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REPORT
"ARE THERE DIFFERENTIATIONS AMONG HUMAN RIGHTS? JUS COGENS, CORE HUMAN RIGHTS, OBLIGATIONS ERGA OMNES AND NON-DEROGABILITY"

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Introduction

In 1968, the states attending the first United Nations Conference on Human Rights in Teheran pronounced that all human rights are indivisible.[1] A decade later, General Assembly resolution 32/130 of December 16, 1977, reiterated that all human rights and fundamental freedoms are indivisible and interdependent and that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil and political and economic, social and cultural rights. Despite such proclamation, repeated from Teheran to Vienna, the issue of hierarchy within the field of human rights remains debated.[2] Debate has included discussion of the importance and impact of doctrines of norms *jus cogens* and obligations *erga omnes* as well as labeling certain human rights core or non-derogable. In general, there appears to be a gulf between far-reaching claims of scholars about the content and consequences of *jus cogens* or other bases for differentiating rights and the more cautious practice of states and most international tribunals. As the same time, within and among human rights treaties, states can and have singled out certain norms for special treatment (e.g. making rights non-derogable rights or criminalizing their violation).

The relationships among, and the sources of, the different doctrines are complex. It appears logical that all international crimes are obligations *erga omnes* because the international community as a whole identifies and may prosecute and punish the commission of such crimes. The reverse is not the case, however. Not all obligations *erga omnes* have been designated as international crimes. Racial discrimination, for example, has been mentioned by the ICJ as an obligation *erga omnes*, but it is not included among international crimes in the Rome Statute or other agreement. As for sources, international crimes are established by treaty, obligations *erga omnes* primarily by custom. Treaties may change custom,[3] custom may render obsolete earlier agreements, treaties may purport to forestall the formation of contrary custom (as UNCLOS does). In this context, *jus cogens* or peremptory norms can be viewed either as a new and non-consensual source of legal obligation or as a consensual identification of certain norms in positive law that are given a normative status higher than others. In its Advisory Opinion on the Threat or Use of Nuclear Weapons, the ICJ did not resolve this question, saying only that the question whether a norm is part of the *jus cogens* relates to the legal character of the norm.[4]

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[1] See *Final Act of the International Conference on Human Rights, Teheran, 22 April - 13 May 1968* (United Nations publication, Sales No. E.68.XIV.2), chap. II, para. 13.

2 The related issue of whether or not human rights law generally has primacy over other international law matters was dealt with in the first session of this seminar.

[3] As remarked by the International Court of Justice in the North Sea Continental Shelf Cases, "Without attempting to enter into, still less pronounce upon any question of *jus cogens*, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties ..." 1969 ICJ Rep. 42, para. 72.

[4] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 1996, para. 83. The Court went on to say that AThe request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

I. *Jus cogens*

In national legal systems, it is a general principle of law that individual freedom of contract is limited by the general interest.[14] Agreements that have an illegal objective are void and those against public policy will not be enforced.[15] Private agreements, therefore, cannot derogate from the public policy of the community. The international community remains divided over whether the same rules apply to the international legal system and whether there are other consequences to violations of peremptory norms, beyond voiding inconsistent agreements. A strictly voluntarist view of international law rejects the notion that a State may be bound to an international legal rule without its consent and thus does not recognize a collective interest that is capable of overriding the will of an individual member of the society. The PCIJ, in one of its first decisions, stated that [t]he rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law'.[16] As recently as 1986, the ICJ reaffirmed this approach in respect to the acquisition of weaponry by States.[17]

The extent to which the system has moved and may still move toward the imposition of global public policy on non-consenting States remains highly debated, but the need for limits on State freedom of action seems to be increasingly recognized. International legal instruments and doctrine now often refer to the common interest of humanity[19] or common concern of mankind to identify broad concerns that could form part of international public policy. References also are more frequent to the international community as an entity or authority of collective action.[2]

The assertion of *jus cogens* norms in practice has focused on two main issues: (1) the "trumping" value of such a norm over other norms of international law, especially customary immunities from suit; (2) imposition of a norm on a persistent objector or in a national system which does not give supremacy to "ordinary" international law. It should be noted that the problem of dissenting States is not as widespread as might be assumed; all states have accepted human rights obligations as members of the United Nations and are parties to at least some of the international instruments. In most cases, therefore, the problem is one of ensuring compliance by States that have freely consented to the obligations in question and not one of imposing obligations on dissenting States. It should also be noted that there is rarely, if ever, any discussion of the evidence that leads to the conclusion that a particular norm or right is part of the *jus cogens* canon. Instead, most tribunals and scholars make unsupported and conclusory assertions in this respect. The remainder of this section reviews the development and application of *jus cogens* doctrine in theory and in practice.

a. Development of *jus cogens* as a concept

The notion of *jus cogens* or peremptory norms as a limitation on international freedom of contract arose in the UN International Law Commission during its work on the law of treaties. An early ILC rapporteur on the subject proposed that the ILC draft convention on the law of treaties include a provision voiding treaties contrary to fundamental principles of international law.[5] This proposal clearly constituted a challenge to the consensual basis of international law, which viewed States as having the right *inter se* to opt out of any norm of general international law. It also represented progressive development of international law and not a codification of

5 Sir Humphry Waldock proposed the concept and three categories of *jus cogens*: (1) illegal use of force; (2) international crimes; and (3) acts or omissions whose suppression is required by international law. The categories were dropped by the ILC, because each garnered opposition from at least two-thirds of the Commission. See Kearney and Dalton, 1970, p 535.

existing State practice.[6] The concept was controversial and divided the Vienna Conference on the Law of Treaties. Strong support came from the Soviet bloc and from newly independent States, who saw it as a means of escaping colonial-era agreements. Western countries were less positive and several expressed opposition to the notion of peremptory norms, voting against the provision and withholding ratification of the treaty because of persisting objections to the concept. To date, the VCLT has garnered 108 ratifications, a little over half the countries of the world.

The drafting of a second treaty on treaties, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, indicated continued uncertainty over the concept of norms *jus cogens*. The text proposed by the ILC included provisions on *jus cogens* modelled after the 1969 VCLT. The commentary called the prohibition of the illegal use of armed force embodied in the UN Charter the most reliable known example of a peremptory norm and also claimed that the notion of peremptory norms, as embodied in VCLT Article 53, had been recognized in public international law before the Convention existed, but that instrument gave it both a precision and a substance which made the notion one of its essential provisions'[7] The representative of France disagreed during the plenary drafting session, expressing his government' opposition to VCLT Article 53 because it did not agree with the recognition that article gave to *jus cogens* whilst another government called *jus cogens* still a highly controversial concept which raised the fundamental question of how to recognize the scope and content of a peremptory norm of general international law, noting that time had revealed 'a divergence of views since 1969 regarding the nature of norms of *jus cogens*, which it had not been possible to define.[8] The text of the Convention was adopted by sixty-seven to one, with twenty-three States abstaining; it has yet to enter into force. Several States explained their abstention by referring to the Articles concerning *jus cogens*, including the dispute settlement provisions on the topic.[25] Even some of those who favored *jus cogens* expressed uncertainty. The representative of Brazil called *jus cogens* a concept in evolution.[26]

No human rights instrument refers to peremptory norms or *jus cogens*.[9] However, to the extent that the theory of peremptory norms derives from custom, natural law, or international public policy, this absence of treaty language is not determinative of the existence or consequences of *jus cogens* norms. The Vienna Convention defines the source of *jus cogens* as the will of the international community (i.e., it is a non-derogable norm "accepted and recognized by the international community of states as a whole"). Notions of *jus cogens* rights, like the existence of human rights themselves, may be grounded in natural law as well. In this respect, it may be noted that human rights instruments recognize that human rights do not derive from the will of

6 Robledo called it 'une innovation profonde et un grand pas franchi'. ROBLEDO, AG (1982BIII), Le Ius Cogens International: Sa Genese, Sa Nature, Ses Fonctions, 172 *Recueil des Cours* 17.

7 According to the Commentary, 'it is apparent from the draft articles that peremptory norms of international law apply to international organizations as well as to states, and this is not surprising. A/Conf.129/16/Add.1 (vol II), pp 39, 44.

8 United Nations Conference on the Law of Treaties between States and International Organizations or Between International Organizations, Vienna, 18 FebruaryB21 March 1986, A/Conf.129/16 (vol I), 17. See also the concerns expressed by Germany, and similar objections raised to Article 64 which concerns the emergence of a new peremptory norm of general international law (p 18).

9 The only references to peremptory norms in international texts are found in the Vienna conventions on the law of treaties. Article 53 of the 1969 Convention (VCLT), concerning treaties between states, provides that a treaty will be void 'if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Such a norm is defined by the VCLT as one 'ccepted 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 having the same character. Article 64 adds that the emergence of a new peremptory norm of general international law will render void any existing treaty in conflict with the norm. No clear agreement was reached during the VCLT negotiations nor has one emerged since then about the content of *jus cogens*.

states, but are Ainalienable@or Ainherent@[10] The American Convention on Human Rights forthrightly proclaims that Athe essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and … they therefore justify international protection. . . .[11]

b. Application of *jus cogens* by international tribunals

At the International Court of Justice the term *jus cogens* or peremptory norms appears only in separate or dissenting opinions;[27] States rarely raise the issue[28] and when they do the Court seems to take pains to avoid any pronouncement on it.[29] The 1986 *Nicaragua* decision, most often cited for the Court's approval of *jus cogens*, does not in fact pronounce on the concept.[32] In its subsequent advisory opinion on nuclear weapons, the ICJ utilized descriptive phrases that could be taken to refer to peremptory norms, in calling some rules of international humanitarian law so fundamental to respect for the human person and 'elementary considerations of humanity that they constitute intransgressible principles of international customary law.[33] The Court did not elaborate and it is left to the reader to determine whether or not intransgressible was intended to indicate that the rules are peremptory .

The ICJ's *Arrest Warrant* judgment of 14 February 2002 is perhaps the case that most closely implicates norms asserted to be *jus cogens*. Belgium issued an international arrest warrant charging the Congolese foreign minister with grave breaches of the Geneva Conventions of 1949 and with crimes against humanity. Congo claimed that in doing this Belgium violated the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers.[30] Based on the pleadings, the Court proceeded from the assumption that Belgium had jurisdiction under international law to issue and circulate the arrest warrant. The Congo contended that immunity from criminal process is absolute or complete and thus subject to no exception, even for international crimes. Belgium specifically argued that immunities cannot apply to war crimes or crimes against humanity, citing treaties, international and national tribunals, and national legislation. In particular, it contended that an exception to the immunity rule was accepted in the case of serious crimes under international law. The Court held that certain holders of high-ranking office enjoy immunity from civil and criminal process and concluded that no customary international law restricts diplomatic immunity when accused are suspected of having committed war crimes or crimes against humanity. The ICJ came to this conclusion without discussing the possible *jus cogens* status of the accusations or the effect of *jus cogens* norms on sovereign immunity.[31]

Human rights tribunals until quite recently also avoided pronouncing on *jus cogens*. In its only human rights judgment to discuss *jus cogens*, decided in 2002, the European Court of Human Rights denied that violation of the peremptory norm against torture could act to deprive a state of sovereign immunity.[34] The court agreed that torture is a peremptory norm, a fundamental value and an absolute right, but found that it was Aunable to discern@ any basis for overriding State immunity from civil suit where acts of torture are alleged.

[10] Pbml., Universal Declaration of Human Rights, *supra* note 5 at para. 1: pmbl, ICCPR, *supra* note 6, para. 2 (Arecognizing that these rights derive from the inherent dignity of the human person@).

[11] American Convention on Human Rights, 22 Nov. 1969, OASTS 36, O.A.S. Off. Rec. OEA/Ser.L/V/11.23, doc. 21, rev. 6 (1979), reprinted in 9 I.L.M. 673 (1970).

In the Inter-American Court of Human Rights, the term has been discussed only once by the court as a whole, in its 2003 advisory opinion on the juridical condition and rights of undocumented migrants.[12] Mexico requested the opinion largely to indicate its concern with domestic labor laws and practices in the United States. Perhaps in an effort to anticipate possible U.S. arguments that it has not consented to relevant international norms, Mexico's fourth question to the court asked: AWhat is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms *jus cogens*? Mexico also asked the court to indicate the legal effect of a finding that these norms are *jus cogens*?

Mexico's request generated considerable interest. Five other states, not including the United States, participated in the proceedings, as did the Inter-American Commission on Human Rights; in addition, a dozen individuals and groups filed briefs as *amici curiae*. However, only the interventions of the Commission, and two briefs from university *amici curiae* commented on the issue of *jus cogens*. Costa Rica expressly disavowed any intention to comment on the topic.

Mexico asserted that unnamed publicists have denominated fundamental human rights as norms *jus cogens*. It also referred to the views of individual judges and the International Law Commission on the legal effects of *jus cogens*. The main argument of Mexico, however, was that Ainternational morality,@ as a source of law, provides a basis for establishing norms *jus cogens*. Mexico claimed, in this respect, that a cautious approach in case law has lagged behind the views of the international community. Indeed, Mexico argued for the Atransfer@ of the Martens clause from humanitarian law to the field of human rights to imply new norms and obligations, even those characterized as *jus cogens*.

The Commission's position simply claimed that the international community is unanimous in considering the prohibition of racial discrimination as an obligation *erga omnes*, then leaps to the conclusion that the principle of non-discrimination on the basis of race is a norm *jus cogens*, while at the same time noting that the international community has not yet reached consensus on prohibiting discrimination based on motives other than racial discrimination. According to the Commission Athis does not lessen its fundamental importance in all international laws.

The Courts opinion, which it expressly stated applies to all OAS member states whether or not they are party to the American Convention on Human Rights, appears clearly to view natural law as a source of obligation. According to the Court, AAll persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure. The court nonetheless cited nineteen treaties and fourteen soft law instruments on the principle of non-discrimination, finding that taken together they evidence a universal obligation to respect and guarantee human rights without discrimination. On whether this principle amounts to *jus cogens*, the court moved

12 '*Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03 Ser A, No 18 (Sept. 17, 2003)).

beyond the Vienna Convention, asserting that Aby its definition and its development, *jus cogens* is not limited to treaty law.[13] The court summarily concluded that non-discrimination is *jus cogens*, being Aintrinsically related to the right to equal protection before the law, which, in turn, derives directly from the oneness of the human family and is linked to the essential dignity of the individual. The court added that the principle belongs to *jus cogens* because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. The effect of this declaration, according to the court, is that all states are bound by the norm *erga omnes*. The court's opinion considerably shifts law-making from states to international tribunals which are asked to assess human dignity and international public order and from these derive human rights norms and determine which of them are *jus cogens*.

In its own jurisprudence, the Inter-American Commission on Human Rights has referred to the concept several times suggesting it as an additional source of obligation. The Commission has declared the right to life, for example, to be a norm *jus cogens*:

- derived from a higher order of norms established in ancient times and which cannot be contravened by the laws of man or nations. The norms of *jus cogens* have been described by public law specialists as those which encompass public international order . . . accepted . . . as necessary to protect the public interest of the society of nations or to maintain levels of public morality recognized by them.[14]

The International Criminal Tribunal for the Former Yugoslavia (ICTY), the first tribunal to discuss *jus cogens*, declared the prohibition of torture as one such norm:

- Because of the importance of the values it protects, [the prohibition against torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force. . . . Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.[15]

The discussion had no bearing on the guilt or innocence of the person on trial, nor on the binding nature of the law violated. It was not asserted that any treaty or local custom was in conflict with the customary and treaty prohibition of torture. The reference served a rhetorical purpose only. Similarly, an International Labor Organization report on a 1996 complaint against Myanmar for forced labour referred to *jus cogens* although the State had long been a

13 In stating that *jus cogens* has been developed by international case law, the court wrongly cited to the ICJ judgments in the *Application of the Convention of the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosnia-Herzegovina v Yugoslavia, ICJ Reports 1996*, p. ?? and the *Barcelona Traction, Light and Power Company, Second Phase, Judgment, ICJ Reports*, p 3, neither of which discusses the subject.

14 OAS, Inter-American Commission on Human Rights, 81st Sess, Annual Report of the Inter-American Commission on Human Rights, *Victims of the Tugboat '13 de Marzo'* v *Cuba*, Rep No 47/96, OR OEA/Ser.L/V/II.95/Doc.7, rev (1997) at 146B147.

15 *Prosecutor* v *Furundzija*, Judgment, Case No ITB95B17/1BT, Trial Chamber (10 December 1998), para 153.

party to ILO Convention (No 29) concerning Forced or Compulsory Labour.[16] The Report's statement that the practice of forced labour violates a *jus cogens* norm appears intended to invite the criminal prosecution of individuals using forced labour. It labels the systematic practice of forced labour a crime against humanity,[17] although such a designation is not required for prosecution and punishment to take place.

The Human Rights Committee addressed *jus cogens* in its General Comment No. 29 on States of Emergency, issued 31 August 2001. According to the Committee, the list of non-derogable rights in Article 4(2) of the Covenant on Civil and Political Rights is related to, but not identical with the content of peremptory human rights norms. While some non-derogable rights are included Apartly as recognition of the[ir] peremptory nature,@ other rights not included in Article 4(2) figure among peremptory norms. The Committee emphatically insists that AStates parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.[18] While this may appear to be adding new conditions to Article 4, in fact paragraph 1 explicitly provides that any measures taken by states in derogation of Covenant rights must not be Ainconsistent with their other obligations under international law@. In terms of consequences of this extension, the Committee asserts that one test of the legitimacy of measures in derogation of Covenant rights can be found in the definition of certain violations as crimes against humanity. Thus, the fact that the Covenant would appear on its fact to permit such measures cannot be invoked as a defense to individual criminal responsibility.

c. Application of *jus cogens* by national courts

The concept of norms *jus cogens* has been asserted most strongly in the domestic courts of the United States, initially in an effort to avoid US constitutional doctrine that considers treaties and custom equivalent to federal law, thus allowing later US law inconsistent with international law to prevail over international obligations. *Jus cogens* norms were asserted first in an effort to enforce the 1986 ICJ judgment against the United States in the *Nicaragua* case.[19] Lawyers argued that the constitutional precedents do not apply to norms *jus cogens*, which have a higher status that bind even the President and Congress. The Court accepted *arguendo* the theory, but held that compliance with a decision of the ICJ is not a *jus cogens* requirement.

Other domestic court cases involving *jus cogens* fall into one of two categories. First are cases in which customary immunities have acted to shield defendants from civil lawsuits for damages. The issue has arisen most often in courts of the United States and the United Kingdom.[20] In both fora lawyers have argued that the foreign sovereign immunity law must be

16 28 June 1930, 39 UNTS 55.

17 Report of the Commission of Inquiry on Forced Labour in Myanmar (Burma), ILO Official Bulletin, 1998, Special Supp, vol LXXXI, Ser B, para 538.

18 General Comment No. 29, para. 11.

19 Committee of US Citizens Living in Nicaragua v Reagan, 859 F.2d 929, 940 (DC Cir 1988).

20 *Al-Adsani* v *Kuwait* was litigated in English courts before it was submitted to the European Court of Human Rights.

interpreted to include an implied exception to sovereign immunity for violations of *jus cogens* norms. The argument relies on the idea of implied waiver, positing that State agreement to elevate a norm to *jus cogens* status inherently results in an implied waiver of sovereign immunity.[21] In the case of former Chilean leader, Augusto Pinochet Ugarte, the issue of *jus cogens* was pressed in response to a claim of immunity from criminal prosecution. Among the many opinions in the case, Lord Millett stated that [i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.[22] The judgment ultimately did not rely on *jus cogens* to determine the issue, however, because the situation was controlled by the relevant treaty.

While nearly every court thus far has refused to "trump" immunity by *jus cogens* norms, four recent cases from different national courts demonstrate the confusion over the issue. In all of the cases the courts held that the underlying violations constituted breaches of norms *jus cogens* B two cases involved war crimes and two concerned torture B but the courts split evenly on whether a finding of *jus cogens* violations results in overriding traditional immunity. In a case from Greece and one from Italy, the respective supreme courts held that German crimes committed during World War II were not protected by sovereign immunity.[23] In contrast, an Ontario, Canada Court of Appeal and an English appellate tribunal held that the *jus cogens* prohibition of torture does not override sovereign immunity.[24]

A second category of domestic law cases in which the nature of norms as *jus cogens* has been asserted are cases filed pursuant to the US Alien Tort Claim Act.[25] Some of the plaintiffs assert violations of norms *jus cogens*, often wrongly claiming that the landmark decision *Filartiga* v *Peña-Irala* held torture to be a violation of international *jus cogens*. In fact, the federal appellate court in that case held that official torture constitutes a violation of the law of nations and never mentioned the doctrine of *jus cogens* norms.[26] No ATCA case has turned on the character of the norm as *jus cogens* or ordinary custom.

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21 See, eg, *Siderman* v *The Republic of Argentina*, 965 F.2d 699 (9th Cir 1992), cert denied, 113 S Ct 1812 (1993).

22 *R* v *Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* [1999] 2 All ER 97 (HL) at 179.

23 See: Prefecture of Voiotia v. Federal Republic of German, Case No 11/2000 (Areios Pagos, Supreme Court of Greece, 4 May 2000) and Ferrini v. Federal Republic of Germany, Corte di Cassazione (Sezioni Unite) judgment no. 5044 of 6 November 2003, registered 11 March 2004, (2004) 87 Revista dirritto internazionale 539**.** The Italian case is discussed in Pasquale De Sena & De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrina Case,@ (2005) 16 EJIL 89.

24 See Bonzari v. Iran, Ontario Court of Appeal, OJ No. 2800 (2004) and Jones v. Saudi Arabia, EWCA Civ. 1394 (2004).

25 28 U.S.C. sec. 1350.

26 *Filartiga* v *Peña-Irala*, 630 F.2d 876 (2nd Cir 1980). The only United States Supreme Court decision to consider issues arising under the ATCA, *Sosa v. Alvarez-Machain*, reprinted in (2004) 43 ILM 1390, also failed to mention *jus cogens*

d. The work of the International Law Commission

The recently completed ILC Articles on State Responsibility and accompanying Commentary take the position that peremptory norms exist, urging that the concept has been recognized in international practice and in the jurisprudence of international and national courts and tribunals.[27] The Commentary notes that the issue of hierarchy of norms has been much debated, but finds support for *jus cogens* in the notion of *erga omnes* obligations and the inclusion of the concept of peremptory norms in the Vienna Convention on the Law of Treaties.

The Articles propose a hierarchy of consequences resulting from various breaches of international law. Article 41 sets forth the particular consequences said to result from the commission of a serious breach of a peremptory norm. To a large extent Article 41 seems to reflect developments in the United Nations, such as the actions of the Security Council in response to breaches of the UN Charter in Southern Africa and by Iraq.[28] The text imposes positive and negative obligations upon all States. In respect to the first, [w]hat is called for in the face of serious breaches is a joint and coordinated effort by all states to counteract the effect of these breaches.[29] The Commentary concedes that the proposal may reflect the progressive development of international law' as it aims to strengthen existing mechanisms of cooperation. The core requirement, to abstain from recognizing consequences of the illegal acts, finds more support in State practice, with precedents including rejection of the unilateral declaration of independence by Rhodesia,[30] the annexation of Kuwait by Iraq,[31] and the South African presence in Namibia.[32] Article 41 extends the duty to combat and not condone, aid, or recognize certain illegal acts beyond breaches of the UN Charter and responsive action by the Security Council. It remains to be seen whether the Article will increase unilateral determinations that serious breaches of peremptory norms have occurred, with consequent unilateral actions.

27 Article 40, Commentaries, para 2.

28 eg, UN SC Res 662 (1990), saying that the annexation of Kuwait had 'no legal validity and is considered null and void' and calling on the international community not to recognize the annexation and to refrain from any action or dealing that might be interpreted as a recognition of it. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971*, p 16, para 126, declaring the illegality of South Africa's presence in Namibia as having *erga omnes* effects.

29 Article 41, Commentaries, para 3.

30 UN SC Res 216 (1965).

31 UN SC Res 662 (1990).

32 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p 16, para 126.

e. The content and uses of *jus cogens*

The primary purpose of asserting that a norm is *jus cogens* seems to be to override competing norms or the will of persistent objectors to a norm of customary international law.[33] The first of these is reflected in the debate over whether some or all of human rights law preempts other international law, e.g. trade or sovereign immunity. It also may be considered when rights are seen to conflict: e.g. the issue of hate speech or that of reconciling and balancing gender equality and freedom of religion. As to the enforcement of norms against dissenting states, if *jus cogens* is a norm from which no derogation is possible and its creation by 'the international community as a whole means anything less than unanimity, then the problem arises of imposing the norm on dissenting States. It is not clear that the international community as a whole is willing to accept the enforcement of widely-accepted norms against dissenters, but the problem is likely to arise infrequently in practice because those norms most often identified as *jus cogens* are clearly accepted as customary international law and there are no persistent objectors. Even if States violate the norms in practice, no State claims the right to commit genocide or enslave persons.[34]

The question of dissenters could arise in the future if the number of purported norms *jus cogens* expands in an effort to further the common interests of humanity. The literature is replete with claims that particular international norms constitute norms *jus cogens*. Proponents have argued for inclusion of all human rights, all humanitarian norms, the duty not to cause transboundary environmental harm, the duty to assassinate dictators, the right to life of animals, self-determination, and territorial sovereignty (despite legions of treaties transferring territory from one State to another).[35] Thus far, international tribunals have been far more restrained. Taking the most progressive reading of the cases and comments described above, the list of norms denominated *jus cogens* consists of the following:

- the right to life,
- the right to a fair trial,
- the right to racial equality,
- the right to be free from torture,
- the right not to be arbitrarily deprived of liberty, and
- the right to the fundamental protections of humanitarian law during armed conflict (presumably the guarantees of common article 3 of the 1949 Geneva Conventions).

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33 Theoretically, of course, the concept would be applicable if two or more States actually decided to enter into an agreement to commit genocide or territorial acquisition by aggression and one of them later changed its mind. According to the VCLT, only a party to an illegal agreement can invoke the illegality to escape its treaty obligations. The ILC Articles on State Responsibility go further and impose obligations on all States to repress breaches of *jus cogens* norms.

34 It does seem, however, that the Mexican government may have asserted the *jus cogens* status of non-discrimination out of concern that the US would claim to be a persistent objector to asserted rights for foreign workers.

35 See, e.g. Beres, LR, 'Prosecuting Iraqi Crimes against Israel During the Gulf War: Jerusalem's Rights under International Law', 9 *Ariz J Int'l & Comp L* 337(1992) (*jus cogens* obligation to assassinate in specified circumstances). Raeyham, P, 'Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention', 60 *Albany L Rev* 771 (1997) (prohibition of genocide *jus cogens*); Upadhye, S, 'The International Watercourse: An Exploitable Resource for the Developing Nation under International Law?', 8 *Cardozo J Int'l & Comp L* 61 (2000) (right to development *jus cogens*).

The rationale that emerges from the literature and the cases is one of necessity: the international community cannot afford a consensual regime to address many modern international problems. Thus, *jus cogens* is a necessary development in international law, required because the modern independence of States demands an international *ordre public* containing rules that require strict compliance. The ILC Commentary on the Articles on State responsibility favours this position, asserting that peremptory rules exist to prohibit what has come to be seen as intolerable because of the threat it presents to the survival of states and their peoples and the most basic human values.36[54] The urgent need to act that is suggested fundamentally challenges the consensual framework of the international system by seeking to impose on dissenting States obligations that the international community deems fundamental. State practice has yet to catch up fully with this plea of necessity and it should be recalled that States legally bound by human rights treaties and custom may not plead internal law as a defense to breach of their obligations. Even if a particular human rights treaty permits denunciation, the denouncing state will remain bound by customary international law and by other human rights agreements that permit no denunciation. Member states of the United Nations have human rights obligations even if they do not ratify or accept any of the existing global or regional human rights treaties, because of the duties that flow from membership in the United Nations.

In theory, a state could refrain from joining the United Nations and claim to be a Apersistent objector@ to the development of human rights law, in an effort to avoid human rights obligations. Even assuming that persistent objection during the formation of a rule is a means to avoid being bound by the rule, in practice no such state exists. There are states, however, that contest particular rights posited as customary international law. Here the doctrine of norms *jus cogens* could be relevant to establish that the right in question has become binding even in the face of persistent objection. A second practical effect of elevating some human rights norms to the status of *jus cogens* would be to establish clearly that these norms override conflicting or incompatible treaty obligations. While the supremacy of human rights law is being pressed by human rights bodies, international financial and trade institutions have shown no indication of their willingness to accept the proposed hierarchy. As noted above, neither international nor domestic tribunals shown a willingness to override the customary laws of sovereign and diplomatic immunity in order to give priority to asserted *jus cogens* norms.[37]

II. Core Human Rights

Core human rights are not necessarily the same as norms *jus cogens*; core rights need not be recognized as peremptory in order to acknowledge that their fulfillment is a prerequisite to the enjoyment of other rights. Identification of such core rights has been attempted by scholars and by international human rights bodies.

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36 Article 40, Commentaries, para 3.

[37] See Case of Al-Adsani v. The United Kingdom, Eur. Ct. Hum. Rts, judgment of 21 Nov. 2001, available at <http://www.echr.coe.int'; Case of Congo v. Belgium, International Court of Justice, judgment of 14 February 2002, available at <http://www.icj-cij.org'.

a. Core rights in theory

The moral philosophy of human rights Ahelps us to delineate the structures of human thought in a manner which reveals the implications of thinking and speaking about rights in a particular way, the relationships of rights to one another, the hierarchical ordering of rights and the nature of the conflicts or tension among rights.@[38] One approach sets individual freedom or autonomy and equality as the common themes, joined to a concept of the natural necessity Ain the sense of prescribing a minimum definition of what it means to be human in any morally tolerable form of society.@[39] Rights which preserve the integrity of the person flow logically from the principle of freedom and autonomy, as does the principle of non-discrimination and are thus core in the sense that all other rights flow from them.

Kantian ethics, presupposing a moral foundation for the different desires and ends of all persons, provide a basis for rights flowing from the autonomy of the individual in choosing his or her life plan, consistent with a similar freedom for others. Rawls's *Theory of Justice* sees justice as the first virtue of social institutions and human rights as both instrumental to and the end of justice, ascertained by rational contractors forming the social contract. The two principles of justice they would choose, according to Rawls are (1) each person is to have an equal right to the most extensive system of equal basic liberties compatible with a similar system of liberty for all and (2) social and economic inequalities are to be arranged so they are both to the greatest benefit of the least advantaged, consistent with a just savings principle and attached to positions and offices open to all under condition of fair equality of opportunity (distributive justice).
Other theorists have constructed a hierarchical system of human rights based upon the protection of human dignity. Dworkin views denial of equality as a core problem to be addressed. He does not elevate individual freedom to this status because of the problem of external preferences (such as prejudice and discrimination) that corrupt a utilitarian decision to afford equal liberties to others. Thus, certain specific liberties like freedom of speech, of religion, association and personal relations, require special protection in the face of such externalities that would corrupt the social duty to provide equal rights to all.

Maurice Cranston proposed in 1967 that human rights must be properly understood to be those matters that are enforceable against duty-holders, genuinely universal, and of paramount importance; everything else must be viewed as aspirational, including, in his view, most economic, social and cultural rights.[40] Henry Shue, in contrast, speaks of the Abasic@ rights to liberty, security, and subsistence, Aeveryone's minimum reasonable demands upon the rest of humanity.@[41] What is crucial to rights being basic is that any attempt to enjoy any other right by sacrificing a basic right would be self-defeating, cutting the ground from beneath itself. Other, non-basic rights may be limited or sacrificed in order to secure the basic right. Shue also argues that there can be no priority according among basic rights because each one is necessary for the exercise of all other rights.

[38] Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, in JANUSZ SYMONIDES, HUMAN RIGHTS: CONCEPT AND STANDARDS 31, 32 (UNESCO, 2000).

[39] Id. at 43.

[40] Maurice Cranston, *Human Rights, Real and Supposed*, in D.D. RAPHAEL (ED.), POLITICAL THEORY AND THE RIGHTS OF MAN, 43 (1967).

[41] HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY (1980).

Joseph Raz similarly posits a distinction between core rights and derivative rights[42] while Diana Meyers argues that four inalienable rights B the right to life, the right to personal liberty, the right to benign treatment, and the right to satisfaction of basic needs B are inherent and inalienable to all human beings, as moral agents who must be able to exercise moral judgments about their life's plans, and that these cannot be limited ore revoked in a just legal system.[43]

b. Core rights in practice

To a large extent, the provisions of positive law reflect the theoretical approaches that posit maximum claims for equality, personal security, and subsistence rights. While there is some variety from one region to another, a minimum core has been identified that supports the idea of fundamental rights and derivative rights.

Equality as a core or foundational human rights finds support in human rights texts. As is well-known, the United Nations Charter has no catalogue of human rights, but expressly mentions the entitlement to respect for human rights without discrimination on the basis of race, sex, language or religion and respect for the equal rights and self-determination of peoples. The phrase Awithout distinction on the basis of race, sex, language or religion@ is added to every reference to human rights and fundamental freedoms in the body of the Charter. The Vienna Declaration called non-discrimination Aa fundamental rule of international human rights law. Further reflecting state practice, it is notable that the Convention on the Suppression and Punishment of the Crime of Apartheid[44] is the only international instrument apart from the Convention on the Prevention and Punishment of the Crime of Genocide[45] explicitly to designate commission of any act covered by the treaty a Acrime under international law. Genocide and apartheid both involve the targeting of individuals or groups and depriving them of fundamental rights because of their race or ethnicity; the criminalization of these acts can support the notion that freedom from systematic discrimination enjoys a high status in international law, at least as far as race is concerned. As discussed more fully below, derogation clauses that permit the suspension of certain rights during periods of emergency generally prohibit discriminatory measures.

It must be conceded that state practice has not been as favorable to non-discrimination on the bases of sex, language or religion, although in theory and on the basis of the U.N. Charter provisions it should be afforded similar importance. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been accompanied by the most wide-sweeping and frequent reservations of any human rights instrument.[46] Neither linguistic nor religious discrimination has generated enough concern to produce agreement on the need for the enactment of a binding legal instrument on the global level.[47] One may also compare the

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[42] Joseph Raz, *On the Nature of Rights*, 93 MIND 194 (1984).

[43] DIANA T. MEYERS, INALIENABLE RIGHTS: A DEFENSE (1985).

[44] International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, *reprinted in* 13 I.L.M. 50 (1974), art. 1. Earlier, the 1968 Proclamation of Teheran called the policy of apartheid a Acrime against humanity.@ Proclamation of Teheran, para. 7.

[45] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. 1.

[46] As of January 2000, 67 states parties to CEDAW had entered reservations or declarations. For earlier studies of the problem, see Rebecca Cook, *Reservations to the Convention on the Elimination of All forms of Discrimination against Women*, 30 VA. J. INT'L L. 643 (1990); Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination against Women*, 85 AM. J. INT'L L. 281 (1991).

[47] The U.N. Declaration on the Elimination of All forms of Intolerance and of Discrimination Based on Religion or Belief is one of the few human rights declarations adopted by the United Nations that has not been followed by a treaty. As for language, only within Europe is there a legal instrument, the Framework Convention on Minority Languages.

number of ratifications of the Genocide,[48] Apartheid,[49] and Racial Discrimination Conventions[50] with that of CEDAW to observe the lesser agreement with eliminating discrimination based on sex and gender.

In another approach, core human rights could be identified as those whose violation is designated an international crime or for which states are obliged to enact national criminal laws. Prohibiting conduct as criminal usually reflects society's strongest condemnation and expresses a desire to uphold the fundamental values of the society. As noted above, genocide and apartheid have been expressly called international crimes. In addition, global and regional treaties against torture call upon the states parties to Aensure that all acts of torture are offences under its criminal law.@[51] War crimes are designated by the Geneva Conventions of 1949[52] and the Protocols of 1977,[53] which call upon states parties to suppress and punish Agrave breaches@ of the Conventions. In the Inter-American system, forced disappearance is considered a crime against humanity.[54] The establishment of *ad hoc* international tribunals for the former Yugoslavia and for Rwanda, as well as the conclusion of the Rome Statute for a permanent International Criminal Court reinforce the understanding that the international community views the commission of certain acts as particularly egregious and necessitating individual criminal responsibility. The right to be free from these abuses could be viewed as "core" protection.

Global and regional bodies have identified core rights, but also core obligations. This approach has been of particular importance in the area of economic, social and cultural rights, where the obligation of states parties to implement treaties is generally progressive and variable.55 The Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), discusses the nature of state parties' obligations, noting that various obligations in the ICESCR are obligations of immediate effect. Two described as being Aof particular importance are the undertaking to guarantee that rights are exercised Awithout discrimination and the other is the obligation Ato take steps. The Committee also is of the view Athat a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential

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[48] Genocide Convention, *supra* note 34.

[49] Apartheid Convention, *supra* note 33.

[50] Convention on the Elimination of All forms of Racial Discrimination, 21 Dec. 1965, 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966).

[51] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc.A/39/51, at 197; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 Nov. 1987, Doc. No. H(87)4 1987, E.T.S' 126, reprinted in 27 I.L.M. 1152 (1988); Inter-American convention to Prevent and Punish Torture, 9 Dec. 1985, OASTS 67, G.A. Doc. OEA/Ser.P, AG/doc.2023/85 rev. 1 (1986), reprinted in 25 I.L.M. 519 (1986).

[52] Geneva Convention for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 12 Aug. 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 74 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 74 U.N.T.S. 287.

[53] Protocol I Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of victims of International Armed Conflicts,8 June 1977, U.N. Doc. A/32/144 Annex I, 1125 U.N.T.S. 17512, reprinted in 15 I.L.M. 1391 (1977); Protocol II Additional to the Geneva conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 17513, reprinted in 16 I.L.M. 1442 (1977).

[54] Inter-American Convention on Forced Disappearance of Persons, OEA/Ser.P AG/doc.3114/94 rev. 1, June 8, 1994, art. 3.

[55] An exception to the approach of "progressive implementation" is the African Charter on Human and Peoples' Rights. See *Economic and Social Rights Center v. Nigeria*, Afr. Comm'n Hum. Peoples' Rts, Case 155/96, decision of 27 Oct. 2001.

levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. In a separate General Comment (No. 12) on the right to adequate food, the Committee recognizes the core minimum obligation to ensure freedom from hunger, as distinguished from the more general right to adequate food.[56]

The Inter-American Commission on Human Rights has adopted a similar Abasic needs@ approach to economic, social and cultural rights. According to the Commission, the obligation of member states to observe and defend human rights, set forth in the American Declaration and the American Convention, obligates such states, Aregardless of the level of economic development, to guarantee a minimum threshold of these rights.[57] States must immediately ensure Aa minimum level of material well-being which is able to guarantee respect of their rights to personal security, dignity, equality of opportunity and freedom from discrimination. The European Social Charter and the ILO Declaration of Fundamental Rights of Workers also indicate that certain core rights are deemed of particular significance in the economic and social field.

III. Obligations *erga omnes*

The International Court of Justice was the first to identify the category of obligations *erga omnes* in dicta in the *Barcelona Traction* case.[58] Unlike obligations arising in respect to specific injured states, e.g. in the field of diplomatic protection, obligations *erga omnes* are owed to the international community as a whole. All states thus can be held to have a legal interest in their protection without the need to demonstrate material injury. There is thus a significant broadening of possible avenues to press for compliance. Obligations *erga omnes* are of crucial importance for unilateral obligations, where there are likely to be no states materially affected by a breach. Human rights obligations are the primary example of such unilateral undertakings.[59]

The importance of this category is thus evident for enforcement, but it is less clear how the category relates to hierarchy of norms. On the one hand, obligations *erga omnes* could be viewed as solely procedural, designed to protect the international community interest where every state or no other state is injured, such as guarantees of human rights. In this respect, the category could be seen as deriving from the principle of effectiveness because violations of the law could not be challenged without the broadening of standing. Yet, the ICJ did not focus on

[56] The IESCR itself makes this distinction, speaking in art. 11(1) of the right of everyone to adequate food and in art. 11(2) of the Afundamental right of everyone to be free from hunger.@

[57] IACHR, The Realization of Economic, Social and Cultural Rights in the Region, *Annual Report of the Inter-American Commission on Human Rights*, 1993, OEA/Ser.L/V.II.85, doc. 9, rev., February 11, 1994, 519-534.

[58] Barcelona Traction Light and Power Company, Limited, Second Phase, 1970 ICJ Rep. 3, 32.

[59] The Barcelona Traction judgment identified as obligations *erga omnes* the rules against aggression, genocide, and Arules concerning the basic rights of the human person, including protection from slavery and racial discrimination. In its Judgment of 11 July 1996 in the Genocide case, the Court held that the rights and obligations contained in the Genocide Convention are *erga omnes"* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, 1996 ICJ Rep. 616, para. 31.

this element in the *Barcelona Traction* decision; instead, it stated that the obligations *erga omnes* exist Ain view of the importance of the rights involved. This suggests, perhaps, a higher status for such norms. It may also provide a link with the doctrine of *jus cogens* norms, because if every state has an interest in compliance with *erga omnes* obligations, it is difficult to see how two or a few states could contract out of the obligation.[60]

A practical effect in favor of human rights does arise from the doctrine of obligations *erga omnes*. It allows any state to raise or contest an alleged violation, in contrast to the law of diplomatic protection which limits standing to bring claims on behalf of an injured person to the state of nationality.[61] In practice, the issue has not arisen. Inter-state human rights cases generally are based upon treaty provisions allowing any state party to the treaty to complain of violations by another state party.[62]

[60] Article 53 of the Vienna Convention on the Law of Treaties, *supra* note 56, provides that a treaty will be void Aif, at the time of its conclusion, it conflicts with a peremptory norm of general international law.@ A peremptory norm is defined as one Aaccepted 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.@ Thus a two stage consensual process is involved: first, there must be a rule of international law accepted by the international community and, second, that rule must be accepted as a peremptory norm.

[61] See Mavrommatis Palestine Concessions (Jurisdiction) case, P.C.I.J., Ser. A, No. 2 (1924); Nottebohm Case (Liechtenstein v. Guatemala), Preliminary Objections, 1953, IC Rep. 110; Merits, 1955 ICJ Rep. 4.

[62] Notably, the American Convention on Human Rights makes the inter-state procedure optional, suggesting perhaps that the *erga omnes* character of the obligations is not fully accepted, at least in respect to the supervisory machinery established by the Convention. Art. 45, American Convention on Human Rights.

IV. Non-derogable rights

The final issue of "relative normativity"[63] in human rights law considers whether international instruments designate certain rights as absolute, in the sense that they apply without limitations clauses and without possibility of reservation, derogation, or denunciation, resulting in treaty-based Afundamental standards of humanity.@[64] Alan Gewirth is one of the few writers[65] to posit that there are absolute rights. A right is absolute when it cannot be overridden in any circumstances, can never be justifiably infringed and must be fulfilled without any exceptions. The contents of any right include the subject, the objective, the respondent, and the justification or basis of the right. Gewirth assumes a Principle of Generic Consistency that requires every agent act towards all in accordance with generic rights that are necessary conditions of action, freedom and well being, the latter being defined in terms of the various substantive abilities and conditions needed for (successful) action. If two rights are so related to each other that each can be fulfilled only by infringing the other, that right takes precedence whose fulfillment is more necessary for action. Rules are absolute if they are specific and not overloaded with exceptions or requiring intricate utilitarian calculations; second, they must be justifiable through a valid moral principle and they must exclude any reference to the possibly disastrous consequences of fulfilling the right. Gewirth uses the example of torture and argues for its absolute nature not only because of the impact on the tortured person, but the impact upon the torturer. Even if the person has knowledge that would save the lives of hundreds or thousands of others, the basic principle of morality that requires respect for the rights of all persons prohibits using any individual merely as a means to the well-being of other persons. Utilitarian arguments are also available: torturing would only lead to further escalation of violence and it cannot be certain that the destruction will not occur anyway. One cannot trade the commission of a present evil for what is only a threatened or possible future evil. In addition, the principle of intervening action makes the bombers/terrorists responsible for any killings that follow, not the person who has knowledge of them or the person who refuses to torture to acquire the knowledge. Gewirth generalizes his example of torture to specify more generally an absolute right not to be made the intended victim of a homicidal project, stemming from the general principle underlying all absolute rights: the prohibition on degrading persons, from treating them as if they had no rights or dignity. Other specific absolute rights may be generated from this principle, such as the right to be free from slavery, but the list is not long.

In practice, the International Covenant on Civil and Political Rights (article 4), the American Convention on Human Rights (article 27), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 15), permit states parties to take measures suspending certain rights Ato the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.[66] Supporting the notion that there is a hierarchy implicit in the idea of non-derogable rights, the Inter-American Commission on Human Rights has

63 See Weil, P (1983), 'Towards Relative Normativity in International Law?', 77 *AJIL* 413.

64 See *Minimum humanitarian standards: Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21*, E/CN.4/1998/87 of January 5, 1998.

65 Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHILOSOPHICAL QUARTERLY 1 (1981)

66 ICCPR, article 4(1).

suggested that states may have a duty to suspend certain derogable rights if this is necessary to protect those rights that are non-derogable.[67]

Only four non-derogable rights are common to the three instruments: the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to be free from slavery, and the right to be free from *ex post facto* criminal laws. Common to the ICCPR and the American Convention as non-derogable rights are recognition as a person before the law, and the right to freedom of thought, conscience and religion. The ICCPR alone declares non-derogable the right to be free from imprisonment for failure to perform a contractual obligation, while the European Convention, with Protocols, considers the freedom from double jeopardy and abolition of the death penalty non-derogable. The American Convention uniquely adds protection of the family, rights of the child, the right to a nationality, the right to participate in government, and fundamental judicial guarantees to the list of non-derogable rights. The instruments also require that measures taken in derogation not be discriminatory.

Among the general human rights conventions, neither the Covenant on Economic, Social and Cultural Rights (CESCR) nor the African Charter on Human and Peoples' Rights contain a provision on derogations. The CESCR perhaps understandably omits discussion of derogations, given that its statement of obligations already contains considerably flexibility for states party to apply the rights Ato the maximum of available resources, with a view to achieving [them] progressively . . . by all appropriate means. . . (art. 2.). The African Commission has interpreted the Charter's omission of a derogation clause to mean that the Charter as a whole remains in force even during periods of emergency, including armed conflict.[68]

The common non-derogable rights of life, and freedom from torture and slavery are also protected by the Convention for the Abolition of Slavery,[69] the Genocide Convention,[70] and the Torture Conventions,[71] none of which contain derogations provisions.[72] International humanitarian instruments add to the thesis that these rights, together with guarantees against discrimination, form the *noyau dur* of human rights. Common Article 3 to the four 1949 Geneva Conventions,[73] the essential core of international humanitarian law, demands that all non-combatants be treated humanely and without discrimination by race, color, religion, sex, birth, wealth or any similar criteria. Specifically protected are life and freedom from torture, humiliating and degrading treatment, hostage-taking, and fundamental due process.

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[67] See Inter-Am. Comm'n on Hum. Rts., Report on the Situation of Human Rights in the Republic of Guatemala, OAS/Ser.L/V/II.53, doc. 21 rev. 2, 13 Oct. 1981, para. 9.

[68] *See* Comm. 74/92, Commission Nationale des Droits de l'homme et des Libertés v. Chad, in NINTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 1995/96, AGH/207 (XXXII), Annex VIII at 12, 16 (AThe African Charter . . .does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State for violating or permitting violations of rights in the African Charter.@)

[69] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 Sept. 1956, E.S.C. Res. 608 (XXI), 226 U.N.T.S. 3.

[70] Genocide Convention, *supra* note 32.

[71] See Torture Conventions, *supra* note 41.

[72] The conventions concerning racial discrimination and discrimination against women also omit derogations provisions, supporting the idea that non-discrimination has a hierarchically superior status in international human rights law because it is a form of aggravated deprivation of human rights.

[73] Geneva Conventions, *supra* note 42, Common Article 3.

The European Court of Human Rights seems to support this view. It has emphasized the absolute character of the prohibition against torture, reiterating that AArticle 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 sec. 2 even in the even of a public emergency threatening the life of the nation.@[74] As such, it could not be violated in order to give priority to another guaranteed right.

The issue of derogations is linked to that of reservations and denunciations. Many human rights treaties have no provisions on either of the latter topics and both are generally regulated by the provisions of the Vienna Convention on the Law of Treaties.[75] This means, first, that reservations are permitted if they are not incompatible with the object and purpose of the agreement,[76] while denunciation is permitted only if it is established that the parties intended the treaty to be denounced.[77]

Concerning reservations, General Comment No. 24[78] issued by the Human Rights Committee questions whether reservations to non-derogable rights in the ICCPR are permissible. It concludes that generally they would be incompatible with the obligations of states, as would be a reservation to the article concerning derogations. The Inter-American Court has gone further, stating that Aa reservation which was designed to enable a state to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it.@[79] In the European Court, reservations incompatible with the object and purpose of the Convention have been rejected. In his separate opinion, Judge de Meyer notes that A[t]he object and purpose of the European Convention on Human Rights is not to create, but to recognize, rights which must be respected and protected even in the absence of any instrument of positive law. It is difficult to see how reservations can be accepted in respect of provisions recognizing rights of this kind.@[80]

Early global human rights treaties permit denunciation or withdrawal, including the Genocide Convention and the Supplementary Anti-Slavery Convention, but later practice omits such provisions and it would appear to be contrary to the object and purpose of such instruments to allow their termination. The Human Rights Committee has interpreted the omission of a withdrawal provision from the ICCPR to mean that denunciation or withdrawal is not

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[74] Eur. Ct. Hum. Rts, Selmouni v. France, judgment of 28 July 1999, para. 95.

[75] Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF.39/26, reprinted in 8 I.L.M. 679 (1969). As of March 1, 2002, there are ninety states parties.

[76] Vienna Convention, *id*., arts. 19-23.

[77] Vienna Convention, *id*., art. 54.

[78] Human Rights Committee, General Comment No. 24, CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994, in U.N. Doc. HRI/GEN/1/Rev.3 (15 Aug. 1997), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*; also available at <http://www.unhchr.ch/tbs/doc/nsf'.

[79] AMerely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose is, however, permissible. See Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of September 8, 1983, ARestrictions to the Death Penalty, Articles 4(2) and 4(4) American Convention on Human Rights,@ Ser. A, No. 3, para. 61.

[80] Belios v. Switzerland, 132 A Eur. Ct. Hum. Rights, Judgment of 29 April 1988 (separate opinion of Judge de Meyer).

permitted, given the nature of the of the Covenant.[81] Regional instruments more commonly contain provisions allowing denunciation upon notice[82].

Taking into account the absence of permissible suspensions, reservations or denunciations in respect to the common non-derogable rights, at least at the global level, they come close to being absolute in nature and thus can be seen as the pinnacle of positive human rights law.

Conclusions

Taking together the four concepts discussed above, it may be asked whether they recognize common rights, obligations or principles. In reviewing what has been said, there first emerges a clear emphasis on equality and non-discrimination. Apart from the fact that it is the sole right mentioned in the UN Charter, it runs through the *jus cogens* prohibitions of genocide and slavery, which generally target individuals based on their identity as members of ethnic or racial groups. Non-discrimination is also an immediate obligation of states implementing economic, social and cultural rights. It conditions the legality of measures in derogation of rights during periods of national emergency and is part of the requirements of humanitarian law. This emphasis on equality and non-discrimination can be seen to flow from the fundamental notion of the inherent nature and dignity of all persons. A denial of equality is a denial of the very foundation of human rights in the worth of each individual.

Other rights that have been recognized as simultaneously being *jus cogens* norms, core and non-derogable rights, and as obligations *erga omnes* are few in number: the right to life, the right to be free from slavery, and the right to be free form torture, together with fundamental judicial protections necessary to ensure the enjoyment of other rights. Among these, the right to life, as has been recognized by human rights tribunals, imposes both negative and positive obligations on states and encompasses some of the obligations corresponding to core economic, social and cultural rights, i.e. ensuring the right to food, shelter and health care.

The legal consequences of denominating these rights in this fashion have yet to be fully determined and will no doubt evolve over time, as will the list itself. For the present, it seems clear that these rights are ones that impose obligations on all states. They may not be suspended or subordinated to other rights, and they cannot be subject to reservation. In theory they should override conflicting norms of whatever origin, but this is a matter for on-going discussion.

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[81] Human Rights Committee, General Comment No. 26, CCPR/C/21/Rev.1/Add.8/Rev.1, reprinted in I.L.M. 839 (1995).

[82] European Convention, *supra* note , art. 58 (requiring six months notice). Greece denounced the Convention in April 1970, after it was found to have committed torture and other human rights violations, and withdrew from the Council of Europe; it rejoined the system in 1974 after the restoration of civilian government. The European Torture Convention, art. 22, similarly allows denunciation, requiring twelve month's notice. The American Convention, *supra* note , art. 78, requires one year's notice. On May 26, 1998, Trinidad and Tobago notified the Secretary General of the OAS of its denunciation of the American Convention. The denunciation became effective one year later. Art. 23 of the Inter-American Convention to Prevent and Punish Torture, 9 Dec. 1985, OASTS No. 67, allows denunciation upon one year notification, as does art.21 of the American Convention on Forced Disappearance of Persons, 9 June 1994, not yet in force, art. XXIV of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 8 June 1994, and art. XIII of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 7 June 1999, not in force.