

GOING GLOBAL: INDIVIDUAL RIGHTS, UNIVERSAL NORMS AND THE EXISTENCE OF AN OVERARCHING NORMATIVE HIERARCHY IN INTERNATIONAL LAW

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I. THE EMERGENCE OF UNIVERSAL RULES AND THE BUILDING OF A NEW NORMATIVE SPACE IN PUBLIC INTERNATIONAL LAW

The adoption of universal norms has revolutionised the conception of normativity at the international level. The traditional focus on a centralised regulatory authority is replaced by the idea of a spontaneous order, which progressively emerged from the decentralised actions of multiple agents. Indeed, the current international system is largely the result of a long process of codification or crystallisation of essentially customary rules, which have developed over time through the un-concerted acts posed at different levels by the various actors that compose the international community. It can be said that the international legal order is distinct in its absence of centralised law-making institutions; typically, all subjects of international law are able to participate in the elaboration of supra-national norms that will then bind them.¹ In particular, the Charter of the United Nations and the various international human rights treaties adopted under its frame are the product of a liberal cosmopolitan vision of the world and of trans-national relations.

The Charter of the United Nations is, in this respect, a truly revolutionary document. It endorses a complete shift -if not a reversal- in paradigm, from the traditional Westphalian to a clearly universalistic conception of international law.² The regime it introduces relies on the existence of an international community, beyond and above the state. Membership in this new social entity, as well as its concerns and interests, are not restricted to that of the sole nation-states. It is, on the contrary, composed of many diverse types of actors, including private individuals. In this view, the foundational role of the Charter could not be over-emphasised. It did not merely create one more legal order but established a set of rather novel institutions and conferred a supra-national constitutional status to basic

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¹ P.-M. DUPUY, *Droit international public*, 8th ed., Paris, Dalloz, 2006, pp. 18-19.

² The 1648 Peace of Westphalia, which ended the Thirty Years War, is at the origin of the modern concept of state sovereignty. It gives effect to the principle of territoriality and to the equality of sovereign states that hold absolute unchecked powers and exclusive control over their national territory, independent of their respective size and military strength. See: G. BERLIA, "Remarques sur la paix de Westphalie", in *Mélanges Basdevant*, Paris, Pedone, 1960, pp. 35-42.

international norms and principles. Its implementation initiated a transforming process for the control mechanisms and the power dynamics at the global level. It has also been the origin of the concept of international public order and the international entrenchment of core normative values, shared by all humanity with an aim to protect each and every single human being against instances of aggression and abuse.

Fundamentally, the Charter constitutes a radical switch of perspective in international relations, going from a state-centric to a truly cosmopolitan world order, and passing from unconstrained national sovereignty to a new international sovereignty. Following its adoption, the international legal order has become independent from states' sovereign powers. Even though it was originally established by the expression of states' assent, it progressively developed an 'objective' existence of its own. In view of this, the Charter is effectively analogous to an *actual* social contract; thus, providing legitimacy for a universal legal order and its institutions.³ It is a remarkably concrete achievement. Contrasting in that the tacit or hypothetical variants of the social contract theory, sometimes put forward at the national level in an attempt to justify coercive institutions, the international system is grounded in a real constitutive legal document, which effectively binds the parties to this agreement. This implies that the transfer of competences from the domestic to the supra-national level and the ensuing devolution of traditional state-owned prerogatives to the international community are irreversible. In this regard, attention should be paid to the distinctive nature and scope of the United Nations' Charter. As the founding text of this organisation, it applies immediately and without exceptions or reservations to all its members. This means that it obliges the quasi-totality of states worldwide to abide by its provisions, including those protecting individual rights and interests.

This point is particularly important and, as such, cannot be ignored when analysing or interpreting the content and application of contemporary rules of international law. In particular, it should always be kept in mind in the context of human rights and humanitarian dispositions, which constitute the keystone of the Charter.⁴ In fact, the Charter completely reverses the values on which the international society is founded by freeing individuals from states' almighty power, conferring to them inalienable rights, irrespective of their ethnicity, background and sex, and prioritising

³ P.-M. DUPUY, *L'unité de l'ordre juridique international*, Cours général de droit international public, *Recueil des Cours de l'Académie de Droit International de La Haye*, 2002, Vol. 297, pp. 9-489; Leiden Nijhoff, 2003, at pp. 204, 220-221 and 412.

⁴ See: UN Charter, Preamble; which posits peace and human rights as the main aims of the organisation.

them by opposition to governments now bound to guarantee those rights.⁵ As a result, the unity of the contemporary international system is less organic than substantive. It is based on the hierarchy of norms that ensues from the recognition, in Article 53 of the 1969 Vienna Convention on the Law of Treaties, of the notion of *ius cogens*; a legal concept itself derived from the higher rank assigned to the basic principles entrenched in the Charter. These peremptory rules, which are by their legal status placed above the will of the states and outside the scope of treaties' control, constitute the core of an emerging concept of international public order. In a word, *ius cogens* norms are at the origin of a new type of normative space, of sovereignty, and of constitutionality.

In this perspective, international institutions have a mandate to guarantee the respect of the international public order and implement the rules of *ius cogens*; chiefly, the non-aggression principle and the rules protecting fundamental rights and liberties (both in times of peace and of war), which are themselves an inter-individual application of this principle. In this regard, one cannot ignore that the protection of human rights in the United Nations system is linked to broader issues of peace and security,⁶ and that the core of absolutely inalienable entitlements is composed of precisely those rights most connected to such questions. While this is surely partly due to the original function and nature of the United Nations as an organisation, it also links individual liberties to a generalised application of the principle of non-aggression, be it among states, communities, private entities or individuals. This all-encompassing principle of non-aggression, then, constitutes the foundation on which the entire international edifice is built.

The supervisory and guarantor role conferred specifically to supra-national institutions and more loosely to the international community as a whole in relation to peremptory rules of international law implies that, in cases of violations of these norms, they are empowered to punish the offenders. Besides, the creation and progressive extension of international mechanisms of supervision reinforces the ban on domestic abuses of these

⁵ P.-M. DUPUY, "L'individu et le droit international: Théorie des droits de l'homme et fondements du droit international", *Archives de philosophie du droit*, 1987, pp. 119-133, at p. 121.

⁶ See, more generally, on the crucial place of war and peace considerations in contemporary international law:

P.-M. DUPUY, "L'enfer et le paradigme: Libres propos sur les relations du droit international avec la persistance des guerres et l'objectif idéal du maintien de la paix", in *Mélanges H. Thierry*, Paris, Pedone, 1998, pp. 187-201.

rules. And the recognition of the existence of an '*actio popularis*'⁷ against such breaches, open to all components of the international community, significantly enhances their protection. Furthermore, it entails that state sovereignty is legally restricted by the respect of *ius cogens*. Such a model conflicts eventually with republican or majoritarian notions about governmental functions and democracy, which are essentially state-centred rather than universalistic. It also clashes irreconcilably with realist views of international relations, which assert uncompromisingly the prevalence of uninhibited state sovereignty and prerogatives. Ultimately, it is built on the primacy of the individual over the community and the polity and, consequently, promotes the protection of human rights against states' overriding power. Finally, it rests on the belief that the recognition of a common humanity can only pass by that of each of its members.

Whereas this double process of organic de-centralisation and substantive unification of the law, and even the mere existence of the notion of *ius cogens*, have been contested until recently, the detractors of such a line of argumentation fail to appreciate the complexity of the international system taken as a whole, and its progressive move away from the traditional state-centric Westphalian model since the adoption of the Charter of the United Nations. In particular, even though *ius cogens* is sometimes relied on for purely instrumental or strategic purposes, one should not forget that -far from constituting "a 'legal word' devoid of any coherent meaning"- it remains an important concept of positive law,⁸ as well as the key stone of the international legal order. Hence, the mere fact that it incorporates values of a mostly ethical nature into the fabric of the law does not give reason to refute its crucial position and function in the development of the supra-national system. In view of this, it is important to look both at its contents and its place in the evolution of general international law, in order to fully appreciate the paradigm shift it creates inside the concept of normative order and the consequences for the architecture of a worldwide global regime.

This paper attempts to do this in light of the role played by human rights,

⁷ The notion of '*actio popularis*' has its origins in Roman law and refers to legal actions brought in front of a tribunal in vindication of the general interest.

See: I.C.J., *South West Africa*, Second Phase, 18 July 1966, p. 47, § 88.

M. RAGAZZI, *The Concept of International Obligations Erga Omnes*, Oxford, Clarendon, 1997, p. 210.

⁸ P.-M. DUPUY, *L'unité de l'ordre juridique international, o.c.*, pp. 28-33, 207-213, 269-313 and 414-427.

P.-M. DUPUY, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi", *European Journal of International Law*, 2005, pp. 131-137, at p. 136.

as the most archetypical example of integral norms, in the creation of this new vision of normativity. The specific focus is motivated by the position occupied by fundamental rights in the general structure of the international system. The progressive entrenchment of human rights, through the recognition of their peremptory status, as the centre of the international public order is challenging the traditional concept of state sovereignty, and replacing it by a new form of international sovereignty of an intrinsically liberal nature. The duties that international human rights law creates for states are not only owed to the protected individuals and legal persons. Because they make up a crucial part of the international public order and are defined as superior interests of the international community, they can be sanctioned by the entire international community. Subsequently, they are insulated from states' obsession with national sovereignty and governmental attempts to reduce them. States' duty to respect them exists, regardless of their ratification of the relevant treaties, derived instead directly from membership and participation in the international society. In consequence, they ground the contemporary evolution and integration of general public international law along the lines of a new global normativity, ultimately based on a universal recognition of the humanity of every individual.

II. THE OBJECT OF INTERNATIONAL HUMAN RIGHTS LAW AND THE CREATION OF A NEW VISION OF NORMATIVITY

In order to fully understand and elucidate the complexities and technicalities of a legal norm, one must analyse it in the light of its ultimate aim and social function.⁹ This explains the insertion, by Article 31 of the 1969 Vienna Convention on the Law of Treaties, of the famous 'object and purpose' test -which states that "a treaty shall be interpreted [...] in the light of its object and purpose"- into the theory of interpretation of international agreements. Accordingly, the idea lying at the core of any international instrument ought to be insulated from adverse attacks and teleological considerations can never be ignored, even in the frame of a thoroughly descriptive account of the law. More precisely, when a certain ideology presided to the creation of a given set of norms, it cannot be dismissed altogether. It undoubtedly was the case for human rights conventions and, to a lesser extent, for the Charter of the United Nations; a fact which cannot be neglected. This implies that, even when looking at their specific provisions, the original aim and theoretical structure underlying the whole human rights project should not be forgotten.

⁹ P.-M. DUPUY, *L'unité de l'ordre juridique international, o.c.*, p. 27.

The object and purpose of international human rights and humanitarian law is neither to establish reciprocal rights and obligations between states for their mutual benefit nor to organise a legal frame for their contractual relations. It does not aim at forwarding national interests or at adjudicating the conflicting claims, disagreements and ambitions of differing governments. On the contrary, human rights and humanitarian conventions are multilateral legal agreements composed of a set of 'absolute', objective or 'self-existent' obligations that states parties unilaterally commit themselves to comply with.¹⁰ Hence, they constitute 'integral' treaties, by opposition to 'interdependent', reciprocal, 'concessionary' or *synallagmatiques* conventions. In other words, they are disconnected from the idea of reciprocity that traditionally tainted most international accords. And they generate obligations that depend neither legally nor practically on their parallel execution by other parties to the same agreement. In contrast, they give rise to autonomously and absolutely binding duties, owed to the entire world rather than merely to the contracting parties.¹¹ This means that, when they ratify those treaties, members of the international community undertake to respect and guarantee the individual rights they protect, regardless of the actions of other states.

This constitutes the uniqueness of this type of treaty in comparison with other international instruments. And it has been alleged to justify at least some departure from the classical secondary rules of general international law.¹² However, the recognition of this specificity and of the ensuing exceptional treatment of human rights issues, in key international agreements codifying secondary international norms, shows that the

¹⁰ E.C.H.R., *Ireland v. UK* [Northern Ireland Case], 18 Jan. 1978, *Series A*, Vol. 25, p. 90, § 239.

E.Com.H.R., *Austria v. Italy* [Admissibility], 11 Jan. 1961, *Y.E.C.H.R.*, Vol. 4, pp. 116-183, at pp. 138-140.

A.C.H.R., *Ivcher Bronstein v. Peru* [Competence], 24 Sept. 1999, *Series C*, Vol. 54, § 42.

A.C.H.R., *Aguirre Roca et al. v. Peru* [Competence], 24 Sept. 1999, *Series C*, Vol. 55, § 41.

I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Pleadings, Reports, 1951, pp. 387-ff.

O. DE FROUVILLE, *L'intangibilité des droits de l'homme en droit international*, Paris, Pedone, 2004, pp. 505 and 507; who underlines that states never contested this.

¹¹ See, for a detailed analysis of this phenomenon and its relevance for human rights and humanitarian law:

P.-M. DUPUY, *L'unité de l'ordre juridique international*, *o.c.*, pp. 139-141 and 382, note 763.

G. FITZMAURICE, "Second Report on the Law of Treaties", *Yearbook of the ILC*, 1957, Vol. II, p. 54.

¹² R. BERNHARDT, "Thoughts on the Interpretation of Human Rights Treaties", in *Mélanges Wiarda*, Köln, Heymanns, 1988, pp. 65-71, at pp. 65-66.

application of different solutions to human rights issues is actually in conformity with the said norms. For example, Article 60 § 5 of the 1969 Vienna Convention on the Law of Treaties specifies that a material breach of such a treaty does not result in its suspension or its termination.¹³ Similarly, it would never justify comparable violations of its provisions (even) regarding nationals of the infringing state. Indeed, the duties undertaken are due by all subjects of international law to the international community at large and do not cease to exist simply because of one country's failure to comply with them. This is the essence of integral obligations.

In addition, states parties to these instruments do not merely engage themselves to guarantee the freedom of fellow member states' citizens. They vouch to protect the individual rights of every person residing on their territory or within their jurisdiction, independent of her nationality and origins,¹⁴ which includes 'illegal' immigrants.¹⁵ For example, Article 1 of the European Convention demands that states "secure to everyone within their jurisdiction the rights and freedoms defined". This covers all persons effectively under their power, be them nationals of the controlling authority or subjects of other (non-)signatory states. So, human rights norms refer to the universal identity of human beings.¹⁶ And the basic underlying idea is to treat every person as a human being,¹⁷ a rule that does

¹³ See: E. SCHWELB, "The Law of Treaties and Human rights", in *Mélanges Mc Dougal*, New York, Free Press, 1976, pp. 262-290, at pp. 278-281; who defends that this disposition should be read in the light of the sixth paragraph of its preamble, which points out its coverage of all human rights and humanitarian treaties.

¹⁴ E.C.H.R., *Ireland v. UK [Northern Ireland Case]*, 18 Jan. 1978, *Series A*, Vol. 25, p. 90, § 239.

E.Com.H.R., *Austria v. Italy [Admissibility]*, 11 Jan. 1961, *Y.E.C.H.R.*, Vol. 4, pp. 116-183, at pp. 138-140.

E.Com.H.R., *Temeltasch v. Switzerland*, 5 May 1982, *D.R.*, Vol. 31, pp. 120-152, §§ 63-64.

H.R. Committee, *General Comment No 15 (27) on the Position of Aliens under the Covenant*, 22 July 1986, § 1.

H.R. Committee, *General Comment No 24 (52) on Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*, 2 Nov. 1994, § 17.

A.C.H.R., *Effects of Reservations on the Entry into Force of the American Convention*, Adv. Op. OC-2/82, 1982, *Series A*, Vol. 2, §§ 29 and 33.

¹⁵ A.C.H.R., *Legal Status and Rights of Undocumented Migrants*, Adv. Op. OC-18/03, 17 Sept. 2003, *Series A*, Vol. 18, §§ 106-107, 111-160, 169-172 and 173 (6-11).

¹⁶ P.-M. DUPUY, *Droit international public*, 8th ed., *o.c.*, p. 214.

¹⁷ N.A. BUTENSCHON, "Citizenship and Human Rights: Some Thoughts on a Complex Relationship", in *Mélanges Eide*, Leiden, Nijhoff, 2003, p. 555-570, at p. 556-557.

not admit any exception. This idea is already expressed in Article 28 of the Universal Declaration, which declares that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realised”. It binds all public institutions at the global, trans-national, municipal and local levels, to protect the said entitlements and provide a frame in which individuals can freely exercise their liberties.

Essentially, international human rights law constitutes the personal rights of each and every individual into universal absolute obligations that the international community owes to her because of her humanity. As a result, one can say that international human rights law stands as a legal order of a quasi-constitutional type. This reinforces the logical primacy of supra-national human rights norms over contradictory rules which are part of the national legal order, even though domestic authorities are usually charged with the enforcement of those international dispositions.¹⁸ The European Court and Commission of Human Rights have expressly recognised this and underlined the European constitutional value of the European Convention on Human Rights in several instances, specifying that this treaty is “a constitutional instrument of European public order”.¹⁹ This is equally valid at the universal level,²⁰ where the Universal Declaration is seen as a “part of the constitutional structure of the world community”, together with the Charter of the United Nations.²¹ Hence, the international bill of rights “may, by finally constituting the individual as a subject of the international commonwealth, prove to be the first decisive

P.-M. DUPUY, *L'unité de l'ordre juridique international, o.c.*, pp. 36, 104, 257-258, 414-415 and 488-489.

A. RODRIGUES, “Apport de la pratique du Tribunal pénal international pour l'ex-Yougoslavie à la protection des droits fondamentaux de la personne humaine”, in *Mélanges Cassese*, The Hague, Kluwer, 2003, pp. 791-826, at p. 794, especially note 10.

B. SIMMA, “From Bilateralism to Community Interest in International Law”, *Recueil des Cours de l'Académie de Droit International de La Haye*, 1994, Vol. 250, pp. 217-384, at p. 242.

¹⁸ F. RIGAUX, “Logique et droits de l'homme”, in *Mélanges Ryssdal*, Koln, Heymanns, 2000, pp. 1197-1211, at pp. 1198-1199.

¹⁹ E.C.H.R., *Open Door and Dublin Well Woman v. Ireland*, 29 Oct. 1992, *Series A*, Vol. 246-A, §§ 68-69.

E.C.H.R., *Loizidou v. Turkey [Preliminary Objections]*, 23 Mar. 1995, *Series A*, Vol. 310, §§ 75 and 93.

E.C.H.R., *Matthews v. UK*, 18 Feb. 1999, *Reports*, 1999, I, § 49.

E.Com.H.R., *Chrysostomos, Loizidou et al. v. Turkey*, 4 Mar. 1991, *Y.E.C.H.R.*, Vol. 34, pp. 35-ff., p. 52.

²⁰ E. SCHWELB, “The Law of Treaties and Human rights”, *o.c.*, p. 275.

²¹ L.B. SOHN, “The New International Law: Protection of the Rights of Individuals rather than States”, *American University Law Review*, 1982, pp. 1-64, at pp. 16-17.

step in the evolution of the federation of the world”.²² More radically, the recent international sovereignty ultimately takes its roots in an inalienable liberal right to liberty and self-determination of all individuals.

Aside from the Charter, the development of human rights norms and the creation of new trans-national institutions further consecrate the evolution “away from the classic regime of state sovereignty [...] toward the firm entrenchment of the liberal regime of international sovereignty”.²³ Accordingly, the system of inter-states complaints obligatory under Article 24 of the European Convention on Human Rights²⁴ is considered as a remedy against a breach of Europe’s public order. The same applies to the optional systems of inter-states requests under Article 41 of the International Covenant on Civil and Political Rights and Article 45 of the Inter-American Convention. It is the case especially for the latter, since the Inter-American Court endorsed the very same approach to this issue as its European counter-part and referred extensively to Strasbourg case law in doing so.²⁵ By definition, inter-states complaints mechanisms embody the very idea that “how a government treats its own citizens is no longer its exclusive business, but a matter of legitimate concern for other states” and their individual inhabitants.²⁶

The International Court of Justice has adopted similar views on the place of human rights conventions in the international system. It first stressed the “common interest” underlying this type of treaties in its advisory

²² H. LAUTERPACHT, “The International Protection of Human Rights”, *Recueil des Cours de l’Académie de Droit International de La Haye*, 1947, Vol. 70, pp. 1-108, at p. 105.

See also, on the strong connection between human rights instruments and the emergence of a global community:

O. DE FROUVILLE, *L’intangibilité des droits de l’homme en droit international*, o.c., p. 266.

R.-J. DUPUY, “L’universalité des droits de l’homme”, in *Mélanges Spertuti*, Milan, Giuffrè, 1984, pp. 539-556, at pp. 543-544.

²³ D. HELD, “Violence, Law, and Justice in a Global Age”, in C. CALHOUN, P. PRICE and A. TIMMER, *Understanding September 11*, New York, New Press, 2002, pp. 92-105, at p. 94.

See also: D. HELD, “Laws of States, Laws of Peoples: Three Models of Sovereignty”, *Legal Theory*, 2002,

pp. 1-44, at p. 2.

²⁴ European Convention on Human rights, new Article 33.

²⁵ A.C.H.R., *Effects of Reservations on the Entry into Force of the American Convention*, 1982, Adv. Op. OC-2/82, 1982, Series A, Vol. 2, §§ 29-30; which paraphrases the European Commission of Human Rights.

²⁶ A. INGRAM, *A Political Theory of Rights*, Oxford, Oxford University Press, 1994, p. 12.

P. SIEGHART, *The Lawful Rights of Mankind*, Oxford, Oxford University Press, 1985, preface, p. vii.

opinion regarding reservations to the Convention for the Prevention and Punishment of the Crime of Genocide.²⁷ And it confirmed, in the *Barcelona Traction Case*, that human rights obligations are *erga omnes* – “obligations of a state towards the international community as a whole” – namely, obligations whose fulfilment can validly be claimed by every member of that community, independent of any particular agreement relative to the issue in hand – and that, subsequently, all states have the same legal interest in their protection;²⁸ an interest that is closely tied to the principle of legality and the respect of the rule of law at the international level.²⁹ International human rights law is undeniably contributing to the emergence of “a new legal order, which encompasses a notion of international society”;³⁰ as well as to the materialisation of an “international civil society” able to claim respect for the rights of its individual components.³¹

This position has been clearly defended by Roberto Ago, who considers that the idea of *erga omnes* obligations is narrowly bound to the existence of an international community and the institutionalisation of such a community.³² Due to his key role in the International Law Commission during the early codification of the project on states’ international responsibility, his views on the question have been very influential on the ulterior work of the Commission. As a result, the International Law Commission has endorsed a similar approach in its recent codification of the responsibility of states for the violation of peremptory norms of

²⁷ I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Adv. Op., 28 May 1951.

²⁸ I.C.J., *Barcelona Traction Light and Power Company Limited*, 5 Feb. 1970, p. 32, § 33.

²⁹ P.-M. DUPUY, *Droit international public*, 8th ed., o.c., p. 243.

P.-M. DUPUY, *L'unité de l'ordre juridique international*, o.c., p. 359.

³⁰ T.M. FRANCK, “Democracy as a Human Right”, in J.L. HARGROVE and L. HENKIN, *Human Rights: An Agenda for the Next Century*, Washington, American Society of International Law, 1994, pp. 73-101, at p. 89.

A.C. KISS, “La Convention européenne des droits de l’homme a-t-elle créé un ordre juridique autonome?”, in *Mélanges Pettiti*, Brussels, Bruylant, 1998, pp. 493-505, at p. 494.

J. KOLASA, “Rules on Emergency Powers in International Human Rights Treaties”, in Council of Europe, European Commission for Democracy through Law, *Human Rights and the Functioning of the Democratic Institutions in Emergency Situations*, Strasbourg, Council of Europe, 1997, pp. 108-128, at p. 110.

³¹ P.-M. DUPUY, “Some Reflections on Contemporary International Law and the Appeal to Universal Values”, o.c., p. 137.

³² R. AGO, “Obligations *Erga Omnes* and the International Community”, in A. CASSESE *et al.*, *International Crimes of States*, Berlin, De Gruyter, 1989, pp. 237-239, at p. 238.

R. AGO, “The International Community and International Organizations”, in R.-J. DUPUY, *Handbook on International Organizations*, Dordrecht, Nijhoff, 1988, pp. 3-12.

international law.

III. THE INTERNATIONAL LAW COMMISSION CODIFICATION OF STATES INTERNATIONAL LIABILITY AS A CONSECRATION OF THIS NEW CONCEPTION OF NORMATIVITY

The need to protect fundamental freedoms and entitlements has strongly influenced the writing of the 2001 final Draft Articles on the Responsibility of States for Internationally Wrongful Acts,³³ later annexed to a resolution of the General Assembly.³⁴ In addition, this project largely contributes to the crystallisation of several innovative tendencies regarding international human rights law and to the entrenchment of a novel approach to normativity at the international level.

First of all, the Draft Articles foresee two distinct sources of states' responsibility. On one side, Article 42 (b) (ii) of this document deals only with the question of inter-dependent obligations and thus with the "invocation of the responsibility" by a state which has been personally injured, as is anyhow mentioned in the title of this disposition. Contrasting this provision, Article 48 institutes an *actio popularis* to the benefit of associations of states and the international community. So, its application is not conditioned by a personal lesion of the state that brings it into play. Article 48 § 1 refers to two groups of integral obligations: those "owed to a group of states including that state" which is invoking the responsibility of another, like duties towards a regional organisation; and those "owed to the international community as a whole". These two types of rules are objective obligations, which do not engage any notion of reciprocity and are never "of such a character as radically to change the position of all other states to which the obligation is owed with respect to the further performance of the obligation".

Article 48 § 1 (a) protects the interests of regional organisations or of other states' groupings, in as much as they differ from the interests of their members. For instance, each member state of the European Union could invoke, in place of the European Commission, the responsibility of another state -irrespective of its belonging or not to the union-, for the violation of the duties it owes to the European institutions. The same applies to states belonging to the Council of Europe or the Organisation of

³³ International Law Commission, *2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, UN Doc., A/CN.4/L.620/Rev.1.

³⁴ UN General Assembly, *Resolution 56/83*, 12 Dec. 2001, *Responsibility of States for Internationally Wrongful Acts*, UN Doc., A/RES/56/83.

American States, which constitutes recognition of the mechanism of interstate applications existing inside these two institutions. Thereby, Article 48 § 1 (a) allows a sort of narrow *actio popularis* in relation to the protection of the object and interests of international organisations. And it *de facto* gives them a certain form of international legal personality.

But Article 48 § 1 (b) goes much further, as it permits any state to intervene in the event of a breach of *erga omnes* obligations. Every government may then ask for the cessation of any infraction to these norms and the reparation of the violation on behalf of the victim. Article 48 § 1 (b) confirms thereby the position of the International Criminal Tribunal for the Former Yugoslavia, which considers that such obligations are “owed towards all the other members of the international community, each of which then has a correlative right”. And it equally endorses the Tribunal’s judgement that their violation “simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”.³⁵

This constitutes the foundation for a multilateral frame, where the notion of reciprocity is diluted and an authentic *actio popularis* is open to all states, aimed at the protection of the international public order.³⁶ This prevalence of objective interests over subjective ones serves the function of restoring international legality, even in the cases where the wronged state is a small powerless country without enough weight on the international scene, and which will not challenge a stronger nation in fear of retaliation. Although Article 48 § 3 refers to Article 45 “regarding the “loss of the right to invoke responsibility””, which prevents any state to invoke the responsibility of another when “the injured state has validly waived the claim”, states cannot validly renounce to a request grounded on the lack of respect of peremptory obligations. In truth, they are not allowed to derogate from these norms even by means of agreement or treaty. So, it seems that they could not possibly acquiesce validly to violations of *erga omnes* obligations either, as these similarly guarantee superior interests of the international community.³⁷

³⁵ I.C.T.Y., *Furundzija Case (Lasva Valley)*, IT-95-17/1-T, *Judgement*, 10 Dec. 1998, § 151.

³⁶ See, for hints at such a result:

A. PELLET, “Le nouveau projet de la CDI sur la responsabilité de l’état pour fait internationalement illicite: *Requiem* pour le crime?”, in *Mélanges Cassese, o.c.*, pp. 655-683, at pp. 660 and 682.

³⁷ See, for a defence of the inapplicability of Article 45 to the circumstances of Article 48 § 1 (b):

Secondly, Articles 25 § 1 (b), 33 § 1, 42 (b) and 48 § 1 (b) of the Draft Articles do not speak of an ‘international community of states’ but of the ‘international community as a whole’, which extends the scope of this concept to cover non-state actors.³⁸ Moreover, according to Article 48 § 2 (b), public authorities introducing an action on the basis of Article 48 § 1 can require the responsible government to repair the damage caused to the injured state or “the beneficiaries of the obligation breached”. This *alinea* implies that they can defend on this ground not only the interests of other states, but also those of private entities or individuals. This second aspect of the *actio popularis*, which is already tacitly expressed in Article 48 § 2 (b), is confirmed by the mention in Article 39 of the contribution to the injury “of the injured state or any person or entity in relation to whom reparation is sought”. Besides, the direct victims of infractions to *erga omnes* obligations -as those of breaches of peremptory norms of international law- are rarely states and usually private individuals.

Subsequently, any state can use the *actio popularis* consecrated in Article 48 to oppose and sanction violations of *erga omnes* obligations to the benefit of individuals who are not its own nationals or residents and, in particular, breaches of the fundamental rights and freedoms that the offending state is bound to respect under treaties it has signed or customary international law. This corollary is corroborated by the absence of application of the clause inserted in Article 44 (a) -on the “admissibility of claims”- to human rights norms, an inapplicability which has been explicitly underlined during the debates of the International Law Commission.³⁹ Article 44 (a) otherwise stipulates that “the responsibility of a state may not be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims”. Its exclusion in matters related to the protection of individual entitlements further derives from the fact that what has already been said in relation to the waiving of states’ responsibility under Article 45 and *erga omnes* obligations is equally valid for

A. GATTINI, “The Obligations of States Likely to Invoke the Responsibility for Serious Breaches of International Peremptory Norms”, in P.-M. DUPUY, *Workshop on Breaches of Obligations under Peremptory Norms of General International Law and the International Responsibility of States*, Florence, European University Institute, 2001, Section III - 4.

A. PELLET, “Le nouveau projet de la CDI sur la responsabilité de l’état pour fait internationalement illicite”, *o.c.*, pp. 673-674.

³⁸ A. PELLET, “Le nouveau projet de la CDI sur la responsabilité de l’état pour fait internationalement illicite”, *o.c.*, p. 666; who is critical of the wording of these articles but still observes, in this regard, that the notion of international community has expanded since the adoption of the 1969 Vienna Convention.

³⁹ International Law Commission, *Report on the Work of its 52nd Session*, 2000, UN Doc., A/55/10, § 422.

Article 44.⁴⁰ This institutionalises a universal system of inter-states applications comparable to the one recognised by the Council of Europe and the Organisation of American States. The next step on this line would involve granting the same right of action to individuals or other non-state actors, a development that is already observable in the increasing precedence given to the rights and interests of victims in international criminal law.

Thirdly, the Draft Articles confer the status of *ius cogens* to the whole set of human rights. Indeed, the project adopted on second reading in 2001 mixes the notions of *erga omnes* obligations and *ius cogens*. It uses them alternatively, substituting one for the other. The third chapter of the second part of the Draft is titled “serious breaches of obligations under peremptory norms of general international law”. Articles 40 and 41, which are included in the said chapter, refer to this very concept; and so does Article 26. By opposition, the first chapter of the third part speaks of obligations owed to the international community or *erga omnes* obligations,⁴¹ as the texts previously adopted. The switch from one term to the other in different dispositions as well as in successive versions of the same provisions consecrates the exact correspondence that exists between the two concepts, in conformity with the definition of *ius cogens* in Article 53 of the Vienna Convention.⁴² Moreover, the International Law Commission has interchangeably made use of both expressions during its debates and justifies the resulting confusion by alleging that the obligations arising under these two types of norms largely coincide.⁴³ Consequently, the norms protecting fundamental freedoms, whose *erga omnes* character is traditionally recognised, also benefit from the status of peremptory obligations or *ius cogens*.

Even so, one might argue that the mix-up of the two terms in the Draft Articles results from an over-simplification of reality and not from a

⁴⁰ A. GATTINI, “The Obligations of States Likely to Invoke the Responsibility for Serious Breaches of International Peremptory Norms”, *o.c.*, Section III - 3.

⁴¹ International Law Commission, *2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, *o.c.*, Articles 42 § 1 (b) and 48 § 1 (b).

⁴² P.-M. DUPUY, *L'unité de l'ordre juridique international*, *o.c.*, pp. 256 and 366.

⁴³ J. CRAWFORD, *Third Report on the Responsibility of States*, UN Doc., A/CN.4/507/Add.4, §§ 372-374.

International Law Commission, *Report on the Work of its 53rd Session*, 2001, UN Doc., A/56/10, § 7.

B. SIMMA, “Bilateralism and Community Interest in the Law of State Responsibility”, in *Mélanges Rosenne*, Dordrecht, Nijhoff, 1989, pp. 821-ff., at p. 825; who judges that the two terms refer to different aspects of the same norms, that they “constitute but the two sides of one and the same coin”.

conscious decision to extend the scope of *ius cogens* to cover all *erga omnes* obligations. However, the Draft does not solely confuse the two notions, and use them in an overlapping fashion. It goes much further in that direction, with the result that the perfect compatibility and equalisation of both terms cannot be denied so easily.

To begin with, it explicitly refers to the peremptory status of individual rights in its Article 50 § 1, concerning the “obligations not affected by countermeasures”; specifying that “countermeasures shall not affect: the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; obligations for the protection of fundamental human rights; obligations of a humanitarian character prohibiting reprisals; [and] other obligations under peremptory norms of general international law”. This disposition mirrors Article 60 of the Vienna Convention, which exempt “treaties of a humanitarian character” from being suspended or terminated as a result of violations of their provisions by states parties to these treaties. Although it leaves the door open for potential new candidates to that status, it expressly recognises the *ius cogens* or peremptory character of the three first categories of obligations it cites, including the protection of human rights.

Here again, one might claim that the mentioned rights are solely the most important ones or those belonging to the hardcore of non-derogable provisions, which cannot be restricted even in times of war or public emergency threatening the life of the nation. On one hand, it can be formally argued that all rights that cannot be suspended under these safety clauses have by definition *ius cogens* status. Article 53 of the 1969 Vienna Convention on the Law of Treaties expressly singles out peremptory norms of general international law as rules “from which no derogation is permitted”. Thus, peremptoriness can be considered as a synonym for inalienability.⁴⁴ As a result, the human rights specifically identified in international treaties to remain always inalienable -independent of the gravity of the circumstances- belong *essentially* to this category.⁴⁵ On the other hand, nothing indicates that Article 53 merely covers this particular category of individual freedoms and entitlements. And it is still improbable that the expression “fundamental human rights” in Article 50 § 1 of the Draft Articles would only refer to the few rights listed in derogation clauses.

⁴⁴ P.-M. DUPUY, *L'unité de l'ordre juridique international*, o.c., pp. 274 and 276.

⁴⁵ P.-M. DUPUY, *Droit international public*, 8th ed., o.c., p. 235.

M.N. SHAW, “Genocide and International Law”, in *Mélanges Rosenne*, o.c., pp. 797-820, at p. 801.

On the contrary, it seems that this expression needs to be interpreted much more broadly, as it is done in the title of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, in its famous *obiter dictum* in the *Barcelona Traction Case*, the International Court of Justice uses the quasi-identical expression of “basic rights of the human person” in relation to the concept of *erga omnes* obligations. The similitude is even more flagrant in the French version of the judgement, which speaks of “*droits fondamentaux de la personne humaine*”.⁴⁶ Besides, all the international rules protecting human rights are applicable *erga omnes*. And the *dictum* of the Court has been interpreted as a reference to the two United Nations Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, before these instruments had even entered into force.⁴⁷

In addition, a distinction among the different human rights cannot be justified at this level, neither on a theoretical basis nor by reference to the practice of international bodies monitoring the respect of individual rights and freedoms.⁴⁸ Finally, the deliberations during the Vienna Conference regarding the parallel Article 60 of the Vienna Convention referred not only to the 1949 Geneva Conventions, but also to the status and protection of refugees, the prohibition of slavery, the interdiction of genocide and, ultimately, to the “conventions for the protection of human rights in general”.⁴⁹ Article 50 § 1 pertains, therefore, to the customary parts of the Universal Declaration of Human Rights and all the dispositions of the two International Covenants, as well as to the other international treaties protecting human rights at the global level.

IV. THE POSITION OF INTERNATIONAL HUMAN RIGHTS NORMS AT THE CORE OF THIS NEW CONCEPTION OF NORMATIVITY

The confusion introduced between the notions of *ius cogens* and *erga omnes* obligations and the recognition of the peremptory character of all human

⁴⁶ I.C.J., *Barcelona Traction Light and Power Company Limited*, 5 Feb. 1970, pp. 32 and 47, §§ 33-34 and 91.

⁴⁷ A. DE HOOGH, *Obligations Erga Omnes and International Crimes*, The Hague, Kluwer, 1996, p. 52.

International Law Institute, “Resolution on the Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States”, *Yearbook of the International Law Institute*, 1990, Vol. II, p. 341-ff.

N.H.B. JORGENSEN, *The Responsibility of States for International Crimes*, Oxford, Oxford University Press, 2000, p. 95.

⁴⁸ Y. DINSTEIN, “The *Erga Omnes* Applicability of Human Rights”, *o.c.*, p. 17.

⁴⁹ H. MOSLER, *The International Society as a Legal Community*, Alphen, Sijthoff and Noordhoff, 1980, p. 63.

E. SCHWELB, “The Law of Treaties and Human rights”, *o.c.*, pp. 274-275.

rights in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts are a crystallisation of recent doctrinal developments on the topic.⁵⁰ The “futility” of trying to draw a distinction between the two concepts is clearly evidenced by the observation that “authors have sometimes come to opposite conclusions as to the larger or narrower scope of either”.⁵¹ More crucially, the International Court of Justice appears to have paved the way to the International Law Commission in failing to differentiate noticeably the two concepts.⁵² And, fundamentally, it is equally implied in the analytical description and clarification of both concepts, underlying the doctrinal definitions.

The rules of *ius cogens* have been compared to domestic rules of public policy or public order.⁵³ Indeed, *ius cogens* –whose origins are generally traced to Roman Law– is seen as an embodiment of the principle that “certain types of contract are, by their very nature, injurious to society and therefore contrary to public policy”.⁵⁴ It incorporates a notion of international public order or “public order of the international community”, composed of international rules and principles which cannot be impaired by the invocation of contrary multilateral agreements or unilateral actions. This entrenchment is motivated by the fact that any such attack would go against what constitutes the very foundation of public international law.⁵⁵ Accordingly, it would even bind dissenting

⁵⁰ See, among others, for a clear doctrinal endorsement of the confusion between the two notions:

B. SIMMA, “From Bilateralism to Community Interest in International Law”, *o.c.*, pp. 292-294 and 299-300; who remarks that, although some norms could theoretically be applicable *erga omnes* without having a peremptory character, examples of such rules appears practically speaking difficult to conceive.

⁵¹ C. TOMUSCHAT, “Reconceptualizing the Debate on Ius Cogens and Obligations Erga Omnes”, in J.M. THOUVENIN and C. TOMUSCHAT, *The Fundamental Rules of the International Legal Order: Ius Cogens and Obligations Erga Omnes*, Leiden, Nijhoff, 2006, pp. 425-436, at pp. 425 and 429-430.

⁵² I.C.J., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, 11 July 1996, § 31.

⁵³ P.M. DUPUY, *Droit international public*, 8th ed., *o.c.*, pp. 21 and 294-297.

P.-M. DUPUY, *L'unité de l'ordre juridique international*, *o.c.*, pp. 280-282.

D.J. HARRIS, *Cases and Materials on International Law*, 5th ed., London, Sweet and Maxwell, 1998, p. 836.

H. LAUTERPACHT, “Report”, *Yearbook of the ILC*, 1953, Vol. II, p. 155.

⁵⁴ I. SINCLAIR, *The Vienna Convention on the Law of Treaties*, Manchester, Manchester University Press, 1973, p. 110.

L.S. SUNGA, *The Emerging System of International Criminal Law*, The Hague, Kluwer, 1997, p. 230.

⁵⁵ I.-A.C.H.R., *James Terry Roach and Jay Pinkerton v. United States*, 22 Sept. 1987, 1986-1987 *Annual Report*, No 3/87, §§ 50-54.

H. MOSLER, *The International Society as a Legal Community*, *o.c.*, pp. 17-18.

states,⁵⁶ whether opposed to the concept as such or to its inclusion of some specific norms. Thereby, the notion of *ius cogens* participates to the transformation of the supra-national system into “universal international law”.⁵⁷ Hence, it is introducing into the international legal order a source of objective illegality, which all states can invoke without being affected directly.⁵⁸ Yet, this is precisely the meaning of *erga omnes* obligations and their main documented effect. Incidentally, the definition of peremptory norm in Article 53 of the Vienna Convention expressly refers to the notion of international community (even if it uses the old expression ‘international community of states’). The terminological confusion introduced by the International Law Commission would, then, correspond to a transcription of this analytical and the ensuing academic vision of *ius cogens*.

In consequence, the Commission cannot be reproached its activism, since its Draft Articles merely embody an approach shared by a conceptual analysis of the relevant terms, the similar perception of a large segment of the doctrine, and a clear jurisprudential trend at the international level. For that reason, the *ius cogens* status of all human rights provisions ought to be currently assured and defended. On top of this, and independently of it, the peremptory character of the whole body of international human rights treaties and customs has also been advanced by part of the international case law and doctrine, although it has always been an object of controversy.

On one side, some authors have contested the very notion of customary

⁵⁶ L.A. ALEXIDZE, “Legal Nature of Ius Cogens in Contemporary International Law”, pp. 246-247 and 258.

M. BOS, *A Methodology of International Law*, p. 246.

G. GAJA, “Ius Cogens Beyond the Vienna Convention”, p. 283.

R.S.J. Mc DONALD, “Fundamental Norms in Contemporary International Law”, p. 131.

R.S.J. Mc DONALD, “The Character of the United Nations and the Development of Fundamental Principles of International Law”, p. 199.

C.L. ROZAKIS, *The Concept of Ius Cogens in the Law of Treaties*, Amsterdam, North-Holland, 1976, p. 78.

⁵⁷ M.C. BASSIOUNI, “The Philosophy and Policy of International Criminal Justice”, in *Mélanges Cassese, o.c.*, pp. 65-126, at p. 68.

J. CHARNEY, “Universal International Law”, *American Journal of International Law*, 1993, pp. 529-551.

⁵⁸ C.L. ROZAKIS, *The Concept of Ius Cogens in the Law of Treaties, o.c.*, p. 24.

L.S. SUNGA, *The Emerging System of International Criminal Law, o.c.*, pp. 232-233.

See also: A. VERDROSS, “Ius Dispositivum and Ius Cogens in International Law”, *American Journal of International Law*, 1966, pp. 55-ff., at p. 58; who underlines that *ius cogens* serves the needs of the international society as a whole, rather than those of particular member states.

international peremptory norms,⁵⁹ scepticism stemming from the lack of a clear consensus on the norms benefiting from this status. Yet, this lack of consensus is not enough in itself to cast doubts on the category as a whole.⁶⁰ At least, many decisions of the International Court of Justice affirm the peremptory character of a number of fundamental rights and freedoms. However, the jurisprudence of the majority of the International Court of Justice seems to restrict the scope of *ius cogens* to a limited number of rights and liberties: those considered non-derogable in all human rights instruments; the ban on genocide; the condemnation of crimes against humanity; and the basic principles of humanitarian law, which basically encompass similar norms, with the adjunction of Article 3 common to the four Geneva Conventions and the rule condemning the killing of prisoners of war. A notable addition to the traditional list of inalienable rights is that of the prohibition of discriminations based on grounds of race, colour, descent and national or ethnic origin.⁶¹ This jurisprudence seriously minimises the impact of peremptory provisions, in particular with respect to economic, social and cultural rights. In fact, it only adds to the lists of non-derogable rights inserted in all human rights conventions the need to respect fair trial guarantees and to care for the wounded and sick, as well as the ban of abusive deprivations of personal freedom and racial discriminations.

Specifically, the proscription of the sole acts of discrimination which are

⁵⁹ P. WEIL, *Le droit international en quête de son identité*, pp. 269-271.

P. WEIL, "Towards a Relative Normativity in International Law", pp. 423-442.

K. WOLFKE, *Custom in Present International Law*, pp. 91-92.

K. WOLFKE, "Ius Cogens in International Law", pp. 145-162.

⁶⁰ ABI-SAAB, "Intervention", in A. CASSESE and J.H.H. WEILER, *Change and Stability in International Law-Making*, Berlin, De Gruyter, 1988, p. 96.

H. MOSLER, *The International Society as a Legal Community, o.c.*, p. 19.

L.S. SUNGA, *The Emerging System of International Criminal Law, o.c.*, p. 233.

⁶¹ I.C.J., *Corfu Channel*, Merits, 9 Apr. 1949, p. 22.

I.C.J., *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Adv. Op., 28 May 1951, p. 23.

I.C.J., *Barcelona Traction Light and Power Company Limited*, 5 Feb. 1970, p. 32, § 34.

I.C.J., *Namibia Advisory Opinion*, Adv. Op., 21 June 1971, p. 57, § 131.

I.C.J., *United States Diplomatic and Consular Staff in Tebran*, Merits, 24 May 1980, pp. 42-43, § 91.

I.C.J., *Military and Paramilitary Activities in and against Nicaragua*, Merits, 27 June 1986, pp. 112-114, 128-130 and 147.

I.C.J., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Request for the Indication of Provisional Measures, 8 Apr. 1993, p. 23, § 49.

I.C.J., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Further Request for the Indication of Provisional Measures, 13 Sept. 1993, p. 348, §§ 51-52.

I.C.J., *Legality of the Threat or Use of Nuclear Weapons*, Adv. Op., 8 July 1996, § 79.

based on race, colour, descent and national or ethnic origin as a rule of *ius cogens* appears decidedly unsatisfactory. Moreover, it has now become highly contestable. In particular, excluding gender equality from the core of non-derogable norms is truly problematic, considering the gravity of human rights violations resulting from discriminations against women. In addition, it neglects the fact that the United Nations Charter, whose dispositions are binding on all members of this organisation and thus on the quasi-totality of states, outlaws sex-based discriminations in several of its provisions.⁶² More generally, the Inter-American Court of Human Rights has recently recognised, in an advisory opinion concerning the rights of ‘illegal’ migrants to fair trial and adequate labour standards, the peremptory character of the principle of equality and non-discrimination taken as a whole. The Court specifies that “this principle may be considered peremptory under general international law, in as much as it applies to all states, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals”. And it justifies this judgement by the fact that “the whole legal structure of national and international public order rests on” the ban of any discrimination. As a result, it sums up that the “discriminatory treatment of any person, owing to gender, race, colour, 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 is unacceptable”.⁶³

The exclusion of all economic and social rights from the list of peremptory international rules is equally upsetting. Yet, this conclusion was put into question by a decision of the Appeals Chamber of the International Tribunal for the former Yugoslavia, which declared that “most customary rules of international humanitarian law” are norms of *ius cogens*.⁶⁴ In the light of the Tribunal’s views regarding the customary character of the biggest part of the laws and customs of war,⁶⁵ this decision does, in turn, give a peremptory status to most provisions of the *ius in bello*. This largely extends the number of non-derogable individual freedoms and

⁶² UN Charter, Articles 1 § 3, 8, 13 § 1, 55, 56, 62 § 2 and 76.

⁶³ A.C.H.R., *Legal Status and Rights of Undocumented Migrants*, Adv. Op. OC-18/03, 17 Sept. 2003, *Series A*, Vol. 18, §§ 97-101 and 110.

⁶⁴ I.C.T.Y., Appeals Chamber, *Tadic Case (Prijedor)*, IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 Oct. 1995, § 143.

A. CASSESE, “The International Criminal Tribunal for the Former Yugoslavia and the Implementation of International Humanitarian Law”, in L. CONDORELLI *et al.*, *The United Nations and International Humanitarian Law*, Paris, Pedone, 1996, pp. 229-247, at pp. 240-241.

⁶⁵ I.C.T.Y., Appeals Chamber, *Tadic Case (Prijedor)*, IT-94-1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 Oct. 1995, §§ 96-137.

entitlements, including in the field of economic, social and cultural rights.

Furthermore, the Court of First Instance of the European Communities had to deal with the contents of international *ius cogens* in several decisions, in the context of the United Nations Security Council's imposition upon all states members of that organisation to freeze the bank accounts of suspected terrorists. It, unfortunately, upheld the European anti-terrorism measures adopted in application of the mentioned Security Council resolutions. However, it did not stop its analysis there. In the process of reaching its verdict, it judged that it cannot review the legality of such resolutions, beyond their conformity with peremptory norms of international law, and went on to examine the scope of such a category of rules. During the subsequent investigation of this question, it recognised that the protection of private property, the entitlement to a fair hearing and the access to an effective judicial remedy are part of the core human rights provisions benefiting from *ius cogens* status, even though it only sanctions arbitrary deprivations of these liberties.⁶⁶ In view of the fact that international organs have the tendency to concede a lesser ranking in the rights hierarchy to individual property than to most other human rights, this shows a marked tendency in favour of recognising such a character to all individual freedoms and entitlements.

On the other side, it has been suggested that all the norms of humanitarian law and the treaties protecting human rights universally ought to be judged as imperative provisions.⁶⁷ For instance, the Human Rights Committee underlines the peremptory character of a great number of rights.⁶⁸ The Inter-American Commission also recognises the *ius cogens* status of fundamental freedoms and entitlements⁶⁹ and affirms, along the same lines, but with a more specific focus on applicable regional instruments, that the entire American Declaration of the Rights and Duties of Man is

⁶⁶ C.F.I., *Abmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, T-306/01, 21 Sept. 2005, §§ 292-293 and 343.

C.F.I., *Yassin Abdullah Kadi v. Council and Commission*, T-315/01, 21 Sept. 2005, §§ 241-242 and 288.

See also: C.F.I., *Chafiq Ayadi v. Council*, T-253/02, 12 July 2006.

C.F.I., *Faraj Hassan v. Council and Commission*, T-49/04, 12 July 2006.

⁶⁷ See, among others: P. ALSTON and B. SIMMA, "The Sources of Human Rights Law: Custom, Ius Cogens, and General Principles", *Australian Yearbook of International Law*, 1992, pp. 82-108, at pp. 103-107.

H. MOSLER, *The International Society as a Legal Community*, o.c., p. 60.

⁶⁸ H.R. Committee, *General Comment No 24 (52)*, o.c., § 8.

⁶⁹ I.-A.C.H.R., *Michael Edwards et al. v. Bahamas*, 4 Apr. 2001, 2000 Annual Report, No 48/01.

“a mandatory rule of *ius cogens*”.⁷⁰

The Japanese judge Tanaka adopts a similar position in his famous dissenting opinion before the International Court of Justice, in the *African South West Case*. During his evaluation of the claim of the principle of non-discrimination to the status of *ius cogens*, he extends it to all other human rights. In consequence, he considers that human rights “are not the product of a particular juridical system in the hierarchy of the legal order, but the same human rights must be recognised, respected and protected everywhere man goes”. Then, he adds that “the existence of human rights does not depend on the will of the state”. To be sure, “a state or states are not capable of creating human rights”. On the contrary, “they can only confirm their existence and give them protection”. As a result, “the role of the state is no more than declaratory”.⁷¹ Moreover, in the *Nicaragua Case*, the Court goes into the same direction, although without expressly mentioning the notion of *ius cogens*. And it points out that the inexistence of any conventional engagement for a country’s public authorities to respect human rights does not mean that this state can violate individual rights with impunity.⁷² This indicates that the Court gives to general international human rights law as a whole a preemptory status or, at the very least, a customary character.

V. THE CONSEQUENCES OF THIS NEW CONCEPTION OF NORMATIVITY FOR THE PROTECTION OF INDIVIDUAL RIGHTS

The crystallisation of this developing tendency and the recognition by the International Law Commission of the fact that all human rights belong to *ius cogens* bears a capital importance in practical terms. Indeed, the preemptory norms of general international law or rules of *ius cogens* are specifically defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as norms “accepted and recognised 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 prohibition of any possibility for states to depart from the rules of *ius cogens*, even through a bilateral or multilateral treaty binding the sole parties to this agreement, constitutes their superiority in comparison with provisions of *ius dispositivum*.⁷³

⁷⁰ I.-A.C.H.R., *Vila-Masot v. Venezuela*, 12 Oct. 1998, 1998 *Annual Report*, No 87/98, §§ 4 and 21.

⁷¹ I.C.J., *South West Africa*, 18 July 1966, TANAKA, Dissenting Opinion, pp. 295-298.

⁷² I.C.J., *Military and Paramilitary Activities in and against Nicaragua*, Merits, 27 June 1986, p. 134, § 267.

⁷³ A. DE HOOGH, *Obligations Erga Omnes and International Crimes, o.c.*, p. 45.

As a result of this, treaties which conflict with peremptory norms of international law already existing at the time of their conclusion are void, while the emergence of new peremptory norms invalidates and terminates all conflicting treaties previously adopted. Indeed, “the basic characteristic of a *ius cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status”. So, “in the event of a conflict between a *ius cogens* rule and any other rule of international law, the former prevails”, with the result that “the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule”.⁷⁴ In consequence, *ius cogens* norms introduce a hierarchy among international norms and serve as criteria both for the validity of other legal rules and for the legality of states’ acts.⁷⁵

Moreover, according to the legal stance expressed in Article 44 § 5 of the Vienna Convention, it seems that invalidation of a treaty in reason of its Article 53 -that is, for inconsistency with a peremptory rule of international law- affects its entirety and not merely the inconsistent clause. Yet, annulling the sole conflicting dispositions appears preferable where they can be severed from the rest of the agreement and that the aim of the latter does not contradict any peremptory norm. And, the International Law Commission allows the parties to revise themselves the endangered treaty to bring it in line with *ius cogens* and salvage it from nullity.⁷⁶ Accessorily, most of the rules of *ius cogens* that were proposed by national delegations during the drafting of the Vienna Convention have a customary origin,⁷⁷ even if their primary position in the structure of the international system let them escape the hazards of states’ fluctuating practice.⁷⁸ But some of them can also derive from treaties, general

J. SZTUCKI, *Ius Cogens and the Vienna Convention on the Law of Treaties*, Vienna, Springer, 1974, p. 68.

⁷⁴ E.C.H.R., *Al-Adsani v. UK*, 21 Nov. 2001, L. CAFLISCH *et al.*, Joint Dissenting Opinion, §§ 1 and 3.

⁷⁵ P.-M. DUPUY, *Droit international public*, 8th ed., *o.c.*, p. 296.

P.-M. DUPUY, *L'unité de l'ordre juridique international*, *o.c.*, pp. 273, 281, 299-302, 306, 393-394 and 400.

⁷⁶ International Law Commission, *Report on the Work of its 15th Session*, 1963, UN Doc., A/5509, p. 199.

⁷⁷ C.L. ROZAKIS, *The Concept of Ius Cogens in the Law of Treaties*, *o.c.*, p. 66.

See also, on the uncertainty surrounding the sources of *ius cogens* norms:

M. BYERS, *Custom, Power and the Power of Rules*, Cambridge, Cambridge University Press, 1999, pp. 187-195; who analyses in details the similitude and divergence between these rules and the three primary sources of international law to conclude that they are more alike customary norms.

⁷⁸ P.-M. DUPUY, *L'unité de l'ordre juridique international*, pp. 223-224 and 397.

principles of international law, or United Nations resolutions.

Anyhow, the wording of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts results in banning any treaty abolishing or negatively affecting international human rights law -be it under the cover of reservations- and in rendering these norms indistinguishably applicable in peace and wartime, as well as absolutely non-derogable in cases of state of emergency. This is an important departure from the ordinary rules governing other treaty provisions and international customs. Indeed, although they cannot be the objects of any reservation,⁷⁹ some derogation can normally be taken from customary rules and states can contract treaties derogating from some of these norms in their bilateral relations.⁸⁰ Conversely, human rights instruments are, now, legally immunised against such common dangers.

As a corollary of their *erga omnes* and *ius cogens* character, their appertaining to an international public order and the ensuing *actio popularis* against domestic attacks on the liberties they protect, individual rights and freedoms are excluded -in the limits of their enactment in international agreements and customary law- from the powers of domestic authorities.⁸¹ By definition, international human rights and humanitarian norms can, therefore, never be legitimately or validly subjected to states' assaults. In the end, they are legally removed from the scope of state sovereignty; they take precedent over it and curtail its legitimate scope. Essentially, they constitute both the foundation and the keystone of a transfer of the ultimate sovereignty to the international community, to the detriment of the powers and competences of its member states.

On the basis of their privileged position, it has been argued that "the Vienna Convention on the Law of Treaties does not and cannot apply in quite the same manner to the interpretation of human rights treaties as it does to ordinary treaties" and that "autonomous rules may have to be

⁷⁹ I.C.J., *North Sea Continental Shelf*, Merits, 20 Feb. 1969, pp. 38-39; PADILLA NERVO, Separate Opinion, p. 97; TANAKA, Dissenting Opinion.

⁸⁰ G. FITZMAURICE, "Third Report on the Law of Treaties", *Yearbook of the ILC*, 1958, Vol. II, p. 27.

H. LAUTERPACHT, "Report", *o.c.*, p. 155.

J. SZTUCKI, *Ius Cogens and the Vienna Convention on the Law of Treaties*, *o.c.*, pp. 180-181.

⁸¹ J. KOLASA, "Rules on Emergency Powers in International Human Rights Treaties", *o.c.*, p. 110.

D. TÜRK, "Reflections on Human Rights, Sovereignty of States and the Principle of Non-Intervention", in *Mélanges Eide*, *o.c.*, pp. 757-766, at pp. 757-758 and 765-766.

developed for the interpretation of human rights instruments”.⁸² This being said, a departure from the dispositions of the Vienna Convention is not even necessary to ground a restrained conception of state sovereignty and the absolute priority of individual entitlements over conflicting considerations. As mentioned above, Article 31 of the Vienna Convention states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The application of this principle of interpretation to the case in hand permits to bypass the question of the need to construct an alternative set of secondary rules to deal with fundamental rights. To sum up, Article 31 provides a textual justification for taking into consideration the particular aim and specific position of human rights instruments, when interpreting them. This motivates, in turn, the adoption of distinct solutions in practical instances, *without* departing from the frame of the Vienna Convention.

The International Law Association draws the consequences of these developments until their logical conclusions and, eventually, completely dissociates human rights from states powers and undertakings. It remarks that fundamental rights “are no longer the reverse side of laws, their mirror image, as it were”; that is to say, that they “must still exist even if all states with their statutes and laws were to collapse”.⁸³ Incidentally, this pronouncement is confirmed by the Preamble to the Inter-American Convention on Human Rights, whose second paragraph specifies that “the essential rights of man are not derived from one’s being a national of a certain state” and that “they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states”. Thus, “since they are not derived from the state or any other external authority, they may

⁸² T. BUERGENTHAL, “The European and Inter-American Human Rights Courts: Beneficial Interaction”, in *Mélanges Ryssdal, o.c.*, pp. 123-133, at p. 130.

⁸³ International Law Association, *Problems in the Implementation of Human Rights: Minimum Standards of Human Rights Norms in a State of Exception (Montreal, 1982)*, London, ILA, 1983, p. 123.

See also: E.C.H.R., *Belilos v. Switzerland*, 29 Apr. 1988, J. DE MEYER, Concurring Opinion, *Series A*,

Vol. 132; who refers to the notion of *ius cogens* after stating that the respect and protection of individual rights exists “even in the absence of any instrument of positive law”.

C. TOMUSCHAT, *Human Rights*, Oxford, Oxford University Press, 2003, p. 60; who acknowledges that, with the end of the cold war and the fall of communism, “the intellectual premise according to which human rights cannot be conceived of without and outside the state seems to have lost ground”.

not be taken away by any authority”.⁸⁴ Similarly, the Inter-American Court of Human Rights considers that “human rights must be respected and guaranteed by all states”. And it justifies this stance by an appeal to the fact that they are “superior to the power of the state, whatever its political structure”.⁸⁵ In a nutshell, individuals hold basic rights because of their humanity and not due to some legal tie with the country of which they are nationals. Therefore, they owe everything to themselves and nothing to the state.⁸⁶

This type of approach is often criticised as the expression of a natural law conception and generally discarded as such. However, the primacy of individual freedom over public interests and the general welfare, the obligation for states parties to the United Nations to respect fundamental rights independent of further agreement on their part, and the international protection of those basic entitlements in all instances, are not mainly rooted in natural rights and their correlative duties. They are, on the contrary, integral components of the international legal order as it stands today; and their affirmation is nothing but positivistic. In fact, they simply refer to the existence, in positive international law, of peremptory norms –namely, *ius cogens* obligations, which are undoubtedly a part of the current legal order at the international level– and to states’ duties towards the international community, as distinct from the sum of all states that belong to it.⁸⁷ This is inherent to the fact that the international arena is not restricted anymore to a select club of states, but composed of a wide array of public and private actors, whose conflicting claims need to be protected globally.

VI. THE FUNCTION OF HUMAN RIGHTS IN THE STRUCTURING OF A NEW UNIVERSAL SPACE OF NORMATIVITY

The distinctive role played by human rights treaties and their specific

⁸⁴ J. KOLASA, “Rules on Emergency Powers in International Human Rights Treaties”, *o.c.*, p. 110.

O. SCHACHTER, “Human Dignity as a Normative Concept”, *American Journal of International Law*, 1983, pp. 848-854, at p. 853.

D. TÜRK, “Development and Human Rights”, in J.L. HARGROVE and L. HENKIN, *Human Rights, o.c.*, pp. 167-181, at p. 168.

⁸⁵ A.C.H.R., *Legal Status and Rights of Undocumented Migrants*, Adv. Op. OC-18/03, 17 Sept. 2003, *Series A*, Vol. 18, § 73.

⁸⁶ P.-M. DUPUY, *L’unité de l’ordre juridique international, o.c.*, p. 104.

⁸⁷ P.-M. DUPUY, “Some Reflections on Contemporary International Law and the Appeal to Universal Values”, *o.c.*, pp. 135-136.

A.C. KISS, “La Convention européenne des droits de l’homme a-t-elle créé un ordre juridique autonome?”, *o.c.*, p. 494.

functions imply that these instruments can never admit clauses limiting the scope or application of their provisions for contradictory purposes. As a result, restrictions to these norms can solely be permitted where this is done with the clear and incontestable aim of guaranteeing and enhancing the protection of individual rights. This contention is supported by the particular position occupied by fundamental rights in the general structure of the international system and favours a vision of international sovereignty residing in the international community as a whole and constructed around the protection of individual entitlements, over its 'political' state-based Westphalian counter-part. Under this new paradigm, the international society becomes the first guarantor of fundamental liberties. Consequently, at the international level, the possibility emerges for unmediated individual claims addressed directly to the international community, independent of any grounding in the nation-state. And, in due course, we end up with a radically cosmopolitan model for the global society.

Bearing in mind the notoriously poor record of state organs and public officials, whenever they are given the opportunity to deal with such private actors as they wish to, the rights and interests of those new international subjects are clearly better protected before supra-national institutions. Accordingly, the international supervision of the respect of human rights and the presence of international mechanisms facilitating the defence of individuals against the national establishment, which is exercising power over them, are answering to an imperative need of the international community.⁸⁸ To be sure, abandoning the protection of human rights to domestic authorities, which are the prime violators of individual freedom,⁸⁹ is obviously inadequate, if not entirely dangerous. Seeing the prominent place given to fundamental rights and more generally to individual concerns in contemporary international law, this had to be remedied one way or another. In consequence, international law and the international society are entrusted with a twofold role as guardians of humanitarian norms and obstacles to states' misdeeds. The role of supervising the respect of these fundamental freedoms and entitlements is ultimately entrusted to the whole international community; that is, all

⁸⁸ H. MOSLER, *The International Society as a Legal Community, o.c.*, p. 59.

⁸⁹ See, among others, for a particularly enlightening characterisation of the situation: A. CASSESE, "La valeur actuelle des droits de l'homme", in *Mélanges R.-J. Dupuy*, Paris, Pedone, 1991, pp. 65-75, at pp. 71-72; who observes that, although states are supposed to ensure the respect of human rights, they are on the contrary the main violators of these rights and underlines the absurdity of having to rely on governments' protection of individual freedoms by comparing it to kindly asking a seventeenth century slave-trader to abandon or reduce his commercial practice.

subjects of public international law in their capacity of trans-national actors and subjects of a cosmopolitan legal order. The enforcement of these norms is, accordingly, equally entrusted to the entire international community; more specifically, to domestic courts and tribunals in first instance and with an appeal before international monitoring bodies.

Through the recognition of their legal prevalence in supra-national documents, fundamental rights are actually providing the conceptual linkage between liberalism and contemporary developments in international law; leading to a new concept of liberal sovereignty, where states “sovereignty is not absolute and includes respect for its legal limitations”.⁹⁰ Incontestably, “sovereignty is only a name given to so much of the international field as is left by law to the individual action of states”.⁹¹ In the first place, states’ pretensions to sovereignty rest, at the international level, on the recognition of this principle in the Charter of the United Nations. As a result, national sovereignty is only appropriate so long as states act inside the limits established by the Charter and respect the norms it protects. This includes, above all, the rights of individuals living under their jurisdiction. In consequence, domestic authorities lose their sovereign control when they are implicated in human rights violations, as the commission of such abuses is clearly outside the limits of the dominion that the Charter concedes to them. Therefore, rights are the principal channel of the contemporary shift from a traditionalist archetype of state sovereignty to a paradigm of liberal international or cosmopolitan sovereignty, which seeks to curtail political power and render it accountable by placing “at its centre the primacy of individual human beings”.⁹²

As such, rights determine the limits of law’s legitimacy and the democratic character of the polity. They “serve as constraints on which institutions we should have”⁹³ and as standards of legality of municipal organs. A legitimate state is a rights-respecting state, and democratic institutions are

⁹⁰ D. TÜRK, “Reflections on Human Rights, Sovereignty of States and the Principle of Non-Intervention”, *o.c.*, p. 765.

⁹¹ H.L.A. HART, *The Concept of Law*, Oxford, Clarendon, 1961, pp. 215-216 and 256; 2nd ed., Oxford, Clarendon, 1994, pp. 220-221 and 305.

⁹² D. HELD, “Law of States, Law of Peoples”, *o.c.*, especially pp. 1-2 and 38-39; who underlines that “the study of the nature and changing forms of sovereignty is the study of the shifting meaning of rightful political authority”, that “sovereignty is a contested phenomenon” and that, “in tracing shifts in the regime of sovereignty, the concern is with the reconfiguration of the proper form and limits of political power and the changing connotation of legitimate political authority”.

⁹³ R.G. FREY, “Act-Utilitarianism, Consequentialism and Moral Rights”, in R.G. FREY, *Utility and Rights*, Oxford, Blackwell, 1985, pp. 61-85, at p. 63.

institutions protective of basic rights. Accordingly, just institutions, both at the trans-national and at the municipal level, emerge from the antecedent rights of individuals. This inverts the conventional republican conception, where fundamental liberties materialise as the result of the adoption of traditional democratic principles or the institutionalisation of the general will. Indeed, the entrenchment of basic rights in constitutional documents, international treaties and customs becomes the corner-stone of states' legitimacy. Subsequently, legal norms and decisions that ostensibly infringe fundamental rights need not only to be considered unjust but also invalid. In a nutshell, human rights constitute at the same time constraints on the individual actions of every agent and standards for the evaluation of the legitimacy of political structures and the validity of laws.

In this new perspective, human rights constitute a sort of Hartian 'rule of recognition' of the international legal order; namely, they serve as criteria for the validity at the supra-national level of each and every legal provision otherwise adopted. Herbert Hart defines a rule of recognition as "a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation". It is normally concerned with conferring powers but it can, nevertheless, include substantive and even moral conditions. It unifies all other norms into a coherent legal system. And it operates as a benchmark for their validity. Therefore, it constitutes the defining element and the ultimate foundation of the entire legal order. Hart adds that "for the most part the rule of recognition is not stated, but its existence is *shown* in the way in which particular rules are identified", in practice, by various actors, chiefly including judicial bodies. This entails a clearly customary aspect.

Besides, the validity of that particular rule does not need to be demonstrated. In spite of the fact that it serves as a touchstone for the validity of all other rules within a given legal order, it cannot (logically) ground either its own legitimacy or that of the system as a whole. These two issues are clearly interdependent but they require some further justification, as well as an extra-legal point of reference from which to assess their truthfulness. Yet, as long as one remains inside the legal paradigm, the rule of recognition functions as a factor of self-validation and rationalisation of that regime. Hence, Hart's rule of recognition is, at the same time, a norm and a blunt fact. It also has both a legal and a meta-legal character. In a way, it is axiomatic precisely because it is the keystone of the system, the main hypothesis on which it is constructed and from

which it derives its internal consistency.⁹⁴

This is precisely the role played by human rights on the international plane. Their *ius cogens* status does not merely give them a peremptory character but implies also that no treaty can restrict or oppose them. This means that they work in practice as a standard for the legality of other norms, which is the nature and function Hart ascribes to his rule of recognition. Accordingly, the European Court of Human Rights considers that domestic rules and policies which violate basic human rights cannot qualify as the law, at least for the purposes of the Convention.⁹⁵ Moreover, as part of the wider set of *ius cogens* norms, they have a customary character at the international level. And the progressive strengthening of their effective recognition and protection has been tightly linked to the development of international customs. Further, although not always explicitly articulated, their impact on the pronouncements of international courts, supervisory organs and other institutions is undoubtedly decisive. They are posited as the core of the recently emerging international public order and the principal justification for the post-Westphalian shift from traditional states' sovereignty to a new conception of sovereignty, residing in the international community, as the guarantor of universal principles and the protector of individual entitlements. In consequence, they constitute the perfect illustration of the materialisation of the international legal integration process through a normative hierarchy and of a universal, extra-territorial and quasi-objective, substantive law; hence, embodying a radically novel conception of normative space and normativity.

⁹⁴ H.L.A. HART, "Lon L. Fuller's *The Morality of Law*", in H.L.A. HART, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983, pp. 359-361.

H.L.A. HART, *The Concept of Law*, *o.c.*, pp. 92-108, 113 and 245-246; 2nd ed., *o.c.*, pp. 94-112, 116, 250 and 292-294.

⁹⁵ E.C.H.R., *Streletz, Kessler and Krenz v. FRG*, 22 Mar. 2001, § 87.