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Perceptions of Status and  
Relationship of Norms

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# Summary

International law is divided into different functional entities governed by different international institutions. The fields of the institutions may intersect and give rise to situations of norm conflict and/or diverging interpretation. This in turn may create legal uncertainty and conflicting State obligations on the international arena. The thesis examines the relationship between the World Trade Organisation (WTO) norms and human rights norms through the respective perspective of the WTO dispute settlement and human rights institutions.

On the whole, general international law does not create any hierarchy between WTO norms and human rights norms, although exceptions may be found in for example *jus cogens* and possibly in some interpretative norms and maxims. However, the institutions governing respective norm complexes do not necessarily follow the same reasoning and may make diverging interpretations of general international law, of the exceptions to lack of hierarchy and of the place of specialised international law within international law.

The WTO dispute settlement proclaims an inclusive approach to general international law evidenced by the inclusion of some basic general international customary law. Concurrently, the WTO exhibits isolationist characteristics in case law. Examples of this are; avoidance of use customary law through avoiding to determine it; a restrictive approach to article 31.3 (c) of the Vienna Convention on the Law of Treaties calling for presence of other international norms in the interpretative context and; limitations to inclusion of human rights as specific terms by not using human rights terminology. The approach in practice isolates trade law and protects it from external influence and use beyond the scope of the WTO regime. Doctrine on the matter suggests several openings for the WTO dispute settlement to other international law, including human rights law.

Approaches range from directly applying other international law in the WTO dispute settlement to using other law in the interpretative material.

Human rights institutions have a different approach to the relationship between norms of human rights and of the WTO. Some basic international law norms have been applied over human rights provisions, but this is not likely in relation to trade norms. Instead, trade norms could be included through interpretation of human rights provisions. Human rights have an all-inclusive character in the sense that all spheres of life are touched upon and may be present in the interpretation. In case of inclusion of trade into the definition of a human right, it would also be present in the balancing between different human rights and thereby have an impact on several human rights. In practice, inclusion of trade is not clearly evidenced. Instead, the overall approach of human rights institutions is that trade law should accommodate human rights within its structure and interpretation. Furthermore, human rights law protects its own structures from external influence through claiming superiority and particularity of its norms.

In conclusion, the WTO approach is protectionist by isolating the regime from other international law and thereby safeguarding the integrity of its norm complex. The human rights approach on the other hand is aggressive in relation to other norm complexes urging them to apply with human rights norms, while concurrently protecting its own structures.

# Sammanfattning

International rätt är uppdelat i funktionella entiteter styrda av olika internationella institutioner. Det kan hända att de olika institutionernas områden sammanstrålar, vilket kan leda till normkonflikter och/eller divergerande tolkning. Det kan i sin tur skapa juridisk osäkerhet och konflikt mellan Staters olika åtaganden på den internationella arenan. Den här uppsatsen undersöker förhållandet mellan WTO normer och mänskliga rättighets normer utifrån WTOs tvistlösningsorgans perspektiv respektive mänskliga rättighetsinstitutioners perspektiv.

Generell internationell rätt utpekar ingen specifik hierarki mellan WTO normer och mänskliga rättighetsnormer. Undantag för detta kan återfinnas bl.a. i *jus cogens* och möjligtvis i vissa tolkningsnormer och maximer. Institutionerna som styr de olika normkomplexen följer inte nödvändigtvis samma tankegång. Därmed kan tolkningen av generell internationell rätt, undantagen för bristande hierarki samt specialiserad internationell rätts plats inom internationell rätt skilja sig åt.

WTOs tvistlösningsorgan anser sig använda ett inkluderande tillvägagångssätt i förhållande till generell internationell rätt, vilket exemplifieras av inkluderingen av viss basal generell internationell sedvanerätt. Samtidigt visar WTO isolationistiska karaktäristik i rättsfall. Exempel på detta är; undvikande av sedvanerätt genom att underlåta att definiera dess innehåll; ett restriktivt synsätt på artikel 31.3 (c) i Wien konventionen om traktaträtten, där inkludering av andra internationella normer i tolkningskontexten påkallas och; begränsningar i inkluderingen av mänskliga rättigheter såsom gängse accepterade termer, genom att inte använda mänskliga rättigheters terminologi. Tillvägagångssättet i praktiken isolerar handelsrätt och skyddar det från yttre påverkan samt användande utanför WTO regimens räckvidd. Doktrin på området föreslår ett flertal sätt för WTOs tvistlösningsorgan att öppna sig för annan internationell rätt,

inklusive mänskliga rättigheter. Förslag sträcker sig från direkt applicering av annan internationell rätt inom WTOs tvistlösningsorgan till inkludering av annan internationell rätt i tolkningsmaterialet.

Mänskliga rättighetsinstitutioner har en annan syn på relationen mellan WTOs normer och mänskliga rättigheter. Vissa basala normer inom internationell rätt har applicerats istället för mänskliga rättighetsnormer, men det är inte troligt att handelsnormer kommer att behandlas på det sättet. Istället kan handelsnormer inkluderas i tolkningen av specifika mänskliga rättigheter. Mänskliga rättigheter täcker alla livets händelseområden och de normer som styr dessa, inklusive handel. I det fall handel inkluderas i en mänsklig rättighet genom att tolkas in i dess definition påverkar rättigheten även andra rättigheter genom att rättigheterna balanseras mot varandra. I praktiken finns inga klara tecken på att handel har inkluderats. Istället är den rådande attityden i mänskliga rättighetsinstitutioner att handelsrätt ska anpassa sina strukturer och institutioner efter mänskliga rättigheter. Dessutom skyddar mänskliga rättighets institutioner sina strukturer från yttre påverkan genom att åberopa normernas företräde och egenart.

Sammanfattningsvis kan sägas att WTOs hållning är protektionistisk och att man genom att isolera regimen från annan internationell rätt söker säkra normkomplexets integritet. Mänskliga rättighetsinstitutionernas hållning är å andra sidan aggressiv i förhållande till andra normkomplex varvid man anvisar dessa att applicera mänskliga rättighetsnormer samtidigt som den egna rättsordningen skyddas.

# Abbreviations

AB	Appellate Body
CCPR	Human Rights Committee
CECSR	Committee on Economic, Cultural and Social Rights
Doc.	Document
DSU	Dispute Settlement Understanding
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICECSR	International Covenant on Economic, Cultural and Social Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organisation
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner on Human Rights
PPM	Process and production method
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WTO	World Trade Organisation
WTO Agreement	Agreement Establishing the World Trade Organization
WTO DS	Dispute Settlement of the WTO



# 1 Introduction

## 1.1 Subject and aim

The existence of regimes governing different sets of norms on the international stage is becoming increasingly problematic. States, as primary creators and subjects of international law, may find themselves in the situation where compliance with one international norm leads to non-compliance with another international norm. Different institutions can come to different results when faced with the same situation, depending on their aims, priorities and inherent limitations. The interpretation of provisions depends on particular circumstances and there is no specific method on how it should be performed. The divergence in outcomes by the increasing number of judicial or quasi-judicial organs leads to legal uncertainty.<sup>1</sup> The problem could of course be solved through state action enlightening the field with conflict clauses, but this is unlikely to happen in the near future.<sup>2</sup> If the problem is instead to be solved through institutional cooperation, some basic questions have to be answered. One of these questions is the relationship and status of norms in different regimes, which is the topic of this thesis.

The thesis revolves around two particular sets of norms; international trade law as perceived under the WTO and international human rights law under UN human rights mechanism and the European Court on Human Rights (hereinafter ECtHR). Both sets of law and institutions have their origin in the same post Second World War era. On the one hand, the Bretton Woods institutions were created to govern the economic dimension of international relations, with a monetary institution, a financial institution and a trade agreement (GATT) which later was one, if not the main pillar of, the

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<sup>1</sup> International Law Commission (ILC), *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, A/CN.4/L.682 pp. 8-17.

<sup>2</sup> Pauwelyn, J. 'The role of public international law in the WTO: How far can we go?' *American Journal of International Law* (2001) pp. 1-2 as in Westlaw 95 Am. J. Int'l L. 535

creation of the trade institution, the WTO. On the other hand, the UN was created to govern political relations between states.<sup>3</sup> Promoting and encouraging human rights is one of the main purposes of the UN<sup>4</sup> and several human rights documents have been adopted under its hospice. These have been coupled with an increasing number of regional human rights instruments of which the European convention on human rights (hereinafter ECHR) and its effective Court.<sup>5</sup>

The purpose of this thesis is to display the relationship between the two sets of norms, related to each other horizontally, through different perspectives in order to put the perceptions of the two regimes in relation to each other. The thesis also investigates probable future perspectives. In order to achieve this, general international law is initially presented as a framework for the relationship between norms. It is followed by the interplay and status of norms from the perspective of WTO law and international human rights law.

## 1.2 Delimitations

This thesis is limited to the relationship of norms from WTO and human rights institutions. Although states are the primary subjects of international law, the creators of the institutions and norm-complexes discussed, and the actors which could agree on a solution to the problem of norm conflicts and competition of decision-making, their role will not be discussed. The choice is made because change through state consent is seemingly farfetched. Concurrently, it must be acknowledged that in reality excluding political decisions is impossible and the institutions remain dependent on State willingness.

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<sup>3</sup> Petersmann, E.-U. 'Time for a United Nations 'global compact' for integrating human rights law into the law of worldwide organizations: Lessons from European integration' *European Journal of International Law* (2002) p. 1 as in Westlaw 13 Eur. J. Int'l L. 621.

<sup>4</sup> UN Charter article 1.3

<sup>5</sup> Steiner H.J. *et al.* (ed) *International human rights in context: Law, politics, morals: Text and Materials* (Oxford University Press, Oxford, 2008) p. 925

The thesis does not aim to solve specific conflicts of norms but to look at the overall understanding of hierarchy and inclusion of international norms within international law, WTO law and human rights law.

Several specialised institutions such as WHO, ILO and UNCTAD have dealt with the question of trade in relation to the human rights they relate to (health, labour rights and the right to development respectively). Although these initiatives are worthy of examination this thesis restricts itself to “pure” human rights institutions.

In order to further clarify the scope of this thesis in relation to many writings on the matter neither the use of WTO enforcement mechanisms to enforce human rights values nor how WTO can limit the possibilities for economic sanctions in response to human rights violations are dealt with in this thesis. In relation to the WTO, the thesis will not discuss the related topics of possible inherent deficiencies such as the lack of transparency.

International human rights case law is in this thesis restricted to case law by the ECtHR as it is the most evolved regional human rights organisation and has the most efficient enforcement mechanisms within human rights law making it more suitable for a comparison with the WTO dispute settlement (hereinafter WTO DS). Documents from UN institutions are included in the form of reports, studies and general comments. The sources for different opinions and facts are stated, but human rights law is treated as one body of law in order to facilitate analysis and comparison with the WTO.

### **1.3 Method and Material**

The methods used are mainly traditional legal method and comparative method. The traditional legal method is used to determine the views of the relationship between WTO and human rights norms. Since the analysis is based on different perspectives of the relationship between WTO and human rights norms it is necessarily comparative. The aim of the comparative

method is to apprehend similarities and differences between the different legal regimes on the subject of the relationship between WTO and human rights institutions.

Some elements of legal-political and legal-philosophical perspectives may exist due to the nature of the subject discussed. Politics cannot be excluded from international law but the political dimension is watered down in the thesis and the approach is legalistic. The purpose of the norms discussed is also prominent for the discussion of the relationship between them, giving the thesis a legal-philosophical perspective.

The material used is as far as possible primary sources such as treaties, case law and reports from the two sets of institutions, as well as the ILC report on fragmentation of international law. Doctrine on the questions is used to clarify and elaborate on the topic, showing possible developments in the approaches, without State action.

As a student of international human rights law the main concern when reading into and reproducing the materials used was to avoid bias against the law in which less knowledge is held. This was achieved by avoiding use of political documents and by reviewing a broad array of sources in order to understand the reasoning of the WTO and trade experts.

## **1.4 Disposition**

The thesis consists of six chapters. Chapter 1 is the introduction, chapter 2 focuses on the nature of international law and its sources and norms. The 3<sup>rd</sup> chapter deals with conflict of norms under general international law in two aspects; which norm to apply when two treaties hold conflicting norms and how to use interpretation to solve treaty conflicts. These two chapters are meant to create a framework into which specific regimes are inserted.

Chapter 4 elaborates on the WTO and consists of a brief introduction to the WTO, followed by an exposé on the treatment of other international law and human rights law in specific within the WTO DS and an outline of possible future solutions of international law inclusion found in doctrine. Chapter 5 is the correlating chapter on human rights institutions and their perception of other international law and WTO law in specific. Doctrine is in this chapter replaced by reports from human rights institutions showing an elaboration on the role of the WTO in human rights law and how hierarchy between norms is seen in human rights law.

Chapter 3 to 5 include a chapter conclusion. The sixth chapter is formed as a conclusion of the whole thesis.

# 2 International law and its norms

## 2.1 Nature of international law

The nature of international law has been explained through different perspectives throughout history. The currently leading theory emanates from the positivist school of law holding that nation-states are the fundamental units of international law and emphasising the sovereign powers of States over their territory.<sup>6</sup> The principle of sovereignty and the equality of states brought the concept of non-interference in domestic affairs.<sup>7</sup> This perception of international law with emphasis on the equal sovereignty of states and non-interference is fundamental and expressed in the UN Charter.<sup>8</sup> The international legal system is consequently horizontal and a State is generally only bound by obligations it has consented to.<sup>9</sup> This is not the case for the core of the international legal system, as lack of State consent to the core rules would lead to its disintegration.<sup>10</sup>

International law has however changed and the centrality of the state is being contested as other subjects enter the arena of international law. Individuals are in some theories seen as the ultimate members of States and they should accordingly be seen as subjects rather than objects of international law.<sup>11</sup> Traditionally this was not the case as individuals were

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<sup>6</sup> Bedi, S. *The development of Human Rights Law by the Judges of the International Court of Justice* (Hart, Oxford 2007) p 40, Neff, S. 'A short history of international law' in Evans M. D. (ed), *International Law* 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2006) p. 39.

<sup>7</sup> Neff. *Supra* note 6 p 40.

<sup>8</sup> UN Charter, article 2.

<sup>9</sup> *Pacta sunt servanda*.

<sup>10</sup> Shaw, M. N. *International Law* 5<sup>th</sup> ed. (Cambridge University Press, Cambridge, 2003) p. 1-11.

<sup>11</sup> Koskenniemi, M. 'What is international law for?' in Evans M. D. (ed), *International Law* 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2006) p. 61.

more or less perceived as the property of the State in which they lived.<sup>12</sup> There has also been a proliferation of international organisations to which States have transferred some of their sovereign powers with the aim of achieving greater cooperation.<sup>13</sup> International organisations are entities composed primarily by states and other international organisations, established under international law through some kind of instrument and having autonomous organs independent of the will of the members. The nature of international organisations allows for the conclusion that they have separate legal personality and consequently become subjects of international law.<sup>14</sup> The powers and limitations of international organisations are normally set out in the constituent instrument, which is complemented by international customary law.<sup>15</sup>

States have created a web of international organisations defined and separated by their functions.<sup>16</sup> This has created a diversification of international law, which is put in contrast with the general international lawyer's perception of the international legal order as unified. The understanding of current international law depends on whether the international legal system is considered to be a unitary order with a hierarchal structure based in general international law, or as the sum of more or less independent specialised regimes.<sup>17</sup>

International law does not include general enforcement mechanisms and has traditionally been seen as building on reciprocity of obligations, whereby states comply with their obligations, in order to create long term stability in

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<sup>12</sup> Smith, R. K. M. *Textbook on international human rights* 3<sup>rd</sup> ed. (Oxford University Press, Oxford, 2007) pp. 6-7

<sup>13</sup> Akande D. 'International Organisations' in Evans M. D. (ed), *International Law* 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2006) pp. 277-280.

<sup>14</sup> *Ibid* pp. 278-279

<sup>15</sup> *Ibid* pp. 286-292

<sup>16</sup> Brölmann, C. *The institutional veil in public international law* (Hart Publishing, Portland, OR 2007) p. 25

<sup>17</sup> Simma B. and Pulkowski D., 'Of planets and the universe: Self-contained regimes in international law', *European Journal of International Law* (June, 2006) as in Westlaw 17 Eur. J. Int'l L. 483 p. 8.

the international system.<sup>18</sup> Although this persists, it has been complemented through the creation of particular enforcement mechanism<sup>19</sup>.

## 2.2 Norms in international law

### 2.2.1 General

International norms are expressed in the international sources of law. A generally accepted authoritative expression of the sources of international law is found in article 38 (1) of the ICJ Statute.<sup>20</sup> The sources enumerated are treaties, customary law, general principles of law, judicial decisions and doctrine. This enumeration is not necessarily exhaustive. Other possible sources are for example unilateral acts, equity, UN resolutions<sup>21</sup> and ILC reports<sup>22</sup>.

Both the WTO and human rights institutions are created through treaties and the examination of sources will therefore be restricted to the sources having an international status equal or superior to treaties.

Treaties are express written agreements by States governed by international law.<sup>23</sup> They have their binding force through the principle of *pacta sunt servanda*. Treaties are only binding on the State parties and have no effect on third States.<sup>24</sup> The law regarding treaties is primarily governed by the VCLT.<sup>25</sup> Customary law is based on what States have repeatedly done to such an extent that it is seen as a rule of what must be done. The determination of customary law has two elements, the existence of consistent settled practice and *opinio juris*, which is the belief that States

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<sup>18</sup> Shaw *supra* note 10 p. 7-9.

<sup>19</sup> Example WTO DS as outlined below.

<sup>20</sup> Shaw *supra* note 10 p. 66.

<sup>21</sup> Thirlway, H. 'The Sources of International Law' in Evans M. D. (ed), *International Law* 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2006) pp. 135-137.

<sup>22</sup> Shaw *supra* note 10 p. 113.

<sup>23</sup> Vienna Convention on the Law of Treaties (VCLT) article 2(a)

<sup>24</sup> Thirlway *supra* note 21 pp. 118- 121, Shaw *supra* note 10 pp. 88-89.

<sup>25</sup> Thirlway *supra* note 21 p. 119



perceive the practice as obligatory.<sup>26</sup> Principles of international law mend the problem of *non liquet*. The judge uses principles to fill in gaps in international law through deducing a solution to a particular problem.<sup>27</sup> Examples of principles of international law are *pacta sunt servanda* and good faith.<sup>28</sup>

## 2.2.2 Supreme norms

The theory of jus cogens or peremptory norms holds that some norms in international law admit no derogation and can only be changed through the adoption of a new norm of the same value<sup>29</sup>, expressed in the VCLT<sup>30</sup>. Article 53 VCLT holds that a treaty is void *ab initio* if it conflicts with a peremptory norm of international law. Article 64 holds that an existing treaty conflicting with a peremptory norm is void from the day of emergence of a new peremptory rule.

No consensus has been reached on which norms have the status of *jus cogens*, but examples have been given in the application and interpretation of international law. The ICJ has on some occasions been said to refer to peremptory norms<sup>31</sup> but it was not explicitly recognised until 2006, when the Court designated the prohibition of genocide as “assuredly” a peremptory norm<sup>32</sup>. Several other international adjudicators have recognised

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<sup>26</sup> Thirlway *supra* note 21 p. 122

<sup>27</sup> Shaw *supra* note 10 p. 93.

<sup>28</sup> Shaw *supra* note 10 pp. 97-98.

<sup>29</sup> Shelton, D. 'Normative Hierarchy in International Law', *American Journal of International Law* (2006) as in Westlaw 100 Am. J. Int'l L. 291 p. 4.

<sup>30</sup> VCLT, *supra* note 23 art 53

<sup>31</sup> Shelton *supra* note 29 2006 p 9. Examples can be found in:

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* 27 June 1986, ICJ, para. 190 <http://www.icj-cij.org/docket/files/70/6503.pdf>, visited on 23 July 2008.

*Legality of the use or threat of nuclear weapons*, 8 July 1996, ICJ, Advisory Opinion, para 79 <http://www.icj-cij.org/docket/files/95/7495.pdf>, visited on the 23 July 2008.

<sup>32</sup> *Armed Activities on the Territory of Congo (New application 2002) (Democratic Republic of Congo v. Rwanda)* Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, ICJ, para 64, <http://www.icj-cij.org/docket/files/126/10435.pdf>, visited on 23 July 2008. In the case the ICJ concluded that breaches of *erga omnes* obligations or *jus cogens* cannot automatically create jurisdiction for the Court.

the existence of *jus cogens*, amongst them the ICTY<sup>33</sup> and the ECtHR<sup>34</sup> which have asserted the prohibition against torture as a *jus cogens* norm.

The UN Charter provides in article 103 that State obligations under the Charter prevail over obligations under other agreements. This relation of supremacy is also expressed in article 30(1) VCLT. The UN Charter thereby gives a legitimate superiority to actions taken under the UN Charter and most importantly to article 25 obliging States to carry out resolutions by the Security Council under chapter VII. Article 103 does not imply that other obligations become void but only that they are put aside in order to comply with UN Charter obligations.<sup>35</sup>

*Erga omnes* obligations are obligations owed to, and in the interest of, the international community as a whole, as they would lack meaning if reduced to a reciprocal obligation between States.<sup>36</sup> The right to react to a breach of an *erga omnes* obligation belongs to every State or group of States.<sup>37</sup> The superiority of *erga omnes* obligations does not have its bearing from normative factors, as in the case of *jus cogens*, but from procedural factors.<sup>38</sup>

### 2.2.3 Hierarchy of sources

The international legal system is horizontal in the sense that no hierarchy is set out between different rules and principles and there is no absolute

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<sup>33</sup> *Prosecutor v. Anto Furundzija*, 10 December 1998, ICTY, no.IT-95-17/1-T10, para. 153 – 157, <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>, visited on 23 July 2008.

<sup>34</sup> *Al-Adsani v. the United Kingdom*, 21 November 2001, ECtHR, no. 35763/97, para 61, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=al-adsani&sessionid=11960899&skin=hudoc-en>, visited on 23 July 2008.

<sup>35</sup> ILC *supra* note 1 pp. 166-173.

<sup>36</sup> *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* 5 February 1970, ICJ, para 33-34, <http://www.icj-cij.org/docket/files/50/5387.pdf> visited on 23 July 2008. Examples of *erga omnes* obligations are accordingly “the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.

<sup>37</sup> Thirlway *supra* note 21 p. 138

<sup>38</sup> ILC *supra* note 1 p. 205.

hierarchy between sources.<sup>39</sup> This is a result of all State consent being of equal value.<sup>40</sup>

There is no inherent hierarchy between treaty and custom. In practice treaties often prevail over customary law, as treaties are seen as express and often more detailed State consent in relation to the tacit consent shown through customary law.<sup>41</sup> This does not mean that a treaty provision has to prevail over a customary norm even when the customary norm is a pre-existing rule on a particular subject. The two sources instead continue to apply concurrently even in cases where their content is identical.<sup>42</sup> A treaty norm can also be replaced by a subsequent customary norm if State practice so requires.<sup>43</sup> The rules of *lex specialis* and *lex posteriori*, which bring further light onto the election of norms in specific situations are discussed below, in subchapter 3.1, in relation to norm conflicts.

The relationship between supreme norms of international law is not evident. It is plausible that all *jus cogens* norms are *erga omnes* obligations as one can presume that all States have an interest in breaches of norms from which no derogation can be made. The opposite link cannot be presumed.<sup>44</sup> In cases where a *jus cogens* norm conflicts with an obligation under the UN Charter the *jus cogens* norm prevails just as it would in relation to any other treaty.<sup>45</sup>

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<sup>39</sup> ILC *supra* note 1 p.166.

<sup>40</sup> Pauwelyn *supra* note 2 p. 2.

<sup>41</sup> Shaw *supra* note 10 p. 116.

<sup>42</sup> *Nicaragua case supra* note 31 para 178-179

<sup>43</sup> Brownlie I. *Principles of public international law*, (Oxford University Press, Oxford, 2003) p. 5.

<sup>44</sup> ILC *supra* note 1 p. 204.

<sup>45</sup> ILC *supra* note 1 pp. 176-177.

# 3 Conflict of norms under general international law

The concept “conflict of norms” is often used in the strict sense that two norms are incompatible and mutually exclusive.<sup>46</sup> A broader definition of conflict exists and holds that incompatibility is not necessary, but it is sufficient if the application of one norm frustrates the goals of another norm or treaty. This can be the case when treaties from different regimes with different backgrounds and justifications are applied to the same situation.<sup>47</sup> The broader definition of norm conflict is more flexible to real life conflicts where norms are not clearly defined or can have very different implications in different situations, which may be the case of human rights.<sup>48</sup>

## 3.1 Choice of applicable norm in case of competing treaties

The basic principle of treaty law is *pacta sunt servanda*, but its application may be impossible when two norms cannot be reconciled and no priority has been stated. In order to decide which norm shall prevail, there are priority rules. The three existing priority rules are the maxims *lex superiori*, *lex specialis* and *lex posteriori*.

*Lex specialis* and *lex posteriori* are used in national law in relation to rules generated by the same source.<sup>49</sup> The principles are also used in international law, but their application is more complex, because international law does not have a singular creator of law nor a singular interpreter of law. The basis

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<sup>46</sup> Sadat-Akhavi A. *Methods of resolving conflicts between treaties* (Nijhoff, Leiden, 2003) p. 5-7, ILC *supra* note 1 p. 19.

<sup>47</sup> ILC *supra* note 1 p. 19, Pauwelyn *supra* note 2 p. 10.

<sup>48</sup> For example, the European Court of Human Rights leaves room for State discretion to define some culturally related terms.

<sup>49</sup> Cassese, A. *International Law 2<sup>nd</sup>* ed. (Oxford University Press, Oxford, 2005) p. 154.

for using *lex specialis* and *lex posteriori* in international law is States' contractual freedom and that the most precise consent should be applied.<sup>50</sup>

Priority rules are often applied in situations of competing norms on the same subject matter. A narrow interpretation of same subject matter would extensively limit the applicability of the rules and make the application of provisions dependent on the labels of law, such as human rights law and trade law, rather than the actual area of application. ILC has taken the opinion that the mere invocation of two rules in the same conflict leads to their application on a sufficiently given subject matter.<sup>51</sup>

### 3.1.1 Lex Superiori

As mentioned above some norms of international law are superior to other norms. These are *jus cogens*, obligations *erga omnes* and obligations under the UN Charter. They have precedence over other rules of international law. Only in a conflict with *jus cogens* does a norm become invalid. The other basis for superiority do not lead to invalidity of the conflicting norm, but just the putting aside of the norm in the particular situation, i.e. priority.

### 3.1.2 Lex Specialis

*Lex specialis derogat lex generali*, a special rule prevails over a general rule. The reasoning behind the rule is twofold. Firstly, a special norm is more effective and precise than a general norm and does not give rise to as many exceptions. Secondly, the special norm is considered as a more precise reflection of State consent.<sup>52</sup> Inherent in the maxim is the problem of deciding what is special and what is general. This cannot be decided in the abstract, but the relationship between two specific norms has to be studied since, at times, the surrounding circumstances are be decisive.<sup>53</sup>

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<sup>50</sup> Pauwelyn, J. *Conflict of norms in public international law: how WTO law relates to other rules of international law* (Cambridge University Press, Cambridge, 2003) p. 388.

<sup>51</sup> ILC *supra* note 1 pp 17-18, 129.

<sup>52</sup> *Ibid* pp. 36-37.

<sup>53</sup> *Ibid* pp. 35 and 61.

There is no express mentioning of *lex specialis* in the VCLT and its basis of existence in international law is uncertain.<sup>54</sup> An expression of the principle exists in article 55 of the Draft articles on State Responsibility holding that the Draft articles can be ignored if special rules of international law govern the situation. In case law it has been stated that even though a special norm exists other international law has to be investigated. In the *Nicaragua case* the ICJ held that treaty law and customary law coexist parallel to each other.<sup>55</sup> Furthermore, in the *advisory opinion on the legality of the threat of use of nuclear weapons* human rights law was considered to exist in the background, although the more specialised provisions of humanitarian law were applied<sup>56</sup>. In *Amoco International Finance Cooperation v. Iran* customary law was seen as useful to fill in the gaps in treaty law.<sup>57</sup>

The ILC, in its report on the fragmentation of international law, expresses the opinion that the application of a special rule is conducted in the normative environment of general international law. The normative environment provides direction to the interpretation of the special norm.<sup>58</sup>

### 3.1.3 Lex Posteriori

*Lex posteriori derogat priori*, a later rule prevails over a previous rule. *Lex posteriori* is explicitly set out in article 30 of the VCLT. It holds that the provisions of a later treaty are applicable before those of an earlier treaty, as long as the application is between parties of both treaties and nothing is provided to imply another priority.<sup>59</sup> There is in other words a presumption, when creating the later<sup>60</sup> agreement, that the parties intended to derogate from the previous agreement.<sup>61</sup>

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<sup>54</sup> Pauwelyn *supra* note 50 p. 385.

<sup>55</sup> Nicaragua case *supra* note 31 para. 178-179

<sup>56</sup> Nuclear weapons advisory opinion *supra* note 31 para. 25.

<sup>57</sup> *Amoco International Finance Corporation v. Iran* 14 July 1987, Iran – US Claims Tribunals Reports, vol. 15 1987-II p. 222 para. 112.

<sup>58</sup> ILC *supra* note 1 p.56.

<sup>59</sup> Article 30 VCLT *supra* note 23

<sup>60</sup> Several questions arise as to what points in time should be compared when deciding which provision is *lex posterior*, but this falls outside the scope of this thesis.

<sup>61</sup> ILC *supra* note 1 p. 119.

*Lex posteriori* is, just as *lex specialis* not an absolute rule. When setting up the provisions of the VCLT no difference was made between different treaties and this complicates the discussion on *lex posteriori*. Treaties of a law-creating character are analogous to domestic public law and legislative enactments where *lex posteriori* is predominant. Treaties which are contractual by nature can instead be seen analogously to contracts under domestic law which are primarily governed by the principle of *lex priori*.<sup>62</sup> *Lex priori* would surface as an applicable rule when the State parties to the treaties are not the same, but there is no consensus on this question. Some commentators instead hold that *pacta sunt servanda* is not favouring any of the obligations but that both obligations are equally enforceable.<sup>63</sup> It is furthermore likely that *lex posteriori* is inapplicable regarding conflicts between different regimes such as in this case human rights law and international trade law. A chronological priority would in this case be unreasonable and inappropriate.<sup>64</sup> A theory has evolved arguing that there is necessarily a continuous consent by State parties in relation to treaties of international organisations.<sup>65</sup> Such a continuous consent would put the maxim of *lex posteriori* out of play.

### 3.1.4 Relationship between conflict rules

*Lex posteriori generalis non derogate priori specialis*: a later general law does not derogate an earlier one which is special in character, the maxim of *lex specialis* in other words prevails over the maxim *lex posteriori*.<sup>66</sup>

Considering that *lex posteriori* is set out in VCLT and *lex specialis* is not, it is difficult to find support in international law for the mentioned hierarchy between norms. One option to defend the maxim would be to claim that *lex*

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<sup>62</sup> ILC *supra* note 1 pp. 123-124

<sup>63</sup> Borgen, C. J. 'Resolving treaty conflicts' *George Washington International Law Review*, (2005) as in Westlaw 37 Geo. Wash. Int'l Rev. 573 pp. 7-8.

<sup>64</sup> ILC *supra* note 1 p. 138.

<sup>65</sup> Simon, D. *L'interprétation judiciaire des traités d'organisations internationales*, (Pedone, Paris, 1981) p. 378.

<sup>66</sup> Cassese *supra* note 49 p. 154.

*specialis* is part of international customary law, which is uncertain. Another option, which is more convincing in the context of international organisations, is the argument that *lex posteriori* is put out of play because of continuous consent by States and *lex specialis* is the remaining principle, whereby it is applied.<sup>67</sup>

The application of *lex specialis* and *lex posteriori* is limited by hierarchical principles, i.e. *lex superiori* but also by certain other principles such as *parte tertiis*.<sup>68</sup>

Except for the primacy of *jus cogens* the principles of precedence in international law have exceptions. It is generally unknown when to apply the rule and when to apply the exception<sup>69</sup>, which leaves the relationship between the different maxims of priority unclear<sup>70</sup>. This may lead to divergence in what norms adjudicators apply and consequently a lack of consistency in international law.

### **3.2 Interpretation of treaty norms in the light of other norms**

A treaty is necessarily concluded as part of a wider set of international norms on which the interpreter can fall back if the treaty does not address a certain issue or if it is vague.<sup>71</sup> It is not always necessary to neglect a norm when applying another. The first norm can instead be used in the interpretation of the applied norm, thereby avoiding a conflict of norms.

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<sup>67</sup> Pauwelyn *supra* note 50 pp. 405-409.

<sup>68</sup> ILC *supra* note 1 p. 137.

<sup>69</sup> Shelton D. 'International law and relative normativity' in Evans M. D. (ed), *International Law 2<sup>nd</sup> ed.* (Oxford University Press, Oxford, 2006) p. 160

<sup>70</sup> ILC *supra* note 1 p. 36.

<sup>71</sup> Pauwelyn *supra* note 50 pp. 201-205.



### 3.2.1 General rule of interpretation

Article 31 to 33 VCLT deal with interpretation of treaties. Article 31 holds the basis for treaty interpretation and reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

There are three principal approaches to treaty interpretation, interpretation in accordance with the textual meaning (objective school), interpretation to find what States meant by their consent (subjective school) and interpretation emphasising the object and purpose of the treaty (teleological school). Article 31 has a mixture of the approaches and is considered as an expression of international customary law on the interpretation of treaties.<sup>72</sup> Subsections two and three of article 31 are complementing the context and are not necessarily inferior to the first section. Also note the approach of the objective school to keep close to the ordinary meaning of terms.

Interpretation is not a static matter and caution is usually taken to formulate rules and hierarchies in order to avoid loss of flexibility in the interpretative process.<sup>73</sup>

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<sup>72</sup> Shaw *supra* note 10 pp. 838-844, Fitzmaurice M. 'The practical working of the law of treaties' in Evans M. D. (ed), *International Law* 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2006) p 198-201, ILC *supra* note 1 p. 89.

<sup>73</sup> Brownlie *supra* note 43 p. 602.

### 3.2.2 Article 31.3 (c)

Certain norms external to a particular treaty are to be taken into account in treaty interpretation. These are mentioned in article 31.3 VCLT and include subsequent agreement and subsequent practice in relation to the treaty but also “any relevant rules of international law applicable in the relations between the parties”.

The provision is not limited to general international law, but comprises all “relevant rules of international law”, i.e. including norms under other specialised regimes. Meanwhile, the scope is limited to rules applicable between the parties, although it is not specified if this refers only to the parties to a particular dispute or all parties to the treaty.<sup>74</sup> The international legal order is of systemic nature<sup>75</sup> and article 31.3 (c) is an expression thereof underlining the fact that a norm cannot be interpreted without considering its normative environment.

In the *Oil Platforms case*, the ICJ refers to article 31.3 (c) VCLT and points out that a treaty cannot be intended to “operate wholly independently” from other relevant rules of international law<sup>76</sup> on the subject at hand, but that relevant rules of international law form part of the process of interpretation.<sup>77</sup>

### 3.2.3 Presumption against conflict

The presumption against conflict is not explicitly mentioned in the VCLT, but it is a strong presumption in international law.<sup>78</sup> It is because new norms are created in a pre-existing setting of international law and that the new norm further determines and develops law rather than counteracts it. This has consequences on the interpretation of treaties, because the interpretation

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<sup>74</sup> VCLT 31.3(c) *supra* note 23.

<sup>75</sup> Simma and Pulkowski *supra* note 17

<sup>76</sup> In this case the international rules on the use of force.

<sup>77</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)* 6 November 2003, ICJ, para 40, <http://www.icj-cij.org/docket/files/90/9715.pdf> visited on 28 July 2008

<sup>78</sup> ILC *supra* note 1 pp. 25-26

putting the norm within international law has priority to interpretations leading to conflicts with other international law. The presumption can at the same time not limit the possibilities for States to contract out of international rules and it does not resolve a situation where conflict of norms has been found. It is only a thumb rule at the initial stage of interpretation.<sup>79</sup>

### **3.3 Chapter Conclusions: The relationship between WTO and human rights norms under international law**

Both WTO and human rights institutions derive primarily from State consent through treaties and there is generally no inherent hierarchy between norms in international law. This leads to the conclusion that the norms emanating from these institutions are of the same legal status. In reality, priority has to be given or balance has to be struck between norms, but in the abstract the fact remains that they are of the same legal value.

Even though both regimes are based on treaties, customary law cannot be discarded and may affect the treaty regimes and their relationship to one another. Supreme norms also have to be taken into account. Both supreme norms and customary law are difficult to use because of the lack of specification of their content, leading to possible inconsistencies in the usage and inclusion of these norms.

As to conflict rules *lex posteriori* is not applicable between the different regimes as such. An application would contravene the development of international law and cannot be seen as contingent with state consent. It is instead perceived as a continuous consent to the norms agreed within the framework of international organisations.

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<sup>79</sup> Pauwelyn *supra* note 50 pp. 241-244.

*Lex specialis* is confined to the same subject matter, but can be used when regimes intersect. In accordance with a strict view on norm-conflict, this would only happen when the regimes intersect directly (i.e. an inconsistency between the norms is evident), while a broad view of conflict allows for an indirect intersection of the two regimes to amount to the same subject matter. Other rules of international law exist as a framework for special rules.

The two conflict rules that would be applied as between different international organisations' law are consequently *lex superiori* and *lex specialis*. If interpreters in both regimes see "their law" as being *lex specialis* they will in questions that fall within their subject matter, give priority to their own norms, whether or not the question also falls within the other regime's subject matter. If the interpreters of one of the regimes considers its norms to be *lex superiori* it will of course always apply its own norms. The interpreters of the other regime may make a different estimation of the status of the norms and consequently not apply the norms seen as *lex superiori* in the other institutional framework.

The use of interpretation to avoid conflict can be efficient, but the interpretation is, because of its flexibility, very much dependent on the interpreter. The presumption against normative conflict is likely to be efficient in strict conflicts, but much harder to apply in a broad conflict where a greater context has to be taken into account.

Because of the lack of priority between rules of different regimes, the vague content of supremacy rules and the lack of precision of interpretative rules, no general hierarchy exists between WTO law and human rights law under general international law. The application of law is instead dependent on the views of the interpreters of the rules within the respective institutional frameworks and the question of who decides the case becomes important.

# 4 WTO law

## 4.1 The WTO

The WTO was created in Marrakech in 1995 through the *Agreement establishing the World Trade Organisation*, hereinafter called the WTO agreement. The WTO is an organisation for the liberalisation of international trade, where trade agreements are negotiated and trade disputes are solved. It has 151 members and they are all parties to specific agreements under the hospice of the WTO. Among these, one can find the GATT agreement<sup>80</sup>, the GATS agreement<sup>81</sup>, the TRIPs agreement<sup>82</sup> and the DSU<sup>83</sup>. These treaties in compilation will hereinafter be called the covered treaties<sup>84</sup>. The WTO has other agreements under its hospice, but not all of them are compulsory for the member-States.

### 4.1.1 The purpose and theoretical underpinnings of the WTO

Trade does not have a purpose in itself but it is a means to an end<sup>85</sup>. This can be seen in the preamble to the WTO agreement where it is stated that economic and trade relations 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”. Furthermore, sustainable

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<sup>80</sup> General Agreement on Tariffs and Trade

<sup>81</sup> General Agreement on Trade in Services

<sup>82</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights

<sup>83</sup> Dispute Settlement Understanding

<sup>84</sup> Covered agreements are the agreements enumerated in Appendix 1 to the DSU which are all under the hospice of the WTO

<sup>85</sup> This approach is not uncontested. In the ‘Sutherland report’ it is said to be erroneous and it is stated that trade can be seen as an end in itself, but without any explanation of the reasoning behind such a conclusion or its expression in WTO documents.

Sutherland *et al.* *The future of the WTO: Addressing institutional challenges in the new millennium* (World Trade Organisation 2004) para. 11,

[http://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm), visited 23 July 2008.

development, protection of the environment and the needs of developing countries are stated as guidelines for, and one might say limits to, trade.<sup>86</sup>

Although it is not mentioned in the WTO agreement experts on international economics see a linkage between economic relations and peace. Trade increases the cost of going to war and the incentives not to go to war through increased cross-border contacts and mutual understanding.<sup>87</sup> There are also claims that trade liberalization, the enhancement of democracy and human rights develop in parallel. EU is given as an example of the parallel, although more empirical studies need to be performed.<sup>88</sup>

The theory underlying the WTO and trade liberalisation is the one of comparative advantage. It holds that even though one country is the better of two at producing everything, both countries will benefit from trade if the “better country” produces what it is comparatively best at and the “worse country” produces what the “better country” is less better at. This is transposed onto the entire international trading system leading to the presumption that all States gain from trading with each other. The assumption is intrinsically flawed as no market is perfect and social costs are excluded in a pure market evaluation of advantages.<sup>89</sup>

Economic theory is not value-free but based on consequentialism,<sup>90</sup> more specifically utilitarianism, and a specific view of the human being as *homo economicus*.<sup>91</sup> The economic analysis of law is based on the premise that

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<sup>86</sup> Preamble of the WTO agreement

<sup>87</sup> Van den Bossche P. *The law and policy of the World Trade Organisation: Text, cases and materials* (Cambridge University Press, New York, 2005) p. 23.

<sup>88</sup> Cottier T. ‘Trade and human rights: a relationship to discover’ *Journal of International Economic Law* (2002) as in Westlaw 5 J. Int’l Econ. L. 111 p. 10.

<sup>89</sup> Massarani, T. F. ‘WTO-GATT, economic growth, and the human rights trade-off’ *Environ Environmental Law and Policy Journal* (2005) as in Westlaw 28-SPG Environ Env’tl. L. & Pol’y Journal.

<sup>90</sup> Consequentialism is ethical theories evaluating the rightness or wrongness of an act solely in terms of its consequences.

<sup>91</sup> Garcia F. J. ‘The global market and human rights: Trading away the human rights principle’ *Brooklyn Journal of International Law* (1999) as in Westlaw 25 Brook. J. Int’l L. 51 p. 6.

*homo economicus* is acting rationally by wanting more and what he wants can be equated with the willingness to pay.<sup>92</sup>

## 4.1.2 Dispute settlement in the WTO

The WTO consists of many different organs. It includes bodies for negotiation of new agreements, adjudication and administrative tasks, but not for execution, which is handled on a State-to-State basis after decisions by the WTO DS bodies<sup>93</sup>. The most prominent WTO DS bodies are the quasi-judicial Panels and the standing Appellate Body (hereinafter AB).<sup>94</sup>

The Panels have broad jurisdiction over claims brought under any of the WTO agreements<sup>95</sup>. They have implied jurisdiction to interpret the claims of the parties<sup>96</sup>, decide if they have jurisdiction over the dispute and if they want to use that jurisdiction<sup>97</sup>. The jurisdiction is compulsory<sup>98</sup>, exclusive<sup>99</sup> and contentious<sup>100</sup> upon the States-members. WTO panels can examine predominantly non-WTO claims as long as they have some sort of connection to a WTO-claim. Only State-members to the WTO agreement have standing before the Panels<sup>101</sup>. Parties to the dispute can appeal to the

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<sup>92</sup> Harris, J. W. *Legal philosophies* 2<sup>nd</sup> ed. (Butterworth, London, 1997) pp. 42-47.

<sup>93</sup> See below

<sup>94</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org2\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm), visited on 23 July 2008.

<sup>95</sup> Article 3.2 DSU

<sup>96</sup> Pauwelyn *supra* note 2 p.16-17, article 23.2 (a) DSU.

<sup>97</sup> Principle of la compétence de la compétence confirmed in *United States- Anti-Dumping act of 1916 (United States v. European Communities, Japan, India and Mexico)* 26 September 2000, WTO AB, Doc. WT/DS136/AB/R <http://docsonline.wto.org/> visited 23 July 2008 para 54 n.30

<sup>98</sup> Article 23.1 DSU

<sup>99</sup> *United States – Sections 301-310 of the Trade Act 1974 (United States v. European Communities)* 27 January 2000, WTO Panel, Doc. WT/DS152/R <http://docsonline.wto.org/> visited 23 July 2008 para. 7.43.

*United States – Import Measures on Certain Products from the European Communities* 11 December 2000, WTO AB, Doc WT/DS165/AB/R <http://docsonline.wto.org/> visited 23 July 2008 para 6.133

<sup>100</sup> *US – Measures affecting imports of woven wool shirts and blouses from India (United States v. India)* 25 April 1997, WTO AB, Doc. WT/DS33/AB/R <http://docsonline.wto.org/> visited 23 July 2008 under VI. Judicial economy.

<sup>101</sup> *US – Import Prohibition of Certain Shrimp and Shrimp Products (United States v. India, Malaysia, Pakistan and Thailand)* 12 October 1998, WTO AB, Doc. WT/DS58/AB/R <http://docsonline.wto.org/> visited 23 July 2008 para. 101.

AB<sup>102</sup> whose scope of jurisdiction is limited to issues of law and legal interpretation<sup>103</sup>.

Decisions by the Panels and the AB must be approved by a political institution, the Dispute Settlement Body, with reverse consensus in order to become enforceable,<sup>104</sup> however this is practically only a formal requirement.

In case a recommendation or ruling from a WTO DS mechanism is not implemented within a reasonable period of time, temporary measures against the non-compliant State can be enforced by the other party to the dispute. The measures provided for are: compensation to the injured State through compensatory agreements or WTO sanctioned retaliation through suspension of concessions or other obligations by the injured State in relation to the violating State.<sup>105</sup>

Considering the jurisdiction of the Panels, the enforcement mechanisms and the structure of other international tribunals, the efficiency and enforceability of the WTO DS and its decisions is remarkable.<sup>106</sup>

## **4.2 The relationship between WTO norms and human rights norms within the WTO dispute settlement**

There has so far not been any case law where a Panel or the AB has used explicit human rights reasoning. The reasoning on the positioning of human right norms in the WTO is therefore based on how the WTO DS has treated, applied and interpreted other international norms.

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<sup>102</sup> Article 17.1 and 4 DSU

<sup>103</sup> Article 17.6 DSU

<sup>104</sup> Article 17.14 DSU also see article 16.4

<sup>105</sup> Article 22.1 and 2 DSU

<sup>106</sup> Jackson J.H. *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge University Press, Cambridge, 2006) p 135.



## 4.2.1 Applicable law

Although the jurisdiction of the WTO DS is limited, there are no provisions limiting or determining the scope of applicable law.<sup>107</sup> The WTO DS obviously applies and interprets covered agreements and several AB reports have furthermore confirmed the applicability of general principles of international law<sup>108</sup>.

On the matter of applicability of international customary law, the analysis finds its starting point in the DSU. According to article 3.2 DSU the WTO DS organs exist to uphold the obligations in the covered treaties and to clarify the meaning of the provisions in these treaties in accordance with customary rules of interpretation of public international law. The interpretation shall according to article 3.2 last sentence “not add or diminish the rights and obligations provided in the covered agreements”.<sup>109</sup> In an early decision, the AB held that article 31 VCLT was an expression of customary law on interpretation and therefore should be applied by the WTO DS. It also added that this was a “measure of recognition” that the covered agreements should not be read in “clinical isolation from public international law”.<sup>110</sup>

The applicability of international customary law relating to norms other than treaty interpretation was first confirmed in the *Korea - measures* Panel Report (which was not appealed). The Panel held that international customary law is applicable in the economic relations between parties to the extent the covered agreements have not contracted out of it.<sup>111</sup> In a footnote of the same report the Panel stated that article 7 of the DSU, concerning

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<sup>107</sup> ILC *supra* note 1 p. 29, Pauwelyn *supra* note 2 p. 15.

<sup>108</sup> Ex *US - Shrimp* *supra* note 101 para 182, para 141.

<sup>109</sup> Article 3.2 DSU

<sup>110</sup> *US - Standards for Reformulated and Conventional Gasoline (Venezuela v. United States)* WT/DS2/AB/R, 29 April 1996, WTO AB, p. 17 <http://docsonline.wto.org/> visited 23 July 2008

<sup>111</sup> *Korea - Measures affecting government procurement (Korea - United States)* 1 May 2000, WTO Panel, WT/DS163/R, <http://docsonline.wto.org/> visited 23 July 2008 para. 7.96

terms of reference for Panels, is not to be seen as an obstacle to the use of other international law as a reference for the Panel<sup>112</sup>.

General international customary law has later been used in several AB and Panel reports in relation to procedural matters.<sup>113</sup> On substantive matters, the position of international customary law is not as clear. In the *EC-Hormones* report, the AB did not find it necessary or prudent to investigate if the precautionary principle was part of international customary law outside the scope of international customary environmental law, but only stated that this awaited authoritative formulation.<sup>114</sup> In a footnote to the relevant paragraph,<sup>115</sup> the AB considers the ICJ to be the body that should be considered competent to give an authoritative statement of international customary law.

Other treaties have so far only been used by the WTO in the process of interpretation of specific terms in the covered treaties and other treaties have never triumphed any provision in the covered agreements.<sup>116</sup> The WTO DS has used a strict definition of conflict of norms demanding that the fulfilment of one norm prevents the fulfilment of another norm.<sup>117</sup>

The maxim of *lex specialis* has only been used in relation between or within covered treaties and to the extent a harmonious interpretation has not been

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<sup>112</sup> *Korea – Measures supra* note 111 para 7.101, footnote 755.

<sup>113</sup> Examples *EC – Report for the importation, sale and distribution of bananas (European Communities v. Ecuador, Guatemala, Honduras, Mexico and United States)* 9 September 1997, WTO AB, Doc. WT/DS27/AB/R, <http://docsonline.wto.org/> visited 23 July 2008 para 133, para 10.

*US – Wool shirts and blouses supra* note 100 para. 358-359

*India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, 19 December 1997, WTO AB, Doc WT/DS50/AB/R, <http://docsonline.wto.org/> visited 23 July 2008, para. 65.

<sup>114</sup> *EC – Measures Concerning Meat and Meat Products (Hormones)(European Communities v. United States)* 16 January 1998, WTO AB, WT/DS26/AB/R, WT/DS48/AB/R, <http://docsonline.wto.org/> visited 23 July 2008, para 123

<sup>115</sup> *Ibid* para. 123 footnote 93

<sup>116</sup> ILC *supra* note 1 p. 224.

<sup>117</sup> Pauwelyn *supra* note 50 pp. 188-200

possible. The presumption against conflict is in other words strong in the WTO DS and the role of *lex specialis* is limited.<sup>118</sup>

## 4.2.2 Interpretation in line with other norms

As mentioned article 3.2 DSU and WTO DS reports combined hold that article 31 VCLT should be used in the interpretation of the covered agreements.

The WTO DS has used an evolutionary approach when interpreting exceptions under article XX GATT. “Exhaustible natural resources” in article XX (g) was interpreted, in line with the objective of sustainable development of the GATT agreement, several other international environmental instruments, ICJ case law and “in the light of contemporary concerns” to include sea turtles.<sup>119</sup>

The right to health can and has been protected through the general exception in article XX (b) for protection of *inter alia* human health, but without making any explicit reference to the human right to health. The exception is difficult to fulfil because of a requirement of necessity for the measures, which has been interpreted as allowing a measure only if no other less GATT- inconsistent measures can be used.<sup>120</sup>

Article 31.3 (c) VCLT was explicitly mentioned in *EC – Biotechnical Products*, thereby confirming the view that it constitutes part of customary international law and is applicable for the WTO DS.<sup>121</sup> The Panel held that the “parties” in article 31.3 (c) is to be understood as all the parties to the covered treaty being interpreted and not only the parties to the specific

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<sup>118</sup> Pauwelyn *supra* note 50 p. 241.

<sup>119</sup> *US – Shrimp* *supra* note 101 para. 126-134.

<sup>120</sup> *EC – Measures Affecting Asbestos and Asbestos-containing Products (European Communities v. Canada)* 12 March 2001, WTO AB, Doc. WT/DS135/AB/R <http://docsonline.wto.org/> visited 23 July 2008, para 157

<sup>121</sup> *EC- Measures affecting the approval and marketing of biotech products (European Communities v. United States, Canada and Argentina)* 29 September 2006, Doc. WT/DS291/D, WT/DS292/D, WT/DS293/D <http://docsonline.wto.org/> visited 23 July 2008 para. 7.65 -7.72.

dispute. In the case at hand not all parties to the covered treaty being interpreted were parties to the “other rules of international law” and 31.3 (c) was not applied.<sup>122</sup> The scope of relevant rules to be used as interpretative material is thereby extensively limited.

The Panel instead used article 31.1 VCLT and its reference to the “ordinary meaning” of terms, to include other rules of international law as an interpretive aid concerning provisions of a covered agreement. The rules are not used in a legal sense but as evidence of the meaning of particular terms. According to the Panel, this is in line with the use of other international documents made by the AB in the *US-Shrimp* case.<sup>123</sup> In both cases international rules have been used as an interpretative aid disregarding the fact that not all disputing parties were parties to the documents used. The use of other rules in this way is under the discretion of the WTO DS, which can choose if any external rules should be taken into account.

In the WTO report “*The Future of the WTO: Addressing institutional challenges in the new millennium*” written after 10 years of WTO existence, the Consultative Board to the Director-General held that the WTO objectives and environmental policy should be sought through two different policies and institutional structures in order to reach the best result.<sup>124</sup> According to this reasoning, the WTO should not be used to enhance non-WTO policies (including human rights policies) but these should be fixed and governed through policies specific to the other regime in question. This does not necessarily imply that WTO rules should not be interpreted in accordance with non-WTO norms, but that the compliance with non-WTO norms should be sought in other forums.

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<sup>122</sup> *EC – Biotech supra* note 121 para. 7.68.

<sup>123</sup> *Ibid* para. 7.167-169

<sup>124</sup> Sutherland *supra* note 85 p. 14.

The report touches upon the question of human rights stating that they are best protected by national governmental structures along with democracy and the successful operation of markets.<sup>125</sup>

## **4.3 The possible inclusion of human rights in the WTO as discussed in doctrine**

Two basic approaches to channels of influence for human rights in WTO DS have emerged and are presented through the writings of two prominent authors. The first approach concentrates on an expansive application of international law in the WTO DS, which is advanced by Pauwelyn. The second approach concentrates on the inclusion of international law through interpretation of WTO provisions for which Marceau is a proponent.

### **4.3.1 Applicable law**

Pauwelyn is of the opinion that lack of provisions limiting applicable law for the WTO DS makes all international law applicable for the WTO DS organs.<sup>126</sup> According to Pauwelyn, the WTO was created in the system of international law and the rules and principles of international law continue to apply, as long as States have not explicitly contracted out of them.<sup>127</sup> The author also states that an explicit reference to some parts of law does not lead to an exclusion of other parts of law.<sup>128</sup>

In response, Marceau writes that if non-WTO law is conceived as applicable law it would unavoidably lead to breaches of article 3.2 DSU and to WTO institutions interpreting non-WTO norms. Marceau is of the opinion that silence on the matter of applicable law does not imply applicability of all international law. Human right norms have the same value and position in

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<sup>125</sup> Sutherland *supra* note 85 p. 30.

<sup>126</sup> Pauwelyn *supra* note 2 p.15.

<sup>127</sup> Pauwelyn *supra* note 50 p. 37.

<sup>128</sup> Pauwelyn *supra* note 2 p.4.

international law as WTO norms, but fall under other dispute settlement bodies and should, according to Marceau, therefore be applied in those forums and not in the WTO.<sup>129</sup>

Pauwelyn does not consider the prohibition in article 3.2. DSU of adding and diminishing State rights and obligations, to exclude non-WTO rules and obligations, held by the parties to the dispute, from being applicable in a WTO dispute. 3.2 DSU, in his view, only prevents the WTO DS from creating new obligations, to which the States have not agreed, but does not serve to exclude obligations that States have agreed to in other forums. If a greater importance was intended to be given to the provision of the WTO, the States would, according to Pauwelyn, have inserted a clause comparable to article 103 of the UN Charter.<sup>130</sup>

The result of Pauwelyn's approach is that the WTO DS, when conflict rules so show, shall set aside WTO obligations and not simply refer to WTO exceptions or justifications.<sup>131</sup> This would be the case in situations where WTO norms are considered *lex generalis*, which according to Pauwelyn is increasingly possible, as trade is related to many aspects of international law.<sup>132</sup> This does not imply that Pauwelyn excludes the possibility to include human rights through interpretation,<sup>133</sup> which is the solution suggested by Marceau.

### **4.3.2 Interpretation in line with other norms**

Marceau is of the opinion that the WTO is not competent to put a non-WTO norm before a WTO norm as it would then add to or diminish the obligations within the covered treaties and use the WTO enforcement mechanisms outside their scope.<sup>134</sup> The author perceives the WTO as a *lex*

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<sup>129</sup> Marceau, G. 'WTO dispute settlement and human rights' *European Journal of International Law* (2002) as in Westlaw 13 Eur. J. Int'l L. 753 pp. 14-15.

<sup>130</sup> Pauwelyn *supra* note 2 p. 17.

<sup>131</sup> *Ibid* p. 18.

<sup>132</sup> *Ibid* p. 3.

<sup>133</sup> *Ibid* p. 22-23.

<sup>134</sup> Marceau *supra* note 129 p.2.

*specialis* regime, which can be interpreted in line with international law, but never be overruled by it.<sup>135</sup>

Marceau emphasises that the WTO has no mandate to neither interpret non-WTO law nor reach conclusions on the existence of breaches of it. This does not preclude that WTO law should be interpreted consistently with non-WTO obligations.<sup>136</sup> Marceau suggests that possible conflicts between WTO and human rights should be handled in accordance with article 3.2 DSU<sup>137</sup> and consequently the VCLT.<sup>138</sup> It should generally be possible to interpret WTO law to allow the State parties to comply with their international obligations in other fields.<sup>139</sup> The strict definition of conflict would, according to Marceau, be sufficient in the WTO DS as compliance with non-WTO norms can be insured through other mechanisms in other forums. A less strict definition would allow for judicial activism and the adjudicating bodies of the WTO would be able to balance international obligations under different regimes without State approval of such action and thereby intrude on the need for State consent.<sup>140</sup>

Marceau views *jus cogens* as having such a strong influence on interpretation of treaty norms that a conflict with a WTO norm is unlikely. If such a conflict should nonetheless arise, the WTO norm would be nullified.<sup>141</sup>

In the case where a conflict between a WTO norm and a human rights norm cannot be avoided, the conflict should, according to Marceau, be brought before another forum, if possible with representation from both regimes. This can be done by all States if the human rights violations amount to an *erga omnes* obligation. Marceau also emphasises that the final decision,

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<sup>135</sup> Marceau *supra* note 129 p.6.

<sup>136</sup> *Ibid* p.6.

<sup>137</sup> "customary rules of interpretation of public international law"

<sup>138</sup> Marceau *supra* note 129 p.15.

<sup>139</sup> *Ibid* p.18.

<sup>140</sup> *Ibid* pp. 22-23.

<sup>141</sup> *Ibid* pp. 25-26.

regarding the balance between WTO and human rights, has to be returned to the States.<sup>142</sup>

Pauwelyn, Marceau and the ILC are all of the opinion that the “parties” in article 31.3 (c) VCLT cannot be interpreted as a need for all WTO members to be members to the other “relevant international rules”. This would have the ironic result that an expanded WTO membership would lead to lessened possible influence from other international law and consequently greater isolation of WTO law.<sup>143</sup> The systemic nature of international law and international consensus should accordingly triumph the need for consent by all State-members.

If “parties” were interpreted to be the disputing parties, the interpretation of WTO provisions would change according to the specific parties of a dispute leading to divergence in case law and interpretation.<sup>144</sup> Pauwelyn is of the view that the uniformity of WTO law can be sacrificed, in order to incorporate other international obligations between the disputing parties.<sup>145</sup> Marceau advocates another approach to the problem, where it is not sufficient with consent by the two disputing parties. Instead, general acceptance and tolerance for the non-WTO treaty should be shown by all WTO members, in order for it to be included in the interpretative material to the particular provision of the covered treaty.<sup>146</sup>

Several concrete examples of possible interpretations in line with human rights have been discussed in literature.<sup>147</sup> Examples of this are the interpretation of the general exceptions in article XX of the GATT, article XIV GATS agreement and in provisions related to patents in the TRIPS agreement. The exceptions are phrased somewhat differently between the

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<sup>142</sup> Marceau *supra* note 129 pp. 27-28.

<sup>143</sup> ILC *supra* note 1 p.237, Pauwelyn *supra* note 2 p. 19, Marceau *supra* note 129 p.17.

<sup>144</sup> ILC *supra* note 1 p.238.

<sup>145</sup> Pauwelyn *supra* note 2 p. 19

<sup>146</sup> Marceau *supra* note 129 p.17.

<sup>147</sup> Examples of such literature is Francioni F. (ed.) *Environment, human right and international trade* (Hart, Oxford, 2001) and Cottier T. *et al* (eds.) *Human rights and international trade* (Oxford University Press, Oxford, 2005).



agreements, but amongst them, one can find exceptions for public morals, for human life and for health. None of the exceptions makes an explicit reference to human rights or use explicit human rights language.<sup>148</sup>

Another term which is seen as open for human rights interpretation is “like product”<sup>149</sup> in various provisions in GATT and GATS. If the provisions are seen to comprise process and production methods (PPMs) there is potential to separate for example products made with child labour from products which are not.<sup>150</sup> This issue is debated within the WTO, but the prevailing view is that PPMs are not to be included.<sup>151</sup>

## 4.4 Chapter Conclusion

The use of the strict definition of conflict of norms in the WTO DS make situations where conflict rules apply scarce and the inclusion of conflict rules unlikely.

The AB limits the presence of customary law. In its case law the AB avoids determining customary law and instead leaves this to the ICJ, whose case law cannot cover all topics. It thereby excludes the application of norms with unestablished status of international customary law until an authoritative source determines its position. It is also interesting to notice that the WTO DS has restricted the applicability of customary international law to general customary international law and does not include customary international environmental law. It would then also exclude customary international human rights law in as far as the ICJ has not confirmed that it is general customary international law. The determination of customary law by human rights adjudicators is thereby not included.

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<sup>148</sup> Art XIV GATS, art XX GATT and art 27.2 TRIPs

<sup>149</sup> Two basic rules of WTO, most-favoured-nation treatment and national treatment, prohibiting discrimination of products are dependent on the term “like product” to determine if discrimination has taken place.

<sup>150</sup> Cottier *et al. supra* note 88 p.12.

<sup>151</sup> Van den Bossche *supra* note 87 p. 316.

In relation to treaty law, no non-WTO treaties have been favoured over a covered treaty. Concurrently with this restrictive approach, the WTO DS, in *Korea Measures* case, has pronounced that WTO legislation should not be read in isolation from other international law, i.e. customary law and treaty law. The case law is in other words giving divergent signals, stating a willingness to be open in the whole but not in particular cases.

The entrance of other international law into WTO DS, as it stands today, seems more likely through interpretation than application of other rules. The interpretation of “parties” in 31.3 (c) VCLT as *all the parties* to the treaty extensively limits the application of the clause and thereby the application of other rules of international law. The alternative the AB has chosen, i.e. to use the ordinary meaning of terms is also quite restrictive. First of all, it leaves the need for an interpretation in accordance with international law at the discretion of the interpreters on a case by case basis instead of a more compulsory use of other international rules, which would be the case if it was established that 31.3 (c) should be applied although the treaties do not have identical parties. Secondly, the interpretation is limited to specific terms. As WTO treaties do not use human rights language, the specific terms do not have to be connected to human rights. This reduces the possibility to use human rights to interpret WTO provisions. The right to health as a human right was for example not included in the asbestos case but a WTO definition was used. The WTO can then avoid the human rights discourse altogether.

The exclusion of international customary law and some broadly recognised treaties in the WTO regime does not take into account that the obligations are binding on States or at least the great majority of States. The restrictive view the WTO has taken on both applicable law and interpretative material isolates the regime from other international law.

Doctrine on the topic opens for several future scenarios. Pauwelyn’s view on broad applicability of international law is not likely to be applied. It is

not consistent with WTO case law as of yet and would put into question state consent. Marceau is accordingly right in her critique and Pauwelyn's approach could potentially lead to a very expansive role of the WTO DS, where its mandate is overstepped. This would be the case if WTO DS becomes a Court trying cases with only a slight connection to trade and a more evident non-WTO claim.

Marceau's views are more in line with the case law of the WTO DS, but the author also somewhat ignores the problem of multiple adjudicators and different areas of law intersecting. She proposes some solutions, which could enhance the inclusion of other international law beyond the current situation. Firstly, the author suggests that, when it is possible, all WTO law should be interpreted not to conflict with human rights (a strict definition of conflict makes this possible in most instances). Secondly, she suggests that if a conflict between different regimes arises, the question should be tried in a different forum. The remaining question is what this forum would be. There is no clear answer as of yet and the solution would require State action.

The use of 31.3 (c) with a broad understanding of "the parties", would create a somewhat less discretionary approach to the application of other international rules. The use would not be connected to a particular terminology. It could be invoked by the parties to the dispute whereby the WTO DS would have to look at the consensus around the norm in question or alternatively apply it as between the parties to the dispute. The interpretative approach is somewhat dangerous as it is prone to lead to WTO interpretation of non-WTO norms in order to interpret WTO norms. This is difficult to avoid and can be remedied through cooperation with the institutions in charge of interpreting the specific non-WTO norms, in order to mend a possible lack of knowledge at the WTO of the field concerned. It is also likely that the WTO DS will end up balancing international norms, an exercise which should be turned over to States. The approach may

nonetheless be considered comparatively profitable to the situation where non-WTO norms are not taken into account.

The suggested approach of including generally accepted norms in the interpretative material can be seen parallel to the issue of *opinio juris* and be compared to the presence of customary law in WTO. It is not the same as customary law, as this also requires state practice. Furthermore, “tolerance” of a norm does not necessarily entail an overall understanding of the norm as binding law. The inclusion of tolerable norms may be less difficult than inclusion of customary norms, as the threshold to reach the particular status is lower. Meanwhile, it remains an approach wholly at the discretion of the WTO DS.

# 5 Human Rights law

## 5.1 Human Rights Institutions

Human rights institutions have been created both on global and regional arenas. On the global arena, the main organisation for human rights is the UN<sup>152</sup> created in 1945<sup>153</sup>, which has seen a proliferation of human rights mechanisms. On the regional arena, several organisations deal directly or indirectly with human rights. This thesis only deals with the ECHR, which was adopted in 1950 under the hospice of the Council of Europe and its adjudicating mechanism the ECtHR. The Council of Europe currently has 47 member-States.

In the following, the purpose of human rights is briefly discussed and a short overview of the main UN mechanisms on human rights and the ECHR is presented. Thereafter the place of international law in general and trade law in particular in human rights institutions is outlined.

### 5.1.1 The purpose of Human Rights

There is no consensus on the underpinnings of human rights. Some theories hold that human rights are given by God, others base them on natural law, the social contract, custom or prerequisites for happiness. This divergence in views does not necessarily provide that the acceptance of these norms falters.<sup>154</sup> Instead, human rights instruments gather around the assumption acceptable to all these theories; that all human beings are born free and equal in dignity and rights, without pinpointing the justification for this statement.<sup>155</sup>

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<sup>152</sup> Other global organisations involved with human rights are for example the ILO and WHO

<sup>153</sup> With the entering into force of the UN Charter

<sup>154</sup> Steiner *et al. supra* note 5 p. 478.

<sup>155</sup> Preamble UN Charter, Preamble and Article 1 UDHR, Preamble ICCPR, Preamble ICESCR, Preamble ECHR.

In readings of human rights, human dignity and worth seem to be the centrepieces on which all theories can intersect<sup>156</sup>. Prominent in western philosophical thought on the topic of human dignity is Kant, who held as a supreme moral principle that human beings are to be treated as ends in themselves and not as means.<sup>157</sup> This reasoning has become central to many interpretations of human rights. It is deontological in its approach emphasising how people are and are not to be treated regardless of the consequences of such treatment.<sup>158</sup>

The purpose of international human rights law is to compel States to comply with human rights. This is achieved through the creation of norms protecting people within the domestic jurisdiction of States.<sup>159</sup> At the time of creation of the UN, this was new and radical, because it moved beyond the traditional approach of State consent and sovereignty into the domestic sphere of States.<sup>160</sup> The multilateral institutional level entered into the domestic realm instead of leaving it to bilateral negotiations.<sup>161</sup>

## 5.1.2 Human Rights organs and functions

The UN Charter does not set up a comprehensive system for the protection of human rights.<sup>162</sup> Human rights are scarcely mentioned in the Charter and are mainly related to the purposes and goals of the UN<sup>163</sup> or the functions and powers of different UN-organs<sup>164</sup>. Many UN-organs have contributed to the evolution of human rights law, including the General Assembly, the Security Council, the Economic and Social Council and some more specialised institutions as for example the High Commissioner on Human

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<sup>156</sup> This does not preclude different views on who is human and consequently has intrinsic dignity.

<sup>157</sup> Garcia *supra* note 91 p 6-7.

<sup>158</sup> *Ibid* p. 7.

<sup>159</sup> Steiner *supra* note 5 p. 1087.

<sup>160</sup> Smith *supra* note 12 pp. 24 - 26.

<sup>161</sup> Goldsmith J. L. and Posner E. A. *The limits of international law* (Oxford University Press, Oxford, 2005) p. 107.

<sup>162</sup> Smith *supra* note 12 p 25.

<sup>163</sup> 2nd paragraph of the UN Charter Preamble, article 1(3), article 55

<sup>164</sup> UN Charter Article 31(1)b, article 56, article 62(2) and article 68

Rights.<sup>165</sup> Some of them have standard-setting<sup>166</sup> and/or interpretative powers<sup>167</sup> while some also have powers to examine state reports and individual complaints<sup>168</sup>.

The ECtHR has jurisdiction over matters of interpretation and application of the ECHR and the protocols thereto. The Court decides if it has jurisdiction or not.<sup>169</sup> It is limited by the temporal scope of entrance into force of the ECHR in relation to the particular State party<sup>170</sup> and by the material scope of the rights in the convention<sup>171</sup>.<sup>172</sup> Furthermore, the convention only covers persons within the jurisdiction of the State<sup>173</sup>, but this does not entail that jurisdiction is territorially decided. States can be held accountable for certain extraterritorial actions<sup>174</sup>. Parties having standing before the Court are States, individuals, NGO:s and groups of individuals. All but States have to claim to be victims of a violation by the State Party in question for the complaint to be admissible.<sup>175</sup>

The judgements of the Court are binding, as the State Parties have agreed to comply with the final decisions of the Court.<sup>176</sup> This does not imply that the

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<sup>165</sup> Steiner *supra* note 5 pp. 134-137.

<sup>166</sup> Ex. General Assembly

<sup>167</sup> Ex. Human Rights Council and High Commissioner on Human Rights.

<sup>168</sup> Ex. treaty bodies.

<sup>169</sup> Article 32 ECHR.

<sup>170</sup> This follows from art 28 VCLT on the binding force of conventions.

<sup>171</sup> Article 33 and 34 ECHR.

<sup>172</sup> Additional admissibility requirements must be fulfilled in relation to particular applications but it is not related to the scope of the general jurisdiction of the Court. (article 33-35 ECHR).

<sup>173</sup> Article 1 ECHR.

<sup>174</sup> *Cyprus v. Turkey*, 10 May 2001, ECtHR, no. 25781/94, para 77

<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=12112487&skin=hudoc-en&action=request>, visited on 28 July 2008

*Loizidou v. Turkey, (preliminary objections)* 23 March 1995 ECtHR no. 15318/89, para 62 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=loizidou&sessionId=12281025&skin=hudoc-en> visited on 28 July 2008.

<sup>175</sup> Article 33 and 34 ECHR.

<sup>176</sup> Article 46 ECHR.

Court can direct a State to take specific measures,<sup>177</sup> instead it is restricted to affording just satisfaction<sup>178</sup>.

In relation to the WTO DS, it can be noted that the ECtHR does not have compulsory or exclusive jurisdiction and that the enforcement mechanisms are weaker.

## 5.2 Applicable law for Human Rights Institutions

Human rights treaties do not have any specific provisions on applicable law. Substantively, only the scope of the rights in the respective convention limits the jurisdiction of the Court and of the treaty bodies.<sup>179</sup> The ECtHR has applied law external to the treaty on several occasions. An example of such application of other international norms is the use of the article on derogation in the ECHR. It provides for the right of a State to derogate from a right in the convention not only on grounds within the treaty itself but also, but also on grounds of “other obligations under international law”.<sup>180</sup> This kind of application of international law has also been evidenced in case law.<sup>181</sup> Similarly, the Human Rights Committee<sup>182</sup> has declared that it has the competence to take into account other international obligations of States when it decides upon measures related to derogation.<sup>183</sup>

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<sup>177</sup> *Saïdi v. France* 20 September 1993 ECtHR no. 14647/89 para 47 <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=saidi&sessionid=12281154&skin=hudoc-en> visited on 28 July 2008.

<sup>178</sup> Article 41 ECHR.

<sup>179</sup> Examples in article 32 ECHR, article 12 CERD, article 41 ICCPR.

<sup>180</sup> Article 15.1 ECHR.

<sup>181</sup> *Brannigan and McBride v. the United Kingdom*, 26 May 1993, ECtHR, no. 14553/89; 14554/89 para 67-73, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=brannigan%20%7C%20mcbride&sessionid=12112487&skin=hudoc-en> visited on 28 July 2008.

<sup>182</sup> Predecessor to the Human Rights Council – see below.

<sup>183</sup> Human Rights Committee, *General Comment No. 29 States of Emergency (article 4)*, (CCPR/C/21/Rev.1/Add.11) para. 10.



The mandates for the Human Rights Council (HRC) and the Office of the High Commissioner on Human Rights (OHCHR) inherently hold limitations to questions relating to human rights.<sup>184</sup> This is further evidenced in the admissibility criteria of communications to the HRC, where a link to an instrument of human rights law is required.<sup>185</sup>

Meanwhile, the concept of human rights is very broad and can be interpreted in different ways to reach all human behaviour throughout different areas of law.<sup>186</sup> This intertwines human rights with all other law and all other law would then be of interest for different human rights institutions and could theoretically be applied. Hence, the line between applicable law and interpretation becomes blurred. It is a similar problem to that of WTO law and both Pauwelyn's and Marceau's theories can be applied.

Human rights treaties are typically cumulative, i.e. the conclusion of one treaty does not replace rights found in another treaty and does not prejudice any broader definition of the rights.<sup>187</sup> The principle of *lex posteriori* is thereby put out of play between human rights treaties and the individual may only be given more rights and not be deprived of them.<sup>188</sup> This does not preclude that the mechanism created to monitor a certain treaty must, in principle, look to that specific treaty and not to other treaties.

As to *lex specialis*, the ECtHR has used it as between provisions within the convention, without there being a conflict between the provisions. The ECtHR considers itself as using the maxim when it applies two rules on the same subject matter concurrently and these two rules are complementing

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<sup>184</sup> Resolution adopted by the General Assembly 60/251: Human rights Council, 3 April 2006, (A/RES/60/251)

Resolution adopted by the General Assembly 48/141: High Commissioner for the promotion and protection of all human rights 7 January 1994, (A/RES/48/141) para 3a.

<sup>185</sup> Implementation of General Assembly resolution 60/251 of 15 March 2006 entitled "Human Rights Council", 6 June 2007 (A/HCR/5/15) para. 4a.

<sup>186</sup> Hestermeyer, H. *Human rights and the WTO: the case of patents and access to medicines*, (Oxford University Press, Oxford, 2007) pp. 205-206.

<sup>187</sup> Article 53 ECHR, article 5.2 ICESCR and ICCPR.

<sup>188</sup> ILC *supra* note 1 p.24.

each other rather than contradicting each other.<sup>189</sup> There is in other words no need for a conflict, whether it is defined broadly or narrowly. Although this is the case within the convention, it is not necessarily the case in relation to other international law. In these instances, the ECtHR instead uses the possibilities of interpretation as will be shown in the following.

### 5.3 Inclusion of international law through interpretation in the ECtHR

The ECtHR acknowledged the use of article 31-33 VCLT already before the entrance into force of the VCLT as it was seen as a reflection of general principles of international law.<sup>190</sup> It has since used article 31.3 (c) to include other rules of international law.<sup>191</sup> The Court has on several occasions pronounced that the convention cannot be interpreted and applied in a vacuum, but that other rules of international law have to be included in the assessment, while keeping in mind the special nature of the ECHR as a human rights treaty. Furthermore, the convention has to be read in harmony with other rules of international law to the extent possible, as the convention itself is part of international law.<sup>192</sup>

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<sup>189</sup> *Brannigan and McBride v. the United Kingdom*, *supra* note 181 para 76  
*De Jong, Baljet and van den Brink v. the Netherlands*, 22 May 1984, ECtHR, no.8805/79; 8806/79; 9242/82, para 60

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=de%20%7C%20jong&sessionId=12114723&skin=hudoc-en> visited 28 July 2008.

*Murray v. the United Kingdom*, 28 October 1994, ECtHR, no.14310/88, para 98,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=murray&sessionId=12114723&skin=hudoc-en> visited 28 July 2008.

*Nikolova v. Bulgaria*, 25 March 1999, ECtHR, no. 31195/96, para 69,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=nikolova&sessionId=12115100&skin=hudoc-en> visited 28 July 2008.

*Neumeister v. Austria (article 50)*, 7 May 1974, ECtHR, no. 1936/63, para 29,

<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=12115100&skin=hudoc-en&action=request> visited on 28 July 2008.

<sup>190</sup> *Golder v. the United Kingdom*, 21 February 1975, no. 4451/70, para 29,

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=golder&sessionId=12115100&skin=hudoc-en> visited on 28 July 2008.

<sup>191</sup> *Bankovic et al. v. Belgium et al.* 12 December 2001, ECtHR, decision on admissibility, no. 52207/99 para. 16-17.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=bankovic&sessionId=12110227&skin=hudoc-en> visited on 28 July 2008.

<sup>192</sup> *Loizidou v. Turkey supra* note 174 para 43,

*Al-Adsani v. the United Kingdom, supra* note 34, para 55,

In the *Bankovic* case, the ECtHR used general international law to determine the scope of State jurisdiction.<sup>193</sup> The Court went even further in cases where a human rights provision (article 6.1 ECHR on access to Court) was set aside in favour of rules on sovereign immunity. According to the reasoning of the Court, a recognised rule of public international law “cannot in principle be regarded as imposing a disproportionate restriction” on the specific right, but the rule of general international law must be seen as an inherent limitation to the human right thereby forming part of its initial interpretation.<sup>194</sup>

The judgements of the ECtHR limiting the scope of human rights provisions by using general international law have been criticised. The Court is, for example, said to disregard the inherent hierarchy in article 31 VCLT which puts object and purpose of the convention before use of other international rules. The Court is also criticised for using a method of interpretation restricting the provisions of the convention and thereby limiting a treaty, which because of its nature should not be limited.<sup>195</sup> As seen above, in the chapter on general international law, there is not necessarily an inherent hierarchy in article 31, as it would be based on the enumerative order. Consequently, there is no evidence contrary to the Court’s use of article 31.3 (c).

However, the ECtHR does not always consider general international law. Regarding reservations to the ECHR, the ECtHR has held that their validity

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*Bankovic et al. v. Belgium et al. supra* note 190 para 57,  
*McElhinney v. Ireland*, 21 November 2001, ECtHR, no. 31253/96, para 38,  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=McElhinney&sessionId=12133459&skin=hudoc-en> visited on 29 July 2008.  
*Fogarty v. the United Kingdom*, 21 November 2001, ECtHR, no 37112/97, para 35,  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=fogarty&sessionId=12133496&skin=hudoc-en> visited on 29 July 2008.

<sup>193</sup> *Loizidou v. Turkey supra* note 174 para 43, *Bankovic et al. v. Belgium et al. supra* note 191 para 59-66

<sup>194</sup> *Al-Adsani v. the United Kingdom supra* note 34 para 53-56, *Fogarty v. the United Kingdom supra* note 192 para 34-36, *McElhinney v. Ireland supra* note 192 para 37.

<sup>195</sup> Orakhelashvili, A. ‘A restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights’ *European Journal of International Law* (2003) as in Westlaw 14. Eur. J. Int’l L. 529.

is not governed by the rules set out by the ICJ in relation to treaty reservations in general. Instead, the fundamental differences between the two tribunals, their purposes and roles calls, according to the Court, for different treatment of reservations to human rights treaties.<sup>196</sup> Case law in other words shows that the ECtHR applies other international law in some instances and not in others.

The interpretation of human rights treaties is not a pure application of the VCLT, but human rights institutions have developed some other interpretative rules.<sup>197</sup> Generally, teleological interpretation is strong in human rights law and the provisions are consequently interpreted in favour of the individual rather than limiting the obligation of the State. This gives rise to the rule *in dubio pro libertate et dignitate*.<sup>198</sup> Other interpretative principles developed by the ECtHR are the principle of dynamic interpretation<sup>199</sup>, the *effet utile*<sup>200</sup> and the autonomous interpretation of terms<sup>201</sup>. The use of these principles distinguishes human rights case law from general international law and may limit the possibilities of inclusion of international law.

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<sup>196</sup> *Loizidou v. Turkey supra* note 174 para 84-85, *Belilos v. Switzerland*, 29 april 1988, ECtHR, no. 10328/83, para 56-60  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=belilos&sessionid=12133884&skin=hudoc-en> visited on 29 July 2008.

<sup>197</sup> Nowak, M. *Introduction to the international human rights regime*, (Martinus Nijhoff, Leiden, 2003) p. 65.

<sup>198</sup> *Wemhoff v. Germany*, 27 June 1968, ECtHR, no. 2122/64, para 8 under “as regards article 5 (3)” para 8,  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=wemhoff&sessionid=12133957&skin=hudoc-en> visited on 29 July 2008.

Nowak *supra* note 196 p. 65-66.

<sup>199</sup> *Tyrer v. the United Kingdom*, 25 April 1978, ECtHR, no. 5856/72, para 31,  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tyrer&sessionid=12133957&skin=hudoc-en> visited on 29 July 2008.

*Dudgeon v. the United Kingdom*, 22 October 1981, ECtHR, 7525/76, para 60  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=dudgeon&sessionid=12133957&skin=hudoc-en> visited 29 July 2008.

<sup>200</sup> *Klass and others v. Germany*, 6 September 1978, ECtHR, no. 5029/71, para 34,  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=klass&sessionid=12133957&skin=hudoc-en> visited on 29 July 2008.

<sup>201</sup> *König v. Germany* 28 June 1978, ECtHR, no 6232/73, para. 88-89,  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=k%F6nig&sessionid=12133957&skin=hudoc-en> visited on 29 July 2008.

## 5.4 WTO norms in UN human rights institutions

### 5.4.1 Approaches to trade in UN human rights institutions

Different approaches to trade and the WTO can be seen in human rights institutions. The approaches range from calling for reform against “the unbridled spread of a global system of economic ordering that has produced few benefits for the majority of human kind”<sup>202</sup> to a more moderate approach, perceiving trade as a possible facilitator of human rights because of increased resources<sup>203</sup>. The later approach, which will be in focus in this thesis, emphasises that there is no automatic link between increased resources and protection and promotion of human rights. Instead, there are potential points of convergence between the two regimes leading some WTO principles to mirror human rights principles thereby opening the WTO regime to human rights.<sup>204</sup> The approach holds that human rights should be adopted as “an indispensable framework for globalisation”.<sup>205</sup>

Diverse human rights institutions have published reports on the matter of human rights and the WTO. The reports have the aim of studying areas of possible conflict between human rights and trade and try to identify solutions to such conflicts.<sup>206</sup> The following is based on these reports.

According to the High Commissioner on Human Rights, there is a need for human rights approaches to the rules of the WTO.<sup>207</sup> The basis for such and

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<sup>202</sup> Oloka-Onyango J. and Udagama D., *The realization of economic, social and cultural rights: Globalization and its impact on the full enjoyment of human rights*, (E/CN.4/Sub.2/2000/13) para 65.

<sup>203</sup> *Globalization and its impact on the full enjoyment of all human rights: Preliminary report of the Secretary-General (A/55/342)* para 13.

<sup>204</sup> *Ibid* para 13-14.

<sup>205</sup> *Ibid* para 50.

<sup>206</sup> Office of the High Commissioner on Human Rights *Human Rights and World Trade Agreements: using general exception clauses to protect human rights (HR/PUB/05/5)* p 1.

<sup>207</sup> *The impact of the agreement on trade-related aspects of intellectual property rights on human rights: report of the high commissioner (E/CN.4/Sub.2/2001/13)* para 60

approach is that member-States to the WTO and human rights institutions have concurrent obligations to implement human rights and trade rules. All WTO members have ratified at least one human rights instrument.<sup>208</sup> In order to combine the two memberships, human rights have to be integrated into the trade system.<sup>209</sup> It is emphasised that international human rights law does not take a stance for or against any particular trade rule in itself, as long as the rule is consistent with and enhances the enjoyment of human rights.<sup>210</sup> The integration of human rights into the WTO would create a balance to international trade by including social aspects<sup>211</sup> and ensuring a “simultaneous and coherent implementation of economic liberalisation and human rights”<sup>212</sup>.

Human rights are the responsibility of states on an internal level, but States also have a collective responsibility to uphold general principles of human rights law on an international level.<sup>213</sup> To ensure human rights on an internal level States should only open their markets (through WTO) to trade rules having undergone human rights assessments and otherwise be cautious to commit.<sup>214</sup> WTO should, to this end establish methods for considering the impact of trade on the enjoyment of human rights.<sup>215</sup> Concurrently, States have the obligation to revise trade policy when it is negative to the enjoyment of human rights<sup>216</sup> and should when concluding agreements

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<sup>208</sup> *Globalization and its impact on the full enjoyment of human rights: Report of the high commissioner for human rights submitted in accordance with commission on human rights resolution 2001/32*, (E/CN.4/2002/54) para 10.

<sup>209</sup> E/CN.4/Sub.2/2001/13 *supra* note 207 para 60  
E/CN.4/2002/54 *supra* note 208 para 10.

<sup>210</sup> *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report by the special rapporteur, Paul Hunt* (E/CN.4/2004/49) para 11 and para 69

<sup>211</sup> E/CN.4/2002/54 *supra* note 208 para 10.

<sup>212</sup> *Liberalization of trade in services and human rights: Report of the high commissioner* (E/CN.4/Sub.2002/9) para 11

<sup>213</sup> *Globalization and its impact on the full enjoyment of human rights: Commission on human rights resolution 2003/23* points 1 and 2  
E/CN.4/Sub.2002/9 *supra* note 212 para 10.

<sup>214</sup> E/CN.4/Sub.2002/9 *supra* note 212 para 67 and 72

<sup>215</sup> *Globalization and Economic, Social and Cultural rights: Statement by the Committee on Economic, Social and Cultural Rights, May 1998* 18<sup>th</sup> session 27 April- 15 May 1998, para 7, in the context only ESCR:s were considered but the reasoning applies across all rights.

<sup>216</sup> E/CN.4/2004/49 *supra* note 209 para 11

consider ways to avoid adverse impact on the enjoyment of human rights<sup>217</sup>. Flexibility should be kept over time and situations, so that trade commitments can be changed in case circumstances change<sup>218</sup>. The approach would facilitate State compliance with both sets of obligations.

Furthermore, the reports comprise measures for international organisations. In one report, the OHCHR identifies ways for the WTO to include human rights and is optimistic that it will do so.<sup>219</sup> However, there is a problem of lacking expertise on the issue of human rights within the WTO, which is raised in several reports.<sup>220</sup> Solutions to this problem are proposed such as asking for inter-institutional advice, require better understanding of the other regime and the linkage between the questions on the institutional level<sup>221</sup>.

## 5.4.2 Approaches by trade experts

The exposé on human rights approaches to the WTO would not be complete without raising the ideas of some trade experts who have suggested inclusion of trade rights in human rights law as human rights. The reasoning behind the suggestions is that the complexes of law have similar underlying values and legitimacy.<sup>222</sup> One author on the topic, Petersmann, regrets the exclusion of economic freedoms, property rights, non-discrimination in the field of competition and the rule of law as applied for the division of labour, from the UN human rights terminology. He compares the UN approach to European integration law and claims that constitutional values in Western European countries have showed the need to protect economic freedoms on the same level as human rights.<sup>223</sup> According to another author, Cottier, the basic similarity between economic liberties and human rights is that both set

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<sup>217</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Convention on Economic, Social and Cultural Rights)*(E/C.12/2002/12). The text only considers the right to water, the reasoning is expandable.

<sup>218</sup> *Human rights, trade and investment: Report of the High Commissioner on Human Rights* (E/CN.4/Sub.2/2003/9) para 58.

<sup>219</sup> HR/PUB/05/5 *supra* note 206

<sup>220</sup> E/CN.4/Sub.2/2003/9 *supra* note 218 para 62.

<sup>221</sup> E/CN.4/Sub.2/2003/9 *supra* note 218 para 62, HR/PUB/05/5 *supra* note 205

<sup>222</sup> Cottier *supra* note 88 p. 3.

<sup>223</sup> Petersmann, *supra* note 4 p.10.

boundaries to the nation-States and impose basic obligations upon them.<sup>224</sup> Furthermore, the trade system is moving towards the perspective of individualistic rights as States bring disputes on behalf of private operators, which brings trade rights closer to human rights.<sup>225</sup> Cottier also poses the question if human rights institutions should take into account the principles and needs of the multilateral trading system, but does not supply an answer.<sup>226</sup>

Human rights reports and human rights experts disaffirm this thinking. Alston points out that the economic liberties referred to by Petersmann are not individual rights in the sense of human rights, i.e. equal for all. Rights emanating from a WTO treaty should furthermore not be considered analogous to human rights primarily because of different purposes. Economic freedoms are not recognised for all on the basis of inherent human dignity, which is the case for human rights.<sup>227</sup> This was also the conclusion in a report on non-discrimination by the High Commissioner, where the human rights principle of non-discrimination was compared to the WTO principle of non-discrimination. The two principles have, according to the report, common traits, but should not be confused particularly because they seek different goals.<sup>228</sup>

Concurrently with this approach of separating human rights and trade rights as different in nature, the ECtHR has chosen to expand some human rights to include corporations as victims of human right abuses.<sup>229</sup> This may bring

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<sup>224</sup> Cottier *supra* note 88 p. 4.

<sup>225</sup> *Ibid* p. 7.

<sup>226</sup> *Ibid* p. 14.

<sup>227</sup> Alston P. 'Resisting the merger and acquisition of human rights by trade law: A reply to Petersmann' *European Journal of International Law* (2002) p 7 as in Westlaw 13 Eur. J. Int'l L. 815.

<sup>228</sup> *Analytical study of the High Commissioner on Human Rights on the fundamental principle of non-discrimination in the context of globalization* (E/CN.4/2004/40) para 25-27

<sup>229</sup> *Ex. Fortum Corporation v. Finland*, 15 October 2003, ECtHR, no.32559/96, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=fortum&sessionid=12138348&skin=hudoc-en> visited on 29 July 2008  
*Telesystem Tirol Kabeltelevision v. Austria*, 29 May 1997, ECtHR, no. 19182/91, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=tirol&sessionid=12138429&skin=hudoc-en> visited on 29 July 2008



human rights closer to trade rights, not at least because one cannot claim inherent dignity of corporations. The difference in purpose between human rights and trade rights is thereby disclaimed. One case before the ECtHR has involved WTO regulations, but only as far as the TRIPs agreement had attained status of law in Portugal<sup>230</sup>.

## 5.5 Hierarchical place of Human Rights in relation to other norms

There are several theories trying to elevate human rights within the hierarchical staircase of international law. Firstly, the nature of the norms is said to give the norms higher standing. It is generally acknowledged that some human rights norms are part of customary international law, although the range of rights is not generally agreed upon.<sup>231</sup> The situation is similar in relation to *jus cogens*. The scope of rights included in *jus cogens* is debated and suggestions range from only a few basic rights to almost all human rights.<sup>232</sup> The uncertainty does not change the fact stated above that rights amounting to *jus cogens* will prevail over other international law. The scope of human rights as *erga omnes* obligations is as undefined as their status as customary law or *jus cogens*. Opinions range from covering statements of all rights in the UDHR to only a very limited range of rights.<sup>233</sup> Supremacy of human rights because of their nature as international norms is in other words ambiguous.

Secondly, supremacy of human rights has been suggested to be a result of the UN Charter according to the following reasoning. Human rights is a

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*Anheuser-Busch inc. v Portugal*, 11 January 2007, ECtHR, no. 73049/01, <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Anheuser-Busch&sessionId=12138429&skin=hudoc-en> visited on 29 July 2008.

<sup>230</sup> *Anheuser-Busch inc. v Portugal*, *supra* note 229.

<sup>231</sup> Office of the High Commissioner on Human Rights, *What are human rights?* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> visited on 29 July 2008.

<sup>232</sup> Seiderman I. D. *Hierarchy in international law: the human rights dimension* (Intersentia, Antwerpen, 2001) p. 67 and 135, Alston *supra* note 227 p 9.

<sup>233</sup> Seiderman I.D. *supra* note 232 p. 134-135.

purpose and principle of the UN<sup>234</sup> and States pledge themselves to act for the achievement of universal respect for human rights<sup>235</sup> making human rights into UN Charter obligations. In conjunction with article 103 UN Charter, this would elevate human rights obligations above other obligations in international law.<sup>236</sup> The *Fédération Internationale des Ligues des Droits de l'Homme* further suggests that the human rights obligations of the UN Charter must be interpreted in the light of the UDHR.<sup>237</sup> This would entail supremacy of all human rights provisions in the UDHR.

Thirdly, human rights treaty norms are sometimes seen as different from other international norms thereby giving them a different status. An argument to support this is that human rights treaties characteristically build on the idea of pre-existing rights recognised in a treaty, and go beyond pure contractual obligations held by States.<sup>238</sup> Another often-emphasised feature is the non-reciprocity of human rights norms. In other words, non-compliance with a human right is usually domestic and does not necessarily relate to any other State. The injured individual becomes the right holder of the international obligation and not another State.<sup>239</sup> The accuracy of the particularity of human rights is debated and international law scholars such as Simma and Brownlie question its validity.<sup>240</sup> Consequently, it is not a generally accepted argument for superiority of human rights.

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<sup>234</sup> Article 1.3 UN Charter

<sup>235</sup> Article 55 and 56 UN Charter

<sup>236</sup> Shelton D. 'Hierarchy of Norms and Human Rights: Of Trumps and Winners', *Saskatchewan Law Review* (2002) as in Westlaw 65 Sask. L. Rev. 301 p 4.

<sup>237</sup> As reproduced in Marceau *supra* note 129 p 24.

<sup>238</sup> Human Rights Committee, *General Comment no. 24: Issues related to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant* (CCPR/C/21/Rev.1/Add.6) para 4,

Committee on Economic, Social and Cultural Rights, *Human rights and intellectual property: statement by the Committee on Economic, Social and Cultural Rights* (E/C.12/2001/15) para 5-6

<sup>239</sup> Nowak *supra* note 197 p. 35, also see General Comment 24 *supra* note 244 para 17, where the particularity of human rights treaties because of lack of state reciprocity is expressed.

<sup>240</sup> Brownlie *supra* note 43 pp. 529-530.

Finally, claims of superiority are made based on the Vienna Declaration<sup>241</sup>, which proclaims the protection and promotion of human rights and fundamental freedoms as the first responsibility of Governments<sup>242</sup>. It also provides that States and international organisations should create favourable conditions for the enjoyment of human rights.<sup>243</sup> The character of the document is not strong from a legal point of view, and although it can be seen as an expression of State intention to prioritize human rights, it does not create hierarchical superiority of human rights. In conclusion, it can be said that none of theories is generally accepted to create superiority of human rights in general, although some rights have superior status as part of *jus cogens*.

## 5.6 Chapter conclusion

Theoretically, human rights institutions can apply trade law through extensive interpretation of human rights. The nature of human rights opens for all-inclusiveness of human behaviour and all norms regulating it, including trade. This makes restrictions on the mandates and applicable law of human rights institutions difficult and it is conceivable that human rights institutions indirectly utilise trade norms when balancing and interpreting human rights. Consequently, the inclusion of trade rules in human rights depends on the adjudicator's discretion.

The ECtHR has used the phenomenon of all-inclusiveness to comprise other international law through interpretation. It and has also shown the falsity in the assumption that human rights should always override other international law, although teleological interpretation is strong in human rights law. However, the Court chooses somewhat arbitrarily when to apply other international norms and when to claim particularity of human rights rules. When other international law is applied, it is considered as an inherent limitation to the right concerned not application of other international rules.

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<sup>241</sup> *Vienna Declaration and Programme of Action* (A/CONF.157/23) 1993

<sup>242</sup> *Ibid.* Part I.1

<sup>243</sup> *Ibid.* Section 13

So far, a strong position of other international norms has only been given to basic general international law norms. The lack of stability and consequent reasoning on inclusion of international law creates uncertainty on how situations will be interpreted in the future.

In an attempt to foresee a future division of included and excluded it can be said that the importance of teleological interpretation in human rights law makes it unlikely that other specialised customary law would overrule human rights norms whether directly or indirectly. However, it must be kept in mind that the discretionary approach to international law taken by the Court when applying other international law makes such predictions uncertain. As trade is a specialised branch of international law, the likelihood of it being included to the extent of overriding human rights law is very low. It is more conceivable that trade is comprised to a lesser extent through incorporation into a human right, without prejudicing the human right itself, i.e. not making trade a limitation to the human right, but a part of the definition of it.

If the Court chooses to include trade norms as part of a human right, it can give the trade norm high value in the entire convention. The harmonisation of norms within the convention instead of using norm conflict rules, as seen in the use of *lex specialis* as a rule of complementarity, opens all human rights to trade norms if trade norms are included in one human right. This can have extra bearing if used in conjunction with the rule to use the less restrictive norm and the view of corporations as individuals under the ECHR. A corporation could then have the trade right inherent in the human right tried before the ECtHR. In this hypothetical situation, the line between human rights law and trade law becomes blurred and trade extensively included in human rights law.

The interpretative principles specific to human rights law both close and open for inclusion of other international law. *In dubio pro libertate et dignitate* is plausible to limit the application of other international rules

following the reasoning that state action against the rights, liberties and dignity of the individual, including other international obligations, should be put aside in favour of the individual's right. Dynamic interpretation on the other hand can open for presence of other international law norms if these are considered to reflect a change in status quo of the view on human rights, but it can also have the opposite effect. The theory of autonomous interpretation of terms quite explicitly closes interpretation from other international rules as the terms can be given a different interpretation from that in other international conventions.

Although inclusion of trade in human rights law is possible, human rights institutions cannot be said to be open for such a demarche. On the contrary, WTO and trade rules are generally not comprised in human rights interpretation. The overall view of human rights institutions is instead that WTO should bend for human rights and even promote and protect human rights. There is a sentiment of superiority that does not necessarily have any legal foundation. From a legal point of view, theories on supremacy of human rights are not conclusive and they are severely limited because of the vagueness of *jus cogens* and *erga omnes*. In other words, there is not legal basis for the attitude adopted by human rights institutions vis-à-vis trade law.

Additionally, the leading human rights approach to the WTO is that States should limit themselves to it, both in agreeing to rules and in ensuring the ability to withdraw from them, in order to safeguard human rights. In addition, other international organisations should adjust in relation to human rights. This evidences a rather aggressive approach by human rights institutions towards the WTO. A further sign in the same direction is that the language between different human rights is one of balance, while in the relationship between human rights and trade the language is almost one of annexation or suppression. The latter may be perceived as part of the belief that human rights norms are superior to other norms. As this reasoning does not have any conclusive legal backing, it must be based on morality and the

purpose of human rights. The individualisation of the WTO, put forward by Cottier, in conjunction with the view of corporations as individuals by the ECtHR, puts into question the difference between human rights and trade law. This in turn can, in the future, diminish the credibility of moral supremacy of human rights and consequently the claim of superiority as a whole.

There is yet another problem inherent in the aggressive approach of human rights institutions. Considering the status of different norms in international law, human rights institutions are overlooking the problem that norms are not binding on States who have not agreed to them. It calls on the WTO to implement human rights with the inevitable consequence that human rights would be implemented in relation to States who have not agreed to them. The problem is set aside through the statement that all WTO members are party to a human rights treaty, but this does not remove the infringement on State sovereignty.

## 6 Conclusion

General international law does, as seen in chapter three, not create a relationship of priority or hierarchy between the WTO and human rights institutions. However, the regimes do not follow the same understanding.

The WTO DS has taken a position stating that it is not isolated from other international law. Although this is theoretically promoted, it is counteracted in practice. This is evidenced by the fact that the WTO DS, in its application and interpretation of the covered agreements and international law, has limited the scope of applicable international customary law, has not favoured other international rules in relation to WTO rules and holds a limited view of possible use of article 31.3 (c) VCLT. The result of these factors is isolation and protectionism of the regime. The interpreters within the WTO guard the integrity and exclusiveness of WTO law, thereby protecting it from outside influence and use for other means than those set up within the WTO. The current approach leads to an overall isolation from other legal sources with an arbitrary inclusion of some international rules, on WTO terms. Human rights law is not an exception to the approach and case law taking human rights law into account is still awaited.

Human rights law follows a different strategy vis-à-vis the WTO. It uses a mixed approach, where its all-inclusiveness is used to bridge over all other international law, at the same time as it proclaims its particularity. On the one hand, the all-inclusiveness leads to inclusion of some basic non-contested international rules as limitations to the human rights themselves. The impact of another norm because of this strategy depends on the value of the norm, which is decided by the human rights body rather arbitrarily. On the other hand, all human behaviour and norms governing it, is comprised in the interpretation of a certain human right, of its definition. This gives a large scope to possible inclusion of other international law. Trade law can at least hypothetically be included in the interpretation of human rights.

The other aspect of the human rights approach, its particularity, gives human rights institutions the opportunity to guard its possibilities to decide when to include other international law and when not to, i.e. to isolate itself or not. As an example of a human rights law trait of isolationism, one can mention autonomous interpretation of terms. This kind of isolationist approach is parallel to the WTO approach to international law, although the two regimes find their underpinnings for their strategy in different rules and characteristics. The human rights institutions' attitude towards trade law is not completely exclusionary, but in general, trade is not tainted with a positive glare within human rights interpretation. Instead, human rights institutions are rather aggressive in relation to trade, requesting the WTO to incorporate its norms, while not consciously introducing trade into human rights.

Furthermore, human rights law perceives itself as superior to other international rules, because of its underpinnings. The underpinnings of WTO law do not have any particular moral value, but is a theory on which one can build and possibly improve society. Human rights on the other hand are inherently linked to notions of moral. There is a sense of not leaving anyone behind in basic human rights theory, where human beings are perceived as ends in themselves. The moral supremacy of the value of human beings and their dignity has lead to a sentiment of legal supremacy of this body of law, which cannot be justified in terms of general international law. However, it is hard to conceive that the human rights regime will change on the issue of supremacy. The perception is deeply rooted within the institutions and has not shifted regardless of lacking legal basis. It is a trait of particularity that the human right institutions hold on to and it might even be enhanced by the current polarity of the two regimes.

Some human rights have status of superior norms, but the scope of these rights is not certain and does not lead to supremacy of all human rights norms. The limitations on supremacy, from a legal point of view, is not



generally accepted, but human rights institutions are instead hinting at legal supremacy, which *inter alia* is evidenced by human rights institutions' views on how States should position themselves in relation to trade law. Trade law is perceived as a potential tool for human rights, and should learn to behave as such, rather than another legitimate part of international law.

Noticeable in the different perspectives on inclusion of each other's norms is that both regimes defend their norms, but through somewhat different means. The WTO regime comes across as having a rather defensive approach, trying to limit the presence of human rights law, while at the same time touching upon many spheres of life in a much similar fashion to human rights law. The human rights regime, on the other hand, has a rather aggressive approach trying to integrate itself into the WTO regime. It uses its wide scope and its moral underpinnings to its advantage, while keeping possibilities for isolationism through claiming particularity.

The two regimes' perceptions of each others law is in constant development. It is likely to change even without State interference as the two regimes compete on the international arena. The WTO has in the past included environmental law within its case law, which raises the likeliness of inclusion of human rights law. Concurrently, the Consultative Board to the Director General is arguing the opposite, exclusion of other fields of law, and the WTO DS has not shown a lenient attitude towards human rights as of yet.

Meanwhile, if the WTO DS is to take human rights into account it is difficult to say how much it will interact with human rights institutions and in what way it will include human rights. Direct application of human rights norms does not seem to be likely if one considers a prolongation of current WTO DS practice. Instead, inclusion of human rights norms through interpretation is more probable. The question is then how they will be included; as generally tolerated rules, as terms existing in human rights treaties or maybe as a change of view on the matter of "parties" in 31.3 (c)

in line with doctrine and the ILC's latest view. Current case law hints at the use of terms in human rights treaties as a likely approach (c.f. case law on environmental issues), but this is hindered by the fact that treaties under the hospice of the WTO do not use terms parallel to human rights treaties. No matter which of these approaches is chosen, human rights inclusion would be limited to those having an 'entrance opportunity' into the WTO through for example exceptions to WTO rules or the concept PPM. The chosen approach will decide how stable or how arbitrary the presence of human rights will be. Either way, the goal should be that of enabling States to comply with their obligations under both regimes.

As to the presence of other international norms within human rights institutions, non-human rights rules can be included through application. Meanwhile, only general international law is likely to have the impact of overruling human rights. This does not exclude inclusion of regime specific norms, such as trade law, through interpretation. Trade rules would then become part of the balance between human rights.

Another interesting perspective when looking at future possibilities is that of Cottier. It may seem far-fetched, but the individualisation identified in WTO law in combination with the expansion of human rights to corporations nevertheless brings the norms of the two regimes closer in nature. It makes for an interesting possibility of convergence of the two regimes, although it puts the basis of both regimes into question. A change in the underpinnings of human rights, by including other structures but human beings, may open for other rules including those advocated by Petersmann. Concurrently, it undermines the moral supremacy of human rights and thereby puts the two regimes on the same playing field not only on the legal arena, but also on the arena of basic values. Human rights may suffer diminished credibility and acceptability through this development as well as attacks on the very need of human rights.

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