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**THE CONCEPTUAL VALIDITY OF HUMAN RIGHTS  
WITHIN THE GENERAL CONTEXT OF NORMATIVE  
LAYERING**

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**Abstract:** Our view on human rights is quite dependent of our perception of the international status quo in which such rights exist and evolve throughout decades. While so called civilized nations have complex legal systems in which issues such as the right to water or the right to internet are serious matters of discussions, one can be inclined to wonder if we are speaking the same language in countries such as Syria or Rwanda. The paper aims to analyze the intrinsic relationship between the development in the international arena of certain actors and how human rights are “a game of privilege”, made available only to the select few and how this affects international relations.

**Keywords:** *normative layering; conceptual validity; human rights; status-quo.*

## **1. Introduction**

*We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind, that is, the approval by the General Assembly of the Universal Declaration of Human Rights. This declaration may well become the international Magna Carta of all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation of the Declaration of the Rights of Man by the French people in 1789, the adoption of the Bill of Rights by the people of the United States, and the adoption of comparable declarations at different times in other countries<sup>1</sup>.*

Eleanor Roosevelt’s force of conviction and undeterred efforts is one of the reasons why, on December 10<sup>th</sup>, 48 countries voted in favor of the adoption of the Universal Declaration of Human Rights<sup>2</sup>. It came at a troublesome time, after a century of gross violations of human rights on a global scale which had all but rendered the concept void of any content. Human rights had all but become the illusionary idealism of the French Revolution or the faint agenda of the now failed League of Nations.

To the best of our knowledge, the first *charter of human rights*, if we may call it that, dates back to the 6<sup>th</sup> century B.C., where Persia’s Achaemenid king Cyrus the Great is said to have laid out the principles of freedom to all and the abolition of slavery in what is known today as *the Cyrus Cylinder*. Whether the *Confucianism* of ancient China, or the content of the Rig Veda and the Gantama Sutra of India, or the now indisputable concept of *natural law* from ancient *Roman law*, which founded the basis for concepts such as

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<sup>1</sup> Eleanor Roosevelt, 1948

<sup>2</sup> The United Nations 1948

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*inalienable rights, fundamental rights, basic human rights, or even jus cogens, one must admit that human rights are not just an issues of the XX<sup>th</sup> and XXI<sup>st</sup> centuries, but that they are intrinsic to humans throughout history and time. One author even went so far as to analyze whether or not Hinduism recognizes the fundamental concepts of international humanitarian law<sup>3</sup>.*

He concluded that:

*“Hinduism believes that war is undesirable and must be avoided because it involves the killing of fellow human beings. Kautilya notably underlines the importance of negotiations between sovereigns who play a considerable role in the conclusion of alliances and in issues pertaining to war and peace. Specifically, kings were requested, before resorting to war, to have recourse to negotiation as the principal means of resolving conflicts. Kautilya’s Arthashastra defines war as an offensive (objectionable) operation. The Sukranitisara, Agni Purana and other works of earlier days hold more or less similar positions. For moral and economic reasons, the policy of exhausting peaceful remedies before resorting to war was advocated by most of the ancient writers. The Hindu concept of Ahimsa, meaning non-violence or non-injury, was successfully employed by Mahatma Gandhi, as the means to fight British colonial rule in India in the early part of the last century. War is justified only when it is meant to fight injustice, not for the purpose of aggression or to terrorize people”<sup>4</sup>.*

In light of historical analysis, one can notice that the *principles of Hinduism* alone could very well be considered an advanced legal system. For example, the recourse to negotiation *as the principal means of resolving conflicts*. In modern international law the requirement is only that State actors undergo a series peaceful means of dispute resolution prior to engaging in any other type of *forcible diplomacy*, however, authors contest that this is an actual customary rule of international law, and that such an obligation can only be validated if a state unilaterally, or by means or a bilateral or multilateral instrument agrees to such conduct as mandatory. It wasn’t until the *Georgia v. Russian Federation*<sup>5</sup>, case of 2008, before the International Court of Justice, that the concept of mandatory prior negotiations, held in good faith and with the intent to reach a commonly acceptable solution, managed to gain ground in favor of the customary nature of such an obligation. Furthermore, the idea that *War is justified only when it is meant to fight injustice, not for the purpose of aggression or to terrorize people*, can very well be viewed as an ancient form of the *responsibility to protect*, and a means to justify forcible intervention against another State actor, subject that it is meant to *fight injustice*, rather than conquer or destroy.

The question therefore raised that in light of such conceptually advanced instruments throughout time, why do we still struggle with the *universality or human rights*? Have we conceptually invalidated them due to our own ideological and philosophical differences? Has the struggle of the so called *civilized nations of 1945* to put forward their own cultural and traditional constitutional values paved the way to the ruin and perish of the universality of universal rights in favor of regional systems? These questions cannot be answered in a single paper nor in a single lifetime, however, based on empirical evidence and a keen observation of State and non-state actors’ behavior within the international arena, we shall try to draw a conclusion as to some of the reasons why we

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<sup>3</sup> Manoj Kumar Sinha, *Hinduism and international humanitarian law*, International Review of The Red Cross, Vol.87, No. 858, June 2005, pp. 285-294

<sup>4</sup> Idem supra, p. 294

<sup>5</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70

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are witnessing a failure to promote human rights *equally and for all*, and if there is indeed a relationship between such a hiatus and *normative layering*.

### **2. The concept of normative layering**

Professor Martti Koskenniemi<sup>6</sup> through his extensive work, both within the International Law Commission and throughout his entire career, has made evident a phenomenon of the utmost significance in international law, *fragmentation*.

*“One aspect of globalization is the emergence of technically specialized cooperation networks with a global scope: trade, environment, human rights, diplomacy, communications, medicine, crime prevention, energy production, security, indigenous cooperation and so on - spheres of life and expert cooperation that transgress national boundaries and are difficult to regulate through traditional international law. National laws seem insufficient owing to the transnational nature of the networks while international law only inadequately takes account of their specialized objectives and needs.*

*(...)*

*This is the background to the concern about fragmentation of international law: the rise of specialized rules and rule-systems that have no clear relationship to each other. Answers to legal questions become dependent on whom you ask, what rule-system is your focus on. Accordingly, this study has sought answers to questions that, though they seem quite elementary, have not been often addressed: What is the nature of specialized rule-systems? How should their relations inter se be conceived? Which rules should govern their conflicts?<sup>7</sup>”*

Normative proliferation and subsequent specialization, doubled by the subsequent hermetic character embedded to such individual normative *chunks*<sup>8</sup>.

*“The international normative apparatus that pumps the legal blood through our international veins is functional, but it is also frail, fractioned and frictional. I say frail because it does not work in the zeiss manner in which one would expect a 21<sup>st</sup> century mechanism of assuring legal security and substance to work. It is fractioned because our fractioned views on the law, expressed especially on a State actors level, deems fractioned continuity, and it is frictional, because every attempt to breed into such a mechanism coherence results in new chunks of norms, displaced from the international legal order”<sup>9</sup>.*

The question of fragmentation is not to be understood as philosophical discourse as to the decaying structure of international law, because it is deeply rooted in reality and the observation of such reality. The proliferation of international jurisdictions, the creation of *self-contained regimes*, the question as to the relationship between human rights and trade law, such are the issues addressed by the International law Commission, which resulted in

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<sup>6</sup> ILC Analytical Study 2006, ILC Study Group on the Fragmentation of International Law. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi. UN Doc A/CN.4/L.682 and Add.1 and Corr. 1. New York: International Law Commission, 2006

<sup>7</sup> Idem supra, p. 244-245

<sup>8</sup> Lisa-Maria Achimescu, *Legal structuralism: why we are dealing with an identity crisis and why the internationally accepted version of the hierarchy of norms is failing on us*, International Scientific Conference Strategies XXI National Defense University „Carol I”, Vol. 2, April 2016, pp. 286-291

<sup>9</sup> Idem supra, p. 286

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the conclusion that international law has become, indeed, fragmented. Perhaps reason for this can be found in the very foundations of modern day international law. Perhaps the wording of the United Nations Charter is representative of only the constitutional and legal traditions of the few that *won* the II<sup>nd</sup> World War, and therefore the whole document is a tribute to post colonial sentimentalism and the fallen Era of the Enlightenment. Of course, one may argue that the values of the Universal Declaration of Human Rights are exactly that, they are universal and embedded in human consciousness, transcending the barriers of state borders and sovereignty. They are inherent to *humans*, not states. Yet, we have seen more acts of genocide subsequent to the adoption of the UDHR than prior. Cambodia in 1975, Rwanda in 1990, Bosnia in 1995, Darfur in 2003. An estimated 28.8 million people live in modern slavery today generating 32 billion dollars for traffickers globally each year, which amounts to more than 3 times the level of slavery in 1833 when the Slavery abolition act came into force.

*“The rationale for the Commission’s treatment of fragmentation is that the emergence of new and special types of law, “self-contained regimes” and geographically or functionally limited treaty-systems creates problems of coherence in international law. New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. The emergence of “environmental law” is a response to growing concern over the state of the international environment. “Trade law” develops as an instrument to regulate international economic relations. “Human rights law” aims to protect the interests of individuals and “international criminal law” gives legal expression to the “fight against impunity”. Each rule-complex or “regime” comes with its own principles, its own form of expertise and its own “ethos”, not necessarily identical to the ethos of neighboring specialization. “Trade law” and “environmental law”, for example, have highly specific objectives and rely on principles that may often point in different directions. In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law or the law of some other specialized branch. Very often new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law. When such deviations or become general and frequent, the unity of the law suffers”<sup>10</sup>*

It is evident that fragmentation creates *self-contained regimes*, like that of the World Trade Organization, The European Union or that specific to the jurisdiction of the European Court of Human Rights. The emergence of said self-contained regimes is explained by the International Law Commission a response to *new technical and functional requirements*. The paper also presents entire legal bodies or *rule-complexes*, such as *human rights law*, trade law, environmental law or international criminal law as examples of self-contained regimes, and it is exactly here that our view departs from that of the distinguished authors.

Indeed, the European Court of Human Rights has created an extraordinary example of such a *self-contained regime*. The ECHR in itself is a *jurisdiction*, and its’ rulings are binding not only upon the State directly taking part in the proceedings before the court, but they are binding upon all High Contracting Parties of the European Convention on Human Rights. While the ECHR has, on various occasions pointed out that:

*“The Convention ... cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must take the relevant rules of international law into account. The Convention should so far as possible*

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<sup>10</sup> *Idem*<sup>6</sup>, p. 14

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*be interpreted in harmony with other rules of international law of which it forms a part, including those relating to the grant of State immunity*<sup>11</sup>.

It can be concluded that, to the greatest extent, the rules-complex created by the European Court of Human Rights does not clash with the relevant body of rules set forth by general international law.

Careful analysis will not render the same conclusion in relation to the World Trade Organization, however. While both the Panel and Appellate Body has stated that:

*“We take note that Article 3 (2) of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary international law rules of interpretation of public international law. However, the relationship of the WTO agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between WTO members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO”*<sup>12</sup>.

The issue here becomes quite evident and has been the source of great dispute among scholars regarding what is known as *WTO-law*. Article 3 (2) of the DSU states that *“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements”*. Some authors have interpreted that<sup>13</sup>: *“WTO dispute resolution panels and the Appellate Body are limited to the application of substantive WTO law and are not authorized to apply general substantive international law or other conventional law”*.

While this may not be self evident for the non WTO-specialist, it becomes so when taking into account cases like EC-hormones<sup>14</sup>, where the European Union could not apply *the precautionary principle* and ban the importation of hormone treated beef products, due to growing public concerns as to the safety of said products. Indeed, the purpose of the WTO is not to observe public health, to supervise risk assessments of the long term consumption of products, to promote and observe human right or to promote environmental development. The purpose of the WTO is to liberalize trade, and to that mantra it has remained faithful since its inception. This is an example of a *rule based regime* which has been created with the distinct purpose of deriving from existing legal order. Every such regime will contribute to the fragmentation and destabilization of the overall coherence of the international legal order.

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<sup>11</sup> *McElhinney v. Ireland*, Judgment of 21 November 2001, ECHR 2001-XI, para. 36. Similarly, *Al-Adsani v. the United Kingdom*, Judgment of 21 November 2001, ECHR 2001-XI, p. 100, para. 55.

<sup>12</sup> *Korea - Measures Affecting Government Procurement* (19 January 2000) WT/DS163/R, para. 7.96.

<sup>13</sup> Joel P. Trachtman, “The Domain of WTO Dispute Resolution”, *Harvard International Law Journal* vol. 40 (1999), pp. 333-377

<sup>14</sup> Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135

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It is our opinion that *fragmentation* is a distinct reality of the modern day international legal order, but only with regard to *specific* self-contained regimes, viewed *ut singuli*, such as that resulting from *WTO-law*, or the convergence or such norms with customary international law and *jus cogens*, within their proximal norm-complex. For example, *WTO-law* is a self contained regime within *international trade law*. International trade law within itself, does not constitute a *single self-contained regime*, but rather a sum of such *individual self-contained regimes*.

The distinction may appear artificial and irrelevant, however, fragmentation is, *in our view*, a privilege of developed normative systems and countries, while *normative layering within norm complexes* is the cause of stringent issues such as poverty, slavery, inequality, discrimination and all other gross violations of human rights. For example, European Court of Justice has just issued a ruling by which time taken to travel to and from work at the beginning and end of each day should count as working time under the law<sup>15</sup> and Sweden has recently switched to a 6 hour work day. It is our assertion that such matters are not being analyzed by the Mohokum al Qada al Motahed (Integrated Judicial Council) of Syria, a country which has entered its third year of civil war. It is highly unlikely that the citizen, or better said, the remaining citizens, of Aleppo will be protesting in the near future for their right to free access to the internet and higher education, seeing how they are not even guaranteed the most basic of rights, such as physical security, medical aid or even food and water.

We have the privilege to argue whether or not the EU should accede or not to the ECHR, and we discuss the refugee crisis from the comfort of scientific panels and international conferences, but for millions of people in the world, living in poverty, in slavery, living in uncertainty and war. For children in sweat shops, for child brides and for those who have been forced to leave their homes, human rights aren't a matter of less work hours, freedom of speech or transgender bathrooms. No, for them human rights are a matter of life and death.

Complex normative systems and procedural guarantees are a privilege of the developed countries, with strong economies, fighting in wars taking place outside their national territories, and it is within this context, of *normative layering*, where human rights include the most complex 3<sup>rd</sup> and 4<sup>th</sup> generations rights such as *the right to internet access*, where nations are questioning whether or not there is an inherent *right to water*, and where we speak of our *intangible cultural heritage*, in can't help but look downwards to *the less developed normative layers within the human rights normative complex*, and ask myself, when will a citizen of Eritrea, Syria or even the Kashmir region of India even begin to dream in such terms?

### **3.The conceptual validity of human rights within the context of normative layering**

So, while we have worldwide recognition of human rights, and while we have a plethora of legal bodies and instruments designated to promote and develop human rights, among which the United Nations Mechanisms, whether UN-treaty or UN-Charter based, such as the International Court of Justice ("The Hague" or ICJ), the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), the

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<sup>15</sup> Judgment of the Court (Third Chamber) of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA*, C-266/14, CLI:EU:C:2015:578,

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International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone, the Crime Panels of the District Court of Dili and Court of Appeals (“East Timor Tribunal”), the UN Interim Administration Mission in Kosovo (UNMIK) “Regulation 64” Panels in the Courts of Kosovo, the Extraordinary Chambers in the Court of Cambodia, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee Against Torture, the Committee on the Elimination of Discrimination Against Women, the UN High Commissioner for Human Rights, Regional tribunals, such as the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, the Caribbean Court of Justice or other tribunals like the Human Rights Commission for Bosnia and Herzegovina, notwithstanding all declarations, procedures and soft law instruments pertaining to the emerging concept of the XX<sup>th</sup> century of *human security*.

Enough ink has been printed reaffirming our devotion to human rights that it could make the world’s rivers run black, and yet to what avail? We have created exceedingly high standards in certain parts of the globe, standards even the most developed states have trouble abiding by, which is self evident in the high number of case brought before human rights courts and the exceedingly high number of cases where states are condemned before the European Court of Justice, the European Court of Human Rights, The Supreme Court of the United States of America, and the list can go on. Even states believed to be the at the epicenter of the development and consolidation of human rights have great difficulties when faced with guaranteeing procedural rights, equal pay for men and women, the general prohibition of discrimination. Some of the most complex issues of competing jurisdictions and norms exist in matters of human rights and yet, developed countries have a hard time keeping up with their own self imposed standards, while other are not even protected against torture and cruel behavior.

In such troubled times, one must concentrate on stringent issues, and one such issue is the broad concept of security, and how security is not limited or equivalent to state security, but that it includes individual security. Guaranteeing human security represents a corner stone the policy of both the United Nations and all relevant state actors, as a fundamental component contributing to the strengthening of human rights.

The Commission on Human Security<sup>16</sup>, in its final report *Human Security Now*, defines human security as:

***“...to protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms – freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people’s strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.” (CHS: 2003: 4)***

The definition proposed by the Committee on Human Security does not only redefine the paradigm of human rights, but it also re-conceptualizes security in a fundamental way by<sup>17</sup>:

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<sup>16</sup> The Commission on Human Security was established in January 2001 in response to the UN Secretary-General’s call at the 2000 Millennium Summit for a world “free of want” and “free of fear.” On 1 May 2003, Co-Chairs of the Commission on Human Security, Sadako Ogata and Amartya Sen, presented the Commission’s Final Report, *Human Security Now*, to the United Nations Secretary-General, Kofi Annan

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- (i) *moving away from traditional, state-centric conceptions of security that focused primarily on the safety of states from military aggression, to one that concentrates on the security of the individuals, their protection and empowerment;*
- (ii) *drawing attention to a multitude of threats that cut across different aspects of human life and thus highlighting the interface between security, development and human rights; and*
- (iii) *promoting a new integrated, coordinated and people-centered approach to advancing peace, security and development within and across nations.*

It must be heighted that *human security* is a complex, multidisciplinary concept, which brings together security concept, human rights and development. The CHS has depicted *human security* as having the following characteristics: people-centered; multi-sectoral; comprehensive; context-specific; prevention-oriented<sup>18</sup>. Human security and state security should not be viewed as fundamentally distinct concept. They are more likely interdependent on each other seeing as how one cannot have human security in the absence of state security, and vice versa.

While the concept of *human security* may appear, in itself vague and insufficiently clear in order to render any specific form of protection or guarantee as to the protection of either people or their fundamental rights, one of the merits of such a concept is that it further forces the reinterpretation of our rigid concept of sovereignty. Sovereignty exists not to protect an abstract entity, *the state*, but to protect the people that make up said state. The concept of human security can be viewed conditioning sovereignty to the otherwise basic requirement that a state must provide for the basic needs of its people in order for it to be considered a sovereign stat. Human security dismisses *sovereignty* as a given, an indisputable *status quo* that is independent of the guarantees it brings to the people found under its' jurisdiction. It can therefore be argued that *human security* elasticizes the very concept of sovereignty in international relations, putting *human rights* before *state rights*<sup>19</sup>.

It is our view that, within the general context of normative layering, and taking into account that in this century, more thought should be given to guaranteeing at least the fundamental human rights, that *human security* may constitute the conceptual foundation for invigorating the conceptual foundations of *human rights*, and the legitimization necessary to make foreign aid, the responsibility to protect and human rights overall a global responsibility, rather than a policy that may or may not be abided by.

### **4. Conclusion**

Weather we are enthusiasts that strongly believe in the prevailing force of the international legal order, or whether we adhere to the apocalyptic of vision Prosper Weil<sup>20</sup>, which, while condoning the apparent nobility behind normative constructions such as *erga*

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<sup>17</sup> United Nations Trust Fund for Security, *Human Security In Theory And Practice, An Overview of the Human Security Concept and the United Nations Trust Fund for Human Security*, United Nations, 2009, pp. 5-6

<sup>18</sup> *Idem supra*

<sup>19</sup> See also Sandra J. Maclean, David R. Black and Timothy M. Shaw, *A Decade of Human Security, Global Governance and New Multilateralisms*, Ashgate, 2006, pp. 31-37

<sup>20</sup> Prosper Weil, *Towards Relative Normativity in International Law*, The American Journal of International Law, Vol. 77, No. 3, Jul., 1983, pages. 413-442

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*omnes* obligations and *universal human rights*, believes that only within the *sanctity of bilateral agreements* can law truly take any coherent shape, one cannot ignore the issue of human rights.

While norm formation is a sensitive topic, and many authors have associated the *jus cogens* or *erga omnes* obligations discourse to *Pandora's box*<sup>21</sup>, and interventionism for the sake democracy has often disguised alternative diplomatic, economic or military agendas, as was the case in the *Nicaragua case*<sup>22</sup> before the International Court of Justice, one cannot flutter in the face of adversity and deny to humanity what has been since the dawn of recorded history, not an ideal, but a fundamental prerequisite of all sentient beings, that we are all born equal and free.

In this bleak context, *human security* challenges the traditional concept of sovereignty to such an extent that it generates the opportunity to overcome the negative aspects of both international fragmentation and normative layering.

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<sup>21</sup> Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box & Did You Ever Think About the Consequences?*, European Journal of International Law, Vol. 18, No. 9, pages 853-871.

<sup>22</sup> Case concerning *Military and Puramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986, p. 14.

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