Primus Inter Pares? In Search of 'Fundamental' Human Rights*

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Abstract

International human rights law is one of the most developed and codified regimes (branches) of public international law. Since 1948 and the adoption of the Universal Declaration of Human Rights, the number and scope of human rights standards evolved considerably. Prima facie this tendency reflects a generally positive phenomenon and is driven by the human rights approach in international law, but at the same time it may raise questions of the system's efficiency, internal coherence, hierarchy of rights and mechanisms of protection and monitoring. Against the richness of human rights standards, designations such as 'fundamental', 'essential', 'basic', 'crucial' or 'core' are being used and ascribed to diverse concepts (inter alia, customary international human rights, erga omnes obligations, non-derogable rights, jus cogens or absolute rights). The article explores the provisions of general human rights instruments – the UDHR, the two Covenants and regional treaties, as well as relevant case-law of the ICJ, ECtHR and IACtHR in search of a definition and catalogue of fundamental human rights.

Keywords: hierarchy, jus cogens, International Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights.

1. Introduction

Since the end of the WWII we have been witnessing a process of internationalization and juridization of human rights.[1] It can successfully be argued that due to a rapid development of international human rights protection systems, human

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1 K. Drzewicki, 'Internationalization of Human Rights and Their Juridization', *in* R. Hanski, M. Suksi (Eds.), *Introduction to the International Protection of Human Rights. A Textbook*, Turku, Institute for Human Rights, Åbo Akademi University, 2004, pp. 25-47.

rights evolved from mere ideas and aspirations to the fully fledged legal norms.[2] Especially in the past three decades, the number of human rights treaties and other normative instruments in this field increased considerably on both the universal and regional level.[3] Apart from the nine core human rights treaties there is a considerable body of other human rights instruments (treaties, declarations and other documents). Scope and content (substance) of rights and freedoms also widened considerably[4] through interpretation (especially systemic and evolutive interpretation).[5] *Prima facie* this tendency seems to be positive and welcomed.[6] Why should we not praise the extensive catalogue of rights and freedoms recognized by law? Is it not that the more normative instruments there are, the more protected our rights are? But perhaps there are some negative (or not that welcomed) aspects and consequences of this phenomenon?[7] Such questions might be seen as doubts raised by *advocatus diaboli*, but at the same time could serve as a starting point for reflection and discussion on a number of relevant theoretical, systemic and practical problems; however, only some of them will be tackled in this article. Even though many of the questions and issues raised are not new, the answers might change depending on a particular context.

For instance, we may analyze the question taking into account different actors that apply and interpret human rights treaties. Since *ratione materiae* jurisdiction of international and domestic courts (and other quasi-judicial bodies) is usually limited, many treaties will serve as context for the purposes of interpreta-

2 M.K. Addo, *The Legal Nature of International Human Rights. International Studies in Human Rights,* Series: International Studies in Human Rights Vol. 104, Leiden/Boston, Martinus Nijhoff Publishers, 2010, passim; A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium. General Course on Public International Law*, Recueil des cours de l'Academie de Droit International de la Haye Vol. 316-317, Leiden, 2006, passim.

3 For a non-exhaustive list *see* www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx (last accessed 3 July 2017).

4 A perfect example of this phenomenon is the right to respect for private and family life. In this regard *see,* inter alia, W.A. Schabas, *The European Convention on Human Rights: A Commentary,* Oxford, Oxford University Press, 2015, pp. 358-407 and M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary,* 2nd ed., Kehl am Rhein, Engel, 2005, pp. 377-405.

5 The issue of interpretation of human rights treaties has been quite extensively explored in legal scholarship. *See,* inter alia, C. Djeffal, *Static and Evolutive Treaty Interpretation. A functional Reconstruction,* Cambridge, Cambridge University Press, 2016, pp. 357-407; A. Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law', *International & Comparative Law Quarterly*, Vol. 66, 2017, pp. 557-588; B. Çali, 'Treaty Interpretation, 21 Specialized Rules of Treaty Interpretation: Human Rights', *in* D.B. Hollis (Ed.), *The Oxford Guide to Treaties,* Oxford, Oxford University Press, 2012, pp. 525-547; M. Fitzmaurice, 'Interpretation of Human Rights Treaties', *in* D. Shelton (Ed.), *The Oxford Handbook of International Human Rights Law,* Oxford, Oxford University Press, 2015, pp. 739-771.

6 T. Meron, *The Humanization of International Law,* The Hague Academy of International Law, Leiden/Boston, Martinus Nijhoff Publishers, 2006, passim.

7 Some authors approaching this problem from a perspective of social sciences raise an issue that human rights need to be distinguished from bogus rights claims on the basis that human rights protect fundamental human interests, as opposed to 'any' interest – *see*: M. Freeman, *Human Rights,* 3rd ed., Cambridge/Malden, Polity, 2017, passim.

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tion[8] of either another human right treaty or domestic provisions. One of the methods of analyzing the impact of different treaties is to research the jurisprudence in search of relevant references.[9] If a broader context (together with cross-references to other court's case-law) is not taken into account, similar provisions and notions may be differently interpreted and applied and – as a consequence – norms may have different scope and content.[10] This problem of multiple interpretations is connected with a more general debate about interplay between universalism and regionalism.[11] It may also affect and impede identification of customary human rights norms.

The rich normative landscape and broad catalogues of human rights could be contrasted with labelling rights as 'fundamental', 'essential', 'basic' or 'crucial'. Examples of this practice may be observed not only in the public discourse, in the

8 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) Art. 31(1) and (3).

9 Even though the European Court of Human Rights declares that in "defining the meaning of terms and notions in the text of the Convention, the Court can and must take into account elements of international law other than the Convention" (cited after: *Bayatyan v. Armenia* ECHR 2011-IV 1, para. 102 and *Demir and Baykara v. Turkey* ECHR 2008-V 395, para. 85) and international law is invoked as 'relevant law', it does not so often directly affect reasoning of the Court.

10 For some basic comparative perspective *see* C. Heyns & M. Killander, 'Universality and the Growth of Regional Systems', *in* Shelton *ws*, 2015, pp. 688-691.

11 *See*, inter alia, J. Donnelly, 'The Relative Universality of Human Rights', *Human Rights Quarterly*, Vol. 29, 2007, pp. 281-306; R. Bernhardt, 'International Protection of Human Rights: Universalism and Regionalism', *in* S. Yee & J-Y. Morin (Eds.), *Multiculturalism and International Law. Essays in Honour of Edward Mc Whinney*, Leiden/Boston, Brill/Nijhoff, 2009, pp. 467-476.

politics and in the media, but also in legal scholarship,[12] soft law instruments and even in domestic[13] and international[14] case-law.

These terms seem to be often intuitively used to emphasize the importance of the subject they describe. And it is done so correctly – at least linguistically speaking. If we look at definitions offered by major dictionaries, we read that 'fundamental' means 'Forming the base, from which everything else develops';[15] or '1. Forming a necessary base or core; of central importance [...] 1.1. Affecting or relating to the essential nature of something or the crucial point about an issue [...] 1.2. So basic as to be hard to alter, resolve or overcome'.[16] However, different contexts in which these expressions are used suggest that they are either being referred and related to different concepts, such as absolute rights,[17] non-deroga-

12 M. Berween, 'The Fundamental Human Rights: An Islamic Perspective', *International Journal of Human Rights*, Vol. 6, 2002, pp. 61-79. *See also* C. Medina, who explores violation of the 'core rights', namely, the right to life, the right to personal freedom, the right to personal integrity, the right to due process of law and the right to a judicial remedy – idem, *The American Convention on Human Rights. Crucial Rights and Their Theory and Practice,* 2nd ed., Cambridge, Intersentia, 2016, passim. Another Author discusses provisions of the EU Charter of Fundamental Rights and suggests that fundamental rights are rights that are justiciable before a competent judicial organ – *see*: N. Jääskinen, 'Fundamental Social Rights in the Charter-Are They Rights? Are They Fundamental?', *in* Peers *et al.* (Eds.), *The EU Charter of Fundamental Rights: A Commentary,* Oregon, Hart Publishing, 2014, pp. 1703-1714. *See also* F. Fabbrini, *Fundamental Rights in Europe. Challenges and Transformation in Comparative Perspective,* Oxford, Oxford University Press, 2014, where the following rights are covered: the right to due process (for suspected terrorists), the right to vote (for non-citizens), the right to strike and the right to abortion.

13 Nigerian Court of Appeal in the case *Uzoukwu v. Ezeonu II* (1991) 6 NWLR (Pt. 200) 708. Commented at www.vanguardngr.com/2017/07/fundamental-human-rights-nigeria-myth-reality-2/ (last accessed 16 June 2017).

14 As an example, see contentions by Mexico, "the right to consular notification and consular communication (...) is a fundamental human right" presented in *Avena Case* (*Mexico v. United States of America*) (Merits) [2004] ICJ Rep 12, para. 124. The United States, referred to the 'basic principles of administration of justice and the equality of States' (*ibid.*, para. 45). In the US Memorial to the ICJ in the *Case Concerning United States Diplomatic and Consular Staff in Teheran* the US argued that Iran had violated 'certain fundamental human rights' of the hostages 'now reflected, inter alia, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights' (*US v. Iran*) (Pleadings, Memorial of the United States) [1980], available at: www.icj-cij.org/en/case/64/written-proceedings (last accessed 3 June 2017), p. 182. *See also* L.F.M. Besselink, 'Case note to the Judgments of the Court (Sixth Camber) of 10 February 2000 in Case C-50/96, Deutsche Telekom AG v. Agnes Vick and Ute Conze, Joined Cases C-270/97 and C-271/97, Deutsche Post AG v. Elisabeth Sievers and Brunhilde Schrage', *Common Market Law Review*, Vol. 38, 2001, pp. 437-454.

15 Cambridge Dictionary, available at: http://dictionary.cambridge.org/dictionary/english/fundamental (last accessed 10 June 2017).

16 Oxford Dictionary, available at: https://en.oxforddictionaries.com/definition/fundamental (last accessed 10 June 2017). Interestingly, as an example of the meaning of a word 'fundamental' the dictionary offers 'protection of fundamental rights'.

17 J. Finnis, *Natural Law and Natural Rights,* Oxford, Clarendon Press, 1980, pp. 205-210.

East European Yearbook on Human Rights 2019 (2) 1
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ble obligations, customary norms,[18] obligations *erga omnes* and *jus cogens*[19] or ascribed a distinctive meaning. Is it justifiable to argue that if one refers to 'fundamental/basic human rights' it is meant to cover all or some of the above-mentioned concepts?

Another point for reflection is that the reference to fundamental, basic or core[20] rights automatically recalls hierarchy.[21] This issue could be approached from two perspectives – an internal and external one. The first would refer to the catalogue of human rights. As a consequence, it would mean that while some rights and freedoms are fundamental (more important than the others), some are not. However, the idea of hierarchy between human rights has been rejected by human rights protection bodies and the majority of scholars,[22] and interdependence and indivisibility of all rights has been advocated.[23] From the second perspective, human rights would stand in opposition to the rules and principles of international and national law. In that case, fundamental human rights could be claimed to have a special place, and therefore in position to trump other norms and principles, such as rules governing immunities.[24]

18 For instance, at the UNHCR webpage a following statement can be found: "some fundamental human rights norms enjoy universal protection by customary international law across all boundaries and civilizations", available at: www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx (last accessed 6 June 2017).

19 C.C. Joyner & C. Bassiouni (Eds.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17-21 September 1998,* Association Internationale de Droit Pénal, 1998.

20 About the difference between the concept of core rights and a core content of each human right or freedom *see* M. Scheinin, 'Core Rights and Obligations', *in* Shelton, 2015, pp. 527-540.

21 T. Meron, 'On a Hierarchy of International Human Rights', *American Journal of International Law*, Vol. 80, 1986, pp. 1-23.

22 T. Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights', *European Journal of International Law*, Vol. 12, 2001, pp. 917-941.

23 Recently, it has been reminded by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights at a joint session (held on 23 June 2016) to commemorate the 50th anniversary of the Covenants: "All human rights, including economic, social and cultural rights on one hand, and civil and political rights on the other hand, should be seen as inseparable, complimentary and supplementary to one another." Available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20170&LangID=E (last accessed 24 June 2017).

24 The principle of State immunity, which has been proclaimed as 'fundamental' by the ICJ ("one of the fundamental principles of the international legal order" – *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*) (Merits) [2012] ICJ Rep 99, para. 57. For a more detailed discussion concerning the conflict of norms in different contexts *see*: E. De Wet & J. Vidmar (Eds.), *Hierarchy in International Law: The Place of Human Rights,* Oxford, Oxford University Press, 2012, passim. Regarding the principle of State immunities *see*, inter alia, C. Focarelli, 'Immunite des Etats et jus cogens. La dynamique du droit international et la fonction du jus cogens dans le processus de changement de la règle sur l'immunité juridictionnelle des états étrangers', *Revue Generale de Droit International Public*, Vol. 4, 2008, p. 761; E. Bankas, *The State Immunity Controversy in International Law. Private Suits Against Sovereign States in Domestic Courts,* Berlin, Springer, 2005, passim; P. Webb, 'Human Rights and the Immunities of State Officials', *in* De Wet & Vidmar, 2012, Chapter V; L.M. Caplan, 'State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory', *American Journal of International Law*, Vol. 97, 2003, pp. 741-781.

Taking all these considerations into account, the key question is how fundamental rights are being defined? Does the notion refer to some (selected) rights and freedoms or all human rights (in general)? The first proposition would mean that there is a special category of human rights (identified on the basis of some definition and criteria),[25] while the second would confer a rather symbolic, philosophical and axiological meaning to the general concept of human rights. In the first case, would it have any normative (legal) meaning and practical function in guaranteeing and protecting human rights or is it only a linguistic ornament serving a figurative role? As we all are well aware of, language and law are inseparable. The first is crucial for the purposes of the latter, and the latter uses the previous as a vehicle. And exactly because 'Few professions are as dependent upon language' (as appealingly observed by Tiersma[26]), law and lawyers should not use words recklessly.

In an attempt to find a definition and a catalogue of fundamental human rights and to answer at least to some of the questions put forward above, the article will explore major human rights legal instruments and case-law of selected international courts. A closer look at the practice of organs and institutions entrusted in human rights monitoring and interpretation should be helpful in reconstructing the substance and meaning of selected concepts. As Wolcher puts it,

> *What* a legal object is – its identity or essence – is co-determined by *how* it is: its mode of existence, or the way it manifests itself in time as a lived phenomenon. Thus, any serious effort to think about human institutions that we call 'law' requires a philosophy of how legal language is related to legal events such as the interpretation and the enforcement of law.[27]

Wolcher's contra-argument to Hart's theory of a 'core of settled meanings' is that only the norm's ongoing application will show the cases to which it applies.

The article is structured as follows. In the first part, the article takes a closer look at the provisions of the general human rights instruments – the Universal Declaration of Human Rights (UDHR), the two Covenants: International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) and main regional treaties. The following parts of the article provide a critical analysis of authoritative pronouncements about the aforementioned concepts, in relation to human rights norms, that can be found in the case-law of the International Court of Justice (ICJ), the

25 One possibility is to define 'fundamental human rights' as rights that pertain to 'fundamental human needs' and are indispensable for human survival and preservation of life, such as a 'fundamental right to freedom from hunger' or 'right to water as a fundamental human right' – *see*: FAO, 'Food – a fundamental human right', available at: www.fao.org/focus/e/rightfood/right2.htm (last accessed 4 July 2017). *See also* WHO, 'The Right to Water', Health and Human Rights Publication Series 3, 2003.

26 P.M. Tiersma, *Legal Language,* Chicago, University of Chicago Press, 2000, p. 1.

27 *See* L.E. Wolcher, 'How Legal Language Works', *UNBOUND*, Vol. 2, 2006, p. 91.

East European Yearbook on Human Rights 2019 (2) 1
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European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR).

2. Normative Points of Reference

To start with, it is worthwhile to look back to the first international instruments that expressed the need to protect and guarantee human rights. The UN Charter in its Article 1(3) listed "promoting and encouraging respect for human rights and for fundamental freedoms (…)" among the purposes of the United Nations,[28] while in the Preamble it reaffirmed "faith in fundamental human rights, in the dignity and worth of the human person". As we know, the Charter does not include either a definition of fundamental human rights or a catalogue of such rights. Although some proposals have been put forward for the inclusion of a human rights charter in the Preamble, decision was made to leave the elaboration of a human rights charter to the General Assembly.[29]

Universal Declaration of Human Rights – a first instrument to cover a broad catalogue of rights – echoed the Charter's Preamble, reminding that "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights".[30] It is worthwhile to note that at the San Francisco Conference the adoption had been proposed of a 'Declaration of Fundamental Human Rights' along with the draft declaration submitted by the delegation of Panama (known as the 'Declaration of Philadelphia'). The operative part of the UDHR mentions the expression 'fundamental' only once – in Article 8, where it provides for a right to an effective remedy for acts violating the fundamental rights guaranteed by

28 This provision has been further developed in Art. 55 where "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" is seen as one of the "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations". Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

29 R. Wolfrum, 'Preamble', *in* Simma *et al.* (Eds.), *The Charter of the United Nations: A Commentary*, Vol I, 3rd ed., OSAIL, Oxford, Oxford University Press, 2012, p. 101.

30 Farther in the Preamble we read that "Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms". Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

the constitution or by law.[31] It may therefore be concluded that the axiological mother of all treaties refers the word 'fundamental' to at least all rights and freedoms recognized in it, or even beyond (reminding at the same time that rights of individuals were already stipulated in a number of constitutions and other domestic laws). The latter interpretation finds a confirmation in the twin provision of Article 5(2) of the two Covenants (ICCPR and ICESCR) that reads as follows:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party [...] pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.[32]

While this is the only provision where the ICCPR is mentioning the word 'fundamental', the ICESCR makes reference to fundamental freedoms twice[33] and refers to only one right specifically – to the "fundamental right of everyone to be free from hunger".[34] Should it therefore be simply interpreted that it is the highest right in the catalogue of at least economic, social and cultural rights? I would argue that in this case, fundamental is to be understood as an indispensable human need.[35] In other words, it acts as a prerequisite for the enjoyment of other interrelated rights expressed in the Covenant.

Also regional general human rights treaties make some references to fundamental human rights. In Article 25 of the American Convention on Human Rights

31 However, during the drafting process some delegations have put forward proposals to include the expression also in other articles. For example, the Mexican Government proposed the following wording of Art.6 – "Individual freedom of thought and conscience and freedom to hold and change beliefs are fundamental human rights" – *see* Comments of the Mexican Government of the Draft International Declaration on Human Rights and the Draft International Covenant on Human Rights, 16 April 1948, E/CN.4/82/Add.1, reprinted in W. Schabas, *The Universal Declaration of Human Rights: The Travaux Préparatoires,* Cambridge, Cambridge University Press, 2013, p. 1417. South Africa suggested to redraft Art.1 into "All human beings are born free and equal in fundamental rights and freedoms". The South African representative argued that this would narrow the scope of truly universal human rights to only 'fundamental' ones and thus respect regional and other differences (such as that "Men and women had and always would have different rights [*sic*]") – *see* Summary Record of the Ninety-Fifth Meeting [of the Third Committee], 6 October 1948, A/C.3/SR.95, reprinted *ibid.*, p. 2137. The first drafts also included Art.15 that stated "When a Government, group or individual seriously or systematically tramples the fundamental human rights and freedoms, individuals and peoples have the right to resist oppression and tyranny" – *see* Report of the Working Group on the Declaration on Human Rights, 10 December 1947, E/CN.4/57, reprinted *ibid.*, p. 1249.

32 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

33 Art. 6(2) – right to work and Art.e 13(1) – right to education.

34 Art. 11(2).

35 J.-C. Heilinger, 'The Moral Demandingness of Socioeconomic Human Rights', *in* G. Ernst & J.-C. Heilinger (Eds.), *The Philosophy of Human Rights. Contemporary Controversies*, Berlin/Boston, De Gruyter, 2012, p. 190.

East European Yearbook on Human Rights 2019 (2) 1
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(setting a right to judicial protection), we find a similar construction to the one of Article 8 UDHR. It thus reads about a recourse for protection against acts that violate "fundamental rights recognized by the constitution or laws of the state concerned or by this Convention". Another reference – albeit to the 'essential rights of man' (*los derechos esenciales del hombre*) – is made twice in the Preamble.[36] Similarly, to the American Convention and American Declaration, the Preamble of the African Charter of 1981 made a clear link between the material source of human rights (referred to here as "the attributes of human beings") and fundamental human rights. Not surprisingly, fundamental rights are also mentioned in Article 7 encompassing the right to have one's case heard.[37] The last but not least, the ECHR mentions 'fundamental' in its very title: The Convention for the Protection of Human Rights and Fundamental Freedoms.[38] Also its Preamble reaffirms a "profound belief in those fundamental freedoms which are the foundation of justice and peace in the world". Neither in the Preamble nor in the catalogue of rights is reference to fundamental or essential human rights to be found,[39] unlike in the two other regional treaties. Was it a mere oversight or a conscious and deliberate choice to not to refer to human rights as fundamental?[40]

Last but not least, the EU Charter of Fundamental Rights needs to be mentioned.[41] Title of the document clearly and intentionally refers to 'fundamental rights' and not to 'human rights'. This may be misleading for non-lawyers as it

36 "Reaffirming [...] intention to consolidate [...] a system of personal liberty and social justice based on respect for the essential rights of man" and when explaining the source of rights and freedoms: "essential rights of man are not derived from rom one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states" – American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123. The latter passage takes its origin from the American Declaration of the Rights and Duties of Man of 1948. The Declaration was itself an "affirmation of essential human rights by the American States" and provided that "[...] judicial and political institutions [...] have as their principal aim the protection of the essential rights of man" – American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

37 In the light of this provision, the rights comprises of, inter alia, "(a) the right to an appeal [...] against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force" – *see* African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

38 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 005 (ECHR).

39 Out of the blue, the Preamble to the Protocol No. 13 to the ECHR concerning the abolition of the death penalty in all circumstances declares that CoE States are convinced that "everyone's right to life is a basic value in a democratic society" – Protocol No. 13 to the ECHR (adopted 3 May 2002) CETS No. 187.

40 Unfortunately, the Travaux Préparatoires to the Convention do not include any explanation on this matter, available at: www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf (last accessed 22 July 2017).

41 Charter of Fundamental Rights of the European Union, O.J. 18 December 2000, C 364/3.

suggests that the rights set out in the Charter are somehow different. In fact, they are not new – on the contrary, they are solidly rooted in the human rights treaties, especially in the ECHR and ESC.[42] Already before the adoption of the EU Charter, the European Court of Justice had used this term when identifying individual rights protected in the European Communities (later EU).[43] In a specific European context the notion of fundamental rights is used as a synonym of human rights and covers all rights stipulated in the EU Charter and thus does not denote any kind of hierarchy between them.

3. Enigmatic International Court of Justice

As observed by Professor Bruno Simma, in several decisions of the International Court of Justice, such as *Corfu Channel* (1949), *Barcelona Traction* (1970), *Tehran Hostages* (1980), *LaGrand* (2001) and *Avena* (2004), human rights considerations appeared in more or less incidental ways.[44] In all of them the Court did not directly refer to 'human rights' but used a myriad of different notions.

In *Corfu Channel* judgment the ICJ referred to "obligations [...] based on [...] certain general and well-recognized principles", among them "elementary considerations of humanity".[45] The wording used by the Court is rather enigmatic and difficult to define. However, we need to take into account that in 1949 most of the human rights standards, as we know them today, were not even in the process of drafting. Two decades later in *Barcelona Traction* judgment, the ICJ stated in obiter dictum that

> [a]n essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-a-vis another State [...] By their very nature, the former are the concern of all States. In view of the *importance of the rights involved* [emphasis added], all states can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example [...] from [...] the principles and rules concerning the *basic rights of the human person* [emphasis added], including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered the body of general

42 The Preamble to the Charter reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

43 C. Walter, 'History and Development of European Fundamental Rights and Fundamental Freedoms', *in* Peers *et al.* (Eds.), *The EU Charter of Fundamental Rights: A Commentary*, Oxford/Portland, Hart Publishing, 2014, pp. 11-14.

44 *Idem*, 'Human Rights Before the International Court of Justice: Community Interest Coming to Live?', *in* C.J. Tams & J. Sloan (Eds.), *The Development of International Law by the International Court of Justice*, Oxford, Oxford University Press, 2013, p. 581.

45 *Corfu Channel Case* (*UK v. Albania*) (Merits) [1949] ICJ Rep 4, 22.

East European Yearbook on Human Rights 2019 (2) 1
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> international law; others are conferred by international instruments of a universal or quasi-universal character.[46]

Undoubtedly, this decision has been a landmark step made by the ICJ to describe the normative character of human rights. The Court introduced a concept of obligations *erga omnes* and combined it with basic rights of the human person. It is clear that *erga omnes* character of human rights norms distinguishes them from other rules of international law. It means that they impose obligations towards all the States of the international community or all States parties to a particular treaty (*erga omnes partes*). However, a phrase 'basic rights of the human person' is quite enigmatic. Should it stand for customary human rights, as the two examples provided would further indicate? Professor Olivier De Schutter suggests that it "should be seen as a mere paraphrase to designate the notion of human rights as 'fundamental' in the guarantees they provide".[47] This view may be supported by the Court's vision that the rights of protection derive from different sources: general international law, universal or even quasi-universal instruments (we may assume that the Court meant treaties). Since the *Barcelona Traction* judgment numerous human rights treaties have been concluded. Hence, do they all foresee obligations *erga omnes*? A catalogue of these obligations has been a subject of academic discussions for many years.[48] According to a dominating position presented in the legal scholarship these are most closely related with the catalogue of customary norms[49] and broader than *jus cogens*:

> [...] while all peremptory norms of international law also are owed to the community of States as a whole and thus are *erga omnes*, the reverse is not true, as 'not all *erga omnes* obligations are established by peremptory norms of general international law'.[50]

Some authors, however, present an opinion that all internationally recognized human rights impose *erga omnes* obligations.[51]

In *Tehran Hostages* judgment, the ICJ condemned the treatment of the detained US diplomatic and consular personnel as incompatible, *inter alia*, "with the fundamental principles enunciated in the Universal Declaration of Human

46 *Barcelona Traction Case* (*Belgium v. Spain*) (Merits) [1970] ICJ Rep 3, paras. 33-34.

47 O. De Schutter, *International Human Rights Law. Cases, Materials, Commentary,* 2nd ed., Cambridge, Cambridge University Press, 2014, p. 115.

48 M. Ragazzi, *The Concept of International Obligations Erga Omnes,* Oxford, Clarendon Press, 1997, pp. 132-188.

49 1987 Restatement Third of The Foreign Relations Law of the United States of American Law Institute, Section 703(2) provides that all human rights of customary character impose obligations *erga omnes*.

50 De Schutter, 2014, p. 91, citing: Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, para. 38.

51 I.D. Seiderman, *Hierarchy in International Law. The Human Rights Dimension,* Antwerp, Intersentia, 2001, pp. 129-134.

Rights".[52] This statement is in a way more precise than the one offered in Barcelona Traction, as the Court generously referred to the UDHR in general. Nevertheless, it is still unclear how this excerpt should be understood? Does it mean that the UDHR is customary law *in toto* or that it reflects general principles of law? According to Professor Rodley, the Court was simply stating that the Declaration as a whole propounds fundamental principles recognized by general international law.[53]

In another widely commented pronouncement – the 1996 *Advisory Opinion on the Legality of Use or Threat of Use of Nuclear Weapons* – the ICJ deliberated on the normative nature of humanitarian law. It noticed that many of its rules are fundamental to the respect of the human person and elementary considerations of humanity. This fundamental nature of many IHL rules, and a fact that the Hague and Geneva Conventions have enjoyed a broad accession, led the Court to a conclusion that they constitute "intransgressible principles of international customary law".[54] The Court has been enigmatic again, perhaps to avoid referring to *jus cogens*.

A case that addressed a specific human right was *Belgium v. Senegal* (2012) where the ICJ expressly acknowledged that "[…] the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)".[55] The Court continued with setting a normative background and sketching evidence of a widespread international practice and on the *opinio juris* of States.[56] However, the reference to peremptory norms was not explored further in the reasoning and did not contribute to the settlement of the dispute. A lot more consideration was given to the nature of the obligation to prevent torture and to prosecute torturers. According to the Court,

> The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. […] That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved […] These obligations may

52 *Teheran Hostages Case*, 1980, para. 91.

53 N.S. Rodley, 'Human rights and Humanitarian Intervention: The Case of the World Court', *International and Comparative Law Quarterly*, Vol. 38, 1989, pp. 321, 326.

54 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 79.

55 *Questions Relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*) (Merits) [2012] ICJ Rep 422, para. 99.

56 Surprisingly, among international instruments of universal application the General Assembly Resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has been listed. Surprisingly again, there was no reference to regional treaties specifically addressing prohibition of torture.

East European Yearbook on Human Rights 2019 (2) 1
doi: 10.5553/EEYHR/258977642019002001004

> be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case.[57]

This argumentation has led the Court to a far-reaching conclusion that

> any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, such as those under Article 6, paragraph 2, and Article 7, paragraph 1, of the Convention, and to bring that failure to an end.[58]

Even though the Court fund it did not have jurisdiction to consider the issue whether there existed an obligation for a State to prosecute crimes under customary international law allegedly committed by a foreign national abroad, in the opinion of Judge Cançado Trindade, the judgment did not preclude that in the future the ICJ could proclaim its jurisdiction over disputes concerning breaches of alleged obligations under customary international law.[59] It is also worth to note that when analyzing the character of State obligations, he referred to "peremptory norms of international law, safeguarding the fundamental rights of the human person"[60] and explained that 'in so far as the safeguard of the fundamental rights of the human person is concerned, the obligations of the State – conventional and of general international law – are of result, and not of simple conduct, so as to secure the effective protection of those rights'.[61]

4. Balancing at the European Court of Human Rights

A review of the ECtHR jurisprudence in search of a reference to 'fundamental rights' and its meaning proved that the Court so far used it rather exceptionally. On the contrary, it was more frequently employed in dissenting and separate opinions.[62]

I will begin the analysis of the ECtHR jurisprudence from a case *Marguš v. Croatia* that concerned conviction for war crimes of a soldier who had previously been granted an amnesty.[63] In this judgment a reference to fundamental human

57 *Ibid.*, para. 68. An interesting point was raised in a Dissenting Opinion of Judge *ad hoc* Sur, who suggested that it is inappropriate to see a treaty (in that case CAT) *in toto* as having *erga omnes* character. Instead, its particular provisions should be considered (para. 30).

58 *Obligation to Prosecute or Extradite*, 2012, para. 69.

59 Separate Opinion to the Judgment, paras. 134-144.

60 *Obligation to Prosecute or Extradite*, 2012, para. 44.

61 *Ibid.*, para. 49.

62 *See* for instance: a Dissenting Opinion of Judge Bonello joined by Judges Zupancic and Gyulumyan to *Kart v. Turkey* ECHR 2009-VI 49; a Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupancic, Fura, Spielmann, Tsotsoria, Power and Poalelungi to *Medvedyev and Others v. France* ECHR 2010-III 61; a Concurring Opinion of Judge Pinto de Albuquerque, Joined by Judge Vucnić and Partly Dissenting Opinion of Judge Wojtyczek to *Mocanu and Others v. Romania* ECHR 2014-V 437.

63 ECHR 2014-III 1.

rights appears several times. The Court observed *inter alia* that so far no international treaty explicitly prohibits the granting of amnesty in respect to grave breaches of fundamental rights.[64] From another part of dictum we may deduce that a catalogue of fundamental human rights includes the right to life and prohibition of torture.[65] In the conclusion the Grand Chamber found the applicant's claim under Article 4 of Protocol No. 7 inadmissible. This view corresponded with a State obligation to investigate and prosecute grave breaches of fundamental human rights, interlinked with a "growing tendency in international law to see such amnesties as unacceptable".[66]

In most instances, the expression 'fundamental human rights' is used by the Court in the process of assessing whether an interference has been in accordance with the Convention (in deliberations concerning lawfulness, necessity, proportionality and balancing between rights and interests).[67] For example, in the Grand Chamber judgment in *Janowiec and Others v. Russia*, the Court noted,

> [E]ven where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence. If there was no possibility of challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention.[68]

In another judgment (that concerned the right to freedom of peaceful assembly), the Court stated,

> In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[69]

When deliberating upon an application concerning interference into the freedom of thought, conscience and religion, the Court reiterated that

64 *Ibid.*, para. 131.
65 *Ibid.*, para. 137.
66 *Ibid.*, para. 139.
67 *Delfi AS v. Estonia* App no. 64569/09 (ECtHR 16 June 2015), para. 128. Dilemmas regarding balancing and weighting fundamental rights have been theoretically developed in the context of constitutional rights by Habermas and Alexy. *See* R. Alexy, 'Discourse Theory and Fundamental Rights', *in* A.J. Menéndez & E.O. Eriksen, *Arguing Fundamental Rights,* Dordrecht, Springer, 2006, p. 23 *et seq*.
68 ECHR 2013-V 203, para. 213.
69 *Lashmankin and others v. Russia*, no. 57818/09 and 14 others (ECtHR 7 February 2017), para. 411.

East European Yearbook on Human Rights 2019 (2) 1
doi: 10.5553/EEYHR/258977642019002001004

> in order for a measure to be considered proportionate and necessary in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned.[70]

Finally, in *N. v. the United Kingdom* (that concerned sending a Ugandan national who was suffering from AIDS back to her country of origin and allegations of a breach of Article 3 of the Convention), the Court had also based its reasoning on the "search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".[71]

In several judgments, particular rights were referred to as fundamental. A function this assertion played in the argumentation allows to present some more general reflections. Coming back to the case *N. v. the United Kingdom* cited earlier, a sort of dissonance in the argumentation could be identified. On one hand, the Court acknowledged "the fundamental importance of Article 3 in the Convention system", but on the other hand it weighted it against the economic interest of States.[72] As the dissenting minority rightly observed, balancing exercise in the context of Article 3 was clearly rejected in the previous case-law.[73] Therefore, if in the majority's opinion there would be no violation of Article 3 in case of expulsion, it would be better – in my view – to motivate it by stating that the medical care in Uganda was good enough and that a minimum level of severity would not be attained. In other words, freedom from torture, inhuman and degrading treatment should not be balanced because of its absolute nature.[74] While the process of balancing or proportionality assessment depends on particular circumstances and no right or freedom is a priori treated as more important than the others, the absolute character of right that does not compromise any exceptions makes such a right a *primus inter pares*.

Secondly, a fundamental character of a right to physical liberty, which protects the physical security of an individual, entails that exceptions that might restrict that right (Article 5 (1) (a) to (f)) must be interpreted narrowly, and in no circumstances may they allow arbitrary deprivation of liberty.[75] In fact, Article 5, which guarantees a right to liberty and security, has been most frequently described as fundamental because "that right is of primary importance in a 'democratic society' within the meaning of the Convention"[76] and its key purpose is to prevent arbitrary or unjustified deprivations of liberty.

70 *Biblical Centre of the Chuvash Republic v. Russia* , no. 33203/08 (ECtHR12 June 2014), para. 58.

71 *N. v. the United Kingdom* ECHR 2008-III 227, para. 44.

72 *Ibid.*, para. 44: "Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States."

73 *Ibid.*, Dissenting opinion of Judges Tulkens, Bonello and Spielmann, para. 7.

74 According to the dissenters, Art. 3 is "one of the core fundamental civil rights guaranteed in the Convention" (*ibid.*, para. 6).

75 *V. K. V. Russia* App no. 9139/08 (ECtHR 4 April 2017) para. 29. *See also Trutko v. Russia* App no. 40979/04 (ECtHR 6 December 2016), para. 31.

76 *Grabowski v. Poland*, no. 57722/12 (ECtHR 30 June 2015) para. 42.

On another occasion, the Court reiterated that "Article 12 secures the fundamental right of a man and woman to marry and found a family".[77] A justification for its fundamental nature was that "the exercise of the right to marry gives rise to social, personal and legal consequences". As for the consequences, the Court noted that although exercising these rights is subject to the national laws of the Contracting States, the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.[78] Similarly, a 'fundamental right to freedom of expression' has been weighted in the balancing exercise against the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 (2) of the Convention.[79]

Finally, the expression 'fundamental' has also been used neither in connection with a particular right nor more generally with reference to all rights enshrined in the ECHR, but to indicate a special quality and importance of certain values of democratic societies. For instance, the Court in *Soering v. United Kingdom* asserted that the absolute prohibition of torture (even in times of war and other national emergencies) expresses one of the "fundamental values of [contemporary] democratic societies".[80] Subsequently, in *Kalashnikov v. Russia* the Court stated that Article 3 of the European Convention on Human Rights

> enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour.[81]

In *Selmouni v. France* the ECtHR categorically reiterated that Article 3 of the European Convention "enshrines one of the most fundamental values of democratic societies".[82]

5. Creative Inter-American Court of Human Rights

With regard to the jurisprudence of the Inter-American organs of human rights protection system, a preliminary observation should be made, that – comparing with the European one – more reflection is given to the relations and links between human rights and *jus cogens*, customary law and obligations *erga omnes*. Inter-American treaty bodies have been more creative in that respect,[83] in fact out of necessity, since not all OAS Member States are parties to the American Convention. Thus, as it could be expected, reference to fundamental rights and

77 *Chernetskiy v. Ukraine,* App no. 44316/07 (ECtHR 8 December 2016) para. 28.
78 *Ibid*.
79 *Karapetyan and Others v. Armenia*, no. 59001/08 (ECtHR 17 November 2016) para. 47.
80 *Soering v. United Kingdom* (1989) Series A no 161, para. 88.
81 *Kalashnikov v. Russia* ECHR 2002-VI 93, para. 95.
82 *Selmouni v. France* ECHR 1999-V 149, para. 96.
83 L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law', *European Journal of International Law*, Vol. 21, 2010, pp. 585-604.

East European Yearbook on Human Rights 2019 (2) 1
doi: 10.5553/EEYHR/258977642019002001004

principles can be found in several judgments and opinions. Selected examples cited below illustrate the variety of its uses.

Although it seems that the Inter-American Court usually refers to 'fundamental rights'[84] or 'fundamental principles' in a general way, one right has been specifically addressed in a couple of judgments – that is – a right to life.[85] The Court continuously reaffirms,

> [D]erecho a la vida es fundamental en la Convención Americana, por cuanto de su salvaguarda depende la realización de los demás derechos. En virtud de ello, los Estados tienen la obligación de garantizar la creación de las condiciones que se requieran para su pleno goce y ejercicio' ('right to life is fundamental in the American Convention, since the realization of other rights depends on its safeguard. By virtue of this, States have an obligation to ensure the creation of the conditions required for its full enjoyment and exercise).[86]

As the Court puts it, the reason behind this elevation is that the right to life is an obvious prerequisite of enjoyment of all other rights and freedoms. The right to life is one of the rights that form part of the non-derogable core established in Article 27(2) of the American Convention; these are rights that cannot be suspended in case of war, public danger or other threats to the independence or security of the States Parties.

Another two judgments that should be given particular attention are *Gelman v. Uruguay*[87] and *Gomes Lund et al. ("Guerrilja do Araguaia") v. Brazil*.[88] In both cases, the Inter-American Court engaged into lengthy and detailed analysis on the position under international law of amnesties granted for grave breaches of fundamental human rights. In the context of grave breaches of fundamental human

84 *See*, for example, *Rights and guarantees of children in the context of migration and/or in need of international protection,* Advisory Opinion OC-21/14, Inter-American Court of Human Rights Series A No 21 (19 August 2014) para. 192: "Regarding the arbitrary nature of a detention referred to in Articles 7(3) of the Convention and XXV of the Declaration, the Court has considered that no one may be subjected to detention or imprisonment for reasons and by means that – although they are classified as legal – may be considered incompatible with respect for the *fundamental human rights* [emphasis added], because they are, inter alia, unreasonable, unpredictable or disproportionate."

85 The Court stated that "derecho a la vida juega un papel fundamental en la Convención Americana, por ser el presupuesto esencial para el ejercicio de los demás derechos" ("right to life plays a fundamental role in the American Convention, since it is essential for the exercise of other rights") – *see Valencia Hinojosa et al. v. Ecuador,* Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 327 (29 November 2016) para. 130.

86 *Chinchilla Sandoval v. Guatemala,* Preliminary Objection, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 312 (29 February 2016) para. 166.

87 Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 221 (24 February 2011).

88 Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 219 (24 November 2010).

rights the Court has also reconstructed a fairly new right – the right to truth (*derecho a conocer la verdad*).[89]

The openness of the Inter-American Court to the whole human rights system and its holistic approach is also noticeable in cases where social and economic rights come into play. For example, in *Gonzales Lluy et al. v. Ecuador* the ACtHR deliberated upon fundamental social rights, specifically a right to health and its interrelations with other human rights.[90] Even though indivisibility and interdependence of human rights is often emphasized in the scientific literature and by treaty bodies vested in monitoring social, economic and cultural rights, the European Court of Human Rights is much more cautious in this respect, in comparison with its Inter-American counterpart.

Lastly, in the recent *Advisory Opinion on entitlement of legal entities to hold rights under the Inter-American human rights system* (2016), the IACtHR referred to 'fundamental rights of legal persons'.[91] What is more, the Court listed (or some of?) these rights: a right to property, freedom of expression, right to petition and a right to association.[92]

6. Concluding Remarks

References to 'fundamental human rights' can be found in policy documents, in the media, scholarly works and legal instruments. They tend to serve different purposes and convey different meaning. The aim of a survey of the major human rights treaties and of the jurisprudence of the ICJ, ECtHR and IACtHR was to trace the meaning and function of this mysterious notion. The analysis of the relevant case-law demonstrated that all three Courts also use an expression 'fundamental' in many contexts, and for different purposes. It is thus virtually impossible to offer a concise definition and a catalogue of 'fundamental human rights', either on the basis of the analysed case-law or from the texts of the major treaties. Moreover, the notion itself does not convey specific legal consequences and does not really help in resolving disputes (especially in a situation of conflict between rights and freedoms). It is therefore unjustified and even undesirable to create a category of 'fundamental' rights and freedoms as opposed to other – 'ordinary' – human rights. At this point a metacategory (a principle) of human dignity comes into play. Because the dignity of the human person is not only a fundamental right in itself but constitutes the real source of human rights,[93] it

89 *Tenorio Roca et al. v. Peru,* Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 314 (22 June 2016) para. 243 and other judgments cited therein.

90 Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 298 (1 September 2015) paras. 104-105.

91 Advisory Opinion OC-22/16, Inter-American Court of Human Rights Series A No 22 (26 February 2016).

92 *Ibid.*, para. 64.

93 C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law,* Vol. 19, No. 4, 2008, pp. 664-724. *See also* Explanations Relating to the Charter of Fundamental Rights, O.J. 2007/C 303/02 (14 December 2007) 17.

East European Yearbook on Human Rights 2019 (2) 1
doi: 10.5553/EEYHR/258977642019002001004

serves as a hard core of each and every right and freedom.[94] In other words, if one would be looking for an argument in favor of a stronger position and protection of some content of the numerous human rights standards, it lies within the core and peripheral content of human rights.[95]

On the other hand, the concept of 'fundamental human rights' is not purely ornamental and devoid of any meaning. When used in a general way it lies in the heart of human rights axiology and reflects the idea of human rights as limits to State sovereignty (in vertical relations between individuals and State) and as a common cause and common goal (in horizontal relations between States and more dispersed relations within international community). In the present author's opinion, this idea has been best grasped by the ICJ in its early judgments, where – paradoxically – the word 'fundamental itself had not been used. Taking this into account it may be concluded that 'fundamental human rights' are most closely connected to the concept of obligations *erga omnes*, which has entered into the system of international law and obtained a rather strong position.[96] Nevertheless, its precise scope and function are still not settled in the judicial application and state practice, even though many years have passed since *Barcelona Traction* judgment. The sense of community, universalism and common interests is also present in the UDHR and main human rights treaties. From this perspective, human rights are to be seen as reflecting welfare and fundamental interests common to all human beings per se.[97]

94 K. Dicke, 'The Funding Function of Human Dignity in the Universal Declaration of Human Rights', *in* D. Kretzmer & E. Klein (Eds.), *The Concept of Human Dignity in Human Rights Discourse*, The Hague, Kluwer Law International, 2002, pp. 118-119.

95 Reconstruction of the core (fundamental) content of rights and freedoms on the basis of the principle of human dignity is, however, a difficult task that would require thorough exploration of human rights standards and their interpretation by relevant bodies. Moreover, the result may be questioned and criticized for being subjective, since there is no universally agreed definition of human dignity. For an interesting discussion in this regard *see* McCrudden, 2008, pp. 664-724 and P. Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply', *European Journal of International Law*, Vol. 19, No. 5, 2008, pp. 931-944.

96 Extensively on the subject: Ragazzi, 1997, passim.

97 Heilinger, 2012, p. 186.