

# RESPECT OF HUMAN RIGHTS IN TIME OF STATE OF EMERGENCY: INTERNATIONAL AND NATIONAL PERSPECTIVES

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## I. INTRODUCTION

The protection and promotion of human rights are important for the development of world public order and of an equitable national order.<sup>1</sup> Human rights instruments both at the universal as well as at the regional levels contain numerous core rights considered inalienable.<sup>2</sup> These core rights are guaranteed by every society through its Constitution, no matter whether it is written or not. The State has the obligation under both conventional and customary law to protect these rights.<sup>3</sup> It is the duty of States to uphold human rights of all citizens irrespective of religion, race and ethnicity.<sup>4</sup> If the basic rights are protected without discrimination by the state organs, there cannot be any violations of human rights.<sup>5</sup>

The principle of non-derogability of fundamental rights is of crucial importance in the legal regime of human rights, for it points to the irreducible core of human rights, any derogation from which will make the whole body of human rights meaningless, as there will no longer be human persons whose rights are to be protected. The implementation of the human rights is important for the development of world public order, as it is essential for the development

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1. See generally, H. Lauterpacht, *International Law and Human Rights* (Praeger, New York, 1950); T. Meron (ed.) *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press, Oxford, 1984); J. Cassese, *Human Rights in Changing World* (Temple University Press, Philadelphia, 1990); M. Cranston, *What are Human Rights?* (Bodley Head, London, 1973); G. Alfredsson, "The United Nations and Human Rights", *International Journal of Legal Information*, vol. 25 (1997), pp.17-34.
2. G. Alfredsson and A. Eide (ed.) *The Universal Declaration of Human Rights : A Common Standard of Achievement* (Martinus Nijhoff, The Hague, 1999); J. Orta, *Human Rights in State of Emergency in International Law* (Clarendon Press, London, 1995); M. K. Sinha, *Implementation of Basic Human Rights* (Manak Publications, New Delhi, 1999); R.P. Claude and B. H. Weston, *Human Rights in the World Community- Issues and Action* (University of Pennsylvania, Philadelphia, 1989).
3. Sinha, *Supra* note 2, pp. 100-182.
4. See generally, G. Alfredsson (ed.) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (Martinus Nijhoff Publishers, The Hague, 2001); A.H. Robertson (ed.), *Human Rights : In National and International Law* (Oceana Publications, Manchester, 1968); K.P. Saksena, *Human Rights : Perspectives and Challenges* (Lancers Books, New Delhi, 1994).
5. Sinha, *supra* note 2.

of an equitable national order. The human rights instruments both at the universal as well as at regional levels have established that these human rights instruments contain diverse lists of non-derogable rights. Thus, a large body of rules of international law governing the realm of human rights, represents one of the most dynamic areas in the progressive development of international law.

## II. IRREDUCIBLE CORE RIGHTS AT UNIVERSAL, REGIONAL AND NATIONAL LEVELS

All available instruments on international protection of human rights contain derogation clause which permits States parties to derogate from certain human rights during emergency or war. Article 4<sup>6</sup> of the International Covenant on Civil and Political Rights (ICCPR) permits States parties to derogate from 18 articles in times of officially proclaimed emergencies. Similar provisions are available both under Article 15 Paragraph (1)<sup>7</sup> of the European Convention on Human Rights and Fundamental Freedom (European Convention) and Article 27 Paragraph (1)<sup>8</sup> of the American Convention on Human Rights (American Convention). Protection of human rights is essential during crisis situations where States suspend basic freedoms and frequently commit massive violation of human rights treaties. It is necessary, however, for improved human rights to be matched by accommodations in favour of the reasonable needs of a State to perform its public duties for the common good.<sup>9</sup> A variety of techniques are available for effecting such accommodations, specifically these techniques include the possibility of the denunciation of a treaty.

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6. Article 4(1) provides, "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".
  7. Article 15 (1) provides, "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law".
  8. Article 27(1) provides, "In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, or social origin."
  9. M. S. McDougal, "Human Rights and Public Order: Principles of Content and Procedure for Clarifying General Community Policies", *Virginia Journal of International Law*, vol.14 (1974), pp.386-90.

### A. Principles Relating to Derogation

An analysis of the derogation<sup>10</sup> clauses against the background of the general principles of international law reveals that they are neither anomalous nor a reflection of any main current of customary law. They do reflect certain tentativeness about the individual as subject of international law and grave fears by governments about the consequence of a binding commitment to the international protection of human rights. For an authoritarian regime, political unrest supplies a welcome pretext for drastic sanctions aimed at the indefinite abrogation of personal rights and freedoms. Especially vulnerable in such situations are political, religious, and racial minorities against whom a hostile majority may opportunistically take repressive measures under the guise of dealing vigorously with a national crisis.<sup>11</sup> It is equally a self-evident principle that the exercise of individual rights cannot be unlimited. In fact, the derogation<sup>12</sup> articles express this concept of reasonable limits, as a tension between individual freedom and the needs of the community as a whole. A widespread perception clearly reflected that suspension of human rights treaties was inevitable during periods of emergency and that realism demanded the treaties to acknowledge and provide for such emergencies. The right of derogation is additional to the right given to States parties to invoke various limitation clauses so as to restrict the application of certain articles.

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10. Significantly neither the Universal Declaration of Human Rights nor the International Covenant on Economic, Social and Cultural Rights which allows progressive realisation of its provisions, contains any derogation clause. See, R. Higgins, "Derogations under Human Rights Treaties", *British Yearbook of International Law*, vol.48 (1977-78), pp.280-320; J. F. Hartman, "Derogations from Human Rights Treaties", *Harvard International Law Journal*, vol.22 (1981), pp.1-52; O. M. Garibaldi, "General limitations on Human Rights: The Principle of Legality", *Harvard International Law Journal*, vol.17 (1976), pp.503-57, D. O'Donnell, "States of Exception", *International Commission of Jurists* (Geneva), vol.21 (1978), pp.52-60; S. P. Marks, "Principles and Norms of Human Rights Applicable in Emergency Situations: Underdevelopment, Catastrophes and Armed Conflicts", in Vasak, ed., *International Dimension of Human Rights*, vol.1, 1984, pp.177-200; Y.K. Tyagi, "The Conflict of Law and policy on Reservations to Human Rights Treaties", *British Yearbook of International Law*, vol. 71 (2000), pp. 181-258.
  11. A few instances worthy of note here are the application of torture to supposed leftists in Greece and Chile, the unequal use of detention and internment against Catholics in Northern Ireland, the wartime internment of native born citizens of Japanese ancestry in the United States and the holocaust in Germany.
  12. It will be seen that a variety of techniques are available for effecting such accommodations: these techniques include the possibility of the denunciation of a treaty, reservations as to its terms, articles stating that individual rights can only be exercised in conformity with the right of others, clauses in the text interpreting the scope of rights guaranteed, 'clawback' clauses and derogations clauses *stricto sensu*. By a 'clawback' clause is meant that one permits, in normal circumstances, breach of an obligation for a specified number of public reasons. Derogations *stricto sensu* are those which allow suspension or breach of certain obligations in circumstances of war or public emergency, these are all techniques of accommodation, providing for a wide variety of possibilities". Higgins, note 10, pp.281-82.

The adoption of specific derogation articles in the above mentioned human rights instrument does not offend general principles of international law. Even Article 57<sup>13</sup> of the Vienna Convention on the Law of Treaties 1969 permits the suspension of conventional obligations, “in conformity with the provisions of the treaty” and the derogation clauses supply the specific criteria necessary for the application of this rule.<sup>14</sup> However, there is some striking resemblance between the derogation clauses and the customary law doctrine of necessity, which excuses a breach of international law when (a) a necessity exists that threatens the preservation of the State, and when (b) the danger is “so imminent and overwhelming that time and opportunity are lacking in which to provide other and adequate means of defence”.<sup>15</sup>

Apart from these aspects of customary international law, the influences on the derogation articles also include municipal laws concerning suspension of rights during wars, internal disturbances and natural disasters. The municipal law regimes generally mention a number of limitations on the right of derogation. Those limitations differ from regime to regime.

### **B. Articles Related with Non-derogable Rights**

The right of derogation is very broad. However, there are certain rights which have been recognised as of non-derogable character at both universal and regional levels. These non-derogable rights which do not permit any kind of derogation are fundamental rights, the validity of these rights can not be called into question irrespective of acceptance of a derogation clause. At universal level, ICCPR contains seven immutable core rights under Article 4(2)<sup>16</sup> which does not admit any derogation with regard to the right to life; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; the right not to be imprisoned on the

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13. Article 57 of Vienna Convention of Treaties says, “The operation of a treaty in regard to all the parties or to a particular may be suspended:

(a) in conformity with the provisions of the treaty; or

(b) at any time by consent of all the parties after consultation with the other contracting States.

14. R.P.Anand, *Salient Documents in International Law* (New Delhi, Banyan Publications, 1994)

15. Hartman, note 10, p.13; Comparing the doctrine of necessity to the derogation clauses raises another interesting point-whether the right to derogate excuses a breach or if, by suspending treaty obligations, it prevents a breach from ever occurring. The end result is the same, i.e., no breach, and little depends on the issue other than the structure of opinions by the European Commission and Court in derogation cases. Sir G. Fitzmaurice in his separate opinion in Judgement of the European Court of Human Rights, Ireland Vs. UK [1978] Eur. Cttee. of Human Rights ser. A. at 132-33, objected to the Court’s consideration of the Article 5 issues before reaching Article 15, on the ground that this put the derogating government in the “false position” of appearing to be a treaty violator. He saw article 15 operating “retrospectively” to prevent a breach rather than making the acts “excusable”.

16. Article 4(2) says, “No derogation from articles 6, 7, 8 (Paragraphs (1) and (2)), 11, 15, 16 and 18 may be made under this provision”.

ground of inability to fulfil a contractual obligation; right against an *ex post facto* law; the right to recognition everywhere as a person before the law, and the right to freedom of thought conscience and religion.<sup>17</sup>

Other universal instruments which contain non-derogable rights are the four Geneva Conventions of 1949<sup>18</sup> and Additional Protocols I & II of 1977.<sup>19</sup> These Conventions are applicable only during armed conflict. The common Article 3 of the four Geneva Conventions 1949 provides that in non-international armed conflicts all the Parties involved should observe at least certain basic humanitarian principles. Article 3<sup>20</sup> common to the four Geneva Conventions is the sole provision dealing with internal armed conflicts, which has been subsequently supplemented by Protocol II of 1977, which exclusively deals with the situation arising out of non-international armed conflicts. It sets out rules which apply to 'armed conflict not of an international character occurring in the territory of the High Contracting Parties'. In such cases 'persons taking no part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds or any other means are in all circumstances, to be treated humanely, without any distinction founded on race, colour, religion, or faith, sex, birth or wealth, or any other similar criteria..." All provisions under Article 3 are "hard core" rights, that contain an absolute prohibition of violations. Another non-derogable provision is available in Article 4<sup>21</sup> of Protocol II that deals with the protection of victims of non-international armed conflicts, which updates the rules in the common Article 3 of the four Geneva Conventions.

On the regional plane, the European Convention does not permit derogation from Article 15(2)<sup>22</sup> in respect of the right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude; and the right not to be held guilty in retroactive application of penalties.<sup>23</sup> A catalogue of eleven rights from which no derogation is permitted is mentioned under Article 27(2) of American Convention on Human Rights. The list of eleven immutable core rights is the largest of non-derogable rights in comparison with ICCPR and the European Convention; ICCPR has identified only seven non-derogable rights whereas the European Convention has

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17. Articles 6, 7, 8(1) and (2), 11, 15, 16 and 18 respectively.

18. See J. S. Pictet, *Geneva Convention Relative to The Protection of Civilian Persons in Time of War* (Geneva, 1958).

19. Protocol Additional I to the Geneva Convention of 1977, came into force on 7 December 1978, U.N. Doc.A/32/144/Annex I (1977), in *ILM* vol.16, (1977), p.1391. Protocol Additional II to the Geneva Conventions of 1949 came into force on 7 December 1978, U.N. Doc.A/32/144/Annex II(1977), *ILM* vol.16 (1977), p.1442.

20. See for text, Pictet, note 18.

21. See for text, *International Legal Materials*, vol.16, no.6 (1977), p.1444.

22. Article 15(2) provides, "No derogation from Article 2, except in respect of death resulting from lawful acts of war, or from Article 3, 4 (paragraph 1) and 7 shall be made under this provision".

23. Articles 2, 3, 4(1) and 7 respectively.

identified four non-derogable rights. The non-derogable rights under the American Convention are the right to juridical personality; the right to life; the right to humane treatment; freedom from slavery, freedom from *ex-post facto* laws; freedom of conscience and religion; the rights of the family; the right to a name; rights of the child; right to nationality; the right to participate in Government; or of the judicial guarantees essential for the protection of such rights.<sup>24</sup> The European Convention lists only four non-derogable rights — the right to life, freedom from torture, and the prohibitions of slavery and *ex-post facto* laws. The ICCPR proclaims seven non-derogable rights; the four enumerated by the European Convention, plus the prohibition against imprisonment for breach of contractual obligation, the right to be recognised as a person before the law, and freedom of thought, conscience and religion. By contrast, under the American Convention no derogation is permitted from eleven specific rights, including the right to nationality and the right to participate in government. The ‘judicial guarantees essential for the protection of these rights are also non-derogable under Article 27(2)’. In spite of this “longer list” of non-derogable rights of the American Convention, it has been observed that this however, permits derogation in emergencies which are much less serious than those envisaged by the other instruments, and to that extent an expanded list of non-derogable rights is more justified.<sup>25</sup>

However, the African Charter on Human and People’s Rights (hereinafter referred to as African Charter),<sup>26</sup> at regional level, contain no derogation clause. Instead of opting for a non-derogable provision, African Charter preferred to qualify certain rights as absolute rights.<sup>27</sup> Thus, their absolute character under the Charter is tantamount to the non-derogable character of other human rights treaties.

### C. Non-derogable Rights under the Indian Constitution

Fundamental rights are set forth *seriatim* in Part III of the Indian Constitution. Articles 12 to 35 of the Constitution are related with the fundamental rights.<sup>28</sup> These rights are not absolute (except Articles 20 and 21) but qualified

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24. Articles, 3, 4, 5, 6, 9, 12, 17, 18, 19, 20 and 23 respectively.

25. T. Buergenthal, “The Inter-American System for the Protection of Human Rights”, in Theodore Meron, ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford, 1984), p.450.

26. African Charter on Human and People’s Rights, adopted 27 June 1981, for text see, *International Legal Materials*, vol.21, no.1 (1982), pp.58-68.

27. U.O. Umzurike, “The African Charter on Human and People’s Rights”, *American Journal of International Law*, vol.77 (1983), p.9. Article 4 which provides that, “Human being are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may arbitrarily be deprived of this right”.

28. These rights are as follows: Right to Equality (Articles 14 to 18); Right to Freedom (Articles 19 to 22); Rights Against Exploitation (Articles 23 and 24); Right to Freedom of Religion (Articles 25 to 28); Cultural and Educational Rights (Articles 29 and 30); Right to Property (Article 31); Right to Constitutional Remedies (Article 32). Right to Property was deleted as a fundamental right vide 44th Amendment, 1978 and made a legal right under Article 300A.

in the sense that in defining their ambit, ample power is expressly conceded to the State to regulate them by law. However, all these rights are justiciable and the Supreme Court and the High Courts have been equipped to grant protection to these rights in its writ jurisdiction. The justiciability of these rights is itself a guaranteed right under Article 32(1) which provides, "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed". In the same Article, paragraph (4) it is specified, "the right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution".<sup>29</sup>

Under the Indian Constitution the power of suspension of enforcement of fundamental rights was very wide before 1978. Article 359(1) empowered the President to pass an order to declare that, "the right to move any court for the enforcement of the rights conferred by Part III, as may be mentioned, in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended either for the entire period of emergency or for such shorter period as might be specified in the order." However, the situation has changed after the Forty-Fourth Constitutional Amendment, which says:

When the Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for enforcement of such of the rights conferred by Part III (except Articles 20 and 21)...shall remain suspended for the period during which proclamation is in force.<sup>30</sup>

The Constitutional rights under Article 20 prohibits *ex post facto* operation of criminal law and confers immunity against double jeopardy and protection against self-incrimination. Article 21 provides that, "No person shall be deprived of his life and personal liberty except according to procedure established by law." The rights embedded in Articles 20 and 21 are thus non-derogable rights. Even during a state of emergency, these rights cannot be derogated. In case of any violation the victim has a right to approach the Court for redress.<sup>31</sup>

The only difference between Articles 358 and 359 after the forty-fourth amendment is that while the former is confined to Article 19, the latter extends to all fundamental rights except those in Articles 20 and 21. As soon as the proclamation of emergency ceases to operate, the effect of the suspension imposed vanishes except in respect of things done or omitted to be done before

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29. D. D. Basu, *Constitutional Law of India* (New Delhi, 1976), ed.6, p.114.

30. The Constitution Forty-Fourth Amendment Act, 1978, Sec.40, for the rights conferred by Part III (w.e.f. 20 June 1979).

31. Even Siracusa Principles on the Limitation and Derogation Provisions in the CP Covenant (1984), supports this, "The ordinary Courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated". Siracusa Principle, *International Commission of Jurists*, no.36 (1986), pp.47-56, p.52.

the emergency law ceases to have effect. The revolutionary judgement pronounced by the Supreme Court in *Maneka Gandhi Vs. Union of India*,<sup>32</sup> infused a new lease of life in Article 21, it has also restricted the arbitrary law making process. At present both Articles 20 and 21 are recognised as the irreducible core of human rights in India. These two rights are so fundamental that they cannot be snatched by an arbitrary fiat of the executive even during the proclamation of emergency. Any executive action, as any piece of legislation, must be “right, just and fair” and not arbitrary, fanciful or oppressive; otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.

The provisions of the Indian Constitution, embodying fundamental rights are basic to political democracy and are not static. It is true that in the context of the non-inclusion of certain human rights in the Indian Constitution and the municipal law, the Indianization of the needed human rights by the judges looks like Constitution making. However, a closer analysis of all significant judgements reveal that the judges have not usurped the role of law maker or the Constitution maker. Through its various judgements, the Supreme Court rationalized the needed human rights into justiciable fundamental rights. The Court has enriched and enlarged the right of access to justice through public interest litigation, transformed the distant Supreme Court into a poor man’s Court. The main emphasis has been on making basic civil and political rights meaningful for the large masses of people who are living a life of poverty and destitution to whom these basic human rights have so far no meaning or significance because of constant and continuous deprivation and exploitation.

### III. JUS COGENS

International law recognises a limited number of peremptory norms having the character of supreme law which cannot be modified by treaty or by ordinary customary law. The origins of *jus cogens* in international law are not clear, but the concept is now accepted, and it is expressly referred to in the Vienna Convention on the Law of Treaties.<sup>33</sup> The main impact of a *jus cogens* approach towards human rights and humanitarian conventions is that the State may not derogate from certain rights during periods of national emergency. Human rights treaties have the character of *jus cogens*.<sup>34</sup> Most areas of human rights concern, such as humanitarian law, apartheid, genocide, torture, and violations of the right

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32. *Maneka Gandhi Vs. Union of India*, AIR 1978 SC 597.

33. For the text of “Vienna Convention on the Law of Treaties”, see *International Legal Materials* (ILM), vol.8 (1969), pp.679-735.

34. E. Schwelb, “Some International Aspects of Jus Cogens”, *American Journal of International Law*, vol.61 (1971), pp. ; K. Parker and L. Beth, “Jus Cogens: Compelling the Law of Human Rights”, *Hastings International and Comparative Law Review*, vol.12 (1989), pp.412-63; V. Nageshwar Rao, “Jus Cogens and Vienna Convention on the Law of Treaties”, *Indian Journal of International Law*, vol.14 (1974), pp.362-85.

to life are governed by the norms of *jus cogens*. The Special Rapporteur of United Nations Commission on Human Rights on Torture asserted that the prohibition of torture, as an *erga omnes* obligation, could be considered “to belong to the rules of *jus cogens*”, the violation of which entailed “the responsibility of the State towards the international community as a whole.” The prohibition of torture, he also reiterated, “could be considered to belong to the rules of *jus cogens*, since it is an international obligation of essential importance for safeguarding the human being from which no derogation is possible.”<sup>35</sup> Also at regional level, on an Advisory Opinion rendered by the Inter-American Court of Human Rights, the Commission argued, that human rights provisions constitute *jus cogens*.<sup>36</sup>

The notion of the peremptory norms of international law is stated in Articles 53 and 54 of the Vienna Convention of the Law of Treaties 1969.<sup>37</sup> Article 53 provides as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and can be modified only by a subsequent norm of general international law having the same character.

Thus, according to this provision a peremptory norm necessarily operates with regard to all States, and this on the basis of the norm having been “accepted and recognised” as peremptory by “the international community of States as a whole”. Even lack of specific acceptance on the part of one or a few States is no obstacle to a norm from becoming peremptory. Thus, in an Advisory Opinion in 1951, the International Court of Justice recognised the humanitarian principles underlying the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as “binding on States, even without any conventional obligation”.<sup>38</sup> The contribution of ICJ opinion in this case reflects that

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35. UN Commission on Human Rights, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (report by the Special Rapporteur, P. Koojijmans), UN DOC.E/CN.4/1987/13 of 9 January 1987, pp.13-15.

36. Cf. A.A. Concado Trindade, “Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional levels)”, *Recueil des Cours*, vol.12, Part-II (1987), p. 87.

37. For text of “Vienna Convention on the Law of Treaties”, see *International Legal Materials*, vol.8 (1969), pp.679-735.

38. Case of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, *ICJ Reports* (1951), p.23. “The origins of the Convention show that it was the intention of the United Nations to condemn and punish a genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law bad to the spirit and aims of the

combating genocide is the obligation of a *jus cogens* nature. It is clear by now that once an international norm becomes *jus cogens*, it is absolutely binding on all States, whether they have persistently objected to it or not.<sup>39</sup>

The former US Secretary of State Henry Kissinger told the Organisation of American States that “there are standards below which no government can fall without offending fundamental values, such as genocide, officially tolerated torture, mass imprisonment or murder, or the comprehensive denial of basic rights to racial, religious, political or ethnic groups. Any government engaging in such practices must face adverse international judgements.”<sup>40</sup>

The Restatement of Foreign Relations Law of the United States list six prohibitions affecting human rights or *jus cogens*. They are as follows:<sup>41</sup>

- (a) Genocide
- (b) Slavery or Slave trade
- (c) Murder or causing disappearance of individuals
- (d) Torture or other cruel, inhuman or degrading treatment or punishment
- (e) Prolonged arbitrary detention, and
- (f) Systematic racial discrimination.

In addition, the Restatement accepts that a rule of *jus cogens* will nullify a conflicting treaty<sup>42</sup> and that “the principles of the United Nations Charter prohibiting the use of force have the character of *jus cogens*.” Rights which have attained the nature of *jus cogens*, may not be derogated, regardless of the state of emergency or national disaster facing a sovereign government. It is essential to accord a higher degree of respect and protection to the physical integrity of mankind. Beyond question, the right to life enjoys the pre-eminent position within the hierarchy of law. Similarly, the right to life is an *erga omnes*.

United Nations (Resolution 96(1) of the General Assembly, December 11, 1946). The first consequence arising from this conception is that the principles underlying the Convention are Principles which are recognised by civilised nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.

39. *Nicaragua Vs. United States Case*, ICJ Report, 1986, pp.114-17.

If a State acts in a way *prima facie* incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself...the significance of that attitude is to confirm rather weaken the rule.

The Court found that the United States is bound by the *Jus Cogens* principles prohibiting the use of force though the United States “objected” by claiming justifications.

40. 75 *Department of State Bulletin*, no.1932 (1976), 1, p.3.

41. *Restatement (Third) of Foreign Relations Law* 702 (1987).

Not all human rights norms are peremptory norms (*jus cogens*) but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void.

42. *Ibid.*

### A. Observations on a Hierarchy of Norms

The quest for a hierarchy among international human rights continues unabated.<sup>43</sup> For a State to enjoy right implies that its possession of legal standing to claim performance of corresponding obligation and, in case of default, to bring the person or persons owing that obligation to abide by it. The International Court of Justice in the Reparations for injuries case observed that, “Only the party to whom an international obligation is due can bring a claim in respect of its breach”.<sup>44</sup> Two decades later, the International Court of Justice gave direction to the idea of a hierarchy in the *Barcelona Traction*<sup>45</sup> case in a famous dictum by suggesting that:

such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *ICJ Reports 1951*, p.23) others are conferred by international instruments of universal or quasi-universal character.

‘Basic rights of the human person’ create obligations *erga omnes*<sup>46</sup>

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend them the protection of the law and assume obligations concerning the treatment to be afforded to them. These obligations, however, are neither absolute nor unqualified. In particular an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concerns of all States. In view of the rights involved all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

This passage has been the subject of differing interpretations, but it seems by making such affirmations the Court sought to draw a fundamental distinction with regard to international obligations and hence with regard to acts committed in breach of those obligation. In the Court’s view, there are in fact a number,

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43. P. Weil, “Towards Relative Normativity in International Law”, *AJIL*, vol.77 (1983), pp.413-42.

44. *Reparation for Injuries Suffered in the Service of the United Nations*, *ICJ Reports*, 1949, p.174.

45. *Case Concerning Barcelona Traction, Light and Power Company Limited (Belgium Vs. Spain)*, *ICJ Reports*, 1970, p.32.

46. *Ibid.*, p.32.

albeit limited, of international obligations which, by reason of their importance to the international community as a whole, are unlike the others. It follows, the Court held, the responsibility flowing from those obligations is entailed not only with regard to the State that has been the direct victim of the breach; it is also entailed with regard to all the other members of the international community.

The position taken in the judgement on the *Barcelona Traction* case is perhaps still too isolated to permit the conclusion that a definite new trend in international judicial decisions has emerged. But there is no doubt that this position is an important factor in support of the theory which advocates two different regimes of international responsibility, depending on the content of the obligations breached.

#### IV. CONCLUSION

The historical process of crystallisation and expansion of international protection of human rights has been marked by the phenomenon of multiplication and co-existence of instruments of distinct legal nature and effects both global and regional levels. The various means of protection is accompanied by their overriding identity of purpose and the broad conceptual unity of human rights. These mechanisms of human rights protection ought to be seen as mutually complementing rather than competing with each other. With the policy of avoidance of conflict between international and national jurisdictions, co-existing human rights procedures seem in practice to reinforce each other at international level. Whenever violations of any right take place the only proper place to seek redress is the judiciary of the State concerned. However, States differ in the level of integrity and independence which they accord their judicial system. Whether independence of judiciary remains intact even during emergency is very controversial in many countries. It is observed that the role of the national judiciary in protecting human rights in such situations is often marginal.

In a world marked by cultural diversity and fragmentation into independent States with diverse socio-political-economic structures, we have not yet reached a stage where the consequences of merging or centralisation, or absence of hierarchy, procedures and mechanisms of human rights protection at global and regional level could be properly anticipated and assessed. The international community should make serious efforts to define the distinction between ordinary and higher rights and the legal significance of this distinction. It should also intensify efforts to extend the list of non-derogable rights recognised by the international community of States as a whole. In addition, the concepts of *jus cogens* and public order of the international community should be allowed to develop gradually through international practice and growing consensus. Acceptance of these concepts would go far towards deterring violation of human rights. Lastly, the new human rights structure should eventually be secured by international acceptance of binding provisions for the adjudication of disputes implicating *jus cogens* and public order of the international community.