Human Rights and the “Public Morals” Exception in the WTO

Doctoral Dissertation

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January 2014

Human Rights and „Public Morals“ – Exception in the WTO

Dissertation

Zur Erlangung der Würde des Doktors der Rechtswissenschaft der

Fakultät für Rechtswissenschaft

der Universität Hamburg

vorgelegt von

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Aus La Habana/Cuba

Hamburg 2016

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Datum des Kolloquiums: 08. März 2016

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Permanent Court of International Justice 440
International Court of Justice 440
UN Human Rights Committee 441
Regional Courts 441
World Trade Organization and GATT 442

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Abbreviations

AAA American Anthropological Association

AB Appellate Body

Art. Article

ASEAN Association of Southeast Asian States

CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CEDAW Convention on the Elimination of All Forms of Discrimination Against Women

CETS Council of Europe Treaty Series or European Treaty Series

CRPD International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of Persons with Disabilities

CTS Consolidated Treaty Series

Doc Document

DSB Dispute Settlement Body

DSM Dispute Settlement Mechanism

DSU Rules and Procedures Governing the Settlement of Disputes

ECHR European Convention for the Protection of Human Rights and Fundamental

Freedoms

ECOSOC Economic and Social Council of the United Nations

ECR European Court Reports

ed (s) editor(s)

EJIL European Journal of International Law

esp. especially

e.g.(*exempli gratia*) for example

et seq. (*et sequens*) and following

et al (*et alii*) and others

Facs Facsimile

GATT General Agreement on Tariffs and Trade

GDP Gross Domestic Product

ICC International Criminal Court

ICCPR International Covenant on Civil and Political Rights

ICERD International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR International Covenant on Economic, Social and Cultural Rights

ICJ International Court of Justice

ICRDPD International Convention on the Rights and Dignity of Persons with Disabilities

ICRMW International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

ICSID International Centre for Settlement of Investment Disputes

ICPED International Convention for the Protection of All Persons from Enforced Disappearance

i.e. *id est* (that is)

IEL International Economic Law

ILC International Law Commission

ILM International Legal Materials

ILO International Labour Organization

ITO International Trade Organization

ITLOS International Tribunal for the Law of the Sea

LNTS League of Nations Treaty Series

NAFTA North American Free Trade Agreement

NGOs Non-Governmental Organizations

No Number

OAS Organization of American States

OAU Organization of African Unity

p(p) Page(s)

para (s) Paragraph(s)

PPMs Production and Process Methods

PCIJ International Permanent Court of Justice

Res Resolution

SAARC South Asian Association for Regional Cooperation

SPS Agreement WTO Agreement on the Application of Sanitary and Phytosanitary Measures

TEC Treaty establishing the European Community

TFEU Treaty on the functioning of The European Union

TS Treaty Series

UDHR Universal Declaration of Human Rights

UN United Nations

UN Charter Charter of the United Nations

UNCTAD United Nations Conference on Trade and Development

UNDP United Nations Development Program

UNESCO United Nations Educational Scientific and Cultural Organization

UNGA United Nations General Assembly

UN GOAR Supp United Nations General Assembly Official Records Supplement

US United States

UNTS United Nations Treaty Series

VCLT Vienna Convention on the Law of Treaties

Vol. Volume

Introduction

The relationship between public morals, international trade, and human rights, requires an analysis of the relationship between morals, law, and economics that takes into account both the empirical and the theoretical underpinnings. The "public morals" exception in the World Trade Organization ("WTO") Agreements is considered an opening to human rights concerns in the WTO legal system. To interpret the public morals exception to trade rules from a human rights perspective implies an analysis of the relationship between human rights, international trade, and international law. This relationship, in turn, implies an analysis of the relationship between morals, law, and economics. Such a relationship is seen clearly in such concrete cases as the effect of production and process methods on workplace conditions, or the effect of patent rights on human health. That is, the practical application of a law often indicates clearly which steps are necessary in order to arrive at certain desired outcomes. These steps appear very often in the legislative process, tending to resolve only punctual situations. Indeed, the legislative legal development of such a relationship is often considered empirically, in particular terms only, even wen it is widely known that this relationship exists also at a more general and abstract level. In this later case, one cannot speak about a particular, concrete situation; what is referred to is rather the overall framework containing a dynamic of morals, international trade, and human rights ground on theoretical and aprioristic considerations where the empirical element is relatively absent. Evidently, theoretical frameworks presuppose a high normative load; this is particularly true when a particular theory is not yet reflected in positive law. Positivist and firm rule of law advocates regard normative issues with great disdain. In these cases, common legislative forms of decision-making are reluctant to give positive legal form to such normative approaches. However, this lack of legislative action can result in outcomes that are unjust. That is why, in such cases, the judiciary has, as part of its function, to address and apply the rules in a conciliatory sense; it should offer guidance on the morally right bearing in mind both, the empirical and the theoretical underpinnings.

In this work, while attempting to answer the question of whether or not it is possible to understand the human rights dimension of the concept of public morals as being a general exception to WTO rules, we consider it appropriate to look into this abstract context while not necessarily going too deeply into the particular effect of international trade rules in specific human rights cases. For this reason, concrete situations are given only as illustrative examples that demonstrate how a general framework may be seen to be valid in a specific situation. The intention is to give priority to deductive reflection over inductive methodology.

The five parts, in summary: In order to answer our question of whether or not it is possible to interpret human rights in the context of public morals as a general exception in the WTO Agreements, we have divided this study into five parts. The first part is devoted to Human Rights theory. The purpose of dealing independently with human rights is to take a position as to what human rights are? What are its philosophical foundations? Are they universal? What is the value of human dignity, and what its concrete manifestations? What place have human rights in international law? The second part deals with the concept of international law, its structure and relevant characteristics. Although, in this part, there is some specific reflection on international trade issues, such as the legality in the WTO of extraterritorial measures, the main objective is to provide an overall picture of contemporary international law in order to disentangle its vertical from its horizontal structures; that is, to look at the relationship between general legal norms, and the specific rules of any particular given subsystem of international law. In this sense, the study tries to establish a relationship between what may be thought of as a polycentric and a concentric legal system, that each departs from the idea of a complete system of international law. The polycentric character of international law is reflected in the emergence and consolidation of a variety of regulatory frameworks, such as international trade, international human rights, the environment, and the law of the sea. The concentric character of international law refers to the fact that such quasi-independent subsystems have present different aspects, such as the international, the transnational, and the universal, while always sharing a common ideal: respect for human dignity. It is this consolidating principle of law at a global level that permits affirmation of three different but concentric systems; one composed of states, the international; one composed of the community of states as a whole, the transnational; and one made up of individuals, the universal. In Part II we deal, then, with such topics as globalization, the concept of international law, the place

of international values and interests in the overall legal structure of mankind, the structure of international law, its fragmentation and its constitutionalization, as well as such concepts as sovereignty and international community. In the third part, we address the structure of the international trade regime as a part of international economic law, with particular emphasis on the system of WTO exceptions. This part has two fundamental objectives: on one hand, we attempt to establish a link between international trade and an international economic law that is largely, if not exclusively, embedded within the normative framework of the New Economic Order; on the other, with the study of the exceptions, we look at links between exceptions to the international trade regime, the objectives of the international trade regime, the objectives of the international economic order, and the objectives of the general international legal framework. The fourth part is dedicated to the international judiciary. Our objective is to highlight the functions of the international judiciary as well as to define the role played by the international judge in giving meaning to positive laws. Is it the function of the judiciary to fill in the gaps and to remove lacunae? Is the legal practitioner bound to a positivist or a non-positivist hermeneutics? Is the act of interpretation a cognitive or a creative act? Which techniques are used by the judiciary in issuing a judgement? Is the international judiciary allowed to act autonomously? These are some of the questions we attempt to answer. In the fifth part, we look still more closely at the relationship between human rights, international trade, and morals. And it is at this point that we address two famous examples within legal scholarship: the first, about labour standards; the second, less well known if often cited, the objective of raising standards of living. Finally, we explore the meaning of the word "morals", both in its public or ordinary sense, and as a philosophical concept. Such general and abstract concepts must at some point take concrete form. It may be helpful at this point to ask two key questions. First, which morality? Economic morality? Human rights morality? Or the morality of the law itself? Or is there any morality that could be legally binding on Members and at the same time be conciliatory with regard to divergent moral principles? Is it appropriate that the judiciary pass such value judgements? We ask also a second, parallel question, namely: whose morality? To what extent can some objective criteria of interpretation permit us to believe that the morals to which a public moral exception applies are moral values common to the whole human race?

The first part of the work is dedicated to human rights; one fundamental objective is to identify whether there is any universally valid legal principle applicable to all

individuals and, if yes, whether this principle is cogent in character. To this end, we have divided Part I into four chapters. Chapter one tells the history of human rights; it inquires into the causes, recognition, and evolution of human claims relative to personhood. This historical investigation attempts to demonstrate that human rights possess both moral and legal features relative to human values, and subsequently that human rights are axiological in nature. The main purpose of enquiring into the evolution of human rights is first to understand the evolution, development, and expansion of human rights among the different nations of the world (domestic level), the different regions of the world (regional level), and, finally, within a global legal structure (universal level), in both its normative and positive aspects. Second, the historical investigation attempts to demonstrate that, although the institutionalization, or positivization, of fundamental freedoms as constitutional rights constitutes a landmark in human development, individual claims to protect and honour certain individual moral attitudes represents a far older tradition than such relatively recent constitutional developments, such that we ask whether the recognition of human rights depends upon a certain predetermined notion one may have about what is and is not a human right. Third, the enquiry into the evolution, development, and expansion of human rights as a historical process refers not only to a territorial aspect but also to an expansion in the scope and content of human rights; that is, from the first generation of political and civil rights as the basis of sovereign national societies, through a second generation of economic, social, and cultural rights as a result of the political and economic developments of post-Enlightenment Europe, to a third generation of collective rights based on notions of distributive justice in regard to the relationship between individual and collective claims, such as the right to development, and the right to favour environmental protection. Fourth, the study of the historical process of human rights expansion attempts to show how human rights concerns have evolved to occupy centre stage in international and universal regulation.

Part I, Chapter 2, looks at the philosophy of human rights. The legal practitioner can only determine the legal effect of a positive rule, when interpreted from a human rights perspective, if he or she truly understands its underlying philosophical human rights justification. For this reason, it is necessary to look into the different transcendental and non-transcendental forms of human rights theory so as better to determine which positive legal effects may be derived from the material principles underpinning human rights, as worked out by philosophical enquiry. Such philosophical scrutiny should

allow us to answer the question of which moral principles lie behind positive human rights. Furthermore, this philosophical examination should also enable us to identify how such principles relate to domestic and international trade, and whether domestic and international trade may ever be usefully understood as the concrete expression of a moral principle. Part I, Chapter 3, attempts to illustrate the different aspects of what is considered to be the ultimate moral principle to which all laws are accountable, that is, human dignity; to this end, the principle of human dignity is investigated from an historical perspective. In this context, it is especially important to develop an understanding of the Kantian formulation of moral categorical imperatives. Kant's categorical imperative develops a vision of the individual from the starting point of his or her intrinsic worth, against which we may evaluate the extent to which this moral principle has been accepted and incorporated into the rule of law. This chapter attempts to demonstrate that human dignity is primarily an axiological concept, which nurtures positive law at the centre both of domestic constitutional and social systems, and international constitutional or proto-constitutional structures, and notably at the centre of the legal system established at the United Nations. Part I, Chapter 4, deals with the universality of human rights. In contemporary discussion, opposition to the realization of certain universal standards is expressed most often in the argument that human rights are relative. This debate raises a question as to whether or not a distinction may be drawn between moral universalism and moral absolutism. This chapter attempts to demonstrate that the contingency of certain concrete expressions of human rights does not imply that a universal content may be trumped by local forms of power, and especially not in the context of a universal commitment to the respect and promotion of certain values recognized in positive form.

Part II is devoted to General International Law. It presents a study of the fundamental features of the structure of international law with a view to determining whether or not there is such a thing as an exclusively domestic legal system that reflects purely and exclusively state interests, or whether there are other norms and legal structures that protect values and interests that go beyond the purely selfish and domestic. Given the existence of a global society of different interacting communities, it is necessary to consolidate the links between different legal frameworks and beneficiaries. In this way, we may come to see how the legal structure of international law is being transformed, through crucial developments of a coordinative and cooperative type, from a horizontal structure (a coexistence of states), into a vertical structure (of subordination).

Part II, Chapter 1 is about globalization. It illustrates how globalization is the principal driving force behind economic, social, and legal developments, and identifies some essential effects of this global phenomenon in the evolution, development, and expansion of global justice, global ethics, and global legal structures. Chapter 2 is dedicated to the concept of International Law; its main task is to evaluate whether the international legal structure has evolved, or is evolving, and, if so, in which direction, or whether it has remained static. Here we ask such questions as, what is the nature and what the characteristics of international law? What is the purpose of international law? What is international law? What are the sources of international law? In posing these questions, we attempt also to identify whether there may be any material or formal source of law that is able to reconcile the voluntarists and the non-voluntarist tendencies. In addition, we ask ourselves how the international society/community is able to respond to the different emerging and consolidating values and interests at the international, transnational, and universal level. It is necessary, too, to ask questions about the structure of international law. Is there any hierarchy in international law? Are there rules the value of which makes them hierarchically superior? Which values and interests are protected or promoted through such hierarchically superior rules? If one may establish a hierarchy of international law, might we then be able to identify, on the basis of the values expressed within this hierarchy, a new model for the global society/community? In what would this new model consist? Is international law a random, polycentric legal framework, without any conciliatory mechanism? Or is it possible to imagine that international law is in a highly dynamic stage of transition, developing a complete legal system of multiple but concentric levels? Is there any concentric structure where international, transnational, and universal values and interests are protected? What are these values and interests? Can they be viewed as imperatives?

Under the heading of "International Community", Chapter 3 attempts to outline the main features of what may be considered the international community/society. To do so, we focus on three interrelated notions: society, community, and the individual. How are these notions understood within the legal framework? What is their positive and their normative content? How are they interrelated, positively and normatively? In answering these questions, we examine the main philosophical systems that underpin the values of the international community, namely, the Hobbesian, the Grotian, and the Kantian. We should then be able better to appreciate which elements of each of these ideals remain

present in today's positive legal global order, on the one hand, and, on the other, to evaluate the cogency of those values. Only then shall we ask ourselves if decision-makers are truly in a position to take account of the inter-relationship of these three coexisting levels: the international, the transnational, and the universal. In the particular case of the WTO international trade regime, we ask to what extent the agreements and jurisprudence recognize transnational values and interests. Part II, Chapter 4 is dedicated to the much discussed topic of sovereignty. The objective of studying sovereignty is to identify the extent to which this concept has been eroded in favour of a recognition of the legality only of certain extraterritorial actions. Is the "living instrument" or "evolutionary" approach to interpretation a judicial reflection of the erosion of sovereignty? To what extent are the Lotus Case rules of jurisdiction adequate in order to accomplish certain legally recognized international, transnational, and universal goals? In the specific context of international trade, it is necessary to ask which types of trade-related measures might be admissible within the WTO legal framework. Is there an exigency regarding the strength of a link between a trade-related measure and its targeted product? Are there any prohibitive measures that influence foreign policy? What has WTO jurisprudence to say in this respect?

Chapter 5 is about the fragmentation of international law. It lays the foundation for an examination of the role of the judicial function both as an element in the process of law formation, and in light of its function of giving coherence and consistency to the international legal system. Linked closely to a process of fragmentation is a process of constitutionalization; for this reason, we reflect, too, on whether there is any form of constitutional order within the global legal structure. Chapter 6 is devoted to the study of constitutionalization understood as the legal order of a body politic. Is there any global constitutional order? Which norms belong to this order, and which are potential candidates to become constitutional? Are there processes of micro-constitutionalization at the international level? Taking into account the fact that constitutionalization is also a concept ubiquitous in WTO scholarship, we examine the different meanings of constitutionalization in a WTO context. Our goal is to disentangle and better understand the extent of interconnectedness that exists between the different aspects of constitutionalization so as more effectively to determine the degree of complementarity between the different centres (concentrism) and sectors (polycentrism), that exist in international law.

Part III is devoted to the study of International Trade Law. Its objective is to determine the place of the WTO international trade regime within a complete system of international law. This relationship will be approached from the perspective of WTO objectives and exceptions. In order for our approach to be fully coherent and systematic, Chapter 1 is dedicated to the study of International Economic Law. It is important not to forget that international trade is above all an economic activity; it is therefore essential to understand the fundamental underpinnings of the international economic order. Is there a definition of international economic law that includes non-economic concerns? Is economic justice only related to commutative justice or does it also involve issues of distributive justice? Chapter 2 researches the structure of international trade law and its relationship to other international law. Our main question here is the following: can International Trade Law be separated from International Economic Law, or indeed from International Law? What does WTO jurisprudence have to say on this matter? In Part III, Chapter 2, we examine the structure of the WTO. Who are the subjects and beneficiaries of WTO provisions? What are the sources of WTO Law? Are there both external and internal sources? What legal value is given to principles within the WTO system? The purpose of these questions is to demonstrate that, in some cases, external principles of international law can usefully be applied when determining the meaning of WTO provisions. But how to ascertain which principles are applicable to WTO rules? Here our investigation has recourse to a study of WTO objectives. What is their legal value? What type of objectives are they? The purpose of this enquiry is to evaluate whether there are also objectives that are non-economic in nature and, indeed, whether such mixed objectives ever draw upon external legal sources. In examining the institution of the WTO, we observe that, besides objectives, there is also a system of exceptions; it is therefore imperative also to analyze how these WTO exceptions relate to WTO objectives. Finally, we examine the links between international law and WTO objectives and exceptions. The objective here is to evaluate whether or not it is possible to substantiate WTO provisions by taking into account the *telos* of the organization and the *telos* and norms of International Economic Law, on the one hand, and International Law, on the other. Chapter 3 looks at WTO exceptions. First we examine the scope of those exceptions. Are they to be understood as protecting domestic interests only? What position has the WTO judiciary adopted on this issue? Is it permissible and useful to take an evolutionary approach to the interpretation of treaty provisions? To answer these questions adequately, while at

the same time assessing the possibility of interpreting human rights within the conceptual framework of public morals makes it indispensable to look first as the structure of the general exceptions. In what way do general exceptions require a two-tiered process, and why? How might an abuse of general exceptions be avoided? When is a measure necessary? Particularly important is to notice what role the importance of the value at stake plays when passing the necessity test. What are the requirements of the chapeau? At the end of the Chapter 3, we make a survey on another type of WTO exception or, better, exemption, namely the waiver. We study two waivers in particular: the TRIPs waiver, and the Kimberly Scheme waiver. Our objective here is to demonstrate how the institution, albeit through a different procedure, remains aware of the overriding worth of certain values beyond purely economic activity and its relationship to trade.

In order to answer thoroughly the question of whether or not it is possible to interpret human rights through the concept of public morals as a positive law exception to international trade rules, it is necessary not only to examine the main features of human rights, international law, and the trade regime established by the WTO; one must also examine the international judiciary, its function, its techniques, the meaning of its interpretations, and the overall characteristics, in particular of the WTO judiciary. The main purpose of Part IV, taking into account non-WTO law in an interpretation of WTO provisions, is to determine to what extent the WTO judiciary possesses legitimacy when issuing autonomous judgements. Can the WTO adjudicatory bodies construe WTO provisions from a human rights perspective? Chapter 1 examines judicial power as an element in the law-making process. The central question is this: what is the function of the international judiciary? Has the international judiciary such power and legitimacy as to consolidate political and legal issues? Taking into account the fragmentary nature of international law, is it a task of the judiciary to integrate, harmonize, and unify international legal structures? Another objective to scrutinizing the international judiciary is to determine the techniques and methods used by this branch of power so as to allocate power. That is, how does the judiciary allocate power so as to obtain a legal result from legal disputes? When are international courts allowed to defer to the determination of final outcomes to domestic decision-making? Inversely, when are courts allowed to make autonomous judgements? As the Dispute Settlement Body regulates the Standards of Review, it is also necessary to examine the practice of the WTO adjudicative bodies, which allocate decision-making faculties to fulfil their

obligation of making an objective assessment of those matters under its consideration. Thus, we explore the relationship between consensus, deference, and autonomy, from the perspective of the judiciary.

Part IV, Chapter 3, is central to our thesis. It is devoted to an examination of the concept and nature of interpretation. In particular, it examines the methods of interpretation used in international law. The initial objective of this chapter is to define the activity of the legal interpreter. The second objective is to describe the methods available to the legal interpreter working in the context of international law. What is the ordinary meaning of interpretation? What is the conceptual meaning of legal interpretation? What is the function of judicial interpretation? Looking into the nature of the interpretative act itself should allow us to establish a relationship between the act of interpretation and the functions of the judiciary. What is the basis of this relationship? How, by means of interpretation, does the legal interpreter construe legal provisions? This study of legal hermeneutics, in both positivist and non-positivist form, should make it possible to determine the spectrum of possibilities available to the legal practitioner so as to yield a satisfactory legal outcome. Such an hermeneutics touches directly the issue of interpretation as a legal concept. In determining whether the judicial function includes a legislative aspect, it is also necessary to identify the general scope and limits of the interpretative act. To this end, a study of the methods of interpretation of international law is likewise undertaken. What were the interpretative criteria established under the Vienna Convention on the Law of Treaties? What role do subjective and objective criteria play in giving meaning to a legal provision? Particular emphasis is placed on the evolution of interpretation, and specifically in the evolution of exogenous interpretation. How have the WTO adjudicatory bodies approached this issue? Finally, Chapter 4 deals with the WTO Dispute Settlement Body. The main purpose of this chapter is to demonstrate that the Dispute Settlement Understanding, together with the other political and legal instruments and bodies of the organization, has as its task to contribute to the achievement of economic, non-economic, and mixed-nature WTO goals. What is the function of a Panel, and the Appellate Body? We examine here the debate surrounding the difference between jurisdiction and applicable law, and ask whether the adjudicative organs of the WTO are correct to apply non-WTO law in the attempted resolution of legal controversy. What is meant by the judicialization of the WTO? Does the Organization, through its different political and judicial organs, encourage a confusion between treaty law and judicial law-making? Does the WTO judiciary have the

function, together with the political bodies of the organization, to strengthen the security offered by the system?

Part V deals with the relationship between human rights, international trade, and public morals. The main purpose of this chapter is to clarify to what extent it is possible to interpret human rights within the concept of public morals as a general exception to WTO rules. Part V, Chapter 1, examines the relationship between human rights, trade, and morals. We first consider those moral principles that underpin the respective systems of action; namely, human rights, on the one hand, and, on the other, economic performance. However, the main question to answer here is whether there is a moral principle common to both economic and human rights discourse. How does the question of human dignity relate to trade and to human rights? What have they in common? In the case of a common moral principle, how is that reflected from a normative as well as from a positive point of view? To illustrate this possible relationship, we give two examples; namely, labour standards, and living standards. What is the nature of labour? Is it a purely economic activity? Or does it possess also a social aspect? Is there a form of justice that, based on moral considerations, is able to honour and respect labour from the point of view of both economic and social justice? Our second example deals with standards of living. This concept is broader in scope than labour; it relates to overall living conditions. Nevertheless, the analysis is in some ways similar. Are living standards a matter of the exclusively economic? Or are they a question of human rights? How is the question of living standards approached by international institutions? Do living standards mean the same thing for the World Bank as for the United Nations Development Programme? Is there a way for different understandings of living standards to be harmonized? Chapter 2 examines both the ordinary and the philosophical meaning of the expression "public morals". What is its legal value? And does the general exception, intended to protect public morals, allow for trade provisions to be limited by moral considerations? Do these moral considerations amount to human rights? Chapter 2 is about the interpretation of the "public morals" exception. What is the ordinary meaning of the word "morals"? What is the ordinary meaning of the word "public"? Taking into account that the ordinary meaning of the words "public" and "morals" may be too general and abstract, we have considered it appropriate to look rather into the meaning of these words more as philosophical concepts. In so doing, we have not at this stage chosen to examine any particular type of morality; we look at morals only from the point of view of its form, and not its content. What does

philosophy understand by morality? Are there different types of morals? Is a moral rule or truth absolute or contingent? Is a moral rule or truth relative or universal? After enquiring into different types of morality we go on to consider the relationship between morality and law. Are there levels of morality? Is morality inferior, equal, or superior to positive law? Is there any international, transnational, or universal morality? We argue that the relationship between human rights, WTO international trade rules, and public morals, hinges upon our answers to these questions. Finally, we assess, taking into account the general practice of WTO adjudicatory bodies, the positive structure of GATT Article XX(a). How has the expression "public morals" been interpreted in the jurisprudence? Can the ordinary meaning of these words, understood on the basis both of a teleological interpretation and taking into account general principles and rules that establish certain cogent moral values, be understood in such a way as to limit trade provisions? The protection of human dignity is a concept of such fundamental importance in any discussion of human rights and international law. In such a context, are trade rules accountable for any direct failure fully to honour human dignity and, if not, should they be? These are our basic questions.

PART I Human Rights

CHAPTER 1 HISTORY OF HUMAN RIGHTS

A The controversial origin of Human Rights

To look to history for an explanation of human action raises at once a fundamental problem: how are we objectively to evaluate the relevance of past events. An attempt to make an objective assessment of history runs several risks. One may under- or overvalue certain historical phenomena. And, even worse, one may turn to history as to a policy tool or instrument, distorting history with a view to giving an appearance of legitimacy to specific policy choices and decisions. However, we cannot look to history for phenomena that match those of the present; we can only look to it for possible antecedents of modern phenomena. In other words, we strive to deepen our appreciation of history so as better to understand the causes of present phenomena prior to addressing ourselves to the future. History has a tremendous bearing on the present in two important ways: first, a depth of historical understanding helps to disentangle the issues of motivation and cause; second, a depth of historical understanding begins to reveal indicators or parameters of right and wrong action which help to match an appropriate policy choice to a desired outcome. History guides our future in that it informs the present about the past.

Human rights have a controversial origin and nature. Our history is complex. In the case, specifically, of the history of human rights, it is characterized by a controversy about its origins, its definition, its purpose. The question, first, of what are human rights, and the question, second, of where, when, and how to fix their origin and to trace their history, are questions notoriously difficult to answer in a satisfactory way. These questions are intimately inter-related; they must be answered together. In this way, the history of human rights is not so much a descriptive history of chronological events as an attempt to trace the normative history of a perennial human search for the

understanding and clear expression of certain fundamental moral claims on behalf of the individual within their community.

B About the concept of Human Rights

The multi-faceted nature of human rights makes their clear definition very difficult.[1] Furthermore, lawyers, politicians, and philosophers tend to outline in divergent ways the origins and history of human rights. Legal scholars often tell the history of contemporary human rights with reference to their modern manifestation in the constitutional Enlightenment. Above all, lawyers focus on rights; for them, the origin of human rights depends on a definition of a "right". Another approach is to look at the origins and history of human rights in search of elements to support and validate, in an holistic way, the existence of universal human rights. This approach differs from that of legal science in that its argumentation and intellectual structure is less singular or reductionist; human rights are rather seen as a phenomenon in the general social sciences. A history of this kind, based upon a broad conception of human rights, is narrated mainly by advocates of human rights, among whom, very often, are the philosophers. In philosophy, human rights are often defined as moral assertions on the value of the individual. However, human rights, to the lawyer, are "legal" or positive rights; that is, positive enactments concerning the value of the individual. In this positivist view, a more general history is reduced to a source of positive right. That is, moral claims, for the positivist, are not rights; at most, they are *lege ferenda* rights. To repeat, the multi-faceted nature of human rights (sociological, cultural, economic, political, legal, philosophical) makes the task of defining human rights difficult to accomplish. At the very least, we can attempt to identify common elements in our contemporary understanding and definition of human rights, most notably in the arena of the social sciences.

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[1] Manfred Nowak, "Introduction to the International Human Rights Regime", 2003, p. 1 This author describes three different definitions of human rights by approach. First, a descriptive approach, as in "those fundamental rights, which empower human beings to shape their lives in accordance with liberty, equality and respect for human dignity". Second, a legal definition, as in "the sum of civil, political, economic, social and cultural rights laid down in international and regional human rights instruments, and in the constitutions of the states". Third, a philosophical approach, as in "the only universally recognized value system under present international law comprising elements of liberalism, democracy, popular participation, social justice, the rule of law and good governance".

Human rights are primarily defined as an axiological concept**.** There is some agreement among scholars that the concept of human rights is of an axiological character. That is, human rights are defined on the basis of human values derived from our moral human nature. Therefore, human rights may be grouped with the study of ethics; they concern principles of liberty, equality, dignity, and justice, as values that pertain to the "humanity" of the human being and his or her life in human society. Therefore, a general vision of human rights may consist in a system of values derived from our moral nature that are applicable to all members of the human family. In this view, human rights may be categorized as a species of moral philosophy.

There are two perspectives: (1) human rights begin according to a definition of a right (inexistence of a *telos*) (2) human rights begin according to the identification of human values (existence of a *telos*). Academic controversy aside, history provides rich material for the construction and support of human rights theory. A positivist approach refers to fundamental freedoms and finds its origins in the Enlightenment, in human rights as domestic constitutional rights; or it turns, rather, to international human rights, also valid among states, that are based upon the dignity of the individual, and universal in reach, in the creation of the United Nations system and the promulgation of the Universal Declaration of Human Rights.[2] Non-positivistic approaches, especially those put forward by human rights advocates, consider the history of human rights rather as a cumulative historical process that is founded in the identification of the values of the individual within society only insofar as he or she forms a part of the human species.[3] They disregard the issue of what is a right, or whether or not, as characteristic of a political system, rights are conferred by the state. Their starting point is not whether or not the positive right is conferred by the state or any other kind of polity, but is rather the question of how human values evolve with respect to norms. One author has put it this way:

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[2] There are authors that conceive the history of human rights focusing on a concept of right. They accentuate that in antiquity and up to the Middle Ages ultimate values do not reside in the individual prior participation in a social or political collective, but that ultimate values derived from the social order itself (in the sense of formal process), that is rights were conferred –as opposite to recognized- by the society to its members. **See** Elaine Pagels, "The roots and origins of human rights" in *Human Dignity –The Internationalization of Human Rights* A H Henkin (Ed.), 1979, p. 2 Endorsing Pagel's approach Charles E. Wyzanski Jr, "The roots and origins of human rights" in *Human Dignity –The Internationalization of Human Rights* A H Henkin (Ed.), 1979, p. 10.

[3] Micheline R Ishay, "The History of Human Rights –From Ancient Times to the Globalization Era", 2004 **See also** Jack Donelly, "Human Dignity and Human Rights", 2009, available at http://www.thelatinlibrary.com/cicero/off.shtml. Last visited 06.June.2012.

> *"The extensive legal protection for human rights that currently exist in national regional and international law is the product of millennia of struggle by individuals concerned with human justice and well-being. These visionaries have provided inspiration and guidance, some of them acting out"*[4]

If we disregard temporarily the academic question of how best to define a right, we see that both the positivist and non-positivist approaches converge when we look to the object of human rights. Both recognize that notions of liberty, equality, dignity, and justice, are present in most cultures in human history. The same concepts are found throughout the social sciences, in philosophy, sociology, politics, and economics. Setting aside the detailed arguments of academic controversy, we may perhaps assert safely that our contemporary notion of human rights is rooted in human culture and nature, it our human values, values which have in some sense been shaped and defended since antiquity and which have come to make a very important contribution to our understanding of right and wrong, expressed either as a right or as a norm, as moral duty or as religious responsibility. In conclusion, we understand human rights to be a moral and legal concept, axiological in nature, that promotes in political discourse a language of universal human value.

C Ancient philosophy and religion

The notion of human rights may already be encountered, arguably, in the religious codes and philosophies of antiquity, the so-called pre-constitutional period. The ethical reflection of ancient cultures flows into contemporary notions of human rights. Justice, well-being, liberty, tolerance, are all concepts that may be argued to exist already in pre-constitutional cultures. Another common standard is a notion of dignity expressed in terms of idealized human virtue and regulated through strict moral code.[5] Great emphasis is placed upon the value of the person, upon compassion, upon love of one's neighbour, upon concern for our fellow man and, very importantly, upon the equality of all by virtue of a shared, common humanity. Principles of dignity, equality, liberty, and justice, permit the elaboration of groups of rights of universal reach. This universality is what the historian human rights advocate argues for in indicating values that appear to

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[4] Dinah Shelton, "An Introduction to the History of International Human Rights Law" Working Paper No.346, The George Washington University Law School, 2007 available at http://www.csb.uncw.edu/people/eversp/classes/BLA361/Intl%20Law/Required%20Readings/18.History%20of%20Human%20Rights%20Law.ssrn.pdf. Last visited 06.June.2012.
[5] Donnelly, above note 3.

be common to many otherwise diverse cultures. The universality of human rights and the concrete legal expression of human morality pose fundamental problems for a doctrine of human rights. In an effort to solve the problem, modern ethics increasingly welcomes a worldwide spectrum of traditions in philosophy and religion that prove, arguably, the universal character of a distinctively moral human nature.[6]

D Modern Constitutionalism

1 The modern constitutional order

It has been suggested that, from an historical perspective, modern human rights as legal rights developed during the Enlightenment from domestic constitutional law.[7] This epoch marks the beginning of the era of Constitutionalism. Modern constitutions are at the top of the hierarchy of the legal system within a national state. Their structure displays a formal as well as a practical aspect. The formal aspect is dedicated to those political bodies, procedures, and structural principles, on which the state is constructed. The practical aspect lays down the values and objectives professed by the state, fundamental freedoms or human rights in particular.[8]

In modern constitutionalism the rights of man serve as the foundation of the New Political Order. Although the United Kingdom did not undergo a political transformation involving classical constitutionalism, some important legal acts do indicate the existence of quasi constitutional rights that both limit the powers of the sovereign and recognize individual liberties. The following documents are especially noteworthy: the Magna Charta (1215); the Habeas Corpus Act (1679); and the Bill of Rights (1689), born out of the English Glorious Revolution. However, it was only at the very end of the 18th century that two revolutions gave birth to the two most influential legal documents of constitutionalism, documents that may be considered the first catalogues of human rights in positivist legal form.[9] Each of these revolutions was inspired by a liberal vision of society and built upon doctrines of rationalistic natural law. Their revolutionary force lay in the belief that the rights of man must be at the

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[6] Micheline R Ishay, "The Human Rights Reader", 2007 (2nd edition) at xxiii.
[7] Nowak, above note 1, p. 36 **See also** Matthias Hartwig, "Der Gleichheitssatz und die Universalisierung der Menschenrechte", in *Gleichheit und Nichtsdiskriminierung im nationalen und internationalen Menschenrechtsschutz* R Wolfrum (ed.), 2003, p. 274.
[8] Nowak, above note 1, p. 15.
[9] Alfred Verdroß, "Die Würde des Menschen und ihr völkerrechtliche Schutz", 1975, p. 7.

foundation of the New Political Order. The first of these revolutions took place in the Anglo-Saxon world: the independence of the Thirteen Colonies from the British Empire. This revolutionary movement resulted in the US Declaration of Independence and the creation of the American constitution. In the European context, the French Revolution gave birth to the *Déclaration de Droits de L'Homme et du Citoyen.* These constitutional models inspired many nations in the western world to establish their own New Political Order founded upon a constitution. The common credo was that reason is an inborn moral sense that enables men to create a socio-politico-legal order in which liberty, equality and justice are possible.[10]

2 United States

The Virginia Bill of Rights of 12 June 1776 is a declaration of rights that served as a basis for the establishment of the foundations of government. Article 1 states that "all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Article 2 goes on to state likewise that "all power is vested in, and consequently derived from, the people(…)" Moreover, Article 3 establishes the objectives to which a society should aspire, while at the same time giving to the majority of the community the right to remove an inadequate government that fails in its duty to produce the greatest happiness and safety. Article 15 states also that "no free government, or the blessing of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."[11]

One month and two days after the Declaration of Independence of 4 July 1776, the reasons for separating from British colonial power were formally communicated. The Declaration drew legitimacy from the Laws of Nature and Nature's God. It states that "We hold these truths[12] to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life,

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[10] Yehoshua Arieli, "The Emergence of the Doctrine of the Dignity of Man" in *The Concept of Dignity in Human Rights Discourse* D Kretzmer and E Klein (eds.), 2002, p. 6.
[11] See Virginia Bill of Rights.
[12] Richard B Lillich, Hurst Hannum, S James Anaya, Dinah Shelton, "International Human Rights", 2006 (4th edition), p. 2 Telling that the word "truths" makes reference to the concept of human rights.

Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." The Constitution of the United States was completed on 17 September 1787. It established the political bodies, structures, and different powers of the nation.[13] A further important step in the constitutional history of the United States was taken in 1791 with the creation of the Bill of Rights. This document includes the first ten amendments to the American constitution. These recognize individual rights such as freedom of religion, speech, press, and assembly[14], and the prohibition of cruel and unusual punishment.[15] Yet another decisive moment in American history, in the history of the American constitution, and of the history of human rights in general, is the abolition of slavery on 12 June 1865.[16]

3 France

In Europe, the French Revolution gave light to the Declaration of the Rights of Man and of the Citizen. It established that: "The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties; (…)" The following articles of the declaration illustrate how the new "Rights of Man" combine a doctrine of natural law with positive legislation in order to establish a new political order: Article 1, "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good."; Article 2, "The aim of all political association is the preservation of the natural and imprescriptible rights of man. These

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[13] Stephen Andrew James, "The Origins of Universal Human Rights: An Evaluation", 2005, p. 17 It is generally acknowledged that the philosophy backing the American Constitution used by Thomas Jefferson and George Manson were taken from the natural law teachings of John Locke, especially those of his Second Treatise on Government.
[14] First Amendment, American Bill of Rights.
[15] *Ibid.*, Eight Amendment
[16] *Ibid.*, Thirteen Amendment.

rights are liberty, property, security, and resistance to oppression."; Article 3, "The principle of all sovereignty resides essentially in the nation. (…)"; Article 4, "Liberty consists in the freedom to do everything which injures no one else." Furthermore, specific rights were also clearly promulgated, *i.e.* Article 11, "The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law."; Article 17, "Since property is an inviolable and sacred right, (…)"

a American and French fundamental contribution

The main political achievement of the American and French charters was the realization that government exists to ensure the rights of the individual. We can see from the above examples that, in terms of the political organization of society, the main achievement of the American Constitution and the *Déclaration de droits de L'Homme et du Citoyen* in France was the legal codification of the principle that government exists to guarantee to the individual his or her inalienable rights.[17] From a much broader, including economic, perspective, one sees that the new constitutional world was also grounded in the individual right to property, and to economic liberalism. In spite of such tremendous historical change, we should note, in passing, that these declarations of an inalienable, natural right to liberty, equality, fraternity, property, coexisted with a wide range of inequalities, that included slavery, racism, and the exclusion of women from some basic political rights.[18] Nevertheless, the effect of these political and social advances was felt not only in the rest of Europe[19] but also in Latin America[20], many of whose countries began to demand independence, principally from Spain and Portugal. The Echo of the "New Man" and "its New Political Order" was heard both in the "new" and in the "old" parts of the human world. The rise of constitutionalism had another important effect in legal philosophy: it shattered the illusion that natural law can be the source of all individual claims. Indeed, natural law systems were criticized for being too open-ended;

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[17] Pagels, above note 2.
[18] James, above note 13, p. 16.
[19] Belgium: Constitution du 7 février 1831[consitution]; Germany: Pauschalkirschenverfassung 1848[consitution].
[20] Venezuela: Constitución Federal de los Estados de Venzuela 1811[constitution]; Mexico: Constitución de Apatzingán 1814 [constitution]; Argentina: Constitución de las Provincias Unidas en Sudamérica 1819 [consitution]; Chile: Constitución de 1822 [constitution].

they were a sort of nonsense.[21] In effect, this doctrine had indeed been used to defend both "good" as well as "bad" rights.[22] The new legal philosophy, that of positive law, aspired to a clearer and less compromised understanding and definition of basic human rights. Constitutionalism, while based on natural law and propagating its postulates, thus gave birth also to positivism and to the axioms of the rule of law.

4 Socialist Constitutionalism

The New Political Order established by the American and French revolutions occurred against the backdrop of an industrial revolution that itself gave rise to a form of capitalism intellectually underpinned by economic and political liberal ideas. The new political order focussed on fundamental civil and political rights, new forms of government, and the separation of powers into distinct Legislative, Executive and Judicial branches. From constitutionalism grew also a new liberal economic thinking in which the individual came to be understood as the principal agent in all economic activity. This individual boasted a right to property that served as the economic basis for an emerging political economy that, in the 19th century, rose gradually to a position of dominance. A further reaction to 19th century capitalism was socialist economic and political thought with its powerful international labour movement. Socialism reached a "constitutional status" with the establishment of the Union of Soviet Socialist Republics (USSR). Another milestone in the history of constitutionalism is therefore the 1917 Declaration of the Rights of the Working and Exploited People.[23] The second article of this declaration establishes that the fundamental aim of the Republic of Soviets of Workers', Soldiers' and Peasants' Deputies is "to abolish all exploitation of man by man, to completely eliminate the division of society into classes (...)".[24] This Marxist-Leninist vision of the world influenced both national liberation movements and the modern

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[21] Jeremy Bentham, "Nonsense upon stilts, or Pandora's Box opened, or the French Declaration of Rights prefixed to the Constitution of 1791 laid open and exposed – with a comparative sketch of what has been done on the same subject in the Constitution of 1795, and a sample of Citizen Sieyès" in *The collected works of Jeremy Bentham: Rights, Representation, and Reform; Nonsense upon stilts and other writings on the French Revolution* P Schofield, C Pease-Watkin and C Blamires, 2002 p. 330 In his critic to the first sentence of Art.2 of the French Declaration ("The end in view of every political association is the preservation of the natural and imprescriptible rights of man") Bentham expressed that "That which has not existence cannot be destroy'd: that which cannot be destroy'd cannot required anything to preserve it from being destroy'd. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts".
[22] Hersch Lauerpacht, "International Law and Human Rights", 1950, pp. 103-111 *e.g.* the opposition to female suffrage.
[23] Declaration of the Rights of the Working and Exploited People.
[24] Art 2, Declaration of the Rights of the Working and Exploited People.

constitutions of young states in Asia and Africa recently liberated from colonial rule. Distinct from the emphasis placed upon civil and political rights in America and France (in what might be described almost as a *laissez faire* ideology), the Soviets saw the function of the state as providing individuals with other kind of rights. They considered it necessary to modify the liberal programme so as to include in it a greater emphasis on economic equity, labour standards, and the right to education.[25] For the Soviet, responsibility for generating economic goods, compensation for labour, restriction of the workday, and paid holiday, was held not by the individual but by the state. This socialist ideology gave birth to a second generation of rights: economic, social, and cultural rights. Another familiar feature of socialism is the emphasis placed upon collectivism. This socialist emphasis, taken together with an antagonism between rich and poor, later influenced the proclamations of collective rights developed by poor countries that wished to avoid some of the social imbalances sometimes associated with an individual rights system. Most states have now opted for constitutions of the western type: the socialist vision of society has largely been dismissed. However, the contribution of socialist thought to human rights history and philosophy has been extensive and hugely important. Indeed, socialist thought plays a critical role in ongoing tensions between north and south, in the debate between notions of commutative and distributive justice, and in antagonist disputes between rich and poor. Indeed, concrete forms of constitutional individual rights are currently taking shape in the international field: one speaks now about the constitutionalization of international law.[26]

E International Human Rights before 1945

1 The Common Law of Humanity

Some philosophers from the humanist tradition of late scholasticism were preoccupied with the question of an individual's universal entitlements. The notion of the universal acknowledgement of an individual's natural rights is especially well developed in the Spanish School of International Law. In the context of the Christianization of the aborigine populations in the West Indies, one thinks, for example, of the works of

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[25] Ishay, above note 3, p. 9.
[26] See below Part II Chapter 6 Constitutionalization.

Bartolomé de las Casas (1484 [?]-1566),[27] Francisco Suárez (1548-1617),[28] and Francisco de Vitoria (1483 [?]-1546).[29] Another example is the defence put forward by Gentili (1552-1608) of a common law of humanity whose violation injured everyone[30]; an historical expression of the universal validity of a certain type of moral claim. Classical international law also emerged in this period, even if the fathers of classical international law saw little scope for protection of the individual as a rule of international law. Rather, the focus on interstate relations and sovereignty was not easily expanded so as to include the interests of the individual. Instead, the relation among states was conceived in an egoistic manner, as a system in which nations pursued only their own interest: the state possessed moral autonomy such that relations among nations were governed not by any reference to the individual but rather by reference to the state and the principle of *pacta sunt servanda.* Notwithstanding the absolutist character of the incipient nation state, the founding fathers of international law did admit interference in domestic affairs in order to protect the individual in cases of a grave breach of human morality. From such beginnings emerged the doctrine of humanitarian intervention. At the time in which the New Political Order was conceived, with the rights of the individual at its centre, such basic human considerations obviously formed part of the study of international relations.

2 The notion of intervention

The classic doctrine of humanitarian intervention aimed at protecting the individual beyond national borders. This theory is found in the works of Grotius (1538-1645)[31] and Vattel (1714-1767).[32] According to such thinkers, a state (or states) could lawfully use force in order to terminate a ruler's incommensurate abuse of their population. The right

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[27] Ishay, above note 6 p. 165 quoting Bartolomé de las Casas in defense of the Indians 1548. "(...) if Sepúlveda's opinion (that campaigns against the Indians are lawful) is approved, the most holy faith of Christ, to the reproach of the name Christian, will be hateful and detestable to all the peoples of that world to whom the world will come of the inhuman crimes that the Spaniards inflict on that unhappy race (…)"
[28] Spanish philosopher and theologian.
[29] Spanish philosopher and theologian.
[30] James, above note 13, p. 25.
[31] Fernando R. Tesón, "Humanitarian Intervention –An Inquiry into Law and Morality", 1997 (2nd edition) p.56, Hugo Grotius in *De iure belli ac pacis* 1646 Ch xxv "if a tyrant (…) practices towards his subjects, which no just man can approve, the right of human social connexion is not cut off in such a case".
[32] *Ibid*.; p. 57 at footnote 8 quoting Emerich De Vattel in *The law of nations or the principles of natural law applied to the conduct and to the affairs of nations and sovereigns* (1758) "if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his unsupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who asked for its aid.

to intervene on humanitarian grounds formed a part of just war doctrine and an extension of the Lockeian right to resistance against domestic political power.[33] The theory is grounded in some minimal limits to the sovereignty of states, such that nations must be regarded as comprising free persons with moral autonomy who live together in a state of nature.[34] However, nations should also be restrained by moral limits. These moral limits came eventually to be set at extreme tyranny. Even if restricted to egregious cases, the importance of this doctrine is that, to protect the individual, it legitimizes intervention *vis-à-vis* states. By contrast, another group of natural lawyers were against force as a means of inculcating truth into a foreign state.[35] Based on Hegel's conception of the state as analogous to the moral individual, thinkers of that time proposed that in the same way that individuals were free, states, too, should be prohibited from interfering in domestic affairs.[36] Certainly, the doctrine of humanitarian intervention was and is often misused by states motivated, for instance, by commercial or political interest. However, when correctly used it seeks always to maintain a sense of universal community founded upon universal morality.[37]

Today, the language of humanitarian intervention forms part of the dogma of contemporary international law. Theories that support interventionism rest on the belief that states possess moral authority to intervene under certain conditions. What is of particular significance here is that no one contests that morality should directly and urgently inform legal action.[38] Note, too, that even the dogmas of international law are dominated by a species of positivism that clearly recognizes the moral cogency of certain principles in the current world order.

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[33] *Ibid.*, p. 55.
[34] *Ibid.*, p. 55 at foonote 6 citing Vattel
[35] *Ibid.*, p. 58 at footnotes 10-12 Referring to Christian Wolff in "Ius gentium Methodo Scientifica Pretactus" Sec 258, at 132 and sec 259 at 132 .
[36] *Ibid.*, p. 66
[37] "The validity of humanitarian intervention is not based upon nation-state-oriented theories of international law (…) It is based upon an antinomic but equally vigorous principle, deriving from a long tradition of natural law and secular values: the kinship and minimum reciprocal responsibilities of all humanity, the inability of geographical boundaries to stem categorical moral imperatives, and ultimately, the confirmation of the sanctity of human life, without reference to place transient circumstance." in W M Reisman, "Humanitarian Intervention and Fledgling Democracies" Fordham International Law Journal 1994, Vol. 18 No. 3, p. 749 *et seq*. Cited in Tesón, above note 31, p. 148.
[38] Antony D'Amato, In the Foreword to the 1st edition of Fernando Tesón's book "Humanitarian Intervention- An Inquiry into Law and Morality" "Professor Tesón's argument is a demonstration of morality informing the law. Morality is not something apart from the law; rather, moral imperatives and legal imperatives continually intersect each other over time because they are a function of the same human aspiration: to live in peace in world society", Tesón, above note 31, foreword (D'Amato).

In today's world, arguments in support of state intervention in cases of a gross violation of human rights are still justifiable under the doctrine of intervention.[39] Although states prefer to proceed with the consent of the United Nations they may still perfectly well intervene in the internal affairs of another country without it, as in the Iraq War of 2003. Nowadays, the post-World War II international community recognizes international human rights, social progress and peace (the Preamble of the UN Charter), and a reluctance to use force (Article 2(4) of the UN Charter). However, in Chapter VII of the UN Charter "[A]cts with respect to threats to Peace, Breaches of the Peace and Acts of Aggression" are considered an exception to the prohibition of the use of force established in Article 2(4) of the Charter. Specifically, Articles 41 and 42[40] constitute a formal recognition of a far broader scope of humanitarian intervention, including not only the use of military force to preserve peace but also, and preferably, measures other than those based on force, such as a partial or even complete interruption of economic relations. It has been said that implied in the meaning of intervention is "a peremptory demand for positive action or abstention—a demand which, if not complied with involves a threat of recourse to compulsion in some form."[41] On this basis, we could redefine intervention in very broad terms, as the use of international mechanisms to help victims of serious human rights deprivations.[42]

Also worthy of mention in a history of human rights is International Humanitarian Law. Some even argue that Human Rights Law has its origins in the laws for the conduct of just war (*jus in bello*) and worries about minimum standards of safety and preservation for individuals.[43] The relationship between Human Rights Law and International Humanitarian Law has evolved from separatism to progressive interpenetration.[44] These two branches of law emerged from distinct beginnings even as today they are seen also to enjoy areas of close interaction.[45] However, our interest here does not lie in the

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[39] Thomas Buergenthal, "International Human Rights in a Nutshell", 1995 (2nd edition), p. 4.
[40] Charter of the United Nations, adopted in San Francisco 26 June 1945, 3 Bevans 1153.
[41] Hersch Lauterpacht "The International Protection of Human Rights" "The International Protection of Human Rights" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1947 Vol. 70 No. 1, p. 19 Discussing the meaning of intervention which includes the opinions of Oppenheim and Verdross.
[42] Similarly Tesón, above note 31, p. 147.
[43] Francisco F Martin, Stephen J. Schnably, Richard J. Wilson, Jonathan S. Simon, Mark V. Tushnet, (eds.) "International Human Rights and Humanitarian Law: Treaties, Cases & Analysis", 2006, p. 2.
[44] Robert Kolb, "Human Rights and Humanitarian Law" in *Max Planck Encyclopedia of Public International Law*, R Wolfrum (ed.), 2012, p. 1040.
[45] Ibid.

concrete rules of International Humanitarian Law and Human Rights Law, but rather the underlying objective of protecting the individual beyond its political and legal domestic system. International Humanitarian Law today is responsible for developing minimum standards for the treatment of persons in regions of armed conflict; it can be considered as the human rights component of the law of war.[46] The major part of this branch of international law[47] is today codified in the four Geneva Conventions (1949) and its Protocols (1977).[48] International Humanitarian Law also covers the laws of international armed conflict that relate to rules that establish the means and methods of warfare laid down in the "Hague Law"(1899 and 1907).[49] The objective of Human Rights Law is to foster the respect, protection and promotion of human rights necessary for a life to be lived with dignity. Today, these branches of law are progressively merging together because of a shared emphasis on protection of the individual from arbitrary action and inhumane treatment. International Humanitarian Law is a body of rules whose objective is to minimize violence; as with human rights, it is believed that limiting violence is the very essence of civilization.[50] The relationship between Human Rights Law and Humanitarian Law has been studied from different perspectives: separatist, complementarist, and integrationist. With the political transformations experienced post-1945, this relationship has mainly evolved in an integrationist direction that, in a shared emphasis on the worth of the individual, acknowledges a core aspect common to both branches.

3 Examples

a Slavery

The next relevant example in the history of modern international human rights comes in the context of the slave trade in the first quarter of the 19th century. Between the 16th and 19th centuries slavery was commonplace. Ideologies of racism, apartheid, and segregation, were legal around the world.[51] The abolitionist movement grew in strength as Enlightenment ideals combined with an improvement in economic and industrial

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[46] Buergenthal, above note 39, p. 17.
[47] *Ibid*., p. 249 Humanitarian law also consists of some earlier instruments on the subject as well as various rules of customary international law.
[48] See International Commitee of the Red Cross, under War and Law available at: http://www.icrc.org/eng/war-and-law/index.jsp last visited November 2012
[49] Kolb, above note 44, p. 1040.
[50] Henckaeters, Jean-Marie; Doswald-Beck, Louise. Costumary International Humanitarian Law, 2005, Vol. 1 Rules.
[51] Lillich *et al*, above note 12, p. 4.

conditions. The Slave Trade Act in Britain[52] and the Act to Prohibit the importation of Slaves in the United States[53] constitute early legal examples of attempts to abolish the slave trade. This abolitionist spirit mirrored general international opinion, marking a turning in man's moral image of himself.[54] In the Congress of Vienna (1814-1815), the Eight Power Declaration acknowledged that the slave trade was repugnant to the principles of humanity and universal morality.[55] The most famous passage of the Declaration is considered to be the most important early development in an international law based on human dignity.[56] In the course of the 19th century, slavery and the slave trade were gradually abolished in most European and American countries. Simón Bolívar, in his message to the Congress of Bolivia, described slavery as the "negation of all law and a sacrilege."[57] In the 20th century an outstanding advance occurred within the League of Nations: a Temporary Slavery Commission was established to report on slavery practices to the Council of the League. The year 1926 saw the drafting of the Convention on the Abolition of Slavery and the Slave Trade. Its signatories were compelled to end slavery and forced labour in all its many forms.[58] Thirty years later, the United Nations published its 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institutions and Practices Similar to Slavery.[59]

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[52] An Act for the Abolition of Slave Trade, Act of Parliament of UK, passed on March 25th, 1807 in Lillich *et al*, above note 12.
[53] Act to Prohibit the Importation of Slaves, Act of the US Congress, passed on March 2nd, 1807 in Lillich *et al*, above note 12.
[54]; Lillich *et al*, above note 12, p. 6.
[55] Prior to the Treaty of Vienna, the Treaty of Peace and Amity between Britain and US of 24 December 1814 and proclaimed on 18 February 1815 expressed in its Art. X that "whereas the traffic on slaves is irreconcilable with the principles of humanity and justice, and whereas both His Majesty and the United States are desirous of continuing its efforts to promote its entire abolition, it is hereby agreed that both the contracting parties shall use their best endeavours to accomplish so desirable an object." **See also** Alfred Verdross and Bruno Simma, "Universelles Völkerrecht", 1976, p. 583 "die erste Urkunde, die sich mit dem Schutze der Menschen als solcher in Friedenzeiten befasst, bildet die Erklärung der am Wiener Kongreß versammelten Mächte "sur l'abolition de la traite des nègres" von 8. Februar 1815, in der sie "à la face de l'Europe" ihre Entschlossenheit bekunden, den Handel mit Negersklaven "comme repugnant au principes d'humanité et de morale universelle", sobald als möglich "par tous les moyens à leur dispisition" zu unterdrücken. **See also** Shelton, above note 4.
[56] Jochen Frowein, A, "Human Dignity in International Law" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer, E Klein (eds.), 2002, p. 122.
[57] Simón Bolívar, Message to the Congress of Bolivia (May 25, 1826) cited in Lillich et al, above note 12.
[58] The Slavery Convention adopted on Geneva, 25 September 1926, entered into force 9 March 1927, 60 LNTS 254.
[59] The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institutions and Practices Similar to Slavery was adopted by Conference of Plenipotentiaries convened by Economic and Social Council resolution 608 (XXI) of 30 April 1956 done at Geneva on 7 September 1956 entering into force 30 April 1957. 266 UNTS 3 Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII~4&chapter=18&Te

b The status of the individual

In the 19th century, international law consisted of a body of rules that regulate the conduct of states in their intercourse with one another, that were based upon sovereignty, equality of states, and non-intervention. That is, states alone were subject to international law. Thus, the individual was merely an object of these international rules. The individual thus lacked international legal personality; individuals were considered to belong to a state, the mere object of international law. Accordingly, if one state harmed a citizen of another state, it was considered to be an injury to the latter state's interest; this latter state could then ask for the reparation of such injury. The right to compensation existed only at the level of the state and not with the injured individual.[60] Only in exceptional cases was there a limited recognition and guarantee of individual rights, *i.e.* in the context of criminal law, piracy and slave trade under the universality principle. In accordance with this principle of universality, an offender could be punished by international tribunal or by any state. The application of this principle has since been extended through customary law to torture, genocide, war crimes, crimes against peace, crimes against humanity, and non-discrimination.[61]

One profoundly important consequence of World War I was the creation in 1919 of the League of Nations. This organization did not establish a universal but instead a local or regional legal system[62] that served later as the model for the United Nations. The League of Nations recognized international human rights: first, through the rights of the minorities; second[63], through the system of mandates[64]; and, third, through the

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[60] James, above note 13, pp. 36-37.

[61] *Ibid.*, p. 34.

[62] André N. Mandelstam, "La Protection Internationale des Droit de l'Homme" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1931 Vol. 38 No.4, p. 6.

[63] Rüdiger Wolfrum and Christiane Philipp (eds.) United Nations: Law, Policies and Practice 1995 Vol. 2 p.892 The system for the protection of minorities provided for a set of rules focused on securing ethnic, religious and linguistic minorities and equal and special protective measures dealing with language, religion and culture. The League of Nations acted as a guarantor of the obligations assumed by the parties to the treaties through a petition system. The Treaty between the Allied and Associated Powers and Poland, signed at Versailles on June 29, 1919 served as a model for subsequent treaties of the same nature. The rights of minorities with the United Nations system are acknowledged in Article 27 of the International Covenant on Civil and Political Rights, as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[64] *Ibid.*, p.892 The system of mandates under the League of Nations was created by virtue of Article 22. The underlying principle of this system was that the wellbeing and development of peoples constitute a

establishment of the International Labour Office.[65] Such developments may be taken as evidence that, already at that time, the dogma of absolute sovereignty was losing importance in international law; it was giving way to protection rather of the individual and, specifically, the individual as the embodiment of the common interests of the international community. It has been suggested that universal human rights at this point crossed a threshold from a moral to a positivist domain.[66] Be that as it may, granting international human rights a formal legal status and value was clear recognition of the central importance of human morality.

c Labour Standards

The creation at the heart of the League of Nations of the International Labour Office was a result of the old struggles of the working class and the influence of the new ideologies born from economic advancement.[67] The intention was to achieve a durable peace through the adoption of certain minimum standards for conditions of work. Such aspiration was inspired by sentiments of justice and humanity[68]; that is, to achieve universal peace through social justice.[69] The principles and scope of activity listed in the preamble establishing the organization are still very important today; they retain their validity.[70] Article 23 of the Covenant of the League of Nations refers to human rights in that it addresses concerns in respect of fair and human conditions of labour for men, women, and children.[71] The ILO constitution came into being in 1919. It has been amended several times, one of the most important changes being the inclusion of the Philadelphia Declaration (1944) concerning the ILO's aims and purpose. The International Labour Organization was granted the status of a specialized agency of the

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sacred trust of civilization. After World War II this system was transformed into the Trustee System/ Trustee Council of the United Nations.

[65] Art 392, Treaty of Versailles, 28 June 1919, 2 Bevans 235.

[66] Madelstam, above note 62, pp. 227-229.

[67] Shelton, above note 4.

[68] Part XIII Labour, Section I Organization of the Labour, Treaty of Versailles, There it is acknowledged that:

"whereas (...) an improvement of those conditions (of labour) is urgently required: as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own recognition of the principle of freedom of association, the organisation of vocational and technical education and other measures; Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries;"

[69] Part XIII Labour, Section I Organization of the Labour, Treaty of Versailles.

[70] Wolfrum & Philipp, above note 63, Vol. 1 p.714.

[71] Art 23, Covenant of the League of Nations, 225 Parry 195 in Treaty of Versailles

United Nations by Article 57 of the UN Charter.[72] Although the ILO also promotes social and cultural rights, its core activity is the establishment and promotion of labour standards of a universal scope and application.[73] The ILO Declaration on Fundamental Principles and Rights at Work, adopted in Geneva in 1998[74], establishes in Article 2 that, even if the state member has not ratified the Convention in question, there arises through simple membership an obligation to promote and realize all the basic principles and fundamental rights of those conventions, namely freedom of association, an effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.[75]

F International Human Rights after 1945

1 The Charter of the United Nations

The end of World War II saw the creation of the United Nations. Its Charter is a global pronouncement that both displays the aspirations of mankind for peace among nations[76] and establishes the conditions under which the obligations of justice and international

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[72] Philadelphia Declaration of 10 May 1944, Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the Constitution of the ILO, ILO Constitution 15 UNTS 40: "The General Conference of the International Labour Organization (...)reaffirms the fundamental principles on which the Organization is based and, in particular, that- (...) **(c) poverty anywhere constitutes a danger to prosperity everywhere;** (d) the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international (...) Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organization that **lasting peace can be established only if it is based on social justice,** the Conference affirms that- **(a) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity**; (b) the attainment of the conditions in which this shall be possible must constitute the central aim of national and international policy; (c) all national and international policies and measures, in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this fundamental objective;(...) The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: **(a) full employment and the raising of standards of living**; (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being; (g) adequate protection for the life and health of workers in all occupations; (h) **provision for child welfare** and maternity protection; (i) **the provision of adequate nutrition, housing** and facilities for recreation and culture; **(j) the assurance of equality of educational and vocational opportunity**. " Emphasis added.
[73]; Nowak above note 1, p. 141.
[74] ILO Declaration on Fundamental Principles and Rights at Work, adopted in Geneva 18 June 1998, 37 ILM 1233 (1998).
[75] See below Part V, Chapter 1 in labour .
[76] See UN Charter Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&lang=en last visited 25.April 2012. Status 193 Members -49 original Members, 144 according to Article 4

law are to be observed.[77] The Charter constitutes the legal basis of the obligation of its members to protect and promote the fundamental rights of the human being.[78] Indeed, it is the first international treaty to base its aims on a universal respect for human rights.[79] It is a resolute (united nations) affirmation of faith in human rights, the dignity and worth of the human person, and the equal rights of men, women, and nations, as the true ground on which to base the aspirations of mankind.[80] Human rights, understood as a positive expression of the contemporary concerns of international justice, is an idea that runs throughout the United Nations Charter of 1945.[81] Although the Charter does not define the human rights that State Members are bound to observe[82], it does contain various provisions directly related to human rights. The human rights element finds its principal expression in the relationship between peace, international security, and improvement in social and economic conditions (standard of living) through respect of human rights. This relationship may be observed in the Preamble to Article 1—particularly Article 1(3)—Article 55, and Article 56. The preamble states that one of the purposes of the UN is "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 55(3) is still more explicit when it expresses that, with a view to creating conditions of stability and well-being so as to favour peaceful and friendly relations among nations, the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion". Interestingly, Article 55(1) of the UN Charter also establishes that, in order to achieve such objectives, the United Nations shall promote "higher standards of living, full employment, and conditions of economic and social progress and development."[83] In addition, the UN Charter serves as the legal basis for the UN Charter monitoring mechanisms, bodies such as the Human Rights Council that replaced the Commission on Human Rights.

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[77] See Preamble, UN Charter.
[78] René Cassin, "La Declaration Universelle et la mise en oeuvre de droits de l'homme" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law1951, Vol.79 No.2, p. 245.
[79] The United Nations and Human Rights 1945-1995. The United Nations Blue Books Series, 1995 Vol.7 p. 5.
[80] See Second recital, Preamble, UN Charter.
[81] See Preamble, Arts 1, 13, 55, 56, 60, 62, 73, 76, 87, UN Charter.
[82]; Lauterpacht, above note 41, p. 17.
[83] Cassin, above note 78, p. 248.

2 The Universal Declaration of Human Rights

On 10 December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights ("UDHR")[84] as an expression of the common aspirations of the entire human family. This manifesto proclaimed a common universal standard towards which all humanity (or at least the declaring states) should strive. It is one of the most important pronouncements of the 20th century[85] in that it constitutes one of the most relevant sources of inspiration for the respect and protection of the individual at a universal level. The set of rights found in the declaration correspond to a set of values the validity and nature of which is very much discussed in human rights scholarship. Its legal effects have also been widely discussed.[86] With the UDHR, human rights are given a formal recognition in international law.[87] Although the declaration was not adopted as a binding instrument of international law, as a non-binding instrument it nevertheless exercises great influence upon the formation of international customary law.[88] Indeed, the principles and rights contained therein are now largely accepted as authoritative within the international community of states.[89] The UDHR has even been cited by the International Court of Justice.[90]

Which is the importance of the UDHR? In contrast to the UN Charter where the phrase is used vaguely, one of the main achievements of the UDHR is a clear definition of "human rights" in so far as it develops a catalogue of rights, in a precise legal language, that asserts human dignity as the crowning value and from which all other rights are

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[84] Universal Declaration of Human Rights adopted by UN's General Assembly in its Resolution 217 A (III) of 10 December 1948, UN Doc. A/810 at 71 (1948).

[85] Louis Henkin, "The Universal Declaration at 50 and the challenges of global markets" Brooklyn Journal of International Law 1999 Vol. 25 No. 1, p. 18.

[86] Buergenthal, above note 39, p. 33 **See also** Jochen von Bernstorff "The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law" The European Journal of International Law 2008 Vol. 19 No. 5, p. 924 Suggesting that the UDHR symbolizes" unity in an increasingly fragmented and contentious institutional and political environment".

[87] Lauterpacht, above note 22, p. 880 The Belgian representative on the Third Session of the General Assembly. Official Records: "In certain circles, it had been said that the declaration of human rights was a purely academic document. That statement was erroneous, for the declaration had not only an unprecedented moral value, it has also the beginnings of a legal value".

[88] Knut Ipsen, "Völkerrecht", 1999, pp. 680-683.

[89] Jack Donnelly, "The Universal Declaration of Human Rights: Liberalism and an International Overlapping Consensus" in *Theoretical Foundations of Humans Rights. Collected Papers, Second International Conference on Human Rights.* 2003 pp. 699-722.

[90] *United States Diplomatic and Consular Staff in Tehran Case* (United States of America v Iran) Judgement 24 May 1980 ICJ Reports 1979, para. 91 "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights."

derived.[91] Regarding its structure and substantive content, it is said that the UDHR resembles the portico of a temple[92], the foundations of which are the Preamble and Articles 1 and 2. The Preamble recognizes that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". By virtue of Article 1 of the UDHR, "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". Besides asserting that human dignity is the source from which all human rights emanate, the UDHR also draws not only on classical civil and political rights inherited from the Enlightenment but also on economic and social rights influenced by the socialist and labour movement, based on the conviction that political, economic and social justice must go together as convictions universally shared among individuals regardless of difference in culture and circumstance. Regarding the structure of the UDHR, it is has been said[93] to have four pillars. Its first pillar is constituted by Articles 3 to 11 and corresponds to rights and freedoms of a personal nature. The second pillar is constituted by Articles 12 to 17 and concerns the individual and his or her relationship to society. The third pillar, from Article 18 to Article 22, corresponds to rights relative to the spiritual life of the individual, his public liberties and fundamental political rights. The fourth pillar is formed by economic, social, and cultural rights. Here it may be useful to cite Article 25, which states that:

> *"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."*

In addition, Article 28 to 30 establish the general contour of human rights. These last articles refer to the duties of the individual towards society and establish the limits within human rights are to be realized. Here we appreciate the place given to another meaning of morality within the context of human rights. Article 29(2) provides that:

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[91] Henkin, above note 85, p. 19 **See also** Thomas Buergenthal, "Codification and implementation of international human rights in *Human Dignity –The Internationalization of Human Rights-* A H Henkin (ed.) 1979, p. 16.
[92], Cassin, above note 78, p. 227.
[93] *Ibid.*, p. 278.

> *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."*

An important characteristic of the UDHR is that it does not constitute a minimum standard or lowest common denominator but rather promulgates a common standard of achievement[94], a "robust conception of the good".[95]

3 The International Bill of Rights, the two Covenants

The UDHR and the International Covenant on Civil and Political Rights[96], with its two Optional Protocols, and the International Covenant on Economic, Social, and Cultural Rights[97], together form the Bill of Rights. The Bill of Rights is the most substantial human rights compendium boosting universal application. Although the legal nature of the UDHR may be controversial, the two Covenants are without question international treaties of a binding nature. They are a corpus of positive, substantive rights, to which most states of the world are now signatories.

The International Covenant on Civil and Political Rights[98] recognizes in its preamble that its rights derive from the inherent dignity of the human person. As in the UN Charter and the UDHR, it acknowledges in its Preamble that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". It further recognizes that freedom from fear and want can only be achieved if the conditions for the enjoyment of civil, political, economic, cultural and social rights are created. On the one hand, Article 1 establishes the right to self-determination, which allows states freely to determine their political and economic development, States Parties to the ICCPR also undertake, on the other, to respect and to ensure to all individuals the civil and political rights established therein

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[94] United Nations, above note 79, p. 26.
[95] Joy Gordon, "The concept of Human Rights: The history and meaning of its politization" Brooklyn Journal of International Law 1998 Vol. 23 No. 3, p. 705.
[96] The International Covenant on Civil and Political Rights was adopted by the United Nation's General Assembly resolution 2200A (XXI) of 16 December 1966 entering into force 23 March 1976 Text at 999 UNTS 171 and 1057 UNTS 407.
[97] The International Covenant on Economic, Social and Cultural Rights was adopted by the United Nation's General Assembly resolution 2200A (XXI) of 16 December 1966 entering into force 3 January 1976 Text at 993 UNTS 3.
[98] Status of ratification of the ICCPR in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en Last visited 25.April.2012; 167 State Parties, 74 Signatories -therefrom 7 have not ratified yet-.

without discrimination as to their status (prohibition of discrimination). The ICCPR is composed of a set of rights that seek to guarantee the political ideals, civil liberties, and freedoms, of a democratic society that is deeply rooted in modern western history. Some rights established therein may nevertheless be limited in order, *inter alia*, to protect public morals. This is the case in Article 12 (freedom of movement), Article 18 (freedom of thought, conscience, and religion), Article 19 (freedom of expression), Article 21 (right of peaceful assembly), and Article 22 (freedom of association). The Covenant has a monitoring body, the Human Rights Committee.

The International Covenant on Economic, Social and Cultural Rights[99] shows an almost identical preamble to that of the ICCPR. The rights established therein are grounded in the inherent dignity of the human being. As in the ICCPR, it acknowledges a fundamental interaction between all types of rights; that is, between economic, social, cultural, civil, and political rights, in order to achieve freedom from fear and want. The heart of the ICESCR is at Part III. The right to work (Article 6), the right to join and form trade unions (Article 8), the right to social security (Article 9), the right to an adequate standard of living (Article 11), all deserve to be given special attention. Also significant is Article 10 on family rights. Article 10(3) provides that: "Their (children and young people) employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law". Note also the right to health (Article 12), the right to education (Article 13), and the right to culture (Article 15). The Committee on Economic, Social and Cultural Rights monitors the implementation of the ICESCR. States parties are obliged to submit regular reports to the Committee in order for implementation to be monitored. As in other monitoring bodies, the Committee publishes in its general comments its views about the content of the specific rights.

G Other global Instruments of a binding nature

The second half of the 20th century has seen much activity in human rights matters. Besides the Bill of Rights, this has been a tremendous time for international human rights treaties of universal scope. Some of these form the core of international human

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[99] Status of ratification of the ICESCR in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en last visited 25. April 2012. Status: 160 State Parties and 70 Signatories -therefrom 7 have not ratified yet-.

rights instruments and constitute the major mechanisms for the universal protection of human rights provided by international law at the global level. These treaties focus on some specific human rights or look to protect specific vulnerable groups. According to the United Nations Office of the High Commissioner for Human Rights, the core United Nations Human Rights Treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[100]; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[101], with its Optional Protocol; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[102], with its Optional Protocol; the Convention on the Rights of the Child (CRC)[103], with its two Optional Protocols, the first on the enrolment of children in armed conflict, the second on the sale of children, child prostitution, and child pornography; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). In the 21st century, one may arguably add to our list the following: the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities (CRPD), with its Optional Protocol.

Another core Convention concerning universal human rights is the Genocide Convention[104], adopted by the UN General Assembly on 9 December 1948, and which

[100] The International Convention on the Elimination of All Forms of Racial Discrimination was adopted by the General Assembly of the United Nations in resolution 2106 (XX) of 21 December 1965.entering into force 4 January 1969. 660 UNTS 195. Status of ratification in United Nations Treaty Collection, available at:
http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en last visited 25.April.2012 Status:175 State Parties; 86 Signatories –therefrom 5 have not ratified yet-.

[101] The Convention on the Elimination of All Forms of Discrimination against Women was adopted by General Assembly of the United Nations in resolution 34/180 of 18 December 1979 entering into force 3 September 1981. 1249 UNTS 13. Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en last visited 25.April.2012 Status: 187 State Parties, 99 Signatories -2therefrom have not ratified yet-.

[102] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the General assembly Resolution 39/46 of 10 December 1984 entering into force 26 June 1987. 1465 UNTS 85. Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en Last visited 25.April.2012. Status: 150 State Parties, 78 Signatories -10 therefrom have not ratified yet-.

[103] The Convention on the Rights of the Child was adopted by the General Assembly resolution 44/45 of 20 November 1989 entering into force 2 September 1990. 1577 UNTS 3. Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en last visited 25.April.2012. Status: 193 State Parties, 140 Signatories -2 therefrom have not ratified yet-.

[104] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly resolution 260 (III) of 9 December 1948 entering into force 12 January 1951. Text at 78 UNTS 277. Status of ratification in United Nations Treaty Collection, available at:

entered into force on 12 January 1951. This convention came into being as a direct result of the Holocaust. The convention declares that genocide, whether committed in times of peace or war, is a crime under international law. All of these conventions have a monitoring body, known as treaty-based bodies, which is responsible for the implementation of the treaty's objectives.

1 The wording of the Preambles in Human Rights Conventions

In one respect, the preambular language of each of the above-mentioned conventions is distinct. This should not surprise us given that the objective of each convention is to develop more specific rules relating to specific rights or rights relative to specific groups of persons. In another respect, there are many similarities among them. All relevant conventions dedicate their first recitals to a consideration of the UN Charter, the UDHR and other international legal relevant documents, including the two covenants, in relevant part, that legitimize the implementation of the expanded rights contained therein. Of particular importance is the reference made by these conventions, directly or indirectly, to the principles of dignity and equality inherent to all human beings. In other words, all human rights proclaimed in these conventions take human dignity as their starting point. In addition, these conventions contain important definitions in the context of international law, such as: the definition of discrimination[105], the definition of genocide[106], and the definition of torture.[107] Such definitions are useful when interpreting rules that can lay outside the legal human rights system.

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http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en last visited 25.April.2012. Status: 142 States Parties, 41 Signatories – 1therefrom has not ratified yet-.

[105] ICERD Art 1 (1)" In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

[106] Genocide Convention Art 2 "In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious groups, as such (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (d) Imposing measures intended to prevent births within a group (e) Forcibly transferring children of the group to another group".

[107]CAT Art.1(1) "the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

H Human Rights Instruments of a non-binding nature

While international treaty law and customary law make up the key legal mechanisms for the protection, promotion, and fulfilment of human rights, there is also a collection of instruments of a non-binding legal nature that have been gradually worked out within international society. These consist in declarations, principles, guidelines, standard rules, and recommendations, whose moral force is beyond doubt. The scope of these provisions ranges across many subjects, each distinguished by its general or specific reach and according to the object of its regulation. The most relevant characteristic of such instruments is that they do not have binding legal effect. They nevertheless contribute considerably, on the one hand to understanding and implementing binding legal human rights and, on the other, to the fostering of human rights as a universal notion. Singular attention has been given to the right to self-determination, the rights of indigenous people, the rights of minorities, the rights of women, the rights of the child, the rights of older people, the right to work and fair conditions of employment, the right to health, the prevention of discrimination, and still other rights.[108] In the area of social welfare, progress, and development, there has been tremendous activity as, for example, in the Declaration on Social Progress and Development[109], the Universal Declaration on the Eradication of Hunger and Malnutrition[110], the Declaration on the Right of Peoples to Peace[111], the Declaration on the Rights to Development[112], and the Universal Declaration on Cultural Diversity.[113]

Instruments of a more general scope also form part of the body of instruments with non-binding legal effects. Ordered chronologically, we cite first the Proclamation of Teheran, of 1968[114], which urges the peoples of the world to redouble their efforts to provide human beings with a life of freedom and dignity in relation to the human

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[108] For a more detailed list, although non-exhaustive, see Office of the United Nations High Commissioner for Human Rights available at http://www2.ohchr.org/english/law/index.htm#instruments last visited 25.April. 2012.
[109] Declaration on Social Progress and Development, UNGA Resolution 2545 (XXIV) of 11December 1969.
[110] The Universal Declaration on the Eradication of Hunger and Malnutrition Adopted on 16 November 1974 by the World Food Conference convened under UNGA Resolution 3180 (XXVIII) of 17 December 1973 and endorsed by UNGA Resolution 3348 (XXIX) of 17 December 1974.
[111] Declaration on the Right of Peoples to Peace, UNGA Resolution 39/11 of 12 November 1984.
[112] Declaration on the Right to Development, UNGA Resolution 41/128 of 4 December 1986.
[113] Universal Declaration on Cultural Diversity, Adopted by the General Conference of the UNESCO on 2 November 2001.
[114] Proclamation of Teheran, Final Act on the International Conference on Human Rights, adopted on 13 May 1968, UN Doc. A/CONF. 32/41.

being's physical, mental, social, and spiritual welfare. Another milestone in the history of Human Rights is the Vienna Declaration of 1993, coming directly after the fall of the Soviet Union. The Vienna Declaration and Program of Action[115], adopted by the World Conference on Human Rights on June 1993, considers that the promotion and protection of human rights must be a priority for the international community. It also places emphasis on the role of the UDHR as the basis and source of inspiration for the development of universal human rights standards. Signatories expressed therein that the universal nature of human rights and fundamental freedoms is undeniable. Specifically, it categorically affirms that all human rights are universal, indivisible, interdependent, and interrelated, goals towards the realization of which the international community pledges itself on the basis of equality and fairness, two parameters of justice that must always be borne in mind. Although a diversity of historical and cultural background is acknowledged, as also a diversity in political and economic state organization, the efforts required for the promotion and protection of human rights and fundamental freedoms fall as a duty that must be observed regardless of all national or regional particularities.

The most recent global reference to general international principles, objectives, and concerns regarding the individual, is the United Nations Millennium Declaration.[116] Typical of such a non-binding document, it affirms a series of values and principles of a very general nature. The purpose of the Millennium Declaration is to encourage unequal societies to conform to a comprehensible and reasonable set of common values and objectives. The Millennium Declaration first recognizes the UN Charter as the indispensable foundation of a more peaceful, prosperous, and just world[117], stating clearly that peace (not war), economic development (social progress and standards of living), and a just world (shared social values) must be the major concerns of an harmonious world. Part V is dedicated to human rights, democracy, and good governance. An appropriate organization of work so as to move nations towards the achievement of the UN Charter and the Millennium Declaration's purposes represents not only the responsibility of a nation towards its own people, but is a duty that must be

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[115] Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 UN Doc. A/CONF.157/23.
[116] Millennium Declaration UNGA A/RES/55/2 adopted on 18 September 2000.
[117] *Ibid.*, para. 1.

assumed collectively[118], beyond national frontiers, and for all people.[119] Aspirational in character, the Millennium Declaration emphasizes that the international community, sovereign states as well as the institutional framework in which those states develop their relations, are collectively responsible for the realization of the global goals established therein. The call of the Millennium Declaration is that Human Rights and fundamental freedoms be respected so as to establish a just and lasting peace all over the world.[120] In other words, it is a call to the world beyond national borders to take action. All these documents suggest that human rights must be achieved through positive measures, both at national and international level, both individually and collectively. Positive measures are also acts of power. Each individual state, and the international community itself, within its institutional framework, is allowed to exert some form of power. That is why, at this point—after a call to take action—we must ask ourselves, in a context of international law, what kind of power we are referring to, and to what extent this power may be useful in the implementation of human rights? In order to answer these questions it is necessary not only to look at issues of legislation and the executive, but also to examine the international judiciary, its function, tasks, and mandates, both at regional and global level; in other words, the scope of its authority.

I Regional Protection of Human Rights

To some extent because of the length of their history and the great age of their culture, many nations have not yet found a way to bring into harmony their conception of individual rights as an expression of individual freedoms and equalities with respect to the individual freedoms and equalities of their neighbour countries, and with respect to the individual freedoms and equalities of their fellow men and women throughout the world. This tension is reflected in the language of classical international law—sovereignty, equality of states, non-intervention—such that the actions of a particular state may be justified simply on the basis of their own interest. In international relations, a commitment to universal standards gradually overcomes, nevertheless, a lack of national understanding and consent. Besides a general evolution towards universality, in

[118] *Ibid.*, para. 2.
[119] *Ibid.*, Principle of Shared Responsibility: Responsibility for managing worldwide economic and social development, as well as, threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.
[120] *Ibid.*, para. 4.

a regional development context, the actual application of human rights standards may be adapted so as better to meet the needs of a specific local situation. The regional protection of human rights may be adjusted not only to a geographical but also to a geopolitical space in which social, cultural, and economic diversity may be determined by religion or ideology. Power expressed through religious or ideological domination may sometimes play a decisive role. The moral world of human beings contains a plurality of moral universes and corresponding notions of righteous action that may sometimes not easily be assimilated into an alien intellectual and cultural construction. Although regionalism is sometimes proposed as an alternative to globalism, and a good substitute for a principle of universal human rights, in reality what we learn from regionalism is that moral values recognized in regional instruments are not as different in their basic conception of human rights as is sometimes supposed.[121] Even if regionalism is sometimes understood to be in opposition to universalism, it at least serves to argue for a kind of universalism within the flexible framework of which some regional values may nevertheless be upheld, at the same time retaining the possibility that local conceptions of morality be transcended in favour of values that are truly transnational.

1 America

The Inter-American system of Human Rights presents a difficulty. It has two distinct legal sources: on the one hand, the Charter of the Organization of the American States (OAS), and on the other, the American Convention on Human Rights.[122] Nevertheless, we are not interested here in dealing at length with the peculiarities of each system, but rather with the notions and ideas that guide and inform the whole American community of states. In 1948, the American Declaration on the Rights and Duties of Man[123] was adopted at Bogotá, seven months before adoption of the UDHR by the UN General Assembly. The Declaration starts with an acknowledgement of the importance of individual dignity, the need to protect the essential rights of man, and the need to create the right conditions for the achievement of spiritual and material progress in concert with the attainment of a greater human happiness. It makes special mention of the need

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[121] Henry J Steiner and Philip Alston, "International Human Rights in Context: Law, Politics, Morals: Texts and Materials" 1996, p. 656.
[122] Buergenthal, above note 39, p. 175.
[123] American Declaration on the Rights and Duties of Man was adopted by the Ninth International Conference of American States in Bogotá, Colombia, 1948 OAS Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003).

to defend international human rights within the evolution of American law. The Preamble states very clearly that all men are born equal in dignity and rights, and that a collective effort is the right basis on which to work towards the full achievement of universal human rights in a brotherhood of man. The last sentence of the preamble's declaration is especially significant. It states that, since moral conduct constitutes the noblest flowering of a culture, it is the duty of every man always to hold it in high respect.[124] In the American Convention on Human Rights (Pact of San José)[125], the American states reaffirmed their intention to consolidate a system of personal liberty and social justice based on respect for the essential rights of man, which do not derive from citizen status but from the inherent value of the human person. It also openly recognized that it based itself upon the same principles as the American Declaration on the Rights and Duties of Man, and the UDHR; that is, the dignity and equality of all human beings. The Convention reiterates its agreement with the UDHR that the ideal of a free man can only be achieved if conditions for the enjoyment of cultural, social, economic, political, and civil rights are also created. Finally, it is important to note that the Inter-American System has established judicial control of the provisions of the Convention through the Inter-American Commission of Human Rights, and through the Inter-American Court of Human Rights. It is their function to interpret the material content of the rights and duties established therein.

2. Europe

As early as 1950, some European states had already formed the Council of Europe[126] and signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[127], which entered into force in 1953. The Convention was a further response to the barbarities committed in Europe during both the First and Second World Wars, a response founded on the belief that governments respecting human rights were more likely to seek to ensure the peace. They considered it necessary for regional peace that it be grounded on regional integration and the harmonization of common values, and that this be in part achieved through the institutionalization of

[124] *Ibid.*, Preamble.
[125] American Convention on Human Rights (Pact of San José) adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, entered into force on 18 July 1978, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).
[126] The Council of Europe was established in 1949 to promote western European democracy.
[127] European Convention for the Protection of Human Rights and Fundamental Freedoms. CETS No. 005, adopted in Rome, 4 November 1950 entry into force 3 September 1953, 213 UNTS 221.

those values.[128] The European Convention takes into consideration the UDHR and further reaffirms, that fundamental freedoms must be the basis of justice and peace in the world, especially in the form of effective political democracy and the common understanding and observance of human rights. The European System of Human Rights has also developed a judicial mechanism in order to supervise the implementation of those rights established in the Convention. The Convention establishes the European Court of Human Rights, the jurisprudence of which has influenced other regional systems of international human rights.

The Council of Europe has adopted other Human Rights agreements. The most prominent is the European Social Charter[129], which guarantees social and economic rights. The European Social Charter states in its preamble that the aim of the European nation members of the European Council is a unity of purpose for the realization and safeguarding of their common heritage and for facilitating their economic and social progress, placing special emphasis on the maintenance und further realization of human rights and fundamental freedoms, and stressing the indivisible character of economic, social, cultural, civil, and political rights. The organ responsible for supervision of the Charter is the European Committee on Social Rights, whose its function is to judge whether or not the state members are in conformity in law and practice with the provisions of the Charter.

3 Africa

The African regional Human Rights system is the youngest of all such complete existing systems. This system is the foundation of the Organization of African Unity, and has as its legal basis the African (Banjul) Charter on Human and People's Rights, adopted on 27 June 1981.[130] The African system endeavours to meet the demands of the new developments in global human rights discourse. At the same time, it tries to reconcile such international standards with the demands of their particular cultures.[131] One of the distinctive aspects of the African system is that the African Charter not only

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[128] Steiner and Alston, above note 121, p. 563 *et seq*.
[129] European Social Charter CETS No. 035 adopted in Turin 18 October 1961, entered into force 26 February 1965, 529 UNTS 89.
[130] African Charter on Human and People's Rights (Banjul Charter) adopted 27 June 1981 entered into force 21 October 1986 OAU Doc. CAB/LEG/67/3 rev. 5, 1520 UNTS 217.
[131] Mashood A Baderin, "Recent Developments in the African Regional Human Rights System" Human Rights Law Review 2005 Vol. 5 No. 1, *e.g.* The African approach to the polygamous relationships under the African's Women Protocol.

deals with specific Human Rights and Duties but also with People's rights. The Charter places an emphasis on collective rights, the so-called third generation rights, such as the right to peace, the right to solidarity, the right to a healthy environment and, most especially, the right to development. In contrast to the European and the Inter-American system, the Banjul Charter also protects the rights of the so-called first, second, and third generations. Moreover, it positively acknowledges the relationship between fundamental peoples' rights and fundamental individual rights. However, it is important to highlight that the document is drafted in such a way as to permit state members to establish extensive restrictions and limitations on the exercise of the rights it proclaims.[132] Nevertheless, Article 30 of the Banjul Charter establishes the African Commission on Human and People's Rights so as to promote and ensure the protection of the rights recognized therein.

The preamble of the Banjul Charter emphasizes that the Organization of African Unity recognizes that freedom, equality, justice, and dignity, are essential objectives for the achievement of the legitimate aspirations of the African peoples. The text affirms the idea of coexistence between, on the one hand, a universal approach to human rights and, on the other, of particular values and tradition. The historical values and traditions of African peoples are not only acknowledged in the preamble; they also find expression in the configuration of the rights and duties established therein. The Charter's preamble expressly recognizes the universality of human rights, in conjunction with the accumulated and indivisible economic, social, cultural, civil, and political rights, as a means to achieving its goals. As in the wording used in the Inter-American Convention, the Banjul Charter also regards fundamental human rights as attributes of the human being; from necessity, these human rights must be protected at both a national and international level.

The African human rights system is well known because of the proclamation of collective rights.[133] Among these rights, the right to development deserves special attention. Complex in nature, it may be thought of as an all-inclusive right, the realization of which has important implications of a political, economic, and social

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[132] Buergenthal, above note 39, p. 229.

[133] Ruti Teitel, "Human Rights Genalogy". Fordham Law Review 1997 Vol. 66 No. 2, p. 312 *et seq*. "Collective human rights all framed within the so called third generation rights. The rights comprehend therein are group rights, collectivity rights, ethnicity rights, rights of peoples and self-determination right. These generations of rights are grounded upon a communitarian perspective."

nature. The provision is formulated as follows: "all people shall have the rights to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." The second sentence establishes a duty of cooperation. It reads as follows: "States shall have the duty, individually or collectively, to ensure the exercise to the right of development".[134] Another important aspect of the African Human Rights system is the African Charter of the Rights and Welfare of the Child.[135] Most of its provisions are modelled on the Convention of the Rights of the Child, with the principal difference, as in Article 31, that responsibilities or duties are also imposed upon the child.[136]

4 Asia

In contrast to America, Europe and Africa, Asia lacks a general system of human rights covering all its regions and states. The creation of a coherent human rights body in Asia is difficult both because of Asia's size, and because of the wide variety of cultures and religions.[137] The international standards to which Asian countries have agreed have until now been at a global rather than a regional level. However, Asian human rights standards also develop at what might be described as a sub-regional level. From a geographical perspective, the following regions may easily be distinguished: Central Asia, Middle East Asia, East Asia, South-East Asia, and South Asia. The regional complexity of the Asian Continent calls for more regional human rights systems. Human rights developments that involve Asia take place only at the level of Asian international civil society as, for example, in the principles reflected in the Asian Charter of Human Rights, or in the NGO Asian Centre for Human Rights.

To achieve a higher standard of living, many western intellectuals argue that the major focus of concern should be human rights, especially civil and political rights, whereas some governments and scholars in East and Southeast Asia place the emphasis rather on good governance, arguing that social stability and economic progress are the key issues. In addition, Asian scholars have argued that, although some Asian nations have succeeded in achieving for their people a higher standard of living by placing an

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[134] Art. 22, Banjul Charter.
[135] African Charter of the Rights and Welfare of the Child, OUA Doc. CAB/LEG/24.9/49 (1990) entered into force in 27, November 1999.
[136] *Ibid.*, Art 31 (b). The child, subject to his age and ability, (…), shall have the duty (b) to serve his national community by placing his physical and intellectual abilities at its service.
[137] *i.e.* the Asian continent is the cradle of Islam, Buddhism, Hinduism, Confucianism, Christianity.

emphasis purely on economic progress, the history of the west suggests that the realization and protection of civil and political rights are in fact only possible when they are accompanied by economic, social and educational progress.[138] In justification of a somewhat ambivalent attitude towards human rights, one fundamental argument given by Asian scholars is that, in some regions, as in East and Southeast Asia, the lack of a western style modern legal tradition makes it difficult to accept legally recognized human rights. In Asia, good and humane governance has traditionally depended on the virtue of the ruler and the prudence of the elite.[139] In many of its behavioural codes, Asian culture insists upon the supremacy of the collective over individual identity and upon an absolute obedience to authority.[140]

a South Asian Association for Regional Cooperation

The South Asian Association for Regional Cooperation is an organization set up to promote welfare through economic growth, social justice, and cultural development. Its Charter, of 8 December 1985 [141], does not mention human rights either in its introduction or among its objectives. Instead, there is a marked emphasis on self-determination, sovereign state equality, non-interference in internal affairs, and national independence. Nevertheless, tacit recognition is given to at least some aspects of the typical human rights discourse of international law; there is evidence of a gradual legal recognition of human rights. For example, the member states speak of their desire to achieve peace and progress through "strict adherence to the principles of the United Nations".[142] They also express an awareness of the importance, through regional cooperation and integration, of individual and collective action in the achievement of peace, freedom, social justice, and economic prosperity. Of the Charter objectives, Article 1(a) states that the association shall "promote the welfare of the peoples of South Asia and to improve their quality of life"; Article 1(b) states that a further objective of the association is "to accelerate economic growth, social progress, and cultural

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[138] Onuma Yasuaki, "Quest of intercivilizational Human Rights "Universal" Vs. "Relative" Asia-Pacific Journal of Human Rights and Law 2000 Vol.1 No. 1 at p. 52.
[139] *Ibid*., pp. 59-60.
[140] Neil A Engelhart, Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore. Human Rights Quarterly 2000 Vol. 22 No. 2, p. 549.
[141] The Charter of the South Asian Association for Regional Cooperation was adopted by the head of state or government of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka on 8 December 1985, UN Doc. A/41/114 Annex I; 4 Asian Yearbook of International Law 473.
[142] See first recital, Preamble , SAARC Charter.

development in the region and to provide all individuals the opportunity to live in dignity and to realize their full potentials."[143]

Towards the end of the 20th century, some human rights principles began to gain legal status in the SAARC.[144] Although the SAARC is not technically a human rights organization, many important human rights developments have occurred at its heart. Central in this regard is the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia.[145] In its preamble, the Convention evokes the UDHR, specifically its pronouncement that children are entitled to special care and assistance. In addition, the Convention clearly upholds the Declaration of the World Summit for Children and the UN Convention on the Rights of the Child. Article 1 of the Convention makes a direct reference to universal human rights in stating that the rights of children are as defined in the UN Convention on the Rights of the Child. Another instrument dealing with regional human rights is the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.[146] In this Convention, emphasis is placed above all on the evil character of trafficking women and children for the purpose of prostitution; it is a traffic that is clearly incompatibile with the dignity and honour of human beings. Moreover, such a practice is a violation of human rights.[147] A further human rights milestone is the Social Charter of the SAARC of 2004.[148] The Social Charter reaffirms its goal of providing to every individual an opportunity to live life with dignity and to realize his or her full potential. In addition, it states that one of its objectives is "to promote universal respect for and observance and protection of human rights and fundamental freedoms for all (...)"[149] A brand new instrument within the framework of the SAARC is the SAARC Charter of Democracy, adopted in February 2011.[150] It reaffirms the "faith in fundamental human rights and in

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[143] *Ibid.*, Article 1 (a) and (b),
[144] See for example Declaration of the Ninth SAARC Summit Malé SAARC/SUMMIT.9/11 at point 63
[145] SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia done at Kathmandu 5 January 2002 available at http://www.saarc-sec.org/userfiles/conv-children.pdf last visited 25.April.2012.
[146] SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Done at Kathmandu 5 January 2002 available at http://www.saarc-sec.org/userfiles/conv-traffiking.pdf last visited 25.April.2012 .
[147] *Ibid.*, The preamble recalls some major human rights treaties like the CEDAW, ICCPR, CRC.
[148] SAARC Social Charter SAARC/SUMMIT.12/SC.29/27 ANNEX-V done at Islamabad 6 January 2002.
[149] *Ibid.*, Article 2 (xii).
[150] SAARC Charter of Democracy, done in Bangladesh February 2011 available at http://www.saarc-sec.org/SAARC-Charter-of-Democracy/88/ last visited November 2012.

the dignity of the human person as enunciated in the Universal Declaration of Human Rights and as enshrined in the respective Constitutions of the SAARC Member States". This is clear evidence of an evolution towards acknowledgement of universal standards within the context of a debate on regional and domestic understanding of individual freedoms.

b Association of South-East States

The Association of South-East Asian States was established by its five original members[151], in Bangkok, on 8 August 1967, in a short document of five articles known as the ASEAN (Bangkok) Declaration.[152] The Declaration is a call to common action to promote the ideals of freedom, peace, social justice, and economic well-being, in a context of regional cooperation. Accordingly, its aims were economic growth, social progress, cultural development, and the achievement of regional peace and stability.[153] In this declaration, no express reference is made to individual rights. Nevertheless, its second point sets out as one of its objectives the attainment of peace and justice through adherence to the principles of the United Nations. Fifty years later, on 20 November 2007, the Charter of the Association of the Southeast Asian States was adopted in Singapore, thereby providing the ASEAN with a legal status and an institutional framework.[154]

The principles of the ASEAN are established in the preamble to the Charter: they are principles of sovereignty, equality, non-interference, territorial integrity, and unity in diversity. These principles aim to ensure a sustainable development that places well-being, livelihood, and their people's welfare, at the heart of the organization.[155] However, the Charter not only recognizes these principles but adheres also to a number of other principles of international law; these other principles include democracy, the rule of law, good governance, and the respect for and protection of human rights and fundamental freedoms. Article 1(7) (Purposes) reads as follows: "To strengthen democracy, enhance good governance and the rule of law, and to promote and protect

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[151] The original members of ASEAN are Indonesia, Philippines, Malaysia, Singapore and Thailand. The current Member States of ASEAN are Brunei Darussalam (1984), Cambodia (1999), Indonesia, People's Democratic Republic of Lao (1997), Malaysia, Myanmar (1997), Philippines, Singapore, Thailand and Viet Nam (1995).
[152] ASEAN (Bangkok) Declaration, Bangkok, 8 August 1967, 6 ILM 1233 (1967).
[153] *Ibid.*, Art. 2.
[154] ASEAN Charter, 13th ASEAN Summit, 20 Singapore 2007 entered into force 15 December 2008 available at: http://www.asean.org/asean/asean-charter/asean-charter last visited 27 November 2012.
[155] *Ibid.*, Preamble.

human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN". Article 2(2)(i) recognizes the principle of respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice. In Article 2(2)(j), the ASEAN also upholds the UN Charter and international law, including international humanitarian law. With regard to the cultural identity of states parties, the Charter in Article 2(l) enacts, as a principle, respect for the different cultures, languages, and religions of the peoples of the region, while underlying the permanence of their common values in a spirit of unity and diversity. The Charter further provides for a member states' obligation to create a human rights body as part of the ASEAN institutional framework.

5 The Arab system

The Arab Charter of Human Rights was adopted by the League of Arab States on 15 September 1994; it was revised in 2004[156], before finally coming into force on 15 March 2008.[157] The Arab Charter refers to the human rights detailed in international (global and regional) instruments; namely, the principles established in the UN Charter, the UDHR, the ICCPR, the ICESCR, and the Cairo Declaration on Human Rights in Islam. [158] In its preamble, the charter reflects a markedly religious character. Nevertheless, the Arab nations confess a faith in the dignity of the human person and a belief in universal human values that confirm the right of everyone to a decent life, based on freedom, justice, and equality.[159]

Article 1 of the Arab Charter establishes that an aim of the Arab world is to place human rights at the centre of the principal concerns of their nations. Besides acknowledging the importance of a common regional history, traditions, and interests,

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[156] Mervat Rishmawi, "The Revised Arab Charter of Human Rights: A Step Forward?", Human Rights Law Review2005 Vol. 5 No. 2, pp. 361 *et seq.*
[157] Arab Charter of Human Rights of 22 May 2004 *reprinted in* 12 International Human Rights Reports 893 (2005).
[158] Cairo Declaration on Human Rights in Islam, August 5, 1990 UN Doc. A CONF.157/PC/62/Add.18 (1993). The Cairo Declaration is an instrument, the purpose of which is to serve as guide for Islamic states in the field of human rights. The Declaration is in a manner a statement of a religious genre which sustain "that fundamental rights and freedoms, according to Islam are an integral part of the Islamic religion and that no one shall have the rights as a matter of principle to abolish them either in whole or in part or to violate or ignore them in as much as they are binding divine commands which are contained in the Reveal Books of Allah…" The Declaration articulates some rights such as the right to life (Art. 2 lit a), prohibition of genocide (Art. 2 lit b), the right of the child to proper nursing, education and material, hygienic and moral care (Art. 7), the right to live in a clean environment away from vice and moral corruption **(Art 17 lit a), the state's duty to ensure the individual the right to a decent living – adequate food, clothing, housing, education, medical care and all other basic needs.** *Emphasis added*
[159] Preamble, Arab Charter on Human Rights.

and, above all, the development of human rights within the context of national identity, and the sense of belonging to a common civilization, the Arab Charter includes also the aim of furthering and protecting Arab culture within the context of universal principles and values already proclaimed in international human rights instruments. Lastly, the Arab Charter anchors itself in the principle that all human rights are universal, indivisible, interdependent, and interrelated. In the Arab Charter there are some provisions of which derogation is not permissible. These are some examples: Article 5 on the inherent right to life; Article 8 on the prohibition of torture or cruel, degrading, humiliating or inhuman treatment; Article 10.1 on the prohibition of all forms of slavery and human trafficking; and Article 10.2 on the prohibition of forced labour.

CHAPTER 2 – ON HUMAN RIGHTS PHILOSOPHY

A Human Rights and International Law

Were there a need for reconceptualizing international law after 1945? As we see from its history, human rights as an aspect of international law is essentially a development in the world post-1945. Wartime atrocities that took place under the Nazi regime are examples of egregious human rights abuses.[160] A spirit of humanism post-World War II was given expression and legal force in the justice administered at the Nuremberg and Tokyo Tribunals. At this time, the international community seized the opportunity to reconceptualise international law with the establishment of new core international rights; these rights reflected a growing consciousness that the individual needed protection not only within the state but also beyond the frontiers of the national state. This new vision of how best to protect the individual consisted in part in creating international rules that could exist in parallel with national law, but supplementing national law such that the international order could to some extent compensate for deficiencies in the national constitutional orders in regard to the treatment of individuals.[161] Universal human rights at the heart of international law is a notion that grew from such beginnings. However, such developments involved breaking with the classical, state-centric dogmas of international law in favour, in principle, of an anthropocentric international order, albeit one where nations may appeal to their sovereign powers when individual rights and entitlements are viewed as a state inconvenience. It is no longer the state, but rather the individual that is the new concern of international law. For the system of international law this marks a reconceptualization, inspired by notions of human dignity and solidarity, of its structural and organizational principles.

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[160] Teitel, above note 133, p. 302 S**ee also** Gordon above note 95, p. 702 **See also See also** Steiner & Alston, above note 121, pp. 59-98 Giving examples that illustrates contemporary notion of human rights through judicial action before the Nuremberg Tribunal: *The Paquete Habana*, Supreme Court of the United States, 1900. *Minority Schools in Albania*. Advisory Opinion, Permanent Court of International Justice, 1935.
[161] Louis Henkin "The International Bill of Rights: The Covenant on Civil and Political Rights", 1981, p. 7.

1 The question about what are Human Rights

Why do we ask ourselves what human rights are? The international legal recognition of individual but universally valid entitlements or claims, beyond any limits imposed by the nation state, is now the basic paradigm of contemporary international law. At the same time, we know from a study of history that the idea of the autonomous individual possessing rights and duties in tension with an outside power, such as a polity, is not new at all. What was new at the time of the origin of the United Nations system was not the existence of human rights, as such, but rather that for the first time these human rights were recognized as international positive rights. Indeed, many scholars argue that the history of human rights begins earlier, even, than with the constitutional developments in France and America during the Enlightenment, and their subsequent institutionalization at the international level in the United Nations legal system. It is a question of history and of philosophy.

Why are human rights necessary? What distinguishes human rights law after the reorganization of international society post-World War II is precisely the new emphasis on individual entitlements as positive cross-border rights, the recognition of the universality of human rights as international positive rights. Today, the legal protection of the individual has become the main focus of attention among social scientists and politicians. Therefore, human rights, understood as a positive legal expression of human entitlement, are a source of intense debate and disagreement. What to many is a self-evident truth or a universally valid moral principle, is sometimes for others just the opposite. Setting aside such theoretical debate, history also suggests that, in practical terms, there exists a need to protect the individual across boundaries—that is, universally—and to do so with legal guarantees that protect the individual from external abuse.

Reflection upon the moral world of the individual requires that account also be taken of the moral implications of the economy. Today, the process of economic globalization accentuates the need to protect the individual against the sometimes negative consequences of such economic development. As many national states might do, new actors in the international economy, notably the purely profit-driven multinational and transnational businesses that operate on the international market in search of economic profit generally do not care so very much about human realization and human flourishing, at least not in a "humanist" sense. Such an economic model, seen from a

humanist or human rights perspective, calls for an analysis of the moral values underpinning its economic theory. To give concrete form to guarantees of individual rights we need again to ask a fundamental question, a philosophical question: to what is, or to what should be, a human being entitled? What are these human entitlements? And are these human entitlements also human rights?

2 About the Philosophy of Human Rights

The concepts of human rights law must of course be subject to philosophical scrutiny; The task is to develop a comprehensible and well-substantiated philosophical explanation of human rights that explains at least the most elementary entitlements of the individual being *vis à vis* external power. That is, on the one hand, which freedoms may we enjoy and, on the other, which constraints may be imposed on our natural individual liberty by a third or outside entity? Philosophy must also explain the degree to which collective interest may or may not overrule individual interest, and vice versa. In concrete terms, philosophy must inform the policymaker as to which positive social model most effectively permits, facilitates, and encourages, the fullest individual expression and realization. Here it is important to stress, too, that there are many different social models, from those of very small, civil societies, to those of very large, politically organized societies, such as the nation state, the transnational society, the international society, the universal society.

The answer to the fundamental question of what precisely are human rights cannot be given from an exclusively or strictly legal standpoint; human rights are multidimensional in character, grounded in both the moral and rational aspects of the human person, and in both the individual's autonomy and in their role in society. Human rights encompasses notions that are political, legal, and axiological. Human rights or human entitlements refer to the value of the human person as well as to the scope and reach of his liberty. Furthermore, human rights contain a component that is intrinsic relative to the nature of the person, and another component that is acquired relative to the contingencies that find expression in certain sets of circumstances. Both elements must be reflected in legal discourse. Human rights have an influence in each single aspect of life: they inform us as to what life is, morally speaking, and how life should be conducted. Human rights have a philosophical dimension, where one finds their

theoretical foundation and conceptual elaboration.[162] Methodologically, the philosophical conception of human rights comes prior to their legal concretization.[163]

It may be helpful to reflect upon the philosophical foundations of human rights. Prior to the United Nations Charter, the world of international relations recognized no international human rights legal regime comparable to that we have today. However, there did exist philosophies and theories that explained international human rights, if not in the contemporary sense, then at least as that to which the human being is entitled. Admittedly, some of these approaches to human rights grew from religious belief; they may be understood in terms of the moral conduct of the individual as guided by faith. There exist also other theories that defend human rights and fundamental freedoms by emphasizing certain basic attributes of human nature, such as individual reason and morality. This is the doctrine of natural law. By contrast, other theories stress the positive legal character of human rights; that is, a theory of positive law that frames human rights within a clear definition of what is a right. Some important ideologies, notably Marxism, express an understanding of human rights that reflects their basic conception of society, their social model, by stressing the major role played by collective effort in contrast to the comparatively minor role played by any one individual. The anthropological school of human rights understands human rights from a cultural perspective. The sociological school, in contrast, thinks of human rights in terms of individual contingent claims within a particular society. In terms of our contemporary understanding, there is a tendency to equate human rights to notions of ethical justice. Theories of this type are variants of a complex view that embraces human rights as part of an overarching conception of law and society, in which ethical behaviour is at the heart of human rights. Closely intertwined with our understanding of justice, we have seen that sometimes a theoretical understanding of human rights evolves as a reaction to injustice, and that yet other theories of human rights may be based upon notions of human dignity. Moreover, there are also theories relative to morality and politics, that is, theories of justice; and theories that link morality and economics, that is, theories that direct their focus on the free individual's utilitarian advantage.[164] It would be a mistake simply to dismiss these theories on the grounds of

[162] Mario I Álvarez Ledesma, "Acerca del Concepto Derechos Humanos", 1998, p. 22.
[163] *Ibid.*, p. 33.
[164] Jerome J Shestack, "The Philosophical Foundations of Human Rights in Human Rights" in *Concepts and Standards* J Symonides (ed.), 2000, pp. 42-61.

their diversity. It should rather be possible to identify the strengths of each school of thought and, moving forward on the basis of such reflection, to come to a more robust conception of individual entitlements.

B Religious Foundations

Religion, or belief in a transcendent being who exercises ultimate control over all human activity, promotes an understanding of human emotion and development that raises it to a level of unique historical value. Our religious beliefs have provided the moral foundations of many, if not all, of our most ancient and impressive cultures: they set the standards of our behaviour and, in such a way, give us also a long and thorough moral history of human conduct. Human rights advocates often find, in religious belief, support for their universal human rights theories. There is a shared interest in and search for normative truths on the question of individual worth. However, not all agree. Some commentators consider certain religious arguments to be in opposition to claims of universal human rights, arguing that religious belief relativizes the universal moral worth of the individual through an emphasis on difference instead of commonality. Setting aside the arguments of human rights theorists, advocates and detractors alike, an acknowledgement should surely be given that religion has always exerted a massive influence upon society and politics, domestically, regionally, and globally. Many of the most significant of our human cultures have erected moral universes from the inalienable absolutes dictated by the voices of gods and goddesses.[165] Our moral understanding, our understanding of how the individual should live his life in society, is deeply embedded in the history of religion.[166] From the absolute standpoint of a divine being, religion defines the roles of, on the one hand, the individual and, on the other, the collective, and establishes their inter-relationship through rules of conduct. This divine being may differ from culture to culture, but the religious and moral codes of the main

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[165] Karl-Joseph Kuschel, "Weltreligionen und Weltethos im Zeitalter der Globalisierung" in *Recht und Ethos im Zeitalter der Globalisierung* H Assmann and R Sethe (eds.) 2004, p. 19 Kuschel mentions three systems of religion as the source from which other religions flows: religions of Indian origin with Hinduissmus und Buddismus; religions of Chinese origin with Daoismus und Konfuzianismus and religion of Middle East origin with Judentum, Christentum und Islam.

[166] For details about the religious contribution to the theory of human rights see *e.g.* Jack Donnelly, "Universal Human Rights in theory and practice", 1989, pp. 50-52 **See also** Donnelly, above note 3 **See also** Kuschel, above note 165 **See also** Andreas Noll "Die Begründung der Menschenrechte bei Luhmann: Vom Mangel an Würde zur Würde der Mangel" M A Niggli *et al.* (eds.) 2006, p. 162 *et seq.* **See also** Micheline R Ishay "The Human Rights Reader" 2007 (2nd edition); Ishay, above note 6.

religions of the world are in many ways nevertheless strikingly similar. An analysis of such similarities gives empirical proof, to some extent, of the universality of certain characteristics of the moral life at the level both of individual and society.[167]

Religion follows essentially the commands of God, not the rationality of the individual. One characteristic of religion is that a greater emphasis is given to duties than rights. The moral norms established by religious codes are evidence of quasi universal human entitlements and claims relative to such fundamental constitutive principles of human rights as dignity, equality, and justice. A significant feature of religion is that, given the divine source of its rules, its normative codes are inalienable from the moral authority of its gods. The only way to introduce greater flexibility to such inalienable religious rules is through an exercise in hermeneutics. That is, the inalienable absolute established by sacred word is reinterpreted according to historical developments and current conditions.[168] This exercise in hermeneutics facilitates the adaptation of divine command to individual and collective human need. However, it resists still the notion that an individual may possess his or her own rational moral autonomy. And the exercise in hermeneutics is carried out, of course, by the religious authority itself. Cultures whose political systems are based on religion and not on the autonomous moral and rational world of the individual still interpret human rights in reference to divine word. Such religious authority arguably frustrates the individual from fully participating in the design and configuration of individual human rights; the individual is somehow prevented from legitimating the content of his or her own basic rights.

C Natural Law

Human rights theory is rooted in the doctrine of natural law; that is, in the belief that human morality pre-exists political systems. The doctrine of natural law also occupies a central place in legal science; it constitutes a theory of the law itself. A notion of natural law throbs always at the heart of calls for justice. In effect, it gives valid judicial criteria for positive law. The doctrine of natural law can be traced back, in the Middle Ages, to Scholasticism, to St. Thomas Aquinas, and then still further back, to ancient Greece, to

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[167] See below, Part IV, Chapter 3 in Hermeneutics.
[168] Jerome J Shestack, "The Philosophical Foundations of Human Rights in Human Rights" in *Concepts and Standards* J Symonides (ed.), 2000, p. 35, Shestack, above note 164, p. 35.

Aristotle, and to the Stoics.[169] However, it was only after the Middle Ages that a religious developed into a rationalistic natural law that convincingly elaborated a conception of individual natural rights. The idea that an individual might an enjoy an inherent right in opposition to an external power was clearly articulated in the context of the rationalist *iusnaturalism*, and the political contractualism that served as ideological support for the constitutional revolutions of the "enlightened" world. *Iusnaturalism* also gave birth to positivism. These 17th and 18th century philosophies sought to legitimate a new political order on the basis of individual natural rights. A close link forged between politics and natural law resulted in new principles of political legitimacy that were consistent with the notion of a social contract (contractariansm), and the idea that the state existed to help foster the full development and realization of the pre-existent (natural) individual. This was the age of John Locke, Jean-Jacob Russeau, Samuel Puffendorf, and Hugo Grotious.[170] For example, it was Locke's assertion that society should be established in such a way as best to defend certain inalienable rights of Man that most inspired and influenced the writing of the American Constitution. The new moral and philosophical paradigm of the modern constitutional nation state, and the protection of the individual through universal, equal, and inalienable rights based upon natural law, came to dominate legal theory and political debate.[171] Natural law, in its contemporary forms, continues to influence politics and law still today.

The conception of a new, further evolved human being, endowed with autonomy and reason and, in certain respects, therefore, independent of a divine master, is also the outcome of reflection and debate on the doctrine of natural law. The new rationalistic conception of the individual human being and his rights resulted in a certain denigration of the divine world and, at any rate, a sharper separation between matters human and divine: [172] now the centre stage would be occupied almost exclusively by the autonomous, rational, moral individual, and questions that concerned his liberties and his rights. Indeed, liberty was the central theme of *iusnaturalism*; that is, justice through liberty, political and economic. The core thesis of rationalistic natural law establishes that the individual human being enjoys natural rights that are absolute in form. These

[169] *Ibid.*,, p. 36.
[170] Knud Haakonssen, "Natural Law and Moral Philosophy" 1996, p.15, **See also**Lauterpacht, above note 22, p. 118 footnote 9.
[171]; Haakonssen, *ibid.*, p. 312.
[172] Knud Haakonssen,(ed.). "Grotius, Pufendorf and Modern Natural Law", 1999 at xiii.

absolutes constitute a "higher law which is the ultimate standard of fitness of all positive law, whether national or international."[173] Classical theories of natural law advance that there are certain principles of human conduct that must be converted by human action into positive law. In other words, to be valid, positive laws must conform to the principles of natural law.[174] Natural rights as derivations of natural law are thereby understood to be one aspect of a morally well-ordered universe[175], itself based on a notion of a common human nature that guarantees equal rights for all.[176] It should now be clear that one objective of this theory is the protection of the individual against a higher authority.

A further characteristic of natural law is that its exponents understand human life from the perspective of its teleological purpose:[177] for the *iusnatuiralists*, the law of nature is the realization of human objectives. The naturalists were of the view that things—animate or inanimate—exist not only to continue to exist, but exist, too, in pursuit of an optimum state understood as a specific good or end (*telos*).[178] In this context, the conception of natural rights as a means to the optimum or supreme end follows from the fact that the being of the rational and moral person must necessarily unfold in accordance with his or her moral and rational purposes or aspirations.[179] The idea of the law having a *telos* is grounded in the fact that the law itself is not only a mirror of human experience but is a mirror, also, of human aspiration. In this way, the law is both descriptive and prescriptive.

Notwithstanding this general and abstract framework, a difficult question remains, at the concrete level, unresolved. How to determine which, from a long list, are individual rights legitimate under natural law? Which rights are natural rights? In addition, one questions whether natural law theory has the flexibility to satisfy new claims based on

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[173] Myres S McDougal, Harold D Lasswell, Lung-Chu Chen, "Human Rights and World Public Order", 1980, p. 68 **See also** Lauterpacht, above note 22, p. 109 "their variety (applications of the term natural law) have tended to obscure the central idea which underlie them all, that of an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be, the justification of every form of positive law".
[174] H L A Hart, "The Concept of Law", 1994 (2nd edition), p. 186.
[175] Haakonssen, above note 170, p. 310.
[176] McDougal *et al*, above note 173, p. 69.
[177] Haakonssen, above note 172 at xv.
[178] Hart, above note 174, p. 188.
[179] Lauterpacht, above note 22, p. 102. "The very conception of natural rights conceived as the means to the supreme and of enabeling man to fulfil his duty follows from the realization that, as a matter of scienific fact, man is distinguished from other living beings by being a rational and moral person who must shape his life in accordance with moral and rational purposes".

contemporary conditions, an evolution in human understanding, and modern phenomena.[180] For the *iusnaturalists* the source of these rights, generally speaking, is given in the form of absolutes. The empiricists subsequently reproached the *iusnaturalists* for not paying sufficient attention to the empirical element in human understanding in which circumstances determine decisions.[181] This in turn led modern *iusnaturalists* to argue that natural law was not divorced from experience; rather, natural law contained within itself the general truths of human experience.[182] Natural law as a normative theory of the prescriptive forces of nature has also been severely attacked on other fronts.[183] Natural rights may all too easily be used as a substitute for legislation; paradoxically, they encourage the abuse of their own doctrine. As illustration, it is sufficient to think of the natural law-based economic and legal justification of slavery, or the opposition to female suffrage[184], or state interference with rights of property and contractual freedom. Indeed, the notion of natural law is all too often a rather too convenient source of politically expedient reasoning, a touch of *laissez faire* over and beyond economic doctrine.[185] This misuse and abuse of the idea of natural rights[186], is the reason why some great philosophers rejected this doctrine, notably Bentham and Kelsen.[187]

The doctrine of natural human rights is a moral doctrine which teaches an ethical understanding of the relationship between the individual and the politically organized collective. Natural law promotes a moral code based upon the existence of a natural order; this natural law, this natural order, is valid irrespective of its recognition within a given political or social community. Natural law must be understood in a pre-governmental (*vorstaatlich*) or moral sense; this is critical to an overall comprehension of natural law philosophy as applied to human rights law. Natural rights are likewise valid even when not recognized or guaranteed within a given legal system.[188] This pre-positivist legal force draws legitimacy from notions of justice.

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[180] Shestack, above note 164, p. 38.
[181] McDougal et al, above note 173, p. 69.
[182] Lauterpacht, above note 22, p.98.
[183] Hart, above note 174, pp. 186-193.
[184] Lauterpacht, above note 22, p. 104.
[185] *Ibid.*, p. 105.
[186] For a more detailed exposition of the abuses of natural law as a source of justification of unfair or immoral laws Lauterpacht, *Ibid.*, pp. 103-111.
[187] *Ibid.*, above note 22, p. 109.
[188] Christoph Menke and Arnd Pollmann, "Philosophie der Menschenrechte: Eine Einführung", 2007, p. 100.

Natural rights were understood first as basic human claims or entitlements; they were of course not understood in the modern sense of constitutional fundamental or contemporary universal human rights, that refer rather to values that assure the individual a satisfactory and decent life. We can say that the notion of natural human rights is axiological in that it asserts individual entitlement to a choice of morally appropriate life, not in a narrow legal sense but in light of certain fundamental human moral values. For the natural law scholar, human rights form part of a wider moral and ethical discourse.[189] Note that this axiological characterization of natural human rights does not necessarily exclude a characterization also of a more legalistic nature. The only particularity is that, for the *iusnaturalist*, human rights must first and foremost be understood from an axiological perspective; only in certain historically contingent circumstances do these rights acquire a legal character. The axiological nature of human rights relate them above all to the moral character of the individual and his or her ethical values[190], and not to the formal process of making law.

D Positive Law

Positivism came eventually to overshadow the *iusnatualism* of the Enlightenment. Nevertheless, after the Second World War the natural law doctrine enjoyed a renaissance. [191] A paramount example of it is the so known Radbruch Formula *(Radbruchsche Formell).*[192] This revival was in part a consequence of the monstrous negation of human worth witnessed under the Nazis, and in part because the theory of natural human rights is close to humanist ethics. The renewal of interest in natural law doctrine is also a reaction to economic forces that have produced a massive growth in

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[189] Mario I Álvarez Ledesma, "Acerca del Concepto Derechos Humanos", 1998 p. 63; Ledesma, above note 162, p. 63.

[190] *Ibid.*, p. 63.

[191] Shestack, above note 164, p. 42.

[192] Gustav Radbruch, "Gesetzliches Unrecht und übergesetzliches Recht", Süddeutsche Juristenzeitung 1946 No. 5, in *Rechtsphilosophie* Gustav Radbruch, 1956 pp. 352-353 "Der Positivismus hat in der Tat mit seiner Überzeugung »Gesetz ist Gesetz« den deutschen Juristenstand wehrlos gemacht gegen Gesetze willkürlichen und verbrecherischen Inhalts. Dabei ist der Positivismus gar nicht in der Lage, aus eigener Kraft die Geltung von Gesetzen zu begründen. Er glaubt, die Geltung eines Gesetzes schon damit erwiesen zu haben, daß es die Macht besessen hat, sich durchzusetzen. Aber auf Macht läßt sich vielleicht ein Müssen, aber niemals ein Sollen und Gelten Gründen (…)Aber Rechtssicherheit ist nicht der einzige und nicht der entscheidende Wert, den das Recht zu verwirklichen hat. Neben die Rechtssicherheit treten vielmehr zwei andere Werte: Zweckmäßigkeit und Gerechtigkeit (…)Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als »unrichtiges Recht« der Gerechtigkeit zu weichen hat. "

the power of the state.[193] We note that human rights theory is to a large extent a secularization of the rationalist natural law doctrines of the 17th and 18th centuries.[194]

Legal positivism is above all a theory of law. It is common understanding among legal scholars that the two central preoccupations of legal positivism are a separation of morality and law and a focus on the formal aspect of law. For positivism, laws are valid only in the context of a well established procedure; positivism sees only the formal aspect of the law, its procedural aspect, as a source of authority and validity. For this reason, positivism often loses sight of a norm's substantive component; that is, it loses sight of the fact that a law has validity only to the extent that the values it defends are just and true. This oversight occurs because positivism is conceived as being an entirely neutral form of law, in which value judgements are essentially neglected.[195] In the late 19th century, legal positivism was the prevailing school of thought in the context of international law. It dominates legal theory still today.

If the doctrine of natural law places its focus and bases its authority on the rational and autonomous individual, the contrasting doctrine of positive law focuses on the authority of the polity, its will and the rule of law.[196] This difference in the allocation of power in relation to authority is of fundamental importance when answering the question of who may legally structure a society? What are the sources of law? With particular regard to human rights, the positivist school speaks in terms of an "authoritative enactment of a system of law sustained by organized community coercion"[197], such that norms are only or mainly positive enactments of the state.[198] In addition, and in contrast to the *iusnaturalists*, the positivists elaborate their assumptions on the basis both of traditional legal concepts and empirical knowledge, while at the same time denying the existence of any *a priori* source of rights. For them, a serious plea to a higher law is little more than a meta-legal aspiration.[199]

Positive law seeks to detach questions of morality from questions of law. For the positivist, there is a clear separation between the law that "ought" to be, and the law that

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[193] Lauterpacht, above note 22, p. 112.
[194] Eusebio Fernández García "Dignidad Humana y Ciudadanía Cosmopolita", 2001 p. 102.
[195] Frauke Lachenmann "Legal positivism" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012, p. 785.
[196] Shestack, above note 164, p. 38.
[197] McDougal *et al*, above note 173, p. 73.
[198] Lillich *et al.*, above note 12, p. 35.
[199] McDougal *et al,* above note 173, p. 38.

is. However, for the *iusnaturalist*, natural law is always superior to positive law. The core thesis of positivism is that a law that ought to be, but which is not, is not a law; for this reason, it is cognitively worthless.[200] This school of thought refuses to give meaningful value to metaphysical argument, since the truth proposed by the transcendentalists cannot be objectively demonstrated.[201] For the positivist, moral principles are subjective in nature; only the law is truly objective. Similarly, legal rights arise from the law itself, moral rights, on the other hand, are merely principles of righteousness.[202] Two major examples from contemporary history suffice to demonstrate how a positivist legal system may become completely disassociated from the ethical and moral foundations of its society: the Nazi Regime in Germany, and the system of apartheid in South Africa. Both systems claimed validity and justification in the argument that positive law must simply be obeyed, regardless of its morality.[203]

The key criticism of positivism is that positive laws may sometimes contain values contrary to basic human morality. These values, values contrary to individual morality, may best be described as negative values, values of human indignity.[204] A law which takes a repeated procedure or custom as its source of validity cannot easily exclude immorality from its legal system. Defenders of legal positivism are vulnerable to easy refutation because positivism does not include a notion of moral correctness or right action among its constitutive elements. However, human indignity, as the examples given above clearly demonstrate, is absolutely not compatible with the order created by the international community, after 1945, with the establishment of the United Nations through UN Charter, not to mention the whole body of treaties that give legal shape to certain universal human claims. A second criticism of positivism is that the somewhat vague, unanchored derivation of its positive legal concepts also renders them vulnerable to manipulation within a confusion of over-elaborated and over-technical rules and procedures; the real value of the legal provisions may then easily be lost in a labyrinth of abstract technicalities. In the case of human rights, basic founding principles, like human dignity[205], are easily lost in a jungle of legalism.

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[200] Shestack, above note 164, p. 39.
[201] Paul Sieghart, "The International Law of Human Rights", 1983, p. 12.
[202] Donnelly, above note 166, p. 9.
[203] McDougal *et al*, above note 173,p. 75.
[204] *Ibid.*, p. 75.
[205] *Ibid.*, 75.

The strength of legal positivism is that it constitutes a complete system of legal norms; criticism aside, it has greatly contributed to the realization of human rights by acknowledging them within a system of positive rules. Human rights, be they domestic, regional, or global, once reflected in a positive set of rights, do at least set out a template of acceptable behaviour. Another advantage of positive law is that, in contrast to natural law, positivism does not recognize absolutes. Positive law is a quintessentially dynamic legal universe that, thanks precisely to its flexibility, is able easily to adapt to the different expressions of human morality and dignity that occur within a given moment and at a given place. The principal achievement of positive law is in its implementation of human rights rather than in its grounding of them. Positive law is thus a truly effective legal means by which, in a context of human dignity, and in the particular case of human rights, to guarantee respect for the moral behaviour of the individual.

E Other approaches

1 Historical school

Anthropology is a not a theory of law but rather a theory of human entitlement. Under the historical or anthropological approach, a theoretical framework is outlined that incorporates the objective and contextual evidence and circumstances that relate to particular situations in which human rights may be acknowledged and implemented. The anthropologist formulates human rights in view of punctual or circumstantial claims for a participation in and a configuration of value processes. The authority under which this approach is grounded is the dynamic character of the "living" law; this living law reflects a particular culture and environment as it exists in time and space.[206] The principal concern of the anthropologist is to elaborate a definition of human rights that takes into account not only the individual per se but also the individual as a member of a group, or culture, of which he forms a part.[207] At the time of the writing of the UDHR, anthropologists were of the view that, if a declaration on human rights were to attempt to guarantee to the individual the realization of his personality to the fullest extent

[206] *Ibid.*, p. 71 For a critic of the anthropological school **See also** Jack Donnelly "International Human Rights", 2007, p. 20. For further debates **See also** *e.g.*Terence Turner: "Human Rights, Human Difference: Anthropology's Contribution to an Emancipatory Cultural Politics" Journal of Anthropological Research 1997, Vol. 53 No. 3, pp. 273-291. *e.g.* grounding a right to human difference.
[207] Statement on Human Rights, American Anthropological Association (AAA), Executive Board, 1947, (Submitted to the United Nations Commission on Human Rights). American Anthropologist, New Series, Vol. 49 No.4 Part 1 1947, p. 539.

possible, it had to do so in full awareness of the fact that the personality of the individual may only be developed fully in terms of its culture and society.[208] The Executive Board of the American Anthropological Association submitted a very famous Statement on Human Rights to the Commission of Human Rights of the United Nations in charge of elaborating the UDHR; this statement has had a significant influence upon the theory of universal human rights. With its emphasis on cultural relativism, the statement clearly rejects the notion of universality. It may be summarized in three points. First, "the individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences." Second, "respect for differences between cultures is validated by the scientific fact that no techniques of qualitatively evaluating cultures have been discovered." Third, "Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole".[209] It is clear that the anthropologists are generally on the side more of moral relativism than moral universalism. More recently, some anthropologists have proposed a search for cross-cultural universals[210]; indeed, what is often ignored by relativists is the fact there is an emerging global culture that is based on a common acceptance of a single economic theory, the theory of comparative advantage.

2 Marxism

Marxism is not a theory of law but rather a political-economic theory of society. "Marxism explains moral beliefs in terms of class structures and struggle, which are determined by the means and mode of production."[211] Indeed, the socialist conception of the world was the result of a process of industrialization that brought about a large and marginalized mass (class) of workers that organized a labour movement (unions) in order to combat the classical liberal economic conception of social justice.[212] The theoretical foundations of the socialist theory of citizen's rights and duties are found in the works of Marx and Engels, further elaborated by Lenin's doctrine of the socialist

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[208] *Ibid.*, p. 540.
[209] *Ibid.*, pp. 541-542.
[210] Ann-Belinda S Preis, "Human Rights as Cultural Practice: An Anthropological Critique" Human Rights Quarterly 1996 Vol.18 No. 2, p. 294.
[211] Donnelly, above note 206, p. 21.
[212] Ishay, above note 6, at xxiv. **See also** McDougal *et al*, above note 173, p. 77. The origin of this conception "is a response to a sense of injustice brought into being by a highly exploitative, industrial society."

state. These theories found their constitutional expression in the Declaration of the Rights of the Working and Exploited People in 1917.[213]

The central idea of Marxism turns around the right to work. The central idea of Marxism is that the political emancipation and realization of rights demanded by bourgeois society is achievable only when human productive activity is not based upon the selfish individual possessing rights to private property, but rather on the socially aware human being, whose first aim is to satisfy the needs of his or her community through the right to work. Communists conceive the human being as a "community being", who owns his or her own means of production, and whose rights are determined objectively on the basis of social relationship. Marxism challenges classical liberalism in proposing a change to the economic foundations of society.[214] Socialist theory outlines a society organized by state, in which the rights of nationals reflect the relationship between state and citizen, and not the relationship between society and the individual man or woman, the autonomous man or woman himself or herself. Citizen rights are state rights which find expression in a legal superstructure that is determined by the economic principles of a socialist society (the theory of socialist production).[215] The right to work is almost as important as the social ownership of the means of production since work constitutes the social foundation of the economic and political system. The right to work is an economic right that extends not only to the possibility freely to undertake a job, and the obligation of the state to provide those jobs, but also to the notion that the working conditions must be appropriate. Such socialist work conditions, pursued through an implementation of the right to work, in turn encourage other economic, cultural, and social rights.[216]

One criticism of Marxism is that it negates human rights.[217] The emphasis placed on economic variables, such as wealth, whether or not these truly enhance social welfare, risks to overlook other values associated with the autonomous individual. On the one hand, it is true that, under the influence of Marxism, liberal theory has more readily embraced such notions as economic equity, the right to trade unions, the right to education, and other social welfare rights, such that they are now to be found in many

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[213] Imre Szabó, "The Socialist Concept of Human Rights", 1966, p. 53.
[214] *Ibid.*, p. 54 .
[215] *Ibid.*, pp. 60-61.
[216] *Ibid.*, p. 59.
[217] McDougal et al, above note 173, p. 78.

national states and also in the body of public International Law that has the UN at its head.[218] On the other hand, a refusal of political and civil rights as conceived by liberal democratic societies would clearly hamper the individual from becoming the genuine shaper of his and her laws, and as such would represent an hindrance to their liberty. For the Marxist, the relationship of the state to the rights of the citizen is procedural, in that the state is actively requested to implement the rights of the citizen.[219] Communist doctrine also affirms that human rights are exclusively a matter of domestic jurisdiction.[220] In this sense, the international community agrees only on "high-level prescriptions" that outline a transnational interest in human rights, while the detailed application of these norms is held to be exclusively a matter of national concern and competence.[221] Neither does communist doctrine tolerate interference in the application of transnational norms[222]; such an idea of non-interference is strongly supported by the dogma of absolute sovereignty. Paradoxically, the major success of Marxism lies in its persistent and conscientious effort to justify and realize human dignity.[223] Socialist theory contributes to the development of human rights theories by expanding the range of its competences, from abstention to intervention, from inaction to positive action, most especially against social and economic inequality and injustice.[224]

3 The sociological school

Although sociology does not take law as its central object of study, it does engage intensively with the concepts of law. Its approach offers a theoretical framework whose central focus is on the process of rights formation[225] in a context of the variable social processes and social interests.[226] Its investigative method is largely empirical. The social and natural sciences develop an understanding of the human person and his or her

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[218] Ishay, above note 6, at xxiv.
[219] Szabó, note above 213 pp. 65-66.
[220] Shestack, above note 164, p. 41.
[221] McDougal *et al*, above note 173, p. 78.
[222] Shestack, above note 164, p. 41.
[223] McDougal *et al,* above note 173, p. 77.
[224] Sieghart, above note 201, p. 9.
[225] Noll, above note 166, p. 191 "Die Diskurstheorie ist ein eigenes Erklärungsmodell, dessen wesentlicher Unterschied vor allem darin besteht, dass der Vertrag lediglich das Endergebnis darstellt und dementsprechend keinen Erklärungswert besitz, zumindest bleibt die Erklärung beim vertraglichen Modell intransparent, weil der Prozess des Zustandekommens ausgeblendet wird. (…) Dieser Mangel wird nun durch die Diskurstheorie behoben, indem sie den Prozess, der zum verbindlichen Vertragsschluss führt transparent macht und erklärt. Die Diskurstheorie kann damit als Vertragsverhandlungstheorie bezeichnet werden."
[226] Shestack, above note 164, p. 42 Explaining that Roscoe Pound, the founder of the school of sociological jurisprudence, catalogued the interests as individual, public and social.

relationship to other human beings, in community; sociologists understand the law as a codification of human insight into human social existence.[227] For sociologists, human rights appear as institutions determined by social intercourse[228]; they are social claims for institutionalized protection.[229] Indeed, sociological jurisprudence tends to dismiss both transcendental rights and analytical types of jurisprudence; it focuses instead on institutional development.[230] Its focus only on institutional development has attracted severe criticism. Nevertheless, it is undeniable that empiricism helps to identify current problems and challenges, those problems and challenges that directly influence the implementation of fundamental rights, and where the specifically empirical component of those rights may be strengthened.[231]

Contemporary sociology grounds its theories of human rights in human discourse, in human communication.[232] Communication is seen as the legitimate channel through which to achieve human agreement. Human rights are institutional rights grounded upon discursive agreement. The main contribution of this school comes thanks to their striving to reach an equilibrium of interests between moral sentiments and the social and economic conditions of time and place.[233] In spite of such positive contribution, the sociological school arguably fails to answer the fundamental logical question of how a normative conclusion about rights can be empirically derived from factual premises. A descriptive science in the social human rights field is helpful but not sufficient to satisfy the need of goal identification.

4 Core Human Rights school

The core rights theory is intended to justify the protection of humanity against acts of atrocious cruelty. It has a markedly humanist inspiration. As a modified or qualified *iusnaturalist* doctrine, it maintains the purpose of identifying absolutes and universal

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[227] *Ibid.*, p. 41.
[228] Niklas Luhmann, "Grundrechte als Institution", 1965, pp. 12-13 „dieser Begriff bezeichnet in der Soziologie nicht einfach einen Normen-komplex, sondern ein komplex faktischer Verhaltenserwartungen, die im Zusammenhang einer sozialen Rolle aktuell werden und durchweg auf sozialen Konsens rechnen können. Grundrechte symbolisieren institutionalisierte Verhaltenserwartungen und vermitteln ihre Aktualisierung in konkreten Situationen. Institutionen sind Zeitlich, sachlich und sozial generalisierte Verhaltenserwartungen und bilden als solche die Struktur sozialer Systeme. Insofern –und nur insofern- sind sie möglicherweise Gegenstand rechtlicher Positivierung."
[229] Bryan S Turner „Outline of a theory of Human Rights" Sociology 1993 Vol. 27 No. 3, pp. 489-512.
[230] Shestack, above note 164, p. 42.
[231] McDougal *et al*, above note 173, p. 78.
[232] Noll, above note 166, p. 194.
[233] Shestack, above note 164, p. 41.

values, that match the "is" and the "ought" in law, while accepting the effectiveness of any positive law that encompasses such values. They understand human life as embracing certain freedoms without which the human being must cease to be understood and designated as such. The values to be acknowledged by positive law are derived from a core minimum of values that must be equally valid for all members of a just and universal society. The core rights must guarantee a minimum of morality consistent with individual freedom.[234] The fruit of core rights theory may be appreciated in notions of inherent dignity, inalienable rights, and equality, as established in the UDHR[235], and as found, generally, in the moral universalist foundations of human rights. The underlying philosophy of core human rights is that of Kant's ethics. For Kant, there is an *a priori* moral rule that transcends all individual needs, desires, wants, and ends, which is not in any way contingent, and which exists outside social convention. Such an *a priori* morality is categorical in character; it is inseparable from the human person's individual autonomy, and based on their intrinsic worth and dignity.[236]

5 Human Dignity school

One closely related core rights theory is another human rights approached based squarely on a notion of human dignity. Indeed, such an approach has today become the central paradigm at all levels of international law, in general, and international human rights law, in particular. According to this theory, human dignity plays the central role; all rights flow from it. To repeat, it is not limited to the justification of just a few core rights; all rights flow from it. One principal characteristic of this doctrine is that it is a value-policy oriented doctrine; it reinforces the aspirational aspect of a legal order. The main goal is to achieve a universal community in which human values are promoted from the perspective of human dignity.[237] Put differently, human rights are social and political guarantees that protect the individual from threats to human dignity not only

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[234] *Ibid.*, p. 42.
[235] See above Part I Chapter 1 in UDHR.
[236] See below Part I Chapter 3 in Immanuel Kant.
[237] Shestack, above note 164, p. 54 The theory of a world public order with human dignity as its head is grounded by McDougal, Lasswell and Chen. " the comprehensive set of goal values we recommend for postulation, clarification, and implementation are those which today are commonly characterized as the basic values of human dignity or of a free society

from political power (the state), but also from economic power (economic subjects), or from any kind of social institution.[238]

6 Theories of justice

A further important contemporary trend among internationalists is to use theories of justice as a justification of certain human rights. This approach argues that legal theory requires value standards, such as justice, against which laws may be measured; these standards of justice are relative to certain human rights. However, in practical terms, the international community has been reluctant to agree on a universal definition of justice; its argument is that the meaning of justice, like that of morality, varies from society to society, and at different times. Moreover, theories of justice may differ substantially depending on the morality and values by which they are sustained, such as utilitarian theories of justice, or communitarian theories of justice. Nevertheless, a reading of the UN Charter, the UDHR, and subsequent international treaties, leaves in no doubt that, in terms of its interpretation of justice, the basis of international law is positive universal human rights.

One prominent example of a theory of justice is that of Rawls.[239] According to Rawls, the first principle of justice is equal liberty, followed by social justice expressed in principles of equal opportunity and respect for difference (a difference principle).[240] Allied to this conception of justice and basic liberties is a principle of reconciliation or common interest. Consequently, liberties are restricted only when it can be proven that unrestricted liberties are a source of general harm. In a positive sense, this principle argues that a limitation to liberty is justified only when it contributes to the advancement of an overall system of liberties.

Are humanist theories of justice suitable to markets? Theories of justice have also been used to legitimate a relationship between markets, human rights, and constitutionalism, and, in particular, to ground the legitimacy of human rights considerations within the international legal trade regime. This link is established on the basis that justice be considered an objective of law. This theory is structured as follows: first, in terms of

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[238] Donnelly, above note 206, p. 22.
[239] John Rawls, "A theory of Justice" 1999 (revised edition).
[240] *Ibid.*, p. 53 The two principles reads as follows. "First: each person is to have an equal rights to most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all."

norms for the just allocation of the human rights and basic freedoms necessary to protect human freedom and to guarantee peaceful cooperation; second, the establishment of principles and rules for the just distribution of scarce resources through private competition and governmental correction of market failure; third, the establishment of norms for a just constitutional order which protects the interests of citizens against a failure in government.[241]

F The unanswered question

The most basic question on the subject of human rights remains unanswered: what are they? The search for a universally accepted definition and understanding of human rights has been and will continue to be the focus of much debate, especially so in a context where organized or institutionalized forms of power tend to argue for the validity of their institutions on the basis of own interest, good or bad, and not at all on the basis of existing values derived from personhood. The highly diverse ways in which collective forms of power are organized still suggests a significant tension and even incompatibility between the role of the individual in society and his or her recognized and respected individual rights. In such a context, it is clearly very difficult to agree, prove, and accept the existence of valid universal values. The antagonism between natural and positive law and the overall difficulty of the task notwithstanding, the existence of human morality, its undeniable reality, make it imperative in the context of a modern, globalized world, to surmount old rivalries and limited perspectives in the struggle for universal recognition of basic human rights and entitlements.

The absolutely basic belief that human rights are the rights one has because one is human is one that dominates international legal doctrine.[242] From the perspective of legal scholarship, this definition is a significant problem: how do theoreticians define the meaning of a "right" in the context of human rights? One suggestion is that the word "right" has both a moral and a political sense. In the moral sense, it has the meaning of something being right, and in accordance with the principles of justice. It is within this

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[241] Ernst-Ulrich Petersmann, "Theories of Justice, Human Rights and the Constitutions of International Markets" EUI Working Paper LAW No. 2003/17, p. 7.

[242] Donnelly, above note 166, p. 9 **See also** Donnelly, above note 206, p. 18 According to Donnelly, human rights are special kind of rights because they are claims of the dispossessed who seeks to alter legal or political practice. They provide a moral standard of national and international political legitimacy.

understanding of rights that one finds a call to correctness. In the second, political sense, its meaning is more that of a positive right. That is, it is a provision that originated in a pre-determined procedure. For most scholars, human rights are understood as a combination of morality and positivity. This places them into a special class of rights; they are moral rights of the highest order, the final resort in the realm of rights, rights of which none higher exist. In this sense, human rights may represent not only positive law but also extra legal claims that may sometimes challenge even the law itself.[243] Universal human rights are first and foremost moral or positive norms: they are a moral idea of what is due to a person and they are a positive enactment of something acknowledged objectively as a right. However, in reference to its claims to special or superior authority or force[244], not only is the legal character of a human rights norm, as given by the classical lawgiver, within a particular political system, to be acknowledged, but also the deeper truth that the profound moral legality of the provision precedes its very pronouncement; the pre-existing truth needs only to be given expression in the law.

Human rights is a multidimensional concept that needs to be understand on at least two interacting levels: on the one hand, on the basis of a value system that places the human being at a superior and privileged ethical level and, on the other, as a positive norm that gives legal expression to such moral claims.[245] Human rights may be said to be axiological in that they express ethical exigencies upon the human person. Human rights are also political in that they appertain to the political discourse of a society; they form part of a political will and ideology. From a political standpoint, human rights are often considered but a part of a society's political structure; they are considered to emanate from political institutions, not from morality. Similarly, for those who think of human rights in terms above all of political institutions, of primary importance is the emphasis on public order relative to the role of the individual in the polity. Clearly, human rights do have a legal element, shaping such values or ethical exigencies into enforced

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[243], Donnelly, above note 166, p. 14.
[244] Noll, above note 166, p. 198 "Der Rechtspositivismus kann bereits auf der analytischen Ebene widerlegt werden, da nämlich ein begrifflich notwendiger Zusammenhang zwischen Recht und Moral existiere. Das Recht erhebe nämlich einen Richtigkeitsanspruch und verweise bereits von seinem Begriff her auf die Moral" **See also** Lauterpacht, above note 22, p. 74 "However (...) while they [natural laws] are bound to be mischievous when conceived as an alternative to changes in the law, they are of abiding potency and beneficence as the foundation of its ultimate validity – the validity of positive laws- and as a standard of its approximation to justice".
[245] Álvarez Ledesma, above note 162, pp. 131-133.

implementation of actual legal rights. Each of these dimensions has its own problematic. Nevertheless, our interest here is simply to reaffirm a conception of human rights that understands them, above all, as moral theory that, in reference to the rules governing society, is primarily axiological in character.

If life in society is understood to aim at the fullest realization of the individual, human rights, equally, must be understood from a moral and ethical standpoint. The rationality underlying the public order is located in a basic human, moral discourse, and not within a purely political or legal area of human activity. That is, they cannot be reduced to positive enactments. The political and the legal serve only means to guarantee a fundamental moral claim, namely, equal treatment before the law for all, with a view to assuring the fullest realization of a person's potential. In other words, the norm against which all acts must be measured is a moral norm. Indeed, a morality of human rights transcends even the importance of the polity. To ask oneself what are human rights is first and foremost to enquire into the moral nature of the human being, for human rights emanate from the individual's moral nature. Thus, the theory of human rights is a moral theory that possesses also a political and a legal dimension. It seeks to establish that human action must conform to certain basic behavioural considerations in order for life in society to be regarded as morally good. In short, the human rights thesis argues that a society's most fundamental rules must be found in the most fundamental rules of morality.[246]

There is no consensus in the understanding of human rights. Human rights philosophers and practitioners have not yet established a unified understanding of the nature, content, and scope of human rights. Although there exists a human rights framework that does encourage a certain evolution of our understanding on the basis of positive national, regional, and global acts, the philosophical debate still reveals much intellectual disagreement on the subject of human rights.[247] Nevertheless, this complex intellectual evolution has of course been difficult, even as nobody said that to reach a consensus on the concept of human rights would be easy. Issues of a political, economic, and moral nature, that suggest the supremacy of certain interests and values over others in the context both of national and of international law, in a world that is experiencing a proliferation of international actors, and which at the same time lacks a strong, central,

[246] Menke & Pollmann, above note 188, pp. 25-32.
[247] McDougal *et al*, above note 173, p. 63.

formal international legal structure, clearly hinders a straightforward road to the realization of a moral theory of universal human rights. One of the biggest failures of which human rights scholars have been accused, is that they have not been able to establish with clarity the common interests of humanity in the context of the shared values of universal human rights. [248] Attempts have been made to explain how human rights differ from one another, especially in relation to the source of their justification, its nature, its content. Some interpretations conceived human rights as natural absolutes of metaphysical justification; others describe them as punctual demands of a particular historical moment. Sometimes human rights exist only when a particular state decides to acknowledge them; they may be said to be given rights, which operate only in a particular state.[249] Some distinguish sources of justification between transcendental, anthropological, and positivist.[250] Yet another author identifies four schools of thought in relation to the fundamental question of what human rights are, namely, the natural school, the protest school, the deliberative school, and the discourse school.[251] All that this really shows us, however, is that human rights have several aspects, moulded from a variety of perspectives, which do not necessarily need always to be wrong.

Human Rights are in part, but not exclusively, concrete forms of human values. Human rights are moral exigencies that belong to a system of values common to all human beings, and that require a certain level of concretization to produce certain effects. Their basic philosophy may be seen in all the most important world cultures.[252] Throughout history, standards of human behaviour have been expressed and executed as moral commandments, or as positive rights, as absolutes, or as contingent guarantees. Human beings seek always a spectrum of action that, in the first place, permits the existence of the individual and, secondly, the subsistence of the individual and, thirdly, to allow the individual to develop his or her personality to its fullest potential. We do so through

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[248] *Ibid.*, p. 64.
[249] *Ibid.*, p. 66.
[250] Noll, above note 166, pp. 170-171 According to this author the foundations of Human rights are transcendental, anthropological, and positivist.
[251] Marie-Bénédicte Dembour, "What Are Human Rights? Four schools of Thought" Human Rights Quarterly 2010 Vol. 32 No. 1, pp. 1-20. The natural school: human rights are those rights one possesses simply by being a human being. The protest school: human rights are claims that allow the status quo to be contested in favour of the oppressed. The deliberative school, human rights are political values a society chooses to adopt, they come into existence through a societal agreement. The discourse school: human rights exist only because people talk about them, human rights is only a political language to express political claims.
[252] Nowak, above note 1, p. 9.

basic truths or principles that nevertheless concern a more complex system of human action and organization, with their source in either religion, natural law (or the autonomous individual), and positive law (or the authority of a collective state of being).[253] We can therefore affirm that human action is derived from moral norms, tradition, and positive law.[254] None of these sources may be excluded.

Human Rights theory is a moral theory with differing philosophies. In international society, the discussion about individual entitlements occurs in the context of human rights discourse. How is the individual to be universally protected? Has he or she any universal rights? Highly controversial issues of this philosophical nature nurture the debate on human rights law and doctrine. As a contemporary doctrine of individual realization in the context of a world permeated with diverse conceptions of states and forms of authority, the notion of universal human rights faces serious difficulties when applied to a specific set of circumstances, circumstances often dominated one or other dogma, such as the sovereignty of the state, the monopoly of the state as the only subject of international law, and so on, which often opposes the thriving cogency of international legal guarantees of individual rights. Efforts to encompass different philosophical notions of human rights have proven very difficult; they have only resulted in positive law as a matter of practical reasoning, as demonstrated by the debates of the drafters of the UDHR.[255] As the Universal Declaration of Human Rights itself shows, practical agreement was only reached[256] with the idea of elaborating a life project to which all humanity could strive. However, both at the practical and the theoretical level, it was agreed that human dignity should be the foundation of human rights.

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[253] Shestack, above note 164, pp. 36-39.
[254] Heinz-Dieter Assman, "Recht und Ethos im Zeitalter der Globalisierung: Zur Einführung" in *Recht und Ethos im Zeitalter der Globalisierung* H-D Assmann und R Sethe (eds.), 2004, p. 11.
[255] The drafters of the UDHR, in spite of coming from different cultural and ideological backgrounds agreed that repesct of human dignity is the moral basis for human rights.
[256] Ishay, Micheline R (ed.). The Human Rights Reader. p 2, Ishay, above note 6, p. 2.

CHAPTER 3 ON HUMAN DIGNITY

A Ordinary Meaning

Notions of human dignity now enjoy a central place in International Law, both as a principle of General International Law and as the foundation of Human Rights. An understanding of human dignity is similarly at the core of the international legal system. But what does this expression, human dignity, really mean? Beyond the semantic and etymology of the word dignity[257], this expression, human dignity, has undergone, in its semantic and etymological origins, a long history. It is a concept, the understanding of which is essential in today's political, legal, and general discourse. Human dignity has become a multidimensional concept, relative to the moral nature of the individual person and his place in society as such. It is an essential concept in philosophy, used also in moral and ethical debate, that is given its most concrete expression in political and legal discourse both at international and at domestic level. However, the concept is, by definition, abstract; there is a risk of it being but an empty expression.[258]

B History of the notion

1 Cicero

The idea that the inherent dignity of man may be used as the basis for a system of values of universal validity has its main source in western philosophy. The phrase "dignity of man" was first used by the Roman stoic, Cicero. His definition of dignity reads as follows: "Dignity is someone's virtuous authority which makes him worthy to be

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[257] Michel Pauliat, "De la *Dignitas* à la Dignité" in *Justice, éthique et dignité* S Gaboriau, H Pauliat (Collected Texts), 2002, p. 29 Etymologically, the word dignity has an indo-european root, *dek* which was substituted by the word *dekos*, which turn into latin to the verb *decet*, having the general meaning of "it is convenient". This verb gave birth to two nouns: *decus*, with the meaning of decency and *decor*, with the meaning of physical beauty together with moral dignity. From the verb *decet* emerged also the adjective *dignus*, with meaning of "that deserve". From this adjective *dignus* is that we obtain the noun *dignitas*. In this sense this word means merit. First, the word *dignitas* was used to refer to an honorific office. Later, the word evolved in two ways. On the one hand, the word refers to the *dignitas* of an office as a function or title which invested someone with a distinguished rank. In this case the word has the meaning of merit. On the other hand, the word dignity has an abstract signification of consideration, prestige, honour, deserve; that is, the quality of being worthy of esteem or respect.
[258] Fernández García, above note 194, p. 19.

honoured with regard and respect."[259] Although for Cicero, as for the Romans, the word *dignitas* was associated mainly with the dignity of the state or the citizen, meaning something like ornament (*decus, decorum*), majesty (*maiestas*), greatness (*amplitude*), conviviality, charity, or eloquence, he does on one occasion use dignity with reference to the human person:

> *"It is essential to every inquiry about duty that we keep before our eyes how far superior man is by nature to cattle and other beasts: they have thought except for sensual pleasure and this they impelled by every instinct to seek; but man's mind is nurtured by study and meditation ... from this we see that sensual pleasure is quite unworthy of the dignity of man ... One's physical comforts and wants, therefore, should be ordered according to the demands of health and strength, not according to the calls of pleasure. And if we will only bear in mind the superiority and dignity of our nature (natura excellentia et dignitas), we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voluptuousness, and how right it is to live in thrift, self-denial, simplicity and sobriety".*[260]

It has been suggested that the particular meaning given by Cicero to the expression human dignity relates to Stoic notions of *personae* (person), *natura* (cosmos, physis, nature), and *ratio* (logos, reason). Human dignity, as in the passage cited above, constitutes a characteristic of human nature, a human nature which is common to all, and in which reason is the distinctive quality. It is reason that allows the human being to distinguish between right and wrong, good and evil. The dignity of man resides in the human person endowed with reason and thus with a capacity freely to make moral decisions.[261] It is Stoic philosophy that conceives the individual as possessing a human dignity within a context of human morality. Moreover, within their political context, philosophers such as Seneca, and Cicero himself, developed the notion that a human being has entitlements prior to the existence of any type of political state. Note also that

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[259] Hubert Canick, "Dignity of Man" and "*Persona*" in Stoic Anthropology: Some Remarks on Cicero, *De Officiis I* 105-107" in *The Concept of Human Dignity in Human Rights* Discourse D Kretzmer and E Klein (eds.), 2002, p. 23 Citing Cicero, *De Inventione*. 2.55.166 "*dignitas est alicuius honesta et cultu et honore et verecundia digna auctoritas.*"

[260] Donnelly, above note 3, p. 17 footnote 15; translation of Walter Miller from Cicero's "*De Officiis*" (on Duties (1.30.105-107) in Latin (only 106) "*Ex quo intellegitur corporis voluptatem non satis esse dignam hominis praestantia, eamque contemni et reici oportere ; sin sit quispiam, qui aliquid tribuat voluptati, diligenter ei tenendum esse eius fruendae modum. Itaque victus cultusque corporis ad vale- tudinem referatur et ad vires, non ad voluptatem. Atque etiam si considerare volumus/ quae sit in natura excellentia et dignitas, intellegemus, quam sit turpe diffluere luxuria et delicate ac molliter vivere quamque honestum parce, continenter, severe, sobrie*". **See also** Canick, above note 259, pp. 22-23.

[261] Canick, *ibid.*, pp. 22-23.

the notion of a universal "*civitas humana*" emerged in this period.[262] However, it is necessary also to highlight that Stoic ideas of rational man were understood as justification of his perceived superiority over animals.

2 Christianity

Stoic philosophy was rediscovered by Christianity, if with important differences. Christians conceived the dignity of the individual in terms of human superiority over all that is not human. They grounded this notion of human superiority in the idea that the individual was created in God's own likeness (*imago Dei*).[263] For Christians, the human person is not complete; that is, the human being is mortal, if occupying a central role in creation. Human dignity, theologically, is a reflection of the dignity of God. The difference from stoicism is that, instead of grounding this superiority in nature, or in the laws of nature, it is grounded in the sacrosanct supremacy of the human being as created by a transcendental God: human worth and value are gifts from God.[264] Nevertheless, certain Christian philosophers were already laying the ground for an anthropological turn within Christiany; this turn would eventually flow into the Enlightenment.

Stoic notions of human dignity were further elaborated during the Italian renaissance, in the Middle Ages, by such thinkers as Giannozzo Manetti (1396-1459)[265] and Giovanni Pico della Mirandola (1463-1494). In the renaissance humanist tradition, the *Oratio de hominis dignitate* of Pico della Mirandolla was a work of particular significance. Mirandola wrote in his Prayer that it is a gift of God that "Man chooses that what he wants to be and have".[266] This example demonstrates how, within Christianity, thinkers were beginning to disassociate themselves from the prevailing theological views on the status of the human individual. But it was not until centuries later that Samuel von Pufendorf (1632-1694) brought stoic notions of human dignity to the centre of the

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[262] Verdroß, above note 9, p. 6.
[263] Bibel, Genesis 1,26. "Then God said, Let us make man in our image, in our likeness (…)"
[264] Kurt Bayertz, "Human Dignity: Philosophical Origin and Scientific Erosion of the Idea" in *Sanctity of Life and Human Dignity* Kurt Bayertz (ed.) 1996 p.73 **See also** Lazaros Sidiropoulus, "Die Würde des Menschen als Leitprinzip in den ethischen und rechtlichen Diskurse der Moderne" 2008, p.246 **See also** Theo Kobusch, "Die Würde des Menschen –ein Erbe der christlichen Philosophie" in *Des Menschen Würde –entdecken und erfunden in Humanismus der italienischen Renaissance* R Gröschner S Kirste und O W Lembke (eds.), 2008, pp. 235-248.
[265] Giannozzo Manetti, "De dignitate et excellentia hominis" in *Iannozzo Manetti De dignitate et excellentia hominis* G Manetti, Elizabeth R Leonard, 1975, Vol. 12 **See also** Alexander Thumfahrt, "Giannozzo Manetti: Wir sind für die Gerechtigkeit geboren" in *Des Menschen Würde –entdecken und erfunden in Humanismus der italienischen Renaissance* R Gröschner *et al.* (eds.) 2008, pp. 73-90.
[266] Giovanni Pico della Mirandolla *Oratio de hominis dignitate* : Oration on the Dignity of Man (1486) 1953.

revolutionary thought of rational naturalism. This jurist from Saxony used the idea of human dignity to support his natural law doctrine, which itself is structurally framed around such stoic concepts as nature, the unity of mankind, and the equality of man.[267] Following Pufendorf, it is the dignity and pre-eminence of the human being, excelling over all other living beings that in fact makes us equal. According to him, the dignity of man is derived from the fact that the human being has an immortal soul, distinguished by the light of intelligence, and by a unique capacity for deciding and choosing.[268]

3 Immanuel Kant

The next fundamental step in the history of human dignity is found in Kant's moral philosophy. Historians agree that the influence of stoicism upon Kant's moral philosophy was considerable.[269] It is also generally agreed that Kant's conception of human dignity is of a secular type; he avoids escaping into metaphysical speculation or an idealistic (transcendental) super elevation of the potential and power of human reason. For Kant, human dignity is grounded in the individual's moral autonomy[270]; that is, the individual's capacity to act according to moral principle. For Kant, since human dignity has no equivalent, it cannot be compared to other values. In this sense, the intrinsic dignity of one man cannot be measured in relation to another.[271] In contrast to animals, which have a price only in so far as they serve a human purpose, for Kant, the philosopher of Koenigsberg, the human individual has an intrinsic worth, above all price. Kant develops extensively the distinction between intrinsic worth and price. This intrinsic worth is an absolute value; it is distinct from the relative value of things. Kant's understanding of human worth is given expression in his practical, or second categorical imperative, which is itself derived from his categorical imperative. Kant's categorical imperative reads as follows: "Act only according to that maxim by which you can at the same time will that it should become a universal law".[272] According to the categorical imperative, the right thing to do is not determined through the pursuit of one's own interests; it exists according to that which all human beings consider to be universal law.

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[267] Canick, above note 259, p. 33 **See also** Kari Saastamoinen, "Pufendorf on Natural Equality, Human Dignity and Self-Esteem" Journal of the History of Ideas 2010 Vol. 71 No. 1, pp. 39-62.
[268] Canick, above note 259, p. 31 Citing Samuel Pufendorf „De iure naturae et gentium 1672 (2.1.5) [Ovid, Methamorphoses 1.76 ff].
[269] *Ibid.*, p. 35 footnote 863.
[270] Immanuel Kant, Grundlegung zur Metaphysik der Sitten. "Autonomie ist also der Grund der Würde der menschlichen und jeder vernünftigen Natur" p.71
[271] Sidiropoulus, above note 264, p. 247.
[272] Kant , above note p. 52 The first formulation of the categorical imperative: "Handle nur nach derjenigen Maxime, durch die du zugleich wollen kannst, dass sie ein allgemeines Gesetz werde"

According to the second imperative, to have dignity means to be entitled to be treated as an end and never used as a means. Kant's formulation of his second categorical imperative reads as follows: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only".[273] These imperatives are at the heart of Kant's moral philosophy; they are the core of his system of ethics and positive laws.[274] The teachings of Kant notwithstanding, the notion of human dignity was viewed with a certain scepticism throughout the 18th and 19th centuries. It was thought that such an abstract notion was susceptible to manipulation. That risk has not yet disappeared; indeed, it still constitutes the main obstacle to such thought becoming fully substantiated.

C Dignity and moral philosophy

Dignity is an axiological notion. The problems that appear when attempting to determine what human dignity is are different from those that appear in connection to neutral ethical concepts. To agree with the idea that humanity and the individual can only be conceived as part of a moral world is to agree that moral considerations are part of a human universal order. In addition, to admit that human society has a certain *telos* is to agree about the necessity of acting within a legal framework that is essentially moral, and not neutral. The core issue in elaborating a theory of human moral behaviour is to establish the moral principles that govern human moral relations. It is widely acknowledged that these principles are found in Kant's moral philosophy, based as it is on individual worth and dignity. Accordingly, Kant's ethics refer to human dignity as an axiological concept that reflects two essential things: the worth of the individual as end in itself, and the respect of the individual with respect to others (equality). Succinctly,

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[273] *Ibid.*, pp. 62-63 The second formulation of the categorical imperative: "Handle so, dass du die Menschheit, sowohl in deiner Person, als in der Person jedes anderen, jeder Zeit zugleich als Zweck, niemals bloß als Mittel brauchest" the explanation of this categorical imperative follows: "Der Mensch aber ist keine Sache, mithin nicht etwas, das bloß als Mittel gebraucht werden kann, sondern muss bei allen seinen Handlungen jederzeit als Zweck betrachtet werden. Also kann ich über den Menschen in meiner Person nicht disponieren." **See also** Dietmer von der Pforten "Zur Würde des Menschen bei Kant" giving account of Kant's uses of the dignity throughout his all work. According to this author, in spite of the almost undisputed acceptance that the concept of human dignity in Kant's moral philosophy is expressed in the second formulation of the categorical imperative, the real idea of the dignity of a rational being is expressed in Kant's third formulation of the categorical imperative: "[die] Idee des Willens jeden vernünftigen Wesens, als allgemein gesetzgebenden Willens" available at http://www.rechtsphilosophie.uni-goettingen.de/ZurWuerdeDesMenschenBeiKant.pdf last visited 06.June.2012 **See also** Fernández García, above note 194, p. 21 Endorsing the Kantian formulations of the categorical imperative.

[274] Mario A Cattaneo "Dignità Umana e Pace Perpetua:Kant e la Critica della Politica", 2002, p. 13.

human dignity refers to a certain quality of the human condition and, as such, of human organization. Thus, it constitutes the moral centre of human social entitlements. Human dignity is the fundamental and ultimate human value to which all positive laws are accountable.

But what is the worth of the individual? In what consists the expression respect for others? Answers to these fundamental questions are explored in Kantian moral philosophy, in the two categorical imperatives, and in the idea of an autonomous, moral individual.[275] But, from an ethical standpoint, where to set the limits of human autonomy? That is, where to set the limits to objective freedom, and to objective equality, in order to allow human subjectivity its fullest expression? Are freedom and equality opposites, or are they complementary? How best to balance individual against collective rights? When a notion of human dignity is used as the basis of human rights, the source of inalienable and universal human rights, we must look first at human entitlements understood as a complex system of interrelated claims. The notion of dignity is dialectical in nature: it explains a relationship between liberty and equality. Where there is no longer a tension between liberty and equality, there, supposedly, is dignity. In this way, dignity reflects a state of equilibrium in human relations. And yet a very difficult question arises here. How to measure this tension? It has proven to be a very difficult task, not least because of the axiological nature of human dignity, which results in ethical assessments based on subjective choice[276] that face challenges such as the antagonism between universality and particularism, uniformity and plurality, absolutism and relativity. The risk of using notions of human dignity is that they may be used as prohibitive instruments that destroy liberties, or as a libertarian notion tending rather to absolute free will.[277] Therefore, scholars try to justify the existence of a core minimal content for human dignity that could be either invariable, or it could respond to relative contingent claims.

Dignity should be understood both as an ideal and a concrete form of human action, its concrete expressions are both based on experience and ideas. How can human dignity best be expressed? The notion of human dignity may be substantiated in two

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[275] See above notes on Kant.
[276] Fernández García, above note 194, p. 22.
[277] Oscar Schachter, "Human Dignity as a normative concept" American Journal of International Law 1983 Vol. 77 No. 4, p. 851.

fundamental ways: in general, as the foundation of universal peace, and, in particular, through human rights.[278] In this way, we see that human rights perform the function of acting as key vectors of human dignity. Human rights are a first concretization, first recourse in the protection of human dignity.[279] Morally neutral concepts like "standard of living", "work gain", or "life", become moral notions once scrutinized from a perspective of human dignity as the ultimate moral value from which come all human entitlements. This special characteristic of human dignity fundamentally transforms the law into a deontological instrument. Fully to understand what is meant by human dignity, we must also bear in mind that, although historically human dignity has been justified by different sources, such as religion, natural law, empiricism, history, or sciences in general, in practical matters, people have always shown an ability and capacity to cooperate for the achievement of common values, irrespective of justification. What is especially relevant is that, in the pursuit of individual or collective interest, account must be taken of the moral world of the autonomous person. In the international legal texts[280], such account has at least to some extent already been taken.

In light of the above, we can affirm that human dignity is an axiological concept that constitutes the moral/ethical basis of the legal order. This fundamental moral/ethical concept, drawing from the law a deontological feature, finds its highest concrete expression at the national level in basic individual rights, and at the international level in universal human rights. In this sense, we affirm human dignity as an ideal of intrinsic individual worth, of the importance of interrelationship and community, and as a concrete expression of positive law in fundamental human rights.

D Human Dignity as a concept of positive law

Human Dignity is a principle of law. Although there is no explicit legal definition of this term it is acknowledged that, positively, human dignity implies a legal commitment to act according to what is morally right. In this way, human dignity finds positive

[278] *Ibid.*, pp. 853-854 Suggesting that the "central idea of human dignity has a wide range of applications outside of the sphere of human rights" According to him "respect for human dignity may be realized in other ways than by asserting claims of rights *i.e* codes of conduct or good manner.
[279] Fernández García, above note 194, p. 20.
[280] See below in this chapter Dignity and positive law.

expression both as a general principle[281] and as a right.[282] As a principle, human dignity is a defining characteristic of the human animal. Therefore, human dignity is not only a general principle of domestic law or a principle applicable only to a particular group; it is also a general principle of international law of universal validity. Moreover, more than constituting the fundamentals of human rights law, human dignity is, for many, the foundation of international law itself, and of the law in general[283], for human dignity is the element that serves to measure the correctness of any positive legal enactment. At the national level, the idea of human dignity retains a paramount importance. One of the most outstanding domestic provisions on the subject of human dignity is found in Article 1 of the German Constitution[284], where human dignity is asserted as the justification of fundamental human rights, and peace, as established in the constitutions of many states.[285]

1 Human Dignity and decision making

Human dignity is an indeterminate concept of positive law. However, contrary to legislated forms of human dignity, as expressed in entire catalogues of fundamental human rights, there is not much agreement regarding its concrete expression at the adjudicatory level. The main challenge faced in attempting to work out the precise meaning of human dignity as a concept of positive law, by means of adjudication, lies in

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[281] Ibrahim Ö Kaboğlu "Qu'est-ce que la dignité?" in *Justice, éthique et dignité* S Gaboriau, H Pauliat (Collected Papers), 2002, p. 106.

[282] Art 4 (right to the protection of the inherent dignity of the person), Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 9 June 1994, 33 ILM 1534; **See also** Preamble; Art 5 (right to the respect of the dignity inherent in a human being African Charter on Human and Poeple's Rights (Banjul Charter) **See also** Preamble (Dignity as a principle) Art 3 (Right to Dignity) Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) adopted on 11 July 2003, CAB/LEG/66.6 (13 September 2000) **See also** Sir Thomas More Lecture "The Right to Human Dignity and other lectures" Ian Mason (ed.) 2005 p.7 the author points out that the Charter of the Fundamental Rights of the European Union contains in its first Chapter entitled Dignity, the right to human dignity **See also** Art. 23. (the right to dignity) Constitution of Belgium [constitution]Considering human dignity as a right implies a reductionist conception of what human dignity is particularly if right is understood in the sense of positive right. However, putting it as a right should at least ensure the legal guarantees established for positive right, which are supposed to be more efficacious than those conceived for general or founding principles of law.

[283] *e.g.* New Heaven School's approach to International Law.

[284] Grundgesetz für die Bundesrepublik Deutschland [constitution] Art. 1 a) *Die Würde des Menschen ist unantastbar. Sie zu schützen und zu achten ist Verpflichtung aller staatlichen Gewalt* b) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder Menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt. c) Die nachfolgende Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht. Emphasis added.

[285] Constitutción Espanola [constitution] Art 10. 1"La dignidad de la persona, los derechos inviolables que le son inherentes, el libre desarrollo de la personalidad, el respeto a ley y a los derechos de los demás son fundamento del orden politico y de la paz social".

the alleged difficulty of achieving a detailed description of its substance in the context of the high risks to legal certainty and the predictability of legal decisions posed by such an indeterminate concept. Identifying the core content of the expression "human dignity" is also difficult in light of the fact that human dignity is both a moral ideal and a concrete form of human behaviour, expressed through fundamental freedoms, human rights, and statutory provisions. Unlike in legislative form, where human dignity finds expression in general provisions that serve rather as guidelines to posterior action, decision making at the adjudicatory level requires an understanding of human dignity in the context of the application and interpretation of the law, where circumstances and contingencies play a more fundamental role in guiding the shape that eventually it takes.

With respect to a positive conception of human dignity, we take as our starting point the two central fields of life to which mainly it refers: on one side, the physical integrity of the person and, on the other, to the various economic and social aspects of the individual. It is mainly with regard to these two specific aspects of human action that human dignity is positively protected.[286] While some mechanisms in international law provide for some form of protection of human dignity (e.g. International Criminal Law), the economic and social dimension of human dignity at the international level is generally not the object of an effective level of protection.[287] Even when all human rights are considered indivisible, the issue of justice in economic, social, and cultural rights remains. This is mainly a consequence of their heterogeneous character: they incorporate almost all aspects of social life.[288] There are three main arguments against the presence of true justice in human rights. The first is that economic, social, and cultural rights demand positive action[289] to ensure their realization, but that such positive action implies very high costs on implementation, especially if domestically it is argued that these rights are also imprecise. Second, to allow the judiciary to determine such matters may result in judiciary activity at risk of encouraging "undesirable" activism that in turn could endanger the independence of the adjudicatory branch of power. Such judiciary activism may undermine the legitimacy given by states to international rules if adjudication substitutes the values of the judges with those selected

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[286] Joël Andriantsimbazovina, "La dignité et le droit international et europeén" in *Justice, éthique et dignité* S Gaboriau, H Pauliat (Collected Papers), 2002, p. 137.
[287] *Ibid.*, p. 139.
[288] *Ibid.*, p. 139.
[289] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" European Journal of International Law 2003 Vol. 19 No. 4, p. 662.

by pre-determined processes.[290] A further argument is that the courts are not competent satisfactorily to deal with the complexity of such economic, social, and political issues. Another argument asserts that social reform through the establishment of rights is unrealistic; it is simply not possible.[291] Indeed, it is said that there exists a certain timidity or feeling of fear with regard to any interpretation of human dignity.[292] Some scholars prefer to assign such issues to politics or to other less formal channels; they prefer to banish them from litigation.[293]

Another critical question is, who has legitimate authority to define what should be understood by human dignity? Current thinking on the legitimization of decision making processes almost universally agrees that consensus is necessary authoritatively to establish a positive provsion of law. However, decision makers, who represent a community whose basic constitutive process demands a comprehensive order of human dignity, should contribute with their decisions to the achievement of this goal above and beyond the requirement of purely formal decision making procedures. It is precisely because human dignity is the central subjective or moral feature of the international law system that courts are fully legitimized to incorporate the notion of human dignity in their reflections and judgments. Decision making is not only legislation; it is also adjudication and, still more so, the administration of any kind of decision that has legal effect. In this sense, the notion of human dignity must be understood both within the context of positive law (as a general principle of law, as a right), and from within a cannon of interpretation (as the fundamental basis of the law and its laws). It is fully and universally accepted by legal practitioners and scholars that human dignity is not only a preambular reference, a statutory provision, or a right in itself; rather, it is the moral foundation and basic principle of all law. Therefore, the notion of human dignity cannot be used as an empty formula available to all kinds of claims, but rather as a substantive interpretative tool in the pursuit of the protection of individual moral worth.

In the context of a gross violation of the most basic human rights, particularly when that violation breaches the most profound depths of a human right, the very essence of the human entitlement, namely, a basic respect for human dignity, a lack of consensus is not

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[290] Steiner & Alston, above note 121, p. 302.
[291] *Ibid.*, p. 303.
[292] Andriantsimbazovina, above note 286, pp. 140-141.
[293] Schachter, above note 277, pp. 853-854.

an acceptable reason not to affirm or recognize the validity of some aspect or minimum content of human dignity.[294] In this regard, Carozza argues that "the capacities of reason and wisdom, drawn from the dynamics of human experience, can lead us to certain conclusions about dignity independently of majoritarian conventionalism."[295] He goes still further, stating that "a minimum consensus cannot be the decisive determinant of the minimum content of the status and basic principle of human dignity."[296] We might add that, not only experience, but also the ideals towards which humanity strives, our human aspirations, deserve also the guarantees offered by positive legal enactments, legislative or adjudicatory. McCrudden describes certain parameters that a fundamental human right must meet, namely: a fundamental human rights must bring additional coherence to the substantive list of human rights, while at the same time being a unifying factor, common to all cultures while admitting of regional difference, both timeless and adaptable. Moreover, our understanding of human dignity must also appreciate the importance of the human person in the context of a human group, a human society. That is, human dignity must be understood in an humanistic sense. Finally, human dignity should be viewed as a substantive right that is independent of state authority.[297] The positive validity of human dignity is drawn from its imperative importance, the cogency of which acts then as the legitimating force that permits the courts, in the absence of formal procedures for decision making, or other positive legislated law, to pronounce binding statements concerning the moral aspect of both positive provision and fact.

E Human Dignity expressed through positive rules

1 Global Agreements

Although indeterminate, the concept of human dignity became a fundamental, epoch-making element in positive international law post-World War II. In the aftermath of all the many inhumanities witnessed during World War II, the UN Charter brought to the forefront of international awareness the question of the dignity and worth of the human person. We may describe the introduction of this moral component into the legal

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[294] Paolo G Carozza "Human Dignity and Judicial Interpretation of Human Rights: A Replay" European Journal of Human Rights 2008 Vol. 19 No. 5, p. 937.
[295] *Ibid.*, p. 938.
[296] *Ibid.*, p. 938.
[297] McCrudden, above note 289, Quoting Glendon, M A in A World Made New: Eleanor Roosvelt and the Universal Declaration of Human Rights (2001).

structure of international law in almost humanist terms as the moralization of international law. During the Enlightenment, at the heart of a new political order, fundamental human claims were given expression in positive law. Once these claims had acquired the form of fundamental rights and liberties in national constitutions, their pre-positive or extra-legal nature was repudiated, substituted, and forgotten by the dominant positivist streak in legal scholarship that had its golden age in the 19th century.[298] With the creation of the United Nations, this ultra-positivist trend was interrupted. A new moral and non-positivist dimension appeared in the structure of the laws of nations, and in the law itself. Although a notion of human dignity does form part of the political discourse prior to the creation of the United Nations[299], as positive law it was first introduced by the UN Charter and then further elaborated in the Universal Declaration of Human Rights.[300] The second recital of the UN Charter establishes that the peoples of the United Nations are determined to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".

The word human dignity appears five times in the UDHR, twice in the preamble, once in Article 1, and then again in Articles 22 and 23.[301] Human dignity, in its preambular form, asserts that human dignity must be taken as the basis for all policy and law making designed to secure freedom, implement justice, and to keep peace. In this way,

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[298] Verdroß, above note 9, p. 8.

[299] *e.g.* Dijon Declaration of 1936, The American Jewish Commeeittee's Declaration of Human Rights of 1944, the Cuban Declaration of Human Rights of 1946, the Georges Gurvits's Bill of Social Rights 1946. All these examples are given in McCrudden's article "Human Dignity and Judicial Interpretation of Human Rights" European Journal of International Law 2003 Vol. 19 No. 4.

[300] Klaus Dicke, "The founding function of Human Dignity in the Universal Declaration of Human Rights" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer, E Klein (eds.) 2002, p. 111.

[301] See **UDHR** Preamble first recital "Whereas recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Preamble fifth recital "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the *dignity and worth of the human person* and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom," Art. 1 "All human beings are born free and equal in *dignity* and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." Art. 22 "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his *dignity* and the free development of his personality." Art. 23 (1) "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." (2) "Everyone, without any discrimination, has the right to equal pay for equal work." (3) "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of *human dignity*, and supplemented, if necessary, by other means of social protection."(4) "Everyone has the right to form trade unions for the protection of his interests".

international law transformed itself into a law, above all, of human dignity. Indeed, the primacy of human dignity within the primary aims and goals of the international community meant a break with the old dogmas of classicism. Moreover, reaffirming a faith in human rights reinforces the presupposition that everyone knows about and understands this language of human rights and human dignity. In this sense, besides being axiological, human dignity is also axiomatic. A respect for human dignity has not only eroded sovereignty and its derivative concepts; it has also itself come to form part of a new dogma.

The notion of human dignity may be better understood through a reflection on the word "worth". This word, "worth", reinforces a sense of moral character in that "worth" begins to mean something beyond measure, in almost the Kantian sense of incommensurability. Article 1 of the UDHR states that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." In other words, the human being may be guided not only by "technical" or "neutral" reason, but also by moral reasoning. This, too, is an implicit acknowledgement of the universal ethical and moral unity of humankind.[302] Furthermore, the wish that human beings act towards each other in a spirit of brotherhood suggests that the universal claims of the UDHR refer not only to ethical individualism but also and equally to ethical collectivism in much the same sense as that expressed by Kant in his categorical imperative. Approached systematically, the expression "human dignity" is directly linked to the needs and conditions of the individual as viewed from a qualitative perspective. This does not mean that human dignity is restricted to the rights set out in Articles 22 and 23 of the UDHR; rather, the emphasis placed on dignity in those articles simply reaffirms the special link between human dignity and the rights established therein. Reference is made to human dignity in Articles 22 and 23 of the UDHR, which concern economic, social, and cultural rights. In this context, human dignity speaks of a certain basic quality of human life. The main achievement of the UDHR is to set outthe regulative principles on which basis the international society should function; namely, universal equality, freedom and dignity. Most impressively, these regulative principles are of universal validity.

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[302] Dicke, above note 300, p. 112.

Regarding the International Covenant on Civil and Political Rights, on the one hand, and of Economic, Social, and Cultural Rights, on the other, human dignity is clearly one of the core values underlying the rights established therein. The fact that human dignity has been granted a foundational character, rather than making a right of it, has far-reaching implications within the system of human rights.[303] The notion of human dignity, understood as a foundational criteria, reinforces the axiomatic character of civil, political, economic, social, and cultural rights, such that human dignity is the key note or leitmotif under which human rights must be interpreted. Both Covenants recall, in their preambles, the UN Charter's recognition of "the inherent dignity and of the equal and inalienable rights of all members of the human family", which is "the foundation of freedom, justice and peace in the world." Moreover, both Covenants also recognize that "these rights derive from the inherent dignity of the human person."[304]

Human Dignity is present in Human Rights Law and other branches of law. The pattern that endorses human dignity as the foundational moral value of universal justice and peace, on the one hand, and of universal human rights, on the other, has been followed in all significant human rights treaties, as well as in some closed related human rights fields in a context of international law. Nevertheless, this archetype has not been expressly followed by all international constituencies; one notable exception, for example, is the international trade regime. Does this mean that the international trade order enjoys a waiver from applying and interpreting the notion of human dignity? The answer to this question can only be given after an analysis of the place of human dignity in general international law. However, the simple fact of considering human dignity as the moral foundation of the law makes it clear that no international regime may be excused from approaching its provisions from a human dignity and human rights perspective. Through its axiological and foundational nature, human dignity has become an axiomatic principle of law. Human dignity informs universal public law from a moral perspective.

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[303] Arthur Chaskalson, "Human Dignity as a Constitutional Value" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer, E Klein (eds.)2002, p. 135.

[304] See **ICCPR** Preamble: first recital (reference to the UN Charter) , second recital (foundational of human rights); Art. 10 (All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity). See **ICESCR** Preamble: first recital (reference to the UN Charter) , second recital (foundational of human rights); Art. 13 (right to education).

In General Public International Law, human dignity is positively recognized as the core moral value that sustains the UN system. That is, it is the moral basis of peace, freedom, and equality, and a bridge to Human Rights Law. In Global Human Rights Law, besides the UDHR and the two Covenants, the notion of human dignity adds to the moral depth of the world order, as it constitutes the moral basis of the rights established under human rights treaties of a more specific scope, even as all these treaties form part of the Universal Order, or international community order, e.g. Slavery Convention 1956[305] (preamble), several conventions of the International Labour Organization[306], the Convention on Elimination of all Forms of Racial Discrimination 1966[307], the Convention on the Rights of the Child[308], the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families[309], the International Convention for the Protection of All Persons from Enforced Disappearance[310], the International Convention on the Rights and Dignity of Persons with Disabilities[311], and the Vienna World Conference on Human Rights (Declaration

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[305] See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institutions and Practices Similar to Slavery Preamble second recital (reference to the UN Charter).

[306] See **ILO** Conventions *e.g.* Employmen Policy Convention, 1964, for more examples see McCrudden, above note 289, p. 669.

[307] See **ICERD** Preamble first recital (reference to the UN Charter) second recital (reference to UDHR) and fifth recital (the elimination of discrimination ensures the dignity if the human person)) International Convention on Elimination of All Forms of Racial Discrimination

[308] See **CRC** Preamble: first, second and seventh recitals (reference to the UN Charter). Art. 23 (right of children with disabilities). Art. 28 (right to education). Art. 37 freedom of torture or other cruel, inhuman or degrading treatment or punishment. Art. 39 (right to social integration and physiological recovery). Art. 40. (Criminal liability.) Convention on the Rights of the Child

[309] See **ICRMW** adopted by UNGA Res. 45/158 of 18 December 1990, Annex, 45 U.N. GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990) Preamble (indirect: through reference to the principles of the UN). Art. 17 respect of dignity if deprived of liberty) Art. 70 Obligation of the States Parties to "take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity "International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted by General Assembly resolution 45/158 of 18 December 1990.

[310] See **ICPED** UN Doc. E/CN.4/2005/WG.22/WP.1/Rev.4 (2005), 20 December 2006, Preamble (indirect: through reference to the principles of the UN). Art. 19 Art. (Personal information of the disappeared person). Art. 24 (the right of the victim to obtain reparation and fair compensation due to material and moral damages for the satisfaction, including restoration of the dignity and reputation of the victim).

[311] See **ICRDPD** adopted by UNGA Res. 61/611 of 13 December 2006 A/AC.265/2006/4, Annex 2 Preamble a) Reference to the UN Charter h) discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person y). protecting the dignity of the disadvantaged (disable) contributes to redress disadvantages. Art 1purpose of the convention (promotion of the dignity of the disadvantaged) , Art. 3 general principles of the convention (respect for human dignity of the disadvantaged). Art. 8 (obligation of the state to take measures to foster human dignity of the disadvantaged). Art. 16 Freedom from exploitation, violence and abuse). Art. 24 (right to education). Art. 25 (right to health).

and Programme of Action).[312] In the field of International Humanitarian Law, the Common Article 3 of the Geneva Conventions[313] provides a legal basis for human dignity. In the closely related field of International Criminal Law, the Rome Statute defines a war crime, *inter alia*, as "committing outrages upon personal dignity, in particular humiliating and degrading treatment."[314] In the context of world culture, the preamble of the Constitution of the UNESCO, and the Universal Declaration on Cultural Diversity, make reference to human dignity as a fundamental aspect of culture and education, expressing the belief that human rights are also guarantees of cultural diversity.[315] In the sciences, human dignity has come to play a central role in the conduct of biomedical experimentation.[316] In the vast area of general human development and social progress, human dignity also occupies a role of paramount importance with respect to life conditions. Several resolutions of the General Assembly of the United Nations make us aware of the links between social progress, development, and an adequate standard of living, as minimum requirements for human dignity.[317]

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[312] See **Vienna Declaration and Programme of Action** Preamble, Art. 11 (linked to the right to development and the adverse consequences in the biomedical and life sciences as well as in information technology, that is bad consequences of progress), Art. 18 (right of the women and the girl-child, particularly sexual related matter sand trafficking), Art. 20 (rights of indigenous people and plurality), Art. 25 (poverty and social exclusion as violation of human dignity), Art. 55 (Torture as one of the most atrocious violations of human dignity).

[313]**Geneva Conventions** Convention (III) relative to the Treatment of Prisoners of War. Geneva 12 August 1949, 75 UNTS 135. Art. 75 Additional Protocol I and Art. 4 Additional Protocol II. **See also** "The Geneva Conventions Today" Statement of 9 July 2009 by Knut Dörmann, Head of the Legal Division International Committee of the Red Cross "The Geneva Conventions remain the cornerstone for the protection and respect of human dignity in armed conflict" available at http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-090709.htm last visited 07 June 2012

[314] See **Rome Statue** adopted on 17 July 1998 2187 UNTS 90, 37 ILM 1002(1998)Art 8 (2) (b) (xxi) and Art 8 (2) (c) (ii). Rome Statue of the International Criminal Court adopted on 17 July 1998.

[315] Constitution of the United Nations Educational, Scientific and Cultural Organization **(UNESCO Constitution)** of 16 November 1945, 4 UNTS 275 Preamble second recital culture and education belong to the dignity of man. **See also** UNESCO's Universal Declaration on Cultural Diversity.2 November 2001 Art 4 Defence of cultural diversity is inseparable from respect for human dignity. This implies that human rights are guarantees of cultural diversity.

[316] See UNESCO Universal Declaration on the Genome and Human Rights UNGA Resolution 53/152, 9 of December 1998 Preamble Arts 1, 2, 6, 10, 11, 12, 15, 21 and 24.

[317] See Declaration on Social Progress and Development UNGA Resolution 2542 (XXIV), 11 December 1969. **See also** International Development Strategy for the Second United Nations Development Decade (the best known as the 0.7% Official Development Assistance resolution), UNGA Resolution 25/2626, 24 October 1970 para. 1 "Governments dedicate themselves anew to the fundamental objectives enshrined in the Charter of the United Nations twenty-five years ago to create conditions of stability and well-being and to ensure a minimum standard of living consistent with human dignity through economic and social progress and development." **See also** International Development Strategy for the 3rd United Nations Development Decade UNGA Resolution 35/56 of 5 December 1980 para. 8 "The development process must promote human dignity. The ultimate aim of development is the constant improvement of the well-being of the entire population on the basis of its full participation in the process of development and a fair distribution of the benefits therefrom".

Furthermore, according to the Declaration on Social Progress and Development "social progress and development shall be founded on respect for the dignity and value of the human person".[318]

2 Human Dignity in Regional Agreements

Human dignity has also served as the founding moral principle in regional legal systems. In the American legal system[319], for example, the most outstanding example of this is the American Declaration of the Rights and Duties of Man.[320] The American Convention on Human Rights also acknowledges human dignity.[321] Another important regional human rights instrument[322] to endorse human dignity is the African System, with its African Charter on Human's and People's Rights.[323] The Charter establishes that dignity is an essential objective of the African peoples. The European system also takes into account some human rights treaties that reflect on the central importance of human dignity, both within the system of the European Council[324], and within the system of the European Union. Remarkably, the Charter of Fundamental Rights of the European Union[325] establishes in Article 1, that "human dignity is inviolable. It must be respected

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[318] See Art. 2, Declaration on Social Progress UNGA Resolution 2542 (XXIV) 11 December 1969.

[319] See Inter-American Convention to Prevent and Punish Torture Preamble. 9 December 1985,OAS Treaty Series, No. 67, entered into force 28 February 1987 **See also** Inter-American Convention on Forced Disappearance of Persons 9 June 1994 OAS Treaty Series No. 68, 33 ILM 1429 (1994), Preamble. **See also** Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 9 June 1994, 33 ILM 1534 (1994) Preamble Art 4 (right to the protection of the inherent dignity of the person). Art. 8 (Obligation of the state to take measures to protect the dignity of the women) **See also** Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities Preamble 7 June 1999, AG/RES. 1608 (XXIX-O/99), entered into force 14 September 2001

[320] American Declaration of the Right and Duties of Man Whereas, Preamble Art. 23 (right to property) OAS resolution XXX 1948.

[321] American Convention on Human Rights. Art. 5 (right to humane treatment). Art. 6 (freedom from slavery). Art. 11 (right to privacy).

[322] Other African Human Rights instruments endorsing human dignity are African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999 Preamble, Art. 11 (Education). Art 13 (Handicapped Children). Art. 17 (Administration of Juvenile Justice). Art. 20 (Parental responsibilities). Art. 21 (Protection against harmful social and cultural practices) **See also** Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) adopted on 11 July 2003, entered into force 25 November 2005 Preamble (Dignity as a principle) Art 3 Right to Dignity.

[323] See African Charter on Human and People's Rights (Banjul Charter) adopted 27 June 1981 entered into force October 1986 OAU Doc. CAB/LEG/67/3rev.5. Preamble. Art. 5 (right to the respect of the dignity inherent in a human being.

[324] See Revised European Social Charter 3 May 1996, ETS No 163 (1996) Preamble and Art. 26 (right to dignity at work) **See also** Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances, Vilnius 3, May 2002, CETS No. 184, Preamble.

[325] See Charter of Fundamental Rights of the European Union of 18 December 2000, 2000/C 364/01, OJ (2000) C7364/1 Preamble, Art 1 (right to dignity), Art 25 (rights of the elderly), Art. 31 (right to fair and just working conditions) **See also** Convention on Action against Trafficking in Human Beings of 16 May 2005 CETS No. 197, Preamble, Art 6, Art. 16.

and protected." In Europe, for example, we see how the notion of human dignity has come to have a positive impact through both legislative and adjudicatory action. In the context of the Council of Europe, the ECHR says surprisingly little on the subject of human dignity. However, the European Court of Human Rights has established that human dignity must be at the centre of the ECHR.[326] In the Arab region, the League of Arab States recognizes, in the Arab Charter on Human Rights[327], a faith in human dignity. In the Asian system, human dignity has been used in the context of the South Asian Association for Regional Cooperation[328], for example, Article 1 of the SAARC Charter of Democracy[329] provides that one of its objectives is "to accelerate economic growth, social progress and cultural development in the region to provide all individuals the opportunity to live in dignity and to realise their full potentials".

3 Human Dignity and Constitutional Law

Human Dignity has a constitutional status in many states, often pre-dating 1945.[330] However, the international recognition of human dignity as the foundation stone of universal justice, peace, and human rights, in the UN Charter, and the UDHR, clearly influenced the incorporation of human dignity into the constitutions of national states.[331] For example, the German Constitution (1949), Article 1(1), reads: "human dignity is inviolable. To respect and protect it is the duty of all state authority". The Constitution of Belgium (1993), Article 23(1), reads: "Everyone has the right to lead a life in conformity with human dignity". The Greek Constitution (1975), Article 2(1), reads: "Respect for and protection of human dignity constitute the primary obligation of the State". The Spanish Constitution (1978), Article 10(1), reads: "The dignity of the person

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[326] See *Case Pretty v. United Kingdom*, No. 2346/02 ECHR 2002-III 423 para. 65.
[327] See Arab Charter on Human Rights. 22 May 2004, entered into force 15 March 2008. Preamble, Art. 2 (right to self-determination) Art. 3 (right to equality between men and women). Art 17 (rights of the children). Art. 20 (right to humane treatment). Art 33 (right to family), Art 40 rights of persons with disabilities) **See also** Cairo Declaration on Human Rights in Islam 5 August 1990 UN Doc. A/CONF.157/PC/62AD.18 (1993) Art. 1 and Art. 6 (equality of men and women), Art. 20(humane treatment).
[328] See SAARC Charter of Democracy **See also** SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Preamble (recognizing that prostitution is incompatible with human dignity).
[329] SAARC Charter of Democracy.
[330] Constitución Política de los Estados Unidos Mexicanos de 1917 [constitution] Art. 3c, Constitução Política da República Portuguesa de 1933 [consitution] Preamble and Art. 45; Constitution of Ireland of 1937 Preamble. Constución Política de Nicaragua de 1939 [Constitution] Art. 100.4, Consitución Política de Cuba 1940 [constitution] Art. 32.
[331], McCrudden, above note 289, p. 673 **See also** More, above note 283 **See also** Giancarlo Rolla "El principio de dignidad humana: Del artículo 10 de la constitución española al nuevo constitucionalismo iberoamericano" Persona y Derecho 2003 Vol. 49, p. 227.

(...) [is] the foundation of political order and social peace". The Constitution of Portugal (1976), Article 1, reads: "Portugal is a sovereign republic, based on the dignity of the human person and the will of the people, and committed to building a free and fair society that unites in solidarity." The constitution of Brazil establishes, in its Article 1(III), that "the dignity of the human person is one of the fundamental principles of the Federative Republic of Brazil". The Constitution of South Africa establishes that the Republic of South Africa is a state founded upon "Human Dignity, the achievement of equality and the advancement of human rights and freedoms". Explicit reference to human dignity is made in many constitutions.[332]

F Human Dignity and international jurisprudence

Among the differing views held by scholars concerning the content of human dignity, arguably the prevailing view among adjudicative bodies is that which considers human dignity to be a value in itself, a value upon which human rights are built. The language of human dignity refers, then, to a principle that informs the interpretation and application of a right. Moreover, in adjudication, human dignity is also a justiciable and enforceable right.[333] The language of human dignity has been used commonly by the ICJ in its first historical semantic sense: the dignity of nations, the dignity of ambassadorial and consular officials. Nevertheless, in a human rights context the language of human dignity has been used within both concurring and dissenting opinion.[334] It has been used in order to justify the prohibition of discrimination, and as the basis of equality. Furthermore, it has been widely acknowledged that human dignity

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[332] Examples of human dignity in some state's constitutions: **Europe**: Italy 1948 Arts. 3, 27, 41; Denmark Part VIII Section 71 Personal Liberty; Finland Section 7 right to life, personal liberty and integrity; Ireland Art. 40 Personal rights; Sweden Art. 2; Latvia Art. 2; Poland Art. 30; Slovenia Art. 21; Czech Republic Preamble, Art. 1; Lithuania Art. 21; Slovakia Art. 12; Russia (1993) Art. 21.1; **America**: Costa Rica 1949 Art. 33 and Art 56; Cuba 1976 Preamble Arts. 9, 42,43; Bolivia 2009 Art. 9 and Art. 22; Perú Art. 1; Puerto Rico Art. 2, Brasil Art. 1; Nicaragua Art. 5; Venezuela fundaments of the state, Colombia Art 1; Ecuador Art. 23; Mexico Art. 1; **Africa:** Namibia 1990 Preamble Art. 8; Ethiopia 1995 Arts. 21, 24, 29, 30, 91; South Africa 2003 Art. 1 **Asia**: Japan 1947 Art. 24; India 1950 Preamble; Turkey 1982 Art. 17; Iran 1989 Art. 26; Israel Declaration of Independence 1948; Israel 1992 (amended 1994) Pakistan 2002 Art. 14; Iraq 2004 Art. 23; Afghanistan 2004 Art. 6 and Art. 24.

[333] McCrudden, above 289, p. 681.

[334] See Dissenting Opinion of Judge Shahabuddeen in *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports 1996 p. 226, at p. 383 citing a circular letter of Mr Max Huber, President of the International Committee of the Red Cross, to the national Red Cross Committees, dated 5 September 1945."if warfare fails to accept the value of dignity of the human being, it will proceed irresistibly to destructions without limit, as the spirit of mankind, which is taking possession of the forces of the universe, seems by its creations be accelerating that devastating impetus".

is to be understood to be a principle or axiom.[335] In a dissenting opinion, one judge at the ICJ, for example, stated that "one of the principal concerns of the contemporary international legal system is the protection of the human rights and dignity of every individual".[336]

The language of human dignity has also been used in regional courts. In Europe, for example, the notion of human dignity has been incorporated into a number of different fields, such as physical integrity, the right to a fair hearing, the right not to be punished in the absence of a legal prohibition, the prohibition of torture, and the right to a private life. Outstandingly, it has been recognized that the "very essence of the Convention (ECHR) is respect for human dignity and human freedom."[337] In another key case, the European Court of Justice held that "the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law."[338] In the Inter-American human rights system, the Inter-American Court of Human Rights has held that the "notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual".[339] This court has gone so far as to apply the notion of human dignity to the idea that the right to life means also that the individual must be able to meet his or her basic needs. In the Case of the Street Children, the Court stated that the right to life "includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from

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[335] See Dissenting Opinion of Judge Tanaka *South West Africa Cases* (Ethiopia v. South Africa; Liberia v. South Africa) Judgement of 18 July ICJ Reports 1966 p. 6 at p. 312 "But it is unjust to require a sacrifice for the sake of social security when this sacrifice is of such importance as humiliation of the dignity of personality" at p. 313 "All human beings, notwithstanding the differences in their appearance and other minor points, are equal in their dignity as persons. Accordingly, from the point of view of human rights and fundamental freedoms, they must be treated equally" **See also** Separate Opinion Vice President Ammoun in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion of 21 June ICJ Reports 1971 p. 16 at p. 77 " human dignity is a principle or axiom. "It is not by mere chance that in Article 1 of the Universal Declaration of the Rights of Man there stands, so worded, this primordial principle or axiom "all human beings are born free and equal in dignity and right" From thus first principle flow most rights and freedoms".

[336] Judge Weeramantry in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, ICJ Reports 1996 p. 595 at p. 641.

[337] *Pretty v. United Kingdom*, above note 326, para. 65.

[338] *Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstaat Bo*nn (2004) ECR I-9609 Case C-36/02, at para. 34.

[339] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* requested be the Government of Costa Rica, Inter-American Court of Human Rights Advisory Opinion OC-4/84, of 19 January 1984 Ser. A No.4 at paras. 55-56.

having access to the conditions that guarantee a dignified existence".[340] Constitutional jurisprudence has also contributed greatly to filling out our understanding of the content of human dignity. The research conducted by McCrudden, in his famous article, "Human Dignity and Judicial interpretation of Human Rights", is especially illustrative. There he gives several examples of how constitutional jurisprudence enriches the content of human dignity.

G Fundamental aspects

In spite of all philosophical controversies and differences of opinion concerning the notion of human dignity, after the creation of the United Nations this somewhat indeterminate concept became the key paradigm in international law. Although human dignity as a legal concept is known in domestic constitutions prior to 1946, this new principle of human dignity in international law came greatly to influence constitutional domestic systems. Before developing into a legal concept, human dignity was above all an idea that was explored in the context of moral philosophy. Its roots are found in Stoic Philosophy, in Christianity, and then much later, in Kant's moral writings. Philosophically, human dignity should be considered as a moral conception of righteous, ethical behaviour, which is common to all people; it should be understood in universal terms, in terms of an ethics common to all humanity. This concept attains concrete form not only through experience, but also through the ideal itself; that is, through its theoretical foundation. Human dignity is an axiological notion that constitutes the moral foundation of the legal order.

The idea of human dignity is given concrete expression through positive law, human rights, universal human rights, and fundamental freedoms. However, it exists also as a part of the deontological aspect of the law. Legislative history and judicial practice shows that positive law follows certain patterns of thinking established in the context of reflection on human dignity. Similarly, numerous references to human dignity are found in conventional law and judicial interpretation. In the first place, it is fundamental to the state itself, to peace, justice, and social progress. Human dignity is also fundamental to an extensive catalogue of rights, both individual and collective. In addition, it is also

[340] *Case of the Street Children* (Villagran-Morales v. Guatemala) Inter-American Court of Human Rights, Judgement of 19 November 1999 Series C No. 63 (merits) at para. 144.

often linked to the prohibition of inhuman treatment, to humiliation, and to issues around degradation of the individual. Another area in which conventional law and jurisprudence have developed the notion of human dignity is in the arena of individual choices, and the necessary conditions for self-fulfilment, autonomy, and self-realization, and the protection of group identity, and culture. Another relevant area in which human dignity relates to positive law is in the creation of the necessary conditions by which individuals may have their essential needs satisfied, and access to an adequate standard of living, particularly in the context of appropriate work conditions and general labour rights. Insofar as human dignity reflects autonomy and responsibility, a necessary link is established to justice, and especially to distributive justice, relative to individual and collective human needs. A prominent legal scholar has affirmed that "economic and social arrangements cannot therefore be excluded from a consideration of the demands of dignity".[341]

Common aspects upon which scholars focus remain often at a very high level of abstraction. Minimum core notions within human dignity are, first, that human beings possess intrinsic worth; second, that this worth should be recognized and respected; third, that the existence of the state is grounded in the existence and well-being of the individual.[342] However, in the context of international law, the word "state", is used sometimes in a way that is biased and misleading. The word "state" is still associated today with the classical dogmas of international law even as new political forms of governance are emerging. This is why, instead of "state", it is better to use a more general term that corresponds more adequately to the realities of globalized power as, for example, the word "polity". To these features it is necessary also to add that human dignity refers to providing the individual the conditions necessary not only for subsistence but also for moral development. Nevertheless, rather than searching agreement on the validity of these features, scholarly debate focusses on the validity of their universality.

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[341] Schachter, above note 277, p. 851.
[342] McCrudden, above note 289, p. 679.

CHAPTER 4 ON UNIVERSALITY

A The fundamental debate

Are human rights universal? Or are they relative? Are human rights absolute? Or are they contingent exigencies? These are essential questions concerning the extent and scope of human rights. From a philosophical and legal point of view, the moral doctrine of human rights is universally valid. However, this kind of moral universalism has been intensively criticized by moral relativists, who argue that there is no such thing as a universal moral claim; at most, such claims are a social or historical phenomenon, and are thus always contingent. Furthermore, opponents to universalism say that human rights are always relative to a particular culture; they are therefore limited to its confines. These philosophical altercations have one main consequence: a lack of agreement serves to instrumentalize human rights, such that some political systems may then justify the legitimacy of certain actions that would otherwise be considered immoral and wrong. In other words, some international actors avoid following certain moral norms and positive commitments by arguing that there is no such thing as a universal moral norm possessing both validity and truth. In spite of some seemingly intractable opposition, fundamentalist at its most extreme[343], certain scholars have dedicated themselves to trying to work out intermediary or moderate positions in order to defend a doctrine of human rights that may be considered both universal and relative[344], and at the very least to recognize that establishing universal human rights standards is a necessity.[345] Others have gone so far as to propose excluding entirely both the term "universal" and the term "relative" from all human rights theory.[346]

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[343] Michael K. Addo, "The Legal Nature of International Human Rights", 2010, p. 241.
[344] Jack Donnelly "The Relative Universality of Human Rights" Human Rights Quarterly, 2007 Vol.29 No. 2 **See also** Jack Donnelly, "Human Right: Both Universal and Relative (A Replay to Michael Goodhart) Human Rights Quarterly 2008 Vol.30 No. 1.
[345] Eibe H Riedel, "Die Universalität der Menschenrechte: Philosophische Grundlagen, Nationale Gewährleistungen, Internationale Garantien" C Koenig and R Alexander Lorz (eds.), 2003 p.139 *et seq.*
[346] Michael Goodhart "Neither Relative nor Universal: A Response to Donnelly" Human Rights Quarterly, 2008 Vol. 30 No. 1, p.189 *et seq.*

1 Universalism

One of the most important defining characteristics of human rights is the notion of their universality.[347] In broad terms, universal moral theories hold that there exist standards of universal validity, truth and right action.[348] In human rights theory, human rights are believed to be universal in that they articulate elementary entitlements worthy of equal consideration by virtue of the simple fact that we all belong to the same human species. One form of especially radical universalism bases itself on a notion of moral absolutes. A fundamentalist form of universalism holds that culture is irrelevant to universally valid human rights. But, again, what exactly do we mean by universal rights? Universal human rights are those rights that belong to everyone, regardless of a person's social status, and without discrimination. Asserting the universality of human rights highlights our common humanity. Universal human rights derive from our human and our moral nature. Thus, they are a moral attribute of the human being that seeks legal expression. And because human rights doctrine is a moral theory, the universalist claim implies that some moral requirements are applicable in the case of every human being, thus proving the existence of universal moral rights and claims. Universality, first and foremost, means equality for everyone, regardless of time, circumstance, or culture.

2 Relativism

In a human rights context, proponents of universalism are subject to severe criticism from proponents of relativism. Relativism, however, is not fully elaborated by one single theory, and there are extreme as well as moderate forms of relativism.[349] From the point of view of a philosophy of human rights, moral relativism basically attacks universalism on three different fronts. First, descriptive relativism affirms that different societies have different understandings or conceptions of right and wrong; this is why different people sometimes accept and live out fundamentally different moral values. Second, according to normative relativism, persons (individual normative relativism), or groups of persons (collective normative relativism), must and will act in accordance with their own group's beliefs, ideas, and sentiments; thus normative relativism is the logical consequence of descriptive relativism, for once it is admitted that there are different descriptions of culture, there naturally follows a duty or obligation to act

[347] Fernández García, above note 194, p. 101.
[348] Thomas Schmidt, "Handbuch der Politischen und Sozial Philosophie" S Gosepathl, W Hinsch. B Rössler (eds.) 2008, p. 1372.
[349] Riedel, above note 345, p. 143.

according to their particular rules. Third, universalism is attacked by relativism with regard to the source of justification of its universal claims. In this context, human rights scholarship speaks of meta-ethical relativism. Relativism holds that moral truth and validity are relative to a particular legal framework. Similarly, moral rights and wrongs are relative to a particular moral framework.[350] In contrast to moral scepticism, which denies even the possibility of knowing what is morally right or wrong, meta-ethical approaches to human rights consider moral truth and validity to be relative to a particular set of circumstances.

B Controversies

There is a fundamental controversy between cultural relativism and universalism. Cultural relativism is a form of descriptive relativism that has come to occupy a prominent place in contemporary moral philosophy and ethical doctrine.[351] Radical cultural relativism understands culture to be the only valid source of moral or positive right. Cultural relativism is based on the primacy of a cultural setting, thus cultural relativists argue that culture is the supreme guiding principle of moral behaviour. A culture implicitly contains some standard of evaluation on the basis of which one determines right action; that is, in other words, that "ideas of right and wrong, good and evil, are found in all societies, though they differ in their expression among different peoples: what is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history."[352] Here we can clearly appreciate how the anthropological relativity of human rights is basically also normative in so far as it is based on the belief that we cannot or should not judge other societies according to our own society's values. Furthermore, cultural relativism in

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[350] Fernando R. Tesón, "International Human Rights and Cultural Relativism" Virginia Journal of International Law 1985 Vol. 25 No. 4, p. 886. **See also** Torben Spaak, "Moral Relativism and Human Rights" Buffalo Human Rights Law Review, 2007 Vol.13, p. 4.

[351] John Tilley, "Cultural Relativism. Human Rights Quarterly" 2002 Vol. 22 No. 2, p. 501.

[352] Statement on Human Rights (AAA), above note 207, p. 539 "the study of human psychology and culture dictates as essential in drawing up a Bill of Human Rights in terms of existing knowledge: 1. the individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences. 2. Respect for differences between cultures is validated by the scientific act that no technique of qualitatively evaluating cultures has been discovered. what about now human dignity?. 3. Standards of value are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole. But what about if we discovered the solution."

human rights discourse becomes rapidly normative in that it is based on a notion of respect for other cultures and for cultural diversity.[353]

There is another controversy between relativism and absolutism. Relativists produce a long list of arguments to prove that universalism as a category is wrong.[354] One of the most popular and relevant themes among human rights scholars is the empiricist's argument that to accept universalism is to say that moral standards are absolute. The controversy between universalists and relativists is underpinned by the either absolute or contingent character of the claims at stake. The basic question is therefore this: does there exist an invariable moral principle? The idea of universal and absolute human rights is problematic for some because universalism not only means that these rights are applicable to all human beings but also that they are identical, or share the same basic meaning, for all human beings, across all cultures, at all times.[355]

C Universality

It is helpful to clarify that most human rights scholars differentiate between moral universalism and moral absolutism. On the one side, moral universalists affirm that there exists a universal moral truth equally valid for all; on the other, moral absolutists consider that there are certain actions that are always right or wrong, regardless of context, such that moral precepts cannot be altered under any circumstances or at any time. The difficulty with universalism is that universalists assume that human rights can only be legitimated by absolute justification; therefore, they cannot ultimately satisfy the requirements of such a distinction. Similarly, there is always at least one principle that cannot be breached. True, the fixed or immovable character of an ultimate moral norm acts against universalism. However, the agreement on a universally moral norm may suffice and serve–at least temporarily–as a source of justification for the existence and effectiveness of a morally universal valid norm. This distinction is profoundly debated in the context of establishing the sources of justification of human rights, particularly between naturalism, voluntarism, and empiricism.

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[353] Donnelly, above note 344 (I), p. 294.
[354] Arnd Pollmann, "Der menschenrechtliche Universalismus und seine relativistischen Gegner" in *Menschenrechte: ein interdisziplinäres Handbuch* A Pollmann und G Lohmann (eds.), 2012, pp. 332 *et seq. e.g.* Decontextualism, Eurocentrism, Anti-pluralism, Individualism, Imperialism. **See also** Walter Kälin and Jörg Künzli "Universeller Menschenrechtsschutz", 2005, pp. 22-35.
[355] Menke & Pollmann, above note 188, p. 71.

How universalism does relate to self-determination? One fundamental aspect of the political debate, with clear repercussions for the legal dimension of human rights, is the fact that this universalist moral doctrine is often in tension with the particular interests of the state and a globalized private sector. A classical controversy between universalists and relativists is that referred to as ethnocentrism and imperialism. According to relativists, the argument of universal ethnocentrism, namely, that one moral judgement is valid for all, reflects an unjustified attitude of cultural superiority.[356] The relativist argues that, applying a set of "westernized" norms to limit some cultural and religious practices, is in itself a violation of a country's sovereignty. They rest their thesis on the principle of self-determination, a principle that proves to be a highly controversial political right when linked to cultural identity and cultural rights. Relativists contend that human rights are a product of Western traditions, which are imposed on non-Western cultures as a form of imperial domination. For them, respect for self-determination means that there is no legal or moral standard that can trespass established state boundaries.[357] However, anti-authoritarian and non-instrumentalist thinkers interpret this principle of self-determination as the entitlement of individuals to democratic government and basic human rights. The counter position to the universalist claim of human rights is that self-determination must be understood in the sense of internal self-determination; that is, that peoples or nations have the right to create whatever form of government they want; they possess a right that implies a duty of non-intervention in internal affairs.[358] This claim is supported on the basis of self-determination and freedom from foreign domination.

The right to self-determination is recognized in Article 1(2) of the UN Charter, as well as in Article 1 of the Two Human Rights Covenants (ICCPR, ICESCR). The right to self-determination has been designed to protect peoples from oppressive power, both internal and external, and also in order to strengthen universal peace. Self-determination also carries with it a notion of the preservation of cultural identity and cultural autonomy; in this sense, self-determination is rather inclined to sovereignty, to non-intervention, and to the equality of states. Furthermore, the principle of self-determination expressly refers to the right of peoples freely to pursue their

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[356] Tilley, above note 351, p. 516.
[357], Tesón, above note 350, or idem, p. 871.
[358] *Ibid.*, p. 880.

economic development. Nevertheless, self-determination as a collective right has the purpose of protecting the rights and interests of individuals, too.[359] Beyond the specificities of a right to self-determination, such as non-intervention, respect for cultural autonomy, and economic development, in all cases the idea of a life of dignity is a part of a people's right to self-determination, as established in the two human rights covenants (ICCPR and ICESCR), according to which this collective right is embedded in human dignity; this is why, whenever the notion is at stake, the exercise of the right must be aware of some kind of moral constraint or moral framework relative to moral dignity. In this way, the foundation of the collective right to self-determination is moral autonomy, not only of the collective or the polity, but also of individual realization in terms of human dignity, which implies also a limit upon collective self-determination.[360]

Human rights advocates believe that there are different ways to achieve agreement on universality. As already noted, one of the most common intermediate positions between fundamentalist universalists and relativists seeking to achieve the acceptance of the idea of a universal moral norm is in proving the existence of the universal norm through consensus.[361] An approach typical of scholars is to appeal to features common to all human beings (global justification by means of communalities); that is, appeals to beliefs and values internal to a particular culture or religion that are also common to all cultures, even if in more abstract and general terms. In this way, such values as human dignity and human equality are endorsed by pre-eminent doctrine in diverse regions of the world.[362] In specific terms, this may take the form of an interdiction on humiliation or inhuman treatment, and a repudiation of degrading living conditions and a lack of basic needs.[363] Another important way of demonstrating the universality of fundamental human rights is through a consensus based on global and regional human rights treaties as well as domestic constitutions. In addition, another way to render true a concept such

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[359] Tomis Kapitan, "Self- Determination and Human Rights" in Theoretical Foundations of Human Rights, Collected Papers: 2nd International Conference on Human Rights 17-18 May 2003, p. 359.
[360] Daniel Kofman "Human Rights, Self- Determination and Relativism" in Theoretical Foundations of Human Rights, Collected Papers: 2nd International Conference on Human Rights 17-18 May 2003, p.458
[361] Donnelly, above note 344 (I), p.289. Citing John Rawls "Political Liberalism", 1993 pp. 133-72 and pp. 385-396. Donnelly uses Rawl's overlapping consensus political theory in order justify the justice of human rights. **See also** Riedel, above note 345, pp.144 *et seq*. **See also** Katherine E Kim, "Human Rights and Consensus" in *Theoretical Foundations of Human Rights, Collected Papers: 2nd International Conference on Human Rights 17-18 May 2003*, p. 461.
[362] Donnelly, above note 344 (I), p. 291.
[363] Oscar Schachter "Human Dignity as a normative concept" American Journal of International Law 1983 Vol. 77 No. 4, p.852, Schachter, above note 277, p. 852.

as universal human rights is if we conceive culture as universal.[364] That is, the culture of a universal community. In addition, the idea of proving the existence of a universal community receives support from the objective process of globalization. An increasing identification with a global community by public sector politicians, private sector companies, and individuals in general, is among the factors to be taken into account when reflecting upon a process of effective power.

D Universality and Positive Law

In spite of worldwide differences regarding conviction, ideology, and philosophy, international law has been able to establish legal standards regarding the universality of human rights. The Universal Declaration of Human Rights is first of all based upon the "*unité de la famille humaine*"[365]; it recognizes the equal and inherent rights "of all members of the human family". Although the binding force of the UDHR is still subject to much debate[366], there is a far-reaching acceptance that it formulates authoritative human rights standards. At least from an exclusively moral point of view, its force is more than proven. The UN Charter, the International Covenant on Civil and Political Rights, and the International Covenant in Economic, Social, and Cultural Rights, recognize respectively, in their first recitals, the equal and inherent rights "of all members of the human family".[367] With the UDHR, by contrast, the binding status of the two Covenants is not even under discussion: they constitute binding instruments of international law. After the breakdown of the socialist regimes in Europe, and especially the Soviet Union, all nation states met to make a declaration on Human Rights. The Vienna Declaration and Programme of Action, of 1993, was about abruptly to fail precisely because of the contentious issue of the universality of human rights. Finally, the world community decided to include, in a fifth paragraph,[368] that:

> *"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and*

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[364] See below Part II, Chapter 1 Globalization.
[365]Cassin, above note 78, p. 277.
[366] For the binding force of the UDHR see Hilary Charlesworth, "Universal Declaration of Human Rights" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 10, p. 567.
[367] Preambles ICCPR and ICESCR.
[368] Vienna Declaration an Programme of Action,

> *religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."*

Adjudication plays a fundamental role in the development of the law. Courts and tribunals are tasked to apply and to interpret laws. Their work largely contributes, in providing the community with comprehensible legal statements about court and tribunal methods and techniques, to achieve to solidify the aspirations of the community. Using the comparative method, courts opt for comparative studies so as to adjudicate in favour of a common standard, or to allow discretionary authority to the domestic judiciary. Consequently, they have developed the techniques of margin of appreciation and consensus. The doctrine of margin of appreciation[369] allows states some freedom of decision, within certain limits, when there are conflicts between individual rights and national interests, or among different moral convictions.[370] Such allowances reflect a tolerance of disagreement and divergences. At first sight, the margin of appreciation could be understood to confirm moral relativism; however, this is not necessarily so. This doctrine refers only to certain permissible differences, based on issues of culture or sovereignty. It is true that an unconscious use of this notion risks the universal ideal; on the other hand, its reasonable employment promotes respect and the fostering of cultural diversity. To complement this margin of appreciation, courts look for consensus within different polities. *Prima facie,* the consensus doctrine is inversely proportional to the margin of appreciation. However, consensus is the result of the same comparative study; this notwithstanding, courts can also issue their autonomous judgement. In such cases, they do not use the comparative analysis; they draw, rather, on the theory of law, particularly through interpretation and interpretative method.

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[369] The doctrine of margin of appreciation has served to inform other international court *e.g.* in the Inter-American Court of Human Rights *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica* requested be the Government of Costa Rica, Advisory Opinion OC-4/84, of 19 January 1984 Ser. A No.4 at para. 62 **See also** Human Rights Committee (HRC) *Herzberg et al v. Finland*, U.N. GAOR, 37th Sess. Supp. No. 40 at 161, para. 10.3, U.N. Doc. A/37/40 (1982) . *Lansman et al. v. Finland*, U.N. GAOR , 58th Session Communication No. 671/1995 at para. 10.5, U.N. Doc. CCPR/C/58/D/671/1995.

[370] Eyal Benvenisti, "Margin of Appreciation, Consensus and Universal Standards" New York University Journal of International Law and Politics 1999 Vol. 31 No. 4, p. 843.

E Limitation Clauses

The tension between human rights and relativism has been given expression in the international courts in limitation clauses. Only a few human rights or fundamental freedoms guaranteed by international treaties or domestic constitutions are considered to be absolute or inderogable. Under certain circumstances, human rights and fundamental freedoms may therefore be modified, limited, or even derogated. Article 29(2) of the UDHR states that:

> *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the welfare in a democratic society."*

Relevant limitation and derogation provisions are: "prescribed by law", "in a democratic society", "public order (*ordre* public)", "public health", "national security", "public safety", "rights and freedoms of others", "restrictions on public trial", or "rights and reputations of others" and "public morals".[371] The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR give some guidance as how to use such limitation clauses may be used. This UN document establishes general interpretative principles regarding the justification of limitations, as well as interpretative principles relating to specific limitation clauses. On the one hand, one general principle establishes that:

> *"the scope of a limitation referred to in the Covenant shall not be interpreted as to jeopardize the essence of the right concerned."*[372]

In the particular case of the "public morals" limitation clause, the interpretative principles to this specific clause states that:

> *"Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of appreciation, shall demonstrate that the limitation in*

[371] See Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination of Minorities.
[372] *Ibid.*, I.A.2.

> *question is essential to the maintenance of respect for fundamental values of the community."*[373]

The following principle states that:

> *"the margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant."*[374]

While protection of cultural identity is obviously a principle of interpretation acknowledging relativism, it is also important to notice that this moral clause does not apply in every case to every right.

F Morals , will and consent

In looking for a solution as to which moral pattern the world should follow, if indeed it should follow one at all, scholars have developed a number of intermediary positions, especially regarding whether or not there is any common ground, taking into account traditions and experience. What, on the one side, seems to be an irreconcilable problem could, on the other, prove to be a false dilemma; this becomes clear when we cease to regard universal and relative claims of human rights as diametrically opposed. Several attempts have been made to achieve such a synthesis.[375] Human rights advocates try to demonstrate, empirically and cross-culturally, that there do exist universal human rights. As we have seen, there are two fundamental synthetic approaches to the existence of universal human rights: the most widespread proposes an overlapping consensus among polities regarding individual claims; the second possibility proposes identifying universal features within an already existing universal community. These difficult theoretical debates notwithstanding, let us at least admit that some kind of universal agreement has been achieved at the level of international law, where human dignity constitutes the core essential moral principle to which all laws are accountable.

Morality is expressed through will and also through cogency. In a context of many attempts, there are still two essential features that could lead to the realization of a universal human right: first, *the will*, expressed through consensus, for the law to

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[373] *Ibid.*, I.B v.27.
[374] *Ibid.*, I.B.v.28.
[375] See debate Donnelly/Goodhart Human Rights Quarterly 2007 Vol. 29 No. 2 and Human Rights Quarterly 2008 Vol. 30 No.1.

become more effective through traditional forms of political discourse, such as legislation; second, *the necessity* expressed through its cogency, to extend the law to other forms of decision-making beyond legislative action, such as adjudication. Even if the binding nature of the totality of the agreed universal human rights is debatable, there are some considerations relative to the rightness of a statute that could only be considered from a moral standpoint and without necessarily looking for consensus.[376] Disregarding its positive content, we repeat that human dignity does constitute a categorical or cogent universal moral principle that, for this very reason, remains at the top of the legal order. Human dignity is a moral attribute of the human species, and the human being is the ultimate subject to which all laws must give account, especially with regard to human preservation, the preservation of human moral attributes, these being the universal principles of the legal order, applicable, in the global context, to all provisions and to all participants. It is precisely in this sense that universalism and particularism may be understood as the two main paradigms of international law.[377]

[376] *e.g.* gross vilation of human rights.
[377] Armin von Bogdandy and Sergio del Valle, "Universalism and Particularism as paradigms of international law. International Law and Justice" Working Papers IILJ Working Paper 2008/3 Institute for International Law and Justice New York University School of Law.

Part II Public International Law

CHAPTER 1 GLOBALIZATION

A Globalization as a process

Globalization is a phenomenon whose nature and implications are the subject of dispute. Globalization reflects the global dimension of reality. In general terms, it is a multi-faceted process, involving a gradual or rapid expansion of human activities within a variety of cognitive frameworks.[378] As a process, it reflects an interconnectedness among peoples in the economic, political, cultural, and social spheres.[379] The global dimension is of particular relevance to problems on a scale too large to be solved by purely national institutions. The process of globalization has resulted in a fundamental transformation of the classical or traditional Westphalian model of the nation state.[380] In principle, globalization is a process conducive to a (more) universal society.[381]

In a narrow sense, the term globalization is also used to depict a new phase in world economics; indeed, expanded economic activity is arguably the driving force behind globalization. From an economic perspective, globalization refers primarily to an ever increasing flow of international capital and trade, without regard to geographical boundaries. The driving forces behind economic globalization itself are: first, of a technical character (the development of transport and communication); second, institutional (free trade and free trade zones, WTO, NAFTA, privatization of markets);

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[378] Rüdiger. Wolfrum, "The role of Law and Ethics in the globalized economics" Joseph Straus (ed.), 2009 at xix **See also** Stefan Oeter in "WTO-Recht: Rechtsordnung des Wetlhandels" M Hilf and S Oeter (eds.), 2005, p. 3 *et seq.*
[379] John Baylis; Steve Smith Steve; Patricia Owens (eds.), "The globalization of world politics: An Introduction to International Relations", 2011.
[380] Armin von Bogdandy, "Globalization and Europe: How to Square Democracy, Globalization and International Law" European Journal of International Law 2004 Vol. 15 No. 5, p. 886 **See also** Stefan Kadelbach, "Völkerrecht und Ethos im Zeitalter der Globalisierung" in *Recht und Ethos im Zeitalter der Globalisierung H-D Assman and R Sethe* (eds.) , 2004, p. 40.
[381] Robert Kolb, "Mondialisation et droit international" Relations Internationales 2005 No. 123 p. 69 (Les Mondialisations-1).

and, third, theoretical (theory of international trade, absolute advantage, comparative advantage, Heckscher-Ohlin theorem). Economic globalization can also be understood in terms of the integration of national economies through the economic global process of international trade, direct foreign investment from corporations and multinationals, and an international flow of capital, technology, and workers.[382]

According to the New Palgrave[383] economic and non-economic bibliography[384], globalization includes such topics and debates as liberalization versus regulation of international trade, capital movements and migration, effects of freer trade and capital movements on rich country workers (out-sourcing)[385], and on poor country workers (sweatshops)[386], extreme world inequality and poverty, neoliberal capitalism versus alternative systems, westernization versus local culture, unequal distribution of political power (hegemonism), the effects of global economic growth on the environment, the deficit of democratic legitimation, and so on. Notwithstanding the existence of many areas of conflict, globalization does offer opportunities both for economic and for social development.

Globalization has its supporters and its detractors. This division is measured best in terms of its effects. There exists deep controversy about positive economic effects versus negative social ills. While most supporters of globalization focus on the material benefits afforded to some, and justified by economic theories that bring together a sort of global economic managerial class, its detractors, represented mainly in civil society institutions that are opposed to liberal and utilitarian economic theories, focus on global social justice issues and a lack of global social progress. In other words, economic globalization has clear, positive economic effects; these are evidenced by an

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[382] Jagdish Bhagwati,"In Defense of Globalization", 2004, p. 3.
[383] William Easterly, "Globalization" The New Palgrave Dictionary of Economics, Steven N Durlauf and L E Blume, 2008 (2nd edition) Vol. 3, p. 681.
[384] *Ibid,*. p. 681 According to this authors the main debates between economist and non-economist are first the outlook that consider economic interactions as zero-sum games (the idea that wealth is unjust, the antagonism between exploited and exploiter. Second the difference between the "economists' notion of Pareto-superior outcomes and common norms of fairness. Third, "the difficulty of accepting the economist notion of the indivisible hand that creates spontaneous outcomes not designed by anyone, where the common habit of thinking is that good or bad outcome must be the result of intentional action by a good or bad agent"
[385] Outsourcing is the contracting out of a business process, which an organization may have previously performed internally or has a new need for, to an independent organization from which the process is purchased back as a service.
[386] Sweatshop is a negatively connoted term for any working environment considered to be unacceptably difficult or dangerous.

unprecedented achievement of wealth, at least for some. However, parallel to that, there is also an unprecedented increase in global poverty, set against a marked lack of progress in achieving a minimum global standard of living.[387]

B Globalization in context

1 Politics

Globalization is not only an objective process; it is also a normative concept. As an objective process, internationalization coexists with a significant degree of denationalization in such areas as economics, politics (liberalization, and the loss of power of the sovereign state in favour of international companies), and morality. As a normative process, it to some extent indicates those substantive matters that require attention so as to be better incorporated into the legal order, through consensus, real practice, or by means of adjudication. In the political context, globalization is generally normative when approached from an economic point of view, as a concept that promotes global and economic welfare as a matter of fact. It provides a stimulus to denationalize markets and laws. And it reveals the normative character of a liberal economic process when compared to a classical understanding of political sovereignty. In other words, institutions like the WTO, the World Bank, and the IMF, powerfully compel nations to draft laws and structure boundaries in such a way as legally to open their national economies; these national economies are then integrated into the financial and trade regimes that are established by the Global Economic Order [388,] which is, in turn, driven, of course, by economic theory. National laws are not able to assert control over the denationalized economic activities conducted by transnational corporations. By contrast, globalization is seldom approached normatively by politicians and international law makers, at least not from an efficient, universal human rights perspective. For this reason, academics and human rights advocates attempt to include

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[387] See Heinrich W Ursprung, "Globalization and the welfare state" The New Palgrave Dictionary of Economics Steven N Durlauf and L E Blume, 2008 (2nd edition) Vol. 3, p. 687 *et seq.* Economic globalization has two main aspects one regarding production/commutative justice and the other regarding distribution/distributional justice. Today, the distributional aspect is not only the concern of the weak, less developed or underdeveloped economies, but has reached welfare states. Liberalization and *laissez-faire* are deemed to jeopardize the ability of the national state to finance welfare state activities. *i.e.* "liberalization of international transactions renders tax bases increasingly footloose, which induces a global tax race to the bottom".

[388] Kort de Joop, "What's in it for us? Globalisation, international institutions and the less developed countries" in *Neo-Liberal Globalism and Social Sustainable Globalisation* E C Nieuwenhuys, 2006.

in international political discourse a discussion of those social issues provoked by globalization. Similarly, the process of change requires rules that adjust adequately to the new global reality so as to formulate global solutions that include not only economic but also moral and humanitarian concerns. Two essential questions must therefore be posed: what kind of globalization do we want and, in function of our answer, what kind of legal reasoning and legal framework is appropriate.

2 Law

In light of the above, we can affirm that the process of globalization is not only complex and dynamic in the economic and social spheres but also in its political and legal dimensions. In fact, the legal antecedents of globalization may be traced back to the 19th Century.[389] Globalization has introduced a highly significant level of change in the international arena. A milestone in the evolution of Public International Law was when the state-centric classical model of international law, pre-1945, based on sovereignty, legal equality, and non-intervention, began to erode. It did so with the creation of the United Nations, especially in the areas of security (peace), human rights (universality and equality) and development (new economic order). Simultaneously, the creation of the World Bank and the International Monetary Fund in 1944, as well as the creation of the General Agreement on Tariffs and Trade (GATT 1947), replaced in 1995 by the World Trade Organization (GATT 1994), also contributed to a gradual shift, even decline, in the fundamental basics of classical public international law. However, the focus of these economic institutions was and is not humanitarian, in the sense of social justice; rather, they have worked out rules relative to economic justice alone. These

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[389] Kolb, above note 381, p. 69 *et seq.* According to this author, a first step towards the globalization of public international law can be traced back to the 19th century with the admission of a new non-European, non-Christian states to the international community (*rationa personae* universalization of international law). A second step was made with the emergence of the League of Nations and the proposition of a novel political organization based on the principles of peace, the rule of law and order. For the first time the common interests of humanity were enclosed in a sort of constitutional body across the barriers of domestic affairs. At this stage of the continuum process of universalization in international law two aspects are highly noticeable, namely, the consolidation of an international objective legal order and the emergence of an international law of cooperation besides an already existing law of coexistence. By that time, the appearance of an international law of cooperation besides an international law of coexistence rendered the principle of sovereignty more controversial as states became more interdependent. The next period is marked by the communitization of international law. Due to the increment of new independent states after 1945, the new variety of international players and the improvements of technical developments, the international community looked for a for form of organization in which some common international interest prevail over the national *e.g.* the principles of the UN Charter, the advent of concepts like *ius cogens* or obligations *erga omnes.*A last period corresponds to actuality in which we can appreciate a big contraction in the equilibrium of power marked by unilateralism, this is the logical result of the interacting set of ideas and human action globally enhanced by human progress in general.

highly efficient international institutions, the WTO in particular, were created to regulate access to international markets. They necessarily limit state intervention in several economic areas, such as customs, services, and intellectual property, as well as in non-economic matters, such as the environment, labour, health care, and morality.[390] Some authors even speak of a global economic law.[391] However, efforts at a social globalization have been hampered by administrative inefficiency and empty rhetoric. One thinks, for example, of the World Commission on the Social Dimension of Globalization, established by the ILO. That notwithstanding, these institutional developments represent a genuine augmentation of international treaty law-making, not to mention the creation of international judicial and quasi-judicial bodies, such as the ICC and ITLOS, or the DSB at the WTO, or the International Centre for for Settlement of Investment Disputes (ICSID), all of which reflect current trends regarding adjudication in International Public Law. Therefore, one consequence of globalization upon international law is the objective interweaving of domestic and international law. This has resulted in the existence of a complex transnational society.[392] And this complex transnational society has already erected regulatory frameworks containing diverging normative principles, such as utilitarianism in economic law, and human dignity in human rights law.

3 Justice

The questions of social justice and the sustainability of globalization have occupied much attention in public debate, independently of the question of whether or not globalization is even desirable. One key criticism of to economic globalization is that a system of *laissez faire* free markets and international free trade conflicts with the achievement of certain basic objectives of the international community, such as the protection, promotion, and realization of human rights, and a respect for non-economic values that contribute towards protection of the environment. Social issues are commonly regarded by the political elites as "interfering with business and free market conditions."[393] Therefore, it is argued that the international community requires a

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[390] Kadelbach, aboev note 380, p. 38.
[391] Hans Ullrich, "La mondialisation du droit économique: vers un novel ordre public économique. Rapport introductive" Revue Internationale de Droit Économique", 2003, pp. 291-311.
[392] Kolb, above note 381, p. 69 *et seq.*
[393] Gertrude Roebeling, "Economic Globalization, civil society and rights" in *Dignity and Human Rights: The implementation of economic, social and cultural rights* B Klein G, A Contreras B, P C Carbonari (eds.), 2002.

regulatory framework in which the actions of international players and individual beneficiaries of the system could be based upon an efficient legal framework that aspires to minimum standards of living, both within the economic and the social spheres. It is what is referred to as "the social dimension of globalization". This normative social dimension of globalization includes respect for universally shared values, a commitment to fight poverty in order to meet basic human needs, and, finally, an undertaking to provide the individual with the necessary conditions and opportunities for his development so that they may live autonomously and with dignity.

In light of economic assumptions and theories, neo-liberalism and the economic sciences in general have reshaped and redefined the concepts of social justice, freedom, democracy, progress, and development. Moral questions are also studied and regulated from the perspective of economic values, even as moral philosophers and ethicists criticize the egoistic *homo economicus*, who is motivated by self-interest, and who thinks purely in terms of economic efficiency.[394] Advocates of social justice and cultural globalization see morality as an enhancement of positive commitments beyond mere utilitarian or economic normativity and self-interest; in the final analysis, it is a question of respect for and realization of human dignity. The ethical basis of fair globalization is grounded, from a legal perspective, in a series of treaties at regional and global level that range from the UN Charter and Bill of Rights, to a series of UN documents and resolutions that may be considered as soft law sources.[395] At the core of these sources are common concepts of human dignity, the material and spiritual well-being of humanity, as well as such structural notions as international cooperation and global governance.[396] Moreover, such international legal concepts as sustainable development and primary environmental protection are also linked to development and human rights. In other words, ethical aspects other than those derived from economic morality must also form part of an overall understanding of legal globalization. Deeper reflection on the insights of economic theory reveals that economic behavior has also an ethical aspect, such that economic regulation does not escape the deontological aspects of the law.

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[394] Eva Nieuwenhuys, "Neo-liberal Globalism and Social Sustainable Globalization" 2006, p. 61.

[395] Millennium Declaration UNGA A/RES/55/2; **See also** World Summit for Social Development and beyond achieving social development for all in a globalizing world UNGA A/RES/S-24/2 15 December 2000 **See also** In Larger Freedom, World Summit (2005). 21 March 2005, UN Doc. A/59/2005.

[396] Pascal Lamy, "Humanising Globalisation" Speech. Santiago de Chile 30 January 2006 available at http://wto.org/english/news_e/sppl_e/sppl16_e.htm last visited 02.July.2012.

4 Ethics

Globalization is often considered a menace to individual and collective moral conviction. Is there any conflict of goals between economic efficiency and moral fairness? Are these two concepts in opposition? Or do they rather complement each other? What is the advantage of integrating economies and societies? Justice, equity, and fairness in a global sense are developed by conceptions of global ethics. A global or universal ethics, articulated in law, has already begun to take shape. We speak about human rights. Truly, human rights doctrine is a moral theory that places universal human rights at the heart of international law. Human rights are the vehicle for the clearest expression of a universal morality and a global ethic.[397] The difficulty here is the question of who possesses legitimacy to develop the necessary legal regime for a global and universal community that facilitates peaceful and flourishing human interaction? In general, social scientists and legal scholars agree that consensus is the right basis on which to establish universal norms of justice. Consensus is a fundamentally important way to establish and acknowledge ethical validity; it brings objective values to the international legal order. However, legislative action alone is not always sufficient to correct legal norms that may have been introduced for purely economic reasons. For this reason, the function of the international judiciary must also be to take account of the environment in which the rules, including moral values, are to be applied and interpreted.

5 Judicial Power

It has been observed that legal globalization results in a judicialization of international relations. Global judicialization is characterized by four key elements: first, the increase in international judicial and quasi-judicial bodies; second, the extraterritoriality of national judicial systems assuming jurisdiction in deciding transnational and international cases; third, a steady increase in international arbitration between states, private persons and states, and private persons; fourth, an international network of judges in a context of various mechanisms of cooperation and coordination. [398] The judge, while performing his duty, promotes the inter-dependence of different national

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[397] See contributions in "Economic Globalization and Human Rights" W Benedek, K de Feyter, F Marrella (eds.), 2007.

[398] Miguel Poiares Maduro, "Legal Travels and the Risk of Legal Jet-Lag. The Judicial and Constitutional Challenges of Legal Globalization" in *Economic Law and Justice in Times of Globalization* M Monti, B Versterdorf, N Von und Zu Lichtenstein, J Westbrook, L Wildhaber (eds.), 2007, p. 175.

and international legal orders. He acts as a mediator among different legal orders. In this light, the judge becomes an active player in global governance. The coherence and integrity of international law demands that judges deliver their judicial decisions in international terms.

CHAPTER 2 CONCEPT

A The basis of International Law

There is a need for understanding the fundamental rules of international law, and the moral basis of international law, namely the recognition of the interest of the state, the interest of the international community as a whole, and the interest of the individual. In order to undertake a comprehensive survey of the meaning of moral issues and human rights matters in International Trade Law, it is crucial to bear in mind the role played by International Trade Law within the general system of International Law. This systematic approach responds to the view, confirmed by the WTO judiciary, that the World Trade Organization cannot be isolated from public international law.[399] As a first step, it is important to understand what are the basic norms underlying both the international legal order and economic orders; only in this way may we come to understand the nature and limits of the international trade order. Only an holistic approach to the legal basis of the international trade system will allow us fully to understand the role of public morals within it. For this reason, our main purpose in this chapter is in large part to clarify certain aspects of the concept of public international law so as then to disentangle these from their relationship to trade. In so doing, we will argue that the moral and dogmatic underlying basis of the international legal system is not only the classical doctrine of international law, including good faith, sovereignty, recognition, consent[400], the "Lotus Principle"[401], and *pacta sunt servand or* pure and selfish state interest, but also the realization of community interests as well as the realization of individual interests. For this reason, we can affirm that today, the moral basis of many of our international rules extend beyond a pure interstate society[402] towards the aspiration to realize a common good, particularly that of the realization of human dignity.

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[399] United States-Standards for Reformulated and Conventional Gasoline, Appellate Body, WT/DS2/AB/R 29 April 1996, p. 17 "That direction reflects a measure of recognition that **the General Agreement is not to be read in clinical isolation from public international law**." Emphasis added.
[400] See Georg Schwarzenberger, "International Law and Order", 1971, p. 16.
[401] *The Case of S.S. Lotus* PCIJ Series A No. 10 Judgment of 7 December 1927, p. 18.
[402] See Christian Tomuschat, "Obligations Arising From State Without or Against Their Will" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1993 Vol. 241 No.4, p. 209 **See also** Bruno Simma and Andreas L Palaus, "The international Community: Facing the Challenge of Globalization." The European Journal of International Law 1998 Vol. 9 No. 2, p. 276.

B Definitions

1 Classical definition

Traditionally, Public International Law has been conceived of as the law that regulates relations among sovereign states. This definition focuses almost exclusively upon subjects; its main characteristic is sovereignty.[403] It leaves little space for interests and concerns that go beyond the individuality of that political body defined as a state. Classical definitions of international law refer to it as the Law of Nations (*Droit de gens*, *Völkerrecht*). In line with this, the "Law of Nations is the name for the body of customary and treaty rules which are considered legally binding by States in their intercourse with each other".[404] The Permanent Court of International Justice stated in the Lotus Case, that:[405]

> *"International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these Co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed."*

Kelsen's definition of international law is one good example of the limited scope of the regulation of the law of nations. According to him, "International Law or the Law of Nations is the name of a body of rules—which according to the usual definition—regulate the conduct of the states in their intercourse with one another."[406] Verifiable empirical facts from modern history, and in particular from the history of the last hundred years, have shown that this definition is not at all satisfactory. Global, regional, and national events, together with the consolidation of collective interstate interests and universal individual values, call for an updating of the laws that regulate such individual and collective intercourse of human matters, rather than keeping only an exclusive law that regulates individual state performance.

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[403] Patrick Daillier; Mathias Forteau; Nguyen Quoc Dinh; Alain Pellet. "Droit International Public", 2009 (8th edition), p. 465 "Ne mériteront la qualification d'État que les collectivités présentant le caractère unique d'être souveraines" **See also**, Juliane Kokott; Karl Doehring; Thomas Buergenthal "Grundzüge des Völkerrechts" 2003 (3rd edition), p. 1 "According to Public International Law, a sovereign state has three main features, a territory, a population and government able to undertake diplomatic and foreign relations and observe the rules of Public International Law."
[404] Hersch Lauterpacht, "Oppenheim's International Law", 1967 (8th edition), p. 4.
[405] The *SS Lotus Case*, above note 401, p. 18.
[406] Hans Kelsen, "Principles of International Law" Revised and Edited by Robert W. Tucker. 1966 (2nd edition), p. 3.

2 Modern definition

A modern definition of Public International Law still gives its consideration primarily to the law among states.[407] However, the new modern definition does not exclusively refer to states as the only subjects of international law, but rather widens its scope to other participants in the international arena, the most readily accepted among these being the international organizations. It also gives some weight to the role played by the individual.[408] The American Restatement of the Law (Third) is an excellent example.[409] Paragraph 101 (international law defined) of the restatement reads as follows:

> *"International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."*

Accordingly, international law is still defined primarily as a law for the external relations of states, and not of their citizens. The restatement's definition of international law is still mainly a state-centric definition. But it also recognizes that international subjectivity has been enhanced to include intergovernmental international organizations, if to a lesser extent, individuals, who can also be regarded as the subject of rights and obligations under international law.[410] It is in the particular case of individual rights that the strongest and most convincing developments in human rights and international criminal law are currently taking place. Contemporary international criminal law contains provisions for the punishment of individuals responsible for offences against the peace and security of mankind.[411] With respect to human rights, the UDHR makes it clear that international law is not only about vertical concerns between the state and those individuals under its jurisdiction; it is also about the concerns of all human beings.[412]

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[407] Thomas Buergenthal and Sean D Murphy "Public International Law in a Nutshell." 2006 (4th edition), p. 2.
[408] Kokott *et al.*, above 403, note p. 2.
[409] Restatement of Law (Third) Foreign Relations Law of the United States 1987 Vol. 1 In spite of the definition given in §101, the Restatement refers in many of its comments to the international law as the law that governs relations between states
[410] Buergenthal & Murphy, *ibid.*, p. 2.
[411] Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law 1992 (9th edition) (3rd impression) 1993, p. 17.
[412] Allan Rosas, "The Death of International Law?" Finnish Yearbook of International Law 2009 Vol. 20, p. 218

International law as the law between states is but the core of international law. In spite of the modern admission of other participants, beyond sovereign states, as the subjects of international law, modernity does not really involve any genuine renovated idea of international law, for international law still focuses on subjects and international personality[413], particularly those of states. As a result of this focus on subjectivity, the state still enjoys primacy in international law, on the one hand while, on the other, there are emerging concerns about the realization of community interests, and individual universal values; for these reasons, some authors prefer to speak about the prominence of the state as a central characteristic of international law, but not necessarily to define international law purely in terms of laws between states.[414]

3 Contemporary notions

The Hersch Lauterpacht definition, includes several elements such as subjects and sources. New ways of thinking about and defining international law began to appear a few decades after the establishment of a renewed international political order made up of the UN, the UN Charter, and the International Bill of Rights (UDHR, ICCPR, ICESCR), new definitions of international law appeared. Hersch Lauterpacht wrote of this phenomenon in the following terms:[415]

> *"International Law is the body of rules of conduct, enforceable by external sanction, which confer rights and impose obligations primarily, though not exclusively, upon sovereign States and which owe their validity both to the consent of States as expressed in custom and treaties and to the fact of the existence of an international community of States and individuals. In that sense international law may be defined, more briefly (though perhaps less usefully), as the law of the international community."*

As Professor Lauterpacht himself acknowledges, this definition contains a number of controversial elements. Here we want simply to call the reader's attention to the fact that the author not only refers to the subjects of international law but also to the sources of validity of international law, namely the consent of states, and the fact of the existence of an international community of States and individuals. Professor Lauterpacht sees

[413] Jennings & Watts (Oppenheim), above note 411, p. 16 **See also** Antonio Remiro Brotóns,; Rosa Riquelme Cortado; Javier Díez-Hochleiner; Esperanza Orihuela Calatayud; Luis Pérez-Prat Durban, "Derecho Internacional", 2007, p. 45 Defines International Law as "conjunto de normas jurídicas que, en un momento dado, regulan las relaciones (derechos y obligaciones) de los miembros de la sociedad internacional ***a los que se les recoonce subjetividad en este orden***". Emphasis added.
[414] Vaughn Lowe, "International Law", 2007, p. 5.
[415] Hersch Lauterpacht, "International Law: The General Works", 1970 Vol. 1, p. 9.

international law as the law that reflects the interests of the international community of states and the individual. His definition cannot be state-centric; indeed, his definition is concentric to the state, the international community of states and the individual. The validity of the law is legitimized by the interest of states, the interests of the community, and the interests of the individual.

Contemporary ideas of international law do not refer to subjects but to aims. These contemporary ideas concerning the function of the law in the international community reflect the new concerns and direction of international law. New definitions, although sometimes expressed in somewhat abstract terms, do at least move away from positivist attempts to deprive the law of its extra-positive aims and motivations. In fact, many new definitions of international law define it in terms of "process" and "policy."[416] One current proposition is to see international law as a normative system that influences, directs, and guides the aspiration towards and achievement of universal values, those values common to all, regardless of race or nationality (the prohibition of discrimination).[417] This idea is at the core of a wider definition of international law, which asks not only to whom international law applies—the question of the subjects of international law—but also, quite simply, the question of what is international law? Definitions referring only to the subjects of international law are viewed now as anachronistic. But this does not mean that the issue of who are the subjects of international law becomes less important; to the contrary, it means only that, together with the question of its subjects, other questions concerning a valid definition of international law must also be posed.

Contemporary definitions of international law pursue the aims of human survival and human flourishing. An understanding of international law that goes beyond that of the classical Law of Nations (*Droit de gens* or *Völkerrecht*) has developed so far as to be defined as the "self-constituting of all-humanity through law."[418] From another perspective, international law is the means by which a universal society realizes the common interests of its participants. Accordingly, international law can be understood as reconciling the common interests of all subordinate societies with the common

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[416] See particularly the New Heaven School.
[417] Rosalyn Higgins, "Problems and Process. International Law how to use it", 1994 (2007 reprinted), p. 1.
[418] Philip Allot, "The Concept of International Law" European Journal of International Law 1999 Vol. 10 No. 1, p. 17.

interests of all human beings for the purposes both of human survival and human flourishing.[419] Thus, international law is more than a separate branch of law regulating state behaviour; it is a distinct international legal system including an international constitutional law, an international public law, and a law of nations[420], that governs international society. However, such a progressive understanding of international law is far from being universally shared, even if the existence of new international structures and mechanisms proves that some of its features already exist within the international legal system, examples of the constitutional kind being *ius cogens* norms, *erga omnes* obligations, and the principle of general international law establishing respect for human rights. These aspects show two things: first, the emergence of vertical structures; second, the consolidation of universality. Indeed, a contemporary picture of international law shows that the new tendency is to understand it as having a hierarchy, an idea of a constitutional order, and carries within it both the egoistic and also the collective interests of both individuals and groups. These tendencies correspond to the idea of the social function of law, and the search for international social justice.

Some very abstract definitions of international law, like that of Dupuy, even when referring not to a particular subject, but to society in general, do not suffice to affirm that the law in question, in this case international law, must or does make reference to an end or *telos*. According to Dupuy:[421]

> *"Le droit international est constitué par l'ensemble des norms et des institutions destinées à régir la société international"*

This is a reflexion of Professor Lauterpacht's definition. However, contrary to Lauterpacht, such a general definition, even if it does not refer directly to the subjects of international law, still puts forward the idea of an international order. The problem with the word "international", however, is that its meaning is clear only insofar as it refers to something among (inter) nations. It may, of course, be helpful to reflect further on such questions as avoidance or ignorance. In a best case scenario, the relegation to a

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[419] *Ibid.*, p. 37.
[420] *Ibid.* pp. 37 *et seq.* Succinctly, the author refers to (1) international constitutional law as containing the structural legal relations among subordinate societies; (2) International public law as the law of the inter-government of international society and (3) the laws of nations as the legal transactions of subjects of international law outside the sphere of international constitutional authority *i.e* Private international law. These levels of international law constitute a hierarchy from 1 to 3 in this order.
[421] Pierre-Marie Dupuy, "Droit International Public", 2004 (7th edition), p. 1 "International law is constituted by the set of norms and institutions that governs the international society."

secondary level of two otherwise essential aspects of the global reality may result, namely the global common and universal individual value and, in particular, the universality of the individual and his subjection to a legal order that takes account of his needs. In his famous book, "The Changing Structure of International Law", Wolfgang Freedman cited a passage of Jenk's "The Common Law of Mankind" in order to illustrate the on-going transformations of international law, which in some ways resembles Lauterpacht's suggestion that the validity of international law is owed, *inter alia*, to the existence of an international community of States and individuals. The famous Jenk's passage in Freedman's book reads as follows:[422]

> *"[T]he emphasis of the law in increasingly shifting from the formal structure of the relationships between states and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its Member States."*

a The universal system

International law—or the transnational or universal law—should refer to the interest of states, the community of states, and the individual. The above indicates that, in its attempt to define a universal regulatory framework for the international community or society, even international law nomenclature is counterproductive unless it is clearly admitted that this international society does indeed include every one of its members.[423] But how from a legal perspective should such a universal system be viewed? A legal system expressed in universal terms may be understood in a number of ways. Professor Simma gives a useful account of some of these different ways of understanding a universal legal system. According to him, universality may be understood in a classical spatial sense, namely laws of global scope, belonging to all. In a second but closely related sense, universality refers to the coherence and unity of the law. Thirdly, it means "that it is possible, desirable, indeed urgently necessary (and for many a process already under way), to establish a public order on a global scale, a common legal order for mankind as a whole."[424] That notwithstanding, let us admit for the purpose of this reflection on the relationship between morality, international trade law, and human rights, that international law has a dimension that trespasses the international, or even

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[422] Wolfgang Friedmann, "The Changing Structure of International Law", 1964, p. 65.
[423] See below Part II Chapter 4 Internaional Community.
[424] Bruno Simma, "Universality of International Law from a Perspective of a Practitioner" The European Journal of International Law 2009 Vol. 20 No. 2, p. 265.

the transnational[425], and that refers to the universal. International law as currently understood, that is, as law that regulates social life universally, or in international society, is made up of a multiplicity of laws that potentially cover all aspects of life. Such an ambition calls for a common legal order for all humanity that is quite distinct from a common legal order of nations or states. The first step towards achieving this goal is to work out a constitutional framework that is valid for all humanity. Does such an international constitutional framework already exist? What are its essential rules? Does this framework have any moral basis? International constitutional law, understood as an instrument to direct and control social reality, can operate in a way similar to that of municipal law, in the sense that it can take into account the moral imperatives of law and justice that take place at an international level and that consequently must also be solved at an international level; that is, moral imperatives that are not only determined by the egoistical interests of the state, but which, rather, are nurtured by the fact of the state's co-existence—in the sense of concentric existence—with other states, and an international community as an independent body comprising universally equal individuals. The idea that the state is the ultimate legitimate authority in international law is now largely being substituted by the idea that international law and politics refer to a "new social group called international community (or society) to which everybody belongs." Thus, the new international law, insofar as it refers to its subjects, must at least reflect, in its norms, the autonomy or self-determination of the individual.[426]

C Nature

In any case, the debate about the nature of international law turns on the question of whether its rules are rules of law or rules of morality. For this reason, the precise nature of international law is a source of detailed discussion and dispute among scholars, some of whom deny its very existence. Such a denial of the existence of international law can

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[425] Philip Jessup, "Trasnational Law", 1956, pp. 2 *et seq.* " Nevertheless I shall use instead of "international law," the term "transnational law to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included as other rules which do not wholly fit into such standard categories". "The concept is similar to but not identical with Scelle's monistic theory of un *Droit intersocial unifié*. One is dealing, as he says, with "human relationships transcending the limits of the various states." But while I agree with him that states are not the only subjects of international law, I do not go to the extreme and say with Scelle that individuals are the only subjects."

[426] Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures" Leiden Journal of International Law 2006 Vol. 19 No. 3, p. 587.

be traced back, among others, to Hobbes. For Hobbes, peoples existed in a sort of state of nature where the law did not reach, where the law was absent. [427] For him, international law was a matter merely of the interaction of physical forces. However, we must not lose sight of the fact that Hobbes lived many centuries ago, in an altogether different reality. More recent jurists, such as John Austin, have admitted the obligatory force of the rules of the laws of nations, while at the same time rejecting its legal character. For him, these laws are merely a matter of positive moral rules, or positive morality. Austin's view is a good example of 19th century positivism. In another school of thought, international law was recognized for its legal character, but only as weak law.[428] This school of thought sees international law in terms of the existence of a community of states which lack, among other features, a central legislative authority, and agencies for enforcing the law (a complete judiciary system). This is why it is sometimes said that international law is only a weak law, typical of a primitive society. Thus understood, for them international law is fundamentally a law of co-ordination that remains based on the principle *pacta sunt servanda* [429] and state freedom of action reflecting a horizontal structure in the international community. In spite of the influence of classical dogmatism, an untrammelled freedom no longer applies. Unrestricted freedom has been strongly limited, particularly since 1945, as the world has developed vertical structures that give priority to the concerns that exist around a hierarchy of values and consequently also of rules.[430] The legal character of international law is currently discussed not only in the context of legal scholarship but also within the arena of political science. In any case, international law is considered by many to be a law the rules of which are deprived of genuine legal character, or a law that effectively is reduced to the public law of the state when applied to its external relations.[431] The modern assertion that accepts the legality of international law only to the extent that it recognizes no authority above that of the state, is only a disguised denial of the already existing vertical structures and human goals and objectives that transcend the state.

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[427] Hersch Lauterpacht, "The function of law in the international community", 1933, p. 400 citing Leviathan Part I chap. xiii. **See also** Dailler *et al*, above note 403, p. 97.
[428], Lauterpacht, *ibid.*, p. 406.
[429] *Ibid.*, p. 417 Citing Cavaglieri in "Lezione di Diritto Internazionale" Parte Generale (1925), pp 44 *et seq*.
[430] Antonio Cassese, "International Law", 2005 (2nd edition), p. 11.
[431] Dailler *et al*, *ibid.*, p. 97.

The classical position says that international law is not law because it is frequently violated. The most common objections to considering international law as a genuine legal system are derived from a general systematic conception of the law as a system of obligatory enforceable rules, such that a society governed by law must possess superior authorities of a legislative, judicial, and executive kind. This institutional framework exists within a state and fits well the idea of internal law. If international law were formulated in the same way, the existence of international law would be conditioned by a supranational organization of international society but, at least according to this argument, such a supranational organization is incompatible with the sovereign state[432], still more so in that it does not reflect today's reality. During an extended period, states affirmed that they were legally and morally bound by international law. Nevertheless, violations of international law occurred with a certain frequency. When such a violation takes place states often attempt to justify their actions through an interpretation of international law that appears to lessen or excuse their wrongdoing; they attempt to justify themselves on the basis of freedom of action, a doctrine of unilateral action that, in the last analysis, adds up to little more than a naked manifestation of arbitrary power. The result is that "violations of international law strain its legal force to a breaking point". Any affirmation about the binding nature of international law is therefore only cynical[433], and its legal character remains *de facto* doubtful.

Fundamentally, international law is considered today to be a law of coordination. There are still many scholars who consider international law to be fundamentally a law of coordination. A law in this sense is characterized as being created and applied between actors who have brought it into existence horizontally, without proper hierarchy. For those who remain stuck at the idea that international law is characterized by an absence of superior sovereign power, international law is unequivocally distinguishable from internal law; this is the dualist view. This group of lawyers and scholars characterizes international law in the following terms: no obvious delineation among the different branches of power, and no clear distinction between political and judicial precedent. Again, they see international law as lacking centralization and such key features as a hierarchical court system, as found in domestic legal systems, and an effective

[432] *Ibid.*, p. 98.
[433] Lauterpacht (Oppenheim), above note 404, p. 15

enforcement mechanism[434] Rather, international law is understood as a system that operates in an exclusively political environment, and that, in order to become universal, regards its function as being the accommodation of regional and sectorial concerns, as a matter of independent states, and not as a matter of conferring rights and duties upon individual persons, moral or physical[435], or pursuing collective or individual interests beyond those of the state. Thus, in international law, consideration of social and humanitarian questions are still considered to belong to the political rather than to the legal arena.[436] Therefore, we can affirm that, in spite of the many changes that have taken place in the world since 1945, the dogmas of international law still reflect the realities of the classical period. That is, the interstate society, and the pursuit of egoistical state interest. In addition, other problems in international law cause some scholars and practitioners to consider it a distinct branch of internal law, and thus speak in terms of a potential conflict of law (unity and coherence of the law) due to the multitude of law-makers at the international level, and the lack of a centralized legislator, executive, and court system, with general and compulsory jurisdiction.[437]

Nevertheless, there exists a willingness at least to recognize, if only formally, the existence of international law beyond the existence of the state: this is immediately clear when one reflects on the radical changes in international society post-1945. Besides, new concerns have arisen out of the objective developments within the process of globalization: claims for solutions, and changes to the dogmas of international law. In other words, there may currently be a need to restructure international law, based both on empirical data, i.e. economic warfare, and the gross violation of human rights, genocide, and such theoretical assumptions as an authoritative notion of justice. The traditional arguments clash with new realities and experience. Human dignity and universality are the new paradigms of international law. And it is not only national constitutions, particularly post-1945, that acknowledge the rules of international law as part of their own national law, but the praxis of states that shows the legal validity of

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[434] Shabtai Rosenne, "The perplexities of modern international law", 2004 p. 15.
[435] *Ibid.*, p. 17.
[436] Judes Fitzmaurice and Spender (joint dissenting opinion) *South West Africa Cases* (Ethiopia V. South Africa) Preliminary Objections, Judgement 21 December 1962, ICJ Reports 1962, p. 319, at 466 "We are not unmindful of, nor are we insensible to, the various considerations of a non-juridical character, social, humanitarian and other, which underlie this case, but these are matters for the political rather than for the legal arena. They cannot be allowed to deflect us from Our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view"
[437] Joost Pauweyln, "Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law" 2003 (2006, 5th printing), pp. 13-17.

international law. It can no longer be argued that there are no formal procedures for creating laws. Indeed, there are now formal ways of authoritatively creating and developing the law; that is, a growing administrative international power through international bureaucracies, and an international judiciary with the power to interpret, apply, and to develop the law.

At present, the discussion on the nature of international law does not focus as much as it did in the past on the question of its existence, but rather on the question of its function. That is, whether international law genuinely exists or not? What is international law? What is its purpose? The functionalist view of international law (and law in general), is to allow the law and the legal practitioner the possibility of including concerns and interests that go beyond the dogmatism imposed by the doctrines of positive law, which in some extreme forms resemble the absolutism or immutability of the *iusnaturalism* of the European Enlightenment. For example, the view defended by Higgins is that the function of the law is to provide an operational system for securing the values that we all share. However, international law is not only about rules; the word law refers to many other things.[438] According to Higgins, international law is best understood as a continuing process of authoritative decisions. The law, for her, is not simply about the impartial application of rules; it is an entire process of decision-making.[439] This functionalist view of law relates substantially to the judicial branch of power. For Higgins, judicial decision-making is a legitimate form of law-making. This view breaks the dogma that there is a monopoly on decision making that is held by sovereign states. Indeed, it is appropriate here to emphasize this understanding of law as a process, particularly as international law is currently undergoing a process of deep transformation. One author describes it in this way: "international law (...) is today overwhelmingly an agent of progress and evolution."[440] To view international law in terms of its process means that the law itself cannot represent the consolidation of a *status quo*; rather, it is an essential and necessary factor in the evolution of a universal society.[441]

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[438] Higgins, above note 417, p. 2.
[439] *Ibid*., p. 2.
[440] Friedmann, above note 422, p. 58.
[441] *Ibid.*, p. 59.

Important current controversies in international law turn on the existence of multiple subjects and regulatory action on how to relate them to each other (unity and coherence of international law). In other words, international law is currently a very controversial discipline; it attempts to turn into law the movement of globalization, but using a classical dogmatism that does not necessarily do justice to the complex realities of globalization. In addition, the structure of international society is far from being clear. This is especially true in relation to the following: new subjects, such as International Constitutional Law, International Commercial and Trade Law, International Human Rights Law, International Law of the Sea, International Environmental Law, and so on; new interests, such as community interests, public interests, private interests, and the interests of the human person; new areas of concern, such as fair trade, and common but differentiated responsibility. In such a context, old concepts may be antagonistic to new realities. Classical dogmatism is counterproductive if we consider its principal aims, interests, and values; the moral neutralism of positivism is challenged by the new international or universal society; and the horizontal coexistence of states is being gradually substituted by vertical cooperative subordination.

1 Different schools of thought

The issue of the fundamental values of international law is relevant because to some extent it explains the obligatory character of this type of law. According to Dailler and others[442], there are two main groups: namely, those who look for the obligatory character of international law within the law itself and, better still, within positive law; and those who see the obligatory character of international law as being ideologically based outside of the law. The paramount importance of the question regarding the foundation values of international law lies precisely in the fact that all answers to this question shed light upon the process of law formation that involve many different ideologies. Therefore, the acceptance of a general idea of international law, from which rules may then be derived, logically requires a very high of degree of global acceptance. However, insofar as consensus is not achieved, and given that human intercourse goes on, the social forces that act in opposition to each other, and that claim to realize different values, require a certain order if they are not to be utterly chaotic. That is, rules, and indeed, international rules, cannot always lead to consensus, given that there exist other legitimate forms for providing a stable legal basis to a universal community.

[442] Dailler *et al*, above note 403 p. 110.

After all, the law represents a way to achieve both the maintenance of an already accepted behaviour, or *status quo*, and the promotion of a behaviour that is desirable, that is, the accomplishment of certain social control purposes to realize certain aims, such as a humanist moral aim (*e.g.,* the realization of and respect for human dignity). The kind of social control that is most desirable or true is one question that can be answered at best within the explanation of the concept of the law itself.

In conformity with contemporary authors[443], there are three main schools of thought. First, the *iusnaturalists*, who see the law as based fundamentally on transcendental values. Second, the positivists, who focus on the validity of the law, and ground it on the form or process of issuance, sanction, and power. Third, the sociologists, who emphasize the effectiveness of the law, justifying the norm according to the efficacy of the rule within the social body. This classification obviously focuses on the idea of law; the international aspect is secondary. However, there are also doctrinal studies that identify other schools of thought, such as the policy science approach, the realist school, the soviet doctrine of international law, or the third world school of international law.[444]

a Positivism

The positivist school is dominated mainly by the voluntarists and the normativists. The voluntarists affirm that the rules of law are products of the human will. For them, the foundations of the law are linked to a definition of an institution. Its obligatory force does not depend upon the conformity of the norms with the content of some external or extra-legal claims. Between the formal and the material aspects of the law, the voluntarist retains solely the formal aspect. The issues of justice and injustice, morality and immorality, are considered only at an extra-juridical level. The positivist-voluntarist sees the starting point or the foundation of international law in the absolute sovereignty of the state, and the principle of *pacta sunt servanda*.[445] For the normativist,

[443] Robert Kolb, "Réflexions de philosophie du droit international: Problémes fondamentaux du droit international public: Théorie et philosophie du droit international" 2003, p. 39.
[444] Henry J Steiner, "International Law, Doctrine and School of Thought in the Twentieth Century" "Encyclopedia of Public International Law" Rudolf Bernhardt 1995 Vol. 2, pp. 1224-1227.
[445] Dailler *et al*, above note 403, p. 112 Giving one example of positivist-voluntarism through the theory of the auto-limitation of the sates of JELLINEK. According to Dailler *et al.*, Jellinek says that, at the international level, the state cannot be subordinate to any other authority. It is its sovereign will which enable them to create international law. thus, the faculty of autodetermination englobes the faculty of auto-limitation. **See also** Dionisio Anzilotti "Cours de Droit International" 1929 "Une catégorie spécial des normes, certainement la plus importante, est forme par celles qui s'établissent au moyen d'accords, tacites ou exprès, entre les Etats mêmes; accords par lesquels ces Etats conviennent réciproquement de se comporter d'une manière donnée, de telle sorte que, si certaines hypothèses se produisent, ils sont tenus

international law is a normative order in a monistic sense, namely a system of valid norms "considered as a supreme legal order which is not under any other legal order."[446] The main criticism of the formalist positivist systems is that they do not take into account the social context in which international law is formed and applied. Positivism is severely criticized for being "non-behaviorist, ahistorical and formally apolitical"[447], and perhaps also morally neutral.

b Natural Law

One of the most influential legal doctrines is that of natural law. Its evolution has seen it pass through several stages, from antiquity, through the middle ages, enlightenment, and modernity, until the present day. Natural law is one of the oldest formal conceptions of organized life. Several theories have emerged from within natural law doctrine; two of these have especially influenced their philosophy. For one school, the doctrines of natural law are considered spiritual or idealist; they see the law as grounded in such values as justice, the common good, and the ideal that the human being possesses certain fundamental moral and physical rights. For them, nature itself is an ethical concept. For a second school, the foundation of the law is nature viewed as hard fact, hard truth. It understands the dictates of the law in terms of instincts, the law of the fittest, the struggle for survival. For them, the law is an empirical concept. Nevertheless, the main idea behind *iusnaturalism* is that the juridical order turns around, and is grounded upon, justice, the supreme value of law[448], and the moral basis of law.

Today, the neo-*iusnaturalists* adopt a position in which positive law plays an essential, an indispensable role. This version of natural law is assimilated to the Grotian dualist formulation of international law. For neo-*iusnaturalists*, law is a matter both of form and content. Positive law depends on the content found in natural law.[449] This

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de faire ou de ne pas faire telle ou telle chose et peuvent émettre des prétentions correspondent. Ces normes expriment une exigence de la conduit réciproque des groupes sociaux entre lesquels elles interviennent, affirment un *devoir être* dont la valeur est indépendant du *fait* que ce devoir être est ensuite réalise ou non. La force obligatoire de ces normes dérive du principe que les Etats doivent respecter les accords conclus entre eux: *pacta sunt servanda*. Ces principe, précisément parce qu'il est à la base des normes dont nous parlons, n'est pas susceptible d'une démonstration ultérieure du point de vue de ces normes elles-mêmes: il doit être pris comme la une valeur objective absolue ou, en d'autres termes, comme l'hypothèse première et indémontrable à laquelle se rattache d'une façon nécessaire cet ordre, comme tout ordre, de connaissances humaines. " pp. 41 *et seq*.

[446] Kelsen, above note 406, p. 177.

[447] Steiner, above note 444, p. 1224.

[448] Kolb, above note 443pp. 44-51.

[449] Dailler *et al*, above note 403, p. 114 **See also** Anthony D'Amato "International Law sources: Collected Papers", 2004 Vol. 3, pp. 3 *et seq*.

contemporary view equates natural order to moral order, to which positive laws are accountable. Therefore, moral values enjoy primacy over positive rules. The theories of natural law have been severely criticized, particularly during the rise of positivism during the 19th century.[450] For this reason, contemporary natural law scholars defend their theories by trying to provide an objective concept of justice; such justice must be considered within an objective legal universe, where ethical values are verified by experience. In order to avoid conflicts arising from cultural diversity, and the possibility of creating a universal moral ground, natural law must be reduced to a few principles. A positivist *iusnaturalist* stream attempts to reduce the legal character of its norms to those moral values incorporated in the body of positive law, such as the principle of good faith, or the acknowledgement of *ius cogens* norms that directly reflect moral issues.[451] As the main preoccupation of the *iusnaturalists* is morality, this school of legal theory endures as one of the main sources of juridical science. That notwithstanding, the principle of human dignity counts as one such moral principle, the realization of which is verifiable, temporarily and spatially, throughout the history of mankind, and which constitutes the foundation itself of international law. However, the main problem of natural law remains that of how to interpret the rules of natural law in terms of positive law?

c Sociological school

For sociologists, the law is a consequence of a spontaneous interaction of social forces. The sociological view is considered to be a reaction to the rationalist *ius natural*, which in principle does not agree with the notion of a universal morality or law, but which interprets the law in terms rather of a precise historical moment and a particular culture. There are two main schools of thought within modern sociology: the subjectivists in Germany, and the objectivists in France. For the sociologist-subjectivist, the law is simply that which is socially recognized as law.[452] Sociological objectivism, on the other hand, sees the obligatory character of law in terms of social necessity and justice.[453] To sum up, we can say that the sociologist also places notions such as social necessity, social validity, and justice, at the centre of their inquiry.

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[450] See Stephen C Neff, "A short history of international law" in *International Law* M D Evans, 2006 (2nd edition), p. 2.
[451] Dailler *et al.*, *ibid*., p. 116.
[452] Kolb, above note 443, p. 43.
[453] Dailler *et al*, above note 403, p. 116.

D Sources

Sources refer to the provenance and identification process of the norm. International law is responsible for establishing the global legal framework in which different actors interact with each other in safe and predictable ways, so as to avoid war, and to secure an environment most suitable to the maximum development, in fullest dignity, of the human personality. This is rather a qualitative approach to international law, which refers to the function of the law, and responds to the question of what purpose is served by international law. In this sense, international law is conceived of as a normative system of values. Furthermore, international law is understood in instrumental or goal-directed terms. As such, it is quite different from the classical conception of international law, as a system of rules imposing constraints, or just limiting the freedom of those subject to it. If we think about the function of international law, and ask about its sources, we will encounter an initial hurdle when attempting to distinguish between formal and material sources of law. When we look at the sources established in Article 38 of the Statute of the ICJ, we are referring to the formal sources of law. These are: international conventions[454]; international custom[455]; and general principles of law recognized by civilized nations. Secondary sources of law are judicial decision, and the teaching of the most highly qualified legal scholars. Lastly, Article 38 of the ICJ Statute recognizes the power of the Court to deicide a case *ex aequo et bono*. These formal sources of law make reference to the process of law formation; that is, to the method of positive law that authorizes a rule to be considered as binding within a legal system.[456] Moreover, the formal sources of law, established in Article 38(a) and (b) of the ICJ Statute, reflect the dominant positivism of the 19th century that, in its search for objectivism, did away with naturalist appeals to morality and natural reason. As a matter

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[454] Jennings & Watts (Oppenheim), above note 411, p. 33 International conventions or treaties give rise to rights and obligations which are legally binding on the parties to it Hersch Lauterpacht, "Oppenheim's International Law", 1967 (8th edition), Lauterpacht, above note, 404 p. 27 They are concluded for multiple purposes, "they stipulate new general rules for future international conduct or confirm, define, or abolish existing customary or conventional rules of a general character" In addition treaties can also be seen as "an act of a state, a legal commitment to act or to refrain from acting in a treaty-specified way. **See also** Anthony D'Amato "International Law Sources: Collected Papers", 2004 Vol. 3, p. 25.

[455] Lauterpacht, *ibid.*, above note, p. 25 International custom is considered as the older and original source of international law. Custom is a general practice that has been accepted as law, that is, that there is a conviction that these practices are obligatory or right. Thus, the two elements of custom are (1) practice and (2) *opinio juris* At this point it is to clarify that today practice cannot be narrowly understood as the external action of the states but broadly as including internal matters and acts of domestic legislative, adjudicative and executive nature.

[456] Dailler *et al*, above note 403, p. 124.

of fact, these formal sources of international law, insofar as they reflect positive doctrine, seek to ensure state power and state interest by giving priority, expressly or only tacitly, to the will or consent of the state.[457] On the other hand, when we speak of the material sources of law, the scope is much broader, for we are referring then to the foundations of the law[458], and to its substance. These fundamentals logically cover all possible areas, that is, they can be social, political, moral, economic, cultural, *et cetera*, and can likewise be related to other formal sources of law, the delineation of which with regard to material sources is not so clear, that is, to general principles, to decisions of the courts, and to the teaching of distinguished legal scholars. This distinction between formal and material sources is also understood in the sense of differentiating between sources and causes of laws.[459] Nevertheless, what is most important to notice here is that to speak about formal sources narrows the scope of those sources in general. In other words, not only formal sources are important but, as a matter of fact, material sources are too; they may be understood as the aggregate of substantive rules, materials, and other relevant areas from which a particular norm gains nourishment.[460] Formal sources are not the only source because these refer only to methods, to techniques that make it possible to elevate normative arguments into positive laws. Material sources are broader because they are found essentially at the beginning of the process of law formation. And this also implies that they remain present throughout the existence of the positive rules, such that the content which gave rise to a rule will accompany it in its positive form throughout, following a certain method established by a given formal source. The issue of the sources of a law in the end includes both its provenance and the identification of its norms.[461] In the Advisory Opinion regarding Reservations to the Convention on the Prevention and Punishment of the Crime to Genocide, the ICJ stated that the principles (sources) underlying a convention, that is, the principles that inspired the convention, are binding principles even without any existing convention or obligation.[462]

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[457] Oscar Schachter, "International Law in Theory and Practice" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1982 Vol. 178 No.5, p. 60.
[458] Dailler *et al, ibid*.,p. 124.
[459] Hersch Lauterpacht, "Oppenheim's International Law", 1967 (8th edition), Lauterpacht, above note, 404, p 24.
[460] Michael Freedman, "The uses of "general principles" in the development of international law" in *International Law in the Twentieth Century* L Gross (ed.), 1969, p. 246.
[461] Higgins, above note 417, p. 17.
[462] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 15, at p. 23.

1 Conciliatory Sources of International Law

In order to see whether or not it is possible to find a way to acknowledge human rights as part of a "public morality" exception in the international trade system established by the WTO, we need to focus, besides also looking at the material sources of law, on those formal sources of law that try to accommodate these two main senses in which an international law may be conceived, that is, the adjustment of a purposive law relative to a normative system of values within a neutral law of nations embedded in a system of positive rights and obligations constraining the freedom of action of its recognized subjects. These conciliatory sources are listed from item (c) of Article 38 ICJ Statute; they are general principles of law, judicial decisions, and doctrine.

a General principles

According to Article 38(c) of the ICJ Statute, the general principles of law recognized by civilized nations constitute a third autonomous source of international law. One of the most important functions of principles in general is to reconcile the extreme positivist and naturalist views of international law.[463] They serve to fill gaps (*lacunae*) in the law, and to clarify how rules derived from custom or treaties are to be applied.[464] There exists a doctrinal debate about whether or not international law may draw upon general principles of law without the express authorization of states. Nevertheless, the international judiciary has made use of such general legal principles, even without such approval.[465] In any case, one key reason for including general principles as a source of law is to allow the international judiciary to apply general principles to domestic legal features, at least insofar as they are applicable or transferable, in the context of international relations.[466] General principles may therefore be made universal in the Kantian sense, as expressed in his moral categorical imperative. Moreover, they may not only be made universal as normative claims relative to moral judgments, but also in a descriptive sense relative to empirical statements. In order for this principle to be applied, it need not necessarily be recognized by all states; recognition by most states is sufficient. This is especially true in the case of a new challenge or subject in

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[463] Lauterpacht (Oppenheim), above note 404, p. 30 **See also** Dominique Carreau, "Droit International" 2004 (8th edition), 2004, p. 287 The author tells that according the promoters of general principles of law as a formal source, general principles should constitute the concrete manifestation in contemporary law of the idea of natural law
[464] Jennings & Watts (Oppenheim), above note 411, p. 40.
[465] Dailler *et al*, above note 403, p. 383.
[466] Jennings & Watts (Oppenheim), *ibid*., p. 37.

international relations. In such cases, a recourse to general principles is more common than in areas where the body of international law already possesses a solid structure.

Principles also serve a variety of other purposes. Friedmann identifies three types of general principles: namely, principles of interpretation, procedural standards of fairness, and substantive general principles.[467] Dailler *et al* give some examples of the use of general principles. In the first place, they name principles relative to the general understanding of law, such as the principle of good faith, or the prohibition of an abuse of law. He also names principles relative to treaties, such as principles of interpretation. Here it is important to note that the use of principles for interpreting a rule may sometimes constitute a development in the rule itself. The dynamics of contemporary international law are characterized by an increasing amalgamation between applications of the law as a cognitive process, and the development of the law itself (judicial decision-making).[468] In the third place, there are principles that deal with liability. And yet another group is formed by procedural principles. Taking into account the aims of this work, reference must be made to general principles relative to individual rights, that is, the protection of fundamental individual rights and the principle of human dignity (e.g. Omega case).[469] In a more technical sense, Professor Wolfrum goes deeply into the legal standing of such general principles. In his view, legal principles are either obligations of conduct, or else obligations to achieve an objective. Following this classification, general principles may have their origin in either municipal law, international relations, general legal relations, legal logic, or conventional law. One clearly sees the importance of general principles when considering the limitations of international law; indeed, these principles are a mechanism for a progressive development of international law[470], as well as performing a constitutional function in the international legal system.[471] General principles are a useful legal tool for adapting to the reality of new demands, especially in the case of demands that cannot be subsumed under specific ordinary rules. Accordingly, the constitutional functions of principles are that they unify the legal system while at the same time performing a

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[467] Freedman, above note 460, p. 247.
[468] Rüdiger Wolfrum, "General International Law (Principles, Rules and Standards)" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol.4, p. 344 Citing Armin von Bogdandy.
[469] Dailler *et al*, above note 403, p. 385.
[470] Wolfrum, *ibid.* p. 344.
[471] Robert Kolb, "Principles as sources of international law (with special reference to good faith)" Netherlands International Law Review 2006 Vol. 53 No. 1 p 25

dynamic devolutionary function. In addition, general principles are also value-catalysers within the legal system; their constitutional character in relation to adjudication is reflected in their function of guiding and even correcting interpretation. General principles are a very useful source of reasoning and argument, accessible both to those making, and to those applying, the law.[472]

b Judicial decisions and teachings of highly qualified authors and teachers

Article 38 of the ICJ Statute determines that court and tribunal decisions are subsidiary and indirect sources of international law. However, one of the principal problems associated with this source of law is the distinct views on the role of the judge in the process of law formation. Traditionally, the judge has applied positive law; that is, he or she is an authority that applies positive law, but without holding any specific power to "create" new law. According to this view, the role of the judge is purely secondary, or supplementary, in the process of law creation. However, the decisions of international courts and tribunals are tremendously influential, especially since they are considered to be "impartial and well-considered statement(s) of the law by jurists of authority."[473] In other words, a judicial decision is the means by which another form of authority, the judiciary, expresses its legitimate legal views. Another problem faced by international jurisprudence is that, because international law is fragmented, it may immediately create a lack of coherence between different outcomes, even in similar cases. However, the dialogue, co-operation, and attempts at harmonization between domestic and international courts clearly reduces the risk of incoherence. Another subsidiary source is the writings of the most highly qualified authors and teachers. These allow the courts and tribunals to ground their decisions upon sound theoretical arguments. International courts and tribunals increasingly draw upon such sources; they add weight to their decisions.

c Other conciliatory sources

Article 38, ICJ Statute, is not exhaustive. International law is fragmented in character; the international community lacks a strong international legislature, and a compulsory adjudicative system to which all members are required to submit their differences. That is, there is no authority endowed with compulsory jurisdiction to ascertain the law; there

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[472] *Ibid.*, pp. 1-36, particularly pp. 7, 9; pp. 27 et seq

[473] Sir Robert Jennings and Sir Arthur Watts, Oppenheim's International Law 1992 (9th edition) (3rd impression) 1993, p. 41 Jennings & Watts (Oppenheim), above note 411, p. 41.

is no single authority to enforce the law; and there is no written constitution.[474] Given the decentralization of the international legal system and the wide range of material and formal sources of international law, it becomes a very difficult task to identify what may or may not truly be considered authoritative. Traditionally, formal sources of international law are those established in Article 38, ICJ Statute. These sources are binding on the ICJ; in addition, they are authoritative, in general terms, for other international tribunals and courts.[475] Nonetheless, even if these formal sources (particularly treaties and custom) do narrow the scope of the material sources, they are still something more than pure positivism and formalism. The sources codified in Article 38 of the ICJ Statute are considered to be Grotian in that they reject both extreme positivism and extreme *ius naturalist* views, while nevertheless establishing consensual and non-consensual sources with a view to harmonizing the will of the state with theory and experience.[476] Even so, one question remains unanswered for legal scholars, namely: "to what extent are the categories listed in Article 38 of the Statute of the International Court of Justice to be regarded as exhaustive?"[477] Certain scholars argue that the sources listed in Article 38, ICJ Statute, are not exhaustive; rather, they are unilateral acts.[478]

Equity is also a source of law. "Equity as a legal concept is a direct emanation of the idea of justice. The court whose task is to administer justice is bound to apply it".[479] To ground a decision on instances of equity is to make recourse to the underlying moral basis of the rule in the sense of justice and fairness. Equity is in this sense a rather direct matter, in which a material form equates to a formal source. Equity is a broad legal concept to be applied to a totality of facts. In addition, equity may also be understood as an element or part of an existing rule of law. In this case, the controversy is not equity itself, but a rule of which equity is part. Although distinct, closely related to the principle of equity are the formal sources of law established in Article 38.2, ICJ Statute, according to which the court, if the parties agree, can decide *ex aequo et bono*. That is, a

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[474] Rebecca M M Wallace; Olga Martin-Ortega, "International Law", 2009 (6th edition), p. 7.
[475] Jennings & Watts (Oppenheim), above note 411, p. 24.
[476] *Ibid.*, p. 25.
[477] Higgins Rosalyn, "Themes and Theories", 2009, p. 121.
[478] Hugh Thirlway, "The Sources of International Law" in *International Law* M D Evans, 2006 (2nd edition), pp. 134 *et seq*. **See also** Jennings & Watts (Oppenheim), *ibid.*, pp. 22 *et seq.* 25.
[479] *Case concerning the Continental Shelf* (Tunisia/ Libyan Arab Jamahiriya) Judgment of 24 February 1982, ICJ 1982 p. 18 at p. 60 , para. 71.

court may reach its decision on the basis of such considerations as it regards as right and proper.[480]

As the international community is dependent upon its institutions, it is argued by some that the activities of international organizations can, to a certain extent, be considered sources of international law. Although the activities of international organizations are themselves formally dependent upon treaty or customary law, experience in international adjudication and state practice indicates that the authoritative work carried out in international organizations certainly could be characterized as a source of law. Members of the international community have developed, through the work of the international organizations, a way to act collectively[481],giving expression, at times, to a general consensus. In addition, international organizations act autonomously through the development of organizational rules to regulate internal affairs. Sometimes these take a quasi-legislative form, e.g. the adoption of instruments legally binding upon states members.[482] The statements issued by international organizations vary as to their legal weight and significance, ranging from decisions, to recommendations, to resolutions. International organizations are a forum for states to act not only individually, but also collectively, and across a wide range of subjects.[483]

cc Comity and Morality

Ultimately, attention also has to be drawn to the role that international comity and morality play as sources of international law. It is widely accepted that the rules of international comity (*courtoisie international*) are not a source of international law; at any rate, they are not considered as such. Nevertheless, general opinion admits that the rules of comity can evolve into rules of law. A different issue is that of morality. Morality appears often as the *rationale* behind the rules established by law. However, it is sometimes argued that the rules of morality differ from the rules of law, in that the rules of morality apply only to conscience; they are not enforced by any external authority. In fact, the International Court of Justice does admit some limited legal value to notions of morality when it states that, "it can only take account of moral principles in so far as they are given a sufficient expression in legal form".[484] However, scholars

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[480] Jennings & Watts (Oppenheim), above note 411, p. 44.
[481] *Ibid*., p. 46.
[482] *Ibid*., p. 47.
[483] *Ibid*., p. 48.
[484] Cited in Jennings & Watts (Oppenheim), *ibid*. p. 52.

plead that "it is scientifically wrong and practically undesirable to divorce international law from the general principles of law and morality which underlie the main national systems of jurisprudence regulating the conduct of human beings."[485] This statement reaffirms the idea that international law exists beyond states; at the same time, it reaffirms the notion that the individual is the key feature of international law. Further, if it is true that international law is a product of moral and economic factors, progress in international law must necessarily be understood in similar or in the same terms. Peace, human development, and progress, all depend on standards of public morality and economic performance. Progress in international law, in the sense of the norms established in the UN Charter, depends on harmony between these two factors. Furthermore, the recognition of fundamental and universal human rights and freedoms as a part of international law may itself be understood as tacit acknowledgement of the presence and importance of individual human morality in the establishment of international, transnational, and universal truths and values. Indeed, the inclusion of human rights into the body of universal rules adds individual morality to the overall ethical content of international law; its inclusion cannot but strengthen the legal quality of international law. This affirmation is a response to the idea, which we share, that the essence of law is morality.[486] Following Lauterpacht, "Law, as repeatedly been stated, is the minimum of socially obtainable morality."[487]

E Structure

1 Horizontality

International law has a predominantly horizontal structure, but a vertical architecture is necessary in order to achieve common goals. International law has shifted from being a law of co-existence to a law of coordination. Furthermore, the principle of co-ordination has been complemented by the principle of cooperation. Moreover, it is suggested that coordination and cooperation should go hand in hand with the principle of solidarity.[488] However, these guiding or structural principles of international law still reflect a strong bias towards an horizontal structure; a universal vertical structure is neglected.

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[485] Jennings & Watts (Oppenheim), *ibid*., p. 52.
[486] Lauterpacht, above note, 415, pp.46-49.
[487] *Ibid*., p. 205.
[488] Rüdiger Wolfrum "International Law" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol. 5, p. 820.

However, a closer analysis of these principles reveals that certain forms of vertical structuralism do exist. The process of globalization brings together new global actors and fresh calls for global justice, both economic and social. The idea of a universal normative value system, regulated and enforced by law, leads us to reflect further on the possibility of a vertical structure to the global legal system, and the notion of the constitutionalization of international law. On the one hand, the distinction co-existence/coordination, the latter complemented by cooperation and solidarity, refers to horizontal international rules; that is, a focus on statehood. On the other hand, the distinction coordination/subordination refers to a hierarchical structure of rules; that is, to a vertical structure of law.

2 Common objectives

The existence of a common objective demands harmonization. As a result of a lack of central authorities and central mechanisms of sanction, "conflict between international norms is inherent in the system of international law".[489] Furthermore, international law is a fragmentary system. It is a matter of perspective. If we view international law from the perspective of prevailing opinion about its nature and content, with states as creators of law, and (common) consent as the basis of international law, basically a static system, then this could be considered true. However, an alternative vision of international law, even when understood within the existing legal framework of authoritative decision-making, could lead us to very different conclusions. First, it is clear that a fragmented legal system could easily result in conflicts of norms. However, if we were able to identify solutions to disagreements and discordant rules, within an existing legal framework, in order to accomplish certain common objectives as derived from consent and the dictates of a universal morality, as opposed to the particular objectives to be accomplished by any single individual, then the language of conflict must necessarily be replaced by that of relationship. Likewise, the belief that a conflict in norms is inevitable in the context of international law must be replaced by a confidence in the harmonization of conflicting objectives. The search for a common goal makes it necessary to look beyond the immediate process of law creation in international law, and instead to include different forms of decision-making, beyond legislation or agreements, such as international executive authority, and the international judiciary, as well as admitting the realm of non-positive sources of law, such as

[489] Pauwelyn, above note, 437, p. 17.

morality. This way of harmonizing legal rules of course depends on the existence and acceptance of imperatives outside the realm of positive law. Any attempt to harmonize exiting legal values depends upon and should be considered, in the latest instance, in terms of the justice of a given decision.

3 Emerging hierarchy and verticality

There exists an emerging hierarchy/verticality in the international legal system. The emergence of a hierarchy of values such as that manifested in human rights, and legal concepts such as *ius cogens* or obligations *erga omnes,* as well as the emergence of a unified international community comprised of states and individuals, suggests that there is a hierarchy of values (human dignity, economic welfare, peace, security, democracy, humanity) interests (collective interests, individual interests, private interests, state interests) and norms (UN Charter, UNHR, ICCPR, ICESCR, WTO GATT, *ius cogens* norms, *erga omnes* obligations, ordinary norms). First, there is a hierarchy among the norms of a particular legal regime. In the area of human rights, for example, we have non-derogable human rights, on one side and, on the other, human rights from which the state may deviate in case of emergency. Second, there is also a hierarchy within the international legal system in a narrow sense, namely the existence of *ius cogens* norms and obligations *erga omnes*. Within the system of international law, a shift has taken place from considering all norms equal, towards a recognition, rather, that some norms, "based on their substantive content", are more important than others.[490] Third, there is also the hierarchy of a global or universal system of law in the largest sense, within an overall system of law that includes both international and domestic law.

a Constitutionalization

The process of constitutionalization of international law reflects the verticalization of international relations. The acknowledgement and acceptance in many fields of legal international decisions by both nation state and international society shows that the status of some global (or universal) rules is superior to that of municipal production. The emergence of a hierarchy of values, interests, and rules, obviously makes us think about a process of constitutionalization in international law. Interestingly, this process of constitutionalization not only reflects the significant social changes that have occurred because of economic expansion and globalization in general; it is rather a

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[490] *Ibid.* p. 21.

twofold process which also includes a parallel institutional development in addition to the verticalization of law. One needs to think only of whether or not it is possible to achieve a common and universal goal by means of an horizontal structure? Horizontal societies are not able to stabilize power. Coercion and coaction function much more effectively within a vertical structure, as demonstrated in domestic systems. We must therefore bear in mind that constitutionalization means two things. First, that there is a hierarchy of norms within international law, not only from a formal point of view, in terms of a hierarchy among the sources of international law, but also from a material point of view, in terms of the substantive content of norms. Second, there is a growing tendency to view the hierarchical structure of law as a positive, unifying factor. An hierarchical structure encompasses the individual, the state, and the international community, thus acknowledging the existence of a global or universal society. In this way, it is superior in rank to any other kind of norm, be that global, regional, or domestic. The acceptance and recognition of certain universal values means necessarily that there is at least a minimum shared content to any juridical construct with authority in the area of rights and obligations. The justification and juridical content of these universal values can be found only at a very high level of abstraction. This overriding idea of justice must, from a legal perspective, try to harmonize the justice of the decision according to positive law, with the justice of the decision according to meta-juridical notions. The question of how to identify these rules is one task of the participant in the process of law formation. The legal practitioner is thus responsible for readjusting legislation so as to make and shape the law. This does not means that it is exclusively a task of the legislative; rather, it is the task of all decision-makers.

F Hierarchy

The relationship between international law and municipal law is the subject of extensive debate both from a material and from a formal perspective. Materially, the problem is one of distinguishing between which matters should be regulated by international law, and which by national law. The question of the material sphere of validity of international law relates to the doctrine of the state's *domaine reservé*. Nevertheless, as previously affirmed, materially, the sphere of validity of the international order is

unlimited.[491] Formally, the debate addresses the process of the elaboration and application of international norms, on the one hand and, on the other, of internal law.[492] The polemic stresses the respective unity, duality, or plurality of legal orders. The two opposing doctrines regarding the relationship between internal and international law are the dualist and monist schools of thought. For the dualists, there exist two coexisting independent systems, totally separate from one another. The efficacy of international law within the system of domestic law is not direct; rather, international law is adapted and transformed into national law. Thus, each reigns supreme in its own sphere. Contemporary doctrine refers to the existence not only of two legal systems, but rather to a plurality of them, as many as there are institutions. On the other side, the monists contend that international law is directly applicable within a system of domestic law; their relationship is basically one of interpenetration. According to this theory, both schemes belong to a unique system that is grounded in the identity of subjects (individuals), and the identity of sources (the existence of an objective foundation and not procedures).[493]

The general doctrinal trend has seen a progressive development, from the law of coordination to a law of subordination that favours the hierarchical structure of the international legal system, as demonstrated by increasing institutionalization. On the one hand, dualists do not pay much attention to the question of a hierarchy of norms within international law. On the other, those who admit the existence of a unique system assure the primacy of international law. In spite of all these debates, scholars generally agree with the principle of the primacy of international law. Accordingly, the principle of the primacy of international law is regarded as the starting point in their conception of an all-embracing legal system. Such a thinking becomes possible when states are considered not to possess sovereignty in an absolute sense. Sovereign collectives acting within a universe of legal structures thus depend on the existence of a superior law; this superior law is international law.[494] The International Court of Justice has recalled in its Advisory Opinion of 26 April 1988, that "the fundamental principle of international law

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[491] Kelsen, above note 406, p. 300.
[492] Dailler *et al*, above note 403, p. 105.
[493] *Ibid.*, p. 107.
[494] *Ibid.*, p. 105. According to them this example correspond with te monists view of the relationship between national and international law represented by the Vienna School (Kelsen, Verdross, Kunz). also Scelle

that international law prevails over national".[495] However, the extent of the supremacy of international over national law on the international plane remains an open question.[496]

There is no hierarchy under the classical horizontal dogma of international law. Municipal law systems contain a hierarchical structure that "reflect[s] the will of people to make some legal commands more important and stronger than others, for they reflect values shared by the overwhelming majority of citizens."[497] Although this is an undeniable truth for western democratic and constitutional societies, classic international law with its horizontal structure, in fact recognizes no hierarchy of sources or rules. Similarly, international law was first conceived of as a law of coexisting entities, without any limits imposed upon the sovereign powers of states; it was quite unlike a domestic system where laws are subject to a vertical structure of subordination.[498] Furthermore, international law has been traditionally conceived of as contractual law born from state consent. It is a law whose sources are all placed at an equal level. The result of this lack of hierarchy was that the relationship among international rules derived from the same source came to be governed by the principles of conflicts of rules like *lex posteriori derogat anteriori and lex speciali derogat generali*.[499]

1 Examples

Today, the panorama is entirely different. At present, new conditions have brought into existence a special class of general rules that enjoy a special legal force. The principal category of rules is the so-called *ius cogens*; these are said to have a peremptory nature.[500] Another important category of superior norms are the obligations *erga omnes*, owed to the international community as a whole. Obligations *erga omnes* are said to be "virtually coexistensive"[501] with obligations of *ius cogens*. In addition, these new developments have brought some scholars to plead in favour of giving *erga omnes*

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[495] Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 Advisory Opinion of 26 April 1988, ICJ Reports 1988, p. 12, at p. 34 para. 57.
[496] Buergenthal & Murphy, above note 407, p. 7.
[497] Cassese, above note 430, p. 198.
[498] Pauwelyn, above note 437, p. 94.
[499] Gilbert Guillaume, "Jus cogens et Souveraineté" in L'Etat Souverain dans le monde d'aujourd'hui. Mélanges an l'honneur de J.-P. Puissochet, 2008, p. 127.
[500] Cassese, *ibid*., p. 199.
[501] Pauwelyn, *ibid*., p. 100.

effects to the so-called public interest norms.[502] Another example of potentially superior norms are the obligations under the UN Charter.[503] Article 103 of the UN Charter states that, "[I]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Furthermore, binding obligations with moral or constitutional content, such as the prohibition of slavery, have been developed successfully within the context of international law. Universal criminal law is another field where the fundamental rules in international law are developing fast. In our contemporary world, international law is far from being a set of norms jumbled together in an uncoordinated assemblage of rules that loosely belong to a fragmentary system. For this reason, we can affirm that international law recognizes and accepts the existence of such fundamental rules of the international legal order as *ius cogens* norms, and *erga omnes* obligations. Interestingly, from a legal perspective the distinctive criterion of all these rules is their legal consequences. Their common factor is the essential need for urgent realization of those values protected by the rule. [504]

G Ius cogens

The notion of *jus cogens* has undergone a deep shift in meaning between the classical period and now. During the classical period, the notion was connected to the doctrine of natural law (*ius natural vel necessarium*). In contrast, during the positivist period a notion of the imperative was almost forgotten. Although *ius cogens*, as such is hard to conceive in international law before the second part of the 20th century, states nevertheless did to some extent limit their freedom of action. States used to limit their action by way of considering treaties contrary to the universal moral order as impossible. According to classical international law, the object of the treaty must thus be physically and morally possible.[505] By the time of the League of Nations, the notion

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[502] *Ibid*., p. 101 "the idea is to make those norms binding on all states, even without their consent, on the ground that they serve a public interest and should hence be seen as benefiting also non-parties".
[503] Alexander Orakhelashvili, "Peremptory norms in international law", 2006, p 7.
[504] Stefan Kadelbach, "*Jus cogens*, obligations *erga omnes* and other rules –the identification of fundamental norms" in *The Fundamental Rules of the International Legal Order. Jus cogens and Obligations erga omnes*. C Tomuschat J-M Thouvenin (eds.), 2006, p. 40.
[505] Mark E. Villiger "Commentary on the 1969 Vienna Convention on the Law of Treaties", 2009, p. 665 **See also** Jochen A Frowein, "*Ius Cogens*" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 6, p. 443, Referring to A W Heffter "Le droit international de l'Europe 1883" **See also** Eva Kornicker, "*Ius cogens* und Umweltvölkerrecht", 1997, p. 11 footnote 42 quoting Alfred Verdorß in „Staatsverträge", 1935, p. 294 "ein Staatsvertrag ist wegen seines Inhaltes unverbindlich,

of imperativeness in international law reflected, through analogy to the roman tradition of civil law, the right freely to accept treaty restraints only in relation to treaties *contra bonos mores* (against good morals). In the private law tradition, the expression *ius cogens* embraced all laws concerning public policy and good morals.[506] This idea of contracts *contra bonos mores* is contained also in Article 53 of the Vienna Convention on the Law of Treaties. However, Article 37 of the VCLT refers to "treaties conflicting with a peremptory norm of general international law (*jus cogens*)". During the drafting of Article 53 of the VCLT, the delegation of Luxemburg interpreted the object of the International Law Commission, in establishing peremptory norms of international law, is "to introduce as a cause of nullity criteria of morality and public policy such as are used in internal law to determine the compatibility of private contracts with fundamental concepts of the social order." In addition, the delegation of Luxemburg "questions whether such concepts are suitable to transfer to international relations which are characterized by the lack of any authority, political or judicial, capable of imposing on all states standards of international justice and morality." The delegation of Luxemburg also found that it was not possible to define peremptory international law, in the context of international relations, by considering that an article on *ius cogens* rules of international law could create "a great deal of uncertainty".[507] These statements from the delegation of Luxembourg capture an essential part of what a *jus cogens* norm was in 1969, and what a *ius cogens* norm is today. That is, the concept of *jus cogens/ius cogens* developed from being a technique of non-derogablity to being a body of superior, proto-constitutional norms, even if materially but not formally acknowledged as such. By 1969, the VCLT affirms at the global level the rule of the absolute nullity of a treaty when its object is not explicit. It also affirmed the rule that treaties *contra bonos mores* are void.[508] This means that a positive recognition of moral imperatives is limited. By the end of the 20th century, the *ius cogens* rules began to be understood more broadly, beyond a narrow conception of public order; indeed, it has become increasingly clear

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wenn er entweder gegen eine positive, zwingende Völkerrechtsnorm verstößt oder wenn er etwas Unmögliches *oder etwas sittlich Verbotenes anordnet*." Emphasis added.

[506] For a detailed history of the origin and evolution of *ius cogens* see Erik Suy, "The concept of *Ius Cogens* in International Law" in *Lagonissi Conference on International Law, Papers and Proceedings* 1967 Vol. 2, pp. 18-25.

[507] Documents of the second part of the seventeenth session and of the eighteen session including the reports of the Commission of the General Assembly A/CN.4/SER.A/1966/Add.1, Yearbook of the International Law Commission. 1966 Vol. 2, p. 20.

[508] Robert Kolb, "Observation sur l'évolution du concept de *jus cogens*" Revue de Droit International Public 2009 Vol. 113 No. 4, p. 838.

that international society requires legal protection for its core common and universal values. For this reason, by the end of the 20th century, legal scholars gave *ius cogens* norms a superior status to other ordinary norms of general international law. Nowadays, norms of a peremptory nature are considered to be vectors of transformation within the international legal order; this is so in both a communitarian (common interest) and a universal (universal human rights) sense.[509] Peremptory norms are thus a vehicle for the incorporation into law of community and individual human universal values, which reflect the transformation of international law into a value-based universal legal order. *Ius cogens* strives for the protection of the interests of the international community and society, and the protection of human dignity; it is not only about the safeguarding of national interest. It also provides a mechanism by which to attempt to give coherence and unity to the fragmented legal system of international law.

Among the many theories of *ius cogens*, the most accepted is the one that conceives it as necessary to establish an international public order. Scholars have advanced several theoretical justifications for the *ius cogens* rules. The main purpose of these efforts has been to identify rules of a universal reach so as thereby to compel states to take certain actions. A slightly different purpose has been to work out rules away from which a sovereign state must not deviate. These theories refer mainly to the existence of principles of an international, transnational, and universal morality, and to general principles of the international community.[510] One important example of *ius cogens* theory addresses the existence of an international public order in terms of fundamental legal rules that encapsulate axiological norms that guide the international community/society. Indeed, among legal scholars, this appears to be the most accepted theory of *ius cogens*.[511] However, in this theory, public order can be understood in two senses, a narrow and a broad. On the one hand, a narrow conception of public order limits its scope to the legality of the object of the treaty; it tries to reduce the notion of international public order to that of the *ius cogens* rules, arguing that this was the

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[509] *Ibid.*, p. 839 According to Prof. Kolb, the evolution of *ius cogens* has the following sequence: "(1)vicaire du droit naturel (2) vecteur de construction du droit international, (3) traits *contra bonos mores*, (4) validité des traités à raison de leur contenu, (5)super-légalité international aux effets chatoyants et multiples.

[510] Władysław Czapliński, "Jus Cogens and the Law of Treaties" in The Fundamental Rules of the International Legal Order. Jus cogens and Obligations erga omnes. C Tomuschat J-M Thouvenin (eds.) 2006, p. 81.

[511] Robert Kolb, "Théorie du *ius cogens* international. Essai de relecture du concept" 2001 **See also** Orakehlashvili, above note 503, p. 7.

intention of the drafters of Article 53 of the VCLT. On the other hand, a broad conception of public order extends its fundamental rules to include and reflect the fundamental values of the international community/society. This broad notion is consistent with the transformation of the international community into a universal society that, in its legal structure, reflects a transformation from a horizontal, state-centred regime, into a vertical, coercive-coactive, individual-collective, concentric society. This transformation fits with the influential notion of an international public order visualized as an institutionalized legal order at the level of international community/universal society. Furthermore, the international legal order is based upon and strives for values and criteria developed through policy-making and inspired by its aims, and by the existence of its proper *telos*.[512] Accordingly, for those who relate the existence of *ius cogens* to the international public order, *ius cogens* norms will play a narrower or broader role depending on how the international public order is understood. Nevertheless, common to all conceptions of international public order is the understanding that public order is based on morality, and that its function is to outlaw offenses against the morality of a given system. It refers both to positive law and to recognized principles of morality, even if these are not always or necessarily reflected in positive law.[513] The Inter-American Commission said in the *Victims of the Tugboat "13 de Marzo"* case, for example, that peremptory norms are "necessary to protect the public interests of the society of nations or to maintain the level of public morality recognized by them".[514]

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[512] Robert Kolb, *ibid.*, pp. 68-82 Prof Kolb identifies seven principal theories and other of a secondary nature. The seven principal theories are 1.- the *ius cogens* as a rule of natural law; 2.- the *ius cogens* as an axiological rules of the international community; 3.- the *ius cogens* as a technical rules inherent to law (non-derogability); 4.- the *ius cogens* as a rules of international constitutional law; 5.- the *ius cogens* as rule of vertical law conflicts (the theory of the hierarchy of sources in international law; 6.- the *ius cogens* as a rules of horizontal conflicts of law (the theory of conflicting successive treaties); 7.- the *ius cogens* as a warrantor of the survival of the system and the entities composing it (theory of an essential minimum). **see also** Stefan Kadelbach, "Zwingendes Recht", 1992, p. 146 Prof Kadelbach groups *ius cogens* theories into four: 1.- Natural law theories; 2.- theories of positive law, including voluntarism, normativism, realism, analytical positivism; 3.- theories influenced by social sciences, which includes anthropocentric models; political approaches, policy oriented approach –the New Heaven school of McDougal and Lasswell-, socialist doctrines and extra-juridical theories; 4.- theories of discourse.

[513] Orakehlashvili, above note 503, p. 49.

[514] Victims of the Tugboat „13 de Marzo" vs Cuba, Inter-American Commission on Human Rights, Report No. 47/96, Case 11.436, 16 of October 1996, para. 79.

1 Anthropocentrism

Some approaches to *ius cogens* enrich our legal understanding. One anthropocentric model sees the existence of *ius cogens* rules as stemming from the notion that international law has its ultimate source in the interests of the individual. Thus, the law ultimately gives priority to and approves that which ensures the existence—the subsistence and the realization—of the individual human being. Accordingly, peremptory norms of international law perhaps give rise to new interpretations of international law, adding depth. In contrast, individual agreements between states are simply not of comparable value to the international community. What really matters are the objectives of peace, social justice, and human realization in dignity. Similarly, the protection of individual values and interests implies the existence of some basic values and interests of a higher rank.[515] This anthropocentrism does not mean that universal society is based only on certain human values; it means, rather, that anthropocentrism must be added to the concentrical structure of universal law. Theory apart, it has been widely accepted by legal scholars that *ius cogens* norms are hierarchically superior to other values, and express responsibilities that cannot be evaded by states provided that the international community itself upholds the values encapsulated in them.[516] What is also clear is that *ius cogens* norms are substantive primary rules based upon interests that extend beyond the state, to include public and private interests, community and general human interests; they describe a moralization of international law[517] at a universal level.

2 *Ius cogens* and Art 53 VCLT

From the point of view of positive international law, *ius cogens* norms are defined in Article 53 of the Vienna Convention on the Law of Treaties of 1969 (VCLT), which regulates in the case of, "*Treaties conflicting with a peremptory norm of general international law ("jus cogens")*". It states that, "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 (VCLT), a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a

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[515] Frowein, above note 505, p. 443
[516] Christian Tomuschat, "Reconceptualizing the debate on jus cogens and obligations erga omnes-concluding remarks" in *The Fundamental Rules of the International Legal Order. Jus cogens and Obligations erga omnes*. C Tomuschat J-M Thouvenin (eds.), 2006, p. 425.
[517] *Ibid.*, p. 426.

whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Today, it is argued by some scholars that the concept of *ius cogens* has expanded beyond what was originally established in Article 53 VCLT. If, in 1969, peremptory norms were meant to be only a non-derogation technique, then today, the main change in the nature of *ius cogens* rules is a consequence of responses to the changes and challenges brought about by globalization. Similarly, peremptory norms have changed from being, on the one hand, a technique of non-derogation boasting the singular effect of nullifying any positive enactment in an horizontal decentralized society, into being, on the other, a body of rules that reflects a normative hierarchy of the material as opposed to formal type, and that contains the fundamental values of a society, or rather, indeed, of the entire international, transnational, and universal society. According to Kolb, this body of material norms enables the legal practitioner to grant certain concessions based on social necessity (*besoin social*), justified not only inductively through experience, but also deductively, through a kind of axiological reasoning (*raisonement axiologique*).[518]

a Legitimating force (substance)

Ius cogens norms have their legitimate force from their substance. The fact that Article 53 of the VCLT establishes that, peremptory norms are based on acceptance and recognition by the international community of states as a whole, raises the question of through which mechanism does the international community of states as a whole bring into existence these types of norms. It also raises again the question of how the international community is to be understood. Hence, while undeniable that international norms are imperative in nature, this formulation also addresses indirectly the issue of substance, or content, of these norms, and likewise raises questions concerning the specificities of process formation, recognition, and acceptance. Therefore, it has been suggested that legitimacy lies here in the subject dealt with, and in the ideas expressed. [519] Although a prominent characteristic of *ius cogens* norms is that they be defined by their effects, this is no reason to deny that an integral part of the norm itself is also causality. It is precisely the content of the *ius cogens* rules that gives it this quality[520], rendering superior these norms. Indeed, the central idea underlying *ius cogens* rules is

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[518] Kolb, above note 508, p. 842.
[519], Pauwelyn, above note 437, p. 98.
[520] Georges Abi-Saab in "Lagonissi Conference on International Law, Papers and Proceedings", 1967 Vol. 2, p. 15 **See also** Orakehlashvili, above note 503, p. 44.

the indispensability of core human and community values and interests. Expressed in another way, "the undisputed denominator of all *jus cogens* norms is the prohibition against disposing over certain rights."[521] Of course, these do not unburden us of the question of the content of the norm in itself; that is, the question of the substance that underlies the right in relation to which derogation is not permitted. The effect of the rule alone does not necessarily tell us much about the quality of the rules; and it is precisely the quality of the rules that depends upon their content. This raises a further question: for what substantive reason is a norm peremptory? What are the operational criteria for determining such content? In order fully to answer these questions it is necessary to look into the overall system of the legal order, asking questions about *telos*, aim, and objective. These can be found today in the UN Charter, and may be summarized in the words peace, social justice, and respect for the human dignity of the individual. Therefore, the answer towards which we are inclined is found here in a broader conception of the international public order, and in a sense of an international, a transnational, and a universal morality. The content of *ius cogens* alludes to the existence of an international public order, a universal morality, the observance of the main interests of the international community, and the guarantee of the realization of all our human capacity and potential.[522] If we were to use a synonym word, with greater contemporary resonance, we might choose the word "capability", so as to include also the issue of economic performance, as well as individual realization. One international tribunal has said that norms are peremptory because of the values they protect.[523] The crucial, indispensable, and therefore mandatory principles are those that may be considered peremptory. By way of summary, we can affirm that *ius cogens* is defined in Article 53 of the VCLT in two ways, one functional, referring to *rationale*, and the other on the basis of its effects.[524]

b Characteristics

Those who see *ius cogens* norms from the point of view of their object identify in the concept several characteristics. These investigations lead one to think not that the concept is one thing or another; rather, it contains a multitude of meanings. First, these

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[521] Kadelbach, above note 504, p. 34.
[522] Stefan Kadelbach, "Zwingendes Recht", 1992, p. 105.
[523] Orakehlashvili, above note 503, p. 46. Referring to peremptory norms in international law Inernational Criminal Tribunal for the ormer Yugoslavia *Furundzija*, 38 ILM 349, 1999.
[524] Kornicker, above note 505, p. 8.

types of rules are inherent to any legal system, and are an essential part of it. They protect the legal system from "subversive arrangements". They are the "irreducible minimum" of international law.[525] At the same time, another group of scholars, who defined peremptory norms by their object, refer to the degree of organization found in a society ordered by a legal system; that is, a narrow or broad public order. For them, *ius cogens* rules articulate elementary social values within a legal system; they are given primacy insofar as they are considered necessary for the maintenance of the community.[526] *Ius cogens* norms are those that refer to the more or less narrow or broad content of the international public order, as recognized and accepted by the international community of individuals and states.[527] Furthermore, authors like Focarelli, see *ius cogens* norms also as a promotional technique to develop "consuetudinary norms" aligned to the future (*norma giuridica in futuro.*). Accordingly, promotional *ius cogens* is a boost, a drive, situated somewhere between the superior and the ordinary—which is at least extraordinary—in relation to those values of justice that require concretization.[528] These different theories of international *ius cogens* are characteristic of this particular type of norm. Nevertheless, there seems to exist in general opinion a belief that the most outstanding and basic characteristic for determining peremptory norms is to be found in the link between international public order and morality.[529] That link lends *ius cogens* norms a certain elasticity that allows them to accommodate new developments, in the sense of moral universalism as opposed to moral absolutism; that is, *ius cogens* can be modified only by subsequent norms of general international law that have much the same character.[530]

c Meaning

The meaning of Article 53 of the VCLT: *ius cogens* represents imperative values that constitute universal society. One possible and important interpretation of Article 53 of

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[525] Abi-Saab, above note 520, p. 9.
[526] *Ibid.*, p. 10.
[527] Kolb, above note 511, pp. 68-82 Making reference to different conceptions of the public order *i.e.* in a narrow sense (1) public order as the lawful of the object of the treaty (2) public order as a synonym of ius cogens; in a broad sense (1) public order as set of rules expressing the fundamental values of a society (2) public order as the legal institutionalized order of the international community ; atomist conceptions (1) Public order as *raison d'Etat*, (2) public order as values and criteria to the service of policy-oriented conception of law.
[528] Carlo Focarelli, "I limiti dello *jus cogens* nella giurisprudenza più recente" Rivista di Diritto Internationale 2007 Vol. 90 No. 3, p. 649.
[529] Orakehlashvili, above note 503, p. 48-49 Referring to authors such as Levi, Virally, McNair, Verdross, Cassese, H Lauterpacht.
[530] Art 53, VCLT.

the VCLT is that, if the legislator decides to express a definition of a norm through a rule of positive law referring only to its effects, it is because he possesses the conviction that there exists a range of values that need legal protection, even as it is for the international community of states as a whole to decide which values deserve such protection. Moreover, this may now be understood as the real sense of the provision; indeed, the protection of certain superior values arguably requires a constitutional support; that is, formal support from the imperative values that constitute the universal society. If true that *ius cogens* norms are fundamental rules of the international legal system, we face a question, too, of a constitutional character, concerning the international society or community.[531] Article 53 of the VCLT proves the existence of a hierarchy within international law. The fact that the lawgiver accepts that it is for the international community to identify those values proves also the necessity of conferring upon the international community of states as a whole, and not only states, the right and authority to decide upon an appropriate hierarchical structure.

d Scope

The scope of *ius cogens* norms stretches to the aggregate acts of the subjects of international law: (1) as a technique of non-derogability; and (2) as a technique to limit freedom of action. Regarding the scope of Article 35 of the Vienna Convention on the Law of Treaties, of 1969, the prohibition to derogate from *ius cogens* rules is limited to treaty law. However, the general opinion and the international judiciary[532] are of the view that the scope of *ius cogens* is broader than contractual law. Currently, it is suggested that *ius cogens* norms produce a multiplicity of effects that not only place restraints on determining the validity of legal acts, but that also limit a freedom of action. This multiplicity of special effects, varying according to context, strengthens the legislative function of the legal practitioner. It does so, first, because these effects are deduced from the content of the rule rather than being inductively demonstrated or empirically ascertainable [533]; and, second, because the role of the judge in a decentralized society is a much stronger one in terms of exerting social control. Clearly, the scope of *ius cogens* norms stretches to the aggregate acts of the participants at the

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[531] Paul Tavernier, "L'identification des règles fondamentales, un problème résolu?" in *The Fundamental Rules of the International Legal Order. Jus cogens and Obligations erga omnes*. C Tomuschat J-M Thouvenin (eds.) 2006, p. 2 **See also** Kolb, above note 508, 842.
[532] Kornicker, above note 505, p. 57 footnote 301.
[533] Kolb, *ibid.,* p. 838.

international, transnational, and universal levels. In addition, the peremptory character of the norm is not expressly found in the legal texts; rather, it is determined through a process of interpretation.[534]

3 Values and interests

Values and interests as a criteria by which to identify *ius cogens* norms. Normally, the content of *ius cogens* norms manifests either or all of a number of characteristics. On the one side, norms of *ius cogens* respond to a moral criterion, namely, that international imperative rules are grounded in morality.[535] The moral norm is the basis upon which is established the rule of *ius cogens*. On the other side, this moral norm, like *ius cogens*, protects the imperative interests and values of the individual and the community; those values and interests that are mainly of an humanitarian and solidarian character.[536] This does not mean, of course, that all norms belonging to morality are *ius cogens*. Indeed, not all moral rules may be considered to be laws, far from it; and for most legal scholars, morality must be sharply distinguished from law. A moral norm, to serve as a basis of *ius cogens*, must be both universal in character, and refer to the primary needs of the human being. And these primary needs should be understood not only in the sense of rights addressed to the survival of humanity, the state, or of the members of the international community; rather, they should be understood also in terms of the essential needs that the contemporary world, development, and progress demand, and that do not refer to any minimal core, but rather to a dynamic of social and individual material and moral progress. Therefore, *ius cogens* norms should have at least a universal moral validity and belong to that group of fundamental moral rules that govern all human life. Professor Tomuschat captures the relationship between morality and *ius cogens* in the following statement:

> *"Although no substantive definition (of jus cogens) was given by the drafters (of the VCLT), ... it is obvious that in order to identify those norms "from which no derogation is permitted", recourse must be had to value judgements sustained both by legal arguments as well as ethical reasoning. Without a perfect*

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[534] Kornicker, *ibid*., p. 58.

[535] Orakehlashvili, above note p. 49 Quoting Fitzmaurice (Special Rapporteur) in Yearbook of the International Law Commission (1958-II), at 41 "...they (*jus cogens)* rules involve not only legal considerations but considerations of morals and international good order" and Lauterpacht (Special Rapporteur) in Yearbook of the International Law Commission (1953-II), at 155(*jus cogens* norms) may alternatively "be expressive of rules on international morality so cogent" that an international tribunal would considered them as part of general principles of law".

[536] Kolb, above note 508, p. 838.

> *coincidence of law and morality, no norm could be held to possess the specific quality of ius cogens"*[537]

Some examples where the underlying morality beneath *ius cogens* is almost unanimously accepted are: the prohibition of the use of force; the prohibition of genocide, where the ICJ recognized the force of moral law[538]; and the prohibition of slavery.[539]

A second criterion that *ius cogens* norms must fulfil, is that these rules protect the interests both of the international community[540], and, where international law is formulated in anthropocentric terms, also the dignity of the human being. Accordingly, *ius cogens* norms reflect both the collective interests of the state community and the particular interests of the individual. Interestingly, some authors do not refer to the interests of the international community as a whole, nor limit their commentaries to the interests of the community of states; they rather refer to the fundamentals of the international community, or just simply to community values.[541] Although several norms that do protect some particular state interest are guaranteed *ius cogens* status, such as the principle of sovereignty, and that of the equality of states, the unity of the nation state and its integrity may also be considered as community interests, for the existence of a well-defined nation state is fundamental to preserving peace, achieving social justice, and guaranteeing respect for the dignity of the human being, all of which form part of the overall purposes and guiding principles of the UN Charter. Therefore, in order to understand the rules of *ius cogens*, and their interest, values, and concerns, it is necessary to understand what international law recognizes as the international community[542], and which interests it pursues. We should also recall and emphasize at this point that the collective interest of the community to protect the individual may also be considered as a genuine community interest.

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[537] Quoted in Kornicker, above note, 505, p. 30.

[538] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 15, at p. 23. " The Origins of the Convention (show that it was the intention of the United Nations to condemn and punish genocide as a "crime under international law "involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses of humanity, and which is contrary to moral law and the spirit and aims of the United Nations."

[539] Kornicker, above note 505, p. 31.

[540] Orakehlashvili, above note 503, p. 47 **See also** Kornicker, *ibid*., p. 34 *et seq.*

[541] Kornicker, *ibid*., p. 34. Giving examples of leading schoolar defing this opinion *e.g.* Simma.

[542] See below Part II Chapter 3 International Community.

How to determine a *ius cogens* rule? The international legal practitioner faces a particularly difficult task: how to determine the content of the *ius cogens* rule? The identification of peremptory norms is a difficult task because there are no lists or catalogues containing these rules. It is a fact that, in their decisions, international tribunals and courts do tackle the question of the character of *ius cogens*. However, international courts and tribunals are very careful when making direct reference to the peremptory character of some rules, especially at a global or universal level. This is no doubt a result of the dominant view, that tribunals do not make law, as such, but only identify and apply pre-existing law; that is, the role of the judge is only to issue cognitive statements. This narrow conception of the international judiciary[543] prevents international courts and tribunals from making much in the way of explicit reference to *ius cogens* norms. The court's failure to refer to some peremptory norms in its ruling does not mean that the rule does not exist or that it is not relevant to the decision.[544] Doctrinally, it has been said that, in the law-making process, there are some principles that do not need to be clearly accepted as rules of law, but that "could be applied by a tribunal merely as principles cogently expressing dictates of international morality."[545] Nevertheless, Tavernier makes us aware that the decentralization of international law, and with it the decentralization of power within the system of international law, leads also to a decentralization of ability or competence to identify fundamental peremptory norms. This fact reinforces the thesis that within such a legal system, different powers have different weight. That is, power must be approached in a different way to that customary in domestic legal systems: the executive and the judiciary most definitely play a more active role in the identification and determination of rules. It has been suggested that the UN Security Council, in order to maintain peace, can derive from its functions the power to determine peremptory norms.[546] It has been further suggested that the process of identification of fundamental rules carried out by the Commission of Human Rights could also be considered as an executive way of identifying *ius cogens* rules.[547] A new standard of law, differing from the traditional positivist approach to law, has in this way been elaborated for identifying *ius cogens* norms through reference to

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[543] Orakehlashvili, above note 503, p. 43.
[544] *Ibid.*, p. 42.
[545] *Ibid.,* p. 127.
[546] Tavernier, above note 531, p. 2.
[547] *Ibid.*, p. 2.

General Assembly resolutions as manifestations of the collective will of the international community.[548]

4 *Ius cogens* and the judiciary

When it comes to the judiciary, the issue of the determination of *ius cogens* norms seems complicated, since the process of determination implies a greater engagement in the process of law creation and, as such, necessarily demands positive action. As stated above, specialized opinion prefers, in the majority, to admit of a powerful international judiciary, than to imagine a judiciary that is strictly limited to the application of positive laws, in the cognitive sense of simply giving utterance to a pre-established meaning. The International Court of Justice, the highest judicial organ of the international community, has remained discreet in its references to *ius cogens.* Other international tribunals, such as the International Criminal Tribunal, or international courts of a regional type, such as the Inter-American Courts of Human Rights, have already declared themselves competent to identify *ius cogens* rules.[549] Indeed, developments in international courts regarding the identification of peremptory norms affirm that the international judge is indeed appropriately tasked with identifying *ius cogens* norms. In order to illustrate the use of *ius cogens* by the international judiciary, we cite here, in its entirety, footnote 529 of the Report of the Study Group of the ILC, finalized by Marti Koskenniemi, entitled "Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law":[550]

"The only format in which the term *jus cogens* has really been put to use in the ICJ comprises of separate and dissenting opinions of individual judges of the Court. Actually already in 1934, Judge Schücking of the Permanent Court of International Justice referred in his separate opinion to the possibility of creation of *jus cogens* in the form of agreements between States. See the *Oscar Chinn* case, *P.C.I.J. Series A/B,* No. 63 (1934) (separate opinion of Judge Schücking) p. 149. Throughout following years, numerous references have been made to peremptory norms in this format. See, e.g., *Case Concerning the Application of the Convention of 1902 Governing the*

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[548] Orakehlashvili, *ibid*., p. 125. Referring to the so-called *Nicaragua-Furundzija-Filartiga* standard.
[549]For examples see. Tavernier, above note 531, pp. 8-9 **See also** Jesús Ollarves Irazábal. "El Derecho Internacional de los Derechos Humanos como normas de *ius cogens*", 2007.
[550] Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Report of the International Law Commission UN General Assembly (Martti Koskenniemi) A/CN.4/L.682. 13 April 2006 ILC.58th Session.

Guardianship of Infants (the Netherlands v. Sweden) I.C.J. Reports 1958 (separate opinion of Judge Moreno Quintana) pp. 106 et seq.; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) I.C.J. Reports 1969* (separate opinion of Judges Padilla Nervo and Sörensen) pp. 97 and 248; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) I.C.J. Reports 1969* (dissenting opinion of Judge Tanaka) p. 182; *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (*Second Phase*) *I.C.J. Reports 1970* (separate opinion of Judge Ammoun) p. 304; *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *v.* United States of America) *I.C.J. Reports 1986* (separate opinion of President Nagendra Singh) p. 153; *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) *I.C.J. Reports 1986* (separate opinion of Judge Sette-Camara) pp. 199 et seq; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia (Serbia and Montenegro))* Order of 13 September 1993 *I.C.J. Reports 1993* (separate opinion of Judge Lauterpacht) p. 440; *Legality of Use of Force (Yugoslavia v. United States of America)* Request for the Indication of Provisional Measures, Order of 2 June 1999, *I.C.J. Reports 1999* (dissenting opinion of judge *ad hoc* Kreca) pp. 53-61, paras. 10-17; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) I.C.J. Reports 2002* (dissenting opinion of Judge Al-Khasawneh) p. 95, para. 3; *Oil Platforms (Islamic Republic of Iran v. United States of America) I.C.J. Reports 2003* (separate opinion of Judge Buergenthal *I.C.J. Reports 2003*, para. 23."

As stated above, the ILC, during discussions of Article 53 of the VCLT acknowledging the recent emergence of norms of peremptory character, and that international law is undergoing a process of rapid development, drafted an article characterized in general by a formal definition, leading in turn to further development of state practice and jurisprudence with regard to imperative rules.[551] In order to identify *ius cogens* norms, the legal practitioner may approach the rule from two different angles: categorically, enquiring into the merits of its substantive content, or, in what amounts to a theoretical approach, to the rule; and through practical evidence, based on experience.

[551] Doc. A/CN.4/SER.A/1966/Add.1, note above 507, p. 248.

a Interpretation

Ordinary rules must also be interpreted in accordance with *ius cogens*. Since *ius cogens* rules are formally defined in Article 53 of the VCLT according to their effects, it is important to understand the relationship between this type of rule and its interpretation. States will normally not conclude treaties that are contrary to peremptory norms; however, the question of interpretation arises when the state applies a rule violating *ius cogens*. In other words, states may offend against *ius cogens* by the way they act, or by the way they exercise a right, which is effectively prejudicial to peremptory rules in its application of another, opposed rule. The process of interpretation allows that, if specific circumstances may be recognized and accepted as rules of general international law, and are hierarchically superior, then the meaning of the act, or this other rule, must be constructed in accordance with this hierarchically superior norm.[552]

b Human Rights

To date, some rules of international law have acquired the character of *ius cogens* as, for example, the prohibition of the use of force, the prohibition of slavery and genocide, the principle of the equality of states, the principle of self-determination, the prohibition of racial discrimination, and other general rules of humanitarian law and human rights.[553] Although *ius cogens* may reflect particular concerns of states, the majority of cases concerning peremptory norms involve the individual, and are thus reflected more in human rights norms.[554] Human rights are not, in principle, a matter of state interests; rather, they articulate the interests and values of the individual and, by extension, the interests and values of humanity in general. This is because, in the first place, human rights protect the individual as such, no matter what the interests, concerns and rights of the state. Hence the protection of human rights is an interest of the international community/universal society.[555] The judicial practice gives some examples of where human values, representing individual interests, are part of *ius cogens*, that is, to the right to life, to physical integrity through the prohibition of torture, to non-discrimination through the principle of equality before the law, and to the principle of *non-refoulement*. Given that individual rights cover the whole spectrum of human

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[552] Orakehlashvili, above note 503, p. 165.
[553] Frowein, above note 505, p. 443
[554] Andrea Bianchi, "Human Rights and the Magic of Jus Cogens" The European Journal of International Law 2008 Vol. 19 No. 3, .p 491.
[555] Orakehlashvili, *ibid.*, p. 53.

action, and that, according to positive law, there are derogable and non-derogable human rights, it remains unclear whether or not all human rights enjoy the character of *ius cogens*. Additionally, it is argued that the quality of peremptory human rights does not necessarily need to respect a distinction between derogable and non-derogable; rather, a distinction based on the content of the right itself is preferable. That is, the *ius cogens* character of the human right at issue is not a matter of whether or not it is classified as derogable; this would be to narrow the scope of the right to only its positive scope. Instead, the peremptory nature of the right must be determined by the substance, the essence of the right in itself. The imperative character of human rights goes hand in hand with imperative character of *ius cogens* rules; in both cases, the imperative element goes beyond derogablity. Accordingly, when we ask ourselves about the imperative character of human rights, we have in the first place to look to the essence of human rights. We need to think first and foremost about the grounding feature of those rights, namely, human dignity. Second, we need to think about what human dignity really means. These questions may be succinctly answered. Human dignity means respect for the realization of the individual, according to that which is morally acceptable. This conception of human realization implies already the guaranteeing of the necessary conditions for human existence, subsistence, and realization.

c Morality

This non-positivistic approach, favouring axiological reasoning and deductive methodology in the search for *ius cogens* rules, permits the legal practitioner better to take account of the particularities of a given case, and thus to determine, on a case by case basis, the weight of the value to be protected. To consider human rights peremptory only because they are non-derogable omits a number of considerations that are crucial to an accurate identification of peremptory human rights. In particular, derogable human rights, in the positive sense, will be especially disadvantaged and pushed down to an inferior level. Ultimately, the criterion to identify the *ius cogens* character of a norm refers to a community or universal interest that goes beyond the egoistic state interest in need of protection. In addition, in the particular case of human rights, the criterion of universal morality will come to play a more active role. If we admit as true that essential human rights possess a dynamic aspect that transcends the assurance of the elementary conditions for human life, but at the same time consider elementary also those rights that facilitate the human being in his or her fullest realization, this aspiration being integral to human morality, it is obvious that the peremptory character of human rights

goes beyond a mere distinction between derogable and non-derogable human rights. Furthermore, to determine that certain basic human rights are peremptory, especially those of an economic, cultural, or social nature, does not mean that its implementation must automatically follow. Since human rights tend to be aspirational, their legal protection must be established in a way that guarantees a right, and at least a minimum standard, for its realization. Its design depends on a synthetic dialectics between universal and particular, and on theoretical conceptions of justice and the good, or moral theory. Moreover, that a right be deemed peremptory need not impede its progressive realization.[556] Human Rights, as a legal form of morality, suggests ways in which morality is legal in character, and how the question of legality is likewise a moral issue. International law is currently moving towards an anthropocentric ideal of international community/universal society; for this reason, there must of necessity be an aspect of international law that addresses such moral issues. The different examples of *ius cogens* in human rights law show how the hierarchically superior norms of international law take account of human rights understood as collective beliefs of universal reach.

H Participants of International Law

International law is usually defined in terms of its subjects. Without making any specific reference to which particular subject, international law has been broadly defined, according to its subjects, as the body of legal norms that regulate relations among the members of the international society in whom legal subjectivity is recognized.[557] For the time being, states remain the main subject of international law. However, in the area of international relations, there is a growing awareness of the need to admit other actors as subjects of international law.[558] This is in part thanks to the fact that international law has gradually become relevant to other international entities. Traditional legal language basically equates the subjects of international law with the state itself. And, while the focus on subjectivity may have a positive resonance, it is perhaps wiser to speak about members of the international community, on the one hand and, on the other, participants in the international legal system. At first sight, the definition of being a participant in the international legal system seems to be narrower than that of being a member of the

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[556] Orakehlashvili, above note 503, p. 60.
[557] Remiro Brotóns *et al.*, above note 413, p. 45.
[558] Higgins, above note 417, p. 39.

international community. This may be true if we consider subjects, participants, and members, from a positivist perspective. That is, to answer the question of whether or not a certain member of the international community, or universal society, participates in the international legal system, depends ultimately on our understanding of international law, and which values and interests we understand to be protected and pursued by it. Who are these members? Active participants in international law are considered, in the first instance, to be the legal entities possessing full political rights and obligations and, second, entities of restricted legal personality who are dependent on the acquiescence and recognition of legal entities of the first type, those possessing full political rights and obligations.[559] But what of others? What of the members of the international community/universal society?

The classical debates on the subjects of international law address the state, international organizations, and the individual. The state, as long as it has a permanent population, a defined territory, a government, and the capacity to enter into relations with other states, is considered to be an authentic subject of international law.[560] However, international organizations may or may not be subjects of international law; it depends upon whether or not they are endowed with legal personality. Besides some characteristics of international organizations used to determine their subjectivity, like the ability to contract, the ability to sue and to be sued, and the ability to own property, their most singular feature is that they possess a distinct will (*volonté distincte*). The international legal personality may be given expression through the constituent instrument of the organization, or it may be deduced from the powers that have been given to it.[561] Today, in general opinion, debate centres not so much on the subjectivity of the state and the international organization, but rather on the refusal to regard the individual as a full subject of international law. For many scholars, the individual in international law plays only a limited role.[562] This minimalist view prevents international society from effectively protecting and furthering the values and interests of the individual. Indeed, to allow the individual only a limited role reaffirms the supremacy of the state, its values and interests, as the primary subject of international law. That the individual not be

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[559] Ian Brownlie, "The rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations", 1998, p. 35.
[560] Higgins, above note 417, p. 39.
[561] *Ibid.*, pp. 46-47.
[562] Cassese, above note 430, p. 4.

considered, in principle, as a subject of international law, responds first and foremost to the idea that the individual is an object of international law only in a secondary way, with the defenders of this notion, as a manifestation of their conservatism, maintaining that this basic differentiation must remain unchangeable.[563] That notwithstanding, the lack of procedural rules for individual access to international adjudication clearly does not mean that the individual has no rights owed to him under international law.[564]

Be that as it may, when we speak about members of the global community we refer to an international legal system of a constitutional type, in its contemporary sense, thus including subjects beyond those of the classical-modern conception of international law (nation state, international organization, very limited subjectivity of the individual). International law's constitutional model differs from the classic coordinated system of international law because it changes the criteria by which to identify the membership of the constitutional society according to the values, interests, and concerns of other entities beyond the state, notably the individual.[565] The contemporary understanding of a constitutional global community focuses on the centrality of individuals; it regards state power as something that is constituted rather than exclusively constituting. Thus the state is instrumental; it is not an end in itself. The main function of the state is to be measured according to how states serve individuals as members of one human family, and not primarily as members of states.[566] The most significant fact here is that the state is composed of individuals; in the final analysis, rights are owed to them. In his concurring view, in the Advisory Opinion on the Legal Status and Human Rights of the Child (2004), judge Cançado Trinidade criticized the Hegelian and neo-Hegelian position that maintains that the state is the last depositary of the freedoms and responsibilities of the individual.[567] Hence, in a constitutional way, individuals are conceived in a more cosmopolitan way in the Kantian than in the traditional sense, where the individual is understood to be an exclusive subject of the nation state. If the

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[563] Higgins, above note 417, p. 49.
[564] *Ibid.*, p. 53. quoting Lauterpacht in International Law and Human Rights, 1950, p. 27 "Thus in relation to the current view that the rights of the alien within foreign territory are the rights of his state and not his own, the correct way of stating the legal position is not that the state asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it the international sphere."
[565] Anne Peters, "The constitutionalization of International Law" J Klabbers, A Peters, G Ulfstein (eds.), 2009, pp. 153-263.
[566] *Ibid.* p. 179.
[567] *Legal Status and Human Rights of the Child*. Inter-American Court of Human Rights, Advisory Opinion OC 17/02 of 28 August 2002, Series A No. 17, para. 13 Opinion Judge Cançado-Trinidade.

international community were to be conceived in only universal constitutional terms, the individual would be considered as an end in itself, and only the state, in this case would be instrumental. In other words, the state is only an apparatus created for the realization of the rights of the individual.[568] However, if we think to the *status quo* of our society, this previous description speaks to aims that, while desirable, are far from today's actual reality. It is therefore now opportune to speak about a model which is neither state-centric nor anthropocentric, but concentric, and that makes viable an effective processing of the various transformations that are taking place in our contemporary world.

Far beyond the above-outlined theoretical approaches one should take notice, too, of the role of some modern and contemporary members of the global constitutional community, such as international organizations, non-governmental organizations (NGOs), and business leaders.[569] International organizations differ widely according to the objectives which they have been set up to address. Thus, the role they play as members of an international legal society will differ according to their scope and size. For example, in the European Union, the individual is constitutionally protected against the organization. But this is not the case in the World Trade Organization. In the WTO, the individual is not empowered to institute judicial proceedings.[570] Legal commentators argue that the WTO is undergoing a process of constitutionalization.[571] In the debates, the researcher can observe that the term "constitutionalization" within the WTO is ambiguous[572]; in the end, the language is used to express a process of transformation within the WTO towards a more judicialized institution, in consonance with extra-WTO law. This process of change, in the special case of the WTO, it being a very successful organization has, as its most outstanding feature, that it provides for a "framework capable of reasonably balancing and weighing different, equally legitimate and democratically defined basic values and policy goals".[573] The use by the WTO judiciary of constitutional techniques, like proportionality analysis, allows it effectively to

[568] Peters, above note 565, p. 179.
[569] *Ibid.*, p. 179.
[570] *Ibid*., p. 215.
[571] See below, Part II Chapter 6 Constitutionalization.
[572] Deborah Z Cass, "The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade." The European Journal of International Law 2001 Vol. 12 No. 1, p. 47.
[573] Thomas Cottier, "Limits to International Trade: The Constitutional Challenge in The American Society of International Law (ed) International Law in Ferment: A New Vision for Theory and Practice, Proceedings of the 94th Annual Meeting. 2000 p. 221 Quoted by Anne Peter, note above 565, p. 177.

balance trade issues with non-trade issues.[574] In this way, contemporary international organizations play a progressive and prominent role as subjects of international law, thanks to their ability to act in an effective administrative and legislative fashion, on the one hand and, on the other, through the creation of a strong judiciary.

Broader conceptions of international law in relation to the international constitutionalization process include non-governmental organizations (NGOs) as a condition of global governance. Through NGOs, non-governmental participation increases the level of good governance for international organizations, as in the 1978 American convention on Human Rights, that allows applications to be made by representative organizations. One major example of the role of NGOs is in the admissibility of *amicus curia* briefs (letters from friends of the court) in WTO dispute settlement; although without vote and not subjects of international law as such, in such a way NGOs may nevertheless take part in the process of law-making and participate in the international constitutional framework. Another important part of international society is the business leader; it is undeniable how much international economic activity influences the development of international law. Taking into account that today many large multinational companies have higher income revenues than the budgets of many states, their activities touch the interests of employees, taxpayers, and consumers in general, particularly considering that their operations extend beyond the territorial limits of the nation state. This fact helps better to understand why international business leaders are accountable in international discourse. Whatever are the theoretical arguments concerning Transnational Companies and Multinational Enterprises as subjects of international law, the key issue regarding their subjectivity is precisely that they must be made subject to legal rights and obligations.[575] From the beginning of the 20th century, private companies have come to occupy an extraordinary and powerful role on the international stage, through litigation against states, "as if they were their equals"[576], such as in the 1965 Convention on the Settlement of Investments Disputes Between States and Nationals of Other States. As with NGOs, international business actors are not really considered to be full subjects of international law; but their

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[574] Peters, *ibid*., p. 216.
[575] *Ibid.*, p. 243.
[576] Lowe, above note 414, p. 16.

responsibility towards the community in general, and the individual in particular, is fact. In this way, international law seeks to structure and formalize their subjectivity.

CHAPTER 3, INTERNATIONAL COMMUNITY

A Society, Community, Individual and Law

Nowadays, when globalization is the most influential phenomenon affecting human matters, human sciences concepts relate and expand their objects of study to the different traditional branches of human social activity, giving shape at times to a single social discipline. Besides globalization, this is also due to the need to update and adapt new social realities to organized forms of human activity, such as politics, policies, aims, laws. Globalization tremendously affects human beings and states. Globalization generates dissimilar global orders. Hence, globalization affects both the national and also the international society, pushing all of us towards an interrelated new order. International society is a sociological, a political, and also a legal concept. Legally, this concept is commonly enunciated in the idea of the international community. At the beginning of the law of nations, the international society was conceived narrowly, in the sense of society (*Gesellschaft*), where equal coexisting units pursued particular, separate, objectives. Later, this society was understood in broader terms to include those entities united with the aim of achieving common ends. In this sense, this society became a community (*Gemeinschaft*). Currently, with the realization that universal human rights and human dignity stay at the centre of an ever consolidating universal society, this community of states has become the main gateway to a universal community of individuals. Such contemporary ideas of international community take inspiration from humanist ideals. International community, in a humanist sense, is the very largest notion, going beyond the limits of the state to include actors, participants, or members of civil international society, and enhancing the political system such that in scope it reaches out to a transnational and a universal community. Its concerns are those fundamental to humanity more than to statehood. Today, all these types of societies coexist. Today, the world experiences a strengthening of the international community of states as a separate entity, parallel to the development of the central notion that there should be a legal framework that furthers the realization of the universal human being.

According to Dupuy, the international community is, from the positivist point of view, a legal fiction; and a categorical imperative from the point of view of normative law. Theoretically, the term "international community" has been regarded, on the one hand,

as a legal fiction, and, on the other, as a categorical imperative.[577] As a legal fiction, the term "international community" is a concept of positive law for juridical purposes only. Once the term "international community" is captured by positive law, the law itself transforms historical, sociological, psychological, and other influential factors into a more narrow, positive legal framework, which enables the legal practitioner to deal only with the positive reality. It is a process of transformation from social reality into positive legal reality. Nowadays, international community in legal terms relies mainly on a principle of an equality of states (individual autonomy, but also coexistence, of each sovereign state) and solidarity (cooperation) among individual entities (states) which, acting in unity, delimit the exercise of autonomous power.[578] Nevertheless, the existence of the international community is a social reality displaying varying degrees of interaction. At the beginning, states consider the international community as whole. Accordingly, states intend to bring to the rule of law a definition of international community that expresses a type of social solidarity which is ground for the existence of values and interests common to all states. Indeed, these values and interests will ideally be shared by all. Through globalization, the international community opens itself up not only to international civil society but even to individuals.[579] In addition, the term "international community" must be considered in a twofold sense: first, it establishes positive rules; and second, it supports a collective project of promoting peace, social justice, sustainable development, and the realization of human dignity. In this sense, the international community may be viewed as a decisive factor in solving global problems and protecting universal principles, including individual human rights. Indeed, it is at this point that the international community becomes a categorical imperative: it acquires normativity at the point at which the concept of international community prescribes, rather than describes, solutions for solving global problems.[580]

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[577] Pierre-Marie Dupuy, "L'Unité de l'Ordre Juridique International" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 2002 Vol. 297, pp. 258-268

[578] *Ibid.*, p. 261.

[579] Robert McCorquodale, "International Community and State Sovereignty: An Uneasy Symbiotic Relationship" in *Towards an International Legal Community?* C Warbrick and S Tierney (eds.), 2006, p. 263 McCorquodale argues that nowadays States are not the only participants in the international community. Besides the states, he includes NGO's, Transnational Corporations and Individuals.

[580] Stefan Oeter, "The international Legal Order and its Judicial Function: Is there an International Community –despite the Fragmentation of Judicial Dispute Settlement?" in *Common Values in International Law: Essays in Honour of Christian Tomuschat* P-M Dupuy, B Fassbender, M N Shaw and K-Sommermann (eds.), 2006, p. 559.

B Philosophical conceptions

There are three main philosophical conceptions of international community, the Hobbesian, the Grotian and the Kantian. Another way of studying the concept of international community is by referring to the philosophical systems upon which this idea of community has been built. Three main groups have been identified, each of them emphasizing a distinct element within global society.[581] In the first place, the Hobbesian or realist tradition focuses on a permanent state of war–hot or cold–where states interact in a context of zero-sum games. It is based on power and national interests. In the second place, there is the Grotian or internationalist group, which conceives international society in terms of states where the individual is only the representative of the collective. This school subdivides into two separate sub-schools, namely: the Vattelian or international in the narrow sense, where emphasis is placed on national interest, and co-operation is the exception–its main value is order; and the Grotian tradition, known as the truly Grotian (or neogrotian, Friedmanian or communitarian), which considers the international system in terms of a process tending to the creation of an organized state community based on common interests, common values, and common institutions.[582] Finally, there is the Kantian or universalist conception. According to Simma and Palaus, "the systematic value promoted by these authors is justice, which may entail a justification of community intervention for the protection of individuals against their own state."[583] The emphasis here lies on the role of international civil society.

According to Simma and Palaus[584], current thinking in public international law is situated somewhere in the middle, between classical international law, on the one hand, and the Westphalian system, dominated by individual interest and communitarian ideals, on the other. The communitarian idea is less important for Kantians, since it permits the inclusion of some Kantian classical elements based on ideas of global justice, human dignity, and peace. These Kantian elements have found positive expression in the UN Charter, as well as in other human rights regimes. Besides, the

[581] Simma & Palaus, above note 402, pp. 266-277 The authors based this distinctions on a classification made by Hedley Bull.
[582] *Ibid*., p. 271.
[583] *Ibid*., p. 270.
[584] *Ibid*., p. 270.

development of international institutions, or the institutionalization of international law, comes to reinforce the idea of an international community that is separate from classical sovereign states. It is true that not every international treaty implies a clear transfer of sovereign rights; however, the autonomy of these institutions makes some kind of independence necessary for their proper and effective functioning. Furthermore, all branches of power implicated in the international decision-making process will necessarily take concerns and decisions out of the reach of classical sovereign power. Although the judicial or institutional dialogue of international courts and tribunals is under the scrutiny of scholars, it must be admitted that there is no projected alternative to such dialogue[585], and none, certainly, that furthers the normative character of an international community working towards the unity of international law in the sense of a collective that includes common and universal values. A neo-liberal development that shifts the focus of international law away from institutions and towards a belief in solutions, reached without regulation by international authorities, is perhaps one way to express agreement with anarchy. Therefore, international institutional development is indispensable to assure peace and well-being.

C Interests, values and decision-making

The debate concerning the international community has evolved in much the same way as the debate concerning globalization; that is, toward integration, but with the terms of the international community becoming increasingly imprecise. For instance, according to Article 53 of the Vienna Convention of the Law of Treaties, "a peremptory norm of general international law is (*inter alia*) a norm accepted and recognised by the international community of States as a whole". On the other hand, the international community is also understood to include other entities beyond the state, such as the EU, the Red Cross, or the United Nations itself.[586] Although most authors recognize the international community as a whole, it is still not clear what should or should not be included within the concept of the international community of states (that is, the international community as an entity beyond the state). Tomuschat, for example, is of

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[585] Oeter, above note 580, p. 599.
[586] Fourth Report on State Responsibility, James Crawford (Special Rapporteur) ILC 53rd Session, UNGA 2 April 2001, A/CN.4/517, para. 36. For a short description of other views **See also** Anne-Laure Vaurs-Chaumette, "The international Community as a whole" in *The Law of International Responsibility* J Crawford, A Pellet, S Olleston (eds.), 2010, pp. 1023-1024. **See also** McCorquodale, above note, 579, p. 252.

the opinion that Article 53 of the VCLT is not really a definition but rather a "proposition" about the existence of an international community.[587] We agree. The international community does include a unity beyond the classical subjects of public international law, that is, the state. This suggests two things. Firstly, the existence of an international community as an entity beyond the state, as has already been identified by the ICJ in its famous *dicta* in the Barcelona Traction case, regarding the existence of an obligation *erga omnes* owed to the international community as a whole[588], and through which the existence of collective interests was recognized.[589] Secondly, due to the fact that human rights, social justice, and respect for human dignity are essential features of the international legal order, they are therefore also interests to this community that goes beyond the community of states, in that this international community also encompasses the interests of individuals. According to the developments of international law, the most accepted notion of international community is that of the international community as a whole, as in the Barcelona Traction case. However, the new transformations operating in the international arena take account of the existence of some public goods towards which not only the interest of the international community as a whole, but also the interest of the international community of individuals, is at stake, namely, for example, the environment, human rights, humanitarian law, dignity, international trade, and the raising of living standards. These common concerns contain an aspect relative to the realization of the individual and not only relative to the realization of the state. It is in these areas, too, that the normativity of the concept of international community meets a descriptive idea of world community, as proposed by McDougal and Reisman, thus placing the human being at the centre of international law. According to them, "It is individual human beings, whatever the group form and modality, who shape and share the interdetermination and interdependence that characterise community".[590] This is also reminiscent of the idea of Lauterpacht when referring to international law as an

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[587] Christian Tomuschat, "Obligations Arising For States Without Or Against Their Will" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1993 Vol. 241 No. 4, p. 195.
[588] *Barcelona Traction, Light and Power Company, Second Phase* (Belgium v Spain) Judgment of 5 February 1970, ICJ Reports 1970 p. 3, para. 33 "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 concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."
[589] Vaurs-Chaumette, above note 586, p. 1024.
[590] McDougal, Myres S. Reisman, W. Michael Willard, Andrew R. "The World Community: A Planetary Social Process" Yale Law School Legal Scholarship Repository. Faculty Scholarship Series. Paper 753

expression of the existence of an international community of States and of individuals.[591]

Today, international relations show how international players are increasingly worried about the need to protect certain common goods and values. The most prominent values are peace, humanity, and social justice.[592] Some common goods that are considered to need protection by the international community, to the extent that every state has to safeguard them, are *inter alia* human rights, the environment, and space. The concept of the international community has also been used in different branches of international law. In international environmental law, the idea of international community is enshrined in the concept of inter-generational equity, which it recognizes the idea of humanity's endurance through time, so securing the claims of future generations. [593] In the case of the Law of the Sea, it is reflected in the concept of the "common heritage of mankind". In the field of human rights, the Vienna Declaration on Human Rights of 1993, paragraph 4, states that the promotion and protection of all human rights is a legitimate concern of the international community. The international community thereby referred to trespasses the limits of the states so as to include also the individual. These examples show that one of the essential changes that the international community undergoes is reflected in such familiar notions as the common concerns of humanity, the common heritage of mankind, and the elementary considerations of humanity.[594]

Decision-makers must take account of three co-existing levels: the international, the transnational and the universal. Such values have already been considered by scholars as constitutive of the international legal order.[595] In order to protect such constitutional values, several international players and legal scholars advocate positive recognition by decision-makers of already existing transformed structures in the current extra-positive

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[591] See Part II Chapter 2 Definition of International Law by H Lauterpacht.

[592] Santiago Villalpando, "The Legal Dimension of the International Community: How Community Interests Are Protected in International Law" European Journal f International Law 2010 Vol. 21 No. 2, p. 393.

[593] McCorquodale, above note, 579, p. 251.

[594] *The Corfu Chanel Case, Merits* Judgment of 9 April 1949, ICJ Reports 1949, p. 4 p. 22 "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war."

[595] Tomuschat, above note 589, p. 195 **See also** Susan C Breau, "The constitutionalization of the International Legal Order" Leiden Journal of International Law 2008 Vol. 21 No. 2, pp. 547 *et seq.*

legal order.[596] They particularly advocate a novel approach to the structure of international law. This transformation touches upon all branches and manifestations of power. Consequently, rules are required to take account of the different co-existing orders, namely, that of the international society, that of the transnational society, and that of the universal society. The rules should therefore reflect the concerns of the international society[597], and those of the international community as an independent body, and those of the international community as regarding the universal equal individual. Further on, because the international community is no longer considered as co-existing states understood *uti singulis*, newer principles of international law, such as the principle of co-operation, and[598] the principle of solidarity[599] (even if they are currently developed within an horizontal structure), may hint at a vertical structural development within global law, the main implication of which being perhaps a more "human" approach to international law, especially through the realization of human rights.[600] Therefore, we can restate here that the main transformation taking place within our understanding of international law is the shift from states understood *uti singulis* to the state understood as a link in the universal public milieu. The international community poses significant challenges to positive law[601], for such entities are not yet well defined.

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[596] Villalpando, above note 592, p. 393.
[597] See Rusell Buchan, "A Clash of Normativities: International Society and International Community" International Community Law Review 2008 Vol. 10 No. 1, p. 3.
[598] Robert Kolb, "Interprétation et création du droit international: Esquisses d'une herméutique juridique modern pour le droit international public", 2006, p. 888.
[599] Rüdiger Wolfrum, "Solidarity among states: An Emerging Structural Principle of International Law" in *Völkerrecht als Wertordnung. Common Values in International Law: Festschrift für Christian Tomuschat*. P-M Dupuy, B Fassbender, M N Shaw, Karl P Sommermann (eds), 2006, p. 1088 Explaining that certain areas of international law are governed by the principle of solidarity; *e.g.* as a structural principle in international environmental law; as a structural principle in the WTO law as far as it concern developing countries; solidarity as a principle in humanitarian assistance/intervention *i.e,* grave and widespread violation of human rights may be used as justification for unilateral military humanitarian intervention **See also** Dupuy, above note 577, pp. 258-268. The author here do not refers to solidarity as a principle but as the guiding feeling that move the community/society of the states to act together in their own benefit for the purposes of achieving peace.
[600] Villalpando, *Ibid*., footnote 25 Referring to Wolfgang .Friedman in "The Changing Structure of International Law" (1964) who sees the change of international law from a law of coexistence into a law of cooperation – linking the law of cooperation with labour and health matters, economic development, human rights collective security etc...; furthermore, he also refers to Jenk's idea of universal law in "the Common Law of Mankind." (1958), **See also** above Part II Chapter 2 Definition of P-M Dupuy of International Law.
[601] Kolb above note 598, p. 3.

1 Normativism

The lack of definition of the international community as a legal concept makes more flexible the inclusion of normative ideas about the international community. The reality today shows that other international members of an international community are involved in the process of law-making by means of their participation in the treaty process itself, and the use of authoritative sources.[602] The notion that the international community responds to the dominant approach, namely that which considers the international community as an independent collective ignores, essentially any kind of enrolment or relationship in the international community other than that which takes place among states, and is a legal fiction. This conclusion only reflects the dogmas of state sovereignty, and the notion that state sovereignty remains the main principle governing the juridical concept of international community. However, international law is dynamic. If only for this reason, the notion that the international community includes interests other than those of the sovereign state and "sovereign collective" remains an open possibility. The limitation of the term international community to consent-related matters discussed among sovereign states no longer reflects the real needs of the world order.[603] The individual as a member of the international community has reached some juridical attention especially through the regime established by human rights law, one of the major and fundamental areas of international law. The individual is held accountable for their violations of international law, be they in the area of piracy, slavery, or crimes against humanity. Furthermore, the individual plays an important role in the creation and interpretation of law. They do so not only in their personal capacity and not only as representative of states; indeed, it is often in their personal capacity that they sit in international courts, tribunals, and dispute settlement bodies.[604] In addition, the imperative quality of certain values is reflected in the *status quo* of global matters within a hierarchical order that in many cases responds to the interests of the human being. Therefore, we can affirm that this verticality of human rights concerns is reflected in the concept of the international community. The human being should normatively be at the top and at the end of all universal rules, and although there is still a long way to go, there is no other alternative than to start using effectively the

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[602] McCorquodale, above note 579, p. 241.
[603] *Ibid*., p. 252. The author refers here to James Crawford, "Responsibility to the International Community as a whole" Indiana Journal of Global Legal Studies 2001 Vol. 8. pp. 303, 314.
[604] *Ibid*., pp. 260-261.

precarious means of international decision-making, such as the judiciary and the executive.

2 WTO jurisprudence

WTO jurisprudence acknowledges the concerns of the community of nations. According to the WTO preamble's explanation of the Max Planck Commentaries on World Trade Law, none of the aims established in the first recital, *e.g.* raising standards of living, constitute common interests, common international goods or international values.[605] However, the AB does not share this view of the commentary. The following was already acknowledged by the Appellate Body in the *US-Shrimp*[606] case regarding the interpretation of the term "exhaustible natural resource":

> *"The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of the contemporary concerns of the* ***community of nations*** *about the protection and conservation of the environment".*

[605] Armin von Bogdandy, "Preamble" in *Max Planck Commentaries on World Trade Law WTO: Institutions and Disputes Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.), 2006 Vol. 2, p. 9.
[606] *United States- Import Prohibition of Certain Shrimp and Shrimp Products,* Appellate Body WT/DS58/AB/R 12 October 1998 , para. 129 Emphasis added

CHAPTER 4 SOVEREIGNTY

A The axiom

Is sovereignty an eroded axiom of international law? States are sovereign entities. The concept of sovereignty is said to be constitutive of international law.[607] Thus, this concept of sovereignty is axiomatic for International Law. However, this axiom is not a fixed and inviolable dogma; rather, it is a variable upon which the transformation of the international, transnational, and universal orders finds concrete expression. We have, then, to ask ourselves, what does sovereignty mean, according to the transformations that takes place in time, the changes in the international, the transnational, and the universal order? Where are the limits of sovereignty? Has this axiomatic concept been overtaken by other, new, but similarly fundamental concepts?[608] State sovereignty means first and foremost state independence and an equality of states.[609] Although the International Court of Justice acknowledges the notion of sovereignty as key within the machinery of public international law[610], it remains in many ways unclear as to what the contours of this sovereignty really are, this equality, and this independence of states, in an interdependent world which increasingly acknowledges universal values and concerns that trespass the sovereign (egoistical) interests of states. The changing global context in which states act has added to the diversity of global players exerting power. There are many different contextual and dynamic developments affecting the allocation of power among international players. The first shift is away from public authorities and towards global markets and business players, where the ability to control and manage economic intercourse is greater. The second shift sees a transfer of power to

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[607] Ian Brownlie, "Principles of International Law", 2008 (7th edition), p. 295 *et seq.*
[608] Stefan Oeter, "Souveränität – ein überholtes Konzept?" in Tradition und Weltoffenheit des Rechts Festschrift für Helmut Steinberger: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 152 H-J Cremer, T Giegerich, D Richter, A Zimmermann (eds.), 2002, pp. 259 et seq.
[609] Patrick Dailler; Mathias Forteau,; Nguyen Quoc Dinh; Alain Pellet, "Droit International Public", 2009 (8th edition), pp. 466-467.
[610] *The Corfu Chanel Case, Merits* Judgment of 9 April 1949, ICJ Reports 1949, p. 4, at p. 53 "Between independent States, respect for territorial sovereignty is an essential foundation of international relations" **See also** *Military and Paramilitary Activities in and against Nicaragua, Merits* (Nicaragua v. United States of America) Judgment of 27 June 1986, ICJ Report 1986, p. 14 para. 263 "However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the *fundamental principle of State sovereignty, on which the whole of international law rests* and the freedom of choice of the political, social, economic and cultural system of the state." Emphasis added.

international organizations and international government mechanisms.[611] Another way of seeing globalization does not refer directly to a reallocation of power, but rather to the outcomes and aims pursued in the exercise of power, namely the role of the individual, of civil society, and of the development of human rights in international law. These developments have diminished the classical dogma of sovereign states as an exclusive inter-state system of international law in favour of a more human-centred, collective-oriented system supporting a vision of individual realization as the ultimate end and therefore as an essential subject to any possible kind of governance.[612]

Sovereignty guarantees an ordered expression of a state's community. It has even been affirmed that sovereignty is above all else an ordering concept.[613] It is true that there are some essential principles and rights inherent to the very idea of sovereignty that, at any given time, remain unchangeable. However, the real dynamics show that public international law increasingly operates according to domestic policies and interests.[614] Certainly, over time a natural evolution occurs within the basic and fundamental architecture of international law. As a matter of fact, in order to achieve its new goals and aims, the movement of globalization leads also to new forms of global and regional governance[615]. Nevertheless, there is, in general terms, only one thing that we can positively affirm about the concept of sovereignty; namely, that sovereignty refers to the capacity of a state to act independently, both internally and externally. The state, subject to some constraints, is given expression mainly through its positive laws (positive rights and obligations), the relativity of which varies according to the determination of the state's commitment to its people to strive towards a life lived in peace (political),

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[611] Robert Howse, "Lost and Found" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.), 2008, p. 63.
[612] Ernst-Ulrich Petersmann, "State Sovereignty, Popular Sovereignty and Individual Sovereignty" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.) pp. 29 *et seq*. "the Westphalian system of international law among sovereign states –based on internal sovereignty (as defined by constitutional law) and external sovereignty (as defined by state-centered international law – was power oriented and lacked democratic legitimacy, as illustrated by colonialism and imperial wars" (...) "the Westphalian system of international Law among sovereign states conceived international law as reciprocal limitations on state power aimed at protecting international order rather than human rights and justice" (...) "The more the human rights obligations of every UN Member state evolve into *ius cogens*, the more it become necessary to construe the "sovereign equality" of states, the limited powers of intergovernmental organisations and the "right to self-determination of all peoples" in conformity with the human rights of their citizens." (...) "From such a human rights perspective, the international legal system –including international economic law –must serve human rights and democratic self-government as the proper basis of Sovereignty.
[613] Vaughan Lowe, "Sovereignty and International Economic Law" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.), 2008, p. 78.
[614] Matthias Herdegen, „Internationales Wirtschaftsrecht", 2008 (7th edition), p. 77.
[615] Howse, above note 611, p. 61.

prosperity (economic), and in respect of human dignity (moral); the existence, in other words, of a *telos*. Hence, the concept of sovereignty may be considered twofold: it has both, a normative and a positive dimension.[616] For the moment, the concept may seem to be too abstract; nevertheless, it is far too important to be ignored. The positive aspect of sovereignty reminds us that international rules in this matter cannot be disregarded; changes can only happen thanks to a positive dynamic between established procedures and the new rules of international law.[617] Thus, if we think in terms of positive law only, we need also to think about how international law is formally created. Empirically, it has been demonstrated that "hyperformalism" risk to jeopardize and perhaps transgress the limits of justice. A normative approach to sovereignty, undoubtedly reflecting reality more objectively, can occasionally, as a result, be of a more diffuse nature; it draws upon more flexible, non-formalistic forms of law-making. Consequently, its evolution involves other sources of power from those of state consent and practice. In particular, normative sovereignty is actually concerned with those values implicated in power allocation; that is, those values considered to have universal reach, such as peace and human rights, the environment, and economic exchange.

B Content

Sovereignty is the source from which emanates a state's rights and duties. Historically, it has been a source of stability in world society; it legally protects nations against foreign intervention[618], while providing states the right to determine their political, economic, social, and cultural system independently and without external pressure.[619] That is, sovereignty confers on the state the necessary authority to act independently, if constrained by certain limits. These limits are closely linked to the structure of international law. Traditionally, these limits have been expressed through the principle of legal equality, the principle of respect for international law, the principle of non-intervention (prohibition of the use of force, and non-intervention in the internal or external affairs of other states), prohibition of the threat or use of force, the principle of peaceful settlement of disputes, the principle of self-determination of peoples, the

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[616] *Ibid*., p. 75.
[617] Ignaz Seidl-Hohenveldern, "International Economic Law" 1999 (3rd revised edition), p. 21.
[618] John H Jackson, "Sovereignty, the WTO and Changing Fundamentals of International Law", 2006, p. 61.
[619] Herdegen, above note 614, p. 77.

principle of respect for human rights[620], and the duty of cooperation.[621] Sovereignty lends the state a capacity to act; that is, to have jurisdiction over its territory (territorial sovereignty), over its people (personal sovereignty), and over its destiny. The core notion of sovereignty refers to a state monopoly of power from which comes also, by extension, a notion of necessary state consent for the establishment of any new rules.[622] Nevertheless, state consent has been challenged as an authoritative standard on the basis of which to legitimize international law. It is no longer considered the only legitimate basis on which to create international rules.[623] Functionally, sovereignty nevertheless provides the state with adequate legal grounds for exerting its power, both within and beyond its state boundaries.

The core principle of the modern concept of sovereignty in international law is the sovereign equality of states. The central idea of sovereign equality is that no state has legal authority over another.[624] Indeed, the main rules of international law, such as the prohibition of the use of force, the prohibition of intervention, and state immunity, are all derived from this principle. According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[625], all states enjoy sovereign equality, in spite of economic, political, or any other differences they may have. This principle includes the judicial equality of states, their territorial integrity and political independence, as well as the right to choose freely their political, economic, social, and cultural systems. Article 2.1 of the UN Charter[626] ratifies the principle of sovereign equality of its members as the basis of the Organization.

Sovereignty in general law has two aspects or dimensions with regard to the state: internal and external. In other words, a state has internal sovereignty such that the state

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[620] Cassese, above note, 430, pp. 46 *et seq.*
[621] Dailler *et al,* above note 403, pp. 479-480.
[622] Jackson, above note 618, p. 23.
[623] *Ibid.*, note pp. 36-37 Citing Oscar Schachter "Towards a Theory of International Obligation" in *The Effectiveness of International Decisions* Stephen M. Schwebel (ed.), 1971 pp. 9-31 Prof. Schachter elaborates a list of possible legitimate sources for international law norms, as follow: 1.- consent of states; 2.- customary practice; 3.- a sense of "rightness- the juridical conscience; 4.- natural reason; 5.- social necessity; 6.- the will of international community (the "consensus" of the international community; 7.- direct (or "stigmatic") intuition; 8.- common purposes of the participants; 9.- effectiveness; 10.- sanctions; 11.-systemic goals; 12.- shared expectations; 13.- rules of recognition.
[624] Seidl-Hohenveldern, above note 617, p. 20.
[625] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations GA Res. 2625, 25 UN GAOR Supp. 18 122; A/Res/25/2625 of 24 October 1970.
[626] Art 2.1, UN Charter "The Organization is based on the principle of the sovereign equality of its members".

may establish its own internal order. It also has an external aspect that gives shape to the state's external relations. Internal sovereignty consists of a state monopoly of power within its own boundaries; it is based on a classical notion of sovereignty, specifically territorial sovereignty, as first developed in the 16th century. However, internal sovereignty can be limited through international law.[627] In its Advisory Opinion concerning the Nationality Decrees Issued in Tunis and Morocco, the PCIJ maintained that "the question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations".[628] External sovereignty, on the other hand, is a direct consequence of internal sovereignty. It is the capacity to act equally among a variety of third parties. External sovereignty occurs in part because of a necessity legally to explain the inter-relationship of states; in the past, this has often been a relationship of co-existence, but nowadays it has undergone a number of fundamental transformations. The essence of co-existence, the basis of interaction, is the fact that no one, given the existence and actions of others, can act entirely free of constraints.[629] Indeed, the key notion in classical external sovereignty is to acknowledge consent as the main constraint of independence.[630] This is precisely what today is being powerfully challenged.

1 Jurisdiction

To be sovereign means to have jurisdiction. In a broad sense, jurisdiction concerns the power of a state to act lawfully, to exert power lawfully.[631] Similarly, it is the competence to exercise sovereignty through the prescription and enforcement of laws.[632] Thus, the state jurisdiction is a fundamental aspect of the state sovereignty.[633] On the one hand, the general condition that has customarily governed jurisdiction suggests that, in principle, a state has jurisdiction over all persons, property, and

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[627] Werner Meng, "Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht", 1994, p. 38.
[628] *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion No.4, 7 February 1923 PCIJ Series B04 p. 24.
[629] Lowe, above note 613, p. 80.
[630] Juliane Kokott, "Sates, Sovereign Equality" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 9, p. 571.
[631] Bernard H. Oxman, "Jurisdiction of States" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 6, p. 546.
[632] Meng, above note 627, pp.1, 26.
[633] Asif H Qureshi, "International Economic Law", 1999, p. 53.

activities in its territory, as well as over its nationals, wherever they are.[634] The fundamentals of international law governing jurisdiction make manifest the principle of sovereign independence and sovereign state equality[635] and, progressively, also a number of concerns in the area of human rights.[636] One important consequence of the principles governing state jurisdiction is the limitation against acting extraterritorially. Today, the evolution of universal society suggests sometimes that the exercise of extraterritorial jurisdiction is unavoidable. In fact, there are rules in international law that govern extraterritorial jurisdiction. Nevertheless, the problematic issue is that of how to regulate the permissibility of extraterritorial jurisdiction from an opposite point of view, taking into account today's world of interdependence and integration of economic, social, and political phenomena. The question is how to work out principles of jurisdiction that are suitable to our new realities. Extraterritorial acts threaten states' sovereign equality and independence; fundamentally, they risk the independence, in effect the freedom, of states to act and determine their own destinies.

Traditionally, courts have interpreted sovereignty in ways that attempt to protect the integrity of its core content. That is, when different values are espoused, courts have given deference to sovereignty. This is due to the fact that limits to independence should not be presumed in international law, hence clauses of treaties containing limitations on state action should be interpreted narrowly. Through the interpretative principles of *in dubio mitius*, when there is not clarity, the interpretation that least affects state sovereignty is that which prevails.[637] However, claims for the realization of emerging and other already consolidated values and interests, such as the respect for the inherent dignity of the human being, through a more extensive interpretation of sovereignty, is becoming more and more imperative in today's reality.

2 Community interests and universal values

The sovereignty of the state has to adopt a form suitable to global und universal purposes, namely the realization of community interests and individual universal values. Although the importance of the sovereign state as the fundamental entity of the

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[634] Oxman, above note 631, p. 546.
[635] Meng, above note 627, p. 500. "Der Völkerrechtliche Regelungswille hinsichtlich staatlicher Jurisdiktionsausübung ist aus den Grundsätzen der Territorialen Unverletzlichkeit, der souveränen Gleichheit der Staaten und ihres Schutzes durch das Interventionsverbot heraus zu bejahen. ", 1994, p. 500.
[636] Oxman, above note 631, p. 546.
[637] Kokott, above note 630, p. 571.

international community has been acknowledged and justified on the grounds that respect for state sovereignty is crucial to any common international progress, the exclusivist state-centered nature of Westphalian sovereignty has been somewhat superseded.[638] On the one hand, a risk of fragmentation provoked by endless claims of statehood endangered peace, security, and economic well-being for all; that is, peace, security, and well-being conceived not only internationally, but also transnationally, and universally. On the other hand, from globalization emerges new realities. Decision-making shifts from the state to markets and economic players, on the one side and, on the other, to international organizations or other forms of international governance. Even when states adhere to the classical model of sovereignty, claiming that international agreements take place among sovereign states and international consent does not transfer sovereign powers to international organizations, there are numerous examples of clear transfer of sovereignty. This is why nationalism and globalism, though *prima facie* opposite in the struggle for power, must be balanced through the common concerns both in their material aspect (state, enterprise, goods, services, environment) as well as subjective aspect (the qualitative dimension of human action, co-operation, solidarity, co-existence, sentiments). In this way, the fate of sovereignty has to match not only national but also global purposes, including the realization of universal human rights, to achieve peace among nations, and the aspiration to realize the well-being of the global, cosmopolitan individual.

C Economic Sovereignty

In the economic field, economic sovereignty is likewise constitutional. Sovereignty in international economic law refers fundamentally to the resources of the state, to the state's economic system, and to the rules governing international economic relations.[639] That is, the notion of independent action focuses on the economic aspect. The economic rights and duties of states are established in the Charter of Economic Rights and Duties of States.[640] As in general international law, economic sovereignty is two-dimensional. There is an internal domain, based on a state's permanent sovereignty over its natural

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[638] An Agenda for Peace, Preventive Diplomacy, peace-making and peacekeeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992.. UN Doc. A/47/277 –S/24111, 17 June 1992, paras. 8-19.
[639] Qureshi, above note 633, p. 35.
[640] Charter of Economic Rights and Duties of the States. GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50; 14 ILM 251 (1975).

and non-natural resources[641], and the right of a state to conduct its own economic system with the correlated right of non-interference in a state's economic affairs through the threat or use of force. Economic sovereignty includes a state's right to use, possess, and freely dispose of its own resources, as well as freely to determine the exploration and exploitation of its own economic resources, which include also issues of management and conservation. In the same vein, economic sovereignty guarantees the state the right to regulate foreign investments, to nationalize and to expropriate property.

The Charter of Economic Rights and Duties of States also establishes, in Article 14, the duty of every state "to co-operate in promoting a steady and increasing expansion and liberalisation of world trade and an improvement in the welfare and living standards of all people, in particular those of developing countries". Internal economic sovereignty entails other duties and responsibilities. States have the duty to contribute to a balanced expansion of the world economy, taking into account, among other things, that the prosperity of the international community as a whole depends upon the prosperity of its constituent parts.[642] "The protection, preservation and enhancement of the environment for present and future generations is a responsibility of all states."[643]

Equality means proportional equality, hence differential treatment, and expresses solidarity. As far as its external economic sovereignty, the state has the economic status and capacity to act independently, on an equal basis, in relation to other players in international law; that is, the capacity to act externally in an economic sense. In the economic context, economic equality also means not only that all states enjoy the same level of protection under international law, but also that the requirement for equality implies an equal treatment under similar conditions resulting in differential treatment proportional to such conditions. This type of differential treatment is based on fairness[644] and treats equality within notions of solidarity and proportionality, e.g. the Generalized System of Preferences, the Enabling Clause, and Special and Differential Treatment at the WTO. The Charter of Economic Rights and Duties of States refers to the necessity of giving developing countries special treatment, taking into consideration

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[641] Art. 2.1, Charter of Economic Rights and Duties of the States, "every state has and shall freely exercise full permanent sovereignty, including possession,, use and disposal over all its wealth, natural resources and economic activities".
[642] *Ibid.*, Art,31.
[643] *Ibid.*, Art.30.
[644] Qureshi, above note 633, pp. 45 *et seq* .

their special needs. However, this flexibility demanded of the principle of state equality, through the principles of solidarity, does not necessarily reveal much about the underlying imperatives implied in certain moral issues, such as the protection and realization of human dignity, because this kind of positive solidarity remains structurally at the horizontal level of international law. Even if the concept of solidarity might imply a collective effort to achieve certain objectives relative to the realization of other common objectives, it would still be insufficient to realize those values enshrined in the normative nature of human rights.

D Sovereignty and current International Law

In principle, and in accordance with classical notions of economic external sovereignty, it is important to underline that the transfer of sovereignty made by states in favour of an international organization does not imply a loss of legislative power over the bargained subject. That is, the state does not lose power to act lawfully; it still has jurisdiction over this matter. Accordingly, there is only a mere transfer of temporary power in order that a particular issue may be addressed in an appropriate way, but not that sovereignty itself has been lost, or indeed the power to decide independently.[645] Nevertheless, the idea of an imperative–dependent on a teleological necessity—lies above this transfer of power, demands a pronouncement from the point of view of international law, and requires also a vertical structure of command. Therefore, when deciding certain issues that touch upon such matters of imperative substance, the competence to act will be limited. Whether interpreters should give more weight to decisions favouring rules that project the notion of a cooperative solidarity of the horizontal type, or a subordinate landscape of nations, or to decisions in favour of absolute independent action, is a constant feature in the normative dimension of sovereignty, and the ability/faculty of decision-makers, particularly those belonging to the judicial branch of power, to structure economic sovereignty in such a way that it reflects the transnational or universal changes taking place in international relations, such as those derived from an ever increasing consolidated universal morality, which at the same time reflects the structural changes referred to above, namely from

[645] Seidl-Hohenveldern, above note 617, p. 23.

co-existence to coordination/cooperation and solidarity (all of them being horizontal) to sub-ordination, which is vertical.

Which is the value of normative sovereignty in interpreting WTO rules? As a concept of dual nature, normative sovereignty tends to regard international law as of hierarchical superiority, given its constitutional role in relation to all humanity; it encapsulates the idea of the realization of the individual based upon a notion of the individual's inherent human dignity within the world community, and enshrining both collective and community interests.[646] This contemporary opinion implicates a weakening of the classical model of nation state sovereignty. The belief that there is no higher authority than the state, thus reinforcing the rule of non-interference in a state's internal affairs, is one challenged by an increasing recognition of human rights understood as universal morality.[647] For legal scholars, attempts to strengthen classical sovereignty are but a form of resistance to the new conditions of reality. The main cause of the debilitation of the classical model of sovereignty is principally economic globalization (in relation to which international trade has naturally been prominent), and the culture of human rights.[648] Nevertheless, it is still sometimes argued that the World Trade Organization has strengthened internal sovereignty. Furthermore, it is said that international organizations in general may be used to express and enhance sovereign power. However, taking into account the process of transformation towards a more interconnected international society, this cannot be true. In any case, treaties are interpreted dynamically; they thus take account of objective developments. Normative sovereignty can therefore be very valuable when it comes to interpreting WTO rules.

As outlined above, territorial sovereignty means that the state has the power to determine and to organize life within its boundaries. Of course this is applicable also to economic relations. However, the consequences of globalization play a prominent role here. Today, foreign producers and foreign products are a fundamental part of national economic order, even if this may lead to potential conflict at the highest levels of power. In this sense, globalization leads to the confluence of different political orders within one single sovereign territory.[649] For this reason, it is important to bear in mind how

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[646] Robert Howse, "Lost and Found" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.) 2008, p.62, Howse, above note 611, p. 62.
[647] *Ibid.*, p. 74.
[648] *Ibid.*, p. 66.
[649] Meng, above note 627, p. 519.

existing rules of positive law can influence the regulation of foreign behaviour in order to protect internal interests, particularly when such interests coincide with already universal legally protected values *i.e* universal human rights.

It has been suggested that the protection of state sovereignty in certain non-economic areas is the *rationale* behind the general exception system established at the WTO. Accordingly, states are allowed to maintain their freedom or competence to act so as to pursue certain carefully defined non-economic objectives, thus protecting their internal public order.[650] However, globalization itself, and certain changes in the structure of international law, encourage a thorough reading of the general exceptions so as to include not only the concerns of individual states, their internal morality and their internal public order, but also issues of global or universal public morals, and consequently a global or universal public order. In the particular case of human rights, the general exceptions of GATT Article XX play a fundamental role. However, measures taken by states to promote respect for human rights in relation to a regulating country, as well as within the territory of other WTO members, are often considered to be an extraterritorial activity.

1 Sovereignty and Dispute Settlement in the WTO

The WTO Dispute Settlement system has played an important role in examining the implications of sovereignty on trade-related issues; this has been achieved through the interpretation of substantive aspects of a member's sovereignty, its participatory rights, and through the development of techniques of interpretation.[651] In many cases, States plead on the basis of their sovereign rights.[652] The Appellate Body said that "in exchange for the benefits they expect to derive as Members of the WTO, they (states) have agreed to exercise their sovereignty according to the commitments they have made in WTO Agreements."[653] However, one commentator has affirmed that "on occasions judicial pronouncements have engaged in the clarification of the scope of sovereignty

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[650] Tobias Bender, in "WTO-Recht: Rechtsordnung des Welthandels" M Hilf & S Oeter 2005 (1st edition) p. 191 **See also** *US-Gasoline*, AB, above note 399 p. 29 "Article XX of the *General Agreement* contains provisions designed to permit important state interests –including the protection of human health, as well as the conservation of exhaustible natural resources –to find expression".
[651] Qureshi, Asif H, "Sovereignty Issues in the WTO Dispute Settlement" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.), 2008, p. 163.
[652] *United States- Import Prohibition of Certain Shrimp and Shrimp Products*. Panel WT/DS5/R 15 May 1998 para. 7.24; *United States – Restrictions on Imports of Tuna, (Tuna II)* GATT Panel Report, DS29/R, 16 June 1994, (unadopted) paras. 3.64 and 4.2.
[653] *Japan- Taxes on Alcoholic Beverages* Appellate Body WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 4 October 1996 pp. 12-15.

independent of the question of WTO commitment"[654], so contributing to the clarification of the notion as a rule of General International Law. There are two reasons to legitimize sovereignty issues within the context of WTO law. First, that WTO system is not a self-contained regime, hence it cannot be seen in isolation from the rest of international law[655] and, second, the principle of sovereignty is itself highly relevant to the rule of General International Law. In the EC- Hormones case, the AB, referring to an excerpt from Jennings and Watt's (eds.) Oppenheim's International Law[656], observed that:

> *"The interpretative principle of in dubio mitius, widely recognized in international law as a 'supplementary means of interpretation', has been expressed in the following terms: 'The principle of in dubio mitius applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.'"*

Although, when interpreting WTO provisions, the judiciary has given deference to the domestic regulation by means of the *in dubio mitius* principle of interpretation, for instance, in order to allow the EC discretion to apply its own levels of health protection, there are cases in which the right to act internally inevitably touches on the integrity of other states because the effects of the measures influence behaviour abroad. In cases of necessity, a balance between the interests affected by the action and the measure itself must be made. In order to protect the principle of sovereignty, the adjudicatory bodies have considered the possibility of applying a less restrictive, reasonably available measure, or a measure less obviously inconsistent with an agreement's provision.[657] However, there are cases in which the necessity and legality of a measure may only be determined by taking into account the importance of the protected values, such as a gross violation of human rights, and not because of its effects on trade or an alleged inconsistency with WTO provisions. Although the outcome of a Panel or AB decision may have an impact upon an overall understanding of the principle of sovereignty, the

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[654] Qureshi, above note 651, p. 166.
[655] *US-Gasoline,* AB*,* above note 399, p. 17.
[656] *European Communities- Measures Concerning Meat and Meat Products (Hormones)* Appellate Body WT/DS26/AB/R 13 February 1998 para. 65 footnote 154 Citing Jennings & Watts (eds), Oppenheim's International Law, 1992 (9th edition) Vol. 1, p. 1278.
[657] *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef* Appellate Body WT/DS169/AB/R 11 December 2000 paras. 164 and 165 Relying in WTO jurisprudence, *i.e. US-Section 337* para. 5.26.

judiciary, in discharging its functions, enjoys legitimacy in limiting sovereignty in relation to universally accepted trade standards, those at least of a *ius cogens* nature. In the context of the environment, for example, the Appellate Body, while neither admitting nor denying the possibility of extraterritorial action, has stated that under the requirement of the existence of some nexus between the measure and the object of regulation, the state may apply national measures to protect the environment (natural exhaustible resources) even if the effects of such a measure extend beyond its own territory.[658] The requirement of this nexus is a guarantee against abusing the possibility of such exceptions.[659]

E Trade related measures

Human rights trade related measures are seen as extraterritorial because they connote an effort to exert influence outside the national territory. The admissibility of such measures under international law will depend on the rationale of the measure and on the existence of a prohibitive rule of international law for influencing conduct abroad.[660] Nevertheless, human rights trade related measures do not always depend on influencing behaviour abroad. In this case, the import restriction could be considered essentially territorial. These kinds of measures are justified by the right a state possesses to take action in order "to ensure that its own consumption does not contribute to what it regards as a great evil"[661], thus protecting internal (and not external) conceptions of the morally good.

Under general international law, trade-related measures are seen with suspicion as there exists no international consensus on a general prohibition against the unilateral use of coercive measures. The opinion that defends the notion that unilateral coercive measures are illegal has linked human rights trade-related measures to the rules governing sovereignty, which involve the principle of non-intervention in the internal

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[658] *US-Shrimp*, AB, above note 606, para. 133.
[659] Tatjana Eres, "The limits of GATT Article XX: A back door for human rights?" Georgetown Journal of International Law 2004 Vol. 53 No. 4, p. 619.
[660] Robert Howse and Donald Reagan, "The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy" The European Journal of International Law 2000 Vol. 11 No. 2, p. 274 The authors discuss de admissibility of trade measures in the context of Production and Process Methods.
[661] *Ibid.*, p. 275.

affairs of other states, and the prohibition of extraterritorial jurisdiction.[662] On the other hand, those claiming the absence of such a prohibition of customary law consider that there is no breach of international law if that measure is taken as a countermeasure due to a prior breach of international law. Nevertheless, in order for the measure to be legal, it has to be proportionate and to meet the conditions established in Articles 45 to 49 on state responsibility. The biggest dilemma raised by the use of human rights trade-related measures is the difficulty of establishing substantive parameters in order to balance the values defended by disputing parties; in the end, human rights trade-related measures do not only involve the sovereignty of the addressee state but also the sovereignty of the state inflicting the measure.[663]

Within the multilateral trading system laid down in the World Trade Organization, the permissibility of human rights trade-related measures has suffered considerably. The WTO system is viewed as tending to want to eliminate trade-related measures as a means to promote respect for human rights.[664] Nonetheless, states can make use of economic measures without breaching the order established by the WTO, that is, where non-states parties are involved or where parties to the organization deal with issues not regulated by this system. In the same vein, but not identical, are those cases in which human rights trade-related measures are not subject to the entire set of rules set out by the WTO, either because countries are exempted (as in waivers, the enabling clause, or blood diamonds) or because there is an exception (GATT Article XX). The Generalized System of Preferences gives the state the opportunity to determine the conditions, in a non-discriminatory fashion, under which the beneficiary of special and differential treatment may enjoy them. The main examples studied in legal doctrine regarding the relationship between non-economic issues and trade are the general exceptions of the GATT Article XX (1994). Specifically, GATT Article XX(a) is a potential way to incorporate human rights into world trade. Furthermore, there is some agreement among international scholars about the legitimacy of some unilateral action in WTO law.[665]

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[662] Anthony E Cassimatis, "Human Rights Trade Related Measures under International Law: The Legality of Trade Measures Imposed in Response of Violations of Human Rights Obligations under General International Law", 2007, p. 162 *et seq.*
[663] *Ibid.*, p. 162 et seq.
[664] Sarah H Cleveland, "Human Rights Sanctions and International Trade: A Theory of Compatibility" Journal of International Economic Law 2002 Vol. 5 No.1, p.135.
[665] Nils Stohner, "Importrestriktionen aus Gründen des Tier- und Artenschutzes im Recht der WTO" 2006, p. 66.

In any case, when analysing the permissibility under WTO law of trade-related measures in connection to human rights violations, both the human rights violation and the trade practice must be taken into consideration. Three kinds of measures have been identified. In the first place, there are those measures that restrict or affect the established trade system when the product is the direct source of the human rights abuse, either due to the process and production method employed, PPMs (e.g. labour rights violations) or due to the use of the product (banning weapons exports due to human rights concerns). In the second place, there are measures that target a product with a less direct nexus to the human rights breach, such as the banning of products that provide capital to finance human rights violations (e.g. blood diamonds). Thirdly, there are economic measures that have no direct relationship to trade. These measures are of a general type and have a negative impact only upon the national economy of the accused state.[666] Measures or restrictions on trade can be in the first instance tariffs and quotas, but also import or export bans, licensing requirements, and labelling.

The difficulty of GATT Article XX(a) is of course that of defining what kinds of values and what kinds of measures it allows. The main problem that the issue of human rights faces is that, in order for them to become effective values within the legal system of international trade, GATT Article XX(a) not only requires a definition of what type of substantive rights are permissible, but also of the jurisdictional scope of "public morals" GATT Article XX(a). The main question, described in the specialised bibliography, is: "Whose moral is to be protected?" In this sense, measures are commonly considered to be directed inward or outward.[667] Regarding the protection of public morals, three different situations according to the origin of the risk to public morals have been identified.[668] First, the risk to public morals has its origin in the targeted product itself (e.g. pornographic products and alcohol). In the second case, the risk to public morals does not have its origin in the product but in the production process, that is, the production process methods are considered to pose a risk to public morality. One classic example is the prohibition of some animal products, such as furs, due to the use of inhumane methods for obtaining the product, *e.g.* leghold traps. Another much

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[666] Cleveland, above note 664, pp. 138-144.
[667] Steve Charnovitz, "The Moral Exception in Trade Policy" Virginia Journal of International Law 1998 Vol. 38 No. 4, p. 689.
[668] Nicola Wenzel, "Art XX a) GATT" in *Max Planck Commentaries on World Trade Law : WTO-Trade in Goods* R Wolfrum, P-T Stoll, H P Hestermeyer (eds.), 2011 Vol. 5, p. 485.

discussed example is labour standards and the PPMs. Here, there exists a link or nexus between the product and the risk to public morals. The third case refers to trade-restrictive measures intended to change conduct in another state or region, but where there is no relationship between the risk to public morals and the product, such as a ban on imports from a country due to constant human rights violations. There is wide acceptance that because of the lack of nexus between the risk to public morals and the product itself, the measure cannot be justified under a public morality exception. To justify the measure would imply a denaturalisation of the public morality exception.[669] In determining the scope of GATT Article XX, it is argued that the interpretation must be limited to protect domestic behaviour only, or else to encompass some kind of extraterritorial efficacy. In the *US–Shrimp* case, the AB[670],while reverting to the Panel's finding, established that measures aiming at influencing policies abroad by conditioning market access to foreign products cannot be considered, *a priori*, as falling outside the scope of the General Exceptions. One commentator explains that the drafters of GATT Article XX did not specify anything regarding the extraterritorial criterion with regard to the litera (a), (b), (d), and (e), and that the silence should be understood as confirming the permissibility of some kind of extraterritorial action.[671] This is precisely what the AB did in its famous *dicta* of paragraph 121 in the *US–Shrimp* case.

F Extraterritoriality

According to Bartels, GATT Article XX does not always entitle States lawfully to apply counter-measures in the form of trade measures in order to enforce another States' obligations. He justifies this on the grounds that not every obligation produces or generates a right to react by means of countermeasures. Therefore, he suggests examining the rules governing jurisdiction in order to read GATT Article XX from a perspective of human rights.[672] Very often the term extraterritorial is used to connote a state's undertakings to exert influence in conduct abroad. Such coercive extraterritorial action is regarded with displeasure in the arena of international law. However, it could

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[669] Wenzel, *Ibid.*, p. 485 **See also** Mark Wu, "Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Doctrine." Yale Journal of International Law 2008 Vol. 33 No. 1, pp. 235 *et seq*.
[670] *US-Shrimp*, AB , above note 606, para. 121.
[671] Salman Bal, "International Free Trade Agreement and Human Rights: Reinterpreting Article XX of the GATT" Minnesota Journal of Global Trade 2001 Vol. 10 No. 1, p. 107.
[672] Lorand Bartels, "Art XX of GATT and the Problem of Extraterritorial Jurisdiction" Journal of World Trade 2002 Vol. 36 No.2, pp 363, 364.

be the case that it is permissible to apply general rules on jurisdiction in order to justify restrictive trade-related measures with extraterritorial connotations. In addition, due to the fact that jurisdiction could be established by an agreement limiting customary rules on jurisdiction[673], it could be the case that trade-related measures are to be interpreted under the specificities of the WTO provisions. Taking into account the particularities of the relationship between human rights and international trade agreements under the WTO, and bearing in mind the question of how human rights concerns can be addressed within the framework provided by the WTO, it is suitable to analyse here the relevant principles of international law regarding the exercise of extraterritorial jurisdiction. In the specific case of the WTO and human rights, and in spite of some difficulties regarding the enactment of extraterritorial jurisdiction, states have a sufficient legal interest to establish the basis for what can be considered as extraterritorial legislation. In line with this suggestion, it is argued that the case of import restrictions due to a violation of core human rights would not mean the enforcement of human rights obligations extraterritorially, but the enactment of such trade-restrictive measures would rather have a legitimate end goal: the promotion of respect for human rights.[674]

Extraterritorial means, in the first place, outside the territory of the state.[675] Moreover, "beyond the geographic limits of a particular jurisdiction".[676] Thus, extraterritorial jurisdiction refers to the capacity of a state to influence matters beyond its own state borders. It can happen by means of prescription, for example through legislative, administrative, and judicial measures. In this case, the power to prescribe a code of conduct through legal rules is known as legislative jurisdiction.[677] Extraterritorial jurisdiction can also occur by means of adjudication. In this case, jurisdiction refers to the legal competence of a court to decide. Recently, jurisdiction has been concerned with the enforcement of laws; it pertains to the implementation and execution of laws. The main problem facing the use of trade-related measures due to a violation of human rights is that they are deemed to be extraterritorial.

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[673] Bartels, *ibid.*, p. 391 According to this author, measures taken under an agreement include those mandated by the treaty, those authorized by the treaty, and those in support of the treaty **See also** Mavroidis, Petros C and Neven, Damien J, "Some reflections on Extraterritoriality in International Economic Law and Economic Analysis" in *Mélanges en Hommage à Michel Waelbroeck,* 1999 Vol. 2, p. 1299 **See also** *The Case of S.S. Lotus* above, note 401, p. 19.
[674] Bartels, *ibid*., p. 353.
[675] Meng, above note 627, p. 73.
[676] Black's Law Dictionary, "extraterritorial" 2004 (8th edition).
[677] Qureshi, above note 633, p. 53.

The lawful exercise of extraterritorial jurisdiction is neither clear in general international law nor in WTO law. Whereas it is accepted that both legislative and enforcement jurisdiction outside the territory of a state is extraterritorial, there is no clarity as to whether legislation prescribing conduct within a territory, but with extraterritorial effects, falls within the scope of extraterritorial jurisdiction or not.[678] Sometimes it is argued that measures intended to regulate the internal market, while denying access to foreign products, is intra-territorial and therefore permissible. This situation raises two questions. Firstly, whether internal measures that have extraterritorial effects are extraterritorial in a juridical sense, or not. Secondly, whether a state may lawfully take measures to address behaviour of this kind, thus risking contravention of the rules of lawful use of extraterritorial jurisdiction. In any case, it seems well established that it is a principle of international law that the lawful exercise of extraterritorial jurisdiction is a subject of international law, because in principle, states cannot always unilaterally decide the limits of their own competence.[679] This means that the power to decide on matters concerning the lawfulness of extraterritorial jurisdiction must be subject to a form of international decision-making.

1 Customary Principles of Jurisdiction

Customary international law identifies some principles of extraterritorial jurisdiction among which some are considered to be basic and others remain controversial. Although international customary law has enunciated some principles, such as those on jurisdiction, the allocation of positive principles in general international law is still inappropriate.[680] This is due to the fact that domestic decisions and the opinion of legal scholars reflect mainly national ideas and interests that, firstly, do not find a way to solve such disagreements and, secondly, still attempt to prove superior over more cosmopolitan notions of the international society and global concerns. This disagreement reflects the horizontal reality of international law. In addition, the legal analysis of quintessential concepts of international law, such as sovereignty, differ considerably among individual states and groups of states.[681] Discordant positions reinforce the urgency of allowing normative aspects of sovereignty to play a more

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[678] Howse & Reagan, above note 660, p. 274 *et seq.*.
[679] Menno T Kamminga, "Extraterritoriality" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 3, p. 1070.
[680] Vaughn Lowe, "Jurisdiction" in *International Law* M D Evans, 2006, p. 337.
[681] Qureshi, above note 633, p. 55.

active role in decision-making processes, and that allow the display of the necessary verticality of "beyond state law". Positively, rules of jurisdiction and extraterritoriality are still governed by the jurisprudence developed in the Lotus Case[682], either in its hard or soft variants. In this remarkable case it was established, if with a certain ambiguity, that prescriptive and adjudicative jurisdictions are permitted if there is a sufficient nexus between the State exercising jurisdiction and the extraterritorial event. Today, international law recognizes a series of principles on prescriptive jurisdiction. They are the territorial principle[683], the nationality principle[684], the protective principle[685], the universality principle[686], the passive personality principle[687], the effects principle[688], and the jurisdiction provided by an international treaty.[689]

a Territoriality Principle

Pursuant to the territoriality principle, which results from territorial sovereignty, the state has the right to rule over all persons, things, and activities within its borders.

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[682] *The SS Lotus Case*, above note 401, p. 18 "Now the first and foremost restriction imposed by international law upon a Sate is that -failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial except by virtue of a permissive rule derived from international custom or from a convention. It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. *Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules, as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.*" Emphasis added.

[683] Mavroidis & Neven, above note 673, p. 1302 "According to the territoriality principle, states can, in principle, extend their jurisdictional reach to activities occurrin in their territory".

[684] *Ibid*., p. 1302 According to the nationality principle, states can extend their jurisdiction to activities whereby its nationals are implicated even if such activities occur outside their territorial boundaries."

[685] Nathalie Bernasconi-Osterwalder, Daniel Magraw ; María Julia Oliva, Marcos Orellana, Elizabeth Tuerk "Environment and Trade: A Guide to WTO Jurisprudence", 2005, p. 237. "Pursuant to the protective principle a state has the right to exercise jurisdiction in order to protect vital interests." *e.g.* the prohibition of counterfeiting of the state currency anywhere in the world.

[686] *Ibid.*, p. 237 This is a typical principle of international criminal law according to which " a state has the right to exert jurisdiction over universally condemned activities such as slavery, torture and genocide" reflecting the impact of human rights.

[687] Bartels, above note 672, p. 368 According to the passive personality principle a state has legislative jurisdiction where the victim of an act is a victim.

[688] *Ibid.* p. 368 The effects principle holds that state may exercise legislative jurisdiction in respect of act with substantial effects on its territory **See also** Qureshi, above note 633, p. 55. A state exercises legislative jurisdiction in order to protect the interests of the state from the effects of the actions taken abroad.

[689] Bartels, *ibid*., 369.. "this jurisdiction may be established both, when the (international) agreements provides for express rights and when it imposes obligation on a party", footnote 69 Citing a rule established by the PCIJ in the *SS Lotus Case*, above note 401, at pp. 18-19.

Thereby, the state has the exclusive power to decide on all these matters. Brownlie has said that the territorial principle, even if it remains the best foundation for the law, fails to provide for current jurisdictional conflicts, and that "the principle of substantial and genuine connection between the subject matter of jurisdiction, and the territorial base and the reasonable interests if the jurisdiction sought to be exercised, should be observed." [690] The territorial principle allows for lawful uses of extraterritorial jurisdiction, that is, for subjective territorial jurisidiction.[691] Conversely, in cases of objective territorial jurisdiction[692] the doctrine is not in unity.

b Effects Doctrine

The effects doctrine falls within this type of objective territorial jurisdiction, and is said to lead to a rule allowing the use of extraterritorial jurisdiction.[693] In conformance with this notion, jurisdiction is used when the actions of a third state have a substantial effect within the territory of the first state, so that the "effect" is the only jurisdictional link to the case.[694] According to Meng[695], there currently exists a majority legal opinion according to which the use of extraterritorial jurisdiction in public economic law, in order to regulate damaging effects from foreign action, is admitted. Although there is no clarity about the limits between a broad and narrow perception of such permissible extraterritorial action, the Restatement (Third)[696] shed some light on this matter. According to § 402 (1) (c), "Subject to § 403 a state has jurisdiction to prescribe law with respect to [(1) (c)] conduct outside its territory that has or is intended to have substantial effect within its territory". Further on, the restatement says that, "a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable under §403." Nonetheless, it is well known that the criteria to ascertain reasonableness in public international law are

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[690] Brownlie, above note 607, p. 299.
[691] Lowe, above note 680, p. 343 According to the subjective territorial jurisdiction a State may exercise prescriptive jurisdiction in circumstances where it applies its laws to an incident which is initiated within its territory but completed outside its territory.
[692] *Ibid.*, p. 344. According to the objective territorial jurisdiction a State may exercise prescriptive jurisdiction in circumstances were it applies its law to an incident that is completed within its territory, even though it was initiated outside its territory.
[693] *The SS Lotus Case*, above note 401, p. 23. "(...) offences, the author of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, *and more especially its effect*, have taken place there" Emphasis added.
[694] Lowe, above note 680, p. 343.
[695] Meng, above note 627, p. 531.
[696] Restatement of Law (Third) , abov e note 409, §§ 402, 403.

quite controversial, especially in relation to the relativity or instability of the concept. Another important issue in determining the lawfulness of extraterritorial jurisdiction, according to the effect, is the degree of the effect, that is, whether the effect is excessive or not. At times, it is the effect of the measure, and its proportionality, too, that could be rendered illegitimate. Furthermore, these alleged wrongful outcomes are not only the consequence of the application of civil and criminal sanctions within the regulating state, but also the result of the application of non-judicial enforcement measures, like the denial of the right to engage in export or import transactions.[697]

The effects doctrine has been labelled as inconsistent for it is affirmed that the exercise of extraterritorial jurisdiction on the sole basis of the effects that an action produces could justify extraterritorial jurisdiction *ad infinitum*. One state may plead on the grounds of the territoriality principle, and the other on the grounds of its effects. Both parties can always argue that the importance of the issue at stake is of such relevance that it is indispensable for the state to legislate. The question is what happens when the determinant issues on lawfulness of extraterritoriality do not depend either on the interest of one state or the other but on a global, superior, or universal issue, acknowledged as such, such as universal human rights or the environment. Today, the effects doctrine enjoys some acceptance in anti-trust law and the regulation of restrictive business practices in general. However, there are burning debates about its applicability in the field of the relationship between human rights and international trade, particularly those related to labour standards and human dignity in general, including the issue of living standards. As a matter of fact, in the case of human rights, it can be the case that the interests defended by one party correspond to those considered as universals which are already enshrined in positive law in global or universally binding legal instruments.

c Genuine Link

Common to the principles on extraterritorial jurisdiction is the requirement for a meaningful connection or genuine link. Extraterritorial acts are deemed to be lawful if there is a substantial and *bona fide* connection between the subject matter and the source of jurisdiction.[698] Conversely, the inexistence of such a connection leads to an

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[697] Bartels, above note 672, p. 378 Citing §431 comment (c), Restatement of Law (Third): Foreign Relations Law of the United States. 1987 Vol. 1.
[698] Brownlie, above note 607, p. 311.

interference in the internal affairs of the state.[699] The requirement of a genuine link between the rule and the object of the regulation in order to consider extraterritoriality as lawful is the subject of much debate. It quickly leads to the question of what is meant by a meaningful connection? Must there be a legal connection or does a mere commercial or factual effect suffice? According to Meng, the idea is that the lawfulness of extraterritoriality, in a "meaningful connection", is justified by the end goal (*Finalität*) pursued by the regulating state.[700] This means that the crucial or key element is the relationship between the aim and its pursuance through the exercise of jurisdiction. It follows that the substantial and *bona fide* connection is to be determined within an evaluative framework in which a balancing of the values involved in the dispute must be established.[701] This evaluative framework may refer either to the substance of the values or to the interests (conflicts) of the states involved. In addition, the framework varies according to the origin or affiliation with regards to a national, transnational, or universal aim. A current suggestion is to reject the concept of a genuine link and its "domestic connotations", and to consider it rather more as a matter of legitimate state interest, through which a balance of interests can be sought. This is justified on the grounds that the existence or not of such a "meaningful domestic connection" does not imply the exclusion of a state interest to exercise legislative jurisdiction on purely extraterritorial matters, such as global commons, the environment, space, or human rights.[702]

2 WTO jurisprudence

The WTO jurisprudence in *US–Shrimp* is considered both as a non-recognition, and as a non–denial of admissibility of extraterritorial jurisdiction. The GATT does not explicitly address the subjects of jurisdiction or extraterritoriality. However, the GATT jurisprudence does display developments regarding this controversial issue. Traditionally, the issues of extraterritorial jurisdiction are discussed following two non-adopted Reports of the Panels, *Tuna I*[703]and *Tuna II*[704] and the well-known *US*–

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[699] Werner Meng, „Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht" 1994, p.541, Meng, above note p. 541.
[700] *Ibid.*, p. 541.
[701] *Ibid.*, p. 545.
[702] Bartels, above note 672, p. 374.
[703] *United States – Restrictions on Imports of Tuna, (Tuna I),* GATT Panel Report DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155 paras. 5.27 and 5.32; paras. 5.26 and 5.31.
[704] *US-Tuna II*, above note 652, paras. 5.23, 5.26, 5.36 and 5.39 According to Bartels World Trade Journal 36 at p387 the panels expanded the Tuna I definition of jurisdiction to allow for extraterritorial

Shrimps. In the Tuna cases, the judiciary saw essentially no validation of a rule allowing extraterritorial jurisdiction. By contrast, in the *US–Shrimp* case, although the judiciary avoided express reference to the term "extraterritoriality", it did give some hints on the matter. In the first instance, the Panel rejected justification under GATT Article XX(g) after finding a violation of GATT Article XI, maintaining that a measure cannot be considered as falling within the scope of GATT Article XX if it operates so as to affect other government's policies, and in a way that threatens the multilateral system.[705] Later, the AB explicitly rejected this Panel's approach, finding that most measures justified by GATT Article XX would have the characteristic of affecting other government's policies by conditioning access into the importing country's market.[706] It further considered irrelevant whether or not there is an implied territorial limitation in GATT Article XX. It found that migratory species occurring within the US waters provided a sufficient nexus for a measure to be justified under GATT Article XX(g)[707]. On this point, the Appellate Body noted that:[708]

> *"The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction.*119 *Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)"*

Two conclusions have been drawn from this. Firstly, that it remains unanswered whether natural resources located outside a territory applying the measure are excluded from GATT Article XX. Secondly, although with effect beyond the jurisdiction of the US, the Appellate Body did not deny that the US was applying a measure exercised extraterritorially. The *dictum* of the AB implied the acceptance of the potential of the importing country to exert influence over the exporting states' order. Contrary to the

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measures, so long as these did not force other countries to change their policies within their own jurisdictions.

[705] *US-Shrimp*, Panel, above note 652, para. 7.51.

[706] *United States- Import Prohibition of Certain Shrimp and Shrimp Products.* Appellate Body WT/DS58/AB/R 12 October 1998 para.121, *US-Shrimp*, AB, above note 66, para. 121

[707] *Ibid.*, para. 133.

[708] *Ibid.*, para. 133.

Tuna Panels, which expressly ban the use of coercion, the AB, in the *US–Shrimp* case, seemed to revert to the Tuna jurisprudence while recognizing that, as far as there is a sufficient nexus between the measure and the object of regulation, measures having extraterritorial effects can be in conformity with WTO law provisions.

CHAPTER 5 FRAGMENTATION

A Polycentrism

The most outstanding feature of globalization is precisely the appearance of global networks. These networks span most social and technical fields, such as human rights, international trade, and the internet. A majority view, rather conservative, argues that public international law is not sufficient to resolve the problems of our global society. The reason given for such an argument is that the international legal system does not enjoy the same level of coherence and verticality as do national systems. Furthermore, it is argued that the lack of a central decision-making mechanism, and the lack of sanctions and enforceability, hinder the realization of the core values of international society. In other words, normative conflicts are and will always be endemic to international law given its decentralized and non-hierarchical structure.[709] Due to the emergence of several separate specialized rules, rules systems, and rules complexes, without necessarily a clear relationship one to the other, the unity of the international system has been challenged. Environmental law is a response to rising concerns about the international environment. Human rights focus on the protection of the individual and the individual's highest good, human dignity. International trade law is the legal instrument that arises from current mainstream economic theory. In many respects, these autonomous regimes pursue very specific objectives that are based on principles that are diametrically opposed. Moreover, even the substantive structure of these regimes may point to diametrically opposed directions and ends. For example, the moral foundations of human rights are rooted in the inherent dignity of the individual, whereas the principles of economics are argued often to be those of egotism, self-interest.[710] This issue of disunity becomes still more acute when new rules and regimes arise to circumvent the old rules and regimes. The avoidance of fulfilling old obligations

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[709] Fragmentation of International Law (Koskenniemi), above note 550, at §486.
[710] Adam Smith, “An inquiry into the nature and causes of the wealth of nations” Book I Chapter 2, -A selected edition- Kathryn Sutherland (ed.) 1993 p. 22 “**It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love and never talk to them of our own necessities but of their advantages**”. Emphasis added.

through engaging in new commitments endangers the possibility of a unified international law.[711]

Fragmentation concerns a plurality of orders, a proliferation of international tribunals and courts, and the existence of the controversial self-contained-regimes. The debate about the unity of the international legal system is a topic that has often been dealt with under the heading 'fragmentation of international law'.[712] These debates arose initially from the references of the ICJ to self-contained regimes in the hostage judgements case of 1980.[713] It is suggested there that the international legal system is fragmented as a consequence of the emergence of self-contained regimes, and the proliferation of international courts and tribunals.[714] However, these developments should not be considered to be the cause of fragmentation; they are rather the consequence of a changing paradigm within the international legal community. As a matter of fact, fragmentation is caused by the enhancement of the material operational scope of international law, provoked in part by a multiplication of players, and an effort effectively and efficiently to follow up on commitments.[715] According to the report of the Study Group of the International Law Commission, the fragmentation of international law arises from the diversification and expansion of international law as a response to the demands of a pluralistic world of different sovereignties, in which pluralism is said to be the constituent value of the system.[716] In the same way, fragmentation is caused by a plurality of rules and regimes in the complex modern world.[717] Furthermore, fragmentation also means the dislocation of international

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[711] Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law. Report study group of the International Law Commission UN General Assembly A/CN.4/L.702 18 July 2006 ILC 58th Session at §10.
[712] See Pierre-Marie Dupuy, "The danger of fragmentation or unification of the international legal system and the International Court of Justice." New York University Journal of International Law and Politics 1998 Vol. 31 No. 4, p. 791 **See also** Georges Abi-Saab, "Fragmentation or unification: Some concluding remarks" New York University Journal of International Law and Politics 1998 Vol. 31 No. 4, p. 919 **See also** John H Jackson, "Fragmentation or unification among international institutions: The World Trade Organization" New York University Journal of International Law and Politics 1998 Vol. 31 No. 4, p. 823.
[713] *United States Diplomatic and Consular Staff in Tehran* (United States of America v Iran) Judgment of 24 May 1980, ICJ Reports 1980, p. 3 para. 86. "The rules of diplomatic law, in short, constitute a self-contained regime (...)".
[714] Tullio Treves, "International Law: Achievements and Challenges" in *Cursos Euromediterráneos Bancacaja de Derecho Internacional* J Cardona Llorens (Director), 2006 Vol. 10, p. 149.
[715] Dupuy, above note 712, p.795.
[716] Fragmentation of International Law (Koskenniemi), above note 550 at § 491.
[717] Treves, above note 714, p. 162.

authority. It refers to the international distribution (or allocation) of power.[718] For example, it is in this context that the question arises about the role and judicial function of the ICJ[719], that is, the relationship between the ICJ and other tribunals or specialized agencies such as the ICSID, or their equivalents, like the WTO[720]. Fragmentation is about a diversity of legal orders, a diversity of tribunals within a particular judicial system, that generate rules in their own specific but diverse ways, but which operate within a unity marked nevertheless by the specificities or characteristics of international law. These specificities normally make reference to the lack of a proper judicial system in international law. The appropriateness in the case of the international judiciary refers specifically to the lack of a central judicial authority[721], existing on a vertical plane, that would integrate and harmonize all possible divergent and contradictory international commitments.

B Normative conflicts

The ILC is of the opinion that current international law provides tools for the harmonization and unification of a fragmented system. Moderates within contemporary international legal scholarship often express the view that, lack of homogenous and hierarchical legal structure at the international level notwithstanding, there should be no reason for "legal paralysis" in the case of normative conflicts. The dynamics of the contemporary world make it impossible to stop at every single independent decision. Although the problem of unity and coherence within the international legal system remains a problem to be solved through legislative power, a certain degree of legal management is nevertheless now taken as a given within the framework of international law, especially in light of techniques and jurisprudence involving conflicts between rules or rule-based systems that is available to lawyers.[722] Furthermore, the ILC has gone so far as to state that "although fragmentation may create problems, they are neither altogether new nor of such nature that they could not be dealt with through techniques international lawyers have used to deal with the normative conflict that may

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[718] Tomer Broude, "Fragmentation(s) of International Law: On Normative Integration as Authority Allocation" in *The Shifting Allocation of Authority in International Law* T Broude and Y Shany (eds.) 2008, p. 102.
[719] Dupuy, above note 712 p. 801.
[720] Abi-Saab, above note 712p. 928.
[721] *Ibid*., pp. 920-926.
[722] Fragmentation of International Law (Koskenniemi), above note 550 at §485.

have arisen in the past."[723] In order to solve the conflicts arising from the existence of highly specialized autonomous systems, that threaten the legal security otherwise provided by international law, the ILC's Study on Fragmentation of International Law is of the opinion that general international law continues to develop through the application of the Vienna Convention on the Law of Treaties, customary law, and general principles of law (recognized by civilized nations), and that these improvements provide a framework that contributes to the unification of a system otherwise in danger of fragmentation. The idea of viewing the different sources of international law (fragmentation of norms) and its emerging vertical structure (fragmentation of authority) through concepts such as *ius cogens*, or obligations such as *erga omnes*, responds to the fundamental view that international law is not to be understood as an arbitrary collection of dispersed norms but rather as an inter-related set of norms with a normative content that expresses and protects its values within a hierarchical structure. This is precisely the first evidence of the emergence of precisely such a vertical form of organization. The main horizontal structural principles to give content to issues of morality are cooperation, followed by solidarity. However, human dignity as the foundation value of international law is recognized throughout the legal order, such normativity being possible thanks in large part to taking a vertical structure as the starting point.

How to solve the problems of normative conflicts according to the International Law Commission? The Conclusions of the ILC's Study Group on Fragmentation refer to four general points. They first refer to international law as a legal system, meaning that the rules of international law cannot be understood as a random collection of norms but rather as a body of interacting rules and principles, viewed in hierarchical order, the formulation of which involves "greater or lesser generality and specificity and their validity may date back to earlier or later moments in time."[724] The second conclusion refers to the application of the law; that is, how do two or more rules relate to each other in the application of international law? Here the ILC identified two different general types of relationship. The first type touches the act of interpretation when one norm assists in the interpretation of the other for the purpose of application, clarification, updating or modification. In the event of such a relationship, both rules will be applied

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[723] *Ibid.*, at §9.
[724] *Ibid.*, at §14 (1).

in conjunction. If the rules were to be in a relationship of conflict the frictions are to be resolved according to the Vienna Convention on the Law of Treaties. A third principle reinforces the methods of interpretation of the VCLT, particularly those established in Articles 31 to 33. In particular, Article 31(3)(c) of the VCLT (systemic integration) plays an essential role in lending coherence to the international order. The fourth and last conclusion concerns the question of adjustment and the combination of various substantive rules into a single outcome. It is the principle of harmonization. When applying this principle, we take into account that "when several norms bear on a single issue [these] should to the extent possible be interpreted so as to give rise to a single set of compatible obligations."[725]

C The international Judiciary

The international judiciary is a key element in giving coherence to international law. Some authors alert us to the fact that the proliferation of international sectorial regimes, like regional courts of Human Rights, the International Tribunal for the Law of the Sea, the Dispute Settlement System of the World Trade Organization, the International Criminal Tribunal, and arbitral tribunals, may threaten the unity of international law.[726] It is also said that the overall increase in the number of international specialized judicial *fora* is leading to a judicialization of international relations.[727] Certainly, it is no secret that more and more international courts and tribunals are not only applying laws but also making them. Besides, while carrying out their task, international courts and tribunals "tend to prefer an integrated conception of [the] international to a fragmented one. The rules of interpretation, and the balancing of values and interests are fundamental tools that courts have in order to promote coherence and unity in the overall system of international law."[728] In spite of the flourishing sectorial regimes, and the contradictions and incongruences that this may bring, it is acknowledged that however autonomous special regimes may aspire to be, "there cannot be a totally self-contained regime within the legal order".[729] The overarching principles of the legal order are responsible for maintaining its unity. In summary, the increasingly complex

[725] *Ibid*., at §14 (4).
[726] Dupuy above note 712, p. 792.
[727] Alan Boyle and Christine Chinkin, "The Making of International Law" 2007, p. 263.
[728] *Ibid*., , pp. 310, 311.
[729] Georges Abi-Saab, "Fragmentation or unification: Some concluding remarks" New York University Journal of International Law and Politics 1998 Vol. 31 No. 4, p.926, Abi-Saab, above note 712, p.926.

nature of global phenomena (globalization) generates the need for a specialized regulatory framework, a framework that promotes harmony and coherence. Unity necessarily demands a common understanding and interpretation of at least the central norms of the legal order; this at the same time demands a considerable degree of coordination among the different legal institutions.[730] Another way of eradicating the damaging effects of fragmentation to the unity of the legal system is to conceive of the international legal order in terms of a constitutionalist analysis.[731]

Regarding the particular case of human rights, it has been said that the unnecessary fragmentation of law, through different judicial bodies following sometimes inconsistent or contradictory views, and without an appropriate knowledge and consequent assessment of these differing views, is a situation causing considerable damage. The use of external sources in the interpretation of a rule is one mechanism by which to seek harmonization.[732] In the European context, it has already been acknowledged by scholars that the Court (ECtHR) role is not only to settle disputes between single states, "but also to construe the law of Convention in a manner which may apply at a pan-European level". In other words, the role of the ECtHR is one of integration, in the sense that, through its decisions and judgments, it is attempting to create a coherent body of human rights rules that apply equally and indiscriminately in the sphere of the legal relations of all of the State Parties to the Convention.[733]

[730] *Ibid.*,p.926.
[731] Peters, above note 426, p. 602.
[732] Louise Arbour, "Dialogue between Judges, European Court of Human Rights, Council of Europe" 2008, p. 94.
[733] *Ibid.*, p. 94 citing Christos Rozakis "The European judge as a comparatist" in Tulane Law Review 205 Vol. 8, p. 272.

CHAPTER 6 CONSTITUTIONALIZATION

A Autonomy of a body politic

In general terms, the constitutionalization of international law alludes to normative frameworks in which the problems of emerging political structures and legal systems may be regulated from an international perspective. [734] Consequently, constitutionalization may be defined in broad terms as an aggregate of basic norms regulating individual and state behaviour within a given polity.[735] Traditionally, this term has designated the highest legal structure of a nation state; that is, its constitution. Nevertheless, it no longer seems problematic to refer to an international constitutional order. The word "constitution", for the purposes of international law, is now understood "as the fundamental legal order of any autonomous community or body politic."[736] In legal scholarship, the existence of international society takes account of the interests and values of the community of individual states, *uti singulis*, the community of states as a whole, and the individual not give rise but also demand the existence of its own constitutional legal framework. As a matter of fact, the principal question in international law raised by constitutionalization turns on the possibility of making decisions beyond national borders and the consent of the nation state, striving for the achievement of supranational aims, the supranational *telos*.

1 Compensatory constitutionalism

International constitutionalization compensates for loss of national sovereignty. The constitutionalization of the international legal order is a reaction to globalization. As a transnational and international process, globalization implies new forms of authority beyond the state. Although there is still wide agreement that the state is the most important actor in international law, it is also clear that the nation state is not by itself sufficient to respond effectively to the challenges posed by economic and moral globalization. Typical functions of the constitutional nation state, such as guarantor of

[734] Erika De Wet, "The International Constitutional Order" International and Comparative Law Quarterly 2006 Vol. 55 No. 1, p. 51.
[735] Peters, above note 426, p. 581.
[736] Bardo Fassbender, "The Meaning of International Constitutional Law" in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* R St J Macdonald, D M Johnston. 2005, p. 838.

human realization, liberty, and equality, are transferred to higher levels of decision-making. Hence, a kind of world constitutionalization compensates for the inability of the state to realize international common interest, and universal individual value. In other words, constitutionalization compensates for a loss of national sovereignty. The constitutionalization of the international world, as a compensatory feature of power structures, reflects changes in the nature of international law, from the horizontality of a law of coexistence, through a law of coordination, co-operation, and consolidating solidarity, into a unified, compulsory system[737], that manifests the verticality typical of a hierarchical legal structure. It follows that compensatory constitutionalization of the international order means a loss of national constitutional power. The power lost by the constitutional state is then won by new forms of international governance, so that international law is now assuming functions that were previously exercised by domestic law.[738] State and non-state actors are entrusted with these new forms of governance, acting under certain protoconstitutional principles and basic rules of law, which enable the international community to realize its goals of peace, social justice, and human dignity.

2 Consolidation of a global order

The consolidation of a universal international community favours the consolidation of a universal or global constitutional order. Today, the consolidation of an international community of individual states is a core value system constituting an international polity. Although grounded in a plurality of legal systems, a complex of norms and sovereignties, this consolidation of international community covers a still wider consolidation, a global network of decision-making structures, which together display certain constitutional features, expressed in a way that is new and distinct compared to the classical constitutional power of the traditional nation state. In this new global order, the decision-making process involves increments in adjudication and interpretation. And it is precisely this international polity of states, international institutional authorities, non-governmental actors, such as international companies and NGOs, and individuals, in relation to whom this broader notion of a constitution must be applied. One important proof of the consolidation of the universal constitutional order is the shift in

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[737] Peters, above note 426, p. 580.
[738] Armin von Bogdandy. "Constitutionalism in International Law: Comment on a Proposal from Germany" Harvard Law Review 2006 Vol. 47 No. 1, p. 234 **See also** Peters, above note, 565, p. 347.

decision-making from the nation state, to regional and global, sectorial, and universal institutions, as a legal response to globalization[739], and the increasing concern, beyond economic performance, with common and universal values. These developments, in part objective (the shift in sovereignty, the transformation in the structures of international law), in part subjective (universal aims) increase the need to understand international law more in unified and universal terms, particularly with regards to international justice, perhaps best understood as the constitution of international society. Constitutionalization at the international level allows also for a greater possibility of a just world order, at least in humanist terms.

The legitimation of a global constitutional order is based on a reconciliation of positive rules and aims currently expressed through principles. However, the fundamental problem in the creation of a constitutional international order is the question of its legitimacy in relation to national legal orders. A great deal of criticism is attached to the development of an international value system seen not only as illegitimate, but also super-imposed, and dominated not only by powerful states, but also by a newly formed international aristocracy. The criticism comes especially from those pleading for the prevalence of cultural relativism over universal standardization. It has been said that global constitutionalization runs a deficit in legitimacy. Moreover, it has also been said that constitutionalization represents a challenge to the legitimacy both of international law and the international legal system. The middle way regarding constitutionalization and its legitimacy is found in a reading of the term "constitutionalism" that takes into account the rules governing the international (global) order, and the normative aspects that most influence the prescriptive rules of positive law, namely, the *telos* of the global order. This path allows us to imagine a legitimate constitutional global order dependent not on state-like governance[740] and procedures, but with its legitimacy based rather on a universal ideal of justice, positivized through the constitutional aims of peace, social justice, and the realization of human dignity, in clear opposition to extreme forms of injustice with regards to "objective wrongs that concern not just the victims, but everyone."[741] As a matter of fact, these forms of injustice do not only concern the international community, as a whole, but also the individual. Such egregious forms of

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[739] De Wet, above note 734, p. 53.
[740] Peters, above note 565, p. 350.
[741] *Ibid.*, 352 Referring to Martti Koskenniemi, "Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization. (2007) 8 Theoretical Inquiries in Law at 35-36.

injustice need everywhere to be condemned. Only in this way will they achieve a universal global legitimacy. The legitimacy of the constitutional legal order is necessary to realize the universal dictates of justice, and the existence of global community interests, in terms both of states and individuals. The erosion of the consent requirement as the fundamental dogma in the process of international law-making is evidence of the existence of new bases on which to build the legitimacy of international, transnational, and universal rules. Today, the international community, while looking for mechanisms through which to implement common universal values, draws upon a set of rules and principles that are consistent with human dignity, peace, and global common interests, and that are already applicable to the sovereign state, and which reflect the concerns of a strengthened autonomous individual.[742] Nevertheless, it is clear that, even when the existence of an international ethos or morality is not nearly as well developed as in many powerful constitutional states, the international community possesses a community of common values already enshrined in the hierarchically superior norms of international law.[743] Indeed, it is this core value system, common to all societies, which constitutes the underpinning of the international constitutional legal system.[744]

B Constitutional global values

A rapid observation of international legal phenomena reveals clearly the existence of an international value system with an incipient objective acknowledgement of a hierarchical structure based on a variety of substantive values common to all, both state and non-state actors. In particular, the principles proclaimed in the UN Charter establish a legal framework in which states, together with their citizens, are to be considered as the constituent parts of a politically constituted world society.[745] The UN Charter proclaims its paramount goals to be the maintenance of peace and the realization of human rights. As already identified, the core values of the international legal system are derived from a combination of Article 1(3) of the UN Charter, with Articles 55, 56, 62 and 68.[746] Furthermore, Article 103 of the UN Charter establishes a hierarchy of norms. Consequently, the International Bill of Rights, establishing international human rights,

[742] Peters, above note 426, p. 587.
[743] von Bogdandy, above note 738, p. 235.
[744] De Wet, above note 734, p. 53.
[745] Fassebender, above note736, p. 847 Citing Jürgen Habermas in "Hat die Konstitutionalisierung des Völkerrechts noch eine Chance? In "Der gespaltene Westen" (2004).
[746] De Wet, above note 734, p. 615.

sees human rights as potential candidates to become part of the international constitutional legal order. This hierarchical constitutional order of a vertical type[747], as witnessed by the superior character of *ius cogens* and *erga omnes* obligations. An examination of these rights and goals leads us to identify their moral foundation in terms of universal categories of individual realization. This is an indication that the transformation or verticalization of international law is in part the result of the acknowledgment of substantive moral imperatives. Furthermore, once this structure is fully realized, these additional substantive aspects may come to act as substantive constitutional principles for the autonomous or, in this case, global polity. In this sense, constitutionalism reveals the global order to be an organic order. At the centre of its ordered ideals of rights and obligations, we find the dignity of the human being as a moral foundation. Human rights are thus recognized to be at the centre of the universal value system, complementing the notion of an international law based on *pacta sunt servanda* and the sovereignty of states.

If classical international law was conceived of as an interstate law based on state sovereignty and equality, international law today is conceived of as including states and non-state actors, especially the individual. International law is no longer a conglomerate of state-centered rules, but rather a hierarchical system of rules establishing the fundamental imperatives that underpin a core value system, humanistic in nature, at different levels of constitutional governance. Therefore, the principle of state sovereignty, and the rights derived from it, are now complemented by other principles of a basic and fundamental nature, like the principles of respect for human rights, human dignity, global common interests, and the rule of law.[748]

The main accepted notion of constitutionalization at the international level is that the sovereign state no longer holds a constitutional monopoly, since the term "constitution" has been expanded to include any fundamental legal order of a polity.[749] Notwithstanding this general agreement on constitutionalization, legal scholars have now come to understand constitutionalism differently. Besides the theories that depict the existence of a global consititutional order[750], there are other trends that interpret the

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[747] See above Part II Chapter 2 in Hierarchy.
[748] Peters, above note 426, p. 586.
[749] Fassbender, above note 736, p. 838
[750] *Ibid.*, p. 838 *e.g.* Herman Mösler "The international society as a legal community"; Christian Tomuschat "Obligations arising for states without or against their will", Bruno Simma "From bilateralism

foundational treaties of international organizations as being constitutions in their own right. In this case, one speaks generally of the micro-constitutionalization of international organizations.[751] The cases of the European Union and the World Trade Organization are at the forefront of this so-called micro-constitutionalism. However, the existence of national, regional, functional, sectorial regimes, of a constitutional type, does not exist in opposition to a global constitutional order. One of the main charges against international constitutionalism is that it integrates the protection and promotion of human rights into the foundational body of rules of international law, which are otherwise based primarily on the sovereignty and equality of states.[752] The merging of state-centred approaches to international law, with the human rights-centred approaches, results finally in a constitutionalized international legal order. And it is precisely this convergence of nation state interests, international public concerns, and the observance of the elementary values of the equal and therefore universal individual, that amounts to the new international constitutional order. Today, this order is supposed to assume control over certain political decision-making structures and processes, involving a definite shift away from the state.[753] It does so essentially as a response to the shift in modern economic activity away from a system based exclusively on traditional national borders. If the state cannot properly fulfil its function as the guarantor of individual realization because of the vast diversity in global economic activity, the protection of the individual must then come from a higher level. Thus, the economics of globalization leads to a resurgence in the global political economy. This new political economy is parallel to the process of constitutionalization.

C Ubiquity and ambiguity of the term Constitutionalization

The concept of constitutionalization of the WTO is ubiquitous, if ambiguous. The legal discourse concerning the constitutionalization of the international trade system has captured the attention of a number of legal scholars. In spite of the ubiquity of the

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to community interests in international law"; Alfred Verdross "Die Verfassung der Völkerrechtsgemeinschaft"; Myers McDougal amd Michael Reisman (policy science approach) "The world constitutive process of authoritative decision".

[751] Peters, above note 426, p. 593.

[752] Ernst-Ulrich Petersmann, "Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society" Leiden Journal of International Law 2006 Vol. 19 No. 3 pp. 633-667.

[753] De Wet, above note 734, p. 53.

concept, the term "constitutionalization" seems to remain ambiguous.[754] For some, the constitutionalization of international trade should be understood in terms of a constitutional polity.[755] For others, there are no indications of any constitutional process within the WTO.[756]

Dunoff has identified three main approaches in legal scholarship to the process of constitutionalization within the WTO. The first use of the term refers to the institutional aspect of the international trade regime, on the one side and, on the other, to the necessity of having an institutional framework that allows for the pursuit of particular and common goals in measured manner.[757] A second use of constitutionalism in the WTO sees the organization as a place designed to establish a series of values to be protected by constitutional limitation of government power. The most important feature of this constitutionalist view of the WTO is the role played by human rights in the international trading system. In order to justify the presence of fundamental human rights in the context of international trade, emphasis is placed on economic freedoms, such as the freedom to produce and exchange goods, or simply the right to trade freely. Accordingly, the freedom of the markets is a vector both of economic performance and human realization. This constitutional view understands economic rights as an integral part of human rights. The main focus is therefore on the integration of market freedoms into human rights law so as to balance out economic and non-economic goals. In this view, international human rights and international trade are not in opposition because both constitute human rights. The role of international trade is precisely to guarantee the freedom of the individual and his or her full realization as an autonomous being, including in terms of economic activity.[758] However, the fact that market freedoms are not opposite to human rights does not prevent a balancing of rights; to the contrary, it provides the legal basis for establishing such a balance. A third and last use of constitutionalist thought, as identified by Dunoff, views constitutionalism in terms of a

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[754] Cass, above note 572, pp. 39-75.
[755] Joel P. Trachtman, "The Constitutions of the WTO" The European Journal of International Law 2006 Vol. 17 No. 3, pp. 623-646.
[756] Jeffrey L. Dunoff, "Constitutional Conceits: The WTO's Constitution and the Discipline of International Law" European Journal of International Law 2006 Vol. 17 No. 3, pp. 647-675.
[757] John H Jackson, "The World Trade Organization: Constitution and Jurisprudence" 1998. **See also** Dunoff, above note 756, pp. 647-675 at footnote 11 Referring to Jackson, John H, "The WTO Constitution and Proposed Reform: Seven Mantras revisited. Journal of International Economic Law 2001 Vol. 4 No.1, p. 67.
[758] Poiares Maduro, above note 398, p. 179 **See also** Steve Charnovitz. "The Globalization of economic human rights" Brooklyn Journal of International Law 1999 Vol. 25 No. 1.

judicial mediation, the basis of which is found in the capacity of the WTO judicial system to generate norms and structures of the constitutional type, most notably through dispute resolution. According to this interpretation, the constitutional moment take places as a result of the borrowing by the WTO judiciary of constitutional rules and principles from other systems, that is, from the integration into its jurisdiction of issues of national constitutional interest, such as public health[759], the environment, and public morality.

In addition to Dunoff's findings, Anne Peters offers a comparable description of the uses of the notion of constitutionalization within the framework of the World Trade Organization. For her, the main uses of this notion relate in the first place to the legalization of dispute settlement. This is based on Professor Cass' theory of judicial norm-generation as the core constitutional aspect of the WTO, complemented by the fact that the WTO judiciary has increasingly taken into consideration such non-trade issues as human rights and the environment. A second aspect of constitutional thought concerns the two core principles of the international trade regime, namely, the principle of most-favoured-nation, and the principle of national treatment. These are arguably the basic constitutive elements in a constitutional principle of non-discrimination, from which ordinary citizens directly benefit. The constitutional principle of the international trade regime applies to importers and exporters, producers and consumers. For this reason, the rules of the WTO should be interpreted in light of fundamental rights, that is, in light of human rights.[760] Another constitutional aspect of the WTO is that one of its core functions is to neutralize domestic power. Lastly, the possibility of directly applying WTO rules in domestic courts to safeguard individual rights suggests that the WTO is ripe to become a constitutional framework of international law. In this respect, the conclusions reached by Anne Peters are almost identical to those of Dunoff.

1 Convergence

In spite of a wide range of views concerning the constitutional functions of the WTO, it has been argued that WTO constitutional discourse is really just a rhetorical strategy to give power to an institution that, in so doing, is going beyond its true mandate. This

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[759] Cass, above note 572, pp. 39-75.
[760] *United States-Section 301-310 of the Trade Act of 1974* Panel WT/DS152/R 22 December 1999, paras. 7.73 and 7.78 Describing the "principle of indirect effect"; this principle consists in that the primary purpose of the WTO is to "produce market conditions" that permit "individual activity flourishing". That is, as an indirect effect.

view is based on the argument that the WTO lacks any kind of constitutional structure. However, all the notions adduced above do have a common denominator, namely, the possibility of limiting state action from "destructive trade politics" through an international organization: the WTO.[761] Authors pleading for an international trade regime with constitutional powers regard the institutional apparatus of the WTO as an alternative to international politics, thus channelling political conflict through constitutional trade law. It has been suggested that, framed within its dynamic context, the WTO constitutional debate must be analysed from, at present, six different constitutional dimensions, namely: the economic (a tool to reduce the costs of achieving certain economic goals)[762]; the human rights (limits to government authority in favour of human realization); the functional (integration of values); the legal and judicial (decision-making in the legal sense); the political (legitimation in the process of decision making); and the redistributive (social solidarity) dimension. Although all these dimensions are complex and may at some point overlap, the debates concerning constitutionalization in the WTO reflect an effort to integrate these different aspects. The crucial point here is not whether or not we agree with Trachtman's thoughts on the interrelationship of all these dimensions, but simply to realize and acknowledge their existence and interconnectedness as a basic part of the functioning of the WTO. It follows that, in order to determine the degree to which the WTO may be constitutional, we must focus on the competing dimensions of a WTO conceived of as an horizontal and a vertical constitutional entity, always bearing in mind that whatever structure it acquires, its dimensions will respond to the changing needs of society. Horizontally or sectorial, the challenge occurs also in other institutions; vertically, it competes with the general international legal order, on the hand and, on the other, with the constitutional state.[763] To explain the compatibility of a constitutional international trade regime with other systems of law, taking into account the aims and needs of international society, it suffices to look at the main common element of any human society, namely: the individual, towards whom the majority of all these systems and subsystems direct their aims. Constitutionalization has a human rights dimension, and human dignity is the

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[761] Dunoff, above note 756, p. 664.
[762] Trachtman, above note 755, p. 631 This dimension identified by Trachtman is based on economic theory and relates to constitutional economics as an independent economic concept. The economic dimension of the constitution according to Trachtman is an economic analysis of law, therefore the constitution is seen as an economic tool. IN this sense economics is normative to law
[763] *Ibid.*, p. 645.

ultimate constitutive element towards which all positive law is accountable. It is this dimension that best indicates the degree of constitutional value to be derived from the WTO, within an overall mechanism of decision-making.

Current global constitutionalization consists of a constitutional network at various complementing levels and sectors. The vision of a global constitutional framework is best understood as a constitutional network at various complementing levels and sectors. [764] And to appreciate regard international law within its constitutional framework demands an integrationist view of the different factors and phenomena taking place in the overall context of globalization, a view that takes full account of how the various rules interact with each other. At least it is clear that a conflict arising from different constitutional schemes requires a balancing out of interests in concrete cases.[765] If globalization poses a global challenge, it is reasonable that international law, as a constitutional construct, is the appropriate instrument to safeguard universal principles. It has been affirmed that constitutional theories of international law demand the use of practical reason in facing humanity's many challenges.[766] It is above all in this regard that the WTO can be considered to have a constitutional function, not as a constitution in and of itself, but as a mechanism through which its constitution, its structure, is able to contribute to a consolidation of the international constitutional order. It is an undeniable truth that the WTO, while further elaborating and formulating its rules, either by means of legislative, executive, or adjudicatory acts, and especially through interpretation, is well placed to deliver value judgements of a moral type.

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[764] Peters, above note 426, p. 601.
[765] *Ibid.*, p. 602.
[766] von Bogdandy, above note 738, p. 242.

Part III International Trade

CHAPTER 1 INTERNATIONAL ECONOMIC LAW

A International Economic Order

International Economic Law involves fundamental questions of the international economic order. It involves a variety of aspects that includes some highly controversial questions. To grasp the inner nature of the international economic order is helpful because it enables the legal practitioner to make a legal analysis from different perspectives. However, the nature of International Economic Law is very controversial. According to Carreau and Juillard, there are two conceptions of IEL, namely, one broad and one narrow definition of International Economic Law.[767] According to Qureshi, there is also a global definition of International Economic Law.[768] Moreover, for Wang, International Economic Law must be approached in an interdisciplinary fashion.[769]

B Definition of International Economic Law

1 Broad definition

Extensively, IEL refers to the set of norms regulating economic operations of all kinds, such as international sales law[770], or, at the least, as "including all branches of law concerned with economic phenomena of international concern."[771] Broadly conceived, IEL does not deny Public International Law but includes also Private International Law, Trans-national Business Law and, to a certain extent, Public International Law. This is

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[767] Dominique Carreau and Patrcik Juillard, "Droit International Économique", 2010 (4th edition), p. 6 *et seq*. **See also** Asif H Qureshi and Andreas R Ziegler "International Economic Law", 2007 (2nd edition), p. 3 *et seq*.
[768] Qureshi & Ziegler, *ibid*., p. 12.
[769] Cheng-Yu Wang, "Different Scholarships, the Same World: Interdisciplinary Research on IEL" in *International Economic Law: The State and the Future of the Discipline* C B Picker, I D Bunn, D W Arner (eds.), 2008, p. 121.
[770] See United Nations Conventions on Contracts for the International Sale of Goods A/CONF.97/18(1980); 1489 UNTS 3.
[771] Qureshi & Ziegler, *ibid*., p. 8.

justified on the grounds of the convergence of Public International Law and domestic law due to the increasing level of relations between States and private parties.[772] Another reason for seeing IEL broadly is that national economic policies and private economic structures are regulated nationally; for this reason, they automatically become of international interest and concern. To define International Economic Law in a broader sense is to admit that: "domestic law affects both internal and external relations between States and people"[773]. The extreme of this position is to consider the majority of international law as international economic law, since nearly all international affairs have an economic aspect.[774] The core issue underlying this narrow or broad definition is the question of the independence of the two different systems of law, namely, international or national; this is especially true in relation to the question as to what extent domestic law may affect international legal decision-making in public affairs, and vice versa, particularly taking into account the validity, efficacy, and acceptance of international decision-making mechanisms by domestic institutions.

2 Narrow definition

The narrow definition of international economic law refers to the set of rules governing international economic relations, namely the macro-economic relations as opposed to micro-economic relations.[775] In this narrow sense, IEL is seen as a branch of public international law, and maintains the distinction between the domestic and international systems of law. This is obviously an invocation to the classical state-centred conception of international law. The distinction, it is argued, is made, *inter alia*, in order to avoid disguised or covert extraterritorial application of national legislations. It is suggested that the conflation of domestic law with international law can unduly support the exercise of hegemonic or imperialist power.

3 Global definition

A more plausible approach is proposed in order to include some aspects beyond the narrow definition of International Economic Law. This "global definition"[776] takes as its starting point the narrow definition in order to make possible some delineation between the function of the international system and domestic law. The global definition

[772] Qureshi, above note 633, p. 6.
[773] Qureshi, above note 633 p. 7.
[774] Jackson, above note 757, p. 25.
[775] Carreau & Juillard, above note 767, p. 7.
[776] Qureshi, above note 633, p. 11.

comprises the public international law analysis of the economic phenomena of international concern, and is therefore detached from the exclusivity of the domestic system in order to reflect with objectivity the system of IEL. The global approach is also value laden in as much as it takes account of the values of the international economic community as a whole. Nevertheless, this notion of the "global" conception of IEL seems at times to rely tremendously on consent and agreement. Another important feature of this global approach is that domestic systems are subject to international legal scrutiny. The public international nature of IEL is such that it provides a normative framework dependent on this public international structure. Thus, the organizing function of IEL makes reference to the integration of domestic economic regulation into the global intercourse of economic affairs.[777] However, IEL does not only refer to purely economic issues; it is also influenced by a heterogeneous corpus of legal norms that lie in the following areas: the Law of Development, Social Standards, Environment, Human Rights, and Taxation.[778] This global approach remains based upon the distinction established by Jackson between transactional IEL and regulatory IEL. The former refers to "transactions carried out in the context of international trade or other economic activities", focusing above all on the way that private business is carried out. It is a descriptive approach to IEL and reflects the "how [to] do it" approach. By contrast, regulatory IEL "emphasises the role of government institutions".[779]

C Non-economic concerns

Defining International Economic Law requires also the inclusion of non-economic concerns. While defining IEL as a branch of Public International Law, it is most interesting to note that, whereas classical international law is based on the inter-state relation guided by the principle of sovereignty, and having as its main objective the achievement and maintenance of peace, international economic law, and particularly international trade law, is based on comparative advantage and cross-border exchanges. This may seem to follow a clear logic because the former, in classical times, was

[777] Herdegen, above note, 614, p. 4 According to this author International Economic Law is defined as "die rechtliche Ordnung der Wirtschaftsbeziehungen von Staaten und internationalen Organisationen, des von Privaten getragenen Verkehrs von Gütern, Dienstleistungen und Produktionsfaktoren sowie der grenzüberschreitenden Aspekte von Unternehmensstrukturen und Produktionsstandards".
[778] Herbert Kronke, "Handbuch Internationales Wirtschaftsrecht" H Kronke, W Melis, B Anton (eds.) 2005, p. 9.
[779] John H Jackson "The Jurisprudence of GATT and the WTO: Insights on treaty law and economic relations" 2000, p. 11.

conceived of as enabling a peaceful coexistence of states, whereas the latter was conceived of for serving purely economic ends. If we were to think in this fragmented way, we would easily accept also a fragmented picture of the legal order, where contradiction would be easy to find. However, looking rather into today's reality and the transformation of today's global structures, the question arises as to whether such separate and independent fields of action are conducive to the attainment of state, inter-state, transnational, and universal goals. The development of economic subjects and economic concerns beyond state limits, together with the development of non-economic values beyond the state, always strongly connected to economic performance, shows that such theories, intended to separate each aspect of life, are in fact unsustainable. Note, too, that, traditionally, it was also argued that national legislation reflected only national economic objectives.[780] Nevertheless, although national legislation often reflects national economic objectives, these cannot always be considered to carry only economic objectives, even if such legislation clearly has direct or indirect economic effects. However, to say that most actions have an economic effect, and that therefore not every action could be denominated as economic, is merely an attempt to diminish the importance of certain issues that, due to their imperativeness, have a bearing on economic intercourse. This is the case with human rights. It follows that there must be a relationship between international law, the international economy, and international relations, in terms of domestic, transnational, and universal concerns. This is arguably the main new factor in today's statehood, namely, the consolidation, often through an infrastructural and normative economic performance, of transnational and universal values. This multidisciplinary approach, particularly if we admit that IEL is essentially International Public Law, is embedded in an Economic Order which emanates from the overall order of things. It is the holistic conception of IEL that calls into question whether economic policies are exclusively based on market principles, guided by the idea of the maximisation of human satisfaction, or whether they are only the normative framework in the IEL.[781] By contrast, an holistic or integrative perspective that takes account of differences between the international economic society and the international society tend to minimize the negative effects of purely economic policies. This holistic conception allows the IEL to establish certain limits to pure

[780] Qureshi, above note 633, p. 8.
[781] Jackson, above note, 779, p. 6.

economic objectives. Furthermore, as a transformative branch of international law, in vertical terms it takes account of the values and rules superimposed by such hierarchically superior norms.

The basic matters regulated by International Economic Law are those related to economic phenomena. It has at first been approached through lists of subject matter belonging to this field of law. [782] Nowadays, a broader, more expansive and non-exclusive notion of international economic law has been forged within the process of globalization thanks to interactions among different types of economies. The global conception brings into the field of IEL the idea of trade-related aspects and sustainable development.[783] On the other hand, a broader conception should not be misinterpreted as including all branches of international law related to trade. In other words, international economic law has at its core rules which are directly related to economic phenomena, but also laws that possess an indirect economic implication such that the limits of IEL are demarcated by the international value system.[784] Likewise, a broader conception looks to IEL as the set of rules that influences domestic laws, but also in terms of the international dimension taking cognisance[785] of domestic affairs. In any case, IEL includes International Monetary Law (IMF), International Development Law (World Bank) and International Trade Law (WTO), among its most significant and developed branches.

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[782] Qureshi, above note 633, p. 12 .The author says that there are some IEL matter's lists like that of Schwarzenberger which includes 1.- the ownership and exploitation of natural resources, 2.- the production and distribution of goods, 3.- invisible international transactions of an economic or financial character, 4.- currency and finance, 5.- related services, 6.- the status and organization of those engaged in such activities; or that of Jackson which includes 1.- trade, investment, services involving transactions that cross national borders and those subjects that involve the establishment on national territory of economic activity of persons or forms originating from outside the territory.
[783] *Ibid.*, p. 13.
[784] *Ibid.*, p. 14.
[785] *Ibid.*, p. 15.

CHAPTER 2 INTERNATIONAL TRADE LAW

A International trade regime

The International Trade Regime is mainly but not exclusively established by the WTO regime. International trade is a key element in interstate economic relations, and economic relations in general, both at the regional and at the global levels. Even when international trade rules do not necessarily encompass all aspects of international economic law, there is general agreement that International Trade Law is more than a simple branch of International Economic Law. Indeed, it is at the heart of International Economic Law.[786] In principle, International Trade Law regulates the flow of goods and services across national boundaries. Accordingly, it serves as the essential legal component in the process of defining and shaping international trade, both descriptively and prescriptively. Although the World Trade Organization provides for a type of constitutional structure, containing the rules under which international trade is to be conducted, and enabling the development of the international economic order, the WTO regime is not sufficient in itself to cover all the distinctive elements of international trade, nor does it constitute the sole element of an extensive world economic legal system already in existence.[787] Despite the fact that the WTO regulates some aspects of development, through the Generalized System of Preferences[788], thus strengthening the principle of special and differential treatment based on the structural principle of solidarity, other important bodies of development law are set by other international bodies, such as the United Nations Conference on Trade and Development (UNCTAD), or the World Bank. Another major example of an aspect of international trade not falling under the WTO is labour rights. Labour rights are formulated by the International Labour Organization (ILO). Furthermore, regional trade integration, notwithstanding the legal basis provided in the GATT, is out of the reach of its

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[786] John H Jackson, "The World Trading System: Law and Policy of International Economic Relations", 1997 (2nd edition) p. 25.
[787] Peter-Tobias Stoll and Frank Schorkopf (eds.), "Max Planck Commentaries on World Trade Law WTO: World Economic Order, World Trade Law", 2006 Vol. 1, p. 1**.**
[788] Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, (Enabling Clause) Decision of 28 November 1979 (L/4903) The Enabling Clause is the WTO legal basis for the Generalized System of Preferences.

regulatory authority.[789] Due to the existence of such trade-related issues, forming as they do a part of international trade, it is currently vehemently debated to what extent all these trade-related aspects could be brought within the legal system established by the WTO.

1 Multidimensionality

Trade policies are multidimensional and involve a variety of subjects, the implementation of which require some degree of uniformity. Nowadays, there is a growth in the formulation of trade policies as a result of the increasing network of international organizations. For this reason, trade-related subjects are now examined also by the Food and Agricultural Organization (FAO), the United Nations Development Programme (UNDP), the United Nations High Commissioner for Human Rights (UNHCHR), the World Intellectual Property Organization (WIPO), the International Labour Organization (ILO), the World Bank, and the United Nations Conference on Trade and Development (UNCTAD). The disintegration of norms governing human action in general, and economic human action in particular, call for intensified effort to increase coordination in the interpretation and implementation of international agreements.[790] Clearly it has become necessary to reach a level of harmonization that facilitates the implementation of multidimensional trade policies. This coordination, in turn, demands efficient mechanisms that enable at least a minimum of shared and uniform understanding of multidimensional trade policies. The solution to these important questions concerning multidimensional trade can be found within the existing mechanisms, or in the creation of new mechanisms. Indeed, the thought to create new mechanisms is exciting, but difficult. Consensus requirements and a general unwillingness to work meaningfully towards the achievement of certain goals clearly hinders finding any effective solution to the problems arising from globalization and economic performance. Therefore, we need to look deeper into the insights of those mechanisms that already exist, trying to identify those tools that may allow us to develop a more uniform and harmonized understanding of trade that takes into account the entire WTO system, including the interstate context, the transnational context, and the universal context. Such a view of course exposes a problem as to the legitimation of

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[789] Stoll & Schorkopf, note above 787, p. 1.
[790] Thomas Cottier and Matthias Oesch, "International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments", 2005, p. 22.

these potential rules.[791] Nevertheless, the variety of the model discussed is itself a response to a reality that shows both the interconnection of the substantive sphere of action, and the interconnection of the different levels of regulatory framework.

2 The diverging rationale of General International Law and International Trade Law

At the end of the 20th century, mainstream thought still modelled international trade law and international law with no thought to relevant mutual implications. A scrutiny of the underlying assumptions on which both systems are based, reveals extensive differences. In the first place, the international trade system is based on economic theory which is itself grounded on economic liberalism and a largely *laissez faire* philosophy. International law, on the other hand, has been built around the principle of sovereignty.[792] Apparently, these driving principles seem to contradict each other. Whereas free trade advocates the reduction and elimination of barriers to trade and to access to domestic markets of foreign products, sovereignty advocates rather for self-determination, and the pursuit of national interest in accordance with national policy and fundamental statutes. Distinct from classical international law, which is based on peace, economic self-sufficiency, and mercantilism, the political economy of the World Trade Organization is grounded on the premise that free trade is beneficial for the augmentation of national wealth and that, in addition, it has a share in the achievement of the common good, at least at an aggregate level. The WTO system is based on the belief that gains from international trade promote and enhance general well-being thanks to a free exchange in open markets. For this reason, the dominant principle within the international trade system encourages the reduction or elimination

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[791] See Amin von Bogdany, "Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization" in *International Economic Governance and Non-Economic Concerns: New challenges for the International Legal Order* S Griller (ed.), 2003 Vol. 5, pp. 103-137 According to this author there are different models of constructing WTO Law with a view to its legitimacy, namely a **liberal model** represented by John H Jackson, correspond to the dominant position. According to this model, citing Jackson, "the basic purpose of GATT is to constrain governments from imposing or continuing a variety of measures that restrain trade"; a **federal or governance model** consist on equipping the international legal regime with more policy functions; the **coordinated interdependence model** looks for a balance between the transnational nature of the economy and the WTO Member's responsibilities under their constitutions and the **judicial authority or proceduralization model** according to which the intervention of the judiciary through the development of procedural rules by circumventing substantive statements in the search for a solution constitute an attempt to give democratic legitimation to the outcome of the dispute **See also** Armin von Bogandy, "Law and Politics in the WTO –Strategies to Cope with a Deficient Relationship-" Max Planck Yearbook of United Nations Law 2001 Vol. 5, pp. 651-670.

[792] Donald M McRae, "The WTO in International Law: Tradition Continued or New Frontier?" Journal of International Economic Law 2000 Vol. 3 No. 1, p. 29.

of barriers to trade[793] as a result of agreeing constraints upon state action and intervention. This liberal approach to international trade aims to achieve fundamental economic objectives from a liberal and a mercantilist view, respectively. Furthermore, the focus on economic policies based upon purely economic issues risks to lose sight of, or does not take a realistic position on, such economic aspects as the distribution of the gains of trade.

3 Convergence

Although International Law and International Trade Law are based on different assumptions, International Trade Law cannot be treated as distinct from either International Economic Law or from International Law. The General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) have created the fundamental laws and structures of the post-World War II international trading system. As there exists a broad international consensus that liberal trade is desirable, the legal regime of international law developed by the WTO focuses, as its main economic objectives, on facilitating trade liberalization, market access through reduction of tariff and non-tariff barriers to trade, and the reduction of protection via fair competition. However, a reading of the most relevant rules of International Law, as well as International Trade Law, suggests that any appearance of opposition is in reality only that, an appearance. Moreover, it has been suggested that free trade and market integration could be understood as objectives, at least if the preamble is understood in a broad sense. Indeed, neither free trade nor market integration appear anywhere as WTO objectives.[794] As a matter of fact, there is increasing concern that the objectives underlying the international trade regime are not only of an economic variety, as demonstrated in the Preamble to the WTO, and through the practice of the adjudicatory bodies of the WTO. Furthermore, such objectives or goals are not only domestic; they can also be found "in international law in general and in treaty law in particular."[795] The system of exceptions provided by the WTO is a major example that indicates the extent of the general admission of non-economic objectives into WTO rules. This gives confirmation that International Trade Law can be separated from neither International

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[793] Andreas F Lowenfeld, "International Economic Law", 2008 (2nd edition), p. 3.
[794] von Bogdandy, above note 791, p. 121.
[795] Cottier & Oesch, above note 790, p. 513.

Economic Law, nor International Law. This integrationist relationship is regarded as the result of a process of constitutionalization of International Law.[796]

4 WTO jurisprudence

The WTO judiciary has confirmed that general international law is applicable to WTO Law e.g. the *US–Gasoline* and *Korea–Government Procurement* cases. Although international trade regulation underwent a development that sets it apart from the general body of international law[797], it is nevertheless now widely agreed that WTO law is embedded in the system of general international law, and must be understood in that context. This systematic view of the different sub-systems within international law implicates all those involved in the determination, shaping, and interpretation of WTO rules.[798] The law of GATT 1947 has been considered by many scholars to be a self-contained regime. Decades later, shortly after the WTO came into existence, the Appellate Body stated in the *US–Gasoline* case that the "general agreement is not to be read in clinical isolation from public international law."[799] In practical terms, international trade law, through the WTO Dispute Settlement Understanding, has gradually developed a case law which for the most part has contributed positively to the elucidation of procedural and substantive aspects of international law.[800] Furthermore, in the *Korea – Government Procurement* case, the Panel expressed its view as follows: "We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law."[801] This *dictum* is accompanied by the explanatory note that, "We (the Panel) should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply."[802]

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[796] Stefan Oeter, in "WTO-Recht: Rechtsordnung des Welthandels" M Hilf; S Oeter (eds.), 2005 (1st edition), p. 17
[797] For the history and evolution of international trade law See Stefan Oeter *ibid.* pp. 59-99 **See also** Paolo Picone and Aldo Ligustro, "Diritto dell'organizzazione mondiale del comercio" 2002, pp. 3-87 **See also** Jackson, above note 786, pp. 31-79.
[798] Götz J Göttsche, in WTO-Recht: Rechtsordnung des Welthandels" M Hilf; S Oeter (eds.), 2005 (1st edition), p. 110.
[799] *US-Gasoline*, AB, above note p. 17.
[800] McRae, above note 792, p. 31.
[801] Korea – Measures Affecting Government Procurement Panel WT/DS163/R 1 May 2000 para. 7.96.
[802] *Ibid.*, footnote 753.

B The WTO functioning

Pursuant to Article III of the WTO Agreement[803], the functions of the organization are, in the first place, to facilitate the implementation, administration, and operation, and to further the objectives, of the WTO and the multilateral trading system. However, the realization of such objectives, and the establishment of trade policies appropriate to that end, frequently result in a discordance between the interests and values of the different societies and cultures represented in the WTO. Frequently, economic policies affect internal political goals. The opposite is also true; internal economic goals often interfere with global political goals. Due to disparate national structures, not only from the legal point of view of the definition of a state and its functions, but also regarding cultural identities, international trade rules often provoke and face difficult dilemmas. Trade rules are to be understood as taking account of economic underpinnings and political insights[804] so as to disentangle those dilemmas intrinsic to international trade and its effects. The effects of international trade must be assessed based upon the objectives established by the Organization, bearing in mind the legal context in which such commitment takes place, namely the legal structure upon which trade law is founded. Such an approach allows for a balancing of such objectives against others of either a more general or a more imperative nature. In the context of trade rules, the three fundamental dilemmas are as follows: first, the dilemma of distribution, caused by the fact that trade rewards some individuals or groups while harming others, thus affecting the domestic distribution of wealth; second, the value dilemma, referring to the fact that the economic benefits obtained by international trade sometimes collide with and jeopardize other domestic social and cultural values; third, the state goal dilemma, which highlights the tension between trade based on economic theory, on the one hand and, on the other, with a motivation sometimes of power, and autonomy, issues of security, independence, and peace.[805]

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[803] Art.3.1 WTO Agreement "The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement. **Agreement Establishing the World Trade Organization (Marrakesh Agreement)**1867 UNTS 154; 33 ILM 1144 (1994).
[804] Qureshi, above note 633, p. 229.
[805] Bruce E Moon, "Dilemmas of International Trade" 2000, pp. 20, 27-9. in *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments* T Cottier and M Oesch, (eds.), 2005, p.3, in Cottier & Oesch, above note 790, p. 3.

C Subjects and Beneficiaries of WTO Law

The question of the subjects of WTO law requires an examination both of the subjects and the beneficiaries of WTO rights and obligations. The subjects of the WTO are its Members. According to Article XII of the WTO Agreement, any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations may accede to the agreement. Beyond this core membership, Article V:1 establishes that appropriate agreements with inter-governmental organizations shall be made for effective cooperation, and Article V:2 establishes that the General Council of the WTO may make agreements for consultation and cooperation with non-governmental organizations.

The WTO also allows non-members to be observers. In the first place, governments may request this status so as to enhance their knowledge of the WTO, perhaps in preparation for accession to the Agreement. [806] Likewise, international inter-governmental organizations may request this status for the purpose of following discussions on matters of interest to them. [807] From an economic perspective, the beneficiaries of WTO rights and obligations are producers, exporters and importers (traders), and consumers. The private sector has neither privileges nor obligations in relation to the WTO. On the other hand, given the diversity of objects regulated by the WTO, such as goods, services, trade-related aspects of intellectual property, and so on, the WTO no longer places obligations only on members, with respect to goods, as in the case of the GATT, but also places obligations on its members with respect to the subjects of trade. Other non-members include non-governmental organizations. Under the legal basis provided for in Article V:2 of the WTO Agreement, the General Council lays down "Guidelines for Arrangements on Relations with Non-Intergovernmental Organizations"[808], in order to improve transparency and outreach in respect of WTO activities. The role of NGOs has gained importance in the system of international trade at the WTO. In the *US–Shrimp* case, for example, the Appellate Body interpretation admitted the right to seek information from any individual or group or any relevant source established in Article 13 of the DSU. They examined the rule from the point of

[806] Rules of Procedures or Session of the Ministerial Conference and the Meetings of the General Council. Annex II Guidelines for Observer Status for Governments in the WTO WT/L/161 25 July 1996.
[807] *Ibid.*
[808] Guidelines for Arrangements o Relations with Non-Intergovernmental Organizations WT/L/162 18 July 1996.

view of what the panel is authorized or not authorized to do. The AB derived a procedural right, based on the discretionary authority of the panel, to receive non-solicited information from non-governmental sources.[809] Such views include both factual matters and legal opinion.[810] All of these non-member international participants are cognitive elements that have an impact upon policy development. In the same vein, they also have the power to affect international public opinion.[811] Given a certain participation in policy formulation, and the fact that they in some sense represent the voice of civil international society, these non-governmental organizations are in fact automatically involved in the political and legal process through which international trade regulations are formed and evaluated.

D Sources of WTO Law

When speaking of the internal sources of WTO law, one must distinguish between primary and secondary law.[812] Primary laws are considered to be the WTO Agreement, the Multilateral Agreements (the GATT, GATS, and TRIPS Agreements), the Plurilateral Agreements, and Ministerial Decisions and Declarations. Secondary law is law derived from primary law; it is not directly created by the Member states but rather by the WTO itself, through its bodies and organs.[813] Its original legitimacy is based upon the faculties transferred by the Members to the Organization in order to carry out its tasks. This constitutes a sort of derivative law which relates above all to the administration of the institution, that is, a facility to forge agreement on the relations between the Organization and other institutions, and the facility to adopt authentic interpretations (Article IX(2) of the WTO Agreement) or the facility to issue waivers (Article IX(3) of the WTO Agreement). A fundamental secondary source is made up of the decisions of the judiciary bodies of the Organization; indeed, decisions, procedures, and customary practices, are routinely developed by the Organization and assist in guiding its activities.[814]

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[809] *US-Shrimp*, AB, above note 606, paras. 102-110.
[810] McRae, above note 792, p. 34.
[811] Cottier & Oesch, above note 790, p. 14.
[812] Göttsche, above note 798, pp. 99 *et seq.*
[813] Olaf Weber, "WTO-Streitbeilegung und EuGH im Vergleich: Zur gerichtsförmigen Konfliktlösung in Handelspräferenzen", 2007, p. 81.
[814] See Art .16.1 WTO Agreement.

In addition to all these internal sources, another capital source of WTO Law is general international law. It is precisely in this context that the famous *US–Gasoline* and *Korea–Government Procurement dicta* come into play. Therefore, it is very important to notice that all sources of international law, particularly those established in Article 38 of the ICJ Statute are to be applied together with the primary sources of the WTO.[815] The terms of Article 38 of the ICJ Statute are brought into the settlement of WTO disputes by Articles 3.2 and 7 of the DSU.[816] The external sources are those outside the WTO system. The integrative approach adopted by the WTO means that external sources refer to those found in the unified system of International Law. This majority opinion is a reflection of the fact that the WTO legal system is firmly embedded in general international law.[817] External sources, taking account of Article 38 of the ICJ Statute, include customs, the teachings of the most highly qualified publicists, international agreements referred to in the WTO Agreement, and other external agreements between the parties, as well as general principles of law[818], resolutions and interpretations. This other international law has different uses in the process of decision-making within the Organization, particularly when the Panel or the Appellate Body decides a dispute. Firstly, they contribute to the interpretation of WTO rules and, secondly, they are used as evidence of compliance with members' obligations; a third function can also be attributed to other international law, as law in the chain of legal reasoning.[819]

The normative structure of the WTO is complex. In part, this is because of the intricate inter-relationship between politics, economics, and international trade. [820] This intersection of economic, political, and legal aspects in the formulation of a coherent system of multilateral trade has resulted in a regime that is regarded as having the

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[815] Göttsche, above note 798, p. 111.
[816] David Palmenter and Petros C Mavroidis, "The WTO legal system: Sources of law" The American Journal of Inernational Law 1998 Vol 92 No.3 p. 399.
[817] Göttsche, above note 798, p. 110, footnote 62 **See also** Palmenter & Mavroidis, note above 816, p. 413 "(the WTO legal system) is an important part of the larger system of public international law. **see also** Joost Pauwelyn, "The Role of Public International Law in the WTO: How far Can We Go?" The American Journal of International Law 2001 Vol. 95 No. 3, p. 535 "(...)other international law continues to apply in the WTO unless the WTO treaty has contracted out of it." **See also** McRae, above note 792, pp. 28-29 **See also** Lorand Bartels, "Applicable Law in WTO Dispute Settlement Proceedings" Journal of World Trade 2001 Vol. 35 No. 3, p. 518 "The DSU contains no provisions excluding *a priori* any sources of international law from being applied to such disputes, which means that all sources of international law should be accepted as potentially applicable in WTO dispute settlement procedures".
[818] Palmenter & Mavroidis, note above 816, p. 409.
[819] Bartels, above note 817, p. 510.
[820] Picone & Ligustro, above note 797, p. 96.

characteristics of a power-oriented, rule-oriented, and principle-oriented organization.[821] Picone and Ligustro distinguish between the vertical and the horizontal normative structure of the WTO.[822] Vertical normativity refers to the degree of generalization or specification in which WTO norms are expressed. It is here where a differentiation may be drawn between objectives, principles, standards, and ordinary norms (the general exceptions are included in ordinary norms). Horizontal normativity refers to the substantive content of the norm. According to the substantive content of the norm, five types of behaviours are identified, namely: norms relating to non-discrimination; norms relating to reciprocity; rules leading to the gradual elimination of trade barriers; rules regarding countermeasures; and instrumental rules.

E Objectives

1 Meaning

The objectives of the Organization are the general governing factors or finalities that belong to the whole system of the WTO. They are programmatic lanes for the conduct of international trade among the subjects of the Organization. Objectives both characterize and condition the functioning of the WTO. In other words, objectives contextualize the regulation of international trade within current actual circumstances and norms, governing the international community/society, including all its participants or members, most obviously states, but also international organizations, multinational and transnational companies, the international civil service, and the individual.[823] Objectives outside the WTO framework might sometimes be considered as opposed to, or incompatible with, WTO objectives. In such cases, an integrative or holistic approach to international trade is employed for the responsible development of a more durable and viable system of reciprocal trade relations. Such trade relations look to the reconciliation of such international, transnational, or universal values with the values encapsulated in the international trade regime, that is, human rights and trade (including labour and trade); sustainable development and trade; culture and trade. These objectives are potentially also a tool with which to minimize the discontinuities and disruptions that otherwise occur within a fragmented system of international law.

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[821] Meinhard Hilf, "Power, Rules and Principles –Which Orientation for WTO/GATT Law?" Journal of International Economic Law 2001 Vol. 4 No. 1, p. 114.
[822] Picone & Ligustro, above note 797, p. 96.
[823] See above Part II Chapter 2 in Subjects and beneficiaries of WTO Law.

The objectives of international trade may be found within the preambles to the agreements that give shape to the WTO, and especially in the preamble to the WTO Agreement itself. The international trade order established by the WTO is made up of the Marrakech Agreement establishing the WTO, and the Covered Agreements. Hence, there are a number of agreements containing preambles.[824] In the case of conflict between the WTO Agreement and other covered agreements, the WTO Agreement always prevails by virtue of the language of Article XVI:3. This means that the objectives established by the WTO Agreement are, in effect, the objectives of the entire trade regime.[825] The legal significance of the preamble may be limited but, in accordance with Article 31.2 of the Vienna Convention on the Law of Treaties, it serves as a context for treaty interpretation, for preambles establish the object and purpose of a treaty. Besides, in general international law the preamble of an agreement is part of the *narratio* and not the *dispositio.* In other words, the preamble does not establish any legal obligation. However, there are occasionally exceptions; the agreement itself may concede a higher legal rank to the preambular text. This is the case of the World Trade Organization.[826] Article III of the Marrakech Agreement lays down the duty of the Organization to facilitate the implementation of its administrative operation as well as to further the objectives of the WTO and the multilateral agreements. With regard to the plurilateral trade agreements, this obligation is limited to the establishment of a framework for their implementation, administration, and operation. Therefore, we can affirm that the preamble, and with it the objectives of the WTO, is a special tool for assessing the content of ordinary provisions of the WTO; it possesses a higher legal rank than a simple narration. The Appellate Body has referred to the Preamble as a means of blending or clarifying the content of members' rights and obligations.[827]

Given the importance of WTO objectives in the relationship between human rights, trade, and public morals, we hereby cite the preamble in full:

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[824] Holger Hestermeyer, "Preamble" in *Max Planck Commentaries on World Trade Law: WTO Trade in Services* R Wolfrum, P-T Stoll, C Feinaugle (eds.), 2008 Vol. 6, p. 19 In cases as GATS or GATT there is not a heading designating the text as the Preamble. However, the location of the text and its content indicate that such texts make up the Preambles of the agreements **See also** von Bogdandy, above note 605, p. 3.
[825] *US-Shrimp*, AB, above note 606, para. 129.
[826] von Bogdandy, above note 605, p. 4.
[827] *US-Shrimp*, AB, above note 606, paras.129-131, 152, 153, 155. **See also** WTO Analytical Index *i.e. US-Gasoline* above note 399, p. 30 WT/DS2/AB/R 29:April.1996 p. 30; *Brazil-Measures Affecting Dessicated Coconut* Appellate Body WT/DS22/AB/R 21 February 1997, p. 14.

Agreement establishing the World Trade Organization

The ***Parties*** *to this Agreement,*

Recognizing *that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,*

Recognizing *further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development,*

Being desirous *of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations,*

Resolved*, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations,*

Determined *to preserve the basic principles and to further the objectives underlying this multilateral trading system,*

Agree *as follows:*

[…]

2 Typology

We can see from the preamble that the objectives of the WTO are many. They include the following: economic objectives; environmental objectives; objectives related to solidarity and justice; objectives regarding the achievement of the WTO's goals (instrumental objectives); and objectives relating to the integration of the international trading system. Additional relevant objectives include: the raising of standards of living; ensuring full employment; sustainable development; special and differential treatment with particular consideration of less developed countries; the reduction of tariffs and barriers to trade; the elimination of discriminatory treatment; and the integration of the viability and durability of a multilateral trading system. It is of paramount importance,

when reflecting upon these objectives, to note that the WTO system is not static but dynamic. This has been confirmed by the WTO judiciary. In the *US–Shrimps*[828] case, for example, the Appellate Body acknowledged, while interpreting Article XX(g) of the GATT, that "the words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of the contemporary concerns of the community of nations about the protection and conservation of the environment." To have a dynamic nature refers, in the first place, to the fact that the WTO is open to accept and incorporate into its rules objective contextual changes and external influences.[829] External influences can come from principles developed in the wider context of international economic law—including private law—but also those coming from general international law—which include considerations of a hierarchical nature, such as the concept of sovereignty, *ius cogens*, the obligation *erga omnes*, or human rights, and which from a substantive point of view that may to a great extent differ from those interests based purely upon economic theory. The openness of the WTO happens not only as a result of decisions taken by its Members, that is, decisions agreed by consensus (e.g. Part IV GATT, Trade and Development)[830], or by the enabling clause which establishes the Generalized System of Preferences, but also through secondary or derivative decision-making mechanisms; the latter do not include direct forms of consent, but do incorporate derivative (jurisprudence) interpretation, either within a cognitive or a creative process.[831] It is also important to bear in mind that, although objectives are normatively relevant, they are very close to economic, political, or ideological principles; for this reason, to make use of them requires at least a very high degree of acceptance and care. At the risk of stating the obvious, we must also bear always in mind that WTO objectives to some extent guide the direction of international trade; they give a provisional answer to the question

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[828] *US-Shrimp*, AB, above note 606, para. 129.
[829] Picone & Ligustro, above note 797, p. 94.
[830] Art XXVI.8 GATT "the developed contracting parties do not except reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties" From an external point of view, this article reflects the adequacy of the WTO order to the objectives proclaimed by the new economic order. From an internal point of view Art XXXVI. 1 GATT recalls some objectives of the preamble reaffirming the commitment towards the raising of standards of living as an overall finality of the system. The principle of special and differential treatment is an exception to the principle of non-discrimination based on solidarity **See also** Rüdiger Wolfrum, "General International Law (Principles, Rules and Standards)" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 4, p. 344.
[831] See above Part III Chapter 2 in Sources of WTO Law , particularly the distinction between primary and secondary sources.

of what we wish to achieve with international trade? Principles, therefore, bear a heavy normative load.

a Synergy between objectives and exceptions

Objectives and Exceptions may complement each other, as confirmed in the *EC–Tariff Preferences* case. The objectives of the international trade system, as established by the WTO, may be pursued through primary obligations, such as GATT Article III, as well as through exceptions, such as GATT Article XX. [832] In any case, the covered agreements are characterized by a system of exceptions.[833] Exceptions, as ordinary norms, are not only supportive of WTO objectives; often they are also complementary to them.[834] We can therefore affirm that, insofar as exceptions complement WTO objectives, they can be considered as fixing certain aspects or parts of those objectives. As such, they may either enhance or limit the scope of objectives, principles, and other ordinary norms within the system. Due to the fact that exceptions, as well as primary obligations contribute, in their introductory clauses, towards the achievement of the goals established by the WTO, exceptions are not to be construed narrowly.[835] Indeed, in the *EC–Tariff Preferences* case[836], the Appellate Body observed that, "WTO objectives may well be pursued through measures taken under provisions characterised as exceptions. The Preamble to the WTO Agreement identifies certain objectives that may be pursued by Members through measures that would have to be justified under the 'General Exceptions of Article XX' (GATT)".

b Instrumental objectives

Instrumental objectives refer only to freer trade; they depend to a great extent on the achievement of non-instrumental objectives. According to the aim or purpose of the agreement, objectives may be instrumental or non-instrumental. Instrumental objectives are those that constitute a means of achieving the ultimate ends of the Organization.[837] They are tools for accomplishing first order or overriding objectives. Similarly,

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[832] von Bogdandy, above note 605, p. 5.
[833] *e.g.* Art XX GATT; Art XIV GATS.
[834] Ernst-Ulrich Petersmann, "Trade and Human Rights I" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.), 2005 Vol. 2, p. 627 From a human rights perspective, exception clauses have a complementary function in order to protect individual freedom, non-discrimination and the rule of law.
[835] von Bogdandy, above note 605, p. 5.
[836] *European Communities –Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body, WT/DS246/AB/R 7 April 2004 para. 94.
[837] Picone & Ligustro, above note 797 p. 99 **See also** von Bogdandy, above note 605, pp. 11-12.

instrumental objectives may also be considered as secondary objectives. As secondary objectives, they mainly depend on the existence and achievement of primary or non-instrumental objectives. This fact does not necessarily mean that those objectives ranked as priority should always take precedence over instrumental objectives. However, instrumental objectives certainly must be used with caution. Even when there is widespread agreement that free trade is an objective of the Organization, it is argued that, due precisely to the instrumental character of objectives such as the reduction of barriers to trade, and the elimination of discriminatory treatment, it is legally impossible, nevertheless, to assert that free trade is an objective of the WTO. As a matter of fact, these objectives aim only at a freer trade. As objectives considered secondary, their achievement depends on the realization of other relevant economic and non-economic objectives. Their instrumental character also means that they are not exclusively the means by which the WTO achieves its ultimate goals.

c non-instrumental objectives

Non-instrumental objectives, on the other hand, are seen as objectives of highest priority; they are ultimate ends. In opposition to instrumentality, non-instrumental objectives represent pure ends; they exist independently of the way or manner in which they are supposed to be accomplished. As ultimate ends, non-instrumental objectives do not tell us to what amount or degree they should or must be achieved, nor to what extent their realization is to be conducted by means of the instrumental objectives established in the preamble. Rather, these characteristics imply only that the extent to which such non-instrumental objectives are to be attained is progressive, and therefore subject to the assessment and review of an ever-evolving and changing reality. Furthermore, their achievement does not depend exclusively on the realization of instrumental objectives. Indeed, the assessment and legal validation of this reality happens commonly through traditional volitional means of decision-making. However, the realization of such objectives can also happen through a judicial form of decision-making. And it is here where interpretation and hermeneutics play a role of fundamental importance. Similarly, non-instrumental objectives exist without regard for the means by which they are to be achieved; their progressive realization does not exclude the influences of sources of decision-making other than those expressed through instrumental objectives. Indeed, non-instrumental objectives are never means. Non-instrumental ends or objectives have an economic, a non-economic, and a mixed nature.

d Economic objectives

International trade forms part of the so-called economic sciences; therefore, the regulation of international trade is supposed to be a question primarily of regulating economic issues. Furthermore, rules governing international trade are mainly based on economic objectives and economic theory. Economic objectives are mainly expressed in the Preamble to the Marrakech Agreement Establishing the WTO. Some of these refer to internal economics, and others to international economics.[838] Among the former, that is, the principles of internal economics, we find the principles of ensuring full employment, and a steady growth of effective demand.[839] Principles of international economics therefore include also the optimal use of the world's resources.[840] This differentiation between economic principles of an internal or the international economy is complex and very dangerous; it risks a powerful impact upon such issues as the allocation of power and the sovereignty of states. Referring to internal and international economic interest may unduly suggest that such objectives as the rising of standards of living are merely national concerns. The words "individual" or "international community" are found nowhere in the preamble; nevertheless, a systematic and integral analysis may clarify that such concepts and objectives may sometimes trespass national borders. In particular, the objective of raising standards of living may be considered an allusion to Article 25 UDHR[841] and ICESCR Article 11.[842] Moreover, the particular dynamism of an active economy does not allow of an easy distinction between objectives of an international or national nature, even if one could perhaps admit that an objective may be more domestic or international in nature. However, globalization as a particular economic phenomenon is proving increasingly challenging to national sovereign frontiers. To differentiate between internal/domestic and international economic objectives is misleading; furthermore, it could result in the limiting of state action against alien aggression of an economic variety. Such developments may potentially impact, too, upon relevant areas of domestic regulation, particularly in relation to a possible lowering of human liberties and human rights standards. Therefore, it is important to note that the absence of individual expression, or international community, does not necessarily imply a lack of common interest in the

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[838] Picone & Ligustro, above note 797, p. 99.
[839] Preamble (first recital) Marrakesh Agreement establishing the WTO.
[840] *Ibid.*
[841] Art.25 UDHR, Right to an adequate standard of living.
[842] Art. 11 ICESCR, Rights to an adequate standard of living.

international community as a whole, nor a lack of interest in the interests of the individual. Objectives such as raising living standards, or sustainable development, show that there is indeed a need to approach WTO goals from a dynamic perspective. WTO objectives should thus not be circumscribed in relation to exclusive national frontiers; rather, they must go hand in hand with the developments that take place outside the framework provided by the legal regime established by the WTO. Interestingly, this trend towards objectivization in the analysis of WTO rules is coupled to a process of constitutionalization.[843]

e Non-economic objectives

According to the scope of regulation, some authors speak about the existence of non-economic objectives.[844] The existence of non-economic objectives within the system of international trade is not always clear or evident. Indeed, the only clear reference to non-economic principles is that of sustainable development, and the protection and preservation of the environment.[845] On some occasions, such non-economic objectives may not usefully be considered real WTO objectives, but rather as objectives that lie outside the legal international trade system, but which have, or may have, an immediate impact on WTO law. On other occasions, such non-economic objectives are expressed as limits to the international trade regime, as recognized through exceptions or exemptions. Non-economic exceptions and exemptions are considered as preponderantly non-economic in nature. Nevertheless, exceptions may sometimes complement real preambular objectives; reading two objectives together may lead to an enhancement of the goals of the organization, especially in the content of such non-economic issues as those expressed in the exceptions. Some of these limitations are explicit as, for instance, the *litera* contained in GATT Article XX, the General Exceptions, the protection of public morals, the protection of human health, or the security exceptions contained in Article XXI. Other limitations are implicit, and derived from or indirectly referred to in some exception of the agreement, such as human rights through the public morality exception.[846]

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[843] Christoph T Feddersen, "Der ordre public in der WTO: Auslegung und Bedeutung des Art. XX lit a) GATT im Rahmen der WTO-Streitbeilegung", 2001, p. 96.

[844] See Stefan Zleptnig "Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements" 2010.

[845] Preamble (first recital)Marrakech Agreement establishing the WTO.

[846] Zleptnig, above note 844, pp. 124-224.

f Objectives of a mixed nature

The objectives of a mixed nature can be approached from the multilevel normative framework provided by International Law and enriched by the content of exceptions. From an historical perspective, it is normally believed that those objectives recognized by the GATT 1947 are largely of an exclusively economic character. For this reason, the goals pursued were more in keeping with the mechanisms of a self-regulatory market rather than with the rules of an organization empowered to interfere in international economic intercourse.[847] Contrary to the much appreciated social quality of the Havana Charter[848], the GATT 1947 lacked legitimacy in its interventions of a social nature. GATT 1947 was rather restrained to rule international trade on a more strictly economic basis.[849] Nevertheless, many of the objectives established in GATT 1947 are evidently of a dual nature; or rather, they cannot be proven to be exclusively economic in character. Today, the objectives established in the WTO support the notion that there is an increasing concern regarding issues of a non-exclusive economic nature, such as sustainable development. These facts support the idea that WTO Members are concerned about conducting trade in a manner consistent with other non-economic world concerns. Indeed, the mixed nature of some objectives is undeniable, such as the raising of living standards. [850] This polyvalent character makes of the rules a multipurpose tool, the content and objectives of which can be examined both within the multilevel system provided under international law—WTO, IEL, General International Law—and also enriched by the content provided for in the system of WTO exceptions.

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[847] Picone & Ligustro, above note 797, p. 100.

[848] Havana Charter for an International Trade Organization. 24 of March 1948 UN Doc. E/Conf.2/78 The Charter recognized in his chapter 1 (Purposes and Objectives) the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations". The Charter furthers realizes "the aims set forth in the Charter of the United Nations, particularly the attainment of the higher standards of living, full employment and conditions of economic and social progress and development, envisaged in Article 55 of that Charter". In order to achieve these goals, the ITO Charter established a variety of objectives of a much more accentuated economic nature, or of an instrumental character in a way that pure economic objectives constituted rather means than ends in themselves.

[849] The fact that the Preamble of the WTO is silent respect some social issues – *i.e* labour- has been considered as a functional differentiation between various international legal regimes **See** von Bogdandy, above note 605, p. 7.

[850] **On the one hand**, for E-U Petersmann "the rising of standards of living" is a non-economic policy goal. Petersmann, above note 834, p. 627 **on the other hand**, for Piconne & Ligustro this goal is classified as an objective of internal economy. Picone & Ligustro, above note 797, p. 99.

3 Coherent interpretation

Legal concepts of international law, such as standards of living and environment, must be coherently developed by coordinated decision-making processes. The diversity of purpose within the Organization, the polyvalent nature of many of its objectives, and the variety of instruments in the legal structure of international trade and international law, provide the system with a wider operational range than that offered by the limited impression given by a restrained WTO action to achieve economic performance within the framework of extreme positives. Objectives such as raising living standards, preservation of the environment, securing developing countries a share in the growth of international trade, show the extremely complex nature of the purposes and objectives of the Organization. Such objectives can be found in the fields of International Economic Law (*i.e.* principles derived from the New International Economic Order) or General International Law (*i.e.* Human Rights). The WTO is by no means a mechanism by which to deconstruct the rules established within other subsystems of international law. On the contrary, an objective and integral approach to the application and interpretation of WTO rules can only make a positive contribution to the establishment of a non-antagonist set of rules of still wider application. International law develops concepts that may, at the same time, appear as objectives, principles, and ordinary norms within the different sub-systems of international law. For example, the right to an adequate standard of living is a human right and is implied in the WTO objective of raising living standards. Another example is the concept of sustainable development. This principle emerged from the United Nations Conference on Environment and Development. It is now also an established concept of international law that has already been used in several international instruments of environmental, economic, and social character.[851] The co-existence of such objectives, principles, standards, and specific rules, along with various types of regulatory bodies of law, might risk to create confusion, or at least to render such concepts difficult to understand and define. On the one hand, there may exist some overlap among similar principles within those more restrained sub-systems of law, such as the raising of living standards as a WTO objective, even as the right to an adequate standard of living may at the same time be understood as a basic human right. On the other hand, there is a danger that such concepts evolve in opposite directions. For this reason, it is necessary to be absolutely

[851] Philippe Sands, "Principles of International Environmental Law", 2003 (2nd edition), pp. 252-266.

clear that such concepts do not constitute an ambivalent mixture of opposite ideas. Furthermore, such international legal concepts must be regarded as having an undisturbed spatial continuity, the limits of which can be found either in the correspondent regulatory framework of law, or within the whole system of public international law. Even so, it is important to distinguish between the extent to which these concepts are inter-related and the extent to which they are inter-dependent and form a unified whole. At any rate, it is unhelpful to allow an unlimited and uncoordinated configuration of legal concepts; to do so might lead to irreconcilable antagonisms.

The opinion that the adjudicative bodies of the WTO may only apply rules set out in the covered agreements has been severely criticized for being "unduly positivistic".[852] For this reason, it is important also to take into account non-traditional forms of positivistic rules. It is thus suitable to address our attention to the principles of law.[853] According to these principles, doctrine differentiates between internal and external principles. Internal principles are those created and developed for and within the WTO, that is, principles of progressive trade liberalization, non-discrimination, reciprocity, observation of sovereignty, sustainable development, co-operation and multilateralism, transparency, rule of law, legitimate expectations, proportionality, fair trade, and the peaceful settlement of disputes. Besides these internal principles, there exist also external principles. These external principles are found in International Law in general, in the law of international organizations, in customary law, in general principles and maxims of law, and in domestic law, some examples being principles of solidarity, co-operation, good faith, *pacta sunt servanda*, the *rebus sic stantibus* clause, equity, legitimate expectation, the prohibition of abuse of rights, procedural external principles such as due process, and principles of judicial economy, such as the principle of multiple complaints.[854]

Principles express the values of the system and serve as the axes of the system itself. These principles, although general in character, do not properly inform us of the objectives of state action; rather, they explain how to act so as to achieve those objectives. Although in some cases principles can be considered as instrumental

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[852] Bartels, above note 817, p. 499.
[853] See Part II Chapter 2 in Sources.
[854] Göttsche, above note 798, pp. 114-137.

objectives, what especially differentiates them from pure objectives or ultimate ends is that they serve essentially as means. They are normative parameters that express values in relation to which ordinary or specific rules must be assessed. The level of concretization of principles is therefore inferior to that of specific norms. For this reason, they are more open to interpretation than ordinary rules. One important characteristic of legal principles is that they can be realized to varying degrees. Principles express not only the essential values of the system; they are also the axes on which the system itself functions.[855] Notwithstanding the respective helpfulness of legal principles in illuminating legal outcomes, they become problematic when those principles appear to be in competition and need carefully to be weighed, one against the other. Their interaction with other WTO principles and objectives, and the principles and objectives of general public international law, is more likely to occur, provoking collisions. The relationship between competing principles must for this reason be established on a case-by-case basis. From the legal nature of the principles concerned, we can say that there is no one dominant principle in relation to which all the others must accept a merely subordinate role.[856] However, principles related strongly to ius cogens norms do deserve special consideration. Close to these principles, but of less certain content, are standards. These are considered as standardized prescriptions which render them functional or auxiliary for the concretization of principles.[857] On the other hand, standards are also technical rules directly referred to or through a reference to an external source, in an agreement that serve to make operational the behaviour of states.[858]

Principles are a fundamental source for interpretation in order to fill gaps. Principles of law are constantly evolving in the dynamic process of interpretation and application of legal rules. Legal texts sometimes make direct reference to such principles. In addition, the interpreter of rules receives guidance from some unwritten principles that on some occasions are in reality at the centre of the system. Principles of law constitute an essential part both of a system's legal structure and of its core values.[859] They allow us to approach systematically any given particular order insofar as they go far towards

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[855] Picone & Ligustro, above note 797, p. 95.
[856] Zleptnig, above note 844, pp. 263-264.
[857] Picone & Ligustro, above note 797, p. 95.
[858] *Ibid.*, p. 95.
[859] Hilf, above note 821, p. 112.

clarifying and fulfilling ambiguities and gaps. Although they may appear to be more general and flexible than particular rights and obligations, they are vital for resolving conflicts raised by omissions or ambiguity, uncertainty or vagueness. Principles can be formulated in either bilateral or multilateral agreements under public international law. They can also result from customary international law and from general international law, that is, even when a principle is not expressly acknowledged in the legal texts of the WTO, such as the principle of good faith, which has been used, among other occasions, in the interpretation of the headnote of Article XX.[860] Finally, those principles common to internal legal regimes of WTO Members may also be given consideration.

General exceptions, besides complementing objectives, are also ordinary norms. Ordinary norms are the prevalent kind of norms within the system of the WTO. These rules are a more concrete form of regulation; they refer to the rights and obligations which, in a strict, material sense, may be said to regulate international trade.[861] General exceptions may also be classified as ordinary norms. As an integral part of the system, general exceptions help to elucidate and resolve the contradictions in relation to other norms of the same level (other ordinary norms), as well as the overall principles or objectives of the Organization.

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[860] *US-Shrimp*, AB, above note 606, para. 158.
[861] Picone & Ligustro, above note 797, p. 96.

CHAPTER 3 THE WTO EXCEPTIONS SYSTEM

A The system of exceptions

The international trade regime established at the WTO includes a large system of both general and specific exceptions[862] such as security exceptions, exceptions for trade in free areas, and exceptions for special and differential treatment, taking into consideration the particular conditions of developing countries. In a broader sense, the system of exceptions may also include the possibility of a waiver, under exceptional circumstances, from WTO obligations, even if, in *strictu sensu*, they may more accurately be defined as exemptions. Within the international trade regime, one can distinguish between exceptions that primarily protect economic values, and exceptions that primarily protect non-economic values.[863] Since our focus here is an analysis of the concept of "public morals" and its relationship to human rights, the centre of attention will be, in the first place, on general exceptions, waivers, and the non-economic character of the value protected through such exceptions.

The interpretation of the exceptions has to be viewed in relation to the principles that underlie them. The general exceptions established in GATT Article XX articulate a rule of global reach given that it forms a part of an international treaty with a list of signatories that covers much of the globe. Moreover, the general exceptions rule has become a model provision for regional and bilateral trade agreements, such as Article 2101 of the NAFTA, and Article 36 of the TFEU (formerly TEC Article 30).[864] Besides being a model for bilateral and regional agreements, GATT Article XX is also considered the classical template for exception clauses in other WTO agreements.[865]

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[862] Rüdiger Wolfrum, "Art XX GATT [Introduction]" in *Max Planck Commentaries on World Trade Law : WTO-Trade in Goods* R Wolfrum, P-T Stoll, H P Hestermeyer (eds.), 2011 Vol. 5, p. 455.
[863] Petros C Mavroidis, "The General Agreement on Tariffs and Trade: A Commentary" 2005, Chapter 3 The author differentiated among business exceptions (includes anti-dumping and countervailing duties, safeguards, infant industry protection); non-business exceptions (include general exception and security exceptions) and institutional exceptions (regional integration). Cited in Stefan Zleptnig. "Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements" 2010, p. 102 For a more detailed critic see Zleptnig, above note 844, p. 94.
[864] Feddersen, above note 843, pp. 154-158.
[865] Zleptnig, above note 844, pp. 101 The international trade regime knows two ways of establishing non-economic justification provision. The classical or "negative" approach, which ascribe to the relationship rule-exception *e.g.* Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantives obligations established by GATT; the new or positive approach does not strictly allows from

Although these provisions are generally of similar or even identical wording, parallel interpretations must be considered very carefully, since the structure and principle underlying bilateral and regional agreements can vary considerably. For this reason, while looking for consensus, the outcomes of similar provisions involve a detailed examination of the principles that lie beneath the exceptions.[866]

The WTO allows for deviation from its obligations on the basis of non-economic matters. International trade theory assumes that trade liberalization is conducive to the improvement of the welfare of states, at least at an aggregate level. Nevertheless, the WTO does not only aim for economic values through a gradual and progressive trade liberalization system and mutually advantageous cooperation; it also recognizes the importance of non-economic issues. Together with some objectives of a non-economic nature, and other objectives of a mixed nature, such as raising living standards, it also limits economic intercourse through a broad system of exceptions and exemptions, including also a large diversity of primarily non-economic issues. Indeed, the system of general exceptions is largely considered to limit trade obligations on mainly non-economic grounds.[867] Although it is said that the differentiation between economic and non-economic justification is unclear, and that this lack of clarity can generate uncertainty[868], what is clear is that WTO law allows for a limited deviation from its obligations on the basis of matters not always exclusively economic.

B Function

The general exceptions of GATT Article XX are in practice one of the most important provisions to justify deviations from the rules and principles that guide international commerce; that is, deviation from the principle of non-discrimination. General exceptions allow differentiation by permitting Members not always to be in full conformity with the most important obligations derived from this principle. The invocation of general exceptions requires in the first place a state conduct contrary to WTO Law. This behaviour may be a measure taken by the member state that breaches

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deviation in the rule-exception sense but incorporate non-economic issues as part of substantive rules of the applicable agreement.

[866] Wolfrum, above note 862, p. 456.

[867] Bender, above note 650, p. 191. **See also** Cottier & Oesch, above note 790, pp. 428-442. **See also**, *EC-Tariff Preferences*, AB, note above 836, para. 97 referring to "measures of primarily non-trade nature".

[868] Feddersen, above note 843, p. 171.

an obligation set out in the agreement[869], following the rule-exception model.[870] It is also important to state clearly that the scope of application of general exceptions is universal. That is, they apply to any GATT obligation.[871] In addition, the different policy objectives that can be legitimately pursued under the different *litera* established under the general exceptions are not mutually exclusive. That is, member states can invoke more than one justification of GATT Article XX in order to legitimate a single measure.[872]

1 Protection of domestic values

In principle, general exceptions serve to protect domestic values through sovereign policy making. Once these values are also consolidated as global or universal common values, the reach of the exception can be perfectly enhanced to the global and universal level. In general terms, it is suggested that exception clauses serve states such that they may derogate from their treaty obligations in order to pursue other national policy objectives. However, this later view merely expresses an egoistic idea of state dominance; it forgets the considerable influence that international institutions can exert in order to protect the common interests of the international community and the universal interests of the individual. The consolidation of international common interests and universal values demonstrates that an evolutionary approach to the international trade regime could render legitimate the insertion of such values as part not only of national policy but also of the international decision-making process itself. The issue of the allocation of power within the WTO has also been largely discussed in both international trade and general international law. On the one hand, it is mainly argued that exception clauses allow states to keep their sovereign rights in certain matters, namely those agreed upon in the general exceptions. On the other hand, this view dismisses the powers with which international institutions are invested in order to apply and interpret an agreement in accordance with global concerns assessed in an objective manner, taking into account the notions of international social justice proclaimed in the overall system of international law. In other words, exception clauses serve in the first place to stabilize the system in terms of human economic realization

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[869] *Ibid.*, pp. 159 The required measure by Art XX GATT refers to any measure contrary to GATT.
[870] *United States-Measures Affecting Imports of Woven Shirts and Blouses from India* WT/DS33/AB/R 25 April 1997 p. 16 "Art XX and Art XI(2)(c)(i) are exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves".
[871] Zleptnig, above note 844, p. 94.
[872] Wolfrum, above note 862, p. 457.

balanced against issues of social justice, such as human rights. Positively, this is possible thanks to the flexibility that exceptions give to WTO norms, thus recognizing the importance also of non-economic values.

2 Protection of non-domestic values

Although legal scholars mainly refer to general exceptions as protecting domestic policies only, there already exists a group of rules beyond state borders that cannot be legally breached. Legal scholars usually make reference to the values explicitly protected in the international trade regime—as well as those derived from them—as non-economic goals, policies, or objectives, or simply as trade and other issues. In spite of the fact that legal scholars tend to disregard topics of a non-primary economic nature, in the context of international trade rules it remains unclear who is the bearer of rights accorded through exceptions.[873] It seems that there is agreement when conferring on those rights the character of legal expressions of sovereign rights. It follows that states are the only bearers of these rights; only they can determine such issues. This idea of restricting some areas of action to sovereign decision-making contrasts with the fact that not all issues listed in exception clauses, or derived from the whole system of exceptions, are of a purely domestic nature, or could be considered as issues involving only domestic concerns. The first difficulty here lies in tracing the dividing line between the purely domestic and the international spheres, and the dividing line, in special cases, between the particular, the regional, the global, and the universal. The second difficulty lies in allowing the international organization, particularly through its adjudicative system, to decide over such matters. This problem stems from the idea that sovereign states do not transfer any sovereign power to an international institution unless they have explicitly agreed to do so. However, we have seen before that there exists today a consolidating hierarchical structure in which state sovereign action can no longer interfere, that is, *ius cogens* norms, obligations *erga omnes*, and the superiority of international law.

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[873] Zleptnig, above note 844, p. 98-100, footnotes 59,60 "Exception clauses "can be considered as a network of corresponding rights and obligations of different states. For example, the right of one state to invoke an exception clause corresponds with an obligation of this state not to misuse the exception clause, as this would frustrate the treaty rights of other states.

3 Protection of sovereignty

Viewing exceptions as protecting sovereignty only responds to a historical vision of the WTO; it is more appropriate today to interpret the WTO in an objective and evolutionary fashion. With special regard to general exceptions established in WTO Law, it has been noted that there is tension and a possible conflict between economic policies and domestic regulatory authority.[874] It could be that general exceptions are created in order to further the cause of diversity. However, some limited truth in these arguments can only be admitted from an historical perspective. By contrast, an evolutionary approach, taking into account the new developments and progress, must be aware of the context and current circumstances in which facts exist, thus increasing current worries. The new philosophy of WTO law, at least at a conventional level, is not only focused on traditional principles like non-discrimination, but also on regulatory policies of positive harmonization.[875] That is, the WTO has begun to appreciate the need, when interpreting WTO rules, to reconcile diversity with uniformity through a process of harmonization by means of external sources.[876]

A more detailed analysis of the nature of the exceptions will help us to understand the reach of those values protected by them. Exceptions are ordinary rules.[877] As ordinary rules, their scope is certainly particular to nation states; they allow space for the interpretative clarification of a measure *per se*. However, exceptions are also to be considered together with the objectives of the Organization. As such, they are not pure ordinary means acting independently from, or at most colliding with, other ordinary norms; rather, they are factors that complement the objectives established by the Organization.[878] Therefore, in some cases, they acquire a status superior to that of simple ordinary norms. Furthermore, exceptions are also implicated in a context that is constantly evolving, building a basis for constant and ongoing assessment. The exception itself acts as an integral part of the objective when sufficient account is taken of its suitability as a common or universal concern, approached organically. It is at that stage that we can affirm that the judiciary, through dispute settlement rules, and with its intrinsic power to exert social control, has the legitimate role of deciding upon such

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[874] Veijo Heiskanen, "The Regultory Philosophy of International Trade Law" Journal of World Trade 2004 Vol. 38 No. 1, p. 33.
[875] *Ibid.*, p .34.
[876] See below Part IV Chapter 3 Interpretation.
[877] Picone & Ligustro, above note 797, p. 97.
[878] Petersmann, above note 834, p. 623.

international common or universal values that, due to the complexity and disparate nature of the decision-making process in international law, cannot otherwise be expected to be given effective positive form through administrative or legislative channels.

4 Protection of morals

Whose moral rights are to be protected? Scholars and the WTO judiciary agree that GATT Article XX allows for some degree of legal extraterritoriality. A very important issue regarding non-economic exception clauses, particularly in the case of human rights, is whether or not measures addressed to protect the values protected therein are permissible according to the effects they may have on other WTO Members. With special regard to GATT Article XX(a), the protection of public morality, it is not yet clear whose morality it is allowed to protect, that of the state applying the measure, or also the morality of third party states. Furthermore, is the reference to state or individual morality, or rather the collective morality of individuals at a national, transnational, or universal level? This is a classic question regarding the scope of GATT Article XX(a) and human rights. [879] Certainly, there is a generally accepted view that GATT Article XX permits the use of measures outside the territory of the state protagonist[880]; however, this question goes to the heart of the extraterritorial character of such measures. The debate leads in turn to the controversies around the extraterritoriality of some of these measures.[881] Be that as it may, it could be considered as an important characteristic of exception measures under GATT Article XX (a) to protect human rights, even if the effects of such measures are felt beyond the territory of the state adopting them. Indeed, when they are judged to be illegitimate, it is because of their unilateral nature and extraterritorial effect, not because of the content of the measure. [882] Moreover, legal scholars have made attempts to identify permissible extraterritorial action. [883] Indeed, the WTO judiciary has itself recognized the permissibility of some kind of extraterritorial action in some particular cases.

That notwithstanding, it remains unclear what type of measures are or are not lawful under WTO Law. The Appellate Body states that "conditioning access to a Member's

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[879] Charnovitz, above note 689, p. 689.
[880] Feddersen, above note 843, pp. 169.
[881] See above Part II Chapter 4 in Extraterritoriality.
[882] Zleptnig, above note 844, p. 300.
[883] *e.g.* Bartels, above note 817.

domestic market on whether exporting members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX."[884] Although permissible to some extent, WTO Members must always give preference to multilateral solutions before making use of arguably unnecessary unilateral measures; after all, WTO Members have above all a duty to negotiate with each other.[885]

C Structure of GATT Article XX

The structure of the general exceptions contained in GATT Article XX consists of two parts, namely the chapeau and the specific grounds for justification. Each of the ten grounds for justification formulates a specific policy objective. Additionally, the chapeau formulates general limitations on the application of the measure at issue. The logic of this provision, that is, the relationship between the chapeau and the particular grounds for justification, is two-tiered: first, it is necessary that the measure is justified under one of the paragraphs from (a) to (j); second, there must follow an examination as to whether the measure meets the requirements of the chapeau.[886] The function of this division is to avoid an abuse of rights through a misuse of general exceptions. The general limitations of the chapeau constrain the use of exceptions, thereby creating a balanced structure that favours a just equilibrium between the right of a member to invoke an exception and the rights of members in general, under other substantive provisions[887], to remain faithful to the principle of good faith.[888] The introductory clause is a second constraint against any opportunity to deviate from WTO obligations.[889] In this way, the structure of GATT Article XX exhibits substantial as well as procedural requirements.

Some other conditions exist in the two-tier logic that need to be met in order successfully to invoke GATT Article XX. First, the measure has to pass tests according

[884] *US-Shrimp*, AB, above note 606, para. 121.
[885] See von Bogdandy, above note 791, p. 666 **See also** Zleptnig, above note 844, p. 316.
[886] *US-Gasoline*, AB, above note 399, p. 22; United States- Import Prohibition of Certain Shrimp and Shrimp Products. Appellate Body WT/DS58/AB/R 12 October 1998 para.149, *US-Shrimp*, AB, above note 606, para. 149; Brazil- Measures Affecting Imports of Retreated Tyres Appellate Body WT/DS332/AB/R 3 December 2007, paras. 139, 213, **See also** Wolfrum, above note 862, p. 458.
[887] *US-Shrimp*, AB, above note 606, para. 159
[888] Bender, above note 650, p. 193.
[889] *Ibid.*, p. 193.

to the introductory wording of the particular grounds for justification. The introductory wording can be the same, but it can also differ, in the ways in which it reflects the relationship between the measure adopted and the value protected.[890] In the specific case of GATT Article XX(a), the measure at issue has to be "necessary" in order to protect public morals. The second step, that of the chapeau, is not intended to assess the measure as such, but rather the manner in which the measure was applied. The chapeau is divided into two parts. Its first part establishes that "nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: - *litera* a) to j)" and has an affirmative nature.[891] The second part establishes a condition that subjects the measure to the requirement that "such measures are not applied in manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

1 *Litera* and necessity test

In order to justify an action to protect public morality that deviates from a WTO obligation, the measure has to be necessary. Since this test is crucial for justifying measures that would otherwise not be permissible under WTO law, a wide test of review for national measures has been established within the dispute settlement system.[892] The case law developed by the Appellate Body on this issue is especially illuminating. The necessity test has some three relevant issues: first, to identify the objective pursued by the measure; second, to assess the contribution of the measure in terms of achieving the objective pursued; and, third, considering alternatives to the measure according to its effects. Finally, this criteria will pass a weighing and a balancing test.[893]

The WTO jurisprudence has confirmed that WTO Members can freely choose a level of protection they deem appropriate. Before entering a more detailed description of the necessity requirement, it is important to bear in mind what level of attainment of the value protected by the WTO Member is permissible. That is, when facing a risk to

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[890] Wolfrum, above note 862, p. 458. Highlighting that the introductory words of the particular exceptions are "necessary" (for lit a, b, d); "relating to" (for lit c, e, g); imposed for (for lit f); "in pursuance of" (for lit h); "involving" (lit.i); "essential (for lit j).
[891] Wolfrum, Rüdiger "Art XX GATT [*chapeau*]" in *Max Planck Commentaries on World Trade Law : WTO-Trade in Goods* R Wolfrum, P-T Stoll, H P Hestermeyer (eds.), 2011 Vol. 5 p. 464.
[892], above note 844, p. 229.
[893] Wolfrum, above note 862, p. 469-470. **See also** Bender, above note 650, p. 193.

human health, whether state A can choose a different level of protection than state B. According to WTO jurisprudence, WTO Members have the right to decide for themselves what is the appropriate level of protection against different risks.[894]

a Criteria

The criteria for the necessity test have undergone extensive judicial development. The first interpretations of necessity were rather rigorous given that the level of constraints imposed on domestic regulation was too high. As was established by the Panel in *US–Section 337*, the measure cannot be necessary if the respondent fails to demonstrate that there was another reasonably available measure that was not inconsistent with GATT or less inconsistent with GATT.[895] It was in the 169 dispute, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, that the necessity test was first relaxed. The Appellate Body, while corroborating the panel findings in previous cases, added that, based on the interpretation of the ordinary meaning of the word, there is a range to degrees of necessity. The Appellate Body concluded that the spectrum of necessity goes from "indispensable" to "make a contribution" in order to achieve the pursued objective, thereby situating the "necessary" measures as being somewhat closer in meaning to "indispensable". In a subsequent case, the AB expressed its view that the measure must produce a material contribution to the achievement of the objective, and that this can be demonstrated through "quantitative projections in the future or qualitative reasoning on a set of hypotheses that are tested and supported by sufficient evidence."[896]

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[894] *European Communities-Measures Affecting Asbestos and Products Containing Asbestos* Appellate Body WT/DS135/AB/R 12 March 2001 para. 168 "it is undisputed that WTO members have the right to determine the level of protection of health that they consider appropriate in a given situation" **See also** *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* Panel WT/DS285/R 10 November 2004, para. 6.461 "We are well aware that there may be sensitivities associated with the interpretation of the terms "public morals" and "public order" in the context of Article XIV. In the Panel's view, the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values. Further, the Appellate Body has stated on several occasions that Members, in applying similar societal concepts, have the right to determine the level of protection that they consider appropriate.904 Although these Appellate Body statements were made in the context of Article XX of the GATT 1994, it is our view that such statements are also valid with respect to the protection of public morals and public order under Article XVI of the GATS. More particularly, Members should be given some scope to define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of values" **See also** *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* Appellate Body WT/DS285/AB/R 7 April 2005, para 308 "Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV".

[895] *United States-US Section 337 of the Tariff Act of 1930*, GATT Panel, BISD 36S/345 para. 5.26; in the *United States-Standards for Reformulated and Conventional Gasoline*, Panel, WT/DS2/R 29 January 1996, para. 6.24, Kept on lane with the previous GATT Panel.

[896] *Brazil-Tyres,* above note 886, para. 151.

In order to determine degree of necessity, criteria have developed within the dispute settlement system such that a more meticulous analysis of the measure must be conducted. The measure must be suitable; that is, there must be a relationship between the objective pursued and the measure itself.[897] It follows that there must likewise be an assessment of the relative importance of the common interest or value that the measure intends to shield from danger or damage, with the result that the more important the value, the more probable the necessity of the measure.[898] Second, panels must consider the contribution of the measure to the end pursued, and in such a way that, the greater the contribution of the measure to the achievement of the objective, the more likely it will be that the measure can be considered necessary. Finally, the measure's restrictiveness on international trade must be taken into account.[899] The lesser the restrictive effects of the measure to international commerce, the greater the probability that it will be considered necessary. Once this element has been approached, a process of weighing and balancing these factors has been jurisprudentially designed for determining the necessary character of a given measure.

The Appellate Body reaffirms in *Brazil–Measures Affecting Imports of Retreated Tyres*, that, in order to determine whether a measure is necessary, the panel must give particular consideration to "the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness".[900] Furthermore, it continued its analysis by stating that, if an analysis of these factors foresees the possibility that the measure be necessary, the outcome of the scrutiny of these factors "must be confirmed by comparing the measure with possible alternatives, which must be less trade restrictive *while providing an equivalent contribution to the achievement of the objective*". Moreover, "this comparison should be carried out in the light of the importance of the interest or values at stake".[901]

The availability of an alternative measure depends on its reasonableness, that is, on a real possibility for the available measure to be adopted. One of the most difficult matters to assess is the question of the availability of an alternative measure. Following

[897] Zleptnig, above note 844, p. 245.
[898] *Korea-Beef*, AB, above note 657, para. 162 **See also** *EC-Asbestos*, AB, above note 894, para. 170 *et seq.*
[899] *Korea-Beef*, AB, paras. 162, 163.
[900] *Brazil-Tyres*, AB, above note 886, para. 178.
[901] *Ibid.*, para. 178.

the jurisprudence of GATT panels, in order for a measure to be considered necessary, it must first be determined whether an alternative measure is reasonably available. It can be that the availability of the measure occurs only at a theoretical level. In 2006, for example, the Appellate Body, in the case *US–Measures Affecting the Cross–Border Supply of Gambling and Betting Services*, opted for rejecting measures "merely theoretical in nature". They are not considered as "reasonable" because of the "undue burdens" they can cause to the state adopting the measure, *i.e.* prohibitive costs or substantial technical difficulties.[902] So there must be a real possibility for the state to adopt a particular available measure. In other words, for the measure to be reasonable it has to be analyzed in terms of its practicability; that is, the extent to which it may realistically be adopted. On the one hand, the feasibility of a reasonable available alternative measure "would preserve for the responding member its right to achieve its desired level of protection with respect to the objective pursued."[903] On the other hand, this does not mean that a reasonable available measure does not imply difficulties or higher burdens or costs. In fact, measures which produce higher costs or are more difficult to implement can be regarded as reasonably available.[904]

Another important step developed in *Brazil–Tyres* is the question regarding the extent to which a measure can contribute to the achievement of the goal. There, the Appellate Body established that in order to achieve certain goals that involving complex issues, such as public health or the environment, can only be pursued through a "policy comprising a multiplicity of interacting measures."[905] Moreover, the AB ascertained that there are measures, the result of which can only be observable with the "benefit of time," so that the effect of the measure does not have to be immediate. As long as the measure materially contributes to the end pursued, it can be considered as necessary.

2 The chapeau

a Function

The function of the chapeau is to avoid abusive use of exceptions and to establish a balance between the right to use exceptions and the substantive rights of the agreement

[902] *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, Appellate Body WT/DS363/AB/R 21 December 2009, paras. 318,325,
[903] *US-Gambling*, AB, above note 894, para. 307.
[904] *US-Gasoline*, Panel, above note 895, paras 6.26, 6.28; *EC-Asbestos*, AB, above note 894, para. 169.
[905] *China- Audiovisuals*, AB, above note 902, paras. 252-253; *Brazil-Tyres*, AB, above note 886, para. 151.

itself. The analysis of the chapeau is the second step for admitting the use of a measure that would otherwise not be allowed under the trade agreement. According to the panel, the exceptions of GATT Article XX are "limited and conditional."[906] They are limited because they only apply under certain circumstances, and conditional because the chapeau sets up conditions for their availability.[907] The drafting history of the article confirms that the intention of the drafters was to avoid the abuse of the exceptions for protectionist purposes.[908] The Appellate Body has clarified the purpose and function of the chapeau while at the same time establishing that, according to its drafting history, the *rationale* for the chapeau is to prevent the abuse of the exception clauses.[909] Furthermore, the AB has established that the function of the chapeau is to maintain a balance of rights and obligations between the right of a member to invoke an exception, and the substantive right of other members under the agreement.[910] The effect of the misuse of the exception in relation to the substantive rights of other Members is that the abuse or misuse "reduces treaty obligations to merely facultative ones and dissolves its juridical character".[911] The chapeau "prevents such far–reaching consequences".[912] In order to maintain this balance, the chapeau shall ensure that the exceptions are applied reasonably[913] as an expression of the principles of good faith and the prohibition of the *abuse de droit*.[914]

The text of the chapeau states that the possibility of success with the invocation of general exceptions is subject to the requirement that the measures at stake are not applied in a particular way or fashion. This is important because the function of the chapeau is not to assess the content of the measure itself but rather the manner in which the measure has been applied.[915] Additionally, in *US–Shrimps*, the AB stated that the "standards of the chapeau (…) project both substantive and procedural requirements."[916]

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[906] *US-Shrimp*, AB, above note 606, para. 157.
[907] *Ibid.*, para. 157. **See also** Wolfrum, above note 891 **See also** Zleptnig, above note 844, p. 272.
[908] Wolfrum above note 891, p. 466 According to this commentator the wording of the chapeau can be traced back to an almost identical provision in the International Convention for the Abolition of Import and Export Prohibitions and Restriction of 1927. This Convention never entered into force. LNTS 97 (1929-1930) 393, 8 Nov 1927.
[909] *US-Gasoline*, AB, above note 399, page. 22.
[910] *US-Shrimp*, AB, above note 606, para. 156.
[911] *Ibid.*, para. 277.
[912] *Ibid.*,para. 156.
[913] *US-Gambling*, AB, above note 894, para. 349.
[914] Zleptnig, above note 844, p. 276.
[915] *US-Gasoline*, AB, above note 399, page. 22.
[916] *US-Shrimp*, AB, above note 606, para. 160.

Since the organs of dispute settlement are occupied with the application of national measures, this brings the judicial organs of the WTO to act from a position not dissimilar to that of a national court. It is accepted that this function does not exceed the authority of dispute settlement bodies.[917] Besides, when interpreting the chapeau, one must bear in mind that the balance of rights and obligations has to be made on a case–by–case basis, that is, taking into account the specific circumstances of the case, factual as well as legal.[918]

The opening clause of GATT Article XX includes three different individual requirements: first, that the measure cannot be applied in a manner that constitutes arbitrary discrimination between countries where the same conditions prevail; second, unjustifiable discrimination where the same conditions prevail; third, the measure cannot be justified if it constitutes a disguised restriction on international trade.

b Sequence of the analysis

In the case of arbitrary or unjustifiable discrimination where the same conditions prevail, the panels should follow a sequence: first, the dispute settlement mechanism examines the discriminatory character of the measure; second, they have to determine if the measure adopted is unjustifiable or arbitrary; third, it has to be taken into account if the arbitrary or unjustifiable discrimination has taken place between countries where the same conditions prevail.[919]

The chapeau only refers to the manner in which discrimination takes place, not to the appropriateness of the measure itself. The findings regarding the content of the word "discrimination" under GATT Article XX, are not convincing.[920] The jurisprudence has only elucidated that "discriminatory", in the sense of the chapeau, is not necessarily equal to "discrimination" under GATT Article I (Most–Favoured–Nation Treatment), GATT Article III (National Treatment), or GATT Article IX (Quantitative Restrictions).[921] For example, the AB has stated that discrimination results not only from different treatment of countries where the same conditions prevail, but also because the application of the measure "does not allow for any inquiry into the

[917] Wolfrum, above note 891, p. 473.
[918] Zleptnig, above note 844, p. 278.
[919] *US-Shrimp*, AB, above note 606, para. 150.
[920] Mavroidis, above note 863, pp. 184-186 **See also** Picone & Ligustro, above note 797, p. 334.
[921] *US-Shrimp*, AB, above note 606, para. 150.

appropriateness of the regulatory program."[922] For this reason, what is really relevant for discriminatory action under GATT Article XX is not the measure as such, but rather the application of the measure. It is precisely the intention of GATT Article XX to allow some kind of discriminatory action justified under the substantive exceptions of the *litera* a) to j). However, the crucial point is that this action cannot be unjustifiable or arbitrary.

Initially, the words "unjustifiable" and "arbitrary" were considered as a substantially unitary concept, and without relevant distinction.[923] It was only subsequently that the *US–Shrimps* panel differentiated between unjustifiable and arbitrary. The distinction between unjustifiable and arbitrary refers to two different aspects of discriminatory treatment.[924] Unjustifiable discrimination refers to the substantive aspect or the material effects of the application of the measure. Furthermore, the AB has already observed that if the resulting discrimination could have been foreseen, the measure can in turn be unjustifiable.[925] Arbitrary discrimination refers to the formal aspect of the application of the measure, such that the measure is arbitrary according to the method in which it has been applied; arbitrary in this sense refers to procedural requirements.[926] In addition, arbitrary also means, according to the AB, to be inflexible or rigid, as in the use of national certification schemes, for example.[927] Nevertheless, the terms unjustifiable and arbitrary continue to be used interchangeably, or without regard to any relevant uniform considerations as to their precise meaning. This interchangeable use reaffirms the statements of the WTO judiciary that this assessment has to happen on a case–by–case basis. In *Brazil–Tyres*, the Appellate Body observed that the assessment of whether a measure is unjustifiable or arbitrary has to be made in light of the objective of the measure.[928]

Another important issue that has been considered by the Appellate Body under the interpretation of unjustifiable discrimination, is the unilateral character of measures. In *US–Shrimps*, the AB stated that bilateral and multilateral negotiations could be an

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[922] *Ibid.*, para. 165.
[923] Picone & Ligustro, above note 797, p.334.
[924] *Ibid.*, p.334.
[925] *US-Gasoline*, AB, above note, 399, page.25.
[926] Wolfrum, above note 891, p. 476.
[927] *US-Shrimp*, AB, above note 606, para. 177; *US-Shrimp*, Panel, above note 652, para. 5.121 *et seq*.
[928] *Brazil-Tyres*, AB, above note 886, para. 227.

alternative to unilateral and non–consensual procedures.[929] In the *US–Shrimps* case, the importing country had conducted negotiations with some countries, but denied access to its markets without previously attempting to reach an agreement with some other countries. The measure was found to be discriminatory and unjustifiable because the country imposing the measure failed to cooperate through these previous negotiations before imposing the measure. Nevertheless, the AB also noted that negotiations do not unconditionally require a certain result. The issue at stake here was the inflexibility and unjustifiable discrimination demonstrated by the imposition of a ban only on certain states. On the one hand, the United States decided in some cases to address the issue of protecting sea turtles through bilateral agreements. On the other hand, with respect to other countries, the United States exclusively acted through a national certification procedure for allowing market access. For this reason, the AB decided to oblige the importing country to engage in serious and good faith negotiations. Furthermore, in *US–Gambling*, for instance, the situation at issue was that the United States denied access to remote gambling services from Antigua. In this case, the possibility of previous negotiations was discussed under the necessity test imposed by GATS Article XIV(a), the protection of public morality and public order. In this case, the panel first established that the measure was not necessary because the United States did not engage in previous consultations with Antigua before applying the restrictive measure.[930] The AB rejected this argument because, in its view, the Panel did not focus on reasonable alternative available measures. The organ of appeal considered that previous consultation was not an appropriate alternative measure due to the intrinsic uncertainties of the process of consultation.[931]

In the *US–Shrimp* case, the Appellate Body, while examining the chapeau, conceded a certain level of lawfulness to unilateral measures. This suggests that the AB is aware of the possible compatibility of the agreement with policies of a non–economic character through the use of unilateral measures with some coercive content. Nevertheless, the assessment of the permissibility of unilateral measures which have a coercive objective should rather be carried out under the examination of the specific justification grounds,

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[929] *US-Shrimp*, AB, above note 606, para. 171; About proceduralization in the WTO see von Bogdandy, above note 791 (I), pp. 126 *et seq.*
[930] *US-Gambling*, Panel, above note 894, paras. 6.533-6.535.
[931] *US-Gambling*, AB, above note 894, paras. 317, 324.

as was the case when interpreting GATS Article XIV in the *US–Gambling* Case.[932] In any case, the use of unilateral measures will still require a very high level of justification since the use of unilateral and coercive measures must be strictly limited.

According to the standards set by the AB, after determining if the discrimination has been unjustifiable or discriminatory, the judicative organs have to assess if such qualified discrimination takes place between countries where the same conditions prevail, so facing a spatial issue. Close examination of the text reveals that a difference in treatment may be justified according to the existing conditions in the correspondent countries. The AB has clarified that the countries to which this text refers cover discrimination between products from different exporting countries as well as discrimination between domestic and imported products.[933]

The third and last condition established by the introductory clause of GATT Article XX is the inadmissibility of a disguised restriction on international trade. This condition, like the two preceding it, has to be interpreted within the purpose and function of the chapeau. That is, to avoid an excessive and abusive use of exceptions.[934] The term is also considered ambiguous among scholars.[935] In the *US–Gasoline* case, the AB stated that the expression "disguised restrictions" goes beyond concealed restrictions.[936] It was in the *EC–Asbestos* case where the term was first given greater elucidation. The Panel confirmed in that case that the term "disguise" denotes the intention to conceal something, and that it covers measures the compliance with which is "only a disguise to conceal the pursuit of trade restrictive objectives".[937] What is relevant here is the refusal of the protectionist aim of the measure otherwise justified under GATT Article XX *litera* a) to j). This means that when the analysis of the exception comes to the chapeau, and the measure is analyzed together with the instrumental objectives of the WTO's third recital of the preamble, such reading supports or emphasizes the importance or ideal of trade liberalization. However, the criteria used to identify when a measure carries a protective objective remain vague. The WTO judiciary has been aware of these

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[932] Wolfrum, above note 891, p. 476.
[933] *US-Gasoline*, AB, above note 399, page. 23.
[934] *Ibid.*, page. 25.
[935] See *e.g.* Zleptnig, above note 844.
[936] *US-Gasoline*, AB, above note 399, page. 24.
[937] European Communities-Measures Affecting Asbestos and Products Containing Asbestos Panel WT/DS13/R 18 September 2000 para 8.236.

difficulties, for which reason it stated that the design, architecture, and structure of the measure are indicators of the protectionist purpose.

D Waivers

Although the Ministerial Conference has no general law–making competence, it is authorized in some cases to engage in decision–making in order to change, make concrete, or create new obligations.[938] Article IX (Decision Making) of the Marrakech Agreement deserves particular attention.[939] One of these powers is the right which gives the Ministerial Conference and the General Council exclusive authority to adopt authoritative interpretations (Article IX(2)). Article IX, paragraphs 3 and 4, establish that in special circumstances the Ministerial Conference may decide to waive an obligation imposed on a Member by the WTO Agreement, or any of the Multilateral Trade Agreements, given that the voting requirements are met.[940] Waivers allow Member States to accommodate the legitimate needs of national interests within the WTO legal framework.[941] Furthermore, such interests and values, as far as their degree of actualization and validity are concerned, trespass national boundaries and may also, potentially, become the object of waivers.

On the one hand, this type of exception has a residual nature, for the waiver will be granted when "exceptional circumstances" exist. Although the expression "exceptional circumstances" has never been interpreted, it is at least clear that it covers circumstances different from those specifically provided for in other derogation clauses.[942] On the other hand, according to WTO practice, a waiver can also be granted for reasons of legal certainty[943], without prejudging the WTO consistency of the measure supposedly in violation of WTO rules, or not justified by its system of exceptions. In this case, we

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[938] Isabel Feichtner, "The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests" The European Journal of International Law 2009 Vol. 20 No. 3, p. 618.
[939] Art. IX WTO has to be read together with Art. XXV:5 GATT 1994 and the Understanding in Respect of Waivers of Obligations under GATT 1994.
[940] Art IX (3) WTO Agreement (...) "Such decision shall be taken by three fourths of the Members unless otherwise provided for in his paragraph".
[941] Cottier & Oesch, above note 790, p. 508.
[942] Picone & Ligustro, above note 797, p. 348.
[943] Waiver Concerning Kimberly Process Certification Scheme for Rough Diamonds. Decision of 15 May 2003 WT/L/518 (27 May 2003).

are not addressing the residual nature of the waivers but the fact that they act as guarantors of legal certainty.

By virtue of Article IX(4), the decision conferring the waiver shall not only explain the exceptional circumstances justifying the decision, but also the terms and conditions governing the application of the waiver, as well as the date on which the waiver shall terminate. Further on, the circumstances under which the waiver was given may be revised, if, for example, the waiver was granted for a period of more than one year, and on the basis of this review, the waiver may be extended, modified, or terminated. Finally, it is important to remember that waivers are acts of secondary law that bind WTO Members.[944]

In spite of the high level of justification required, waivers are broadly used. As in many areas regarding the meaning of exceptions within the WTO regime, debates about the meaning of special circumstances that justify the granting of waivers are not always especially illuminating. Nonetheless, there are some issues that have been clearly addressed. For example, as waivers have a residual nature, they may include all possible cases not named in other derogation clauses. Moreover, waivers can also be issued when they act as guarantors of legal certainty, even when the value at stake is protected in other derogation clauses. It can be added that waivers are granted in order "to modify obligations in individual cases and concrete situations".[945] In addition, a historical view supports the idea that the intention behind the possibility of a waiver stems from a Member's obligation "to address temporary situations of urgency which prevent members from complying with certain obligations".[946] Furthermore, some authors are of the view that waivers are *de facto* contractual modifications.[947] On the one hand, these arguments support the view that waivers are to be understood as narrow exceptions, as in the legal text of Article IX(3) and (4), through the establishment of a high level of justification, thus suggesting that the use of waivers should be sparing. On the other hand, GATT and WTO practice shows that waivers have been used more broadly. In particular, in relation to the Kimberly Process Classification Scheme for Rough Diamonds, the waiver was conceded due to issues of legal certainty. The waiver was

[944] Feichtner, above note 938, p. 633.
[945] *Ibid.*, p. 620.
[946] *Ibid.*, p. 620.
[947] Bender, above note 650, p. 195.

granted due to the urgency with which the issue at hand needed to be addressed, and revealed the true temporary character of an exemption. The purpose of the waiver in this case was to curb international trade with conflict diamonds through a waiver from provisions established in Article I:1, Article XI:1 and Article XIII:1 of GATT 1994.[948]

1 Coordinative structural nature

Waivers have a coordinative structural nature, they are connective features that link international trade to other international, transnational, and universal areas of concern and regulation. Whatever the nature of the waiver, as an exemption from compliance from WTO rules the waivers constitute a mechanism for introducing flexibility not only among the different interacting rules within the system, but also to balance economic and non-economic issues, contributing in doing so to the international trade system's legal stability. The fact that states can accommodate their interests in exceptional circumstances within the international trade framework, through a system of legal waivers, serves to reconcile competing interests, not only in cases based on domestic law; but also in cases of conflicting international legal regimes. Furthermore, waivers can be used in order to reconcile domestic interests with international values and concerns. Bearing this in mind, waiver decisions have been adopted, first, in order to "legalize abstractly defined measures for all or groups of members"[949], and, second, as a device through which "to coordinate the WTO legal order with other international legal regimes without a general modification of WTO norms".[950] It is in the sense of coordination that waivers serve as structural connective features between the international trade regime and international law in general. Decision–making within the political organs of the WTO (Article IX) through waivers, contrary to amendments and authoritative interpretations, are not only discussed from a predominantly economic or WTO perspective; their scope is enhanced to other areas of international, transnational, and universal concern and regulation of international trade.

Waivers are a tool for giving coherence to the fragmented system of international law. It is argued that the power of waivers opens the door to political debate within the WTO. Waivers are binding legal instruments which are the result of a political process. Due to

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[948] Request for a waiver- Kimberly Process Certification Scheme for Rough Diamonds. G/C/W/431, 12 November 2002.
[949] Isabel Feichtner, "The Waiver Power of the WTO: Opening the WTO for Political Deliberation on the Reconciliation of Public Interests" Jean Monet Working Paper Series 11/08, 2008, p. 10.
[950] *Ibid.*,, p. 10.

their residual character and openness to non-legal and non-economic arguments, waivers are an ideal mechanism to address issues that could even go beyond the furthering of WTO objectives, because they do not imply changes as significant as those resulting from amendments or authoritative interpretations.[951] This flexible mechanism allows for ethical or moral issues to be sensitively addressed. Since waivers can be granted in order to favour norms from other legal regimes, they also favour a legal–political debate based on the rationality and objectives of other legal regimes. In addition, due to the fact that Members deal with waivers in the political organs of the WTO, their consideration makes the politics of the WTO more transparent; this in turn results in a firmer realization of the relationship of trade to other areas of regulation. On the one hand, this level of realization and focus warrants the grounding of arguments as to the relationship between human rights and trade. On the other, it contributes to the education of external players with regard to the internal workings of the WTO.[952] In light of all of the above, we can affirm that the debates generated by the granting of waivers allows political and external issues to come into the agenda of international trade. It is precisely this that is intended by the waivers' coordinating function within the overall system of international law. They contribute to the coherence of a system of law which is otherwise marked by fragmentation.

a Human Rights and waivers

In the particular case of human rights, the waiver concerning the Kimberly process certification scheme for rough diamonds has caught the attention of many scholars.[953] Much of the discussion has focused on the issue of the suitability of this mechanism to address the particular issue at hand, which involved trade with diamonds and human rights. This was due to the fact that the waiver was granted without regard to the legality of the Kimberly Scheme for the trade in "conflict diamonds", but rather on the grounds

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[951] Singapore WTO Ministerial Declaration WT/MIN(96)/DEC 18 December 1996 Trade related issues such Labour standards has failed to enter the positive legal framework of the WTO because they have been considered out of the reach of WTO objectives.
[952] Feichtner, above note 938, pp. 633-638.
[953] *e.g.* Joost Pauwelyn, "WTO compassion or superiority complex? What to make of the WTO waiver for conflict diamonds" Michigan Journal of International Law 2003 Vol. 24 No. 4, pp. 1177-1207; Krista Nadakavukaren Scheffer, "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights interface with the WTO Waiver for the Kimberly Process" in *Human Rights and International Trade* T Cottier, J Pauwelyn, E Bürgi (eds.), 2006, pp. 391-450; Kevin R Gray, "Conflict Diamonds and the WTO: Not the best Opportunity to be missed for the Trade-Human Rights interface: Commentary on Krista Nadakavukaren Scheffer" in *Human Rights and International Trade* T Cottier, J Pauwelyn, E Bürgi (eds.), 2006, pp. 452-462.

of granting legal certainty to the measure. The main argument was that the measure could have potentially been justified under (1) GATT Article XX(a), the protection of public morals; or (2) GATT Article XX(b), the protection of human, animal, or plant life or health; or (3) through GATT Article XXI(c), the security exception by virtue of which a state party is allowed to take action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security.

The *rationale* for the Kimberly Scheme waiver are legal certainty, protection of international peace and human rights. In the Kimberly Scheme waiver, the General Council noted that the decision did not prejudge the consistency of domestic measures, including any relevant WTO exceptions, while granting the waiver for reasons of legal certainty.[954] The General Council admitted the contribution of the measures adopted with the Kimberly Scheme to implement measures provided in previous resolutions of the United Nations Security Council under Chapter VII of the United Nations Charter. It further considered the urgent character of the measure, as well as its overall effectiveness. The most critical issue of an objective nature was the question of recognizing that the trade in conflict diamonds is a matter of serious international concern due to its direct link to armed conflict through the activities of rebel governments intending to overthrow legitimate governments, as well as in the illicit traffic and proliferation of arms.[955] Equal consideration was given to the recognition of the extraordinary humanitarian nature of the issue and its impact on peace, safety, and the security of people in the countries affected, as well as the gross human rights violations perpetrated in those conflicts.[956]

The *rationale* for the TRIPS waiver is the protection of public health and the promotion of access to medicines for all. The relationship between the WTO regime and the right to public health has been severely criticized. It is argued that the TRIPS Agreement imposes some limitations on the access to essential medicines, thus hampering the fulfilment of certain basic human rights, such as the right to life (ICCPR Article 6), and the right to the enjoyment of the highest attainable standard of physical and mental

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[954] Kimberly Waiver, note above 943.
[955] *Ibid.*
[956] *Ibid.* **See also** for the background and circumstances justifying the waiver Request for a waiver-Kimberly Process Certification Scheme for Rough Diamonds. G/C/W/431, 12 November 2002 and Interlaken declarations contained in the Request for a waiver Kimberly Process Certification Scheme for Rough Diamonds.

health (ICESCR Article 12). The tension between the right to public health, on the one hand, and intellectual property rights, on the other, has been addressed within the WTO. In 2001, WTO Members adopted a special Doha Ministerial Declaration to elucidate the relationship between the need for governments to apply the principles of public health and TRIPS rules. It reflected the worry that patent rules might restrict access to affordable medicines in developing countries, in their efforts to control diseases, and the hurdles developing countries face when implementing measures in order to guarantee public health. The WTO Members, while reiterating their commitment to TRIPS, agreed that the TRIPS Agreement should be interpreted in a manner supportive of WTO Members' rights to protect public health, and to promote access to medicines for all.[957] Two years later, in 2003, although still without expressly recognizing the impact of TRIPS on the fulfilment and realization of a particular human right as such, the General Council granted a waiver for the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, which modifies the rules on compulsory licensing.[958]

The WTO, through the Kimberly Scheme and the TRIPS waivers, has shown that it is able to reconcile human rights with international trade issues. Although the WTO, through its political decision–making mechanisms, has proposed a solution to certain human rights issues, it has been argued that dispute settlement is a better model for furthering human rights than is waivers. In spite of the controversies[959] generated by the mechanisms by which member states choose to solve the issue of international trade of rough diamonds originating in some conflict countries, the focus of our attention lies rather in the recognition of the validity of human rights issues within the system of the WTO. This is perhaps the main implication of issuing such waivers, grounded as they are on the protection and realization of human rights. We must bear in mind that this waiver was adopted by consensus and is binding upon Members. Its legal relevance is also the fact that political issues lying outside purely trade matters, but with an impact upon trade, do find legal expression within the WTO by means of legislative consensus. The inclusion of human rights issues is already a fact within the international trade

[957] Doha WTO Ministerial Conference, WT/MIN(01)/DEC/W/2 of 14 November 2001particularly Declaration on TRIPS Agreement and Public Health.
[958] More elaborated and extensive in this topic Holger Hestermeyer, "Human Rights and the WTO. The Case of Patents and Access to Medicines", 2007.
[959] Nadakavukaren Scheffer, above note 953 at p. 391 and Gray, above note 953 at p. 452 .

regime, and stretching across the full horizon of legislative acts.[960] Moreover, since all Member States approve the issuing of waivers, it proves an existing consensus of the international community's concerns regarding humanitarian issues and gross violation of human rights. The waivers go beyond proving or disproving the legality of a measure by demonstrating consensus regarding the supremacy of some types of human rights interests over international trade, and by reconciling different fields of public international law that are otherwise regulated independently. These waivers are a manifestation of norms conflict and of interests conflict in international law as well as a means to reconcile such tensions.[961]

[960] Pauwelyn, above note 953, p. 1198
[961] Feichtner, above note 949, p. 10.

Part IV The International Judiciary

CHAPTER 1 INTERNATIONAL JUDICIAL POWER

A International judicial law-making

The Judicial power is as an element of the law-making process. The identification of law-making processes depends upon the way in which international law is defined.[962] Moreover, before defining international law, it is first necessary to be clear about the meaning of law. This is especially the case when moral issues are at stake. These definition-related matters all constitute in fact the basis for any analysis of legal matters. The still heterogeneous and incomplete nature of international law makes it very difficult to establish a threshold or point where non-law ends and where law begins.[963] In the search for coherence between social reality and law, the figure of the judge, or the judicial power, plays a fundamental role. Our analysis makes it necessary to establish a framework that delimits the functions, reach and power of the international judiciary as an essential element in the decision-making process. For our purposes here we will assume that rules of law or legal norms in general are not fixed features and that they evolved without regard for the form these norms adopt, *e.g.*, conventional, customary, principles. Furthermore, we will assume that this given framework provided by international law conceives of it as an authoritative system of decision-making available, in a highly fragmentary or decentralized system which includes several, dissimilar participants, to all authorized decision makers.[964] In addition, International Law, or law itself, cannot be conceived of as merely as a body of rules but it has to be

[962] Boyle & Chinkin, note 727, p. 1.
[963] Alain Pellet, "The Normative Dilemma: Will and Consent in International Law-making" Australian Yearbook of International Law1989 Vol. 12, p. 22.
[964] Higgins, above note 417, p. 10

viewed as a normative system used for the achievement of common, indeed, universal values.[965]

At this point we restate that one of the main consequences for the legal order of economic, social and cultural globalization is the judicialization of international relations.[966] Because globalization increases the interdependence of national and international legal orders, it becomes more difficult for the national state to guarantee essential aspects of life such as security, justice, liberty and wealth.[967] One of the main legal effects of globalization is the emergence of certain relationships that give rise to community interests and reinforce the universality of certain values - fundamentally, human rights. In order to achieve global solutions, new courts and tribunals have emerged, resulting in a fragmented international legal order. The lack of a logical structure governing the proliferation of international courts and tribunals applying international law has been qualified as a "disordered medley."[968] However, even if international law currently enjoys only a limited degree of coherence, it is suggested that international law, particularly at the normative level but also positively, has already acquired a minimum degree of systemic integration[969]

B The international judge

The international judge accomplishes his task in a polycentric or concentric and multicultural society, balancing widely differing interests.[970] The position of the judge as mediator among the various interests represented in such legal systems becomes very difficult since international judges normally operate within an apparently incomplete legal system. Currently, the judicialization of international law is expressed through the flourishing of international judicial and quasi-judicial bodies. In addition, the extra-territorial character of many national decisions for national jurisdictions is invoked when it is a matter of deciding international cases. The threat posed by the fragmentation of international law is met by the emergence of an international network

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[965] *Ibid.*, pp. 95 *et seq.*
[966] Poiares Maduro, above note 398, p. 175.
[967] Angela Del Vecchio, "Globalization and its effects on international courts and tribunals" The Law and Practice of International Courts and Tribunals 2006 Vol. 5 No. 1, p. 1.
[968] R Y Jennings, "The Judiciary, international and national, and the development of international law" International and Comparative Law Quarterly 1996 Vol. 45 No. 1, p. 4.
[969] Yuval Shany, "The Competing Jurisdictions of International Courts and Tribunals" 2004, p. 98.
[970] Del Vecchio, note above 967, p. 4.

of judicial praxis that boosts judicial dialogue based on certain mechanisms created in order to establish cooperation and coordination among different judicial *fora*.[971] These cooperation and coordination mechanisms reflect not only horizontality; there is also an emerging verticality that can be appreciated fundamentally in the use of international courts within the jurisprudence of the ICJ. Furthermore, this coordinating function of the judiciary which gives coherence and uniformity to international law is not only reflected in dialogue among adjudicatory bodies dealing with the same issues, but also in the application of external rules involved in the merits of cases. In this latter sense, the judiciary plays an essential role in coordinating different areas of regulations.

For a considerable amount of time, the principal view of the role of the international judge was that, in spite of Article 38 of the ICJ Statute recognizing judicial decisions as a source of law, this rule does not necessarily empower the judge to make new laws. In line with this opinion, there is the basic principle of the process of adjudication, according to which any permissible modification and development of the law must be within the limits of permissible interpretation. This idea is based on the notion that litigating parties resort to judges not because they are wise men but because they know the law.[972] However, this principle, which is of a rather positivist nature, first ignores the fact that the law in general is a cyclical process in which its positive form sometimes depends more on legislative acts and at others on judicial acts. Second, positivist approaches to the judicial function also ignore the fact that the process of interpretation entails a creative aspect in that it converts new facts into rules. Moreover, the expansion of treaty law makes it useful to distinguish between treaties accommodating state interests and treaties which pursue community interests. Treaties pursuing community interests have an inherent norm-creating function derived from the necessity to bring up to date the interests and objectives established therein.[973] This micro-legal system embedded in the general international normative framework often involves a judicial mechanism which performs the function of updating the relationship between law and reality. One of the main tools in this process of updating by the judiciary is interpretation. It has been suggested that the WTO-covered agreements- particularly if

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[971] Poiares Maduro, above note 398, p. 176.
[972] Jennings, above note 968, p. 3.
[973] Rüdiger Wolfrum "Developments of International Law in Treaty Making" R Wolfrum and V Röber (eds.) Beiträge zum ausländischen öffentlichen Recht und Völkerrecht A von Bogdandy and R Wolfrum (eds.), 2005 Vol. 177 p. 3.

we take into account their preambles and exceptions, that is, their objectives - can be regarded as being of a mixed nature. On the one hand, it is acknowledged that WTO agreements are of the synallagmatic or *do ut des* type that allows Members' own interests to be realized. On the other hand, WTO agreements are also considered to be law-making or norm-creating because their objectives are considered to be converging values towards which Members collectively strive.[974] It is a task of interpretation to accommodate both characteristics.[975]

The trend among legal scholars is to grant the judiciary certain law-making powers. Nowadays, the evolution and process of norm change in international law is hotly debated, owing to the shift of legislation of domestic facture to the international arena.[976] Currently, the discussions focus on the question as to who is responsible for giving shape to international law. Legal scholars are beginning to concentrate attention on the role of interpretation of international law and the agents entrusted with interpreting the law, particularly the judge. The notion that the application of laws involves a change of the applied norm itself is gaining ground among international legal scholars.[977] Hitherto, there was at least a certain level of agreement that the judge had a creative function and that "adjudication [wa]s not a mere, automatic application of existing rules to a particular situation".[978] In addition, some authors even note a certain level of agreement that international courts and tribunals have law-making powers.[979]

The international judge must be impartial and have expertise. The exercise of the judicial function is characterized by the impartiality, independence, competence and expertise of the judicial decision-maker.[980] In addition, at the basis of the independence

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[974] Isabelle van Damme, "Treaty Interpretation by the WTO Appellate Body" 2009, p. 86 The distinction between contractual and law-making treaties is trace back to the distinction between *traité-contrat* and *traité-loi*. *Traité-contrat* "consists of a series of reciprocally operating rights and duties, the treaty being more or less synallagmatic and reflecting a *do ut des* adjustment of concrete interests."*Traité loi*" consists of a series of generalized, and not particularly reciprocal, statements of norms which the contracting parties pose for themselves." According to this author this distinction has been formulated in those terms by Shabtai Rosenne in "Is the Constitution of an international Organization an International Treaty? 12 Comunicazioni e Studi (1966 pp. 23-29).
[975] *Ibid*., p. 86.
[976] Niels Petersen, "Law-making by the International Court of Justice" in *International Judicial Law-making* A von Bogdandy, I Venzke (eds.), 2012 p. 18.
[977] Armin von Bogdandy and Ingo Venzke, "In Whose Name? – An investigation of International Courts' Public Authority of and its Democratic Justification" The European Journal of International Law 2012 Vol. 23 No. 1 at p. 7.
[978] Higgins, above note 477, p. 28.
[979] Del Vecchio, note above 967, p .4.
[980] Pasquale Pasquino, "Prolegomena to a theory of judicial power: the concept of judicial independence in theory and history" The Law and Practice of International Courts and Tribunals 2003 Vol. 2 No.1, p. 11.

of the judicial function lies the necessity to control legislative and executive power in order to preserve power in general.[981] On the one hand, traditional positivistic thinking regards the function of the judge as being that of a mere agent who only applies and enforces the law. The judge is simply the mouthpiece of the law, applying the will expressed in that law. This model is founded on the idea that legal systems are based on the primacy of law as a manifestation of a democratic legislative will.[982] On the other hand, a second line of thought sees the legitimization of judicial power as being the competence and expertise of the agent issuing the judgment. Whatever the historical antecedents of the nature of the judicial power may be, it is clear that nowadays the need for coherence in international, transnational and universal society requires that international judges embody these two qualities. Hence, the judge must be impartial, as well as being an expert who can make viable a coherent system of legal rules. The topic of judicial independence has also raised many questions in the legal milieu. Judicial independence today is understood in terms of impartiality as an instrument for delivering a judgment. This impartiality consists of the neutrality of the judge. That means that the judge cannot be subordinate to the parties to the conflict, neither owing to another power interested in a given judgment nor to "bias of passions and partiality of the judge himself or herself."[983]

1 Acceptance of the judicial decision

The efficacy of the decision depends on its acceptance. Today, legal scholars widely agree that international courts and tribunals, through their judicial decisions, are objective validators of international law.[984] This coincides with the thought that the significance of the international judiciary and its influence on shaping international law depends upon the weight and acceptance of its decisions.[985] Of course, the authoritative character of judicial decisions is often associated with the role that the international court or tribunal plays within the overall system of international law. Therefore, the degree of acceptance of a decision of an international court or tribunal is a substantial measure of its impact on a specific rule. This means that States tend to establish practice

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[981] Steve Charnovitz "Judicial Independence in the World Trade Organization" p. 220, footnote 4 Citing Montesquieu, The Spirits of Laws 202 (David Wallace Carrithers ed. 1977) Book XI, Chapter 6 paras. 5, 6.
[982] Pasquino, above note 980, p. 18.
[983] *Ibid.*, p. 25. **See also** Gilbert Guillaume. "Some Thoughts on the Independence of International Judges *vis-à-vis* States" The Law and Practice of International Courts and Tribunals 2003 Vol. 2 No. 1 p. 163.
[984] D'Amato, above note 454, p. 25.
[985] Boyle & Chinkin, note 727, p. 300.

on widely accepted judicial decisions.[986] In many cases judges base their decisions on rules and principles of law that are not supported by state practice or *opinion juris.* And in many cases these rules are described as novel.[987] However, what really matters is the effect of the judicial decision, that is, the response of States, and also the response of the international community and international civil society, to the judicial decision. It is in that way that we can ensure that the international judiciary is not only applying the law but is also part of the process of making the law.[988]

C The axiom of the judicial function according to which a legal system as a whole has no gaps

Notwithstanding the fragmentary character of international law, it is axiomatic for the judicial function that a legal system as a whole has no gaps. Notwithstanding the above, there is another way in which international courts and tribunals deal with the issue of law-making. The behaviour of the international judge in this respect depends on their degree of concern regarding the coherence and fragmentation of international law, that is, the issue of the completeness of international law. The main defect of the completeness of the international legal system lies in the assumption that disputes, owing to the absence of rules among members of the international community, cannot legally be disposed by a judicial decision. This is the reason for the slowness of international law and gives rise to the question of the limit and scope of the judicial function.[989] The idea that the judge is allow to decide a case even if the law is silent, obscure or insufficient is based on the principle that a court cannot be guilty of a denial of justice.[990] In this case, it is clear that justice cannot be considered in terms of positive law. It is precisely the positivist doctrine that states that, in the absence of applicable provisions of law, international courts and tribunals have to refuse adjudication. This demonstrates that positivism unduly narrows the scope of the judicial function. The

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[986] *Ibid*., p. 301.
[987] *Ibid*., p. 311.
[988] *Ibid.*, p. 311.
[989] Lauterpacht, above note 427, p. 60.
[990] *Ibid*., 62. The idea that a court cannot deny justice comes from domestic systems of Civil Law. A widely known rule is that established in the Civil Code of Switzerland, Article 1, which states that "if in a particular case the positive law does not in the opinion of the judge provide sufficient basis for decision, he shall decide in accordance with custom, or, in the absence of the latter, in accordance with a rule which he would follow if he were legislator, and that in doing so, he ought to be guided by tradition and by recognized legal authorities."

other dogma underlying the idea of law states that "the completeness of the rule of law (...) is an *a priori* assumption of every system of law, not a prescription of positive law. A legal system as a whole has no gaps."[991] This is so because, following Lauterpacht, given that the first function of the legal community is the preservation of peace based on the maxim that there should not be violence, if the preservation of peace is abandoned through the declination to adjudicate,[992] physical violence – as the first manifestation of force, which is, admittedly, outsourced, at least in normal circumstances-will inevitably supply the judicial function, and this is exactly contrary to any postulate of law. That means that the novelty of action and absence of precedent do not hinder the recognition of a claim.[993]

1 Integrative approach in the judicial function

Today, it is widely accepted that international judges prefer an integrated conception of international law to a fragmented one. International judges see it as part of their judicial function to ensure consistency in international law, since international courts and tribunals are considered to be a vehicle for integrating international law into international affairs.[994]A powerful example of the integration of one system into another is provided by the WTO, as demonstrated by the well-known *dicta* in the US-Gasoline case.[995] Another example from the WTO, where the integration of international law has been observed, is the so-called US-Shrimp Case, in which the AB, in interpreting the term "natural resources", applied the articles of the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, Agenda 21 adopted by the United Nations Conference on Environment and Development, and the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals. In addition, when interpreting the term "exhaustible", the AB referred to the species of sea turtles listed in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora

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[991] *Ibid.*, 64.
[992] In the Dissenting Opinion of Judge Higgins in the *Legality of the Threat or Use of Nuclear Weapons,Advisory Opinion*, the judge cited some examples where the Court has declined to answer a question even after it has established its jurisdiction. However, in none of the cases is the *non-liquet* due to deficiencies in the law. *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion 8 July 1996, ICJ Reports 1996 p. 226 para. 37.
[993] Lauterpacht, above note 427, p. 62.
[994] Boyle & Chinkin, note 727, p. 311 and pp. 268-269.
[995] *US- Gasoline*, AB, above note 399, p. 17 "the General Agreement is not to be read in clinical isolation from public international law."

("CITES").[996] Furthermore, Courts such as the ECHR, in their integrative function, use external sources in their search for a consensus that empirically supports their reasoning.[997]

2 The political and judicial functions of the international judiciary

One of the greatest problems regarding law-making and adjudication by the international judiciary is the political and judicial function which is attributed to this branch of power. In many cases it happens that political and judicial issues are very closely related to one another. It might even be the case that friction arises among the various organs of the institution. This happens in particular in those organizations which have a powerful judiciary, as is the case of the WTO. There the power of decision-making is to a larger extent delimited. Thus, a political organ can accuse a judicial body of exceeding its functions. On the other hand, in order to reach a judicial decision, the fact should be borne in mind that political issues are not to be dismissed from the dispute. Indeed, judicial responses, especially in the international arena where a variety of actors are defending their interests, cannot avoid favouring or prejudicing a political position. It has been recognized by the ICJ that the assessment of the legality of the conduct of the States is an essentially judicial task, whatever its political aspects. Moreover, a legal assessment of situations which involve political issues can help to solve a conflict by clarifying the legal aspects. That is, a political question does not automatically exclude the existence of rules applicable to it, even if in some cases a certain degree of novelty is required. It has been noted that the ICJ has generally not accepted arguments that it should decline to rule on an issue because it is a political question. On the contrary, the court has acknowledged that many disputes have political implications and this does not constitute an excuse not to enquire into the issue presented[998], thereby allowing a political-judicial balance. The New Heaven School is a good example of such an approach that relates politics with legal issues, precisely because, in their opinion, international law as a continuing process of authoritative decisions has a bearing on domestic decision-making not only through treaty law or custom or its formal sources but also through the policies, purposes and principles

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[996] *US-Shrimp*, AB, above note 606, paras. 130, 131
[997] See below Part IV Chapter 2 in Consensus.
[998] William J Davey, "Has the WTO Dispute Settlement System Exceeded its Authority? A consideration of Deference Shown by the System to Government Decisions and its Use of Issue-Avoidance Techniques" in *The role of the Judge in International Trade Regulation* T Cottier and P C Mavroidis, (eds.) 2003, 2006 (reprinted) The World Trade Forum Vol. 4, p. 67.

underlying those formal sources, indeed, because it takes into account the material sources of law.[999] Owing to the importance of such an argument, we reproduce here the pronouncement of the ICJ in its Advisory Opinion concerning the Legal Consequences of a Wall in the Occupied Palestinian Territory.[1000]

> *"Furthermore, the Court cannot accept the view, which has also been advanced in the present proceedings, that is has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has a political aspect. As, in the nature of thing, is the case with so many questions which arise in the international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal Advisory Opinion, I.C.J. Reports 1973, p. 172 para 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judiciall task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. Conditins of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1947-1948, pp.61-62; Competence of the General Assembly for the Admission of a State to the United Nations, Adisory Opinion, I.C.J. Reports 1950, pp.6-7; Certain Expenses of the United Natins (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p 155." (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I), p 234, para 13"*

[999] Tesón, above note 31, pp. 20-21 **See also** Criticizing the New Heaven school Brownlie, above note 559, pp. 8-11.
[1000] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion 9 July 2004, ICJ Reports 2004, p. 136, para. 41.

CHAPTER 2 ABOUT JUDICIAL TECHNIQUES

A The doctrine of the margin of appreciation

The theory of the margin of appreciation is a technique used by courts and the origin of which is the result of the necessity to confer on the States a certain degree of autonomy in order to define some fundamental rights. This autonomy in defining fundamental rights is justified by differing local circumstances and a lack of consensus. However, the fact that a margin of appreciation is conferred on States in order to define rights intrinsically means that some kind of common meaning exists, a sort of common trunk from which all substantive forms depart. The doctrine of the margin of appreciation is also the response of the international courts and tribunals to certain problems concerning the limits of the power of the international judiciary when reviewing domestic legislation. Like many contemporary legal concepts of international law referring to the power of the international judiciary, the legitimacy of the doctrine of the margin of appreciation is controversial. Many scholars considering the application of this method are wary of the fact that discretion can both constitute a way for international courts and tribunals to escape or sidestep their supervisory function and can hinder the creation of a harmonious system.[1001]

1 Concretization of norms

The margin of appreciation is a mechanism which renders positive law more flexible and helps to the make legal norms concrete. The main problems that international adjudication bodies face today relate on the one hand to their legitimacy to make decisions over certain matters considered to be of an exclusively domestic nature and, on the other, to the democratic deficit of the international judiciary.[1002] Nevertheless, the doctrine of the margin of appreciation tends to provide a less intrusive mechanism, which at the same time is more politically viable and capable of balancing both national and transnational interests. The notion of discretion tends to make the strength of

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[1001] Onder Bakircioglu, "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases" German Law Journal 2007 Vol. 8 No 7, p. 731.
[1002] Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" The European Journal of International Law Vol. 16 No. 5, p. 908.

positive law more flexible. Its application depends essentially upon the degree of interdetermination of positive rule.[1003]

The legitimating source of the doctrine of the margin of appreciation is founded in the ability of the inherent powers of international courts and tribunals "to determine their own procedures and effectively exercise their jurisdiction".[1004] Its purpose is not to prevent judicial review but to structure the scope of the operative aspect of the judicial function. This doctrine may stimulate "non-uniform, subjective or relativist applications of international law."[1005] This stimulus may lead to an erosion of the function of the judiciary consistent with offering normative guidance. Another consequence is the loss of authority that international courts and tribunals may experience because limiting judicial review directly prejudices norms that aim to control behaviour. This is particularly paramount in the field of human rights, owing to the antagonism between cultural relativism and universality. In any case, the legal practitioner should always aim to achieve a healthy balance between the normative guidance provided by international courts and tribunals and the substantive goals of norms.[1006] Furthermore, in order to balance the effect of the margin of appreciation, international courts and tribunals have formulated the doctrine of consensus. It is suggested that the margin of appreciation is complementary to consensus.[1007]

2 Normative flexibility

Margin of appreciation allows for judicial deference and normative flexibility. Although it is said that the development of the doctrine of margin of appreciation has some inconsistencies, it is clear that it is a methodology which allows the international judiciary to scrutinize decisions made by national authorities. It is acknowledged that the essence of this technique consist of two elements, namely, judicial deference and normative flexibility.[1008] On the one hand, judicial deference means that international adjudication bodies should grant national authorities a degree of deference in respect of

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[1003] Jean-Pierre Cot, "Margin of Appreciation" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 6, p. 1012.
[1004] Shany, above note 1002, p. 911.
[1005] *Ibid.*, p. 912. Other negative implication of the doctrine of the margin of appreciation highlighted by Shany is that it "contributes to obliteration of the boundaries of legality of legality, and might reinforce perceptions of international-law as non-law" p. 912.
[1006] *Ibid.*, p. 913.
[1007] Peter Paczolay, "Dialogue between Judges, European Court of Human Rights, Council of Europe", 2008, p. 65.
[1008] Shany, above note 1002, p. 909.

domestic performance of international legal obligations. Consequently, international courts and tribunals should exercise judicial restraint. On the other hand, normative flexibility applies in such situations in which rules offer different national authorities the possibility to arrive at different conclusions without losing their lawfulness. That is, that the same international legal norm can lawfully be applied under differing interpretations. In addition, under this doctrine, absolute or total deference to States' discretion is not admitted. Nonetheless, taking into account the superiority of international law over domestic law, international courts are authorized to review domestic behaviour under the overarching system of international law.[1009]

3 Superiority of the international legal system

The margin of appreciation as a technique of the international judiciary reinforces the superiority of the international legal system. According to Shany, the doctrine of a margin of appreciation has both advantages [1010] and disadvantages. The leading argument in favour of discretion is of an institutional nature. Given that the international judge is not supposed to be as well-equipped and informed about national processes and its complexities as domestic bodies, deference to national authorities ensures optimum outcomes. Authors advancing this reasoning consider that both national and international judicial-making processes are only an inferior way of developing rules because they lack inter-disciplinary approaches. By contrast, since international courts and tribunals are better equipped and informed to identify and interpret rules of international law, they are in a better position to control the adequacy and rightness of domestic rules according to international law. Therefore, the institutional argument should always bear in mind the conjunction of domestic laws within the international framework. The objective is a non-intrusive review of international courts. Nevertheless, judicial review of administrative and legislative measures is a paramount feature of the judicial branch. That means that the deference granted to national authorities is compelled to undergo a judicial review taking into account the particularities of international law. According to the doctrine, the court or tribunal

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[1009] *Ibid.*, pp. 910-911.
[1010] Here we deal in brief with two of the four pro margin of appreciation policy arguments put forward by Shany. Namely the *Institutional argument* and the *Democratic accountability argument*. The other two are *fairness in attributing responsibility argument* (the requirement of international courts to exercise caution in attributing liability), and *inter-institutional comity argument* (encouragement to reciprocal cooperation and coordination between international and national institutions). See *ibid.*, pp. 921-922.

injects a certain degree of relativity into the application of a norm.[1011] The court is aware that it is not part of a national legislature or judiciary with plenary authority to strike a balance between competing interests in complex areas of law and public policy. Thus, the court will not require a party to provide the most comprehensive action possible, but that which is within the margin of compatibility with the norm.[1012]

a Supervisory and orientative function of the court

The idea of discretion was first incorporated into the ECHR's jurisprudence on the basis of the international supervisory function of that Court. It is said that the judicial review function of the court is part of a continuum, which includes other institutions. In this sense, the ECHR is not seen as a supranational court of appeal but is limited to supervising national performance on human rights in an effort to legitimize European consensus on these rights. The framework in which this doctrine was developed in Europe depends fundamentally on two things. First, it depends on the supervisory function of the organs of the European Human Rights Convention with particular reference to the degree of integration ("stage of integrative growth or disintegrative decline").[1013] However, today, besides the supervisory function of the court, on many occasions the international adjudicative enjoys a degree of autonomy that enables it to issue autonomous judgments in order to prescribe behaviour aiming to attain the objectives of the international agreement. It is at this point that fundamental principles such as sovereignty suffer most the effects of erosion. This erosion of sovereignty that leads to the enhancement of the judicial function from mere supervision to orientation is brought about by the imperative need to give coherence to the international legal system. At this point discretion or deference cannot be permitted.

4 Synergy between margin of appreciation and consensus

The doctrine of the margin of appreciation does not constitute an argument against the prohibition of judicial law-making. The margin of appreciation is complemented by the consensus doctrine and limited by the autonomous judgments of the court. This doctrine

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[1011] Paolo G Carozza, "Uses and misuses of comparative law in international human rights: Some reflections on the jurisprudence of the European Court of Human Rights" Notre Dame Law Review 1998 Vol. 73 No. 5, p. 1220.
[1012] Laurence R. Helfer, "Consensus, Coherence and the European Convention on Human Rights" Cornell International Law Journal 1993 Vol. 26 No. 1, p. 137 .
[1013] Howard C. Yourow, "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" 1996, p. 2.

has been considerably criticized[1014] as being detrimental to the legal character of the international legal system. This problem has a marked bearing on so-called judge-made law.[1015] Nonetheless, it is true that the judge, through his judicial decisions, contributes not only to the clarification of a norm, but also to the development of new ones through the processes of law application and law interpretation. In addition, the huge weight of judicial decisions as primary sources of international law is indisputable, particularly to those who see law not as a set of positive rules led by the principle of the rule of law in its narrowest understanding, but as a continuing process of authoritative decisions open to all authorized decision-making bodies. The doctrine of margin of appreciation is risky because courts can flagrantly weaken the force of international law. However, this doctrine has its limits: it should be remembered that this doctrine is complemented by the doctrine of consensus and, furthermore, courts can always issue autonomous judgments. If the field of human rights is considered, where an almost irreconcilable dispute between the universalist and the relativist takes place, it would be inadmissible to assert that the elaboration of general standards and core elements of a particular right must be deferred to domestic authorities. If it is true that international adjudication may limit the scope of the State's freedom of action, it is also true that where States are not alone, decisions have to be made outside the boundaries of provincial thought. In the end, a constructive application of the doctrine of margin of appreciation consists in resolving in substantive terms the dichotomy between the national and non-national – international, transnational and universal- interests.

5 Inward and outward looking rights

Another central argument in favour of the use of this doctrine is that related to the democratic accountability of the judicial branch. It is commonly understood that courts and tribunals have a very low degree of democratic legitimation. Hence, it is argued, important decisions, especially those involving social conditions and particularly those referring to human rights, require a major degree of democratic participation. In line with these thoughts, in the specialized literature[1016] a distinction in the context of this doctrine is found between inward-looking rights and outward-looking rights. Inward-looking rights allow for a major degree of deference; the literature refers to human

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[1014] See Benvenasti, above note 370, p. 843.
[1015] Shany, above note 1002, p. 922.
[1016] Benvenasti, above note 370, p. 843 **See also** Shany, above note 1002, p. 920.

rights as the typical rights falling within this classification. Outward-looking rights are those of which the function is to protect one state or society against another. In such cases no margin of appreciation is permitted.[1017] On the one hand, this classification may respond to the belief that there some areas, including human rights, which are more closely related to state sovereignty than others. On the other hand, although it must be admitted that there are areas of decision more prone to be settled at national level, there are some interests and values that cannot be decided by domestic rules, since they have acquired such a degree of internationalization that international protection, including international supervision, cannot be deferred to a sovereign state, particularly those transnational and universal values that begin to gain hierarchical superiority in the vertical structure of the international, transnational and universal system.

Regarding the identification of the criteria that meet the demands of international and universal justice and give a measure a more outward-looking character, thus making it more prone to international judgment, it can be said that the main parameter in international law is the contribution a particular measure makes to international peace, social justice and respect for the achievement of human dignity and the assessment of the effects this measure has on the limitation of national policies. Another criterion to be applied when considering a measure as outward-looking is the nature of the interest at stake and its degree of imperativeness. In this case, the international assessment of the striking conflicting values is considered from the perspective of the degree of its necessity and the degree of elasticity of the substantive content of the rights concerned. The necessity, however, can not only be considered in consequentialist terms but also in deontological terms. The degree of elasticity of the right allows for a more or less static or dynamic interpretation of the right. In the case of *ius cogens* norms no discretion is permitted. The main argument behind the impossibility of applying a margin of appreciation when confronting an imperative norm of international law is that these hierarchically superior rules protect fundamental international interests and values. The preservation of such values and interests is so high that international supervision and uniformity becomes a task of the international judicial function. Another criterion is the degree of universality of the right. Precisely because of the moral nature of human rights and their universal character[1018] and their cogency there is at least one common

[1017] Cot, above note 1003, p. 1012.
[1018] See above Part I Chapters 3 and 4 On dignity and on universality.

feature that cannot be deferred to domestic legislation in particularly sensitive cases, namely those involving gross violation of the very essence of the notion: human dignity. Conceiving international law in more anthropocentric terms implies an exigency to construe human rights, national fundamental freedoms, in more universalistic ways. International courts have hitherto at least acknowledged the special nature of certain rights.[1019]

6 Examples

Explicit and implicit reference to the doctrine has been made by the European Court of Human Rights[1020], the Inter-American Court of Human Rights[1021], the European Court of Justice[1022], the WTO[1023], the International Tribunal for the Law of the Sea[1024], the UN Human Rights Committee[1025], the Permanent Court of International Justice[1026], and the International Court of Justice.[1027] The case of the International Court of Justice is very particular because it has sometimes been argued that its jurisprudence is inconsistent. However, the fact that the World Court has in some cases narrowed or broadened the possibility given to States to use discretion in choosing the means for implementing

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[1019] Yourow, above note 1013, p. 190.
[1020] *Handyside Case* (Ireland v UK) European Court of Human Rights, Judgment 7 December 1976, Application No.5493/72.
[1021] *Amendments to the Naturalization Provision of the Constitution of Costa Rica,* above note 339.
[1022] *Leifer and others v. Germany*, European Court of Justice, Judgment 17 October 1995, Case C-83-94, Report of Cases, ECR I-03231.
[1023] *EC-Hormones*, AB, above note 656.
[1024] According to Shany in reality the ITLOS has referred to this doctrine only in one separate opinion (Judge Cot, the *Volga Case*, Promt realese) and two dissenting opinions (*Camouco Case*, Promt Realese, Judge Anderson and Judge Wolfrum) **See** Shany, above note 1002, p. 930 footnote 142.
[1025] *Leo Hertzberg et al. v. Finland*, UN Human Rights Committee, Communication No. 61/1979, U.N. GAOR, 37th Sess. Supp. No. 40/1982, U.N. Doc. A/37/40 (1982), 2 April 1982 para. 10.3 "The Committee feels, however, that the information before it is sufficient to formulate its views on the communication. It has to be noted, first, that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities" **See also** *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, UN Human Rights Committee, CCPR/C/12/D/35/1978, 9 April 1981 para. 9.2 (b)(2)(ii) (1) "the legal protection or measures a society or a state can afford to the family may vary from country to country and depend on different social, economic, political, cultural conditions and traditions. (here emphasis is made on both objective –conditions-and subjective –traditions- elements.
[1026] *The SS Lotus Case*, above note 401, p.18.
[1027] On the one hand, favouring the application of a margin of appreciation, *LaGrand* Case (Germany v. United States of America) Judgment of 27 June 2001, ICJ Reports 2001, p. 466 para. 125 "In the case of such a conviction and sentence, it would be incumbent upon the United States to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention. This obligation can be carried out in various ways. The choice of means must be left to the United States. "this obligation can be carried out in various ways. The choice of means must be left to the United States." On the other hand, rejecting the doctrine the *Oil Platforms* (Islamic Republic of Iran v United States) Judgment of 6 November 2003, ICJ Reports 2003, p.161 para.73 "The Court does not however have to decide whether the United States interpretation of Article XX, paragraph 1 (d), on this point is correct, since the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion""

their international obligations only tells us that the margin of discretion granted to States has to fit the special circumstances of a particular case.[1028]

B The WTO and the standards of review

The term "margin of appreciation" is unknown within the system of the WTO. However, Article 11 of the DSU uses a germane expression: "standard of review".[1029] The issue of standards of review arises whenever the adjudicative bodies of the WTO are required to review compliance of a Member's measure or law with the law of the WTO.[1030] This procedural rule serves to determine how much deference international adjudicators should give to the national authorities and how much power the institution retains for itself in determining an issue of fact or law.[1031] In other words, it reflects the relationship between supranational adjudication and national sovereignty. It is about the relationship "between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the members for themselves."[1032] The purpose of Article 11 of the DSU is to establish a balance between the powers of the WTO and the power of its Members. Similarly, it concerns the scope or limits of national sovereignty imposed by the international trade regime.[1033] This rule, understood in broad terms, also constitutes part of a consolidating process of procedural legalization within the WTO and also a connective structural feature of an overall process of constitutionalisation that links international trade policies with domestic positive law.[1034] In this sense, the standards of review encompass criteria for "procedural requirement for the enactment of trade-restrictive measures, methods of treaty interpretation, panel activism on passivity in the process of fact finding, judicial activism or restrain in filling legislative gaps and issue-avoidance techniques".[1035]

[1028] Cot above note 1003, p.1012.
[1029] Matthias Oesch "Standards of Review in WTO Dispute Resolution" Journal of International Economic Law 2003 Vol. 6 No. 3, p.638.
[1030] *Ibid.*, p.637.
[1031] Cot above note 1003, p.1012.
[1032] *EC-Hormones*, AB, above note 656, paras. 114, 115.
[1033] Stefan Zleptnig. "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority. European Integration online Papers (EIoP) Vol. 6 (2002) No. 17 available at: http://eiop.or.at/eiop/texte/2002-017a.htm last visited 15 August 2011.
[1034] *Ibid*.
[1035] Oesch, above note 1029, p. 638.

1 WTO jurisprudence

According to the jurisprudence -EC-Hormones- the WTO judiciary can neither conduct a *de novo* review not defer totally to Members but have to make an objective assessment of the facts; Argentina–Footwear confirms extension to issues of law. Article 11 of the DSU states that the function of the panels is to assist the DSB in discharging its responsibilities under the DSU and the covered agreements. According to this provision, the judiciary has to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.[1036] The history of this provision reveals that the meaning of "standard of review" was left for further elaboration to the process of judicial law-making. According to the Appellate Body in the EC-Hormones Case, the standard of review under Article11 of the DSU "is neither a *de novo* review, nor total deference, but rather the objective assessment of the facts".[1037] In the Argentina-Footwear case[1038] the AB said that in "addition to an objective assessment of the fact, we note, too, that part of the objective assessment of the matter required of the panel by Article 11of the DSU is an assessment of the applicability of and conformity with the relevant covered agreements." The relevance of this *dictum* is that an objective assessment in the legal sense involves interpretative questions. One of the main consequences of the jurisprudence settled in the EC-Hormones case is that, in balancing the power between the WTO and its Members, the adjudicative organs of the Organisation declined to engage in a high level of judicial activism while rejecting a *de novo* review. Another important consequence was that rejecting total deference to domestic authorities implies that Member States are subject to scrutiny by international judges.[1039] Furthermore, in a broader sense, the significance of Article 11 of the DSU is that it frames (scope and limits) the exercise of sovereignty as well as judicial power, and constitutes at the same time an essential provision involving non-economic national[1040], international and global policies.

[1036] Article 11, DSU.
[1037] *EC-Hormones*, AB, above note 656, paras. 115-117.
[1038] *Argentina-Safeguard Measures on Imports of Footwear* Appellate Body WT/DS121/AB/R 19 December 1999, para. 122.
[1039] Zleptnig, above note 1033, at 2.2.2.
[1040] *Ibid*.

a Issues of facts

Issues of fact relate to two fundamental factors. On the one hand, there is an inquisitorial aspect that relates to the scope and appropriateness of the relevant factual evidence. On the other hand, the issues of fact also refer to the plausibility of the factual conclusion. This second aspect in particular may include very sensitive aspects of the political, economic, ethical and societal and general types. This factual conclusion will give rise to coexisting truths that may be hard to reconcile. In such cases, the judiciary, so it has been suggested[1041], is advised not to decide on the prioritisation of diverse political and societal values. Accordingly, the adjudicatory bodies could leave room for domestic regulatory decision-making. In the US-Combed Cotton Yarn case, the Appellate Body stated that "Panels must examine whether the competent authority has evaluated all relevant factors". The relevant factors to which the AB referred were, first, "whether an adequate explanation has been provided as to how those facts support the determination" and ; second, whether the "competent authority's explanation addresse[d] fully the nature and complexities of the data and respond[ed] to other plausible interpretations of the data." The AB continued by stating that " However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority".[1042] In the US-Lamb Meat case the AB made it even clearer that it does not mean that Panels simply accept factual conclusions arrived at by domestic authorities. The Panel said: "We wish to emphasize that, although panels are not entitled to conduct a de novo review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities"; furthermore, that the Panels must "review whether the competent authority's explanation fully address the nature, and, especially, the complexities of the data, and responds to other plausible explanation of the data".[1043] As a consequence, the scrutiny of the panel comes closer to a *de novo* review. The margin of discretion left to national authorities has in general been small. Furthermore, in the Australia-Salmon case, the AB was classing the judiciary's behaviour as intrusive when it stated that "Panels, however, are not required

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[1041] Oesch, above note 1029, pp. 640-641.
[1042] *United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, Appellate Body WT/DS192/AB/R 8 October 2001, para. 74.
[1043] *United States-Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* Appellate Body WT/DS177/AB/R,WT/DS178/AB/R 1 May 2001 para. 106.

to accord to factual evidence of the parties the same meaning and weight as do parties"[1044], which is supportive of the idea od the autonomy of the court.

b Issues of law

Issues of law and standards of review suggest that the WTO judiciary can make its own assessment of the matter. The question of law relates to the consistency or inconsistency of a Member's measure or law with the relevant provisions of the covered agreements. This question arises from the issue of power allocation and the principle of state sovereignty. It is suggested[1045] that acceptance and compliance with panels and AB reports largely depends on whether they succeed in achieving a reasonable balance between appropriate deference to important national policy or domestic values and the need to strengthen the multilateral trading system, including non-economic considerations. In the US –Sections 301-310 case[1046] the Panel stated that "when it comes to deciding on the correct interpretation of the covered agreements, a panel will be aided by the arguments of the parties, but not bound by them; its decisions on such matters must be in accord with rules of treaty interpretation applicable to WTO." That suggests that the adjudicatory bodies of the WTO engage in a *de novo* standard of review of WTO rules.[1047] It is in the sense of predictability and achieving a balance between rights and obligations of Members aimed at in Article 3.2 of the DSU that, if individual members were given too broad a margin of appreciation to interpret WTO rules, their harmonisation would be endangered and this could undermine the core values and objectives pursued by the Organisation, both as a member-driven organisation and as an institution within the holistic structure of international law. The language of Article 11 of the DSU allows the judicial bodies of the WTO discretionary power to determine the precise meaning of the rule. It is for that reason that this provision allows the WTO and policy issues to be appreciated more broadly. Hence, this particular rule provides a clear example of the controversy surrounding the role of the judge in international adjudication. Indeed, Article 11 of the DSU give rise to debate

[1044] *Australia-Measures Affecting Importation of Salmon* Appellate Body WT/DS18/AB/R 6 November 1998, para. 267 **See also** *United States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* Appellate Body WT/DS213/AB/R 28 November 2002, para. 146 "Accordingly, bearing in mind that Article 11 does not oblige panels to attach to a particular piece of evidence the same weight as the party submitting that evidence" **See also** Petros C Mavroidis "Article 11 DSU" Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement R Wolfrum, P-T Stoll, K Kaiser (eds.), 2006 Vol. 2, p. 401.
[1045] Oesch, above note 1029, p. 641.
[1046] *US-Section 301-310 of the Trade Act of 1974* Panel, above note 760, para. 7.16
[1047] Oesch, above note 1029, pp. 567-657.

concerning legalization and politicisation in the international trade system, its constitutionalisation, trade and non-economic issues and legitimisation matters.[1048]

2 Allocation of power

The legalisation of the WTO, through the standards of review enables power to be allocated among Members. The evolution of the WTO legal system shows that the WTO has emerged from being a rather political organisation of an homogeneous group of trade officials of the "club model" type to being a highly legalised institution with little room for political negations in trade dispute resolution.[1049] Here we are talking about the legalisation of the WTO. This legalisation means that a legalistic approach to international trade dispute resolution erodes politically-oriented and power-oriented approaches to decision making. Today, the WTO legal order has turned into a rule-oriented system where decision making is often conducted through adjudication. Since international trade has become highly legalised, the standard of review rule permits power to be allocated among Members and the organisation as a whole. Members of the organisation must be aware that judicial decisions will inevitably have political consequences.[1050]

3 Horizontal and vertical coordination

The standards of review is a mechanism of coordinating sovereign and international trade values, horizontally and vertically. There is a widely held view that dispute settlement in the WTO endangers national sovereignty.[1051] Today's interdependent world needs clarification about the relationship between domestic and international forms of decision making. The standard of review is one of those features that helps to explain this relationship, that is, how to reconcile differing views about the allocation of power on matters of vital importance for domestic governments as well as for transnational and universal concerns. These concerns relate to the holistic and concentric concept in international law. Hence, the standards of review, inasmuch as they contribute to the harmonisation of trade rules at the international level, become an

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[1048] Zleptnig, above note 1033 at 3.1.
[1049] *Ibid.*, at 3.1.1.
[1050] Claus-Dieter Ehlermann and Nicolas Lockhart, "Standards of Review in WTO Law" Journal of International Economic Law" 2004 Vol. 7 No. 3, p. 492.
[1051] Steven P Croley and John H Jackson, "WTO Dispute Procedures, Standards of Review, and Deference to National Governments" The American Journal of International Law 1996 Vol. 90 No. 2, pp. 194, 211 "as national economies become increasingly interdependent, and as the need for international cooperation and coordination accordingly become greater, the standard-of-review question will become more and more important" **See also** Ehlermann & Lockhart, above note 1050, p. 492.

instrument of coordination in the process of constitutionalisation of international law.[1052] In the sense that it coordinates domestic laws with the international legal system, it reflects a vertical structure in international law when WTO interests, either international, transnational or universal, are given priority. In this sense, constitutionalisation is the framework within which Members are forced to act by giving judicial bodies a minimum amount of power to interpret and articulate the rights and obligations contained in the positive legal order. Although Panels must also be aware that compliance is voluntary and that abuse of power could undermine the acceptance of their judgments, they also need to take account of the fact that they play a central role in enhancing and harmonising WTO rules. Thus, caution needs to be exercised when deference is given to Members needs, taking both factors into account and not interfering unduly with national sovereignty or undermining the international legal system as a whole. The standard of review has an impact on the hierarchy governing two separate polities that balances on many occasions pugnacious values and policy goals of an international, transnational and universal nature within one centralized trading framework, which certainly cannot be separated from the overarching system of international law.

A Balance of conflicting values

The standard of review is a judicial mechanism for balancing conflict values. Since almost the very beginning of the WTO, the organisation has faced many challenges concerning sensitive political issues which at first sight may seem to be harmful to WTO jurisdiction. These issues can be incorporated into the international trade system in different ways, *i.e*., reform of the treaty. However, the central question here is how to determine the possibility of incorporating those issues through the judiciary and not through traditional legislative or executive norm-creation processes. Not infrequently the adjudicating organs of the WTO have been faced with having to balance economic and non-economic values. This is because the WTO and the international trade regime

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[1052] Thomas Cottier and Petros C Mavroidis "The role of the judge in International Trade Regulation", 2003 (2006 reprinted), pp. 353 *et seq*. argue that: "Standards of review, in the very end, depend upon constitutional structures and the design of interplay of different bodies of a given polity." They continue concluding that models which include notion of global subsidiarity, institutional sensitivity, check and balances and political inclusiveness engage in constitutional analysis **See also** Robert Howse and Kalypso Nicoaidis, "Legitimacy through Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far in *The role of the judge in International Trade Regulation: Experience and Lessons for the WTO"* T Cottier and P C Mavroidis (eds.), 2003 (2006 reprinted) The World Trade Forum Vol. 4, p. 341 Concluding that constitutionalization is not the right answer to WTO legitimacy crisis.

established under it touch upon several non-economic issues, which could primarily be regarded as falling within, or even interfering with, national non-economic policies. The standard of review is one fundamental mechanism for responding judicially to such challenges.[1053] Similarly, the standards of review "seek to strike a balance between political choices left to Members and the legal requirements that set the parameters for member action".[1054]

The standard of review helps to solve political question through judicial activity. Owing to the "highly contested nature" of non-economic trade-related measures, the issue of the applicable standard of review becomes more difficult. Thus, the nature of non-economic trade measures moves from a purely legal technical question to a matter which is also of a political nature, in which value-based reasoning plays an essential role. The main criticism of the kind of judgment where political interests are at stake is that such decisions might be detrimental to the WTO judiciary's institutional authority[1055], because it is often argued that the judicial should not interfere in the political arena. However, such views seem to ignore the fact that, in many cases, the judicial decision will inevitably land on one or other side of the pugnant political positions and thus the judicial decision will have political consequences on whichever side it falls. In any case, the standard of review is a mechanism that guarantees the separation of powers. The judge will always have the authority to verify the conformity of an action and develop a norm, particularly through interpretation. The standard of review is a fundamental procedural rule of a technical coordinative type because it constitutes mechanism of checks and balances as far as it allocates decision-making authority among the different branches of power.[1056] Moreover, it is suggested that allocating power within a WTO adjudicatory body, contrary to the incentive that States have in accommodating facts and legal interpretations in their own objectives, offers the advantage that the disputed issues can be approached without bias.[1057]

The standard of review defers according to the agreement and according to the disputed issues. Panels have discretionary power to seek evidence and information beyond that

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[1053] Zleptnig, above note 1033, at 3.2.
[1054] Ehlermann & Lockhart, note above 1050, p. 505.
[1055] Zleptnig, above note 1033, at 3.2.
[1056] Ehlermann & Lockhart, note above 1050, p. 491.
[1057] Andrew T Guzman, "Determining the Appropriate Standard of Review in WTO Disputes" Cornell International Law Journal 2009 Vol. 42 No. 1, pp. 45-76.

provided by the parties. The question arising out of this problematic is evident. Where do the dispute-settlement bodies allocate the power to decide over certain issues involving such highly contested measures of a political nature? To what extent can WTO adjudicating bodies regulate on domestic non-economic policy areas? It has first been observed that the jurisprudence of the WTO has acknowledged implicitly that the standards of review vary depending on the agreement and also depending on the issue disputed.[1058] It is suggested that a balancing act has to be performed between economic issues and other legitimate social goals.[1059] For instance, in the context of the SPS Agreement, it has been said that trade-restricting measures may be justified and therefore valid if they conform to harmonised standards issued by standardised bodies.[1060] Furthermore, a measure is also adequate if the measure establishing stricter standards is supported or justified on scientific grounds.[1061] However, a panel composed of legal and economic experts does not seem to be the most appropriate forum for determining issues of scientific matters of the non-legal kind. This is the case because the parties can always submit scientific evidence supporting their pleadings, which are both considered to be the truth. It is precisely in these cases that a standard of review plays a fundamental role because, as a legal procedural tool, it enables what is at least the adequate authority for deciding the matter to be distinguished.[1062] In the case of scientific uncertainty, Panels are not required to follow the majority opinion: if they act in good faith they can deliver a dissenting opinion. Thus, at least procedurally, a measure supported by scientific evidence will tend to be in conformity with WTO practice. Furthermore, the Panel's right to seek information established in Article 13 of the DSU is discretionary and not mandatory.[1063]

C The comparative method

The comparative method allows certain ideals to be empirically verified. When a court issues a judgment, it can, on the one hand, adopt a standard giving content to the right through theoretical arguments while making use of its power to decide on an

[1058] *Ibid.*,pp.45-76.
[1059] Zleptnig, above note 1033, at 3.2.
[1060] Mavroidis, above note1044, p. 403.
[1061] Articles 2.1, 2.2 and 2.3 SPS Argeement, WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS 493.
[1062] Zleptnig, above note 1033, at 3.2.
[1063] Mavroidis, above note 1044, p. 401.

autonomous basis. In addition, when an adjudicative body issues a judgment, it can also use empirical methods, i.e., the comparative method.[1064] It is very well-known that questions requiring judicial authority to balance competing interests of the economic, political and social kind affecting state sovereignty are particularly sensitive.[1065] It is a very difficult task to determine a dispute when these differing national systems are constrained within an autonomous and normative (or quasi-normative) framework that is supposed to allow for both uniformity and difference. One of the most crucial tools available therefore is the comparative method, which, in spite of being criticized[1066], is of a very high theoretical and practical value.[1067] Interstate comparative references provide objective proof of the length and breadth of the substantive common understanding of certain rights. Comparisons in general inform the court about the emergence of established consensus among Member States. Hence, in many cases the court will seek consensus among Members' practices. Together with the technique of the margin of appreciation, international courts such as the ECHR or the adjudicatory bodies of the WTO, in availing themselves of the comparative method in their decision, will look for consensus, which is at the one extreme of the comparative methodology. The search for consensus may result in deferring to national authorities or autonomous interpretations. That means that the use of one method does not exclude the other. In the context of human rights adjudication it has been acknowledged that the consensus doctrine is another important tool for implementing the object and purpose of human rights treaty law since it legitimises the Court's decisions.[1068] Moreover, a court could base a decision on a theoretical aspect and at the same time strengthen the legitimacy of its judgments owing to the consensus found among Members. The theory of consensus has been extensively developed by the ECHR, and that is why it is considered appropriate here to make the analysis with reference to that Court.

[1064] Anatoly Kolver, "The role of consensus in the system of the European Court of Human Rights" in *Dialogue between Judges European Court of Human Rights, Council of Europe* 2008 "Dialogue between judges", 2008, p. 12.
[1065] Helfer, above note 1012, p. 137.
[1066] Carozza, above note 1011, p. 1219 According to Carozza, the need is for more methodological discipline: better, or least, more comparative study, and more systemtic principled approach to the comparative exercise.
[1067] *Ibid.*, p. 1219.
[1068] Helfer, above note 1012, p. 137 **See also** Kanstantin Dzehtsiarou, "Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights" Public Law 2011 No.3, p. 534.

D The autonomy of the court

Although the WTO does not have the same degree of autonomy as the ECHR, Article 11 of the DSU can be understood as confirming the principles of autonomy, self-restraint and dynamic interpretation. In order to better understand the supervisory function of the ECHR, it is important to note that the European Convention on Human Rights constitutes an autonomous system. In this sense, we can analogously affirm that the WTO also constitutes an autonomous system, although not a self-contained regime. However, owing to the fact that the standards of review established in Article 11 of the DSU neither allow total deference nor a *de novo* review, the degree of autonomy can be considered procedural insofar as the adjudicating bodies of the WTO make an objective assessment of the matter before it. The ECHR, in order to justify its decisions, is guided by three fundamental principles: the principle of autonomy, the principle of dynamic interpretation and the principle of judicial self-restraint.[1069] As an autonomous body, the ECHR is entitled to give a specific meaning to the terms of the convention. In this sense it can also be stated, particularly in cases in which terms appear to be vague, unclear or have an indeterminate nature, that the WTO adjudicatory bodies, in spite of their limited autonomy, have the same function of clarifying the meaning of WTO rules[1070] led by those principles.

It is frequently difficult for the ECHR to issue a judgment which is able to convince and be accepted by the parties and Member States. Thus, recourse to an independent interpretation is often avoided if the solution can be reached through consensus or deference to national authorities. In other words, the Court often prefers a meaning the extent of which is rather provided by the Member States. This is the case because the European Convention on Human Rights exists in a context that also aims to protect the autonomy and independence of the Contracting Parties. The Court's attitude towards independent pronouncements has led one commentator to affirm that, where no consensus is identified and it is also impossible to defer to national legislators, the Court can make an autonomous interpretation of the rule.[1071] The European Court of Human

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[1069] Carozza, above note 1011, p. 1219 Identifying three related principles of justification of the Court's jurisprudence related to inter-state comparative references. First, that European Convention on Human Rights establishes an autonomous normative system. Second, the principle of dynamic interpretation of the Convention. Third, the principle of judicial-self-restraint.
[1070] See Article 3.2, DSU.
[1071] Dzehtsiarou, above note 1068. p. 534.

Rights as an independent body to which the role of moral arbiter has been accorded can always make recourse to independent judgments before reflecting consensus or exercising self-restraint.[1072] When the Court is indifferent to consensus among Member States and at the same time does not defer to national authorities, it is because the judiciary sees the necessity to develop a "public order that transcends national peculiarities".[1073] This is especially true when the right at stake cannot be culturally determined but demands configuration on the basis of the moral truth common to the core aspects of the rights. The autonomous interpretation of the convention by the ECHR means that the rules to be developed in the Convention "are to be regarded as parts of a self-governing legal system that must be interpreted independently from the legal systems of the contracting parties".[1074]

E Consensus

Consensus has a legitimating force in the autonomous judgments of the courts. Although the search for consensus has been criticized as having an *ad hoc* character and that the comparative method is applied inconsistently[1075], the main argument favouring consensus is that it provides the court with a technique for legitimating the court's judgments.[1076] If a judicial decision is supposed to convince and be accepted by the States and the general public, the comparative analysis has a legitimating function for achieving coherence and harmonisation of standards in a given region or polity. Commonly, the question of legitimacy of norms and decisions arises from the way norms are created, that is, focusing on procedure; depending on their content, that is, focusing on the substance of the rule or statement; or because of their consequences, that is, focusing on outcomes.[1077] Consensus does not relate so much to the manner or procedure in which the rule is established as to the procedure itself that targets the substantive part of the norm.

[1072] John L Murray, "Consensus: concordance, or hegemony of the majority?" in *Dialogue between Judges, European Court of Human Rights, Council of Europe*, 2008, p. 22.
[1073] Paul Martens, "Perplexities of the national judge faced with the vagaries of European consensus" in *Dialogue between Judges European Court of Human Rights, Council of Europe*, 2008, p. 47.
[1074] Paczolay, above note 1007, p. 67.
[1075] Dzehtsiarou, above note 1068 footnote 41S**ee also** Murray, above note 1072, p. 20 According to Murray the use of consensus as an interpretative tool is problematic because it begs fundamental questions of legitimacy.
[1076] Critizing the role of consensus due to its adverse effects on minority right Benvenasti, above note 370, p. 843.
[1077] Dzehtsiarou, above note 1068 footnotes 29, 30.

1 Autonomy and legitimacy

Consensus is supposed to oppose the margin of appreciation; furthermore, they are considered to be inversely related.[1078] That means that the less consensus the court is able to establish through comparative analysis, the wider the margin of appreciation, thus the more it is possible to defer to national institutions to determine the content of the right. Consensus has two effects, namely, it drives forward or, on the contrary, restrains the court's interpretation of treaty law.[1079] Consensus constitutes the primary determining factor in clarifying the substantive content of the rules encapsulated in a treaty. It therefore constitutes an important means by which a Member's autonomy and independence is confirmed.[1080]

2 Majority

However, the matter of consensus doctrine lacks clarity. The ECHR has not been able to consistently define in its judgments what elements are necessary to establish a norm on the basis of the consensus doctrine.[1081] It is argued that the degree to which international treaties and laws and practices influencing the search for consensus are relevant to the finding of consensus and final outcomes has not been defined. Recourse to formulas such as "developments and commonly accepted standards," "modern trends," "the great majority" or "a great number", "common European standard" or "general trend" are indeterminate and thus misleading.[1082] Furthermore, other similar expressions such as "common ground," "common European approach", "increased social acceptance", "commonly accepted", "common European approach", in spite of being indeterminate, seem in fact to refer to a given state of morals, convictions or positive laws, as expressed through an inspection of domestic legislations.[1083] Notwithstanding such imprecise clauses, consensus in the context of the European Convention on Human Rights does not refer exactly to the collective unanimous opinion of Member States, but to comparative examination of widely accepted standards with respect to a given matter.[1084] In conclusion, consensus means the general tacit or explicit agreement

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[1078] Benvenasti, above note 370, p. 851.
[1079] Klover, above note 1064, p. 7.
[1080] Murray, above note 1072, p. 21.
[1081] Helfer, above note 1012, p. 138.
[1082] *Ibid.*, p. 140.
[1083] Martens, note above 1073, p. 50.
[1084] Dzehtsiarou, above note 1068 footnote 74.

among the members of one group with respect to a given matter.[1085] Nonetheless, it is also necessary to make it clear that the absence of consensus does not prevent progressive or dynamic interpretations. This can be confirmed by the fact that consensus as an empirical technique often complements theoretically based decisions. Consensus does not mean unanimity but general tacit or expressed agreement on a given matter.

3 Decision-making

According to the introductory remarks prepared by the Organising Committee on the role of consensus in the system of the European Convention on Human Rights, consensus is and indicates several things.[1086] In the first place, it is general agreement among the members of a group. Consensus has always played a primary role in the formation of customary law and treaty-made law. Therefore, consensus is a decision-making technique. Particular weight is given to consensus in the substantiation of fundamental rights. On the one hand, consensus may form the basis for advancing human rights. On the other hand, consensus cannot be used to justify the erosion of certain core features of fundamental rights. As a technique, consensus tries to balance the relationship between the autonomous European rights system created through the European Convention on Human Rights and the national systems. Furthermore, consensus is a legitimising technique that facilitates the acceptance of the court's judgments in domestic law.

4 Advantages

In spite of the critics, the consensus doctrine is supported as it helps to update national policies in the sense of harmonisation and uniformity while respecting domestic processes.[1087] Another advantage of consensus is that it facilitates the execution of the court's judgments since consensus reasoning is more easily accepted by Member States.[1088] It also plays a part in maintaining the balance between the European supervision of domestic human rights violations and state sovereignty[1089] Nevertheless, it is worth noting that consensus acts as a mediator between dynamic interpretations and the margin of appreciation as widely accepted standards may constitute the basis for

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[1085] Klover, above note 1064, pp. 2, 12.
[1086] The organizing Committee was composed of Anatoly Klover, Vladimiro Zagreblesky. Lech Garlicki, Dean Spielmann, Renate Jaeger and Roderick Liddel "Dialogue between Judges, European Court of Human Rights, Council of Europe" 2008, France.
[1087] Benvenasti, above note 370, p. 852.
[1088] Dzehtsiarou, above note 1068, pp. 535,536.
[1089] Paczolay, above note 1007, p. 67 **See also** Klover, above note 1064, pp. 6, 7.

such dynamic interpretations.[1090] Moreover, the idea of considering treaties as living instruments does not only recognize that terms are not static but also that one of the functions of international courts and tribunals is to clarify rules by means of autonomous definitions, regardless of how these terms are defined domestically. These attitudes of international courts in truth finding have led scholars to suggest that national judges may consider such judgments as an invitation to accept that, in pluralistic societies, truths and positive laws are in a permanent state of incertitude or risk and in need of updating by international authorities.[1091]

5 Types

According to Helfer, at least three factors have been identified by the ECHR as evidence of consensus: in the first place, legal consensus as demonstrated in domestic statutes, regional legislation and international treaties; in the second place, consensus also refers to expert consensus[1092], that means, the opinion of specialized professionals, as in the case of a psychiatrist or a psychologist, for example; the third element for identifying European consensus is found within the European public consensus. Public consensus is highly important because it reflects a kind of general feeling of society. In this sense, the ECHR has articulated that evolutive interpretations have a bearing on developments in society and public opinion. In the same vein, the ECHR has admitted that public sentiment may be taken into account in order to make a decision.[1093] In any case, the arguments put forward by the Court regarding consensus have to be very persuasive in order for its ruling to be accepted by sovereign Member States. Once again, consensus may imply sovereignty-limiting aspects of the judicial function and has to be carefully reasoned.[1094]

Martens makes a very important observation regarding the nature of consensus as applied by the ECHR. According to that author[1095], the Court approves consensus as endorsing choices made at the domestic level. On other occasions, the Court finds that

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[1090] Dzehtsiarou, above note 1068, footnote 74 Citing A Morowa "The Common European Approach, International Trends and the Evolution of Human Rights Law. A comment on Godwin and I v United Kingdom" German Law Journal 2002 Vol.8.
[1091] Martens, above note 1073, p. 54.
[1092] Helfer, above note 1012, p. 139 footnote 25 *e.g.Winterwerp v. The Netherlands* (1979); *Marckx v. Belgium* (1979).
[1093] For some case law of the ECtHR see Helfer, *ibid*., p.139 footnote 26 *e.g. Ozturk v. Federal Republic of Germany* (1984) *Winterwerp v. The Netherlands* (1979); *Marckx v. Belgium* (1979).
[1094] Helfer, ibid., p. 140.
[1095] Martens, above note 1073, p. 48.

there is no consensus, thus providing space for differentiation, although a consequence of that might be the abandonment of the idea of uniformity and harmonisation. at other times, when issuing autonomous judgments, the Court shows a certain element of anxiety in building a transnational order beyond national particularities. Therefore, consensus is sometimes positive, sometimes negative, sometimes descriptive, sometimes prescriptive, sometimes decisive, sometimes contingent. According to Klover, consensus can be reflected at different levels, namely consensus among the judges of the European Courts, consensus within the legal community, consensus throughout civil society or public opinion in a broad sense.[1096]

F The tension between consensus, deference and autonomy

We have already seen that the ECHR operates within a context of international law and different historical, social and political milieus, where deference, consensus and autonomy are measured by their effect on sovereignty. The consequence of this is that the Convention's jurisprudence has been characterised as containing a persistent tension between what is perceived as its two major interpretative poles: consensus and moral truth.[1097] As we saw above, the Court uses consensus, deference or its autonomous powers to issue its judgments. Moreover, the Court awards such techniques different weight or also uses them jointly. For example, in the Tyrer v United Kingdom case in 1978 concerning the use of the birch on the Isle of Man, the ECHR did not analyse domestic legislation or assess any other objective indicia in order to establish a European consensus against the use of corporal punishment. Instead, the Court referred to the nature of the punishment, concluding that, as an institutionalized assault on a person's physical integrity and dignity, birching was in violation of Article 3.[1098], In this case, the judgement was not based on consensus but on the Court's assessment of the intrinsic nature of the punishment at issue, that is, not on the basis of empirical verifiable consensus, but on the basis of theoretical ideals, namely on a "moral truth" approach. This suggests that the Court can use autonomous decisions according to the

[1096] Klover, above note 1064, p. 2.
[1097] Murray, above note 1072, pp. 28, 29.
[1098] *Tyrer v United Kingdom* Judgement of 25 April 1978, Application No. 5856/72 para. 33 "Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment- whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity".

nature of the issue, which of course can always be supported or reinforced by empirical sources such as consensus. This also postulates the idea that searching for the meaning of a positive provision also involves a search for its moral content and moral truth. The fact that we live in a moral universe speaks against neutralising the legal sciences. As a matter of fact, living in a moral world means that law and therefore judicial decisions cannot be detached from the moral values and ethos that guide society.[1099]

Although recourse to factors such as "morality and ethos guiding a society" may seem at first sight to undermine the dogma of the rule of law, it is highly important to recall, particularly in those cases where a court lacks a solid constitutional systematic structure, that moral truth does not always undermine but can contribute to the clarification of the substantive content of a given positive norm, thus strengthening the dogma of the rule of law. In addition, such judicial pronouncements based on moral concepts, although they lack a real deliberative process of the domestic democratic type, can be supported by the search for empirical proofs. This consensus does not always have to be found within the limits of a given treaty text, but it can be found in those external sources that form, at least, the most elemental core notions of a given environment or polity, i.e. the international polity, the transnational polity and the universal polity. It is not that the existence of such a technique of consensus renders judicial conclusions or judicial reasoning based on moral truth irrelevant, but rather that it is only an empirical support for metaphysical considerations.

[1099] Murray, above note 1072, p. 34.

CHAPTER 3 INTERPRETATION

A Meaning

Interpreting the law through adjudicative organs has fundamental legal consequences. International adjudication makes abundant use of rules, principles and maxims of interpretation; in fact, international adjudication constantly involves issues of interpretation.[1100] In particular, the ambit of treaty interpretation is a topic that has traditionally given rise to extensive doctrinal debate.[1101] The "art" or the "science"[1102] of interpretation is very often central to legal disputes.[1103] In legal sciences, the question of interpretation is a difficult one because interpreting acts and laws enables the interpreter to influence matters which may have legal consequences in a way that may not persuade the parties to the dispute or third parties, especially when the outcome of the interpretation follows some kind of abstract criteria, such as those reflected in value- or policy-oriented approaches to international law, where legal concepts are of a higher normative nature. Furthermore, the way in which the laws in question are interpreted may have serious consequences for the future since in most cases interpretation determines subsequent practice. Being aware of the fact that interpreting the laws will necessarily have legal consequences, it is evident that those responsible for interpreting the norm have considerable legal power for developing a rule into a positive form inasmuch as the adjudicative organ is allowed to choose the sense of the law while giving it, at least, a general orientation.[1104]

[1100] Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session ILC Document A/6309/Rev.1 in Yearbook of the International Law Commission, 1966 Vol. 2, p. 218, para. 3.
[1101] Most notoriously put by Lord McNair: "there is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation" in "The Law of Treaties" 1961, cited by Malgosia Fitzmaurice, "Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement" Austrian Review of International and European Law 2005 Vol. 10, p. 41 **See also** Alain Pellet, "Les techniques interprétative de la norme international" Revue Général de Droit International Public 2011 Vol. 115 No. 2, p. 291 *et seq*. **See also** Carlos Fernández de Casadevante Romaní, "La interpretación de las normas internacionales", 1996, p. 29.
[1102] ILC Yearbook 1966 Vol. 2, above note 1100, para.
[1103] Sir Robert Jennings, "Collected Papers of Sir Robert Jennings" 1998 Vol. 1, p. 211.
[1104] Serge Sur, "Droit International Public" J Combacau and S Sur (eds.), 2001 (5th edition), p. 168.

According to the Concise Oxford Dictionary of current English (1995)[1105], the verb "to interpret" means to explain the meaning of, for example, abstruse word. Similarly, a second meaning of this verb is "to elucidate" or "bring out the meaning of", e.g.., a creative work. Another meaning is that to interpret means to explain or understand in a specified manner, *e.g.*, a gesture. It is clear that the three relevant meanings of the verb "to interpret" all concern the explanation of the significance of something. The elucidation of the meaning of these abstruse words, creative works and gestures will enhance the meaning of such actions with that recognized in their interpretation. The New Shorter Oxford English Dictionary on Historical Principles (1993)[1106] makes reference to the etymology of the word. Etymologically[1107], the word "interpret" comes from the French *interpréter* or Latin *interpretari* meaning explain, translate. Here, too, the dictionary provides several meanings of the word, adding to the Concise Oxford Dictionary's indication that "to interpret" denotes "[to] give a particular explanation of, explain or *construe*[1108] (an action etc.) in a specified manner". Furthermore, the New

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[1105] The Concise Oxford Dictionary, Della Thompson (ed.), 1995 (9th edition).
[1106] The New Shorter Oxford English Dictionary on Historical Principles, Lesley Brown (ed.), 1993 Vol. 1 The French dictionary Vocaboulaire Juridique, Gérard Cornu (ed.), 2007 does not include the French verb for interpret but only the noun "*interprétation*" and defines it as the "*opération qui consiste à discerner le veritable sens d'un text obscure*", further on, in its second point it says that "*(interprétation) désigne par ext. la method qui inspire la recherche*". The 22 nd edition of Diccionario de la Lengua Española de la Real Academia Española in its digital version refers to the verb "*interpretar*" (to interpret), among other meanings, as "*explicar o declarar el sentido de algo*" or "*explicar acciones, dichos o sucesos que puedan ser entendidos de diferentes modos*" or "*concebir, ordenar o expresar de un modo personal la realidad*" While the noun "*interpretación*" (interpretation) refers to the "*acción y efecto de interpretar*" last visited on 13 October 2011 available at:http://buscon.rae.es/draeI/SrvltConsulta?TIPO_BUS=3&LEMA=interpretar.
[1107] For a detailed explanation the etymology of the words interpret, interpretation and interpreter (their Spanish equivalents *interpretar*, *interpretación* and *intérprete*) **See** the Enciclopedia Jurídica Latinoamericana, 2006 Vol. 6, pp.480-481.
[1108] *Interpretation of Judgement Nos. 7 and 8, Judgment (The Chorzów Factory)* PCIJ Series A No.13, Judgement of 16 December 1927, p. 10 According to the Permanent Court of International Justice the term "construe" means to give a precise definition of the meaning and scope **See also** Sur, above note 1104, p. 168 *"le sense (de une règle, d'une formule, d'un mot) est toujours construit ou reconstruit par un interprète donné"* **See also** Black's Law Dictionary 1990 (6th edition) Stating that "in the strict usage of this term, construction is a term of wider scope than interpretation; for, while the latter is concerned only with ascertaining the sense and meaning of the subject-matter, the former may also be directed to explaining the legal effects and consequences of the instrument in question." (…) it continues: " These two terms are, however, commonly used interchangeably" **See also** Olivier Corten, "Les techniques reproduits aux articles 31 à 33 des conventions de Vienne: approache objectivitse ou aproache voluntariste de l'interpretation?" Revue Général de Droit International Public 2011 Vol. 115 No. 2, p. 363 "(...) *le processus interprétatif apparaît comme une construction, mettant en oeuvre des techniques selon de combinaisons très variées, et sur le ondament de principes que l'on pourrait considerer come fictifs*." **See also** *US-Section 301 Trade Act*, Panel, above note 760, para. 7.22 "for pragmatic reasons the normal usage, and we will follow this usage, is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then ***to seek to construe*** it in its context and in the light of the treaty's object and purpose". Emphasis added **See also** Fragmentation of International Law

Shorter Oxford English Dictionary refers to the noun "interpretation" in the first place as "the action of explaining the meaning of something; specially the proper explanation or signification of something". Indeed, it is this adjective "proper" which, in legal interpretation, makes the application of a rule so controversial for, in spite of all the maxims and legal principles and rules developed throughout history in the context of legal interpretation, it is not always clear in which manner a rule is to be interpreted in order to achieve the desired "appropriateness" of its meaning.[1109] Moreover, Black's Law Dictionary (1990) defines the verb "to interpret" as follows: "*to construe*, to seek out the meaning of language; to translate (…)". The noun "interpretation" is defined as: "The art or process of discovering and ascertaining the meaning of a statute, will, contract, or other written document. The discovery and representation of the true meaning of any signs used to convey ideas."

Interpretation, of course, requires an interpreter. Etymologically, the interpreter (from the Latin *interpres*) is an intermediary, a mediator, an agent, and also the translator: that is, the agent that puts into clear language that which is provided in unfamiliar terminology. Applied more broadly, this *interpres* also designates the person who explains or clarifies.[1110] Because our case here concerns legal interpretation, it is thus also necessary to discuss the role of the legal interpreter. The interpreter, legally speaking, is to be considered the authority responsible for substantiating the law. And here, the figure of the interpreter faces two major problems. On the one hand, he needs to be legitimised to issue verdicts. On the other hand, he also needs to be aware of the limits of his power to issue legal pronouncements. Unlike dictionaries, legal encyclopaedias are more extensive in their descriptions of the act of interpretation. The *Enciclopedia Jurídica Latinoamericana*[1111] provides a more exact definition of the concept "legal interpretation" (*interpretación jurídica*). It is giving a formulation in theoretical terms when it states that the interpretation that allows the application of the law is part of the legal experience and, as such, interpretation is an act creative of law.

(Koskenniemi), above note 550 Chapter on systematic integration. The author makes abundant use of the verb "to construe" while referring to the act of interpretation.

[1109] Richard A Falk, "On Treaty Interpretation and the New Heaven Approach: Achievements and Prospects." Virginia Journal of International Law 1968 Vol. 8 No. 2, p. 324. "Dictionary definitions used as a starting point for investigation disclose, as is so often the case, an ambivalence deeply embedded in the subject matter itself. In the instance of interpretation there is disclosed the wavering between the autonomy and objectivity of the interpretative process, on the one side, and its normative, instrumental function on the other."

[1110] Rolando Tamayo y Salmorán, "Enciclopedia Jurídica Latinoamericana" 2006, Vol 6, p. 481.

[1111] *Ibid.* pp. 480 *et seq.*

The way in which this definition can be regarded as belonging to a broad view of interpretation can be seen below. Following that statement, we can see that the interpreter, when giving a meaning to a rule, is at the same time deciding upon the course law is to take, for instance, when the outcome of the interpretation of a treaty, for example, results in the imposition of duties or the conferring of faculties.[1112] It goes on to state that, although it is normally believed that only the legislature has the right to complement, modify or extinguish the law, it is clear from the above that the interpretation of the facts and material submitted to those authorized bodies also complements, modifies and creates law.

The Max Planck Encyclopaedia of Public International Law offers a less theoretical definition of the concept of interpretation than that offered by the *Enciclopedia Latinoamerica*. However, in the conceptual part, dedicated to the term "interpretation of international law", it captures very concisely the legal nature of the act of interpretation. According to that definition, interpretation has a dual character: it is both a cognitive and a creative process. This definition is an eclectic one, belonging to the synthetic conception of interpretation. This eclectic conception means that, as a cognitive act, interpretation establishes a pre-existing meaning. Furthermore, the creative element of interpretation concerns the assessment of the relevant criteria, including the facts considered relevant by the interpreter.[1113] The dual or eclectic nature of interpretation means that the two aspects have an influence on each other, in fact at both moments, namely, at the moment at which the law is created originally and at the moment at which the law is applied, to a certain extent suggesting that the application of the law can constitute a derivative form of the law, and therefore a creative act. Although the Max Planck Encyclopaedia of International Law does not go into the topic in any depth, it at least makes the reader aware of the dual character of this legal act. This distinction concerning the nature of legal interpretation is crucial for our overall purpose of justifying the possibility of interpreting human rights in the legal text enshrined in Article XX (a) GATT and similar public morality exceptions within the WTO system, for the limits placed on the interpreter depend precisely on the legal nature conferred on

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[1112] Matthias Herdegen, "Interpretation in International Law." in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 6, p. 260 Along the same lines, the Max Planck Encyclopaedia of Public International law defines interpretation in international law as essentially referring "to the process of assigning meaning to texts and other statements for the purpose of establishing rights, obligations and other consequences relevant in the legal context."
[1113] *Ibid.*, p. 260.

the act of interpretation. The legitimation of judicial acts depends to a considerable extent on the nature of the action being performed. Of course, the definition of interpretation, in the particular field of international law, has a direct effect on the dogma of international law, particularly upon the principle of sovereignty.[1114] One important implication of admitting the dual nature of interpretation is that, accordingly, legal interpretation is a way of adding or diminishing content to or from legal phenomena in a given set of circumstances, that is, in a given context, which will have certain legal consequences. Legal interpretation plays an important role and is highly involved in the substantiation of law. Furthermore, the action of substantiating the law is a creative act.

At this point we can see that there is a difference between interpretation in ordinary terms and legal interpretation, since the second instance limits interpretation to the legal clarification of certain facts or legal terms which are relevant to or integral part of a system of law, the consequences of which are also legal. The purpose of interpretation is to specify the juridical ambit and normative content of facts and norms.[1115] That is, interpretation is a mechanism through which the legal interpreter orders reality inasmuch as it clarifies, delimits or establishes the **legal** reality derived from the combination of facts and rules, even when, to that end, it is necessary to apply abstract norms which go beyond positive rules. Thus, interpretation is a technique involved in the process of the positivisation of legal rules. The legal interpretation presupposes a legal reasoning which is applied to the text or behaviour to be interpreted. As a scientific exercise, legal interpretation can clearly be stated to consist, on the one hand, in giving legal meaning to certain facts or phenomena through legal reasoning.[1116]

Scholars[1117], as well as dictionaries[1118], make reference to different types or modes of interpretation. Black's Law Dictionary says that interpretation can be "legal, which

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[1114] Carlos Fernández de Casadevante Romaní, "Sovereignty and Interpretation of International Norms" 2007, pp. 3 *et seq*., Fernández de Casadevante Romaní, above note pp. 3 *et seq.*
[1115] Alexander Orakhelashvili, "The interpretation of Acts and Rules in Public International Law" 2008, p. 285.
[1116], Sur, above note 1104, p. 170 The legal interpretative reasoning refers to the reasoning which is made by the subjects in charge of the interpretation.
[1117] *Ibid*., p. 170 The author refers to the uniltateral interpretations, *interprétation concertée* and jurisdictional interpretation **See also** Fernández de Casadevante y Romaní, above note 1114, pp. 24 *et seq.* According to this author, there are "different types of interpretation based on the following criteria: the interpreter, the content of the interpretation and the legal scope of this interpretation".
[1118] The French dictionary Vocabulaire Juridique, Gérard Cornu (ed.), 2007 makes a difference between the interpretation made by the person who is the author of the act (*loi interpretative, jugement*

rest*[s]* on the same authority as the law itself, or doctrinal, which rests upon its intrinsic reasonableness". Legal interpretation may be either "authentic", when it is expressly provided by the legislator, or "usual", when it is derived from unwritten practice. Doctrinal interpretation may turn on the meaning of words and sentences, when it is called "grammatical", or on the intention of the legislator, when it is described as "logical." When logical interpretation stretches the words of a statute to cover its obvious meaning, it is called "extensive"; when, on the other hand, it avoids giving full meaning to the words, in order not to go beyond the intention of the legislator, it is called "restrictive".[1119] It is obvious that Black's Dictionary uses the expression "legal interpretation" in the narrow sense. Here, we prefer to use a notion of legal interpretation in the broader sense, to include aspects of doctrinal interpretation as a source for the law-making process. This notion can be confirmed simply by looking at the formal sources of law established in Article 38 of the ICJ, particularly item (d) – judicial decisions and teaching of the most highly qualified publicists of the various nations".

B Types

The efforts made by scholars in order to make a serious classification of the various types of interpretation are not sufficient to enable clear implications to be drawn from systematization of that nature. They are, however, very helpful. Most of the authors deal with the issue of interpretation focusing on the subject in charge of the interpretation. It is clear that, for legal scholars, the most relevant classification of the act of interpretation is that based on the interpreter's perspective. In general terms, the main differentiation is that made between authentic interpretation and the non-authentic forms.[1120] Authentic interpretation can be unilateral, which is the one which the State makes by virtue of its sovereignty, or collective, *i.e.*, authentic interpretation by the

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interpretative) and that made by a person alien to the act, (*interprétation doctrinal, interprétation judiciaire d'une convention*). According to the 22nd Edition of Diccionario de la Lengua Española of the Real Academia Española in its digital version, the word *interpretación* (interpretation), if made by a legislator is authentic (*interpretación auténtica*), that made by jurists is doctrinal (*interpretación doctrinal*), and that authorized by the jurisprudence is the usual interpretation.

[1119] Black's Law Dictionary (1990) names certain types of interpretation such as close or strict interpretation (*interpretatio restricta*), extensive interpretation (*intepretatio extensiva* or liberal interpretation, extravangant interpretation (*interpretatio soluta*), limited or restrictive interpretation (*interpretatio limitata*), authentic interpretation and customary interpretation.

[1120] Patrick Dailler and Allain Pellet, "Droit International Public", 2002 (7th edition), pp. 254 *et seq.*

political organs of the WTO –Ministerial Conference, Article IX (2)-which is said to be the one true interpretation. The non-authentic forms of interpretation are those made by international judges or the jurisdictional interpretation, or by the international organization, the latter being known as executive or institutional interpretation.[1121] In our case, we are interested only in the jurisdictional or institutional interpretation of the exception "public morals", as it appears in WTO agreements.

When referring to the difference between interpretation in its purely semantic meaning and legal interpretation as a scientific category relating to law, that is, interpretation as a legal concept, it was mentioned that legal reasoning is a fundamental task carried out according to the subjects that intervene in the process of interpretation. Given the diffuse character of public international law, very often and particularly in its classic period, the interpretative process, and with it, the reasoning itself, was almost limited to the individual State alone. That is why, since its very beginnings, the activity of interpretation has been said to be part of the legal policy of the State, slightly different, reflecting the individual interest of the State while limiting from the outset, the autonomous character of the court in issuing its legal pronouncements. However, since the institutionalisation of international courts and tribunals, in particular since the creation of the Permanent Court of International Justice and the Permanent Court of Arbitration, the current flourishing of adjudicative fora and recent developments in international law in the context of globalisation in general show that interpretative activities have experienced a shift from the State -as the traditional holder of the monopoly of legal reasoning- to jurisdictional integrative interpretation. Thus, two kinds of interpretation coexist in public international law: on the one hand, auto-interpretation and, on the other, jurisdictional interpretation.[1122] Today, the dominant belief among commentators is still that the fundamental problem of international jurisdictional interpretation is related to its lack of democratic legitimisation to deal judicially with issues of a somewhat political character. However, we have seen that politics and a lack of democratic legitimisation cannot prevent an international court from issuing a legal statement.

If it is clear that in the classic period of public international law, legal interpretation followed domestic policies in a rather egoistic manner, reflecting only the state-centric

[1121] *Ibid.*, pp .257 *et seq.*
[1122] Sur, above note1104, p. 170.

character of international law, today the shift of interpretation to international jurisdictional institutions favours the view that international law has expanded not only its normative but also its positive scope to other aspects of life beyond the egoistic interest of the State, *i.e.,* a polycentric notion of international law that includes the interests of the international community as a whole, transnational interests, and universal interests. The move from state-centric interpretation to jurisdictional interpretation leads necessarily to the advent of a judicial policy which is intrinsic to the judicial power and which is developed by the judicial organ in charge of interpreting and applying the laws, an organ that is independent of the parties although not from the context and therefore legitimately issues autonomous decisions. It is for that reason that we can already affirm that one of the main implications of the proliferation of international courts and tribunals, that is, the broadening of international judicial power, is the appearance of an independent judicial policy, the degree of activity of which is reflected cyclically and depends inversely on the degree to which other manifestations of power are able to give concrete form to policies. Here is very important to bear in mind that the jurisdictional organ, in order to choose the type of hermeneutics it is going to use, will take into account its own judicial policy.[1123] In our case, the agent responsible for the interpretation of the "public morals exception" is the jurisdictional organ of the WTO. However, in order to interpret our "public morals exception" in the light of human rights, it is crucial to understand that issues of jurisdiction and the rule of law still constitute a fundamental obstacle to the providing of an answer acknowledging that human rights can be interpreted in terms of the concept of public morals.

Scholars still consider jurisdictional interpretation in public international law to be exceptional.[1124] This is due to the fact that the international jurisdictions, although constantly increasing in number, are still rare. Even more importantly, their competences are established by the consent imparted by States. The jurisdiction of international courts and tribunals is limited because their mandate is conditioned by the sovereignty of the State.[1125] Traditionally, international society has been wary of bringing its disputes to independent organs. The reasons for this are two-fold: first, States still prefer to control the way in which they resolve their disputes. Second, the

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[1123] Kolb, above note 598, p. 343.
[1124] Sur, above note 1104p. 173 **See also** Kolb, above note 598, p. 342.
[1125] Fernández de Casadevante y Romaní, above note 1114, p. 3.

judicial function at international level is still not well-defined. In particular, the question as to whether an international court or tribunal is empowered to pursue a judicial policy is highly controversial. Finally, the jurisdictional function is still commanded by the dogmas of classical international law, particularly that consisting in the prohibition of legislating. This prohibition is often expressed by the courts through the argument that, in interpreting a text, a court or tribunal cannot make a revision of the treaty, but may only interpret it.[1126] Yet, nowadays, international law is no longer in a classical period. In addition, the flourishing of international adjudicative bodies suggests that the exercise of a wider judicial function can be seen as a solution responding to all those situations in which the positive legal framework is insufficient owing to both its indeterminacy and deficiencies.[1127] It has been affirmed that "it is part of the judicial function and a duty of international tribunals to arrive at results that do not affirm the absence of legal regulation on matters that fall within the ambit of international law" but to refine the scope of the positive rule in cases where rules are very abstract or general in nature.[1128]

C Object, purpose and scope

When speaking about legal interpretation, we have to be aware of the object of interpretation. In international law, interpretation normally relates to treaties; but it can also concern oral agreements, unilateral acts, judgments and decisions of international courts and tribunals as well as arbitral awards. Moreover, non-binding instruments can also be interpreted, and, to a certain extent the idea exists that rules of customary law can also be subject to interpretation.[1129] In other words, although the process of

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[1126] Kolb, above note 598, p. 375.
[1127] Orakhelashvili, above note 1115, p. 26 "The absence of a specific rule of positive law addressing a particular point arising in an international dispute can be addressed in different ways. The relevant outcome should obviously depend on *all normative considerations* involved in the relevant case." Emphasis added.
[1128] *Ibid*., p. 29 From the doctrinal point of view, this theory is based on the idea about the completeness of international law developed by Professor Hersch Lauterpacht. **See also** *Continental Shelf* (Libyan Arab Jamahiriya/Malta) Judgment of 3 June 1985 ICJ Reports 1985, p. 13 para. 13 Separate Opinion of Judge Valticos " If I may make an observation on a point of principle, due account should be taken of the fact that the Court's vocation is to resolve disputes by means of legal solutions and, in doing so, to elicit, state and exemplify the relevant rule of international law. In the present field, where the legal rule (the equitable solution) is a guideline framed in deliberately broad terms, it is by means of a gradual refinement of its scope, through the resolution of particular questions, that the Court will eventually be able to elicit objective principles capable of guiding States, apparently). In so doing, it will also be able to contribute to that clarity, certainty, predictability and stability which are so essential in international law."
[1129] Herdegen, above note 1112, p. 260.

interpretation in international law mainly concerns the interpretation of treaties, in general terms it concerns the overall "qualified juridical behaviour" of subjects of international law.[1130] In our case, it is clear that we are dealing with the interpretation of a treaty's rule. The purpose of interpretation is sometimes also taken as the object of interpretation.[1131] Here we differentiate between the two concepts. We have already seen that the reason why rules and acts are interpreted in a legal sense is to specify their ambit and normative content.[1132] That is why, when this principle is applied to a treaty, we can affirm that the purpose of interpreting a treaty is to establish the meaning of its rules through the elucidation of its ambit and normative content. But in what way can this be achieved? In order to clarify or elucidate the meaning of a rule, the legal practitioner develops theories and methods. The criteria used in order to interpret treaties as well as to decide whether a treaty is to be interpreted by virtue of the intention of the parties (subjectivists) or objective criteria (objectivists) or whether the convictions or subjectivity of the interpreter has some influence in the judicial outcomes are the most difficult questions which traditionally give rise to debate.[1133] These criteria also depend on one's notion of the nature of the act of legal interpretation. As already mentioned, our overall purpose is to establish whether human rights can be interpreted under the public morals exception within the legal system of the WTO.

The scope of the judicial function is highly dependent on the act of interpretation. In order to elucidate the meaning of the legal rule, the interpreter has to take into consideration a variety of definitions and circumstances. The result of his selection involves a considerable amount of judicial power, because it is the interpreter who is

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[1130] Sur, above note 1104, p. 168. **See also** Orakhelashvili, above note 1115, p. 287. "Interpretation also relates to the broader category of international acts and rules, including statements, declarations, actions, judgments, institutional decisions, and customary rules".

[1131] Schwarzenberger, above note, 400, p. 117 **See also** Georg Schwarzenberger in "Myths and realities of treaty interpretation: Articles 27-29 of the Vienna Convention on the Law of Treaties" 9 Virginia Journal of International Law 1968 Vol.9 No 1, p. 8 The author states that "In the doctrine of international law, the objects of treaty interpretation are variously stated with emphasis on the text as the authentic expression of the intention of the parties, on the intention of the parties as a subjective element (apparent from, implied in, or distinct from the text) or on the objects and purposes of the treaty". These elements were considered by the ILC as concerns to the basic approaches to treaty interpretation; **See also** ILC Yearbook 1966 Vol. 2, above note, 1100, p. 218, para. 2. **See also** Sur, above note 1104, p. 169.

[1132] Orakhelashvili, above note 1115, p.285.

[1133] By way of example, the 9th edition of Oppenheim teaches that "the purpose of interpreting a treaty it to establish the meaning of the text which the parties must be taken to have intended it to bear in relation to the circumstances with reference to which the question of interpretation has arisen" Jennings and Watts (Oppenheim), above note 411, p.1267.

responsible for making sense of the laws and defining the orientation they take.[1134] The act of interpretation entails two aspects: on the one hand, a non-restrictive element, that is, it implements the law; and, on the other, a restrictive element, that is, this activity is associated with certain limits, *i.e.,* the positivist dogma.[1135] Because the importance of the power of determining the scope and ambit of rules in international law is often in the hands of a small group of agents in charge of interpreting, the debates about the nature of the interpretative function has already acquired a permanent character. The reach of the juridical power thus depends substantially on the nature of the act of interpretation.[1136]

D Hermeneutics

Hermeneutics is a constructivist technique that establishes criteria for interpretation. The interpreter, in order to discover the proper meaning of a rule, makes use of hermeneutics. The word "hermeneutics" (from the Greek *hermenéia* – έρμηνευεία-) is equivalent to the Latin *interpretatio*. Briefly, hermeneutics is the clarification of a legal text beyond a purely linguistic analysis. It examines the whole set of circumstances surrounding the case in order to elucidate the proper meaning. The use of hermeneutics is based on the construction of the meaning of the norm which allows it to adapt, through an updating process, to the facts to which the rule is to be applied. In the search for "appropriateness", the interpreter must endeavour to ensure that the material interpreted is coherent, harmonious and compatible with a **whole** which, for some, covers only the positive body of rules and norms constituting a system and, for others, extends beyond the positive laws to the whole of the reality, thus taking into account extra-legal factors. Hermeneutics entails the criteria which will be used for the interpretation of the legal behaviour. It is a constructivist technique.

There are two types of hermeneutics: the positivist and the non-positivist. The act of interpretation, as a hermeneutic exercise, could imply a narrow but also a broad use of the sources that the interpreter has at his disposal. Moreover, depending on the type of

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[1134] Sur, above note 1104, p. 168.
[1135] *Ibid*., p. 169. **See also** Rolf Einar Fife, "Les Techniques interprétatives non juridictionnelles de la norme international" Revue Général de Droit International Public 2011 Vol. 115 No. 2, p. 367 " (...) l'interprétation est donc un élément indissociable et une opération incontournable de la mise en œuvre du droit international".
[1136] Sur, above note 1104, p.168.

hermeneutics the interpreter has chosen, he will feel legitimised to draw inspiration from sources which might not be formally recognised as such in a given system. Through hermeneutics, the interpreter is able to combine different aspects of the nature of the act of interpretation. Thus, interpretation is necessarily a hermeneutic exercise. There are two main types or opposing categories for describing hermeneutics that certainly correspond to the two main ways in which the law is understood; namely, the positivist and the non-positivist approach.[1137] Again, the operations that the interpreter performs in either approach are merely a reflection of the main principles and canons developed according to each of those different ways of conceptualising the law.

1 Positivist hermeneutics

Professor Kolb explains the main characteristics of each of these approaches. For him, the overriding principle of the positivist school is the dogma whereby interpretation expresses a preconstituted will (*volonté preconstituée*). That means that the agent in charge of interpreting the law looks only for the lawgiver's will. The interpreter is not allowed to add or remove anything. A second characteristic is that positivists work exclusively through formalised methods of interpretation.[1138] Professor Kolb continues by listing the different fundamental structural principles which occur in positivistic hermeneutics, namely: the differentiation between "is" and "ought" (*être and devoir être*; *sein and sollen*); the degree of completeness of the system of law; the equating of laws to positive law; the degree of clarity of the positive rules. Another crucial characteristic of positivistic hermeneutics is that interpretation is limited by the idea that the legislative authority is a self-contained power which retains the monopoly to issue and develop the law as opposed to the idea that legislative power is not only a faculty and attribute of a specific branch of power, but that it shares the faculty of developing laws with other branches of powers. This school of thought is based on four main principles: the principle of legal certainty; the separation of powers; the principle of legality; and the principle of equality. The main difficulty of that system is that the supporters of this school considered themselves, particularly owing to the existence of a powerful and highly efficient legislature, able to respond to all society's demands. However, such a positivist approach faces large-scale problems in systems such as those

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[1137] Kolb, above note 598, p. 74.
[1138] *Ibid.*, p. 75.

in which international law lacks a strong legislature. This suggests that the balance of power cannot be established when they differ so clearly.

2 Non-positivist hermeneutics

At the other extreme, we find non-positivist hermeneutics. It distinguishes itself by being a fragmentary and open system.[1139] Again, following Professor Kolb's line of thought, this type of hermeneutics operates as a criticism, constituting a reaction to the inflexibilities of the positivist system. He identifies four main fundamental aspects. In the first place, the process of interpretation takes place in a multiple context. Contrary to the rather technical character of the positivist interpretation with formalised rules of interpretation, for the non-formalist or non-positivist, the interpretation is contextual, it looks for intrinsic as well extrinsic factors that have an influence on it. The main example of an intrinsic or subjective factor is the psychology of the interpreter. The extrinsic factor *par excellence* is the socio-political context. According to Professor Kolb, the constantly changing factors provide the conditions that create a favourable environment for dynamic interpretation. Most importantly, at the same time, is the ideology of the interpreter, which is both subjective, because it relates to the experiences that have taken place in life, and objective in the sense that such experiences take place in an ideological context that can ultimately be depicted as the dominant, prevalent or reigning ideology. Another factor of an extremely important mixed character is the so-called hermeneutic prejudgment (*préjugé herméneutic, Vorverständnis*).[1140] The starting-point of the substantivisation of a concept is the perspective, the angle from which facts and norms are considered. This is because the process of interpretation depends on the direction the interpreter wants to give to the norm; therefore, the interpreter himself has to look into the abstract theories as well as into the particularities of a specific case.

Professor Kolb continues by stating the other three fundamental elements of non-positivistic hermeneutics. The second element of the non-formalist system is the multifunctional character of interpretation. That means that the scope of the normative field of interpretation extends beyond a search for the legislator's will (the cognitive act) to an act of interpretation that includes the assessment of choices and its

[1139] *Ibid.*, p. 80.
[1140] *Ibid.*, p. 343. Citing J. Esser in "Vorverständnis und Methodenwahl in der Rechtsfindung. 1972 p 30 *et seq*, p. 43 *et seq*. p 136 *et seq*.

consequences (the volitional act). The third element is the agent in charge of the interpretation. According to the non-positivist approach, the interpreter who is at the heart of this process will perceive the norm in the sense of its renewal through a process of adaptation to the objective circumstances, including the written laws that, at the same time, are influenced by their own subjectivity and that of those others implicated in the process of interpretation, namely the parties and other judges if appropriate. Finally, a fourth element consists in conceiving of interpretation as an act which is oriented to the achievement of a result, and not as purely technical exercise. Therefore, in endeavouring to elucidate a meaning of the norm, the interpreter can equally use formalised methods, that is technical, as well as axiological, that is, take account of a series of factors, such as political, economic, social and moral *i.e.* human considerations. This is supported by the idea that the judicial function legitimises its agents to watch over and ensure that the balance upon which justice and the law itself rests is not undermined by immoral positive rules.

E Theoretical underpinnings

The concept of interpretation is a highly difficult one at the theoretical level because it has no unitary definition.[1141] As has been seen from the different definitions given by the dictionaries and encyclopaedias, the act of interpretation is involved in a multiplicity of events and it is perceived differently according to the object, or the subject in charge of the interpretation, or the weight given to it in order to establish substantive rights or obligations on the basis of qualified juridical behaviour. Moreover, interpretation becomes highly technical if it develops principles of a very specific nature, as is often the case in so-called self-contained regimes. In addition, it becomes even more complicated if interpretation is conceived of as an act aiming at a result rather than as a merely technical exercise.

1 Relativity

In other words, the act of interpretation is highly relative. The lack of theoretical unity depends fundamentally on the relativity with which the concept is applied. Legal

[1141] Carlo Santulli, "Les techniques interprétatives de la norme international" Revue Général de Droit International Public 2011 Vol. 115 No. 2, p. 297 Stating that, if, on the one hand, some see in interpretation a linguistic, sometimes methodological, even extra-juridical, at most meta-juridical exercise, on the other hand others try to establish the study of interpretation within the limits of positive law only.

interpretation is relative to the branch of law in which interpretation is conducted directly, reflected in the content of the rules of interpretation.[1142] That is, interpretation is relative to the legal structure in which it takes place and to the content, or substantive aspects, of the topic in question. This is particularly true when the extent to which an international regime is open or closed to general law and extraneous sources is considered. Such relativity is reflected in judicial techniques, such as "issue-avoidance" or "proceduralisation" owing to the political character of some disputes. In the case of the international trade system within the WTO it has been already acknowledged that account has to be taken of the general methods of interpretation provided in the VCLT.[1143] Also, all formal sources established in Article 38 of the ICJ must be used for the purpose of interpretation. However, what still remains debatable is the introduction of other sources necessary in the hermeneutics of the single case. Nonetheless, the practice and jurisprudence of the WTO has shown that it is quite common to apply extraneous rules when interpreting a particular case.[1144]

Legal interpretation is also relative to the manner in which the legal order and the law itself is perceived.[1145] This kind of relativity, is necessarily linked to the first kind of relativity, for the legal order, as well as law, itself provides both the general and the systemic framework in which all other subsystems of law are intended to lie. In addition, it is logical that those who have a dissenting view of public international law will plead for the use of certain means that could be considered alien to the system of international law, *i.e.,* a constitutional approach to international law, an anthropocentric approach to international law, a concentric or polycentric approach to international law, involving the role of values, interests and semi-normative or semi-positive laws, such as issues of necessity, equity, morality, proportionality, deference, consensus and autonomy. Since the act of interpretation is instrumental in other law-related matters that constantly occur in real life, and these other matters become part of the law through the act of interpretation, it can only be said that the result of interpreting rules has to be considered part of the law-making process. Interpretation is a law-making mechanism, especially if, as was stated at the beginning, the consequences of interpretation are legal ones.

[1142] Kolb, above note 598, pp. 11 *et seq.*
[1143] See above Part II Chapter 2 in The basis of International Law.
[1144] *US-Shrimp*, AB, above note 606, para. 132.
[1145] Kolb, above note 598, pp. 11 *et seq.*

a Argumentation

Non-positivistic interpretation is based on argumentation. But, again, what is the legal nature of the term interpretation? History has shown that laws can be interpreted in a narrow or in a broad fashion. The development of law is an eternal fluctuation between these two poles. At one extreme we have the more narrow positivistic trend, with a variety of sub- schools of thought, the fundamental premise of which is limited to the formal law-making process, manifestly pursuing the aim of legal certainty. At the other extreme we have the non-positivists. In essence, they follow a school of thought that understands interpretation to be a complex process based on argumentation. Their starting point is a multiplicity of basic considerations from which arguments can be derived without requiring previous formalisation. The principal feature of this line of thought is that, contrary to what the positivists claim, the subjectivity of the interpreter is at the centre of interpretation. The subjectivity of the agent responsible for the interpretation of the acts or statements is ineluctable. The phases in which this school predominates are characterized by flexibility. In cycles in which the non-positivistic or non-formalistic approach to interpretation dominates, interpretation enables moral considerations to be added, indeed, it allows for value judgments to be made, particularly in cases in which conflicting values and interests are not governed by legislation.

b Justice

The constitutional principle of non-positivistic interpretation is justice. If the positivists postulate the legal certainty as the supreme principle, the non-positivists give priority to the conformity of the norms with the necessities of social and legal life, even if it means that the system loses some degree of certainty. While the positivists consider appropriateness to mean attachment to certain rules and gravitate narrowly around a linguistic exercise, the extreme being that, in order to interpret, they need rules of interpretation, for the non-positivist appropriateness means to render justice to the case. The postulate of the non-positivist, its constitutional principle, is justice, and they postulate justice regardless of whether or not a formal rule of law exists. The non-formalist thus considers the act of interpretation to be an art and not a science.[1146]

[1146] Kolb, above note 598, p. 22.

c Liberty and restriction

Interpretation has an eclectic nature that oscillates between a kind of unbounded liberty and strict adherence to the text. The existence of these two poles is synthetically reflected in the eclectic forms of interpretation. Hence the hermeneutics used by the legal interpretative authority oscillates between a certain type of unrestrained liberty and strict adherence to a text. Therefore, owing to the lack of unity, and also bearing in mind that the outcome of interpretation automatically becomes law and ultimately that, in order to elucidate the legal significance of an act, interpreters oscillate between broad and narrow concepts, we can only come to the conclusion that interpretation is an elastic concept. What is the ultimate aim of interpretation? What benchmark should it follow? Perhaps the constitutional criteria developed in international law, perhaps the will of the States only. It all depends on our objectives, if indeed we have any. Essentially, from a theoretical perspective, the difficulty of the legal concept lies in the distinction made between interpretation as a cognitive act and interpretation as an act of will. These two theories lie at opposite ends of the scale: the one at a descriptive end, the other at the normative end. Thus, theoretically, the reach of the norm is also relative to the normative or descriptive character attached to the act of interpreting.

2 The cognitive act

Positivists see interpretation as a cognitive act. As such, interpretation tends to appoint a pre-existing meaning[1147], purporting to identify the *correct sense* of the word only in so far as the interpreter affirms or verifies the content of the norm. That is, the interpreter only clarifies the sense of a norm or an act. From a historical perspective this theory is the outcome of the Enlightenment[1148] and is one of the most classical forms of positivism. The main feature of this school is that its proponents understand the cognitive act to be the clarification of the will of the lawgiver, which is the only true meaning of the law. In a more flexible variant, this historical or subjectivist school admits that interpretation consists in elucidating the true sense (as opposed to the will) only in the case of obscure texts.[1149] Positivism is somehow guided by the maxim *in claris non fit interpretatio.* Yet, today, these extreme forms of positivism are at least

[1147] Herdegen, above note 1112, p. 260.
[1148] Pierre Brunet, "Aspects théoriques et philosophiques de l'interprétation normative" Revue Général de Droit International Public 2011 Vol. 115 No. 2, p. 313.
[1149] Kolb, above note 598, p. 22.

doctrinally obsolete[1150], since the fact of ascertaining the clarity of a norm is already considered to be interpretation. In addition, it is of paramount importance to be aware of the fact that, for the cognitivists, the methods of interpretation have an *a priori* function: they give the interpreter a route which is supposed to enable them to reach the correct meaning of the act or rule.

3 The volitional act

Interpretation as a volitional act means that the interpreter is the real creator of the norm. As an act of will, the interpreter is seen as the real creator of the norm. This concept is framed in open systems of law. Briefly, according to this concept, the act of interpretation is an act of will because the interpreter is in a situation in which he can freely determine the meaning of a text.[1151] The interpreter plays an active role in the law-making process since this activity of interpreting is founded in the indeterminacy of the normative language. For them, positive rules are enunciates.[1152] In this case, the indeterminacy of the language obligates or constrains him to make choices regarding the meaning of the terms while ascertaining not only its descriptive content but also its normative content. The act of interpretation is an act of the will (decision) and, very importantly, it is also an act of power which is related by the policies followed by the adjudicative organ. In this case, the interpreter has a great degree of freedom to decide upon the content of the qualified juridical behaviour to be interpreted, adding or diminishing, that is establishing, the contours of the norm according to the objective circumstances and not exclusively to the historical intentions of the parties. This is essential because for them, the function of the methods of interpretation is to justify a choice that has already been made. According to those who conceive of interpretation as an act of will, the methods of interpretation can never determine a choice *a priori*, because they can only serve, *a posteriori,* the justification of a previous choice.[1153]

[1150] Among the positivist scholarship there is the believe that clarity in the meaning of a treaty does not need interpretation (*in claris non fit interpretation*). However, such an opinion is misleading. Indeed, the determination that a rule or a law is clear, is the result of the process of interpretation. The explicitness and precision of a legal statement must always be ascertained against the facts and circumstances for which the rules are suppose to apply. See Hersch Lauterpacht, "Restrictive interpretation and the principle of effectiveness in the interpretation of treaties" British Yearbook of International Law 1949 Vol. 26, pp. 48 *et seq* **See also** Jennings & Watts (Oppenheim), above note 411, p.1267 **See also** Santulli, above note 1141, p. 299 **See also** Kai Schollendorf, "Die Auslegung völkerrechtlicher Verträge in der Spruchpraxis des Appellate Body der Welthandelsorganisation (WTO)", 2005, pp. 43-44.
[1151] Brunet, above note 1148, p 312.
[1152] *Ibid*., p. 313.
[1153] *Ibid*., p. 314.

4 Eclecticism

These two aspects of interpretation have given rise to three different theories.[1154] Two of these theories are those described in brief hereabove. The third theory is the synthetic outcome of the two others. In general terms, the synthetic or eclectic view of interpretation considers the action of interpretation as a cognitive act that, depending on the circumstances, requires intervention of the will. The degree of intervention of the will depends on the language of the text, particularly when the meaning is ambiguous, uncertain or vague, when the language has been intentionally left open to further judicial materialisation, when there is a lack of coherence or unity in the system, or the judicial organ is entrusted with the function of identifying the scope and reach of a legal rule. Nevertheless, it is important to note that the intervention of the will can happen only after the interpretation has passed its cognitive phase. The eclectic theory of interpretation, as it usually the case, is founded in the relativisation of the other two extreme theories.

a Dynamism

Eclectic forms of interpretations favour dynamic and evolutionary approaches. One fundamental feature of the eclectic approach is that the legal language has a relative character. The degree of indeterminacy of the language expressing a rule is one of the most crucial factors that allows interpretation to become an act of will[1155], so that the greater the indeterminacy of the language, the greater the extent to which the will intervenes in the process of interpretation. In particular in cases of indeterminate or vague concepts, such as amorality or public morals, the will of the interpreter, together with the power with which he is invested, plays a fundamental role. This also enables the concept of an abstract and general nature to be approached dynamically and evolutionarily, that is objectively. All eclectic forms acknowledge, to a greater or lesser extent, that the interpreter has discretionary powers, allowing him to participate actively in the development of the law. The eclectic acceptance that interpretation is a cognitive act also allows the criteria for interpretation to be endorsed far more easily. In fact, the establishment of several criteria, without establishing any hierarchy among them, far

[1154] *Ibid*., p.313. see footnote 5. This author states that this classification is generally attributed to H. L. H. in his essay "Positivism and the Separation of Law and Morals" in Essays in Jurisprudence and Philosophy and in his book "The Concept of Law".
[1155] *Ibid.*, p. 315.

from supressing the discretionary power of the judge, gives him some guidance and a certain margin for determining on which criteria he wishes to base his judgement.

b Prescriptivism

Interpreters have to be cautious when, but cannot be prevented from, interpreting in a prescriptive fashion. However, when attempting to give a concrete meaning to the indeterminate language, the interpreter has to take care not to "neglect" or "hijack" the provision at stake. Many authors see in this indeterminacy a danger which is conducive to this "neglecting" or "hijacking" of the provision to be interpreted. It is clear that the indeterminacy of the language is "an open door to value-inputs by the interpreter"[1156] and could pervert the dogmatic of international law itself, especially through the use of "non-law" and "quasi-normative non-law materials" in the act of interpretation.[1157] Nonetheless, what for many authors is nowadays considered non-legal values or quasi-normative law materials can be considered by a non-positivist legal expressions that are, at least, involved in the prescriptive (as opposed to the descriptive) aspects of law. Furthermore, to base a judgment only on the risks involved is a form of generalisation that puts the question of the justice of the case in question in jeopardy. That suggests that exchanging one risk by another involves a value judgement, which first is not admitted within the positive doctrine and second cannot be a sufficient legal argument if the specifics of the case are taken into account. Case-by-case judicial decision-making inevitably involves internationally legally protected values which are of paramount importance, such as peace, security, sustainable development, human dignity, equity, morality *etc.*

c Indeterminacy

The degree of indeterminacy of the language also refers to the degree of generality of the norm. That the degree of indeterminacy of the language is relative to the degree of generality in which the norms have been expressed is a clear consequence of the notion that the formulation of the legal norm is the task of those responsible for interpreting facts and norms. The legal norm is supposed to be applied in the circumstances in which the norm itself emerged; however, in those cases in which the legislator cannot really

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[1156] Orakhelashvili, above note1115, p. 286.
[1157] *Ibid.*, p. 287 According to this author non-law materials are interests and values. Quasi-normative non-law materials are techniques of a procedural nature, but with a strong substantive character, such as the doctrine of margin of appreciation, the tests of necessity and proportionality, concepts such as equity or fair and equitable treatment as well as the doctrine of the legitimate expectations.

foresee how further developments will take place, the only solution is for the positive rule to be expressed in more general terms.[1158] Furthermore, abstract or general concepts such as morality and public morals have an open nature and, in spite of possessing a kind of static core, they have a markedly contingent aspect. It is because of this that the application of the norm to a concrete case depends, on the one hand, not only on the degree of indeterminacy but also on the degree of generality in which it has been expressed, resulting in an analysis of the objective criteria at the moment of interpretation. The same is, to some extent, true of subjective criteria. It is well known that, in many cases, the intentions of the parties cannot be easily discovered, either because there was no common intention of the parties at all or because the real intention was concealed by an obscure formulation or an ambiguity.[1159]

cc Socio-political environment

The degree of determinacy of the socio-political environment also influences the role of interpretation. Furthermore, the idea exists that the techniques used to interpret depend on the degree of determinacy of its socio-political environment. Modern theories of interpretation show that law and its interpretation cannot be detached from the socio-political context in which the interpretation takes place. According to those theories, the techniques of interpretation cannot be always be formalised. At most, the existing techniques are to be considered as guides but not as the only methods.[1160] It has been affirmed that it is a misconception to assume that only positive rules of interpretation offer a "secure safeguard against arbitrariness and impartiality."[1161] In order to follow the socio-political context of international law it is clear that the interpreter has to take account of the structure and nature of international law. It has already been recognized by the ILC[1162] that the necessity and coherence of the international legal system is an objective of the international society/community.

[1158] Daillier & Pellet, above note 1120, pp. 253.
[1159] Jennings, above note 1103, p. 211.
[1160] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Request for Advisory Opinion)* Advisory Opinion 22 July 2010, General List No. 141, para. 94 "While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account." **See also** Fife, above note 1135, p. 367.
[1161] Lauterpacht, above note 1150, p. 53.
[1162] Fragmentation of International Law (Koskenniemi), above note 550.

F Discretionary power of the judicial function

The judicial function includes legislative aspects and needs to exercise discretionary powers. It is in this sense too that it is argued that the interpretative function is not only complex because it is tasked with formulating a rule of law applicable in a given situation[1163] but because in many cases it has a markedly legislative function as well.[1164] Nevertheless, the idea exists that "the law-creating autonomy and independence of judicial activity may be an unavoidable and beneficent necessity. But they are so only on condition that the judge does not consciously and deliberately usurp the function of legislation."[1165] The same author further continues: "to presume –to imply- intention is to predicate that intention does not matter. To do that without circumspection would be to introduce into the world of interpretation an element of broadly uncontrolled discretion inconsistent with the legitimate exercise of the judicial function". [1166] Although this latter passage pleads very well in favour of subjective interpretation, the two passages also suggest that the legislative function of the judicial power is beneficial although it has to be applied with a great deal of caution. In line with the eclectic theories, the legal language is indeterminate or relative because all language has a core meaning (*noyau clair de signification, Begriffskern*)[1167], which covers situations that are clearly captured by the expression. Moreover, legal enunciates have also a part to play, the significance of which is possible (*zone d'ombre, Begriffshof*), that is, a part of the meaning the significance of which is open to wide-ranging interpretation. Thus, the greater the extent to which the issue belongs to that part of the expression which is in the core meaning or in the only possible part, the more difficult the case. This is very important because there is a proportional relationship between the level of difficulty and the use by the interpreter of his inherent discretionary power. Similarly, the existence of legal enunciates and indeterminate or general legal rules necessitates the use of discretion. This enables the outcomes reached by the judge, as well as by the parties involved, to be based on subjective criteria such as beliefs and preferences.[1168]

[1163] Fife, above note 1135, p. 367.
[1164] Kolb, above note 598, p. 163.
[1165] Hersch Lauterpacht Restrictive interpretation and the principle of effectiveness in the interpretation of treaties in British Yearbook of International Law 1949 Vol. 26, p.83, Lauterpacht, above 1150, p. 83.
[1166] *Ibid.*,p. 49.
[1167] Feddersen, above note 843, pp. 259 *et seq.*
[1168] Brunet, above note 1148, p. 315.

It is clear that positivists or formalists are opposed to non-positivists or non-formalists. These two competing poles make way for a wide spectrum of synthetic forms. In the end, they all relate fundamentally to the role assigned to the agent in charge of the interpretation, that is, an active, passive, or moderately active or passive, role.[1169] The explicitness and precision of a legal statement, that is, the degree of determinacy, must always be ascertained against the background of the facts and circumstances in which the rules are supposed to apply.[1170] This approach favours the justice of the single case. Thus, the real problems of interpretation arise as a function of the degree of difficulty and the plurality of senses at the moment when the particular facts of the single case are related to rules.[1171] This kind of particular dynamism, consisting in a constant renewal of the rule according to the particular facts, is intrinsic to the notion of justice which is supposed to be captured and constitute the ultimate guidance of law itself. The more senses implicated in the resolution of the matter at stake, the more difficult becomes the task to opt for a solution suitable to the parties and which at the same time also fits into the imperative framework provided for international law. In addition, the act of opting for one or another interpretation will require an assessment of all those possibilities. This is evidently a value judgement; this kind of subjectivity belongs already to the discretionary power of the interpreter in the same manner that the choice of one or another method of interpretation belongs to the discretionary power of the interpreter. Furthermore, the discretion is also proportional to the number and elasticity of the rules available.[1172] In order to establish a limit between constraint and freedom, between legal security and the values of justice, the legal interpreter has to endeavour to systematise the activity of interpretation. The mixed or eclectic school, obviously, justifies the existence of the freedom of interpretation but put limits on it too. But what are those limits to the freedom of interpretation?

The act of interpretation includes both aprioristic rules in order to determine the sense of a rule and a posteriori means that justify a decision. As we have seen above, the methods of interpretation are techniques that can be considered in a variety of ways. On the one hand, the cognotivist considers the methods of interpretation as aprioristic techniques in order to guide the interpreter in the search for the correct meaning; they

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[1169] Kolb, above note 598, p. 24.
[1170] Jennings & Watts (Oppenheim), above note 411, p.1267.
[1171] Sur, above note 1104, p. 168 *et seq*.
[1172] Lauterpacht, above note 1150, p. 53.

have an obligatory nature. On the other hand, for the voluntarists or sceptics -voluntarist here not in the sense of a supporter of subjective interpretation-, these methods are simply a means to justify a previous choice and are somewhat discretionary. For some authors, the distinction between techniques as aprioristic instruments for determining the sense of the norm on the one hand, and techniques as *a posteriori* means to justify a decision on the other, has a bearing on the relationship between the techniques of interpretation and the system of law in which the interpretation takes place. This is reflected in the idea that determination of a sense and justification of a decision are both functions of interpretation that cannot be completely disassociated.[1173]

Whether or not they are discretionary or obligatory, the rules of interpretation in Articles 31, 32, 33 VCLT are praised for their suitability. Again, the interpretation of international treaties is a very difficult and vast doctrinal area.[1174] In the context of the codification of customary rules of interpretation, the ILC stated in the introduction to its commentary to the rules of interpretation that, in spite of it being easy to justify the inclusion of rules of interpretation owing to the great reliance on and relevance of principles and maxims of interpretation in international law, the issue concerning the distrust and challenge of jurists towards the rules on treaty interpretation did not arise out of their relevance but out of their obligatory character. The reason for such a suspicious attitude towards obligatory rules of interpretation is that recourse to principles and maxims of interpretation are discretionary rather than obligatory. In this sense, the ILC observed that "the interpretation of documents is to some extent an art, not an exact science."[1175] However, the ILC added that, in spite of such controversies, the cogency of formulating general principles of law as general rules of interpretation lies in the necessity to provide a basis for the subsequent application of the treaties and the drafting of treaties itself.[1176] This is reflected doctrinally for instance by Professor Lauterpacht, when he said that the seventh edition of *Oppenheim 1948* instructs that

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[1173] Benjamin Remy, "Techniques interprétatives et systèmes de droit" Revue Général de Droit International Public 2011 Vol. 115 No. 2, p. 329.
[1174] Duncan French, "Treaty Interpretation and the incorporation of extraneous legal rules" International & Comparative Law Quarterly 2006 Vol. 55 No. 2, p. 282.
[1175] ILC Yearbook 1966 Vol. above note 1100, p. 218, para. 4.
[1176] *Ibid*., p. 218, para. 3 The ILC add three other fundamental reasons from which most of the doctrinal controversies arise. First, that the interpretation of treaties in good faith and according to law is essential for the operationalization of the *pacta sunt servanda* principle. Second, to take a clear position with respect to role of the text in treaty interpretation. Third, to accord the place of the intention of the parties in order to interpret treties.

"there exists neither customary nor conventional rules of interpretation of treaties"; however, "it is important to enumerate some rules of interpretation which commend themselves on account of their suitability".[1177] Nowadays, and in consonance with practice and doctrine, we can affirm that, although Articles 31 to 33 of the VCLT give some positive form to the methodology of interpretation, they have not resolved this problem yet. Nonetheless, in spite of quite diverging opinions about the nature of interpretation and the content of its rules, the community of the States decided to codify "the comparatively few general principles which appear to constitute general rules for the interpretation of treaties".[1178] These rules are found in Articles 31, 32 and 33 of the VCLT. The articles of the VCLT on interpretation remain largely part of the doctrine in an open manner, which offers the interpreter the possibility of choosing which direction to take. For that reason, rules of interpretation cannot be considered obligatory.[1179] However, the methodology developed in the VCLT is important because it tries at least to unify and to order some cogent aspects of the legal thinking which are indispensable for both the process and the outcome of interpretation.

G Rules of interpretation of the Vienna Convention on the Law of Treaties

The nature of interpretation is linked to the nature of the legal system; both notions include objective and subjective criteria. But before broaching the subject of interpretation in the WTO, it is important to highlight the current state of the methods of interpretation in General International Law. This will enable the notions according to which contemporary scholars comprehend the relationship between means or methods of interpretation and international law to be examined in depth. Today, the debate on the methods of interpretation is principally divided into two fundamental schools, namely the objectivist school and the subjectivist school.[1180] Although legal scholars sometimes

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[1177] Quoted in Lauterpacht, above note 1150, p. 49.
[1178] Daillier & Pellet, above note 1120, p. 264. The methods of interpretation codified in the Vienna Convention are general guidelines rather than strict rules.
[1179] Sur, above note 1104, p. 174.
[1180] Corten, above note1108, p. 351 **See also** Sir Gerald Fitzmaurice, "The law and Procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points" British Yearbook of International law 1957 Vol. 33, pp. 203 *et seq.* The author mentions four different groups. The first is dedicated to the distinction between textual and "intentions approach", the second concerns the teleological approach, the third refers to the theory of the "emergent purpose" –this is an extreme form of the teleological approach that regards the purpose and object of a treaty as a dynamic feature, "liable to

refer to quite different methods based on a variety of combinations, it is necessary to highlight that nowadays the major disagreement about where to find the true meaning of treaty rules through treaty interpretation is strongly linked to the notion of international law. Therefore we find it appropriate not to focus only on interpretative techniques isolated from our notion of international law, but to deal with interpretation theories bearing in mind the nature of international law. On the one hand, in terms of interpretative schools, the subjectivists see international law as law founded on the consent of the States. On the other hand the objectivists consider international law to be law reflecting the objective necessities of the international society/community which are constantly evolving. [1181] This fundamental discrepancy as to what constitutes international law is encapsulated in the debates that took place in the context of the VCLT when referring to treaty interpretation. During these debates there was a heated exchange of views between the objectivist approach and the subjectivist approach to treaty interpretation.[1182] In brief, for the objectivist, the valid interpretation is the one that corresponds to the social necessities of the international community at the moment at which interpretation takes place. For the subjectivists "the valid interpretation is that which corresponds to the will of the States."[1183]

1 Subjective approach

The subjective approach to treaty interpretation in its core version is based on the premise that the purpose of treaty interpretation is to establish the intention of the parties. Particularly problematic is the issue concerning the intention at the moment of the treaty's conclusion. For the subjectivist, all other means are considered to be instrumental in the search for that intention.[1184] Interpretation by means of the intention of the parties is rooted in the theory of the separation of powers. It reflects

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change"- and the last group assembles affiliated schools with the teleological school, that is, mixed forms of the teleological school. **See also** McRae, Peter. "The Search for Meaning: Continuing Problems with the Interpretation of Treaties" Victoria University Wellington Law Review 2002 Vol. 33 No. 2, p. 209 This author distinguishes instead between the textual or "ordinary or plain meaning school", the "intention of the parties school" the "purpose" or "teleological" school and other schools which can be considered synthetics attempts, such as the "genuine shared expectations school" of the Yale scholars - McDougal *et al*.- combining elements of intention and teleology; or the "objective intention school" **See also** Falk, above note 1109, p. 324.

[1181] Corten, above note 1108, p. 351.

[1182] *Ibid*., p. 352.

[1183] *Ibid*., p. 364 **See also** Orakhelashvili, above note 1115, p. 305. The author stated that "International law is a system of agreed rules, from which it inherently follows that it has to be interpreted according to an agreed, fixed and predictable set of rules aimed at discovering the parameters of an original agreement."

[1184] Corten, above note 1108, p. 364.

fundamentally the relationship between the lawgiver (which in international law obviously refers to the parties to a treaty), that is, the legislative power, on the one hand, and the judge, that is, the judicial power, on the other. From the point of view of the nature of international law, the subjectivist school is also on the side of the voluntarists, that is, on the side of those who see the ultimate source of international law as the will or consent of the States and the principle *pacta sunt servanda* and the rule of law; in other words, on the side of the positivists.[1185] However, the issue is highly complex: Professor Lauterpacht argues that the relevance of the common intention of the parties refers to the nature and limits of the judicial function.[1186] This school of thought, which puts the will of the parties at its centre, denies any faculty of the judge beyond that consistent with reproducing the will of the legislator.[1187] Everything outside this will, particularly the original will, would mean attributing legislative faculties to the judge that, in line with positivism, is not permissible. It is true that respect for the intention of the parties contributes to legal certainty; however, the intention of the parties is not simply to perceive as it occurs in the cases where the will has been exteriorized, in spite of the fact that this exteriorized intention is not capable of covering all possible facts taking place in the future. In many cases, disputes arise because there was no common intention of the parties at all[1188], and this is due to many reasons; for instance, for diverse reasons it was decided to use an abstract expression or one expressed in general terms in order to be developed further by the jurisdictional organs. Owing to these intricacies, the jurist, in order to cope with positivism, has transformed the intention of the parties into a complex phenomenon which agglomerates a variety of aspects. It is sufficient to consider the difference between the will which has been exteriorized and the real will or the implied or tacit will.[1189]

2 Objective approach

The objective approach to treaty interpretation has often been treated in a fragmentary fashion. There is as yet no convincing definition of what it really means to be an

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[1185] Kolb, above note 598, p. 609.
[1186] Lauterpacht, above note 1150, p. 83.
[1187] Kolb, above note 598, p. 606.
[1188] Jennings, above note1103, p. 211.
[1189] Kolb, above note 598, pp. 606-623The intention of the parties or the will is a complex phenomenon , therefore not linear. The will is formed by a conglomeration of divers aspects. Prof Kolb mention different kinds of will, namely the real will, the exteriorized will, the updated will, , the tacit will, the reasonable or attributed will, the general will (the intention of the treaty as a whole), the hypothetical will, the unilateral, multilateral or universal will.

objectivist, other than simply expressing a way of departing from or neglecting the prominence of the subjective approach. Therefore, it seems that being objectivist means to interpret using methods that do not put the intention of the parties at their core or starting point, particularly not the intention of the parties at the moment when a treaty is concluded. Objectivism then arises in reaction to an absolute reliance on the "intention of the parties" approach to treaty interpretation. Very often, authors do not even mention the word "objectivism" or ally other techniques of interpretation to that of "the original intention of the parties", only making direct reference to specific techniques which focus on objective criteria of interpretation without even mentioning its objective character. This might be the case because the main opposition to pure subjectivism comes from different schools of thought which are also competing with each other. Particularly problematic is the allocation of the teleological school as an objective or subjective line of thought. The most important objective school is the so-called textual school, which approaches the text in a variety of forms: the clear sense, ordinary sense, natural sense, special sense, grammatical sense, are some of these forms. It sees the text as the objective criterion at the starting point of the interpretation. The teleological school is more complicated; some have considered it an autonomous group, yet it seems correct to state that it has a mixed nature[1190] even though some scholars class teleology as an objective criterion[1191] and others as a subjective one.[1192] The study of the context as a technique of interpretation also covers a large part of the literature and is one of the most highly acknowledged methods of interpretation, including in the VCLT. The international judiciary, particularly the ICJ as a model court and point of reference for other international adjudicatory bodies, shows reliance on a variety of objective criteria. It is important to bear in mind that the objective parameters span a variety of techniques, such as principles, maxims, presumptions and arguments of a substantive nature. As such they are not procedural rules, that is methods, but real substantive norms.

3 The eclectic approach of the VCLT

The VCLT uses an eclectic approach to treaty interpretation; however, it clearly favours objectivism over subjectivism. The distinction between objectivists and subjectivists acquired relevance in the codification of the customary rules of interpretation that were

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[1190] The teleological school is mainly considered as autonomous method. It has both objective and subjective elements. **See also** Corten, above note 1108, p. 358.
[1191] Corten, *ibid.*, p. 364.
[1192] Fernández de Casadevante y Romaní, above note1114, p. 34 Citing Remiro Brotóns and A. Favre

finally laid down in the VCLT.[1193] This dichotomy between subjective and objective elements in treaty interpretation is obviously marked by the importance that interpreters give to some prime factors in treaty interpretation which have both a subjective and an objective character. In the ILC commentary on the Draft Articles on Treaty Interpretation[1194], the Commission made a quite illuminating conclusion when it stated that jurists differ about the weight which should be placed on the "text of the treaty as an authentic expression of the intentions of the parties", in second place, "the intentions of the parties as a subjective element distinct from the text" and lastly the "declared or apparent objects and purposes of the treaty". A fast reading of the articles on treaty interpretation of the VCLT shows very clearly that the convention favours the objectivist approach – the consecration of objective elements such as the text, context, object and purpose. However, it provides evidence of a certain degree of subjectivism within the single general rule established directly in Articles 31.4 and 32 by mentioning the *travaux preparatoires.* Moreover, a careful reading of the articles on interpretation of the VCLT reveals indirectly evidence of subjectivism, through Article 31.3 (a) and (b)[1195] as well as the hierarchy established between Articles 31 and 32.

In general terms, it can be said that this eclectic approach is a relativisation of objectivism and subjectivism.[1196] Within certain limits, the idea that recourse to subjective and objective criteria can be made by the interpreter is reflected in the Vienna Convention in two ways. First, through the explicit comment that the rules contained in Article 31 cannot be "regarded as laying down a legal hierarchy" and second because the "application of the means of interpretation in the article would be a single combined operation".[1197] However, the limits of the equilibrium between objectivism and subjectivism are provided by the fact that the VCLT itself gave preference to objective criteria over subjective ones because the techniques enshrined in Article 31 refer to "the agreement between the parties at the time **when** or **after** it received authentic expression in the text".[1198] That means that, once a treaty has been concluded, it exists objectively, beyond the exclusive intention of the parties, which at a later time could even be

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[1193] Orakhelashvili, above note 1115, p. 301-309.
[1194] ILC Yearbook 1966 Vol. 2, above note 1100, p. 218, para. 2.
[1195] Corten, above note 1108, p. 357. It is argued, although also debatable, that Art 31.3 a) and b) has to be seen as regarding the States as responsible for adapting to the evolution of international relations without giving the interpreter the possibility to substitute through interpretation this form of evolution
[1196] *Ibid*., p. 352.
[1197] ILC Yearbook 1966 Vol. 2, above note 1100, p. 218, paras. 8-9.
[1198] *Ibid*., p. 218, para. 10.

detrimental to the real intention of the parties at the moment of its signature. Therefore we speak of the objectivisation of the interpretation, which consequently indicates the deficiencies of the intention of the parties.[1199] The ILC considered it justified to relegate the *travaux preparatoires* to a supplementary role and with it the important subjective aspect of interpretation.

For that reason, it is legitimate to conclude that no one can claim that its opposite is entirely non-existent, not only because the rules of interpretation established in the VCLT make reference to both objective and subjective elements but because none of them, if considered in absolute terms, can offer a completely satisfactory answer to the problems of indeterminacy of legal enunciates and rules for all cases equally. The idea put forward in the Vienna Convention with regard to the objective criteria, and the text in particular, is twofold. In the first place, the objective criteria constitute the starting-point in the elucidation on the significance of the norm, that is, the normative scope of the norm is determined by first looking into objective parameters, *inter alia*, the text, the context, the object and purpose. Secondly, these objective criteria serve also as a means to transport the intention of the parties to the normative scope of the rule, that is, the "objectively ascertainable intention of the parties as manifested in the treaty text".[1200] However, this intention reflected in the objective criteria cannot be strictly or narrowly considered as referring to the original or historical intention. Furthermore, the objective criteria go beyond the intention of the parties and reflect instead the necessities of society.

4 Favouring the objective criteria

The establishment in the VCLT of objective criteria as the starting-point of interpretation legitimates the creative function of the legal interpreter. Establishing objective criteria as the initial point of interpretation does not really mean relegating to some lower level all these other types of intentions which are well-known in legal sciences[1201], but to assure a place to existing conditions and the reality that confirms the justice of the case. This is precisely the great achievement of the Vienna Convention, that if, before a norm is clarified by establishing the intentions of the parties, the judge seems to be attached to the positive laws only, now, the development of the normative

[1199] Orakhelashvili, above note1115, p. 306.
[1200] *Ibid*., p. 308.
[1201] Kolb, above note 598, pp. 606-623.

ambit of the norms through objective criteria confers on the interpreter wider discretionary powers, thus legitimating him to play a more active role in the decision-making process. The VCLT has opened the door to evolutionary and dynamic interpretation, turning rules into living instruments, which can be adapted through a process of objective updating to single cases and to reality in general. The VCLT manifestly allowed for the consideration of objective criteria in the process of interpretation, opening up the possibility for the legal interpreter to extend his faculties in order to structure and organise the legal order through the interpretation of legal enunciates and norms. The articles on interpretation in the VCLT constitute, therefore, a source of legitimation regarding the creative function of the judicial power.

a Harmonizing function

The purpose of the eclectic approach is to harmonize the will of the parties and the necessities of the international society/community. The rules of treaty interpretation of the VCLT mean that the weight given to one or other technique depends on the real needs of orientation in order to elucidate the significance of rules, on the one hand, and on the result to be obtained, on the other, while taking account of the general aspects of international law which precondition the act of interpretation. Interpretation either reflects the will of the States or the objective necessities of the international society/community at the moment of interpretation. Moreover, interpretation may reflect a combination of both. The articles on treaty interpretation of the VCLT reflect the view of the ILC when it depicted interpretation as a combined operation. The rule, the single rule established in the VCLT, is composed of different elements which are not isolated but related to each other. It establishes no hierarchy among the several means recognised but only the basis whereby interpretation is founded on the principle of good faith.[1202] The VCLT allows the interpreter to perform the interpretation by bringing the will of the parties into line with the objective needs of the international society/community. This combination is the outcome of a particular understanding of international law, that is, a combination of the private or particular interests of the States with the public aspect of the international society that includes all the values and interests that are involved at the international, transnational and universal levels.

[1202] Fernández de Casadevante y Romaní, above note 1114, p. 115.

b freedom of discretion

In addition to all these questions of hierarchies within the means, methods or rules of interpretation what remains paramount and critical is the question of the delimitation of the interpreter's freedom to make recourse to one or other method of interpretation.[1203] The conclusion has already been reached that, by including even the predilection in the Vienna Convention for objective criteria for the purposes of interpretation, the issue of the freedom of interpretation has only been partially answered inasmuch as the Convention allows for a certain degree of discretionary power, on the basis of the permissibility of objective criteria as a means of interpretation. It has also been concluded that the degree of the interpreter's freedom is a balance between the subjective and objective criteria, on the one hand, and the need to describe the content of the norm or prescribe certain behaviour as legal, on the other. Furthermore, the freedom of interpretation depends on the existence of a common intention of the parties –it could be that there is no intention at all- or on the fact that the parties did not intend the same result, or that the parties gave different meaning to some particular clause, or that the parties used ambiguous expressions, leaving the divergence of views to be resolved subsequently. In short, in cases in which the common intention of the parties may be to avoid giving definitive meaning to rules, or the circumstances demand a certain kind of interpretation, it is the right and duty of tribunals to impart a meaning and consequently give legal effect to these rules. That means also that the process of interpretation has also the more general purpose of "ensuring the completeness of the international legal system".[1204]

We have already observed that the VCLT allows evolutionary interpretations. Article 31 (3) of the VCLT establishes dynamic elements of interpretation, such as the subsequent practice and the change in the normative environment of the treaty. The use of evolutionary interpretations has been endorsed by the ICJ in a very convincing manner in its Advisory Opinion in the Namibia case. There the ICJ refers to the subsequent development of international law and also states that "events subsequent to the adoption of the instruments in question should also be considered." Therefore: "Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions

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[1203] *Ibid*., p. 35.

[1204] Orakhelashvili, above note 1115, p. 307 The author developed this view on the basis of Lauterpacht's approach to international law as a complete legal system.

of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant-"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned-were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust"." (...) "Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."[1205] Professor Reisman puts it this way: "the question of what was agreed, externally or internally, is only part of the problem. Whatever was agreed inevitably changes. Life is Heracleitian. Nothing stands still."[1206]

c evolutionary interpretation

There are two kinds of evolutionary interpretation: as an endogenous process on the one hand, and as an exogenous process, on the other. The endogenous evolutionary interpretation is based on the subsequent practice and is recognized in Article 31(3)(b) of the VCLT; while the evolutionary interpretation of the exogenous type is based on the systematic evolution of the normative environment around a particular treaty, as acknowledged in Article 31(3)(c) of the VCLT. These two kinds of evolutionary interpretation differ from each other in terms of their provenance, that is, their source.[1207] Endogenous evolutionary interpretation is a consequence of the subsequent practice. Once something has been agreed, the parties start to adjust their behaviour "in accord with and in reliance on" that letter of the treaty. The Parties adapt the treaty to the new circumstances. In the particular case of continuing treaties, each of their members decides what is proper under the treaty that parties manifest by implementing the treaty. This implementation is part of international law and constitutes to a certain degree part of the expectations of all parties involved. These endogenous evolutionary interpretations are captured by the legal interpreter and are the result of a new, modified or adapted will of the parties which is called "subsequent practice".

[1205] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 16, paras. 51-53.

[1206] W Michael Reisman, Mahnoush H Arsanjani, Siegfried Wiessner, Gayl LWesterman, "International Law in Contemporary Perspective", 2004 (2nd edition), p. 1340.

[1207] Giovanni Distefano, "L'interprétation évolutive de la norme international." In Revue Général de Droit International Public 2011 Vol. 115 No. 2, p. 373.

cc Exogenous evolutionary interpretation

The exogenous evolutionary interpretation presupposes a systematic change in the normative environment, that is, a change in the legal environment outside the treaty. Exogenous interpretation means that the changes outside the treaty have such an impact on the rule being interpreted that the outcomes of interpretation cannot be conceived without taking account of such cogent developments. Exogenous interpretation also means that international rules do not operate *in vacuo iuris*, that is, in "clinical isolation". In spite of all the above, it is necessary to state clearly that the incorporation of extraneous rules in treaty interpretation in the search for the appropriate meaning will and already does give rise to accusations of judicial activism on the one hand and inflexibility and insularity on the other.[1208] However, it also admitted that Article 31(3)(c) is perhaps the only positive rule that facilitates the integration of all the various sources of international law.[1209] Furthermore, it has even been suggested that the principle of systematic integration has the status of a constitutional norm within the international legal system.[1210]

Interpretation does not serve as a static legal structure, on the contrary, interpretation is a process of adaptation and renewal of reality into the positive laws. It is not interpretation itself, but international law in the sense that it is its structure and legal concepts and terms in general that evolve. Evolution may even occur in a way that the parties neither anticipated nor, in some cases, even wished.[1211] For evolution is ultimately an objective process independent of the will. Nor does the selection of the method of interpretation respond to the logical character of one or other type of methodology, or its obligatory character, but requires a discretionary ambit for interpretation; in particular judicial interpretation has the function of completing the legal system by constantly updating the relationship between norms and facts to the point where it does not totally usurp the function of the legislature. That means that judicial interpretation is legislative only in so far as it disentangles the relationship between reality and the legal order and within the legal order itself. Interpretation has a bearing on the perceptiveness and sensitivity of the interpreter regarding both the

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[1208] French, above note 1174, p. 281.
[1209] *Ibid*., p. 301.
[1210] Campel McLachlan, "The principle of systematic integration and Article 31(3)(c) of the Vienna Convention. International and Comparative Law Quarterly Vol. 54 2005, p. 280.
[1211] Reisman *et al*., above note 1206, p. 1340.

subtleties of the language and the concepts as well as the subtleties or the evidences of the realities in terms of the outcomes of the process being carried out.[1212] The concept of a living instrument has been the courts' answer to the argument that they are using existing treaty articles to obtain innovative outcomes that reflect society's changing attitudes.[1213]

The rationale for interpreting international obligations by reference to their normative environment system is that, because all treaty provisions receive their force and validity from general international law, treaty rules are to be understood as part of a coherent and meaningful whole.[1214] This kind of interpretation is thus useful for international courts and tribunals when deciding disputes arising from within a particular treaty which need a connection to a broader field of international law.[1215] Thus, systematic integration means that. although an international court or tribunal may have jurisdiction over a particular instrument, this instrument, "the adjudicative body", must always interpret and apply this instrument"[1216] in relationship to other international laws. In spite of some fine distinction[1217] between the meaning of "applying international rules in force between the parties" and "taking such rules into account", what really matters when applying Article 31(3)(c) of the VCLT is that consideration of such rules serves and provides a basis for interpretation inasmuch as they give meaning to legal concepts, particularly those that are undetermined or general or evolutionary in their nature, *i.e.,* public morality.

The value of the applicable law or the law that is to be taken into account does not lie in its overriding character, such as the norms of *ius cogens*, but they enable a healthy balance and coherence to be established between the complete system of international law as a response to the need imposed by new circumstances. Systematic integration means to give effect to current needs, interests and values that may be underrepresented in international law, such as treaties not yet in force or customary rules *in statu nascenti*

[1212] Daillier & Pellet, above note 1120, p. 264. "Bien plus qu'à l'esprit de géometrie, l'interprétation des traités fait appel à l'esprit de finesse. "
[1213] Boyle & Chinkin, above note 727, p. 276.
[1214] Fragmentation of International Law (Koskenniemi), above note 550, p. 208.
[1215] Treves, above note 714, p..115..
[1216] Fragmentation of International Law (Koskenniemi), above note 550, p. 212.
[1217] Treves, above note 714, p. 116.

as well as of law. Systematic integration is about linking specialised parts of international law "to each other and to universal principles".[1218]

International jurisprudence has make use of this method of interpretation by harmonising, although not always with a great deal of success, several aspects.[1219] In particular, the WTO has made abundant use of external sources in interpreting WTO treaty provisions. Although it has been suggested that the use by the WTO adjudicative bodies of external sources could be considered a supplementary means of interpretation only by indicating that such external agreements are evidence of the intent of the parties[1220], it has also been counter-argued that the WTO has admitted through the use of extraneous rules WTO conflicting interpretations that otherwise would not have been so.[1221] Furthermore, the use of this method of interpretation does not contradict the wording of Article 3.2 of the WTO DSU. It is argued that constructing a meaning by reference to the normative environment of a rule as an interpretative act does not add or diminish rights and obligations, but that a meaning is received only as a result of the interpretative act.[1222]

In the EC-Biotech case, the Panel noted that the expression enshrined in Article 31(3)(c) of the VCLT "rules of international law", in accordance with the jurisprudence established in the US-Shrimp case[1223], means that general principles of international law are to be taken into account in the interpretation of WTO provisions.[1224] Furthermore, the Panel stated that:[1225]

> *"(...), where consideration of all other interpretative elements set out in Article 31 results in more than one permissible interpretation, a treaty interpreter following the instructions of article 31(3)(c) in good faith would in our view need to settle*

[1218] Fragmentation of International Law (Koskenniemi), above note 550, p. 239.
[1219] See for instance *Oil Platforms Case*, above note 1027, paras. 41-42; for a detailed analysis of international adjudication with respect to Art 31(3)(c) VCLT see Fragmentation (Koskenniemi), *ibid*.,pp. 218 *et seq.*
[1220] Fragmentation (Koskenniemi), *ibid.* p. 225 Citing Isabele van Damme "What Role is there for Regional International Law in the Interpretation of WTO Agreements" 2006.
[1221] See *Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products* Panel W/DS207/R, 3 May 2002 paras. 7.81-7.86 in Fragmentation (Koskenniemi), *ibid.*, p 226.
[1222] Fragmentation (Koskenniemi), *ibid.*, p. 239.
[1223] *US-Shrimp*, AB, above note, para. 158 "(...) our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law.
[1224] *European Communities-Measures Affecting the Approval and Marketing of Biotech Products* Panel WT/DS291/R, WT/DS292/R, WT/DS293/R 29 September 2006 para. 7.67.
[1225] *Ibid.*, para.7.69.

> *for the interpretation which is more in accord with other applicable rules of international law."*

Finally, the EC-Biotech Products Panel saw itself as fulfilling the function of an integrative body when they observed that:[1226]

> *"Requiring that a treaty be interpreted in the light of other rules of international law which bind the States parties to the treaty ensures or enhances the consistency of the rules of international law applicable to these States and thus contributes to avoiding conflicts between the relevant rules*

H The moment of interpretation

Interpretation can be both an act *ex nunc* and an act *ex tunc.* The manner in which systematic integration is observed has been accused of promoting "undesirable" judicial activism. Without making reference here to the issues of desirability, it is important at least to clarify a few points. First, it is said that even when a part of the doctrine believes that interpretation should precede application of the norms, both acts takes place *uno acto,* since it is recognised that the act of interpretation is implied in the application of the norm.[1227] Regarding the distinction between interpretation and modification, it is acknowledged that interpretation is intended to know, through a cognitive act, the laws. This implies that the rule is a static feature. However, modification also implies a transformation of the laws through updating and renewal of its content, unveiling a dynamic intrinsic nature of most legal concepts. Depending on which kind of hermeneutics is chosen, it is clear that, if we agree that interpretation has a creative dimension, imposing a dynamic nature on interpretation will inevitably lead to a modification of the rule in the sense of the development of its development.[1228] The distinction between revision and interpretation is also relevant. This differentiation is based on a purely subjective notion of interpretation, that is, an interpretation which is dominated by the intention of the parties. It is clear that revision takes places *ex nunc*, that is, it operates as from the present while interpretation, if it were to be considered a process of verification and clarification of an historical will, could be qualified as a process *ex tunc*. However, broad hermeneutics and evolutionary approaches also consider interpretation to be an *ex nunc* process. Thus, if it is agreed that interpretation

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[1226] *Ibid*., para. 7.70.
[1227] Kolb, above note 598, p. 26.
[1228] *Ibid*., p. 27 **See also** Fernández de Casadevante y Romaní, above note 1114, p. 36.

is an act which does not *ab initio* look into the will of the parties but has as it starting point an objective criterion, the ideas of revision or modification do not seem to be incompatible with the act of interpretation, since to revise the treaty does not exclusively mean a prohibitive act of adapting –which in any case would imply modification. Interpreting also means to adapt and comprehend the rules according to a reality that is reflected in the substantive nature of the rights or obligation.

CHAPTER 4 WTO DISPUTE SETTLEMENT

A WTO Dispute Settlement and WTO goals

The DS Mechanism is indispensable for achieving economic, non-economic and mixed-natured WTO goals. The WTO is an institution that makes considerable efforts to enhance the world's liberal market activity by providing it with a legal framework.[1229]Moreover, markets need this institutional framework in order to perform their activities properly.[1230] Within the WTO bibliography, the idea prevails that a rule-oriented system of human institutions is essential for carrying out beneficial economic transactions.[1231] However, the mere existence of such rules is not enough for their effective application and interpretation. An effective international trade legal order requires a dispute-settlement system that applies and interprets these rules fairly, so essential elements in a legal system such as predictability and stability can be achieved only if a system of rules is accompanied by a dispute settlement mechanism and its procedures.[1232] GATT 1947 knew only a few rules on dispute settlement procedures.[1233] With the advent of the WTO, dispute settlement progressed towards a more rule-oriented system that enabled the values contained in it to be realised, these values being economic, non-economic as well as of a mixed nature, thus contributing to the security, stability and predictability of the complex network of international trade legal rules.[1234] Furthermore, it is now common among the specialized bibliography to hold trade law institutions, and in particular, the dispute settlement mechanism, in the absence of an effective global legislative, responsible for resolving the difficult linkage issues involving trade and economic values on the one hand and non-trade and non-economic values on the other.[1235]The DSU established under the WTO includes[1236] the existence

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[1229] Friedl Weiss, "The Limits of the WTO: facing non-trade issues" in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.), 2006, p. 155 Suggesting that the central mission of the WTO is to create economic welfare through liberalization of trade.
[1230] John H Jackson, "Perceptions about the WTO trade institutions" World Trade Review 2002 Vol. 1 No. 1, p. 103.
[1231] Jackson, above note 779, p. 7.
[1232] *Ibid.*, p. 9.
[1233] Meinhard Hilf in "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.), 2005, p.507.
[1234] *Ibid.*, pp. 507, 517.
[1235] Frank J Garcia "The Global Market and Human Rights: Trading Away the Human Rights Principle" 1999 Brooklyn Journal of International Law Vol. 25 No. 1, pp. 62-63.

of a unified dispute settlement mechanism[1237], the right to establish a Panel[1238] and the possibility to appeal the Panel's decisions through the establishment of the Standing Appellate Body.[1239] A highly important modification was the so-called negative consensus[1240]and the establishment of enforcement mechanisms.[1241]

The Dispute Settlement Mechanism is intended to embrace Members only. However, there are admittedly a variety of private interests behind disputes.[1242] In the US-Section 301 Trade Act case, the Panel made a statement recognising that not only States but also other actors are legitimated to benefit from the rules of the international trade regime.[1243] According thereto:[1244]

> *"Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators"*

Moreover, according to this Panel:[1245]

1236 Hilf, above note 1233, pp. 509.
1237 Art. 1:1 DSU.
1238 Art. 6 DSU.
1239 Art. 17 DSU, Christian Walter "Article17 DSU" in *Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.), 2006 Vol. 2, p. 448 "Article17 (DSU) is therefore a necessary corollary of the "depolitization" and "judicialization" of the dispute settlement procedure."
1240 Art. 2:4 (footnote 1) DSU.
1241 Joost Pauwelyn, "Enforcement and Countermeasures in the WTO: rules are Rules- toward a More Collective Approach" The America Journal of International Law 2000 Vol. 94 No. 2, p. 347 stating that "Once WTO rules have been accepted as international legal obligations that affect individuals and merit collective enforcement for the public good, however, and once this new perception has come to be accepted and entrenched, it will be increasingly difficult to justify both he absence of certain traditional remedies, including reparation, and the lack of a more effective system to induce compliance with WTO rules" **See also** Giorgio Sacerdoti, "The dispute settlement system of the WTO in action: a perspective on the first ten years" in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.), 2006, p. 56 Suggesting that a reform of the WTO DS mechanism might include admitting claims by private parties and granting the judicial organs the power to award damages.
1242 Hilf, above note,1233, p. 507 **See also** Francisco Orrego Vicuña, "International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization", 2004, p. 92 *et seq*. Giving some examples about the emergence of the individual in the WTO dispute settlement system see the *Kodak-Fuji Film* case, *EC-Bananas* case, *US-Shrimp* case, the issue of *amicus curie* briefs.
1243 Peter-Tobias Stoll, "Art 3 DSU" in *Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement* R Wolfrum, P-T Stoll, K Kaiser (Eds.) 2006 Vol. 2 at § 9.
1244 *US-Section 301 Trade Act*, above note 760 para. 7.75.
1245 *Ibid*., para. 7.77.

> *"Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines."*

Although it is clear that in this case the judicial power legally recognized and extended the effect of trade rules to private economic subjects it is clear that, in so doing, it also implicitly recognized the legal value of trade rules as belonging to private subjects in addition to Members. Thus, an extensive interpretation of the Panel's *dicta* suggests that the Panel interpretation must take account of the effects of its rulings upon private persons.

B Jurisdiction

The Panel has only contentious jurisdiction. It is not empowered to issue advisory opinions. The *rationale personae* compulsory jurisdiction of the Panel includes all the Members of the WTO, that is, original Members as well as any State or separate custom territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in the WTO agreement.[1246] Non-members, that is, non-member States, private economic actors, such as multinational and transnational companies, as well as individuals are not entitled to bring cases, directly, to the Dispute Settlement Mechanism. The Rules and Procedures Governing the Settlement of Disputes (DSU) establish the jurisdiction *ratione temporis*. By virtue of Article 3(11) DSU, the adjudicative body has jurisdiction only over proceedings that were initiated after the entry into force in January 1995 of the WTO Agreement. *Ratione materiae*, the Panel's jurisdiction is limited to all the disputes arising under the "covered agreements." According to Article 1:1 DSU -jurisdiction of the Panels- the DSU rules apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in its Appendix 1[1247], the WTO Agreement and or any other covered agreement (the so-called "covered agreements"). In the Brazil-Desiccated Coconut case[1248]the AB said that the covered agreements include the WTO Agreement, Annexes 1 and 2, as well as any Plurilateral Agreement in Annex 4, where its committee of

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[1246] See Article XI and Article XII WTO Agreement.
[1247] Appendix 1, DSU The covered agreements are: the agreement establishing the WTO, the multilateral trade agreements (*e.g.*GATT, GATS, TRIPS, DSU), plurilateral trade agreements (see Appendix 1 (C) DSU).
[1248] *Brazil-Desiccated Coconut* above note, 827, p. 13.

signatories has taken a decision to apply the DSU. In addition, in some cases certain agreements contain modifications to the procedural rules of the DSU.[1249] These clauses have priority over DSU provisions because they are considered *lex specialis*.[1250] By virtue of Article 3.1 of the DSU, Members affirm their adherence to the principles for dispute management under Article XXII and Article. XXIII GATT 1947. Article XXII establishes the rules for consultations. Article XXIII establishes the conditions under which jurisdiction *ratione materiae* occurs. Accordingly, Members can bring a dispute to the compulsory jurisdiction of the WTO adjudicative mechanism if they consider that any benefit accruing to it directly or indirectly under the respective laws is being nullified or impaired or that the attainment of any objective of the relevant agreement has been impeded as result of a) a failure to meet Members' obligations under the relevant agreement, b) the application by another Member of any measure, whether or not it conflicts with provisions of the relevant agreement, and c) any other situation.[1251]

1 Applicable Law

One fundamental question arising from the study of the dispute settlement mechanism in the WTO is the "applicable law-treaty interpretation" paradigm.[1252] This question arises from the jurisdiction-applicable law controversy. Scholars are of the opinion that the question of jurisdiction is different from that of applicable law. Accordingly, jurisdiction refers to or determines whether or not the adjudicatory body can receive a case. By contrast, the question of applicable law refers to which rules this judicial body will apply in order to decide a dispute.[1253] The issue of the applicable law in WTO dispute statement is a highly controversial one. The most relevant question within what could be considered "jurisdiction to apply law" is to what extent other international law is applicable within WTO dispute settlement.[1254]Some models have been identified[1255],

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[1249] Article 4.12 of the Agreement on Subsidies and Countervailing Measures (1867 UNTS 14) reduces in some cases to the half the time-periods established in the DSU.
[1250] Hilf, above note 1233, p. 509 **See also** Article1.2 DSU.
[1251] Article XXIII (1) GATT 1947 **See also** Gabrielle Marceau "WTO Dispute Settlement System and Human Rights European Journal of International Law 2002 Vol. 13 No. 4, p. 767 **See also** Werner Zdouc "The Panel Process" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.), 2005 Vol. 1, p. 1236 **See also** Hestermayer, above note 958, p. 212 *et seq*. Explaining that, owing to the Panel's limited subject matter jurisdiction neither through violation complaints nor through non-violation complaints would a panel have jurisdiction to hear claims concerning the violation of human rights.
[1252] van Damme, above note 974, p. 169.
[1253] Hestermayer, above note 958, p. 213.
[1254] Joel Trachtman "Key Issues in WTO dispute settlement: The First Ten Years" R Yerxa and B Wilson (eds.), 2005, p. 135.

i.e.,. the self-contained regime which prevents the judiciary from applying non-WTO law. Another model regards the use of non-WTO law as limited to clarifying the meaning of a WTO provision, that is, the WTO adjudicatory bodies are allowed to "apply" non-WTO law in the process of interpretation. Another group of authors sees the possibility of applying non-WTO as being outside the process of interpretation, ,*i.e.,* rules of general international law concerning burden of proof. In particular, the works of Joost Pauwelyn[1256] and his theory on the conflicts of law in public international law has attracted the attention of most scholars. Such controversies concerning jurisdiction very often arise because it is not yet clear what the function, role and inherent powers of the adjudicatory bodies of the WTO are. For many scholars, the WTO judicial mechanism has marked a radical change in international law[1257], especially because, for some of them, the procedures established in the DSU involve a tremendous decision-making authority for the interpretation of international trade rules in the overall context of international law. For this part of the doctrine, the legitimacy of the adjudicatory bodies is derived not only from international agreement in the sense of a self-contained regime but also from the interests and values that lie outside the WTO, such as the principle of respect for recognized international human rights[1258] This idea has brought some authors who have a rather new view of the authority of the WTO to affirm that, even when the WTO judiciary cannot enforce human rights provisions, this "does not reduce the obligation of WTO adjudication bodies to interpret and apply WTO law in conformity with human rights law".[1259] The foregoing indicates that a distinction exists between "jurisdiction over claims" as referring to the subject matter of the dispute and "jurisdiction to apply laws"[1260] as referring to the sources of law applicable to the dispute. Even when it is considered that the jurisdiction of the WTO organs is limited[1261], there is agreement that the applicable law before them is not for Panels and

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[1255] Hestermayer, above note 958, p. 209. The author identifies five models: the self-contained regime model, the interpretation model, the conflict rules model –LorandBartels-, the conflict model –JoostPauwelyn-, and the *de lege ferenda* model.
[1256] See particularly Pauwelyn, above note 437.
[1257] *e.g.* van Damme, above note 974.
[1258]Ernst-Ulrich Petersmann "From "member-driven governance" to constitutionally limited "multi-level trade governance" in the WTO in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.), 2006, p.90,
[1259] Marceau, above note 1251, p. 764 **See also** Saskia Hörmann, in "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.), 2005, (1st edition), p. 653.
[1260] Trachtman, above note, 1254, pp. 134-135.
[1261] Marceau, above note 1251, p. 757.

the AB is able to apply different sources of law in solving cases within their "limited" jurisdiction.[1262]

The jurisdiction of the Panels is limited by their terms of reference. The terms of reference are a fundamental provision for including non-WTO rules in order to resolve a dispute. In the India – Patents case the Appellate Body said, relying on previous jurisprudence in the EC-Bananas case, that "[it] is the terms of reference governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred".[1263] Furthermore, the AB in the India-Patents case relying on a *dictum* in the Brazil Desiccated Coconut[1264] case restated that:

> *"A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective in that they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second,* ***they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute****"*

Some scholars are of the opinion that Article 7 DSU –terms of reference- does not allow international law to mention anything other than the rules of interpretation in addition to the covered agreements.[1265] However, another, considerable, section of scholars is of the view that non-standard terms of reference allow for the use of non-WTO law beyond rules of interpretation. The Panel in the Korea-Government Procurement case stated that:[1266]

> *"We note that DSU Article 7.1 requires that the relevant covered agreement be cited in the request for a panel and reflected in the terms of reference of a panel. That is not a bar to a broader analysis of the type we are following here, for the GPA would be the referenced covered agreement and, in our view, we are merely fully examining the issue of non-violation raised by the United States. We are merely doing it within the broader context of customary international law rather than limiting it to the traditional analysis that accords with the extended concept of pacta sunt servanda. The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do*

[1262] Bartels, above note 817, p. 503.
[1263] *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products* Appellate Body WT/DS50/AB/R 19 December 1997, p.31 *European Communities-Regime for the Importation, Sale and Distribution of Bananas* Appellate Body WT/DS27/AB/R, 9 September 1997, para.145.
[1264] *India-Patents (US)*, AB, *ibid*. p. 31; *Brazil Dessicated Coconut*, AB, above note 827, p. 22 Emphasis added.
[1265] Hestermayer, above note 958, p. 217.
[1266] *Korea-Government Procurement*, Panel above note 801para. 7.101.

> *not see any basis for arguing that the terms of reference are meant to exclude reference to the broader rules of customary international law in interpreting a claim properly before the Panel."*

To sum up, the wording of Article 7 of the DSU does not make any reference to the sources of law to which the panel has to allude in the process of interpretation. That means that the terms of reference do not prejudge the sources of law to which WTO Panels can refer when they are used to clarify and construe the existing provisions of the covered agreements.[1267] Thus, in spite of the fact of that the Dispute Settlement Mechanism has limited substantive jurisdiction[1268], it can draw on other sources of international law beyond the covered agreements.

The specialized bibliography still seems to be somewhat divided as to the meaning of 'application'. Some authors make a distinction between application and interpretation.[1269] This distinction is suggested because it is known that the WTO Panels make reference to non-WTO rules outside the process of interpretation. Although scholars regard this distinction with caution[1270], it is important to note that the term 'application of non-WTO law by the WTO judiciary in deciding a dispute' is used in three ways: first, as a means of interpreting and construing WTO provisions; second, rules that are applied as incidental norms[1271], that is, in cases when a decision has been reached not by interpreting WTO rules but by applying rules of public international law in incidental issues such as burden of proof or standing; third, application of non-WTO provisions as a defence of a WTO claim, that is, when an extraneous rule of international law is used to support a claim of a violation of a WTO rule. This last

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[1267] Karen Kaiser, "Art 7 DSU" in *Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.), 2006 Vol. 2, p. 355.

[1268] Marceau, above note 1251, p. 762 explaining that the WTO Panels and AB have a delegated and limited jurisdiction. **See also** Lorand Bartels, "The Appellate Body and Public International Law" in *WTO: Law and Process: Proceddings of the 2005 and 2006 Annual WTO Conferences* F Ortino and S Ripinsky (eds.), 2007, p. 54 Explains that different to a court with general jurisdiction like the ICJ, which according to Article36 (1) and (2) Statute has jurisdiction to all cases which the parties refers to it and all legal disputes involving international law, the WTO judiciary is limited to the covered agreements.

[1269] Lorand Bartels in "The Appellate Body and Public International Law in "WTO: Law and Process" Federico Ortino and Sergey Ripinsky, 2006, p. 54.

[1270] See above Part IV Chapter 3 Interpretation.

[1271] Incidental question within the WTO have taken place in determining rules on burden of proof *e.g. US-Wool Shirts and Blouses*, AB, above note 870 at p. 14; rules on standing *e.g. EC-Bananas*, AB, above note 1263 para. 133. The power to determine whether one has substantive jurisdiction is one element of the implied or inherent power of the panels (*compétence de la compétence*), **See also** Joost Pauwelyn, "The application of non-WTO rules of International law in WTO Dispute Settlement in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005 Vol. 1, p. 1410.

scenario encapsulates the question as to whether the pursuance of non-WTO rights and obligations could supersede WTO obligations, *i.e.,* could a human rights provision supersede WTO rules in a WTO dispute? Answers can be found at either end of the spectrum.[1272] However, without losing sight of the fundamental question as to whether human rights can be interpreted under the term "public morals" as a general exception in the WTO agreements, we are evidently interested only in the application or use of non-WTO rules in giving meaning to the expression. Doctrine as well as practice agrees that general international law can certainly be taken into consideration when WTO provisions are interpreted.[1273]

C Article 3.2 DSU

It is a firmly held conviction that the judicial organs of the WTO have the capacity to interpret, apply and enforce other treaties or customs in spite of their limited jurisdiction. Others affirm the contrary, even for cases where irreconcilable conflict exists between, for example a WTO provision and a human rights question. According to this last position, solving such conflicts means adding to, diminishing or amending a WTO treaty and this, in principle, is not a faculty of the judicial organs of the WTO.[1274] It is precisely owing to these two contrasting convictions that scholars try to prove that applying extraneous rules in interpreting a WTO provision does not add to, diminish or amend the treaty. According to Article 3.2 of the DSU, "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trade system." As central elements, security and predictability encapsulate not only the economic dimension but also the legal, political, social and all the other complex objectives established by the international trade system.[1275] In order to clarify the WTO rules for providing the system with security and predictability, Article 3.2 DSU further contains the rule for interpretation. Its second sentence states that dispute settlement "serve[s] to preserve the rights and obligations of the Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". This

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[1272] Denying the possibility Marceau, above note 1251, p. 813. Affirming the possibility Joost Pauweyln. "Cooperation in Dispute Settlement" in *Human Rights and International Trade* T Cottier, J Pauwelyn, E Bürgi (eds.) 2006, p. 205.
[1273] Bartels, above note 1268 p. 54.
[1274] Marceau, above note 1251, p. 813.
[1275] Stoll, above note1243 at § 8.

wording has led some scholars to affirm that Article 3.2 allows for the potential application of the whole international law (*in toto*). The third sentence of Article 3.2 has also received a great deal of attention from scholars. It states that "stipulations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreements". Article 19.2 DSU has a similar stipulation.[1276]

1 Differing perspectives

It is argued that the two similar sentences of Articles 3.2 and 19.2 of the DSU are both conflict rules.[1277] This argument has been raised on the premise that international law from all sources is potentially applicable as WTO law because nowhere else, particularly not in Articles 6.2 DSU and 7 DSU, is it stated that the applicable law is limited to that contained in the covered agreements.[1278] As a conflict rule, the prohibition to add to or diminish the third sentence of Article 3.2 of the DSU and the similar sentence in Article 19.2 of the DSU guarantees that the covered agreements prevail over any other rules inconsistent with them. It is acknowledged that this is not a common conflict rule since conflict rules are those found in the General Interpretative Note in Annex 1A of the DSU and Article XVI:3 of the WTO Agreement. However, the conflict rule of Articles 3.2 and 19.2 of the DSU operates in an indirect manner, its purpose being to ensure the primacy of the covered agreements.[1279] For example, in the EC-Hormones Case, the AB said that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the SPS Agreement.[1280] Note here the expression "does not override". This statement reflects the idea that it is possible to have a court with limited jurisdiction but not limited in the applicable law.[1281] The Argentina-Footwear case may be considered to have similar implications.[1282]

[1276] Article19.2 DSU "In accordance with paragraph 2 of Article 3, in their findings, the panel and the Appellate Body cannot add or diminish the rights and obligations provided in the covered agreements".
[1277] Bartels, above note 817, p. 506.
[1278] *Ibid*., p. 499.
[1279] *Ibid*., Bartels, above note p.5 07.
[1280] *EC-Hormones*, AB, above note 656, para. 125.
[1281] Bartels, above note 817, p.502 The author establishes an analogy between the DSU and ITLOS. In determining the disputes over which ITLOS has jurisdiction, that is those dispute concerning the interpretation and application of UNCLOS 1982- the Tribunal shall apply UNCLOS 1982 and other rules of international law not incompatible with it. Article288.1; Article293.1 UNCLOS 1982.
[1282] *Argentina- Footwear*, AB, above note 1038, para. 74 the AB said: "What is more, we fail to see how any panel could be expected to make an "objective assessment of the matter", as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims."

According to another commentator[1283],Article 3.2 DSU cannot be automatically considered as a conflicting rule favouring the WTO but it act as a limitation on the function of the judicial power, which is prevented from making too broad interpretations that could be considered a revision of the treaty. Article 3.2 DSU addresses the judiciary and not the legislative. Thus, Article 3.2 refers to the interpretative function of the Panel and not to the applicable law before the panel. For Pauwelyn, the prohibition not to "add or diminish the rights or obligations provided in the covered agreements" means that the creation of new rights and obligations is prohibited. This reading of Article 3.2 DSU has the purpose of demarcating interpretation, its function is to enhance the applicability of extraneous rules in order to defend a claim. According to this author, Panels are allowed to apply non-WTO rules binding between the parties when examining the validity of a WTO claim. That is, in defence of a WTO claim, Panels would merely "give effect to the law made and agreed upon by the disputing parties themselves" without transgressing their *ratione materiae* jurisdiction.

Notwithstanding the above, some proponents of the broad constitutional functions of the WTO regard the organisation and its dispute settlement system, particularly Article 3.2 of the DSU, as containing a mandate for maintaining coherence between WTO law on the one hand and national and international trade governance on the other, as parts of a broader international legal system. Although it is acknowledged that regarding the WTO as a constitutional body in which entrepreneurs give concrete manifestation to their right to freely conduct economic transactions, demands a different, more advanced constitutional structure of the world community/society, such a vision involves a feature that is already a fact in the existing structure of international law, namely, the function of the judiciary in unifying the fragmentary system of rules in the sense of harmonization. Petersmann's doctrine implies that in some cases, if international law were to be seen as deriving its legitimacy from respect for universal human rights, universal accepted principles must be encompassed into the process of interpretation and application of the covered agreements. Because this doctrine requires further development of positive rules, application here could be limited to interpretation. The fact that in some cases[1284] the AB referred to international agreements concluded

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[1283] Pauwelyn, above note 1271, p. 1421.
[1284] *US-Shrimp*, AB, above note 606, para. 132.

outside the WTO in order to interpret WTO rights and obligations[1285] as an accepted method by the Members, proves the validity of this possibility. The further fact that the WTO is not a self-contained regime, on the one hand, and that general international law is applicable in order to establish legal security and predictability, on the other, makes judicial clarification a necessary means of achieving uniformity within the system of international trade rules and of contributing to complete the lacunae in a system of international law by establishing the external limits of trade rules. Slightly differently, Article 3.2 of the DSU carries a mandate for systematic coherence that regards international trade governance not only as internally harmonizing WTO rules, but as part of a broader international legal system. Moreover, it is also crucial to be clear that the general limits of such a conflict rule are established by hierarchical superior norms, particularly those of a *ius cogens* nature.

2 Permissibility of extraneous rules

Article 3.2 DSU allows the use of extraneous rules for interpreting WTO rules. What remains important, notwithstanding theoretical debates about the function of Article 3.2 of the DSU, is that the judiciary is competent to balance and reconcile the rights and obligations of the Member States under the covered agreements with obligations of Members under certain international legal standards in the process of interpretation to the extent that this interpretation does not render WTO provisions pointless. This idea is defensible because, after admitting that Article 3.2 of the DSU brings this mandate to systematic coherence, the first factor to be borne in mind is that, when applying foreign rules to interpret WTO provisions, we are not directly applying an extraneous rule to the facts in the sense of subsumption, but we are applying extraneous rules to the rules that are going to be applied to the facts. Article 3.2 of the DSU is merely a warning not to usurp the legislative function of the political organs of the WTO as well as a warning not to render WTO provisions or interpret its rules as arrive at absurd outcomes contrary to the objectives of the organisation. If extraneous rules serve to accomplish the objectives established by Members, then it follows that they can support the establishment of the external limits of the WTO rules. As has been seen, interpretation is a creative process that consists in adapting reality into the framework of given rules

[1285] Petersmann, above note 1258, p. 105.

and fills them with content. The limits of the use of extraneous rules have been confirmed by the AB. In the US-Certain EC Products case[1286]the AB said that:

> *"It is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the WTO Agreement. Only WTO Members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is to "preserve the rights and obligations of Members under the covered agreements and clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."*

Furthermore, in the Korea-Government Procurement case[1287] the Panel observed that,

> *"We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law.753. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO."*

Which is the place of foreign law in the chain of legal reasoning? In the process of interpretation, the Dispute Settlement organs have used other international laws in different ways without intending to add or diminish treaty rules. International law has also not only served to fill gaps[1288] or as evidence of the compatibility of Members' WTO obligations with other international commitments[1289] but also in the chain of their legal reasoning. This latter use of other international law refers to the courts' methodology in answering a legal question. It is an exercise of logic and means that in order to answer one question a previous question which may involve other rules must be answered, *i.e.,* if a case involved the use of a definition provided by general international law, such as sustainable development. Although this term could to some

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[1286]*United States- Import Measures on Certain Products from the European Communities* Appellate Body WT/DS165/AB/R 11 December 2000 para. 92.
[1287] *Korea-Government Procurement,* above note 801, para. 7.96.
[1288] *Ibid*.,para. 7.101.
[1289] in the *US-Shrimp* Case the AB used the Inter-American Convention for the Protection and Conservation of Sea Turtles as evidence in order to render a measures as unjustifiably discriminatory. *US-Shrimp*, AB, above note para. 171.

extent be confusing, because it might imply some overlap between application and interpretation[1290], to use non-WTO rules while arriving at a result in the chain of legal reasoning means only the application of this "foreign" law as far as it applies to the rule and not to the facts. In the context of legal reasoning, the AB has said that nothing in the DSU limits the faculty of the Panel to use arguments submitted by the parties or to develop its own legal reasoning in order to assist its findings. In the EC-Hormones case[1291] the AB said that:

> *"Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties –or to develop its own legal reasoning- to support its own findings and conclusions on the matter, as mandated by Article 11 of the DSU, if in its reasoning it had to restrict itself solely to arguments presented by the parties to the dispute"*

The adjudicatory bodies use non-WTO rules in the process of interpretation in order to establish the substantive external limits of a WTO provision. In doing so, the Panel has used non-WTO law in cases of conflicts or over-determination[1292], gaps or under-determinations,[1293] and in terms of equity also.[1294] In this sense, it can be affirmed that the judicial organs of the WTO have applied definitions, principles or rules of international law which are not included in any the covered agreements.[1295] It is important to note that a distinction must be made between general international law and other non-WTO law.[1296] General international law is binding on all States. Because of that, and as long as States do not contract out WTO rules –or they are not inconsistent with WTO rules- there is unanimous agreement that they can be used in WTO disputes. Typical areas of general international law are the law of treaties, rules on state responsibility and the judicial settlement of disputes, as well as the entire body composed of treaty and customary law. In addition, general principles of law have proved to have a certain degree of importance in the further development of WTO

[1290] Bartels, above note 817, p. 512.
[1291] *EC-Hormones*, AB, above note 656, p. 156.
[1292] *Brazil-Desiccated Coconut*, AB, above note 827, p. 12.
[1293]The use of other international laws in order to fill gaps, refers essentially to its use for enabling the practice and procedure of the dispute settlement system.
[1294]For example the application of the principle of good faith as codified in the Article 26 of the Vienna Convention on the Law of Treaties, *e.g. US-Shrimp*, above note, AB, para. 122.
[1295] Bartels, above note 817, pp. 512-518.
[1296] Pauwelyn, above note 1271, p. 1413.

provisions.[1297] In the WTO these rules are to be regarded as a tool or adjuvants in order to facilitate proceedings which frame the substantive external limits of a provision or facilitate the course of the procedure. Slightly differently, such rules refer to the "life-cycle"[1298], that is, the creation, application, interpretation and enforcement of WTO provisions. Panels will not be considered to have exceeded their jurisdiction or to have added or diminished through such practices, provided they do not render WTO provisions pointless or ineffective.

a Examples

In allowing *amicus curiae* briefs, for instance, the AB entered a highly contentious area, since allowing such briefs ensured that civil society had a place within the WTO. As seen above, this is a recognition of the individual interests of private entities and of the fact that WTO rules are also to be read in accordance with such interests. Another frequently discussed example is that of the AB, without the necessary authorization, completing legal analysis of matters not addressed by the panel in its report and also cases in which none of the parties presented an appeal. On the issue of the lack of remand authority, Members appear to accept that, if it is advantageous for the parties, the AB should complete the legal analysis.[1299] That the Member States allow such activities on the part of the judiciary indicates that unconventional forms of law-making exist, that law is elaborated through judicial power. Thus, given that jurisdiction in the WTO seems to be a more restricted term than applicable law, what is important here is that, in order to achieve a result, the judicial organs of the WTO will make use of other sources in order to clarify, through interpretation, the term of the covered agreement. It is a fact that, in order to arrive to an outcome, the adjudicators have made recourse to other sources of international law without clearly "applying" it. In the broader sense, they have "used" this law first in order to facilitate proceedings but without touching on issues of primary substantive claims and, second, in order to interpret and clarify the terms of the covered agreements. Accordingly the question arises as to when the Panels and the AB are legitimated to involve in judicial activism in order to solve a dispute

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[1297] See Andrew D Mitchel "Legal principles in WTO Disputes" 2008; Isabelle van Damme "Treaty Interpretation by the WTO Appellate Body" 2009, van Damme, above note 974.; Götz J Göttsche "Die Anwendung von Rechtsprinzipien in der Spruchpraxis der WTO-Rechtsmittelinstanz" 2005; Palmenter & Mavroidis, above note 816.
[1298] Pauwelyn, above note 1271, p. 1414.
[1299] Both examples are dealt with in greater depth in Weiss, above note 1229 pp. 163-169.

without exceeding their mandates and the mandate of the organization itself. This question deals with the boundaries of WTO judicial governance.

3 Merger between treaty law and judicial-law-making

With the evolution from GATT 1947 into the WTO, international trade relations went from being a power-oriented, diplomatic system of rules to a rule-oriented system with an impartial dispute settlement system. This important change reflects an ideal of fairness in international economic relations, inasmuch as it, at least formally, disregards the economic power or influence of the litigating parties.[1300] The WTO provides for a system of dispute settlement that is obligatory for all its Members. Furthermore, its decisions are final and binding. In contrast to Article IX of the Marrakech Agreement, the Dispute Settlement Understanding, in practical terms, while resolving individual disputes, provides the basis for the development of trade law through judicial decision-making. This process of judicial decision-making has a direct impact on international law in general because it constitutes a forum for the development of procedural and substantive concepts of law through the application and interpretation of WTO legal rules. Where WTO law meets other branches of law, especially through the application and interpretation of general exceptions, through teleological or evolutionary interpretations, or through autonomous decisions, the dispute settlement process is more willing to participate materially in the establishment of legal norms.[1301] Although the WTO is a treaty-based regime that also establishes non-judicial forms of decision-making, the WTO judicial organs, through the numerous cases it hears, the diversity of issues with which they have dealt, the delivery of high-quality reasoned judicial decisions, and their integrative judicial function have proved to be very efficient in articulating and further elaborating the law. This process of application and interpretation of the law by the judiciary has been recognized as a merger of treaty law and judicial decision-making.[1302] This merger however, has led scholars to affirm that the WTO adjudicatory bodies have exceeded their authority through judicial law making, suggesting that judicial law-making is undesirable. However, it is clear that as long as the judicial organs remain active within the framework of interpretation, filling some lacunae, and their creative activity remains limited to giving coherence to the

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[1300] James Cameron and Kevin R Gray, "Principles of international law in the WTO Dispute Settlement Body" International and Comparative Law Quarterly 2001 Vol. 50. No. 2, p. 249.
[1301] McRae, above note 792, p. 30.
[1302] *Ibid.*, p. 40.

system inasmuch as they watch over the balance between Members' rights and obligations, such activity shall not be considered as undesirable or unduly active. On the contrary, the judiciary's function as a manifestation of power is to provide legal answers, even if they are limited to the rights or obligations falling within their jurisdiction from external areas. One commentator suggests that what on the one hand may be labelled activism, could be more aptly called "effectiveness"[1303] on the other.

D Structure

1 Dispute Settlemen Body

The judicial organs of the WTO are subordinated to the Dispute Settlement Body (DSB).The main task of the Dispute Settlement Body is the administration of the DSU and, to the extent permissible, to the administration of the consultations and dispute settlement procedures of the covered agreements. To that end, the DSB is endowed with the authority to establish panels and to adopt the reports of the panels and the AB.[1304] The DSB has also the function of monitoring the implementation of rulings and recommendations, and authorizing the suspension of concessions and other obligations under the covered agreements. According to Article 2.4 of the DSU, the decisions of the DSB are reached by consensus. In contrast to the GATT system, the DSB adopts its decision through negative consensus. Footnote 1 to Article 2.4 of the DSU states that "The DSB shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting of the DSB when the decision is taken, formally objects to the proposed decision. "Although it is always possible that the legislative organs overturn a report by using an authoritative interpretation as established in Article IX:2 of the Marrakesh Agreement[1305], the reversal of the GATT consensus rule into a WTO negative consensus rule imparts an automatic natures to the adoption of reports. The main effect of this automatic nature is that it eliminates to a

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[1303] Robert Howse and Susan Esserman, "The Appellate Body, the WTO dispute settlement system, and the politics of multilateralism" in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.), 2006, p. 62.
[1304] Art. 2 DSU.
[1305] Mitsuo Matsushita, "Some Thoughts on the Appellate Body" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005 Vol. 1, pp. 1402-1403.

considerable degree the political pressure put on the judges.[1306] It means a step away from political power.[1307]

2 Appellate Body

The DSU give the parties to the dispute the right to appeal. The Standing Appellate Body is established in Article 17 of the DSU. Article 17 of the DSU is complemented by the Working Procedures and those are complemented by the Rules of Conduct. It has seven members who are elected for a four-year term by the DSB and can be re-elected for a further four years. According to Article 17 (1) of the DSU, the Appellate Body shall hear appeals from Panel cases. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the Panel.[1308] Nevertheless, the AB also formally lacks authority to act in certain cases, *i.e.,* in the legal text there is no clear authorization to remand a case.[1309] By virtue of Article 17.6 DSU "appeals shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". On the one hand, this could mean that the jurisdiction of the AB is limited to issues of law. On the other hand, the impossibility of appealing issues of fact does not necessarily mean that the AB cannot deal with "any factual issue".[1310] The distinction between legal and factual issues can be further elaborated by considering Article 11 of the DSU (Function of the Panel). The Panel has to make an objective assessment of the matter before it. This includes both legal and factual issues Therefore, when the AB examines an infringement of Article 11 owing to a failure to make an objective assessment of the facts, it will be dealing with a characterization of facts that could be regarded as a question of law. Nevertheless, there have been cases in which the AB has reviewed the manner in which the Panel considered factual evidence and applied it to the WTO Agreement involved.[1311] Hence, in practice, the AB has handled questions of mixed facts and law.[1312] Furthermore, the AB has completed a legal analysis of matters not

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[1306] Howse & Esserman, above note 1303, p. 63.
[1307] Sacerdoti, above note 1241, p. 36.
[1308] Art.17.13 DSU.
[1309] Matsushita, above note, 1305 p. 1395 "if an issue of remand comes up in a case in which the Panel's fact finding was no sufficient, the Appellate Body could reverse the ruling of the Panel based on insufficient fact-finding and send its report to the DSB with a comment that the reversal is due to the lack of sufficient fact-finding rather than a deficiency in legal reasoning." The author provides for other solutions.
[1310] *Ibid*., p. 1391.
[1311] *e.g. EC-Hormones*, AB, above note 656.
[1312] Matsushita, above note 1305, p. 1392.

addressed by the panel in its and also matters not appealed by any of the parties.[1313] Here it is important to stress that, according to the jurisprudence developed by the AB itself in the EC-Hormones case:[1314]

> *"The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question. Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is also a legal question which, if properly raised on appeal, would fall within the scope of appellate review."*

E Judicialization

As in the case of the DSB, the establishment of a Standing Appellate Body is a step towards the legalisation of trade disputes because it substitutes economic and political expediency with the judicial operationalisation of rules.[1315] Despite the fact that in the WTO there is a certain amount of room for diplomacy and non-legal arguments[1316], the WTO system of dispute settlement confirms that the international trade system has become judicialised. With the judicialisation of the international trade system, the realistic international relations view that considers international law as a legal order dominated by domestic national interests based on the sovereignty of the States and hence based on political power starts to erode. The existence of an efficient judiciary means that the place of political power decreases insofar as the performance of treaty rights and obligations is subject to the scrutiny of the judicial power. That the realization of the common objectives of Members may be supervised through a highly judicialised institution implies that there is a real and effective transfer of decision-making faculties from the political to the adjudicative organs as far they determine the way in which rights and obligations are to encompass its very objectives, particularly through the faculty that this judiciary has not adhered to the interpretations and suggestions given by the parties, but has developed its own autonomous views. The belief is still held that the WTO judiciary, particularly the AB, is in the process of formation and that therefore, the system still falls somewhere between a judicial and a political process. Also, the fact that its jurisdiction is limited implies that its courts, and

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[1313] Weiss, above note 1229, p.166.
[1314] *EC-Hormones*, AB, above note para. 132.
[1315] Sacerdoti, above note 1241, p. 36.
[1316] Cameron & Gray, above note 1300, p. 249.

with it its powers, differ from those of traditional domestic courts or courts of a general jurisdiction such as the ICJ.[1317] However, the judicial nature of the content of WTO rights and obligations which is already widely accept by Members suggests that the judicial organs of the WTO are a truly independent organ for the resolution of disputes among trading nations accepted as such by Members. The jurisprudence of the AB in notable cases, such as the US-Shrimp or EC-Hormones cases, shows the way in which the AB has been able to balance political values in a judicial manner (biodiversity and trade; public health and trade). This possibility of balancing values and interests through a judiciary helps to achieve security and minimize arbitrariness.

The WTO judiciary contributes to the realization of the objectives of the organization. As seen above, the object of the WTO is to regulate international trade. In its efforts to do so, it has left space for other policy objectives.[1318] In other words, the WTO institutional framework is not exclusively committed to economic liberalism, but rather includes volatile political issues of a neoliberal economic nature, as reflected in the Preamble of the Marrakesh Agreement, *i.e.,* rising standards of living, full employment. In contrast to GATT 1947, the WTO now explicitly recognizes objectives such as sustainable development, which is a concept based on the interaction between economic development, environmental protection and human rights. The WTO favours the balancing of economic values of liberalism with other non-economic and mixed values. This kind of governance is mainly associated with the process of constitutionalism[1319] of international law, in which the function of the judicial power is to give coherence to the fragmentary system of international law, for instance when balancing market access rights with the general exceptions of Article XX GATT. As we have seen, constitutionalism within the WTO[1320]is regarded as a more or less complete system with enforcement mechanisms endowed with the function of balancing competing values – economic, mixed or non-economic, between and among themselves-[1321], and

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[1317] Matsushita, above note 1305, p. 1390. For a contrasting view which also takes into account an analysis of similarities and divergences of other international courts **See also** McRae, above note 792, pp. 27-41. McRae is of the view that in all essential respects the role of the judicial organs of the WTO is similar to that of the ICJ or ITLOS. In spite of some procedural differences, the task of both the Panel and the Appellate Body is essentially of a judicial nature.

[1318] Friedl Weiss, "The Limits of the WTO: facing non-trade issues" in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.) 2006,p.161, Weiss, above note 1229, p. 161.

[1319] *Ibid*., p. 162.

[1320] See above Part II Chapter 6 Consitutionalization.

[1321]Meinhard Hilf and Stefan Oeter, in "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.), 2005, (1st edition), p. 710 "Das(…) Szenario einer in den Ambitionen beschränkten

coordinating international law in a vertical direction. Moreover, constitutionalism within the WTO is also regarded as a sort of global regulator of economic, social, environmental and developmental concerns.[1322] In other words, constitutionalism co-ordinates, both horizontally and vertically, concentric international, transnational and universal interests and values. It is precisely this holistic view of international law which suggests that, taking into account modern theories of international law where its legitimacy does not derive only from exclusive inter-state conventional law and consensus, but from the realization of transnational interests, public –environment- and private –entrepreneurs' - interests or from respect for the individual and his/her universal rights –human rights understood in their moral sense rather than in their legal sense-, the WTO judiciary has the function and the power to determine autonomously the limits of trade rules, even if such limits belong to the deontological aspect of the law.

The judicial bodies, together with the political bodies, strengthen the level of security offered by the WTO system. It is true that the WTO can still be depicted as a member-driven organization. Representatives of the Member States' executives are responsible for decision-making, that is, through the Ministerial Conference, the General Council, and great variety of groups and committees sub-ordinate to them, that is, from the point of view of the legislative and the executive.[1323] However, the judicial bodies help to constantly structure rights and obligation. They are an essential mechanism for the effective functioning of the organization insofar as they are responsible for maintaining a balance between the rights and obligations of the Members as well as for providing the system with stability and predictability. Consequently, the WTO judiciary, in the sense of power control, grants and strengthens the WTO system through one of the main

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Minimalordnung" des Welthandels ist und bleibt daher das wohl wahrscheinliche Leitbild auch der künftigen WTO." (…) p.711 "Das WTO ist insoweit paradigmatischer Ausdruck eines modernes Völkerrecht, das weit mehr leistet als einen (vorübergehenden) Ausgleich staatlicher Macht- und Verbandinteresse. Es organisiert ein Gemeinchaftsinteresse der Völkergemeinschaft, ein globales "Gemeinwohl" das mit der Herstellung einer möglichst stabilen (und ungestörten) Weltwirtschaft, deren Produktivkräfte sich tendenziell unabhängig von staatlichen Eingreifen entfalten können sollen, die Partialinteressen der beteiligten Staaten weit übersteigt. "

[1322] Ernst-Ulrich Petersmann, "Welthandelsrecht als Freiheit- und Verfassungsordnung" Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2005 Vol. 65 No. 3, p. 554 "Im Unterschied zum "Freund-Feind-Denken nationalistischer Machtpolitik und der auf "souveräne Gleichheit" (Art.2) aller 191 Mitgliedstaaten ausgerichteten VN-Charte ist das WTO Recht durch transnationale Freiheits-, Gleichheits- und Eigentumsgarantien zugunsten privater Markteilnehmer und eine für alle WTO-Mitgliedstaaten obligatorische Jurisdiktion der WTO Streitbeilegungsorgane für die friedliche Streitbeilegung, Auslegung und Durchsetzung des WTO gekennzeichnet."

[1323] Hilf & Oeter, above note 1321, p. 710.

characteristics of law itself: security. This balance is particularly important because, owing to global integration and normative interests in securing global stability, it is a fact that the objectives followed by the WTO are not exclusively directed to maximising economic advantages but to another set of broader objectives, particularly if they are pursued along with exceptions.

Part V Human Rights, Trade and "Public Morals"

CHAPTER 1 THE RELATIONSHIP BETWEEN HUMAN RIGHTS, TRADE AND PUBLIC MORALS

A Human Rights, Trade and Morals

The linkage between human rights, trade and morality has a long history. Vitoria, for example, expressed the view that foreigners may trade, provided that they do not hurt citizens.[1324] In the 19th century, there was also a recognition of the relationship between human respectability and trade, *i.e.* the US ban of manufactured goods by convict labour established in Section 51 of the Tariff Act of 1890.[1325] Another major example of this relationship is the prohibition of the slave trade established in the context of the Vienna Congress at the beginning of the 19th century.[1326] Currently, the issue of human rights, trade, and morality, is founded in the terms of the GATT 1947, including the failed Havana Charter for an International Trade Organization.[1327] The ITO Charter referred to fairness in trade and labour. However, the ITO project collapsed, leaving the GATT 1947 as the only legal framework available in which to conduct international trade. The GATT 1947 did not have any human rights qualification for accession, nor did it include any direct reference to human rights. Some decades later, at the end of the 20th century, the General Agreement on Tariffs and Trade was replaced by the WTO. This institutional framework remains, with the exception of the reference in the preamble to the objective of rising standards of living, as silent as GATT 1947 itself regarding human rights language. Nevertheless, it is said that Article 55 of the UN

[1324] Susan Ariel Aaronson and Jamie M Zimmerman, "Trade Imbalance: The Struggle to Weight Human Rights Concerns in Trade Policy Making" 2008, pp. 5-6.
[1325] *Ibid*. pp. 5-6.
[1326] See above Part I Chapter 1 History of Human Rights.
[1327] ITO Charter, above note 848.

Charter is the legal basis on the basis of which one should establish the legal relationship between trade and human rights.[1328] Indeed the language of Article 55(a) and the Preamble of the WTO is almost identical. Today, human rights discourse increasingly takes place at the heart of the WTO.[1329] In particular, there is an increasing claim that the WTO judiciary should regard the international trade regime as the bearer of some kind of international responsibility, in a broader sense, towards the fulfilment and realization of human rights, and therefore that WTO provisions should be interpreted in conformity with human rights.

1 Construing International Law under a Human Rights perspective

Since the establishment of the WTO, debates about the relationship between human rights, trade and morality, have entered a new dimension. From the legal point of view, this relationship has encroached upon the traditional domains of economic sanctions for the sake of the realization of human rights. Nowadays, the debates are centred on the thesis that trade rules affect in a negative sense or else diminish the accomplishment and fulfilment of human rights. Contemporary scholars have thus begun to consider economic development, including international trade, from a human rights perspective. Therefore, the fundamental objective of human rights advocates is that WTO provisions are interpreted in conformity with international human rights standards. The main argument in this controversy is that, as human rights are undoubtedly primary rights, and possess a markedly deontological character, for this reason they should take precedence over inferior trade norms, which are more consequential rules.[1330] Within the specialized bibliography, there is the belief that outcomes that are considered as having recourse to a deontological framework, such as human rights, tend to involve elements that are more compatible with imperative or essential forms of justice in general, as opposed to economic justice. Besides, human rights defenders consider the international trade regime to be intrusive into the domain of human rights.[1331] Human

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[1328] Lorand Bartels, "Trade and Human Rights" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 9, p. 979 According to this author Art 55 a) UN Charter was the basis for the establishing a working party to draft the Charter for an International Trade Organization while Art 55 c) was used for erecting for the human rights regime.

[1329] The realization of Economic, Social and Cultural Rights: Globalization and its impact on the full employment of human rights United Nations, Economic and Social Council 15 June 2000, E/CN.4/Sub.2/2000/13, para. 14.

[1330] Thomas Cottier, "Trade and Human Rights: A relationship to discover" Journal of International Economic Law. 2002 Vol. 5 No. 1, p. 111.

[1331] The realization of Economic, Social and Cultural Rights: Globalization and its impact on the full employment of human rights, above note 1329, paras. 13-19.

rights experts have gone so far as to argue that the assumptions on which WTO rules are based are prejudiced and even grossly unfair[1332]; that is, those assumptions are based on selfish economic theory, *i.e.* self-interest. In summary, human rights advocates approach the WTO system as a legal framework for international trade whose rules can be construed in such a manner that the negative consequences of trade on human rights can be removed by institutional mechanisms.[1333] On the other hand, traders see the advancement of human rights within the international trade regime established through the WTO as at best merely something to hope for, but in reality illusory; in other words, they consider it a chimera.

2 Lack of positive interaction

Whatever the magnitude of human rights and trade as autonomous fields of action, it is beyond doubt that at a certain level both branches interact.[1334] The complexity of this connection lies in the fact that human rights are "positivized" ideals of justice, equity, freedom, and especially human dignity, while the values and principles upon which trade is founded differ diametrically from those of human rights. The main objective of human rights is the realization of human aspirations, especially in terms of the development of human personality within a worthy, adequate, and decent environment; that is, to live in dignity. In other words, positive human rights are a manifestation of the justice demanded by human dignity.[1335] However, the main task of trade regulation is economic efficiency. Such economic efficiency, as opposed to human rights, is, according to the main utilitarian theories, not based on human dignity at all, but rather on self-interest, the obtaining and securing of wealth.[1336] Economic morality regards the human being as a *homo ecomonicus*. On the one hand, as with many fields of public international law, both areas evolved quite independently, which suggests that, normatively, different systems do not allow for the realization of objectives alien to their own autonomous scope of regulation; that is, is economic morality adequate to assess non-economic values, or values of a mixed nature? On the other hand, globalization, together with the changes in the legal structure of international law, is bringing together, faster than ever, human rights concerns into traditional independent

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[1332] *Ibid*., para. 14.
[1333] James Harrison, "The Human Rights Impact of the World Trade Organisation", 2007, p. 38.
[1334] The realization of Economic, Social and Cultural Rights: Globalization and its impact on the full employment of human rights, above note 1329, paras. 1-14.
[1335] See above Part I Chapter 3 On human dignity.
[1336] Garcia, above note 1235, p. 63.

branches of law. International law calls for harmonisation, particularly in the sphere of human rights. One of the main difficulties of the relationship between trade, human rights, and morality, is that due to their independent origins and lack of conciliatory legal positive treatment, there is not yet any comprehensive general **legal** theory about their relationship at a normative level that conciliates the necessity to live life in dignity with economic processes. Some major efforts have attempted to give a legally exhaustive explanation of the relationship between human rights, trade, and justice, such as those carried out by Professor Petersmann.[1337] However, these have been severely criticized.[1338] In other areas of the social sciences, reconciliatory theories, such as the capabilities theory of Amartya Sen[1339], are somewhat unknown to the institutional legal mechanism of international trade, even as they have proven a big success in other international regulatory areas, such as development.[1340] Such theories could be very useful in order to consolidate human rights and economic performance from a legal perspective, too. Their success is that they reconcile economics, human rights, and law, at the normative level, proposing in the first instance the realization of the human being as the ultimate moral principle to which legislation or law-making must be accountable.

[1337] Petersmann above note 241, p. 7 **See also** Ernst-Ulrich Petersmann, "International Trade Law, Human Rights and Theories of Justice" in *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* S Charnovitz, D P Steger, P Van den Bosse (eds.) 2005, p. 47 According to Petersmann there exist three basic principles to solve macro-justice problems of individuals in their society 1) principles and rules for the just allocation of equal freedoms and other basic rights to individuals in order to protect human dignity and peaceful cooperation among citizens; 2) principles and rules for the just distribution of scares resources through private competition and governmental correction of market failures; 3) principles and rules for just constitutional order protecting general citizen interests against government failure.

[1338] See the debates Petersmann-Alston EJIL 2002 and Petersmann-Howse EJIL 2008.

[1339] Amartya Sen, "Capability and Well-being" in *The Philosophy of Economics: An anthology* D M Hausman (ed.) 2008 (3rd edition), pp. 270-289.According to this author capability is a term that defines the alternative combinations of things a person is able to do or be. This conception is about evaluating the ability to achieve various functionings as a part of living. The set of individual capabilities forms part of the informational base for assessing the achievement of life's goals. The word functioning means a part of a state of a person –it is about things one manages to do or be in life-. Functionings are differently ranked *i.e.* some elementary are adequate nourishment, good health; other can be more complex like social respect or social integration. Capability represents the alternative combinations of functionings a person can achieve and from which the person can choose. A central aspect of this theories the valuations of objects. In order to identify them we must establish norms which are dependent on the purpose we pursuit with that assessment.

[1340] John M Alexander, "Capabilities, human rights and moral pluralism" The International Journal of Human Rights" 2004 Vol. 8 No. 4 at p. 451 The Human Development Report published since 1990 by the United Nations Development Programme uses the theoretical underpinnings of Sen's capability theory. The index ranks countries based on some fundamental capabilities, namely life expectancy, which includes the ability to live long and avoid premature death; literacy, which is about the ability to read, write and communicate better; economic standard of living which deals with the ability to buy goods and services that one wants.

3 Inductive reasoning vs deductive reasoning

Legal efforts to reconcile human rights, trade, and morality are methodologically inductive; deductive reasoning, although emerging through the pleas for constitutionalization, is generally ignored. Today's efforts to reconcile human rights with international trade from a legal perspective deal with isolated or particular cases rather than a general framework. The focus on specific topics, such as the basic human right to water and international trade, freedom of expression and trade, the right to health and trade, gross violation of human rights and trade, the right to food and the right to housing and trade, culture and trade, gender and trade, labour and trade, characterizes this subject matter as sectorial.[1341] Methodologically, conclusions are exposed predominantly through inductive reasoning. Much effort is put on the specificities of the case. The persistently fragmented and decentralized structure of international law, as well as the relative absence of a formal hierarchy of norms and overarching principles, leads to the lack of a comprehensive general legal theory about the relationship between human rights, trade, and morality at both levels, both normative and positive. Such a lack of legal theory at a general level makes any deductive methodology impossible. Nevertheless, certain efforts in the legal sciences have produced results in the search for coherence, such as the process of global constitutionalization and verticalization of international law[1342], or in the theory of the coordinative and unifying function of the international judiciary.

4 Normative and positive levels

At this point, it is important to remind the reader that we are referring to a relationship that occurs both at a normative and at a positive level. Notwithstanding such differentiation, it must be clearly stated that we are adopting here the position that there is not a straightforward dividing line between one and the other, particularly not where questions of morality are concerned, and in the configuration and further concretization of positive rights. Such limits, as we saw when dealing with issues of interpretation and hermeneutics, are highly dependent upon the position that legal practitioners adopt when discharging their tasks. There is always a zone in which this line has to be determined or clarified by the corresponding international authority. The indeterminacy of legal statements allows normative approaches to be taken into account when giving

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[1341] Cottier, above note 1330, p. 113.
[1342] *Ibid.*, p. 114.

them meaning. Therefore, this international authority is called upon to analyze facts, theories, and rules for them to be effective.[1343] This is the moment when the court, while issuing autonomous judgments, is convinced that it is acting according to its own beliefs regarding certain moral truths.

5 Trade and human dignity

The legal rank of trade rules *vis–à–vis* human rights is determined by human dignity. Another truth when analyzing the relationship between human rights, trade and public morals is that the WTO, *de facto*, sees the world of its Members and its own world from a trade perspective: the starting point is a compliance with trade law. It is logical and common sense that, where there is no obligation to consider laws other than those established by a given regime, trade rules based on economic morality will take primacy over any other rule that otherwise is alien to international trade. However, the *status quo* of international law, through a solidifying hierarchy of norms, offers a picture that enables an integrative or "issues–friendly" interpretation of such rules, integrating not only the positive form of the rules concerned, but also their moral underpinnings. One very controversial topic in the linkage of human rights and international trade is the problem of hierarchy. Which rights are hierarchically superior? What is the legal rank of trade rules *vis–à–vis* human rights norms? These answers are not found in WTO law, but rather within contemporary doctrines of international law and general practice. Essentially, there is uncertainty about how subsystems of international law interact with each other. Therefore, there is also uncertainty as to the hierarchical value of human rights norms *vis–a–vis* trade rules. Opinions from scholars regarding these issues differ, sometimes fundamentally; neither judicial reasoning nor state practice is as yet conclusive.[1344] However, there is now a considerable weight of scholarly opinion supportive of the view that human rights enjoy priority since having achieved the status of *ius cogens* or obligations *erga omnes*.[1345]

Human dignity forms also a part of economic morality. How does WTO dispute settlement achieve results that are fair, predictable, and in conformity with basic principles of justice? It is often argued that there is no real need to address the effects of international trade on the content of human rights given that it is the nature of

[1343] Garcia, above note 1235, p. 73-76.
[1344] Harrison, above note 1333, p. 57.
[1345] *Ibid.*, p. 57.

international trade to enhance their protection. An explicit human rights approach to the international trade regime is thus not necessary given that the promotion of human rights is a natural consequence of WTO rules, which pursue open trade policies. This is a clear normative statement in the Smithian sense of the invisible hand. Accordingly, there are no values to be balanced. Everything happens by means of a self-regulating process; no external action is necessary. However, questions of justice always imply a decision, and therefore a balance. In balancing different values, what is important to notice is that the legal practitioner must realize that economic justice includes certain moral issues that are traditionally considered to belong exclusively to the realm of human rights. These are the values alluded to in Petersmann's theory of international trade, or Sen's theory of economic development, and most especially with regard to the realization of the human being. Furthermore, since the legal practitioner does not perform any economic action, he is not bound to differentiate, as economists do, between positive and normative economics when assessing the meaning of WTO objectives. For the legal practitioner it therefore makes sense to take account of both positive and normative economics when interpreting trade rules.[1346] International trade justice is not only driven by strictly "pure" economic principles, in the sense of commutative justice, but by other principles, too, which include also distributive and social contemporary notions of economic justice. As Petersmann explains, once economic morality is regarded as a derivation of human dignity, then any interpretation one could make of trade rules should ultimately consider whether or not their action and effects are in conformity with such a shared understanding of human dignity. In their concluding remarks, two economic philosophers, Hausman and Markpherson, stated that "once one begins thinking of overall well-being, one has left behind cost-benefits analysis and the futile hope that economic questions can be sharply separated from distributional questions."

[1346] Daniel M Hausman and Michael S McPherson; "The Philosophical Foundations of Mainstream Normative Economics. in *The Philosophy of Economics: An anthology* DM Hausman (ed.), 2008 (3rd edition), p. 230 The question of which features or outcomes for individual matters points to four possible answers: Welfare, Freedom, Rights and Justice. The following questions constitute the moral framework of normative economics:" what should economists appraise? What method of appraisal should economists use? What matters about outcomes? Which features for individuals matter? what is welfare? How does welfare (as preference satisfaction) bear on the evaluation of outcomes? What role do other ethical notions play?

B Labour

1 The dual nature of labour

Labour is a fundamental element of economic activity. It also constitutes a fundamental part of the social system. Labour has an economic and a social dimension. Economically, labour is a fundamental economic factor. From the social point of view, the right to work is a human right recognized in both the UDHR [1347] and the ICESCR.[1348] The relationship between labour and trade is one marked in the first place by a shared connection to human rights. Indeed, labour rights have a substantial social nature; they may be considered as human rights. Nevertheless, due to their pronounced economic and thus political nature, they have been treated with a certain political scorn and disdain. For this reason, advocates of labour standards have suggested going beyond arguments about the nature of these rights as human rights, trying instead to discuss principles or guidelines without the whole "baggage" of human rights language.[1349] However, for all that this suggestion represents merely a rhetorical effort to foster labour rights, such pronouncements should not influence the idea that labour rights are human rights. Indeed, there can be no doubt that core labour rights are human rights.[1350]

2 The positive protection of international labour standards

How are international labour standards protected? Since 1919, the International Labour Organization has been in charge of creating and securing international labour standards based on freedom, equity, security, and dignity.[1351] The ILO has the function of fostering those working conditions, without discrimination, that best ensure the material well-being and spiritual development of the individual, on the basis of human dignity, economic security, and equal opportunity. Here the connection with Article 55 of the UN Charter is quite clear. It recognizes the attainment of "higher standards of living, full employment and conditions of economic and social progress and development", together with "universal respect for, and observance of, human rights and fundamental

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[1347] Art 23 UDHR According to Art 23.1 "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".

[1348] Art 6 ICESCR According to Art 6.1 "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right".

[1349] Philip Alston, "Labour Rights as Human Rights: The Not So Happy State of the Art" in *Labour Rights as Human Rights* P. Alston (ed.), 2005, p. 1.

[1350] Michael J Trebilcock and Robert Howse, "Trade Policy & Labor Standards" Minnesota Journal of Global Trade 2005 Vol. 14 No. 2, p. 271.

[1351] See www.ilo.org last visited 11.05.2012.

freedoms for all without distinction as to race, sex, language or religion."[1352] As can be seen from the history of international labour protection, labour rights have come to enjoy a very high degree of international legal consideration. The main reason for guaranteeing such individual benefits was the realization that economic progress must go hand in hand with social justice and peace. That is, legally to recognize other aspects of labour, beyond the narrowly economic, through guaranteeing those labour rights that are of fundamental importance to individual human development. The key documents relating to the creation, promotion, and protection of labour standards, are the ILO Constitution of 1919[1353], the Philadelphia Declaration of 1944[1354], the Declaration on Fundamental Principles and Rights at Work of 1998[1355], and the ILO Declaration on Social Justice for a Fair Globalisation of 2008.[1356]

One outstanding example in the area of human and labour rights is the Convention on the Rights of the Child. It represents the recognition and achievement of a global aspiration to achieve a human rights standard. Although it is centred on a specific category of human being, and not on a specific type of right, its purpose is to ensure that children, as the most vulnerable among us, are allowed adequate development on the basis of their best interests.[1357] The CRC alludes also to the principles proclaimed in the United Nations Charter, recalling its recognition of the inherent dignity of all human beings, and of the equal and inalienable rights of all members of the human family, these being the foundation of freedom, justice, and peace in the world. In tune with the UN Charter, States Parties reaffirmed their faith in fundamental human rights, and in the dignity and worth of the human person and, in so doing, anticipated the promotion of social progress, better living standards, and greater freedom.[1358] Article 4 of the CRC establishes a duty to ensure, to the maximum extent possible, the child's survival and

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[1352] Art 55 UN Charter.
[1353] ILO Constitution, 15 UNTS 40.
[1354] Philadelphia Declaration of 10 May 1944, Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the Constitution of the ILO, ILO Constitution 15 UNTS 40.
[1355] ILO Declaration on Fundamental Principles and Rights at Work, Geneva 18 June 1998; 37 ILM. 1233 This Declaration establishes an obligation to respect and promote certain core labour standards, namely, the freedom of association and the rights to engage in collective bargaining, the elimination of forced labour, the elimination of child labour and the elimination of discrimination in employment.
[1356] ILO Declaration on Social Justice for a Fair Globalization of 2008, International Labour Conference, 97th Session, Geneva 10 June 2008.
[1357] Cris R. Revaz, Jonathan Todres, Mark E Wojcik "The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification", 2006, pp. 9-18.
[1358] See Preamble Convention on the Rights of the Child.

development.[1359] This right is the key to the realization of other human rights. In addition, when it comes to the obligation of the state to protect the right to life[1360], a government is held accountable if insufficient action is taken to prevent practices that represent a threat to the fulfilment of that right, such as inhumane, violent, abusive, or exploitative trade. Further on, Article 27 of the CRC establishes the right of every child to a standard of living adequate for their physical, mental, spiritual, moral, and social development. Moreover, Article 32 of the CRC also secures for the child the right to be free from exploitation, and from performing any kind of hazardous work that may interfere with their adequate development.[1361]

3 Link between Labour, Human Rights and Trade

Is the effective protection of labour standards only achieved through human rights organizations? Labour standards are closely connected to trade issues: one trades that which is produced, and production is the result of work. The relationship between trade and labour has a long history. This history has been extensively commented upon in terms of economic performance and, in particular, in relation to the normativity of comparative advantage and unfair competition. Today, it is more than widely admitted that this relationship has likewise an essential social dimension, the regulation of which is crucial for the effective advancement of labour standards, human rights, and social justice. It is obvious that an analysis of the link between international trade and labour rights, viewed from the perspective of pure economics, fails to take account of the social dimension of labour. In relation to the link between labour and trade, this seems to be the view adopted by such organizations as the WTO and UNCTAD. For them, this relationship is evaluated rather in terms of exporting and importing countries. It is based on the economic morality of self-interest and economic progress, and is supported by

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[1359] Ibid., Art. 4.

[1360] Manfred Nowak "Art. 6 The Right to Life, Survival and Development" in *A Commentary on the United Nations Convention on the Rights of the Child.*" 2005, p. 24 According to this author the obligation to protect means also the obligation of the state party to protect the rights against interference by private parties *i.e.* companies and the like.

[1361] See Convention on the Rights of the Child, particularly Art. 28 right of the child to education, Art 32.(1) "right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual moral or social development." Art. 32(2) "states parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments. States parties shall in particular: a) Provide for a minimum age or minimum ages for admission to employment b) provide for appropriate regulation of the hours and conditions of employment c)provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

the classical dogmas of international law, namely sovereignty, state equality, and non-intervention. Something different happens if we look at this link from the angle of labour and human rights organizations, such as the ILO. Due to the accentuated social nature of labour, the legal framework provided by such non-economic organizations to the link between trade and labour is not seen in economic terms but in terms of human entitlement to self-realization. The link is evident. It is considered from the perspective of a different morality, namely, that of the improvement of living standards, decency and human dignity; in other words, from a human rights viewpoint. Considering economic freedom and labour as human values pertaining to a common ideal of social justice goes beyond the limits of Smithian economic theory based on self-interest and the invisible hand. It also encroaches upon a narrow vision of labour standards as exclusively human rights. This common ideal of social justice imposes a demand on the legal order to take into account, whenever the issue arises, at least a minimal consideration of both the economic and the social dimension of labour. This is so because the trade-labour linkage, perceived in terms of social justice, is determined by the basic principle that international labour standards are necessary in order to protect workers from economic exploitation[1362], unfair competition, and social dumping. It is about balancing the effects of economic performance of trade in order to avoid either a "race to the bottom"[1363] or a race to the top.

The institutional framework for labour trade and human rights is fragmented. How has this link between trade labour and human rights been understood institutionally? In spite of the general opinion that trade, labour, and human rights are interrelated concepts, the evolution of the legal link between trade, labour rights, and human rights shows that, from the very beginning, all were developed in a coexistent although fragmented way; in other words, in "splendid isolation" from each other.[1364] This was typical of

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[1362] Trebilcok & Howse, above note 1350, p. 261.
[1363] *Ibid*., p. 266. Arguing that countries selling goods produced by processes that fail to respect or comply with legal international labour standards are engage in unfair competition, thus practicing "social dumping. Economic theory, however, suggests that immediate imposition of common international labour standards would reduce total economic welfare. In addition, such low wages exporting countries argue countries in early stages of industrialization consider low-cost and low-skilled labour as one of their sources of comparative advantage. The consequence of this is that low labour standards exporting countries undermines the worker's level of protection in higher wages exporting countries inducing this way to a so called "race to the bottom" **See also** Alston, above note 1349, p. 4 **See also** Friedl Weiss "Trade and Labor I" *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.), 2005 Vol. 2, p. 577.
[1364] Weiss, *ibid*., p. 575.

international law in the first half of the 20th century, when "self-contained regimes" were erected, perhaps in order to protect the nation's freedom to contradict its own acts. The origins of the legal link between trade and labour have been depicted as "the Apartheid of Labor and Trade." [1365] On the one hand, the International Labour Organisation was responsible for creating and monitoring international labour standards; on the other, the GATT/WTO international trade regime was in charge of trade matters only, and almost exclusively on purely economic terms. Furthermore, the whole international human rights institutional system did not always take genuine account of the realities imposed by economic performance, damaging an emerging awareness of the need to include labour issues in the international trade regime. All parts of this fragmented institutional framework operate largely in isolation from each other[1366], each regime having its own system of rights and obligations, and each regime having its own standard of interpretation. This multiplicity of legal regimes favours inconsistent views in terms of the content of such rights and obligations, and hinders their implementation in a coherent and harmonious way.

How are labour standards as a multidimensional feature protected in context? In the context of international law in general, and international trade in particular, the rights of workers are addressed by scholars using such language as "social question", "social standards", or "social clause". The social question expresses concerns that cover a broad social justice range and that refer to both the social and the economic nature of labour. For this reason, it may be affirmed that the social question has highly political connotations[1367], is difficult to reconcile, and ultimately very difficult to regulate. In spite of these difficulties, it remains present within international law. Indeed, the overall view is an integrative one, occupying a prominent place in international law. This is confirmed by Article 55 of the UN Charter and the objectives of the United Nations established therein. To a certain degree, the solutions to the "social clause" are given concrete form within the UN system through the Economic and Social Council (ECOSOC), and other specialized agencies, particularly those concerning the protection

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[1365] Janelle M Diller, "Trade and Labor II" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.), 2005, Vol. 2, p. 599.
[1366] *Ibid*., . p. 599.
[1367] Wolfrum & Philipp, above note 63, p. 1180 **See also** Sebastian Puth "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.), 2005 (1st edition), p. 637.

of human and labour rights, such as the UDHR, the ICESCR, and the ILO. In addition, some developments in trade regimes likewise give expression to labour rights. At the regional level, the most relevant progress in terms of integrating trade and labour has taken place in America and Europe, namely the North American Agreement on Labour Cooperation under the NAFTA[1368], and the Charter of Fundamental Social Rights within the context of the Council of Europe.[1369] In the external relations of the European Union, steps have been taken for the promotion of labour standards through the inclusion of human rights clauses in bilateral and multilateral trade agreements, and through the framework provided by the WTO through the Generalized System of Preferences.[1370] From a global perspective, to integrate labour standards into the international trade regime has proven extremely difficult. An important attempt to integrate some of these values into one single legal framework, through conventional law, was made in the 1948 Havana Charter[1371]. The Havana Charter stated clearly that unfair labour conditions create difficulties in international trade. However, the ITO Charter was never adopted. Its labour standards were not legally recognized within the international trading system. Further attempts have been made, including at the heart of the international trade regime, to promote labour standards. However, such attempts have remained unsuccessful.[1372] With regard to the development of labour standards through international trade adjudication, their presence is extremely limited.

[1368] North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States 32 ILM 1499 (1993), 14 September 1993 provides for a mechanism to ensure the enforcement of existing and future labour standards and laws based on the principle of sovereignty. Article 2 "Level of Protection" provides that "Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light. Annex 1 establishes eleven principles which include the right to strike, the prohibition of forced labour, minimum employment standards, elimination of employment discrimination.

[1369] European Social Charter, above note 129 The charter guarantees, among other economic and social rights, the right to work, the right to bargain collectively, the right to social security, the right to social and medical assistance, the right to protection and assistance for migrant workers and their families.
[1370] Alston, above note 1349, pp. 18-19. **See also** *EC-Tariffs Preferences,* above note 836.
[1371] ITO Charter above note 848.
[1372] Weiss, above note 1363, p. 574 Referring to the request of the US at the Ministerial Conference held at Marrakesh on April 15, 1994 to include a reference to internationally recognized worker's rights, 33 ILM 1263 (1994). **See also** First WTO Ministerial Conference held in Singapore WT/MIN(96)/DEC, 18 December 1996 that summarizes the general attitude towards the issue trade and labour at both extremes. Point 4 of the Declaration (4) "We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration." This wording was reaffirmed in the Doha Declaration at point 8. Doha WTO Ministerial Declaration WT/MIN(01)/DEC/1 of 20 November 2001.

Adjudication remains the main legal basis for the use of the general exceptions of GATT Article XX, by means of the flexibility offered to pursue non-economic goals.[1373]

4 The holistic approach to international law

The idea of universal moral norms, derived from the universal interest of mankind in global peace and social justice relative to human welfare, the improvement of living standards, and human dignity in general, can only be conceived in an holistic and harmonious system that takes account simultaneously of trade and labour in its economic and human dimension. It is the idea of a universal morality that necessarily indicates that there must be coherence between global markets and national labour rights. And an imbalance between international economic performance and national protection of the worker is contrary to the universal ideal of human rights; hence it is contrary to the new paradigm of international law, with individual and human rights at its centre, that decades ago broke with the egoistical dogma of state sovereignty. An imbalance between economic and social justice creates injustice; therefore, if injustice is generated there is a need to achieve or restore that justice. The law is supposed to establish a well-balanced relationship between economic performance and individual human welfare. And if there are international shared values regarding economic functioning there must also be a correlative international shared value system relative to fair conditions at work as being likewise an expression of human welfare. However, if human well-being, welfare and living standards are the aims of such systems, it is easy to realize that this common purpose can only be achieved if rules are understood and agreed in a way that is harmonious.

There is a need for a harmonious or holistic integrative view in order to protect labour standards. Today, the need to assure transnationally such individual core conditions at work not only retains its validity but has also been augmented. This is because the globalized economics of the modern world tremendously affect the forms in which labour occurs within sovereign states, in that the domestic worker must face the challenges of national economic issues within the framework of a global economy, to which trade is essential. Notwithstanding all the efforts of the ILO to provide the worker with fair working conditions, the ILO institutional framework is insufficient to implement all the rights and standards recognized therein. This is because, as is

[1373] Christopher McCrudden and Anne Davis, "A perspective on trade and labor rights" Journal of International Economic Law 2000 Vol. 3 No.1, p. 58.

characteristic of international law, these standards have been given positive validity without a general legal context that would allow their effective implementation. In other words, the relationship between labour, trade, and human rights, has been legally ignored by states, especially if we take into account the lack of enforcing mechanisms. In addition, it is important to recall that the ILO's governing body, after establishing a Working Party on the social dimensions of the liberalization of international trade, decided to suspend the discussion on the link between international trade and social standards, or a sanction-based social clause mechanism.[1374]

Again, the issue of social standards constantly raises the question as to whether, in the future, the current international institutional effort to implement labour rights will be sufficient. The institutional framework is patently disappointing. On the one hand, there is a widespread view that at least core labour rights are human rights but, on the other, state practice shows that the human rights dimension of labour law has been denied in terms of the economic performance of nation states. Moreover, the ILO has also taken attention away from the adverse economic effects of trade on labour standards. This may be because emerging economics or new industrialized countries seek a comparative trade advantage through lower labour standards. It is an empirical error to argue that economic morality may often prevail over human rights morality. The prevalence of minimal market regulation and global trade rules, that is, the invisible hand, liberalism, *laissez faire*, have segregated the human rights aspect from general international law; this is one thing. Quite another is to recognize the necessity of integrating the human rights dimension of labour into international trade. Contemporary perspectives on trade and labour rights indicate that, in spite of efforts made, the legal framework for effective implementation of core labour rights is far from sufficient. Since our main concern here is the WTO and Human Rights, it is already time to ask the question of the possibility of inserting labour standards into the international trade regime. What does the international legal system in general allow us to do? What does the global trade regime allow us to do in this respect? Many questions and proposals have been intensely debated with the aim of inserting the human rights aspect of the link between international trade and labour within the WTO system. The starting point of such an analysis is the question of how to protect labour rights in a national workplace subject to the outside pressures of a system of global economics; that is, within a system of

[1374] Trebilcock & Howse, above note 1350, p. 262.

international markets embedded in the quasi-institutional world of economic globalization? McCrudden and Davis state that there exist two alternatives to classical approaches in the debate about trade-labour standards[1375], namely, voluntary multilateralism based on state agreement to transferred competencies to the WTO, and involuntary multilateralism based on WTO adjudicatory institutions. Everything regarding state agreement and legislature has proven extremely difficult to achieve. However, the legitimation of the law is derived not only from the will, but also from the necessity or the commands of justice. The legitimation of the law lies in the nature of the phenomena involved in a dispute, and in the question of needing a legal pronouncement, that is, in the values and interests involved. On this account, adjudication is an appropriate means to compensate for a lack of agreement. For this reason, it is often argued that at least the core labour standards established by the ILO should be admitted into the WTO through adjudication, for they are considered a cogent minimal standard consistent with at least the public moral exception established in GATT Article XX(a), either as a manifestation of the protection of a universal morality or of a domestic morality. Although it is not our objective here to discuss what kind of measures are suitable to protect labour standards through the public morality exception, one possible and very popular measure intended to protect labour standards and human rights in general is "social labelling."[1376]

C Standards of living

1 Positive protection of standards of living

According to Article 25(1) UDHR:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment,

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[1375] McCrudden & Davis, above note 1373, pp. 57 *et seq*. According to these authors there are four different way of approaching the link between trade and labour. First the "unilateral model" consists in giving solution through unilateral action by one state. Second, the "NGO model" is about the pressure put by civil groups to governments in order to act. Third, the "regional model" attempts to resolve the tensions between labour and trade at a regional level through regional agreements. Fourth, the "multilateral level" internationalizes the issue of protecting labour standards while shifting its regulation to an specialized agency, the ILO.

[1376] Carlos Lopez-Hurtado, "Social labeling and WTO Law" Journal of International Economic Law" 2002 Vol. 5 No. 3, p. 719 The legality of the social labeling depends by large in the Product/Process distinction p. 734 *et seq*. **See** particularly Howse & Reagan, above note 660, p, 249.

sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

Article 11 of the ICESCR establishes that:

"The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent."

Direct or indirect references to an adequate or decent[1377] standard of living are present in several international agreements, of both global and regional type. The phrase "adequate standard of living and social justice" is part of the post-1945 international legal discourse. The UN Charter, in Article 55(a) refers to the promotion of higher standards of living, full employment, and conditions of economic and social progress and development. Article 55(c) of the UN Charter recognizes the necessity of promoting universal respect for and observance of human rights and fundamental freedoms. Both are considered by the UN Charter as intended to contribute to the achievement of stability, well-being and peace. The World Trade Organization recognises in the first recital of its preamble the objective of raising standards of living and ensuring full employment.

The right to an adequate standard of living is essential in order to ensure that the individual may enjoy a life of dignity and on the basis of a free development of personality. This right is "the most basic social right" that relates both to the means of subsistence and the means for the unfolding of the individual's personality; indeed, a right that allows the individual to have a minimum level of decent life".[1378] The right to an adequate standard of living does not refer directly to the existence of the individual, as would be the case of a right to life, but to the dignity of the individual according to his material and moral well-being. The right to an adequate standard of living is a step forward in the development of human capacities or capabilities. It is a right that refers to

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[1377] *e.g.* Principle 4 of the European Social Charter „workers have a right to fair remuneration sufficient for a decent standard of living for themselves and their families.

[1378] Louis Henkin; Gerald L Neuman; Doane F Orentlicher; David W. Leebron, (eds.), "Human Rights" 1999, p. 1147.

the amelioration of living conditions so as to make individual life adequate to certain evolving standards, both material and spiritual. Its main components are: the right to food and nutrition, the right to adequate housing, the right to special care and assistance to motherhood and childhood, the right to clothing, the right to medical care and the right to social security.[1379]

2 Components of the standards of living

The right to an adequate standard of living refers to circumstances that may be, domestic, regional and global. Taking into account that the right to an adequate standard of living intends to guarantee the individual his sources of income and subsistence in order to ensure that life may be lived in an environment which is adequate to the circumstances and the environment, its link to a right to work and a right to property is undeniable. However, one might suggest that the role of the right to an adequate standard of living is to cover loopholes afforded by other rights, and to address the most basic needs in order to ensure that the individual meets at least their basic needs. In spite of this being partially true, a mere read of the established right indicates that this cannot be its sole function. A standard of living which is adequate has first of all to adapt to, to fit into and correspond with, a set of circumstances which can be considered on different levels, namely domestic, regional and global, as well as at different stages of development. The more specific or developed the system in which a set of circumstances appear, the more difficult or detailed the structure of the legal right. The nature of this right cannot be associated to a gesture of charity or a solidarity duty, but with a human entitlement to a life in dignity relative to conditions, moral and material, that assure the realization of individual personality and worth within society, whether domestic, regional or universal.

3 Measurement

a The World Bank

How to measure a standard of living? Measuring a standard of living is an extremely difficult task due to the objective and subjective implications of the right. Even more difficult is the basic question simply of how to measure a standard? Which parameters are involved in the measurement of a standard? Are they quantitative parameters? Are

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1379 Chris Maina Peter, "Standards of Living, Promotion of" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012, p. 463.

they qualitative parameters? Are they both? Which parameters are to be considered in order to evaluate a standard of living? Morality? Human happiness? Economic satisfaction? Here we face the fundamental problem of the right to a standard of living. It has a variety of elements. Yet do these elements not vary according to culture or polity? Are there any universal living standards? The dual nature of the right to an adequate standard of living is incontestable. As labour, it has a markedly economic nature, but it has also a social feature that relates to the concerns of social progress and morality. As a concept within the social sciences in general, an adequate standard of living is said to include elements of "material goods and services, socio-economic fluidity, education, inequality and political and religious freedom."[1380] However, the most widely used measure of material standard is the Gross Domestic Product (GDP) per capita. Although today it is recognized that GDP omits important economic features, like productive endeavours that range from preparing meals at home, to conditions surrounding the work environment, crime, pollution and important issues affecting the quality of life, economists nevertheless believe that "real GDP per capita does summarise or otherwise quantify important aspects of the average availability of goods and services." In similar words, wealth is a basic factor in determining standard of living.[1381] The World Bank, for instance, approaches poverty and inequality from the point of view of the measurement of the well-being of the individual through the individual's standard of living. In principle, for the World Bank, standards of living include the effects of access to social services, social stigma, stress, insecurity, vulnerability, social exclusion, and others. However, for the World Bank, the measurement of living standards still relies on the measurement of the material rather than the spiritual well-being of the individual. Therefore, the standards of living measured by the World Bank are expressed in terms of expenditure or consumption and income, the components of which are later adjusted for the economic scales at household level. In order to adjust the relationship between expenditure and income, the World Bank establishes a poverty line.[1382] Some common variables used in order to

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[1380] Richard H Steckel, "Standards of living (historical trends)" in *The New Palgrave Dictionary of Economics* 2008 (2nd edition) Vol. 7 p. 841.
[1381] Oxford Comprehensive Altas of the World, 2008, p. 92.
[1382] World Bank, "Making transition Work for Everyone: Poverty and Inequality in Europe and Central Asia" 2000, p. 367 **See also** Owen O'Donnell; Eddy van Doorslaer; Adam Wagstaff; Magnus Lindelow, "Analysing Health Equity Using Household Survey Data: A Guide to Techniques and Their Implementation" 2008, pp. 69-82 Defining income as "the earnings from productive activities and current transfers. It can be seen as comprising claims on goods and services by individuals or households"

measure consumption are: wage income from labour services, rental income from the supply of land capital or other assets, self-employment income and current transfers from governments or non-government agencies or other households. In terms of consumption, there are also four main classes, namely: non-food items; non-food, non-durable items, consumer durables and housing.[1383] From this perspective, the standard of living is conceived mainly as a result of economic activity. This World Bank formula to measure a standard of living obviates the spiritual aspects of the human person, that is to say, the qualitative aspect of life related to the individual's moral sphere in terms of social justice.

b The United Nations Development Programme

A different approach to the question of living standards is taken by the United Nations Development Programme. For them, the standard of living is an indicator of human development. In the last decade of the 20th century, in 1990, the United Nations Development Program (UNDP) issued the first report known as the Human Development Report.[1384] The purpose of this report is "putting people back at the centre of the development process in terms of economic debate, policy and advocacy."[1385] The UNDP 1990s report is very clear when it states that people are the real wealth of a nation.[1386] That means that the UNDP changes the focus when measuring development from national (state) income to individual well-being. The theoretical foundations of the Human Development Index are found in the works of Amartya Sen on the capabilities and functioning of the individual.[1387] The core idea behind this index is that

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Consumption resources actually consumed. In other words, the defined income as "the amount of money received during a period of time in exchange for labour or services, from the sale of goods and property, or as a profit from financial investment" Expenditure as " money payments or incurrence in liability to obtain gods or service. Consumption as "final use of goods and services, excluding the intermediate use of goods and services in the production of other".

[1383] O'Donnell *et al.*, *ibid.*, pp. 72-73.

[1384] The Human Development Index was developed by the Pakistani economist Mahbub ul Haq and the Indian economist Amartya Sen.

[1385] See site UNDP at www.undp.org last visited 22.May.2012 **See also** Bartels, above note 1328, p. 979 Explaining that today the relationship between trade and human rights has become controversial due to the evolution of human rights approaches to economic development.

[1386] UNPD, Human Development Report 1990, p. 9.

[1387] *Ibid.*, p. 10 According to this report "Human development is a process of enlarging human choices. In principle, these choices can be infinite and change over time. But at all levels of development, the three essential ones for people are to lead a *long and healthy live, to acquire knowledge and to have access to resources needed for a decent standard of living*. If these essential choices are not available, many other opportunities remain inaccessible. But human development does not end there. Additional choices, highly valued by other people. Range from political, economic and social freedom to opportunities for being creative and productive, and enjoying personal self-respect and guaranteed *human rights*". Emphasis added.

development is not seen as a manifestation of the wealth of a state but as a reflection of individual material and spiritual well-being, individual choices, individual freedom. The Human Development Index is a summary composite index that measures the three basic aspects of human development described by Sen and Ul Haq, namely: longevity, knowledge, and a decent standard of living.

CHAPTER 2 THE "PUBLIC MORALS" EXCEPTION [GATT ART. XX(A)]

A Ordinary Meaning

The word "moral" is a very complex one. It can be both a noun and an adjective. The Shorter Oxford English Dictionary[1388] explains its various meanings. According to this dictionary, the noun "moral" refers, among other things, to "moral habits, conduct, or (formerly) qualities; habits of life with regard to right or wrong conduct; especially sexual conduct; without qualification, good or right habits or conduct". It goes on with an example from A. Bevan: "this may be sound economics. It could not be worse morals". A second example is from the Weekly News (Cambridge): "He was concerned over the lack of morals among the town's young people." The dictionary is very clear, "moral" refers to right and wrong practices.

The adjective "moral" is much more complex. Most of the meanings given by the Shorter Oxford English Dictionary denote the relational character of the adjective. Its first meaning is (a) "Of or pertaining to the human character or behaviour considered as good or bad; of or pertaining to the distinction between right and wrong, or good and evil, in relation to the actions, volitions, or character of responsible beings; ethical; (of knowledge, judgments, etc.) pertaining to the nature and application to this distinction. (b) Of a feeling: arising from the contemplation of something as good or bad. (c) Of a concept or term: involving ethical praise or blame." The dictionary illustrates these meaning with examples, such as this one from M Flanagan: "It's not my habit to pass moral judgements". The second section of the adjective "moral" is shorter: "Treating or concerned with right and wrong, or the rules of right conduct, as a subject of study", that is, moral philosophy. The fourth section speaks about the moral "Of persons, habits, conduct, etc.: morally good, conforming to or reflecting accepted standards. Its fifth section is even more helpful, clarifying that "Morals" refers also to the moral "Of an action (...); of rights, obligations, responsibility, etc.: founded on moral law, valid according to the principles of morality. The last section, number nine, is also illuminating. In this case, the relational aspect of the adjective moral is "Of, pertaining to, or concerned with the morals of a person or a community." The dictionary continues

[1388] Shorter Oxford English Dictionary on historical principles, 2007 (6th edition) Vol. 1, pp. 1834-1835.

to offer special collocations of the word moral. Some significant examples are "moral law" as "the body of requirements to which an action must conform to be right or virtuous, a particular requirement of this kind"; "moral rights" as "the rights of an author, etc.", or "moral sense", as the ability to distinguish between right and wrong, especially as a faculty of the human mind. Lastly, "moral turpitude" as "(an instance of) conduct considered depraved".

Two other words in the dictionary are strongly related with the former, namely the word morale and the word morality.[1389] The word "morale" means essentially "morality, morals; moral teaching" and is now rare. The word "morality", however, is more widely used. It means, *inter alia*, "the doctrine or branch of knowledge that deals with right and wrong conduct and with duty and responsibility; moral philosophy; ethics (...) points of ethics, moral principles or rules (...). A particular system of moral philosophy or moral conduct." Another meaning is: "the quality or fact of being moral; the degree of conformity with an idea, practice etc., to moral law; moral goodness, or rightness. The word "morality" also denotes moral conduct; especially good moral conduct; behaviour conforming to moral law; moral virtue.

There is another word which is crucial for the legal interpretation of the GATT Article XX(a) general exception, namely, the word "public". According to the Shorter Oxford English Dictionary[1390], this word may also be both adjective or noun. As an adjective, its first meaning is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." In its sixth section, the dictionary makes the following reference: "of or pertaining to the international community." It adds, "**of or common to the whole human race**". In the special collocations and phrases offered by the dictionary, one can read the following entries: first, "public good", referring to the common or national good or well-being; second, "public law", referring to "(a) the part of the law pertaining to the relationship between the state and a person subject to it; (b) a law having validity in a number of states or nations"; third, "public wrong", refers to "an offence against society as a whole".

[1389] *Ibid.*, p. 1835 The word moral (noun) in its sixth section: in plural =morality (now rare); in its eight section: =morale (now rare).
[1390] *Ibid.*, pp. 2394-2395.

The French text of GATT Article XX(a) speaks about "*moralité publique.*" The Nouveau Petit Robert[1391] gives three meaning to the word *moralité*. The first refers to the moral character, to the moral or ethical point of view, that is, the merit, the quality, the morality of an action, or of an attitude. The second meaning relates to persons, and concerns an attitude, a conduct, or a moral value. The last meaning refers to moral reflexion. Furthermore, the *Dictionnaire de la Langue Philosophique*[1392] refers to the word *moralité* as the characteristic of that person or thing that is moral. Sometimes phenomena can be amoral, if it is alien to a world of morals–*étranger à la morale*–and sometimes it can be immoral, if it is contrary to morals–*contraire à la morale*. However, if we look into the etymology of this word, we see that the dictionary mentions the Latin word *moralitas.* In the English dictionary[1393], we see that the word, the etymology of which is *moralitas*, means both morality and morals. Since these words are related through their etymology, it makes sense that in interpreting the meaning of the expression "public morals" we can look into the significance of the word morality in order to elucidate its meaning. The meaning of the word "morality" in the English dictionary denotes "moral quality or endowment". Furthermore, it denotes the "quality or fact of being moral, **the degree of conformity of an idea, practice,** etc". The French word *moral* coincides with its English and Spanish equivalents in the WTO texts. For the Nouveau Petit Robert, the word *moral,* as an adjective, means something concerning the customs, habits and, above all, the rules of conduct admitted and practiced in a society. Moreover, a different but also strongly related word, *morale,* signifies the science of good and evil, the theory of action, as for example in Kantian morality. This word *morale* also means the set of rules of conduct considered as good in an absolute manner. In addition, *morale* also denotes the set of rules of conduct deriving from a moral conception. The French philosophical dictionary[1394] explains it still more clearly. The word *morale* means, if it were to be considered in absolute terms, the set of norms of conduct considered absolutely and universally valid. Nonetheless, if the word were to be used with a determinative complement, perhaps an adjective, the French *morale* could concern a particular field or a particular conduct, as in Kantian *morale*.

[1391] Le Nouveau Petit Robert. Dictionnaire alphabétique et analogique de la langue française 2000, pp. 1614-1615
[1392] Dictionnaire de la langue philosophique (Foulquié, Paul) 1962, pp. 453-454.
[1393] Shorter Oxford Dictionary, above note 1388, p. 1835.
[1394] Dictionnaire Phiosophique, above note 1392, pp. 453-454.

Black's Law Dictionary[1395] does not contain the word "moral" as an independent word. Nevertheless, it dedicates a lot of space to several collocations, such as moral law, "a collection of principles defining right and wrong conduct; a standard to which an action must conform to be right or virtuous"; moral relativism, "the view that there are no absolute or constant standards of right and wrong", moral right or moral turpitude, "conduct that is contrary to justice, honesty, or morality". Notwithstanding this, the legal dictionary includes the word "morality", giving it three meanings. The first is "conformity with recognized rules of correct conduct"; the second, "the character of being virtuous, especially in sexual matters"; the third, "a system of duties; ethics". It refers in particular to the collocation "public morality". The first signification of public morality is "**the ideals or general moral beliefs of a society"**. The second signification is "the ideals or actions of an individual to the extent that they affect others". According to Black's Law Dictionary, the adjective "public", in its first meaning, alludes to its relational aspect. Consequently, "public" signifies "**relating or belonging to an entire community, state, or nation**."

B Morals and Philosophy

Moral sciences have a very old and long history. Traditionally, morality has been seen as a main object of study in philosophy. Over the centuries, the most prominent thinkers of mankind have based their political, economic, social, and cultural systems on certain types of morality, that is, on certain kinds of norms on which human behaviour may be based. Each aspect of human conduct is governed by a certain moral principle, by a certain moral idea. These moral rules inform us about the rightness or wrongness of our actions. The difficulty of the philosophical task in moral sciences has been, and continues to be, to identify the moral principles, or the moral principle, which reigns over human activity. This of course presupposes another very difficult philosophical task, that is, to identify the source of these moral principles. This is fundamentally the case when moral principles are conflicting. The existence of such moral principles is crucial in determining all other ordinary rules that shape the specific field of action.

According to the Stanford Encyclopedia of Philosophy, "morality" can be used either descriptively or normatively. When morality is used in a descriptive sense, it alludes,

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[1395] Black's Law Dictionary 2004 (8th edition), pp. 1030 *et seq.*

first, to "some codes of conduct put forward by a society or a) some other group, such as religion, or b) accepted by an individual for her own behaviour". When the term "morality" is used in a normative sense, it refers to "a code of conduct that, given specified conditions, would be put forward by all rational persons." The encyclopedia further states that, "to take morality to refer to an actually existing code of conduct put forward by a society results in a denial that there is a universal morality, one that applies to all human being".[1396] This kind of classification resembles the distinction between positive law and natural law; it is, in essence, analogous.

The common substantive aspects of descriptive and prescriptive morality are that both refer to avoiding and preventing harm to others. The encyclopedia, in its introduction, when comparing the essential features of these senses, explains that there is a basic distinguishing feature which they all share. On the one hand, for those who hold the descriptive sense of morality, "if one is not a member of that society or group, and is not that individual, accepting a descriptive definition of morality has no implications for how one should behave". On the other side, those who hold the normative sense of morality do it in a universal normative sense; therefore, the fact of accepting a normative definition of morality "commits a person to regarding some behaviour as immoral"[1397] because they maintain that, at least under certain conditions, all rational persons would endorse the moral code they are proposing. Notwithstanding this main difference, there is a common feature shared by descriptive and normative morality, namely that they both "refer to guides to behaviour that involve, at least, avoiding and preventing harm to some others".[1398] In this integrative sense, morals can then be de defined as the reality, the sense of which is to serve the ideal of the good.[1399] Following this criteria, we see how the substantive content of morals is in its own nature an ideal value, which is intrinsically normative.[1400] **Morals is a point of reference from which human action stems but also towards which human action tends**.

[1396] Stanford Encyclopedia of Philosophy. "The Definition of Morality" First published in 2002. Revised in 2011 available at http://plato.standford.edu/entries/morality-definition/ last visited on 20. January 2012.
[1397] *Ibid.*
[1398] Luigi Condorelli, "Some Thoughts about the Optimistic Pessimism of a Good International Lawyer" European Journal of International Law 2010 Vol. 21 No. 1, p. 31.
[1399] Robert Kolb, "Réflexions de philosophie du droit international: Problémes fondamentaux du droit international public: Théorie et philosophie du droit international" 2003, p. 341.
[1400] *Ibid*. p. 341.

1 Types of Morals

In his book about the philosophy of international law, Professor Kolb reflects on the word *morale* in the following terms. He explains that morals refer on the one hand to the individual (*morale individuelle*), and on the other to society (*morale sociale*). The individual "moral" is that belonging to the person as a single entity. It can have two forms: subjective, that is, the morals of conscience; or objective, that is, religious morals. The social moral is that corresponding to the individual as a member of the society; that is, in his inter-subjective relations. Here, too, he distinguishes two types of social morals: the absolute morals, which are the human morals relative to certain constant necessities of the human being; and contingent morals, that change according to the changing moral rules accepted by a society in a given moment.[1401]

It is evident that our interest here lies in social morals. In the first place, these morals concern the relations among the individuals in a group, let us say a group of two or more individuals that could also expand to include billions of individuals. Considering social morality in its contingent aspect is to put more weight on the descriptive character of morality, since it reflects practices, it depicts reality. As the word already implies, the moral is contingent when it reflects prevalent ethical-social conceptions within a given group. In addition, this kind of morality is commonly accepted by the majority of the members of that given group. In this case, the law does not necessarily look only at whether or not this moral rule is truth, but whether or not this rule exists positively. By contrast, absolute social morality is said to be above contingent morality. It belongs to all, because it refers to the nature and existence of the human being and has as its source the Reason (constraining ourselves here in this research only to human morality, since we are talking about human rights). Absolute morality is more of an ideal; it puts more weight on normativity, it does not depict the existing reality, but it commands certain truths. It does not describe anything, but indicates rather the direction of action that is believed to be good and therefore right. It is precisely social morality of this absolute type that stays in close relation to interdependence with the common good, justice, and finally the law. [1402] All these categories are generally considered irreconcilable; however, the tensions between moral contingency and absoluteness, descriptivism and

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[1401] *Ibid*., p. 341.
[1402] *Ibid*., p. 346-347.

normativity, indicate that there is a point at which such considerations come together, and this is the law.

2 The relationship between law and morals

One of the central questions in philosophy of law is that of the relationship between morals and law. As a matter of fact, law and morals form the most important and complex matrix of social norms, made up of those rules humans employ in social groups. Therefore, it is particularly difficult from either a positivist legal or moral perspective to answer the questions of what are morals, and what is law? Also difficult is the question of whether there is any legal or moral precept that allows the law to enforce moral claims. In other words, has either positive or moral law the authority to uphold certain morals? This interrogation can be framed in even more specific terms, namely, is a judicial power obliged to uphold a certain kind of morality? If so, which morals? Whose morals? Another fundamental question in modern philosophy of law is to define what is the right law (*richtiges Recht).* Very closely linked to this question remains the question of whether morality can be a source of law and, if so, to what extent? Moreover, can a meta-positive legal norm be enforced if a conflict exists between positive law and justice? The relationship between law and morality is largely intricate and abstract due precisely to the differentiation between what is legal and what is moral, that is, the legality or morality of something. The point of coincidence between legal norms and the prevalent morality is the central question of all those theories that see in the law a form of guarantee of a prevalent conception of action.[1403] We have already seen that this point refers to descriptive practices and normative ideals, to contingent facts and to absolute beliefs.

3 Scope of morals

Vertically, morality is present at three different levels, namely, at the top, morality is above positive laws, it is a validator of those positive laws. Morality exists also at the same level as positive law. It is a positive reflection of morality. At the bottom level, we have morality existing also under positive laws, that is, in some cultural or religious traditions, sexual morality. Horizontally, the idea of universal morality is present in three forms: the foundation of the law, the formation of the law, and the execution of the

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[1403] Reinhold Zippelius, "Rechtsphilosophie" 2011 (6th edition), p. 30.

law.[1404] In spite of the difficulties involved in disentangling the relationship between law and morality, it seems clear that law and morals often share a "grey area", where normative, descriptive, contingent and absolute considerations meet; the result is an interesting synthesis of various elements. This is especially the case if we consider the relationship between positive law and normative morality. One of the main characteristics of normative morality is that its postulates exist at a very abstract level; they show a high degree of generality. However, positive rules directly derived from this kind of morality may also have a high degree of generality and indeterminacy. It is at this moment when positive rules may be characterized rather as positive legal enunciations, allowing for broader judicial interpretation. Indeed, judicial activity is necessary in order to fill such positive indeterminate enactments with content. Particularly in the initial period during which positive rules begin to take concrete shape, both moral rules and positive rules tend to be considered either as one or the other, or even the same, as in proto-constitutional rights. In our case, we have the particular problem of identifying which and whose morality we are going to apply. We do not have the problem of determining whether or not we are allowed to use morality in order to interpret the GATT Article XX(a) and its WTO versions, as the case has been won that human rights are moral in terms also of positive law.

4 The WTO judiciary is bound to find a positive conception of the good

If we agree that positives laws are supposed to be the good, that morals is supposed to rationally represent what is good, and the legal practitioner is allowed by positive law to make use of moral considerations, then the legal practitioner, in this case the WTO judiciary, is bound to find a positive conception of the good. This acts also as a guarantee that WTO law is right (*richtig*). It follows that if moral rules are not reflecting the good, then the positives laws arising out of them are not right (*unrichtig*). Identifying universal rules is not an easy task, but one should not conclude from this that there are no universal rules, either contingent or absolute. Indeed, we have seen how the law and morality fuse in the most elementary and constitutional aspects of life. This is so because the law, and particularly constitutional rules, are the first concretisation of justice (and not only the just), and justice is the reflection of the good (rather than only the right), and the good is a moral idea.[1405] The fundamental link

[1404] Kolb, above note 443, pp. 365-366.
[1405] *Ibid*. p. 348.

between law and morals is that they share common stock, or a common meeting point, in the idea of both the duty (*Sollen*) and the obligation (*Müssen*). Furthermore, morality, due to the possibility that it must be understood in either a relativist or universalist sense, can perfectly well be used in order to relativize a right, or in order to positively universalize a conduct.

Is there an international, transnational, universal morality? One fundamental question in international law is whether there exists such a thing as a global morality? Moreover, is there such a thing as a transnational or a universal morality? These questions have received many answers. In a discussion of public morality, it is obvious that the main issue is the existence of a global, even universal, moral idea that is valid for all humankind. Regarding the existence of a trans-boundary or cross-border morality leads us then to the question of whether human rights may be understood in terms of a universal morality. Distinct from what is normally considered international, the word universal is a more far-reaching term, for universal incorporates that which is typical or natural to the whole of humankind; it does not refer exclusively to states. Although universal can also mean something which is common to a particular universe (a group), we are referring here to the meaning of the international and of the universal from the point of view of the totality of humankind. The main argument in order to answer in the affirmative the question of the existence of a universal morality is not only that individuals are equal, and therefore that one may speak of universal attributes, but also the existence of a universal collective, a universal polity, that is, the universal society/community. The biggest example of universality from the institutional side is the United Nations; further examples, from which integral obligations may be derived, are given throughout the combined assembly of international institutions aspiring to universal membership. But who are the participants and members of this international society? Nowadays we could count through them very quickly, that is, the nation state (and let us include here the *de facto* state, failed states, and states of any other kind, including colonies), international institutions, NGOs, the international enterprises, and the individual.

a Human dignity as the new paradigm of International Law

Respect for human dignity is the new paradigm of international, transnational, and universal morality. Another fundamental question concerns the process of identification, and implementation or legitimization, of international rules derived from international,

transnational, or universal morality. What is the content of these morals? In the beginning of the 20th century it was said that international morality could be divided into different groups according to its object. In the first place, the individual interests of the state in which, amongst its most important interests, we find the existence of the state itself, its independence, and its liberty. Another group is formed by the so-called solidary goods, in other words, those goods that represent an interest to the members of the community, therefore its members have an interest in creating, preserving, or extinguishing them, that is, the maintenance of peace, the law and its judicature, and the organization of international economics, for instance via international commerce. A last group deals with situations directly concerning the human being, from sexual morality to human well-being.[1406] Nowadays, these two last groups, as depicted by Kraus in 1927, have changed considerably. In particular after the creation of the United Nations, many of those values were integrate into different autonomous levels. Indeed, the UN Charter, in its preamble and objectives, shows clearly that solid goods, as well as goods belonging to the individual, cannot be conceived of as being separate from one another. Today the interests of preserving some transnational and individual values constitute a relationship of symbiosis. That is, human rights may be the basis for peace, and peace is the basis for human flourishing. In particular, Article 55 of the UN Charter establishes at positive-legal level a normative statement expressing the relationship between human well-being and peace. Furthermore, the recognition of human dignity as an inherent and universal attribute, and as the foundation of an individual's freedom, although to different degrees, constitutes the key paradigm of today's international, transnational, and universal morality.

From the perspective of the nation state, morality refers to concepts like absolute sovereignty, the law of coexistence, the law of horizontal coordination, and so on, and principally expresses aspects of distributive justice through the principle of solidarity as a way of compensating for a foregone pursuit of state objectives. This international morality, as couched in the word, refers primarily to the nation. A broad understanding of the phrase "international morality" might expand the meaning of morality to those areas that deal with the international community as a whole, that is, to international morality as relative to some transnational values such as the environment, and spatial

[1406] Herbert Kraus, "La morale international" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1927 Vol. 16 No.1, p. 508 *et seq.*

objects, such as the deep sea bed, the Antarctica, and the collective interest of states to promote human rights. In this sense, morality expresses through a principle of horizontal cooperation what might be described as a kind of transnational morality; a collective morality where states collectively pursue, through joint action, the accomplishment of certain common objectives. The reference in the word "transnational" to the state indicates that the point of departure of morality, and the ultimate beneficiaries of this kind of morality, remains state interests and power. However, universal morality in its truest sense must reflect first and foremost the values and interests of the individual as he or she exists within the human species, for it is the universality of the individual's morality that makes possible a universal order. The state, besides pursuing individual and transnational interests, in the sense of universality, is rather a vehicle for guaranteeing the realization of this universal dignity. And from a supranational perspective–taking into consideration that international law is superior to domestic law–this universal morality emanating from the individual trumps domestic interests precisely because it encapsulates the equal universal values of the individual. Some social scientists advocate that law is a morally neutral science that prohibits or denies a balancing act between conflicting values. For them, the judicial function must not pass moral judgement. However, we have seen that, in developing and interpreting the law, judges are required often to reach decisions that involve a delicate balancing of values.

Both international and universal morality influence the formation and application of international law. In international law, the question of morality is taken very seriously especially because, other than in domestic law, global constitutional rules are still undergoing a process of formation.[1407] These proto-constitutional norms can be considered as semi-positive rules, having as their main characteristic a lack of proper and legitimating legislative process. Therefore the need for positivization makes the judiciary susceptible to or legitimizes further elaboration. Several of the main principles of international law are grounded in a universal morality, that is, with cooperation as a core moral value. Indeed, the principle of international cooperation is a legal principle to allow a formal place to international institutional structures within the political sphere, thus generating obligations of an integral type in such areas as labour and international trade, with the purpose of accomplishing, by joint action, common goals

[1407] Kolb, above note 443, p. 356.

underpinned by common values.[1408] This development of international institutionalization has increased enormously in recent decades. The principle of solidarity is another example of a proto-constitutional norm of the moral type. This principle "strives for the amelioration of inequalities of opportunities or possibilities of particular states in comparison to others"[1409], that is, special and differential treatment in the WTO.[1410] At the top of the list of international norms based on universal morality is the protection of human rights and the recognition of the principle of human dignity. Institutions appreciate humanitarian intervention, the emergence and development of an international public order based on legal imperatives grounded in the concepts of *ius cogens* and obligations *erga omnes*. solidarian international economics based on economic theorists with elements of distributive justice as compensation to commutative justice reflected in the New Economic Order are major examples of morality as foundation of international rules.[1411] Another very important aspect of the relationship between morality and law is that the former influences the latter whenever the law must be applied. Indeed, according to Professor Kolb, in international law there is still not a sharp separation between political and judicial power, such that legal disputes must often bear the weight of a significant political content, too. Professor Kolb goes on to explain that the main form in which universal morality influences the application of the law is through the application of general principles of law. Legal principles, as moral principles, are developed at a high level of abstraction. In a sense, principles of law are the main derivatives of original moral principles. General principles of law allow the legal practitioner simply to take account of the kind of morality from which the principle stems. In this sense, we can affirm that such principles gravitate towards moral questions. Another use of a moral conception in international law is given by international adjudication[1412], that is, the principle of love one's neighbour and not to damaging that which belongs to others, the use of consideration, of humanity, respect, and the repudiation of gross violations of human rights.

[1408] Wolfrum, above note 488, p. 820.
[1409] *Ibid*., p. 820.
[1410] Enabling Clause, above note 788, It is the WTO legal basis for the Generalized System of Preferences.
[1411] Kolb, above note 443, p. 356 *et seq.*.
[1412] *Ibid*., p. 356 *et seq.*

C Which morals? whose morals?

It is not so much the question of using morality itself that is important, but the questions: which morals, whose morals? On many occasions, certain actions may be considered immoral but not necessarily illegal. In contrast, many things may be considered illegal but not necessarily immoral. The topic that occupies us here concerns above all the question of whether some universally accepted immoral conduct can be recognized by the international WTO judiciary as illegal. It is common when discussing the topic of the sources of the law to differentiate between courts applying the law and the activity of the court developing the law. There are also antagonist positions about applying standards which are binding without at the same time giving space to litigants to posit moral counterarguments, as well as the idea of developing the law on the basis of considerations of a moral kind, or indeed of any other type of rational reflection– expert or scientific evidence beyond strict positivism.[1413] To answer such questions it is crucial to state clearly that a moral idea is present already at the moment of law formation; it is also present at the moment of application, through an interpretation of the law.[1414] In addition, morality is present during the process of law development. This remains true independently of the question of who is legitimated to develop the laws, as whoever is in charge of giving positive form to the law must be aware that positive rules are informed by morals. To understand our question concerning the use of morals in applying and developing the law becomes easier when one considers the express reference to public morals in the WTO exception, that is, in GATT Article XX(a). In the language of positive human rights law, reference to morals is used also as an exception, through the so-called claw-back clauses[1415], or limitation clauses.[1416] What really becomes difficult in our case is not the use of morals *per se* but rather the issue of determining which and whose morals.

1 Political and economic interests

The relationship between human rights and international trade through the use of the public morals exception in the WTO agreements is marked by very important questions

[1413] Joseph Raz, "The Authority of Law: Essays on Law and Morality", 2009 (2nd edition), p. 52.
[1414] Kolb, above note 443, p. 346.
[1415] Eva Brems, "Human Rights: Universality and Diversity", 2001, p. 121.
[1416] Siracusa Principles, above note 372.

of an economic and political nature.[1417] These issues were already addressed by Professor Charnovitz in his famous writings on the public moral exception in international trade.[1418] From an economic point of view, the question is: should morals be able to trump economic globalization? However, from the political point of view, the question is: should international morals be able to trump the exercise of power by local elites? Of course, these questions may play a considerable role in a juridical interpretation of the public morals exception; answering them involves a balance of normative considerations, that is, a value judgment. In the context of the first question, the main normative value alluded to is that of the economic self-interest of the economic agent. This economic morality is also driven by commutative notions of justice, and apparently morally neutral economic concepts like rational choice, preferences, economic standards of living, labour as an economic factor, economic efficiency, profit, wealth, greed, and egoism. In this sense, the question, restated, could be posed as follows: should humanist morals trump economic morals? In the second question, the main normative value is that of the self-interest of the political agent. This self-interest may include the element of economic performance, but it will often also be broader than that, including all political aspects within the boundaries of the nation state, including fundamental freedoms. For this reason, the question touches also upon the issue of sovereignty. The second question may also be restated, as follows: should universal human rights morality, that is, the morality of human dignity, trump sovereignty? It is commonly believed that such questions form an exclusive part of political discourse and that for this reason they should be answered from a legislative perspective. However, the political discourse, particularly in international law, can find concrete legal form also through recourse to the judiciary. Once the law makes express reference to a concept like public morals, the judiciary has the obligation of giving a judicial response, with all the legal consequences that such a response may entail.

2 Evolutionary interpretation of exceptions

General exceptions are not to be narrowly interpreted but, as with other ordinary rules, are dynamic and evolving. The relationship between public morality and international trade rules is that public morality issues are exceptions to trade rules. The first

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[1417] Stephen Powell, "The Place of Human Rights Law in the World Trade Organization Rules" Florida Journal of International Law 2004 Vol. 16 No. 1, p. 224.
[1418] Charnovitz, above note 689, p. 690.

implication of this is that the role of public morals issues could be considered as limited if we take into account the potential clashes between these two orders. Prior to the creation of the WTO, adjudication under GATT 1947 used a narrow interpretation approach with regard to general exceptions.[1419] Its jurisprudence was grounded on the belief that a narrow interpretation would better preserve the objective and principles of the WTO, because the *rationale* of general exceptions is to deviate from WTO obligations by means of a state jurisdiction argument, such that states may not then coerce third parties into changing their policies. Some still believe that coercive action in order to change foreign policy must not only be considered impermissible on extraterritorial grounds, but also as hampering market access rights. We have seen already that AB jurisprudence acknowledges as legitimate that some kind of coercion may be permissible. One commentator [1420] has properly explained that neither GATT Article XX nor the VCLT includes any rules suggesting that exceptions should be narrowly construed. Furthermore, it has been recognized that final outcomes are always determined or controlled by the factual situation. In the *EC–Hormones* case[1421], the Appellate Body stated that:

> *"(...) merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation."*

The idea that general exceptions are to be interpreted like other ordinary norms, taking into account the objectives of the Organization, open the door also to evolutionary interpretations.[1422] In the *US–Shrimp* case, the AB interpreted GATT Article XX(g) in an evolutionary fashion when it observed that:

> *"The words of Article XX(g), "exhaustible natural resources", were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."*

[1419] Chrisptoph T Feddersen, "Focusing on Substantive Law in International Economic Relations: The public Morals of GATT's Article XX a) and „Conventional" Rules of Interpretation" Minnesota Journal of Global Trade 1998 Vol. 7 No. 1, p. 94 The author explains that during GATT 1947 panels use to interpret exception narrowly See *United States- (Tuna I)*, above note 703 and *United States- (Tuna II)*, above note 652.
[1420] Feddersen, *ibid*., p. 95.
[1421] *EC-Hormones*, AB, above note, para. 104.
[1422] *US-Shrimp*, AB, above note 606, para. 129.

a Values beyond domestic jurisdiction

Exceptions can also be used in order to protect values and interests beyond domestic jurisdictions. Another significant aspect of general exceptions is that it is commonly wrongly believed that their aim is to protect national or domestic interest or values only. That is, according to some authors, that general exceptions are intended only to protect certain national policies. However, from panel and AB jurisprudence regarding the broad nature of exceptions, and the possibility of evolutionary interpretations, it follows that when common objectives are at stake, like the environment, or others of a more universal reach, such as the raising of living standards, the spatial limits of the corresponding measure cannot be limited to national jurisdiction, but could be extended to the extent that there were found to be international or universal consensus or acceptance. In the *US–Shrimp* case, the AB clearly stated[1423],while reverting the legal analysis of the Panel, that:

> *"It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX. Paragraphs (a) to (j) comprise measures that are recognized as exceptions to substantive obligations established in the GATT 1994, because the domestic policies embodied in such measures have been recognized as important and legitimate in character. It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."*

aa Legal guarantees against abuse

The risk of abuse of exceptions decreases through the tiered structure of GATT Article XX. Another problem regularly linked to the use of exceptions has always been that general exceptions are prone to abuse. Accordingly, misusing general exceptions through trade restrictive measures could risk the liberalization of trade or, in any case, the international legal course of trade on economic terms.[1424] However, the

[1423] *Ibid.*, para. 121.
[1424] Wu, above note 669, p. 215.

tiered structure of Article XX prevents such abuses. In the *US–Shrimp* case[1425], the AB wisely noted that:

> *"(...)a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in so doing, negates altogether the treaty rights of other Members. The chapeau was installed at the head of the list of "General Exceptions" in Article XX to prevent such far-reaching consequences."*

Furthermore, when establishing the relationship between the headnote of GATT Article X and the specific exceptions, the AB clarified[1426] that:

> *"When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. What is appropriately characterizable as "arbitrary discrimination" or "unjustifiable discrimination", or as a "disguised restriction on international trade" in respect of one category of measures, need not be so with respect to another group or type of measures. The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour."*

3 Indeterminacy

The relationship between public morality and international trade rules is also marked by the very high degree of abstraction or indeterminacy intrinsic to the legal concept of public morals itself. The question of whether human rights could be interpreted to include the concept of public morals is particularly intricate not only because of the complex meta-legal dimension of that relationship, but also because of the reduced legal framework in which such a relationship must be understood.[1427] Standard textbooks on WTO Law[1428] see the inclusion of human rights issues under the concept of public morals in a very pessimistic way. Even when there is limited recognition of the *ius cogens* character of some human rights norms, and the *erga omnes* obligations of states

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[1425] *US-Shrimp*, AB, above note 606, para. 156.
[1426] *Ibid*., para. 120.
[1427] Wu, above note 669, p. 237 Suggesting that the development of the exception should be constant with the developments of public international law and also that interpreting public morals as to include human rights issues do not undermine the global trade system.
[1428] *e.g.* "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.), 2005 (1st edition).

arising therefrom, there is an unequivocal denial of the public morals exception as including human rights.[1429]

4 Deductive methodology

For many years, the doctrinal pronouncements on GATT Article XX(a) were pessimistic and saw little scope for human rights concerns. It seems to be that, without having a clear notion about it, scholars always refer to this exception as serving to protect national morals in a sense of moral rules under, or at the same level as, domestic positive law. However, it was surely not to protect morals beyond the positive laws, that is, morals in the sense of *bones mores*.[1430] In addition, with the exception of one or two articles, most legal scholars do not really touch upon the substantive content of the phrase "public morals". There are no real worthy theoretical considerations of the normative and positive dimensions of this morality. Claims for the potential use of human rights, besides those made by Petersmann[1431] and to some extent Cottier[1432] and Garcia[1433], do not properly refer to the content of morals and human rights by using a deductive but rather an inductive methodology. Authors focus on the general structure of GATT Article XX, and terms like "to protect", "necessary", or specific areas, like labour standards, food, water, women rights, culture, and health. Notwithstanding this lack of deductive analysis of the content of public morals as a general exception to trade rules, there is consensus that the public morals exception of GATT Article XX(a) has the potential to incorporate human rights issues into the adjudicative agenda of the WTO, for it is the legal basis that provides for a source of discretion for the application and interpretation of human rights. This potential is justified by the idea that human rights are positive rights of an axiological nature, and therefore that they belong to the group of rights the foundations of which are laid upon essentially moral considerations. What perhaps is lacking in the analysis is to realize that moral human rights, besides being the foundation of positive human rights, are also moral norms, at least as far as the respect and development of human dignity is concerned, and imperatives the legal validity of which trespass positive enactments and constitute the paradigm of

[1429] Hörmann, above note 1259, p. 661.
[1430] Brandon L Bowen, "The World Trade Organization and its interpretation of the Article XX exceptions to the General Agreement on Tariffs and trade, in light of recent developments" Georgia Journal of International and Comparative Law 2000 Vol. 29 No. 1 at p. 181.
[1431] Petersmann, above note 1322, p. 543.
[1432] Cottier, above note 1330, p. 111.
[1433] Garcia, above note 1235, p. 51.

international law today. Before this exception had been interpreted by the adjudicative body of the WTO, the concept of public morals was considered a very vague, indeterminate, almost catch-all concept. Today, even following initial steps in a judicial interpretation [1434], the term still remains unclear, at least from a human rights perspective.

It is argued that if human rights were considered customary law, and therefore binding on all states, or if the human right at stake were to be contained in a treaty that is ratified by both states, then the state subject to the trade restriction, and the state imposing the restrictive measure, would both be obliged to meet the conditions of a common public morality. This would be confirmed if the judiciary were to apply Article 31(3)(c) VCLT. In such a case, the State Member taking a measure would not be imposing its own moral standard but rather a moral standard common to both parties[1435], that is, a moral standard which is positively applicable to both parties. This legal argument may also be justified on the basis of the belief that human rights violations have repercussions in other parts of the world, as was the case with the Holocaust. For this reason, respect for human rights cannot always and exclusively be considered the "*domaine réservé"* of the single nation state; protection of human rights constitutes rather an obligation owed to the whole of the international community. The *erga omnes* character of human rights provisions confirms that each state has a legitimate interest in the respect for human rights observed by other states. It has also to be sagely noted that the existence of an international obligation to respect human rights, particularly if the rule has a *ius cogens* character, is both a strong indicator of the importance of the values and interests that can be potentially protected by the public morals exception, and a deontological justification to pass the necessity test.[1436]

One of the main dilemmas posed by the potential use of the public morals exception arises from the question of whose morals are to be protected, especially in terms of a distinction between inwardly and outwardly directed measures. It has been suggested that the two ends of this question lie, on the one hand, in the moral principles represented by the national sovereign states and, at the other extreme, the moral values

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[1434] *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* DS285; *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* DS363.
[1435] Wenzel, above note 668, p. 493.
[1436] *Ibid*., p. 495.

of a universal type shared by all humankind.[1437] It is a clear fact that, even when in principle it remains an open question as to whether or not the drafters of the GATT intended to use the public morality exception in just an inwardly directed way, GATT Article XX(a) itself may include both inwardly directed measures (such as measures to address the protection of public morals of the states imposing the measure) as well as outwardly directed measures (such as measures to address the protection of public morals outside the territory of the country imposing the measure).[1438] The question of whether the public morals exception "should be outward-directed and consequently serve as a legal cover for trade restrictions against countries with poor records on human rights, labour norms and women norms"[1439] shows how the issue of human rights and international trade is confronted by the dilemma of whether or not human rights have a constitutional character in international law. It is at this point that not only the term "morals", but also the term "public" begin to play a fundamental role. Understanding the word "morals" in universal terms, and understanding the word "public" in universal terms, also means that the public morals exception is potentially valid such as to admit positive universal human rights concerns. The dilemma between universalism and unilateralism was left unresolved by the Appellate Body, at least in specific terms. However, the Appellate Body did allow for the introduction of universal standards. The *dictum* in the Gambling case recognizing the relativity of the morality[1440] invoked is only a positive-legal manifestation of the expression "public morals". It does not exclude the possibility that in further cases it may be deemed necessary to legally recognize, in positive form, some universal aspects of morality, such as the respect and realization of human dignity. Moreover, in the Gambling case, our attention is drawn to one point: the practice of the judiciary indicates that while trying to define a moral standard, it examine the practices and legislations of other countries. Based on the evidence that some other Members had restricted gambling-related services and products, the Panel rejected such an approach to public morality (in this case a pure unilateralist approach).

[1437] Wu, above note 669, p. 231.
[1438] This differentiation of inwardly directed measures in contraposition to outwardly directed measures is ascribed to Steve Charnovitz in his writing "The Moral Exception in Trade Policy" in the Virginia Journal of International Law 1998 Vol. 38 No. 4 Nonetheless, the author admits to base this differentiation through the use made by Robert Hudec of the term "externally-directed" measures.
[1439] Wu, above note 669, p. 216.
[1440] *US-Gambling*, Panel, para. 6.465.

D The use of the Public of the "Public Morals" exception

Why was this exception expressly created? How is this exception currently used? What is its potential? Until now, the most detailed historical study on GATT Article XX (a) has been carried out by Professor Charnovitz.[1441] According to him, the drafting history of GATT Article XX(a) shows that there was almost no discussion or debate about its meaning.[1442] There is an account on record that one delegate had wished to emphasize that his country's policy on alcohol taxes and pricing was covered by the public morality and human health protection exceptions, and that the purpose of the policy was to promote temperance. This lack of discussion is justified by Charnovitz, who argues that the delegates knew perfectly well the meaning of the public morals exception. For him, the use of the exception proposed by the US government is an import of elements of a proposed pre-GATT international trade agreement, that somehow made it through to the General Agreement. This, then, is where the focus of the research has to take place, not in the *travaux preparatoires*, where there is more or less nothing to find, but in the circumstances around the drafting of the agreement. Tracking the back history of the public morals exception in treaties prior to GATT leads to the International Convention Relating to the Simplification of Customs Formalities, of 1923, which allows the parties not to affect past or future obligations arising from other treaties if the intention is to protect public morals. In 1927, the International Convention for the Abolition of Import and Export Prohibitions and Restrictions included an exception for moral and humanitarian reasons. The preparatory work of this international treaty shows that this exception was not incompatible with the freedom of trade. We can take some examples from the preparatory work of the 1927 International Convention, for they include, as prohibitions or restrictions of commerce on moral or humanitarian grounds, the following: the improper traffic of intoxicating liquors, smoking opium, narcotic drugs, lottery tickets, obscene and immoral articles, counterfeits, plumage of birds (this one in order to safeguard birds in other countries), and so on.[1443] The prohibition or restrictions imposed on moral or humanitarian grounds became a standard provision in international

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[1441] Charnovitz, above note 689, p. 689.
[1442] *Ibid.*, p. 704. See footnotes from 85 to 93 **See also** Feddersen, above note 843, at (Annex) US Proposal, US-Draft Charter, London/New York Drafts, Geneva Draft, Havanna Charter, GATT.
[1443] Charnovitz, *ibid.*, p. 706.

trade agreements before GATT 1947.[1444] Besides these concrete examples falling into the category of "prohibitions or restrictions imposed on moral or humanitarian grounds", there are other historical examples of moral concern and trade giving place to international agreements constraining trade for moral reasons. This is particularly the case with regard to anti-slavery trade-related treaties. Already in 1815, at the Vienna Conference, trade slavery and slavery in general was considered to be against the principles of humanity and universal morality.[1445] Other trade regimes containing similar assertions are the international narcotic regime of 1912[1446], the international regime regulating trade in liquor[1447], and the international regime regulating traffic of obscene publications.[1448] These are cases in which morality serves as the basic foundation of the norm. However, we should not forget that our target here is to justify the influence of morality in the development of the law through its application. This short history of morality and international trade before the existence of the GATT 1947 reveals the existence of some specific areas in which morality issues are sensitive to trade, so as to allow prohibition or at least restriction. However, this short history not only shows where were the main moral concerns of trade and morality during that period, but also to whom these concerns were addressed, namely, not only those within the borders of a national territory but also those beyond them.

Today, the public morality clause is widely used, becoming a common standard in international trade agreements.[1449] Currently, it is very common practice to restrict trade on moral grounds. The Secretariat in Trade Policy Review[1450] has identified many

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[1444] A detailed list of trade agreements containing this clause is provided by Charnovitz, *ibid.*, footnotes 123 and 124.
[1445] *e.g.* Declaration of the Eight Courts relative to the Universal Abolition of Slave Trade 8 February 1815, Annexed as Act XV to the 1815 General Treaty of Vienna Congress, 63 CTS 473.
[1446] *e.g.* International Opium Convention of 23 January 1912 Art 7, 8 LNTS 187.
[1447] *e.g.* African Liquor Convention of 10 September 1919 Arts. 2-4, 8 LNTS 11.
[1448] *e.g.* International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications of 12 September 1923 Art 1, 27 LNTS 214.
[1449] *e.g.* North America Free Trade Agreement (NAFTA) of 1 December 1992 Art 2101 (1), 32 ILM 605; Agreement on the Common Effective Preferential Tariff Scheme for ASEAN Free Trade Area of 28 January 1992, Art 9, 31 ILM 513; Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy of 19 February 1997, Art. 226, available at http://www.caricom.org/jsp/community/revised_treaty-text.pdf last visited 26 November 2012. for a detailed list of examples see Wu, above note 669, p. 221 **See also** Jeremy C. Marwell, "Trade and Morality: The WTO Public Morals Exception after Gambling" New York University Law Review 2006 Vol. 81 No. 2, Appendix I, p. 838 Provides some examples of Bilateral Free Trade Agreements including public morals clauses.
[1450] Available at http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm last visited 30 August 2012.

countries which have applied morality-based trade restrictions. A few examples are:[1451] Bangladesh, swine products[1452]; Canada, hate propaganda[1453]; Colombia, warlike toys[1454]; Fiji, games of chance[1455]; Haiti, narcotics[1456]; Indonesia, alcohol[1457]; Israel, goods with false product descriptions[1458]; Morocco, bovine animals[1459]; Romania, drugs and narcotics[1460]; Taiwan, dog meat[1461]; Turkey, products making illegal use of trademarks[1462]; Zambia, pirated or counterfeit goods.[1463] Moreover, the use of trade restrictive measures on public morality grounds is used in different ways. Nevertheless, it has been noticed that, through the mechanism of Trade Policy Review, a State Member restricting trade makes reference to morality generally together with other reasons for limiting or prohibiting trade. In addition, some State Members restrict trade on public morality grounds but do not mention any specific restrictions.[1464] Another group of states has restricted the trade of some articles apparently for public morality reasons, however they have not made their reasoning explicit.[1465] Nevertheless, our goal here remains to disentangle the availability of the public morals exception for human rights purposes.

1 Possibility

Could this exception be used in order to protect human rights? When we ask this question, we see at first glance that here we are dealing with the question of the interpretation of the law. It is very different from asking what, with this exception, was

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[1451] Marwell, above note 1449 at Appendix II, p. 840 The examples given here have been addressed posteriorly by Mark Wu "Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Doctrine" Yale Journal of International Law 2008 Vol. 33 No.1, p. 250 The full list of countries include Bahrain, Bangladesh, Benin, Brunei, Canada, Colombia, Fiji, Gambia, Guyana, Haiti, Honduras, Indonesia, Israel, Jamaica, Korea, Malaysia, Morocco, Mozambique, Nigeria, Panama, Qatar, Romania, Sri Lanka, Suriname, Taiwan, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, Zambia.
[1452] Trade Policy Review, Secretariat, Doc. WT/TPR/S/168 Rev 1 (Nov. 15, 2006) at 55 142.
[1453] Trade Policy Review, Secretariat, Doc. WT/TPR/S/53 (Nov. 19, 1998) at 46.
[1454] Trade Policy Review, Secretariat, Doc. WT/TPR/S/172/Rev. 1 (Apr. 3, 2007) at 41.
[1455] Trade Policy Review, Secretariat, Doc. WT/TPR/S/24 (Mar. 13, 1997) at 24.
[1456] Trade Policy Review, Secretariat, Doc. WT/TPR/S/99/Rev. 1 (Oct. 7, 2003) at 41.
[1457] Trade Policy Review, Secretariat, Doc. WT/TPR/S/184/Rev. 1 (Nov. 6, 2007) at 46.
[1458] Trade Policy Review, Secretariat, Doc. WT/TPR/S/157/Rev. 1 (Mar. 24, 2006) at 30.
[1459] Trade Policy Review, Secretariat, Doc. WT/TPR/S/116 (May 19, 2003) at 41.
[1460] Trade Policy Review, Secretariat, Doc. WT/TPR/S/115/Rev.1 (Jan. 31, 2006) at 38.
[1461] Trade Policy Review, Secretariat, Doc. WT/TPR/S/165/Rev. 1 (Oct. 10, 2006) at 39.
[1462] Trade Policy Review, Secretariat, Doc. WT/TPR/S/125 (Nov. 19, 2003) at 43-44.
[1463] Trade Policy Review, Secretariat, Doc. WT/TPR/S/106 (Sep. 25, 2002) at 39.
[1464] Wu, above note 669, pp. 250 *et seq.* According to Wu this countries include, Antigua, Australia, Barbados, Chile, India, Kenya, Lichtenstein, Madagascar, Mexico, Niger, Paraguay, Switzerland, Uganda, the United States, Venezuela.
[1465] *Ibid.*, 250 *et seq.* According to Wu these are the cases of Namibia which has banned indecent or obscene goods and Papua New Guinea which has banned pornography.

the objective of the drafters of the General Agreement? Even if the intention of the parties is an essential criteria for interpreting a legal text, interpretation does not refer only to historical will, but also to objective changes to legal rules and the objective elements of the legal rule itself. Furthermore, when the intention of the parties is unclear, reference needs to be made to an abstract and general concept using the objective criteria of interpretation.

2 Jurisprudence

There are two important cases in which the public morals exception has been discussed, namely in the *US–Gambling* case[1466] —GATS Article XIV—and in the *China–Publications and Audiovisual Products* case[1467]— GATT Article XX(a). In *China–Publications and Audiovisual Products*, the Panel first considered the meaning of the concept "public morals" as it appears in GATT Article XX(a). Accordingly, they observed[1468] that:

> *"We note that the panel and Appellate Body in US – Gambling examined the meaning of the term "public morals" as it is used in Article XIV(a) of the GATS, which is the GATS provision corresponding to Article XX(a). The panel in US – Gambling, in an interpretation not questioned by the Appellate Body, found that "**the term 'public morals' denotes standards of right and wrong conduct maintained by or on behalf of a community or nation**". The panel went on to note that **"the content of these concepts for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values."** The panel went on to note that **Members, in applying this and other similar societal concepts, "should be given some scope to define and apply for themselves the concepts of 'public morals' … in their respective territories, according to their own systems and scales of values."** Since Article XX(a) uses the same concept as Article XIV(a), and since we see no reason to depart from the interpretation of "public morals" developed by the panel in US – Gambling, we adopt the same interpretation for purposes of our Article XX(a) analysis".*

However, in the dispute between the US and China—distinct from the *US–Gambling* case—the United States did not challenge China's assertion that, if disseminated in

[1466] *US Gambling* , Panel, above note 894.
[1467] *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* Panel W/DS363/R 12 August 2009.
[1468] *Ibid*., para 7.758 emphasis added **See also** *US-Gambling*, Panel, above note 894, para. 6.465 "The Panel considers the term "public morals" denoted standards of right and wrong maintained by or on behalf of a community or nation"**See also** *US-Gambling*, AB, above note 894, para. 296.

Chinese territory, the type of prohibited content would have a negative impact on public morals in China. That is why the Panel decided to continue the analysis[1469] of the case:

> *"... on the assumption that each of the prohibited types of content listed in China's measures is such that, if it were brought into China as part of a physical product, it could have a negative impact on "public morals" in China within the meaning of Article XX(a) of the GATT 1994."*

One commentator has suggested that, because general exceptions have the purpose of protecting domestic policies, Article XX(a) empowers states to protect domestic interests, and therefore the point of reference of the public morals exception is not universal in that such standards of right or wrong conduct are nationally defined.[1470] However, according to the Panel's *dicta* in the *US–Gambling*[1471] case, such standards are contingent upon time and space. This hypothesis does not exclude the possibility of considering the universal or transnational context. Time and space can bring about new universal rules. The *dicta* in *US–Gambling* refers only to the relative character of morality. It is a positive statement against the absolute character of morality, nothing else. Furthermore, on that occasion the Panel said that, in applying a concept like public morality, "**some"** scope "**should**" be "**given"** to Members in order to define domestic standards. This is also a clear reference that the judiciary reserves for itself the opportunity to issue an autonomous judgement. The universalist approach is considered problematic[1472] because it could render the use of exceptions useless, and that would go against the *effet utile* or effectiveness of the provision. Nonetheless, a universalist use of the provision does not automatically mean that it always has to be regarded from an universalist standpoint. On the contrary, today's international society/community is manifestly polycentric—the fragmented picture of international law—and concentric—the respect and promotion of human dignity as the normative *Grundnorm* of the international relations in the various existing subsystems, the domestic, the transnational, and the universal. The judiciary, when analysing the facts, will look at the importance of the value or interests protected. It is at this point that they are compelled to determine whether the values have a domestic or universalist reach, that is, whether to defer to domestic regulation or express its own view on the matter.

[1469] *China- Publications and Audiovisual Products*, Panel, above note 1467, paras. 7.758, 7.762.
[1470] Wenzel, above note 668, p. 482.
[1471] *US-Gambling*, Panel, above note 894, para. 6.461.
[1472] Marwell, above note 1449, p. 820.

3 The word "public"

In the *US–Gambling* case, the Panel did not opt for an historical interpretation. Instead, the Panel used the Shorter Oxford English Dictionary in order to look for the ordinary meaning of the word "public". The Panel noticed[1473] that:

> *"In determining the ordinary meaning of the terms "public morals" and "public order", we turn to the Shorter Oxford English Dictionary. "Public" is defined therein as: "Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." The Panel believes that a measure that is sought to be justified under Article XIV(a) must be aimed at protecting the interests of the people within a community or a nation as a whole. This is the case whether the measure is asserted to be necessary to "protect public morals" or to "maintain public order" since both terms contain the word "public"."*

However, in determining the ordinary meaning of the word "public", the Panel is also empowered to consider the whole meaning of the word. In doing so, they can also opt to take into account contemporary developments in the international community/society. Consequently, they can enhance the legal value of the word "public" by observing that its ordinary meaning is "[O]f or common to the whole human race"[1474]. Moreover, public also means "devoted or directed to the promotion of the general welfare", suggesting that the word concept is strongly connected with the common good. Taking into account that there is no *stare decisis* in international law, and that the Panel is compelled to make an objective assessment of the matter before it and, in addition, that it has already construed WTO rules taking into account interests other than those of the state, nothing prevents the judiciary from determining, according to the ordinary meaning, that there can be cases in which the public morality to be protected is the one belonging to the individual in universal terms, particularly if there is international consensus about the type of morality.

4 Teleological interpretation

In establishing the legal meaning of public morals as a general exception to trade rules in the sense of human rights, the teleological interpretation plays also a fundamental role. It is sometimes argued that the WTO system does not embody human rights. Furthermore, it is likewise said that it is devoted exclusively to free trade issues[1475], and that therefore invocation of human rights is inconsistent with WTO provisions. An

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[1473] *US-Gambling*, Panel, above note 894, para. 6.463.
[1474] Shorter Oxford Dictionary, above note 1388, Section 6b, p. 2394.
[1475] Bal, above note 671, p. 92

examination of WTO legal texts manifestly suggests the contrary. Furthermore, considering international law as a complete if fragmentary system of law, that is consistent in its process of decision-making, reveals that certain moral issues touching upon human rights have priority over trade rules. Therefore, decision-making bodies within the WTO system may autonomously draw their legal contours taking human rights into account. A reading of the Preamble to the WTO Agreement establishes as one of its objectives that the "endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand." We have already seen that these goals are almost identical with the wording of Article 55(a) of the UN Charter[1476] about economic and social cooperation that, when read in conjunction with Article 55(c) results in a strong systematic view of the relationship between living standards and human rights. Furthermore, Article 25 of the UDHR establishes a right to an adequate standard of living. In addition, Article 11 of the ICESCR establishes a right to an adequate standard of living for an individual and his or her family. Taking into account the historic moment in which all of these provisions were established, it is legitimate to affirm that the standards of living to which reference is made in WTO law refers to the same standards of living set up in the UN Charter, the UDHR, and the ICESCR. Furthermore, the objective of raising standards of living, as well as the goal of ensuring full employment, makes direct reference to individuals and not to states or businesses. This suggests that, when interpreting the public morals exception, as complemented by the objectives of raising standards of living and ensuring full employment, some weight must be given not only to the rules of human dignity as the ultimate parameter to which legal statements are accountable, but also in relation, at least, to the right to an adequate standard of living, and that not only in a strictly narrow economic sense, but also in the broader sense of economic development and progress that would in turn encourage greater respect for human rights as a social aspect of economic intercourse.

5 Consensus

In the search for universal consensus, we have seen how, from the judicial practice of other adjudicatory bodies, like the ECHR and the WTO itself, consensus does not refer to unanimity but rather to a sort of qualified majority. In the *US–Gambling* case, the

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[1476] Art 55 a) UN Charter (...), the United Nations shall promote: higher standards of living, full employment and conditions of economic and social progress and development".

Panel concluded, in light of different international practices, that the measures prohibiting gambling and betting, including the supply of those services by the Internet, fall within the meaning and scope of GATS Article XIV(a)[1477], that is, the practice of various states within the context of Trade Policy Review[1478], the International Conference for the Abolition of Import and Export Prohibitions and Restrictions, and the League of Nations[1479], and the practice of other jurisdictions, such as the European Court of Justice.[1480] That the court, in applying the techniques of consensus, does not require total acceptance means a rejection of the requirement of universal or total acceptance of the standard, on the one hand and, on the other, the rejection of total deference to the disputing party to determine unilaterally the meaning of morality standards.[1481] This facilitates still more the possibility of interpreting public morals according to human rights; it does so inasmuch as it demonstrates the autonomous power of WTO adjudicative bodies, and with that, the possibility of the court to take into consideration the moral truth involved in the case.

There may be some overlap between public morals and public order. In the *US–Gambling* case, the Panel clarified the concept of public morals in a legal sense, when it compared it with the concept of public order. According to the Panel, public morals and public order may overlap as far as they protect similar values. In their view, public order refers to the "preservation of the fundamental principles of a society, as reflected in public policy and law." Moreover, the Panel considered that such "fundamental interests can relate, *inter alia*, to standards of law, security and morality."[1482] On that occasion, the Panel noticed that:[1483]

> *"Based on the dictionary definitions referred to above [Shorter Oxford English Dictionary] and taking into account the clarification added by the drafters of the GATS in footnote 5, we believe that "public morals" and "public order" are two distinct concepts under Article XIV(a) of the GATS. Nevertheless, to the extent that both concepts seek to protect largely similar values, some overlap may exist."*

[1477] *US-Gambling*, Panel, above note 894, para. 6.474.
[1478] *Ibid*., para. 6.471.
[1479] *Ibid.*, para. 6.472, footnote 913.
[1480] *Ibid.*, para. 6.472, footnote 914.
[1481] Wu, above note 669, p. 232.
[1482] *US-Gambling*, Panel, above note 894, para. 6.467.
[1483] *Ibid*., para. 6.467.

This suggests that the notion includes core values of a moral nature, that is, human rights, and that these rightly belong to the emerging international public order, particularly those associated to *ius cogens* rules, which can be perfectly assimilated into the concept of public morals as an exception to international trade rules.

6 Necessity

In the *China–Publications and Audiovisual Products* case, the Panel's focus was on demonstrating that the measures adopted by China were unnecessary. Later, the AB upheld the Panel's finding that China did not demonstrate that the measures were necessary within the meaning of GATT Article XX(a). In analysing the necessity of the measures, the Panel noticed two things of special significance. First, they recalled the *Korea–Beef dicta* that the word "necessary" is not limited to that which is indispensable, by clarifying "that it is through 'a process of weighing and balancing a series of factors' that it must be determined whether a measure is 'necessary' within the meaning of Article XX." Second, they recalled the *US–Gambling* case that further elaborated on the balancing technique. According to the Panel:[1484]

> *"The process begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure. Having ascertained the importance of the particular interests at stake, a panel should then turn to the other factors that are to be 'weighed and balanced'. The Appellate Body has pointed to two factors that, in most cases, will be relevant to a panel's determination of the 'necessity' of a measure, although not necessarily exhaustive of factors that might be considered. One factor is the contribution of the measure to the realization of the ends pursued by it; the other factor is the restrictive impact of the measure on international commerce."*

One central argument for not using this exception to include human rights is the belief that human rights trade restrictive measures would fail the necessity test, for they are considered ineffective or because it is difficult to find reasonably available alternative measures. However, the fact that in the balancing test the first step is to assess the importance of the value protected indicates that some balancing factors of the consequentialist type, such as effectiveness, or the restrictive impact of the measure on trade, cannot trump deontological considerations, as in the case of certain types of human rights violations, namely gross, serious and systematic violations of human rights. This deontological question must also be taken into account when analysing the

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[1484] *China- Publications and Audiovisual Products*, Panel, abovenote 1467, para. 7.782

requirements of the headnote, so that in the case of human rights violations, legality will be measured by the necessity of limiting commerce for the benefit of the protection of human dignity. As we have seen above, with the advent of the WTO, the jurisprudence established by the panels under GATT 1947 changed towards a more open approach, especially through evolutionary interpretations, evolving into a general exception that allows the consideration of values policies and interests beyond the realm only of trade liberalization and market access rights.[1485] What is important to notice is that the measure addressed to protect public morals, in the sense of human rights, has a link, that is, a sufficient nexus to the product or service object of the measure.

[1485] Padideh Ala'I, "Free Trade or sustainable development? An analysis of the WTO Appellate Body shift to a more balanced approach to trade liberalization" American University International Law Review 1999 Vol. 14 No. 4, p. 1131.

Conclusions

The history of human rights: Is there any legally valid universal principle applicable to all? The history of human rights reveals that people have in fact claimed, since ancient times, to be entitled to certain "rights", based on personhood, and even "humanity". This "humanity" transforms human rights into what is essentially a moral category of axiological character, often obtaining positive legal form through political discourse. Two fundamental milestones in the history of modern human rights are, on the one hand, the constitutional developments in the USA and France, and the establishment of civil and political rights and, on the other, the constitution of the Union of Soviet Socialist Republics, and the establishment of economic, social, and cultural rights. With the advent of the 20th century, particularly post-World War I, these developments regarding human claims were to some extent given form within the new legal framework established by the League of Nations. However, it was not until the end of World War II that constitutional rights, in the sense of fundamental freedoms, truly acquired positive recognition in the international legal order. And it was only in the second part of the 20th century that collective rights were also declared, such as the right to development. Although the International Bill of Rights does not contain constitutional rights as recognized in modern and contemporary constitutions, human rights were gradually established in international declarations, covenants, conventions, and treaties; in relation to the individual, these resemble constitutional legal entitlements of the first rank. The historical development of such moral claims, relative to the individual, shows that, irrespective of their origins, there is a continuous expansion in at least two directions: from the point of view of content and from the point of view of territorial reach. This expansion demonstrates the universal acceptance of certain human moral values. Indeed, human rights or fundamental freedoms are increasingly recognized in contemporary constitutions around the world. Regional integrative economic and political frameworks recognize human rights by placing them at the heart of their regulatory frameworks, e.g. the Council of Europe, the European Union, the Organization of American States, the African Union, the League of Arab States, the

Association of Southeast Asian States, and the South Asian Association for Regional Cooperation. Historically, we can observe that human rights tend to be understood as moral-legal categories reflecting values relative to the humanity of the individual. These moral claims have expanded and enlarged at different levels, such as in content and territorial scope; this is a reflection of their universal application and reach.

The philosophy of human rights: Although human rights have "humanity" as a common feature, the question of human rights has been approached in many different ways. From the perspective of philosophy, human rights have been justified from both transcendental and non-transcendental worldviews. On the one side, non-transcendental justifications of human rights are found in religion or natural law; on the other, non-transcendental forms of justification of human rights may be empirically based and approached objectively, as in positive law. Positive and natural law seem at times to be locked in an antagonist relationship. Whereas natural law focuses on norms derived from nature, such as reason and justice, positive law focuses on justice as it is derived from certain formal procedures, as when positive law differentiates the law as it is and the law as it ought to be. In other words, legal rights do not exist prior to legislation. A way of reconciling this antagonism is through the proposition that human rights are both a positive legislated expression of human values, on the one hand and, on the other, that it represents moral entitlements reflected in certain principles which also form part of the judicial branch's sources of power and authority. For this reason, human rights are both positive enactments and moral principles. The study of the philosophical foundations of human rights allows us to recognize that human dignity in fact constitutes both the moral and the legal foundation of human rights.

Human dignity: Which are the principles underlying positive human rights, to which all laws must supposedly be accountable? Kantian moral philosophy, rooted in Stoicism, teaches us that it is because of intrinsic individual worth, that is, human dignity, that the individual must be treated as an end in and of him- or herself, and never as a means. Individual worth is measured in terms of a dynamic equilibrium between liberty and equality. This equilibrium is reached by means of the categorical imperative: "*Act only according to that maxim by which you can at the same time will that it should become a universal law*". The second imperative is a derivation of the first, and speaks to the intrinsic worth of the individual: "*Act so that you treat humanity, whether in your own person or in that of another, always as and end and never as a mean[s] only*." This

Kantian idea of the dignity of the human person was viewed with a certain scepticism in the 18th and 19th centuries. Nevertheless, it served as the intellectual foundation of the universal positive rights that were proclaimed in the late 1940s. Today, human dignity is considered both as a concept of moral philosophy relative to the worth and values of the human person, and as a concept of positive law. As a moral concept of axiological nature, it lies at the centre of the debate on individual entitlements. As a concept in positive law, it constitutes a cogent legal principle, as demonstrated by its recognition in all major human rights agreements, in many national constitutions, and in an increasingly large body of jurisprudence originating in national and international courts. Some reference to human dignity is also made in both conventional law and its judicial interpretation. Moreover, human dignity is at the heart of contemporary international community, with notions of peace, justice, and social progress, on the one hand and, on the other, a large catalogue of individual and collective rights. The idea of human dignity is commonly linked primarily to a prohibition of inhuman treatment, humiliation, and degradation of the individual. Other areas in which conventional law and jurisprudence have also developed the notion of human dignity are the following: the creation of the necessary conditions for individuals to have essential needs satisfied, and an adequate standard of living, particularly through appropriate work conditions and labour rights; individual choice, and the conditions for self-fulfilment, autonomy, and self-realization; and the protection of group identity and culture. To the extent that human dignity reflects the values of autonomy and responsibility, there is a necessary link established to justice, especially distributive justice. Indeed, economic and social arrangements cannot be excluded from a consideration of the demands or exigencies of human dignity.

The universality of human rights: Are human rights universal or are they relative? This question has also provoked much debate. Here we adopt the position that human rights are universal, even if they have also a relative aspect insofar as they may sometimes be contingent. We have decided not to adopt a firm position as to whether or not there are certain actions that are always right or wrong, regardless of context, such that moral precepts cannot be altered under any circumstance at any time. Instead, we have decided to adopt the position of moral universality, according to which there exists a universal moral truth, equally valid for all. This position is backed by the definition of the *ius cogens* norms of Article 53 of the VCLT, according to which imperative norms may be substituted by other norms of the same type. This question of the relativity or

universality of human rights is to a certain extent a reflection of the question of whether or not there is a universal moral law. As far as human rights are concerned, both history and philosophical inquiry tell us that it is precisely the universality of human rights, that is, our common humanity, that makes it even imaginable to affirm that human entitlements are universal. The process of universalization of such moral entitlements expands spatially and temporarily throughout history, each time facing and overcoming the hurdles of relativism, as its legislative and jurisprudential history shows; it is a dialectical process between relativism and universalism, at the centre of which are the imperatives necessary to respect, protect, and promote human dignity.

Globalization: Globalization, as a process that reflects the global interconnectedness of our contemporary reality, has several different dimensions; namely, economic, political, social, and legal. Globalization is the context in which global rules must be interpreted. As an objective process of interpenetration of global values into domestic societies, and vice versa, it denotes the increasing development of a global ethics in search of a global justice. The global or universal ethics brought about by globalization consists mainly in the further development of universal human rights. Similarly, human rights are the vehicle for the expression of a universal morality and a global ethics. Globalization implies also an increasing consensus about the validity of a universal ethics.

The definition of international law: Part II, Chapter 2, reflects upon the structure of international law. When interpreting the concept of public morals in an integrative fashion, as opposed to in isolation from other norms, it is important to take into account the fundamental rules of international law, and its moral basis. International law is a dynamic, evolving reality. In its classical period, it was defined as a law of nations, that is, an interstate law. Modern definitions, while recognizing international law's primary meaning as the law among states, include also the rules and principles applied to international organizations, and the relationship among these legal subjects. However, contemporary forms of international law do not refer exclusively to the subjects of international law; rather, they speak also of the beneficiaries of this body of rules, as well as its sources and aims. In very abstract terms, international law may nowadays be defined as the law of the international society. However, besides this international society, there exists also an already consolidated transnational society, and a universal society in the process of formation. A look into the UN Charter, the International Bill of Rights, and the many human rights agreements, global and regional, gives additional

support to this view. According to Hersch Lauterpacht, international law owes its validity, "*to the consent of States as expressed in custom and treaties and to the fact of the existence of an international community of States and individuals*." Furthermore, international law is also considered today as a normative system, that influences, directs, and controls the achievement of shared human values. Hence, International Law may be understood as reconciling the common interests of a variety of vertically structured societies. It does so on the basis of the common interests of all human beings, and for the purposes of human survival and human flourishing. Community interests are also represented in this society. Indeed, because the ultimate aims are to guarantee human survival and human flourishing, we can speak of three concentric societies/community: the international, the transnational, and the universal.

The international, the transnational, and the universal societies: The existence of these three different core societies, or communities presupposes the existence of three different principles of action. Typically, the international society is associated with a state of horizontal coexistence; its causes are the protection and achievement of national interest, so it is based on the moral normative principle of self-interest, of egoism. This period is characterized by the coordination of the relations between states in an egoistical sense. The second core society is the transnational society. On the one hand, the transnational society is based on the existence of public common interests. As such, it attempts collectively to protect and achieve its common interests. It is a law characterized by horizontal cooperation as, for example in the administration of common spaces. This change originates in a collective moral principle of action so as to achieve common purposes. Nevertheless, it is important to insist on the fact that this law is also mainly horizontal, and for this reason essentially coordinative. In contrast, more advanced forms of cooperative action take form in the principle of solidarity, itself a moral normative principle. According to this principle, states strive to reduce inequalities among states. On the other hand, the transnational society also raises fundamental questions in the private sector. Although we did not go deeply into this subject, it is nevertheless useful to note again that private economic forces at transnational level cause, put in motion, and shape the structure of the global legal system, and particularly the economic system. The third type of society is made up of individuals, but individuals viewed from a universal perspective; it is for this reason that it is referred to as the universal society. The law protecting the rights of individuals, internationally, is the law of human rights. This type of action is justified on the basis of

the moral normative principle of respect for human dignity. The law of human dignity has two aspects: first, the prohibition of inhuman treatment, and second, the promotion of human flourishing. Similarly, human dignity speaks to the conservation of the individual, as well as to the realization of human personality to the fullest extent possible. Since human action is driven by the moral principle of dignity and occurs always within a community, it is logical to think that the actions of our human societies lead us ultimately to the protection of a single moral principle, human dignity. The state is never ultimately an end, but only a means to articulate certain individual claims. Here we adopt the view that respect for human dignity is a reconciliatory principle that remains at the centre of the international, the transnational (public and private), and the universal society/community.

The verticalization of international law: Taking into account the objective process of globalization, it is undeniable that the prohibition of inhuman treatment, and the promotion of human flourishing, all in the context of the process of human development in its global dimension, have brought into the global system certain structures of a legal type. Particularly important are the UN Charter, the International Bill of Rights, and the emerging hierarchy of international law, especially Article 103 of the UN Charter, obligations *erga omnes*, and *ius cogens* norms. Besides, the process of fragmentation in international law is correlative to the process of constitutionalization. It is in this sense that international law begins to experience a process of verticalization. The achievement of coexisting national interests, common public, as well as transnational private goals, and the protection of human dignity, are all transforming an exclusively horizontal system of law into one of subordination.

Conciliatory sources of international law: When looking at the sources of international law, we find that there exist some conciliatory sources. Among these conciliatory sources, we find principles of law, judicial decision, and the writings of the most highly qualified authors and teachers. Since Article 38 of the ICJ Statute is not exhaustive, we consider also other sources, such as equity, the activities of international organizations, and morality. We also reach the conclusion that principles of law may serve as guidance to the judiciary when it is called upon to decide highly complex cases, particularly when specific issues of morality are matched by universally accepted cogent universal moral principles, such as human dignity.

***Ius cogens*:** There exist a variety of doctrines regarding the nature of *ius cogens* norms, including: *ius cogens* as an axiological rule; as a technique of non-derogability; as constitutional norms; as a rule of vertical law conflict; and as a technique to limit freedom of action. However, although these theories may hint of certain characteristics of imperative norms, the most accepted notion is that *ius cogens* norms are necessary in order to establish an international public order. This public order in many cases overlaps with public morals. International law itself recognizes a definition of *ius cogens* norms. This definition is established in Article 53 of the VCLT. According to this definition, *ius cogens* norms are defined by their effects, implying that the legitimate force of these rules lies in their substance, meaning that, in principle, *ius cogens* norms can also reflect imperative international, transnational, and universal standards of morality, producing their effects on the public order established by the concentric rings of international, transnational, and universal society.

The participants in international law: Finally, Part II, Chapter 2 undertakes a survey of the principal participants in international law. We observe that in the global context there exists a variety of participants. These include a diversity of non-state actors. Besides States, the international community as a whole, and international organizations, Non-Governmental Organizations, Transnational Companies and Multinational Enterprises, and individuals, all influence, and often determine, the new structures of the global legal system.

The international community: The words society and community are closely related, but in an important sense they are also different. In international law, "society" is used rather in the sense of coexisting features; in contrast, "community" is a form of society in which separate entities aim at common ends. Today, with the individual increasingly at the centre of international law, it has become difficult in some cases to determine at precisely what stage there is a society or a community. For this reason, we often refer here to the community/society. The idea of an international community or society of humanist inspiration poses a particular challenge to the classical dogmas of international law. The international community or society is a legal fiction, on the one hand and, on the other, it is a categorical imperative. The former is associated with positive law, the latter with normative law. The international community is conceived of in three main ways: the Hobbesian, based on power and national interests; the Grotian, based on common values, common interests, and common institutions; and the Kantian, based on

the common and universal values of the individual. Taking into consideration that these three forms remain present in the structure of international law, and that there is a lack of an accurate definition of the international community as a legal concept, it is appropriate for decision-makers to take account of the imperative notions of each of such societies or communities as part of the positive structure of international law. WTO jurisprudence has acknowledged, in interpreting "exhaustible resources", that this term has to be interpreted in an evolutionary fashion, taking the interests of the community of nations into account. Furthermore, the WTO judiciary has acknowledged that WTO rules must take into consideration the economic private sector. This implies a potential recognition also of the interests of the individual, if the interpreter were to look at such WTO objectives as raising living standards and ensuring full employment.

Fragmentation: Globalization and progress have brought into existence a fragmented system of international law. Nevertheless, the polycentric structure of international law does not mean that rules are to be interpreted in isolation one from the other. On the contrary, the proliferation of international judicial fora, through the emergence of several separated special sets of rules, imposes a special duty on the judiciary to give coherence to international law. The practice of international law and tribunals shows that to interpret treaty rules it is sometimes necessary to apply extraneous rules to a particular subsystem. The WTO adjudicatory bodies have recognized that WTO provisions cannot be interpreted in clinical isolation from international law. This fact demonstrates that the international judiciary has an important role to play in the process of law formation; its function is that of giving coherence to, and harmonizing, international law.

Constitutionalization: In one way, the constitutionalization of international law refers to the fundamental legal order of political bodies; it is a process of increasing verticalization within the legal structure of international law. It presupposes an evolution from an exclusive coordinative structure of cooperation into a structure of subordination containing imperative norms. The merging of state-centred approaches to international law, with human rights-centred approaches, results in a constitutionalized picture of a global legal order. Such consolidation of the international community also favours the consolidation of a universal constitutional order. Some of these constitutional values are found in the UN Charter and Human Rights agreements. Constitutionalization is also a phenomenon used to describe the function of some

institutional structures, such as the WTO. In such cases, one speaks of micro-constitutionalization. The common denominator of the different approaches to the constitutionalization of the WTO is the possibility they envisage to limit prejudicial state action, in the form of harmful trade policies, thanks to an international organization: the WTO. Authors pleading for an international trade regime with constitutional functions regard the institutional apparatus of the WTO as a substitute for international politics, thus channelling political conflict through constitutional trade law. However, the constitutionalization of the WTO has two dimensions: the horizontal or sectorial, according to which the challenge is that of other institutions; and the vertical, according to which the WTO competes with a general international legal order, on the one hand and, on the other, the constitutional state. In sum, the vision of a global constitutional framework must be broken down into a constitutional network of various complementary levels and sectors. To interpret international law within a constitutional framework demands an integrationist view of the different factors and phenomena that occur in the context of globalization. Finally, we come to the conclusion that international constitutionalization compensates nations for a loss of national sovereignty.

Sovereignty and the possibility of extraterritorial action: Although the principle of sovereignty is essential to contemporary international law, it is something of an eroded axiom; rather, globalization favours new forms of global and regional governance mechanisms for the achievement of its new aims. To be sovereign means to have jurisdiction, the lawful power of the state to act. However, jurisdiction itself remains subject to certain rules. According to these rules, states cannot, except in very few cases, act extraterritorially. In the case of trade-related measures, the Appellate Body clearly implied that, in a particular case, if there is a sufficient nexus between a targeted product and a trade-related measure, this measure can be lawfully applied.

International Economic Law: International Economic Law concerns the fundamental questions of the International Economic Order. There are different views of the nature of IEL and, accordingly, different definitions. In a narrow sense, International Economic Law refers only to macro-economic relations. Consequently, IEL is considered to be a branch of Public International Law. Broadly, IEL refers to the set of norms regulating economic operations of all kinds, including micro-economic relations. A third definition, the so-called "global" definition, departs from this narrow definition,

arguing that IEL has the particular function of integrating domestic economic regulation into global economic discourse. Furthermore, this global definition understands IEL to include also non-economic objectives. As such, IEL has a multidisciplinary nature. This definition facilitates the possibility that economic international provisions be interpreted and applied within the context of the Economic Order and International Law. Conceiving IEL in a multidisciplinary way allows for a consideration of issues of purely economic justice, both commutative and social–distributive. justice

The holistic view of International Trade Law: International Law and International Trade Law differ as to their rationale. International Law has largely been considered to be based on the principle of sovereignty, and *pacta sunt servanda*, whereas International Trade is based on economic liberalism. Although these systems are based on different assumptions, they nevertheless cannot be completely separated, either from each other or from IEL. The WTO adjudicative body has confirmed that General International Law is applicable to WTO law. Regarding the subjects and beneficiaries of WTO law, we have reached the conclusion that, in spite of those formally recognized subjects of the WTO, there are a variety of participants in international trade, particularly those directly benefiting from it; all deserve consideration in the interpretation of a WTO provision. The adjudicative organs of the WTO, seeking information, have admitted *amicus curiae* briefs from NGOs. The judiciary has also recognized and given legal value to the interests of private economic agents. Such recognition suggests that taking into account such preambular objectives as the raising of living standards, and ensuring full employment, may lead also to the recognition of the values and interests of the individual. All these non-member international participants are cognitive factors that have an impact upon the development and construction of WTO rules.

Objectives, and their relationship to exceptions: After a study of WTO objectives, we must highlight that there are certain finalities that guide and inform the whole WTO institution; they characterize and condition its functioning. The objectives of the WTO are found in the Preamble to the WTO Agreement, and the preambles of the different agreements. In the case of a conflict among the preambles to the different agreements, the WTO preamble has priority. The WTO Agreement speaks of economic objectives, objectives regarding the needs of the individual, environmental objectives, objectives relating to social justice, objectives regarding how to achieve the goals of the WTO (instrumental objectives), and objectives relating to the overall integration of the

international trading system. Thus, we can affirm that the WTO recognizes economic, non-economic, and mixed nature objectives. The WTO judiciary has recognized that these objectives are to be interpreted on the basis of contemporary concerns; this implies that they are not of a static, but are rather of a dynamic nature. Objectives, in turn, relate to general exceptions; indeed, exceptions are not only supportive of, but also complement, WTO objectives, by enhancing or limiting their scope. Non-economic and mixed nature objectives require the particular support of extraneous law, so that a given concept or provision may achieve a coherent meaning. The WTO is by no means a mechanism by which to deconstruct the rules established in other subsystems of international law. On the contrary, an objective and integrated approach to the application and interpretation of WTO rules can only contribute to the establishment of a non-antagonist set of rules in relation to those rules which are external to the WTO regime, in a coordinated decision-making process.

Internal and external prinicples: The WTO relies upon principles in order to give meaning to its provisions. There are internal and external principles. Such principles articule the values upon which international trade is to be conducted. They are the axes of the entire system. They constitute a fundamental source for filling in the gaps and lacunae of the international trading system established under the WTO.

The system of exceptions within the WTO: The WTO has a wide system of exceptions, namely, general exceptions, waivers, security exceptions, and exceptions based on the principle of solidarity, or special and differential treatment. The interpretation of these exceptions must be understood in relation both to the principles that underscore them, and the objectives of the organization. In principle, general exceptions serve to protect domestic values, interests, and certain general domestic policies . However, the evolution of these values and interests, from the domestic arena to the transnational or universal level, makes it appropriate, taking evolutionary interpretations into account, to enhance their scope to such a transnational or universal level.

The structure of GATT Article XX(a) and the importance of the value to be protected: In order to interpret the public morals exception we look at the insights of GATT Article XX(a). This provision consists of two parts, namely, the chapeau, and the specific grounds for justification. First, the measure at stake must be justified under one of the paragraphs, from (a) to (j). There must follow an examination as to whether or not

the measures meet the requirements of the chapeau. In the particular case of GATT Article XX(a), the measure must also pass a necessity test. This test has been developed by the jurisprudence of particular relevance in the case of public morals and human rights, not so much for the consequentialist effects of the measure, that is, the contribution of the measure to a given objective, or the restrictiveness of the measure on trade, but for the importance of the value protected, including a deontological assessment of the necessity of the measure. The function of the chapeau is to avoid an exaggerated and abusive use of exceptions, and to establish a balance between the right to exceptions, and the substantive rights of the agreement. On a case-by-case basis, the function of the chapeau is also to establish a balance of rights and obligations between parties to a dispute. The different requirements of the chapeau, although very difficult to demonstrate, have gradually been developed by the jurisprudence.

Waivers: Through waivers, Members may be exempted from certain of their WTO commitments. Waivers are residual in nature and their function is also to establish legal certainty. In spite of exacting requirements, waivers are used broadly. Waivers are used in order to allow for the possibility of certain activities lying outside the regulatory framework of the WTO. As such, they have a coordinative and structural nature. They are connecting features that link international trade to other international, transnational, and universal areas of concern and regulation. In other words, waivers are a tool for giving coherence to the fragmented system of international law. Two waivers, namely the TRIPS waivers, and the Kimberly Scheme waivers, have human rights as their rationale.

The integrative function of the judicial power: The judicial power is an essential element of the law-making process. It is precisely the heterogeneous nature of international law that justifies the role of the judicial function in giving coherence to the relationship between social reality and law. International law, as an authoritative mechanism of decision-making, constitutes an explanation of the role of the international judiciary. The judicialization of international relations leads to a higher commitment to integrate the different existing legal frameworks. Thus, one of the functions of the judicial branch, in fragmentary periods of history, is to balance the different interests, values, and legal principles that coexist within the international, transnational, and universal society/community. In other words, to create meaning on the basis of positive provisions of international law, the judge acts as a mediator for all

these different concerns. Furthermore, in interpreting the law, the judicial function constitutes a mechanism by which to harmonize the relationship between law and reality. For this reason, we can affirm that adjudication is not at all about an automatic application of law; it is rather a means to give shape to international law. The exercise of the judicial function is characterized by the impartiality, independence, competence, and expertise of the judicial decision-maker. Therefore, the judicial function is a form of objective validation of international law. Its influence on shaping international law depends upon the gravity and seriousness of its decisions. Understanding international law as a whole reinforces the idea that the judicial function plays a fundamental role in creating coherence within the still fragmentary system of international law. The WTO is a good example of how particular rules can be interpreted in an holistic, integrative, and harmonious fashion, both from the point of view of positive rules belonging to different legal systems, and from the point of view of integrating political sensibilities into legal statements.

International courts and tribunals, consensus and autonomy: International courts and tribunals employ different techniques in order to reach a final outcome. Particularly important are the techniques of margin of appreciation, on the one hand and, on the other, consensus. Moreover, international courts and tribunal courts, as autonomous bodies, may take legitimate autonomous decisions, irrespective of what the parties to a dispute may consider to be the correct interpretation of a certain provision. Margin of appreciation is therefore a technique that allows the international judiciary to scrutinize decisions taken by national authorities. It allows for judicial deference and connotes a certain normative flexibility. The degree of deference in international law depends very much on the degree of internationalization of a given right, interest, or value. Many international courts and tribunals make use of this technique. The WTO does not precisely refer to margin of appreciation, but does draw on a similar feature: standards of review. Standards of review reflects the relationship between national sovereignty and institutional power. The adjudicative organs of the WTO have observed that the WTO judiciary can neither conduct a *de novo* review, nor defer entirely to Members; rather, an objective assessment must be made of the matter before it. This means that standards of review has the function of allocating power among Members and institutions, while permitting the establishment of a balance between conflicting values. This balancing function implies a possible solution to political questions through judicial activity. Standard of review differs according to the level of agreement over a

given disputed issue, that is, according to the substance or matter before it. For this reason, in solving especially difficult cases, as in the ECtHR, the WTO judiciary, which is led by the principles of autonomy, dynamic interpretation, and judicial self-restraint, is free to choose under which principle of power allocation it will base its final decision. Another essential technique in determining the meaning of a positive provision is consensus. However, consensus does not mean unanimity; on many occasions it is expressed rather through such formulae as "developments and commonly accepted standards", "modern trends", "great majority" or "great number", "general trend", and so on, suggesting that consensus refers primarily to a certain tacit or expressed agreement on a given matter. Consensus is a legitimizing technique that facilitates the reception of court judgments into domestic law. Often, consensus, deference, and autonomy are in fact in tension with each other. In especially difficult cases, recourse to arguments regarding the permissibility of certain moral truths may in turn be necessary. In the specific case of GATT Article XX(a), there is direct reference to the use of public morals. It is the function of the court to determine which moral standards are to be applied in a given case. It is within the inherent powers of the court to determine whether to defer, to look for consensus, or to justify its argument, by means of an autonomous reasoning based on a particular moral truth.

Interpretation: The art or science of interpretation remains always at the centre of legal disputes. Interpretation is part of the legal experience, thus in legal sciences one speaks of legal interpretation. Legal interpretation has a dual character: it is both a cognitive and a creative process. The interpreter, legally speaking, is to be considered to be the authority responsible for substantiating the law through its application and interpretation. Therefore, interpretation is understood to be a legal mechanism through which the legal interpreter orders reality, inasmuch as an interpretation clarifies, delimits, or establishes the legal reality on the basis of a combination of facts and rules, even when it is necessary to apply abstract norms beyond positive rules. There are many types of legal interpretations, but within the process of international law-making, the judicial interpretation occupies an especially prominent place.

Interpretation contains a legislative aspect: The scope of the judicial function is closely connected to the act of interpretation. Interpretation has two opposed elements, namely, a non-restrictive element, according to which laws are put in motion, and a restrictive element, according to which interpretation is limited by legal dogma, such as

natural or positive law. In addition, the legal interpreter, in order to give meaning to certain provisions, makes use of hermeneutics. Hermeneutics is a constructivist technique that establishes the appropriate criteria of interpretation. There are two types of hermeneutics: the positivist, according to which the legal interpreter looks only for a preconstituted will (*volonté preconstituée*), but is not allowed to add to or diminish; and the non-positivist interpretation, which takes place in rather fragmentary and open systems. In non-positivist hermeneutics, the starting point of the substantivization of a concept is the perspective from which facts and norms are interpreted, that is, a previous understanding or conception of the facts and norms. To some extent, this is because an interpretation depends often on the direction in which the interpreter wishes to take the norm, therefore looking into abstract theories and the particularities of a concrete case.

The eclectic approach to the act of interpretation: There is a lack of consensus on a definition of interpretation and its nature. For some, it is science. For others, it is art. Moreover, legal interpretation is also relative to the manner in which the legal order and the law itself is conceived. In a positivist interpretation, it is a cognitive act. In a non-positivist interpretation, it is a volitional act, according to which the interpreter is the real creator of the norm. According to the synthetic form, interpretation is of an eclectic nature. It oscillates between a kind of unlimited liberty and, at the same time, restrictive obedience to a text. However, eclectic forms tend to favour dynamic and evolutionary approaches to interpretation, implying that, although the interpreter has to be cautious when drawing meaning from norms, he is not obliged to issue only descriptive statements. On the contrary, nothing can prevent him from interpreting in a prescriptive fashion. Such prescriptive statements depend in high measure upon the degree of indeterminacy or generality of the norm. This indicates that the judicial branch includes intrinsic legislative aspects.

The eclectic VCLT approach to interpretation and systematic integration: International law recognizes several methods of interpretation. Here we assume the position that interpretation includes both *a priori* rules in order to determine the sense of a rule, as well as *a posteriori* means to justify a given decision. The VCLT opts for an eclectic approach, with a special emphasis on text and context. The articles of the VCLT constitute a large part of the doctrine on interpretation: an open catalogue that offers the interpreter the possibility to choose between many directions. For that reason, rules of interpretation cannot be considered obligatory. Interpretation can be approached

subjectively, as in the establishment of the intention of the parties, or objectively, as defined by an indifference to the intention of the parties. Likewise, the object and purpose of interpretation has a dual nature. It can be considered from a subjectivist as well as from an objectivist perspective. This eclectic approach to interpretation attempts to harmonize the intentions of the parties with the current objective necessities or exigencies of the international, transnational, and universal society/community. Evolutionary approaches are of two types, endogenous and exogenous. Here we focus on exogenous evolutionary approaches, through reference to Article 31(3)(c) of the VCLT. This article allows the legal interpreter to take account of systematic changes in the normative environment. The rationale for interpreting international obligations by reference to their normative environment is that, because all treaty provisions draw their force and validity from general international law, treaty rules must be understood as part of a coherent and meaningful whole. Indeed, the WTO adjudicatory bodies have made recurrent use of systematic integration in dispute settlement.

The Dispute Settlement Mechanism: The Dispute Settlement Mechanism of the World Trade Organization is indispensable for the achievement of economic, non-economic, and mixed nature objectives. It is a system that has given rise to the jurisdiction-applicable law controversy. There is now basic agreement that, whereas jurisdiction refers to or determines whether or not the adjudicatory body can accept a case, the question of applicable law refers to the rules that the judicial body must apply in order to resolve it. In the latter case, this difference has brought to light a number of different expressions, namely, "jurisdiction over claims", and "jurisdiction to apply laws". The latter relates to the possibility of applying non-WTO rules to the interpretation of WTO provisions. Although the WTO has no general jurisdiction, the terms of reference in Article 7 of the DSU make no reference to the sources of law on which the panel must base its process of interpretation. Consequently, the terms of reference do not prejudge the sources of law to which WTO Panels can refer in order to clarify and construe the existing provisions of the covered agreements. In spite of the fact of that the Dispute Settlement Mechanism has limited substantive jurisdiction, it can, for this very reason, draw from other sources of international law, beyond the covered agreements, in order to interpret WTO provisions. Further, Article 3.2 of the DSU is a very controversial procedural rule. It aims at ensuring security and predictability within the WTO system. As central elements, security and predictability encapsulate not only the economic dimension, but also the complex legal, political, and

social objectives established under the international trading system. A holistic approach to these rules understands this article as containing a mandate for establishing and maintaining a balance, or coherence, between WTO law, on the one hand and, on the other, national and international trade governance, as parts of a broader international legal system. This coherence can be justified at least so as to establish the external limits of WTO provisions, including considerations of a deontological type.

The change from a power-based into a rules-based institution: The WTO provides for a system of dispute settlement that is obligatory for all its members. That is, the basis of international trade relations has changed from a power-oriented, diplomatic system of rules, into a rules-based system, with judicial dispute settlement. This process of judicial decision-making has a direct impact on international law, in that it provides a forum for the development of procedural and substantive legal concepts through the application and interpretation of WTO provisions. Interpretation is often considered as a combination of treaty law and judicial decision-making. The judicialization of the WTO, with the establishment of panels and the Appellate Body, means a substitution of economic and political power by the judicial interpretation of legal rules. This means that one of the functions of the judiciary is to contribute to the realization of the objectives of the organization, be those economic, non-economic, or mixed nature objectives.

The relationship between morals, human rights, and international trade: In order to establish the relationship between human rights, trade, and morality, it is first necessary to look separately into the underpinnings of each of these systems. Human rights are based on human dignity. International trade is embedded on economic liberalism (including also neo-liberal thinking). Morality refers to certain standard of right and wrong conduct; it relates to human action. From a concrete point of view, this relationship is viewed mainly from the perspective of the impact of international trade on human rights. Accordingly, the study of such situations approaches inductively this relationship, advocating for descriptive regulative forms. However, from a more general or abstract perspective, the relationship between morals, international trade, and human rights, looks more to the existence of a common principle of human action, that is, a moral principle common to both international trade and human rights, on the basis of a deductive methodology. International trade is a part of economics; the moral underpinning of economics is generally considered to be self- or national interest.

According to Adam Smith, the father of economics, it is self-interest that makes economic actors from human beings. Today, economic performance is mainly driven by self-interest. Human rights, on the other hand, are based on the humanity of the individual, that is, on human dignity, which is measured by a relationship between freedom and equality, between self-interest and a collective solidarity. The only way to reconcile international trade with human rights is to concede that economic performance must ultimately be accountable to human dignity, in the sense that economic activity must not cause harm to others. The objectives of raising living standards, and ensuring of full employment, are also human rights. As such, they are concepts relative to social justice. However, they are also economic concepts. Approaching those concepts deductively, from the point of view of human dignity, will allow us to observe where to place the external limits on trade rules, even if the legal interpreter must then have recourse to deontological reasoning. The limits of trade rules occur there where they breach the duties imposed by the respect, promotion, and protection, of human dignity.

The meaning of morals: In determining whether or not it is possible to interpret human rights under the general exception provided in GATT Article XX(a) (the protection of public morals), it is crucial to take account of the normative framework provided by the general relationship between human rights and international trade from a moral perspective. Looking into the meaning of the word "morals", we notice that the word "moral" refers to certain standards of what is right and wrong. However, this meaning does not tell us much about how to determine which standard is to be applied. Going deeper into the meaning of "morals", we notice that, according to their scope, morals can be either relative or universal. According to their degree of normativity, they may be descriptive or prescriptive. According to its subjects, morals may be individual or social. According to its actions, morals may be relative to the economy, the environment, or human rights. According to its duration, they may be absolute or contingent. And when relating morals to law we face a further difficulty. The relationship between morals and law is one of the most difficult topics in philosophy of law, our understanding of which fluctuates from extreme separation to fused forms. However, when examining the relationship of morals and law, we observe that morality may be expressed in two ways. Vertically, morality is present at three different levels: at the highest level, as a validator of positive law; at the same level, as a positive reflection on morality; at the bottom level, with morality under positive law, as cultural or religious tradition, as in sexual morality. Horizontally, the idea of universal morals takes

three forms: the foundation of the law; the formation of the law; and the execution of the law.

Since GATT Article XX(a) makes direct reference to the protection of public morals, the WTO judiciary is bound to find a positive conception of the good. Furthermore, the Panel is authorized to determine whether this conception of the good is relative to domestic morals, transnational morals, or universal morals. When interpreting this clause, the WTO judiciary has favoured the use of the objective interpretation, while looking at the same time to the ordinary meaning of the words; it has consequently disregarded the historical interpretation that the intention of the parties was to protect certain domestic moral values. In any case, the expression "public morals" has a very high degree of indeterminacy, allowing for a great variety of interpretation. Thus, we must remember that the WTO judiciary, as well as the rules of treaty interpretation in international law, favour objective criteria of interpretation, particularly in today's fragmented system, especially those of a evolutionary type, which manifest the living instrument approach to international treaties. When looking to the ordinary meaning of the word "public", we see that, besides referring to that "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation", the word "public" refers also to values "of or common to the whole human race". Thus, a panel, taking into account the objectives of the WTO Agreements, especially those relative to the raising of living standards, and ensuring full employment, and taking into account the imperative universal value of the protection, promotion, and respect for human dignity, may find it appropriate to regard the expression "public morals" as applicable to the whole human race, that is, to apply a universal standard of morality relative to human dignity. As to "public morals" as a possible way of recognizing human rights, the necessity test may provide further guidance. In balancing conflicting values, the judiciary has also recognized that the first step in admitting the legality of a trade-related measure is to look at the significance of its values. Here it is vital to notice that imperative values, of a *ius cogens* nature, may also apply under public morality rules. It is the imperativeness of the moral value that allows it to pass the necessity test and the requirements of the chapeau. In determining the legality of a measure, the goal of raising living standards, particularly if these are understood not only in economic terms, but based on human rights, and the *erga omnes* obligation to protect, promote, and respect human dignity, may beyond doubt justify trade-restricting measures. One

essential requirement for allowing such limitations to trade rules is that there must be a sufficient nexus between the measure itself and the product targeted.

Bibliography

CONVENTIONS, DECLARATIONS AND LEGAL DOCUMENTS

Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, (1984) UN Doc E/CN.4/1984/4 United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination of Minorities.

An Act for the Abolition of Slave Trade, Act of Parliament of UK, passed on March 25th, 1807 in *International Human Rights* Lillich, R B; Hannum, H; Anaya, S J; Shelton, D, 2006 (4th edition) Aspen.

Act to Prohibit the Importation of Slaves, Act of the US Congress, passed on March 2nd, 1807 in *International Human Rights* Lillich, R B; Hannum, H; Anaya, S J; Shelton, D, 2006 (4th edition) Aspen.

Declaration of the Eight Courts relative to the Universal Abolition of Slave Trade 8 February 1815, Annexed as Act XV to the 1815 General Treaty of Vienna Congress, 63 CTS 473.

International Opium Convention of 23 January 1912, 8 LNTS 187.

African Liquor Convention of 10 September 1919, 8 LNTS 11.

International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications of 12 September 1923, 27 LNTS 214.

North America Free Trade Agreement (NAFTA) Art 2101 (1) of 1 December 1992, 32 ILM 605.

Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy of 19 February 1997, See Internet.

Agreement on the Common Effective Preferential Tariff Scheme for ASEAN Free Trade Area of 28 January 1992, 31 ILM 513.

Charter of the United Nations adopted in San Francisco 26 June 1945; 3 Bevans 1153.

Message to the Congress of Bolivia Simón Bolívar (May 25, 1826) in *International Human Rights*, R B Lillich, H Hannum, S J Anaya, D Shelton, (eds.) 2006 (4th edition) Aspen.

Slavery Convention adopted on Geneva, 25 September 1926, 60 LNTS 254.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institutions and Practices Similar to Slavery adopted by Conference of Plenipotentiaries convened by Economic and Social Council Res. 608 (XXI) of 30 April 1956 done at Geneva on 7 September 1956, 226 UNTS 3.

Covenant of the League of Nations 225 Parry 195 in (Treaty of Versailles, 28 June 1919, 2 Bevans 235.

ILO Declaration on Social Justice for a Fair Globalization, International Labour Conference, 97th Session, Geneva 10 June 2008.

ILO Declaration on Fundamental Principles and Rights at Work, Geneva 18 June 1998; 37 ILM. 1233 (1998).

Philadelphia Declaration of 10 May 1944, Declaration Concerning the Aims and Purposes of the International Labour Organization, Annex to the Constitution of the ILO, ILO Constitution 15 UNTS 40.

ILO Constitution, 15 UNTS 40.

Universal Declaration of Human Rights adopted by the General Assembly of the United Nations Res. 217 A (III) of 10 December 1948, UN Doc A/810 at 71 (1948).

International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nation Res. 2200A (XXI) of 16 December 1966, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).

International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nation Res. 2200A (XXI) of 16 December 1966, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967).

International Convention on the Elimination of All Forms of Racial Discrimination adopted by the General Assembly of the United Nations Res. 2106 (XX) of 21 December 1965, Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 UNTS 195.

Convention on the Elimination of All Forms of Discrimination against Women adopted by the General Assembly of the United Nations Res. 34/180 of 18 December 1979, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adoted by the General Assembly of the United Nations Res. 39/46 of 10 December 1984, Annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984); 1465 UNTS 85.

Convention on the Rights of the Child adopted by the General Assembly of the United Nations Res. 44/45 of 20 November 1989, Annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989); 1577 UNTS 3; 28 ILM 1456 (1989).

Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations Res. 260 (III) of 9 December 1948 78 UNTS 277.

Proclamation of Tehran, Final Act on the International Conference on Human Rights; adopted on 13 May 1968 A/CONF. 32/41.

Vienna Declaration and Programme of Action adopted by the Wolrd Conference on Human Rights on 25 June 1993 A/CONF.157/23, 32 ILM 1661 (1993).

Millennium Declaration United Nations General Aassembly A/RES/55/2 adopted on 18 September 2000.

World Summit for Social Development and beyond achieving social development for all in a globalizing world UNGA A/RES/S-24/2 15 December 2000.

In Larger Freedom, World Summit (2005). 21 March 2005 UN Doc. A/59/2005.

American Declaration on the Rights and Duties of Man adopted by the Ninth International Conference of American States in Bogotá, Colombia, 1948 O.A.S. Res. XXX, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003).

American Convention on Human Rights (Pact of San José) adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

European Convention for the Protection of Human Rights and Fundamental Freedoms. CETS No. 005 adopted in Rome, 4 November 1950, 213 UNTS 221.

Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances Vilnius 3 May 2002, CETS No. 184.

European Social Charter Turin, 18 October 1961, CETS No. 035, 529 UNTS 89.

Revised European Social Charter. Strasbourg, 3 May 1996, ETS No 163 (1996).

Convention on Action against Trafficking in Human Beings of 16 May 2005 CETS No. 197.

Charter of Fundamental Rights of the European Union of 18 December 2002**,** 2000/C 364/01, OJ (2000) C7364/1.

African Charter on Human and People's Rights (Banjul Charter) adopted 27 June 1981 OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

Charter of the South Asian Association for Regional Cooperation at Sri Lanka on 8 December 1985, UN Doc. A/41/114 Annex I; 4 Asian Yearbook of International Law 473.

Declaration of the Ninth SAARC Summit Malé SAARC/SUMMIT.9/11.

SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia done at Kathmandu 5 January 2002 see Internet.

SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution done at Kathmandu 5 January 2002 see Internet.

SAARC Social Charter SAARC/SUMMIT.12/SC.29/27 Annex-V 6 January 2004.

SAARC Charter of Democracy, Bangladesh February 2012 see Internet.

ASEAN (Bangkok) Declaration, Bangkok, 8 August 1967, 6 ILM 1233 (1967) .

ASEAN Charter, 13th ASEAN Summit, 20 Singapore 2007 see Internet.

Cairo Declaration on Human Rights in Islam, August 5, 1990 UN Doc. A/CONF.157/PC/62/Add.18 (1993).

Arab Charter of Human Rights of 22 May 2004 *reprinted **in*** 12 International Human Rights Reports 893 (2005).

Charter of Fundamental Rights of the European Union 18 December 2000, 2000/C 364/01.

Statue of the International Criminal Court 17 July 1998; 2187 UNTS 90, 37 ILM 1002(1998).

Constitution of the United Nations Educational, Scientific and Cultural Organization of 16 of November 1945, 4 UNTS 275.

Declaration on Social Progress and Development UNGA Resolution 2542 (XXIV) 11 December 1969, 24 UN GAOR Supp. (No. 30) at 49, UN Doc. A/7630 (1969).

The Universal Declaration on the Eradication of Hunger and Malnutrition adopted on 16 November 1974 by the World Food Conference convened under UNGA Resolution 3180 (XXVIII) of 17 December 1973 and endorsed by UNGA Resolution 3348 (XXIX) of 17 December 1974.

Declaration on the Right of Peoples to Peace, UNGA Resolution 39/11 of 12 November 1984.

Declaration on the Right to Development, UNGA Resolution 41/128 of 4 December 1986.

Universal Declaration on Cultural Diversity, Adopted by the General Conference of the UNESCO on 2 November 2001.

International Development Strategy for the Second United Nations Development Decade UNGA Resolution 25/2626 of 24 October 1970.

International Development Strategy for the 3rd United Nations Development Decade UNGA Resolution 35/56 of 5 December 1980.

UNESCO Universal Declaration on the Universal Genome and Human Rights UNGA Resolution 53/152, 9 of December 1998.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted by General Assembly of the United Nations Res. 45/158 of 18 December 1990, Annex, 45 U.N. GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990).

International Convention on the Rights and Dignity of Persons with Disabilities adopted by the General Assembly of the United Nations Res. 61/611 of 13 December 2006 A/AC.265/2006/4, Annex 2.

International Convention for the Protection of All Persons from Enforced Disappearance UN Doc. E/CN.4/2005/WG.22/WP.1/Rev.4 (2005), 20 December 2006.

Convention (III) relative to the Treatment of Prisoners of War of the Geneva Convention III 12 August 1949, 75 UNTS 135.

Inter-American Convention to Prevent and Punish Torture 9 December 1985,OAS Treaty Series, No. 67, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003).

Inter-American Convention on Forced Disappearance of Persons 9 June 1994 OAS Treaty Series No. 68, 33 ILM 1429 (1994).

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women 9 June 1994, 33 ILM 1534 (1994).

Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities 7 June 1999, AG/RES (XXIX-O/99) (XXIX-O/99).

African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990).

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) adopted on 11 July 2003 CAB/LEG/66.6 (Sept. 13, 2000).

Charter of Economic Rights and Duties of the States UNGA Res. 3281 (xxix) 1974, 12 December 1974, UN GAOR, 29th Sess., Supp. No. 31 (1974) 50; 14 ILM 251 (1975).

Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law Report of the ILC UN General Assembly (Martti Koskenniemi) A/CN.4/L.682. 13 April 2006 ILC.58th Session.

Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law Report study group of the International Law Commission UN General Assembly A/CN.4/L.702 18 July 2006 ILC 58th Session.

Reports of the International Law Commission on the second part of its seventeenth session and on its eighteen session ILC Document A/6309/Rev.1 in Yearboook of the International Law Commission, 1966, Vol. 2.

The realization of Economic, Social and Cultural Rights: Globalization and its impact on the full employment of human rights United Nations, Economic and Social Council 15 June 2000, E/CN.4/Sub.2/2000/13.

Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

United Nations Conventions on Contracts for the International Sale of Goods A/CONF.97/18(1980); 1489 UNTS 3.

Fourth Report on State Responsibility, James Crawford (Special Rapporteur) ILC 53rd Session, UNGA 2 April 2001 , A/CN.4/517.

Charter of Economic Rights and Duties of the States. GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50; 14 ILM 251 (1975).

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations GA Res. 2625, 25 UN GAOR Supp. 18 122; A/Res/25/2625 of 24 October 1970.

An Agenda for Peace, Preventive Diplomacy, peace-making and peacekeeping, Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992. UN Doc. A/47/277 – S/24111, 17 June 1992.

North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, 14 September 1993, 32 ILM 1499 (1993).

Documents of the second part of the seventeenth session and of the eighteen session including the reports of the Commission of the General Assembly A/CN.4/SER.A/1966/Add.1, Yearbook of the International Law Commission. 1966 Vol. 2.

DICTIONARIES AND ENCYCLOPEDIAS

Black's Law Dictionary, Henry Campbell Black 1990 (6th edition) West Group

Black's Law Dictionary, Bryan A Garner 2004 (8th edition) Thomson West

Diccionario de la Lengua Española de la Real Academia Española (22 nd edition) see internet.

Dictionnaire de la Langue Philosophique, Paul Foulquié, 1962, Presses Universaiters de France.

Le Nouveau Petit Robert, Dictionnaire Alphabétique et Analogique de la Langue Française 2000, SNL Le Robert

The Concise Oxford Dictionary, Della Thompson (ed.) 1995 (9th edition) Oxford University Press

The New Shorter Oxford English Dictionary on Historical Principles, Lesley Brown (ed.), 1993 Vol. 1 Clarendon Press

The New Shorter Oxford English Dictionary on Historical Principles, Angus Stevenson (ed.), 2007 Vol. 1 Oxford University Press

Vocaboulaire Juridique, Gérard Cornu (ed.), 2007 Presses Universitaires de France

Stanford Encyclopedia of Philosophy. First published in 2002. Revised in 2011 see internet.

The New Palgrave: Dictionary of Economics Steven N Durlauf and Laurence E Blume (eds.) 2008 (2nd edition) Macmillan Publishers

Enciclopedia Jurídica Latinoamericana, 2006 Vol.6, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Editorial Porrúa.

Max Planck Enciclopedia of Public International Law, Rüdiger Wolfrum (ed.) 2012 Oxford University Press.

WTO MATERIALS

Agreement Establishing the World Trade Organization (Marrakesh Agreement)1867 UNTS 154; 33 ILM 1144 (1994).

General Agreement on Tariffs and Trade (GATT 1947) 55 UNTS 194; 61 Stat. pt. 5; TIAS 1700.

General Agreement on Tariffs and Trade (GATT 1994) 1867 UNTS 187; 33 ILM 1153 (1994).

Agreement on Trade-Related Aspects if Intellectual Property (TRIP's) 1869 UNTS 299; 33 ILM 1197 (1994).

General Agreement on Trade in Services (GATS) 1869 UNTS 183; 33 ILM 1167 (1994).

Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1869 UNTS 401; 33 ILM 1226 (1994).

WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 UNTS 493

Agreement on Subsidies and Countervailing Measures 1867 UNTS 14

Havana Charter for an International Trade Organization. 24 of March 1948 UN Doc. E/Conf.2/78.

Singapore WTO Ministerial Declaration WT/MIN(96)/DEC 18 December 1996.

Doha WTO Ministerial Declaration WT/MIN(01)/DEC/1 of 20 November 2001.

Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, (Enabling Clause) Decision of 28 November 1979 (L/4903).

Request for a waiver - Kimberly Process Certification Scheme for Rough Diamonds. G/C/W/431, 12 November 2002.

Waiver Concerning Kimberly Process Certification Scheme for Rough Diamonds Decision of 15 May 2003 WT/L/518 (27 May 2003).

Rules of Procedures or Session of the Ministerial Conference and the Meetings of the General Council. Annex II Guidelines for Observer Status for Governments in the WTO WT/L/161 25 July 1996.

Guidelines for Arrangements of Relations with Non-Intergovernmental Organizations WT/L/162 18 July 1996.

Trade Policy Review, Secretariat, Doc. WT/TPR/S/168 Rev 1 (Nov. 15, 2006).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/53 (Nov. 19, 1998).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/172/Rev. 1 (Apr. 3, 2007).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/24 (Mar. 13, 1997).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/99/Rev. 1 (Oct. 7, 2003).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/184/Rev. 1 (Nov. 6, 2007).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/157/Rev. 1 (Mar. 24, 2006).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/116 (May 19, 2003).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/115/Rev.1 (Jan. 31, 2006).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/165/Rev. 1 (Oct. 10, 2006).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/125 (Nov. 19, 2003).

Trade Policy Review, Secretariat, Doc. WT/TPR/S/106 (Sep. 25, 2002).

INTERNET

World Trade Organization available at http://www.wto.org/ Last visited 01. December. 2012.

International Labour Organization available at www.ilo.org Last visited 11.05. 2012.

United Nations Development Programme available at www.undp.org Last visited 22. May. 2012.

Office of the United Nations High Commissioner for Human Rights available at http://www2.ohchr.org/english/law/index.htm#instruments Last visited 25.April. 2012.

World Bank available at http://www.worldbank.org/ Last visited 10. June. 2012.

International Court of Justice available at http://www.icj-cij.org/homepage/ Last visited 01. December. 2012.

European Court of Human Rights
available at http://www.echr.coe.int/echr/homepage_EN Last visited 25. May. 2012.

European Court available at http://curia.europa.eu/ Last visited 25. May. 2012.

Inter-American Court of Human Rights available at http://www.corteidh.or.cr/ Last visited 01. December. 2012.

International Commitee of the Red Cross, under War and Law available at: http://www.icrc.org/eng/war-and-law/index.jsp last visited November 2012

The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institutions and Practices Similar to Slavery Conference of Plenipotentiaries convened by Economic and Social Council Resolution 608 (XXI) of 30 April 1956 done at Geneva on 7 September 1956 available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XVIII~4&chapter=18&Temp=mtdsg3&lang=en Last visited 25.April.2012.

UN Charter Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&lang=en last visited 25.April 2012.

International Covenant on Civil and Political Rights Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en Last visited 25.April.2012

International Covenant on Economic Social and Cultural Rights, Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en Last visited 25. April 2012.

The International Convention on the Elimination of All Forms of Racial Discrimination General Assembly Resolution 2106 (XX) of 21 December 1965.http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en Last visited 25. April. 2012.

The Convention on the Elimination of All Forms of Discrimination against Women General Assembly Resolution 34/180 of 18 December 1979 Status of ratification in United Nations Treaty Collection, availableat:http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en Last visited 25.April.2012

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment General Assembly Resolution 39/46 of 10 December 1984 Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en Last visited 25. April. 2012.

The Convention on the Rights of the Child General Assembly Resolution 44/45 of 20 November 1989 entering into force 2 September 1990. 1577 UNTS 3. Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en Last visited 25.April.2012.

The Convention on the Prevention and Punishment of the Crime of Genocide General Assembly Resolution 260 (III) of 9 December 1948. Status of ratification in United Nations Treaty Collection, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en Last visited 25. April. 2012.

SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia done at Kathmandu 5 January 2002 available at http://www.saarc-sec.org/userfiles/conv-children.pdf Last visited 25. April. 2012.

SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Done at Kathmandu 5 January 2002 available at http://www.saarc-sec.org/userfiles/conv-traffiking.pdf last visited 25.April.2012

SAARC Charter of Democracy, done in Bangladesh February 2011 available at http://www.saarc-sec.org/SAARC-Charter-of-Democracy/88/ Last visited November 2012.

ASEAN Charter, 13th ASEAN Summit, 20 Singapore 2007 available at: http://www.asean.org/asean/asean-charter/asean-charter Last visited 27 November 2012.

Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy of 19 February 1997, available at http://www.caricom.org/jsp/community/revised_treaty-text.pdf Last visited 25. November. 2012.

Diccionario de la Lengua Española de la Real Academia Española www.rae.es

Stanford Encyclopedia of Philosophy. "The Definition of Morality" First published in 2002. Revised in 2011 available at http://plato.standford.edu/entries/morality-definition/ last visited on 20. January 2012

Max Planck Encyclopedia of Public International Law available at http://www.mpepil.com/

Dörmann, Knut. "The Geneva Conventions Today" Statement of 9 July 2009, Head of the Legal Division International Committee of the Red Cross "The Geneva Conventions remain the cornerstone for the protection and respect of human dignity in armed conflict" available at http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-090709.htm Last visited 07. June. 2012.

Donelly, Jack. "Human Dignity and Human Rights", 2009, available at http://www.thelatinlibrary.com/cicero/off.shtml Last visited 06. June. 2012.

Shelton, Dinah. "An Introduction to the History of International Human Rights Law" Working Paper No.346, The George Washington University Law School, 2007 available at http://www.csb.uncw.edu/people/eversp/classes/BLA361/Intl%20Law/Required%20Readings/18.History%20of%20Human%20Rights%20Law.ssrn.pdf. Last visited 06. June. 2012.

von der Pforten, Dietmer. "Zur Würde des Menschen bei Kant" available at http://www.rechtsphilosophie.uni-goettingen.de/ZurWuerdeDesMenschenBeiKant.pdf last visited 06.June.2012

Lamy, Pascal. "Humanising Globalisation" Speech. Santiago de Chile 30 January 2006 available at http://wto.org/english/news_e/sppl_e/sppl16_e.htm last visited 02. July. 2012.

Zleptnig, Stefan. "The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority" European Integration online Papers (EIoP) Vol. 6 (2002) No. 17 available at: http://eiop.or.at/eiop/texte/2002-017a.htm last visited 15. August. 2011.

JOURNALS

American Anthropologist

American Journal of International Law

American University International Law Review

Asia-Pacific Journal of Human Rights and Law

Australian Yearbook of International Law

Austrian Review of International and European Law

British Yearbook of International Law

Brooklyn Journal of International Law

Buffalo Human Rights Law Review

Connecticut Journal of International Law

Cornell International Law Journal

European Journal of International Law

Finnish Yearbook of International Law

Florida Journal of International Law

Fordham International Law Journal.

Georgetown Journal of International Law

Georgia Journal of International and Comparative Law

German Law Journal

Harvard Law Review

Human Rights Law Review

Human Rights Quarterly

International and Comparative Law Quarterly

International Community Law Review

International Journal of Human Rights

New York University Journal of International Law and Politics

Journal of Anthropological Research

Journal of International Economic Law

Journal of the History of Ideas

Journal of World Trade

Law and Practice of International Courts and Tribunals

Leiden Journal of International Law

Max Planck Yearbook of United Nations Law

Michigan Journal of International Law

Minnesota Journal of Global Trade

Netherlands International Law Review

New York University Journal of International Law & Politics

New York University Law Review

Notre Dame Law Review

Persona y Derecho

Public Law

Relations Internationales

Revue Général de Droit International Public

Revue Interntionale de Droit Économique"

Rivista di Diritto Internationale

Sociology

Victoria University Wellington Law Review

Virginia Journal of International Law

Yale Journal of International Law

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

CASES

Permanent Court of International Justice

Nationality Decrees Issued in Tunis and Morocco, PCIJ Series B No.4, Advisory Opinion No.4, 7 February 1923.

The Case of S.S. Lotus PCIJ Series A No. 10 Judgment of 7 December 1927.

Interpretation of Judgement Nos. 7 and 8, Judgment (The Chorzów Factory) PCIJ Series A No.13, Judgement of 16 December 1927.

International Court of Justice

The Corfu Chanel Case, Merits Judgment of 9 April 1949, ICJ Reports 1949, p. 4

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 15.

South West Africa Cases (Ethiopia V. South Africa) Preliminary Objections, Judgement 21 December 1962, ICJ Reports 1962, p. 319.

South West Africa Cases, Second Phase (Ethiopia v. South Africa; Liberia v. South Africa) Judgment of 18 July 1966 ICJ Reports 1966, p. 6.

Barcelona Traction, Light and Power Company, Second Phase (Belgium v Spain) Judgment of 5 February 1970, ICJ Reports 1970 p. 3.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 16.

United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) Judgment of 24 May 1980, ICJ Reports 1980, p. 3.

Case concerning the Continental Shelf (Tunisia/ Libyan Arab Jamahiriya) Judgment of 24 February 1982, ICJ 1982 p. 18.

Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment of 3 June 1985 ICJ Reports 1985, p. 13.

Military and Paramilitary Activities in and against Nicaragua, Merits (Nicaragua v. United States of America) Judgment of 27 June 1986, ICJ Report 1986, p. 14.

Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 Advisory Opinion of 26 April 1988, ICJ Reports 1988, p. 12.

Legality of the Threat or Use of Nuclear Weapons Advisory Opinion 8 July 1996, ICJ Reports 1996 p. 226.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections 11 July 1996, ICJ Reports 1996 p. 595.

LaGrand Case (Germany v. United States of America) Judgment of 27 June 2001, ICJ Reports 2001, p. 466.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion 9 July 2004, ICJ Reports 2004, p. 136.

Oil Platforms (Islamic Republic of Iran v United States) Judgment of 6 November 2003, ICJ Reports 2003, p. 161.

Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Request for Advisory Opinion) Advisory Opinion 22 July 2010, General List No. 141.

UN Human Rights Committee

Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius, UN Human Rights Committee, CCPR/C/12/D/35/1978, 9 April 1981.

Leo Hertzberg et al. v. Finland, UN Human Rights Committee, Communication No. 61/1979, U.N. GAOR, 37th Sess. Supp. No. 40/1982, U.N. Doc. A/37/40 (1982), 2 April 1982 .

Lansman et al. v. Finland, UN Human Rights Committee, Communication No. 671/1995, U.N. GAOR , 58th Session U.N. Doc. CCPR/C/58/D/671/1995.

Regional Courts

Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, requested be the Government of Costa Rica, Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984 Series A No.4.

Case of the Street Children (Villagrán-Morales and others v. Guatemala), Merits, Inter-American Court of Human Rights, Series C No. 63, Judgement of 19 November 1999.

Legal Status and Human Rights of the Child. Inter-American Court of Human Rights, Advisory Opinion OC 17/02 of 28 August 2002, Series A No. 17.

Victims of the Tugboat „13 de Marzo" vs Cuba, Inter-American Commission on Human Rights, Report No. 47/96, Case 11.436, 16 of October 1996.

Handyside Case (Ireland v UK) European Court of Human Rights, Judgement 7 of December 1976, Application No.5493/72.

Tyrer v United Kingdom, European Court of Human Rights, Judgment of 25 April 1978 Application No.5856/72.

Leifer and others v. Germany, European Court of Justice, Judgment of 17 October 1995, Case C-83-94, Report of Cases, ECR I-03231.

Pretty v. United Kingdom, European Court of Human Rights, Judgment of 29 April 2002 Application No. 2346/02.

Omega Spielhallen und Automatenaufstellungs- GmbH v. Oberbürgermeisterin der Bundesstaat Bonn, European Court of Justice, Judgment of 14 October 2004, Case C-36/02 Report of Cases ECR I-09609.

World Trade Organization and GATT

Argentina-Safeguard Measures on Imports of Footwear Appellate Body WT/DS121/AB/R 14 December 1999.

Australia-Measures Affecting Importation of Salmon Appellate Body WT/DS18/AB/R 20 October 1998.

Brazil-Measures Affecting Dessicated Coconut Appellate Body WT/DS22/AB/R 21 February 1997.

Brazil- Measures Affecting Imports of Retreated Tyres Appellate Body WT/DS332/AB/R 3 December 2007.

Chile-Price Band System and Safeguard Measures Relating to Certain Agricultural Products Panel W/DS207/R, 3 May 2002.

China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products Panel W/DS363/R 12 August 2009.

China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products Appellate Body W/DS363/AB/R 21 December 2009.

European Communities-Regime for the Importation, Sale and Distribution of Bananas Appellate Body WT/DS27/AB/R, 9 September 1997.

European Communities- Measures Concerning Meat and Meat Products (Hormones) Appellate Body WT/DS26/AB/R 13 February 1998.

European Communities-Measures Affecting Asbestos and Products Containing Asbestos Panel WT/DS13/R 18 September 2000.

European Communities-Measures Affecting Asbestos and Products Containing Asbestos Appellate Body WT/DS135/AB/R 12 March 2001.

European Communities –Conditions for the Granting of Tariff Preferences to Developing Countries, Appellate Body, WT/DS246/AB/R 7 April 2004.

European Communities-Measures Affecting the Approval and Marketing of Biotech Products Panel WT/DS291/R, WT/DS292/R, WT/DS293/R 29 September 2006.

India-Patent Protection for Pharmaceutical and Agricultural Chemical Products Appellate Body WT/DS50/ABR 19 December 1997.

Japan- Taxes on Alcoholic Beverages Appellate Body WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 4 October 1996.

Korea- Measures Affecting Government Procurement Panel WT/DS163/R 1 May 2000.

Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef Appellate Body WT/DS169/AB/R 11 December 2000.

United States-Standards for Reformulated and Conventional Gasoline Panel, WT/DS2/R 29 January 1996.

United States-Standards for Reformulated and Conventional Gasoline Appellate Body, WT/DS2/AB/R 29 April 1996.

United States-Measures Affecting Imports of Woven Shirts and Blouses from India Appellate Body WT/DS33/AB/R 25 April 1997.

United States- Import Prohibition of Certain Shrimp and Shrimp Products Panel WT/DS5/R 15 May 1998.

United States- Import Prohibition of Certain Shrimp and Shrimp Products Appellate Body WT/DS58/AB/R 12 October 1998.

United States-Section 301-310 of the Trade Act of 1974 Panel WT/DS152/R 22 December 1999.

United States- Import Measures on Certain Products from the European Communities Appellate Body WT/DS165/AB/R 11 December 2000.

United States-Safeguard Measures on Import of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia Appellate Body WT/DS177/AB/R,WT/DS178/AB/R 1 May 2001.

United States-Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan Appellate Body WT/DS192/AB/R 8 October 2001.

United States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany Appellate Body WT/DS213/AB/R 28 November 2002.

United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services Panel WT/DS285/R 10 November 2004.

United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Appellate Body WT/DS285/AB/R 7 April 2005.

United States – Restrictions on Imports of Tuna, (Tuna I) GATT Panel Report, unadopted, DS21/R, DS21/R, 3 September 1991, BISD 39S/155.

United States – Restrictions on Imports of Tuna, (Tuna II) GATT Panel Report, unadopted, DS29/R, 16 June 1994.

United States-US Section 337 of the Tariff Act of 1930, GATT Panel Report, adopted, BISD 36S/345, 7 November 1989.

BOOKS AND ARTICLES

Aaronson, Susan Ariel and Zimmerman, Jamie M "Trade Imbalance: The Struggle to Weight Human Rights Concerns in Trade Policy Making" 2008 Cambridge University Press.

Abi-Saab, Georges "Fragmentation or unification: Some concluding remarks" New York University Journal of International Law and Politics 1998 Vol. 31 No. 4.

Abi-Saab, Georges. in "Lagonissi Conference on International Law, Papers and Proceedings", 1967 Vol. 2, Carnegie endowment for international peace (European Centre).

Absjørn, Eide. "Article 27. The right to an Adequate Standard of Living" in *A Commentary on the United Nations Convention on the Rights of the Child* A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M Verheyde (eds.) 2006 Martinus Nijhoff Publishers.

Addo, Michael K. "The Legal Nature of International Human Rights" 2010 Martinus Nijhoff Publishers.

Ala'I, Padideh "Free Trade or sustainable development? An analysis of the WTO Appellate Body shift to a more balanced approach to trade liberalization" American University International Law Review 1999 Vol. 14 No. 4.

Alexander, John M. "Capabilities, human rights and moral pluralism" The International Journal of Human Rights" 2004 Vol. 8 No. 4.

Allot, Philip. "The Concept of International Law" European Journal of International Law 1999 Vol. 10 No. 1.

Alston; Philip. "Labour Rights as Human Rights: The Not So Happy State of the Art" in *Labour Rights as Human Rights* P. Alston (ed.) 2005 Oxford University Press.

Álvarez Ledesma, Mario I. "Acerca del Concepto Derechos Humanos" 1998 McGraw-Hill.

Andriantsimbazovina, Joël. "La dignité et le droit international et europeén" in *Justice, éthique et dignité* S Gaboriau, H Pauliat (Collected Texts) 2002 Presses Universitaires de Limoges.

Anzilotti, Dionisio. "Cours de Droit International" 1929 Recueil Sirey.

Arbour, Louise. "Dialogue between Judges, European Court of Human Rights, Council of Europe" 2008, France.

Arieli, Yehoshua. The Emergence of the Doctrine of the Dignity of Man. In *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer and E Klein (eds.) 2002 Kluwer Law International.

Assman, Heinz-Dieter. "Recht und Ethos im Zeitalter der Globalisierung: Zur Einführung" in *Recht und Ethos im Zeitalter der Globalisierung* H-D Assmann und R Sethe (eds.) 2004 Nomos.

Baderin, Mashood A. "Recent Developments in the African Regional Human Rights System" Human Rights Law Review 2005 Vol. 5 No. 1.

Bakircioglu, Onder. "The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases" German Law Journal 2007 Vol. 8 No. 7.

Bal, Salman. "International Free Trade Agreement and Human Rights: Reinterpreting Article XX of the GATT" Minnesota Journal of Global Trade 2001 Vol. 10 No. 1.

Bartels Lorand. "Art XX of GATT and the Problem of Extraterritorial Jurisdiction" Journal of World Trade 2002 Vol. 36 No. 2.

Bartels, Lorand. "Applicable Law in WTO Dispute Settlement Proceedings" Journal of World Trade 2001 Vol. 35 No. 3.

Bartels, Lorand. "The Appellate Body and Public International Law" in *WTO: Law and Process: Proceddings of the 2005 and 2006 Annual WTO Conferences* F Ortino and S Ripinsky (eds.) 2007 British Institute of International and Comparative Law.

Bartels, Lorand. "The Appellate Body and Public International Law" in *WTO: Law and Process:* F Ortino and S Ripinsky (eds.) 2006 British Institute of International and Comparative Law.

Bartels, Lorand. "Trade and Human Rights" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol. 9 Oxford University Press.

Bayertz, Kurt. "Human Dignity: Philosophical Origin and Scientific Erosion of the Idea" in *Sanctity of Life and Human* Dignity Kurt Bayertz (ed.) 1996 Kluwer Academic Publishers.

Baylis, John; Smith Steve; Owens, Patricia (eds.) "The Globalization of World Politics: An Introduction to International Relations" 2011, 5th Edition, Oxford University Press.

Bender, Tobias. "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.) 2005 (1st edition).

Benedek,Wolfgang; de Feyter, Koen; Marrella Fabrizio (eds.) "Economic Globalization and Human Rights: EIUC Studies on Human Rights and Democratization" 2007 Cambridge University Press.

Bentham, Jeremy. "Nonsense upon stilts, or Pandora's Box opened, or the French Declaration of Rights prefixed to the Constitution of 1791 laid open and exposed

– with a comparative sketch of what has been done on the same subject in the Constitution of 1795, and a sample of Citizen Sieyès" in *The collected works of Jeremy Bentham: Rights, Representation, and Reform; Nonsense upon stilts and other writings on the French Revolution* P Schofield, C Pease-Watkin and C Blamires, 2002 Clarendon Press.

Benvenasti, Eyal. "Margin of Appreciation, Consensus, and Universal Standards" New York University Journal of International Law & Politics. 1999 Vol. 31 No. 4.

Bernasconi-Osterwalder, Nathalie; Magraw Daniel; Oliva, Maria Julia; Orellana, Marcos; Tuerk Elisabeth "Environment and Trade: A Guide to WTO Jurisprudence" 2005 Routledge.

Bhagwati, Jagdish. "In Defense of Globalization" 2004 Oxford University Press.

Bianchi, Andrea. "Human Rights and the Magic of *Jus Cogens*" The European Journal of International Law 2008 Vol. 19 No. 3.

Bowen, Brandon L. "The World Trade Organization and its interpretation of the Article XX exceptions to the General Agreement on Tariffs and trade, in light of recent developments" 29 Georgia Journal of International and Comparative Law 2000 Vol. 29 No. 1.

Boyle, Alan and Chinkin, Christine. "The Making of International Law" 2007 Oxford University Press.

Breau, Susan C. "The constitutionalization of the International Legal Order" Leiden Journal of International Law 2008 Vol. 21 No. 2.

Brems, Eva. "Human Rights: Universality and Diversity" 2001 Martinus Nijhoff Publishers.

Broude Tomer. "Fragmentation(s) of International Law: On Normative Integration as Authority Allocation" in *The Shifting Allocation of Authority in International Law* T Broude and Y Shany (eds.) 2008 Hart Publishing.

Brownlie, Ian. "Principles of Public International Law" 7th edition 2008 Oxford University Press.

Brownlie, Ian. "The rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations" 1998 Martinus Nijhoff Publishers.

Brunet, Pierre. "Aspects théoriques et philosophiques de l'interprétation normative" Revue Général de Droit International Public 2011 Vol. 115 No. 2.

Buchan, Rusell. "A Clash of Normativities: International Society and International Community" International Community Law Review 2008 Vol. 10 No. 1.

Buergenthal Thomas. "International Human Rights in a Nutshell" 2nd edition 1995 West Publishing Company.

Buergenthal Thomas; Murphy, Sean D. "Public International Law in a Nutshell." 2006 (4th edition) West Group.

Buergenthal, Thomas. "Codification and implementation of international human rights *Human Dignity –The Internationalization of Human Rights-* A H Henkin (ed.) 1979. Aspen Institute for Humanistic Studies, Oceana Publications and the Netherlands.

Cameron, James and Gray Kevin R. "Principles of international law in the WTO Dispute Settlement Body" International and Comparative Law Quarterly 2001 Vol. 50. No. 2.

Canick, Hubert. "Dignity of Man" and "*Persona*" in Stoic Anthropology: Some Remarks on Cicero, *De Officiis I* 105-107" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer and E Klein (eds.) 2002 Kluwer Law International.

Carozza, Paolo G. "Human Dignity and Judicial Interpretation of Human Rights: A Replay" European Journal of Human Rights 2008 Vol. 19 No. 5.

Carozza, Paolo G. "Uses and misuses of comparative law in international human rights: Some reflections on the jurisprudence of the European Court of Human Rights" Notre Dame Law Review 1998 Vol. 73 No. 5.

Carreau, Dominique. "Droit International" 2004 (8th edition) A. Pedone.

Carreau, Dominique and Juillard, Patrick. "Droit International Économique" 2010 (4th edition) Dalloz-Sirey.

Cass, Deborah. "The Constitutionalization of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade." The European Journal of International Law 2001 Vol. 12 No. 1.

Cassese, Antonio. "International Law" 2005 (2nd edition) Oxford University Press.

Cassimatis, Anthony E. "Human Rights Trade Related Measures under International Law: The Legality of Trade Measures Imposed in Response of Violations of Human Rights Obligations under General International Law" 2007 Martinus Nijhoff Publishers.

Cassin, René. "La Declaration Universelle et la mise en oeuvre de droits de l'homme" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law1951, Vol.79 No.2 Libraire du Recueil Sirey 1952.

Cattaneo. Mario A. "Dignità Umana e Pace Perpetua: Kant e la Critica della Politica" 2002 Casa Editrice Dott. Antonio Milani CEDAM.

Charlesworth, Hilary. "Universal Declaration of Human Rights" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol. 10 Oxford University Press.

Charnovitz, Steve. "Judicial Independence in the World Trade Organization" in *International Organizations and International Dispute Settlement: Trends and*

Prospects (L Boisson de Chazournes, C Romano, R Mackenzie (eds.) 2002 Transnational Publishers.

Charnovitz, Steve. "The Globalization of economic human rights" Brooklyn Journal of International Law 1999 Vol. 25 No. 1.

Charnovitz, Steve. "The Moral Exception in Trade Policy" Virginia Journal of International Law 1998 Vol. 38 No. 4.

Chaskalson, Arthur. "Human Dignity as a Constitutional Value" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer and E Klein (eds.) 2002 Kluwer Law International.

Cleveland, Sarah H. "Human Rights Sanctions and International Trade: A Theory of Compatibility" Journal of International Economic Law 2002 Vol. 5 No.1.

Condorelli, Luigi. "Some Thoughts about the Optimistic Pessimism of a Good International Lawyer" European Journal of International Law 2010 Vol. 21 No. 1.

Corten, Olivier. "Les techniques reproduits aux articles 31 à 33 des conventions de Vienne: approache objectivitse ou aproache voluntariste de l'interpretation?" Revue Général de Droit International Public 2011 Vol. 115 No. 2.

Cot, Jean-Pierre. "Margin of Appreciation" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol.6 Oxford University Press.

Cottier, Thomas. "Trade and Human Rights: A relationship to discover" Journal of International Economic Law. 2002 Vol. 5 No. 1.

Cottier, Thomas and Oesch, Matthias. "International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments" 2005 Staempfli Publishers Ltd. Berne and Cameron May Ltd.

Cottier Thomas and Mavroidis Petros C (eds.)."The role of the judge in International Trade Regulation: Experience and Lessons for the WTO" 2003 (printed 2006) The World Trade Forum Vol. 4 The University of Michigan Press.

Croley, Steven P and Jackson, John H. "WTO Dispute Procedures, Standards of Review, and Deference to National Governments" American Journal of International Law 1996 Vol. 90 No. 2.

Czapliński, Władysław. "*Jus Cogens* and the Law of Treaties" in *The Fundamental Rules of the International Legal Order. Jus cogens and Obligations erga omnes*. C Tomuschat J-M Thouvenin (eds.) 2006 Martinus Nijhoff Publishers.

Dailler, Patrick and Pellet, Allain. "Droit International Public" 2002 (7th edition). L.G.D.J.

Daillier, Patrick; Forteau, Mathias; Quoc Dinh, Nguyen; Pellet, Alain. "Droit International Public" 2009 (8th edition) L.G.D.J.

D'Amato, Anthony. "International Law Sources" Collected Papers 2004 Vol. 3 Martinus Nijhoff Publishers.

Davey, William J. "Has the WTO Dispute Settlement System Exceeded its Authority? A consideration of Deference Shown by the System to Government Decisions and its Use of Issue-Avoidance Techniques" in *The role of the Judge in International Trade Regulation* T Cottier and P C Mavroidis, (eds.) 2003, 2006 (reprinted) The World Trade Forum Vol. 4 The University of Michigan Press.

De Wet, Erika. "The International Constitutional Order" International and Comparative Law Quarterly 2006 Vol. 55 No. 1.

Del Vecchio, Angela. "Globalization and its effects on international courts and tribunals" The Law and Practice of International Courts and Tribunals 2006 Vol. 5 No. 1

Dembour, Marie-Bénédicte. „What Are Human Rights? Four schools of Thought" Human Rights Quarterly 2010 Vol. 32 No. 1.

Dicke, Klaus. "The founding function of Human Dignity in the Universal Declaration of Human Rights" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer and E Klein (eds.) 2002 Kluwer Law International.

Diller, Janelle M. "Trade and Labor II" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005, Vol. 2 Springer.

Distefano, Giovanni, „L'interprétation évolutive de la norme international." In Revue Général de Droit International Public 2011 Vol. 115 No. 2.

Donnelly, Jack. "The Universal Declaration of Human Rights: Liberalism and an International Overlapping Consensus" in *Theoretical Foundations of Human Rights, Collected Papers: 2nd International Conference on Human Rights 17-18 May 2003* Mofid University 2003 Center for Human Rights Studies.

Donnelly, Jack "Human Dignity and Human Rights", 2009, available at http://www.thelatinlibrary.com/cicero/off.shtml.

Donnelly, Jack. "Universal Human Rights in theory and practice" 1989 Cornell University Press.

Donnelly, Jack ."International Human Rights" 2007 Westview.

Donnelly, Jack. "The Relative Universality of Human Rights" Human Rights Quarterly 2007 Vol. 29 No. 2.

Donnelly, Jack. "Human Right: Both Universal and Relative (A Replay to Michael Goodhart) Human Rights Quarterly 2008 Vol. 30 No. 1.

Dörmann, Knut "The Geneva Conventions Today" (Statement) of 9 July 2009 Legal Division International Committee of the Red Cross available at http://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-090709.htm.

Dunoff, Jeffrey L. "Constitutional Conceits: The WTO's Constitution and the Discipline of International Law" European Journal of International Law 2006 Vol. 17 No. 3.

Dupuy, Pierre-Marie. "L'Unité de l'Ordre Juridique International" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law2002 Vol. 297, Martinus Nijhoff Publishers 2003.

Dupuy, Pierre-Marie. "The danger of fragmentation or unification of the international legal system and the International Court of Justice." New York University Journal of International Law and Politics 1998 Vol. 31 No. 4.

Dupuy, Pierre-Marie "Droit International Public" 2004 (7th edition) Dalloz.

Dzehtsiarou, Kanstantin. „Does consensus matter? Legitimacy of European consensus in the case law of the European Court of Human Rights" Public Law 2011 No 3.

Easterly, William. "Globalization" The New Palgrave Dictionary of Economics" Steven N Durlauf and L E Blume 2008 (2nd edition) Vol. 3. Palgrave Macmillan.

Ehlermann, Claus-Dieter and Lockhart, Nicolas. "Standards of Review in WTO Law" Journal of International Economic Law" 2004 Vol. 7 No. 3.

Engelhart, Neil A "Rights and Culture in the Asian Values Argument: The Rise and Fall of Confucian Ethics in Singapore" Human Rights Quarterly 2000 Vol. 22 No. 2.

Eres, Tatjana. "The limits of GATT Article XX: A back door for human rights?" Georgetown Journal of International Law 2004 Vol. 53 No. 4.

Falk, Richard A. "On Treaty Interpretation and the New Heaven Approach: Achievements and Prospects." Virginia Journal of International Law 1968 Vol. 8 No. 2.

Fassbender, Bardo. "The Meaning of International Constitutional Law" in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* R St J Macdonald, D M Johnston. 2005 Martinus Nijhoff Pubishers.

Feddersen, Christoph T. „Der ordre public in der WTO: Auslegung und Bedeutung des Art. XX lit a) GATT im Rahmen der WTO-Streitbeilegung" 2001 Duncker & Humblot.

Feddersen, Chrisptoph T. "Focusing on Substantive Law in International Economic Relations: The public Morals of GATT's Article XX a) and „Conventional" Rules of Interpretation" Minnesota Journal of Global Trade 1998 Vol. 7 No. 1.

Feichtner, Isabel. "The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests" The European Journal of International Law 2009 Vol. 20 No. 3.

Feichtner, Isabel. "The Waiver Power of the WTO: Opening the WTO for Political Deliberation on the Reconciliation of Public Interests" Jean Monet Working Paper Series 11/08, 2008 NYU School of Law.

Fernández de Casadevante Romaní, Carlos. "La interpretación de las normas internacionales" 1996 Aranzadi Editorial.

Fernández de Casadevante Romaní, Carlos "Sovereignty and Interpretation of International Norms" 2007, Springer.

Fernández García, Eusebio. "Dignidad Humana y Ciudadanía Cosmopolita" 2001 Dykinson.

Fife, Rolf Einar, "Les Techniques interprétatives non juridictionnelles de la norme international" Revue Général de Droit International Public 2011 Vol. 115 No. 2.

Fitzmaurice, Malgosia. "Canons of Treaty Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement". 2005 Austrian Review of International and European Law Vol 10.

Fitzmaurice, Sir Gerald "The law and Procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points" British Yearbook of International law 1957 Vol. 33.

Focarelli, Carlo. "I limiti dello *jus cogens* nella giurisprudenza più recente" Rivista di Diritto Internationale 2007 Vol. 90 No. 3.

Freedman, Michael. "The Changing Structure of International Law" 1964 Columbia University Press.

French, Duncan "Treaty Interpretation and the incorporation of extraneous legal rules" International & Comparative Law Quarterly 2006 Vol. 55 No. 2.

Friedmann, Wolfgang. "The uses of "general principles" in the development of international law" in *International Law in the Twentieth Century* L Gross (ed.) 1969 Appleton-Century-Crofts.

Frowein, Jochen A. "Human Dignity in International Law" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer, E Klein (eds.) 2002 Martinus Nijhoff Publishers.

Frowein, Jochen A. "*Ius Cogens*" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol. 6 Oxford University Press.

Garcia, Frank J. "The Global Market and Human Rights: Trading Away the Human Rights Principle“ 1999 Brooklyn Journal of International Law Vol. 25 No. 1.

Goodhart, Michael. "Neither Relative nor Universal: A Response to Donnelly" Human Rights Quarterly 2008 Vol. 30 No. 1.

Gordon, Joy. "The concept of Human Rights: The history and meaning of its politicization" Brooklyn Journal of International Law 1998 Vol. 23 No. 3.

Göttsche Götz J. "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.) 2005 (1st edition) Nomos.

Göttsche, Götz J. "Die Anwendung von Rechtsprinzipien in der Spruchpraxis der WTO-Rechtsmittelinstanz" 2005 Duncker & Humblot.

Gray, Kevin R. "Conflict Diamonds and the WTO: Not the best Opportunity to be missed for the Trade-Human Rights interface: Commentary on Krista Nadakavukaren Scheffer" in *Human Rights and International Trade* T Cottier, J Pauwelyn, E Bürgi (eds.) 2006 Oxford University Press.

Guillaume, Gilbert. "Jus cogens et Souveraineté" in L'Etat Souverain dans le monde d'aujourd'hui. Mélanges an l'honneur de J.-P. Puissochet. 2008 Pedone.

Guillaume, Gilbert. "Some Thoughts on the Independence of International Judges vis-à-vis States" The Law and Practice of International Courts and Tribunals 2003 Vol. 2 No.1.

Guzman, Andrew T "Determining the Appropriate Standard of Review in WTO Disputes" Cornell International Law Journal 2009 Vol. 42 No. 1.

Haakonssen, Knud." Natural Law and Moral Philosophy." 1996 Cambridge University Press.

Haakonssen, Knud. (ed.). "Grotius, Pufendorf and Modern Natural Law." 1999 Ashgate Publishing.

Hart, H.L.A. "The Concept of Law".1994 2nd edition Oxford University Press.

Hartwig, Matthias. "Der Gleichheitssatz und die Universalisierung der Menschenrechte" in *Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz* R Wolfrum (ed.) 2003 Springer.

Harrison, James. "The Human Rights Impact of the World Trade Organisation" 2007 Hart.

Hausman, Daniel M and McPherson, Michael S. "The Philosophical Foundations of Mainstream Normative Economics. in *The Philosophy of Economics: An anthology* DM Hausman (ed.) 2008 (3rd edition) Cambridge University Press.

Heiskanen, Veijo. "The Regultory Philosophy of International Trade Law" Journal of World Trade 2004 Vol. 38 No. 1.

Helfer, Laurence R. "Consensus, Coherence and the European Convention on Human Rights" Cornell International Law Journal 1993 Vol. 26 No. 1.

Henckaeters, Jean-Marie; Doswald-Beck, Louise. "Customary International Humanitarian Law". Volume I: Rules. 2005. International Committee of the Red Cross. Cambridge University Press.

Henkin, Louis. "The International Bill of Rights: The Covenant on Civil and Political Rights" 1981 New York Columbia University Press.

Henkin, Louis; Neuman, Gerald L; Orentlicher, Doane F; Leebron, David W. (eds.) "Human Rights" 1999 Foundation Press.

Henkin, Louis "The Universal Declaration at 50 and the challenges of global markets" Brooklyn Journal of International Law 1999 Vol. 25 No. 1.

Herdegen, Matthias. "Internationales Wirtschaftsrecht" 2008, 7th Edition, Beck Juristischer Verlag.

Herdegen, Matthias. "Interpretation in International Law." in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol. 6 Oxford University Press.

Hestermeyer, Holger. "Human Rights and the WTO. The Case of Patents and Access to Medicines" 2007 Oxford University Press.

Hestermeyer, Holger. "Preamble" in *Max Planck Commentaries on World Trade Law: WTO Trade in Services* R Wolfrum, P-T Stoll, C Feinaugle (eds.) 2008 Vol. 6, Martinus Nijhoff Publishers.

Hilf, Meinhard; Oeter, Stefan (eds.) "WTO-Recht: Rechtsordnung des Welthandels" 2005 (1st edition) Nomos.

Hilf, Meinhard and Oeter, Stefan in "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.) 2005, (1st edition) Nomos.

Hilf, Meinhard. "Power, Rules and Principles –Which Orientation for WTO/GATT Law?" Journal of International Economic Law 2001 Vol. 4 No. 1.

Higgins Rosalyn. "Problems and Process: International Law how to use it" 1994 (2007 reprinted) Clarendon Press. Oxford.

Higgins, Rosalyn. "Themes and Theories" 2009 Oxford University Press.

Holy Bible, Crossway, 2010.

Hörmann, Saskia in "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.) 2005, (1st edition) Nomos.

Howse, Robert and Nicolaidis, Kalypso. "Legitimacy through Higher Law"? Why Constitutionalizing the WTO Is a Step Too Far in *The role of the judge in International Trade Regulation: Experience and Lessons for the WTO"* T Cottier and P C Mavroidis (eds.) 2003 (2006 reprinted) The World Trade Forum Vol. 4 The University of Michigan Press.

Howse, Robert "Lost and Found" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.) 2008 Hart Publishing.

Howse, Robert and Esserman, Susan. "The Appellate Body, the WTO dispute settlement system, and the politics of multilateralism" in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.) 2006 Cambridge University Press.

Howse, Robert and Reagan, Donald "The Product/Process Distinction – An Illusory Basis for Disciplining "Unilateralism" in Trade Policy" The European Journal of International Law 2000 Vol. 11 No. 2.

Ipsen, Knut. "Völkerrecht". 1999 Beck.

Ishay, Micheline R. „The History of Human Rights –From Ancient Times to the Globalization Era-" 2004. University of California Press.

Ishay, Micheline R." The Human Rights Reader". 2nd edition. 2007. Taylor & Francis.

Jackson, John H. "The World Trade Organization: Constitution and Jurisprudence" 1998 Routledge.

Jackson, John H. "The WTO Constitution and Proposed Reform: Seven Mantras revisited. Journal of International Economic Law 2001 Vol. 4 No.1.

Jackson, John H. "Sovereignty, the WTO and Changing Fundamentals of International Law" 2006 Cambridge University Press.

Jackson, John H. "Sovereignty: Outdated Concept or New Approaches" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.) 2008 Hart Publishing.

Jackson, John H. "Fragmentation or unification among international institutions: The World Trade Organization" New York University Journal of International Law and Politics 1998 Vol. 31 No. 4.

Jackson, John H. "The World Trading System: Law and Policy of International Economic Relations" 1997 (2nd Edition) The MIT Press (Massachusetts Institute of Technology).

Jackson John H. "The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations" 2000 Cambridge University Press.

Jackson, John H. "Perceptions about the WTO trade institutions" World Trade Review 2002 Vol. 1 No. 1.

James, Stephen Andrew. "The Origins of Universal Human Rights: An Evaluation" 2005 UMI.

Jarvis, Liane M. "Women's Rights and the Public Morals Exception of GATT Article 20" Michigan Journal of International Law. 2001 Vol. 22 No. 2.

Jennings, R. Y. „The Judiciary, international and national, and the development of international law" International and Comparative Law Quarterly 1996 Vol. 45 No. 1.

Jennings, Sir Robert. "Collected Papers of Sir Robert Jennings" 1998 Vol. 1 Kluwer Law International.

Jessup, Philip. "Transnational Law" Yale University Press 1956.

de Joop, Kort. "What's in it for us? Globalisation, international institutions and the less developed countries" in *Neo-Liberal Globalism and Social Sustainable Globalisation* E C Nieuwenhuys 2006 Brill.

Kaboğlu, Ibrahim Özdem. "Qu'est-ce que la dignité?" in *Justice, éthique et dignité* S Gaboriau, H Pauliat (Collected Texts) 2002 Presses Universitaires de Limoges.

Kadelbach, Stefan. "Völkerrecht und Ethos im Zeitalter der Globalisierung" in *Recht und Ethos im Zeitalter der Globalisierung* H-D Assmann und R Sethe (eds.) 2004 Nomos, Baden-Baden.

Kadelbach, Stefan. "*Jus cogens*, obligations *erga omnes* and other rules –the identification of fundamental norms" in *The Fundamental Rules of the International Legal Order. Jus cogens and Obligations erga omnes*. C Tomuschat J-M Thouvenin (eds.) 2006 Martinus Nijhoff Publishers.

Kadelbach, Stefan. "Zwingendes Recht" 1992 Schriften zum Völkerrecht Band 101 Duncker & Humblot. Berlin.

Kälin, Walter and Künzli, Jörg. "Universeller Menschenrechtsschutz" 2005 Helbing & Lichtenhahn Basel. Genf. München.

Kaiser, Karen. "Art 7 DSU" in *Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.) 2006 Vol. 2 Martinus Nijhoff Publishers.

Kamminga, Menno T "Extraterritoriality" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol. 3 Oxford University Press.

Kant, Immanuel."Grundlegung zur Metaphysik der Sitten" Kommentar von C Horn, C Mieth and N Scarano 2007 Suhrkamp.

Kapitan, Tomis. "Self- Determination and Human Rights in Theoretical Foundations of Human Rights" 2003 *Theoretical Foundations of Human Rights, Collected Papers: 2nd International Conference on Human Rights 17-18 May 2003* Mofid University 2003 Centre for Human Rights Studies (Not Finally Edited).

Kelsen, Hans. "Principles of International Law" Revised and Edited by Robert W. Tucker. 1966 (2nd edition) Holt, Rinehart and Winston, Inc.

Kim, Katherine Eunjung. "Human Rights and Consensus" in Theoretical Foundations of Human Rights, Collected Papers: 2nd International Conference on Human Rights 17-18 May 2003 Mofid University 2003 Center for Human Rights Studies.

Klover, Anatholy. "The role of consensus in the system of the European Court of Human Rights" in *Dialogue between Judges European Court of Human Rights, Council of Europe* 2008, France.

Kobusch, Theo. "Die Würde des Menschen –ein Erbe der christlichen Philosophie" in *Des Menschen Würde –entdecken und erfunden in Humanismus der italienischen Renaissance* R Gröschner, S Kirste und O W Lembke (eds.) 2008 Mohr Siebeck Tübingen 2008.

Kofman, Daniel. "Human Rights, Self- Determination and Relativism" in *Theoretical Foundations of Human Rights, Collected Papers: 2nd International Conference on Human Rights 17-18 May 2003* Mofid University 2003 Centre for Human Rights Studies (Not Finally Edited).

Kokott, Juliane; Doehring, Karl; Buergenthal, Thomas "Grundzüge des Völkerrechts" 2003 (3rd edition) C. F. Müller.

Kokott, Juliane. "Sates, Sovereign Equality" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol. 9 Oxford University Press.

Kolb, Robert. "Human Rights and Humanitarian Law".in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Oxford University Press.

Kolb, Robert. "Mondialisation et droit international" in Relations Internationales 2005 No. 123.

Kolb, Robert. "Réflexions de philosophie du droit international: Problémes fondamentaux du droit international public: Théorie et philosophie du droit international" 2003. Editions Bruylant (Université de Bruxelles).

Kolb, Robert."Observation sur l'évolution du concept de *jus cogens*" Revue de Droit Interntional Public 2009 Vol. 113 No. 4.

Kolb, Robert. "Principles as sources of international law (with special reference to good faith)" Netherlands International Law Review 2006 Vol. 53 No. 1.

Kolb, Robert. "Théorie du *ius cogens* international. Essai de relecture du concept" 2001 Presses Universitaires de France.

Kolb, Robert. "Interprétation et création du droit international: Esquisses d'une herméutique juridique modern pour le droit international public" 2006 Editions Bruylant (Université de Bruxelles).

Korniker, Eva. "*Ius cogens* und Umweltvölkerrecht" 1997 Hellbing & Lichtenhahn. Basel und Frankfurt am Main.

Kraus, Herbert. "La morale internationale" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1927 Vol. 16 No.1 A W Sijthoff 1972 (12th edition).

Kronke, Herbert „Handbuch Internationales Wirtschaftsrecht" H Kronke, W Melis, B Anton (eds.) 2005 Otto Schmidt.

Kuschel, Karl-Joseph Kuschel „Weltreligionen und Weltethos im Zeitalter der Globalisierung in *Recht und Ethos im Zeitalter der Globalisierung* H-D Assmann und R Sethe (eds.) 2004 Nomos.

Lachenmann, Frauke. „Legal positivism"in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Oxford University Press.

Lamy, Pascal. „Humanising Globalisation" Speech. Santiago de Chile 30 January 2006 available at http://wto.org/english/news_e/sppl_e/sppl16_e.htm last visited 02.July.2012.

Lauterpacht, Hersch. "The International Protection of Human Rights" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1947 Vol. 70 No. 1 Martinus Nijhoff Publishers (12 edition) A W Sijthoff 1973.

Lauterpacht, Hersch. Restrictive interpretation and the principle of effectiveness in the interpretation of treaties in British Yearbook of International Law 1949 Vol. 26.

Lauterpacht, Hersch. "International Law and Human Rights". 1950 Paeger.

Lauterpacht, Hersch. "International Law: The General Works" 1970 Vol. 1 Cambridge at the University Press.

Lauterpacht, Hersch. "The function of law in the international community" 1933 Oxford at the Clarendon Press.

Lillich, Richard B; Hannum, Hurst; Anaya, S James; Shelton, Dinah. "International Human Rights" 2006, 4th edition, Aspen.

Lopez-Hurtado, Carlos "Social labeling and WTO Law" Journal of International Economic Law" 202 Vol. 5 No. 3.

Lowe, Vaughn "Jurisdiction" in *International Law* M D Evans 2006 Oxford University Press.

Lowe, Vaughn „International Law" 2007 Oxford University Press.

Lowe, Vaughan "Sovereignty and International Economic Law" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.) 2008 Hart Publishing.

Lowenfeld, Andreas F "International Economic Law" 2008 (2nd edition) Oxford University Press.

Luhmann,Niklas "Grundrechte als Institution" 1965 Duncker & Humblot.

Maina Peter, Chris. "Standards of Living, Promotion of" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Oxford University Press.

Mandelstam, André N. "La Protection Internationale des Droit de l'Homme" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1931 Vol. 38 No.4 A W Sijthoff 1969 (12th edition).

Manetti, Giannozzo and Leonard, Elizabeth R. "Ianotii Manetii De dignitate et excellentia hominis" 1975 Vol. 12 Antenore.

Marceau, Gabrielle. "WTO Dispute Settlement System and Human Rights European Journal of International Law 2002 Vol. 13 No. 4.

Martens, Paul. "Perplexities of the national judge faced with the vagaries of European consensus" in *Dialogue between Judges European Court of Human Rights, Council of Europe* 2008, France.

Martin, Francisco F; Schnably, Stephen J.; Wilson, Richard J.; Simon, Jonathan S.; Tushnet, Mark V. "International Human Rights and Humanitarian Law : Treaties, Cases & Analysis" (eds.) 2006 Cambridge University Press.

Marwell, Jeremy C. "Trade and Morality: The WTO Public Morals Exception after Gambling" New York University Law Review 2006 Vol. 81 No. 2.

Matsushita, Mitsuo. "Some Thoughts on the Appellate Body" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005 Vol. 1 Springer.

Mavroidis, Petros C and Neven, Damien J. "Some reflections on Extraterritoriality in International Economic Law and Economic Analysis" in *Mélanges en Hommage à Michel Waelbroeck* 1999 Vol. 2 Bruylant Bruxelles.

Mavroidis, Petros C. "Article 11 DSU" *Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.) 2006 Vol. 2 Martinus Nijhoff Publishers.

Mavroidis, Petros C. "The General Agreement on Tariffs and Trade: A Commentary" 2005 Oxford University Press.

McCorquodale, Robert. "International Community and State Sovereignty: An Uneasy Symbiotic Relationship" in *Towards an International Legal Community?* C Warbrick and S Tierney (eds.) 2006 British Institute of International and Comparative Law.

McCrudden, Christopher. "Human Dignity and Judicial Interpretation of Human Rights" European Journal of International Law 2003 Vol. 19 No. 4.

McCrudden, Christopher and Davis, Anne. "A perspective on trade and labor rights" Journal of International Economic Law 2000 Vol. 3 No.1.

McDougal, Myres. "Perspectives for an International law of Human Dignity" Yale Law School Legal Scholarship Repository 1959 Faculty Scholarship Series. Paper 2612.

McDougal Myres S; Laswell Harold D; Chen, Lung-Chu "Human Rights and World Public Order" 1980 Yale University Press.

McDougal, Myres S. Reisman, W. Michael Willard, Andrew R. „The World Community: A Planetary Social Process" Yale Law School Legal Scholarship Repository. Faculty Scholarship Series. Paper 753.

McLachlan, Campel. "The principle of systematic integration and Article 31(3)(c) of the Vienna Convention" International and Comparative Law Quarterly Vol. 54 2005.

McRae, Donald M. "The WTO in International Law: Tradition Continued or New Frontier?" Journal of International Economic Law 2000 Vol. 3 No. 1.

McRae, Peter. "The Search for Meaning: Continuing Problems with the Interpretation of Treaties" Victoria University Wellington Law Review 2002 Vol. 33 No. 2.

Meng, Werner. "Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht" 1994 Springer.

Menke, Christoph and Arnd Pollmann. "Philosophie der Menschenrechte zur Einführung" 2007 Junius.

Meyer, Michael. "Dignity as a (Modern) Virtue" in *The Concept of Human Dignity in Human Rights Discourse* D Kretzmer and E Klein (eds.) 2002 Kluwer Law International.

Mitchel, Andrew D. "Legal principles in WTO Disputes" 2008 Cambridge University Press.

Moon, Bruce E. "Dilemmas of International Trade" in *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland: Cases, Materials and Comments* T Cottier and M Oesch (eds.) 2005 Staempfli Publishers Ltd. Berne and Cameron May Ltd.

More, Sir Thomas. "The Right to Human Dignity and other lectures" (Lecture)Ian Mason (ed.) 2005 Wildy, Simmonds & Hill Publishing for the Honourable Society of Lincoln's Inn.

Murray, John L. "Consensus: concordance, or hegemony of the majority?" in *Dialogue between Judges, European Court of Human Rights, Council of Europe* 2008, France.

Nadakavukaren Scheffer, Krista. "Stopping Trade in Conflict Diamonds: Exploring the Trade and Human Rights interface with the WTO Waiver for the Kimberly Process" in *Human Rights and International Trade* T Cottier, J Pauwelyn, E Bürgi (eds.) 2006 Oxford University Press.

Neff, Stephen C. "A short history of international law" in *International Law* M D Evans 2006 (2nd edition) Oxford University Press.

Nieuwenhuys, Eva. "Neo-liberal Globalism and Social Sustainable Globalization" 2006 Brill.

Noll, Andreas. "Die Begründung der Menschenrechte bei Luhmann: Vom Mangel an Würde zur Würde der Mangel" M A Niggli, M Amstutz, M Mors (eds.) 2006 Helbing & Lichtenhahn.

Nowak, Manfred. "Art. 6 The Right to Life, Survival and Development" in *A Commentary on the United Nations Convention on the Rights of the Child* 2005 Martinus Nijhoff Publishers.

Nowak, Manfred. "Introductionto the International Human Rights Regime" 2003 Martinus Nijhoff Publishers.

Oesch, Matthias. "Standards of Review in WTO Dispute Resolution" Journal of International Economic Law 2003 Vol. 6 No. 3.

Oeter Stefan. "Souveränität – ein überholtes Konzept?" in Tradition und Weltoffenheit des Rechts Festschrift für Helmut Steinberger: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 152 H-J Cremer, T Giegerich, D Richter, A Zimmermann (eds.) 2002 Springer.

Oeter, Stefan. "The international Legal Order and its Judicial Function: Is there an International Community –despite the Fragmentation of Judicial Dispute Settlement?" in *Common Values in International Law: Essays in Honour of Christian Tomuschat* P-M Dupuy, B Fassbender, M N Shaw and K-Sommermann (eds.). 2006 N P Engel.

Ollarves Irazábal, Jesús. "El Derecho Internacional de los Derechos Humanos como normas de *ius cogens*" 2007. Impresos Nicola. Caracas.

Oppenheim's International Law Hersch Lauterpacht, 1967 (8th edition) (8th impression) Longman.

Oppenheim's International Law 1992 Jennings and Sir Arthur Watts, (9th edition) (3rd impression) 1993 Sir Robert Longman.

Orakhelashvili, Alexander. "Peremptory norms in international law" 2006 Oxford University Press.

Orakhelashvili, Alexander. "The interpretation of Acts and Rules in Public International Law" 2008 Oxford University Press.

Orrego Vicuña, Francisco. "International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization" 2004 Cambridge University Press.

O'Donnell, Owen; van Doorslaer, Eddy Wagstaff, Adam; Lindelow, Magnus. "Analysing Health Equity Using Household Survey Data: A Guide to techniques and Their Implementation" 2008 The International Bank for Reconstruction and Development/The World Bank.

Oxford Comprehensive Altas of the World 2008 Oxford University Press.

Oxman, Bernard H. "Jurisdiction of States" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Oxford University Press.

Paczolay, Peter. "Dialogue between Judges, European Court of Human Rights, Council of Europe" 2008, France.

Pagels, Elaine. "The roots and origins of human rights" in *Human Dignity –The Internationalization of Human Rights-* A H Henkin (ed.) 1979. Aspen Institute for Humanistic Studies, Oceana Publications and the Netherlands.

Palmenter, David and Mavroidis, Petros C. "The WTO legal system: Sources of law" The American Journal of International Law 1998 Vol. 92 No.3.

Pasquino, Pasquale. "Prolegomena to a theory of judicial power: the concept of judicial independence in theory and history" The Law and Practice of International Courts and Tribunals 2003 Vol. 2 No.1.

Pauliat, Michel. "De la *Dignitas* à la Dignité" in *Justice, éthique et dignité* S Gaboriau, H Pauliat (Collected Texts) 2002 Presses Universitaires de Limoges.

Pauweyln, Joost. "Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law" 2003 (2006, 5th printing) Cambridge University Press.

Pauwelyn, Joost. "The Role of Public International Law in the WTO: How far Can We Go?" The American Journal of International Law 2001 Vol. 95 No. 3.

Pauwelyn, Joost. "WTO compassion or superiority complex? What to make of the WTO waiver for conflict diamonds" Michigan Journal of International Law 2003 Vol. 24 No. 4.

Pauwelyn, Joost. "Enforcement and Countermeasures in the WTO: rules are Rules-toward a More Collective Approach" The America Journal of International Law 2000 Vol. 94 No. 2.

Pauwelyn, Joost. "The application of non-WTO rules of International law in WTO Dispute Settlement in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005 Vol. 1 Springer.

Pauweyln, Joost. "Cooperation in Dispute Settlement" in *Human Rights and International Trade* T Cottier, J Pauwelyn, E Bürgi (eds.) 2006 Oxford University Press.

Pellet, Alain. "The Normative Dilemma: Will and Consent in International Law-making" Australian Yearbook of International Law1989 Vol. 12.

Pellet, Alain. "Les techniques interprétative de la norme international" Revue Général de Droit International Public 2011 Vol. 115 No. 2.

Peters, Anne. "The constitutionalization of International Law" J Klabbers, A Peters, G Ulfstein (eds.) 2009 Oxford University Press.

Peters, Anne. "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures" Leiden Journal of International Law 2006 Vol. 19 No. 3.

Petersen; Niels. "Law-making by the International Court of Justice" in *International Judicial Law-making* A von Bogdandy, I Venzke (eds.) 2012 Springer.

Petersmann, Ernst-Ulrich. "Theories of Justice, Human Rights and the Constitutions of International Markets" EUI Working Paper LAW No. 2003/17 European University Institute.

Petersmann, Ernst-Ulrich. "State Sovereignty, Popular Sovereignty and Individual Sovereignty" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.) 2008 Hart Publishing.

Petersmann, Ernst-Ulrich. "Trade and Human Rights I" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005 Vol. 2 Springer.

Petersmann, Ernst-Ulrich. "From "member-driven governance" to constitutionally limited "multi-level trade governance" in the WTO in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.) 2006 Cambridge University Press.

Petersmann, Ernst-Ulrich. "Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society" Leiden Journal of International Law 2006 Vol. 19 No. 3.

Petersmann, Ernst-Ulrich. "The WTO Constitution and Human Rights" Journal of International Economic Law 2000 Vol. 3 No. 1.

Petersmann, Ernst-Ulrich. "International Trade Law, Human Rights and Theories of Justice" in *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* S Charnovitz, D P Steger, P Van den Bosse (eds.) 2005 Cambridge University Press.

Petersman, Ernst-Ulrich. "Welthandelsrecht als Freiheit- und Verfassungsordnung" Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 2005 Vol. 65 No. 3.

Pico della Mirandolla, Giovanni. *Oratio de hominis dignitate* : Oration on the Dignity of Man 1953 Anvil Press.

Picone, Paolo and Ligustro, Aldo. "Diritto dell'organizzazione mondiale del comercio" 2002 Casa Editrice Dott. Antonio Milani.

Poiares Maduro, Miguel. "Legal Travels and the Risk of Legal Jet-Lag. The Judicial and Constitutional Challenges of Legal Globalization" in *Economic Law and Justice in Times of Globalization* M Monti, B Versterdorf, N Von und Zu Lichtenstein, J Westbrook, L Wildhaber (eds.) 2007 Nomos.

Pollmann, Arnd. "Der Menschenrechtliche Universalismus und seine relativistischen Gegner" in *Menschenrechte: ein interdisziplinäres Handbuch* A Pollmann und G Lohmann (eds.) 2012 Verlag J. B. Metzler. Sttutgart undWeimer.

Powell, Stephen J. "The Place of Human Rights Law in the World Trade Organization Rules" Florida Journal of International Law 2004 Vol. 16 No. 1.

Preis, Ann-Belinda S. „Human Rights as Cultural Practice: An Anthropological Critique" Human Rights Quarterly 1996 Vol. 18 No. 2.

Puth, Sebastian. "WTO-Recht: Rechtsordnung des Welthandels" M Hilf and S Oeter (eds.) 2005 (1st edition).

Qureshi, Asif H. "Sovereignty Issues in the WTO Dispute Settlement" in *Redefining Sovereignty in Economic International Law* W Shan, P Simons and D Singh (eds.) 2008 Hart Publishing.

Qureshi, Asif H. "International Economic Law" 1999 Sweet and Maxwell.

Qureshi, Asif H and Ziegler, Andreas R. "International Economic Law" 2nd edition 2007. Sweet and Maxwell.

Radbruch, Gustav. "Gesetzliches Unrecht und übergesetzliches Recht", Süddeutsche Juristenzeitung 1946 No. 5, in *Rechtsphilosophie* Gustav Radbruch 1956 (5th edition), K F Koehler

Rawls, John. "A theory of Justice" Revised Edition 1999 Oxford University Press.

Rawls, John. "Political Liberalism" 1993 Columbia University Press.

Raz, Joseph. "The Authority of Law: Essays on Law and Morality" 2009 (2nd edition) Oxford University Press.

Reisman, William Michael. "Humanitarian Intervention and Feldgling Democracies" Fordham International Law Journal 1994 Vol. 18 No. 3.

Reisman, W Michael; Arsanjani, Mahnoush H; Wiessner, Siegfried; Westerman, Gayl L; "International Law in Contemporary Perspective" 2004 (2nd edition) Foundation Press.

Remiro Brotóns, Antonio; Riquelme Cortado, Rosa; Díez-Hochleiner, Javier, Orihuela Calatayud, Esperanza; Pérez-Prat Durban, Luis. "Derecho Internacional" 2007 Tirant lo Blanch.

Remy, Benjamin. "Techniques interprétatives et systèmes de droit" Revue Général de Droit International Public 2011 Vol. 115 No. 2.

Restatement of Law (Third) Foreign Relations Law of the United States 1987 Vol. 1 American Law Institute Publishers.

Revaz, Cris R, Todres, Jonathan; Wojcik, Mark E. "The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of US Ratification. 2006 Transnational Publishers.

Riedel, Eibe H. „Die Universalität der Menschenrechte: Philosophische Grundlagen - Nationale Gewährleistungen- Internationale Garantien" C Koenig and R A Lorz (eds.) 2003 Duncker & Humblot.

Rishmawi, Mervat "The Revised Arab Charter of Human Rights: A Step Forward?" Human Rights Law Review 2005 Vol. 5 No. 2.

Roebeling, Gertrude. "Economic Globalization, civil society and rights" in *Dignity and Human Rights: The implementation of economic, social and cultural rights* B Klein G, A Contreras B, P C Carbonari (eds.) 2002 Intersentia.

Rolla, Giancarlo. "El principio de dignidad humana: Del artículo 10 de la constitución española al nuevo constitucionalismo iberoamericano" Persona y Derecho 2003 Vol. 49 Universidad de Navarra.

Rosas, Allan. "The Death of International Law?" Finnish Yearbook of International Law 2009 Vol. 20.

Rosenne, Shabtai. "The perplexities of modern international law" 2004 Brill Academic Publishers.

Saastamoinen, Kari. "Pufendorf on Natural Equality, Human Dignity and Self-Esteem" Journal of the History of Ideas 2010 Vol. 71 No 1.

Sacerdoti, Giorgio. "The dispute settlement system of the WTO in action: a perspective on the first ten years" in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.) 2006 Cambridge University Press.

Sands, Philippe. "Principles of International Environmental Law" 2003 (2nd edition) Cambridge University Press.

Santulli, Carlo. "Les techniques interprétatives de la norme international" Revue Général de Droit International Public 2011 Vol.115 No. 2.

Schimdt, Thomas. „Handbuch der Politischen Philosophie und Sozialphilosophie" S Gosepathl, W Hinsch, B Rössler (eds.) 2008 Hubert & Co. GmbH & Co. KG.

Schachter, Oscar. "International Law in Theory and Practice" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1982 Vol. 178 No.5 Martinus Nijhoff Publishers 1985.

Schachter, Oscar. „Human Dignity as a normative concept" American Journal of International Law 1983 Vol. 77 No. 4.

Schimdt, Thomas. "Handbuch der Politischen Philosophie und Sozialphilosophie" Stefan Gosepath et al. (eds.) 2008.

Schollendorf, Kai "Die Auslegung völkerrechtlicher Verträge in der Spruchpraxis des Appellate Body der Welthandelsorganisation (WTO) 2005 Duncker und Humblot.

Schwarzenberger, Georg. "International Law and Order" 1971 Stevens & Sons.

Schwarzenberger, Georg. "Myths and realities of treaty interpretation: Articles 27-29 of the Vienna Convention on the Law of Treaties" 9 Virginia Journal of International Law 1968, Vol.9 No. 1.

Seidl-Hohenveldern, Ignaz. "International Economic Law", 1999 (3rd revised edition) Kluver Law International.

Sen, Amartya. "Capability and Well-being" in *The Philosophy of Economics: An anthology* D M Hausman (ed.) 2008 (3rd edition) Cambridge University Press.

Shany, Yuval. "The Competing Jurisdictions of International Courts and Tribunals" 2004 Oxford University Press.

Shany, Yuval. „Toward a General Margin of Appreciation Doctrine in International Law? The European Journal of International Law Vol. 16 No. 5.

Shelton, Dinah. "An Introduction to the History of International Human Rights Law" Working Paper No.346, The George Washington University Law School, 2007 available at http://www.csb.uncw.edu/people/eversp/classes/BLA361/Intl%20Law/Required%20Readings/18.History%20of%20Human%20Rights%20Law.ssrn.pdf.

Shestack, Jerome J. "The Philosophical Foundations of Human Rights" in "Human Rights: Concepts and Standards" J Symonides (ed.). 2000 UNESCO. Darmouth Pulishing Co. Ltd & Ashgate Publishing Ltd.

Sidiropoulus, Lazaros. "Die Würde des Menschen als Leitprinzip in den ethischen und rechtlichen Diskurse der Moderne: Rekonstruktion und Bewertung des Menschenwürde anhand ihrer Erprobung an aktuellen Beispielen" 2008 DVH-Verlag München.

Sieghart, Paul. "The International Law of Human Rights" 1983 Clarendon.

Simma, Bruno. "Universality of International Law from a Perspective of a Practitioner" The European Journal of International Law 2009 Vol. 20 No. 2.

Simma, Bruno and Palaus, Andreas L."The international Community: Facing the Challenge of Globalization." The European Journal of International Law 1998 Vol. 9 No. 2.

Smith, Adam. "An inquiry into the nature and causes of the wealth of nations" -A selected edition- Kathryn Sutherland (ed.) 1993 Oxford University Press.

Spaak, Torben. "Moral Relativism and Human Rights" Buffalo Human Rights Law Review 2007 Vol. 13.

Statement on Human Rights (Submitted to the United Nations Commission on Human Rights) American Anthropologist, New Series, Vol. 49 No.4 Part 1 1947 American Anthropological Association Executive Board (AAA), 1947.

Steckel, Richard H. "Standards of living (historical trends)" in *The New Palgrave Dictionary of Economics* 2008 (2nd edition) Vol. 7 Steven N Durlauf and Lawrence E. Blume (eds.) Macmillan Publishers Ltd.

Steiner, Henry J."International Law, Doctrine and School of Thought in the Twentieth Century" "Encyclopedia of Public International Law" Rudolf Bernhardt 1995 Vol. 2 North-Holland.

Stenier, Henry J., Alston, Philip. "International Human Rights in Context: Law, Politics, Morals; texts and materials" 1996 Clarendon Press.

Stohner, Nils "Importrestriktionen aus Gründen des Tier- und Artenschutzes im Recht der WTO" 2006 Stämpfli.

Stoll, Peter-Tobias and Schorkopf, Frank (eds.) "Max Planck Commentaries on World Trade Law WTO: World Economic Order, World Trade Law" 2006 Vol. 1 Martinus Nijhoff Publishers.

Stoll, Peter-Tobias. "Art 3 DSU" in *Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.) 2006 Vol. 2 Martinus Nijhoff Publishers.

Sur, Serge. "Droit International Public" J Combacau and S Sur (eds.) 2001 (5th edition) Editions Montchrestien, E.J.A.

Suy, Erik. "The concept of Ius Cogens in International Law, in *Lagonissi Conference on International Law, Papers and Proceedings* 1967 Vol. 2, Carnegie endowment for international peace (European Centre).

Szabó, Imre. "The Socialist Concept of Human Rights". 1966 Akad, Kiado.

Tamayo y Salmorán, Rolando. "Enciclopedia Jurídica Latinoamericana" 2006 Vol.6, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, Editorial Porrúa.

Tavernier, Paul. "L'identification des règles fondamentales, un problème résolu?" in *The Fundamental Rules of the International Legal Order. Jus cogens and*

Obligations erga omnes. C Tomuschat J-M Thouvenin (eds.) 2006 Martinus Nijhoff Publishers.

Teitel, Ruti. "Human Rights Genealogy" Fordham Law Review 1997 Vol. 66 No. 2.

Tesón, Fernando R., "Humanitarian Intervention –An Inquiry into Law and Morality" 1997 (2nd edition) Transnational Publishers.

Tesón, Fernando R. "International Human Rights and Cultural Relativism" Virginia Journal of International Law 1985 Vol. 25 No. 4.

Thirlway, Hugh. "The Sources of International Law" in *International Law* M D Evans 2006 (2nd edition) Oxford University Press.

Thumfahrt, Alexander. „Giannozzo Manetti: „Wie sind für de Gerechtigkeit geboren" in *Des Menschen Würde –entdecken und erfunden in Humanismus der italienischen Renaissance* R Gröschner, S Kirste und O W Lembke (eds.) 2008 Mohr Siebeck Tübingen 2008.

Tilley, John. "Cultural Relativism" Human Rights Quarterly" 2002 Vol. 22 No. 2.

Tomuschat, Christian. "Reconceptualizing the debate on jus cogens and obligations erga omnes-concluding remarks" in *The Fundamental Rules of the International Legal Order. Jus cogens and Obligations erga omnes*. C Tomuschat J-M Thouvenin (eds.) 2006 Martinus Nijhoff Publishers.

Tomuschat, Christian. "Obligations Arising From State Without or Against Their Will" Académie de Droit International, Recueil des Cours/ Collected Papers of the Hague Academy of International Law 1993 Vol. 241 No.4 Martinus Nijhoff Publishers 1994.

Trachtman, Joel P. "The Constitutions of the WTO" The European Journal of International Law 2006 Vol. 17 No. 3.

Trachtman, Joel P. "Key Issues in WTO dispute settlement: The First Ten Years" R Yerxa and B Wilson (eds.) 2005 (PIV DS) Cambridge University Press.

Trebilcock, Michael J and Howse, Robert. "Trade Policy & Labor Standards" Minnesota Journal of Global Trade 2005 Vol. 14 No. 2.

Treves, Tullio. "International Law: Achievements and Challenges" in *Cursos Euromediterráneos Bancacaja de Derecho Internacional* J Cardona Llorens (Director) 2006 Vol. 10 Tirant le Blanch.

Turner, Bryan S. „Outline of a tgheory of Human Rights" Sociology 1993 Vol. 27 No.3.

Turner, Terence. "Human Rights, Human Difference: Anthropology's Contribution to an Emancipatory Cultural Politics" Journal of Anthropological Research 1997 Vol. 53 No. 3.

Ullrich, Hans. "La mondialisation du droit économique: vers un novel ordre public économique. Rapport introductive" Revue Internationale de Droit Économique" 2003 Vol. 17 No. 3.

United Nations (Boutros-Boutros-Gahli –introduction-), The United Nations and Human Rights 1945-1995. The United Nations Blue Books Series, 1995 Vol.7 United Nations Publication.

UNPD Human Development Report 1990 Oxford University Press.

Ursprung, Heinrich W. "Globalization and the welfare state" The New Palgrave Dictionary of Economics" Steven N Durlauf and L E Blume 2008 (2nd edition) Vol. 3 Palgrave Macmillan.

van Damme, Isabelle. "Treaty Interpretation by the WTO Appellate Body" 2009 Oxford University Press.

Vaurs-Chaumette, Anne-Laure. "The international Community as a whole" in *The Law of International Responsibility* J Crawford, A Pellet, S Olleston (eds.) 2010 Oxford University Press

Verdroß, Alfred. "Die Würde des Menschen und ihr völkerrechtliche Schutz ional Community: How Community Interests Are Protected in International Law" 1975 Niederösterreichisches Pressehaus.

Verdroß, Alfred and Simma Bruno. "Universelles Völkerrecht: Theorie und Praxis 1976 Duncker und Humblot.

Villalpando, Santiago. "The Legal Dimension of the International Community: How Community Interests Are Protected in International Law" European Journal f International Law 2010 Vol. 21 No. 2.

Villiger, Mark E. "Commentary on the 1969 Vienna Convention on the Law of Treaties" 2009. Martinus Nijhoff Publishers.

von Bernstorff, Jochen. "The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law" The European Journal of International Law 2008 Vol. 19 No. 5.

von Bogdandy, Armin and del Valle, Sergio. "Universalism and Particularism as paradigms of international law. International Law and Justice" Working Papers IILJ Working Paper 2008/3 Institute for International Law and Justice, New York University School of Law.

von Bogdandy. Armin. "Globalization and Europe: How to Square Democracy, Globalization and International Law" The European Journal of International Law 2004 Vol. 15 No.5.

von Bogdandy, Armin. "Preamble" in *Max Planck Commentaries on World Trade Law WTO: Institutions and Disputes Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.) 2006 Vol. 2 Martinus Nijhoff Publishers.

von Bogdany, Armin. "Legitimacy of International Economic Governance: Interpretative Approaches to WTO law and the Prospects of its Proceduralization" in *International Economic Governance and Non-Economic Concerns: New challenges for the International Legal Order* S Griller (ed.) European Community

Studies Association of Austria (ECSA Austria) Publication Series 2003 Vol. 5 Springer.

von Bogandy, Armin. "Law and Politics in the WTO –Strategies to Cope with a Deficient Relationship-" Max Planck Yearbook of United Nations Law 2001 Vol. 5.

von Bogdandy, Armin. "Constitutionalism in International Law: Comment on a Proposal from Germany" Harvard Law Review 2006 Vol. 47 No. 1 .

von Bogdandy, Armin and Venzke, Ingo. "In Whose Name? – An investigation of International Courts' Public Authority of and its Democratic Justification" The European Journal of International Law 2012 Vol. 23 No. 1.

Walter, Christian. "Art 17 DSU" in *Max Planck Commentaries on World Trade Law : WTO, Institutions and Dispute Settlement* R Wolfrum, P-T Stoll, K Kaiser (eds.) 2006 Vol. 2 Martinus Nijhoff Publishers.

Wallace, Rebecca M M; Martin-Ortega, Olga "International Law" 2009 (6th edition) Sweet and Maxwell.

Wang, Cheng-Yu. "Different Scholarships, the Same World: Interdisciplinary Research on IEL" in *International Economic Law: The State and the Future of the Discipline* C B Picker, I D Bunn, D W Arner (eds) 2008. Hart Publishing.

Weber, Olaf. „WTO-Streitbeilegung und EuGH im Vergleich: Zur gerichtsförmigen Konfliktlösung in Handelspräferenzen" 2007 Nomos.

Weiss, Friedl. "Trade and Labor I" *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005 Vol. 2 Springer.

Weiss, Friedl. "The Limits of the WTO: facing non-trade issues" in *The WTO at Ten* G Sacerdoti, A Yanovich, J Bohanes (eds.) 2006 Cambridge University Press.

Wenzel, Nicola "Art XX a) GATT" in *Max Planck Commentaries on World Trade Law: WTO-Trade in Goods* R Wolfrum, P-T Stoll, H P Hestermeyer (eds.) 2011 Vol. 5 Martinus Nijhoff Publishers.

Wolfrum, Rüdiger. "International Law" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.), 2012 Vol. 5 Oxford University Press.

Wolfrum, Rüdiger and Philipp, Christiane (eds.) United Nations: Law, Policies and Practice 1995 Vol. 1 and Vol. 2 Martinus Nijhoff Publishers and Beck.

Wolfrum, Rüdiger. "The role of Law and Ethics in the globalized economics" Joseph Straus (ed.) 2009 Springer.

Wolfrum, Rüdiger "General International Law (Principles, Rules and Standards)" in *Max Planck Encyclopedia of Public International Law* R Wolfrum (ed.) 2012 Vol.4 Oxford University Press.

Wolfrum, Rüdiger "Developments of International Law in Treaty Making" R Wolfrum and V Röber (eds.) Beiträge zum ausländischen öffentlichen Recht und Völkerrecht A von Bogdandy and R Wolfrum (eds.) 2005 Vol. 177 Springer.

Wolfrum, Rüdiger "Art XX GATT [Introduction]" in *Max Planck Commentaries on World Trade Law : WTO-Trade in Goods* R Wolfrum, P-T Stoll, H P Hestermeyer (eds.) 2011 Vol. 5 Martinus Nijhoff Publishers.

Wolfrum, Rüdiger. "Art XX GATT [*chapeau*]*"* in *Max Planck Commentaries on World Trade Law : WTO-Trade in Goods* R Wolfrum, P-T Stoll, H P Hestermeyer (eds.) 2011 Vol. 5 Martinus Nijhoff Publishers.

Wolfrum, Rüdiger "Solidarity among states: An Emerging Structural Principle of International Law" in *Völkerrecht als Wertordnung. Common Values in International Law: Festschrift für Christian Tomuschat*. P-M Dupuy, B Fassbender, M N Shaw, Karl P Sommermann (eds) 2006 Engel.

Woody, Karen E. "Diamonds on the souls of her shoes: The Kimberly Process and the morality exception to WTO restrictions" Connecticut Journal of International Law 2007 Vol. 22 No. 2.

World Bank. "Making transition Work for Everyone: Poverty and Inequality in Europe and Central Asia" 2000 The International Bank for Reconstruction and Development / The World Bank.

Wu, Mark. "Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Doctrine" Yale Journal of International Law 2008 Vol. 33 No.1 .

Wyzanski Jr, Charles E. "The roots and origins of human rights" in *Human Dignity – The Internationalization of Human Rights*- A H Henkin (ed.) 1979 Aspen Institute for Humanistic Studies.

Yasuaki, Onuma "Quest of intercivilizational Human Rights. "Universal" Vs. "Relative" Asia-Pacific Journal of Human Rights and Law 2000 Vol. 1 No. 1.

Yourow, Howard Charles "The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence" 1996 Kluwer International Law.

Zdouc, Werner "The Panel Process" in *The World Trade Organization: Legal Economic and Political Analysis* P.F.J. Macrory, A.E. Appleton and M. G.Plummer (eds.) 2005 Vol. 1 Springer.

Zippelius, Reinhold „Rechtsphilosophie" 2011 (6th edition) Beck.

Zleptnig, Stefan "The Standard of Review in WTO Law: An Analysis of Law, legitimacy and the Distribution of Legal and Political Authority. European Integration online Papers (EIoP) Vol. 6 (2002) No. 17. http://eiop.or.at/eiop/texte/2002-017a.htm.

Zleptnig, Stefan "Non-Economic Objectives in WTO Law: Justification Provisions of GATT, GATS, SPS and TBT Agreements"