RIGA
GRADUATE
SCHOOL OF
LAW

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HUMAN DIGNITY AS A FOUNDATIONAL VALUE OF PEREMPTORY NORMS IN INTERNATIONAL LAW

RGSL RESEARCH PAPER
No. 22

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ISSN 1691-9254

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This publication is based on a distinction-awarded Master's thesis.

Abstract

The appeal of the idea of a morally structured, systemized international legal system implied by the *jus cogens* regime has resulted in an abundance of literature covering different aspects of this normative category. This article discusses a comparatively under-explored issue in this field, that is, the foundational values of peremptory norms and, in particular, invites the reader to consider the value of human dignity as one such underlying value. An in-depth analysis of the definition of *jus cogens* as included in the Vienna Convention on the Law of Treaties reveals that the values that peremptory norms are believed to represent are intertwined with such notions as the international community, the shared interests of that community, and normative hierarchy in international law. The value of human dignity speaks to the very core of each of these notions. This is demonstrated by the wide recognition of the value in the context of states' constitutions and broader international legal instruments, as well as in the work of international courts such as the International Court of Justice and the European Court of Human Rights. However, there is no clear understanding of the very concept of human dignity as there are many different conceptions of both the content and function of this value. This article proposes a possible common denominator in this regard, namely, the basic claim of human dignity as an ontological value in the sense of the physical integrity of a person. Mindful of its potential in the context of the development of the international community and the future of the international legal system as such, the examination of this reading of the value shows that indeed it could be considered as one of the underlying values of peremptory norms in international law.

Key words: human dignity, *jus cogens*, theory of international law, peremptory norm, dignitarian jurisprudence

CONTENTS

1. LAYING THE GROUNDWORK: PREMISES TO BE FOLLOWED

The notion of *jus cogens* in international law is by no means understudied. However, more often than not the focus of studies on *jus cogens* relates to the substantive content of norms, identifying them and the problems surrounding this process. The aim of this article is to inquire into a somewhat less explored aspect of this normative category, namely, the values upon which peremptory norms are founded. What follows is an attempt to outline what sort of values underlie *jus cogens* by examining the very idea behind this normative category as informed by efforts to define the concept both in scholarly writings and available definitions of *jus cogens* in international law. The ultimate objective is to understand whether the value of human dignity can be regarded as a value in which norms that merit peremptory status are embedded. It is submitted here that the answer to that question is affirmative.

The article is structured as follows: first, an overview of the initial scholarly debate on the idea of peremptory norms and deliberations on this question throughout the drafting process of the Vienna Convention on the Law of Treaties (VCLT) is presented. Here, the notion of *jus cogens* is discussed in light of the normative regime that it is implied to entail by the definition of *jus cogens* in Article 53 of the VCLT, namely, the existence of an international community, the idea of a normative hierarchy in the international legal system and the centrality of some shared interests among the international community. Next, it is examined whether the value of human dignity conforms to the requirement of a value recognized as fundamental internationally. After having examined recognition of the value internationally, the analysis turns to the issue of lack of a definition of the very concept of human dignity and how, in turn, the claim of human dignity as underlying *jus cogens* is undermined due to difficulties in formulating the value as universal. To this end, the article proposes a possible common denominator between different understandings of the concept. Lastly, it offers a brief assessment of the value of human dignity in light of the second requirement for a value to be considered as underlying *jus cogens* – namely, its fundamentality for the international community and the future of the international legal system as such.

Given the particular interest of this article, it will come as no surprise that the premises to be followed throughout the analysis are grounded on the idea of law as a value-laden concept. The approach taken in this article, therefore, negates the idea of law as value-neutral and in turn invites the reader to consider it as an interpretative concept. This approach builds upon the central proposition of legal interpretivism, whereby the true purpose and meaning of any law is best explained by recourse to the values that underlie the key aspects of the practice that a particular law seeks to regulate, by applying what Dworkin labelled a "theory embedded view of practice"[1].[2] However, even if one of the basic premises that underlies this article is that morality has an important role in the way international law is and should be advanced, it should not be read as advocating moral theories as the only, authentic means for understanding international law.[3]

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[1] Ronald Dworkin, *Justice in Robes* (Harvard University Press: 2006), p. 51.

[2] For a general introduction to the application of legal interpretivism in international law, *see, e.g.*, Basak Çali, "On Interpretivism and International Law", in *European Journal of International Law* 20, Issue 3 (2009): pp. 805-822.

[3] For an introduction to moral theories in international law, *see, e.g.*, Allen Buchanan, "The Idea of a Moral Theory in International Law" in *Justice, Legitimacy and Self-determination: Moral Foundations for International Law* (Oxford University Press: 2004), pp. 10-44.

The instructions of legal interpretivism are of great importance for the first part of the analysis that follows. That is, in order to discern what values underlie norms meriting peremptory status in international law, a solid understanding of the function and meaning of *jus cogens* within the international legal system will be pursued. According to legal interpretivism, such analysis of the role and purpose of *jus cogens* will reveal what values best speak of the practices that peremptory norms seek to regulate. The results of this inquiry will later be used in respect of the value of human dignity to see whether or not it can be regarded as a value that underlies peremptory norms in international law.

As one last comment before turning to the subject matter of the present inquiry, it should be pointed out that any study on peremptory norms, however thorough or peripheral, is exposed to the enduring discord concerning the theoretical foundations of *jus cogens*. Mindful of this problem, it is not the objective of this article, or even a necessity, to solve the debate between the different strands of theorizing the concept. However, it deserves to be pointed out that disagreement as to the theoretical groundwork of peremptory norms "remains as ripe as ever"[4] and certainly poses some difficulties for any research on *jus cogens*, including the present one. Against the background of the variety of possible ways of explaining the phenomenon, the Special Rapporteur on *Jus Cogens*, Dire Tladi, draws the conclusion that "no single theory has yet adequately explained the uniqueness of *jus cogens* in international law"[5]. This is evidently illustrated by scholarly speculations on the issue: while Criddle and Fox-Decent write that "most contemporary commentators continue to view *jus cogens* through the positivist prism of state consent"[6], Karl Zemanek claims that the "public order explanation has attracted the widest following among scholars"[7], whereas Mary O'Connell states that "to explain the existence of the category and how the norms operate, most international lawyers turn to natural law theory"[8].

2. DECIPHERING THE DEFINITION: VALUES IN *JUS COGENS*

Is it possible to sketch the contours of exactly what sort of values peremptory norms represent? Presumably, yes. The nature of interests and values embodied in *jus cogens* can be singled out with the help of scholarly observations about the concept throughout its development and, most notably, the description of *jus cogens* as included in the VCLT, which to this day is the authoritative definition of peremptory norms. Importantly, itis not the aim here to draft a concrete list of values assumed to underlie *jus cogens* norms, but instead to try to discern the nature of interests that peremptory norms are anticipated to represent and thus to evaluate what sort of values these interests best speak of.

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[4] Study Group of the International Law Commission, *Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, A/CN.4/L.682, p. 184.

[5] International Law Commission, *First Report of the Special Rapporteur Dire Tladi on Jus Cogens*, 8 March 2016, A/CN.4/693, p. 37.

[6] Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens", *The Yale Journal of International Law* 34, Issue 2 (2009): p. 339.

[7] Karl Zemanek, ''The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order'' in *The Law of Treaties Beyond the Vienna Convention,* ed. Enzo Cannizzaro. (Oxford University Press: 2011), p. 383.

[8] Mary Ellen O'Connell, "Jus Cogens: International Law's Higher Ethical Norms" in *The Role of Ethics in International Law*, ed. Donald Earl Childress. (Cambridge University Press: 2012), p. 78.

Observations on *jus cogens* prior to the VCLT

The idea of peremptory norms being "a twentieth-century innovation without a meaningful precedent in international legal theory"[9] is, in fact, a misconception.[10] Most notably, the early scholars representing the school of natural law – Hugo Grotius and Emer de Vattel –touched upon some ideas pertinent to the subject of peremptory norms.[11] Grotius wrote about the differences between the law of nature and volitional or statutory law, whereby the former is commanded by reason and moral necessity, but the latter originates in will. Additionally, he famously argued that certain principles of the law of nature are so unchangeable that even God cannot change them.[12] Vattel added to the claim by maintaining that obligatory law or *jus scriptum* does not permit derogation and that nations "are absolutely bound to observe it"[13] as it is binding upon their conscience. Without expressly using the terms "*jus cogens"* or "peremptory norms", the idea was further discussed by later legal scholars such as Hyde and Hall, who spoke of "fundamental principles of justice"[14]. Hyde wrote that an international agreement is "dependent upon something more than the mere yielding of consent" and that it cannot be concluded where international society considers it as "gravely injurious to its interest"[15]. Similarly, Hall spoke of "universally recognized principles" that cannot be subject to derogation by states even if such principles are based on mutual agreement.[16]

However, despite some early scholarly remarks on the matter, it is Alfred von Verdross who is largely regarded as the founding father of the concept of *jus cogens.* In his seminal work "Forbidden Treaties in International Law" [17] Verdross discussed the seemingly unfettered freedom of subjects of international law to conclude treaties and how, in fact, it is restrained by necessary compliance with rules of international law having the character of *jus cogens*. He argued that such rules determine the validity of concluded treaties as they serve to "prescribe certain, positive or negative behaviour unconditionally" [18] .Notably, Verdross distinguished between two kinds of peremptory norms: on one hand, a group of "different, single, compulsory norms of customary international law"[19] (such as norms regulating use of the high seas or the acquisition of *terra nullius*) and, on the other hand, norms representing a general prohibition on concluding treaties *contra bonos mores*. These latter norms, Verdross argued,

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[9] Criddle and Fox-Decent, *supra* note 6, p. 334.
[10] For a historical overview of the development of the concept and the term jus cogens as such, *see* Carnegie Endowment for International Peace, "The Concept of Jus Cogens in Public International Law", in Papers and Proceedings: Report of a Conference in Lagonisi, Greece, April 1966 (Geneva, 1976), p. 18.
[11] Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Liberty Fund: 2005); Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, eds. Béla Kapossy and Richard Whitmore (Liberty Fund: 2008).
[12] Grotius, *The Rights of War and Peace*, Chapter 1.
[13] De Vattel, *supra* note 11, § 7-9.
[14] Charles Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little Brown Company: 1922), § 490.
[15] *Ibid*.
[16] William Hall, *A Treatise on International Law*, ed. A. Pearce Higgins (William Hein:2001), p. 383.
[17] Alfred von Verdross, "Forbidden Treaties in International Law: Comments on Professor Garner's Report on the "The Law of Treaties'", in *The American Journal of International Law* Vol. 31, Issue 4 (1937): pp. 571-577.
[18] *Ibid*, p. 571.
[19] *Ibid*, p. 572.

are characteristic of every judicial order for they safeguard the "rational and moral coexistence of the members of a community"[20]. Essentially, Verdross maintained that "a truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis"[21]. Thus, all in all it can be concluded with ease that initial attempts to elaborate on the idea of peremptory norms underlined their contingency on moral considerations.

Defining the concept through the Vienna process

Being a definite milestone in the development of international law in the 20th century and one of the core instruments of international law in general, the VCLT is a product of persistent efforts to reconcile widely divergent views on the nature and purpose of international law. Since the notion of peremptory norms speaks to the very heart of the classic voluntarism–natural law debate, the codification of its definition was certainly not an easy task for the drafters of the Convention. A study by Sztucki on the records of the two conferences that took place as part of the drafting process of the VCLT reveals that the participating states, in fact, nominated a substantial amount of norms potentially meriting peremptory status.[22] The nominated norms can be roughly divided into two groups: norms defending the independence and security of states on one hand[23], and norms safeguarding the interests of individuals[24], such as the right to life, liberty or property, on the other.[25] Trying to pinpoint the content of peremptory norms, many states spoke of the societal criterion underlying *jus cogens*, stressing the norms' importance in terms of assuring the international community's legal security[26], protection of public order[27] as well as emphasizing the relationship between the norms and the legal conscience of the international community[28].

As is known, the ILC chose not to list specific peremptory norms in the Convention. Thus, Article 53 reads as follows:

> [..]a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Rather understandably, this definition is often argued to expose *jus cogens* to conceptual and theoretical weaknesses. With respect to conceptual weakness, the definition is sometimes said to be largely tautological for it describes a peremptory norm as a norm that is considered to be

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[20] *Ibid*.
[21] *Ibid*.
[22] Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties*: *A Critical Appraisal,* (Springer-Verlag: 1974).
[23] To name a few of the norms falling in this group as nominated by the participant States: prohibition of the threat or use of force contrary to the UN Charter, sovereignty of states, prohibition of colonialism, non-intervention in the domestic affairs of other states, principle of pacific settlement of disputes.
[24] Among the norms nominated in this group were: prohibition of genocide, prohibition against slavery and prohibition of piracy.
[25] George Haimbaugh, "Jus Cogens: Root & Branch (An Inventory)", in *Tauro Law Review* Vol. 3 (1987): p. 212.
[26] Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (Finnish Lawyers Publishing Company: 1988): p. 167.
[27] *Ibid*.
[28] *Ibid,* p. 176.

peremptory without further specifying the criteria.[29] As for theoretical weakness, the definition fails to provide a principle or idea on which the whole concept of *jus cogens* is founded. In other words, it does not entail an adequate, solid theoretical foundation that would advance effective application of this normative category.

Admittedly, the Commission chose to "leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals"[30] to prevent any "misunderstanding as to the position concerning other cases not mentioned in the article"[31] if any precise examples had been mentioned. However, the ILC did provide a non-exhaustive list of examples of treaties that it would consider in contradiction with *jus cogens* norms.[32] It deserves to be underlined that most of these examples (similarly to those nominated by the participating states at the Vienna Conference) seek protection of the individual and address violations that quite unmistakably dishonour human dignity.

Despite the ambiguity that Article 53 entails with regard to the substantive content of peremptory norms, it does clarify certain essential aspects of these norms that are of fundamental importance for the present inquiry and thus will now be looked at in turn.

The implied normative hierarchy

The definition of *jus cogens* in the VCLT implies recognition of a highly disputed idea, namely, the hierarchy in the international legal system. This "systematizing and morally structuring virtue"[33] of *jus cogens* is one of the main aspects of the concept's appeal for international lawyers as it entails a promise of an organized international legal system – something that international lawyers tend to long for, influenced by the authentic example from domestic legal systems.

The definition in the VCLT indicates *jus cogens* as an element of structural and substantive hierarchies.[34] In the sense of structural hierarchy, *jus cogens* is placed in the

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[29] For inquiry into the conceptual and theoretical weaknesses of *jus cogens see*: Markus Petsche, "Jus Cogens as a Vision of the International Legal Order", in *Penn State International Law Review* 29, Issue 2 (2010): pp. 240-242.

[30] Draft Articles and Commentaries to the VCLT (1966), p. 248.

[31] *Ibid*.

[32] Such treaties are: treaties envisaging use of force contrary to the provisions prescribed by the Charter of the United Nations; treaties envisaging conduct considered criminal under international law; and treaties such as the slave trade, genocide, and piracy as well as treaties that violate human rights, the principle of self-determination or the fundamental equality of states thus contemplating conduct of acts in suppression of which "every state is called upon to cooperate" (*See*: *Yearbook of the International Law Commission* 1966, Vol. II, p. 248).

[33] Jean d'Aspremont, "Jus Cogens as a Social Construct Without Pedigree", in *Netherlands Yearbook of International Law* 46 (2015): p. 93.

[34] As between two norms, different types of possible hierarchical relations can be discerned, namely, structural, substantive, logical and axiological hierarchy. The first type – structural hierarchy – refers to the relations according to the conditions of law-making, or, to put it differently, between the laws on the creation of norms and the norms created thereof. The second type – substantive hierarchy – refers to the relations between two norms as instructed by one of the norm's derogatory power. Accordingly, a legal norm with the ability to abolish (or confine) the legality of another norm is of a higher rank as compared to the derogable norm. Thirdly, the logical or linguistic hierarchy is essentially based on the distinction between primary and secondary rules. As HLA Hart famously put it, secondary rules are on a different level than primary rules, since they are 'about such rules': primary rules refer to actions that must or must not be done, whereas secondary rules refer to the primary rules themselves. Finally, the axiological hierarchy maintains

context of law-making by the first sentence of Article 53, which, ultimately, deems peremptory norms as limiting states' treaty-making power. In respect to *jus cogens* as a phenomenon of substantive hierarchy, its indication is found in the second sentence of Article 53, whereby a peremptory norm is defined as 'a norm from which no derogation is permitted' thus establishing its derogatory power. However, most scholars immersed in the topic stress the moral paramountcy of *jus cogens*, indicating its unique place specifically in the axiological hierarchy of international law.[35] This aspect of the special moral importance of *jus cogens* was acknowledged throughout the whole Vienna process (and before) by various actors as already addressed previously. It suffices to recall that it has been generally accepted that the status of a peremptory norm is derived, in the words of the ILC, from "the particular nature of the subject-matter with which it deals"[36], which further points to a peremptory norm being "superior to other rules on account of the importance of its content"[37].

The hierarchical superiority of *jus cogens* norms inevitably raises the question of how international law copes with different degrees of normativity. As famously put by Prosper Weil, implied variable normativity as proposed by *jus cogens* is a conceptual weakness of international law, for it turns normativity into a question of "more or less" and blurs the threshold of detecting the existence of a legal norm thus replacing "the monolithically conceived normativity of the past by graduated normativity"[38].[39] Thus, given the intricacies of international law-making, the hierarchical status of peremptory norms certainly is a conundrum – one that has even been referred to as "one of the most impenetrable mysteries"[40] in international law. The complexity of this issue was demonstrated in the judgment in *Armed Activities on the Territory of the Congo*, where the International Court of Justice (ICJ) was asked to adjudge the reservation of Rwanda to the Genocide Convention as null and void as it sought to "prevent the […] Court from fulfilling its noble mission in safeguarding peremptory norms"[41]. Instead, after having reaffirmed the prohibition of genocide as surely a peremptory norm, the Court famously affirmed that a breach of a peremptory norm does not suffice to generate the jurisdiction of the Court, because the jurisdiction of the Court remains strictly consent-based.[42] It follows that

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hierarchical relations between norms based on the importance of their contents. From a strictly formalist positivist's perspective, this sort of hierarchy does not and cannot exist as there are no formal, systematic criteria for arranging legal norms according to the value of their content. Be that as it may, some scholars explicitly use the idea of axiological hierarchy to systemize the international legal system. For more detailed discussion on the different types of hierarchy, *see*: Thomas Kleinlein, "Jus Cogens as the 'Highest Law'? Peremptory norms and Legal Hierarchies", in *Netherlands Yearbook of International Law* 46 (2015): pp. 174-207.

[35] *See, e.g.*: Susan C. Breau, "The Constitutionalization of the International Legal Order", in *Leiden Journal of International Law* 21 (2008): p. 550.

[36] Draft Articles and Commentaries to the VCLT (1966), p. 261.

[37] International Law Commission, *Report on the Fragmentation of International Law,* p. 182.

[38] Prosper Weil, "Towards Relative Normativity in International Law?" in *American Journal of International Law* 77 (1983): p. 421.

[39] *Ibid*, p. 415.

[40] Enzo Cannizzaro, "Peremptory Law-making", in *International Law-making: Essays in Honour of Jan Klabbers*, eds. Rain Liivoja et al. (Routledge: 2014): p. 261.

[41] *Armed Activities on the Territory of the Congo* (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, paras. 56, 121.

[42] Although often argued as having diminished the claims of *jus cogens* as hierarchically superior to other norms in international law, because of the apparent choice of the ICJ to deem rules on jurisdiction "more important" than *jus cogens*, this reading of the judgment is fundamentally misconceived as the issue involved interaction between substantive and

even a breach of obligations arising from *jus cogens* "cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute"[43]. Judge *ad hoc* Dugard in his Separate Opinion wrote that an opposite conclusion by the Court would have been "a bridge too far"[44] and defended the Court's approach by stressing that:

> the scope of *jus cogens* is not unlimited and the concept is not to be used as an instrument to overthrow accepted doctrines of international law.[45]

He pointed out that the Court could not have declared a peremptory norm as a trump over an accepted and recognized norm of general international law "which has guided the Court for over 80 years"[46]. Therefore, while at first glance the Court's dictum might seem to have rejected a *jus cogens* claim of normative hierarchy in international law, upon closer examination it becomes clear that the dictum had no effect on this matter as *jus cogens* and the procedural rules of international law, such as the rules on the jurisdiction of the ICJ, cannot conflict in such a way.

The notion of the international community

The way the definition in Article 53 of VCLT conditions *jus cogens* norms to recognition by the "international community of states as a whole" signals acknowledgment of the existence of an international community, the legal value of which is often contested for the existence of the legal and social realities that necessarily predicate such a community are put in doubt. In this respect, James Crawford has rightly pointed out that the "international community as a whole is an abstraction"[47] in so far as no legal entity is known by that name. However, while the international community is certainly not conceived as a legal entity under international law, it nevertheless is a legal community.[48] It is through these lenses of the construct of legal community that the potential of *jus cogens* can be truly appreciated.

Without entering the realm of sociology, it suffices to note that the emergence of an international community is the result of a complex course of development of the international legal system over time. What started as purely profit-oriented social relations as exemplified by the Westphalian model of international relations with the only aim being to achieve peace between the states through the legal articulation of two principles governing all social interactions between them – sovereignty and equality – has developed into an intricate web of interdependencies and shared interests today.[49] Alongside gradual intensification of interaction due to the industrial revolution and development of an international economy at the end of the 18th century, the Westphalian model of the law of coexistence started to yield to the law of cooperation. Ultimately, a new model of synergy between the members of international society has appeared, whereby not all interests can be deemed strictly individual as the pressing reality

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procedural rules of international law and thus cannot, technically, be regarded as giving rise to a conflict as a matter of hierarchical order.

[43] *Supra* note 74, para 64.

[44] *Armed Activities on the Territory of the Congo*, *supra* note 41, para 14.

[45] *Ibid*, para 6.

[46] *Ibid*, para 13.

[47] James Crawford, "Responsibility to the International Community as a Whole", in *Indiana Journal of Global Legal Studies* 8 (2001): p. 306.

[48] *See* Samantha Besson, "*UbiIus, IbiCivitas*: A Republican Account of the International Community", in *Legal Republicanism: National and International Perspectives*, eds. Samantha Besson and Jose Luis Marti. (Oxford University Press: 2009): pp. 222-225.

[49] For a detailed survey on the development of the international community, *see*: Asher Alkoby, "Three Images of 'Global Community': Theorizing Law and Community in a Multicultural World", in *International Community Law Review* 12 (2010): pp. 41-47.

of the existence of some global or, in other words, 'community interests' is acknowledged. Consequently, the construct of the international community has matured and is now "cemented by its members' commonalities"[50].

The formulation "international community of states" should also be addressed with regard to its express indication of states as the constituent element of the international community. In light of the changing reality for states as the sole participants of international law, one should ask if it would not be more precise to omit the word 'states' so that the notion of international community could be regarded as more inclusive towards other actors on the international plane. It is questionable whether such a pure model of international community as a society of states, with the only source of legitimacy thus being the states, corresponds to actual reality, where, for instance, the laws of international organizations, such as the EU, account for a significant part of international law as well.[51] Having said that, while international law is indeed no longer a creation only for the benefit of states, it still largely remains created by states; and while it is true that international organizations have increased legislative power, their constituent documents nevertheless remain agreements between states, and again, while the role of individuals is increasing on the international plane, they are excluded from – or better said, they are only indirectly involved in – international law-making.[52] Even more so in the context of *jus cogens:* it seems inconceivable that the recognition of peremptory norms could be formally expressed through other means than states themselves. However, while the acceptance of peremptory norms largely depends on states as the constituent elements of international law, one should not forget that this does not mean that states are the sole beneficiaries of the *jus cogens* regime. Quite the opposite: as the upcoming examination of the potential of *jus cogens* will show, the main addressees of the benefits entailed by the structures of *jus cogens* are the basic units of states as such – individuals.

Shared interests

The chosen wording of Article 53 of VCLT is "symptomatic of a subjacent interest"[53] of peremptory norms, the presence of which was already discussed at length by Special Rapporteurs and the participants of the Vienna Conferences alike. Essentially, it proposes the community of states as entailing a value system that is not necessarily an aggregation of distinct individual interests alone; rather, it suggests thinking of the international value system as grounded on such values, among others, that are shared by all the members of the community.[54] Reference to this subjacent shared interest of the international community is found already in the very first judgment of the ICJ – *Corfu Channel*– where the Court relied on "elementary considerations of humanity"[55] as giving rise to obligations on the part of the Albanian authorities to inform approaching warships of the danger of a minefield in the water, in the general (shared) interest of navigation. In addition, Judge Alvarez in his Individual Opinion stressed that "a new international law had arisen […] founded on social

[50] Monica Hakimi, "Constructing an International Community", in *American Journal of International Law* 111 (2017): p. 53.
[51] Besson,*supra* note 48, pp. 214-217.
[52] *Ibid.*, p. 211.
[53] Santiago Villalpando, "The Legal Dimension of the International Community: How Community Interests are Protected in International Law", in *The European Journal of International Law* 21, Issue 2 (2010): p. 403.
[54] Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (Cambridge University Press: 2015): p. 29.
[55] *Corfu Channel* (*The United Kingdom of Great Britain and Northern Ireland v. Albania*), Judgment, I.C.J. Reports 1949, p. 22.

interdependence" and that, consequently, due "to the *predominance of the general interest*, the States are bound by many rules which have not been ordered by their will" [emphasis added][56]. Another noteworthy reference to community interests is found in the *Reservations to the Genocide Convention* Advisory Opinion of the ICJ, where the Court expressly stated that:

> [t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose […] In such a convention, the contracting States do not have any interest of their own; they merely have, one and all, a common interest.[57]

It is exactly this subjacent collective interest that differentiates peremptory norms from ordinary international norms in so far as it refers to certain shared concerns for preservation of some global legal goods the protection of which can only be attained if all members participate in so doing.[58] As already noted, these shared interests are not merely an aggregation of various particular states' interests. Instead, the common interest:

> is formed at the intersection between the ideal and the real, as society responds to its current and potential situation in the light of its continuing theories, values and purposes.[59]

It follows that – at least with regard to certain interests – the members of the international community can be said to be "imbued with a collective consciousness which subsumes individual awareness"[60]. Intuitively, as far as the community interests represented by *jus cogens* norms are concerned, these should take precedence over the individual interests of states where the preservation of the latter risks frustrating the common good pursued by collective interests.[61] That being said, this observation does not necessarily presuppose that community values are by definition of greater importance than other values, but rather suggests that the advantages of preservation of community values are greater, for the benefits of their protection are spread across the entire community.[62]

However, the evident lack of agreement as to what interests merit the status of community interests is normally perceived as the ultimate weakness and signal of the illegitimacy of the notion of an international community.[63] As James Brierly has suggested, exactly because every society "needs a spiritual as well as a material basis", in other words, "a sentiment among its members of community and of loyalty, of shared responsibility for the conduct of a common life", doubts as to the existence of an international society are justified.[64] Aware of the problems that this lack of accord may create, Monica Hakimi has proposed the contrasting idea of a community being constituted by conflict, not exclusively an agreement.[65] Accordingly, the existence of a disagreement as such means that the members of the community consider there to be some issues of importance for all of them, meaning that the

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[56] *Ibid*, pp. 40 and 43 respectively (Separate Opinion of Judge Alvarez).
[57] *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23.
[58] Villalpando, *supra* note 53 p. 391.
[59] Philip Allott, *The Health of Nations: Society and Law Beyond the State* (Cambridge University Press: 2002), p. 295.
[60] Villalpando,*supra* note 53, p. 392.
[61] *See* for discussion: Weatherall, *Jus Cogens*, p. 21; Villalpando, *supra* note 53, p. 415.
[62] Villalpando,*supra* note 53.
[63] M. Hakimi,*supra* note 50, pp. 3-4.
[64] James Leslie Brierly, *The Basis of Obligation in International Law, and Other Papers*, eds. H. Lauterpacht and C.H.M. Waldlock. (Oxford: Clarendon Press, 1958), p. 251.
[65] Although to some extent counterintuitive, this idea is not novel by any means. To this end, e.g., the Aristotelian view on community underscored diversity between opinions as a crucial element of community as opposed to an "obstacle to social harmony that community seeks to overcome" (See Hakimi, *supra* note 50, p. 5).

disagreement itself signals recognition of the existence of the community on the part of its members. In respect to *jus cogens* this means that the significance of peremptory norms in demonstrating the existence of an international community stems not only from the potential of peremptory norms to define the values of the community, but also from the fact that the very dilemma over *jus cogens* invites otherwise loosely connected actors to argue about what such values are or could be, thus contributing to the further forming of that community. [66]

Be that as it may, the question of what interests and values the notion actually refers to remains unanswered. Moreover, given that values are not "a free-standing source of obligation in international law"[67], the utility of their identification may even appear senseless.[68] Having said that, the benefits of identifying the values at the basis of peremptory norms become evident as soon as it is realized that these values play an important role in the process of delineating norms and obligations "in the integrity and enforcement of which the international community shares a strong common interest"[69] so that the international legal system could be adjusted accordingly.

Observations by the International Court of Justice

Peremptory norms, while hardly new to the language of the judgments delivered by the ICJ, remain applied rather rarely.[70] Although already in the first contentious case before the ICJ the Court referred to 'elementary considerations of humanity'[71], which can be easily recognized as relating to the notion of *jus cogens,* in general the Court has exhibited hesitation in addressing *jus cogens.*[72] However, even if not categorically asserting the peremptory nature of certain norms, the Court has nevertheless considered the meaning and scope of *jus cogens* on several occasions.

A good starting point for the outline of the ICJ's deliberations on peremptory norms is its judgment in *Military and Paramilitary Activities in and Against Nicaragua*[73], which is often

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[66] Hakimi, *supra* note 50, p. 9.

[67] Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press: 2017), p. 4.

[68] The fact that considerations based on shared values of the international community do not, as such, form the basis of the peremptory character of certain norms' was affirmed in *South West Africa* (Second Phase Judgment), where the ICJ noted that it is erroneous to hold that "humanitarian considerations are sufficient in themselves to generate legal rights and obligations", because the Court could "take account of moral principles only in so far as these are given sufficient expression in legal form" (*see*: *South West Africa*, Second Phase, Judgment, I.C.J. Reports1966, para 49).

[69] Costelloe, *supra* note 67, p. 4.

[70] The first mention of peremptory norms is found in the Separate Opinion of Judge Schücking in the judgment of the Permanent Court of International Justice in *Oscar Chinn* (*United Kingdom v Belgium*), 1934, at para 149: "I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even today, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void."

[71] Villalpando, *supra* note 53, p. 391.

[72] For a comprehensive analysis of the Court's application of *jus cogens* in its jurisprudence, *see*: Gleider Hernandez, "A Reluctant Guardian: The International Court of Justice and the Concept of 'International Community'", in *British Yearbook of International Law* 83(2013), pp. 13-60.

[73] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, Judgment, I.C.J. Reports 1986.

observed as initiating a new phase in the Court's reading of the international legal order "into a natural embrace of its communitarian obligations"[74]. However, this paradigm shift should not be overstated as the Court's reasoning was still firmly based in classical legal positivism and the Court used the language of customary law in its reasoning. Moreover, despite having relied on the ILC's pronouncements of the prohibition of use of force as *jus cogens*[75], the Court itself did not expressly refer to the notion of peremptory norms, although it might be inferred that the Court found confirmation of this fact by reference to the aforementioned acknowledgment by the ILC as well as the Court's observation that prohibition of the use of force was "frequently referred to in statements by State representatives [..]as*a fundamental or cardinal principle*" [emphasis added][76].

Next, in the *Nuclear Weapons* Advisory Opinion, the Court repeated the notion of "elementary considerations of humanity", as previously used in the *Corfu Channel* reasoning, to demonstrate the fundamentality of rules of humanitarian law as applied in armed conflicts. Furthermore, the Court declared such rules to constitute "*intransgressible principles* of international customary law" [emphasis added][77] meaning that they are to be observed by states "whether or not they have ratified the conventions containing them"[78] and finally concluded that "these principles and rules of humanitarian law are part of *jus cogens*"[79]. With respect to recognition of certain norms as *jus cogens,* repeated mention should be made of the judgment in *Armed Activities in the Congo* as it is notable for its pronouncement on the prohibition of genocide as 'assuredly' having the character of a peremptory norm, which was later also upheld in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide.*[80]

More recently, in *Jurisdictional Immunities of the State*[81], the Court had to take an explicit position in respect to the consequences of a rule being characterized as peremptory. While Italy defended the practice of its courts whereby they had adjudicated cases against Germany in respect to claims for Nazi-era war crimes, on the grounds of the violations pertaining to *jus cogens*, Germany argued that its jurisdictional immunities could not be waved even in case of breaches of peremptory norms. Ultimately, the ICJ upheld Germany's claim for immunity, largely building on its dictum in *Armed Activities on the Territory of Congo.*

Last to be mentioned, in *Questions relating to the Obligation to Prosecute or Extradite*[82] the Court acknowledged that the prohibition of torture "has become a peremptory norm (*jus cogens*)"[83].[84] In his Separate Opinion, Judge Trindade expressed regret at the Court's failure to

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[74] Hernandez, *supra* note 72, p. 17.
[75] *Nicaragua v. United States of America, supra* note 73, para 190.
[76] *Ibid.*
[77] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para 79.
[78] *Ibid*.
[79] *Ibid.*, para 83.
[80] *See*: *Armed Activities on the Territory of the Congo*, *supra* note 41 para 64;*Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, para 87.
[81] *Jurisdictional Immunities of the State* (*Germany v. Italy: Greece intervening*), Judgment, I.C.J. Reports 2012.
[82] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), Judgment, I.C.J. Reports 2012.
[83] *Ibid*, para 99.
[84] At the time of this judgment, the peremptory character of the prohibition of torture had already been upheld by the International Criminal Tribunal for the Former Yugoslavia (see *Prosecutor v. Anto Furundzija* (Trial Judgement), IT-95-17/1-T, ICTY (1998), para 153).

"dwell further upon it" so as to develop reasoning on *jus cogens* "as it could and should, thus fostering the progressive development of international law"[85]. He himself took the opportunity and stressed that by "enshrining common and superior values shared by the international community as a whole, *jus cogens* ascribes an ethical content to the new *jus gentium*, the International Law for humankind"[86].

In conclusion, while the Court has somewhat contributed to the understanding of some of the norms that can be classified as *jus cogens,* all in all it could have taken a more active role in the advancement of the doctrine. Surely, the main reason for the Court's hesitation is not only the many ambiguities surrounding the normative category, but also difficulty in reconciling it with the consent-based approach to international law and, perhaps most importantly, the risk of judicial activism that a more proactive role by the ICJ in this regard could provoke. Nevertheless, as evidenced by the pronouncements of the Court, the currently identified peremptory norms in international law are the prohibitions against slavery[87], genocide[88], crimes against humanity, torture[89], systematic racial discrimination[90], aggression, and war crimes[91].

Lack of clarity – deadlock or opportunity?

Because of the difficulties in arriving at a coherent and fixed content of peremptory norms, many scholars argue that the normative category in fact lacks practical utility.[92] As a definition of criteria of the substantive content of *jus cogens* norms is inaccessible, it is largely left for interpretation by anyone who seeks a formulation of what *jus cogens* norms entail. Andrea Bianchi sees this possibility as one of the dominant threats for the concept of *jus cogens* altogether, as it allows "some of its most fervent supporters to see it everywhere"[93]. Such excess in identifying rules as peremptory would only undermine the credibility of this normative category.[94]Ian Sinclair commented on this matter stressing that when invoked indiscriminately, *jus cogens* "could rapidly be destructive", therefore it must be applied "with wisdom and restraint in the overall interest of the international community"[95].

All things considered, the lack of a conclusive definition of *jus cogens* clearly prevents a more effective understanding of peremptory norms in international law in general and is certainly disadvantageous for the present objective of delineating the values that underlie *jus cogens*. However, the complications should not be overestimated. As has been famously pointed out, even if the category is like an empty box, it is still valuable "for without the box it

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[85] *Belgium v. Senegal*,*supra* note 82, Separate Opinion of Judge Trindade, para 158.
[86] *Ibid.*para 182
[87] *See: Germany v. Italy: Greece intervening*, *supra* note 81, para 93
[88] *See: Armed Activities on the Territory of the Congo, supra* note 41, paras 64, 78.
[89] See *Questions Relating to the Obligation to Prosecute or Extradite*, para 99.
[90] *Armed Activities on the Territory of the Congo, supra* note 41, para 78.
[91] *See*: *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 77, para 83; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, para 157.
[92] *See, e.g.*, Mark Weisburd, "The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina", in *Michigan Journal of International Law* 17, Issue 1 (1995): pp. 27-40.
[93] Andrea Bianchi, "Human Rights and the Magic of Jus Cogens", in *The European Journal of International Law* 19, Issue 3 (2008): p. 506.
[94] *Ibid*.
[95] Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press: 1984), p. 223.

cannot be filled".[96] This section of the article has attempted to show that the box can, indeed, be filled with valuable information on *jus cogens* despite the drawbacks of its definition in the VCLT.

From what has been discussed above, it is clear that peremptory norms function as the normative expression of particular interests that are based on fundamental values of the international community as a whole. *Jus cogens*, then, is grounded on "certain overriding universal values"[97]: values that are not only, coincidentally, in the interest of everyone that constitutes the international community, but *values that are shared primarily due to their significance for the very existence and viable functioning of the highly complex, interdependent international society* that we witness today. If this description seems far-reaching at first glance, upon second thoughts it should be asked – is there really an abundance of values that can be regarded as shared by the whole of the international community? Is there really a long list of interests which can be defined as fundamental for it? This is unlikely to be so.

3. RECOGNITION OF THE VALUE OF HUMAN DIGNITY

In line with the rough contours of the description of values embedded in *jus cogens* as spelled out at the end of the previous section, it is clear that in order for human dignity to be considered as a foundational value of *jus cogens* norms, it has to be a global legal good in that it is recognized as a value by the whole of the international community of states, and representative of its fundamental interests. To see if it is so, firstly, the international recognition of the value of human dignity has to be examined and, secondly, it is necessary to look into the necessity of human dignity as a value or, in other words, to consider the fundamentality of human dignity and the function of respect for it within the international legal system. This section is devoted to an inquiry into the first of these requirements – recognition of the value as imperative at the international level.

Recognition in international law

There is an apparent, critical difference as to how a value materializes as an important element of a legal system in national and international frameworks. In national structures, it is the idea of the sovereign that legitimizes certain values as engraved in a given legal system and it is thanks to this that such values attain the status of basic, constitutional, paramount or foundational, to name just a few of the words used to denote their place in the legal hierarchy. But how does the international legal system legitimize its fundamental values in light of the absence of an international sovereign? Evidence for the paramountcy of certain values has to be sought elsewhere. It is not the aim here to settle where and how the legitimacy of fundamental values on the international plane is to be attained. For present purposes, recognition of the value as expressed in regional and international legal instruments will be explored. It is anticipated that wide recognition of the value of human dignity indicates that the value conforms to the precondition of being accepted by the whole of the international community. After all, international legal instruments, especially under the auspices of the United Nations, can hardly be regarded as not demonstrating overall international sentiment in respect of the particular subject matter they cover, for they enjoy overwhelming acceptance among

[96] Georges Abi-Saab, "The Third World and the Future of International Legal Order", *Revue Egyptienne de Droit International* 29 (1973): p. 53.
[97] Vera Gowland-Debbas, "Judicial Insights into Fundamental Values and Interests of the International Community", in *The International Court of Justice: Its Future Role after Fifty Years*, eds. A. S. Muller et al. (Kluwer Law International: 1997), p. 328.

states all across the globe and, in light of the absence of an international sovereign, enjoy authority approximating to that of analogous legitimacy in national legal systems, which is otherwise unparalleled at the international level. Importantly, due to the limits of this paper, in terms of the background of the richness of legal instruments worldwide, only a cursory inquiry into their content is possible.

Within the UN system

Reference to human dignity is a common feature of modern international law, for international instruments recurrently adopt the so-called "dignity language".[98] However, this has not always been so; it was the atrocities experienced in WW2 that served as the trigger for adoption of the UN Charter and later the Universal Declaration of Human Rights (UDHR)[99], which, in turn, spurred an unforeseen commitment to the protection of and respect for human dignity and its further inclusion in constitutional, regional and international legal texts across the globe. Starting with the UN Charter, all of the most significant UN Conventions, including, of course, the UDHR, have included a reference to the value of human dignity and have endorsed the paramount need for its protection and respect for it.

Understandably, the notion of dignity has played an especially central role in the development of international human rights law. Indeed, dignity has been so paramount to the United Nations' conception of this field of law that when adopting guidelines for future human rights instruments in 1986, the United Nations expressly asserted that any new human rights instruments have to be, inter alia, "of fundamental character and derive from the inherent dignity and worth of the human person"[100]. Thus, the UN Conventions adopted ever since often refer to dignity and its centrality for human rights and frequently stress the significance of human dignity for the specific rights that are in question in the particular convention. Examples include: the Supplementary Convention to the Slavery Convention[101], which reaffirms "faith in the dignity and worth of the human person"[102]; the Convention on the Rights of the Child[103], where the necessity for bringing up a child in the spirit of dignity is emphasized[104]; the Convention on the Rights of Migrant Workers[105], which stipulates that all migrant workers "shall be treated with humanity and with respect for the inherent dignity of the human person"[106]; and the Convention on the Rights of Disabled Persons[107], which sets as its purpose the

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[98] Christopher McCrudden, "Human Dignity and Judicial Interpretations of Human Rights", in *European Journal of International Law* 19, Issue 4 (2008): p. 670.
[99] United Nations General Assembly, *Universal Declaration of Human Rights*, A/RES/217(III) (10 December 1948).
[100] United Nations General Assembly Resolution, Setting international standards in the field of human rights, A/RES/41/120 (4 December 1986).
[101] United Nations, *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, UN Treaty Series vol. 266, p. 3 (7 September 1956).
[102] *Ibid*, Preamble.
[103] United Nations, *Convention on the Rights of the Child*, UN Treaty Series vol. 1577, p. 3 (20 November 1989).
[104] *Ibid*, Preamble.
[105] United Nations, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, UN Treaty Series vol.2220, p. 3 (18 December 1990).
[106] *Ibid*, Article 17.
[107] United Nations, *International Convention on the Rights and Dignity of Persons with Disabilities*, UN Treaty Series vol.2515, p. 3 (13 December 2006).

promotion of respect for the inherent dignity of persons with disabilities[108]. Additionally, endorsement of respect for human dignity and its centrality in more specific areas can be evidenced in international instruments dealing with, for example, the right to food[109] or the death penalty[110].

Before turning to the UDHR, the adoption of which was undoubtedly momentous for discussion and recognition of the value of human dignity at the international level, special mention should be made of the two covenants – the International Covenant on Civil and Political Rights[111] (ICCPR) and the International Covenant on Social, Economic and Cultural Rights[112] (ICESCR). Together with the UDHR these covenants constitute what is known as the International Bill of Human Rights. They are among the most celebrated instruments of international law to this day and, furthermore, accentuate the authority of human dignity as a value pertinent to the whole of the international community. In particular, the preambles of both covenants reiterate in an identical way the recognition of dignity as inherent for "all members of the human family" and proclaim it as a "foundation of freedom, justice and peace in the world". Additionally, both the ICCPR and the ICESCR assert that the rights conceived in the Covenant "derive from the inherent dignity of the human person".[113]

As already stated above, the Universal Declaration of Human Rights is commonly perceived as the turning point for considerations of the potential of human dignity as a legal value. In the Declaration dignity is mentioned five times: twice in the preamble, once in Article 1, and twice with regard to social and economic rights - in Articles 22 and 23. The preamble, most importantly, states that:

> Whereas *recognition* of the inherent dignity and of the equal and inalienable rights *of all members of the human family* is the foundation of freedom, justice and peace in the world [emphasis added].

The other reference to dignity in the preamble reads:

> Whereas the peoples of the United Nations have in the Charter reaffirmed their *faith* in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women [emphasis added].

There are two considerations to be acknowledged from these references. The first important consideration flows from the definition of human dignity as a quality inherent to "all members of the human family": this formulation informs the reader about the quality of human dignity as universal. The other significant idea to be taken away from the preamble stems from the use of the word 'faith' instead of 'recognition' in the second reference to human dignity: while the initial choice of the word 'recognition' might induce an assumption of human dignity being dependent on recognition as a constituent element, use of the word 'faith' in the second

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[108] *Ibid.*, Art. 1.
[109] *See:* United Nations, *Agreement Establishing the International Fund for Agricultural Development*, UN Treaty Series vol.1059, p. 191 (13 June 1976), Preamble.
[110] *See:* United Nations, *Second Optional Protocol to the International Covenant on Civil and Political Rights*, UN Treaty Series vol.1642, p. 414 (15 December 1989), Preamble.
[111] United Nations, *International Covenant on Civil and Political Rights*, UN Treaty Series vol.999, p. 171 (16 December 1966).
[112] United Nations, *International Covenant on Economic, Social and Cultural Rights*, UN Treaty Series vol.993, p. 3 (16 December 1966).
[113] *See* the Preambles of both Covenants, *supra* notes 111 and 112.

instance dismisses any such confusion and informs the reader that human dignity is not conditioned by any such societal approval.[114]

Next, Article 1 of the Declaration reads:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Apart from a repeating emphasis on the universality of human dignity, Article 1 stresses that the dignity conferred upon individuals is equal – it is not a variable that can be measured in different amounts from one person to another. It is a constant, inherent quality of every human being.

Outside the UN system

Even though the centrality of the concept of human dignity in the discourse of international human rights law is undisputed, it is also a common feature of instruments of international humanitarian law. Similarly to the field of human rights, for international humanitarian law a major boost for the use of the language of dignity also came following the end of WWII. Of chief importance in this regard was the approach taken for the drafting process of the Geneva Conventions, whereby "the importance of dignity as its basis"[115] was clear from the very beginnings. The initial preamble for all four conventions, as proposed by the International Committee of the Red Cross, stated that:

> [r]espect for the personality and dignity of human beings constitutes a universal principle which is binding even in the absence of any contractual undertaking.

The final text of the conventions refers to human dignity most notably in the Common Article 3, according to which "outrages upon personal dignity, in particular humiliating and degrading treatment" are forbidden and "shall remain prohibited at any time and in any place whatsoever".

Although to differing degrees and with varying conceptions of its role and function, human dignity is also incorporated in all the major regional human rights instruments. In the context of the inter-American human rights system, mention should be made of the American Declaration of the Rights and Duties of Man, the first international human rights instrument in the world to be adopted, the preamble of which states that: "all men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience…".[116] The other major human rights instrument in the region, namely, the American Convention on Human Rights,[117] also refers to the dignity of human beings, though purely in the context of the right to humane treatment.[118] Recognition of dignity as inherent in every human person is also included in the Preamble of the San Salvador Protocol to the American Convention on Human

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[114] Klaus Dicke, "The Founding Function of Human Dignity in the Universal Declaration of Human Rights", in *The Concept of Human Dignity in Human Rights Discourse*, ed. David Kretzmer et al. (Kluwer Law International: 2002), pp. 114.

[115] McCrudden, *supra* note 98, p. 667.

[116] This Declaration (also known as the Bogota Declaration) is nowadays largely displaced by the more elaborate American Convention on Human Rights, which came into force in 1978, though it is still used as a source of international obligations with regard to those states that have not ratified the Convention – *e.g.* Canada, the USA and Cuba.

[117] Organization of American States, *American Convention on Human Rights* (Pact of San Jose), adopted 22 November 1969.

[118] Art. 5 of the American Convention reads: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Rights[119], where recognition of the dignity of every person is formulated as the basis for civil, political and economic, social and cultural rights alike.

The main human rights instrument in the African system of human rights protection – the African Charter on Human and Peoples' Rights[120] (also known as the Banjul Charter) – in its preamble echoes the Charter of the Organization of African Unity and reaffirms that dignity is among the "essential objectives for the achievement of the legitimate aspirations of the African peoples"[121]. Furthermore, in the substantive part of the Charter appears the right to have one's inherent dignity respected.[122] An individual right to dignity is also included in the substantive provisions of the Protocol to the Charter on the Rights of Women, which stipulate that: "every woman shall have the right to the dignity inherent in a human being"[123]. The same Protocol is also noteworthy, for its Preamble states that dignity (the same as equality, peace and justice, to name a few) is among the principles that underlie African values.[124]

In the European system of human rights protection, the value of human dignity is protected through various mechanisms. Firstly, it is an important value within the human rights protection system of the Council of Europe. Although no reference to human dignity appears in the text of the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has drawn extensively on the notion of human dignity as a basis for its decisions, particularly in the context of Article 3 of the Convention, which prohibits torture and inhuman and degrading treatment. The very first time the ECtHR referred to human dignity in this context was in 1978 in *Tyrer v. UK*, when the Court ruled that corporal punishment is contrary to the prohibitions expressed in Article 3 of the ECHR as such a sentence is a violation of the very purpose of Article 3, which is the protection of a "person's dignity and physical integrity"[125]. Until today, the Court has referred to the necessity of protection of human dignity in the context of prohibition of torture[126], the right to private life[127] and the right to a fair hearing[128], to name a few. However, despite not being included in the text of the ECHR, human dignity is prominent in several other conventions of the Council of Europe, for example, the Convention on Human Rights and Biomedicine[129] and the Revised European Social Charter[130].

Additionally, human dignity is a prominent value in the European Union system. According to Advocate General Jacobs, the constitutional traditions of the Member States of the European Union altogether indicate that "there exists a principle according to which the State must respect not only the individual's physical wellbeing, but also his dignity, moral integrity

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[119] Organization of American States, *Additional Protocol in the Area of Economic, Social and Cultural Rights* (Protocol of San Salvador), adopted 17 November 1988.
[120] African Union, *African Charter on Human and Peoples' Rights* (Banjul Charter), adopted 27 June 1981, OAU Doc. CAB/LEG/67/3.
[121] *Ibid.*, Preamble.
[122] *Ibid.*, Article 5.
[123] African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, adopted July 2003, Art. 3.
[124] *See:* Preamble of the Protocol, which underlines "the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, *dignity*, justice, solidarity and democracy" [emphasis added].
[125] *Tyrer v. United Kingdom*, 25 April 1978, §33, ECHR Series A no. 26.
[126] *Ribitsch v. Austria,* 4 December 1995,§38, ECHR Series A no. 336.
[127] *Goodwin v. United Kingdom,* 11 July 2002, §§ 90-91, ECHR 2002-VI.
[128] *Bock v. Germany*, 29 March 1989, §48, ECHR Series A no. 150.
[129] Council of Europe, *Convention on Human Rights and Biomedicine* (Oviedo Convention), adopted 4 April 1997, ETS 164.
[130] Council of Europe, *European Social Charter,* adopted 18 October 1961, ETS 163.

and sense of personal identity"[131]. Thus the value of human dignity has been integrated judicially as a general principle of EU law.[132] This was confirmed in the Treaty of Lisbon, where human dignity is mentioned as one of the values that the Union is founded upon.[133] In a similar manner, the Preamble of the Charter of Fundamental Rights of the European Union asserts that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity"[134]. Article 1 of the Charter elaborates by stating that: "Human dignity is inviolable. It must be respected and protected."[135] In addition, the Charter further refers to the concept in Articles 25 and 31.[136]

Turning to the human rights protection system of the Arab world, here, too are numerous legal texts that endorse the value of human dignity. For example, the first of the human rights instruments in the region, namely, the Universal Declaration of Human Rights in Islam (1981), includes several references to human dignity: in the foreword, twice in the preamble, and in the provisions on the status of workers. Here, however, protection of and respect for human dignity and its conception (in much the same way as is the case with human rights in general) is restricted to the limits of Sharia law. Evidently, there is no substantive provision concerning the recognition of human dignity similar to the examples of the Inter-American, European or African systems, which stress dignity as inherent to every human being. Acknowledgments of human dignity within the Declaration are expressed strictly in respect to its source from the divine origin[137], and, moreover, as something conferred on mankind in general, not every individual in particular[138]. In line with these two premises, the Preamble of the Declaration states that while "every effort shall be made" in order to "ensure to everyone security, dignity and liberty", it is to be realized "in terms set out and by methods approved and within the limits set by the Law".

The next important human rights instrument in the Arab World to be mentioned is the Cairo Declaration[139] (1990). This document, while recognizing much of the same rights as conceived in the UDHR, overtly subjects any such entitlements to the boundaries set by Sharia law and, therefore, effectively and substantially, restricts the scope of the UDHR in the region. In particular, the Declaration recognizes that all men are equal in human dignity without any discrimination; however, "the true religion is the guarantee for enhancing such dignity along the path to human integrity"[140]. These provisions are problematic in light of Sharia law's admission

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[131] Opinion of Advocate General Jacobs in *Christos Konstantinidis,* C–168/91, ECLI:EU:C:1993:115, § 39.
[132] McCrudden, *supra* note 98, p. 683.
[133] *See:* Arts 1a and 10a of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ C 306, 17.12.2007.
[134] *See:* Preamble of the Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.
[135] *Ibid.*, Art. 1.
[136] Art. 25 refers to a life of dignity in respect to the rights of the elderly, whereas Art. 31 addresses dignity in the context of fair and just working conditions.
[137] *See*, *e.g.*, Preamble to the Declaration: "Therefore we, as Muslims, who believe … d) that ..teachings of Islam represent the quintessence of Divine guidance in its final and perfect form, feel duty-bound to remind man of the high status and dignity bestowed on him by God".
[138] *See* the Foreword, which states: "Islam gave to mankind an ideal code of human rights fourteen centuries ago. These rights aim at conferring honour and dignity on mankind and eliminating exploitation, oppression and injustice" and the Preamble: "..human rights decreed by the Divine Law aim at conferring dignity and honour on mankind..".
[139] Organization of the Islamic Conference, *Cairo Declaration on Human Rights in Islam*, adopted 5 August 1990.
[140] *Ibid.*, Art. 1.

of certain types of punishment that entail not only physical suffering, but possibly death, which clearly contravenes the commitment to respect for human dignity. This issue is even more precarious considering that the same document explicitly prohibits subjecting an individual to "physical or psychological torture or to any form of humiliation, cruelty or indignity".[141] However, again, this should be read in light of the broader obligation to conform to Sharia law. Lastly, the Arab Charter on Human Rights[142] (2008) should be mentioned. This contains only two references to human dignity and does not elaborate on its conception too much. Most importantly, its Preamble underlines the Arab world's belief in human dignity, and, interestingly enough mentions "*its* right to a life of dignity" [emphasis added][143] thus emphasizing dignity as a communitarian value, not individual.[144]

Finally, with regard to the Asian human rights system, there are a few notable mentions of human dignity within the most significant legal texts of the Association of Southeast Asian Nations (ASEAN). In particular, the Declaration of the Basic Duties of ASEAN Peoples and Governments[145] (1983) addresses the "wretchedness, the hunger, the pain, the suffering and the despair"[146] of millions of Asian people to then affirm that such conditions "denigrate human life and dignity, and retard the development of Asian peoples"[147]. The Declaration also stipulates that it is the duty of each of the governments of the ASEAN states to insure and protect the human dignity of its people[148] and that governments cannot derogate from this obligation even in times of emergency.[149] More recently, in 2012, the ASEAN Human Rights Declaration was adopted. This similarly states as one of its basic principles the quality of dignity among all persons.[150] However, it does not elaborate any further either on the rights derived therefrom, or the obligations imposed upon governments that they have to observe in order to comply with this basic principle. Thus, it can be concluded that the reference to human dignity within the ASEAN system is rather vague compared to some of the other examples reviewed above.

In line with the above mentioned illustrations of the value of human dignity in international legal instruments, indirect recognition of this value is also found in the set of norms most frequently cited for the candidacy of peremptory status. Echoing the set of norms recognized as peremptory throughout the work of the ICJ, as discussed previously, Koskenniemi in the Report on Fragmentation of International Law under the heading of *jus cogens* lists prohibitions on the use of force, genocide, torture, crimes against humanity, slavery and the slave trade, racial discrimination and apartheid, as well as basic rules of international humanitarian law and the right to self-defence.[151] In the case of these norms, there is no doubt that they seek protection of the dignity of the human being. Indeed, their relevance for the safeguard of the human dignity of a person is crystal clear and does not necessitate further elaboration: the right to be free from genocidal attacks, torture,

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[141] *Ibid.*, Art. 20.
[142] League of Arab States, *Arab Charter on Human Rights*, adopted 15 September 1994.
[143] *Ibid.*, Preamble.
[144] The other mention of human dignity in the Charter (Art. 1) is made with regard to its vulnerability towards "racism, zionism, occupation and foreign domination".
[145] Association of Southeast Asian Nations, *Declaration of the Basic Duties of ASEAN Peoples and Governments* (1983).
[146] *Ibid.*, Preamble.
[147] *Ibid.*
[148] *Ibid.*, Art. I.
[149] *Ibid.*, Art. XI.
[150] *See* General Principle 1 of the ASEAN Human Rights Declaration (2012).
[151] Study Group of the International Law Commission, *supra* note 4,p. 189.

slavery, crimes against humanity and the like addresses the very basic notion of human dignity – the integrity of a person in a physical, mental, moral sense.

Constitutional recognition

Evidence of human dignity as a constitutional value serves as yet another indication of the value's widespread recognition across the globe, although in light of *jus cogens* being an element of international law, recognition of the concept in international instruments is conceivably of much greater importance.

The absolute brutality of WWII and the outright disrespect for human life and dignity involved resulted in a "turning point in the annals of the human experience".[152] Among the concepts most identified with this ideological shift are human rights and human dignity. Respect for human dignity, in particular, represents the antithesis to the terror of war and what it epitomized.[153] Thus, the two landmark inclusions of the notion of human dignity following the end of WWII – in the UN Charter and the UDHR – served as catalysts for the constitutional recognition of human dignity across the globe. Indeed, in the period between 1900 and 1944, only five countries expressly referred to human dignity in their constituent documents[154], whereas, with increasing inclusion of the concept after adoption of the UN Charter and the UDHR, today around 70% of national constitutions worldwide refer to human dignity (or the dignity of man), according to the Comparative Constitutional Project.[155] In some regions, for example Europe, it is possible to discern two more 'waves' of the elevation of human dignity to constitutional status, namely, in the 1970s, following the fall of dictatorships in Southern Europe, when the notion of dignity was included in the newly established democratic constitutions and, secondly, at the beginning of the 1990s, with the fall of the Berlin Wall and the Soviet Union and the transition to democracy in the newly established states in Central and Eastern Europe.

Nowadays, the notion of human dignity is a "standard ingredient"[156] of at least European constitutions but, more generally, is regarded as a "central marker of democratic constitutionalism"[157].[158] In some instances, human dignity is framed as the primary purpose of the State[159], in others it is referred to as the guiding principle or

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[152] Doron Shultziner, Guy E. Carmi, "Human Dignity in National Constitutions: Functions, Promises, Dangers", in *The American Journal of Comparative Law* 62, Issue 2 (2014): p. 464.

[153] *Ibid*.

[154] These countries were: Mexico (1917 Constitution, Art.3(c)); Weimar Germany (Reich Constitution of August 1919, Art. 51); Finland (1919 Constitution); Portugal (1933 Constitution, Art. 45); Ireland (Preamble).

[155] For more information on the project and the data retrieved, *see* project webpage at: www.comparativeconstitutionsproject.org.

[156] Catherine Dupre, "Unlocking Human Dignity: Towards a Theory of the 21st Century", in *European Human Rights Law Review* 2(2009): p. 1.

[157] Jean-Guy Belley, "The Protection of Human Dignity in Contemporary Legal Pluralism" in *Dialogues on Human Rights and Legal Pluralism,* ed. R. Provost et al. (Springer: 2013), p. 103.

[158] For a detailed inquiry into the constitutional status of human dignity across the world, *consult* McCrudden, *supra* note 98, pp. 656-675.

[159] *E.g.*, the Constitution of Peru (Art. 1) refers to protection of human dignity as the supreme goal of the State.

even the founding principle[160]. McCrudden, upon concluding a thorough survey of the use of the concept of human dignity in constitutional adjudication worldwide, stated that the concept is:

> enabling different cultures with vastly different conceptions of the state, differing views on the basis of human rights, and differing ethical and moral viewpoints to put aside these deep ideological differences and agree instead to focus on the specific practices of human rights abuses that should be prohibited.[161]

In a reply to McCrudden, Paolo Carozza similarly affirmed that human dignity "serves as a common currency of transnational judicial dialogue"[162]. In addition, according to Carozza, McCrudden's survey signals that such a use of the notion of human dignity in a way harmonizes the constitutional adjudication between different jurisdictions:

> By appealing to the principle of human dignity, courts establish the basic ground of commonality and comparability of their decisions with those of courts in other jurisdictions, despite whatever other differences may exist in their positive law or political and historical context.[163]

Evidence that this commitment to systematic use of the concept exists, Carozza claims, lies in the fact that oftentimes – when decisions are delivered whereby the concept of human dignity is put into use in a different way from that of decisions from other courts abroad – the judges tend to explain what sort of particular requirements, such as certain social or legal preconditions, are specific to their jurisdiction that justify such a deviation.[164] Such behaviour on part of the courts can only be explained if the meaning of human dignity "transcends local context and constitutes a commonality across the differences of time and place"[165]. Therefore, it seems evident that the value of human dignity, although a relative novelty in the context of constitutional recognition, is assuredly a common feature of constitutional arrangements across the globe today.

4. DEFINING THE VALUE OF HUMAN DIGNITY

The previous section of the article has provided much needed evidence of the notion of human dignity being referred to by an array of international and national legal texts. However, there is a conceptual difficulty for the formulation of human dignity as a universally applicable value – the absence of a clear-cut understanding of what the concept actually means. In fact, current positive international law does not provide any settled definition of the concept of human dignity. This happens to be particularly troublesome in light of its ordinary use in legal, political and moral discourses alike. From the legal perspective, especially problematic is the question of the concept's legal value, as there is neither a conclusive definition of its content, nor of its function in a given legal system.[166] The explanation for this multi-faceted understanding is that

[160] In particular, the South African Constitution (Art 1) establishes human dignity as the founding principle of the Republic.
[161] McCrudden, *supra* note 98, pp. 722-723.
[162] Paolo Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply" in *European Journal of International Law* 19, Issue 4 (2008): p. 931.
[163] *Ibid.*, p. 932.
[164] *Ibid*.
[165] *Ibid*.
[166] Doron Shultziner, "Human Dignity – Functions and Meanings", in *Global Jurist Topics* 3, Issue 3 (2003): p. 1.

human dignity is primarily a moral-philosophical concept.[167] Thus, the perception of what human dignity means is largely subjective as it is contingent upon certain variables, namely, the social and historical exigencies that pervade the society with which an individual seeking a definition of human dignity identifies. Inevitably, definition of the term will depend on the particular perception of the world and the place of both 'human' and 'dignity' within it.[168]

In other words, the concept of human dignity is seriously vulnerable to claims of cultural relativism.[169] The main issue that cultural relativists raise in respect to human dignity relates to its foundational source. Nevertheless, however narrowly the content of human dignity is drawn, it cannot avoid the question why exactly human dignity is inherent to every human being. Even if narrowed down to the basic ontological claim, which maintains that human dignity is contingent upon no more than merely being human, cultures that justify human rights and the crux of mankind as attributed to God, will essentially deem such justification illegitimate. Moreover, the dichotomy continues beyond disagreement about the origins of human dignity. In light of the prevalent communitarian values that dictate every aspect of social life within several of the biggest communities worldwide, the grounding of human dignity on the 'humanity' of the human being is unacceptably individualistic.[170] In strong communitarian societies the rights and freedoms of individuals are secondary to community interests and therefore their violation is justified if it benefits the greater good of the community.[171]

Consequently, to ensure meaningful use of the concept of human dignity, first and foremost a clear consensus has to be found between different legal cultures as to what this concept stands for. The present research can only speculate on the results of such efforts and aims to loosely pinpoint where this common denominator might lie within the extensive discourse on the value of human dignity. What follows further below is an attempt to briefly illustrate the different theories regarding the function and content of human dignity so as to highlight that even though it can be comfortably conceived as a value shared by the whole of the international community, as long as a common understanding of what it actually stands foris absent, the claim of human dignity as a community value can be disputed with ease.

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[167] Adeno Addis, "The Role of Human Dignity in a World of Plural Values and Ethical Commitments", in the *Netherlands Quarterly of Human Rights* 31, Issue 4 (2013): p. 403.
[168] *Supra* note 166, p. 6.
[169] Arguably, this elasticity of the concept is one of the reasons why it is so interesting for the global ethics debate; it is its "independent appeal as an ethical standard" that allows its application across different cultures and societies. Depending on the given social model – whether it is a traumatized genocidal society, a liberal-democratic one, a revolutionary or emancipatory society – the contours of the very purpose of human dignity as a legal concept, and its function in the legal order, will diverge immensely (*See* David Weisstub, "Honor, Dignity and the Framing of Multiculturalist Values", in *The Concept of Human Dignity in Human Rights Discourse*, *supra* note 114, pp. 265-266).
[170] Audrey Guichon, "Universality of Human Rights in Islam", in *Religion, Human Rights and International Law,* ed. Susan C. Breau *et al*. (Brill: 2007), p. 173.
[171] Rhoda Howard attempts to reconcile the accounts of individualistic and communitarian societies and even questions the very existence of such strict separation between them by claiming that societies based on individualism in fact contain many features of the communitarian model. She suggests that the community-based society is "too critical of the breakdown of community", while the one based on the individualistic outlook is "too uncritical of the costs of individualism" (*see* Rhoda E. Howard, "Cultural Absolutism and the Nostalgia of Communities", in *Human Rights Quarterly* 15, Issue 2 (1993): p. 315). This claim certainly has some truth to it, but regrettably does not provide any guidance as to how to legitimize the ontological claim of human dignity from both perspectives.

Content of human dignity

Whereas the very idea of human dignity can be traced back to as early as classical antiquity, the legal value of human dignity remained unexplored until the modern era and is a rather novel feature of international legal thought. In addition to ancient ideas, development of the concept has been influenced by biblical ideas, natural law, Humanism and the Enlightenment among others. As a result, it is difficult to ascertain the precise legal roots of the concept as it entails a variety of theological, philosophical, political and historical foundations.[172]

Although the earliest considerations of 'dignity of man' can be found in Stoic anthropology, the emergence of the notion of 'human dignity' is traditionally attributed to the work of the Roman noble Cicero, who famously defined it as "someone's virtuous authority which makes him worthy to be honoured with regard and respect"[173]. This definition immediately draws attention to the social aspects, such as the prestige or rank, of a person. Indeed, the initial formulation of 'human dignity' was based on pure social rank – it entailed dignity as a visible and social quality. This model can also be referred to as 'contingent, external dignity'[174]. However, all in all this "rank like conception of humanity"[175] has become largely obsolete in the contemporary discourse on human dignity. In addition, Cicero's writings emphasized the reciprocity between morality and human dignity by revealing the duty of the individual to exercise his rational mind so as to act in compliance with the standards of morals in order to maintain his dignity.

A definitive milestone in the evolution of the concept of human dignity was the work of Immanuel Kant. Human beings, as understood by Kant, are of key importance in the process of creating laws that are capable of servicing all members of a given society as they are endowed with reason – an exclusively human quality – which enables them to formulate and create laws that merit the status of universal. This ability, argued Kant, is the actual source of the respect that is owed to human dignity. As formulated by Kant, human dignity entails two distinct elements or qualities, which – taken together – make dignity function as both the subject and object of respect[176]: on one hand, dignity is an inner quality – inalienable, absolute, and inherent by mere virtue of the individual being; on the other hand, it is an outward quality, which dictates the relationship with other individuals and informs about the duties towards them. This second quality denotes human dignity as a "morally prescriptive principle of respect"[177] for all human beings due to their inherent (inner) quality of human dignity.[178]

Now, turning to the debate over the content of the concept of human dignity, in general, it is common to differentiate between three main elements, or better said – claims –

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[172] For a historical overview of use of the concept of human dignity, *see* Kretzmer, *supra* note 114, pp. 41-44.
[173] For more on Cicero's understanding of dignity *see*: Kretzmer, *supra* note 114, pp. 20-22.
[174] Dietmar von den Pfordten, "Some Remarks on the Concept of Human Dignity", in *Human Dignity as a Foundation of Law,* ed. Winfried Brugger et al. (Franz-Steiner Verlag: 2013), pp. 13-15.
[175] Stephanie Hennette-Vauchez, "A human dignitas? Remnants of the ancient legal concept in contemporary dignity jurisprudence", in *International Journal of Constitutional Law* 9, Issue 1 (2011), p. 38.
[176] Thomas Weatherall, *supra* note 54, p. 34.
[177] *Ibid.*, p. 35.
[178] In comparison to the inner quality of human dignity, which prescribes protections for the individual, the outward quality or morality generates duties. In this sense, human dignity can be regarded as a prescriptive principle of order that determines policies and laws to be established so as to satisfy respect for the human dignity of all.

about what the concept entails.[179] These claims are: the ontological claim, the relational claim and the limited-state claim. All three claims are implicit in the concept of human dignity and can be discerned from the preamble of the Universal Declaration of Human Rights, the first and fifth paragraphs in particular. Differences between the contrasting conceptions of human dignity mainly concern the weight of one claim over the other: in some conceptions the emphasis on the relational claim can be particularly strong, whereas another conception might give priority to the limited-state or ontological claim. To sum up, since there is no general agreement, either politically or philosophically, as to how any of these three claims should best be understood, while there might be settled acceptance of the very concept of human dignity, there are certainly different conceptions of it.[180] But before turning to the main avenues for explaining the content of human dignity, a moment should be spent on reflecting on the concept of autonomy.

Autonomy

The notion of autonomy is truly central to the debate on the content of human dignity. It is rooted in the ontological claim of human dignity; however, the overview of the three claims of human dignity conducted below will show that the notion of autonomy is closely intertwined with the ontological, relational and limited-state claims alike. To a large extent, it is exactly the differing conceptions of what autonomy is and what its role in respect to human dignity that lie at the heart of the lack of consensus as to the content of the value of human dignity as such. Thus, even if autonomy as a notion pertinent to the human being can be found in all three claims of dignity as reviewed further below, the import it conveys therein varies across the board of different cultures and thus often constitutes the key point of contention.

Oftentimes contemplating human dignity entails the idea of the individual having the capacity to determine his or her choices as well as having the necessary conditions to make such decisions.[181] Thus, paramount to autonomy is the idea of self-determination.[182] Through the lens of self-determination, autonomy implies reason, independence and choice.[183] Reason denotes the mental capacity to make informed choices. Independence means the absence of coercion or external manipulation as part of the decision-making process, while choice in this sense means the actual presence of alternatives to choose from. Autonomy as self-determination, therefore, means that the individual is able to make personal decisions that are grounded on the individual's own evaluations of the situation and the ability to do so without excessive external influences.[184]

Ontological claim

The ontological claim refers to the inherent, unique qualities that are irreplaceable in constituting a human being's dignity. Echoing the Kantian doctrine of dignity as the ability to reason and the Ciceronian Stoic proposition of dignity as rooted in the self-actualization of a

[179] See, e.g.: McCrudden, *supra* note 98, p. 679; Rinie Steinmann, "The Core Meaning of Human Dignity", in *Potchefstroom Electronic Law Journal* 19 (2016): p. 7.
[180] McCrudden, *supra* note 98, p. 680.
[181] Adeno Addis, *supra* note 167, p. 419.
[182] Luis Barroso, " 'Here, There and Everywhere': Human Dignity in Contemporary Law and in Transnational Discourse", in *Boston College International and Comparative Law Review* 35, Issue 2 (2012), p. 368.
[183] *Ibid*.
[184] A conception of dignity that is contingent upon the existence of choice is used to support a plea for protection and further expansion of second generation human rights. Here, human dignity is conceived as validation for the right to a dignified life in the sense of attainment of certain social and economic standards.

person, the ontological claim addresses the intrinsic worth of the individual.[185] It is the "totality of the uniqueness of a human being's nature"[186] encompassing intelligence and sensibilities as one. Importantly, the intrinsic aspect of dignity is not an instrumental value in that it cannot be attributed to someone on a case-by-case basis. [187] Therefore, the ontological claim is sympathetic to diversity in cultures and human beings, as it derives dignity from the mere fact of being a human – it is "as a member of the human genre"[188] that an individual benefits from the right to respect for human dignity.[189]

The notion of autonomy accommodates itself easily within the ontological claim. The inherent uniqueness that is foundational to each human being's dignity not only explains why human beings are autonomous in the sense of their ability to reason, but also legitimizes the entitlements to dignified life as derived from the requirements of independence and choice predicted by the recognition of inherent dignity.

Relational claim

The relational claim pertains to the social dimension of human dignity – the relationship between the individual on one hand and the community on the other and the necessary recognition and respect paid to the human dignity of every individual as exercised through this relationship. The notion of autonomy within this aspect of human dignity is fundamental. Here, dignity is portrayed as a socially constructed quality and community value; one that can more precisely be regarded as a constraint on individuals as it, in fact, often conflicts with the individual's liberty and autonomy.[190] Importantly, the dynamics of the relational claim involve the process of balancing between the competing interests of society as a whole and the individual, aiming to avoid the extreme form of communitarianism where collective interests take precedence over the interests of the individual at all times, but also evading "radical, abstract individualism".[191] As a consequence, the personal autonomy of the individual is to be confined by the values, interests and commitments of their society to a degree particular to every society depending on the context in place.

Strong adherence to the relational claim, whereby the autonomy of the individual is highly conditional on community values clearly limits the exercise of whatever rights and enjoyments it has the potential to furnish. It is, therefore, no surprise that the magnitude of consequences flowing from a strong conception of the relational claim induces a major conflict in the human rights discourse between differing legal cultures. After all, it is because of strong societies built upon communitarian values that the project of universal human rights faces denunciation from different parts of the world.

Limited-state claim

Because the limited-state claim is a further extension of the relational claim, it is subject to considerable controversy as those who challenge the relational claim will similarly question the relevance of the limited-state claim.[192] In a nutshell, this claim advocates that recognition of

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[185] Steinmann, *supra* note 179, p. 11.
[186] *Ibid*.
[187] *Supra* note 182, p. 363.
[188] Jean-Guy Belley, *supra* note 157, p. 105.
[189] *Supra* note 185.
[190] Steinmann, *supra* note 179, p. 18.
[191] Henk Botha, "Human Dignity in Comparative Perspective", in *Stellenbosch Law Review* 20 (2009): p. 219.
[192] Steinmann, *supra* note 179, p. 23.

human dignity entails recognition and realization of dignified existential conditions on the part of the state.[193] Thus, the central component of the limited-state claim is the state's obligation to respect the dignities of its people through recognition and realization of their socio-economic rights in order to ensure the necessary existential minimum of their living conditions.[194]

It is not difficult to see how the limited-state claim relates to the notion of individual autonomy: it addresses that aspect of autonomy which speaks about the actual existence of alternative choices from which to choose when deciding upon one's life. From this perspective, life in poverty, where the minimum threshold of well-being is not reached, deems autonomy "a mere fiction"[195] and contradicts the idea that human dignity presupposes a dignified life. Basic health care services, education, shelter, food, water and clothing are just some of the essential utilities mentioned as components of the existential minimum.[196]

Function of human dignity

Similarly to the debate on the content of the value of human dignity, there is also no one right answer with regard to what is the actual function of this concept. To begin with, a peculiar – but still recurrent – remark should be mentioned, namely that the concept is empty of any normative meaning. Accordingly, dignity "is just a sonorous word"[197] people use when they "want to sound serious but are not sure what to say"[198] and as such has no ethical content on its own, for whatever it represents is expressed by reference to other concepts, such as equality or respect.[199] Jeremy Waldron writes that while such views are overly pessimistic, they do "alert us to the fact that dignity may not necessarily be a load-bearing idea"[200]. A variant of this argument advocates the emptiness of the concept due to its strong interdependence with the notion of autonomy: it is argued that everything that dignity is understood to mean is captured more precisely by the concept of autonomy. Such reductionism is unconvincing, since there are several strongly arguable reasons why the two ought to be treated as separate values. Dignity ought not to be reduced to mere autonomy for, firstly, such synonymous application of the two concepts would essentially mean that only autonomous individuals could be claimed to have dignity. We would then have to accept that, in respect to many in our societies, it would make no sense to talk about dignity, for example, in the context of children, people with mental incapacities, the elderly suffering from dementia, and so on. Another reason to reject the synonymous application of dignity and autonomy is that while both can be described as having a 'relational' quality, only dignity can be regarded as a 'reflexive' value.[201] This is to say that dignity can be thought of as a value which is, in a sense, "held in joint account"[202], so that someone who violates someone else's dignity necessarily and simultaneously violates their own. Lastly, dignity and autonomy cannot be synonymous because not all violations of dignity involve

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[193] *Ibid*.
[194] *See*, for further elaboration: Steinmann, *supra* note 179, p. 23; Barroso, *supra* note 182, p. 371.
[195] *Ibid.*, Barroso.
[196] *Ibid*.
[197] Jeremy Waldron, "How Law Protects Dignity", in *Cambridge Law Journal* 71, Issue 1 (2012): p. 201.
[198] McCrudden, *supra* note 98, p. 655.
[199] For further overview on the discussion of human dignity as an empty concept, *see*: Mary Neal, "Respect for human dignity as 'substantive basic norm'", in *International Journal of Law in Context* 10, Issue 1 (2014): pp. 28-32.
[200] Waldron*supra* note 197.
[201] Neal, *supra* note 199, p. 28.
[202] *Ibid*.

violation of autonomy – and the other way around. It is certainly possible for constraints on personal autonomy to violate dignity, but this is not necessarily so. After all, autonomy is "exercised and enjoyed in perpetual negotiation with the autonomy of others"[203] and thus is necessarily limited by state authority; synonymous application of the two concepts would effectively mean that constraints on human dignity are not only unavoidable, but also welcome in every society.

One step further from the conception of dignity as an empty concept is the conception of dignity as merely a label for the collection of an individual's human rights that are provided or thought of as necessary to be provided. In other words, it is a "label on a vessel that contains all human rights"[204]. This "vessel theory" contemplates the function of the concept, but it does not tell us anything as to the source of the rights or how to identify which rights are to be conferred upon human beings.[205] Moreover, it can be considered as contradicting the understanding of the concept as expressed in many national constitutions and multilateral agreements alike, where the chosen formulation of wording implies that human rights and human dignity are intended to capture different ideals. Normally, these documents refer torespect for human dignity separately from recognition of human rights, therefore stressing the difference between the two.[206]

Next, another approach to illustrating the function of human dignity is to perceive it as the only source of human rights.[207] In fact, it is not an uncommon feature of international and constitutional instruments to expressly indicate the human dignity of a person as the actual source of their human rights.[208] An additional argument of the source theory claims that human dignity can also be used as an organizing, interpretive concept to order and reconcile conflicting rights, meaning that it serves not only as the generative, but also as an interpretive means of an individual's rights.[209]

Yet another conception of human dignity holds that it is actually an individual human right. Of course, the very idea of human dignity is deeply and intimately linked with rights; however no specific right to dignity is spelled out in international law as it currently stands.[210] Therefore, if human dignity is, in fact, a human right, the proponents of such a conception are clearly ahead of their time as in the present human dignity jurisprudence dignity is not reflected as an individual right. The biggest challenge to the idea of a separate right attributable to

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[203] *Ibid*, p. 29.
[204] Adeno Addis, "Human Dignity in Comparative Constitutional Context: In Search of an Overlapping Consensus", in *Journal of International and Comparative Law* 2, Issue 1 (2015): p. 9.
[205] An evident problem with the "vessel" theory is posed by the lack of a definitive list of what human rights would be collected under the umbrella term "human dignity". If there is no understanding of what the "vessel" is meant to represent, the theory seems counterproductive as it, in fact, further perplexes as to the meaning and function of the concept.
[206] *See, e.g.,* the South African Constitution, Art. 1, where the values that the Republic is founded upon are spelled out as follows: "Human dignity, the achievement of equality, and the advancement of human rights and freedoms".
[207] For more on this perspective, *see, e.g.*: Paul Tiedemann, "Human Dignity as an absolute value", in *Human Dignity as a Foundation of Law*, *supra* note 174, pp. 25-41; for criticism of this perspective *see, e.g.*, Addis, *supra* note 204, p. 11.
[208] *See, e.g.*, the International Covenant on Civil and Political Rights, the Preamble of which begins with the acknowledgement that all the rights contained in the covenant are derived from the inherent dignity of every human person.
[209] Addis, *supra* note 167, p. 417.
[210] Neal, *supra* note 199, p. 30.

dignity is that it is difficult to conceptualize the specific normative content of such a right which is not already provided for by other rights provisions. More precisely, it is difficult to imagine what the right to dignity would imply besides what, for instance, is already covered by the prohibition of inhuman, degrading treatment and the right to private life as conceived in Articles 3 and 8 of the European Convention on Human Rights.[211]

Human dignity as a legal principle

In light of the all the above mentioned conceptions of the function of human dignity in a legal system, perhaps the optimal approach to grasping the concept with a view to meaningful application is through the lenses of legal principle. Scholarly literature on this approach is plentiful, and the principle has even been noted as "the foundational premise of modern day constitutionalism"[212].

Normally the academic discussion about legal principles commences with determining the difference between legal principles and rules.[213] Similarly, it usually refers to the most acclaimed version of this distinction, namely, that of Dworkin, whereby "rules are applicable in an all-or-nothing fashion"[214], meaning that whatever the situation, a given rule is either valid or invalid and there is no in-between, whereas a principle "states a reason that argues in one direction, but does not necessitate a particular decision"[215].[216] In addition, principles, as opposed to rules, havea "dimension of weight or importance"[217], which is used when balancing between two or more of them.[218] As a result of the need for the balancing process, depending on the given circumstances, principles can be realized to varying degrees. Thus, Barroso writes that legal principles are "norms that have more or less weight in different circumstances" and that their realization and application "require a good faith commitment".[219] Drawing on the arguments of both Dworkin and Alexy and turning specifically to the legal principle of human dignity, Barroso comes to the conclusion that "human dignity, as a fundamental principle, should take precedence in most, but not all, situations"[220]. In response, Mary Neil argues that while this conclusion has some merit, legal narratives about dignity – and jurisdictions that expressly value human dignity – claim dignity to be above all other values and thus to never

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[211] *Ibid*.
[212] Hennette-Vauchez, *supra* note 175, p. 34.
[213] *See* Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press: 2002), pp. 45-46, where he explains that there are several ways to conceptualize the distinction between the two: according to their degree of generality (principles are of high generality as opposed to rules, which are relatively specific), model of creation (rules are created, but principles evolve), or their supposed function (principles are norms for argumentation, while rules - for behaviour).
[214] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press: 1978), p. 24.
[215] *Ibid*, p. 26.
[216] Accordingly, there may very well be other principles arguing in the opposite direction and ultimately prevailing over the principle in question in some circumstances, but it does not signify that a principle that yielded once is erroneous, since it may prove prevalent in other instances when contravening another principle in a different set of circumstances.
[217] *Supra* note 214, p. 26.
[218] Robert Alexy adds to this by developing a theory of principles as "optimization requirements", whereby principles are perceived as norms that command optimization, that is, their fulfilment to the highest degree that is "actually and legally possible" the same as that of other principles involved in the balancing process (*see* Robert Alexy, "On the Structure of Legal Principles", in *Ratio Juris* 13, Issue 3 (2000), pp. 294,295).
[219] Barroso, *supra* note 182, p. 355.
[220] *Ibid*, p. 357.

allow violation of dignity.[221] For example, in German constitutional law "any encroachment upon human dignity means a violation"[222] as it has absolute effect. Accordingly, Neil holds that any failure to fulfil the claim of dignity completely seems unconscionable, because:

> [a]lthough various aspects of dignity must often be weighed against one another to get the focus of the dignity picture right, dignity itself is never truly weighed against other values: no outcome can be both dignity-violating and legally acceptable.[223]

Likewise acknowledging the fundamentality of human dignity, Barrosso proceeds to claim that human dignity is not an ordinary legal principle, but rather one of constitutional rank. Drawing on the two main roles that constitutional principles serve in a legal system, he claims that the principle of human dignity not only has a generative, but also an interpretive role: the core meaning of the principle serves as a direct source for rights and duties, but the interpretive role serves as "a good compass in the search for the best solution" if there are apparent gaps in the legal system or in case of "tensions between rights and collective goals".[224] This view is also echoed by Oliver Lembcke, when he writes that dignity should be interpreted as a constituent principle of the highest rank and "a criterion of interpretation on the basis of which man is placed into legal conditions"[225]. A variant of the same argument is also proposed by Luis Coutinho as he associates the role of the principle of human dignity in a legal system with the idea of *paideia* in the ancient Greek world, definable as "the basic value reflected by each city constitutional order, materially structuring it and establishing its legitimacy from the perspective of those shaping their individual and collective existence according to it"[226]. Following the same line of thought, Hennette-Vauchezlabels human dignity as a *Grundprinzip* or "trump" to apply Dworkinian vocabulary.[227]

Applied as a legal principle in contemporary jurisprudence, human dignity has inspired the so-called "dignitarian human dignity jurisprudence"[228].[229] A telling example of this tendency is the famous dwarf-throwing case, whereby a game where people compete as to who can

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[221] Neal, *supra* note 199, p. 34

[222] Eckart Klein, "Human Dignity in German Law", in *The Concept of Human Dignity in Human Rights Discourse*, *supra* note 114, p. 148.

[223] *Supra* note 199, p. 37.

[224] Barroso, *supra* note 182, p. 356.

[225] Oliver W. Lembcke, "Human Dignity - a Constituent and Constitutional Principle: Some Perspectives of a German Discourse", in *The Concept of Human Dignity in Human Rights Discourse*, *supra* note 114, p. 215.

[226] Luis Pereira Coutinho, "Human Dignity as a Background Idea", in *The Concept of Human Dignity in Human Rights Discourse*, *supra* note 114, p. 105.

[227] Neal goes even further when she insists that since, legally speaking, violations of human dignity are impermissible, dignity fails altogether to conform to the mainstream conception of a legal principle and Dworkinian balancing. Therefore, she proposes an entirely different status for the concept of human dignity, namely, that of a substantive basic norm for only such formulation properly describes not only the fundamentality of the very idea of human dignity, but also the connection between human dignity and law in general (*see* Neal, *supra* note 199, p. 10).

[228] See for more on this phenomenon: Hennette-Vauchez, *supra* note 175, pp. 36-42.

[229] Hennette-Vauchez offers an interesting perspective on this contemporary dignitarian jurisprudence by arguing that it signals resemblances with the way the ancient rank-like(legal) concept of dignity was applied. Essentially, she maintains that contemporary use of the concept resembles that of the ancient approach to *dignitas* as quality of social rank rather than the rights-generating, equalizing use of the concept. She proposes that contemporary dignity-related jurisprudence introduces another meaning of the legal concept, which is grounded on "humanity" as the new rank (see Hennette-Vauchez, *supra* note 175, p. 34).

throw an individual suffering from dwarfism the furthest was prohibited on grounds of considerations of human dignity, no matter that the dwarfs themselves had given their full consent to the game and took part therein willingly.[230] The game was found to constitute violation of human dignity; however, the dignity to be violated was not that of the dwarf, but rather dignity as such in an abstract, objectified sense.[231]

Hennette-Vauchez succinctly summarizes such objectification of human dignity in the following way:

> every human being is a repository (but not a proprietor) of a parcel of humanity, in the name of which she may be subjected to a number of obligations that have to do with this parcel's preservation at all times and in all places.[232]

Classification of human dignity as a legal principle seems most advantageous as the background of the other options for approaching the concept, and especially so if compared to the perception of human dignity as an individual right. After all, as a right, human dignity would have to be balanced against other rights; thus it would be susceptible to the provisions of possible derogations and therefore could be waived. This possibility seems contradictory, even counterproductive in light of the concept's axiological value, which suggests that it should rather be used "as an external parameter for permissible solutions when rights clash"[233] as legal principles do. The axiological value of the concept stresses the fundamentality of human dignity for the individual as much as for society at large. Therefore, it seems that the potential of a legal principle provides the most efficient terrain for the flourishing of the concept of human dignity. Additionally, in particular with regard to the notion of *jus cogens*, the value of human dignity as a legal principle is likely to fulfil its potential to the broadest extent: if applied as a value that informs the whole development of the normative category of peremptory norms, the value of human dignity has the aptitude to reach out to and spread throughout the intricate network of international law as a whole.

One last thing to be addressed in respect of the principle of human dignity is the criticism against such a use of the concept. That is, opponents of the use of human dignity as a legal principle may easily take advantage of the claim of textualism: indeed, human dignity has not been enshrined as a legal principle in positive international law and its varying uses in different international legal texts would only complicate this task. However, it suffices to keep in mind that all constitutions contain values or ideas that guide and inspire their concrete provisions despite lacking textual inclusion.[234] Therefore, there is no reason why human dignity could not be held to nourish the content and inform the interpretation of written norms without express textual inclusion in the respective legal texts.[235] A valuable example here is interpretation of the ECHR by the Strasbourg Court – without an explicit reference to human

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[230] *See*: Conseil d'Etat, Assemblée, 27 octobre 1995, 136727. Available on: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007877723. Accessed on 15 May, 2018.

[231] In this sense, dignity is something that belongs to the whole of mankind, thus giving rise to an obligation on the part of each individual not to violate their own dignity. Failure to do so would result in violation of the humanity that resides in the whole of humankind. Such objectified human dignity thus serves for the antonym of rights: for the sake of preserving the human being's dignity (and thus the dignity of humankind) an individual's dignity may not be violated even if with the consent and will of the individual.

[232] Hennette-Vauchez, *supra* note 175, p. 43.

[233] Barroso, *supra* note 182, p. 357.

[234] *E.g.*, in the US Constitution, there is no mention of such values as democracy or the rule of law; however both are omnipresent in American jurisprudence.

[235] Barroso, *supra* note 182, p. 352.

dignity in the Convention, the ECtHR appeals to the principle in many decisions as already described in Section 3 of this article.

Human dignity as the integrity of a person

All things considered, some fundamental conceptual problems make formulation of human dignity as a universal value a challenging task. In particular, objections posed by cultural relativism and the otherwise differing perceptions of the function and content of the concept are too pressing to be overlooked. Thus the common denominator for the understanding of human dignity must be rather minimal. It is suggested here that the likely minimal value of the content of human dignity should not be seen as stretching beyond the most basic notion of human dignity, which relates to someone's physical integrity; and even then some degree of "enlightened idealism"[236] is required to resist the challenges of certain established practices and customs involving violence that address human dignity and are still present today. As international law currently stands, anything beyond such a minimal understanding of human dignity as a universal value simply does not withstand the criticism posed by lack of consensus.

In respect tothe recognition of physical integrity as the essence of human dignity, many national constitutions endorse the idea of violation of the physical integrity of an individual as degrading and humiliating to their dignity.[237] A similar conception of human dignity is reinforced by the main international and regional human rights conventions that prohibit torture and inhuman or degrading treatment, such as the ICCPR[238], the American Convention on Human Rights[239], the ECHR[240] and the African Charter on Human and Peoples' Rights[241]. Moreover, in most cases, these provisions are non-derogable even under public emergencies threatening the life of the nation.[242] Adeno Addis identifies a further manifestation of this consensus in customary international law on universal jurisdiction in matters relating to crimes against humanity.[243] Evidently, such crimes deny their target of "an important ingredient of being a human subject"[244] and constitute an outright attack on the individual's integrity as a person. Therefore, all in all, it can be concluded that the physical integrity of a person is widely recognized as an essential aspect of how the value of human dignity is conceived.

Importantly, in certain societies such a modest construction of the notion of human dignity may seem insufficient. Where the society's self-conception and maturity has resulted in the human rights debate evolving beyond outright violations of human dignity in the form of abuse of the physical integrity of a person, this reading of the common denominator may even seem unhelpful. However, for many societies problems that speak to the very heart of this core of human dignity, such as extrajudicial killings, torture or utterly inhuman detention conditions, to

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[236] *Ibid.*, p. 361.
[237] For examples of constitutions that conceive physical integrity as an important aspect of human dignity, *see*: Addis, *supra* note 204, p. 16.
[238] Art. 7 ICCPR.
[239] Art. 5 of the Convention states that everyone "has the right to have his physical, mental, and moral integrity respected" and later affirms that to subject an individual "to torture or to cruel, inhuman, or degrading punishment or treatment" is contradictory to respect for his integrity.
[240] Art. 3 ECHR.
[241] Art. 5 of the Charter after recognizing the right of "the dignity inherent in a human being" to be respected, prohibits any form of "degradation of man particularly slavery, slave trade, torture, cruel, inhuman and degrading treatment".
[242] *See, e.g.*, Art. 4 ICCPR, Art. 27 of the American Convention or Art. 15 ECHR.
[243] Addis, *supra* note 237, pp. 19-20.
[244] *Ibid.,*p. 20.

name a few, are still vital elements of people's daily struggles and concerns.[245] This point, however, should not be used against the minimum content of the common denominator of the integrity of a person as good reasons remain to affirm it as such. Illustrative in this sense is the assessment of Jeremy Waldron: after listing legal systems that have "fallen short" of fulfilling promises of protecting dignity on various grounds, such as torture of terrorist suspects, humiliation of prisoners or the death penalty, he concludes that the international commitment to dignity "may be thought of as imminently present even though we sometimes fall short of [it]"[246]. Thus, human dignity as the integrity of a human person can be regarded as the basis for the evolution of a common understanding in the future of what the value of human dignity entails and what its protection necessitates, despite the still evident violations of personal integrity in some parts of the world.

On the changing nature of the common denominator

Every value judgment, and that in respect of human dignity included, is not a static constant – it is apt to change over time. To illustrate how, Doron Shultziner reminds us that there are two different layers, namely, the thick and the thin layer to the understanding of any notion that involves moral considerations.[247] The thick layer of understanding encompasses the whole moral outlook of a person, shaped by the specific social and cultural climate the individual finds himself surrounded by, or in other words, the layer that is subject to cultural relativism. With regard to the concept of human dignity, this layer is constituted by two fundamental premises – human and dignity – which relate to basic assumptions about the worth, place and nature of the human being in its society and the world.[248] The concept encompasses all the elements that pertain to the understanding of the individual's role and function within its society and is contingent on the societal model in place as already described previously. The thin layer of understanding, on the other hand, as explained by Shultziner, corresponds to that linguistic notion of the concept of human dignity which denotes humiliation of the human being and diminution of human worth.[249] Accordingly, this layer of understanding is revealed in concrete situations which demonstrate a "breach and debasement of the very human moral foundations" [250] and is largely intuitively perceived. Essentially, we know something is humiliating to an individual's dignity the moment we witness profound disrespect for it. Mark Weisstub explains this peculiarity by virtue of humanity as the most basic aspect of human dignity, which addresses the primitive quality of humanness inherent in every human being.[251] Again, this thin, intuitive meaning is neither static nor universal: behaviour that was once customary can be judged differently today as it has undergone evaluative changes due to historical, social and cultural developments.

Because of this changing nature of moral judgment it is possible for the common denominator in respect to understanding the content of the value of human dignity to develop over time. This is to say that if today the content of the universal value of human dignity is drawn at most at the threshold of dignity as the physical integrity of a person, this does not mean that it will not grow into a more inclusive conception of human dignity in the future. For the purposes of the present research, then, it is exactly this reading of the value of human

[245] Carozza, *supra* note 162, p. 933.
[246] Waldron, *supra* note 197, p. 221.
[247] Shultziner & Carmi, *supra* note 152, p. 6.
[248] *Ibid.*, p. 8.
[249] *Ibid.*, p. 12.
[250] *Ibid.*
[251] Shultziner, *supra* note 152, p. 5.

dignity that is seen as having potential as an underlying value of peremptory norms in international law. Thus, the final section of this article will inquire into the conformity of this conception of human dignity with the other requirement of values underlying *jus cogens* as earlier delineated, namely, the fundamentality of the value for the international community and the future of the international legal system as such.

5. FUNDAMENTALITY OF THE VALUE OF HUMAN DIGNITY FOR THE INTERNATIONAL LEGAL SYSTEM

Having affirmed that the value of human dignity is, indeed, internationally recognized and thus shared by the international community, the other requirement– fundamentality of the value for the international legal system and the future of the international community – needs to be satisfied. This, however, is a task exceeding the limits of this paper and deserves separate, thorough research on its own. Without the dedicated, all-inclusive inquiry that this matter necessitates, only a brief look into the subject is conceivable. Therefore, for now it is suggested that instead of asking *if* the value of human dignity underlies *jus cogens,* one should rather ask – *why* the value of human dignity underlies the normative category of peremptory norms in international law. What structures, what avenues for the protection of human dignity does *jus cogens* provide? How does the permanence of the value of human dignity advance the potential of *jus cogens* in the context of international law? In other words, the synergy between the two notions – *jus cogens* and *human dignity* – will be explored.

On the role of international law for international society

It is useful to begin the inquiry into the role of international law for the international community by noting the way Philip Allott observes the relationship:

> Law is another of the wonderful creations of the human mind. It enables a society to carry its structures and systems from the past through the present into the future. It enables a society to choose particular social features from among the infinite range of possible futures. Above all, it enables society to insert the *common interest* of society into the willing and acting of every society-member, human individuals and subordinate societies, so that the energy and the ambition, the self interest of each of them may serve the common interest of all of them.[252]

Indeed, the point of departure and the point to be kept in mind further on, is that for the international community law is the most efficient of instruments to be used for actualizing the ideal or, in other words, for the self-perfecting of international society.

The potential of self-perfecting is exercised through the conception of the ideal by observing the present and the possibilities of a better future.[253] The history of the human race shows many examples of evolutionary change in the self-conception of societies leading to attainment of an "improved" reality as a consequence, and international society is capable of similar self-enlightenment. In fact, as little as a cursory overview of the history of the international community shows such moments to have happened, for instance, the human rights movement, the abolition of slavery and racial segregation. Allott calls such momentum "a revolution in the human species-mind"[254] and law happens to be among the main tools for

[252] Allott, *supra* note 59, p. 84.
[253] *Ibid*.
[254] *Ibid*.

realizing such a revolution. Law serves to formulate the re-conceived self-image of a society and at the same time guides the society towards its own idea of self-perfection.[255] Law creates the "mental atmosphere" within which the society finds itself and which impacts the minds of the people of that society.[256] Parallels can be drawn between this bold conception of societal changes as conceived by Allott and general observations of culture as a living and "open-ended experience"[257], which is capable of "reforming itself by re-interpreting its own principles and values"[258].[259] International law is the law of the whole of international society – the society of all societies. It is the law of the society with the greatest capacity to promote the wellbeing of its members. At the same time, it is the law of the society with the greatest capacity to cause harm for itself and its members. International law should thus be thought of as embodying the potential of the law of the whole human race.[260] If law provides the means not only for survival, but also for the prosperity of society, then international society, "having the burden of consciousness"[261] must take responsibility for re-conceiving itself so as to fulfil the potential of international law as the medium for prosperity for the whole of humankind.[262]

The potential of international law via *jus cogens*

The appeal of *jus cogens* as a systematizing, ordering element in the structure of international law has been underlined repeatedly. The unique aspect of peremptory norms "helps international lawyers fulfil their moral needs"[263] while at the same time signalling that international law is capable of making moral demands on the world.[264] In the context of the above-discussed process of self-perfection and international society's re-conception of itself, the normative category of *jus cogens* can be of great use. Not only can it be used as a means to prioritize efforts, but also as a channel for their most effective protection. To be sure, we have to ask whether any other mechanisms in the structures of international law provide for the fundamental interests of international society with similar potential. This is unlikely to be so. As opposed to national legal systems, where fundamental values attain their rank due to the idea of the sovereign, in the international context values of fundamental importance must seek protection through the still disorganized structures of international law of which the prospects of a hierarchical, normative international legal system as entailed by the notion of *jus cogens* provide for the optimal safeguard.

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[255] Allott distinguishes between 4 different types of consciousness as forming the public mind of a society, namely: *personal consciousness*, which relates to the society's self-constitution with itself, through the private minds of its members; *interpersonal consciousness*, whereby the society is self-constituted in contact with other societies, e.g., as between two states; *social consciousness*, which is shaped as the society takes part in the public minds of societies super-ordinate to it, such as international organizations; and, lastly, *spiritual consciousness*, which is formed through, e.g., socialising of religion in human practice (*see* Allott, *supra* note 59, p. 74).
[256] *Ibid*, pp. 76-77.
[257] El Sayed Said, "Islam and Human Rights", in *Human Rights and Humanitarian Law – The Quest for Universality*, ed. D. Warner. (Martinus Nijhoff Publishers: 1997), p. 8.
[258] Guichon, *supra* note 170, p. 181.
[259] *Ibid*, pp. 178-183.
[260] Philip Allott, *Eunomia: New Order for a New World* (Oxford University Press: 2001), p. 180.
[261] *Ibid.*, p. 408
[262] *Ibid.*, p. 255.
[263] D'Aspremont, *supra* note 33, p. 93.
[264] *Ibid*.

Clearly, the structures of *jus cogens,* at this point, are far from coherent and unambiguous. Even taking this avenue, the fundamental values of the international community are vulnerable to abuse. In this respect, Antonio Cassese provides a "blueprint for action" for enhancing the potential of *jus cogens* through three separate paths: increasing reliance on the notion of *jus cogens* by international and national courts, enhancing implementation of peremptory norms at national levels and, lastly, augmenting the role of international civil society in inducing states and other international subjects to acknowledge and comply with *jus cogens* and the values upheld thereby, meaning that NGOs, international legal scholarship and practitioners should further underline the significance of *jus cogens* for a new, better reality for the international community.[265] Equipping the fundamental values of the international community with the required mechanism of protection thus necessitates coming to terms with and clarifying the ambiguities surrounding *jus cogens* in international law.

The role of the value of human dignity for the future of international law

As for a general conceptual connection between law and dignity, interesting insights are provided by Jeremy Waldron. He views the association between dignity and the idea of law as such as being even more profound than that between dignity and human rights. His argument is built on the premise of "law's pervasive emphasis on self-application"[266], whereby people are expected to apply norms to their conduct without coercive intervention on the part of the state. This expectation, Waldron claims, of people being capable of applying law to their own behaviour essentially means that legal systems operate "by using […] the agency of ordinary human individuals"[267].[268] In conclusion, he submits that there is "an implicit commitment to dignity in the tissues and sinews of law"[269].

As mentioned previously, those peremptory norms that have been recognized as such as international law stands today, all can be traced back to considerations for the protection of the very basic unit constituting international society – the individual as a human being. It is from this viewpoint that it is possible to speak of the doctrine of *jus cogens* as centred on the notion of the value of the individual and the value of human dignity as underlying peremptory norms in international law. To further accentuate the importance of the value in light of the potential of *jus cogens* as discussed above, one should answer this question: in whose interest is international law to be developed in the future? Predictably, the common answer to this question would be – states – as they are the principal actors on the international stage, the decision makers, the duty bearers. However, in whose interest are states delegated with these

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[265] Antonio Cassese, *Realizing Utopia: The Future of International Law* (Oxford University Press: 2012), pp. 170-171.
[266] Waldron, *supra* note 197, p. 206.
[267] *Ibid.*
[268] It is difficult not to notice that Waldron's argument relies on the already discussed problematic analogy between dignity and autonomy. He bases his claim on the emphasis of the individual's capacity to think and take part in the legal process, which ultimately undermines his reasoning since autonomy, as already pointed out, forms only part of dignity. In addition, for his claim of interdependence between law and human dignity, Waldron provides another argument – one of them based on the law's commitment to non-brutality as proof of the necessary connection. In short, he maintains that not only is law committed to human dignity as drawn from its procedural aspects that presuppose its legal subjects as reasonable and intelligent beings, but also due to law's general rejection of brutality (*see* Waldron, *supra* note 197, p. 218).
[269] *Ibid.*, p. 222.

powers? The answer is similarly straightforward - their people. If international law is to be re-conceived as the law of the whole of the human race, instead of as the law for sovereign states plain and simple, then there is no doubt as to the centrality of the value of human dignity within the framework of the international legal system. In this sense, the notion of human dignity is much more than just a legal term: rather, it is a synonym for the idea of humanity[270]:

> The principle of dignity marks the unity of the human species. Throughout each individual person, humanity can be injured and so can all others.[271]

Thus, the common interest, in fact – the supreme interest –of international society, is "the survival and prospering of all human beings"[272] through the protection of human dignity. And the recognition of the fundamentality of this value is merely "the consequence of the universality of human reason"[273]. This finding, ultimately, gives grounds for a positive answer to the initially set research question.

[270] Jan Philipp Schaefer, "Human Dignity: a Remedy for the Clash of Cultures?" in *Human Dignity as a Foundation of Law*, *supra* note 174, p. 189.
[271] Hennette-Vauchez, *supra* note 175, p. 40.
[272] Allott, *supra* note 260, p. 96.
[273] Petsche, *supra* note 29, p. 259.

CONCLUSION

This article has attempted to inquire into the role and function of the normative category of *jus cogens* in international law, based on the definition of the notion as formulated in the Vienna Convention on the Law of Treaties and scholarly observations on the topic, in order to evaluate what sort of values the norms meriting peremptory status are embedded in and, ultimately, to see whether the value of human dignity might be among such values.

The article proceeded on the premise that international law is a value-laden system that serves the benefit of the international community. This presumption provided a basis for concluding that *jus cogens* is the normative expression of interests that are shared by the whole of the international community due to the fundamentality of the values that such interests refer to. Inquiry into the conformity of the value of human dignity with that depiction reveals that the value of human dignity does indeed enjoy worldwide recognition as fundamental. Then, the issue was raised of discord as regards defining human dignity and the problems it poses for considering the value as underlying peremptory norms unless a common denominator is found which can withstand the claims of cultural relativism. Consequently, it was suggested that only a minimal content of the concept, in the shape of human dignity as the physical integrity of a person, can be regarded as composing a value that, indeed, might be seen as a value underlying the normative category of *jus cogens* in international law. Lastly, we explored the fundamentality of the value of human dignity in the context of the future of the international community and the international legal system, which gave a basis for an affirmative final answer to the initially set question, albeit with a significant proviso: the value of human dignity can indeed be considered as a value underlying *jus cogens* in international law; however, only the minimal content of this value – such as human dignity as the physical integrity of a person – can fully conform to the description of values underlying peremptory norms in international law.