain without constitutions, on the other hand, represent paradoxical approaches that try to label

these new, peculiar arrangements. Further, social groups aiming to make changes in the UNSC performances and structures can be characterized as being directed to the formation of a democratic configuration on a terrain without a *demos*. They also request permanent responsive feedback from this UN body in order to make the appreciation of human rights themes a requirement. The paradoxical claims aspire to a constitutionalization of the UNSC that can be perceived as demands for democratic control, human rights obedience, and rule of law-based responsibility on a global arena.[96]

Here are constitutional battles incarnate. Global protests and the participation of NGOs show the necessity of a responsive turn by the UNSC. The notion of social gaze contributes, since it embraces the simultaneity of observation and irritation involving two distinct arrangements, as well as the mutual changes caused by the gaze. The crucial point for this work is the showing of influences from NGOs (and courts) in relation to the performances of the UNSC. These claimants, however, also have internal problems with regard to their representation's deficit and, linked with this problem, with the technocratic way by which they are arranged and formulate their demands. This constitutes, in fact, one more paradox, since the organisms seeking participation in arcane spheres also major conundrums if the question touches upon representation.[97]

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[96] See Deitelhoff & Fischer-Lescano, 2013, 68, here in the context of private security-governance.

[97] Luhmann (Luhmann, 1998, p. 920ff; 2000, p. 330ff.) argued that the question about representation revolves around the difference between particular and universal in a given social context. Legal representation has its roots in the Ancient Roman notion of *representatio*. After transformations of the 13th and 14th Centuries, which can be seen for example in Marsillius' concept of universitas civium, "representation" has, with the

Problems with regard to representativeness usually appear in the discussions of nonstatal constitutions and have to be addressed. Although not negating the mushrooming of international juridification, thinkers such as Grimm (2004, p. 15) argue that the democratic deficit and the nonexistence of a continuous, nonephemeral public sphere are hurdles to identifying constitutions in nonstate terrains.

Radical democratic republicanism, represented by scholars such as Maus, regards the absence of popular sovereignty in transnational legal regimes as the main fact to sustain the impossibility of a complete formation of "constitutions" or even "law." What is more, since the present semantics of constitutionalism without *demos* do not focus people as the central problem, they have a strong similarity with a "counter-revolutionary resistance" of defenders of the "ancient regime" constellation, because 19th-century thinkers such as Hegel and Edmund Burke (1890) would have semantically mimicked the new, revolutionary vocabularies related to the French Revolution of 1789 (which had constructed a normative

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juridification of its concept, preserved its linkage to its social origins and was converted into a constitutional notion still recognized today that bears a latent right of resistance by virtue of this social basis. After the French Revolution, the figure of representation was strongly associated with the legitimation of the political system, being part of the political structure. The question concerning the agitation of the social basis was transferred to the figure of people, which was since then used as a counter-concept of representation; the semantics of representation, however, would be reworked under categories related to political discussion (Luhmann, 2000, p. 333). For this author (2000, p. 370), in the context of the evolution of the political system, "representation" took place when a "cosmological and social space" could be formed (in a church or in a territory with an authority, for example), a domain in which a collectivity as a communicative sphere is able to encompass fluxes of communication that had to be shaped. From this emerges the problem related to speech of the representative, which was anchored in the premise that all the members are considered as *universitas*, leading to the problem of the political decision and constituting the premises of this decision's internal political problems.

constitution in a revolutionary democratic movement) to bring ancient arrangements into light, according to Maus (2010, p. 29f.).

For Burke, only the "sovereign people," by way of representation or not, are the source of law-making and exist in the state a differentiation between legislative and the application or enforcement of law; the "sovereign people" can only be realized in a state based on a functional rule of law (Rechtsstaat) (Maus, 2007a, p. 8ff.).[98] Tackling Habermas's (2005) proposal regarding a constitution beyond states, Maus (2007b, p. 353ff.; 380f.) stated that we should leave the constitutional semantic related to these nonstate areas and come again to the classic legal notion of contract in international relations, since democratic control could be assured in municipal spheres—for a detailed discussion about this issue, see (Möller, 2014).

Here rest fragments of a discussion that goes back to the Hobbesian notion of representation. For Hobbes, "representation" means a legitimate authorization given by one person ("the author") to another ("the actor") in order to be stood for in some arena. "Natural persons" are those whose actions are their own, while "artificial" persons are those whose words represent others—thus, his terminology differs from the current legal vocabulary. Influenced by this view sprung from acting on behalf of

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[98] Maus (2007a) stated:

> 'Volkssouveränität' ist genau deshalb nicht, wie in der herrschenden Literatur vielfach behauptet, als Spiegelbild der Fürstensouveränität zu qualifizieren, weil nämlich dem souveränen Volk (direkt oder repräsentiert) nur die Gesetzgebung zukommt, während das exekutivische Gewaltmonopol an der Spitze des Staates verbleibt, wodurch eine rigide rechts—staatliche Gewaltenteilung zwischen Rechtssetzung und Rechtsanwendung institutionalisiert ist" (Maus, 2007a, p. 8).

another agent, artificial persons would own their action to those being represented, and authority in this milieu is conceived as the “right of doing any action.” A person, thus, would be the transmitter of the words from a given one to another (Hobbes, 1998, p. 106ff.; for a discussion, see Pitkin, 1967, p. 15ff.). In Hobbes’s opinion, getting men out of the constant state of nature in which distrustfulness reigns —that is to say, to create a commonwealth—cannot be achieved solely through the social contract, but must have also the help of representation. The rationale chain starting with men giving representation to a sovereign (which can be not only a single man, but also a joinder of men) concludes that the sovereign’s actions, as the representative, constrain its constituents as if they had indicated its orders by themselves. Although the representative should, in principle, do exactly his constituents’ will, there are no limits to the Hobbesian sovereign’s movements, because his range of acting is very broad when in charge of its duty to ensure common peace and safety (Hobbes, 1998, p. 155ff.; for a discussion concerning sovereignty, observing Hobbesian notion as pre-modern, see Neves, 2008, p. 156ff.; to a view of this Hobbesian discussion, see Pitkin, 1967, p. 299ff.).

Burke’s aristocratic view of representation insulates the will of the represented from the people, because the elite could decide better than anyone over the good and the national interest without taking particular wishes into account (Pitkin, 1967, p. 170ff.).[99] More than a mere trustee model in which the representatives (the

[99] Burke (1854-56) held that:

"natural aristocracy") bear a wide range of freedom to act against its constituents' will, Burke defended the possibility of existing legitimized representation in areas where the express consent of the constituents is absent. He aimed to justify European monarchies besides England, which were then not legitimized by an elected parliament (Burke, 1791, 1890).

The main problem of arguments placing the ultimate cause of politics in the representation of people, the will of the people, or in the protection of minorities lies in the nonobservation of modern politics in its full complexity. These are fixed doctrines of political science that, in fact, represent only one of the sides of the political prism. In modernity, the influences of several political programs from dissimilar parts of the political system and also the processed environmental communications are reduced through internal political processes, in a strategy that legitimizes political power by internal mechanisms of the political system. The legitimacy of politics (politics' contingency formula) is in a permanent process of construction, since very different political programs are considered when political decisions are shaped (Luhmann, 2014, p. 209ff.). This means that people's representation is only one of aspects that politics has to process internally when shaping its decisions based on programs formulated in its periphery. Representation entails a subject among many others that, understandably, has to be faced in order

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> Parliament is not a congress of ambassadors from different and hostile interests, which interests each must maintain, as an agent and advocate, against other agents and advocates; but Parliament is a deliberative assembly of one nation, with one interest, that of the whole—where not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You choose a member, indeed; but when you have chosen him he is not a member of Bristol, but he is a member of Parliament. (Burke, 1854-56)

to respond to the modern political semantic developed, since it also involves a main political topic of current global developments.

Political debate at transnational realms also revolves around representation, since transnational nongovernmental organizations are the closer equivalent figures vis-à-vis state people who can be found in nonstate constellations, since no global people—at least, in this classic state sense—exist. What is noteworthy here is that many transnational NGOs not only do not represent any particular people; they simply were not created with particular people's interests or specific social groups in mind, or when they do consider *people*, they do it along with many other factors and in a very broad sense.

Amnesty International, Greenpeace, Human Rights Watch, Global Justice, and others do not even claim to be representative of anyone, as checked at their websites in August 2015, following a strategy of Rubenstein. They usually assert of being defenders of rights. Jordan and Van Tuijl (2000, p. 2053) agree with this position, stating that many transnational NGOs assert that local communities have mechanisms for being represented, which means that NGOs deny the notion of representation—the authors suggest the notion of political responsibility to solve the notion puzzle of representation regarding transnational NGOs. A survey by Smith, Pagnucco, and Lopez (1998, p. 389) that focused on international human rights NGOs (67% of the 295 international Human Rights NGOs inquired were from Western Europe or North America), also confirms this, as the most important goals of international human rights NGOs were found to be related to promoting or protecting the rights of particular groups or women, promoting international legal standards on human rights, promoting mechanisms for enforcing human rights, strengthening the NGOs' capacities, monitoring violations in specific areas, and assisting victims of human rights abuse. They also noted differences between Southern and Northern NGOs, such as greater efforts by the former in exerting influence over domestic political regimes (Smith et al., 1998, p. 395).

Not every legal question revolves around human rights, such as the legal protection of animals and the environment. Environmental advocacy networks, according to Keck and Sikkink (1998a, p. 121), are not even distinctly principled in many situations, since they may also cite professional interests, norms, and values; they spend time struggling to protect natural resources, without taking human rights

clearly as an issue. People, then, are relegated to a very subsidiary, fluid, and abstract locus.

In terms of Luhmannian systems theory, these organizations—including some that are not concerned with environmental issues—do not select *people* as a communicative, relevant topic for further communication in order to institute points of connection for further actions; or, to put it another way, people are not even an addressee of communication in many situations. It seems that there is no necessity for a transnational realm of some kind of direct or indirect representation, or maybe, such claims are nowadays not as relevant as they are at state terrains. *People* is still a notion linked with state, and the state is the main communicative addressee regarding people's claims. There is still no strong social pressure aimed at including people in outside global arenas, maybe because NGOs are seen as the mechanisms that global society developed in order to be adapted to nonstate institutional arrangements. When considering global campaigns and transnational demands urging the consideration of some people—for instance, the Palestinian or Kurdish people—they aim at new statal formations. In this sense, "transnational social movements" currently have almost nothing to do with the notion of *people* that was observed in the formation of modern states.

At the same time, however, some NGOs do struggle for the particular interests of some groups in concrete situations, by standing against some governments and political centers. In a way, they present themselves as elites bearing privileges to deal with political centers due to this social basis, especially in very specific situations when there are rights violations. This unveils the paradox of representation: NGOs have no constituents (contrary to national subjects, as analyzed by Burke), were not even in contact with persons in the territories before their action, and even claim to be marked by a social basis.

The descriptions of the NGOs in this chapter show that these transnational organizations have a technocratic face. However, this cannot be regarded as a pure technocrat view of international regimes, because even if social movements do not invoke or take into account *people*, the expertise power at the center of international institutions is still challenged by the NGOs and other organizations' claims, and are thus not exclusively exercised by technical professionals in one single field. What is occurring—also due to the necessary specialized vocabulary grasped by NGOs to

communicate with pivotal international institutions—is a dialogue among experts, but among experts pertaining to very dissimilar realms of world society.

Thus, technocracy on a global arena involves a highly complex flux of dissimilar professional communications that will be processed at a given regime's center. The thing is that criticisms regarding a democratic deficit of international institutions must be reworked, while also embracing types of social movements that do not observe themselves as being strictly bound to people (or that what is meant by *people* also has to be reworded).

The very liberal idea of representation also must be questioned, since liberalism has traditionally considered people, or the political participation of people, in an elitist manner. In the American 18th century constitutional experiences, slaves, Black people (especially in Southern states), and women were disqualified from pertaining to *people* or bearing political entitlements. In fact, Black people were first mentioned during the Philadelphia Convention in July 11, 1787, in a discussion concerning the number of inhabitants of the states to establish the proportional numbers of legislative delegates, when the Southern states wanted slaves to be included in their numbers. The French Revolution of 1789 excluded women and colonial peoples from the notion of *people*—accepting the suggestion of Mirabeau, the vague term "people's representatives" ("Les Représentants du Peuple Français") was taken as "*populous*," not as "*plebe*," transforming the Tiers-État (the common people) into the "French people" during the Estates-General of 1789. The first Jacobin Constitution, in Articles 27, 7, 8, 9, and 10, had radicalized this notion when it erased the term "representatives," stating that the sovereignty lied in the people itself (for the discussion regarding both American and French experiences, check Comparato, 1997, p. 215). Contrary to the Greek experience, these asymmetries are not regarded as natural facts in modern times, and struggles exist against them. Furthermore, while constructed under an inclusive vocabulary, modern legal texts have helped political struggles urging equal treatment to achieve some of their goals.

In many European events, other forms of political discrimination such as the census suffrage and the banning of the vote for illiterates and naturalized citizens were only very later abolished. The dismissal of many persons from being subjects of political representation was reproduced in Latin America, Asia, and Africa. Equal suffrage is a very recent achievement of world society, since women's suffrage was only permitted in the twentieth century, for example. Comprehensive political

inclusion is related to liberal ideals, but cannot be explained solely by liberalism, as many other theoretical streams and social movements emerged during the process of its achievement. As articulated by Neves (2013), constitutions found the principle of equality as significant to democracy, with primary legal equality having strong reflexes on both democratic political and legal systems:

> Without citizens who have equal political rights, democracy has no meaning. Without equal votes, disconnected from the voter's other positions and social roles, democracy lacks political rationality. . . . On the other hand, normative concretisation of the juridico-constitutional principle of equality cannot be guaranteed without the democratic procedures of lawmaking, voting in elections, and direct participation (via plebiscites and referenda), or without the difference between politics and administration in the plane of the political system. (Neves, 2013, p. 49f.)

However, political differences among dissimilar subjects that have historically culminated with the dominance of particularism shall be regarded, from the very beginning of modern constitutionalism, as embedded into it and as one of its fundamental keystones, rather than as something strange. Current lacks of representation within and beyond states are inherited from first constitutional experiences and theoretical approaches.

Liberalism—a stream that encompasses many authors—presents an elitist bias in many events, with the works of John Stuart Mill being a remarkable example thereof. Mill is too complex to be roughly labeled as "elitist," since he had democratic participatory concepts and wrote later texts on gender equality. In fact, he made efforts to balance individual liberty and social control, although falling into various elitist statements during this task. He espoused, for instance, the Hare Plan, which consisted of strategies to give proportional representation for minority positions. However, as an admirer of the Prussian Constitution of 1850 (based on a difference among votes according to tax-paying criteria), he argued in the 1835 *Rationale of Representation* that less-educated classes should obey a well-instructed minority responsible for deciding political matters (Mill, 1977); in *Principles of Political Economy* of 1848 that the lot of the poor should be regulated "*for* them, not *by* them," (i.e., by the higher classes; (Mill, 1873, p. 456); and in *On Liberty* (Mill, 2010b), a text from 1859, that less-educated classes should follow the intellectual advice of the higher classes, following his arguments regarding the importance of intellectuality.

He smoothed these positions in the 1861 *Considerations on Representative Government* (Mill, 2010c), but even then the educated elite was viewed as responsible for leading the majority, as he gave great importance to experts responsible for drafting law, while diminishing the role of elected representatives. His rationale was to be directed only to “civilized” states, while not considering equality among nations as being related to colonies, since Mill believed that there were barbarous people incapable of cooperation outside Europe (Mill, 2010a, p. 163f.). Hence, actions against them were not to be regarded as violations of the law of nations, for example, since international customs and the rules of international morality could not be obtained between “civilized nations” and “barbarians,” due to the questionable facts, among others, showing that “barbarians” would not show reciprocity and would not desire independence. He questioned: “The Romans were not the most clean-handed of conquerors; yet would it have been better for Gaul and Spain, Numidia and Dacia, never to have formed part of the Roman Empire?” (Mill, 1874, p. 252f.). Also, despite his rationale concerning equality and democracy as sides of the same coin, Tocqueville (2002) can be presented as an a thinker who bore aristocratic views of representation, since he was against every single proposal that tried to reform suffrage during the constitutional July Monarchy, even claiming that it was not adequately shaped because it preserved the bourgeoisie (for this discussion concerning Stuart Mill and Tocqueville, check Kahan, 1992, p. 71ff.). Also, as analyzed by Bendix (1977, p. 49), Tocqueville claimed that masters and servants observe each other, respectively, as inferior or superior extensions of themselves (in a consensual relationship), a psychological fact rooted in the complete domination relationship developed since childhood. In view of the Weberian Bendix (1977, p. 50f.), the rhetoric of authority in the orbit of representation expounded by Mill and Tocqueville pertains to a medieval type of intrajurisdictional and patrimonial relationship involving master and servants, and lords and retainers, in which the servants were intrinsic linked to the lords—peasants had indirect political participation, for example, when authorized to bear arms in order to protect their lord’s jurisdictional realm, so long as the medieval basis was maintained. The jurisdictional privileges and immunities of some were the subject of protests in the urban revolutions dating from the 11th century. Forgetting Mill and misanalysing the elitist bias of Tocqueville, Miguel (Miguel, 2013, p. 33ff; 110ff.) expounded upon more recent elitist streams connected with political representation

in the political thought of Nietzsche; in the works of Gaetano Mosca, Wilfredo Pareto, and Robert Michels; and even more recently, in Ortega y Gasset and Schumpeter. These are conformist doctrines that argued the necessity of elites guiding the rest of the people. In 1956, Wright Mills formulated a critical but static analysis of elitism in democracies, and was later criticized by Robert Dahl, who showed a plurality of influential groups in several sectors of a democracy and the struggles inside the very core of the elites. As argued by Vitullo (2007, p. 64), the denegation of conflicts as having a place in political dynamics and in democracies is the key to understanding political elitism. An elitist strategy can be clearly observed in the works of Samuel Huntington, such as in his book *Political Order in Changing Societies*.

It is interesting how the current rationale describing transnational or international realms in which technocracy empires is similar to the traditional, arcane, and aristocratic authority rationale concerning representation, as if international security would be per se better managed by a restricted group of state experts within an organ that is, from its very beginning, ruled by political inequality among its members. Following this, it is also interesting how medieval-like explanations (with medieval age meaning fundamentally structural disparities among its bodies) are in trend regarding the analysis of current global dynamics.

This does not mean that technocracy is absent in the present world society or that observations concerning elitist movements cannot be made, but only that eventual remarks on this matter have to made critically in order to not fall into static, naturalized justifications of the current state of affairs, as if the current arrangements would be in order. Such justifications would be a contemporaneous replication of Mill, who had a normative bias in his considerations.

It must be stated that the inexistence of people or some form of social control is not merely an actual, natural fact, as often presented, but also a circumstance used by strong powerholders to maintain their positions within quasi-despotic arrangements at international or transnational arenas. The rhetoric that any social control in nonstate fields is impossible due to the absence of people—an argument that culminates with a reaffirmation of state-based control over nonnational organisms as the ancient international contractual model (Maus, 2007b, p. 380f.)—can therefore be regarded as a strategy that merely satisfies the aspirations of privileged political centers. These actors have politically controlled states and other

organizations in the world constellation for a long time and want to continue ruling the world without being disturbed by other social spheres.

Furthermore, the argument that state-based schemes (such as international agreements) would grant representation at nonstate arenas through indirect mechanisms of representation can be observed as merely an idealistic approach. The performances of democratic states touching on international bodies are, in fact, far from corresponding to citizens' demands because most international pacts, agreements, and treaties are made and approved by statal bodies that also present very important lacks of representation, on the one hand. On the other hand, many states governing billions of persons are nothing but strong dictatorships.

Representation not only entails political participation during decision-making processes in the name of others, but also encompasses agenda setting and public debate in the name of others, for spreading political themes in several dimensions of society (Miguel, 2013, p. 121f.). This may be connected to the formation of subaltern counterpublics, understood by Fraser (in a debate with the Habermasian notion of public sphere) as "parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs" (Fraser, 1990, p. 67). These publics also have, by virtue of their heterogeneity, problems and diffuse demands, including antidemocratic and anti-egalitarian ones. The interpretation of NGOs as having participation in the formation of decisions and in the setting and diffusing of debates concerning public themes also undermines the thesis concerning a rigid separation between "public political centers" and "civil society" in the nonstate terrains analyzed, which evokes the dualistic conception of state *versus* civil society.

Notwithstanding their deficits concerning their linkage with people and their technocrat face, transnational NGOs fulfill some of the requisites at the Security Council's domain. They present themselves as being representatives of people or rights without being elected or designated as such, claiming many times, as already stated, to be representative of no one, which constitutes a current paradox of the world society: Indirectness is not even a matter to be considered, maybe because humankind is not relevant when the planet itself is being regarded, as can be observed in the rhetoric of groups such as Greenpeace. When they do claim to bear representativeness, their political representation is made without the voice of the

constituents, which leads to a paradoxical situation in which the representatives choose their constituents. Furthermore, many disconnected organizations can claim to be representative of a given people—thus, the representation can be based on the plurality of representatives, besides the plurality of constituents. This does not means that democracy is not important, but merely that transnational situations have to unfold the paradoxes related to nondemocratic representation.

To unfold these paradoxical situations, some political science streams have developed the notion of advocacy. Dealing with electoral contexts and having Mill as her point of orientation, Urbinati (2000)—who also noted that "representation" is often described as the weakening of self-government—identifies many benefits in the institution of representation, since the autonomy of the representatives—originating from the gap between constituents and representatives—is desirable to enhance deliberative activities (Urbinati, 2006). Hence, participation and representation would not be collided notions in modern democracies, but a continuum in the political games. The representation gains the component of advocacy, which is understood as having "two components: the representative's 'passionate' link to the electors' cause and the representative's relative autonomy of judgment" (Urbinati, 2000, p. 773), presenting them as "intelligent defenders" (p. 775) that recognize the weight of the other positions. Agonistic political games would be generated by virtue of the "intelligent" and "passionate" characters of advocates, and conduct the partisan to produce decisions. In the electoral constellation, representation meets some mechanism of accountability through the possibility of reviewing the representative by vote. The view of Urbinati, although trying to avoid the elitist bias of Mill, is one good spot from which to understand the rise of "advocates" as political actors, which are often linked to NGOs. By virtue of the fissure between representatives and constituents, as well as the high level of specialization involving the working of this civil organizations (which was before observed as its technocrat face), NGOs can be understood as *advocates*, and not exactly as representatives as conceived in domestic, electoral spheres, notwithstanding the fact that representation can also subsist in nonelectoral realms, as argued by Pitkin (1967).

NGOs' arrangement, which some could call *post-political* due to its novelty and peculiarity, has many problems that cannot be naturalized for being "new" phenomena, in contrast to the "old" state problems already embedded in semantics.

The absence of the constituents' authorization to be represented, the nonexistence of relationships of identity and identification between representatives and constituents (for this, check Miguel, 2013, p. 248), and the lack of accountability mechanisms are indeed some of the most problematic questions at this sphere. They demonstrate NGOs' paternalist and authoritarian faces (Miguel, 2013, p. 259f.), which prove that the financing sources of these transnational movements, which theoretically should give voice to excluded people, must be better investigated. Transnational NGOs mainly come from Northern, rich parts of the globe, and interact with other organizations from the world's economical periphery, making the hidden interests of the financing dynamics potentially problematic.

Another paradox here lies in the fact that demands regarding more democratic practices at international or transnational fora are made by these very undemocratic movements, which are often financed by former colonial powers and strong enterprises with interests in poor world regions. In a mailed survey from the 1990s responded to by nearly 150 NGOs, Smith, Pagnucco, and Lopez (1998) revealed that 60% of international human rights NGOs received foundation grants to back their activities, while 52% were financed by governmental or intergovernmental institutions.

On the other hand, specialization—which means, from my point of view, the grasping of adequate vocabularies and strategies of communicating with the center of political and legal spheres—can be a strong feature in helping local communities' demands to be heard. Second-best actors can be very important in cases when the actors that have more contact with specific communities and problems—and therefore bearing more adequate representativeness—do not have the sufficient grammatical and material tools to channel center organs, as argued by Rubenstein (2014, p. 119). Northern NGOs, notwithstanding all of the problems related to their linkage to strong powerholders or economic powers, can help to enhance peripheral demands in specific cases. This is related to the formation of transnational advocacy networks, which Jordan and Van Tuijl (2000) define as "a set of relationships between NGOs and other organizations that simultaneously pursue activities in different political arenas to challenge the status quo" (2000, p. 2053). This definition does not help to reveal the character of this type of relationship, since it ignores that NGOs can also serve to maintain the status quo, even if they do not want it.

The introduction of NGOs in the decision-making processes of the UN and specifically in the UNSC cannot be regarded as a strategy related to democracy in the United Nations. They are, by no means, democratic organs, and many lack sufficient accountability structures. Representative democracy presupposes, if not a paradoxical identity between dominators and those who are dominated (Rodríguez, 2010, p. 30), at least a recurrent moment when constituents can rule about who will be the next rulers—that is, elections. However, even if democracy is not the main theme, it can still be possible to talk about responsiveness. In this milieu, the representation of people at the transnational sphere paradoxically subsists as a constitutional problem in a realm without constitution, with NGOs being some of the strange subjects involved.

Representation in the UN also has several inconsistencies. As pointed out by Sikkink (2002, p. 316), the dogmas of sovereignty (apart from other patent problems) are conducted using the doctrine of one state, one vote in international organizations, which means that Vietnam, Burundi, Antigua and Barbuda, Russia, and Seychelles have equal representation. Furthermore, some important regions of the world—such as the State of Palestine and the Kurdish territories—have no vote or representativeness at the UN due to international political problems. Many marginalized populations, such as the Brazilian quilombolas, have no voice, notwithstanding being formally represented by Brazil in the UN. At the United Nations sphere, democracies and dictatorships have equal voices, regardless of whether the states' citizens understand their representation in this organism as being satisfactory. The UNSC, IMF, and World Bank, for example, are exceptions thereof, but they also cannot be observed as paradigms of bodies with adequate representation. In this regard, although not considering the absence of voices from marginalized spaces or states in the UN, Sikkink (2002, p. 316) affirms that NGOs and networks bring a diversity of perspectives and information that would not be otherwise offered, with the presence of NGOs being a strategy to diminish global inequalities. NGOs' responses would have been constructed with the lack of representation in international institutions in mind, adapting themselves to these deficient situations. In an optimistic manner, Sikkink (2002) stated:

> The voices of NGOs from authoritarian regimes enhance the representation of people whose political participation is limited under harsh authoritarian rule. To the extent that NGOs are holding IO bureaucrats accountable, as Nelson's

> discussion of the World Bank and Donnelly's discussion of the IMF stress, they also enhance international democratization because very few mechanisms exist to hold international bureaucrats accountable to citizens in the countries they serve. Yet the structure of representation through transnational advocacy is still inadequate to compensate for the deficit created by the loss of democratic accountability as decisions are made at higher levels. NGOs and networks are informal, asymmetrical, and ad hoc antidotes to domestic and international representational imperfections. The dilemma that transnational NGOs, networks, and movements face is how to continue to pragmatically pursue their policy agendas at the same time that they work to enhance, to the degree possible, their own internal democratic practices and the representation and accountability of the transnational network sector. (Sikkink, 2002, p. 316)

As I understand these processes, NGOs are not so much interested in reworking their own representative structure, as presented by Sikkink, but in causing political change in areas where their central demands can be achieved. Representation as a typical political figure fades away, and this kind of political measure has to be analyzed beyond state contexts.

Observations of social movements substantiate that other sectors of society want to be heard in important political centers beyond their own states—*Las Madres de la Plaza de Mayo* are among the best examples thereof. An eventual and questionable constitutionalization of the UNSC might be perceived as a paradoxical demand for democratic control (or responsiveness), respect for human rights, and rule of law–based responsibility on a global arena.[100] The constitutional *demos* as a prerequisite for the formation of constitutions is currently being challenged by several

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[100] See Deitelhoff/Fischer-Lescano (2013, p.: 68) here, in the context of private security-governance.

distinct arrangements of the world society that urge political centers to deeply change. Thus, they cannot be regarded merely as the mimics of older semantics trying to bring back old privileges (as Burke and Hegel were, according to Maus). On the very contrary, protests and the participation of NGOs strive for a responsive turn by the Security Council, with such organizations mainly having human rights as their political and legal foundation.

The crucial point for this work at the moment is to show influences from NGOs in relation to the performances and legal arrangement of the UNSC. Arria formula briefings, international campaigning, bilateral consultations, reports, and the Working Group on the Security Council are all forms of contacting Security Council, while in some cases also contributing in shaping decisions. However, they may serve to legitimate the performances of strong powerholders.

Second Conclusion. Paradoxes: Constitutional Claims, Human Rights, and Constitutions

I. Democracy, constitutionalism, and human rights present overlapping issues and demands, which are sometimes even in conflict. Currently, human rights are the main semantic choice of societal forces such as courts and social movements to try to block the expansive political rationality, but pieces of the other two semantics may also be found. The rationale might be unfolded.

The communicative location of human rights and its semantic importance disembogue in the semantic dispute among the question of human rights, democracy, and a constitution before and after the French Revolution.

Authors such as Hunt (2007), Joas (2011), and Moyn (2010) have shown, assuming very dissimilar theoretical pathways, that human rights are a kind of vocabulary that may emerge with weight in certain situations when societal forces embody their meaning, disregarding other existing semantics. Following from their rationale, without strictly following any one of them, we may assume that, we may assume that the force of human rights grammar has declined after the French Revolution, due to its concurrence with democratic and constitutional semantics, because they would have occupied the social place of human rights in some cases. The influence of human rights rhetoric has been blotted by other semantics in the same social dimension, with overlapping issues where political and legal spheres are connected. In this sense, the motto “the more democracy exists, the more human

rights will be developed" can be observed as nonoperational to this kind of approach, especially when considering the vision of Moyn (2010). Human rights semantics have never died, but after the recognition of grave statal problems, especially after the Second World War, it has received great importance again.

In presenting intersecting issues and social claims, we might talk about a semantic concurrence involving democracy, human rights, and constitutionalism.[101] At the transnational arena, due to the political weakness of rhetorical arguments concerning democracy and constitutionalism by virtue of the absence of historical requisites that led to their evolution in statal environments, human rights have become the main semantics used by social forces (courts and social movement organizations) that are able to block the expansionist tendencies of political arbitrariness. Here lies one of the reasons why social movements are grasping human rights vocabulary in this domain. Human rights grammar has reduced institutional prerequisites vis-à-vis democracy and constitutionalism, while being grounded mostly in norms, not in political organizations. Obviously, the normative texts were once approved by political centers and only exist by virtue of their continuous application, but they subsist from the moment of their formation and onward without rigid requisites, compared to democracy, for example.

The semantic processes concerning the limitations to the exercise of political power at nonstate arenas have occurred without the same social prerequisites found

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[101] I am thankful to Pedro Henrique Ribeiro, who presented me with and discussed the sources mentioned here. The idea of "semantic concurrence" is a development we made together. Moyn (2010), for example, argued that "Human rights were discovered only in contest with and through comparison to other schemes" (p. 121). Part of Ribeiro's thesis concerns the semantic concurrence regarding human rights, democracy, and constitutionalism.

inside states.[102] Nonetheless, there are paradoxical pieces of constitutional problems, constitutional claims, and constitutional forms in this sphere. Outsiders at a terrain without the traditional statal conditions all represent paradoxes that urge unfolding.

The struggles of social movements' organizations vindicating the formation of an arrangement based on, in statal-fixed terms, the rule of law (how authority exerts its authority), respect for human rights, and responsiveness at a nonstate arena have reached the political system. Along the same lines, decisions from distinct courts centered upon *jus cogens*, rule of law, and human rights grounds are provoking central political organs' authority.

The gazes of these social spheres therefore demand transformations in a firstly unperturbed arrangement, which suffers from perturbations, even if it is not inclined to change. Here, the gaze metaphor helps to explain our point. The central political body—the UNSC—cannot remain the same, as if it has not been gazed. In a sense, a social gaze, as presented in this work, comprises the notions of observation and irritation, showing the concomitance of the events and the mutual changing in both gazer and gazed actors.

Crisis seems to be one of the notions that can contribute to determining the linkage between what is happening to constitutional forms. Indeed, the described demands at the formation of new constitutional-like alignments, related to the participation of social movements, can fundamentally be explained—but also to the

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[102] This is comparable to the assimilation of liberal semantics in peripheral parts of the globe, such as in Latin America, where egalitarian liberal semantics were processed in circumstances without a structural or moral basis related to egalitarianism—the presence of slavery in the 18th century and, even after its abolishment, the actual abysm comprising Black people and White people, on the one hand, and the exclusion of women from political life, on the other hand, represent examples thereof. For this, see Neves (2015).

courts—by the severe, wide loss of legitimacy of the addressed organ. Some of the causes include the Security Council's arcane formation and some of its disastrous military and nonmilitary performances. The battles to find new vocabularies and political strategies capable of influencing the reshaping of this organ by introducing responsiveness are some of the consequences of such events.

The birth of a constitutional constellation presupposes the experience of a huge crisis, in which a change is a requirement for the survival of such organizations, as stated by the *pouvoir constituent* doctrine. According to Teubner (2011), in order to pass through changes, some regimes have historically first "hit the bottom," which signifies—in the context of an unwise expansion of the partial regime's rationality—a crisis moment related either to a catastrophe's imminence or to events in which social pressure transforms the inner acting and performances of an organ, which is named its "inner constitutions." Teubner understands these events as "constitutional moments" of the regimes.[103]

Although terms like crisis, chaos, and catastrophe are currently overused, the necessity of hecatombs and disasters to the occurrence of radical changes is, in fact, an old presupposition of evolutionist and systems theories encountered in the works of many dissimilar authors, from Marx to Darwin, for instance.

Crisis requires and provokes changes. Clearly, many of the social demands from courts and social movement organizations are not revolutionary, since they do not want the complete destruction or a visceral transformation of the social system's texture or of some particular orbit—a perception that may be inspired by young Marx's works.[104] On the contrary, their endeavors to alter the status quo are merely

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[103] Teubner's formulation must be understood in the context of the 2008 financial crisis, but can be also applied, for instance, to political crises. See (Teubner, 2011, p. 8).

[104] Keck and Sikkink (1998a) present a more optimistic approach:

In other words, as modern anthropologists realize, culture is not a totalizing

directed toward reforms of existing global organs (Gohn, 1997, p. 172f.). The new human-rights-based technocracy and judicial expertise are not events to be uncritically welcomed.

In any case, the communications addressed to the UNSC may be observed as demands aiming at something resembling a constitutionalization process, due to the pretension of restricting the traditional ways of exercising authority and, moreover, due to the pretension of aspiring to develop a more responsive regime. Here, the communicative battles urge for elements beyond a functional constitutionalization. This is another paradoxical request.

However, the conceiving of a political and legal arrangement that would be more than a functional constitution at this dimension is a very problematic assumption. Political constitutions presuppose democracy, on the one hand. A constitution is a modern achievement linked to states, on the other hand. Constitutions have been seen as a form of allocating powers in a given state (as a political organization responsible for the accomplishment of highly specific functions) through one or more documents, setting a legal hierarchy and prescribing competencies for producing law.

> influence, but a field that is constantly in transformation. Certain discourses such as that of human rights provide a language for negotiation. Within this language certain moves are privileged over others; human rights is a very disciplining discourse. But it is also a permissive discourse. The success of the campaign for women's rights as human rights reveals the possibilities within the discourse of human rights. (Keck & Sikkink, 1998a, p. 211f.).

As the new, ambitious project of Ackerman (2016) demonstrates, more than one path to constitutionalism might be found.[105] Following, the rationale of several possible pathways in general, might constitutions flourish in global fora? Or will they remain related only to state experiences?

The fundamental question, here, swirls around *borders.* What, then, are borders and limits? They are merely spaces fixing where some kind of communication might communicate. Territorial limits are to be understood merely as one of the possible spaces in which political and legal communications may communicate. Constitutions are historically linked to a certain kind of space.

Constitutions are confined to territorial borders, in which political and legal systems may be found. Nonstate arrangements have also their borders, but they are not territorial. Would family resemblances exist between state and nonstate borders? Or, on the contrary, is a territory is a kind of creature with no relatives? The answer is that they all are spaces, making it possible to recognize family resemblances.

In order to explain this question, a debate revolving around this question shall be presented. In the third part of this rationale, the theme will return and a diagnosis will be provided.

II. In the systems theory realm, there is a hard discussion concerning the presence of nonstate constitutions. Luhmann presents constitutions as evolutionary achievements and structural couplings between two closed systems—law and politics—that have emerged in modern times. The constitutional field represents the locus at which both political and legal systems are grounded by environmental requirements that are vital to their reproduction—needs that were not or could not be

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[105] In this phase, this unpublished work wrongly limits the pathways to only three. Furthermore, it does not observe non-statal constellations or non-statal influences over national spheres. I addressed detailed considerations in this sense to the author, but here is not the place for their presentation.

generated by either one of those systems in an isolated manner. State constitutions enable the communication between those systems without any of them losing their own capacity for self-reproduction (i.e., their autopoiesis; (Luhmann, 1990); see also Holmes (2012, p. 122). Although state constitutions have been linked to the development of (the paradoxical) regional differentiation in modern law and political systems (i.e., the formation of states), Luhmann (1993) argued that there is no equivalent to the state constitution in the global arena (p. 582) and that a constitution offers "political solutions for the problem of the self-reference of the legal system and legal solutions for the problem of the self-reference of the political system"; since constitutions are conceived as the constitutions of the "state," a necessary condition is that the state is a "real object which needs to be constituted" (Luhmann, 2004, p. 410).

In another text, which was also constructed with regard to mostly state constellations, Luhmann (1995a) argued that a constitution is necessary to resolve the self-determination-of-law paradox (i.e., the problem regarding the lawfulness of the code's difference between lawful and unlawful) in a juridification process.[106]

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[106] Luhmann (1990) stated:

> Daß es Verfassungen geben muß, wird in der juristischen Interpretation begründet mit der Notwendigkeit, die Geltung des Rechts zu begründen. . . . Nur darf keine Selbslbeschreibung zugelassen werden, die die Frage aufwirft, ob der Code selbst Recht oder Unrecht ist. Das darin liegende Paradox muß unsichtbar bleiben. Aber damit werden die Fragen nur abgeschnitten, die dennoch hin und wieder gestellt

Luhmann also recognizes the existence of legal forms that did not or do not have a state constitution as an evolutionary modern achievement, such as archaic law; the law of older, premodern, high cultures; and the international order. International law is compared to tribal orders due to the necessity of renouncing the power to determine what would constitute violations of law, and to the necessity of renouncing the organized sanctioned powers (Luhmann, 1995a, p. 234).

Notwithstanding this basis, some scholars have been inspired by Luhmann's approach regarding the necessity of a constitution in juridification dynamics to affirm the existence of constitutions in state realms, which is perfectly acceptable from a methodological perspective. In this direction, along with the primacy of functional differentiation, authors like Teubner and Fischer-Lescano (Fischer-Lescano, 2005; Fischer-Lescano & Teubner, 2004, 2006; Teubner, 2003) used this last Luhmannian consideration to state that constitutions can also be found at a societal, nonstate realm. Regimes' constitutions are presented as permanent structural couplings between legal arrangements and subject-specific orders (i.e., between autonomous legal events and social processes; Fischer-Lescano & Teubner, 2006, p. 55).

As mentioned at the beginning of this work, (Fischer-Lescano & Teubner, 2006, p. 7ff.) argue that Luhmann had predicted in 1971 the emergence of a legal fragmentation based on social sectors (and no longer based on state territories) because a transition from normative to cognitive expectations in a worldwide context would occur. Now, it is time to observe this assertion carefully. In the cited article, Luhmann (1975a) neither dealt with legal differentiation in functional sectors, nor mentioned legal fragmentation. Although also facing problems related to law and international law when in contact with politics (when touching, for example, upon the subject of a global state, asking if law and politics would remain as the fundamental

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werden können und insbesondere bei radikalen Veränderungen des Gesellschaftssystems an die Oberfläche drängen. Die Idee der Verfassung ist ein darauf antwortendes Enlparadoxierungskonzept. (Luhmann, 1990, p. 186) About this question, see also Fischer-Lescano (2005b, p. 10).

bearers of the human risk; (Luhmann, 1975a, p. 56)), he does not allude to a supposed radical legal fragmentation. Rather, he tackled the differentiation between normative and cognitive expectations, and also possible events in which an expectation type could be transformed into another, in an evolutionary sense. Luhmann (1975a, p. 63) sustained (as the fundamental rationale of his text) that interactions in a global arena were primarily structured by cognitive expectations, while questioning or even stating "speculatively" that norms at the realm of a consolidated world society would not be responsible in future for the previous selection of patterns of what can be recognized. Instead, he said that the problematic of the capacity of learning (Lernfähigkeit) would obtain structural primacy; the structural conditions of the learning should be then supported by normatization in all partial systems—the author was practically quoted here. This means that, even if correctly assuming that Luhmann came to grips with legal problems in this writing, Fischer-Lescano and Teubner extrapolated the meaning of his words. However, this misuse does not invalidate Fischer-Lescano and Teubner's rationale and conclusions with regard to the current developments of the world society.

On the other hand, thinkers such as Neves (2013) and Ladeur (2011) have taken the first Luhmannian statement to maintain that special historical conditions must be fulfilled in order to produce something that can be named a *constitution*. These scholars are concerned with the modern historical background that is invariably related to states labeling some texts as constitutions.[107]

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[107] Facing similar questions, Habermas (2005) stated:

The position rejecting the global correspondence to the phenomenon of states' constitutions is based on several assumptions: Firstly, it argues that operational closeness is necessary for a system to couple structurally with another system. Indeed, this structural coupling is presented as a way for closed systems to establish a nonephemeral communication with its environment, consistent with Luhmannian theory (Luhmann, 1998 pp. 92ss, esp. 101.; 2004, p. 404), making the system responsive to its environment, since environmental communicative fluxes are processed according to the system's existing structures. The adaption of a system in relation to its environment cannot be clarified, in this sense, like the "natural selection" explanation does when describing the evolution of live organisms, due to the importance of its internal structures in processing the environmental irritations (Luhmann, 1998, p. 101). The irritations from the environment trigger internal operations, which are always processed by the system's internal logic.

Secondly, for these assumptions, a large asymmetry between different systems blocks the formation of a constitutional arrangement—horizontality between systems, meaning that the operative closeness of the systems in contact is

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> Wenn diese Beschreibung zutrifft, stellt uns die postnationale Konstellation vor eine unbequeme Alternative: Entweder müssen wir die anspruchsvolle Idee der Verfassung einer sich selbst verwaltenden Assoziation freier und gleicher Bürger preisgeben und uns mit einer soziologisch ernüchterten Interpretation der Rechtsstaaten und Demokratien zufrieden geben, von denen nur noch die Fassaden stehen bleiben. Oder wir müssen die verbleichende Idee der Verfassung vom nationalstaatlichen Substrat lösen und in der postnationalen Gestalt einer politisch verfassten Weltgesellschaft wiederbeleben. Natürlich genügt es nicht, im philosophischen Gedankenexperiment vorzuführen, wie der normative Gehalt der Idee begrifflich in einer Weltbürgergesellschaft ohne Weltregierung aufgehoben werden kann. Die Idee muss in der Welt selbst mit einem empirischen Entgegenkommen rechnen dürfen (p. 235).

guaranteed, and is therefore a requirement for the formation of a structural coupling. Thus, the extremely unbalanced power configuration among states blocks such a constellation beyond states. Furthermore, law operates in fields such as the lex mercatoria or lex constructionis merely as an instrument of the respective regime's expansive rationality, far away from being a configuration that restrains its rationality as observed in states—hence, a democratic formation is a premise for a constitution, as a structural coupling between law and politics (Neves, 2013, p. 70).

III. As I see the debate, approaches that argue the exclusivity of state constitutions actually observe "constitutions" only in rich states (the United States, Canada, Australia, etc.) of the world society, especially in Western European states. They are still linked with French and U.S. developments, as if they constitute a rigid model to be followed—for example, the "separation of powers" is an adamant prerequisite to the existence of a constitution, according to Article 16 of the 1989 French Declaration of Human and Civic Rights.[108] Basically, the constitutional question swirls around how the state's power is organized and how fundamental rights are guaranteed.

Authors who embrace this kind of view hold that the structural role played by constitutions cannot be perceived adequately in other realities. For them, politics and law in some European states constitute themselves as functionally autonomous arrangements that operate self-recursively and communicate with other systems (in the sense of being cognitively open). Thus, forming a constitution as a mutual "solution" to some problems and necessities of systems entails such a high imperative that it seems almost impossible to hold that other states globally (such as

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[108] Article 16 states: "Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution" [Any society in which no provision is made for guaranteeing rights or for the separation of powers has no constitution.]

in all African states and some Latin American states) bear or should also bear constitutions.

This is a paradox. Colonial powers and rich states have formulated and imposed a model to other realities that cannot be implemented in these very realities. To these models based on Luhmann (for example, 2004, p. 404), the only manner of understanding constitutional experiences outside rich countries or Western Europe is to deny their constitutional status by denouncing either a “colonization” of politics by law or the corruption of the code of law by politics or other systems. Although constitutional problems can be observed in the world society for Neves (2012), the interplay between politics and law in spheres where a functional constitution is, according to our view, being shaped cannot be adequately seen through such a lens alone.

This rich-statal, European-based view, if extended, would argue that there are no *real* parliamentary regimes in other states beyond Europe, because this kind of government is historically grounded on European developments. And how about states or supreme courts? Were they not created in the modern age under very specific Western European prerequisites, and are they not they very different structurally and in their concrete functioning, compared with their European models?

These ways of thinking are, in fact, contra-factual models not based on many constitutional experiences around the world, but only on strict regional models linked with historical events, as if the words would have some kind of essence bound to specific states of affairs. The cited paradox concerning different realities of the same model must be recognized, but it cannot block its unfolding, while always making reference to the previously rigid conditions of the ideal model.

To spin the debate around words and their uses, with social requisites as the background, a philosophical reasoning has to be placed here in order to show my argument. In one word, therapy seems to be necessary here.

An Augustinian view of language has some valid points, but the adequate understanding of a phenomena interwoven with the use of a given word cannot remain grounded on it, as the meaning of a given word is nothing more than its use in the language (Wittgenstein, 1999 , §43). It is true that historical events shape the meaning of words—in fact, speaking is as part of our human nature and history as eating, drinking, and walking are. Nonetheless, a word can be employed in other states of affairs if it makes sense to speakers of a given language game. The

recognition of a constitution in a given context is thus related to the learning and understanding of the legal and political grammar (Wittgenstein, 1999 § 381).

This was the classic method used by H. Pitkin (1967) when discussing representation. Based on Wittgenstein, she demonstrated that it is important to know how thinkers have conceived a given notion, how the term has been used in the ordinary language, and how the given word or expression has been institutionalized over the years to a comprehensive understanding of some vocabulary. The understanding of terms, in this sense, cannot be reduced to any of these uses insulated from others.

This is not that simple. Naïve nominalist approaches have to be contested, and the problem of misunderstandings has to be put on the table. Wittgenstein (1999) thought about misunderstandings, misconceptions, and misuses of words. Shortly after providing a very sad, prejudicial metaphor opposing "savages" and "civilized men," in order to compare the philosopher to the "primitive people" who hear foreign expressions, misinterpret them, and produce odd conclusions, he stated:

> §195. . . . the sentence only seems queer [*seltsam*] when one imagines a different language-game for it from the one in which we actually use it. (Someone once told me that as a child he had been surprised that a tailor could "sew a dress"—he thought this meant that a dress was produced by sewing alone, by sewing one thread on to another).
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> §196. In our failure to understand the use of a word we take it as the expression of a queer *process* [*Vorgang*]. (As we think of time as a queer medium, of the mind as a queer kind of being.)

However, the comprehension and the use of words in specific language games can be transformed into new forms of expressions that adapt words to specific contexts—that is, nothing but the use of terms throughout grammar rules. This means that new language games can be created if the use of a word in a given context is used and comprehended as such; in the present case, we are dealing with an ancient notion of our own history, and not with some odd, alien expression.

The opposite view would be the understanding of a realm in which words mirror things of the "*real world*." Although Wittgenstein's picture theory of language may be very complex concerning the relationship between references and meanings,

this is the position assumed in *Tractatus Logico-Philosophicus,* not in his *Philosophical Investigations*.

The learning and comprehension of the legal grammar must be based on many, barely unrelated historical episodes when the speakers have used legal terms in some sense. First, the combated positions underestimate the relevance of constitutions as vital acquisitions in particular historical experiences. In many cases, the normative force and the role played by constitutional texts are less important, by far, compared with political agents' will, such as in the Latin American dictatorial times. However, a constitution cannot be viewed as an almost a priori, theoretical concept. We must learn from constitutional experiences, as they have occurred in many places throughout the world over the last centuries without their constitutional status being denied because they were, for example, also important for holding the exercise of arbitrariness in some events, even in grisly epochs. A constitution bearing symbolic elements (for the notion of a 'symbolic' constitution, see Neves, 2007a) for what is bad and good can be still observed as a constitution. With such an approach, the notion of "constitution" loses its "purity," taking this concept historically and worldwide, while embracing non-Western European cases that can be named as constitutional experiences. Constitutions can therefore also be observed in periods when strict constitutional practice was very low.

This does not mean that differences among the states of the world cannot be assessed. The rationale presented here is that all of these state experiences are constitutions, using theory to explain their diversity as adequately as possible.

Secondly, constitutional semantics seem to be relevant to social movements and to institutional realms, whether they are linked with states or not, even in despotic eras. Constitutional rules, constitutional changes, and constitutional claims toward the approval of a new constitution all serve, in many cases, as vital demands in several social arrangements.

Constitutional problems appeared in times when constitutions were instrument of political power. These constitutions were in many times disregarded by central institutions, including courts. However, while they were constitutional problems in constitutional realms, occasional successes in this sphere could be made due to the legal constitutional logic. Hence, one can neither merely deny the constitutional status of a constitution nor the constitutional relevance of the claims by having

theoretical concepts in mind, even those based on historical experiences; dictatorial constitutions were, in a grim sense, still constitutions.

In any case, this does not mean that everything may be called “constitution” in a naïve, nominalist way. Seeing constitutions everywhere has to do with the problems linked to the absence of adequate semantics in outlandish spaces, but they might not be accurate. For example, there have been no formed, finished constitutions in the nonstatal realms until now. The problem of identifying constitutions at nonstatal terrains is not the problem with using the word “constitution.” At a nonstate domain, all structures, forms, and problems might eventually be considered as pertaining to the same family. The hurdle lies in the societal, historical developments.

The social claims of their existence represent a material axis of constitutions, since they originated from the elite or from broader movements. At nonstate realms, no social movements urge or struggle to shape a constitution. The courts that observed, for example, the ICTY—a UN constitution—were merely referring to the word “constitution” at its most very basic sense, as a constitutive instrument. Thus, they were not making analogies with the way by which statal constitutions bind and legitimize authority, rule the people’s everyday routine, and provide grounds for human rights.

This again leads to the discussion about people. As stated, there is no such thing as a “global people” that could be regarded as being equivalent to a state’s people, and it is also very reasonable to identify a lack of democratic presuppositions in a global arena. In systems theory terms, it is crystal clear to hold that, when comparing sense dimensions to the configuration of state orders, the social dimension (the people) is missing. However, some fragments of the material dimension and the temporal dimension can be observed. In fact, themes on which communication communicates (e.g., the issues regulated by law or the material dimension) are present, whereas what can be expected in a temporal manner is uncertain with regard to two main, unlike features. This is because the restriction on possible action related to powerful actors in the future is unsure, on the one hand, but the rules concerning human rights are not being modified at the will of powerful actors, on the other hand. Generalization is a process related to avoiding the typical problems concerning the aforementioned dimensions, giving symbolic immunization against other alternatives that are not related to their features, while reducing them in

order to help the system reproduce, through some mechanisms. *Norming processes* give duration to the expectations, irrespective of eventual disappointments—the expectations and norms remain unchanged, aside from their violations. An agreement is assumed through *institutionalization*, notwithstanding the factual disapproval of some. *Identification* ensures unity of sense and cohesion, despite the diverse forms of expectations.[109]

Returning, to sum up: Helped by Wittgenstein, we stated that a word may be used with sense when family resemblances are present, which is far beyond a simplistic, nominalist perspective and avoids the question of polysemy. Given that law and politics are merely communication circulating in some spaces, nothing blocks the possible observation of familiarities between state courts and nonstate courts, and state documents and nonstate documents, etc. A territory is only one of the possible spaces and, as with any other space, is communicatively constructed.

The problem here is the absence of social claims directed to the construction of constitutions, which should attract the world's attention. There are paradoxical constitutional claims, but from this we cannot conclude that a constitution is presented or being formed because the claims are not directed to the shaping of a constitution, while revolving around constitutional problems. There is no aprioristic thought here, since social claims urging constitutions might also come from state elites. They are simply absent, although their formation is possible.

Consequently, there are no resemblances if the social, constitutional claims made within states aimed at forming constitutions, as well as nonstate claims, are observed. This does not mean, however, that such events might not be identifiable in the future. The existence of nonstate constitutions is not impossible hereafter, if the same words are used with arguments from the same family.

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[109] About sense dimensions concerning social systems, see (Luhmann, 1987, p. 94ff.).

Conclusion

Co-evolutionary, ongoing, unfinished processes are haunting the relationships among politics, social movements, and law on a global terrain. They embrace questions such as global human rights, the contentious of the political rationality, the restriction of political rationality, and responsiveness. There are still many semantic conundrums trying to nominate the phenomena behind such processes.

The present work has shown three main points regarding human rights language, security, and societal pressures. First, positive law—which includes legal customs—might be observed as being connected to the Security Council, possibly binding its measures. Second, some social players—namely, the social movement organizations and courts—struggle to address communications in order to restrict their rationality with the human rights grammar. Finally, the Security Council has changed some of its performances by virtue of such gazes, albeit using their rationale strategically to implement its grim performances in many events.

In cases when communications are addressed by NGOs inserted at the periphery of the UNSC regime, the adequate theoretical explanation would be that the communicative flux is being made in an even more direct way than were some courts' decisions. This may be explained by the fact that, in some very particular cases that have already been shown, NGOs helped to construct the Security Council's decision regarding what is good and bad. Again, this does not mean any kind of naïve, triumphalist approach, since NGOs present an excluding, technocratic side, making it possible for them to act as accomplices to human rights violations by the Security Council, as the support and silence of some of these organizations may be viewed vis-à-vis some violent, authorized measures.

UNSC represents a central piece in defining the meaning of risk. To such a task, it acts in a technocratic, despotic, and arcane manner. Risk, as a notion observed by systems theory, is being defined by experts of law, politics, and social movement organizations. It would be possible to add security enterprises, a topic not discussed here.

Global security, then, is a theme for experts. It is an issue for security actors, including international organizations such as the Security Council, specialized NGOs, and courts defining the legal boundaries. It involves technocracy against technocracy, in some moments, and technocracy helping technocracy, in others. It is

a battle of elites. Responsiveness in this terrain should be understood in a very weak manner, since it has been linked with nondemocratic, technocratic realms such as NGOs and tribunals. Courts or NGOs may be also more responsive, but this does not seem to be the present case of the statal and nonstatal organizations presented.

Social movement organizations and legal actors gazing at the Security Council with concern do not channel revolutionary communications but, in general, merely have demands that have already been discussed and accepted by the mainstream media, Northern-based courts, and strong global powerholders. *Change* may be in the horizon of such social mobilizations, but not *revolution*. A revolutionary approach at the UN sphere would entail, for example, a proposal concerning the complete abolition of the UN Security Council and/or the establishment of a global security system, in which the use of force would be completely forbidden in any situation, or even the complete abolition of nuclear weapons for all countries around the world. These kinds of demands, if argued by social movement organizations, would find no resonance at this realm, since they do not comprise the limited human rights vocabulary that is usually employed.

In this sense, the absorption of human rights vocabularies by the main global political centers can be used, indeed, as a mere stratagem to keep social unrest under control (i.e., to conserve the current situation as it is). The consideration of what human rights would be by organizations such as the Security Council would correspond to the minimum able to grant stability to global asymmetries.

However, if the social spheres aim to construct responsive forms of securitization and embed them socially, then these arcane arrangements—including the current NGOs—have to be transformed. Human rights semantics have the potential to help in such a task, especially its political side is considered. The legal logic may also operate in order to restrict political authority, making the role of courts important here.

The use and misuse of human rights language by central organizations does not mean that the semantics of human rights has to be abandoned. On the very contrary, social mobilizations have to be aware of a possible manipulative use and consider the chance of revolutionary approaches. The revolutionary praxis is at the hands of political movements. A political revolution can only occur through politics and within politics. Courts and legal theory could merely change or make a revolution inside the legal space.

An eventual adequate, responsive legal apparatus based on human rights and the rule of law would not be the panacea for security questions. With this formation, even if constitutional-like formations take place, the everyday political and legal praxis would show if it is effective or not. This arrangement might be nothing but a sham. Having this in regard, human rights—as with any kind of social vocabulary—also have limits, and the social *praxis* can help to mold other vocabularies based on original, actual experiences and demands, while changing or destroying old means of political action or old semantic grounds. Or they may merely maintain the status quo. Monsters can continue to perform monstrosities.

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ANEXO – VERSÃO DA TESE EM PORTUGUÊS

UNIVERSIDADE DE BRASÍLIA
FACULDADE DE DIREITO
PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO

Encarando o monstro: Tribunais, ONGs e o Conselho de Segurança da ONU

BRASÍLIA-DF
2016

MAURÍCIO PALMA RESENDE

ENCARANDO O MONSTRO: TRIBUNAIS, ONGS E O CONSELHO DE SEGURANÇA DA ONU

Resumo em português da tese apresentada como requisito parcial para a obtenção do título de Doutor em Direito, Estado e Constituição pelo Programa de Pós-Graduação em Direito da Faculdade de Direito da Universidade de Brasília.

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RESUMO

Ancorada na teoria dos sistemas, a tese apresenta, em um primeiro momento, o contexto legal no qual se insere o Conselho de Segurança da ONU. Argumenta-se que tal órgão é fonte de expectativas normativas da sociedade mundial, bem como, ao mesmo tempo, um ator da política mundial que bloqueia a aplicação do direito e o viola em diversos eventos. No segundo capítulo, a tese aborda os meios legais de restrição do arbítrio de tal órgão por meio da análise de decisões de tribunais em âmbitos estatais e não estatais, e mostra que o Conselho de Segurança pode auxiliar no processamento de expectativas normativas em certos casos. Em sua terceira parte, por fim, a tese apresenta organizações não governamentais (ONGs) como fontes perturbadoras do regime do Conselho de Segurança, atores que lutam para a contenção da racionalidade política de tal corpo da ONU, participando na formação de normas de segurança internacional. Problematiza-se a atuação de tais ONGs, bem como se aborda a apropriação estratégica do vocabulário dos direitos humanos, o que também pode ser notado em decisões judiciais. Ao fim, indaga-se sobre a paradoxal busca por formas constitucionais nessa esfera. A tese possui o argumento de que Tribunais, ONGs e o Conselho de Segurança são âmbitos tecnocratas da sociedade mundial em conflito e em diálogo, bem como esferas que terão de passar por mudanças se quiserem ser observadas como responsivas.

Palavras-chave
Movimentos sociais, constitucionalismo global, organizações internacionais, cortes internacionais, segurança internacional

ABSTRACT

Anchored in the perspective of the systems theory, the dissertation presents, first, the legal arrangement in which the United Nations Security Council (UNSC) is inserted. It is argued that UNSC can be observed as a source of normative expectations of the world society and, at the same time, as a global actor that blocks the application of the law and violates legal parameters in several events. In the second Chapter, the dissertation examines court's decisions in state and nonstate spheres that review or assess UNSC's acts, also showing that the UNSC might perform in some instances as an actor that contributes to the processing of normative expectations. In the third Chapter, the dissertation presents non-governmental organizations (NGOs) as actors struggling for the restriction of UNSC's political rationality and as actors that participate in the formation of international security norms. The dissertation investigates problems concerning NGOs' performances and discusses the strategic appropriation of the human rights vocabulary by these social movement organizations, a fact that might also be perceived in the courts' decisions. Lastly, the dissertation put the problem of the paradoxical struggles for the formation of constitutional arrangements in this nonstate arena. The dissertation shows that court, NGOs, and the UNSC are technocrat areas of world society in conflict and in conversation, as well as organizations that have to change to be seen as responsive spheres.

Keywords

Social Movements, Global Constitutionalism, International Organizations, International Courts, International Security.

Introdução.

O presente texto é um resumo da tese apresentada como requisito parcial à obtenção do grau de Doutor em Direito junto à Universidade de Brasília e, portanto, as considerações aqui aduzidas podem ser observadas com mais detalhes em seu original. Optou-se por apresentar todas as referências jurisprudenciais, documentais e bibliográficas da tese ao fim do presente, a fim de que se tenha conhecimento do que foi originalmente abordado.

A tese observou uma organização bastante peculiar da sociedade mundial, assim como algumas das repostas sociais a ela. Assombrados pela memória de acontecimentos gris da Segunda Guerra mundial, seus arquitetos ofereceram a ela um poder nunca visto e a batizaram como o Conselho de Segurança das Nações Unidas.

Para alguns, tal organização representa um monstro insensato que possui a capacidade de destruir todo ambiente que o circunda e, ao mesmo tempo, um arranjo bizarro projetado para assegurar um status quo desigual. Para outros, representaria um titã que protegeria o mundo de problemas piores, bem como de outras abominações e sortilégios.

Pode-se dizer aqui que nenhuma argumentação unilateral é capaz de apreciá-la suficientemente, pois se trata de uma criatura capaz de mudar seu temperamento de acordo com seus movimentos internos e com as influências ambientais.

Num mundo complexo, certos comportamentos crucias tendem a afetar vários âmbitos e desencadear reações. A criatura central das Nações Unidas está sendo encarada por diversos atores sociais. Em contraste com o que ocorre com rotineiras observações, um olhar fixo e penetrante é um momento vívido e enérgico que afeta tanto o encarado quando o que o olha.

Olhares fixos ao Conselho de Segurança oriundos de duas arenas serão aqui abordados, como foram na tese original. Em primeiro lugar, há o direito. Em segundo lugar, há ONGs (Organizações Não Governamentais), organizações dos movimentos sociais. Inicialmente, após a exposição do ângulo legal do Conselho, será demonstrado que o direito toca as motivações políticas e reage ao construir firewalls legais através de suas cortes e também através de sua teoria. O lado político, por sua vez, usa argumentos legais para fundamentar suas decisões. Subsequentemente, será afirmado que as ONGs lutam para restringir tempestuosas atividades do Conselho através dos direitos humanos, contribuindo com a construção, em alguns casos, de novas formações. Em certo sentido, trata-se de uma teoria social de resistência e criação normativa.

Foi exposto que tais reações sociais também possuem seus próprios problemas, bem como que o Conselho de Segurança já se moveu e se move praticamente livre em diversas situações, sob o ponto de vista legal. Não se pode aqui encontrar nenhuma teleologia, uma vez que a evolução social ruma de acordo com informações complexas, bem como de acordo com o acaso.

De certo modo, construções sociais, incluindo pessoas, podem ser observadas como monstros em algumas situações. Potenciais Leviatãs institucionais estão por todo lugar, e homens ou mulheres podem ser lobos para seus conhecidos ou estranhos. Ao cabo, conflito, posturas totalitárias e reações são eventos usuais de nossa sociedade.

1. Advertências teóricas e apresentação da tese

1.1 Regimes, sistemas da sociedade mundial e a ONU

O que constitui os sistemas, regimes e outros arranjos da sociedade mundial é algo que apenas pode ser abordado com a ajuda de inúmeros olhares vinculados a diversos ângulos de um determinado arsenal comunicativo, considerando-se problemas concretos e os meios tangíveis de resolução edificados factualmente. Olhando-se apenas para textos legais, negligenciam-se comunicações políticas; voltando-se apenas para atos políticos violentos, perdem-se de vista as lutas de

atores dos movimentos sociais; observando-se apenas movimentos sociais, outras pressões sociais podem ser ignoradas.

A política não constitui o direito, a economia não constitui o sistema de tratamento de doenças, a educação não constitui a política. Factualmente, cada sistema global luta para se auto constituir com a ajuda de fluxos comunicativos de diversas fontes, buscando plasmar ou manter sua integridade através de seus próprios processos. Aqui a sociologia política encontra o direito, uma vez que é uma tarefa sociológica explorar a formação dessas constituições intrincadas e inquietantes. Assim como pode ser notado na maioria das constelações estatais, os sistemas sociais não são completamente diferenciados num âmbito global, sendo possível notar a concorrência de distintos tipos de diferenciação em paralelo à diferenciação funcional. Por isso, muitos tipos de arranjos comunicativos além de sistemas podem ser identificados.

Devem ser analisadas com cuidado a miscelânea de diferentes arranjos sociais e a colonização de alguns regimes por, em sua maioria, poderosos atores políticos e econômicos. Desembaralhar emaranhados exige esforços transdisciplinares. Por esse motivo a teoria sistêmica luhmanniana pode ajudar, pois as dinâmicas internas podem ser investigadas tendo o ambiente em relevo. O déficit dessa teoria, ao menos como originalmente formulada, é o não reconhecimento, em certos eventos, da concorrência de diferentes códigos operando em constelações concretas, como é o caso de realidades de estados pobres, nas quais poderes político e econômico influenciam em grande medida a reprodução de outros sistemas, tais como ciência e direito. Inúmeros influxos podem ser analisados tendo em conta sua influência sob um determinado regime, uma vez que os desenvolvimentos internos podem ser investigados olhando seu ambiente.

Não há arranjo social isolado da sociedade, não há organismo que exista em si e para si. Pode-se apenas falar sobre a política da sociedade, os estados da sociedade, o direito da sociedade, as universidades da sociedade e assim por diante. A Organização das Nações Unidas (ONU) é parte da sociedade e, portanto, seu Conselho de Segurança (CSONU) apenas pode ser observado adequadamente enquanto um órgão da sociedade, enquanto o Conselho de Segurança da sociedade. Isso quer dizer que tal órgão está imerso num mar com diversos atores, alguns dos quais que inclusive agentes que o irritam. Pode-se dizer que o Conselho

de Segurança está, em certo sentido, sob ataque de alguns de seus observadores atentos, por exemplo de movimentos sociais e organizações jurídicas.

Sob o ponto de vista sistêmico, a sociedade mundial é primariamente um arranjo funcionalmente integrado que vê dificuldades praticamente insuperáveis no que tange à formação de uma democracia global e de esferas baseadas em *rule of law*, de um lado. De outro, observa a presença de movimentos altamente excludentes e não democráticos de organizações internacionais que podem, em teoria, afetar a todos. Tais dinâmicas estão acopladas ao fato de que a sociedade está tentando encontrar novas disposições para responder a problemas ligados a movimentos estatais e a movimentos não estatais globais. Ao mesmo tempo, pressões sociais demandam o desenvolvimento de formas mais responsivas de exercício da autoridade, olhando com preocupação arranjos hierárquicos nos quais a manutenção de privilégios institucionais é apresentada como algo dado, como irrefutável. Paralelamente, as pretensões conectadas a uma democracia global possuem muitos pontos controversos, sendo que as ideias de um estado global ou de uma república mundial podem ser apenas muito problematicamente formuladas (conforme Maus, 2002, p. 243ff.; veja também Fischer-Lescano, 2005, p. 247). É um tempo incerto e transicional, no qual novas formas jurídicas e políticas estão sendo plasmadas por um processo em curso e inacabado, o qual não possui, por sua vez, qualquer fim decidido com antecedência.

As Nações Unidas e seus corpos políticos são organizações que resolvem problemas altamente específicos da sociedade mundial. Eles não são nem sistemas funcionais, nem organizações exclusivas de um determinado sistema funcional, mas sim loci centrais onde diversos tipos de comunicação providos de diferentes atores operam para regrar esferas da sociedade em termos econômicos, políticos e/ou jurídicos. Eles são peças, portanto, da governança global[110] e do direito global. As

[110] Governança tal como entendido por Teubner enquanto “das Resultat von sozial-politisch-administrativen Interventionen (…) in denen öffentliche und private Akteure gesellschaftliche Probleme lösen.” “Im Vordergrund steht damit die konstitutionelle Begrenzung von politischer Macht, deren Besonderheit darin besteht, dass sie partiell vergesellschaftet ist”” (Teubner, 2012, p. 23f.).

ações da ONU estão conectadas à moderna diferenciação funcional, pois realizam funções que não poderiam ser executadas por estados, enquanto organizações políticas da sociedade, ou por outras organizações sociais, tais como empresas, universidades ou hospitais. Entretanto, a diferenciação diferencial é uma entre outros tipos de diferenciações operando na sociedade, pois concomitantes são formas como centro/periferia, exclusão/inclusão.

A abordagem tradicional da teoria dos sistemas é a de que o direito seria um sistema funcional global segmentado regionalmente, nos estados. Isso significa que, por todo o mundo, o direito desenvolveu-se tendo como base seu código lícito/ilícito, uma diferenciação reconhecida como orientadora de condutas humanas em termos temporais, estabilizando expectativas contrafactuais, tendo as operações realizadas por inputs internos e estatais. A política também é um sistema segmentado territorialmente, operando sob o código poder/não poder (e, em democracias, sob o código governo/oposição). A política possui como função a imposição vinculante de decisões coletivas. Diferentemente operam, por exemplo, economia e ciência enquanto sistemas sociais, uma vez que suas operações não são condicionadas ou restritas a eventos limitados às fronteiras estatais.

Outros enfoques, tais como o de Neves (1992), desafiaram a primazia da diferenciação funcional, provando que contextos regionais bloqueariam o alcançar da diferenciação funcional em realidades específicas por causa de fortes pressões desdiferenciantes, o que levaria à corrupção de determinado código sistêmico. Este seria o caso que envolve política global e direito global: ao lado dos sistemas funcionais diferenciados (sendo a economia o mais claro exemplo), podem ser encontrados outros conjuntados em que estariam ausentes sistemas diferenciados, estando presentes outros tipos de formações comunicativas. Os fluxos comunicativos moldando tais alinhamentos poderiam ser explicados por esquemas centro/periferia, por padrões hierárquicos e mesmo pela teoria das redes, conforme o ponto de vista do observador ou do contexto. Neves, assim como este trabalho, não quer dizer que não exista a diferenciação funcional. Pelo contrário, ela coexiste com outros tipos de diferenciações, podendo dar-se a concorrência de códigos.

Nas décadas passadas, segundo alguns autores, o direito teria passado por uma transição, qual seja, de estruturas legais estatais a arranjos globais, em algumas esferas. Teria, então, seguido as pressões da diferenciação funcional em

alguns loci sociais globais, uma vez que novos desafios mundiais, primariamente baseados em expectativas cognitivas, precisam do direito para solucionar problemas. O mundo estaria sendo confrontado por novos regimes legais não estatais, possuidores de racionalidades próprias, como a lex mercatoria e lex digitalis, as quais produziriam comunicações afetando outros regimes (Fischer-Lescano & Teubner, 2006, p. 7ff.).

Alguns arranjos jurídicos seriam, portanto, produtos de novos setores sociais, combinados com a transição de expectativas normativas para cognitivas. O direito seria um arranjo formado para auxiliar o melhor desenvolvimento desses regimes, um instrumento de suas racionalidades parciais. O direito manteria sua unidade, pois aplicaria o código lícito/ilícito. Embora sejam tais posições, no geral, adequadas, as assertivas de Fischer-Lescano e Teubner baseiam-se num artigo de Luhmann publicado originalmente em 1971 (Luhmann, 1975a), em que este autor não tratava sobre a diferenciação do direito em distintos setores funcionais ou sobre a "fragmentação" do direito. Sob uma perspectiva luhmanniana tradicional, os influxos cognitivos enfraqueceriam o direito enquanto sistema pautado primariamente por expectativas normativas.

Ao contrário do sugerido por Teubner e Fischer-Lescano, regimes globais não possuem racionalidades unitárias, petrificadas. Pelo contrário, dinâmicas internas podem mudar rapidamente uma racionalidade específica, retrabalhando o alcance e o foco de suas operações quando batalhas internas transformam seus centros decisórios. Ademais, já que não completamente formada e possuindo diversas fontes (como as diversas e concorrentes empresas da lex mercatoria), não se pode falar em racionalidade, mas em racionalidades. Ainda que reconheçam tais autores conflitos internos e às vezes um tipo de racionalidade operacional, não corporificada, a identificação de uma única racionalidade pode ser percebida como uma tentativa de homogeneizar um campo social por meio do emprego altamente seletivo de casos exemplificativos.

Teubner é bastante lacônico no que toca a noção de regimes públicos. Segundo a presente perspectiva, eles podem ser entendidos como zonas onde arranjos políticos ligados a estados ou a outros tipos de centros políticos assumem papéis fulcrais. O acima afirmado em relação a racionalidades flutuantes pode ser aplicado às organizações políticas estatais ou não. Enquanto organização, o

Conselho de Segurança possui uma racionalidade que ruma conforme a composição de seus membros e segundo os pressupostos de seu ambiente, oscilando temporalmente seus problemas, metas e interesses. Por exemplo, suas ações anteriores a 1989 são muito distintas das pós-1989, embora o P5 (os cinco países com poder de veto) não tenha se alterado. Incertezas semânticas e operacionais são as marcas desse organismo interestatal, que deve definir termos vagos ou ambíguos como “ruptura da paz” e garantir que os propósitos da carta da ONU sejam alcançados baseando-se em situações de fato altamente controversas e nebulosas, como, por exemplo, uma guerra, um genocídio e mesmo emergências internacionais de saúde (vejaGoede, 2014, p. 82ff.). A lógica do mais forte não pode sempre explicar essa constelação jurídica e social, até por não existir um único ator poderoso, mas sim membros com poderes de veto e barganha, algumas vezes com intuitos diversos.

Desde 1989, o Conselho de Segurança apresentou em muitas situações uma racionalidade expansiva tendente a aniquilar seus ambientes naturais e sociais para atingir suas metas, ainda que sob justificativas diversas e opostas a isso, como a proteção aos direitos humanos. Os regimes internos do Conselho, por seu turno, como o regime de sanções, assim como as performances militares, apresentam diferentes métodos e objetivos.

Com tal formação pós-1989 em tela e, dado que as performances do Conselho de Segurança põem em perigo a existência de qualquer outro fragmento social, tal corpo político encontra reações de diferentes tipos. As comunicações endereçadas ao Conselho de Segurança provêm de empresas não militares e militares (como a Blackwater), organizações regionais de segurança, estados, tribunais regionais, supranacionais, domésticos e internacionais, bem como de outros corpos das nações unidas como a Assembleia Geral e o ECOSOC (Conselho Econômico e Social das Nações Unidas).

O Conselho de Segurança das Nações Unidas vê também respostas de outros setores da sociedade que buscam a) sob uma perspectiva política, a restrição de sua racionalidade, o que se assemelha ao constitucionalismo; b) o procedimento jurídico em seus atos, o que pode assemelhar-se à rule of law; e c) a salvaguarda de direitos individuais e sociais sob uma perspectiva mais ampla. O presente trabalho fulgura algumas demandas que buscam um Conselho de

Segurança mais responsivo primariamente por meio da análise de ONGs e tribunais.

Nesse sentido, a racionalidade política está sendo confrontada com dinâmicas contenciosas, noção inspirada em Tilly (1978), em áreas não estatais. Além da restrição da racionalidade política, portanto, há também elementos que tornam o regime do Conselho de Segurança cada vez mais contencioso. Esses, contudo, não são os únicos fenômenos dignos de nota, pois atores não estatais estão também contribuindo para a formação de decisões políticas e de atos jurídicos globais, como o último capítulo demonstrará.

1.2. Observações e olhares fixos

A tese circundou em torno de observações de segunda ordem. Algumas considerações teóricas têm de ser apresentadas para melhor apresentar o significado disso. Há um grande e notável tipo de observação direcionada às performances do Conselho de Segurança que podem ser explicadas a partir de uma impura e cibernética leitura de *le regard*, noção lacaniana, traduzida para o português como “o olhar”, para o espanhol como “la mirada” e para o inglês como “the gaze”.

O olhar lacaniano é aqui apenas uma pedra de toque, pois há consideráveis diferenças em relação ao arsenal teórico sistêmico. Por exemplo, em contraste como a teoria sistêmica, Lacan vê o sujeito despedaçado, no qual também a linguagem é o Outro, de modo ainda atado à filosofia da consciência, estando o sujeito fora do processo de significação (Fink, 1995, p. 44ff.).

De acordo com a teoria sistêmica, a linguagem é o acoplamento estrutural entre mente e comunicação, esta vista como externa à consciência. Ainda, a tensão entre o sujeito e o objeto é recorrente em Lacan, mas tal conflito foi, senão eliminado, muito alterado com a tese da autonomia da comunicação. Zizek (1989, p. 137) argui que o sujeito lacaniano aliena-se no significante; em outras palavras, está dividido no momento que em a cadeia de significação ocorre, tendo a ordem simbólica (o Outro) uma fenda, um espaço no qual o sujeito pode construir sua identificação. O sujeito é distinto do objeto, do Outro, e o Outro é distinto do objeto.

Em tal diversidade, a fissura do Outro emerge. O olhar lacaniano insere-se no contexto do desejo do sujeito, que está conectado ao desejo do Outro.

De qualquer forma, a noção lacaniana possui similaridades com a visão luhmanniana concernente à cadeia de observações, e detém o mérito de desvelar a transformação da relação entre observado e observador durante e após o olhar, portanto contribuindo para o presente trabalho[111]. Ao lidar com a noção do olhar, também abordando seus aspectos físicos, Lacan descreve a "estranha contingência" que existe no relacionamento contínuo entre luz e opacidade, isto é, o fato de que estar sendo observado ou sendo potencialmente observado gera ansiedades, uma vez que as aspirações primárias nunca se coadunam com o que se experiencia, em uma abordagem, portanto, cibernética.[112]

Não há observação absoluta, uma vez que a visão sempre perde algo. Contrariamente a Sartre, Lacan entende que o olhar observa a si mesmo, o que significa que o sujeito olhado percebe um olhar enquanto olhar (Lacan, 1979, p. 84) De um lado, o olhar de um objeto faz com que surja a sensação de que o objeto está olhando de volta do modo que lhe convier, como a lata no mar em sua história verídica – uma abordagem cibernética, portanto. De outro lado, a ideia de se estar sendo hipoteticamente observado (ao perceber traços da presença do outro) traz ao observado o reconhecimento da existência de áreas não visíveis em seu campo de

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[111] O olhar panótipo de Foucault não é válido para aqui, pois não se trata da constante sensação de se estar sendo observado de forma permanente que implicaria numa desconfiança permanente que catapultaria mudanças comportamentais. Há também pouco contato comunicativo ou nenhum dentro das instituições descritas pelo pensador francês, conforme (Foucault 1996: 235).

[112] "The gaze is presented to us only in the form of a strange contingency, symbolic of what we find in the horizon, as the thrust of our experience, namely, the lack that constitutes castration anxiety (…) [3] - In our relation to things, in so far as this relation is constituted by the way of vision, and ordered in the figures of representation, something slips, passes, is transmitted, from state to stage, and is always to some degree eluded in it - that is what we call the gaze" (Lacan, 1979, p. 72f.).

visão (Lacan, 1979, p. 94ff.).

Não há correspondência entre o olho e o olhar, pelo contrário, há uma fissura, uma vez que um sempre gostaria de ter sido ou ser observado de uma maneira diferente do que de fato foi, e o que um olha nunca é o que gostaria de olhar. O “objeto a” é reconhecido como separado e possui algumas relações com tal lacuna. O sujeito deve entender que está sendo confrontado com outros observadores em muitas situações e que, ao mesmo tempo, ele/ela não pode controlar quem observa (Lacan, 1979, p. 102f.); (veja também Newman, 1990) .

Tais considerações possuem relação com o cerne do presente trabalho. No contexto de diversos olhares dirigidos ao Conselho de Segurança, ONGs transnacionais são o exemplo mais proeminente de atores não estatais com acesso a tal arena urgindo a consideração de certos temas com base em direitos humanos globais. ONGs estão progressivamente capturando um vocabulário especializado a fim de serem capazes de estabelecer comunicação com o regime do Conselho de maneira relevante. Tribunais ligados a estados ou a organizações supraestatais inserem-se em tal dinâmica de observação fixa, decidindo com base em muitos fundamentos além dos direitos humanos.

As performances dos atores ligados a movimentos sociais trazem como problemática sua representatividade em relação a grupos locais e suas maneiras tecnocráticas de agir. Tribunais também apresentam sérios problemas de representatividade e legitimidade, embora tenham dado decisões contrárias aos ditames do CSONU. Cortes e organizações de movimentos sociais são apresentadas na tese como localizadas na periferia do regime do Conselho de Segurança, aqui em termos inspirados na teoria sistêmica e nos desenvolvimentos de Fischer-Lescano e Teubner (2006).

Só se pode falar de abertura e responsividade se for provado que um determinado órgão, regime ou arranjo possui modos de ser confrontado e mudado, ou seja, que não é um âmbito despótico e absoluto. Por isso, será apresentado em primeiro lugar o contexto jurídico no qual se insere o Conselho, o que também está ligado aos tribunais. Isso mostra sua face não absoluta, não onipotente, o que vai de encontro a muitas perspectivas que o vêm como desenfreado em termos jurídicos.

Esse órgão das Nações Unidas está sendo encarado por muitos organismos sociais. Como mencionado com a noção inspirada em Lacan, pode-se dizer que os

olhares sociais impelem mudanças no seio do Conselho de Segurança. Este teve de desenvolver formas para se adaptar ao seu meio ambiente, considerando as observações dos outros. O Conselho não pode ignorar os fluxos comunicativos. Tem, no mínimo, de alterar-se para bloquear futuros olhares. O que é olhado não tem poderes sobre o que olha, tendo de construir repostas.

A relação das Nações Unidas deve ser analisada a fim de que se entendam os referidos olhares sociais. A Carta da ONU é um fragmento de um mundo político e jurídico multifacetado, o qual processa algumas das diversas demandas sociais. Pressões sociais sob instituições internacionais são mencionadas por teorias da politização.

Zürn (2013, p. 13f.) assume a primazia da diferenciação funcional como plausível, sendo um dos seus pré-requisitos teóricos. Tal autor afirma que tudo que entra na arena política é politizado, definindo a politização de instituições políticas internacionais como o processo pelo qual os poderes capazes de formar uma decisão e as interpretações sobre os estados de coisas a eles ligados são transportados para a arena política (Zürn, 2013, p. 19), vista como o sistema político, inspirado por termos sistêmicos, ou para o espaço político, aqui entendido como o locus de debates acerca da melhor lógica funcional para um determinado problema. Haveria uma reflexão tocando o processo de formação de uma decisão (*politics*) e o conteúdo de uma determinada decisão (*policy*), o que está ligado a saber se uma decisão seria adequada se observadas as circunstâncias do problema. Tal processo envolveria também, do ponto de vista operacional, a resistência pública a instituições internacionais e uma crescente mobilização pública ligada à expansão das funções das organizações internacionais, bem como aos seus novos meios de exercício da autoridade (Zürn et al., 2012, p. 71).

Sob esse ponto de vista (Zürn et al., 2012, p. 70), as instituições internacionais que possuem autoridade seriam aquelas que aceitas por seus endereços comunicativos como suficientemente competentes para julgar e prover decisões vinculantes. Logo, as instituições internacionais exerceriam funções regulatórias por serem capazes de implementar regras e decisões.

Zürn et al (2012) subestimam muitos desenvolvimentos teóricos que reconhecem o papel de organizações sociais (veja, v.g., Keohane and Nye (1972), bem como não conseguem compreender a função e a responsabilidade de movimentos sociais na formação e implementação de decisões de organizações

sociais. Além disso, como os sistemas não são diferenciados completamente numa escala global, a politização de instituições pode também ser vista em seu aspecto negativo, enquanto destruidora de fluxos comunicativos específicos de outras esferas. O direito, portanto, pode ser corrompido pela política.

Ao trazer reinvindicações e protestos transconstitucionais ao debate, pressões sociais indicam que pretendem transformar o status quo em algo similar a um arranjo constitucional no âmbito da ONU, numa órbita em que já se verificam padrões legais, esse arranjo parece ligar-se a pretensões sociais transconstitucionais. O direito pode afetar o cerne de instituições políticas em função de sua própria lógica, não servindo meramente como instrumento da política.

As expectativas normativas da sociedade mundial, plasmadas com a participação de movimentos sociais e dos meios de comunicação em massa, proporcionam uma base legal para os insistentes e peremptórios reclames ligados a batalhas sociais. O direito pode assumir tal função, mas isso não significa que o faça sempre. O potencial emancipatório de um regime jurídico renovado pode ser apenas vislumbrado, e não observado claramente, numa esfera global. Se existe um potencial emancipatório dos direitos humanos, ele estaria mais no campo político do que no jurídico, algo contrário à posição de Fischer-Lescano and Möller (2012, p. 57ff.; 84.).

O direito, enquanto um observador social, luta para encontrar respostas semânticas e estruturais para novos arranjos, de qualquer forma. Como a força semântica do constitucionalismo ainda é fraca numa arena global, são os direitos humanos quem parecem prover um vocabulário forte o suficiente para alertar a sociedade mundial a respeito de graves violações, escandalizando muitos âmbitos sociais. Para além dos direitos humanos, certas demandas tocam problemáticas ligadas à democracia e típicos problemas constitucionais. Áreas sem constituição podem apresentar não apenas problemas constitucionais, como sustentado por Neves (2013, p. 2), mas também demandas e reivindicações constitucionais. Elas também são paradoxais, pois ligadas a constituições, ou seja, a arranjos comunicativos estatais por excelência. O paradoxo, no entanto, deve ser desenrolado socialmente.

A tese arguiu que as pressões sociais ligadas a direitos humanos estão empurrando o arranjo legal do Conselho de Segurança para ter uma configuração similar ao que encontramos em áreas estatais, ao identificar problemas relacionados

a *rule of law* (à maneira pela qual a autoridade decide e trata os endereços de suas decisões) e à restrição da racionalidade, da lógica política, alocação de funções etc., o que está mais ligado ao constitucionalismo. Algumas decisões são também plasmadas com ajuda de movimentos sociais. Um arranjo constitucional no âmbito do Conselho de Segurança da ONU não é apenas altamente improvável, como também um paradoxo, uma vez que se observa tal regime como se ele fosse capaz de alcançar tal configuração. E é a semântica dos direitos humanos a que estimula mudanças nesse âmbito, num contexto de grave crise. A contingência da evolução social não permite afirmar se um arranjo de tal modo existirá.

Como será reafirmado mais adiante, a tese sustentou que no âmbito não estatal, não há que se falar em constituição. Isso não se deve pela alta vinculação de constituições com os desenvolvimentos estatais. Estados são tão somente espaços demarcados por onde comunicam comunicações de cunho jurídico e político. Uma constituição não deve ser vista como absolutamente ligada aos estados. Outros espaços em que comunicações jurídica e política podem transitar podem ser demarcados, sem se atrelarem a territórios. Exemplos claros aqui seriam regimes comunicativos plasmados por estados e organizações como empresas e organizações ligadas a movimentos sociais. A ausência de constituição aqui está relacionada à dimensão social, uma vez que as reinvindicações sociais, que hoje vêm de organizações de movimentos sociais, não urgem a formação de uma constituição, mas apenas a resolução de alguns problemas.

Termos globais legais e políticos (como, v.g., socialismo e direitos humanos) mudaram ao se deparar com estruturas normativas ligadas às realidades locais. No âmbito global, um contraste pode ser visto: ideias territorializadas estão sendo usadas para descrever dinâmicas globais, ao lado de semânticas globais outrora já modificadas em estados. Se tal propósito é razoável, ou se isso se constitui apenas uma mimetização de antigas semânticas para trazer à tona formas passadas de dominação, como já ocorrido conforme Maus (2010), é o que se discutirá.

3. ONU, jus cogens, obrigações erga omnes e direitos humanos.

A tese demonstrou que, sob uma perspectiva formal, a tríade formada pelo Artigo 103 da Carta da ONU, jus cogens e pelas obrigações erga omnes ilustra a

formação de um arranjo baseado nas relações entre normas primárias e secundárias do direito internacional por proverem critério para mudança de outras normas em tribunais e órgãos legiferantes, oferecendo ainda padrões para que pese a licitude de uma dada norma. Tais bases legais podem operar como fontes para outros regimes, inclusive em arenas transacionais, ou ao menos os afetar. O trabalho aceita o argumento de Fischer-Lescano (2005) no sentido de que o Artigo 38 do Estatuto da Corte Internacional de Justiça compõe esse tabuleiro. Tal autor também tem razão ao dizer que dinâmicas judiciais podem formar constelações legais funcionalmente hierárquicas, dando como exemplo o caso Marbury v. Madison, 5 U.S. 137 (1803) da Suprema Corte estadunidense[113]. Com efeito, foi a partir de uma decisão judicial que a dinâmica constitucional hierárquica foi moldada.

Textos legais são, portanto, estruturas vivas dos regimes legais. Jus cogens, obrigações erga omnes e qualquer outro tipo de fonte jurídica podem ser apreciadas por cortes, ocasião na qual os sentidos legais serão definidos. Há outros intérpretes, por exemplo a teoria do direito, mas as cortes são os centros dos regimes jurídicos. O caráter jurídico sobre o que pode ser entendido por *jus cogens* está em franco desenvolvimento ainda.

Várias cortes já julgaram normas internacionais tendo como pano de fundo a doutrina do jus cogens, [114] englobando temas relatos aos direitos humanos, como a

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[113] Esse autor, contudo, afirma que a "constituição global" poderia ser dividida em normas de jurisdição, entendidas como (a) remédios globais no contexto de uma rede de cortes internacionais, supranacionais e estatais, (b) jus cogens e (c) normas que formam a validação de normas, como o citado Artigo 38 do Estatuto da CIJ. Fischer-Lescano também afirma que jus cogens pode ser entendido como "Formelles Verfassungsrecht", o direito constitucional formal kelseniano, o que não parece corresponder com a doutrina desse autor. Eu não chego a tanto. Eu sustento que jus cogens pode ser entendido como regras primárias em alguns casos e como regras secundárias em outros, sempre no sentido de Hart, num processo dinâmico que pode englobar outras fontes normativas.

[114] Para uma revisão do debate, veja the International Law Commission Report (2006, at para. 374).

proibição de regimes de apartheid, do crime de genocídio[115], de escravidão, tortura,[116] a proibição de tortura durante a guerra e da execução de prisioneiros de guerra. [117] Algumas outras normas de direito humanitário também foram consideradas parte do jus cogens[118], o que pode ser visto igualmente em posições teóricas (de Wet, 2004a); (Mausama, 2006, p. 30); (Starck, 2000, p. 156ff.) e na prática costumeira da ONU em suas conferências, como na Conferência de Teerã em 1968 sobre Direitos Humanos, que culminou no Protocolo Adicional I à Convenção de Geneva de 1977 (Starck, 2000, p. 159)[119], e suas ações em conflitos armados. No tocante à Corte Internacional de Justiça (CIJ), votos em separado e opiniões divergentes tentaram definir o que seria jus cogens.[120]

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[115] Genocide Convention case (Preliminary Objections), ICJ Reports 1996, p. 616, para. 31.

[116] Barcelona Traction case (1970). Aqui, a CIJ entendeu que entre as normas da categoria de jus cogens estariam as proibições relativas a genocídio, aos direitos fundamentais do ser humano, como a escravidão. No caso *Prosecutor v. Anto Furundžija*, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, 121 ILR (2002) at 260–262, paras. 151–157), foi afirmado que a prática de tortura seria contrária ao *jus cogens.* Para uma exploração desse caso, veja (de Wet, 2004b). Para uma compreensão sobre tortura enquanto crime contra a humanidade, com a investigação de obrigações erga omnes e do papel da esfera internacional na proteção de direitos humanos, bem como na persecução penal de violações de direitos humanos, veja (Aragão, 2007, p. 203ff.) .

[117] Veja, por exemplo, o voto em aparte de Simma no caso Armed Activities on the Territory of the Congo (ICJ Summary of the Judgment of December 19, 2005, p. 8).

[118] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of July 8, 1996, ICJ Reports 1996, p. 226.

[119] São exemplos de Resoluções da Assembléia Geral da ONU, segundo essa Starck, 2000: 2597 (24), 2674 (25), 2675 (25), 2852 (26), 3102 (28), 3267(29), 30/21, 31/19 e 32/18.

[120] Por exemplo, Judge Moreno Quintana, Guardianship of Infants, ICJ Reports 1958, pp. 54, 106; Judge Fernandes, Passage Over Indian Territory, ICJ Reports 1960, pp. 5, 135; Judge Tanaka, South West Africa Cases, ICJ Reports 1966, pp. 2, 298, bem como os casos North Sea Continental Shelf, ICJ Reports 1969, pp. 2, 182; Judge Ammoun, Namibia, ICJ Reports 1971, pp. 15, 77ff.; Nagendra Singh, Nicaragua Case, ICJ Reports 1986, pp. 14, 153; Judge Sette Camara, Nicaragua Case, ICJ Reports 1986, pp. 199–200; Judge

A dinâmica entre *jus cogens* e outras esferas jurídicas não representa uma "hierarquia informal" tal qual apresentada pela International Law Commission, dirigida por Koskenniemi (International Law Commission, 2006, pp. p. 167, para. 327), mas sim uma formação derivada da prática e produção jurídica internacional, do costume e de decisões, envolvendo uma relação cíclica e funcional entre dois tipos de normas, quais sejam, regras primárias e secundárias.[121]

Jus cogens pode ser observado como um padrão para a identificação de normas primárias de obrigações. Em outras palavras, pode operar como uma regra secundária no que toca o direito dos tratados por ponderar acerca da validade de uma regra primária, o que possui consequências no caso de violação de regras primárias (International Law Commission, 2006, pp. p. 167, para. 327; Tomuschat, 2006, p. 430ff.). Nem toda norma de jus cogens é secundária, pois pode ser em outros casos apenas uma típica regra primária ao lado de normas de tratados internacionais.

A tese demonstrou que não há que se definir jus cogens apenas por sua capacidade de anular normas de tratados internacionais, pois os artigos 53 e 64 da Convenção de Viena são meramente exemplificativos. Jus cogens também pode ser posicionado num âmbito normativo operando em outras situações jurídicas que não tenham origem necessariamente em um tratado específico, o que contraria diversas posições como a de Tomuschat (1993, 2006).

Weeramantry, Gabcíkovo-Nagymaros Case, ICJ Reports 1997, pp. 7, 114. Tais exemplos podem ser encontrados em Kadelbach (2006, p. 32).

[121] A tradução de Ribeiro Mendes para o português de "primary and secondary rules", noções de Hart, é "normas primárias e secundárias". No entanto, entendo que a tradução mais próxima ao texto hartiano seria "regras", não "normas", uma vez que Hart inspirou-se em desenvolvimentos da filosofia da linguagem wittgensteiniana como observada em "Investigações Filosóficas", para a qual há "regras" em nossa linguagem, conforme tradução mais adequada do alemão "Regel", como as regras de um jogo de tênis. Ademais, parece-me claro que se a opção de Hart fosse para o que conhecemos por "norma", teria usado a palavra inglesa "norm".

Como regra secundária, jus cogens pode operar para solucionar o “defeito da incerteza”, em termos hartianos, por amalgamar diferentes normas de tratados num mesmo campo legal quando dizendo que são válidas, ou seja, que pertencem ao direito internacional por estarem em harmonia com o jus cogens. Assim, jus cogens é uma composição normativa cuja identificação separa o que é lícito do que não é. Se o jus cogens não pode ser considerado a regra de reconhecimento do direito internacional por haver múltiplas fontes para a identificação de uma norma como sendo parte do âmbito deste, constitui-se parte da solução para identificação de obrigações internacionais (argumento inspirado em Hart, 1994, p. 92). Ao lado de jus cogens, há obrigações erga omnes e outros princípios costumeiros que, juntos, têm parentesco com a regra de reconhecimento hartiana.

Efeitos erga omnes, ligados ou não a normas de jus cogens, contribuem para a formação de um arranjo global no qual padrões legais podem ser usados contra perpetradores estatais ou não estatais. A invocação de tais normas pode ser realizada mesmo sem o expresso consentimento de uma das partes (Fischer-Lescano, 2005, p. 230), sendo aplicável também a organizações internacionais e a atores não estatais.

Nesse sentido, qualquer órgão das Nações Unidas deve seguir padrões de direitos humanos para que cumpra o mandado da Carta da ONU, a qual deve ser compreendida como imersa num âmbito legal mutante, que se define hoje também com o balizamento a partir de normas de jus cogens, de obrigações erga omnes e de direitos humanos básicos.

O Conselho de Segurança da ONU não deve ser entendido como superior a tal constelação, mas apenas como um órgão da ONU, situado no regime da desta, portanto como peça do direito internacional. Eventuais violações devem ser entendidas não como atos políticos ordinários, mas como performances ilícitas.

Isso não quer dizer que a mera existência de direitos humanos fundamentais, jus cogens e obrigações erga omnes automaticamente façam a revisão judicial algo possível, não sendo também suficiente para explicar a necessidade de implementação de tais direitos. De fato, o direito não pode ser reduzido a textos legais; a implementação, ou seja, o *enforcement* de normas internacionais por atores globais devem ser encarada, bem como reivindicações de outros setores. Na próxima seção será explorada a difícil relação entre cortes e o Conselho de

Segurança, sendo que na última seção serão expostas algumas das performances de atores sociais relacionados ao tema.

3. O Conselho de Segurança da ONU e Tribunais

A tese demonstrou que a judicialização e a resolução de disputas no âmbito do regime de segurança das Nações Unidas podem ser observadas sob dois ângulos distintos. De um lado, o Conselho de Segurança da ONU pode operar funcionalmente em alguns casos relevantes como um órgão que resolve litígios (Keohane, Moravcsik, & Slaughter, 2000, p. 834f.; Mondré & Zangl, 2005) ou que ao menos auxilia em tal tarefa. A criação de tribunais ad hoc para a Antiga Iugoslávia, através da Resolução 827/1993, e para Ruanda, através da Resolução 955/1994, está nesse contexto. A tais tribunais foram conferidas competências e jurisdição para tratar de violações de direitos humanos em tempos de guerra, sem serem, ao adjudicar, subordinados ao arbítrio político do Conselho de Segurança. O regime de sanção baseado na Resolução 1267 possui semelhanças com um corpo adjudicatório ou quase-judicial, o que talvez também possa ser notado em outros subregimes de tal órgão político da ONU.

Ainda no que toca o papel do CSONU na resolução de conflitos, pode-se notar, em primeiro lugar, que tal órgão possui a responsabilidade primária para avaliar casos de ameaça à paz internacional que não tenham sido resolvidos por estados no âmbito da ONU. Em segundo lugar, o CSONU também pode tratar qualquer disputa internacional que ameace a paz, ainda que não tenha sido chamado a isso, podendo ainda fazer recomendações às partes envolvidas. Em terceiro lugar, qualquer membro da ONU pode chamar a atenção do CSONU para analisar algum caso que tangencie ameaças à paz. Finalmente, conforme o Artigo 13, parágrafo b, do Estatuto de Roma, o Conselho de Segurança pode, contra a vontade estatal e sob o Capítulo VII da Carta das Nações Unidas, referir situações

ao Procurador do Tribunal Penal Internacional (TPI), já o tendo feito em alguns casos.[122]

De outro lado, há o caso de avaliação das performances e decisões do CSONU por diversas cortes. A tese demonstrou que vários tribunais já avaliaram os limites dos poderes do Conselho de Segurança da ONU, ou mesmo decidiram de tal forma que, indiretamente, as resoluções ou procedimentos legais do CSONU perderam efeito. Cortes nacionais, como não têm jurisdição sobre o CSONU propriamente, julgam a legalidade, convencionalidade ou constitucionalidade de decisões estatais ou supraestatais (houve casos concretos na União Europeia) promulgadas para concretizar diretrizes políticas do CSONU. Isso demonstra que o trabalho da tese é baseado na teoria sistêmica de Luhmann, portanto sociológica. Mesmo que não se trate de comunicação jurídica em um mesmo sistema jurídico, um dos regimes, mesmo que não o do direito, pode ser afetado e pode alterar-se.

A tese demonstrou que há precedentes da Corte Internacional de Justiça[123] e de vários outros tribunais, fundamentalmente de países da União Europeia[124], a

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[122] Veja a Resolução 1970 (2011), a respeito da situação na Líbia; Resolução 2000 (2011), sobre o caso na Costa do Marfim, a Resolução 1593 (2005), referente à situação de Darfur, a Resolução 1497 (2003), em relação à Libéria e as anômalas resoluções 1422 (2002) e 1487 (2003). Houve também casos em que o CSONU declarou a importância do TPI, como por exemplo Resolução 1998 (2011), referente aos direitos das crianças e ao fim da impunidade por crimes cometidos contra elas em tempos de conflito. Tais Resoluções mostram a seletividade do TPI, pois pessoas de países ricos não são levadas a julgamento no TPI ou referidas pelo CSONU ao seu Procurador (para isso, veja Johansen, 2006).

[123] Sobre o debate relacionado à capacidade de apreciação judicial de atos do CSONU, veja Cannizzaro, E. (2006, p. 191ff.); Michael Fraas (1998). A CIJ já sopesou os poderes do CSONU em casos em que o Article 38 (1) de seu estatuto e a Carta da ONU estavam conectadas. Incluem-se "Certain Expenses of the United Nations" (1962), "Legal Consequences for the States of the Continued Presence of South Africa and Namibia (South West Africa) Notwithstanding Security Council Resolution 276" (1970), bem como o caso Lockerbie (1992)

[124] Isso pode ser visto nos casos Kadi I e II, European Court of First Instance Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities [Case T-315/01], 2005; Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities. Joined cases [C-402/05 P and C-415/05 P. Judgment of the Court (Grand Chamber) of 3 September 2008. Também nos casos da Corte Europeia de Direitos Humanos M & Co v. Federal Republic of Germany. Application 13258/77. Decision of 9 February 1990; Matthews v. The United Kingdom. Application no. 24833/94. Judgment of 18 February 1999; Grand Chamber. Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi

esse respeito. Também o Tribunal Penal para a Antiga Iugoslávia ICTY[125] e o Tribunal Penal para Ruanda[126] inserem-se nessa dinâmica ao avaliarem os poderes do Conselho de Segurança.

A questão atual não deve ser mais em relação a *se* as resoluções do Conselho de Segurança das Nações Unidas podem ser analisadas por tribunais, mas sim *como* os julgamentos acontecem. A tese demonstrou que há comunicações vindas de tribunais forçando o regime jurídico do Conselho de Segurança a responder, principalmente as que dizem respeito aos regimes de sanções que afetam indivíduos de estados ricos. Cortes, portanto, avaliam os poderes do CSONU, como se verifica no caso Tadic do Tribunal Penal para a Antiga Iugoslávia, e podem inclusive tornar inefetivas as decisões do CSONU ou, ao menos, gerar problemas para os estados que tentavam concretizar tais ditames.

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v. Ireland. Application no. 45036/98. Judgment of 30 June 2005; European Court of Human Rights. Grand Chamber. Behrami v. France, application no. 71412/01 and Saramati v. France, Germany and Norway. Joined Applications nos. 71412/01 and 78166/01 (Admissibility). Judgment of 20 May 2007; Nada v. Switzerland. Application no. 10593/08. Judgment of 12 September 2012. Interessante também é a decisão da Suprema Corte da Suíça Youssef Mustapha Nada v. Staatssekretariat für Wirtschaft, BGE, No. 1A.45/2007, 14 November 2007. Disponível em: http://www.admin.ch/ch/d/sr/sr.html, accesso em 08/08/2015. Além disso, pode-se apontar a decisão canadense no caso Abdelrazik v. Canada (Federal Court of Canada. Abousfian Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada, 2009. FC 580. Judgment of 4 June 2009). Em tribunais estadunidenses, pode-se apontar decisões nos casos Kindhearts for Charitable Humanitarian Development v. Geithner, 647 F.Supp. 2d 857 (N.D. Ohio 2009); Al - Haramain v. U.S. Dept. of Treasury, 585 F.Supp. 2d 1233 (D. Or. 2008); People's Mojahedin Org. of Iran v. U.S., 613 F.3d 220, 225 (D.C. Cir. 2010).

[125] Veja Prosecutor v Tadić (IT-94-1-AR72), Appeals Chamber of the ICTY, Decision on the Defence Motion for Interlocutory-Appeal, 2 October 1995; Prosecutor v. Anto Furundžija, Judgment of 10 December 1998, Case No. IT-95-17/1, Trial Chamber II, 121 ILR (2002) .

[126] The Prosecutor v. Joseph Kanyabashi, Decision on the Defence Motion on Jurisdiction, 18 June 1997. ICTR, case No. ICTR-96-15-T; The Prosecutor v. Karemera, Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, inter alia, lack of jurisdiction and defects in the form of the Indictment, 25 april 2001. Case No. ICTR-98-44-T.

O caso do Comitê de Sanções ligado às resoluções 1267 (1999) and 1989 (2011) a respeito da Al-Qaeda e indivíduos e entidades associadas é o mais claro. Aqui, também em função de decisões de diversas instâncias contrárias aos procedimentos legais a ele ligados e aos instrumentos normativos estatais que dariam efeito às ordens do CSONU, este órgão alterou esse regime sancionatório, tendo criado inclusive a figura de uma (o) ouvidora (o) (ombudsperson) para tratar dos casos. O trabalho também arguiu que esse subregime ainda possui muitos problemas sob uma perspectiva de *rule of law.*

Se o CSONU fosse realmente onipotente e impenetrável, as regras praticamente despóticas, claramente contrárias a princípios legais mínimos e relacionadas às sanções ditas inteligentes, não teriam sido alteradas. Isso mostra que mesmo o Conselho de Segurança pode ser afetado por comunicações jurídicas e modificar-se.

Verificaram-se ainda processos de aprendizados entre tribunais, como nos casos Behrami, Bosphorus e Kadi, além de outros processos domésticos, algo em harmonia com a tese de Neves (2013). Em outros eventos, como, por exemplo, em Abdelrazik v. Canada, caso da Corte Federal do Canadá, não houve referência a casos similares que não os domésticos no tocante ao cerne da argumentação jurídica, embora aqui tenham sido citadas fontes jurídicas não canadenses, bem como uma decisão da Corte Permanente de Arbitragem Internacional.

A questão, então, gira em torno do aprendizado jurídico por regimes. A mudança no procedimento do CSONU prova que há aprendizado não apenas entre cortes, mas também entre diferentes esferas de regimes jurídicos, como a mudança de esferas produtoras de direito por razão de decisões judiciais de outros arranjos comunicativos.

Os estados aos quais as cortes estão ligadas encontram-se em xeque. De um lado, eles devem obediência ao poder judiciário nacional ou internacional. De outro, eles também devem observar as resoluções do CSONU, sendo que não podem desrespeitar uma obrigação internacional sob a alegação de que sua ordem interna assim não permite (Tzanakopoulos, 2010).

Mais importante do que a discussão acerca da existência de uma constituição em âmbitos internacionais ou transnacionais é a formação de mecanismos jurídicos de restrição das vontades políticas e a instauração de um alinhamento regimental que engloba os lados político e legal. Em uma palavra, formas constitucionais.

Tendo entidades políticas no centro de seu regime (primariamente o CSONU e, subsidiariamente, a Assembleia Geral), o regime de segurança da ONU também encara com preocupação as cortes de sua periferia, que às vezes bloqueiam que determinada razão política seja atingida.

Dificilmente, no entanto, pode-se falar em um regime que opera de maneira responsiva. O caso da mudança do regime de sanções da Al-Qaeda demonstra ainda a alta seletividade dos mecanismos do CSONU, uma vez que as mudanças ocorreram nesse subregime em razão da comunicação jurídica de tribunais ligados a países ricos. Outros regimes sancionatórios não obtiveram a mesma sorte. O citado subregime dividiu-se em dois através das Resoluções 1988 e 1989, com a criação de um outro subregime para sanções ligadas ao Taliban, sendo que apenas aquele relacionado à Al-Qaeda transformou-se em direção a mecanismos mais próximos do que conhecemos como rule of law, e ainda assim de maneira insuficiente.

4. Organizações Não Governamentais e o Conselho de Segurança da ONU

Compondo as outras observações sociais dirigidas ao Conselho de Segurança da ONU estão Organizações Não Governamentais. Em primeiro lugar, a tese expôs as principais formas de participação de ONGs no seio da ONU. Fez-se um brevíssimo histórico a respeito do surgimento e da participação de ONGs, e expôs-se como a participação de atores não estatais foi prevista na Carta das Nações Unidas.

Seguindo-se Brühl (2003, p. 80f.), argumentou-se que os contatos entre ONGs e o CSONU ocorrem por intermédio de a) encontros regulares, b) reuniões segundo o que ficou conhecido como a fórmula de Arria (Arria-formula briefings), e anteriormente por meio da fórmula de Samovía, bem como c) através de consultas bilaterais. Mais indiretamente, pode-se também falar em d) estratégias de lobby, correlatas ao que se conhece por *advocacy*, e) campanhas internacionais, em f) engajamento da implementação de decisões internacionais, bem como g) no exercício da influência na construção e mudança de normas internacionais. Foram apresentadas mais detidamente algumas dessas estratégias e, dada a relevância das reuniões baseadas nas propostas de Arria, então embaixador Venezuelano, foram discutidos os limites e as perspectivas de tais encontros.

Embora não haja previsão expressa na Carta no sentido de participação de Organizações Não Governamentais, o Conselho de Segurança pode regular seus próprios procedimentos, tendo já expressamente previsto a possibilidade de comunicação com ONGs em decisões e notas presidenciais (Note by the President of the Security Council S/2006/507 de 19 de Julho 2006, § 54, e Note by the President of the Security Council S/2010/507 de 26 de Julho 2010, § 65; Presidential Statement, The Role of Civil Society in Conflict Prevention and the Pacific Settlement of Disputes, S/PRST/2005/42, de 20 de Setembro de 2005), bem como na Resolução 1296/2000 (intitulada “The Protection of Civilians in Armed Conflict”), em especial, mas também em outras, como na Resolução 1325/2000. Ademais, como o ponto de partida da tese é baseado na teoria dos sistemas, a análise deve considerar modos não formais, ou seja, estratégias não regimental e procedimentalmente estabelecidas, mas que ainda assim são importantes para a formação das decisões políticas, em uma espécie de costume político.

A relevância de comunicações de direitos humanos em centros políticos não pode ser tida apenas como uma ingênua divagação acadêmica, uma vez que já houve impactos na autoridade política quando esta se confrontava com situações graves. O Conselho de Segurança incorporou, por exemplo, resoluções concernentes à igualdade de gênero (Resolução 1325/2000), citada acima, à proteção de crianças em conflitos armados (fundamentalmente a Resolução 1261/1999), bem como à proteção de civis durante conflitos armados (Resolução 1265/1999), o que impulsionou medidas concretas no tocante a princípios elementares em situações de guerra. Todas as operações de paz após a Resolução 1325/2000 requereu consultores de gênero, uma unidade de gênero, ou um ponto focal de gênero. Ainda, muitas cortes desafiaram as resoluções do Conselho de Segurança tendo como base a semântica dos direitos humanos, ainda que tais dinâmicas sejam bastante limitadas e ligadas a dinâmicas dependentes de partes do norte global. Os extremos desvios no uso da linguagem dos direitos humanos podem ser apontadas, no entanto. O mote da “Reponsabilidade de Proteger” (Reponsibility to Protect) é fundado na defesa de populações civis, mas foi apenas invocado pelo CSONU quando da autorizada intervenção da OTAN na Líbia (Resolução 1973/2911) com o fim de legitimar interesses escondidos (Tryggestad, 2009, p. 551). Assim, a possível aplicação simbólica ou instrumental do vocabulário dos direitos humanos, como por exemplo nas ditas *intervenções humanitárias*, tem

de ser problematizada. Nesse âmbito, faz sentido a afirmação crítica de Maus (1999): “Die Institutionalisierung einer Weltpolitik bedeutete die endgültige Isolierung und Zerstörung der Menschenrechte” (p. 292).[127]

Se, como manifestado por Luhmann, a violação dos direitos humanos paradoxalmente leva à sua afirmação, então a afirmação de direitos humanos num âmbito político global pode também levar, paradoxalmente, à sua aniquilação.

Foi exposto que tais organizações são importantes atores na introdução da semântica dos direitos humanos no âmbito do Conselho de Segurança. Mostrou-se que ONGs apreendem tal semântica para que reinvindicações sociais possam ser apresentadas com força junto ao Conselho de Segurança. Explicou-se que isso se deve ao fato de que, em ambientes não estatais, os direitos humanos representam o tipo de semântica mais forte para sensibilizar os centros políticos, visando a mudanças em suas decisões e em seus regimes jurídicos.

Inspirado nos desenvolvimentos da teoria dos sistemas, o trabalho sustentou que as Organizações Não Governamentais podem ser concebidas como inseridas na periferia do regime de segurança da ONU. Isso não quer dizer que ONGs sejam membros, ou seja, componentes do próprio Conselho de Segurança, mas sim que, devido ao fluxo comunicativo constante e relevante entre as duas esferas, tais organizações dos movimentos sociais são fonte comunicativa que elabora programas político e jurídicos no seio do próprio Conselho de Segurança.

Da inserção de tal semântica e da participação das ONGs nesse âmbito não se extraíram as conclusões apressadas de que o CSONU ou os Estados que o compõem, fundamentalmente os que detêm o poder de veto (P5), irão seguir as propostas das ONGs, nem, tampouco, que ONGs sejam atores salvadores das populações mais necessitadas do globo.

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[127] Traduzido por mim como “A institucionalização de uma política global significa os finais isolamento e destruição dos direitos humanos”.

Para a demonstração das problemáticas tocando o âmbito das organizações não governamentais, foram apresentadas teorias a respeito de movimentos sociais transnacionais e mostrou-se o posicionamento teórico fincado fundamentalmente em Charles Tilly (1978) e em Keck and Sikkink (1998a). Expôs-se ainda problemas concernentes a representação nessa esfera, discutindo-se a tal noção em atores como Burke e Mill, bem como a visão de Maus (Maus, 2007b, p. 380f.) e Urbinati (2000).

Concluiu-se que ONGs são organizações dos movimentos sociais, problematizou-se o déficit de representação e a tecnocracia de tais organizações, bem como se afirmou que a introdução de temáticas relacionadas a direitos humanos no âmbito das Nações Unidas é bastante seletiva.

Foi demonstrado que os contatos entre as duas esferas comunicativas, o CSONU e ONGs, são regidos pelo segredo e pelo trabalho de um corpo de experts. Embora se admita que a tecnocracia faça parte de um processo que segue a tentativa de tratamento de problemas altamente específicos da sociedade mundial, ambas as organizações ainda têm muitos problemas no que toca responsividade, uma vez que, no caso das ONGs, a filtragem das reinvindicações de movimentos locais por ONGs transnacionais, as quais representariam os agrupamentos locais, deve ser encarado como altamente problemático.

Nesse sentido, concluiu-se, em primeiro lugar, que ONGs são âmbitos excludentes que combatem ou dialogam com esferas arcanas, no caso o CSONU, de maneira tecnocrática. Trata-se, assim como podia ser observado no caso do relacionamento entre cortes e o CSONU, de batalhas ou de diálogos entre setores elitistas da sociedade mundial, nos quais os reclames de populações mais pobres podem ser deixados de lado em prol de interesses secretos com o verniz de argumentos de experts.

De qualquer maneira, as reivindicações das Organizações Não Governamentais tocam a limitação do arbítrio político do CSONU, a consideração de fundamentos básicos da *rule of law*, bem como a necessidade de respeito a direitos humanos básicos. As comunicações dos corpos jurisprudenciais apontadas no segundo capítulo também estão inseridas em tais dinâmicas, enquanto baseadas em tratados internacionais, direitos humanos, jus cogens e obrigações erga omnes. Cortes e ONGs são os âmbitos sociais apresentados na tese como os que encaram

de maneira relevante o Conselho de Segurança da ONU, o qual se vê impelido a responder a tais influxos ao menos de maneira a evitar novas comunicações no futuro. Tendo em vista a aparente semelhança com temas constitucionais estatais, foi discutido se faria sentido falar-se em uma constituição nessa esfera.

Negou-se a existência de constituição estatal nessa arena, bem como de outras constituições não estatais, pelas razões a seguir elencadas.

A partir de interpretação de obras como as Hunt (2007) e Moyn (2010), apresentou-se que houve uma espécie de concorrência entre as semânticas dos direitos humanos, democracia e constitucionalismo na formação das constituições estatais, sendo que muitos temas estariam em sobreposição. Arguiu-se que nos âmbitos não estatais a semântica dos direitos humanos parece ser a que mais força e ressonância encontra, um tipo de linguagem que ganhou especial força após o fim da Segunda Guerra Mundial.

Admite-se a existência paradoxal de problemas constitucionais, o que é baseado em Neves (2013), bem como de formas constitucionais. As reinvindicações semelhantes às constitucionais provindas de organizações de movimentos sociais, no entanto, não urgem a formação de uma constituição não estatal, mas apenas o respeito a determinados parâmetros legais. Por tal motivo, e não pela ausência de povo ou de um território estatal[128], nem em função de outras rígidas pressuposições semânticas estatalistas, não se pode falar aqui em constituição. Isso quer dizer que as peças constitucionais paradoxalmente existentes nesses âmbitos não formam constituições. Mas não significa, no entanto, que uma constituição não estatal não possa em futuro ser formada.

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[128] O estado nacional foi concebido como uma espécie de espaço no qual comunicações jurídicas e políticas tradicionalmente circularam, tendo em algum momento formado o acoplamento estrutural conhecido como constituição. Por tal motivo, entende-se que qualquer espaço delimitado que possibilite com sentido a circulação de direito e política pode, em tese, possuir constituições, desde que os requisitos existentes para a nomear algo como constituição sejam semelhantes ao uso da palavra, inspirando-se a tese aqui na filosofia da linguagem ordinária wittgensteiniana.

Como a questão gira em torno dos usos e significados de palavras, foi apresentada a filosofia da linguagem ordinária de Wittgenstein, mostrando-se que o uso da palavra é seu significado, sendo que se podem observar semelhanças de família entre os diferentes usos de uma mesma palavra (como a palavra jogo, que é a mesma para jogos extremamente distintos), o que afasta tal filósofo de uma teoria nominalista simplista. Pode-se mencionar que tal desenvolvimento filosófico foi apresentado para dizer que as reinvindicações de atores sociais não se assemelham às de atores sociais no âmbito estatal, uma vez que não se verificam, no momento, clamores direcionados à formação de uma constituição.

Adverte-se aqui que os atores estatais não foram apresentados de maneira idealizada, uma vez que em casos estatais as constituições também podem ser formadas a partir de movimentos das elites. Assim, uma constituição não estatal também poderia, como já ocorreu em diversas oportunidades em países de diferentes partes do globo, ser plasmada por setores elitistas da sociedade mundial.

Conclusão

A tese concluiu que processos coevolucionários em curso rondam política, movimentos sociais e direito em um terreno global. Tais dinâmicas englobam questões como direitos humanos globais, a restrição da racionalidade política, dinâmicas contenciosas e responsividade. Ainda há muitas questões semânticas que desafiam o entendimento tradicional, o que torna complicada a tarefa da nomeação dos processos nessa tese apontados.

O trabalho apresentou sempre três pontos fundamentais no tocante à linguagem dos direitos humanos, à segurança e às pressões sociais provindas dos âmbitos jurídico e das ONGs. Em primeiro lugar, o direito positivo, o que inclui o costume legal, o qual pode ser visto como elemento vinculante em relação às performances do CSONU. Em segundo lugar, atores sociais, quais sejam, ONGs e tribunais batalham para dirigir suas comunicações ao CSONU para restringir sua racionalidade baseados na gramática dos direitos humanos. Finalmente, foi demonstrado que o CSONU alterou algumas de suas performances em decorrência

de tais olhares, embora usando-as estrategicamente com o intuito de implementar suas decisões.

Teoricamente, pode-se dizer que alguns dos influxos de ONGs afetam mais diretamente o Conselho de Segurança do que se consideradas algumas decisões judiciais, uma vez que em situações excepcionalíssimas o papel de tais organizações de movimentos sociais foi central para a construção de decisões e normas do Conselho de Segurança, não importando aqui se elas seriam as mais adequadas ou não.

O Conselho de Segurança é peça central na definição do que se considera risco sob um ponto de vista social, ou seja, é fundamental para que se entenda a decisão social de se denominar algo como risco. Para que cumpra tal tarefa, age de maneira tecnocrática, despótica e arcana. Nesse jogo, participam direito e organizações dos movimentos sociais.

Segurança global, portanto, é assunto para experts. É tema para atores políticos da segurança, o que inclui organizações como CSONU, ONGs especializadas e cortes, definindo limites legais. É tecnocracia contra tecnocracia, em alguns momentos, e tecnocracia com tecnocracia, em outros. É uma batalha de elites. Responsividade num tal terreno poderia ser entendida de maneira bastante fraca, uma vez que ligada a reinos não democráticos e tecnocratas como ONGs e tribunais. Cortes e ONGs podem também ser mais responsivas, mas não parece ser o caso se observadas as composições estatais e não estatais.

Organizações de movimentos sociais e atores legais que dirigem os olhares ao Conselho de Segurança não possuem comunicações revolucionárias, mas, em geral, apenas demandas que já foram discutidas e aceitas pela grande mídia, por tribunais baseados no hemisfério norte, bem como por poderosos detentores de poder em escala global. Há no horizonte mudança, não revolução. Abordagens revolucionárias abrangeriam, por exemplo, a abolição do Conselho de Segurança, o estabelecimento de um sistema de segurança global no qual a força fosse completamente proibida, ou mesmo a completa abolição das armas nucleares para todos os países. Tais demandas dificilmente encontrariam ressonância nessa esfera, também pelo fato de que elas não estão associadas ao vocabulário dos direitos humanos tal qual conhecemos.

Nesse sentido, a absorção de vocabulários de direitos humanos pelos centros políticos globais pode ser usada como mero estratagema para que convulsões sociais sejam mantidas sob controle a fim de que o status quo seja mantido. A consideração de direitos humanos por centros políticos globais parece corresponder ao mínimo hábil para que assimetrias globais sejam mantidas.

Contudo, se as esferas sociais visam a construir formas responsivas de securitização embebedadas socialmente, os arcanos arranjos sociais apresentados, incluindo as ONGs, têm de se transformar. A semântica dos direitos humanos possui potencial para ajudar nessa questão, especialmente se observado seu lado político. A lógica legal pode também operar no âmbito da restrição da autoridade política, o que faz as cortes aqui importantes.

A capacidade de organizações centrais distorcerem linguagem dos direitos humanos não quer dizer que tal semântica deva ser abandonada. Pelo contrário, mobilizações sociais têm de estar atentas ao possível uso manipulativo e considerar a possibilidade de abordagens revolucionárias. A práxis revolucionárias está nas mãos dos movimentos políticos, dado que uma revolução política vai apenas acontecer através da política. Tribunais e teorias jurídicas podem apenas mudar ou revolucionar o espaço jurídico.

Um eventual aparato legal responsivo, socialmente adequado, baseado nos direitos humanos e na rule of law não seria a panaceia para as questões de segurança. Em tal hipotética formação, ainda que presentes formas similares às constitucionais, a dinâmica política rotineira e a práxis jurídica mostrariam sua efetividade ou sua não efetividade. Tal arranjo poderia ser nada mais do que uma fachada.

Tendo isso em vista, os direitos humanos, como qualquer outro vocabulário, possuem também limites, e a práxis social pode auxiliar em moldar outros vocabulários baseados em experiências reais e demandas, enquanto modificando ou destruindo antigos modos de ação política ou antigos fundamentos semânticos. Ou podem simplesmente manter o status quo. Monstros podem continuar a fazer monstruosidades.

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