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The Contours of the Systematicity of International Law

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Abstract

This article addresses the contours of the systematicity of international law from a perspective that contrasts with the distorted image shaped by the paradigm of the state-centeredness of law. Adopting a dialectical methodological approach and employing documentary and bibliographical research techniques, it aims to question the contours of that image in light of the process of institutionalization of international society and the proper operability of the basic concepts of the General Theory of Law. It is observed that the process of institutionalization of international society has given rise to a normative reality of its own, that is, to an effective legal order composed of norms endowed with objective validity and safeguarded by an institutionalized mechanism of sanction, whose primary norm of legal production lies in inter-State consensus. The lower degree of institutionalization of sanctions and the existence of soft norms do not affect its juridicity. Custom and treaties constitute primary sources of law, whereas secondary sources correspond to the law-making activity of international organizations. Since each legal system regulates, from an endogenous perspective, its relations with other legal orders, it may be stated that there is no a priori answer to the question concerning the relational design between international law and domestic law. However, a proper examination of this inter-legal-order relationship must dissociate the attributes of originality and independence.

Keywords

International Legal Order, Norm on Legal Production, Theory of the Sources of Law, Inter-Legal-Order Relations

1. Introduction

The image of law as a set of rules enacted by state authorities is not only inaccu-

rate, both historically and dogmatically, but also distorts the very understanding of the legal phenomenon in its entirety, whether through the hypertrophy of the hierarchical principle in the articulation of the sources of law or by ignoring the plurality of legal orders that make up the positive law applicable to one and the same community.

Permanent human associations constituted as organic units and, as such, ordered around power are endowed with a particularized legal order, characterized as a systematized set of norms integrated around a common point of reference that functions as their ground of validity, answering the question as to why their norms ought to be obeyed.

As a coercive social order, the legal rules of a given system are endowed with objective validity, guaranteed by a sanctioning mechanism. It should also be emphasized that such rules possess legal character solely by virtue of belonging to the legal order, regardless of any structural traits; indeed, they belong to the legal order insofar as they have been produced in accordance with the rules on law-making established by the legal order itself.

From a formal standpoint, every legal order establishes its respective sources of law, providing for the acts and facts which, by producing norms, bring about systemic consequences of the creation, modification, or extinction of norms, and also lays down the rules governing the relationship among its sources and between these and the sources of other legal orders that it recognizes.

Now then, the prevailing image, distorted by the paradigm of statehood, mirrors positive law as that which is produced or recognized by state authorities, having as its ground of validity the original constituent power ("normativized" by Kelsen through the hypothetical basic norm), which also legitimizes the exclusive use of legitimate force, thereby excluding its subsistence in other systems. Moreover, state law, by virtue of its sovereignty, would constitute the ground of validity of international law, which would possess only such degree of positivity as might be attributed to it by the state.

Adopting a dialectical methodological approach and employing documentary and bibliographical research techniques, this study calls into question the accuracy of this depiction in light of the process of institutionalization of international society and the operability of the basic concepts of the General Theory of Law, proceeding from the notion that systematicity is the characteristic present in a set of elements which, articulated according to a predefined order, compose a unitary reality.

Accordingly, the analysis of the systematicity of international law—what distinguishes it from other legal systems, including domestic legal orders—depends on the identification of a systematized set of international norms endowed with objective validity, articulated by an ordering norm, ensured by mechanisms of institutionalized sanction, grounded in its own sources of law, and capable of self-regulating its relations with other legal orders, as will be developed below.

The present work results from investigations conducted within the framework

of the doctoral thesis entitled "A proteção supranacional dos direitos e a transformação dos ordenamentos jurídicos", developed at the University of Granada (Spain), under an international cotutelle arrangement with the Federal University of Paraíba (Brazil). Its originality lies in the consolidation of theoretical notions essential to the understanding of legal pluralism, establishing an interface between Constitutional Theory, General Theory of Law, and General Theory of International Law.

2. The Institutionalization of International Society

The juridical-normative dimension is a phenomenon inherent to the formation of any human grouping that constitutes an organic unit, understood as associations that embody a permanent reality and are organized around power.

Indeed, individuals possess a natural aptitude for forming human associations—in the broadest possible sense—that share values and objectives and are organized according to specific rules. Three constitutive elements may thus be identified: the subjective element, composed of their constituent members; the teleological element, represented by shared values and objectives; and the normative element, consisting of the rules governing relations among members, between them and the association, and between the association and other recognized human associations.

Permanent associations may furthermore function as a dynamic reality (Crisafulli, 1970), insofar as their elements are mutable and the association itself undergoes social processes of integration and differentiation. This gives rise to the need to organize the exercise of authority, establishing a "preordained scheme of positions and functions" (Giannini, 1958: p. 237) that defines the capacities, responsibilities, and duties of the subjects and institutions comprising that social grouping.

It is precisely in this conjunction that the political dimension of law becomes evident, that is, the process of "co-participation of power" (Reale, 1998: p. 224), whether institutionalized (political power) or traditional (diffuse power), through which the values and normative representations of subjects are rendered juridical. This occurs as certain norms are selected—according to the respective preordained scheme of positions and functions—to prevail with objective validity for all members of the association. In other words, it is this socio-legal reality that allows for the identification of both the existence and the contours of the law in force within a given human association.

By way of example, medieval law was radically pluralistic and characterized by variable geometry (Hespanha, 2019), marked by the coexistence of multiple legal orders which, in addition to differing in content and sources, lacked pre-established rules of interrelation: ius commune, canon law, corporate legal regimes, territorial statutes, customs, and local practices, among others. This model of legal system reflected the dispersion of political power among the various recognized human associations, in accordance with the corporative paradigm of society ex-

pressed through status and privus legis.

Modern law, however, is characterized by the concentration of political power in the State, a type of human association which, influenced by individualism and legal equality, initially absorbed the "partial societies" (Rousseau, 2000: p. 36) in order to construct a community that was unitary in composition, homogeneous in its set of values, and unified by bonds of national identity (Gierke, 2010). This arrangement was grounded in a social worldview that polarized the individual and the State, the latter being the primary locus of communal life. Accordingly, such a political arrangement could only correspond to a legal system exclusively produced by the State, the sole holder of sovereignty.

It is true that a form of sociopolitical pluralism reemerged in the second half of the twentieth century as a result of the renewed valuation of intermediate social groups. These groups came to function both as mechanisms for the horizontal control of political power and as arenas for the affirmation of personality. In their favor, political power and normative authority were conferred, all articulated within a new constitutional model that no longer merely founds the State and establishes the requirements for the exercise of authority, but also seeks to regulate the political phenomenon and organize legal production—no longer necessarily and exclusively state-based—within a plural and sovereign community.

The examination of the international sphere likewise reveals this socio-legal reality, as one can identify an association endowed with subjective, teleological, and normative elements, structured as a dynamic reality and organized around power. This is evident from the historical development of the institutionalization process of international society.

The historical landmark marking the emergence of sovereign States—those endowed with the monopoly over the production and organization of law—is the same as that marking the advent of modern international society and its movement toward institutionalization: the Peace of Westphalia (1648). From this point onward, the idea prevailed that, at the level of external individuality, sovereign States constituted the sole form of political organization capable of participating in international relations. This was a Eurocentric conception of power organization, consistent with the reciprocal recognition of sovereignties arising from the Treaties and with the resulting decentralization of power, in the absence of a higher authority holding the monopoly of legitimate force.

Thus, in this initial Westphalian phase, International Law presented itself as a regulatory instrument of interstate relations which, grounded in a paradigm of coexistence, required the prescription of essentially abstention-based obligations (i.e., obligations not to act), predominantly related to matters of war and peace (Treaties of Utrecht of 1713; Peace of Basel of 1795; Treaty of Nanking of 1842; Treaty of Paris of 1856), territorial issues (Treaties of El Pardo of 1778; Fontainebleau of 1807; Paris of 1815; Lisbon of 1864), including colonial or post-colonial contexts (Treaties of Madrid of 1750; Adams-Onís of 1819), and trade (Methuen Treaty of 1703; Berne Convention of 1880).

Accordingly, a legal order emerged composed primarily of norms deriving from interstate legal transactions, as states regulated their own interests and the production of corresponding legal effects through bilateral or multilateral expressions of will, within essentially synallagmatic legal relationships. It is therefore unsurprising that general contract theory exerted a strong influence on the theory of international treaties, as well as on the development of a traditional view of the absolute dependence on sovereign will for the creation of international norms.

However, beginning with the Treaty of Versailles (1919), a new paradigmatic type of international relation was consolidated, based on state cooperation and marked by a universalist aspiration. Drawing on the positive experiences of permanent international bodies (e.g., the International Commission for the Rhine River, the International Telegraph Union, and the Universal Postal Union), the League of Nations was established as an international organization composed of sovereign states, aimed at instituting a system of collective security and promoting cooperation and peace. It was endowed with its own governmental structure, consisting of an Assembly and a Council, assisted by a permanent Secretariat (Article 2 of the Covenant of the League of Nations).

The League of Nations, as is well known, was unsuccessful. Nevertheless, it laid the groundwork for a reconfiguration of international society based on three key factors: the creation of an intergovernmental organization for political cooperation endowed with functional autonomy; the international protection of commonly defined values and objectives; and the establishment of a permanent mechanism of judicial cooperation through an international court of justice.

This model extended beyond the United Nations system and proved more consistent with the need to institutionalize the supervision and enforcement of compliance with constituent treaties (and other norms) by all States parties, thereby avoiding a scenario in which one State would control the sovereign conduct of another. It also gave rise to a variety of dispute settlement mechanisms. Moreover, it reflects a more universalist approach concerning the need to respect shared values and objectives. In this regard, Bassiouni (2010: p. 05):

"Nevertheless, progress has been achieved in the last century as states' interests and the values that their societies embrace have become less divergent. This convergence demanded greater conformity by states to certain human aspirations and also greater conformity to the expectations of the higher good of an international community consisting not only of states, but also of peoples and individuals. This is the premise of the United Nations' system of collective security entrusted to the authority of the Security Council and the veto power of its five permanent members."

Indeed, the very Charter of the United Nations, within the scope of regulating the maintenance of international peace and security, significantly expanded the subject matter and scope of international cooperation by delineating common international interests and values. These were projected both in the content of the norms that would subsequently emerge and in the type of obligations imposed,

which now also assumed a positive character (obligations to act or to perform), and not merely within the United Nations system (of the United Nations Organization/UN).

Cançado Trindade (2012) recalls that the expansion of the law of international organizations is indicative of the increased institutionalization of international law and identifies the relevant areas in which the most recent development of derivative law [law autonomously produced by international organizations] has taken place: the law of the sea, outer space law, international trade law, the international administration of territory, and the right to humanitarian assistance.

Accordingly, this new Westphalian phase produces a legal system whose subjects are not only States but also international organizations, to which competences are delegated to autonomously safeguard and supervise collective interests and common values, characterized by their transnational nature. Sovereign will remain a necessary precondition for a State's participation in such organizations and for the acceptance of their legal output. However, alongside this, a parallel foundation is progressively developed, grounded in the significance of the collective interest or common value protected and in the autonomy and technical character of the action of international organizations, ensured by mechanisms of responsibility of varying intensity.

Hence emerges the recognition of the enunciation of binding norms addressed to the international community as a whole (ICJ, 1962), as well as the existence of international obligations erga omnes (ICJ, 1970), as a result of the very evolution of international society and its legal system. This includes the rules of jus cogens, which would, at least theoretically, possess the capacity to alter the general structure of international law, impacting both its juridical nature and the configuration of its systematicity.

From this period, one may also highlight the North Atlantic Treaty Organization (1949) and the Warsaw Pact (1955), the Latin American Free Trade Association (Treaty of Montevideo of 1960, replaced by the Treaty of Montevideo of 1980), the World Intellectual Property Organization (Stockholm Convention of 1967), and the Treaty of Maastricht (1992), which founded the European Union and was subsequently amended and modified. Equally illustrative are the instruments that reveal the process of the humanization of international law itself, based on the understanding that States exist for the protection of the common good and that, albeit indirectly, all their activity—including international action—should take the individual and human dignity as reference points (Trindade, 2015b). This is exemplified in the fields of International Human Rights Law, International Humanitarian Law, and International Criminal Law.

It is thus evident that, within international society, processes of integration and differentiation have taken place and continue to occur. Moreover, one observes a transformation of the subjective element—initially composed solely of states as participants, later including international organizations—of the teleological element (Shaw, 2003)—previously centered on state interests mediated by negative

obligations, later encompassing internationally protected common interests and values, also mediated by positive obligations—and of its organizational structure, as demonstrated by the proliferation of the autonomous bureaucratic structures of international organizations. These developments also delineate the elements necessary for identifying its legal order.

In turn, international society has developed in a structurally horizontalized, decentralized, and atomized manner into a series of distinct groupings of States. Some are based on a paradigm of coexistence and the absolute predominance of sovereign will, while others rest on a paradigm of cooperation and solidarity, primarily grounded in common values and interests and, indeed, possessing a universalist aspiration.

Having demonstrated that the institutionalization of international society has been accompanied, as a natural consequence, by the formation of a particularized normative system, it now remains to examine it in light of its systematicity, through the identification of its fundamental ordering norm, the characteristics of its institutionalized sanctions, its sources of legal norms, and the self-regulation of its relations with other legal orders.

3. The Systematicity of International Law

3.1. The Unity of the International Legal Order

The legal order is, according to Callejón (2018), a systematized set of legal norms and, as a system, it is characterized by the integration of all its components around a common reference point that operates as their foundation of validity, such that it is composed of propositions that are essentially non-contradictory.

For normative positivism, this foundation of validity must be sought by referring not to reality, but to another norm from which the first may be derived (Kelsen, 1990), so that the unity of the normative system rests upon the reduction of all its norms to one and the same basic norm (Kelsen, 1998), which functions as the common source of validity for all the norms of that normative system.

Although the hypothetical basic norm has enjoyed broad theoretical acceptance, the fact remains that constitutionalist legal scholarship has already demonstrated that it is not necessary for the purposes of systemic unity (Callejón, 2020). First, the chain of normative causality ends with the positive-law constitution (or with the basic norm of positive law of any legal system), such that above it—or prior to it—there is no juridicity. Second, and as a consequence of the first point, legal dogmatics (Perassi, 1967) need not investigate the foundation of validity of the legal order itself, basically because there is no authorizing norm for the constituent act or for constitutive custom, both of which are phenomena that inaugurate any system. Thus, in the case of the recent state-constitutional experience, the foundation of legitimacy of the legal order would be the original constituent power, which is initial, just as the recognition of the traditional character of a general norm of obedience is initial in a non-state legal system.

The systematicity of a given legal order must instead be examined in light of its

law-making processes, in endogenous terms—that is, on the basis of an analysis of the norm-producing sources regulated by the legal order itself. This may appear tautological (but it is not). What is being reaffirmed here is the juridicity of the norm from the standpoint of its formal aspect, which is a significant contribution of Kelsenian doctrine to legal science.

Kelsen defines the material constitution as the "positive norm or the positive norms through which the production of general norms is regulated" (Kelsen, 1990: p. 247). The material constitution—despite its reference to the state phenomenon—is inherent in any legal system and establishes the requirements and competences for norm-production and the sources through which norms are incorporated into the respective system (it should be emphasized: norms of content or norms governing the production of other norms), while also being associated with the attribute of the objective validity of the legal norm.

As is well known, the objective validity of a legal norm does not depend on moral principles or social psychology, but is conferred by its belonging to a legal system, insofar as it is related to a superior norm that grants it validity (Kelsen, 1986), which, in turn, will have its own validity subject to another superior norm, thereby establishing normative causality within the system itself until it reaches—so we argue—the basic norm of positive law.

In summary: (a) the systematicity of a legal order does not require a search for its source of legitimacy. For legal dogmatics, it is sufficient to identify it and to recognize its effectiveness within a given association; (b) systematicity is affirmed by referring all its norms to a common reference point (the Kelsenian material constitution), which is ascertained through an examination of its law-making processes, that is, on the basis of the norms that the legal order itself provides for the production of its general norms, which also confers belonging [i.e. objective validity] upon them.

If that is so, all the questions that have over time been directed toward identifying the source of legitimacy of the international legal order—including Triepel's common will (1966) or the change in the content of the basic norm promoted by Kelsen himself (1998)—seem to us to be futile. The fact is that national societies (and their members) recognize in international law the capacity to enact and secure the rules of coexistence governing relations among States, international organizations and, indirectly, individuals, which interact with other norms of positive state and non-state law (such as those of other politically organized social groups).

From the standpoint relevant to the jurist, the international legal order exists and is effective (Fitzmaurice, 1956), and this suffices for its systemic analysis, which must begin, once again, from its law-making processes, by identifying the norms governing legal production that the international legal order itself establishes.

On this point, we consider it scientifically sound to maintain that the only primary norm governing legal production in the international legal order is interstate

consensus (the agreement of State wills), so that the genesis of the norm does not dispense either with the State's explicit consent, in the case of conventional norms, or with its tacit consent, in the case of customary norms. Even the law-making activity of international organizations (derived international law) is based on a secondary norm of production, insofar as its authorization derives from the constituent treaties produced by interstate agreement.

This is to say that, given the sectoral variability in the level of sociopolitical integration and the low degree of institutionalization of international society as a whole, the systematicity of its legal system is also attenuated—in comparison, of course, with state legal orders—so that the sovereign will of the State remains a crucial element of nomogenesis, after all, there is always the theoretical possibility that the State may choose not to participate in international society and, therefore, cease to be a subject of its legal order.

3.2. Analysis of the Objections to Inter-State Consensus as the Primary Rule Governing the Production of Law in the International Legal Order

The first objection to the doctrine of consensus as the sole primary rule of legal production in international law is the claim that the identity between the producer and the addressee of the norm would be logically impossible, since, if that were the case, violations of the law would not be conceivable.

This objection stems from a conceptual confusion: the production of a legal norm is one thing, whereas the reason why it ought to be complied with is another. To assert that an international norm originates from state consent has nothing to do with the recognition of its objective validity and, therefore, does not interfere with the occurrence of legal violations.

Structurally, a legal norm is a "statement that deontically qualifies a behavior" (Guastini, 2005: p. 174). Accordingly, a violation of the norm occurs when the subject to whom it is addressed engages in conduct contrary to the normative statement—expressed in deontic form (e.g., "it is prohibited", "it is mandatory", etc.)—thus subjecting itself to a pre-established legal consequence. Such a norm must be complied with not because of state will, but by virtue of its objective validity.

Therefore, what is being asserted is that inter-State consensus produces the international norm, but that this norm acquires objective validity—and, consequently, the capacity to generate its own legal consequences—not by virtue of, or for as long as, State will persists—which would indeed be contradictory—but rather by virtue of its incorporation into the legal system, in this case, the international legal order (Perassi, 1955), which, as already demonstrated, arises from the very existence of States and their participation in international society.

Other common objections concern the inadmissibility of reservations or denunciation in certain treaties, or treaties that provide for amendment procedures capable of resulting in the automatic (and involuntary) adherence of all States once approved by a certain majority, as is the case with the Charter of the United

Nations (Art. 108), in which the will of each State would be irrelevant for the production of legal effects.

These objections are easily overcome, since, at their origin, there lies an act of State consent—namely, the signature of the treaty that provides either for the prohibition of reservations or for the automatic entry into force of amendments—and, in the course of their development, the binding submission to an international norm to which the State has not expressly adhered.

More complex arguments concern, on the one hand, the production and effectiveness of international custom and, on the other, norms of jus cogens.

Conceptually, customary law is a "fact constitutive of general norms" (Bobbio, 2010: p. 31). It is a fact because it constitutes a spontaneous method of forming legal norms, whereby a (normally) repeated, uniform, constant, and public practice is adopted as the expression of a legal requirement, thereby generating the expectation of its observance by all subjects of the legal order (MacGibbon, 1957).

Thus, in the process of the formation of customary norms, the role of legal conviction (opinio juris sive necessitatis) is indisputable, and there is a clear connection with the acquiescence of the subjects of the legal order (Díaz Inverso, 2015). However, once the practice is reproduced with the conviction of its juridical character, it acquires the status of a customary legal norm and thereby attains objective validity. Such validity, it bears repeating, does not depend on acceptance or adherence by the subjects bound by it, including states or international organizations that emerge after the formation of the custom, which, as already demonstrated, does not in any way affect the identification of consensus as the sole primary rule of production of international law.

In this regard, MacGibbon (1957) also considers that State acquiescence plays a crucial role in the formation of customary international norms and further associates it with the doctrine of the persistent objector (protest) for the purpose of identifying the juridical character of the adopted practice.

In turn, jus cogens norms correspond to the category of imperative or peremptory norms of international law, defined in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

From this definition, it may be inferred that jus cogens norms represent a form of true universal consensus and, moreover, that they originate independently of the express or tacit consent of States, being not subject to denunciation (or objection, if customary in nature) and constituting a substantive limit on the content of other international legal provisions. Indeed, "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law" (Art. 53, VCLT, first part), and furthermore, "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates" (Art. 64, VCLT).

If, empirically, such imperative norms had attained the characteristics attributed to them by doctrine and by the Vienna Convention, they would, in addition to posing a problem for the political dimension of law, represent a rupture with the doctrine of international consensus as the primary rule of legal production. They would likely be situated at the level of a pre-existing natural law (Accioly et al., 2023), thereby conditioning the validity of all positive law—not only international, but also domestic and that of other institutionally organized human associations.

In this regard, there is a jurisprudential trend toward the recognition of jus cogens norms in international human rights tribunals and within the International Court of Justice (ICJ). To cite a few examples, the ICJ, in the Nicaragua v. United States case (1984), when deciding on its own jurisdiction, recognized the existence of binding principles of customary law independently of their codification in treaties (ICJ, 1984). The same Court, in the East Timor case (ICJ, 1995), acknowledged the essential character of the principle of self-determination of peoples. Finally, in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, it stated that it had identified "that the obligations violated by Israel include certain obligations erga omnes (…), such as the obligation to respect the right of the Palestinian people to self-determination and certain obligations under international humanitarian law" (ICJ, 2004).

The fact is that, notwithstanding their gradual jurisprudential construction and doctrinal efforts at systematization—including their inclusion on the agenda of the International Law Commission—the category of jus cogens does not, empirically, possess the scope often attributed to it.

First, there is the undeniable problem of identification. After all, which norms belong to the category of jus cogens? Although the crystallization of the concept in the VCLT reflects a certain degree of State consensus regarding its axiological content, it is not possible to determine in advance which norms form part of jus cogens. This represents a pragmatic obstacle for both domestic and international law-making bodies, thereby placing reliance on the systematizing role of bodies responsible for the application of international law, with the well-known deficits of enforcement.

The second problem concerns its still deficient concrete legal effects. If jus cogens norms effectively protect inalienable international interests and establish obligations erga omnes, independently of State consent, a natural consequence would be the recognition of the legal legitimacy of States (and international organizations), in the face of a violation of a jus cogens norm, to resort to sanctions and mechanisms of responsibility, including through domestic or international jurisdictions, against which neither jurisdictional immunity nor consent to jurisdiction would be opposable.

However, the ICJ itself, in the Jurisdictional Immunities of the State case (2012), dissociated the substantive character of jus cogens rules from their possible procedural effects, holding that the violation of a peremptory rule of international law

did not override the procedural rule concerning jurisdictional immunity (ICJ, 2012). Likewise, the same Court has held that the violation of an obligation erga omnes is not sufficient to dispense with the requirement of recognition of its jurisdiction (ICJ, 2006).

Finally, jus cogens, as presently developed, also suffers from a problem of practical utility. The catalogue of peremptory international norms commonly identified in the literature largely reflects an already existing and concrete international consensus derived from numerous international commitments of universal scope. It is unlikely that an international treaty (or even a domestic normative act) would be adopted in violation, for example, of the prohibition of aggression, genocide, or torture. This renders the category of jus cogens more of an argumentative reinforcement in the assessment of non-normative State conduct than a decisive tool for evaluating the compatibility of international or domestic normative production.

Even if this were not the case, in essence, we consider that jus cogens norms represent only an apparent opposition to voluntarism in a broader sense, since it does not seem correct to exclude from international consensus—as an element external to individually considered States—the enactment of imperative norms capable of sanctioning any State, even in the absence of its express or tacit consent to their formation (Hsu Cleto, 2021).

For these reasons, the current incipient stage of development of jus cogens norms and their doctrine, combined with the relatively low level of institutionalization of international society, allows for the continued recognition of the scientific validity of inter-State consensus as the sole primary rule governing the production of law in the international legal order.

4. The Problem of Sanctions in International Law

Analyzing the systematicity of international law from the standpoint of the element of sanction, Malcolm Shaw (2003) states that it does not have a unified enforcement apparatus along the lines of domestic law, since there are cases of legitimate and institutional use of force, through the UN, of an economic and military nature, as well as recognized situations of the right of self-defence, such as in cases of aggression, left to the discretion of States. In his analysis, this circumstance, insofar as it would operate in the individual interest of the State, would shift the axis of the system's juridical character from sanction to the effective obligation to obey objective rules. He concludes by stating that "(…) the character of the international legal order has to be examined in order to seek to discover whether in fact states feel obliged to obey the rules of international law and, if so, why" (Shaw, 2003: p. 5).

In our view, the premise that sanctioning mechanisms would not serve the international community and its legal system does not seem correct, since the triggering act for the legitimate use of force, even at the current stage of institutionalization of international law, is already the violation of a norm of the interna-

tional system (e.g., the norm of non-intervention, non-aggression, etc.), and the fact that the actual exercise of the sanction depends on a State judgment merely reveals the greater dependence of the holders of the legal order on the activation of the existing sanctioning mechanisms, without thereby stripping the collective nature of the international interest involved.

In any event, we believe that, in other respects, there is a widespread conceptual misunderstanding that associates sanctions with the juridical character of the norm. To clarify: international law constitutes a legal order composed of norms endowed with objective validity and possessing a structured guarantee of coercion, as is characteristic of legal normative systems. Let us explain.

Seen within the ecosystem of social control, law is a coercive social order, with sanction being a modality of coercion that generates adverse consequences for the practice of actions deemed reprehensible. For Kelsen, the moment of coercion is the decisive factor differentiating law from other methods of control, since inherent only to law is "the circumstance that the act stipulated by the order as the consequence of a situation of fact considered socially detrimental must be executed even against the will of the person affected and—in case of resistance—through the use of physical force (…)" (Kelsen, 1998: p. 37). Thus, it is characteristic of law to possess an immanent and institutionalized sanctioning mechanism.

Kelsen's diagnosis seems correct. However, it must be made clear that, for a given legal system, sanction functions pragmatically as an instrument guaranteeing the objective validity of its norms. Accordingly, sanction is not an indispensable element for identifying the juridical character of a norm; rather, it is relevant for the classification of a normative system, provided it is admitted that, even among different legal systems, different degrees of strength and institutionalization (Perassi, 1955) of immanent sanction can be detected, depending on the types of procedure through which sanction operates as a guarantee.

These are scientifically sufficient reasons to arrive at two conclusions. First, although it has a lower degree of institutionalization of sanctions when compared with domestic law, international law nonetheless constitutes a legal order. Second, all of its norms, regardless of their level of imperative force, are to be qualified as legal norms.

As regards the first point, we once again turn to Perassi (1955), for whom sanctioning mechanisms in the international system manifest themselves in two general types of procedure: (a) the determination of the law applicable to a given set of operative facts [hipótese de incidência], which serves a guarantee function because it entails the substitution of the individual wills of the subjects involved (something that also occurs in domestic law with so-called merely declaratory judgments); (b) the coercive enforcement of the law in a concrete case: this has been absorbed at the domestic level by the State, the holder of the most powerful legitimate violence, which does not, however, prevent the operation in international law of norms produced by inter-State agreements, such as those providing for self-help measures or regulating institutional or collaborative protection,

which are becoming increasingly institutionalized.

As to the level of imperative force, we refer to the use of soft norms in positive international law. Although international legal scholarship tends to subsume within that category a diversity of heterogeneous legal phenomena (Bellido, 2004), by soft norms (or soft law, generally) we mean here normative acts produced by subjects of international law (states and international organizations) that do not establish binding legal obligations, either because they do not prescribe specific conduct or because they do not provide for a specific mechanism to secure compliance with their command (Culot, 2005).

It should be noted that the absence of a binding legal obligation does not imply the non-juridical character of the norm. This bears repeating: first, because sanction is not an element of the norm, but rather a guarantee of the objective validity of the system of norms. Second, because soft norms reveal the minimum and circumstantial content of international consensus, but can only be described as "soft" by comparison with a traditional and state-centred model of normative regulation (hard law)—a model that is clearly idealized, as is evident from the profusion of open texture in state legislation.

5. The Sources of International Law: An Outline

Every legal order has its respective sources of law. In the case of international law, it is noteworthy that its process of institutionalization has involved the increasing use of conventional sources, including through the codification of customary rules, as well as the proliferation of multilateral treaties and an expansion in the diversity of matters regulated internationally, in addition to those entrusted to international organizations as a "centre of attribution of international rights and duties" (Castro, 2021).

The primary formal sources of international law are custom and treaties. It is true that Article 38 of the ICJ Statute sets out a broader list, adding general principles, judicial decisions, and the teachings of publicists; and, since "all Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice" (Article 93(1) of the UN Charter), one might conclude that there is also broad consensus regarding the role of these instruments in the production of international law.

With regard to general principles, Trindade (2015a: p. 77) reveals a strong attachment to his jusnaturalist inspiration in asserting that they "possess inherent validity and necessity, emanate from natural law, and demonstrate […] that consent can never constitute the ultimate source of International Law nor account for its own validity".

However, in practice, the productive role of general principles in international law resembles that observed in domestic legal systems. This is what Luño (2000) describes as the metanormative function of general principles, whereby they operate as a cultural element in the process of elaborating international normative provisions or, alternatively, as general principles in their ontological sense, when

they function as an inductive precept in the application process carried out by a judicial body in resolving a concrete case. Therefore, general principles cannot be regarded as autonomous sources of legal norms: in the former case, the source lies in the international normative provision, whereas in the latter it is the judicial decision that reveals a given content of a general principle.

As for custom, we have already explained that it is a method of the spontaneous formation of legal norms, with nomogenesis derived from social (rather than political) power. It consists of a practice that is (normally) repeated, uniform, constant, and public, which is adopted as the expression of a legal requirement, thereby generating a claim to observance by all subjects of the legal order. It is therefore a fact-source, endowed with both a material and an immaterial element. The former refers to general practice habitually accepted, whereas the immaterial element is opinio juris, that is, the legal conviction regarding the obligatory nature of the norm emerging from general practice.

In turn, a treaty is an international agreement concluded in writing between States or between States and international organizations, governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever its particular designation (Article 1(a), VCLT). Treaties are characterized as act-sources and, within the international legal system, their requirements of validity are: (a) the capacity of the parties; (b) the authority of the agents; and (c) mutual consent.

There is no hierarchy between the primary sources, whether conventional or customary. Indeed, unlike the process by which custom is absorbed by law produced by normative authorities within national States, in international society there is no relationship of dependent validity between custom and treaty. Thus, in international law, not only does the customary source not depend on the law of treaties, but it may also produce a legal effect modifying or abrogating a prior treaty (Mazzuoli, 2012), there being no difference in their degrees of legal efficacy, as the ICJ itself recognized in 1986:

"[...] But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability. Nor can the multilateral treaty reservation be interpreted as meaning that, once applicable to a given dispute, it would exclude the application of any rule of customary international law the content of which was the same as, or analogous to, that of the treaty-law rule which had caused the reservation to become effective."

Nor is there a hierarchy between conventional primary sources, such that the relationship between norms from different treaties (at least ideally, subject to the caveat of a possible material hierarchy of the UN Charter, deriving from its Article 103) should not give rise to systemic contradictions, insofar as each treaty or set of treaties would serve to constitute a self-sufficient subsystem, exercising a law-producing function with respect to the matters covered by its institutional objec-

tives.

If treaties and international custom are primary sources of international law, the profusion of international organizations vested with normative competence also signals the existence of a body of legal production characterized by its dependence on those primary sources and which, for that reason, is termed secondary formal sources (or derived law), both forms of production integrating positive international law and raising the question of their legal efficacy within national systems.

Accordingly, there is a hierarchy between derived law and the constituent treaties from which it stems. In other words, the legal production of an international organization is subordinate, in its validity and efficacy, to the norms of its constituent treaties, and it may not violate international custom either. On the horizontal plane, however, no hierarchy is contemplated between the legal productions of different international organizations, since their institutional competences are governed by the principle of speciality (Varella, 2011), unlike the principle of universality that permeates the capacities of states, which has likewise been confirmed by the ICJ (1996):

"[...] The Court need hardly point out that international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the "principle of specialty"; that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them."

As an example of derived law, it may be noted that the UN Charter confers normative competence upon the General Assembly to issue recommendations addressed to the Security Council and the Member States or upon the Security Council to issue binding decisions (Articles 10-14). Article 54 of the OAS Charter assigns to the General Assembly the competence to establish rules for coordinating the activities of the organs, agencies, and entities of the Organization, while Article 30 of the Treaty of Montevideo (1980) assigns to the Council of Ministers for Foreign Affairs the competence to "issue general rules aimed at the better fulfilment of the objectives of the Association, as well as at the harmonious development of the integration process".

Yet it is within the sphere of the derived law of regional integration organizations that this legal production attains even greater positivity, especially within the European Union, which possesses binding decision-making and normative competences vis-à-vis the Member States. This has prompted important reflections concerning its vertical legal efficacy (at the domestic level) and the need for political and legal controls applicable to its legal production (Guimarães, 2021).

Lastly, with regard to the category of jus cogens, it must be emphasized that, subject to the caveats already set out, such norms would not constitute a special normative source. Since jus cogens manifests itself through either customary or conventional sources, in the very terms of Articles 53 and 64 of the VCLT, what

exists is a relationship of material hierarchy and, accordingly, it operates upon the sphere of validity of conventional or customary norms contrary to it.

6. Which Prevails? An Introduction to Inter-Order Relations

The purpose of this final section is to demonstrate that it is not possible to answer a priori the question of which is hierarchically superior in the relationship between international law and domestic law. This is because each legal system regulates, from its own perspective, at a given historical moment and in accordance with its cultural specificities, its relations with other systems.

In general terms, relations between legal systems may assume three broad forms: ignorance, proscription, or recognition—the latter subdivided into relations of complementarity, accumulation, or parallelism (Arnold, 2004). For example, during the period of Portuguese colonization in Brazil, metropolitan law ignored Indigenous legal systems, just as contemporary state law proscribes the normative systems of criminal organizations.

In inter-order relations of complementarity, there is a distribution of competences, either fixed and stable or more flexible and dynamic depending on the institutional design, as occurs within federal states. In inter-order relations of accumulation, each legal system has the competence to regulate the same subject matter, which "results in a cumulative validity of norms of diverse origin" (Arnold, 2004), thereby requiring the application of criteria for resolving normative conflicts, with the consequence of the inapplicability or invalidity of one of the norms stemming from different sources.

By contrast, inter-order relations of parallelism denote the coexistence of systems that do not communicate and are independent of one another, although the external application of another legal system may occur based on connecting factors, as in relationships governed by private international law.

Over the past century, legal scholarship has been divided between monists—whether nationalist or internationalist—and dualists. In general terms, monists would imply a relation of recognition by accumulation, in which either the national or the international system would be hierarchically superior, respectively, whereas dualists tend to conceive the relationship as one of parallelism. This division is commonly grounded either in the notion each theorist adopts regarding the source of international law or in a prescriptive approach as to how the systems should operate jointly in order to ensure the protection of certain values or to avoid international responsibility.

Hans Kelsen was an internationalist monist. As a consequence of identifying the presupposed norm of the entire legal system in a norm (not enacted by any authority) that authorizes the custom of states as a law-creating fact, he maintained that domestic law constitutes a partial legal order whose validity is grounded in a norm of positive international law. This means that only international law would qualify as an original legal order, providing, in his view, the only explanation compatible with the existence of an international community (Kelsen,

1989). From this perspective, there would be no inter-order relationship, since domestic and international law would form a single system.

Heinrich Triepel argued that the source of international law lies in a common will, superior to that of each individual state, aimed at regulating equitable legal relations between states, unlike domestic law, which governs legal relations between subjects or between subjects and the state. Consequently, domestic and international law would constitute two original legal systems that may develop contingent connections but do not overlap. This led him to defend the thesis that an international rule can never have legal effect per se within domestic law, since such effect can only arise through an act of state consent within domestic law, such as legislation, regulation, or even the constitution itself (Triepel, 1966). Accordingly, the inter-order relationship would be one of recognition by parallelism.

Antônio Augusto Cançado Trindade, reinforcing his perspective of the moral subordination of law characteristic of a renewed natural law approach, contends that international law is grounded in a universal juridical conscience concerning objective values (Trindade, 2015a), which are thus situated above the will of the state and its legal order. This would imply conditioning the very validity of law upon such universal values. In this case, one might conceive of a relation of recognition by complementarity, with the primacy of international law.

Regardless of the internal coherence of these theories, it must be observed that all of them fail insofar as they attempt to construct a monolithic reality to address a phenomenon that is essentially diverse and can only be properly understood from the perspective of legal pluralism and the interaction of multiple legal orders. Although contemporary state legal practice tends to favor the conception of the originality of domestic law and the dependence of international law, closer examination reveals a wide range of global arrangements, as well as different models of incorporation, concerning the position or legal effects attributed to particular sources or regulatory sectors.

This demonstrates that each legal system regulates, in its own manner, its relationship with the sources of other legal orders. For instance, from the standpoint of international law, rules of domestic law are generally treated as facts, that is, as a form of state conduct subject to assessment in light of internationally assumed obligations, except where a rule of fundamental importance is concerned (Article 46(1) of the Vienna Convention on the Law of Treaties), whose manifest violation (ICJ, 2002) may result in the invalidity of the treaty concluded.

From the perspective of domestic law, however, rules of international law may produce different legal effects. The current French Constitution adopts a monist formula with the primacy of international law (Article 55), while the Constitution of the Netherlands allows for the (indirect) amendment of the constitution itself by virtue of incompatible treaty provisions (Article 91(3)). In such cases, domestic and international law are internally articulated within a single systemic unity, and no separate act of incorporation is required (beyond the constitutional provision itself) for the integration of international norms.

Customary international law has direct applicability within the domestic legal orders of Germany (Article 25 of the Basic Law for the Federal Republic of Germany), Greece (Article 28(1) of the Constitution of Greece), and Italy (Article 10(1) of the Italian Constitution).

Derived international law [law produced by international organizations through their own normative acts] automatically forms part of domestic law in the Netherlands (Article 93 of the Constitution of the Netherlands) and in the Portuguese legal system (Article 8(3) of the Constitution of Portugal), as well as, in the case of norms originating from regional integration organizations, under the Venezuelan Constitution (Article 153)—a formula not adopted in Brazil with regard to Mercosur norms (STF, 1998).

It is therefore crucial to examine relations between legal orders first from the endogenous perspective of each system and, subsequently, by dissociating the attributes of originality and independence. In this regard, Barrilao (2014) distinguishes between original and derived legal orders, on the one hand, and dependent and independent ones, on the other. Original orders are those that do not derive their origin or validity from another system, unlike derived ones, whereas independent orders are those whose validity does not depend on another.

Accordingly, even where a state legal system preserves its originality vis-à-vis international law, the latter—or parts thereof—may retain a derived character or evolve toward independence, as is the case with European Union law. Conversely, an original legal order may become dependent, as occurs in federal systems within centripetal federations (e.g., the United States).

7. Conclusion

International society constitutes a permanent reality organized around power, undergoing social processes of integration and discrimination and endowed with its own normative reality. Unlike national societies, however, it has developed in a structurally horizontal, decentralized, and atomized manner across a series of different state groupings, some based on a paradigm of coexistence and the absolute predominance of the sovereign will of states, others on a paradigm of cooperation and solidarity grounded primarily in common values and interests.

Accordingly, the international legal order exists and is effective and does not require, for dogmatic purposes, the identification of its source of legitimacy, since its systematicity is ensured by the existence of a common referential point analyzed in light of its law-producing processes. In this regard, the sole primary norm governing legal production within the international legal order is inter-State consensus, and the objections commonly raised in the literature, when properly examined in light of the concepts of general legal theory, are incapable of displacing this conclusion.

When its systematicity is analyzed from the standpoint of sanction, international law is shown to constitute a legal order composed of norms endowed with objective validity and backed by a structured guarantee of coercion, as is charac-

teristic of juridical normative systems, and not merely of the State legal order, even though the lower degree of institutionalization of international society is reflected in the lower degree of institutionalization of sanctions, in comparative terms with State legal orders.

This lower degree of institutionalization of sanctions does not interfere with the juridical nature either of the international system or of its norms. Moreover, neither does the limited binding force or effectiveness of soft norms preclude the legal nature of their rules or of the international legal order itself, just as open-textured norms in domestic law do not affect the juridical nature of the State system.

Since every legal order has its respective sources, international law establishes custom and treaties as primary sources, with no hierarchy between them or among treaties. The normative production of international organizations, by contrast, constitutes secondary sources (or derivative law), so classified because their effectiveness is limited by the respective constituent treaties (there is a formal hierarchy), and there is no (theoretical) hierarchy among the legal productions of different international organizations, given that they are governed by the principle of speciality, although part of the literature admits the material hierarchical superiority of the UN Charter.

In examining inter-ordinal relations, especially the hierarchy between international law and domestic law, the prevailing perspectives are usually grounded either in the conception each proponent holds regarding the source-origin of international law or in a prescriptive approach as to how both should operate jointly to enable the protection of certain values or to ensure the absence of international responsibility.

In any event, each legal system regulates, from its own endogenous perspective, its relationship with the sources of other legal orders; thus, the relational design can only be ascertained from each system in reference to the other, which requires that originality and independence be dissociated.

Thus, from the perspective of international law, rules of domestic law are treated as juridical facts, except where a norm of fundamental importance is concerned. In turn, from the perspective of State law, there is a tendency toward the predominance of the originality of State law and the dependence of international law. Yet closer examination reveals a broad range of different global arrangements, as well as different formulas of incorporation, regarding their position or effectiveness, relating to particular sources or sectors of regulation.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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