

An International Legal Perspective on Human Dignity: The Extrinsic Recognition of an Intrinsic Condition

Regard juridique international sur la dignité humaine: la reconnaissance extrinsèque d'une condition intrinsèque

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Abstract

Human dignity plays an important role in the international legal order, and references to the principle can be found in various international human rights instruments. Its meaning, however, remains an object of avid discussion due to the impossibility of finding a precise and timeless way of defining the concept. In this article, we argue that acknowledging inherence as an element of human dignity gives extrinsic legal recognition to an intrinsic human condition and tends to expand human dignity's influence. Vagueness — or openness — in defining the concept provides for a dynamic and evolutionary understanding of human dignity, and, coupled with the idea of inherence, these characteristics represent tools for universalization and adaptation of the concept to new circumstances. These findings are based on a review of philosophical discussions of the idea of

Résumé

La dignité humaine joue un rôle important dans l'ordre juridique international et des renvois à ce principe se trouvent dans divers instruments internationaux relatifs aux droits de la personne. Sa portée reste cependant un objet de vives discussions en raison de l'impossibilité de trouver une définition précise et intemporelle du concept. Dans cet article, nous soutenons que la reconnaissance de l'inhérence comme élément de la dignité humaine permet une reconnaissance juridique extrinsèque d'une condition humaine intrinsèque et tend à étendre son influence. L'imprécision — ou l'ouverture — de sa définition permet une appréciation dynamique et évolutive de la dignité humaine et, associées à l'idée d'inhérence, ces caractéristiques représentent des outils d'universalisation et d'adaptation du concept à de nouvelles

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human dignity, followed by an analysis of how it is addressed in international legal instruments and international jurisprudence and identification of its recurrent elements. We defend the view that the vagueness of its definition does not mean that its content is impossible to identify in particular circumstances. Scholars and institutions can have a concrete sense of the meaning of human dignity even though its substance may admit new elements as new social demands emerge. In our view, the essential meaning of human dignity is founded on the influence of the whole body of human rights as well as on its particular connection to the rights of social minorities, in which human dignity is emphasized because of the material precariousness of such groups under social systems that subject them to discriminatory treatment.

Keywords: human dignity; human rights; inherence; international human rights law; international legal order; protection of social minorities; universalization; vagueness.

circonstances. Ces conclusions sont basées sur un examen des origines philosophiques de l'idée de la dignité humaine, suivi d'une analyse de la manière dont elle est abordée dans les instruments juridiques internationaux et la jurisprudence internationale, et de l'identification de ses éléments récurrents. Nous défendons l'idée que l'imprécision de sa définition ne signifie pas qu'il est impossible de cerner son contenu dans des circonstances particulières. Les spécialistes et les institutions peuvent avoir un sens concret de la signification de la dignité humaine même si sa substance peut admettre de nouveaux éléments à mesure que de nouvelles exigences sociales émergent. Pour les auteurs, le sens essentiel de la dignité humaine est fondé sur l'influence de l'ensemble des droits de la personne, ainsi que sur son lien particulier avec les droits des minorités, dans lesquels la dignité humaine est soulignée en raison de la précarité matérielle de ces groupes en vertu de systèmes sociaux qui les soumettent à un traitement discriminatoire.

Mots-clés: dignité humaine; droits de la personne; droit international des droits de la personne; imprécision; inhérence; ordre juridique international; universalisation.

INTRODUCTION

The idea that all human beings are endowed with intrinsic dignity has unquestionable importance in contemporary society. It finds its origins in philosophical approaches, most of them endeavouring to attribute to the human species a special quality that evokes a state of dignity — notably, by religious thought according to which the mentioned quality would derive from humanity's "creation" or, in rationalist philosophical thought, from the human ability to behave according to reason. Today, human dignity is referred to in national constitutions and in international legal instruments. These legal instruments frequently resort to the idea of inherence since human dignity is not attributed to one or a few human beings but, rather, to all human beings without distinction. The postulate according to which

dignity is inherent to human beings, therefore, is important to extending its field of influence and to avoiding discrimination.

Although the expression “human dignity” is well known, its definition is still under avid discussion. Theorists, while making efforts to identify its dominant elements, diverge on the function and consequences of the vagueness of its definition. In this article, the philosophical origins of human dignity are described as a way to identify different approaches to human dignity historically. This analysis is followed by an examination of how international legal instruments address human dignity. International legal provisions include general and specific approaches found in universal or regional instruments or declarations. Examples of general approaches can be observed in the *Universal Declaration of Human Rights*,¹ the *Charter of the United Nations (UN Charter)*,² as well as in regional regimes, such as the *American Convention on Human Rights (ACHR)*³ and the European Union’s *Charter of Fundamental Rights*.⁴ Human dignity is also invoked in specific contexts, including those elaborated to address certain categories of human rights, such as the *International Covenant on Civil and Political Rights (ICCPR)*⁵ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*;⁶ as well as in instruments governing human rights designed to protect people living under special social circumstances leading to discrimination or prejudice, such as the *International Convention on the Elimination of All Forms of Racial Discrimination*,⁷ the *Convention on the Elimination of All Forms of Discrimination against Women*,⁸ the *Convention on the Rights of Persons with*

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), preamble, arts 1, 22–23 [UDHR].

² *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, preamble (entered into force 24 October 1945) [UN Charter].

³ *American Convention on Human Rights*, 21 November 1969, 1144 UNTS 123, arts 5–6, 11 (entered into force 18 July 1978) [ACHR].

⁴ *Charter of Fundamental Rights of the European Union*, 2 October 2000, [2000] OJ, C 364/01 (entered into force 1 December 2009) [EU Charter]; *Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2702 UNTS 3, preamble, ch 1 (entered into force 1 December 2009).

⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47, preamble, art 10 (entered into force 23 March 1976) [ICCPR].

⁶ *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46, arts 11, 13 (entered into force 3 January 1976) [ICESCR].

⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, preamble (entered into force 4 January 1969) [Convention on Racial Discrimination].

⁸ *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31, preamble (entered into force 3 September 1981) [Convention on Discrimination against Women].

Disabilities,⁹ the *Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*,¹⁰ and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.¹¹

After reviewing the relevant international legal instruments, the article analyzes how international jurisprudence has absorbed, interpreted, and applied the human dignity postulate. Decisions delivered by the European Commission on Human Rights, the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights are discussed in order to demonstrate the aspects of human dignity that are most emphasized by the cases. It will be shown that international jurisprudence frequently resorts to human dignity in cases related to social minorities, including Indigenous peoples and racial and ethnic minorities. It is further used as an important concept to address the conditions of people traditionally subjected to discriminatory measures, such as women, members of the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) communities, or persons with disabilities. It will also be demonstrated that the principle of human dignity is extremely valuable in evaluating conditions of detention in order to clarify that, in prison, one's suffering must not exceed that associated with the deprivation of liberty as such — thus, food and health care shall be available to persons in such circumstances.

Finally, the article discusses some directions for identifying the elements of human dignity. It addresses the ideas of universalization, flexibility, and adaptability to new circumstances as core elements of human dignity. For this purpose, it resorts to positions taken in various international fora, whether through guidelines, recommendations, speeches, or other public documents, which build on the findings of the previous sections. It asserts that the idea of inherence and the lack of a closed definition are special attributes of the human dignity concept. We do not regard the absence of a clear definition to be a failure of international and national legal orders in this regard. It is argued, rather, that this is a tool for expanding human dignity's field of influence. Moreover, we do not consider that the idea of inherence precludes the notion that rights are historical and secularized

⁹ *Convention on the Rights of Persons with Disabilities*, 24 January 2007, 999 UNTS 171, preamble, arts 1, 3, 8, 16(4), 24–25 (entered into force 3 May 2008) [*Convention on Persons with Disabilities*].

¹⁰ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, preamble (entered into force 26 June 1987) [*Convention on Torture*].

¹¹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, 2220 UNTS 3, arts 17, 70 (entered into force 1 July 2003) [*Convention on Migrants*].

constructs. The idea of inherence is part of the postulate of human dignity and corresponds to a social construct. It aims to avoid any sort of discrimination by proclaiming that every human being is entitled to dignity and that this idea pertains to every social group and every local culture. In short, the idea of inherence is treated, in this article, as an extrinsic recognition of an intrinsic condition.

Furthermore, we do not consider that the lack of a closed and immutable definition implies converting the principle into a meaningless rhetorical device. We argue that, even though it has no definitive formulation, it is possible for scholars and institutions to ascertain the content of human dignity at a certain time or place or in a specific case before an international or national tribunal. It will be seen that, today, human dignity already plays a concrete role in judicial decisions, and it also operates as a mechanism for integrating national and international legal orders, since its purpose is to be pursued in every legal regime. We also find that human dignity is commonly referred to in situations where a person is in a position of particular social vulnerability, as in the case, for example, of minorities, detainees, or persons affected by climate change, because the potential precariousness of such positions requires an emphasis on their dignity. Such emphasis is treated in this article as evidence that the content of human dignity can be found even in the absence of a closed definition. The fact that human dignity is frequently invoked in such cases is also regarded as evidence that the concept tends to be more decisive in situations where the connection with the other dimensions of human rights has been weakened. But it does not mean that such circumstances circumscribe in an exhaustive manner the field of its relevance.

HUMAN DIGNITY IN ITS PHILOSOPHICAL ORIGINS

Although philosophical discussion¹² of human dignity dates to ancient¹³ times, human dignity has recently been embodied in international legal

¹² Before Immanuel Kant's contribution based on rationalism, religious influences included Giovanni Pico Della Mirandola in his famous dissertation "De dignitate hominis" in 1486 and Juan Luis Vives, "Fabula de homine" in 1518. For Vives, as for Pico, dignity meant freedom or human capacity to reach the highest goals because all human beings are equally worthy. Immanuel Kant, *Fundamental Principles of the Metaphysics of Morals* (Toronto: Pearson, 1949); Giovanni Pico Della Mirandola, *Discurso sobre a dignidade do homem*, translated and introduced by Maria de Lurdes Sirgado Ganho (Lisbon: Edições 70, 2001); Juan Luis Vives, "Fabula del homine" in *Diálogos y otros escritos* (Barcelona: Planeta, 1988).

¹³ The origins of theoretical concept of human dignity can be found in antiquity. The word "dignity" derives its original meaning from the Latin word "*dignitas*," conveying honour and respect. *Vocabolario Latino – Italiano. Da Luigi Della Noce e Federico Torre* (Torino and Milan: G. Favale e Compagnia and Natale Battezzati, 1856).

instruments and national¹⁴ constitutions. The inherent dignity of the human person has been recognized as the foundation for human rights articulated in international law since the Second World War.¹⁵ Yet, despite its recognition in various international legal instruments, the concept of human dignity remains devoid of a common definition,¹⁶ whether in religious and philosophical traditions or in the constitutional and international law areas.¹⁷ According to Ronald Dworkin, anyone who professes to take rights seriously must accept “the vague but powerful idea of human dignity.”¹⁸ Ingo Wolfgang Sarlet states that human dignity cannot be fixed and static but must be harmonized with the diversity of values present in modern democratic societies. He argues that, currently, “human dignity can be understood as an intrinsic quality of human beings that distinguishes and qualifies them to be respected by the state and by society; makes human beings holders of rights and duties that ensure protection against inhuman oppression; ensures the promotion of the minimum existential conditions for living healthily; and gives them the opportunity

¹⁴ Conor O’Mahony, “There Is No Such Thing as a Right to Dignity” (2012) 10:2 *Intl J Constitutional L* 551 at 555 (“[i]n a legal sense, these constitutional provisions and the surrounding case law and literature would seem to establish the following points in relation to human dignity as a constitutional concept in Western states: 1. Every human being has an inherent dignity by virtue of his or her humanity, irrespective of external characteristics including (but not limited to) sex, age, race or ethnicity, religious or political belief, nationality, status, sexual orientation, or mental or physical condition. 2. This inherent dignity demands that certain human rights should be protected. 3. Because dignity inheres in human beings, irrespective of external characteristics, every human being should be entitled to enjoy his or her human rights without suffering any discrimination or distinction based on such external characteristics”).

¹⁵ Evadné Grant & Joan Small, “Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law” (2005) 6:2 *Human Rights Rev* 25 at 34.

¹⁶ O’Mahony, *supra* note 14 at 557 (“[h]ow is it, if most people can agree that human dignity is very important, that there is so little agreement on what the concept actually entails? The answer to this lies in part in the fact that the project of drafting universal human rights standards is one which naturally has to face up to almost insurmountable problems associated with cultural difference”).

¹⁷ Silvia Scarpa, “Conceptual Uncertainty, Human Dignity and Contemporary Forms of Slavery: An Appraisal and Some Proposals” (2019) 64 *Questions Intl L* 19 at 22–23 (“it is worth noting that the concept of human dignity is not only used in the two above-mentioned branches of international law, namely international humanitarian law and international human right law, but also in others, such as international criminal law, and international slavery, trafficking and labour laws, so that its contours — in light of the possibility of fragmentation in international law and the politicization of the notion — might be difficult to trace and to universalize in a manner going beyond the boundaries of particular sub-areas of international law”).

¹⁸ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977) at 198.

to freely and actively pursue happiness and enjoy their lives in the community.”¹⁹

The dignity of human persons is increasingly referred to as a basic ideal and widely invoked as a legal and moral ground for protest against degrading and abusive treatment.²⁰ According to Erin Daly and James May, the concept of human dignity refers to “the inherent humanness of each person and recognizes and reflects the equal worth of each and every member of the human family, regardless of gender, race, social or political status, talents, merit, or any other differentiator.”²¹ Philosophers agree that there is not a common definition of human dignity, and, as with human rights more generally, it is often regarded as a Western concept. In contemporary human rights discourse, the concept of human dignity features more prominently due particularly to the recognition of poverty and climate change as major violations of human rights as well as the emergence of certain challenges caused by modern science, particularly biomedicine and genetic engineering.²²

The paradigm of human dignity is conceived as a universal ethical and legal principle, stressing that all human beings have intrinsic worthiness and inalienable rights by the mere fact of being human.²³ Although human dignity is considered a moral-philosophical²⁴ term that has several levels of meaning corresponding to different linguistic and cultural functions,²⁵ the universality of human rights is based on the recognition of human dignity by all cultures.²⁶ Once universal, states and transnational organizations must put human rights into practice and respect and protect them.²⁷ Human dignity becomes a limit and objective of society, in general, and of the state,

¹⁹ Ingo Wolfgang Sarlet, *Dignidade da pessoa humana e direitos fundamentais* (Porto Alegre: Livraria do Advogado, 2001) at 60.

²⁰ Oscar Schachter, “Human Dignity as a Normative Concept” (1983) 77:4 Am J Intl L 848 at 849.

²¹ Erin Daly & James R May, “A Primer for Dignity Rights” (2018) 3 Juriste international 21 at 21.

²² Paulus Kaufmann et al, *Humiliation, Degradation and Dehumanization: Human Dignity Violated* (Dordrecht: Springer, 2011).

²³ Roberto Andorno & Antonio Pele, “Human Dignity” in Henk ten Have, ed, *Encyclopedia of Global Bioethics* (Cham, Switzerland: Springer, 2015) 1537 at 1540–41.

²⁴ According to Kant, in the realm of purposes everything has either a price or dignity. Whatever has a price can be replaced by something else that is equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has dignity. Kant, *supra* note 12.

²⁵ Doron Shultziner, “Human Dignity: Functions and Meanings” (2003) 3:3 Global Jurist Topics 16.

²⁶ Antônio Augusto Cançado Trindade, *Tratado de direito internacional dos direitos humanos*, vol 3 (Porto Alegre: SA Fabris, 1994) at 301–403.

²⁷ Hans Jörg Sandkühler, “La dignité humaine et la transformation des droits moraux en droit positif” in Antônio Augusto Cançado Trindade & César Barros Leal, eds, *Le respect de la dignité humaine* (Fortaleza: FB Editora, 2015) 67.

in particular. The limit means never being able to become a thing or an object — an instrument for other purposes and not an end in itself. As an objective, human dignity determines specific duties of protection, especially by the state, for the protection of human dignity, ensuring it through positive or performance measures, such as removing obstacles that hinder the development of human dignity and creating the conditions that enable the fullest enjoyment and exercise dignity.²⁸

Human dignity implies the necessary recognition that all human beings, equal among themselves, are entitled to equal dignity, ontologically speaking. In this sense, dignity is integrated with all human rights — whether civil, political, economic, social, or cultural — and belongs equally to all human beings, without any form of discrimination in this respect.²⁹ Human rights are a particular social practice that aims to realize a distinctive substantive conception of human dignity.³⁰ Human dignity's origins show that the idea of inherence has accompanied its entire philosophical trajectory. The purpose of expanding human dignity by regarding it as intrinsic to individuals represents, then, the central point of the concept. Whether considered in religious perspective, whereby every person must be dignified by being considered a divine creation, or in rationalist philosophical terms, in which every person is considered to have intrinsic value by virtue of being graced by reason, the postulate is to expand human dignity to all human beings, avoiding discrimination. As will be seen, in the era of human dignity as a legal principle and right, it not only influences the entire legal system but also drives efforts to adapt its application to specific realities and situations in which human beings may be placed.

HUMAN DIGNITY IN INTERNATIONAL LAW

The concept of human dignity has played an important role in the development of international human rights law, not in providing an agreed content to human rights but, rather, in contributing to particular methods of interpreting human rights. According to Christopher McCrudden, the basic minimum content of the principle seems to have at least three elements: (1) the intrinsic worth of all human beings; (2) the recognition and respect of that intrinsic worth by others; and (3) the duty of states to protect human rights. Despite the existing consensus on this minimum core,

²⁸ Humberto Nogueira Alcalá, "Dignidad de la Persona, Derechos Fundamentales, Bloque Constitucional de Derechos y Control de Convencionalidad" (2010) 5 *Revista de Derecho de la Universidad Católica de Uruguay* 79.

²⁹ Mariana Blengio Valdés, "La dignidad humana como parámetro de interpretación en fuentes de derecho internacional de los derechos humanos y bioética. ¿la definición inexistente?" (2016) 25:49 *Revista de Derecho Público* 31.

³⁰ Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Human Rights Conceptions" (1982) 76 *Am Political Science Rev* 303.

McCrudden argues that there are significant political and philosophical differences of understanding regarding its three elements. In particular, there are differences as to what intrinsic worth consists of and regarding the kinds of treatment that offend that intrinsic worth.³¹ Ginevra Le Moli points out that, within a legal system, we can in fact see that the principle of human dignity has three main features: (1) it is a structural element (indeed, a necessary foundational element of the international legal system); (2) it possesses legal substance, which is the protection of the human dignity of all individuals and the injection of considerations of humanity, concretized through a series of legal norms, into different areas of international law; and (3) it is an obligation-creating principle, which derives directly from its legal substance and concretizations.³²

Respect for human dignity is considered a fundamental principle. Due to this fundamentality, it need not be explicitly included in normative texts in order to produce effects. This assumption does not reduce the principle to a natural right. The phenomenon is broader than exaggerated positivism might suggest; law is a function of society and not a product of the state.³³ As a fundamental general principle, it represents “the highest common denominator” of relevant international rules and finds expression in treaties and customary international law.³⁴ As a fundamental principle, however, human dignity may need to be balanced against other principles or collective goals.³⁵ Muriel Fabre-Magnan, on the other hand, argues that, while fundamental rights and freedoms can be balanced against each other, the principle of human dignity cannot be opposed to any fundamental right or freedom, insofar as it constitutes the basis of other human and fundamental rights.³⁶

Dignity can be considered as a right and a principle recognized in national and international legal instruments and can also be used as a criterion for interpretation to provide a broader sense of human rights. In this sense, human dignity has significant legal functions and embodies numerous dimensions of fundamental rights, including personal integrity, non-discrimination, freedom of choice and minimum conditions for a decent life, among others. Humiliating treatment, discrimination in all its facets,

³¹ Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19:4 *Eur J Intl L* 655 at 676.

³² Ginevra Le Moli, “The Principle of Human Dignity in International Law” in Mads Andenas et al, eds, *General Principles and the Coherence of International Law* (Leiden: Brill/Nijhoff, 2019) 352 at 360.

³³ José de Oliveira Ascensão, *ODireito. Introdução e teoria geral* (Coimbra: Almedina, 2001) at 5.

³⁴ Le Moli, *supra* note 32 at 360.

³⁵ *Ibid.*

³⁶ Muriel Fabre-Magnan, “La dignité en droit: un axiome” (2007) 58:1 *R interdisciplinaire d'études jur* 1.

and inequality are evident denials of human dignity. Human dignity is asserted in several international legal instruments³⁷ applicable to various aspects of international social dynamics and to special thematic areas or regions.³⁸ General provisions can be found in legal instruments such as the *Universal Declaration of Human Rights*³⁹ and the *UN Charter*⁴⁰ as well as in regional instruments such as the *ACHR*⁴¹ or the EU's *Charter of Fundamental Rights*.⁴² Special thematic instruments invoking human dignity include the *ICCPR*,⁴³ the *ICESCR*,⁴⁴ the *International Convention on the Elimination of All Forms of Racial Discrimination*,⁴⁵ the *Convention on the Elimination of All Forms of Discrimination against Women*,⁴⁶ the *Convention on the Rights of Persons with Disabilities*,⁴⁷ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,⁴⁸ and the *International Convention on the Protection of the Rights of All Migrant Workers and Member of Their Families*.⁴⁹

International legal instruments also embrace, in some cases, the assumption of inherence. In the *Universal Declaration of Human Rights*'s preamble, it is stated that the recognition of inherent dignity and equal inalienable rights is the foundation of freedom, justice, and peace in the

³⁷ According to Celso D de Albuquerque Mello, human dignity was first affirmed, in an international document, in the *Declaration of Philadelphia* in 1944, which expanded the purposes of the International Labour Organization. Celso D de Albuquerque Mello, *Curso de Direito Internacional Público*, 15th ed (Rio de Janeiro: Renovar, 2004) at 866. Article II(a) of the declaration provided: “[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.”

³⁸ Theodor Meron, in his contribution to the *Recueil des Cours*, defined human rights as a series of legal entitlements protecting human dignity. But he held that it does not constitute a special field of international law. His purpose was to demonstrate how human rights influence general international law in order to prove that it radiates throughout the whole system, moving international law from “state-centred” to “individual-centred.” Theodor Meron, “International Law in the Age of Human Rights” (2003) 301 *Rec des Cours* 9 at 21–22. According to this conception, human rights would not be a branch of international law but, rather, one of its stems.

³⁹ *UDHR*, *supra* note 1, preamble, arts 1, 22–23.

⁴⁰ *UN Charter*, *supra* note 2, preamble.

⁴¹ *ACHR*, *supra* note 3, arts 5–6, 11.

⁴² *EU Charter*, *supra* note 4, preamble, ch 1.

⁴³ *ICCPR*, *supra* note 5, preamble, art 10.

⁴⁴ *ICESCR*, *supra* note 6, arts 11, 13.

⁴⁵ *Convention on Racial Discrimination*, *supra* note 7, preamble.

⁴⁶ *Convention on Discrimination against Women*, *supra* note 8, preamble.

⁴⁷ *Convention on Persons with Disabilities*, *supra* note 9, preamble, arts 1, 3, 8, 16(4), 24–25.

⁴⁸ *Convention on Torture*, *supra* note 10, preamble.

⁴⁹ *Convention on Migrants*, *supra* note 11, arts 17, 70.

world.⁵⁰ Article 1 of the declaration lays out that every person is equal in dignity and rights.⁵¹ The *UN Charter's* preamble also affirms faith in fundamental rights, in the dignity and worth of the human person, and in the equal rights of men and women.⁵² Like the *UN Charter*, the *ICCPR* holds in its preamble that inherent dignity is one of the foundations of freedom, justice and peace in the world,⁵³ and the *International Convention on the Elimination of All Forms of Racial Discrimination* has a preambular provision considering that dignity and equality are inherent in all human beings and reiterating that the *Universal Declaration of Human Rights* proclaims that all human beings are equal in dignity.⁵⁴ Similarly, the preamble of the *Convention on the Elimination of All Forms of Discrimination against Women* states that its spirit is to reaffirm faith in fundamental human rights and in the dignity of the human person, and it recalls that discrimination against women violates equality of rights and respect for human dignity.⁵⁵ Furthermore, the *Convention on the Rights of Persons with Disabilities* regards as its purpose to promote and respect inherent dignity,⁵⁶ and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or*

⁵⁰ *UDHR*, *supra* note 1, preamble (“[w]hereas 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”).

⁵¹ *Ibid*, art 1 (“[a]ll 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”).

⁵² *UN Charter*, *supra* note 2, preamble (“to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”).

⁵³ *ICCPR*, *supra* note 5, preamble (“[c]onsidering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; [r]ecognizing that these rights derive from the inherent dignity of the human person”).

⁵⁴ *Convention on Racial Discrimination*, *supra* note 7, preamble (“[c]onsidering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings. ... Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin”).

⁵⁵ *Convention on Discrimination against Women*, *supra* note 8, preamble (“[n]oting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women”).

⁵⁶ *Convention on Persons with Disabilities*, *supra* note 9, preamble (“[r]ecalling the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world”).

Punishment affirms that the rights contained therein are results of the recognition of inherent human dignity.⁵⁷

This sort of approach evidences an assumption that there is worth and dignity in a human person abstractly considered: it postulates that a human person has an intrinsic right to dignity that must be respected. This assumption has the effect of extending protection to human persons living in different social conditions, special circumstances, or regions. If it is inherent — deriving from the mere fact of being human — human dignity’s applicability cannot vary in terms of social position, circumstance, or region. Therefore, as a basic assumption to be followed by specific normatization, human dignity operates as a legal principle. Thus, based on the idea of inherence, the international legal order aspires to the universalization of human dignity. The postulate of inherent human dignity is enshrined in the international legal order, widely accepted by international society, confirmed by tradition, and resonant in pluralistic cultures.⁵⁸ The assumption of inherence must therefore be understood, at the legal level, as an extrinsic recognition of an intrinsic condition.

Nevertheless, if the postulate of inherence is embodied in the positive international legal order, it must be considered to have positive legal content. The idea of inherence does not set aside the perception that rights are, historically speaking, achievements. The idea of inherence is subject to secularization, as with any other aspect of human rights. Extending the feature of dignity to human beings in every social group, culture, or nationality must be considered a historical achievement *per se*. Yet it also means that the international legal order has reached some level of consensus that is conducive to universal recognition. Such a finding is underlined by the fact that, as we have seen, the idea of inherence is present in the most important international legal instruments, such as the *Universal Declaration of Human Rights*.

⁵⁷ *Convention on Torture*, *supra* note 10, preamble (“[c]onsidering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world[; r]ecognizing that those rights derive from the inherent dignity of the human person”).

⁵⁸ Roberto Andorno raises different cultural traditions in which human dignity finds resonance — from the Christian approach in which human dignity derives from human creation by God in his image to the Kantian position whereby human dignity is founded on the human capacity to conceive. Andorno points out that, although the concept of human dignity is often attributed to Western thought, it is also expressed in the teachings of Confucianism — as a result of the human capacity to be oriented by a sense of justice — and Islamic traditions — justified in the belief that God has endowed human beings with the best shape, intellect, freedom, and dignity. Roberto Andorno, “Human Dignity and Human Rights” in Henk ten Have & Bert Gordijn, eds, *Handbook of Global Bioethics* (Dordrecht: Springer, 2014) 45 at 46–49.

The second feature of the postulate of human dignity is its vagueness — as has been pointed out — in the sense that its normative formulation refrains from affixing a decisive and immutable definition to human dignity. Traditionally, this has been evidenced by a “negative” approach whereby the international legal order identifies specific examples of violation of the principle but, on the whole, maintains an open definition in order to enable an evolutionary and flexible understanding of the concept. Considering that international society is mired in social complexity — in which new conceptions of human dignity are always emerging by virtue of new social positions and conditions occupied by human beings — the absence of a fixed definition is a tool for permitting its continuity and adaptation to newly arising contexts.

In this vein, the vagueness of human dignity’s definition would be better understood if it were treated as openness, as this more fully captures human dignity’s intelligibility. It does not mean that it is impossible for scholars or institutions to determine its general sense in a given period or its applicability to a specific concern. It means that the principle possesses a dynamic feature and resorts to the absence of a closed definition as a second way — besides the idea of inherence — to permit expansion of its influence and its aspiration to universalization.⁵⁹ In sum, through vagueness of definition, the legal principle of human dignity can be compared to the first liquid to fill a new receptacle — it can be human rights law’s first response to newly emerging social circumstances.

Once established as a legal principle, other international instruments enhance human dignity as a legal right that operates in specific domains, thus reaffirming its existence as both a principle and a right. The *ACHR* announces, in Article 5.2, that there will be no torture or cruel punishment or treatment, as a way of respecting the inherent dignity of the human

⁵⁹ Regarding the role of principles in the conception of a legal system, Marco Antônio Ribeiro Tura posits that if “law is presented as a teleological-axiomatic system[, this] implies assuming that, contrary to logical-axiomatic systems, [a] legal system is open and movable. ... Logical-axiomatic systems are closed and immovable because from a few axioms, formulas held as self-evident truths [*sic*], it is possible to solve every arising problems [*sic*]. Now, law does not express itself like the said systems. It is not possible to conceive that every arising problems [*sic*] can be solved by elements contained within [a] legal system. The ... idea that [a] legal system foresees mechanisms to solve antinomies and to fulfill legal gaps weakens its understanding as a logic-axiomatic system. Therefore, [a] legal system has permanent interconnection and interchanging with vital world [*sic*]... [A] [l]egal system, hence, can only be conceived as an open system because it is permanently subjected to the influence of the acting forces over [the] objective world (natural), intersubjective world (social) and subjective world (individual).” Marco Antônio Ribeiro Tura, *Placing Principles into a Conception of Law as a System*, translated by Emílio Mendonça Dias da Silva (Kindle E-book, 2019) at paras 7–8. It would thus be the role of principles to be open in order to enable a legal system’s adaptability to new circumstances.

person.⁶⁰ Further, Article 11.1 addresses the recognition of human dignity as a right: “[E]veryone has the right to have his honor respected and his dignity recognized.”⁶¹ In the same vein, Article 1 of the EU’s *Charter of Fundamental Rights* is titled “Dignity” and provides that human dignity is inviolable and shall be respected and protected.⁶² The *ICCPR*, in Article 10(1), identifies treatment in accordance with human dignity as a right of all persons deprived of their liberty.⁶³ Article 13 of the *ICESCR* provides that everyone has the right to education on the basis that it promotes the full development of human personality and the sense of human dignity.⁶⁴ Article 39 of the *Convention on the Rights of the Child* provides that states parties shall “promote physical and psychological recovery and social reintegration of a child victim of ... any form of neglect, exploitation, or abuse; torture and any other cruel, inhuman or degrading treatment or punishment; or armed conflict” in an environment fostering health, self-respect, and dignity.⁶⁵ The *Universal Declaration on Bioethics and Human Rights* commands that human dignity shall be fully respected.⁶⁶

The special properties of the principle of human dignity — aspiring to universality by the idea of inherence and through vagueness of

⁶⁰ *ACHR*, *supra* note 3, art 5(2) (“[n]o 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”).

⁶¹ *Ibid*, art 11(1) (“[e]veryone has the right to have his honor respected and his dignity recognized”).

⁶² *EU Charter*, *supra* note 4, art 1 (human dignity) (“[h]uman dignity is inviolable. It must be respected and protected”).

⁶³ *ICCPR*, *supra* note 5, art 10(1) (“[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”).

⁶⁴ *ICESCR*, *supra* note 6, art 13(1) (“[t]he States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of dignity, and shall strengthen the respect for human rights and fundamental freedoms”).

⁶⁵ *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3, art 39 (entered into force 2 September 1990) (“States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child”).

⁶⁶ United Nations Educational, Scientific and Cultural Organization (UNESCO), *Universal Declaration on Bioethics and Human Rights* (19 October 2005) in UNESCO, *Records of the General Conference*, 33rd Sess (Paris, 3–21 October 2005), vol 1 (Paris: UNESCO, 2005) at 74, preambular para 3 (“[r]ecognizing that ethical issues raised by the rapid advances in science and their technological applications should be examined with due respect to the dignity of the human person and universal respect for, and observance of, human rights and fundamental freedoms”).

definition — enable it to promote interpretation of different dimensions of human rights, by exercising its influence over instruments governing individual liberties, social and economic conditions, and the vulnerabilities of special collectivities — such as those subject to discriminatory treatment, for instance. Thus, the principle is intended not only to be applied if society changes but also to integrate international and national legal systems under its auspices by representing the contact point among these different legal spheres. In any case, it is evident that instruments addressing the human rights of social minorities or other groups in specific circumstances resort to human dignity as a way of vindicating the enforcement of the whole body of human rights in such specific domains.

From such legal foundations, human dignity is also the object of a developed jurisprudence emanating from international adjudicative bodies operating in different spheres, as will be demonstrated next.

HUMAN DIGNITY IN INTERNATIONAL JURISPRUDENCE

Although considering that human dignity plays an important role in human rights adjudication, McCrudden argues that its vagueness favours judicial discretion. Reviewing judicial cases coming from international, regional, and local adjudicatory bodies, he observes that, in the International Court of Justice, the concept of dignity is mostly associated with the dignity of states. However, dignity applied to human rights contexts has also appeared in some dissenting opinions, as in the case, for example, of the opinion of Judge Kōtarō Tanaka in the *South West Africa* case.⁶⁷ Human dignity, otherwise, is more frequently raised by human rights adjudicative bodies, such as the European Commission on Human Rights and the European Court of Human Rights.⁶⁸

⁶⁷ McCrudden, *supra* note 31 at 682; *South West Africa, Second Phase (Ethiopia v South Africa; Liberia v South Africa)*, [1966] ICJ Rep 6 at 250, Dissenting Opinion of Judge Tanaka. This case was initiated by Ethiopia and Liberia against the Union of South Africa in order to evaluate performance of its duties as the mandatory power in South West Africa. Although the court found that there was no legal basis for the applicants' request, Tanaka J declared in his dissenting opinion that some of the pleadings were well founded. As to the matter of differential treatment of particular population groups, Tanaka J found that the treatment betrayed racial discrimination, which would be contrary to the principle of equality since "[a]s persons they have the dignity to be treated as such" (*ibid* at 308).

⁶⁸ In this sense, McCrudden points out that human dignity was first addressed by the European Commission of Human Rights in the *East African Asians* case, regarding racial discrimination as an infringement of human dignity: *East African Asians v United Kingdom* (1973), 3 EHRR 76 at paras 189, 207–08 (Eur Comm'n HR). In turn, according to McCrudden, the first reference to the principle was made by the European Court of Human Rights in *Tyrer v United Kingdom* (1978), No 5856/72, [1978] ECHR 2, 2 EHRR 1, in relation to the imposition of corporal punishment in a judicial sentence. McCrudden, *supra* note 31 at 683. Since then, the court has invoked human dignity in several cases, most

The same can be found in relation to the Inter-American Court of Human Rights (IACtHR). In the case *Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and Their Members v Panama*,⁶⁹ the court decided that Panama had violated Article 21 of the *ACHR*. From 1972 to 1976, the Indigenous peoples, the Kuna of the Madungandí and the Emberá of Bayano, were forced to abandon their ancestral territories, which were flooded by the reservoir of a dam. They argued that, as they lacked any other alternative, they were forced to relocate to new lands offered by the state, which it said were of better quality and greater quantity, and to accept the economic compensation that was offered in exchange for the destruction and flooding of their ancestral territories. According to the IACtHR, “the right to territory includes the use and enjoyment of the natural resources found in the territory, and is directly tied to, indeed is a prerequisite for, the rights to a dignified existence, food, water, health, and life.”⁷⁰ For this reason, the court indicated that “an indigenous community’s relations to its land and resources are protected by other rights set forth in the *American Convention*, such as the right to life, honor, and dignity, freedom of conscience and religion, freedom of association, rights of the family, and freedom of movement and residence.”⁷¹

The *ACHR* prohibits discrimination of any type, a notion that includes unwarranted distinctions on the basis of race, colour, sex, language, religion, political or other opinions, national or social origin, economic status, birth, or any other social condition.⁷² Concerned that violence against women is an offence against human dignity and a manifestation of historically unequal power relations between women and men, the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women* affirms that every woman has the right to the recognition, enjoyment, exercise, and protection of all human rights and freedoms embodied in regional and international human rights instruments, including the rights to have the inherent dignity of her person respected and her family protected.⁷³ In the 2006 case of *Miguel Castro-Castro Prison v Peru*, the

recently in finding that a failure to provide proper medical treatment to a detainee violated the human dignity of the person. *Kikolishen v Ucraina*, No 65544/11 (15 April 2021).

⁶⁹ *Kuna Indigenous People of Madungandí and Emberá Indigenous People of Bayano and Their Members (Panama)* (2014), Inter-Am Ct HR (Ser C) No 284.

⁷⁰ *Ibid* at para 194.

⁷¹ *Ibid*.

⁷² *ACHR*, *supra* note 3, art 1.

⁷³ *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, 9 June 1994, OASTS No 61, 33 ILM 1534, art 4 (entered into force 5 March 1995).

IACtHR applied a gender perspective based on this provision for the first time.⁷⁴

In other cases, the IACtHR has indicated that “at the current moment in the development of international law, the fundamental principles of equal protection and non-discrimination have taken on the status of *jus cogens*.”⁷⁵ The court has also stated that “the notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual, and that principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority.”⁷⁶ In the 2006 case of *Ximenes Lopes v Brazil*, the IACtHR indicated that one must take into account the special position of guarantor that the state assumes with respect to persons who are under its custody or care, such as persons institutionalized in mental health centres, to whom the state has the positive obligation of providing the conditions needed to lead a dignified life.⁷⁷ Furthermore, the IACtHR has addressed the concept of a dignified life among the obligations imposed under Article 4 of the *ACHR*. Thus, in the case of “*Street Children*” (*Villagrán Morales et al*) *v Guatemala*, the court established that “the fundamental right to life includes ... also the right ... not [to] be prevented from having access to the conditions that guarantee a dignified existence.”⁷⁸ This interpretation was revisited in three cases involving Indigenous communities arguing against Paraguay, for whom the state did not take the necessary measures to provide a dignified life through the provision of health services, among other things.⁷⁹

The principle of human dignity has also been embraced within the African framework for the legal protection of human rights, comprising the African Commission on Human and Peoples’ Rights and the African Court on

⁷⁴ *Miguel Castro-Castro Prison v Peru* (2006), Inter-Am Ct HR (Ser C) No 160 at paras 68–69.

⁷⁵ *Flor Freire v Ecuador* (2016), Inter-Am Ct HR (Ser C) No 315 at para 109.

⁷⁶ *Ibid.*

⁷⁷ *Ximenes Lopes v Brazil* (2006), Inter-Am Ct HR (Ser C) No 149.

⁷⁸ “The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it.” *Case of the “Street Children” (Villagrán Morales et al) v Guatemala* (1999), Inter-Am Ct HR (Ser C) No 77 at para 144.

⁷⁹ *Case of the Yakye Axa Indigenous Community v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 142 at para 161; *Case of the Sawhoyamaya Indigenous Community v Paraguay* (2006), Inter-Am Ct HR (Ser C) No 146; *Case of the Xákmok Kásek Indigenous Community v Paraguay* (2010), Inter-Am Ct HR (Ser C) No 214 at paras 194–217.

Human and Peoples' Rights (ACtHR). For example, in 2003, the commission delivered a communication in *Purohit and Moore v Gambia* regarding discriminatory features, directed at people with mental illnesses, of Gambia's *Lunatics Detention Act*.⁸⁰ In that case, the complainants submitted that there was no clear definition of who could be detained as a person with a disability. The legislation also resorted to discriminatory expressions like "idiot" or "lunatic." The complainants further submitted that, because of the lack of precise definition of the legislation's scope, there was overcrowding in the country's psychiatric units. The commission found the communication admissible and declared, on the merits, that Gambia had violated the *African Charter on Human and Peoples' Rights (African Charter)* by imposing discriminatory treatment on people with disabilities.⁸¹ The commission also considered that Gambia had violated human dignity, which "is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled ... without discrimination."⁸²

The ACtHR has also observed that respect for human rights as a whole is intended to protect the dignity of the human person. However, as the court has pointed out, the reference to human dignity takes a specific form in the provisions of Article 5 of the *African Charter*, which prohibits restrictions on human dignity.⁸³ Thus, the court shares the commission's view that Article 5 of the *African Charter* "can be interpreted as extending the broadest possible protection against abuse, whether physical or mental."⁸⁴

In the jurisprudence of the United Nations (UN) Human Rights Committee (HRC), respect for human dignity is expressed above all in the protection of physical and mental integrity as well as in the prohibition of torture and slavery. This prohibition protects individuals from humiliation and degradation.⁸⁵ It is also the HRC's position, stated in *General Comment No. 36*, that environmental degradation and climate change constitute

⁸⁰ *Lunatics Detention Act*, Laws of The Gambia, c 40.05.

⁸¹ *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986).

⁸² African Commission on Human and Peoples' Rights, *Purohit and Moore v Gambia*, Communication No 241/2001 (29 May 2003) at paras 55–57, online: <africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2003/49>.

⁸³ "The Court observes that respect for human rights as a whole is intended to protect the dignity of the human person. However, under Article 5 of the Charter, the protection of human dignity takes a specific form, namely the prohibition of treatment likely to restrict it, such as slavery, slave trade, torture and any other form of cruel, inhuman or degrading treatment." *Léon Mugesera v Rwanda*, No 012/2017 (27 November 2020) at para 80 (African Ct HPR), online: <www.african-court.org/cpmt/details-case/0122017>.

⁸⁴ *Ibid.*

⁸⁵ Anja Seibert-Fohr, *La protection de la dignité de la personne en droit international* (Heidelberg: Ruprecht-Karls-Universität, 2019).

extremely serious threats to the ability of both present and future generations to enjoy the right to life, and that states should take all appropriate measures to address threats to the right to life as well as conditions, including environmental pollution, that prevent individuals from enjoying their right to life with dignity.⁸⁶ Based on this position, the HRC held that the authors of a communication against Paraguay should be provided with an effective remedy, entailing full reparation for the persons whose rights had been violated. The authors of the communication had alleged that their right to a life with dignity had been violated as a result of the large-scale use of toxic agrochemicals, which had had severe impacts on their living conditions, livelihoods, and health.⁸⁷

A negative approach to human dignity is frequently associated with humiliation and degrading treatment, torture, poverty, and slavery.⁸⁸ Instead of deducing moral principles from an abstract conception of human dignity, such a perspective starts from some act or practice that often is, or can be, characterized as a violation of human dignity: humiliation, degradation, or dehumanization. In other words, instead of attempting to derive a conception of human dignity from normative ethics, proponents of this method choose a negative approach.⁸⁹ Similarly, Egle Venckienė argues that human dignity may be summarized as a negative duty not to treat the human being as an object for the attainment of other needs at the national level. Thus, human dignity must be protected by means of law making, and legal norms may not be interpreted in such a way as to permit the infringement of human dignity. For example, the application of capital punishment, the application of physical punishment, the humiliation of human beings in the course of criminal procedures and places of detention, and the creation of inhuman conditions must be prohibited.⁹⁰

Therefore, international jurisprudence shows that human dignity is more frequently addressed in cases where a person is in a special circumstance of social vulnerability or discriminatory treatment. These circumstances embrace

⁸⁶ Human Rights Committee (HRC), *General Comment No 36: Article 6: Right to Life*, UN Doc CCPR/C/GC/36 (2019) at para 3.

⁸⁷ HRC, *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No 2751/2016*, UN Doc CCPR/C/126/D/2751/2016 (2016).

⁸⁸ E.g., *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287, art 3(1) (entered into force 21 October 1950); Pasquale De Sena, “Slaveries and New Slaveries: Which Role for Human Dignity?” in Andrea Gattini, Rosana Garcíandia & Philippa Webb, eds, *Human Dignity and International Law* (Leiden: Brill, 2021) 113 at 116 (referring to a “tendency to consider respect for dignity as the legal ground for both the ban on torture and cruel and degrading treatment”).

⁸⁹ Kaufmann et al, *supra* note 22.

⁹⁰ Egle Venckienė, “The Right to Dignity: Terminological Aspects” (2011) 18 *Jurisprudence* 91.

gender, race, sexuality, ethnicity, and disability. They also comprise people deprived of liberty by virtue of judicial punishment. The emphasis on human dignity in these cases is crucial to connecting persons who are living under conditions of social exclusion to the full enjoyment of all dimensions of their human rights since their links to social standards have been weakened by the social conditions in which their exclusion is rooted. The principle of human dignity thus sheds light on the whole of human rights protection and is emphasized in cases of special vulnerability. Resorting to human dignity is important for restoring minimum conditions in which vulnerable persons can be protected by civil, political, social, economic, and cultural rights. Therefore, before pursuing new, more direct human rights protections, the emphasis on human dignity is justified as a way to reconnect persons with civilized standards of existence and, as a consequence, with recognized dimensions of human rights. It is a means of reiterating that, even faced with vulnerability, such persons are as human as other persons and are, by that fact alone, equally worthy.

INTERNATIONAL LEGAL ELEMENTS OF HUMAN DIGNITY

Considering that dignity is a right and a principle recognized in international legal instruments and can be used as a criterion for interpretation by judicial bodies in order to provide a broader understanding of human rights, that the international legal order aspires to universalization of human dignity, and that the postulate of inherent human dignity is enshrined in the international legal order and is widely accepted by international society, some dynamic and flexible elements can be embedded in the human dignity concept, guiding its interpretation at both the national and international levels. In other words, rather than a mere concept, human dignity can be conceived as a set of elements with many different aspects, as well as a process, rather than having a fixed meaning. Its different aspects should reflect an international perspective and the proliferation of sources in which it is recognized, in line with the plurality that shows (according to Mireille Delmas-Marty, using the cloud metaphor)⁹¹ an intertwining of norms interacting horizontally in a process of integration and disintegration without hierarchy, either in an approach of a supranational character or through *jus cogens* human rights norms.

International law, including human dignity, can be understood as a cultural and temporal construct, a system that constantly evolves through time.⁹² Sixty years ago, the concept of a human right to a healthy environment was viewed as a novel, even radical, idea. Today, it is widely recognized

⁹¹ Mireille Delmas-Marty, *Les forces imaginantes du droit (II). Le pluralisme ordonné* (Paris: Seuil, 2006).

⁹² Paulo Borba Casella, *Direito Internacional no Tempo Antigo* (São Paulo: Editora Atlas, 2011).

in international law and endorsed by an overwhelming proportion of countries.⁹³ According to Principle 1 of the Stockholm Declaration, all persons have the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and they bear a solemn responsibility to protect and improve the environment for present and future generations. As to whether a healthy environment is essential for the enjoyment of human rights, there is a growing sense that environmental degradation and climate change can negatively impact human dignity.

On 28 July 2022, the UN General Assembly (UNGA) adopted a historic resolution declaring that access to a clean, healthy, and sustainable environment was a universal human right. UNGA Resolution 76/300 represents a universal recognition that the impact of climate change and the unsustainable management and use of natural resources interfere with the enjoyment of a clean, healthy, and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights. The resolution recognizes that sustainable development and the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights for present and future generations.⁹⁴ Considering that all human beings depend on the environment in which they live, a safe, clean, healthy, and sustainable environment is a common principle. Without a healthy environment, human beings are unable to fulfill their aspirations, and they may not have access to even minimum standards of human dignity. Based on the assumption that all human beings are part of the same planet and are all interconnected and belong to the same human species, all individuals are of equal value and, therefore, deserve equal respect and concern. Human dignity recognizes and reflects the equal worth of each and every member of the human family. Human dignity does not mean the superiority of the human species over other species of animals, but it is related to the idea that, within the human family, all of its members are of equal value.

Even though human dignity becomes a value underlying different ways of life, as societies develop their own conceptions about how humans should relate to one another,⁹⁵ international society has recognized its universality through norms of international law widely accepted by states. Dignity is a universal principle because everyone is born with, and possesses, the same

⁹³ David R Boyd, *The Effectiveness of Constitutional Environmental Rights*, Yale UNITAR Workshop (April 2013).

⁹⁴ *The Human Right to a Clean, Healthy and Sustainable Environment*, GA Res 76/300, UN Doc A/RES/76/300 (28 July 2022).

⁹⁵ Man Yee Karen Lee, "Universal Human Dignity: Some Reflections in the Asian Context" (2008) 3:1 *Asian J Comp L* 1.

rights, regardless of where they live, their gender or race, or their religious, national, cultural, or ethnic background. During a lecture entitled “Do We Still Have Universal Values?” delivered at Tübingen University in 2003, then UN Secretary-General Kofi Annan affirmed that “our universal values require us to recognize the human characteristics, both good and bad, that we have in common with all our fellow human beings, and to show the same respect for human dignity and sensitivity in people of other communities that we expect them to show for ours.”⁹⁶ He stressed that “the function of universal values is not to eliminate all differences, but rather to help us manage them with mutual respect, and without resorting to mutual destruction,” and he concluded that “values are not there to serve philosophers or theologians, but to help people live their lives and organize their societies. So, at the international level, we need mechanisms of cooperation strong enough to insist on universal values, but flexible enough to help people realize those values in ways that they can actually apply in their specific circumstances.”⁹⁷

As a universal value, human dignity involves promotion by, and the responsibility of, all society. State responsibility is an old general principle of international law, and, historically, states hold primary responsibility to respect human rights, respond to them when violated, protect against violations by third parties, and create an environment where all rights are respected.⁹⁸ Based on the assumption that human dignity is a universal value, and that international law establishes that state responsibility for its violations is limited by territoriality as well as by citizenship, the promotion and protection of human dignity can result in a paradox. Each state is responsible for human rights violations occurring in its own territory. In contrast, state responsibilities with regard to the human rights of citizens of other states are vague and weak.⁹⁹ Jürgen Habermas has stressed that, despite its abstract meaning, human dignity still retains from its particularistic precursor concepts the connotation of depending on the social recognition of status — in this case, the status of democratic citizenship. According to this conception, only membership in a constitutional political community can protect, by granting equal rights, the equal human

⁹⁶ United Nations (UN) Department of Public Information, “Universal Values — Peace, Freedom, Social Progress, Equal Rights, Human Dignity — Acutely Needed,” Lecture by the Secretary-General at Tübingen University, Germany (12 December 2003) at para 26, online: <www.un.org/press/en/2003/sgsm9076.doc.htm>.

⁹⁷ *Ibid* at paras 37, 43.

⁹⁸ Malcolm N Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003) at 541.

⁹⁹ Mark Gibney, Katarina Tomagevski & Jeans Vedsted-Hansen, “Transnational State Responsibility for Violations of Human Rights” (1999) 12 *Harv Hum Rts J* 268.

dignity of every person.¹⁰⁰ From a cosmopolitan perspective, however, the individual human being is the ultimate unit of worth and is entitled to equal consideration regardless of nationality and citizenship.¹⁰¹ Respect for the right to dignity may be demanded from a democratic state and legal community by every human being on the grounds of his or her existence, without any preliminary conditions and without differentiation related to citizenship or any other aspect.¹⁰²

The debate on migration might be addressed based on human dignity and the idea that international standards of human rights must be implemented in order to successfully and morally address migration questions. International law on human rights establishes unequivocally that migrants and members of their families are first and foremost human beings, the holders of universal human rights whose dignity and security require specific protection.¹⁰³ Consequently, they enjoy the protection of international human rights law like anyone else, even if they are in an irregular situation, as can be the case with some migrants.¹⁰⁴ The dignity of the person cannot be respected and protected if there is no recognition of fundamental rights and freedoms that apply equally to all people, irrespective of their gender, economic status, or nationality.¹⁰⁵ The UN *Report on the Human Rights of Migrants at Europe's Borders* recommended, for states visited by the Office of the High Commissioner for Human Rights as well as EU institutions, “norm-based and practical guidance on ensuring human rights-based migration and asylum governance measures under the premise that respecting, promoting, and protecting

¹⁰⁰ Jürgen Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights” (2010) 41:4 *Metaphilosophy* 464.

¹⁰¹ Kok-Chor Tan, *Justice without Borders: Cosmopolitanism, Nationalism and Patriotism* (Cambridge: Cambridge University Press, 2004).

¹⁰² Venckienė, *supra* note 90.

¹⁰³ UDHR, *supra* note 1; ICPCR, *supra* note 5; ICESCR, *supra* note 6; *Convention on Torture*, *supra* note 10; *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150, Can TS 1969 No 6 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, 4 October 1967, 606 UNTS 267 (entered into force 4 October 1967); *Convention on Discrimination against Women*, *supra* note 8; *Convention on the Rights of the Child*, *supra* note 65; *Convention on Racial Discrimination*, *supra* note 7; *Convention on Persons with Disabilities*, *supra* note 9; *Convention on Migrants*, *supra* note 11; *Protection of Migrants*, GA Res 67/172, UN Doc A/RES/67/172 (20 December 2012); *New York Declaration for Refugees and Migrants*, GA Res 71/1, UN Doc A/RES/71/1 (19 September 2016).

¹⁰⁴ Inter-Parliamentary Union, *Migration, Human Rights and Governance*, Handbook for Parliamentarians No 24 (2015).

¹⁰⁵ Callixte Kavuro, “The Value of Human Dignity in the Refugee Protection” (2019) 5:1 *African Human Mobility Rev* 1510 at 1513.

the human rights of all migrants, regardless of their nationality, migration status or other circumstances, facilitates effective migration governance.”¹⁰⁶

The notion of universal value also engages the debate on private sector responsibility for human rights, an issue that has arisen more frequently in contemporary human rights discourse. In an era of globalization, state action alone is not sufficient to guarantee the enjoyment of human rights and human dignity. For instance, access to essential medicines is not only dependent on the policies and actions of the state but also on the decisions and policies of pharmaceutical corporations.¹⁰⁷ In June 2011, the HRC endorsed the *Guiding Principles on Business and Human Rights* and emphasized that the guiding principles are grounded in recognition of (1) states’ existing obligations to respect, protect, and fulfill human rights and fundamental freedoms; (2) the role of business enterprises, as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; and (3) the need for rights and obligations to be matched to appropriate and effective remedies when breached.¹⁰⁸ One year later, the HRC launched an interpretative *Guide on Corporate Responsibility to Respect Human Rights*.¹⁰⁹ According to the guide, the idea of human rights is as simple as it is powerful: that people have a right to be treated with dignity. The guide recognizes that human rights are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or other status. Therefore, the responsibility to respect human rights applies in all contexts. It is a uniform standard, reflecting its roots in the universal expectation that enterprises should not harm the dignity of people as they go about their business.

Thus, at the international level, especially through international legal instruments that are widely recognized and accepted by states, human dignity currently involves dynamic and flexible elements that guide its interpretation and scope of applicability. Considered as a cultural

¹⁰⁶ UN Office of the High Commissioner for Human Rights (OHCHR), *In Search of Dignity: Report on the Human Rights of Migrants at Europe’s Borders* (2017) at 7.

¹⁰⁷ Danwood M Chirwa, “The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights” (2004) 5 *Melbourne J Intl L* 1 at 2.

¹⁰⁸ John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc A/HRC/17/31 (21 March 2011), endorsed by UN Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN Doc A/HRC/RES/17/4 (2011).

¹⁰⁹ UN OHCHR, *Guide on Corporate Responsibility to Respect Human Rights* (2012).

and temporal construct, the vagueness of human dignity permits its amplification and updating, preventing a static concept composed of one or a few elements. Whereas a right to a healthy environment or corporate social responsibility under international law was unimaginable sixty years ago, today, new elements can be identified to correspond to new forms of dignity. Thus, at the international level, human dignity can be interpreted as (1) universal, regardless of race, colour, age, disability, gender, familial status, religion, sexual orientation, gender identity, genetic information, language, religion, nationality, ethnic or social origin, political belief, citizenship, or any other status or condition in life; (2) inherent, within every person, such that all individuals are of equal value and, therefore, deserving of equal respect and concern; and (3) a sustainable and community value, pursuant to which states have the duty to protect human dignity and corporations have the responsibility to respect and promote human dignity in a sustainable society.

The elements of human dignity as a right (the existential minimum) are applicable, especially at the national level, within constitutional orders and currently engage a range of rights related to (1) environmental dignity, such as the right to live in a healthy environment protected from the impacts of climate change or the right to access to clean water; (2) physical dignity, such as life, freedom of movement, sexual liberty, the prohibition of torture and slave labour, the protection of prisoners from cruel and unusual punishment, and a dignified death; and (3) moral dignity, including rights to culture, language, education, health, pension, proper sanitary systems, privacy, housing, work, due process of law, universal suffrage, freedom of assembly, freedom of religion, freedom of speech, sexual and gender identity, and access to justice, among other fundamental rights.

CONCLUSION

The idea of human dignity may come to be consolidated in the collective consciousness of human beings, helping them guard against a retreat to barbarity. The articulation of the significance of dignity is a manifestation of its fundamental importance, in that the impact of the idea of dignity would be considerably diminished if we failed to reach a consensus on its significance or unilaterally expanded or narrowed the sphere of its applicability.¹¹⁰ The idea of inherence is a tool for the universalization of the human dignity concept, even if we must focus on its minimum content in order to preserve its adaptability to different cultures. Thus, the assumption that human dignity is to be regarded as an intrinsic condition of human beings does not exclude the premise that rights are a societal and historical phenomenon. It means that

¹¹⁰ Gan Shaoping & Zhang Lin, "Human Dignity as a Right" (2009) 4:3 *Frontiers of Philosophy in China* 370.

part of the principle's postulate is that dignity shall be extended to all human beings in the current international order. Therefore, it is an extrinsic attribution extended to all human beings by resorting to the idea of an intrinsic value.

The lack of a unique and static definition, further, is a tool for permitting the concept to evolve over time, as a way of embracing emerging situations with which human beings may be faced. Social complexity is a hallmark of modern human existence, and, consequently, sectoral social groups with particular vulnerabilities or specific needs can rapidly appear. Not being confined by a closed definition, the principle of human dignity is able to influence legal responses to new social facts. As we have stated above, vagueness can allow human dignity to be the first liquid to fill a recently discovered receptacle. Human dignity's definition is not static because the situations demanding its application are not static. And if it is supposed to govern complex and dynamic social conditions, human dignity has to be dynamic as well. However, vagueness does not mean that the concept cannot be delineated by observing its general application at a certain time or in a specific circumstance. In fact, finding that the concept is impossible to define would be to render human dignity meaningless. We do not agree that this is the objective of vagueness or its consequence.

As has been demonstrated, human dignity inspires human rights instruments governing different human conditions in society. It covers civil, political, social, economic, and cultural rights, regarding those aspects of social life that are founded in human dignity. At this point, we can consider that human dignity is a value that entitles a person to enjoy life and liberty, that imposes restrictions on a state's ability legitimately to deprive persons of their liberty by way of punishment and, if it is to do so, that compels it to treat them in accordance with minimum human necessities. It also guarantees human participation in political life, through which opinion shall be free and protected. International legal instruments further consider social and economic rights to be elements of human dignity, in the sense that human persons shall enjoy fair, favourable, secure, and healthy — as well as non-discriminatory — labour conditions in order to earn remuneration that is sufficient to meet their economic needs.

Having consolidated these rights in the international legal order, tribunals do not always explicitly resort to the concept of human dignity, since there are more direct ways of approaching their decisions. Regardless, human dignity has been indirectly applied whenever these rights are enforced. Basically, human dignity compels society to deliver to all human persons the conditions needed for their subsistence, including material human needs. By virtue of highlighting human dignity, all human beings shall be fully integrated into society. Additionally, as has been shown, human dignity's meaning is strongly connected to the protection of social minorities, as exemplified in international legal instruments that aim to eliminate racial

discrimination and discrimination against women, to establish the rights of persons with disabilities, and to protect migrant workers and ethnic minorities. The international jurisprudence canvassed above is further evidence of this tendency since judicial decisions on the rights of minorities frequently resort to the concept of human dignity.

When members of social minorities find themselves in precarious conditions because of oppressive factors rooted in social structures and realities, human dignity — of the same standard enjoyed by those individuals who are not part of socially disadvantaged groups — must be emphasized. Therefore, human dignity has a prohibitive content directed against discriminatory measures based on gender, sexuality, race, ethnicity, or disability, and it also obliges the state to take positive and effective measures to reverse discriminatory social frameworks. The precariousness of the social realities of minorities justifies an approach that stresses human dignity, which is the reason why most of human dignity's content is connected to the idea of inherence — that is, the postulate that dignity shall be enjoyed by all, independently of gender, race, and so on. The independence of human dignity and one's particular social position is contained in the idea of inherence, but the need to focus the concept on the protection of social minorities is so manifest that many scholars find it necessary to highlight this application of the concept. Clearly, its stronger presence in these cases does not mean that its application is restricted to those groups. It simply means that there are social circumstances where an emphasis on human dignity is crucial because of the higher levels of vulnerability of certain groups.

Other evidence of human dignity's strong impact is the emphasis given to its enjoyment by detainees. Detention is a very special social condition where a person is deprived of liberty. Human dignity prohibits detention that causes disproportionate suffering beyond the deprivation of liberty itself. In this sense, human dignity compels states to provide proper treatment that has regard for the quality of a detainee's subsistence, particularly with respect to access to food and health care. This category of rights regarding conditions of detention is in addition to the classic civil and political rights governing the circumstances under which a person can be found guilty of an offence and incarcerated.

Therefore, it can be seen that, although it is impossible to find an absolute and immutable definition for human dignity, since it is constantly being adapted to new circumstances, it is not correct to conclude that its meaning is impossible to determine at a particular time or in a particular case. Human dignity has been providing concrete answers to emerging human rights concerns within the international legal order with a view to placing every person, independently of their particular social position, in a position to fully enjoy their human rights. Its openness is explained by the function that it plays in the legal system. It serves as a legal goal with a

meaning that needs to be pursued in each case. As a principle — perhaps a macro principle — it is open by nature, with sufficient flexibility to be adapted. As a legal purpose, human dignity's intent is to direct every circumstance towards realizing the whole of human rights. In this way, it is possible to affirm that human dignity embraces the whole of human rights development. Its meaning, however, cannot be regarded simply as a sum of the various human rights pieces since “the whole is more than the sum of the parts” of most systems. Human dignity, being more than the sum of its parts, provides the whole of international human rights law with a dynamic, purposeful substance. Its openness and its receptiveness to new elements furnish the whole of human rights with a special character that corresponds to its adaptable and evolutionary nature.