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HUMANITARIAN LAW: THE CONTROVERSIAL HISTORICAL CONSTRUCTION OF A UNIVERSAL MORAL

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Abstract

Humanitarian law was conceived by legal and moral normativism founded on universal principles. Despite its undeniable universal moral content, its formulations and application methods are however the result of historical conflicts. This article aims to analyze how the universality of humanitarian law is produced by highly controversial conflicts. It is necessary to overcome the antagonism between an analysis that focuses on the moral undeniable value of humanitarian law by ignoring its controversies and an analysis that focuses on social antagonism questioning the achievability of the moral and universal value of humanitarian law. For this, we must consider that humanitarian law is a construction. It appears as autonomous and independent of power relationships, as based on the rationality of morality and thus worthy of universal recognition. Yet its development is only possible when one considers the historical roots of reason. It is only through political struggle that humanitarian law is realized in history.

The aim of this paper is to analyze how the universal nature of humanitarian law is produced by highly controversial conflicts. Firstly, an analysis is offered on the universal but at the same controversial character in the codification of humanitarian law, recalling controversies around the creation of the Additional Protocols of 1977 (Section 1). Next, an analysis is given on the conflictual character of organizations supporting humanitarian law, taking in account conflicts between the Red Cross and Doctors Without Borders and controversies around the ambitions to pass from an humanitarian law to a right of humanitarian intervention (Section 2). Finally, a reflection is offered on how the theories of international relations that most appropriately grasp the universal nature of humanitarian law must be complemented by a "historical sociology of the universal" that embraces the conflicting historical dimension in the construction of the universal (Section 3).

Keywords

Humanitarian law; law of war; the Geneva Conventions; Red Cross; Doctors without Borders

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HUMANITARIAN LAW: THE CONTROVERSIAL HISTORICAL CONSTRUCTION OF A UNIVERSAL MORAL

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Introduction

Humanitarian law, once called "jus in bellum" (law in war), the law of the battlefield and later extended to all kinds of non-military catastrophic situations, became very popular in the 1990s: its meanings have multiplied; a polysemy gave origin to the noun "humanitarian" and also justified the idea of a "duty to interfere". As Ladi explains, facing the lack of an enemy advance, it is the logic of a situation calling for a commitment that brings out the "humanitarian" (Laidi, 2001: 186) in a process that makes it increasingly autonomous from politics. The vogue of humanitarian is thus explained by a strategy without high political costs (loss of life), economic costs (resource transfers) or social costs (migration); the humanitarian meets the requirements of an unimpeachable legitimacy (to save lives), being limited in time (before the doubts of public opinion) and escaping from fundamental solutions that would jeopardize past responsibilities or would require massive economic and military resources. During the conflict in Kurdistan, humanitarian intervention served as an objective policy to protect the Kurds, ensure the autonomy of Kurdistan and prevent Kurdish refugees from destabilizing Turkey. In contrast, its privileged role in Yugoslavia was explained mainly by the absence of seeking a political solution to the conflict. In Somalia (where humanitarian agencies have stepped in to care for victims of the "humanitarian war" led by the UN), it was nevertheless expected that humanitarianism would lead to a policy of reconciliation (Laidi, 2001: 168-170). The scepticism that all these difficulties constitutive of humanitarian law have also created, however, offer an opportunity to rethink the frameworks within which it can still be meaningful. This requires associating its theoretical, essentially "moral" presuppositions with a "political" conception of humanitarian law, which clarifies that, despite being devoted to universal values conceived as products of "universal reason", "universal moral conscience" or "consensus", its formulations and its implementation are the result of highly controversial political and legal compromises.

The aim of this paper is to analyze how the universal nature of humanitarian law is produced by highly controversial conflicts. Firstly, an analysis is offered on the universal but at the same controversial character in the codification of humanitarian law, recalling controversies around the creation of the Additional Protocols of 1977 (Section 1). Next, an analysis is given on the conflictual character of organizations supporting humanitarian law, taking in account conflicts between the Red Cross and Doctors Without Borders and controversies around the ambitions to pass from an humanitarian law to a Right of Humanitarian Intervention (Section 2). Finally, a reflection is offered on how the theories of international relations that most appropriately grasp the universal nature of humanitarian law must be complemented by a "historical sociology of the universal" that embraces the conflicting historical dimension in the construction of the universal (Section 3).

1) Political controversies in the codification of an universal humanitarian law

Precursors of the rules of humanitarian law are found in all cultures: in ancient India, among African, Greek, Roman, Persian, Sumerian and Hittite customary traditions, in the Code of Hammurabi, in the great literature (Mahabharata) and religious books (such as the Bible and Koran), in the rules of warfare (the laws of Manu and the Japanese Bushido) and in the rules of chivalry of the Middle Ages. While the ethical reflection on the very humanity of the enemy goes back to the ancient times of different cultural traditions, we find its modern legal formulation in the Enlightenment. Jean Jacques Rousseau establishes the difference between combatant and non-combatant: "War is not a relationship between humans, but a relationship between States, in which individuals are enemies only accidentally; not as men, nor even as citizens, but as soldiers; not as members of the homeland, but as its defenders...." (Rousseau, 1962: 240-241). Immanuel Kant criticizes the basis of the traditional "right to war" (*jus ad bellum*), the right that a State claims to have to use or threaten the life or the things of its citizens to make war. This means the right to do what we want with properties - which may apply to things, but not human beings, "who are not chickens, pigs, cows or apples that can be consumed, but persons" (Kant, 1797: 344-345). Kant's critique on the right to war, which founds the distinction between "just war" and "unjust war" that has justified aggression in modern times, is one of his most important attacks on the classic law of the people. The "right to war" means that a State that has suffered an actual violation (first attack) has the right to defend itself. According to Kant, this right means that it is "just" for human beings to "exterminate each other, finding the perpetual peace in the vast grave that covers all the horrors of violence as well as its authors" (Kant, 1795: 143). Secondly, Kant sets down the principles of the "law in war" (*jus in bellum*, which would later be called humanitarian law) - despite being a contradiction, since war is a state of the most complete absence of law: "Law in war is precisely that part of the law of the people that presents the greatest difficulty to make from it a concept and to think of a law in this state without law (*inter arma silent leges* - between arms, laws are silent). Under this title, Kant condemns inhuman war procedures and other unacceptable practices based on the idea that even the extreme situation of war requires the observance of certain rules of law (Kant, 1797: 347).

It is within this framework of thinking, which inspires the peace movement as well as the liberalist theories of peace, that humanitarian law is codified. Until the Middle Ages, warring nations were allowed by ethics and law to kill their enemies, be they combatants or not. Grotius justifies several acts of violence against the enemy, even captives and those who want to surrender (Grotius, 1999; Morgenthau, 1978: 242). War did not suffer significant moral restrictions because it was considered a conflict between the inhabitants of a territory, not between armed forces, which made all citizens of the enemy State themselves enemies.

It is only since the end of the Thirty Years War that the conception prevails that war is not between people, but between the armed forces of warring States (Morgenthau, 1978: 241). The distinction between combatant and non-combatant becomes a fundamental ethical and legal principle; only those who can and want to participate actively in combat may be subject to military action - the sick, wounded, prisoners or

those who want to surrender cannot be attacked; not to attack, injure or kill a non-combatant becomes a legal and moral duty (Morgenthau, 1978: 242). This trend towards the humanization of war, introduced in the sixteenth century, culminates in multilateral treaties in the nineteenth and twentieth century. 291 international treaties are drawn up between 1581 and 1864 to protect the lives of the wounded and sick in war.

In 1863, Abraham Lincoln approved the "Lieber Instructions" written by the lawyer Francis Lieber, a code with instructions of conduct to be applied by the U.S. army in campaigns, which can be considered representative of the rules of war at the time. In the same year, a decisive event for humanitarian law took place - the founding of the Red Cross, which symbolizes the realization of these institutional moral convictions (Morgenthau, 1978: 242).

Henry Dunant, a Swiss businessman, arrived in the village of Castiglione delle Stiviere in the evening of June 24, 1859 in what is currently northern Italy. The Battle of Solferino had just taken place in the neighbourhood in the context of the Franco-Austrian War, leaving about 6000 dead and 40,000 wounded. The next day, Dunant went to Solferino, finding the thousands of wounded left on the battlefield without medical care. France and the Austro-Hungarian Empire had provided more vets to treat horses than doctors to treat their wounded. Dunant organized the assistance to the wounded on both sides with the help of people from the surrounding area, mostly women, who chanted the motto "tutti fratelli". Deeply affected by the horror of war and the tragic fate of the wounded, Dunant began a campaign back in Geneva to organize volunteers to treat the war wounded. He vividly described his experiences in the manuscript *A Memory of Solferino* (1862), distributed throughout Europe, which attracted considerable attention and a large number of supporters for his ideas. This led to the creation of the International Committee of the Red Cross in 1863, the source of the humanitarian conventions on the protection of war wounded, prisoners and civilians decisive to the formation of humanitarian law until today.

The Geneva Convention of 1864, followed by those of 1906, 1929 and 1949, transforms the moral convictions related to the treatment of the wounded and sick as well as the doctors treating them during war into a statutory, concrete, detailed legal duty (Morgenthau, 1978: 242). Moreover, if prisoners of war are no longer killed in the eighteenth century, but still treated as criminals, Article 24 of the Treaty of Friendship signed between the United States and Prussia in 1785 represents a change in the moral convictions on this matter, which will lead to the creation of a comprehensive system of legal rules in the Hague Conventions of 1899 and 1907 as well as the Geneva Conventions of 1929 and 1949. The treaties, continues Morgenthau, concluded by the middle of the nineteenth century reflect these same concerns regarding life and suffering, aiming to humanize war, defending or limiting the use of certain weapons: The Paris Declaration of 1856 limits maritime war; the St. Petersburg Declaration of 1868 prohibits the use of projectiles with explosive or flammable substances; several international conventions prohibit gas, chemical and biological weapons; the Hague Conventions of 1899 and 1907 codify the laws of war on land and sea and the rights and duties of neutral States; the London Protocol of 1936 limits the use of submarines against merchant vessels; and, since World War II, considerable efforts have been made to limit the use of nuclear weapons (Morgenthau, 1978: 243).

Today, the most important treaties concerning humanitarian law can be grouped under 5 main themes:

1) ***Protection of Victims of Armed Conflicts***: Geneva Conventions I-IV (1949) with their Additional Protocols I, II (both of 1977) and III (2005) and the Declaration; Convention on the Rights of the Child (1989) with its Protocol (2000);
2) **International Criminal Court**: Rome Statute (1998);
3) ***Protection of cultural Property in Armed Conflicts***: Hague Convention (1954) with its Protocols I (1954) and II (1999);
4) ***Environment***: New York Convention (1976);
5) ***Weapons***: Geneva Protocol on Asphyxiating, Poisonous or other Gases (1972), London, Moscow and Washington Convention on Biological and Toxic Weapons (1972); Geneva Convention on Conventional Weapons (1980) with its Protocols I-III (all from 1980), IV (1995), IIa (1996), V (2003) and Amendment (2001); Paris Convention on Chemical Weapons (1993), Oslo Convention on Anti-Personnel Mines (1997); Convention on Cluster Munitions (2008).

This codification was, however, characterized by a profound conflictuality, which can be easily seen in the 1977 Additional Protocols to the Geneva Convention, the first related to international armed conflicts and the second related to civil wars. These protocols attempt to regulate the new generation of conflicts. Such conflicts are rather more internal and driven by irregular guerrillas than international and driven by regular battles between uniformed armed forces (Greenwood, 1999: 3) in order to recognize the armed struggle against colonial powers, even if the conflict is not between States. Going beyond the initial proposals of the International Committee of the Red Cross, the lobby of Third World States sought to amplify combatant status to include members of a guerrilla, so they would also be treated as prisoners of war in the case of capture. This group has had several victories, such as the highly controversial Article 1 (4) of the 1st Protocol, according to which "armed conflicts in which people fight against colonial domination and alien occupation and racist regimes in the exercise of their right to self-determination" should be characterized as international conflicts to which all humanitarian law, and not provisions for internal conflicts, should be applied (Greenwood, 1999: 6). Thus, as Greenwood observes, Additional Protocol I is the "only agreement of humanitarian law described by a member of the U.S. government at the time as 'law in the service of terror'" (Greenwood, 1999: 4; see Feith, 1985 and Solf, 1986). According to observations of representatives of the German delegation, the fundamental antagonism in the Conference was not between West and East, but between North and South (Bothe et al, 1982: 7-8).

The North-South divide conditioned the negotiations on the status of combatants, the methods and means of fighting, the prohibition and limitation of armaments and the protection of the civilian population, marked by what Greenwood calls the "Vietnam syndrome", which is the paradigm of a conflict between an industrialized and non-industrialized country. The tendency was to accept the tactics of the Guerrillas of the Viet Cong and North Vietnam and reject the practices of the United States and their allies, based on two military concepts: "the power of man" and "power of weapons". This conflict was accompanied by the controversy between the "realists", who were

more attached to the "power of weapons", and "idealists", who were more attached to "human power" and who had more weight in the votes as well as more impact on the final solutions, which are well suited to asymmetrical conflicts, but not to disputes between developed countries with dense population (Bothe *et al*., 1982: 9-10).

2) Conflict in humanitarian international organizations

Humanitarian law, as it has developed and become legalized, acquired a content that is interpreted by supporters and opponents alike as primarily moral and charitable. Jean Pictet, general director of the Red Cross in the 1950s and one of the main theoretical references to humanitarian law in the following years, makes the distinction: "To judge is to separate (…) the just from the unjust; it is to measure individual responsibility. However, charity has no use for this justice. It refuses to calculate the merit or fault of each individual. It goes much further; (...) it is the very image of mercy – of goodness without limit (Pictet, 1966: 19) ... Humanism would therefore prefer solutions dictated by compassion to those dictated by an imperfect justice, behind which revenge is (scarcely) hidden. In wartime, when the concepts of just and unjust become virtually indistinguishable and when moral standards are shaken, it is nearly impossible to be fair. If you want to act for the good of your neighbour and improve the average lot of people, you must be guided by spontaneous generosity" (Pictet, 1966: 20). The author goes on to say, "... justice in its highest degree eventually unites with charity. However, until it has reached this summit, there will always be room alongside it for charity, as charity generates initiative and spontaneity; it brings a human element into social relations that law, which is impersonal and abstract, does not know" (Pictet, 1966: 22). Pictet quotes Lao Tzu: "I am good to whom is good and I am good to whom is not good" (Pictet, 1966: 19). The author also quotes Lossier: If "justice is to respect human beings, love is to move toward them" (Pictet, 1966: 22).

Following this doctrine, the Red Cross kept silent on the extermination fields in World War II based on its belief that impartiality is a necessary condition for treating victims. Despite considering making the information they had on the extermination policy public in 1942, the International Committee of the Red Cross decided to keep silent. Thus, the Red Cross became an accomplice by omission. In 1969, Bernard Kouchner and other doctors serving the International Committee of the Red Cross on a mission in Biafra decided to break the silence and make a political denunciation, creating a new organization denominated "Doctors Without Borders".

While Doctors Without Borders represents a significant correction of the doctrine of silence of the Red Cross, transforming humanitarians into whistle blowers of atrocities, it becomes clear very early on that it is not easy to escape the political strategies of States. It was not the case in Biafra, as they had been led to believe, of a genocide organized by the Government of Nigeria. The starving people were held hostage by the military that led the secession, which presented these people as victims of the enemy. Unaware of the political problems in the disaster that they wanted to relieve, the humanitarians had ended up supporting the criminals.

The two organizations work with different but complementary aims. While one denounces, seeking to mobilize public opinion, but sometimes losing authorization to act in the territory of the State it denounces, the other keeps silent (although not more so much than in the past), but thusly it ensures access to the sick and wounded.

2.1) From humanitarian law to humanitarian intervention

The aspect that has proven the most problematic of its doctrine is that Doctors Without Borders have understood politics as the humanitarian policy of State, calling for military action. Despite the nonexistence of a "right" of humanitarian intervention in the UN Charter or customary international law, mandates authorizing the use of unilateral force, such as arbitrary acts of the Security Council UN, have relied on this doctrine.

It is precisely this idea that Habermas will develop in the 1990s with a reconstruction of Kant's cosmopolitan right aimed at legitimizing a worldwide realization of human rights. According to Kant, the three levels of legal organization – the State, international law and cosmopolitan law – should be maintained simultaneously and the idea of a world State is rejected as "soulless despotism", but several reconstructions of Kant argue that the historical difficulties that conditioned Kant's thinking have been overcome. For these reconstructions, a cosmopolitan law in the sense of a global right must replace international law, allowing the use of force on behalf of humanity.

Habermas (1996) considers three dimensions of law: the law of each country, international law (that of relations between States) and cosmopolitan right in the Kantian sense, which sees every citizen not as a citizen of the State but of the world. The Kantian idea of cosmopolitan law, says Habermas, should now guide policies aimed at the worldwide triumph of universal human rights, the main instrument of which is humanitarian intervention: "The weakness of the global protection of human rights is the absence of an executive force that would, if necessary, be able to ensure compliance with the Universal Declaration of Human Rights by intervening in the sovereignty of member States." Thus, Habermas concludes, the prohibition of intervention must be reviewed: "Except when, as in the case of Somalia, there is no State power that may be exercised, the world organization works (as in the case of Liberia and Bosnia-Croatia) with the consent of the governments involved. With Resolution 688 of April 1991, a new path in the Gulf War is opened, at least in practice, if not with regard to the legal justification for intervention. At the time, the United Nations invoked the right of intervention based on Chapter VII of the Charter on 'threats against international security'. In this sense, the UN has not intervened in the 'internal affairs of a sovereign country.' But the allies knew very well that this was what they were doing (...) to create 'protection zones' (...) for Kurdish refugees and to protect the members of a certain national minority against its own State". Habermas understands that the aim of interventions is the democratization of the internal order, a condition of a "sustainable economy, supportable social relations, egalitarian democratic participation, the rule of law and a culture of tolerance".

Academic debate arises in newspapers when NATO attacks Kosovo. Habermas writes in the newspaper *Die Zeit*, referring to the virtual disappearance of the rhetoric of "reason of State" still evoked in the Gulf War, that "fortunately, the dark tones are absent from the German public space (...). Supporters and opponents of the [NATO] attack use a crystalline normative language" (Habermas, 1999: 1). In an article published in the Frankfurter Allgemeine Zeitung, entitled "The unfair enemy: what would Kant have said about the Kosovo war", Reinhardt Brandt asks, "How can we judge the appropriateness of NATO attacks against Serbia? What philosopher can be put in the bags of soldiers? We must go back two hundred years to re-enter the conceptual world that is now claimed by the political leadership of NATO." Hegel, the author recalls, focused on the

singular Germanic State; Marx and Nietzsche took distance from legal ideas. Kant remains the most classic modern author to consider a peaceful legal world order. A note by the *Frankfurter Allgemeine Zeitung* attached to this article warns its readers that "Kant's work Perpetual Peace is now a key text from which to evaluate a universal policy of human rights. The current issue of reconciling the legal principle of non-interventionism with the principle of humanitarian intervention had been addressed at its foundations in 1795" (Brandt, 1999: 11).

Habermas, however, makes an exception to the requirement that he had made four years earlier that human rights violations must be pursued legally. Facing a blocked Security Council, the NATO intervention in Kosovo could be based on the principle of the "necessary assistance" of international law, even without a UN mandate, since human rights have a moral content, sharing the moral norms of the claim to universal validity (Habermas, 1999: 1; Anderson-Gold, 1998: 103-111). Challenging this view of humanitarian law, the lawyer Marcelo Neves argues that "according to this conception of the moral character of humanitarian interventions conducted unilaterally by major Western powers, Habermas' idea does not exactly produce a world domestic policy for the achievement of human rights, but a Western external political control of human rights. In this case, decisions regarding attacks and their selective, arbitrary applications do not occur under the control of procedures based on the model of the rule of law and democracy" (Neves, 2000: 207). Among the critical responses to Habermas formulated in a Kantian perspective, two weeks later and also in *Die Zeit*, Reinhard Merkel states that any international act requires the mandate of a legal entity recognized by the international community; that a war without a mandate destroys the conditions of the judicialization of international relations and threatens the future of the international order as a legal order - and not for the precarious balance of self-legitimized powers, he notes, explaining that he does not argue in realistic terms (Merkel, 1999: 10). Likewise, Reinhardt Brandt remarks that, given the absence of a UN mandate for NATO action, "Kant (...) would certainly have seen an extremely serious injury to law in the weakening of an international forum" (Merkel, 1999: 10). Four years later, Habermas contests the Iraq war of 2003 and U.S. foreign policy, calling on Europe to redefine its "foreign policy". Habermas identifies the European foreign policy with "a Kantian expectancy of an inner world politics", relegating the role of following the "European model" to the South (Habermas and Jacques Derrida, 2003). However, the difficulty in the argument that Europe should act as a counterweight to the United States is the reintroduction of the "balance of power" of realism in the "crystalline normative language" that he once praised and that normativism claimed to fight so decisively.

There is here a displacement firstly from politics to law (to legitimate political action), then from law to moral (when law, at an impasse, cannot justify) and finally from moral to power (when moral does not help understand "what happens"). Fichte is in fact emblematic of such as pathway. Inspired by Kant, Fichte denies at first that peace can be achieved by the balance of power, which only serves to justify new attacks and wars: peace cannot result from a compromise between powers, but from an international law that rules over them, a League of Nations, whose driving centre would be revolutionary France (Fichte, 1971: 90-96; Losurdo, 1991: 74-105). He begins to suspect that France could be the centre of such a federation after the defeat of Prussia and the triumph of the Empire of Napoleon, when he felt that the enthusiasm for the

French Revolution and the ideal of perpetual peace prevented him from clearly seeing power relationships. And that's when the turn begins from Kant to Machiavelli, this "magnificent mind" (Fichte, 1971: 408; Losurdo, 1991: 119), says Fichte. This return to Machiavelli should not serve to investigate the true nature of the human being nor develop politics of power based on cynicism or brutality, but simply to be aware of hazards that can cause unpleasant surprises in the international scene: Machiavelli's lesson has painfully been confirmed by history (Losurdo, 1991: 119-120). Fichte, Losurdo analyzes, does not abandon the ideal of perpetual peace to be conducted by a law above States and their conflicts, but until then ... we must take power relationships into account (Losurdo, 1991: 135-136).

Humanitarian logic is completely different from a military project, which makes the choice between those who should live and who should die, assuming that the sacrifice of a few is justified by a "lasting peace" (Weissman, 2004: 62). Many humanitarians believe that the vulnerability of the humanitarian doctrine comes primarily from the use of a universal moral language, of the certainty that all people of good will reach a consensus on its rules, irrespective of their political or religious convictions, because, thereby constituting a unanimous international opinion that could change the world (Milner, 2004: 53). This is undoubtedly a desirable situation from a normative point of view, but does not provide tools for analyzing the political issues of contemporary disasters.

3) The conflicting nature of the universal in theories on international relations

In international relations theory, humanitarian law, together with human rights, is consecrated as the great evidence of the existence of a global moral built by a global society that knows no borders – world-society. As Jean-Jacques Roche (2010) analyzes, as opposed to a conception of international society as a society of States united by common interests and agreement on standards of behaviour, the idea of a world society considers a society of individuals united by common values, a society that considers itself independent of all political authority, thus challenging violence between States. This idea, which dates back to ancient cosmopolitanism and persists in various forms across the history of philosophy, finds its most recent theoretical inspiration in the liberalism theory based on the principle of a civil society and in positivism, which considers the replacement of "the theological age" with the "scientific age" and "mechanical solidarity" with "organic solidarity", in which each individual chooses his/her own links with others. In the theory of international law, Scelle develops the concept of a "sociological objectivism": the international society, such as the internal society, is a group of individuals. The individual, not the State, is the first component of both the national and international society and the first subject of both domestic law and international law. Sovereignty belongs to the international society; the State is an intermediate group whose internal and external powers are conferred by international law. In 1972, the year of apogee of the Soviet-American detente, with the summit in Moscow in June 1972, Robert O. Keohane and Joseph Nye published *Transnational Relations and World Politics* and John Burton published the *World Society*, which had great impact. With the increase in the East-West tension in the 1980s, the theme of Burton's World Society no longer played a central role and Keohane and Nye refocused

their attentions on the role of the State. These transnationalist ideas regain interest in the post-Cold War after the fall of the Berlin Wall (1989); many authors believe that the world of States, which finds its origin in the Treaty of Westphalia, has been surpassed. The post-Westphalian world is characterized by the emergence of a world society in confrontation with the logic of States - a world in which global problems require new tools for decisions and actions. The *Theorie des kommunikativen Handelns (Theory of Communicative Action*, 1981) by Jürgen Habermas, the *Gesellschaft der Individuen* (Society of Individuals, 1983) by Norbert Elias and *Turbulence in World Politics* (1990) by James Rosenau become central theoretical references. The privileged method of acting by global society, which considers the individual and not the State in the centre of its concerns, is "governance", addressing issues such as humanitarian law, which goes beyond the limits of the State and which could hardly be addressed by the traditional categories of international relations. Governance is not based on political solidarity between States, but includes transnational solidarity between individuals. NGOs emerge as the preferred form of governance. NGOs focused on the implementation of humanitarian law, as the Red Cross and Doctors Without Borders, are then considered the ultimate symbol of the world-society.

3.1) The universal and identity conflicts: the perception of the world

Conflicts in the world-society result not from conflicts between States, but above all from conflicts in the 'world economy' and 'conflicts of identities', which may or may not be confused with political entities, such as a State. The identity issue was already present in the thinking of classical realism, in which identity is confused with the morality of the State. The classical realist Morgenthau in *Power Among Nations* (1948, followed by several re-editions) recognizes and affirms the existence of an international morality, expressed by excellence in humanitarian law. Although there are arguments against the effectiveness of these treaties, which are completely violated, the author states, "this is no argument against the existence of a moral conscience that feels ill at ease in the presence of violence, or at least certain types of violence, on the international scene". Most States try to harmonize these moral principles through international treaties and, when they are violated, governments have to justify and apologize. "They are the indirect recognition of certain moral limitations, which nations at times completely disregard and frequently violate." Large groups within a State at war revolt against violations of moral principles in the conduction of war, which proves "the existence of a moral conscience aware of moral limitations" (Morgenthau, 1978: 243).

Morgenthau does not question whether an international morality exists or not – he considers it incontestable that such a morality exists –, but he sees that the larger dimensions of war make humanitarian law impossible. These larger dimensions can be identified in four central aspects:

1) the portion of the population engaged in essential activities of warfare;

2) the portion of the population affected by the conduction of war;

3) the portion of the population identifying with war through conviction and emotion; and

4) the objectives of war.

Mass armies are supported by the production of the majority of the civilian population, such that the successful production of a civilian population is as important as the military effort itself. Modern warfare takes its weapons from a vast industrial machine that eliminates the distinction between soldier and civilian: "The worker, the engineer, the scientist are not innocent bystanders... They are as intrinsic and indispensable a part of the military organization as are the soldiers, sailors and airmen." The Second World War has air strikes and long-range shelling to destroy the productive capacity of a nation and its force of resistance (Morgenthau, 1978: 245). Based on the moral conviction of the inter-war years, on June 11, 1938, American Secretary of State Cordell Hull expressed his disapproval regarding the sale of aircraft and aircraft armaments to nations that bombed civilian populations following the bombardment of Canton by Japan. A year later, U.S. President Roosevelt made the same moral embargo to the Soviet Union regarding attacks on civilians in Finland. However, all warring nations soon practiced attacks to a higher degree than that which had been condemned. The morality of war, analyses Morgenthau, change with Warsaw and Rotterdam, Coventry and London, Nuremberg and Cologne, Hiroshima and Nagasaki: "The war in Indochina war for all practical purposes obliterated the distinction between the combatants and the civilian population" (Morgenthau, 1978: 246). In destroying enemy productivity and the emotional engagement of the masses, national interest destroys international morality: "As the religious wars of the sixteenth and seventeenth centuries were followed by the dynastic wars of the later seventeenth and eighteenth centuries, and as the latter yielded to the national wars of the nineteenth and the early twentieth centuries, so war in our time tends to revert to the religious type by becoming ideological in character. The citizen of a modern warring nation, in contrast to his ancestors of the eighteenth and nineteenth centuries, does not fight for the glory of his prince or the unity and greatness of his nation, but he 'crusades' for an 'ideal', a set of 'principles', a 'way of life', for which he claims a monopoly of truth and virtue. In consequence, he fights to the death or to 'unconditional surrender' all those who adhere to another, a false and evil, 'ideal' or 'way of life'. Since it is this 'ideal' and 'way of life' that fight in whatever persons they manifest themselves, the distinctions between fighting and disabled soldiers, combatants and civilians - if they are not eliminated altogether – are subordinated to the one distinction that really matters: the distinction between the representatives of the right and the wrong philosophy and way of life. The moral duty to spare the wounded, the sick, the surrendering and unarmed enemy, and to respect him as a human being who was an enemy only by virtue of being found on the other side of the fence, is superseded by the moral duty to punish and to wipe off from the face of the earth the professors and practitioners of evil" (Morgenthau, 1978: 246).

For Morgenthau, the subjective vision of the world is thus closely linked to the national moral. Raymond Aron, in turn, arguing that international relations cannot be fully rational because they are human relations, distinguishes material interests from immaterial interests. Non-objective and non-quantitive criteria influence diplomatic choices, such that each interpretation is different, depending on the culture, origin and psychology of each observer. If Morgenthau and Aron mainly take into account the perception in the framework of the State, the most recent studies on the perception of

international relations are detached from the State as a place of the critical construction of subjectivity. Major reference works include *The Image: Knowledge of Life in Society* (1956) by Kenneth Boulding, *Introduction à l'Histoire des Relations Internationales* (1964) by Pierre Renouvin and Jean-Baptiste Duroselle and *Perception and Misperception in International Politics* (1976) by Robert Jervis. Renouvin and Duroselle consider it necessary to "realize" the influences, the "deep forces", the unstable variables that guide the course of international relations. Behaviourism is incorporated into international relations, focusing on the study of the representation that the individual has of her/his environment. In the post-Cold War, the theoretical "constructivist" approach (Alexander Wendt, 1999) develops in international relations, aiming to determine the role of social structures in international life. The question raised is how social structures influence the identity and the conduct of the actors and how these actors reproduce or create social structures. It thus shows a great interest in "unstable variables"; norms, values and identities acquire as much importance in the analysis of international relations as material criteria for power (realism) or safety (neorealism). According to these doctrines, humanitarian law appears as the consecration of a moral value and a transnational rule of law constructed by several players – a law that can predominate on the international scene as well as other interests and that can even be a deciding factor in the behaviour of States.

Culture is now considered by some authors as the main source of antagonism. Norbert Elias already saw that globalization widens the areas of freedom of the individual while promoting the phenomenon of identity relocation as soon as the individual needs a space in her/his measure. Samuel Huntington, however, gives a radical sense to this idea: the ideological competition between East and West, in his view, leads to a confrontation between the West and the rest of the world. Civilizations transmit antagonistic conceptions of the human being. However, this is an exaggerated description of identity conflicts that does not offer the theoretical tools needed to explain the undeniable phenomenon of the construction of universal values that support humanitarian law.

3.2.) The political history of the universal moral of humanitarian law

The fundamental political question, however, still most affects the concept of humanitarian law that does not relate to the causes of war in a vain attempt to reintroduce law where law has failed and to submit to law those who have replaced law with violence (Chemillier-Gendreau, 2002: 80-81). In the case of humanitarian intervention, this refusal to combat the causes of conflicts becomes all the more dramatic (Chemillier-Gendreau, 2002: 82). The problems at the root of dramatic situations that call for humanitarian responses require a legal framework, indicating the deficiency of international law with regard to facing contemporary problems. As Chemillier-Gendreau analyzes, the following are its major inefficiencies:

1) the maintenance of peace (the central legal mechanism of the UN, but the operation of which is subject to the veto power of the permanent members of the Security Council) is discredited by impotence, partiality, wars disguised as maintenance of peace and the criminalization of operations conducted;

2) the judicial mechanism of dispute resolution also proves ineffective: the International Court of Justice in the Hague requires the consent of States to be able to judge; the International Criminal Court and the special courts set up by the Security Council for the former Yugoslavia and Rwanda have not had the expected results;

3) there is no control of weapons that are used in international crimes, especially devastating landmines, despite several agreements on specific weapons (which apply only to signatory States); and

4) the economic realm, which is the main cause of the breakdown of societies, divides humanity between those who benefit from a social organization that ensures survival, freedom and (potential) participation in the decision-making process and the growing masses of those sentenced to be eliminated, who later call for the humanitarian (Chemillier-Gendreau, 2002: 83-85).

The latter problem requires the differentiation between functional violence, which consists of the structural oppression inherent to social relations and which eliminates any kind of resistance incompatible with the reproduction of the system, and non-functional violence, which concerns the rest of the world market (this is the kind of violence that does not exploit, but leaves to die, also as a product of the world economy). These people have no possibility of emancipating themselves through their fighting. Balibar calls "civility" the politics that, having this problem in mind, aims at producing the very conditions for political action, reducing the extreme violence that prevents any form of communication and recognition between persons. This is a kind of politics that distinguishes itself from politics as "emancipation" (the conquest of individual rights) and "transformation" (transformation of power relationships and structures) (Balibar, 2001: 183). In the framework of such a policy, which takes these forms of violence into account, humanitarian law may regain its senses.

This conception of law supposes that its contents can hardly be seen through categories of rationalization and consensus (Habermas), but it is still the category of "compromise", as Kelsen insists, that expresses the very substance of law: it is a product of the struggle between different actors, a struggle that determines the formulation, interpretation and application of the rules of humanitarian law, the meaning of which is understood in its social function and conditioned by the context into which they are inserted. Despite all the difficulties of the implementation of humanitarian law, the historical analysis of its quarrelsome emergence and development, of its institutions, documents and rules, reveals the violence in international relations, but, at the same time, underlines the possibilities of political and legal action that can oppose this violence.

It is necessary to surpass the cosmopolitan normativism of Habermas as well as the realism of Morgenthau. According to Habermas' legal theory, humanitarian law depends on the institutionalization of the legal forms necessary for the formation of rational will. According to the Morgenthau's realism, the construction of a negative image of the enemy excludes the possibility of making universal values effective. It is necessary to overcome the antagonism between an analysis that focuses on the undeniable moral value of humanitarian law by ignoring its controversies and an analysis that focuses on social antagonisms, questioning the feasibility of the universal moral values of

humanitarian law. We must then consider that humanitarian law is a construction. There is nothing obvious in the idea of having humanitarian rights against the enemy even during war or in the conflict against her/his own government or against a dominant power. As Bourdieu analyzes, nothing is less obvious than to feel oneself a victim of injustice and to have rights and this applies even in the extreme situation of the absence of rights – war. The question is how to reconcile universal discourse on humanitarian law with a sociological analysis that considers how legal discourse is socially and historically produced. With Boudieu, it is possible to understand that the symbolic effect of humanitarian law is possible only if it is socially accepted as a neutral and independent response to real needs. For this end, codifying is essential. In the codification of humanitarian law, it appears that it is neither a product of universal reason nor the imposition of a dominant ideology. It results from a long, cumulative systematization that produces coherence and rationality, causing the effect of universal and normalization. Humanitarian law is also based on customs, but rationalization produces clarity, unlike customs. It appears as autonomous, as independent from power relationships, as based on the rationality of morality and thus worthy of universal recognition. The historical forms seem to have a transcendental foundation. However, the development of humanitarian law is only possible when one considers the historical roots of reason. As Bourdieu analyzes, the power of reason is not enough to achieve it. It is only through political struggle that reason is realized in history. Only by discovering its historical and social conditions, humanitarian law finds the means to escape its historicity.

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