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# *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*

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## **Abstract**

*Considerable confusion has surrounded the question of whether there exists a hierarchy of human rights in contemporary international law. Most human rights studies do not recognize such a hierarchy, mainly because of their emphasis on the indivisibility of human rights. This paper provides a possible coherent understanding of this issue from the perspective of non-derogable rights, which demonstrate the existence of a hierarchy of human rights most clearly in international law concepts. It is a serious mistake to regard non-derogable rights as a unitary concept. Rather, the concept may be identified in at least three different ways: by means of value-oriented, function-oriented and consent-oriented criteria. Within this analytical framework, and particularly with respect to the first two criteria, non-derogable rights need to be distinguished from similar concepts such as core human rights, jus cogens and obligations erga omnes. These concepts display the same character when identified by the value-oriented criterion, but this is not the case when they are identified by the function-oriented criterion. Throughout this discussion, it is argued that non-derogable rights provide the key to understanding hierarchy in international law in general.*

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## 1 Introduction

The question of whether a hierarchy of human rights norms may be identified has been the subject of controversial debate for quite some time. One reason for this may be traced to the confusion remaining in this regard in international law in general. Since the adoption of the Vienna Convention on the Law of Treaties (1969), the existence of *jus cogens* has been unquestionable, even for positivists, but the nature and scope of this concept remain unclear. The *Barcelona Traction* case (1970) has been highly celebrated as an example of jurisprudence establishing the notion of obligations *erga omnes*, but this has not freed the concept from confusion. The concept of international crime as defined in the International Law Commission's Draft Articles on State Responsibility, although it will almost certainly be removed, has been hailed as one of the most significant achievements of modern international law.<sup>1</sup> Nevertheless, international law scholarship lacks a coherent understanding of hierarchy and, in essence, nothing has been changed since Prosper Weil argued in his famous 1982 article that such a hierarchy would hinder the functioning of international law in its main role, namely to ensure coexistence and a common aim in a fundamentally pluralistic society.<sup>2</sup> If international law in general cannot resolve the confusion and ambivalence surrounding the notion of hierarchy, nor can consensus be reached on the question in international human rights law. Theodor Meron specifically addressed the issue of a hierarchy in human rights in his well-known 1986 article,<sup>3</sup> yet most of the questions raised there remain unanswered.

The prevailing idea of the interdependence and indivisibility of human rights makes the notion of hierarchy an even more contentious one. The United Nations International Covenants (1966) each recognized the importance of their counterpart in their Preamble and, even more clearly, the First World Conference on Human Rights in Teheran (1968) proclaimed that 'human rights and fundamental freedoms are indivisible ...'. It is widely claimed that the realization of each human right requires other human rights and, in this sense, all human rights are indivisible. This notion has taken firm root in contemporary discourse, expressed for instance in Article 6 of the Declaration on the Right to Development (1986) and paragraph 5 of the Vienna Declaration and Programme of Action (1993) adopted at the Second World Conference on Human Rights. The indivisibility of human rights would appear to be incompatible with any notion of hierarchy in this area. Moreover, the concept of indivisibility allows us to steer clear of serious philosophical questions, such as 'what does it serve a starving man to be free?'; thus, the understandable conclusion that '[s]uch ranking must ... be avoided at all costs, and so should any classification which

<sup>1</sup> The current Special Rapporteur does not deny the notion itself and its future development. See J. Crawford, *First Report on State Responsibility* (A/ CN.4/490/Add.3) para.99, [www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm](http://www.law.cam.ac.uk/rcil/ILCSR/Statresp.htm); Crawford, 'Revising the Draft Articles on State Responsibility', 10 *EJIL* (1999) 443. However, its status is quite unstable.

<sup>2</sup> Weil, 'Vers une normativité en droit international', 86 *RGDIP* (1982) 5. Strong opposition to hierarchy is also found in Schwarzenberger, 'International *Jus cogens*?', 43 *Texas Law Review* (1965) 455.

<sup>3</sup> Meron, 'On a Hierarchy of International Human Rights', 80 *AJIL* (1986) 1.

could lead to it'.<sup>4</sup> In addition, the idea of indivisibility accords with the traditional international spirit of respect for diverse cultural values by avoiding priorities in the domain of human rights norms. Thus, while major studies in international law may now be beginning to recognize emerging hierarchies, human rights scholarship tends still to deny their existence, both in terms of description and justification.

Little attention has been devoted to this inconsistency as a result of the rather different paths of development of these two related fields.<sup>5</sup> Thus, this issue raises a pertinent question: What position should human rights occupy in international law itself? Critics even argue that '[b]y remaining in the periphery, in the field of largely subconscious, private, moral-religious experience that defies technical articulation, human rights may be more able to retain their constraining hold on the way most people, and by extension most states, behave.'<sup>6</sup> If this were true, the language of the literature on the subject should be inspirational rather than merely analytical and it would produce more utopians. On the contrary, a lack of consistent claims in legal terms could lead such passions to a rather messy 'Weil's nightmare'. The notion of indivisibility means that specific human rights cannot have hierarchical status and that all human rights hold the same standing, while we may believe that some human rights, however they may be selected, are more important than others. As noted, this confusion is aggravated by an ambiguous sense of hierarchy in international law in general. The hierarchical status of human rights can be labelled arbitrary. This problem not only prevents us from maintaining theoretical consistency, it also hampers the development of genuine human rights activities.

One possible approach is to consider the question of hierarchy from the perspective of different legal theories, demonstrating in particular that each theory recognizes hierarchical norms.<sup>7</sup> Although clever, this approach does not seem to eliminate the dangers mentioned above to which opponents warn us. Another possible 'answer' may be to not take any notice of the differences in hierarchical norms, in the belief that

<sup>4</sup> P. Sieghart, *The Lawful Rights of Mankind: An Introduction to the International Legal Code of Human Rights* (1985), at 83.

<sup>5</sup> From a human rights perspective, '[i]nternational human rights is now a common subject for intellectual as well as popular discourse, but few have written about it in relation to the massive literature on "rights"' (L. Henkin, *The Age of Rights* (1990) 31). From the mainstream of international law, what exists is a particular domestic law, the framework of a standard-setting convention, or relevant principles of general international law and thus, as Brownlie notes, 'there is no such entity as "International Human Rights Law"': I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (1998), at 65–66.

<sup>6</sup> Koskenniemi, 'Pull of the Mainstream', 88 *Michigan Law Review* (1990) 1962. More generally, Rorty, 'Human Rights, Rationality and Sentimentality', in S. Shute and S. Hurley (eds), *On Human Rights* (1993).

<sup>7</sup> Fastenrath, 'Relative Normativity in International Law', 4 *EJIL* (1993) 305; Weiler and Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?', 8 *EJIL* (1997) 545.

such differences are minor or will disappear.<sup>8</sup> However, although this approach does recognize such hierarchies, it does not show the extent to which they may be justified nor does it reveal the differences between these hierarchies in different contexts.

One of the desirable positions of this controversial debate is to provide a coherent description and justification of hierarchy in international human rights norms. For this purpose, this article focuses on non-derogable rights prescribed in such norms as Article 4 of the International Covenant on Civil and Political Rights (1966) (ICCPR).<sup>9</sup> This particular category of rights shows most clearly the hierarchy of human rights: it exclusively relates to human rights norms and the human rights mentioned are not merely examples but constitute an exhaustive list. Because of their normative specificity and status, non-derogable rights are often regarded as core human rights, *jus cogens* and obligations *erga omnes*. But these equations require further explanation. For instance, if non-derogable rights are *jus cogens* by definition, then non-imprisonment for debts (Article 11 of the ICCPR), whose non-derogable status has already been doubted, also enjoys *jus cogens* status. But nobody would accept this logical conclusion. In addition, three human rights treaties contain different lists of non-derogable rights: for example, the American Convention on Human Rights (1969) provides for eight more non-derogable rights (such as the rights of the family (Article 17)) than the European Convention on Human Rights (1950). This would suggest that we should not treat all non-derogable rights in the same way in the context of general international law. Thus, a more thorough examination of the concept of non-derogable rights and other related notions is needed. This type of study will make it possible to provide an analytical framework in which to situate the hierarchy of international human rights norms as a whole. Although this paper does not discuss the implementation of relevant norms, precise formulations of substantive norms and their relations are a prerequisite for their legitimate and effective implementation.<sup>10</sup>

<sup>8</sup> St. J. Macdonald, 'Fundamental Norms in Contemporary International Law', 25 *The Canadian Yearbook of International Law* (1987) 144; Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations', 10 *EJIL* (1999) 358.

<sup>9</sup> Article 4 stipulates that: '(1) In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to 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, colour, sex, language, religion or social origin. (2) No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. (3) ...'. The other two examples are Article 15 of the European Convention on Human Rights (1950) and Article 27 of the American Convention on Human Rights (1969).

<sup>10</sup> T. Meron, *Human Rights Law-Making in the United Nations* (1990), at 2; T. Franck, *The Power of Legitimacy among Nations* (1990), at 50–90.

## 2 Analytical Framework

Non-derogable rights are those stated in the relevant provisions of the relevant treaties and, thus, calls to develop the content of the concept may be criticized for being unrealistic. However, the term of non-derogable rights is often employed with different connotations even within the same treaty. In fact, the criteria used to identify non-derogable rights vary in both their formulation and rationale. Using this term as a unitary concept is thus a mistake.<sup>11</sup>

### A Value-oriented Identification

Because law is not merely a means of dealing with issues, but concerns the purposive self-ordering of society,<sup>12</sup> each articulation of law carries social and value-related implications. So it is with the concept of non-derogable rights.

Bearing in mind that international law is mostly regarded as inter-state law and that non-derogable rights are not derogable even when the life of that state is in peril, it is quite natural to think that non-derogable rights should be identified as an intrinsically valuable part of human rights. It is this feature that makes non-derogable rights the clearest example of the hierarchical nature of human rights norms. In this understanding, non-derogable rights show their real human rights character in the famous Dworkin sense: a right as a trump.<sup>13</sup> The focus is exclusively on individuals. In several phases of the *travaux préparatoires* for various human rights treaties, the drafters referred to this criterion: for instance, the UK and Belgian representatives for the European Convention on Human Rights regarded non-derogable rights as, respectively, 'fundamental' and '*essentiels au respect de nous-mêmes*'.<sup>14</sup> Academic works have also made mention of this criterion, using for non-derogable rights phrases such as 'the most basic human rights', 'core rights', 'irreducible core', 'sacrosanct rights', '*les droits fondamentaux réservés*'.<sup>15</sup>

Justification for this criterion is simple: the more important human rights deserve more protection. This criterion should furthermore be applied in states of emergency.

<sup>11</sup> Although not systematically, some authors do pay attention to the difference of identifying criteria in this concept. See, e.g., Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision', 7 *Human Rights Quarterly* (1985) 114; Shraga, 'Human Rights in Emergency Situations under the European Convention on Human Rights', 16 *Israel Yearbook on Human Rights* (1986) 230; J. Oraá, *Human Rights in States of Emergency in International Law* (1992), at 94–96; Fitzpatrick, 'Protection against Abuse of the Concept of "Emergency"', in L. Henkin et al. (eds), *Human Rights: An Agenda for the Next Century* (1994) 209.

<sup>12</sup> P. Allott, *Eunomia: New Order for a New World* (1990), at 110.

<sup>13</sup> R. Dworkin, *Taking Rights Seriously* (1977). More radically, the idea of 'side-constraint' in R. Nozick, *Anarchy, State, and Utopia* (1974), at Ch. 3.

<sup>14</sup> Council of Europe, *Collected Edition of the 'Travaux Préparatoires'*, Vol. VI (1985), at 78–81, 126–129. On the right to marriage in the *travaux préparatoires* of the ICCPR, see, A/C.3/SR.1261, at para.31; A/C.3/SR.1262, at para.16. etc.

<sup>15</sup> See, e.g., Buergenthal, 'The American and European Conventions on Human Rights: Similarities and Differences', 30 *The American University Law Review* (1981) 165; Robertson, 'Humanitarian Law and Human Rights', in C. Swinarski (ed.), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (1984) 798; A. S. Calogeropoulos-Stratis, *Droit humanitaire et droits de l'homme* (1980), at 130.

However, giving greater importance to certain rights makes it difficult to avoid criticism for arbitrary judgements. Meron admits that ‘the characterisation of some rights as fundamental results largely from our own subjective perceptions of their importance.’<sup>16</sup> Notwithstanding this problem, this criterion can be supported, as will be argued later, and reference is at least made to it.

## B *Function-oriented Identification*

When a legal norm is expressed as an article in an institutional framework, it is articulated in a particular manner for a particular purpose.<sup>17</sup> In the context of non-derogable rights, the human rights idea is specifically articulated in terms of protection of human rights in a state of emergency. This is obvious in both direct and indirect ways.

A direct function-oriented identification focuses on an individual’s specific needs in a state of emergency. Drafters of human rights treaties rarely mention this criterion, but the idea has found expression in some works, including the drafts proposed by the International Committee of the Red Cross.<sup>18</sup> Justification for this criterion comes from the pragmatic idea that applicable law should be made suitable for the very purpose of emergency regulation. This same rationale applies for international humanitarian law; conversely all humanitarian law norms can be regarded as ‘non-derogable’ in this sense. That is the reason why one can argue about the nature of the interplay between humanitarian law on the one hand and the non-derogable parts of human rights law on the other.

<sup>16</sup> Meron, *supra* note 3, at 8. Similarly, Koskeniemi emphasizes that ‘if you and I believe something is so important that it can in no circumstance be derogated, then surely this conviction is deeper and more forceful than any conviction about legal validity created by any formal test . . .’ in Koskeniemi, *supra* note 6, at 1961 (emphasis in the original). More generally in the context of the derogation clause, Carty clearly criticizes the ILA Report dealing with this topic because purported value-neutrality is impossible; see Carty, ‘Human Rights in a State of Exception’, in T. Campbell *et al.*, *Human Rights: From Rhetoric to Reality* (1986).

<sup>17</sup> Generally, Allott, *supra* note 12, at 164. In the human rights context, several scholars illustrate this idea, e.g., ‘background rights’ and ‘institutional rights’ in Dworkin, *supra* note 13, at 93; the idea of ‘the possession paradox’ in J. Donnelly, *The Concept of Human Rights* (1985), at 11–26.

<sup>18</sup> Gasser, ‘A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct’ and Meron, ‘Draft Model Declaration on Internal Strife’, both in 262 *International Review of the Red Cross* (1988). Their idea is clearly expressed in Gasser’s critique that ‘the inalienable rights listed in human rights treaties do not sufficiently take into account the ***specific needs and problems arising in internal disturbances and tensions***.’ (*ibid.*, at 45, bold emphasis in the original, italic emphasis added). The Turku Declaration follows this approach. See the letter dated 5 January 1995 from the Permanent Representative of Norway and the Chargé d’Affaires of the Permanent Mission of Finland addressed to the Commission on Human Rights, E/CN.4/1995/116 (31 January 1995). This identification can also be found in the Human Rights Committee comment that ‘in times of emergency, the protection of human rights becomes *all the more* important, particularly those rights from which no derogations can be made.’ UN Human Rights Committee, General Comment No. 5, A/36/40, Annex VII, at para. 3 (emphasis added). However, the Human Rights Committee does not seem to maintain a determined idea in their comment on reservations. It argues that Article 4 does not make certain important rights non-derogable and shows other identification criteria randomly. UN Human Rights Committee, General Comment No. 24, CCPR/C/21/Rev.1/Add.6, at para.10.

If this pragmatic mode of thinking is adopted, the prevailing idea just mentioned is not necessarily true. Many people think that non-derogable rights represent the minimum core of human rights, but some norms, such as the protection of medical and religious personnel, are also useful in the regulation of a state of emergency. The Red Cross' proposals consider them non-derogable. However, norms in force in a state of emergency are not a part of those applicable in peacetime.<sup>19</sup>

Confusing this form of 'non-derogability' with the original one is to be avoided. Non-derogable rights can enjoy a higher status by the very existence of ordinary human rights; this implication does not exist with regard to humanitarian law. This is true even if the actual articulation shares a humanitarian law type of non-derogable character.

The other function-oriented identifying criterion appears indirectly. Non-derogable rights have often been recognized as the residuum remaining after states have declared their need to derogate from human rights norms. Drafters have relied on this criterion more frequently than on others.<sup>20</sup> A clear example may be seen in the US proposal, in the *travaux préparatoires* of the ICCPR, to enumerate not non-derogable rights but derogable rights.<sup>21</sup> Justification for this criterion is inherited from that of derogation. States may derogate from human rights treaties because of their need to recover social order. The scope of justified derogation is therefore strictly confined to the extent of measures necessary to reach this end. This criterion clearly reflects the negative definition of non-derogable rights.

Although frequent reference is made to this indirect criterion, it remains problematic. Firstly, as a result of the indirect two-step process, the list of non-derogable rights includes some rights for which derogation is not relevant, such as non-imprisonment for debts (Article 11 of the ICCPR). Selected rights tend to be miscellaneous. In addition, this criterion does not provide a unique *raison d'être* for non-derogable rights, because the rationale behind it is inherent in the principles described in the first paragraph of the derogation clauses, especially the proportionality principle. Moreover, the primary focus here is on the right to life of a state, not the rights of individuals. This does not appear to be easily compatible with the spirit of non-derogable rights as a cornerstone of the protection of human rights.

<sup>19</sup> Dinstein mentioned this special type in his categorization of human rights. Dinstein, 'Human Rights in Armed Conflict: International Humanitarian Law', in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (1984), at 350–354.

<sup>20</sup> This criterion is supposed to be more heavily relied upon, especially when the list tends to be expanded in *travaux préparatoires*, particularly in the American Convention on Human Rights and in academic studies. This proliferation caused the so-called 'inflation of human rights' and, even more serious in this context, 'the inflation of non-derogable rights'. Teraya, 'Kokusajinken no itsudatsufukanosei [Non-Derogability of International Human Rights] (2)', 112 *The Journal of the Association of Political and Social Sciences* (1999), at 938–956, 978–989. See, generally, Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) 607.

<sup>21</sup> E/CN.4/170/Add.1, 13 May 1949. The same line was used in the Philippines proposal (E/CN.4/365, at 19). The reasoning to support or refute some rights as non-derogable includes this criterion. Yugoslavia's support for equality (E/CN.4/SR. 196, at para. 17), Israel's support for fair trial (E/CN.4/515/Add.6), Philippine's refusal of the right to marriage (A/C.3/SR.1259, at para. 50) and so on.

Both the value-oriented and the two function-oriented identifications relate to the substantive aspect of non-derogable rights. These perspectives form a hermeneutic circle: an important part of human rights is verified by their need to be protected even in a state of emergency and this function is verified by the importance of the rights concerned.<sup>22</sup> The following chart presents the features of each approach and the relations *inter se*. Non-derogable rights are not a unitary concept.

**Table 1: Comparison of Substantive Identifying Criteria**

Index Identifying criterion	Primary concern	The way to identify non-derogable rights	Consideration of specific situation
Value-oriented	Individuals	Directly	No
Function-oriented (I)			Yes
Function-oriented (II)	State	Indirectly	

### C *Consent-oriented Identification*

A procedural aspect also plays a role. As long as non-derogable rights exist in the form of a treaty, they are never free from a state's will. Thus, it is generally legitimate to consider the degree of hesitation on the part of states to participate in a treaty and the need to lower the threshold in order to increase participation. Some drafters have actually expressed this concern in determining non-derogable rights.<sup>23</sup> However, this consideration should not be emphasized because, in general, domestic considerations cannot provide an excuse for the incompatibility of international law and domestic law. It is especially the case of non-derogable rights that state parties dare to give consent in advance to be bound by a norm, acknowledging its importance and the difficulty in maintaining its compliance. Non-derogable rights are intended to obtain maximum respect, so that the substantive aspect is more important than the procedural one.

## 3 International Human Rights Law

### A *The Interdependence and Indivisibility Doctrine in Human Rights Theories*

In order to gain an understanding of the issue of a hierarchy in human rights norms, it is necessary to examine the preliminary question of the interdependence and indivisibility of human rights.

<sup>22</sup> Generally, H. G. Gadamer, *Truth and Method* (2nd Eng. ed., 1979), esp. at 235 *et seq.*

<sup>23</sup> E.g., the comment of the Greek delegation (E.CN.4/SR.196, at para. 3).



Advocating this feature seems to be in contradiction not only with the general trend of international law but also with other human rights theories. One of these is the so-called third generation of human rights.<sup>24</sup> Emphasizing fraternity among nations, this theory enumerates the so-called 'new rights', including the right to peace and the right to development. The study of human rights admits, at least, the categorization of human rights.<sup>25</sup>

More important is the relationship between the interdependence and indivisibility doctrine and the core theory. In General Comment No. 3, the Committee on Economic, Social and Cultural Rights reaffirms the interdependence and indivisibility of human rights on the one hand, while, on the other, emphasizing minimum core obligations such as the supply of essential foodstuffs. This distinction would appear to entail a hierarchy in some sense. In addition, this General Comment, by providing for this core obligation, hinders the required progressiveness of states' obligations.<sup>26</sup> But the immediacy of the obligation does not necessarily follow from the importance of the question and vice versa. Although each theory conveys a certain degree of coherence, most human rights scholars tend to use theories as a means of promoting human rights and indeed pay little attention to theoretical consistency.

It is thus necessary to locate the crux of human rights theories in order to interpret them as coherently as possible. Some play a more leading role than others in practice. It is therefore important to recall the purpose of the doctrine of interdependence and indivisibility. This doctrine was developed in order to negate a dichotomy of rights, which had led to the predominance of civil and political rights over economic and social rights. Attempts were made to support the latter and, more correctly, the core rights of economic and social rights, in recognition of the fact that one-fifth of the world's population suffers from lack of fulfilment of even the most basic human needs, such as food. The core theory should therefore occupy the central position among human rights theories. To this extent, the interdependency and indivisibility of human rights should be denied and a hierarchy of human rights appears.

## **B Core Theories**

If we admit the existence of core rights or a core of rights, the thorny problem of defining that core without falling into arbitrary judgement arises again. Several approaches have been adopted in order to avoid this difficulty. One of these is based on the consent of states by means of the lowest common denominator. For example, Article 20(b) of the European Social Charter prescribes that at least five of the seven articles in that paragraph must be binding. This flexible approach leaves room for states to decide on the core as a '*noyau flottant*'.<sup>27</sup> This same idea is applied in selecting

<sup>24</sup> Vasak, 'A 30 Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', *The Unesco Courier* (November 1977) 29.

<sup>25</sup> Besides, the third generation idea is wrong in that the first and second generations cannot be realized in this interdependent world either without international support.

<sup>26</sup> The Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (1990), at para. 8.

<sup>27</sup> P. Meyer-Bisch, *Le corps des droits de l'homme* (1992), at 270.

common rights among several treaties.<sup>28</sup> Although this kind of approach assures the stability of international relations, it does not provide any guidelines for establishing a reasonable core, because the selected rights only show the result of consensus among states and do not point to the desirable character of the rights themselves. Another approach, partly expressed in General Comment No. 3 of the Committee on Economic, Social and Cultural Rights, focuses on the immediacy of obligations since some rights, even among economic and social rights, can be realized immediately.<sup>29</sup> Although pragmatic, this approach is incomplete, because it begins to work only after certain norms have been recognized as rights. Immediacy does not necessarily suggest a recognizable core norm, nor does this approach cover certain vital norms which cannot be realized immediately.

The third approach is to identify the core by clarifying the (inter)dependence of each right. The most important is the Basic Human Needs Approach. This approach forcefully argues that the realization of all rights relies on the fulfilment of basic human needs such as minimum food and nutrition. One could criticize this approach for committing the naturalistic fallacy of deducing norm from fact,<sup>30</sup> but determination of basic human needs should be recognized as a result of the philosophical consideration that no human right can be realized without the fulfilment of such basic needs. While science may be helpful in delineating those basic needs, the problem of their definition remains. Although scientific knowledge can reduce the grey areas, controversial issues reflecting community values persist.<sup>31</sup> Should education, for instance, be considered a basic need?

This leads to the purported value-neutral approach. Rather than referring to value, this approach focuses only on the logical dependence of each human right. Basic rights means that if those basic rights are infringed, all other rights are automatically infringed as well. Interestingly enough, Henry Shue, a forerunner in this area, recognized the difficulty of judging values early on and wrote 'what is not meant by saying that a right is basic is that the right is more valuable or intrinsically more satisfying to enjoy than some other rights'.<sup>32</sup> One could argue that the value-neutral nature of this approach is questionable both because the result is usually the same as that of the Basic Human Needs Approach and because it seems impossible to avoid considering basic human needs when judging 'logical' dependence. Nevertheless, this is not so important. What should be avoided is not so much value judgements, but

<sup>28</sup> Marks, 'Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts', in K. Vasak (ed.), *The International Dimensions of Human Rights* (1982, I) 203.

<sup>29</sup> The Committee on Economic, Social and Cultural Rights, *supra* note 26, esp. at paras 5 and 9. In a more general context see Schachter, 'International Law Implications of U.S. Human Rights Policies', 24 *New York Law School Review* (1978), at 75–76.

<sup>30</sup> Donnelly, *supra* note 17, at 27–31.

<sup>31</sup> M. Walzer, *Spheres of Justice* (1983), at xv, 64–67.

<sup>32</sup> H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (1980) 20. Similar ideas are found in many writings: Campbell, 'Introduction', in T. Campbell *et al.* (eds), *Human Rights: From Rhetoric to Reality* (1986) 12; J. Raz, *The Morality of Freedom* (1986), at 168–170.

rather arbitrary decisions while feigning neutrality. Seen together, these two approaches can provide enough clarity to avoid criticisms of arbitrariness.<sup>33</sup>

Compared with the core identified as non-derogable rights, basic human needs have a more general character. Without any specific context, they are articulated from the human rights idea. Non-derogable rights, however, are influenced by specific situations, as shown above in the function-based identification. In this context, it should be recalled that non-derogable rights essentially share a negative rights character: freedom from the interference of states. The traditional dichotomy must return, though not in the same sense as noted earlier. Claiming a dichotomy here does not mean going back to 'the good old days' liberal-centric conceptions of rights, but rather maintaining a respect for economic and social rights. Without this understanding, there is a danger of misunderstanding the fact that economic and social rights include no core and, accordingly, no important parts.<sup>34</sup> The truth is that only the formulations are different. It is not necessarily true that non-derogable rights are core rights or the core of rights and *vice versa* when they are identified by means of the function-oriented criteria.

#### 4 International Law in General (1): *Jus Cogens*

It is often argued that non-derogable rights, or at least four common non-derogable rights (the right to life, prohibition of torture, prohibition of slavery, non-retroactivity of penal law), in the three main treaties have a *jus cogens* character.<sup>35</sup> Both non-derogable rights and *jus cogens* use the same term 'no derogation'. They carry a sense of superiority to the remaining parts (i.e., derogable rights and *jus dispositivum*), they share the natural law tradition and make use of the same examples, such as the right to life. In addition, theoretical confusion surrounding the concept of *jus cogens* makes it difficult to differentiate between the two categories.

<sup>33</sup> More generally, R. Higgins, *Problems and Process: International Law and How We Use it* (1994), at 97.

<sup>34</sup> This is presumed to be the drafters' attitude in each treaty. Although the counterparts have a derogation clause and non-derogable rights, the International Covenant on Economic, Social and Cultural Rights (1966) and the Protocol of San Salvador (1988) do not have them. More importantly, although the European Social Charter has a derogation clause and thus had a chance to include non-derogable rights, it does not contain any. Teraya, *supra* note 20, at 956–970.

<sup>35</sup> E.g., International Law Association, 'Minimum Standards of Human Rights Norms in a State of Exception', *Report of the Sixty-first Conference Held at Paris, August 26th to September 1st 1984* (1985) 70; S. R. Chowdhury, *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Exception* (1989), at 147–148; UNESCO's opinion in E. A. Daes, *Freedom of the Individual under Law* (1990), at 189. The opinion regarding the four common rights as *jus cogens* is, e.g., shown in N. Questiaux, *Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment*, E/CN.4/Sub.2/1982/15 (1982), at 19; the Austria Comment to the Questiaux Report in E/CN.4/Sub.2/1983/15 (1983), at 3; 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', *7 Human Rights Quarterly* (1985), at 11–12, 31.

### ***A Requirements of Jus Cogens in Article 53 of the Vienna Convention on the Law of Treaties***

Article 53 of the Vienna Convention on the Law of Treaties seems circular. Furthermore, the few cases<sup>36</sup> concerning *jus cogens* are not helpful. Nevertheless, four requirements can be distinguished: (1) (on the scope of validation) ‘General international law’, (2) (on the means of determining) ‘a norm accepted and recognized by the international community of states’, (3) (on the character) non-derogability and (4) (on the condition for change) a norm which ‘can be modified only by a subsequent norm of general international law having the same character’.

A glance at these requirements shows that non-derogable rights do not always have a *jus cogens* character. Non-derogable rights set down in a regional treaty, such as the rights of the family (Article 17 of the American Convention on Human Rights), do not meet the general international law requirement. Nor is the ratification by about 140 state parties of the ICCPR necessarily decisive in creating a general international law. However, it can be argued that this static analysis cannot deny the increasing proximity of the two norms, because the present gap should be just *lex lata* and filled in by *lex ferenda*.<sup>37</sup> A more normative approach is therefore required.

The key requirement is acceptance and recognition by the international community of states as a whole. This requirement proves that even *jus cogens* is based on consent, thus giving it a subjective character. More importantly, combined with the non-derogability requirement, this consent must be given not only in relation to the general international law character but also to the non-derogability character. This second consent makes *jus cogens* a unique concept, giving it an objective character.

In this double consent construction,<sup>38</sup> *jus cogens* shares the non-derogable character as recognized by international consensus. The relationship between *jus cogens* and non-derogable rights is explained from this intersubjective perspective. Two constructions are conceivable in order to connect subjectivism and objectivism.

The first conception emphasizes the quality of the object to which states, the traditional subjects of international law, give consent. From a formalistic point of view, the international community requirement of Article 53 of the Vienna Convention is concerned only with a procedural aspect: Who should decide *jus cogens*? Yet, because ‘the international community’ does not exist in the same form as states which have well-ordered organs, and because this requirement means that *jus cogens* shall be recognized ‘not only by some particular group of States, even if it constitutes a

<sup>36</sup> For example, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment*, ICJ Reports (1986), at 100–101. They do not clarify the character of *jus cogens*, but rather just mention that some norms have that status.

<sup>37</sup> The ILA takes this view when they argue that ‘[t]he obligations in this area are of a dynamic and developing character’. International Law Association, *supra* note 35, at 70.

<sup>38</sup> Robledo, ‘Le *ius cogens* international’, 172 *RdC* (1981-III), esp. at 104–108; G. J. H. van Hoof, *Rethinking the Sources of International Law* (1983), at 156–166; Komori, ‘Kokusaiho ni okeru Kyokokihan [Peremptory Norm in International Law]’, in Onuma, Y. (ed.), *Kokusaiho, Kokusairengo to Nihon [International Law, the United Nations and Japan]*, (1987), at 24–31.

majority, but by all the essential components of the international community',<sup>39</sup> the substance of *jus cogens* matters. *Jus cogens* must include common elements among major different (legal) cultures. In this context, the *pacta sunt servanda* principle should be carefully considered. Because *pacta*, especially based on the positivist understanding, is frequently regarded as just an agreement which has no relation to its content and *jus cogens* assumes a natural law character, it is sometimes argued that *jus cogens* based on consent is contradictory. But the fact is that the *pacta sunt servanda* principle based on individual consent<sup>40</sup> is preceded by the same principle based on collective consensus which takes into consideration the content of *jus cogens*.

While the first construction makes the *pacta* of states more objective by considering its content, the next possible construction tries to confine its functional aspect: non-derogability. When only non-derogability matters, it is conceivable that *jus cogens* has no relation with the importance of the content. Emphasizing the function of *jus cogens* in relation not to *jus dispositivum* but to norms as a whole would lead to a rejection of the familiar idea that *jus cogens* introduces a hierarchy in international norms.<sup>41</sup> Non-derogability is the unique function of *jus cogens* in the issue of validity. However, law-makers cannot allot non-derogability to any norm they choose, especially in the international sphere, because *pacta sunt servanda* occupies the main position in norm decisions.<sup>42</sup> Making some norms non-derogable as a matter of validity means that the norm obtains a more important character than that basic principle. Here again, the special function implies the importance of the norm.

## B The Scope of Jus Cogens in Human Rights Norms

The first construction to emphasize the content of *jus cogens* will give priority to those human rights which are common to different cultures among the candidates for *jus cogens*, because no political entity would deny its members' welfare as a fundamental aim. Developing this idea leads to the claim that not all human rights can obtain *jus cogens* status, as some human rights remain controversial as a result of cultural

<sup>39</sup> *Yearbook of the ILC* (1976, II, Part One), at 119. This comment primarily concerns the question of international crime, but the ILC follows the system in *jus cogens* when they argue on international crime. See also, Ago, 'Droit des traités à la lumière de la convention de vienne', 134 *RdC* (1971-III) 323; Gaja, 'Jus cogens beyond the Vienna Convention', 172 *RdC* (1981-III), at 283–284; Danilenko, 'International Jus cogens', 2 *EJIL* (1991), at 53–55; L. Hannikainen, *Peremptory Norms (Jus cogens) in International Law: Historical Development, Criteria, Present Status* (1988), at 210–215.

<sup>40</sup> *Pacta* in this traditional sense was clearly expressed in *Affaire du «Lotus»*, C. P. J. I., série A, N° 10 (1927), at 18.

<sup>41</sup> Onuf and Birney, 'Peremptory Norms of International Law', 4 *Denver Journal of International Law and Policy* (1964) 189; Virally, 'Réflexions sur le «jus cogens»', 12 *AFDI* (1966) 10; Calogeropoulos-Stratis, *supra* note 15, at 137. Quite similarly, Meron argues that '[I]f a derogable right conflicts with a non-derogable right, the latter will not necessarily prevail ...'. Meron, *supra* note 3, at 16. This is the corollary of his 'non-derogability' identified by the function-oriented basis.

<sup>42</sup> Non-derogability is the common feature to all kinds of *jus cogens* in domestic, regional and universal realms. What makes *jus cogens* in the VCLT sense is community interest at a worldwide level. See Chapter 6.

diversity. Respect for this multicultural aspect requires a higher threshold for ‘intervention’ by the international community in the form of invalidation. Thus, only basic rights are in a certain sense *jus cogens*.

In this way, non-derogable rights as an expression of basic rights assume relevance and the four common non-derogable rights demonstrating minimum consent of states can be more cogently regarded as *jus cogens*. Furthermore, it should be noted that *jus cogens* relates to general content and validity of norm, while not all non-derogable rights assume that general character. Therefore, identification between the two concepts is possible when the specific features of both norms are set aside and identified by the value-oriented criterion. This is also true of the four non-derogable rights common to the relevant treaties. They can be *jus cogens*, so far as they are intended to express fundamental value for human beings.<sup>43</sup>

While the first construction looks into the content of states’ *pacta* and considers whether a quality of human rights reaches an intersubjective conception of *jus cogens*, the second construction seeks for complete subjectivism in the sense of questioning whose *pacta* is relevant: Among which subjects does the non-derogability function? Imagine a slave-exchange treaty between State A and State B. This is exclusively a matter of *jus cogens*, because the treaty would be invalidated despite there being no influence on others, a matter about which the *pacta terris* principle would be concerned. Nevertheless, looking more carefully, we see that the treaty influences third parties: A nationals and B nationals.<sup>44</sup> Non-derogability matters among non-state actors. This point leads people to view the prohibition of slavery as *jus cogens*. While the first construction deals with the issue of states making value judgements, usually referred to as moral decisions, this construction concerns value judgements in terms of subject-relations including non-state actors and, thus, comes close to objectivism.<sup>45</sup>

This idea might lead to the conclusion that all human rights are *jus cogens*, because all kinds of human rights have this character. But this does not accord with domestic constitutional laws and practices, according to which most states admit that some parts of human rights are subject to public welfare. It is clear that limiting the enjoyment of some parts of human rights on the grounds of public interest is legitimate to the extent provided for by international standards, but what these standards consist of must be questioned next. Non-derogable rights thus come to the fore again in order to provide a clear borderline. This idea sounds reasonable in that

<sup>43</sup> That is why the prohibition against the retroactive application of criminal law differentiates itself in character from the other three. It is mainly identified by the function basis. See Shraga, *supra* note 11, at 234–235; Teraya, *supra* note 20, at 978–984, 1001.

<sup>44</sup> A similar argument is found in C. Chinkin, *Third Parties in International Law* (1993), at 120–133; M. Byers, *Custom, Power and the Power of Rules* (1999), at 200. Focusing on individuals’ *pacta* might seem strange to traditional international lawyers, but this reflects one of the main modern political philosophies: social contract theory. See, generally, Allott, ‘The Concept of International Law’, 10 *EJIL* (1999) 39.

<sup>45</sup> *Jus cogens* can be a matter of paternalism beyond borders. See Komori, *supra* note 38, at 31–45. To develop this idea, *jus cogens* is a matter of paternalism in worldwide relations and is not necessarily limited to inter-state relations.

the formulation of non-derogable rights relates to the limit of state discretion. This seems one of the main reasons why people easily identify these two norms with each other. However, if we follow this logic, norms called non-derogable rights should be limited further here. Non-derogable rights directly identified by function can entail more enumeration, because there are more rights to be selected teleologically in any specific situation, as demonstrated in humanitarian law. Indirect function-oriented identification leads to various kinds of non-derogable rights which do not necessarily assume *jus cogens* character.

It is therefore this author's conclusion that, whether we rely on the first or the second conception of *jus cogens*, an identification between *jus cogens* and non-derogable rights is possible only when non-derogable rights are identified by the value-oriented process.

## 5 International Law in General (2): Obligations *Erga Omnes*

### A The Concept of Obligations *Erga Omnes*: Full and Empty

The starting point in an examination of obligations *erga omnes* should be paragraphs 33 and 34 of the judgment in the *Barcelona Traction* case.<sup>46</sup> This judgment, frequently referred to by international lawyers, acknowledged the concept of obligations *erga omnes*. It provides examples from which obligations *erga omnes* may be derived. They include 'the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination'. The term 'basic' here would seem to recognize the existence of hierarchy in human rights, but the expression is used inconsistently in various international documents. The 1951 *Genocide Convention* Advisory Opinion cited as a precedent could provide a useful indication of the existence of a hierarchy in human rights, but in that jurisprudence the outlawing of genocide is enumerated separately from 'basic rights of the human person'. Therefore, *Barcelona Traction* is the first case not only to uphold the concept of obligations *erga omnes* in the present international law scene, but it is also the first case which appears to recognize an emerging hierarchy in international human rights norms.

An important clue is to be found in paragraph 91, which seems to contradict the famous paragraphs 33 and 34. It argues that '... on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality ...'.<sup>47</sup>

A number of academics have sought to interpret these passages consistently. One of the key points is the meaning of 'the capacity to protect' in this paragraph. Bruno

<sup>46</sup> *Barcelona Traction, Light and Power Company, Limited, arrêt*, C.I.J. Recueil 1970, at 32.

<sup>47</sup> *Ibid.*, at 47.

Simma confines it to ‘*die Befugnis der Staaten zum diplomatischen Schutz*’.<sup>48</sup> If so, paragraph 91 notes nothing special, because states may exercise diplomatic protection only in respect of their nationals. However, this interpretation does not accord with the last part of paragraph 91, which does not confine itself to diplomatic protection.<sup>49</sup> Another interpretation is that paragraph 91 is merely a fact,<sup>50</sup> while paragraphs 33 and 34 are concerned with the judgment concerning norm. This may be true, but it would lead to the opinion that there exist no ‘basic rights of the human person’ to produce obligations *erga omnes*.

The most convincing interpretation is, as argued by Meron, that paragraphs 33 and 34 refer only to certain important human rights norms, while paragraph 91 refers to all human rights.<sup>51</sup> According to paragraph 34, two elements produce obligations *erga omnes*: ‘some of the corresponding rights of protection’ which ‘have entered into the body of general international law’, on the one hand, and ‘international instruments of a universal or quasi-universal character’, on the other. Paragraph 91 denies the latter. This interpretation accords with other factors: the passage enumerates only important norms as basic rights of the human person. Furthermore, paragraph 34 adds the term ‘basic’ to rights, while paragraph 91 does not.<sup>52</sup>

Another question which should also be asked is whether these documents provide enough evidence to determine some specific consequences of obligations *erga omnes*. Paragraphs 33 and 34 mention nothing in this regard and paragraph 91 just denies ‘the capacity to protect’. Obligations *erga omnes* have been discussed in the context of standing, especially in the much lamented *South West Africa* case (Second Phase, 1966). However, the ICJ, in the *East Timor* case (1995), clearly states that ‘the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things’.<sup>53</sup> Therefore, the problem of ‘inconsistency’ lies mainly in deriving overly far-reaching implications from these passages. Indeed some writers argue that ‘[h]uman rights guarantees which cannot be protected by some action, however weak, are not worth the ink with which they are written.’<sup>54</sup> Nevertheless, even if obligations *erga omnes* do not lead automatically to a specific consequence, it is possible to conclude that they can serve a unique function when accompanied by certain conditions and in certain contexts.

<sup>48</sup> ‘The capacity of states to exercise diplomatic protection’ (author’s translation). Simma, ‘Fragen der zwischenstaatlichen Durchsetzung verträglich vereinbarter menschenrechte’, in I. von Münch (ed.), *Staatsrecht, Völkerrecht, Europarecht: Festschrift für Hans-Jürgen Schlochauer* (1981), at 642–643.

<sup>49</sup> M. T. Kamminga, *Inter-State Accountability for Violations of Human Rights* (1992), at 155.

<sup>50</sup> Opinion individuelle de M. Petrén, *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, ICJ Reports (1974), at 303.

<sup>51</sup> Meron, *supra* note 3, at 10–11. See also Kamminga, *supra* note 49, at 155.

<sup>52</sup> M. Ragazzi, *The Concept of International Obligations Erga omnes* (1997) at 140, note 44.

<sup>53</sup> *East Timor (Portugal v. Australia)*, Judgment, ICJ Reports (1995), at 102.

<sup>54</sup> Frowein, ‘The Interrelationship between the Helsinki Final Act, the International Covenants on Human Rights, and the European Convention on Human Rights’, in T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord* (1977) 71. See also Crawford, ‘The Standing of States: A Critique of Article 40 of the ILC’s Draft Articles on State Responsibility’, in *Festschrift in Honour of Lord Slynn of Hadley* (1999) in press.



*Barcelona Traction's* significance as precedent therefore lies in its demonstration of the way that a hierarchy of international human rights emerges in the form of obligations *erga omnes*, and it provides at least two examples: protection from slavery and racial discrimination. The borderline remains vague, however.

In this respect, the US Third Restatement<sup>55</sup> seems to provide a clear borderline. Under the heading of 'Customary International Law of Human Rights', Section 702 provides several human rights and, in the comment, admits that violations of the rules in this section are those of obligations *erga omnes*.<sup>56</sup> The point is that it uses customary international law as a borderline of obligations *erga omnes*. This is however not certain. The formulation or generation of law is a different matter from the relations of obligations in any area of law.<sup>57</sup> In obligations *erga omnes*, customs must be recognized between international community and individual states, but the international community is again too fictitious to yield practice.<sup>58</sup> In addition, *opinio juris*, a more speculative element, is usually difficult to prove.

Contrary to these documents, two other sources suggest that all human rights belong to obligations *erga omnes*. One of these is Article 40 of the Draft Articles of State Responsibility (1996), which deals with the concept of 'injured state'. Paragraph 2 (e) (iii), 'the right has been created or is established for the protection of human rights and fundamental freedoms', does not restrict the scope of human rights. Although the International Law Commission's commentary denies that all human rights give rise to the application of Article 40,<sup>59</sup> the present special rapporteur argues that 'this protestation is not reflected in the text of paragraph (e) (iii)'.<sup>60</sup> Another example is provided by the Institute of International Law's 1989 resolution, '*La protection des droits de l'homme et le principe de non-intervention dans les affaires intérieures des Etats*'.<sup>61</sup> After mentioning human rights, Article 1 prescribes that 'Cette obligation internationale est, selon une formule utilisée par la Cour internationale de Justice, une obligation *erga omnes*.' No hierarchical term is employed here.

Given these rather fragmentary materials, it may well be more useful to describe the usage of obligations *erga omnes* rather than to seek some genuine conception. It would seem that two usages may be distinguished in contemporary discourse. The first emphasizes the two elements: the *erga omnes* relation of obligation between subjects (i.e. nothing to do with the substance of norms) and the valuable interests for the international community. *Barcelona Traction* uses the term in this sense and some

<sup>55</sup> The American Law Institute, *Restatement of the Law: The Foreign Relations Law of the United States* (1987).

<sup>56</sup> It is possible to interpret this in other ways, because the rights are merely set down in an explanatory enumeration. But L. Henkin, Chief Reporter of this restatement, clearly notes: 'Obligations of customary law in respect of human rights are *erga omnes*.' L. Henkin, *International Law: Politics and Values* (1995), at 216.

<sup>57</sup> See e.g. Gaja, *supra* note 39, at 153; R. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th ed., 1992), at 5; Kawasaki, 'Kokusaiho ni okeru erga omnes na gimu [Obligations *Erga Omnes* in International Law]', 11-4 *Hitotsubashi-kenkyu* (1987) 16.

<sup>58</sup> Ragazzi, *supra* note 52, at 191.

<sup>59</sup> *Yearbook of the ILC* (1985, II, Part Two) 27.

<sup>60</sup> Crawford, *supra* note 54.

<sup>61</sup> Institute of International Law, 63-II *Yearbook* (1989), at 340.

international tribunals also follow this usage.<sup>62</sup> Among special rapporteurs, Ago seems to have adopted this understanding. He argues that '(w)hen *erga omnes* was used in the *obiter dictum* of the *Barcelona Traction* decision, the Court had something else in mind: obligations toward the international community'.<sup>63</sup> On this basis, he tried to introduce the concept of 'international crime'. This interpretation, by considering the international community, leads to universal validation of the norm. The second usage of obligations *erga omnes* restricts the concept only to the *erga omnes* relation of obligation. This is most clearly expressed in Article 40(2)(f) of the Draft Articles on State Responsibility. Riphagen was so conscious of this usage that he admitted the possibility that even a treaty with a limited number of parties can create obligations *erga omnes*.<sup>64</sup> The present special rapporteur clearly distinguishes these two usages,<sup>65</sup> calling the first obligations *erga omnes* and the second obligations *erga omnes partes*. The second understanding could be more suitable in showing the uniqueness of obligations *erga omnes*, because such obligations are not such as a matter of validation. Nevertheless, it is not an intrinsic feature, but rather a corollary, that the first usage entails the universal validation of norms. Both usages are, therefore, possible.

Another aspect which adds confusion to this concept is the matter of legal consequence. Obligations *erga omnes* have been thought of as a concept related to legal consequence, such as countermeasure, because the *Barcelona Traction* case seems to suggest this conception. Furthermore, the ILC project frequently refers to this concept, confining its role to secondary rule, as they widely define it. It is important to know, however, that obligations *erga omnes* have no intrinsic or automatic corollary at the secondary level.<sup>66</sup> The fact that the ILC has been trying to establish the most suitable institutional framework for dealing with the failure of obligations *erga omnes* proves that no proper legal consequence does exist.<sup>67</sup> Furthermore, because this concept existed prior to the ILC project, it does not necessarily reside only at the level of secondary rule. In a sense, the concept of obligations *erga omnes* is full and almost empty of meaning.

<sup>62</sup> E.g., International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v. Furundzija*, 1998, para. 151, in 38 *ILM* (1999).

<sup>63</sup> Ago, 'Obligations *Erga omnes* and the International Community', in J. H. H. Weiler *et al.* (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 238.

<sup>64</sup> *Yearbook of the ILC* (1980, II, Part One), at 120.

<sup>65</sup> J. Crawford, *Third Report on State Responsibility* (A/CN.4/507) (2000), at para. 66 *et seq.* But some care is required here. Although the term of '*partes*' focuses primarily on the scope of validation, in this paper's position, limited validation is not an intrinsic feature but a result of a synthesis of *erga omnes* character and limited interest within the regime. A similar structure is found in regional *jus cogens*. See *supra* note 40.

<sup>66</sup> This point relates to the criticism directed towards the state responsibility project of the ILC for its broader than expected scope. See Higgins, *supra* note 33, at 162–163.

<sup>67</sup> The concept of international crime is presumed to be a special category, which specifies legal consequence including specific implementation.

## B The Scope of Obligations Erga Omnes in Human Rights Norms

If scholars rely on the understanding that obligations *erga omnes* should only refer to the relation of obligation, all human rights seem to belong to obligations *erga omnes*. Relation among subjects is a different issue from types of human rights. Riphagen is consistent in that he uses obligations *erga omnes* in this meaning and, at the same time, does not make a distinction among human rights norms in his Article 5 of Part 2 (Article 40 in the 1996 Draft Articles). For him, human rights are a unitary concept and should be identified as 'extra-State interests'<sup>68</sup> without any hierarchical implication. According to one of the constructions, a human right of a national of State A *vis-à-vis* State A gives rise to a right of State B *vis-à-vis* State A.<sup>69</sup> Individuals' human rights are, as it were, transferred to a state's rights at an inter-state level. This shows an *erga omnes* character within a treaty regime. Another possible construction argues that the right of individuals has, in itself, an *erga omnes* character; against states, against international organizations and against other individuals, known as *Drittwirkung*.<sup>70</sup> This feature is more generally known as right as a trump. A state's obligation is one of them.

These constructions that refer only to relation are similar to the already-mentioned explanation of *jus cogens* which confines its meaning to non-derogability, although in this case *erga omnes* is too meaningless to restrict the scope of human rights. In this construction, all non-derogable rights, as a part of human rights, have an *erga omnes* character; but this does not show the uniqueness of non-derogable rights.

On the other hand, when a *Barcelona Traction* type position is taken, the content of human rights norms does matter. The scope of obligations *erga omnes* depends on the character of the community interest to be protected; consideration needs to be given not only to the kinds of human rights, but also the extent and manner of their violation and means of protecting them.

Therefore, legal consequence should influence the conception of obligations *erga omnes* in this construction, although there is no intrinsic connection. This point was important in interpreting the US Third Restatement as being compatible with other documents. Paragraph (g), 'a consistent pattern of gross violations of internationally recognized human rights', is the only example which does not express types of rights. Thus, all kinds of rights can yield obligations *erga omnes* on the condition of consistency and grossness of human rights violation. It is from this angle that the above-mentioned resolution adopted by the Institute of International Law is not inconsistent with other instruments. Although it identifies all human rights as obligations *erga omnes*, the resolution has Article 4(b) which prescribes that 'la

<sup>68</sup> *Yearbook of the ILC* (1980, II, Part One), at 127. Similarly, B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994-VI), at 319.

<sup>69</sup> Dinstein, 'The *Erga omnes* Applicability of Human Rights', 30 *Archiv des Völkerrechts* (1992) 18.

<sup>70</sup> See e.g. A. Clapham, *Human Rights in the Private Sphere* (1993); P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), at 22–26.

*measure sera proportionnée à la gravité de la violation*'.<sup>71</sup> Therefore, a sort of hierarchy appears in the phase of legal consequence.

This construction is the same type as the mentioned explanation in *jus cogens*, which does not confine its meaning to non-derogability. Yet, in the case of *jus cogens*, there is no need to discuss the massiveness of violations because all treaties which violate *jus cogens* constitute an offence to all nationals, even if there is no actual harm. This understanding accords with the US Third Restatement's interpretation that only paragraph (g) denoting no kinds of rights has no *jus cogens* character.<sup>72</sup>

In this construction, all non-derogable rights share an *erga omnes* character, but obligations *erga omnes* cover a broader scope because the formula of non-derogable rights cannot reflect grossness of violations.

## 6 International Law in General (3): Hierarchy

### A Hierarchy as a Distinctive Concept

The term 'hierarchy' has not as yet been defined in this paper. Although it is frequently referred to, it has various meanings. Hierarchy as a distinctive concept will provide a better analytical framework within which to comprehend the present status of human rights and, accordingly, the development of international law.

The most important feature of hierarchy is the value-oriented element from the point of view of the international community. Article 53 of the Vienna Convention on the Law of Treaties implies this attitude by referring to 'the international community as a whole' and the *Barcelona Traction* case uses the same phrase and 'the importance of the rights involved'. The definition of international crime in the Draft Articles on State Responsibility follows suit. These phenomena imply that the purported value-neutral attitude based on a horizontal structure has been gradually changing within international society.<sup>73</sup>

Emphasis on the element of value in this paper's definition of hierarchy distinguishes it from other similar ideas usually referred to as hierarchy. Firstly, hierarchy here distinguishes itself from that in Hans Kelsen's sense of the term. His *Grundnorm*, ranked at the top of the hierarchy, is only hypothetical and free from any particular content, by which means he established his acclaimed *pure* theory of law.<sup>74</sup> Secondly, a more useful definition of hierarchy is different from popular understanding: the hierarchy of sources. Earlier studies, such as Akehurst, tended to use the term

<sup>71</sup> Institute of International Law, *supra* note 61, at 342.

<sup>72</sup> The American Law Institute, *supra* note 55, para. 702, comment n.

<sup>73</sup> This paper has shown that the concepts of *jus cogens* and obligations *erga omnes* can be used without the element of value. The usage of regional *jus cogens* and obligations *erga omnes* among limited state parties is conceivable. Nevertheless, it is better to consider values as community interest in order to view the trend of international law as a whole.

<sup>74</sup> Among his numerous works, e. g. H. Kelsen, *Reine Rechtslehre* (1934), esp at. Chs 5 and 9.

in this sense.<sup>75</sup> This conception is irrelevant, however, because one can argue the kinds of source of *jus cogens*, claim that obligations *erga omnes* derive from both customary law and treaty, and prescribe that international crime has no relevance to the origin of the international obligation breached.<sup>76</sup> Thirdly, hierarchy here has no direct relationship with the scope of validation. Hierarchical norm (usually) entails universal validation; this however is not its distinctive feature, but the result of the concept. Moreover, universal validation results not from those functions such as non-derogability in *jus cogens* but from its high value which involves all members of the international community. This first feature is important in order to distinguish hierarchy from other similar concepts.<sup>77</sup>

The second distinctive feature of hierarchy is that the function of norms yields to some clear articulation of norms. *Jus cogens* makes a distinction between derogable and non-derogable norms and obligations *erga omnes* give the *erga omnes* relation of obligation only to some norms. In this way, hierarchy is distinguished from principle, which does not guide rules decisively. In other words, hierarchical norms appear as a result of accommodating competing values.<sup>78</sup>

The third distinctive element of hierarchy is that of collective decision, which relates to the structure of international society generating community interests. A value-free attitude of international society is necessary for a horizontal world in which no individual state can claim supremacy in determining hierarchized norms. The shift to a more value-oriented attitude implies some modification to this basic structure. In this way, certain interests which are only common to some states, such as those based on administrative expediency, are not relevant to hierarchy. In fact, Weil, warning of the dangers of hierarchical norms, argues that the purpose of international law is coexistence and common aims. The relevant interests are not just common but also constitute those of the international community at large. Even if decision-making in the form of agreements between states is still dominant, the content must be considered from the viewpoint of individuals, groups smaller than the state and the international community as a whole.

Analogous to non-derogable rights, as mentioned earlier, the first and second elements of hierarchy show a hermeneutical circle. An idea actualizes in the specific context in which the law functions: a non-derogable right in relation to the individual

<sup>75</sup> Akehurst, 'The Hierarchy of the Sources of International Law', 47 *BYBIL* (1977); M. Bos, *A Methodology of International Law* (1984), at Ch. IV; Monaco, 'Observations sur la hiérarchie des sources du droit international', in R. Bernhardt et al. (eds) *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift für Hermann Mosler* (1983).

<sup>76</sup> See Art. 17 of the ILC Draft Articles on State Responsibility (1996).

<sup>77</sup> One of the other points is that hierarchy should be distinguished from regulatory provisions, such as Article 103 of the United Nations Charter. See e.g. Czaplinski and Danilenko, 'Conflicts of Norms in International Law', 21 *Netherlands Yearbook of International Law* (1990), at 12–18; Simma, *supra* note 68, at 287–288.

<sup>78</sup> See McDougal, 'The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System', in H. D. Lasswell and H. Cleveland (eds), *The Ethic of Power: The Interplay of Religion, Philosophy, and Politics* (1962); Dworkin, *supra* note 13, at 22.

right and state's duty in a state of emergency, *jus cogens* in legal validation, obligations *erga omnes* usually in the right–duty relation of states and frequently in the legal consequence of its violation.

### **B Hierarchy in Human Rights Norms**

These three features have an influence upon hierarchy in human rights norms.

The concept of human rights is used as a direct expression of individual welfare. Any international value is supposed to be attributed to individuals, because a legal fictitious entity, especially a state, does not have a real existence. Therefore, it is quite natural that the language of human rights is employed when international lawyers assign high priority to certain international norms. This idea should be supported, even if it does not come to the fore when hierarchy is discussed at the inter-state level, such as in the case of the Draft Articles on State Responsibility.<sup>79</sup> Among human rights, non-derogable rights signify a more fundamental interest of human beings and share the original character of the concept of a 'political trump' which is rather different from the present expanded human rights. This sense of non-derogable rights should confine its scope to norms by value-oriented identification. In other words, non-derogable rights distinguished only according to the function-oriented identification in each specific context cannot claim higher status in the hierarchy. Furthermore, because the formula of non-derogable rights cannot express the grossness and manner of their violation, which should be considered in conceptualizing community interests, non-derogable rights cannot cover all the hierarchized domain of human rights norms.

These claims can also be expressed in terms of function. For example, *jus cogens* in the original sense functions within the realm of validity. Relevant considerations such as *pacta sunt servanda* and freedom of contract are limited to this domain. Similarly, non-derogable rights need specific consideration in order to work effectively in a state of emergency. Such a function places a limitation on the form they may take. For example, non-derogable rights and core rights express only certain kinds of rights. It is safe to conclude, therefore, that the borderlines of hierarchies in different contexts do not accord with each other. Such accordance is possible to some extent, but only when relevant terms are used in a limited sense as mentioned earlier.

By requiring collective decision, hierarchy involves a structural change of international society. A more fundamental linkage between human rights and emerging hierarchy appears in this feature, because, among community interests, only human rights express who the beneficiaries of this welfare are: individuals. Especially when focusing on functions of non-derogability and the *erga omnes* relation, hierarchical concepts do not have to confine themselves to inter-state relations and indeed lead to conceptions which throw light on individuals. Some distinguished scholars do not fail to mention the position of individuals when they discuss the

<sup>79</sup> The present special rapporteur does not agree with treating human rights as a special category. Crawford, *supra* note 65, at paras 88–89.

structural change of international society and law.<sup>80</sup> Among the special rapporteurs of the ILC, as early as 1957, Fitzmaurice argued that *jus cogens* shared an absolute obligation because 'all rules of this particular character are intended not so much for the benefit of the States, as directly for the benefit of the individuals concerned, as human beings and on humanitarian grounds'.<sup>81</sup> This is the reason why human rights have played a leading role in the emerging hierarchy of international law.

Hierarchy affects human rights; human rights give birth to hierarchy in general. Table 2 (p. 940) may be helpful.

## 7 Concluding Remarks

As is well known, Carl Schmitt showed his special interest in *Ausnahmezustand* with the conviction that '*die Ausnahme beweist alles*'.<sup>82</sup> Non-derogable rights are the exception to exception, exception of exception. From this standpoint, the above argument has sought to provide a possible coherent understanding of hierarchical norms in international law. From the outset human rights have been strongly influenced by political expediency<sup>83</sup> and the situation will not change in the foreseeable future. The idea of human rights is a mixed bag: a means to political and economical ends, international security that is legitimate but not human rights itself.<sup>84</sup> All considerations are justifiable in their own context, but they are only so on condition that the true human right is not forgotten.

Finally, two relevant issues should be mentioned briefly. The focus on human rights could be criticized on the grounds that it emphasizes the Western origin of rights-talk.<sup>85</sup> However, human rights ideas ensure cultural diversity when their scope is carefully limited to those important ones, such as non-derogable rights. Rights may not only oppress cultural diversity, but they can also provide a common framework to promote it. In other words, my support for non-derogable rights as a hierarchical

<sup>80</sup> P. C. Jessup, *A Modern Law of Nations* (1956), at Chs 1 and 2; W. Freedman, *The Changing Structure of International Law* (1964); Ishimoto, 'Kokusaiho no Kozotenkan [The Structural Change of International Law]' in *Kokusaikankei no Kadai [The Problems of International Relations Law]* (1988), esp. at 29–31.

<sup>81</sup> Fitzmaurice, 'The General Principles of International Law: Considered from the Standpoint of the Rule of Law', 92 *RdC* (1957-II), at 125. See also Waldock's comment: 'the more the international community became integrated, the more its attention would be directed to the position of the individual. Significant *jus cogens* developments could therefore be expected in the direction of the protection of the rights of the individual in the interests of the world community as a whole.' *Yearbook of the ILC* (1966, I, Part Two), Summary Records of the Seventeenth Session, 828th meeting, para. 56. It should also be remembered that Riphagen selects human rights as a special category in Article 40 of the ILC Draft Articles on State Responsibility.

<sup>82</sup> 'The exception proves everything' (author's translation). C. Schmitt, *Politische Theologie* (1922), at 15.

<sup>83</sup> Tabata, S., *Jinken to Kokusaiho [Human Rights and International Law]* (1952); H. Arendt, *The Origin of Totalitarianism* (1951), at Ch. 9; A. Cassese, *Human Rights in a Changing World* (1990), esp. at 11–47.

<sup>84</sup> See e.g. three types of justification in S. Hoffmann, *Duties beyond Borders* (1981), at 108–111; the conception of 'utilitarianism of rights' described by Nozick, *supra* note 13, at 28.

<sup>85</sup> See e.g. Onuma, 'In Quest of Intercivilizational Human Rights: Universal vs. Relative Human Rights Viewed From an Asian Perspective', in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality* (1997). In the context of hierarchy, see Koskeniemi, 'Hierarchy in International Law: A Sketch', 8 *EJIL* (1997) 582.

**Table 2: Identification of Relevant Concepts at a Glance**

Domain          Identify criteria		International human rights law		International law in general			
		Kinds of human rights		Kinds and massiveness of human rights norms			
				By definition, massive	The degree of massiveness matters		
		Non-derogable rights	Core rights, especially within economic and social rights	<i>Jus cogens</i>	Obligations <i>erga omnes</i>	Hierarchy in general	
Substantive aspect (content)	Function-oriented	Direct way (the same as in humanitarian law) Indirect way (the same as in proportional principle)	Immediacy/progressiveness	<validation> 'a norm from which no derogation is permitted' (Art. 53)	< <i>erga omnes</i> relation> 'obligations <i>erga omnes</i> ' (in the <i>Barcelona Traction Case</i> )	Clearly articulated	
	Value-oriented	Value-oriented Important part of human rights	Basic Human Needs Approach ↑↓ Logical (inter) dependence	'A norm accepted and recognized by the international community of states as a whole' (Art. 53)	'The obligations of a State towards the international community as a whole' 'the importance of the rights involved' (in the <i>Barcelona Traction Case</i> )	Value as a community interest	
Procedural aspect (consent-oriented)		Consent of a state party	The least common denominator (e.g. floating core)		(Maybe the same way as in <i>jus cogens</i> )	Consensus (collective decision) (→ structural change)	

N.B. The identifying criteria will not reflect the scope of related norms in a direct way.

norm derives from the same reasoning which led Weil to oppose the concept of hierarchy, although the conclusion is quite the contrary. Another relevant consideration concerns democratization at the worldwide level. While it is referred to favourably in many official documents and academic works,<sup>86</sup> democracy *per se* means just government by the many; some complementary considerations are

<sup>86</sup> See e.g. Franck, 'The Emerging Right to Democratic Governance' 86 *AJIL* (1992).



required.<sup>87</sup> Human rights, essentially resisting the majority, provide a constitutional framework, especially when they work as a hierarchical norm. Non-derogable rights transcend inter-state relations in international society, sharing the same character as democracy at the worldwide level.

<sup>87</sup> A rather cautious attitude is shown in Allott, *supra* note 12, at 280; Crawford, 'Democracy and International Law', 64 *BYbIL* (1994), esp. at 115, 130–131.