HIERARCHY OF NORMS: THE CASE FOR THE PRIMACY OF HUMAN RIGHTS OVER WTO LAW

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(2014)

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ABSTRACT

How WTO rules relate to human rights norms, and whether one takes precedence over the other in the event of conflict remains a subject of contention. This article aims to demonstrate why human rights have primacy over WTO rules. Three lines of argument are advanced here. First, trade is merely a means to advance socioeconomic ends (most of which are recognized as human rights). Should conflict arises between the two, it remains to reason that the end must trump the means. Second, while WTO rules are ordinary treaty rules of reciprocal nature, at least certain human rights norms have peremptory status. Moreover, the UN Charter is the foundation for modern human rights law. Thus, the overriding character of the UN Charter, it is argued here, accords human rights a superior value than ordinary treaty rules. Finally, their peremptory status notwithstanding, human rights are distinct in that they are not statutory norms; they are inherent, inalienable, and universal entitlements of individuals, not of states. On the contrary, human rights are primarily meant to constrain the power of the state (including its contractual power) vis-à-vis the individual. Therefore, human rights transcend the reciprocal interests of trading nations.
TABLE OF CONTENTS

I. INTRODUCTION

II. TRADE IS JUST A MEANS TO HUMAN ENDS (RIGHTS)

III. HUMAN RIGHTS AS PEREMPTORY NORMS

   A. The Peremptory Character of Human Rights

      1. Non-Derogability of Human Rights

      2. The Peremptory Status of Human Rights in Case Law

   B. The *Erga Omnes* Character of Human Rights

   C. The UN Charter as the Foundation of Human Rights

IV. INALIENABLE NATURE OF HUMAN RIGHTS

V. CONCLUSION
I. INTRODUCTION

International law does not operate under a monolithic constitutional umbrella. Its norms and institutions are fragmented to a point that prompted some commentators to conclude that any attempt for normative unity is an exercise in futility. The most immediate result of such normative decentralization is the uncertainty regarding how conflict of norms ought to be resolved. The conflict between WTO law and human rights has been at the center of the debate on the topic for some time now. Yet, whether human rights norms as such take precedence over WTO law is not immediately obvious, unless, of course, the human right in issue is a jus cogens norm. Admittedly, even the notion of jus cogens does not seem to be particularly helpful to resolve conflicts between human rights norms and WTO rules for two reasons. First, while there is no authoritative catalogue of jus cogens norms, it is uncertain if all but few human rights belong to that category. Second, well recognized peremptory norms (jus cogens) seem to have little to do with trade. The WTO has never been accused of committing genocide or perpetrating torture. It is rather socioeconomic rights, which are not widely regarded as jus cogens norms that normally conflict with WTO law.

The conflict between WTO and human rights as a question of fact is rarely contested. The WTO itself concedes that people may lose their jobs, go bankrupt and have their

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2 There is no dispute that at least those human rights recognized as jus cogens norms prevail over WTO law. See generally the Vienna Convention on the Law of Treaties (VCLT), Arts 53, 64.

3 Although jus cogens norms are considered as the crowning of the international normative system, neither the VCLT nor any other instrument lists down the norms that belong to that category. See generally Alexander Orakhelashvili, *Preemptory Norms in International Law* (Oxford University press, New York, 2006) 50-66.
livelihoods shattered as a result of trade liberalization.\(^4\) Ironically, however, when the same issue is presented in normative terms, it becomes a bone of contention. Scholars are deeply divided on the issue. Broadly, there are three different arguments regarding how WTO rules relate to human rights: human rights are inherently superior and thus should trump WTO rules; human rights and WTO rules are essentially of the same rank, but parallel (not conflicting); and, instead of one trumping the other, there should be a balancing test between the two.

Human rights advocates generally believe that in the event of conflict, human rights should take precedence over trade rules.\(^5\) The United Nations (UN) Committee on Economic Social and Cultural Rights (ESCR) declared in its 1998 statement on globalization that states and international organizations that they create have the obligation to ensure that trade and other economic policies are compatible with human rights standards.\(^6\) On the occasion of the third WTO Ministerial Conference, the Committee reiterated that trade liberalization must be harnessed towards the promotion and protection of human rights, which is ‘the first responsibility of governments.’\(^7\) The position of other human rights bodies is no different.\(^8\)


\(^{5}\) UN human rights institutions believe that not only must international trade be consistent with human rights, but also has to be put into the service of human rights promotion. That is what the ‘human rights approach to trade’ proposed by the Office of the High Commissioner for Human Rights (OHCHR) at the 2003 WTO Ministerial Conference outlines. See OHCHR, *Human Rights and Trade, 5th WTO Ministerial Conference, Cancún, Mexico* (10-14 September 2003).


\(^{8}\) The UN Special Rapporteurs on Globalization and Its Impact on the Full Enjoyment of Human Rights particularly unequivocal when they declared: ‘The primacy of human rights law over all other regimes of
Trade scholars, by contrast, seem unenthusiastic about any association between trade and human rights. Nonetheless, they also claim that WTO rules have generally equal legal value with other norms of international law. Pascal Lamy, former WTO Director General argued: ‘in international law, all norms are equal except (i) those included in the so-called “peremptory norms” or *jus cogens* and (ii) those that would be in conflict with the UN Charter…I believe that none of the work that we do in the WTO corresponds to any of these two exceptions; so, generally…WTO norms are equal to other international norms.’ The allusion seems that the WTO is not obliged to take into account human rights, unless the human right in issue is a *jus cogens* norm or stems from the UN Charter. However, while the question of whether all human rights form part of *jus cogens* is arguable, there is little doubt that the UN Charter is the basis for modern human rights norms.

Lastly, some commentators believe that there should be a sort of ‘balancing test’ to ensure coherence between the goals of trade and human rights in the same fashion that trade and environmental objectives are balanced. It is claimed that trade has some compelling values such as poverty reduction that justify ‘modest incursions on human international law is a basic and fundamental principle that should not be departed from.’ J. Oloka-Onyango and Deepika Udagama, UN Special Rapporteurs, Globalization and its Impact on the Full Enjoyment of Human Rights, Preliminary Report Submitted in Accordance with Sub-Commission Resolution 1999/8, Doc. E/CN.4/Sub.2/2000/1315 (June 2000).


When subjected to scrutiny, this argument is problematic. Human rights being individual entitlements, they cannot be subjects of economic tradeoff.

This article aims to demonstrate why human rights, including socioeconomic rights, have primacy over WTO rules. Three lines of argument are advanced here. The first one is a purposive argument. Trade per se has no intrinsic normative value; it is merely a means to advance socioeconomic ends (most of which are recognized as human rights). Should conflict arise between the two; it remains to reason that the end trumps the means (for the relevance of the means hinges on the end it serves). Second, given the reciprocal nature of the rights and obligations they create, WTO rules do not even have the status of customary international law, let alone that of jus cogens. By contrast, it is unarguable now that at least certain human rights norms have peremptory character. It is no accident that most cases of jus cogens involve human rights. The link between jus cogens and human rights seems indeed intrinsic. Moreover, the UN Charter is the foundation for modern human rights law. Thus, the overriding force of the UN Charter, it is argued

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13 The alleged value of poverty reduction is problematic at least for two fundamental reasons. First, the goal of poverty reduction does not and should not require sacrificing individual rights. Second, it misleadingly purports that WTO trade is aimed at poverty reduction, while in reality poverty reduction is alien to the trading regime’s modus operandi. Indeed, the current Doha ‘Development’ Round stalemate evidences that the trading regime has serious difficulty reconciling the issue of development with its mercantilist ethos.
14 ‘Given its club-like purpose of granting reciprocal rights and duties to Members, WTO norms cannot be part of jus cogens or even customary international law: non-member surely cannot be bound by any of its rules...’ Sarah Joseph, Blame it on the WTO? A Human Rights Critique (Oxford University Press, New York, 2011) 47.
15 There is ground to argue, therefore, that at least those basic human rights that have attained the status of custom, general principles of law, or impose erga omnes obligations, should normally prevail over trade rules. See generally Robert Howse and Makau Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization (International Centre for Human Rights and Democratic Development, Montreal, Quebec, 2000).
here, accords human rights a superior status to ordinary treaty rules.\textsuperscript{17} Finally, their peremptory status notwithstanding, there is no doubt that human rights are distinct from all other norms of international law. Human rights are not statutory norms; they are inherent, inalienable, and universal entitlements of individual human beings, not of states. On the contrary, human rights are primarily meant to constrain the power of the state (including its contractual power) vis-à-vis the individual. Therefore, human rights transcend the reciprocal interests of trading nations, and are nonnegotiable.\textsuperscript{18} These three arguments are put forward under Parts II, III, and IV respectively.

**II. TRADE IS JUST A MEANS TO HUMAN ENDS (RIGHTS)**

The case for free trade is not self-evident. Thus, addressing the basic question of why trade should be liberalized is the point of departure for any discussion about international trade. The more familiar economic argument for free trade is based on the classic theory of comparative advantage. Nobel Laureate Paul Samuelson provides a representative summary of economic arguments. He writes: ‘there is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one: Free trade promotes a mutually profitable regional division of labor, greatly enhances the potential real national product of all nations, and makes possible higher standards of living all over the globe.’\textsuperscript{19} That is the central premise underpinning the establishment of the World Trade Organization (WTO). The Preamble of the WTO Agreement reaffirms that trade (and economic relations in general) should be conducted with a view to, \textit{inter alea}, raising

\textsuperscript{17} See preamble cum Arts 55, 56 and 103 of the UN Charter.
\textsuperscript{18} Clearly, human rights are not at the disposal of the state. Some human rights are non-derogable even when the interests of the whole community are in peril. See Art 4 of the International Covenant on Civil and Political Rights (ICCPR).
standards of living of people worldwide.\textsuperscript{20} The WTO’s \textit{raison d’être} lies in the enhancement of standards of living for all.

There is no much dispute over the economic virtues of free trade. There is profound disagreement, however, on whether WTO trade proceeds in accordance with the stated goals. Also, to argue that free trade can help enhance the economic welfare of nations is one thing; whether it is enhancing the standards of living of people equitably is something else altogether.\textsuperscript{21} Therein lies the major weakness of the argument for balancing trade and human rights mentioned above. A balancing test that may well work to harmonize the goals of trade and that of environmental protection (both of which involve collective interests) may not be relevant to deal with human rights. Human rights being individual entitlements, they cannot be reduced into bargaining chips between trading nations. Therefore, any discussion about \textit{trade and human rights}, it is argued here, should start with a recognition that individuals possess certain entitlements that cannot be trumped by national welfare considerations.\textsuperscript{22} It is a question elementary justice that the amount of aggregate gains derived to the rest of the society does not justify the violation of human rights. Rawls writes:

\begin{quote}
Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many.\textsuperscript{23}
\end{quote}

\textsuperscript{20} See the opening paragraph of the preamble of the Marrakesh Agreement Establishing the World Trade Organization (15 April 1994); available at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.
\textsuperscript{21} The idea that every nation benefits from free trade hinges on various assumptions. But even if such assumptions hold, and thus every nation could reap benefits from free trade, there is no guarantee that such economic benefit would translate into the lives of every individual.
\textsuperscript{22} Normative individualism is the bedrock of human rights; hence, an individual’s human rights are not subject to economic tradeoff, no matter what the welfare gains to the entire society may be.
Therefore, trade, like other state polices, has to be reconciled with pre-exiting entitlements of individuals. Importantly, the standard economic argument with which the WTO reckons is not based on some intrinsic value of free trade. It is rather based on the instrumental value of free trade in improving the standards and conditions of human life. In other words, economic arguments are consequentialist.\footnote{Sen defines consequentialism as a component of utilitarian moral theory that judges the rightness of actions and choices ‘entirely by the goodness of the consequent state of affairs.’ See Amartya Sen, Resources, Values and Development (Harvard University Press, Cambridge, 1984) 278.} Expanding trade may help maximize wealth. Yet, wealth is, as Aristotle observed, ‘merely useful as a means to something else.’\footnote{Aristotle, The Nicomachean Ethics (5th ed., Kegan Paul, Trench, Trubner &Co, London, 1893) 8.} One must necessarily go a step further and show that the welfare thus derived enables people to nourish themselves better, live longer and healthier, and to expand their overall substantive freedoms. That is, trade is useful only if it helps facilitate the realization of the right to food, the right to health; promote the enjoyment of other substantive freedoms that convert existence into living.\footnote{See generally Amartya Sen, The Standard of Living: Lecture I, Concepts and Critiques in Geoffrey Hawthorn (ed.), The Standard of Living (The Tanner Lectures, Clare Hall, Cambridge, 1985) 1.} The way free trade is pursued must thus be judged entirely by its consequence on the lives of people.\footnote{Even without such explicit reference, ultimately, ‘the overall legitimacy of a system of law must be assessed by reference to the results in human terms.’ Philip Alston, International Law and the Human Right to Food in P. Alston and K. Tomasevski (eds.), The Right to Food (Martinus Nijhoff Publishers, 1984) 15.}

The WTO’s stated goals of helping promote standards of living, employment, and so on, draw striking similarity, both in language and essence, with human rights. They are about people. There is no great mystery here: where living standards are raised, socioeconomic rights are realized. However, whether and to what extent the promises translate into the lives of people needs serious scrutiny. The WTO reckons with the theory of comparative advantage to assert the economic virtues of trade and by extension justify its existence.
Yet, comparative advantage theory is concerned about aggregate economic gains of nations; it shows almost nothing about the lives of people.

It is sometimes argued that even though some may be adversely affected, trade is still a positive-sum game that ‘everybody can be made better off if appropriate domestic policies are put into place.’\textsuperscript{28} However, there are fundamental reasons why this may not be the case. First, trade may not necessarily be a positive sum-game for all.\textsuperscript{29} For instance, although Benin, Burkina Faso, Chad, and Mali produce cotton at half the cost of the USA, they claim to have sustained losses estimated at 1 to 3 percent of their GDP as a result of the US cotton subsidy.\textsuperscript{30} Such practices do not merely shatter the livelihoods of subsistence farmers, but also deprive poor nations of export earnings that they badly need, thereby undermining their ability to assist victims of liberalization.\textsuperscript{31}

Importantly, WTO rules severely constrain domestic policy space. It is a basic principle of international law that national law or policy cannot be relied upon to avoid international obligations. If that still leaves any ambiguity, Art XVI (4) of the Marrakesh Agreement expressly obliges member states to ensure that their internal laws, regulations and procedures are consistent with their WTO obligations. Accordingly, following the

\textsuperscript{28} See WTO (2008), supra n 4 at 125.
\textsuperscript{29} ‘Power differentials have a great impact on trade….rich countries with a far greater capacity to reach outward are likely to gain far more benefit from liberalized trade. It is the rich that will penetrate the poor; not the other way around.’ George Kent, Freedom from Want: The Human Right to Adequate Food (Georgetown University Press, Washington D.C., 2005) 199.
\textsuperscript{31} When, for example, Haiti removed trade restrictions on agricultural imports in the 1990s, highly subsidized US rice flooded Haitian market, devastating Haitian rice farmers, prompting former US President Bill Clinton to regret: ‘It was a mistake…I have to live with the consequence of the lost capacity to produce a rice crop in Haiti…because of what I did.’ See Clinton quoted by IRIN, HAITI-US: Washington Aid Policy May Be Shifting (19 April 2010): http://www.irinnews.org/report.aspx?ReportId=88857.
incorporation of Trade-Related Aspects of Intellectual Property (TRIPS) agreement into the WTO system, developing countries were forced, under threat of sanctions, to change their patent laws. Thus, when South Africa, a country hard hit by HIV/AIDS, decided to combat the pandemic by taking measures that would keep drugs available to the poor, even if that meant violating its obligations under the TRIPS, the USA responded by partially withholding preferential tariff treatment under the General System of preferences and even threatened to use the notorious Section 301 of the US Trade ACT of 1974 against South Africa.\(^\text{32}\) It did not matter that the latter had obligation under international law to fulfill the health rights of its citizens and that it was a question of life or death for millions. Thus, in the absence of any guidance as to how a member state should deal with conflicting obligations, the relatively stronger accountability mechanism under the WTO provides an incentive for states to prioritize their WTO obligations over their human rights obligations.\(^\text{33}\)

Two points merit particular emphasis here. First, to say that trade is but a means to an end is to concede that trade per se has no normative value. Even the most ardent advocates of free trade have not argued on non-instrumental grounds; that is, trade for its own sake, but only as a means to an end. Second, most of those ends which trade is meant to enhance are recognized as human rights. Helping enhance the living standards of people


\(^{33}\) It is paradoxical, albeit hardly surprising, that the international rule-based system has unparalleled development. At the political level, there is near universal support for human rights, while there are deep divisions and skepticisms over free trade. Yet, in practice, states observe WTO rules or risk retaliation, while comparable degree of accountability for human rights violations is conspicuously lacking. In short, although international trade is more controversial than human rights, trade norms and practices have flourished in a more concrete fashion than that of human rights.
is facilitating the realization of the right to adequate standard of living. Therefore, WTO rules must be made coherent with individual’s right to adequate standard of living lest the trading regime undermines its own *raison d'être*. If trade rules (which merely have instrumental value) come into conflict with human rights norms, it is a question of elementary logic that human rights should prevail for the relevance and legitimacy of the means hinges on the ends it serves.\(^{34}\) An end pursued for its own sake (in this case, human rights) is superior to that which exists for the sake of something else (trade).\(^{35}\)

### III. HUMAN RIGHTS AS PEREMPTORY NORMS

The notion of peremptory norms continues to attract controversy. To be sure, controversy and uncertainty are not peculiar to norms of higher rank. However, jus cogens norms seem particularly embedded in morality, and that seems to revive some facets of the traditional debate between natural law and legal positivism. Discussing morality is an uncomfortable terrain, and more so to base judicial decisions on morality.\(^ {36}\) Yet, the ICJ’s familiar reference to ‘elementary considerations of humanity,’ ‘conscience of mankind,’ and even ‘moral law,’ cannot but affirm that norms of overriding character cut across the realms of law and morality. For example, in the *Reservations to the Genocide Convention*, the ICJ opined:

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\(^{34}\) ‘It would be odd for means to prevail over ends,’ Joseph, supra note 14 at 49.

\(^{35}\) ‘Surely [what is good is] that for the sake of which all else is done. And that in medicine is health, in war is victory, in building is a house, a different thing in each different case, but always, in whatever we do and in whatever we choose, the end. For it is always for the sake of the end that all else is done.’ Aristotle, supra note 25 at 13.

\(^{36}\) Brownlie remarks: ‘it is very unfashionable to discuss morality. Morality is old hat, and to remain smart, to remain acceptable to your pals, you must discuss morality under some acceptable cloak, and law appears to be an acceptable cloak.’ Ian Brownlie, *To What Extent are the Traditional Categories of Lex Lata and Lex Ferenda still viable?* in Antonio Cassese and Joseph H.H. Weiler (eds.), *Change and Stability in International Law-Making* (de Gruyter, Berlin, 1988) 67.
The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations resolutions 96(I). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligations. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required.  

The idea of jus cogens was initially greeted with skepticism, especially by legal positivists, who advocate states’ complete freedom of contract and highlight the principle of pacta sunt servanda. In his provocative article, Weil, for example, argued that the idea of jus cogens relativizes normativity by relegating other norms to secondary importance. Of course, such concern is misplaced as jus cogens norms neither weaken the legal force of other rules nor make them less significant. Theoretical debates notwithstanding, the fact remains that all legal systems recognize that some legal norms have superior rank than others. Indeed, much of the debate now is not on whether jus cogens norms exist; it is rather on what sets of norms belong to that category. For our purpose, the question is this: are all international human rights norms part of jus cogens?

37 Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports (1951) at 23.
38 See generally Orakhelashvili, supra note 3 at 32-5.
39 ‘Normativity is becoming a question of “more or less”: some norms are now held to be of greater specific gravity than others, to be more binding than others.’ See Prosper Weil, Towards Relative Normativity in International Law? 77 A.J.I.L. (1983) 421.
40 As long as a treaty is consistent with a jus cogens norm, its importance and binding force remains intact; but if it is contradictory, it will be considered void. Thus, there is no relativism involved.
41 ‘The view that some norms are of a higher legal rank than others has found its expression in one way or another in all legal systems.’ International Law Commission (ILC), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission finalized by Martii Koskenniemi, UN Doc. A/CN.4/L.682 (13 April 2006) para 361 (hereafter ILC Report).
To address this question, we shall have to put the concept of peremptory norms in perspective.

**Peremptory Norms as Checks on State Power**

Some commentators believe that traditional international law imposed obligations only on those states willing to be bound by them. ‘No outside ‘legislator’ was tolerated: law was brought into being by the very states that were to be bound by it. Consequently there was complete coincidence of lawmakers and those to whom law was addressed.’43 Even custom ‘ultimately rested on consent.’44 Of course, there is room to disagree with such claim, especially if consent signifies having substantive choices.45 However, it was the view of many legal scholars, particularly in the positivist school, that states, as free and independent agents, were subject to no authority. Hence, they could only be bound by their own consent (express or tacit).46

It seems inescapable that the very existence of a reasonably coherent legal system presupposes some norms with overriding character.47 Whether for functional reasons or on account of their inherent value, some norms are held higher than others. Even within a single branch of law or institution, constitutive instruments prevail over other agreements

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44 Id.
45 If the notion of consent implies having substantive choices, traditional international law that imposed little restraint on the use of force and is rather characterized by gun-boat diplomacy was actually less consent-based than modern international law.
46 The 19th century ‘business-oriented philosophy, stressed the importance of the contract, as the legal basis of an agreement freely entered by both (or all) sides…influenced the theory of consent in international law.’ Malcolm N. Shaw, *International Law* (6th ed., Cambridge, New York, 2008) 9.
47 See generally ILC Report, para 412.
and by-laws. As a result, even positivists concede that some norms have greater value than others. For Kelsen, it is apparently the principle of *pacta sunt servanda* that is the basic norm of international law to which the validity of all other norms can be imputed. However, even from a purely technical point of view, the idea of having legal norms with overriding character; i.e. valid regardless of consent, seems to contradict the claim that a state is subject to no higher authority or norm. In reality, of course, the foundation of international law is and has always been more complex than just state consent. Even the very principle of *pacta sunt servanda* is thicker than just being bound by formal stipulations of given a treaty. It presupposes good faith and mutual confidence. In *Nuclear Tests Cases*, the ICJ affirms:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created is respected.

48 For example, the Marrakesh Agreement establishing the WTO prevails over all other WTO agreements. See Art XVI (3) of the Marrakesh Agreement. Not only agreements, but some rules and principles within a single agreement stand out from the rest. For example, such rules as the Most Favored-Nation Treatment (MFN) and National Treatment (NT) are seen as cornerstones of WTO legal framework that altering these rules would profoundly affect the entire WTO legal edifice.

49 According to Kelsen, the principle of *pacta sunt servanda* has special, even foundational importance for it enables ‘states as the subjects of international community to regulate by treaty their mutual behavior.’ Since treaty norms owe their validity to principles of customary international law, particularly to the principle of *pacta sunt servanda* they are subordinate to those principles. Hans Kelsen, *Pure Theory of Law* (University of California Press, Berkley and Los Angeles, 1967) 323-4.

50 Kelsen’s claim that the validity of all international norms can be ultimately imputed to a single ‘basic norm’ has been disputed even by fellow positivists. Hart, for example, rejects the proposition as simply ‘false.’ H.L.A. Hart, *The Concept of Law* (2nd ed., Oxford, New York) 233.

51 ‘To give one example, there are about 100 states that have come into existence since the end of the Second World War and by no stretch of imagination can it be said that such states have consented to all rules of international law framed prior to their establishment.’ Shaw, supra n 46 at 9.

To be sure, state consent is to a large measure the basis for international obligations. Yet, if it has ever been, it is not any longer the sole basis. At least jus cogens norms and principles of the UN Charter that are necessarily related to international peace and security (as stated in Art 2(6) of the UN Charter) are binding on states regardless of consent. The existence of certain universal obligations concerning ‘overriding universal values’ that transcend the reciprocal interests of contracting states, and thus exist independently of state consent is now well established, both in doctrine and practice. Such values transcend whatever is prescribed in black letter law, and seem to cut into the realm of ethics. Indeed, the very idea of normative hierarchy seems is some sense a reaffirmation of the link between law and ethics.53

As pointed already, the Vienna Convention on the Law of Treaties (VCLT) expressly precludes states a priori from making treaties that conflict with peremptory norms of international law in much the same way the First Amendment to the US Constitution curbs the legislative authority of the Congress.54 Art 64 of the VCLT adds that even an emerging peremptory norm of general international law renders void any preexisting treaty which is inconsistent with it. Note that if a particular provision of a treaty conflicts with a peremptory norm, not just that particular provision but the whole treaty is void.55 Jus cogens norms prevail over other norms not because states have so decided but rather

53 ‘Perhaps the most significant positive aspect of the trend toward normative hierarchy is its reaffirmation to the link between law and ethics, in which law is one means to achieve the fundamental values of an international society’ Dinah Shelton, *Normative Hierarchy in International Law*, 100 A.J.I.L (2006) 323.
54 See Art 53 of the VCLT. Hence, the treaty-making power of states is circumscribed.
55 See Arts 44(5) cum 53 of the Convention; see also Aust, supra note 42 at 258.
because they are intrinsically superior. As a matter of fact, peremptory norms evolved mainly through judicial decisions and opinio juris rather than standard treaty law.

Criteria (or lack thereof) of Peremptory Norms

Art 53 of the VCLT declares that a treaty is void if it conflicts with a peremptory norm of general international law. It does not, however, specify which specific norms fall within the category of peremptory norms. It does not even provide precise criteria for identifying which norms belong to that category. It only vaguely defines a peremptory norm of general international law 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.’ This definition may not be deeply illuminating. It nonetheless provides a starting point.

Non-derogability (and acceptance and recognition as such by the community of states as a whole) is clearly the most important criterion, or even the hallmark of jus cogens. But

57 Still, there are now a set of well recognized as jus cogens norms. According to ILC, the prohibition of aggression, slavery and slave trade, genocide, racial discrimination and apartheid, torture, basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination have the character of jus cogens. See ILC. Commentary on Article 40 para. 4 of the Draft Articles on Responsibility of States for International Wrongful Acts, General Assembly, 53 Session (A/56/10) (2001). Of course, this by no means represents an exhaustive list, something which, if desirable, seems impossible, given the evolving nature of the international law.
58 See Art 53, VCLT.
59 See generally Cassese supra n 43 at 140; see also Aust supra note 42 at 257.
60 ILC Report, para 375.
61 Teraya breaks down the criteria under Art 53 of the VCLT into four: it must be general international law (validation); ‘accepted and recognized by the community of states (means of determining); non-derogability (character); and mode of change. Teraya Koji, International Human Rights and Beyond: From the Perspective of Non-derogable Rights, EJIL, Vol. 12 No, 5 (2001) 928.
it is a criterion with ‘a disturbing circularity.’ Two contradictory conclusions may be drawn from the above definition. One, the expression ‘norm accepted and recognized by the international community of States’ suggests that the content of jus cogens norms ultimately depends on state consent. Two, the statement that any treaty (even one that involving the community of states as a whole) is void if it conflicts with jus cogens is an equivocal pronouncement that jus cogens places an absolute cap on what states may lawfully agree. Art 64 of the VCLT suggests that the latter interpretation is correct.

In general, due to their value-laden nature, jus cogens norms are exceedingly vague. Controversies abound as to the source, content, criteria, and precise nature of jus cogens. For example, if it is not treaty law, morality or natural law, international custom must be the source of jus cogens. Yet, it is not clear if and when a rule of international custom attains the status of jus cogens. As regards content, jus cogens seem an open (certainly not anymore empty) box. And the legal impermissibility of derogation (i.e. prohibition of states from making agreements that would violate jus cogens norms) seems the only uncontroversial criteria for the identification of jus cogens.

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62 ILC Report, para 375.
63 It seems obvious that that a peremptory norm is ‘a norm accepted and recognized by the community of states as a whole’ as non-derogable does not necessarily mean that each and every member of the community of states must formally consent. It rather seems to refer to the morality of the norm concerned and its significance to the international ‘public order.’ It is not the number of states parties that, for example, makes the Conventional against Genocide stand out from many other treaties; it is rather its substantive importance.
64 If Art 53 is not unequivocal enough in the declaration of the nullity of a treaty contradicting a jus cogens norm, Art 64, makes is plain when it declares: ‘If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.’ Emphasis added. Indeed, historically, the roots of ‘jus cogens lies in the anti-voluntarist, often religiously inclined natural law.’ ILC Report, para 375.
Content of Jus cogens

The notion of jus cogens has even been criticized as an ‘empty box’ - a purely formal concept without substance in it. The lack of agreement on its content is the main reason for the criticism. Abi-Saab’s response is that ‘even if an empty box jus cogens is necessary, because if you do not have the box, you cannot put anything in it.’\textsuperscript{65} Many would agree that we are now past the empty-box debate. There are now well recognized substantive norms in the box of jus cogens; whatever else belongs to that box remains indeterminate.

However, even in the case of recognized norms of jus cogens, the consensus seems more of moral and political than practical. According to the Inter-American Commission on Human Rights, for example, ‘the right to life…has the status of jus cogens.’\textsuperscript{66} If the right to life is a jus cogens norm, it seems obvious that states cannot maintain death penalty as a form of criminal punishment. In reality, however, even member states of the Organization of American States maintain the death penalty. Similarly, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) reaffirms, the protection against torture is considered as a jus cogens norm.\textsuperscript{67} However, torture is a

\textsuperscript{65} Abi-Saab, \textit{New Normativity in the International Community?} in Cassese and Weiler (eds.), supra n 36 at 96.

\textsuperscript{66} The Commission states: ‘the right to life, understood as a basic right of human beings in the American Declaration and in various international instruments of regional and universal scope, has the status of \textit{jus cogens}. \textit{See Victims of the Tugboat, ‘13 de Marzo’ vs. Cuba} (October 16, 1996) para. 79.

\textsuperscript{67} ‘Because of the importance of the values it [the prohibition of torture] protects, this principle has evolved into a peremptory norm or \textit{jus cogens}, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules.’ \textit{See Prosecutor v. Anto Furundzija (Trial Judgment), IT-95-17/1-T, ICTY, 10 December 1998} para. 153. Protection against torture is also one of the handful non-derogable human rights under Art 4 of the ICCPR.
routine human rights violation in many parts of the world, often with impunity. Yet, the impermissibility of derogations is one thing; violations of such norms is quite another. Therefore, to claim that a certain legal norm is non-derogable only shows the prevailing moral consensus to that effect, and not necessarily state practice. The repeated unanimous declarations and commitments to protect and promote inherent and inalienable human rights show the existence of moral and political consensus on the subject. In view of this, all human rights may be plausibly considered to be part of jus cogens.

A. The Peremptory Character of Human Rights

Back in 1937, Alfred von Verdross wrote that the protection of life, liberty, and property of men are so fundamental that any treaty that compromises a state’s ability to provide adequate protection to such interests is immoral, and hence should be forbidden. He maintained that a state’s duty to protect the life, liberty and property of people in its territory constitutes ‘the ethical minimum recognized by all states of the international community.’ Writing prior to the formal articulation of international human rights norms, Verdross argued for the peremptory significance of states’ right and obligation to protect fundamental interests of men. Those interests are now recognized as human rights.

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68 Even without getting into such debates as whether waterboarding or solitary confinement constitutes torture, reports by pertinent UN Committee Against Torture (CAT) and other human rights watchdogs at any given time shows that torture is still a widespread practice. ‘We tortured some folks’ after 9/11, conceded Barack Obama. See BBC News, 1 August 2014: [http://www.bbc.com/news/world-us-canada-28619559](http://www.bbc.com/news/world-us-canada-28619559).
70 Id.
Not everyone believes that human rights bear the characteristics of peremptory norms as defined under Art 53 of the VCLT. According to Aust, ‘it would be rash to assume that all prohibitions contained in human rights treaties are jus cogens, or even customary international law.’ Most commentators seem to agree with Aust. Yet, if human rights declarations are to be taken seriously, there is ground to argue otherwise. At the conclusion of the World Conference on human rights, 171 states unanimously declared: ‘Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments.’ They added that universal nature of human rights is ‘beyond question.’ In fact, that is essentially a restatement of fundamental values already declared in legally binding human rights treaties. Thus, if the declaration remains a remarkable reference of human rights, it is not so much for the novelty in the values expressed, but rather for the unprecedented consensus attained. Now, once it is accepted that human rights are inherent, inalienable, and universal entitlement, and that their protection and promotion is the primary job of governments, it stands to reason that they have peremptory status. Human rights are inherent and inalienable means that they cannot be lawfully taken way, while universality is the hallmark of peremptory status. On the other hand, if the protection and promotion of human rights is the first responsibility of states, it is only logical that it has priority over all other affairs. Indeed, if the recognition of human rights as the ‘foundation of freedom, justice and peace in the world,’ as declared in the opening paragraph of the

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71 Aust, supra n 42 at 258.
72 Some commentators believe that too liberal invocation of human rights as jus cogens norms might undermine the credibility of human rights as a legal disciple. See, for example, Theodor Meron, On a Hierarchy of International Human Rights, 80 A.J.I.L (1980) 22.
74 Art 1 cum 5, id.
75 The Declaration was unanimously adopted by 171 states. The UN had 184 member states at the time.
Universal Declaration of Human Rights (UDHR) is taken seriously, it seems difficult to argue otherwise.

1. Non-Derogability of Human Rights

Human rights are normally non-derogable. Indeed, if the protection and promotion of human rights is the first responsibility of states, it follows that there cannot be any interest so compelling as to justify disregard of human rights. Only in times of emergency that ‘threatens the life of the nation,’ may states derogate from some of their human rights obligations as stated under Art 4(2) of the International Covenant on Civil and Political Rights (ICCPR). Still, state of emergency is not an occasion for a state to disregard human rights; the dispensation from its obligations must be strictly justified by the ‘exigency of the situation.’ Importantly, this is a temporary measure necessary to save the ‘life of the nation.’ 76 Hence, the term derogation in this context carries a different meaning than in the context of the VCLT. Under the VCLT, derogation refers to nullification of a norm through agreements under normal circumstances, while under Art 4 derogation refers to a temporary and strictly justifiable dispensation from obligations in extraordinary circumstances of public emergency. 77

There is some confusion on this issue, stemming from the equivocal nature of the term derogation that merits clarification. Art 4(2) of the ICCPR singles out certain human rights which are non-derogable, even in times of public emergency. Some commentators take that as a prioritization of some human rights over others based on their overriding

76 See Art 4, ICCPR.
77 See Orakhelashvili, supra note 3 at 58-9.
value. Such conclusion is only partially true, as derogation under Art 4 is not based solely on the relative value of the human right in issue. The purpose of Art 4 is different from just proclaiming the relative value of human rights. Not all well recognized jus cogens norms (which are also human rights) are included under Art 4 (2). Conversely, some of the rights included therein as non-derogable may not necessarily have peremptory character. The UN Human Rights Committee has the following to say on the issue:

The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question of whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the covenant as being of a non-derogable nature…is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the covenant…However, it is apparent that some other provisions of the covenant were included in the list of non-derogable provisions because it can never become necessary to derogate from these rights during a state of emergency…Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4.79

Therefore, the prohibition of derogation from certain human rights obligations under Art 4(2) of the ICCPR should not lead to a classification of human rights into ‘ordinary’ and ‘non-derogable’ human rights.80 Derogation is dictated as much by the practical necessities of emergency situations as by the relative normative value of the rights. For instance, ‘to the extent strictly required by the exigencies of the situation,’ a state may arbitrarily arrest persons or derogate from its obligation to treat its prisoners ‘with humanity and with respect to the inherent dignity of the human person,’ but under no

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79 UN Human Rights Committee, General Comment No 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001) para. 11.
80 See generally Pauwelyn, supra note 78 at 21.
circumstances can a state imprison a person for failing to honor her contractual obligations. It does not follow; however, that freedom from imprisonment on account of contractual obligations is more important than freedom from arbitrary detention or from the right to be treated with humanity and dignity. But in the nature of things, security concerns under emergency situations may require detaining persons, which, given the exigency of the situation, is likely to be arbitrary. Likewise, emergency situations may render a state unable to treat its prisoners, or other people with dignity. However, there is no necessary connection between imprisoning someone for debt non-performance and emergency necessities. Still, some rights are non-derogable on account of their inherent value. Torture is a clear example. For example, a state under the ‘ticking time bomb scenario’ might want to employ torture to gather valuable information. Yet, regardless of whatever ‘instrumental utility’ it might have, torture is prohibited categorically.

In sum, the categorization of human rights into derogable and non-derogable under Art. 4 of the ICCPR is not a pronouncement that only some human rights are jus cogens and the rest are jus dispositivum. While the classification of norms into jus cogens and jus dispositivum is strictly based on the relative value of norms and thus the power of states

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81 See ICCPR, Arts 4 (1) cum 9, 10, and 11 respectively.
82 Some of the rights recognized as non-derogable, such as freedom from torture or inhuman or degrading treatment or punishment and the right to be free from slavery are well recognized norms of jus cogens. However, the right not to be subjected to retroactive criminal law (Art 15) or the right not to be imprisoned on account of contractual obligation (Art 11) cannot be said to be more important than some of the derogable rights in the covenant (to argue otherwise would be a self-contradiction since the right to liberty and security (Art 9) is derogable, while it is non-derogable if the ground for the imprisonment is failure to discharge contractual obligations). These rights are, nevertheless, non-derogable because derogation from these obligations does not serve the goal of overcoming emergencies. According to Teraya, non-derogability could be based on three criteria: ‘value-oriented, function-oriented and consent-oriented.’ See Teraya, supra n 61 at 917; see also Eckart Klein, Establishing a Hierarchy of Human Rights: Ideal Solution or Fallacy? 41 Isr. L. Rev (2008) 481.
83 See generally Orakhelashvili, supra note 3 at 59.
to alter them through standard agreements or customary rules, derogability under Art 4 is not at all about the alteration of norms. Therefore, derogability under Art 4 does not in any way undermine the argument that all human rights are part of jus cogens. As already indicated, the legal impermissibility of agreements (or unilateral acts) that would constitute a violation of those norms is the defining criterion of jus cogens norms under Art 53 of the VCLT. Certainly, human rights meet that crucial criterion, as two or more states cannot conclude a treaty that would nullify human rights norms. The recognition of human rights as inalienable, interdependent, and universal entitlements of all human beings only consolidates the credibility of their candidacy to the realm of jus cogens.

2. The Peremptory Status of Human Rights in Case Law

The essence, object, and development of both human right and jus cogens norms reveal that it is not a matter of coincidence that all well recognized cases of jus cogens, with the exception of the prohibition of aggression (Art 2(4) of the UN Charter) and perhaps piracy, involve human rights. Indeed, as Judge Tanaka suggests, if there are any jus cogens at all, human rights must be among them. In his dissenting opinion in the *South West Africa* case, Judge Tanaka notes:

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84 While both theory and state practice show that some rights are more important than others, there is also a significant objection to the idea of elevating some rights above others. Generally, there are two basic grounds of objection. First, for legal positivists who argue that international law is based (solely) on the will of sovereign states, all international norms are inherently equal. This approach is based on placing paramount importance on the source of norm, i.e. state-consent, rather than the relative value of the norm itself. The other objection is based on the argument that putting a hierarchy among human rights would be discriminating amongst human rights, which, according to some scholars, runs contrary to the doctrine that all human rights are indivisible, interdependent and interrelated. See generally Kristin Nadasdy Wuerffel, *Discriminating Among Rights?: A Nation’s Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law*, 33 Val. U.L. Rev (1998); Klein, supra n 82 at 481-3.

85 Peremptory norms of international law also serves ‘to internationally de-legitimize any legislative, administrative or judicial act authorizing’ their violation. See *Prosecutor v. Anto Furundzija*, para. 155.

86 The outstanding effect of peremptory norms as stated under Art 53 of the VCLT is that any treaty of customary practice contrary to jus cogens is null and void. See Cassese, supra note 43 at 143.

87 See n 57 above.
If we can introduce in the international field a category of law, namely *jus cogens*, recently examined by the International Law Commission, a kind of imperative law which constitutes the contrast to *jus dispositivum*, capable of being changed by way of agreement between States, surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*.88

The ICJ has been conspicuously cautious on the notion of *jus cogens*.89 It seems to prefer employing surrogate (and more imprecise) phrases; such as ‘elementary considerations of humanity,’ ‘intransgressible principles of customary international law,’ ‘obligations *erga omnes,*’ and the like. Still, the ICJ has from the beginning affirmed the existence of certain norms that are binding on states regardless of consent. In *Corfu Channel* case, for example, the ICJ found the defendant state responsible based ‘on *certain general and well recognized principles,* namely: elementary considerations of humanity.’90 On the *Legality of Nuclear Weapons*, the ICJ held that ‘fundamental rules [of international humanitarian law] are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of customary international law.’91 They are *intransgressible* because they are ‘so fundamental to the respect of the human person and “elementary considerations of humanity.”’92 Obviously, jus cogens norms are intransgressible, and at least some of them (such as basic rules of humanitarian law) seem to emanate from elementary considerations of humanity. Yet, the ICJ has traditionally resisted using the phrase jus

89 ‘Even in cases in which treatment of or reference to *jus cogens* would have been compelling, the ICJ has carefully eschewed doing so.’ Bianchi, supra n 16 at 502; see also generally ILC Report, para 378.
90 In this case, the ICJ found Albania responsible for the explosion of mines in its territorial waters, causing damage to the United Kingdom’s Navy. Although the case falls beyond the scope of Hague Convention No VIII, which applies in times of war, the Court nonetheless held that Albania had obligation emanating from ‘elementary considerations of humanity’ to notify approaching vessels of the existence of a minefield in its territorial waters. *Corfu Channel Case, Judgment, ICJ Reports* (1949) para. 22.
92 Id; emphasis added.
cogens. The vocabulary chosen notwithstanding, it is important to note that norms that are binding at all times irrespective of consent concern humanity and the protection of the human person.

The ICJ has finally referred to jus cogens norms, albeit tangentially. The break from tradition came in a case between DRC and Rwanda in which it declared that the mere fact a particular case involves jus cogens norms is no ground for the Court to assume jurisdiction, which must always be based on the consent of the parties to the dispute.93

Other courts and tribunals, both domestic and international, invoke jus cogens to buttress their judgments. In Furundzija, the ICTY stated that the prohibition of torture has attained ‘a particularly high status in the international normative system, a status similar to that of principles such as those prohibiting genocide, slavery, racial discrimination, aggression, the acquisition of territory by force and the forcible suppression of the right of peoples to self-determination.’94

As noted above, the Inter-American Commission on Human Rights considers the right to life as jus cogens norm.95 It adds that even ‘equality before the law, equal protection before the law and non-discrimination belong to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental

93 Armed Activities on the Territory of the Congo (New Application: 2002), Democratic Republic of the Congo v. Rwanda (3 January 2006) paras. 64,123,125.
94 Prosecutor v. Anto Furundzija, para. 147. Note that although the acquisition of territory by force seems just a form of aggression, the court puts the two apparently as separate norms of jus cogens.
95 See Victims of the Tugboat, ‘13 de Marzo’ vs. Cuba (October 16, 19996) para. 79.
principle that permeates all laws. While the ICTY restricts itself to a qualified ‘racial
discrimination,’ the Inter-American Court holds that the prohibition of discriminatory
treatment based on ‘gender, race, color, language, religion or belief, political or other
opinion, national, ethnic or social origin, nationality, age, economic situation, property,
civil status, birth or any other status…has entered the realm of jus cogens.’ It should be
remembered that (although without pronouncing its jus cogens status), the ICJ has
already in South West Africa, reaffirmed that discrimination ‘based on grounds of race,
colour, descent or national or ethnic origin which constitute a denial of fundamental
human right is a flagrant violation of the purposes and principles of the [UN] Charter.

Generally, it appears that regional courts have shown less indecision in pronouncing the
primacy of human rights over other rules. In a much discussed Kadi case the European
Court of Justice (ECJ) struck down an EC regulation on the ground that it violated the
fundamental human rights of the applicant, even though the regulation in issue was meant
to implement a UN Security Council Resolutions. Mr. Kadi was on the UN’s list of
individuals associated with the Al-Qaeda network. He was thus subjected to targeted
economic sanctions, and his assets were frozen by various EU regulations, which
constituted direct implementation of UN Security Council Resolution 1267 (1999). The
applicant challenged the EC regulations before the EC Court of First Instance (CFI),
claiming that the measure violated his fundamental right to be heard and to private

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97 Id.
99 On appeal, the Kadi case (C-402/05P) was joined by Al Barakaar case (C-415/05P) on account of their similarity. See Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission, European Court of Justice (Grand Chamber), ECR I-6351 (3 September 2008).
property.\textsuperscript{100} As in many cases related to terrorism, the question of due process was at the heart of this case. The CFI concluded that it had no authority to question the validity of the Resolution of the Security Council, save with regard to jus cogens norms.\textsuperscript{101} On appeal, however, the ECJ found that the CFI had made an error of law when it held that a regulation that gives effect to UN Security Council resolution was beyond judicial scrutiny. The ECJ held that obligations imposed by an international agreement cannot violate the EC’s constitutional principles, including ‘the principle that all Community acts must respect fundamental rights.’\textsuperscript{102} Although the ECJ did not pronounce that the right to be heard is a jus cogens norm, it maintained that any measure (even one emanating from the UN Security Council) is unacceptable in the EU if it is incompatible with fundamental human rights.

B. The \textit{Erga Omnes} Character of Human Rights

Obligations \textit{erga omnes}, a concept invented by the ICJ in \textit{Barcelona Traction} case seems different from jus cogens norms. Jus cogens refer to substantive norms characterized by their peremptory status, while obligations \textit{erga omnes} are obligations to the fulfillment of which the ‘international community as a whole’ has legal interest. The two concepts thus seem as distinct as a norm and an obligation are.\textsuperscript{103} Still, the two concepts exhibit

\textsuperscript{100} The EU Council imposed the sanctions on the applicants without communicating to them. Accordingly, the appellants argued that the sanction infringes their fundamental rights, including their right to be heard and the opportunity to defend themselves and challenged the evidences against them.

\textsuperscript{101} \textit{Kadi v. Council and Commission}, Judgment of the Court of First Instance (Second Chamber, Extended Composition), T-315/05 (21 September 2005) paras, 226-42; 282-6; 288-90.

\textsuperscript{102} Id, para 285.

\textsuperscript{103} However, some view the distinction between the two concepts differently. According to Aragio-Ruiz, for example, ‘the concept of \textit{erga omnes} obligation is not characterized by the importance of the interests protected by the norm (as is typical of \textit{jus cogens}) but rather by the “legal indivisibility” of the content of the obligation, namely by the fact that the rule in question provides for obligations which bind simultaneously each and every State concerned with respect to all the others.’ Gaetano Aragio-Ruiz, Fourth
significant overlapping. Indeed, it is apparent that all jus cogens norms constitute *erga omnes* obligations.\(^\text{104}\) According to the ICJ, international obligations may be classified as:

obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature, the former are the concern of all states. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.\(^\text{105}\)

Confusion abounds in the literature regarding the interface between jus cogens norms and obligations *erga omnes*. The ICJ’s traditional usage of the language of obligations *erga omnes*, even in cases that involve well-recognized jus cogens norms, has not helped clarify the confusion. For example, the right to self-determination is in the ILC’s list of jus cogens norms. As noted already, it is also recognized as such by international tribunals. The ICJ itself accords the highest gravity to the right to self-determination, declaring it an ‘irreproachable’ norm, but short of calling it a jus cogens.\(^\text{106}\) In *East Timor*, the ICJ states that ‘the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.’\(^\text{107}\) Irreproachability apparently reveals more of the substantive quality (status) of a norm than the scope of application of obligations deriving from it. Thus, the ICJ seems to attest that self-determination is a jus cogens norm, without saying it is. Similarly, the ICJ found out in *Israel wall* that Israel has violated Palestinian people’s

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\(^{104}\) According to the ICJ, obligations *erga omnes* derive from prohibitions of aggression, of genocide, as well as from ‘the basic rights of the human person, including protection from slavery and racial discrimination.’ *Barcelona Traction case, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, Judgment, *ICJ Reports* (5 February 1970) para. 34; see also ILC Report, para 404.

\(^{105}\) *Barcelona Traction case*, para. 33.

\(^{106}\) Shelton notes that ‘states rarely raised the issue [of jus cogens], and when they did the Court [ICJ] seemed to take pains to avoid any pronouncement on it.’ Shelton, supra n 53 at 305.

right to self-determination and some of its obligations under international humanitarian law. Yet, although the violation involves a well-recognized jus cogens norm, the ICJ once again eschewed the language of jus cogens and concluded that Israel has violated ‘certain obligations erga omnes.’

Now, do human rights impose obligations erga omnes? In other words, do all states hold legal interest in the protection of human rights? The answer seems easy and affirmative. Although states do not have human rights themselves, they have legal interest in the respect and protection of individual human rights, because that is the ‘foundation of peace in the world.’ The legal interest of states in the protection of human rights stems from the significance of human rights to international public order. In that sense, it seems that all states hold legal interest in the protection of human rights. It is plausible to argue, therefore, that human rights impose obligations erga omnes. Indeed, if obligation erga omnes exist as essentially communitarian norm, it seems difficult to imagine a better candidate than human rights. State practice too corroborates this view. Even though hypocrisy and double standards abound, states are more prone to criticize, severe diplomatic ties, or even intervene, when human rights violations are involved. If a state imposes sanctions against another state on grounds of human rights

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108 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) para 155; see also Bianchi, supra n 16 at 502.
109 "[T]he concept of human rights and the institutions aimed at the monitoring and enforcement of the human rights constitute what is, to a certain extent, a discrete public order system. The human rights system supplements the community of States as a public order system. At the same time, and this is paradoxical, the protection of human rights depends upon the system of States and forms part of it.” Ian Brownlie, The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations (Martinus Nijhoff Publishers, The Hague, 1998) 65.
110 See the opening paragraph of the UDHR.
111 See generally Orakhelashvili, supra note 3 at 7-35.
violations, it is obvious that the punishing state believes that it has legal interest in the protection of human rights elsewhere, and that is what *erga omnes* is all about.\textsuperscript{112}

C. The UN Charter as the Foundation of Human Rights

The UN Charter, the foundational treaty of the postwar world order, was adopted in 1945. The UN was organized based on the traditional Westphalian system of states.\textsuperscript{113} Yet, the Charter has also injected radical changes into it. First, in stark contrast to the Covenant of the League of Nations, which may be regarded as a classic example of sovereignty centric pact amongst states, the UN Charter is a ‘social contract’ of sorts among peoples of the World. Whereas states were both the makers and subjects of the Covenant, the UN Charter is theoretically an agreement among peoples of the United Nations.\textsuperscript{114} People are at the center of the UN agenda. This may be regarded a radical departure from the traditional conception of international law as governing solely the relations amongst states. Second, the Charter has not only brought human rights into the realm of international law, but also, for the first time, affirmed their universal validity.\textsuperscript{115} Third, by emphasizing on the ‘equal rights and self-determination of peoples,’ it has made the state system universal.\textsuperscript{116} This was a major shift from the League of Nations Covenant that

\textsuperscript{112} It should be emphasized that obligations *erga omnes* imply only that all states have legal interest. It does not necessarily suggest the existence of legal standing.

\textsuperscript{113} Despite some suggestions to the contrary, State sovereignty remains the hallmark of international relations. Art 2(7) of the UN Charter guarantees member states of their sovereign authority to decide on ‘matters which are essentially within the domestic jurisdiction.’ However, sovereignty is not an impregnable shield for states anymore.

\textsuperscript{114} Unlike traditional treaties (and like domestic constitutions) the UN Charter opens with: ‘We the peoples of the United Nations…’ To be sure, there is some controversy over the precise meaning of the word ‘peoples’ in the Preamble of the Charter. See Generally Heidelberg Wolfrum Rüdiger, Preamble in Bruno Simma (ed.), *The Charter of the United Nations: A Commentary* (Oxford, New York, 1994) 46.

\textsuperscript{115} In contrast with the League of Nations that was built on political and legal edifice inherently precarious for human rights, such as colonialism, universal respect for human rights and fundamental freedoms forms one of the chief objectives of the UN. See preamble, Arts 1(3), 55, 56, the UN Charter.

sanctioned (or at least condoned) colonialism.\textsuperscript{117} Fourth, in addition to outlawing war, which was a major step in itself, the Charter underscores the necessary link between socioeconomic progress and global peace.\textsuperscript{118} The Charter entrusts the Economic and Social Council (ECOSOC) with the task of furthering the goal of protecting human rights as well as facilitating international cooperation in wide-ranging fields. Fifth, the Charter not only declares its supremacy over all other international treaties, but also proclaims the universality of its central principles.

Human rights figure prominently in the UN Charter. The Charter opens with a declaration that: ‘We, the peoples of the United Nations…reaffirm faith in fundamental human rights, in the dignity and worth of the human person…’\textsuperscript{119} It was on that basis that the UDHR spells out particular human rights norms.\textsuperscript{120} Indeed, the Charter explicitly states that universal respect for human rights and fundamental freedoms forms one of principal objectives of the UN.\textsuperscript{121} Due to the comprehensive nature of the Charter, human rights norms are found scattered throughout the Charter. There is no doubt, however, that the UN Charter is the foundation of modern human rights laws in general.\textsuperscript{122}

\begin{footnotesize}
\begin{enumerate}
\item Art 22 of the Covenant goes: ‘to those colonies and territories…which are inhabited by peoples\textit{ not yet able to stand by themselves}…there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization…’ By contrast, the UN system was based on the recognition of the right to self-determination of all people. See Arts 1(2), 55, the UN Charter.
\item Art 55 of the UN Charter goes: ‘[w]ith a view to the creation of conditions of stability and well-being which are\textit{ necessary for peaceful and friendly relations}…’ the UN ‘shall promote higher standards of living, full employment, and conditions of economic and social progress and development.’ Emphasis added. See also Arts 1(3), 13, 55, 56, 60-62, the UN Charter.
\item See the opening lines of the preamble of the UN Charter.
\item ‘Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind…Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights…’ See Preamble, UDHR.
\item See Art 1, UN Charter.
\item See Preamble, Arts 1(3), 13 (1) (b), 55 (c), 56, 62 (3), 68, and 76 (c).
\end{enumerate}
\end{footnotesize}
The Overriding Character of the UN Charter

That member states shall behave consistently with objectives of the UN is too obvious to emphasize. What is rather so interesting is that the UN is authorized to ensure that even non-members comply with the fundamental principles of the Charter that are pertinent to peace and security.\textsuperscript{123} This is a radical departure from the traditional sovereignty-centric normative order.\textsuperscript{124} The UN Charter tempers the Westphalian notion of state sovereignty with the imperatives of international peace which in turn is linked to human rights and socioeconomic conditions.\textsuperscript{125}

Against the backdrop of the tragic failures of the impotent League of Nations, the desire was to establish a strong organization.\textsuperscript{126} Its ‘constitutive’ character accords the UN Charter supremacy over all other international treaties.\textsuperscript{127} Whether a treaty conflicting with the UN Charter becomes void (as in the case of conflict with jus cogens) or is merely set aside remains a subject of debate. There is no dispute, however, that UN Charter prevails over all other treaties, including WTO law. In fact, it is explicit under the WTO law that a member state may lawfully ignore its WTO obligations if its obligation under the UN Charter associated with the maintenance of peace and security so requires.\textsuperscript{128} If ‘disregard and contempt for human rights’ is the cause of war, and conversely, if respect for human right is the ‘foundation of...peace in the world,’ as declared in the preambles of UN Charter and the UDHR respectively, it follows that

\textsuperscript{123} Art 2 (6), the UN Charter.
\textsuperscript{124} The UN Charter has thus, at least in theory, transformed international law from a tool for managing co-existence between sovereign states based on non-interference to one of cooperation-based coexistence.\textsuperscript{125} Art 55, the UN Charter.
\textsuperscript{127} See Art 103 of the Charter.
\textsuperscript{128} See GATT Art XXI: C.
human rights are a matter of peace and security. Indeed, it is explicit that respect of human rights and fundamental freedoms form among the overriding goals of the UN Charter. Thus, it is plausible to argue that human rights norms have primacy over WTO rules.

**IV. INALIENABLE NATURE OF HUMAN RIGHTS**

The ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,’ reads the opening paragraph of the preamble of the UDHR. The premise that human rights are *inherent*, and are not statutory creations is the foundation of UN human rights system. To assert that human rights are inherent in the human person means that they do not owe their existence to the will of governments.\(^{129}\) That is, human rights treaties, such as the two covenants, do not create human rights; they just recognize the inherent rights of individuals. By signing the UN Charter, states simply ‘reaffirm faith in fundamental human rights.’ While declaring the UDHR, states simply recognized that ‘disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind,’ although no human rights treaty existed before the war. In other words, the existence of human rights transcends the domain of contractual power of states.

Entering into traditional reciprocal treaties being an attribute of sovereignty, state obligation to do or refrain from doing a particular act does not constitute a relinquishment

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\(^{129}\) To say that the history of human rights is largely the history of the twentieth century should not suggest human rights are accidental creations of the last century. Human rights have always existed in different names, but the twentieth century has brought about unprecedented political recognition of those rights.
of sovereignty. Human rights treaties differ from those treaties. First, human rights treaties do not involve reciprocity in the strict sense. Human rights obligations are generally owed towards human beings, not states. The reason is that human rights do not stem from states sovereignty, but rather from an ideal and universal conception of humanity that transcends the legitimate authority of the state. Naturally, therefore, human rights cannot be objects of reciprocal exchange of rights and obligations between states. On the contrary, human rights treaties are historically and normatively meant to, first and foremost, circumscribe the legitimate powers of the state. Indeed, tempering the traditional attributes of sovereignty, such as non-interference that emanate from the notion that the state is subject to no higher authority, is the point of departure of human rights norms. While all other treaties are manifestations of state sovereignty, human rights operate as cap on the traditional sovereign powers of states. Therefore, regardless of whether human rights form part of jus cogens, they have primacy over all other treaties by virtue of their unique nature- their being the very standards of political legitimacy. An international treaty of domestic policy is only legitimate if it is based upon respect for human rights.

130 See S.S.Wimbledon, Permanent Court of International Justice (PCIJ), Series A, No.1 (1923) para. 35.
131 As already noted, states hold legal interest in the protection of human rights, not because they are entitled to human right claims as such, but because human rights impose obligations erga omnes.
133 There has probably been nothing comparable to human rights that has curbed or, more precisely redefined, the classical concept of state sovereignty.
134 The foundational paradigm of international human rights law is the protection of the individual from abuses of sovereign states and by other actors. As such, it imposes an irredeemable limitation on state sovereignty. It should be kept in mind that while states were traditionally the ‘sole and exclusive’ subjects of international law and enjoyed unfettered sovereign power within their jurisdictions, it was the abuse of that sovereignty that made the protection of certain inalienable human rights a top priority in the aftermath of WWII. See generally the preambles of the UN Charter; UDHR.
Human rights are not given; hence, they cannot be legitimately taken away. UN Member states cannot be said to have legitimate power to legalize torture or derogate from their obligation regarding the right to adequate food. The UN Human Rights Committee states: ‘international law does not permit a State which has ratified or acceded to the Covenant to denounce it or withdraw from it.’\footnote{UN Committee on Human Rights, General Comment No.26: Continuity of Obligations: UN Doc CCPR/C/Rev.1/Add.8/Rev.1 (12/08/1997) para 5.} By contrast, WTO rules derive from reciprocity-based agreements. State consent being the sole basis of reciprocal obligations; they can be abrogated by the withdrawal of that consent. While it is known most jus cogens norms are human rights, reciprocal rights and duties deriving from WTO Agreements cannot be part of jus cogens, or even customary international law. Therefore, by their nature, human rights norms have higher status than other rules of reciprocal nature, including WTO rules.

In sum, while WTO rules establish \textit{reciprocal} rights and obligation for WTO member (and members alone), human rights obligations are \textit{integral} in nature.\footnote{For more on reciprocal versus integral obligations, see Pauwelyn, supra note 78 at 52-88.} As early as 1951, the ICJ affirmed the existence of obligations of ‘integral’ character that are binding regardless of state consent. With respect to the Convention on the Prevention and Punishment of the Crime of Genocide specifically, the ICJ, in its advisory opinion stated:

\begin{quote}
The Convention was manifestly adopted for a \textit{purely humanitarian} and \textit{civilizing purpose}. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting parties do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of the high purposes which are the \textit{raison d’être} of the convention. Consequently, in a convention of \textit{this type} one cannot speak
\end{quote}
of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.\textsuperscript{137}

The above statements seem to apply to all human rights in general. In terms of object, all human rights have\textit{ humanitarian} and\textit{ civilizing purpose}. Human beings (not states) stand as the direct beneficiaries of human rights treaties. Thus, human rights are not at the disposal of states.\textsuperscript{138} As such, human rights obligations are ‘of an objective character’ that they cannot be subjected to reciprocal tradeoff. In its advisory opinion, the Inter-American Court on Human Rights (IACHR) affirmed:

\begin{quote}
[\text{M}]odern human rights treaties in general…are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.\textsuperscript{139}
\end{quote}

In the case of the \textit{Sawhoyamaxa Indigenous Community v. Paraguay}, Paraguay argued, among others, that the IACHR had no competence to decide on a dispute involving the Sawhoyamaxa Community’s right to property over their ancestral lands and a foreign investor that has acquired the land, thanks to a bilateral investment treaty. Procedurally, Paraguay argued that the matter being a dispute between two private parties, it was the jurisdiction of its domestic courts. Substantively, it argued it could not satisfy the

\begin{footnotes}
\footnote{\textit{Reservation to the Convention on Genocide, Advisory Opinion, ICJ Reports} (1951) para. 23. Emphasis added.}
\footnote{See generally Orakhelashvili, supra note 3 at 53.}
\end{footnotes}
Community’s claims, as the owner of the land was protected under an investment treaty between Paraguay and Germany. The IACHR rejected Paraguay’s procedural argument, on the ground that it had ‘competence to analyze whether the State ensured the human rights of the members of the Sawhoyamaza Community.’\textsuperscript{140} The Court likewise rejected Paraguay’s substantive argument stating:

\[T\]he Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.\textsuperscript{141}

Likewise, the European Commission on Human Rights in \textit{Pfunders} case affirms the integral nature of human rights obligations. It states ‘obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.’\textsuperscript{142}

In consequence, the violation of a certain human rights treaty by a State does not in any way absolve other States Parties from their own obligations. This is reaffirmed by the VCLT. The VCLT declares that a breach of treaty obligations by a State may entitle the

\textsuperscript{141} Id, para 140.
\textsuperscript{142} \textit{Austria vs. Italy}, Application No. 788/60 (1961), \textit{European Yearbook of Human Rights} (Vol.4, 1961) 116 at 140.
other party to the treaty to terminate or suspend the operation of the treaty.\(^{143}\) This principle does not apply, however, ‘to provisions relating the protection of the human person contained in treaties of a humanitarian character.’\(^{144}\)

To be sure, the impermissibility of reciprocal breach of obligations is not peculiar to human rights. In its judgment on *Tehran Hostage* case, the ICJ held that no reciprocal breach of diplomatic immunity is permissible.\(^{145}\) However, the impermissibility of reciprocal breach here seems justified on rather functional grounds for the inviolability of the person of diplomatic agents and premises is necessary for the proper functioning of diplomatic missions.\(^{146}\) Otherwise, reciprocity is the very underpinning of international diplomacy. When it comes to human rights, however, it is fundamentally a state *versus* individual (rather than state versus state) affair. Therefore, since the rights belong to the individual, they cannot be disposed of by the state.

**Conclusion**

If repeated (often with unanimity) declarations on human rights are to be taken seriously, then the case for their primacy over WTO rules is compelling. In contrast to WTO rules, which derive solely from ordinary agreements of a kind that may be easily abrogated, human rights emanate from the universal conception of humanity that transcends the legitimate authority of the state. This may be somewhat paradoxical, but human rights are

\(^{143}\) From the reciprocal nature of most international treaties, it follows that a ‘material breach’ of its obligations by a State Party results in the loss of its rights under that treaty. See Art. 60 (1-4), VCLT.

\(^{144}\) Id.


\(^{146}\) It is purely on account of their functions that diplomats are treated differently from ordinary people. Similarly diplomatic premises are considered inviolable merely because that is (instrumentally) a necessary condition for the proper functioning of diplomacy.
not creations of a treaty; hence, they cannot be abrogated by a treaty. Human rights have distinct status that stems from their intrinsic nature. While trade and trade rules are tools that are only relevant for the sake of something else, which is the promotion of socioeconomic conditions (i.e. facilitate the realization of socioeconomic rights), human rights concern the dignity and worth of the human person.

Although normative hierarchy is a deeply controversial terrain of international law, there is a prevailing agreement that at least jus cogens norms, norms imposing obligations *erga omnes* and the UN Charter have overriding character. These norms prevail over ordinary commercial treaties primarily because substantive values that transcend the reciprocal interests of contracting states are involved. Human rights are at the heart of all of these classes of superior norms. Indeed, once it is conceded that human rights are universal and inalienable entitlements of human beings, and respecting and protecting them is the foundation of peace and justice in the world, it remains to reason that they have primacy over all other ordinary reciprocal treaty rules. In sum, respect for human rights is the standard of political legitimacy. WTO law (or any law) is legitimate only if it is based on respect of human rights.