A Critical Approach to the Contemporary Regime of the Human Rights: About some conceptual and case based contradictions*

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"The deepest sin against the human mind is to believe things without evidence"

Aldous Huxley

SUMMARY

The article provides a general critic over some fundamental contradictions found in the human's rights regime. For that purposes, in a first part it criticizes some conceptual aspects of the human right practice. In a second part, it presents the well-known European case of the "crucifix", to demonstrate how religion could influence the basis of a international court decision in a human right issue. In the same fashion, in the next part, the case of the treatment of property in the European Human Right System is analyzed. Equally important is the critique developed in the fourth part of the article to the self-determination right application nowadays. The

* This article is based on the Master Thesis of the author, to obtain the degree of Master of International Law in the University of Helsinki.

essential conclusion of the article is that, despite the fact of the foundational morality of the human right regime, it is still significantly influenced by politics.

RESUMEN

Este artículo hace una crítica general sobre algunas contradicciones fundamentales encontradas en el régimen de los derechos humanos. Para tales efectos, en una primera parte critica algunos aspectos conceptuales de los derechos humanos. En una segunda parte, presenta el caso europeo de los "crucifijos", para demostrar como la religión puede influir bases fundamentales de una decisión de una corte internacional en temas de derechos humanos. En el mismo sentido, se trata el caso de la propiedad en el sistema de derechos humanos. Igualmente importante es una crítica sobre la aplicación contemporánea del derecho a la libre determinación de los pueblos. La conclusión central del artículo es que a pesar de los fundamentos morales de los derechos humanos, en la práctica son influidos por razones políticas.

PALABRAS CLAVE

Derechos Humanos - Religión - Eurocentrismo - Derecho Internacional -Política - Moral - Universalidad – Propiedad - Economía - Libre Determinación - Percepciones

KEYWORDS

Human Rights - Religion – Eurocentrism - International Law - Politics - Morality - Universality - Property - Economics - Self Determination - Perceptions

1. INTRODUCTION

From a critical point of view, the regime of human rights could be described as self-contradictory, with a clear western bias, complicated,

dense and hard to understand. However, it enjoys the highest respect of the population and is perceived as the key solution to many global problems.

The idea of this brief article is to illustrate with some practical examples, how contradictory is the regime of the human rights and to show that morality is not always the main foundation of its preaching. During the history of international law, many regimes, such as the trading regime, the civilizing mission, among others, have been motivated by interest that had little to do with morality, and more with politics. The article does not pretend to affirm that the whole human rights project is motivated by immoral intentions, its goal is to illustrate the reader with some questionable aspects that could be evaluated in more deepness.

2. THE HUMAN RIGHTS: A NEW STANDARD WITH MANY CONTRADICTIONS

Contemporary, human rights have become a new religious vocabulary that could be characterized for being something uncontestable, a part of a universal truth, without the uncomfortable necessity of providing evidence about its arguments. Perhaps the moral reason –to protect in the most basic form the humans– could be regarded as something positive for the whole humanity.

Perhaps there is a much of romanticism involved on the creation and redaction of rights, however this desire does not necessarily match the reality. As Noll correctly observes "In international law, human rights research is entangled in a problematic relationship with human rights advocacy, and, as a consequence, with politics"[1]. In other words, human rights law making, may have a closer relation with politics, consequently with campaigning, government, electioneering, lobbies, among other activities. And in the multilateral arena, there is not a significant difference,

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1 Gregor, Noll. The Exclusionary Construction of Human Rights in International Law and Political Theory. Available: https://www.tcd.ie/iiis/documents/discussion/pdfs/iiisdp10.pdf

the relation of human rights is even closer to power and national interests that are the realm of any international political project. Accordingly human rights legislation would be the result of different elements that may not have relation with the goal of protecting the human being.

Human rights when are conceived in this manner, become very powerful vocabularies as far as they provide entitlements that can be claimed against an authority, in fact diminishing the power of the government over its citizens. In this regard Koskeniemmi considers:

> *"As soon as rights were conceived in this way, they began to seem extremely valuable as instruments for any group to buttress its benefits. To dress a claim (a claim for resources, for example, or a claim for inviolability immunity, concern etc.) in the form of a "right" was to put it in its strongest available terms. To have a "right" was to have the upper hand against administrators and managers".*[2]

This fact that normally can be perceived as a positive achievement may create a dilemma when a list of rights have to be created, enlarged or regulated. That is usually the opportunity when particular groups of interest interfere and reshape the genuine objective for what those rights where initially created, as long as "there are no authoritative lists of prelegislative rights. This is why political actors are always able to dress their claims in rights-language"[3]. In other words, human rights display a very peculiar characteristic; they are "*a la carte*" arguments, whereas groups of power can tailor their content to their needs, if they enjoy enough political power.

According to very reputable economists such as the Nobel laurate Amartya Sen there is a relation between economic freedom and human

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2 Martti, Koskenniemi. Human Rights Mainstreaming as a Strategy for Institutional Power. Humanity: An International Journal of Human Rights, Humanitarianism, and Development, Volume 1, Number 1, Fall 2010, pp. 47-58 P. 4. Available: http://muse.jhu.edu/article/394857

3 *Ibid*., p. 5.

rights development[4]. This argument that has been constructed over the basis of the studies of such a prestigious academic, might be used many times with the political goal to liberalize economies. This statement could be –and has– been manipulated and interpreted to provide a convenient meaning to that "economic freedom" and as a result to arrive to outcomes in the interest of different groups, like to conclude that contract rights "should be placed at the top of a new agenda for international human rights"[5]. Hence, a relation intentionally created between free markets and human rights, naturally concludes that the freer a market is the more human rights will be respected[6]. Nevertheless there is little evidence that could support an argument of this nature whereas this serves as a perfect argument to certain groups of power to develop their own agendas. It would be very different to propose that there is a relation between poverty and human rights violations, that would seem more logical and evidence could be found in that stream[7], nevertheless there is little attention to this topic.

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4 ODI Briefing Paper. Economic Theory, Freedom and Human Rights: The Work of Amartya Sen. Available: http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/2321.pdf
Also see: James Gwartney & Robert Lawson. Ten Consequences of Economic Freedom. NCPA Policy Report No. 268 July 2004. Available: http://www.ncpa.org/pdfs/Economic-Freedom.pdf

5 John O. McGinnis, A New Agenda for International Human Rights: Economic Freedom, 48 Cath. U. L. Rev. 1029 (1999). Available at: http://scholarship.law.edu/lawreview/vol48/iss4/2

6 See: Indra de Soysa & Krishna Chaitanya. Do pro-market economic reforms drive human rights violations? An empirical assessment, 1981–2006. Available: http://www.uni-heidelberg.de/md/awi/professuren/intwipol/public_choice.pdf. See also: Ross E. Burkhart. The capitalist political economy and human rights: cross-national evidence. The Social Science Journal 39 (2002) 155–170. Available: http://courses.arch.vt.edu/courses/wdunaway/gia5434/burkhart.pdf. Tarek F. Maassarani. WTO-GATT, Economic Growth, and the Human Rights Trade-Off. Available: http://environs.law.ucdavis.edu/volumes/28/2/maassarani.pdf

7 Neil J. Mitchell & James M. McCormick. Economic and Political Explanations of Human Rights Violations. World Politics, Vol. 40, No. 4 (Jul., 1988), pp. 476-498. Available: http://www.jstor.org/stable/2010315

Furthermore, human rights, as a regime, have not taken into account the diversity of systems, moral foundations or customary law of many communities around the world, having become almost the reflex of western ideas. An interesting characteristic of this particular regime is that is composed by an astounding quantity of instruments. Moreover, it exists in almost every country in a constitutional level –under the label of fundamental rights–, in the main integration organizations instruments –such as European Union, Organization of American States, African Union, among others–, in bilateral treaties, in universal treaties, in the United Nations Charter, resolutions, decisions, among many other documents. But is this enormous quantity making any difference? For Posner no difference is achieved, in this regard he considers:

> *"At a time when human rights violations remain widespread, the discourse of human rights continues to flourish. The use of "human rights" in English-language books has increased 200-fold since 1940, and is used today 100 times more often than terms such as "constitutional rights" and "natural rights".*[8]

Furthermore, the quantity of treaties and the multiplicity of intra regimes[9] that can be found, only affect the way in which human rights can be enforced and monitored. There should be highlighted that human rights treaty ratification is not the same than human rights practices[10]. And despite the fact that this ratifications are always desired as far as they are the first step to recognize the existence of a problem, this act does not necessarily always lead to a positive result, as Oona Hathaway tells:

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8 Eric Posner. The case against human rights. Available: http://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights

9 Dirk Pulkowski. Narratives of Fragmentation International Law between Unity and Multiplicity. Available: http://www.esil-sedi.eu/sites/default/files/Pulkowski_0.PDF

10 Oona Hathaway. "Do Human Rights Treaties Make a Difference?" (2002). Faculty Scholarship Series. Paper 839. Available: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1852&context=fss_papers

11 *Ibid*. P. 2020.

> *"Although universal ratification of a treaty can make a strong statement to the international community that the activity covered by the treaty is unacceptable, pressure to ratify, if not followed by strong enforcement and monitoring of treaty commitments, may be counterproductive".*[11]

But human rights, as mentioned above, are a very powerful argument, one that can be strong enough to paralyze and demand decisions or actions of the State without almost any questioning. Therefore the indeterminacy that exists in this moment about what is a human right or which are the precise contents of them could be used for purposes far away from their nature, as Koskeniemi suggests:

> *"At this point, "human rights" have completely lost their specificity. Anything can a "human rights" claim. And everything will depend on the sovereign, that is to say, the administrative or bureaucratic decision-maker- precisely the situation that human rights were invented to deal with".*[12]

Referring to the case of a 10-month detention of an Iraqi-British citizen, Koskenniemi considers that "In one recent instance, a policy of imperial coercion represented itself as a human rights measure"[13], the Judgment of the case was:

> *"The Security Council, charged as it is with primary responsibility for maintaining international peace and security, has itself determined that a multinational force is required. Its objective is to restore such security as will provide effective protection for human rights for those within Iraq. Those who choose to assist the Security Council in that purpose are authorized to take those steps, which include detention, necessary for its achievement".*[14]

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12 Marti Koskeniemi. Human Rights *Op. Cit*. P. 7
13 *Ibid*.
14 *Ibid*.

As Koskenniemi suggests, at this point anything can be a human right claim, even a human right violation could be considered a human right way of protection creating a very dangerous obvious contradiction. About the current situation Cimini says:

> *"The contradictions which mark contemporary international law is perhaps best manifested in the field of international human rights law which even as it legitimizes the internationalization of property rights and hegemonic interventions, codifies a range of civil, political, social, cultural and economic rights which can be invoked on behalf of the poor and the marginal groups. It holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds".*[15]

But maybe the most dangerous aspect of the human rights regime is that it removes the power from the State and it transfers it to other entities, according to Koskenniemi:

> *"they remove political power from the legislators –political parties, parliaments, States– to the institutions whose task it is to apply the law. In domestic life "regulators" and managers of all kinds, scientific and economic experts and professional negotiators come to play a key role in the determination of the way broadly formulated legislative "policies" or balancing standards are to be applied. In the international field, treaties transform from sets of behavioral directives to "frameworks" that provide for procedures for further negotiation or the application or broad standards of reasonableness laid out in them".*[16]

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15 B.S Chimini. Third World Approaches to International Law: A Manifesto. International Community Law Review 8: 3–27, 2006. Available: http://www.jnu.ac.in/SIS/MakingSISVisible/Publications/Third%20World%20Manifesto%20BSChimni.pdfP. 27.

16 Marti Koskeniemi. Human Rights *Op. Cit.* P. 3.

In simple words, a burocracy may have the power to decide very sensitive aspects without a public control, due to its expertise. Moreover, frequently private actors are also taken into account in human right´s evaluations –such as NGO´s– that may have their own interest and agendas which do not necessarily coincide with the people´s best interest.

In conclusion human rights regimes has not necessarily something to do with human right protection, for contradictory that this can appear. They can have more relation with private agendas, with law-makers commitments or with politics. In other words, their close relation to politics make them part of a power contest instead of an instrument of protection.

3. THE CASE OF RELIGION IN EUROPE: ABOUT THE EUROCENTRISM

The purpose of this part is to argue, that human rights application could be contradictory depending on what interest are in play. In this regard, the eurocentrical view over rights is very clear when it comes to religion. Two cases could clearly illustrate the bias of the European Court of Human Rights, when it comes to such an important topic: the case Lautsi v. Italy (2011) and S.A.S. v. France (2014).

In the first case, a citizen of Finland, Mrs. Soile Lautsi, took to court a School Council of a School in Padua, claiming that the crucifixes in school classrooms offended the principle of secularism. The Administrative Court and afterwards the Supreme administrative Courts, decided that the crucifixes in the schools classrooms did not violated the principle of secularism, despite the fact that it had a religious origin, it symbolized several principles (tolerance, mutual respect, etc.) that characterized Italian civilization.

Mrs. Lautsi appealed the sentence to the European Court of Human Rights (2006) and the Chamber of the Second Section of the Court gave her the reason. The Chamber decided that there was a violation of the article 9 of the European Convention of Human Rights and Article 2 of the

first Protocol to the Convention, because there is of course a religious meaning in the crucifix.

As a natural reaction the Italian Government appealed the decision to the Grand Chamber. The decision of the Chamber was: "by prescribing the presence of crucifixes in State-schools classrooms –a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity– the regulations confer on the country's majority religion preponderant visibility in the school environment". But it declared: "That is not in itself sufficient, however, to denote a process of indoctrination on the respondent State's part and establish a breach of the requirements of Article 2 of Protocol No. 1 (...) a crucifix on a wall is an essentially passive symbol and (...) cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities". In other words, there was no problem of displaying the crucifix as long as it is a passive symbol.

However the same logic did not apply in the case S.A.S. v. France, where a French national complained (a Muslim) that according to a new law enacted in France (Law no. 2010-1192 of 11 October 2010) she was not longer allowed to carry her Islamic scarf, as long as in accordance to that law there was a prohibition of "concealment of one´s face in public". France augmented that the prohibition was based on: "respect for equality between men and women", "respect for human dignity" and "respect for the minimum requirements of life in society". Moreover for the French authorities an individual should be "identifiable when required".[17]

The Court in a majority decision found –according to the European Convention on Human Rights– that there was no violation of Article 8 (right to respect for private and family life) and no violation of Article 9 (right to respect for freedom of thought, conscience and religion); and by unanimous decision that there was no violation of no violation of Article 14 (prohibition of discrimination). In it´s arguments the Court considered that "living together" was a legitimate goal of the state therefore there is a regulatory capacity –with a very flexible margin of appreciation– that each member State could use in this kind of cases.

The two cases have been analyzed from different perspectives, however essentially they share as a common feature the display of religious symbols. In one case, the Court agreed that the crucifix is a "passive symbol" that does not indoctrinate pupils, in simple words an indifferent symbol. Nevertheless is the symbol "can only be passive insofar as it can remain unnoticed"[18], and it is quite obvious that displaying a symbol in a classroom is not going to let it be unnoticed. As Lorenzo Zucca proposes:

> *"the decision is very poorly reasoned on every important point. It suggests a very dubious notion of passive symbols. It dodges the problem of secularism as if it were a mere ideology. It preaches respect only to allow the state freedom to disrespect minorities. Finally, it ignores important legal problems at the local level that Italy would not revise unless pressured to do so".*[19]

And it would be in this point fair to ask: is the crucifix really a passive symbol? Because it has been used in the inquisition, anti-Semitism, crusades, etc.[20]. Or more modernly it has been used by groups of neo-Nazis, the kkk, among other intolerant groups. In other words, it is highly questionable to consider that the crucifix is a symbol that has only been used to display tolerance and brotherhood. On the other hand the Islamic scarf, can not necessarily need to be considered as a symbol of discrimination. There are clear cases where women are forced to wear a hijab but others are

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17 See: https://strasbourgobservers.com/2013/11/29/s-a-s-v-france-a-short-summary-of-an-interesting-hearing/

18 The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom Available: https://books.google.com.pe/books?id=mf906gNgnkIC&pg=PA399&lpg=PA399&dq=crucifix+passive+symbol&source=bl&ots=JTjAU65RNk&sig=A6fPkJj1tobIOHVLd3M2fZTAi8g&hl=es-419&sa=X&ved=0ahUKEwiNlM62i8fRAhVK2SYKHd-8Ac0Q6AEIRDAI#v=onepage&q=crucifix%20passive%20symbol&f=false P. 399.

19 https://academic.oup.com/icon/article/11/1/218/776139/Lautsi-A-Commentary-on-a-decision-by-the-ECtHR#13569642

20 The Lautsi Papers: Multidisciplinary. *Op Cit.* P. 408.

using it voluntarily. The Court never draw a line that could differ in which cases a religious symbol might incite violence, discrimination, etc. It would seem that the decision was taken over a clear bias with no serious evidence nor a proper argumentation or comparison between cases. The content of each human right might seem to be depending on subjective factors, therefore is impossible to state that they are universal.

Is because as a product of the West, human rights has many bias, a clear foundation on their interest to protect their own human rights, and to impose their vision in other countries or communities that legitimately can claim their difference. One initial conclusion that can be reached from these cases is that contradictions in the regime are not important if there is power that can legitimize them.

4. RIGHT TO PROPERTY: WEREN´T HUMAN RIGHTS SUPPOSED TO PROTECT THE MOST BASIC FEATURES OF THE HUMANS OR ECONOMIC INTERESTS? IS THIS PART OF A HUMAN RIGHT PROJECT OR AN ECONOMIC PROJECT?

The right to property is a human right very well recognized by several international instruments. For example by the ECHR, the article 1 of the protocol 1 of this Convention says: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

Is clearly stated that the holders of this right are natural and legal persons. In general, it is important to mention that property is finally part of an economic system concept, created to assign efficiently limited sources. This economic system, which normally is based on free markets and efficiency, could not be regarded as a human right itself as long as the very basic core of a human right is the "human" component. What is human in property or in an economic system? Absolutely nothing. However,

some authors such as Rothbart consider that in conception property rights should be considered human rights:

> *"In the first place, there are two senses in which property rights are identical with human rights: one, that property can only accrue to humans, so that their rights to property are rights that belong to human beings; and two, that the person's right to his own body, his personal liberty, is a property right in his own person as well as a "human right". But more importantly for our discussion, human rights, when not put in terms of property rights, turn out to be vague and contradictory, causing liberals to weaken those rights on behalf of "public policy" or the "public good"".*[21]

It is undeniable that property rights have helped to improve living conditions and "historians have suggested that property rights are much more significant than political rights to improve the lives of ordinary citizens"[22]. Therefore it would be absurd nowadays to deny the importance of having rights to property for an economic welfare and a level of security. Nevertheless, is not to far to consider them human rights? what about of *ius cogens*?[23]. According to the United Nations Human Rights Office of the High Commisioner human rights could be conceived as:

> *"Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible".*[24]

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21 Murray N. Rothbard. "Human Rights" as Property Rights. Available: https://mises.org/library/human-rights-property-rights

22 David Joh Marotta. Are Property Rights Human Rights? Available: http://www.emarotta.com/are-property-rights-human-rights/

23 See: Andrea Bianchi. Human Rights and the Magic of Jus Cogens. *EJIL* (2008), Vol. 19 No. 3, 491–508. doi: 10.1093/ejil/chn026

This definition has a lot of relation conceptually with the most fundamental rights that are: life, prohibition of torture, prohibition of slavery and forced labor, liberty, fair trial, among others[25]. Moreover, in the framework of United Nations several Committees has been created to observe the application and performance of the instruments to preserve and enforce certain human rights such as The Human Rights Committee that observes the application of the ICCPR or the Committee on Economic, Social and Cultural Rights that monitors the ICESCR; or the Committee on the Elimination of Racial Discrimination observes the CERD; or the Committee on the Elimination of Discrimination against Women that observes the CEDAW; or the The Committee Against Torture observes the CAT or Committee on the Rights of the Child that observes the CRC; or the Committee on Migrant Workers that observes the ICRMW; or the Committee on the Rights of Persons with Disabilities that observes the Convention on the Rights of Persons with Disabilities; or the Committee on Enforced Disappearances that observes the ICPPED.

Nevertheless the right to property seems to be one of the most invoked. The European Court of Human Rights has been created in the framework of the European Council to protect the most basic rights of the Europeans, and has been a remarkable example of order and human right protection. However, it is very curious that out of the 572 cases judged reported in the HUDOC, the property issue has been the most invoked, the following chart can illustrate the situation of the property in comparison to the other most invoked rights[26]:

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24 See: Web page of the Human Rights Office of the Higgh Comissioner of United Nations. Available: http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx

25 These fundamental rights coincide with the Human Right Convention of Europe-

26 European Court of Human Rights Database HUDOC. Available: http://hudoc.echr.coe.int/eng#{"sort":[«kpdate Descending»],»documentcollectionid2":[«JUDGMENTS»],»nonviolation»:[«P1-1»]}

Right invoked	Number of times
(Art. 2) Right to life	36
(Art. 3) Prohibition of torture	52
(Art. 4) Prohibition of slavery and forced labour	28
(Art. 5) Right to liberty and security	50
(Art. 6) Right to a fair trial	228
(Art. 14) Prohibition of discrimination	228
(P1-2) Right to education-{general} (30)	30
(P1-1) Protection of property (572)	572

But, assuming that this is such a fundamental right, like the freedom, right to work, among others. Would that be enough reason to provide a human right to the legal persons? Because, the article 1 of Protocol No. 1, of the European Convention on Human Rights –just as an example– states very clear "Every natural or legal person is entitled to the peaceful enjoyment of his possessions". It is important to make a difference between the diverse types of legal persons that may exist, on the one hand there could be legal entities like the peoples or on the other had it could be extended to private enterprises. In this regard, perhaps it could be more legitimate to claim the ownership of territories of an indigenous group, considering that these groups are a minority –typically weaker– that requires its lands to perform activities that are an inherent part of their culture. However, could it be so legitimate a private enterprise to claim property rights when a piece of legislation is changed for public interest that may affect their incomes? It is obviously much more questionable.

To sum up, it is not an inherent right to the human being to have property rights, it is part of a decision of an economic system, that has an undeniable efficiency and the better is assigned the more efficiency and

27 See: Hernando de Soto. *El otro sendero: la revolución informal.* Lima: Ausonia.1986.

welfare would have a society[27]. But the fact that a right provides efficiency or social welfare is not sufficient reason to provide it the status of a "human right", it would be against the most basic conception that this regime has been created. Moreover, to grant this right as a human right to private entities might be completely incompatible with the very same purpose that this regime was developed and became just another tool to provide legal extremely strong tools to privates to pursue their interests beyond any moral or legal justification.

5. IS SELF DETERMINATION FOR EVERYONE? KOSOVO VS CRIMEA: WAS THERE REALLY ANY DIFFERENCE?

The central proposition of this brief chapter is to propose that there has been a very extend discussion –that even involved the ICJ– in the case of Kosovo. Nevertheless in the case of Crimea there were only voices pointing to the illegality of their referendum but any discussion if their people´s should enjoy also the right of self-determination. Kosovo is in the sphere of interest and influence of the west and Crimea is simply not.

General Assembly issued the Resolution A/RES/63/3 the 8 of October of 2008 entitled "Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law" that formally requested the ICJ to make an advisory opinion of the Kosovo declaration of independence in the following manner:

> *"Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?".*

The Court provided its opinion on 22 of July of 2010 which a very controversial and "narrow approach"[28], not taking the opportunity to make an extensive analysis over the case and it issues a very general statement that says:

> *"The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law".*[29]

The Court avoided entering into an analysis over the right to self-determination or other related topics that may be invoked to answer in a deep manner the question formulated by the General Assembly. In this regard, Circovic describes "In the Court´s view, it was not called upon to decide whether Kosovo had a right or entailment to independence (…) the UNGA question turns on whether or not the applicable international law prohibited the declaration of independence"[30]. In other words, the Court avoided to look into the juridical facts and aspects that may shape the especial characteristics of the Kosovo case and instead reshape the problem turning it into a general analysis of international law where the question would be more like: is it violating international law a declaration of independence?

The very first critic should not be made to the Court Advisory Opinion, as far as it was answering a wrongfully formulated question. It is very well known that the ICJ many times answer questions in a very vague manner and it tends to avoid referring to very politically controversial issues

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28 Mushfig Mammado. Traditional GAP in the ICJ Advisory Opinion on Kosovo. Caucasian review of international affairs. [Vol. 4(4) autumn2010] P. 315. Available: http://mercury.ethz.ch/serviceengine/Files/ISN/143375/ipublication document_singledocument/73b773ba-2847-4a9e-8ea4-e168bb03b016/en/CRIA_Autumn_2010_Full_Issue.pdf (28/3/15).

29 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010, p 452.

30 Elena Cirkovic . Op Cit. P. 898.

31 Jan Klabbers. International Law. Cambridge: Cambridge University Press. 2013. P. 163.

as far as "sometimes the ICJ is asked to solve a highly charged political issue, and therewith replace the role of politicians".[31]

Therefore, questions presented to the Court should be very juridical and punctual, in this case, the questions was too wide. Nevertheless, it is also true that even with that question, the ICJ could have provided a better answer to the General Assembly, in this regard Judge Simma says:

> *"I believe that the General Assembly's request deserves a more comprehensive answer, assessing both permissive and prohibitive rules of international law. This would have included a deeper analysis of whether the principle of self-determination or any other rule (perhaps expressly mentioning remedial secession) permit or even warrant independence (via secession) of certain peoples/ territories"*.[32]

As Judge Simma points there is a core problem in this case that is the self-determination and how this operates outside a colonial context. One of the topics that the Court missed is that it did not developed a jurisprudential definition and regulation of the remedial secession which finally is the figure that is applied in this case, and that is not universally accepted[33]. For Simma the Court did not frame the case into a "legal" sphere but into an exclusion of the illegality. In other terms, by avoiding refer to the legality of the declaration of independence of Kosovo the Court only recognized that it was not illegal. About this aspect Judge Simma considers:

> *"That an act might be "tolerated" would not necessarily mean that it is "legal", but rather that it is "not illegal". In*

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32 Declaration of Judge Simma .P 480. In: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010.

33 See: Joel Day. "The Remedial Right of Secession in International Law".Potentia No 4, Fall 2012. Christine Griffioen. "Self-Determination as a Human Right.The Emergency Exit of Remedial Secession". Available: http://www.peacepalacelibrary.nl/ebooks/files/335882129 (2/3/15).

> *this sense, I am concerned that the narrowness of the Court's approach might constitute a weakness, going forward, in its ability to deal with the great shades of nuance that permeate international law".*[34]

Furthermore, for Simma, this disregard of the ICJ causes not only a reduction of the quality of the Advisory Opinion, but also it produces more doubts about the legality of a declaration of independence. In other words, the ICJ might have opened a "Pandora box" by considering that is not illegal for an entity to declare its independence and not providing further juridical analysis that can lock secession into a certain characteristics that are unique or very particular in the case of Kosovo. In this regard, Judge Simma says:

> *"For the Court consciously to have chosen further to narrow the scope of the question has brought with it a method of judicial reasoning which has ignored some of the most important questions relating to the final status of Kosovo. To not even enquire into whether a declaration of independence might be "tolerated" or even expressly permitted under international law does not do justice to the General Assembly's request and, in my eyes, significantly reduces the advisory quality of this Opinion".*[35]

Despite the fact that Judge Sepulveda voted in favor of the Advisory Opinion, he also criticized the lack of content in many aspects such as self-determination, "remedial secession", among others that should have been addressed by the Court to give juridical guidance to the pertinent organs of United Nations. It is important to recall that the International Court of Justice is the most recognized international Court and is universally accepted, and is one United Nations Organ, therefore its guidance is extremely

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34 Declaration of Judge Simma. P 480-481. In: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010.

35 *Ibid.*

important for these multilateral cases that involve the whole international community[36] Judge Sepulveda criticized in the following manner:

> *"Many of the legal issues involved in the present case require the guidance of the Court. The Security Council and the Secretary-General of the United Nations, and not just the General Assembly, would indeed benefit from authoritative statements of law in order to dispel many of the uncertainties that still affect the Kosovo conflict. The scope of the right to self-determination, the question of "remedial secession", the extent of the powers of the Security Council in relation to the principle of territorial integrity, the continuation or derogation of an international civil and military administration established under Chapter VII of the Charter, the relationship between UNMIK and the Provisional Institutions of Self-Government and the progressive diminution of UNMIK's authority and responsibilities and, finally, the effect of the recognition or non- recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory functions".*[37]

However inside the Court some of the disagreements with the Opinion were even stronger, especially from the dissident votes. Judge Koroma strongly disagreed with the fact that resolution 1244 (1999) provided any legal basis to Kosovo to declare its independence. Moreover,

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36 In this regard Jan Klabers proposes: "After all, its judgments can be highly authoritative, and in the absence of an international legislature, what better organ to help develop the law than the world´s leading court?" Jan KLABBERS. *Op Cit* p. 164.

37 Declaration of Judge Sepulveda .P 499. In: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010.

the Resolution 1244 (1999) only stablishes "substantial autonomy and meaningful self-administration for Kosovo"[38] and all the articles, principles and annexes of the document do not mention in any manner a right or project for the independence of Kosovo, only a self-administration.

The case of Kosovo is closely related to a self-determination problem as far as this case is about a group of people, inside a territory searching for its independence which refers immediately to one of the central documents that regulate this right, the Resolution 1541 (XV) that entitles a group to secession when is the desire or aspiration of the majority of the population[39]. There is only one problem with the contemporary application of this Resolution, this was designed in for decolonization purposes and the right of self-determination recognized by several Resolutions and international instruments[40] was never evaluated nor by the International Court of Justice[41] or any United Nations instrument outside a colonial context in relation to a secession.

However, among these disagreements and lack of content of the Advisory Opinion, Judge Cancado Trindade made a tremendous exposition of 240 pages about his particular point of view on this case. It is to recall that the

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38 Security Council resolution 1244 (1999) on the situation relating Kosovo.

39 The Resolution 1541 (XV) "Principles which should guide Members in determining whether or nor an Obligation exists to transmit the information called for under article 73e of the Charter" which is considered to be the main document regarding secession establishes in its principle VI: "Principle VI A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:
(a) Emergence as a sovereign independent State;
(b) Free association with an independent State; or
(c) Integration with an independent State".

40 Among the main international instruments are: The United Nations Charter, article 1 "The Purposes of the United Nations are: (…) 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". Among this article there are several that refer directly or indirectly to the right of self-determination.

background of Judge Cancado Trindade is very related to the human rights regime therefore his view was concentrated on this aspects. This judge centered his opinion on the self-determination right which is the realm of any attempt of independence of any group of people. This case is problematic as far as the design of the right of self-determination was in a colonial context, however, Judge Cancado proposes something that has become more common in the doctrine and was an innovation in the juridical doctrine, to compare the colonial context to the situation of *"Peoples under Prolonged Adversity or Systematic Oppression"*[42]. With these analogy, Judge Cancado Trindade has opened a whole new perspective of the right of self-determination and is maybe the most significant contribution to the international law in the whole text of the Advisory Opinion.

But, one of the analysis that has not be really noted in specialized literature is the "unbelievable" affirmation that the ICJ makes in relation to the territorial integrity:

> *"Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations*

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Also it is important to refer to the main like the declaration 1514 (XV) "Declaration on the Granting of Independence to Colonial Countries and Peoples", the Resolution 1541 (XV), mentioned in the previous reference, the Resolution 2625 (XXV). "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations". Also it can be mentioned the Helsinki Act of 1975: "Declaration on Principles Guiding Relations between Participating States" that mentioned in its principles the territorial integrity and the self-determination right.

41 The main cases in which the International Court of Justice participated about the self-determination right are:

- South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Judgment. I.C.J Reports 1962.
- Western Sahara, Advisory Opinion, I.C.J. Reports 1975.
- Timor Oriental (Portugal vs. Australia) Judgment. I.C.J. Reports 1995.
- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion. I.C.J. Reports. 2004.

> *of independence is implicit in the principle of territorial integrity (...) Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States".*[43]

In other words, the principle of territorial integrity that by contraposition creates a right to a territorial integrity from the State is only opposable to others States. Therefore if a separatist group, a terrorist group, a multinational enterprise or any other kind of group performs actions to dismember a State, to divide it or to implode it, is perfectly legal according to the ICJ because this principle is only opposable among States.

The ICJ has opened a "Pandora Box" that could encourage groups inside a State to declare its independence or to affect in other manner the territorial integrity of a State. Under this reasoning there should not be any legal problem in the declaration of independence of Crimea for example, despite the fact that the international community has rejected it. Finally, the territorial integrity principle will not be applicable to Ukraine as far as the separatist are not another State, therefore they are entitled to declare its independence. Following this reasoning the International Community would be applying a double standard by not recognizing the independence of Crimea if there is an acceptance of the Advisory Opinion of the ICJ in the case of Kosovo, among many other cases. The ICJ was not thoughtful when presented that part of its Advisory Opinion and did not took into account the possible consequences that it may have internationally.

The discussion about the dissident opinions of the Court clearly point to argue that the Opinion lack of content in the case of self-determination, it did not provide sufficient guidance to the General Assembly and the

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42 Separate opinion of Judge Cançado Trindade. P. 592 In: Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010.

43 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010. Paragraph 80.

arguments were presented incoherently. However, the main critic that could be done to this Opinion is the ambiguity in this case and that it created a precedent, a very dangerous and inconvenient one, but a precedent about the illegality of the declarations of independence.

Despite the fact of not being binding it would be very hypocritical and even immoral for a government, NGO or academic to propose that this should only be applied to the case of Kosovo because of its "peculiar" characteristics, it would be like stating that in this case a set of norms should be applied for political convenience. However politicians do not lose the chance to qualify with negative words the comparison Kosovo with Crimea, like Angela Merkel who stated: "In my opinion it is shameful to compare Crimea to Kosovo. And even if there had been other breaches of international law –Kosovo not being one of them– Russia's actions in Ukraine are still a breach of international law".[44]

The purpose of this article is not to analyze whether the declaration of independence or the annexation to Russia of Crimea is legal under international law. However, is a main objective to determine that international law many times contradicts itself. That contradiction is completely instrumental, that explains why in the case of Kosovo –no matter it´s particular characteristics– the idea of self-determination has always been central (despite the fact of not being mentioned) but in the case of Crimea it has not even been proposed. In one case the declaration of independence is legal but in the other case it is not, however there are no real reasons to state that both cases in essence are the same, two groups of people´s that wanted their independence from a country.

About Crimea, after the fall of the Russian Empire the territory continued being considered part of Russia for the following governments and for the Union of Soviet Socialist Republics (USRR). In 1921 the Autonomous Socialist Soviet Republic of Crimea was formed, and according the agreement that formed the USRR, it was made part of the

44 See the declarations in : https://euobserver.com/foreign/123454

territory of the Federation of Russia and maintained the status of oblast until 1945.[45]

Afterwards for a purely "internal administrative issue"[46] the region of Crimea was transferred to Ukraine. This should not have affected in any manner it´s situation, as far as all the republics were under the umbrella of the USRR, so it was just a mere administrative without any real significance. According to Dolya that transfer was performed for political interests:

> *"But what was the aim of the Soviet leaders on transferring the peninsula to Ukraine? Crimea was not the only region to undergo a similar fate within the USSR. Transnistria, a historically Ukrainian region was transferred to the Moldavian Soviet Socialist Republic, Upper Karabakh, a historically Armenian region joined the Soviet Socialist Republic of Azerbaijan, South Ossetia and Abkhazia became part of the Georgian Soviet Socialist Republic. Historians suggest various readings of these decisions taken by the Soviet authorities, such as, for example, the artificial creation of enclaves within Soviet Republics, in order to neutralize any possible nationalistic tendencies. But there is one thing now about which there can be no doubt: all these regions remain problem territories and are used as a means of manipulation in Russia's imperial plans".*[47]

This situation changed on the 20th of January of 1991 when, in the middle of the crisis that the USSR was facing, and a referendum, in Crimea took place. In that referendum, 93.26% voted in favor of the restauration

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45 Anatoly Kapustin. Crimea's Self-Determination in the Light of Contemporary International Law. ZaöRV 75 (2015), 101-118. P. 109.

46 *Ibid.*

47 Anna Dolya. The annexation of Crimea: Lessons for European security. Available: http://www.robert-schuman.eu/en/doc/questions-d-europe/qe-382-en.pdf P. 2

of the Republic of Crimea, and to become an independent State, result that was accepted by the USSR and Ukraine, but it could not be implemented due to the failure of the USSR[48]. Nevertheless on 1992 the self-determination aspirations of Crimea continued and became even stronger, the 5th of May of 1992 the Supreme Council of Crimea called another referendum that should have taken place on the 2nd of August of 1992, but it was declared unconstitutional by the Supreme Council of Ukraine[49]. According to Kapustin the actions taken by the Ukrainian authorities have had the intention of weaken the identity and frustrate the aspiration of the Crimean's, performing actions such as: extending them the Ukrainian nationality without their consent, denying the right over their lands and natural sources (a very basic self-determination feature, taking off the official status of the tartars and Russian languages in favor of the Ukrainian.[50]

On the 16th of March of 2014, the legislature of the Autonomous Republic of Crimea and the government of Sevastopol called a referendum on the status of Crimea, asking the population if they wanted to join Russia as a federal subject or to restore the 1992 Crimean Constitution and Crimea´s status being a part of Ukraine. According to Russia Today (RT) the results were an astonishing 96.77% of the population wanted to join Russia.[51]

In the case of Crimea, there has been a tremendous discussion about the illegality of the annexation to Russia, or the declaration of independence perhaps the main topic has been the territorial integrity of Ukraine. These are unquestionable important and central aspects to the case, but amazingly the academia has a complete silence about the right of self-determination of the Crimean's. There is no serious intention to

48 Anatoly Kapustin. *Op Cit* 110. See also: Alexander Salenko. Legal Aspects of the Dissolution of the Soviet Union in 1991 and Its Implications for the Reunification of Crimea with Russia in 2014. Available: http://www.zaoerv.de/75_2015/75_2015_1_a_141_166.pdf

49 Anatoly Kapustin. P. 110.

50 Anatoly Kapustin. P. 111.

51 Crimea declares independence, seeks UN recognition. Available: https://www.rt.com/news/crimea-referendum-results-official-250/

repeat a complete legal, uncontestable, promoted by United Nations referendum. It would seem that the self-determination of the Crimean's is a topic that does not even deserve discussion or perhaps that could undermine certain interests.

The silence or double standards of international law could be appreciated in other cases, such as the Western Sahara case. As is well known a referendum should have taken place long time ago, but the lack of interest or the convenient silence is the main problem. So is the international community interested in the self-determination of the people´s or just of certain people´s?. There are some views that has went as far as denning the existence of an international community and to propose that is just the reflect of the interest of certain nations:

> *"the international community does not exist. The international community is an invention of the US and its fellow travelers in central and Western Europe, and in Canada and Australia. The international community, as defined by the Western world is in reality the will of Washington and Brussels, the will of the EU and NATO. So, it is a mythical creature".*[52]

This could be an extreme view, or maybe is just describing a world that is divided where international law works for the powerful countries, becoming many times its instrument, a placeholder of words such as justice, self-determination, human rights, that sound very attractive but that had little to do with the reality. This brief chapter just have described how in one case, despite the immense discussion of the legality of the solution, a group of people´s was entitled to have their self-determination right, no matter that legally the decision of the ICJ had been questionably concluded; but in the other there is not even any discussion if that group of people´s should have any mechanism to achieve their self-determination.

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52 Srdja Trifkovic. Crimea and Kosovo: Commonalities and Differences Available: https://www.chroniclesmagazine.org/blogs/srdja-trifkovic/crimea-and-kosovo-commonalities-and-differences/

To sum up, this chapter describes how the same right, in this case "self-determination" could operate in such a different manner. In one case is fully granted, in the other is not even discussed about it. Kosovo became independent, as a result it had a massive recognition[53], despite the fact of the many contradictions and questionable arguments of the ICJ Opinion. But in the case of Crimea, no serious discussion has been taken about its independence or if there could be any legitimate way to achieve it. That proves that the universality of the application of human rights is utopian and that they respond to political interests in first instance, especially when is about collective rights.

6. CONCLUSION

To summarize this article has exposed some, of the many contradictions, that could be found in the human rights regime. Furthermore those discrepancies had been illustrated with some examples, such as the case of the contradictory approach to the "right to respect for freedom of thought, conscience and religion" in the jurisprudence of the European Court of Human Rights.

On the other hand, the case of the property rights in Europe can evidence that in some cases human rights are losing the human component and becoming a legal instrument of legal persons to claim rights, that perhaps legitimate, could not have theoretically the status of human rights. Finally, the example of the cases of Kosovo and Crimea expose the biased approach of the "international community", which proves that the human right application and implementation has much to do with politics and in some cases a very vague relation with the morality that should compose its realm.

Given these points, the central conclusion of the article is that human rights are in many cases guided by political reasons and not always by a solid moral foundation. As suggested during the introduction, the intention

[53] Until now is recognized by 114 members of UN. See: http://www.kosovo thanksyou.com/

of this article is not to critizice the good will of the human rights activist, legislators or academics; but to show, as a matter of fact, that many times those good intentions could be used as an instrument of particular interests.

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