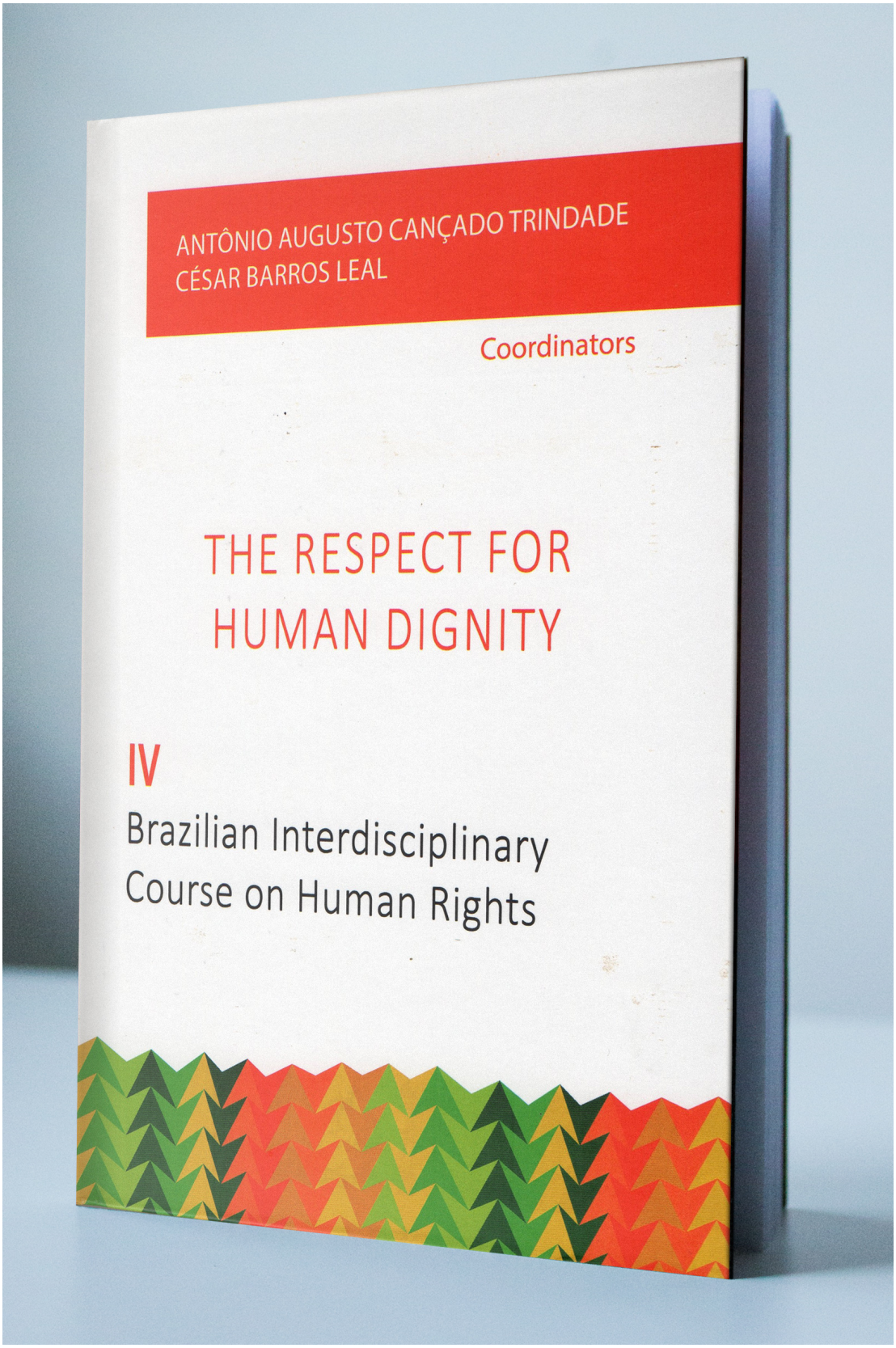
ANTÔNIO AUGUSTO CANÇADO TRINDADE
CÉSAR BARROS LEAL
Coordinators
THE RESPECT FOR HUMAN DIGNITY
IV
Brazilian Interdisciplinary Course on Human Rights

Antônio Augusto Cançado Trindade and César Barros Leal
Coordinators

THE RESPECT FOR HUMAN DIGNITY

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PREFACE

Following up an extraordinary cultural project, which is renewed every year, we are launching five books (with articles originally written in Portuguese, Spanish, French, English, and Italian) on "The Respect for Human Dignity", the central theme of the *IV Brazilian Interdisciplinary Course on Human Rights*, organized by the Brazilian Institute of Human Rights, and the Inter-American Institute of Human Rights in Fortaleza, Ceará, Brazil, from August 3 to 14, 2015.

The tomes, for free distribution, gather a group of scholars from several fields of expertise and nationalities, who deal with the issue proposed under the most different perspectives, many of them subject of conferences, panels, and workshops that comprise this event, certainly one of the most prestigious academic activities in the field of human rights, carried out in Latin America, with the participation of students and observers from different states of Brazil, and other countries in the region.

The choice of the theme has taken into account the topicality, relevance, and extent of the human dignity principle, truly universal (and with many implications), considered a fundament of the Republic under Brazil's 1988 Constitution, the Citizen-Constitution, and present in uncountable debates and studies – like these – on topics such as the promotion and protection of fundamental rights, the existential minimum, bioethics, non-discrimination, the Democratic Constitutional State, as well as the application of justice and the compliance of laws with the international protection rules, which leads us to the jurisprudence of the Inter-American Court of Human Rights.

The reader, before the plurality of texts, will have the opportunity not only to confirm the dimension of the singular and unconditioned values that settle the dignity of every human being (which differentiates him from other beings, according to Emanuel Kant, being worth to distinguish here, in our opinion, the dignity of the moral behavior of a person from the dignity of the own person), and the wealth of ideas and reflections of those who, in view of our call, have written with competence, objectivity, and commitment. That makes the reading of those five books a fabulous trip through the recognition of the human condition and the respect that, for Christian theology, should be

granted without distinction of any species, since, created in the image and likeness of God, we are all – according to Kant himself, – endowed with the utmost dignity among all the beings on earth. Perception joins this line of reasoning, nurtured by the transparency of the facts, that dignity is continuously violated in today's world, widening the huge gap between the ideal plan – of the golden letters of deontology - and the perverse reality of everyday life.

Adopted and proclaimed by the United Nations General Assembly on December 10, 1948, the Universal Declaration of Human Rights, included in the tomes as an attachment due its importance, points out in its Preamble, that the recognition of the dignity inherent to all members of the human family, and their equal and inalienable rights is the foundation of freedom, justice, and peace in the world. It adds that the peoples of the United Nations have reaffirmed, in the Charter, their faith in fundamental human rights, in the dignity and worth of the human person, as well as in the equal rights of men and women. Never shall we forget its 1st Article: All human beings are born free and equal in dignity and rights.

Being entitled to rights, man must be respected in his essence and dignity, either by his community group, or by the State, while his intrinsic condition as a human person is teleologically preserved, which is enhanced with due emphasis on the doctrine, constitutional texts, conventions, treaties, and sentences (accompanied by votes) issued by courts, and international and regional organs for the protection of human rights. The reader, especially the one who will have the opportunity to attend the IV Brazilian Interdisciplinary Course on Human Rights, is imposed, in conclusion, the inalienable duty to reflect on the topics addressed in this collection, and stimulate their discussion in multiple instances, by disseminating this collective message, as vigorous as instigating, of faith in the respect to the human person dignity, the same faith that also makes us fight for the affirmation of our beliefs and making our dreams come true.

Special thanks to Juana María Ibáñez Rivas, illustrious Peruvian lawyer, for the priceless support she has given us.

Antônio Augusto CANÇADO TRINDADE and César BARROS LEAL
The Hague / Fortaleza, June 13, 2015

REHABILITATION OF VICTIMS AND THEIR DIGNITY: REFLECTIONS ON SOME ISSUES RAISED IN THE CASE *BELGIUM VERSUS SENEGAL* (2012) ADJUDICATED BY THE INTERNATIONAL COURT OF JUSTICE ([1*])

Antônio Augusto Cançado Trindade

Judge of the International Court of Justice; Former President of the Inter-American Court of Human Rights; Emeritus Professor of International Law of the University of Brasilia, Brazil; Full Member of the *Curatorium* of The Hague Academy of International Law, and of the *Institut de Droit International*; Former President of the Latin American Society of International Law.

I. INTRODUCTION

The topic which I shall here examine, on the Rehabilitation of Victims (in the context of a recent case resolved by the International Court of Justice), is of great importance and has been attracting much attention in contemporary international legal doctrine. In its recent Judgment, of 20 July 2012, in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), the International Court of Justice (ICJ) has established violations of Articles 6(2) and 7(1) of the 1984 United Nations Convention against Torture[2], has asserted the need to take immediately measures to comply with the duty of prosecution under that Convention[3], and has rightly acknowledged that the absolute prohibition of torture is one of *jus cogens*[4].

1 (*) The present study served as basis for the two lectures delivered by the Author in the XL Course of International Law organized by the OAS Inter-American Juridical Committee (2013), in Rio de Janeiro; originally published *in*: XL *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2013,* Washington D.C., OAS General Secretariat, 2014, pp. 85-151.

2 Judgment´s *dispositif*, paras. 4 and 5.

3 Judgment´s *dispositif*, para. 6.

4 Court´s reasoning, para. 99.

The Court's Judgment paves the way for considerations pertaining to restorative justice, in particular on the relevance of the realization of justice for the rehabilitation of the victims. I have sought to stress this point in my Separate Opinion appended to the Court's Judgment, whereby I stated the reasons which led me to support most of the findings of the Court, though advancing a distinct reasoning on two particular points, namely, the Court's jurisdiction in respect of obligations under customary international law, and the handling of the time factor under the U.N. Convention against Torture.

The present study derives from my aforementioned Separate Opinion in the *cas d'espèce*. My reflections pertain to considerations at factual, conceptual and epistemological levels, on distinct points in relation to which I have not found the reasoning of the Court entirely satisfactory or complete. At the factual level, I have dwelt upon: a) the factual background of the present case: the regime Habré in Chad (1982-1990) in the findings of the Chadian Commission of Inquiry (Report of 1992); b) the significance of the decision of 2006 of the U.N. Committee against Torture; c) the clarifications on the case before the ICJ, in the responses to questions put to the contending parties in the course of the legal proceedings; and d) the everlasting quest for the realization of justice in the present case.

At the conceptual and epistemological levels, my reflections have focused on: a) urgency and the needed provisional measures of protection in the *cas d'espèce*; b) the acknowledgement of the absolute prohibition of torture in the realm of *jus cogens*; c) the obligations *erga omnes partes* under the U.N. Convention against Torture; d) the gravity of the human rights violations and the compelling struggle against impunity (within the law of the United Nations itself); e) the obligations under customary international law; and f) the *décalage* between the time of human justice and the time of human beings revisited (and the need to make time work *pro victima*). In sequence, I have proceeded to: a) a rebuttal of a regressive interpretation of the U.N. Convention against Torture; and b) the identification of the possible emergence of a new chapter in restorative justice, with attention focused on the relevance of the realization of justice for the rehabilitation of victims.

As to the reassuring assertion by the Court that the absolute prohibition of torture is one of *jus cogens* (para. 99), - which I have

strongly supported, - I have gone further than the Court, as to what I have perceived as the pressing need to extract the legal consequences therefrom, which the Court has failed to do. The way was then paved for the presentation of my concluding reflections on the matter dealt with in the aforementioned Judgment of the Court. In the present article, these issues are reviewed in sequence.

II. THE FACTUAL BACKGROUND OF THE PRESENT CASE: THE REGIME HABRÉ IN CHAD (1982-1990) IN THE FINDINGS OF THE CHADIAN COMMISSION OF INQUIRY (REPORT OF 1992)

In the written and oral phases of the proceedings before the ICJ, both Belgium and Senegal referred to the *Report* of the National Commission of Inquiry of the Chadian Ministry of Justice, concluded and adopted in May 1992. Thus, already in its *Application Instituting Proceedings* (of 19.02.2009), Belgium referred repeatedly to the findings of the 1992 *Report* of the Truth Commission of the Chadian Ministry of Justice, giving account of grave violations of human rights and of international humanitarian law during the Habré regime (1982-1990) in Chad[5]. Subsequently, in its *Memorial* (of 01.07.2010), in dwelling upon Chad under the regime of Mr. H. Habré, Belgium recalled that,

> According to an assessment published in 1993 by the National Commission of Inquiry of the Chadian Ministry of Justice, Mr. Habré's presidency produced tens of thousands of victims. The Commission gives the following figures: `more than 40,000 victims; more than 80,000 orphans; more than 30,000 widows; more than 200,000 people left with no moral or material support as a result of this repression'[6] (para. 1.10).

The aforementioned *Report* was also referred to in the course of the oral arguments at the provisional measures phase[7]. Subsequently, Belgium referred repeatedly to the *Report*, from the very start of its

5 ICJ, *Application Instituting Proceedings* (of 19.02.2009, Belgium *versus* Senegal), pp. 13, 39, 57, 89 and 93.

6 Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices - Rapport de la Commission d'enquête nationale du Ministère tchadien de la Justice* [*The Crimes and Misappropriations Committed by Ex-President Habré and his Accomplices - Report by the National Commission of Inquiry of the Chadian Ministry of Justice*], Paris, L'Harmattan, 1993, pp. 3-266.

7 ICJ, document CR 2009/08, of 06.04.2009, pp. 18-19.

oral arguments on the merits of the case[8]. For its part, in its oral argument of 16.03.2012 before the Court, Senegal also referred to those findings of the Chadian Truth Commission, as evoked by Belgium[9]. Those findings were not controverted.

In my understanding, those findings ought to be taken into account in addressing the questions lodged with the Court in the present case, under the CAT Convention, one of the "core Conventions" on human rights of the United Nations. (This is of course without prejudice to the determination of facts by the competent criminal tribunal that eventually becomes entrusted with the trial of Mr. H. Habré). After all, the exercise of jurisdiction - particularly in pursuance to the principle *aut dedere aut judicare* - by any of the States Parties to the CAT Convention (Articles 5-7) is prompted by the *gravity* of the breaches perpetrated to the detriment of human beings, of concern to the members of the international community as a whole. Bearing this in mind, the main findings set forth in the *Report* of the Chadian Truth Commission may here be briefly recalled, for the purposes of the consideration of the *cas d'espèce*. They pertain to: a) the organs of repression of the regime Habré in Chad (1982-1990); b) arbitrary detentions and torture; c) the systematic nature of the practice of torture of detained persons; d) extra-judicial or summary executions, and massacres. The corresponding passages of the *Report*, published in 1993, can be summarized as follows.

1. The Organs of Repression of the Regime Habré in Chad (1982-1990)

According to the aforementioned *Report* of the Chadian Truth Commission, the machinery of repression of the Habré regime in Chad (1982-1990) was erected on the creation and function of four organs of his dictatorship, namely: the Directorate of Documentation and Security (*Direction de la Documentation et de la Sécurité* - DDS) or the "political police", the Service of Presidential Investigation (*Service d'Investigation Présidentielle* - SIP), the General Information [Unit] (*Renseignements Généraux* - RG) and the State Party (*Parti-État*), called the *Union Nationale pour l'Indépendance et la Révolution* - UNIR). And the *Report* added:

8 Cf. ICJ, document CR 2012/2, of 12.03.2012, pp. 12 and 23.
9 ICJ, document CR 2012/5, of 16.03.2012, p. 31.

> Tous ces organes avaient pour mission de quadriller le peuple, de le surveiller dans ses moindres gestes et attitudes afin de débusquer les prétendus ennemis de la nation et les neutraliser définitivement.
>
> La DDS est l'organe principal de la répression et de la terreur. De toutes les institutions oppressives du régime Habré, la DDS s'est distinguée par sa cruauté et son mépris de la vie humaine. Elle a pleinement accompli sa mission qui consiste à terroriser les populations pour mieux les asservir.
>
> Habré a jeté les bases de sa future police politique dès les premiers jours de sa prise de pouvoir. Au début, elle n'était qu'un embryon appelé `Service de Documentation et de Renseignements' (…). Quant à la DDS telle qu'elle est connue aujourd'hui, elle a été créée par le décret n° 005/PR du 26 janvier 1983[10].

The "territorial competence" of the DDS extended over "the whole national territory" and even abroad. No sector, public or private, escaped its supervision[11]. Promotions were given in exchange for information. The DDS aimed also at those who opposed the regime and were based in neighbouring countries, whereto it sent its agents to perpetrate murder or kidnappings[12]. The DDS was directly linked and subordinated to the Presidence of the Republic, as set forth by the decree which instituted the DDS; given the "confidential character " of its activities, there was no intermediary between President H. Habré and the DDS[13].

10 Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices - Rapport de la Commission d'enquête nationale du Ministère tchadien de la Justice*, *op. cit. supra* n. (5), pp. 20-21.

11 *Ibid*., p. 22: - "Des agents ont été disséminés partout à travers le territoire à commencer par les préfectures, les sous-préfectures, les cantons et même les villages. Il a été implanté une antenne par circonscription. Celle-ci, pour superviser son territoire, recrute des agents locaux à titre d'indicateur ou informateur. Chaque antenne est composée d'un chef et d'un adjoint. (…)".

12 *Ibid*., p. 22.

13 He gave all the orders, and the DDS reported to him daily; *ibid*., p. 22. This was how, during his 8 years in power, he imposed a regime of terror in Chad.

2. The Systematic Practice of Torture of Persons Arbitrarily Detained, of Extra-Judicial or Summary Executions, and Massacres

The same *Report* added that, in the period of the Habré regime, most victims were arbitrarily detained by the DDS, without knowing the charges against them. They were systematically torture, either for "intimidation" or else as "reprisal"[14]. And the *Report* added that

> La torture est une pratique institutionnalisée au sein des services de la DDS. Ainsi les personnes arrêtées sont systématiquement torturées puis détenues dans les cellules exiguës, dont les conditions de vie sont épouvantables et inhumaines. (…) [L]a DDS a pratiquement érigé la torture en système de travail et que la presque totalité de ses détenus y sont soumis d'une façon ou d'une autre, sans aucune distinction de sexe ou d'âge[15].

And the Chadian Truth Commission proceeded in its account of the facts it found:

> Toute personne arrêtée par la DDS, que ce soit à N'Djamena ou en province, est systématiquement soumise au moins à une séance d'interrogatoire à l'issue de laquelle un procès-verbal d'audition est établi. La torture étant l'outil de préférence lors des interrogatoires, les agents de la DDS y recourent de façon systématique.
>
> Plusieurs anciens détenus de la DDS ont fait état à la Commission d'Enquête de la torture et des mauvais traitements auxquels ils ont été soumis pendant leur détention. Des traces de ces tortures et des examens médicaux ont corroboré leurs témoignages[16].

The *Report* of the Chadian Truth Commission also acknowledged cases of extra-judicial or summary executions, and of massacres:

> Durant huit années de règne, Hissein Habré avait instauré un régime où toute opinion politique contraire à la sienne pouvait entraîner la liquidation physique des ses auteurs. Ainsi,

14 *Ibid*., p. 38.
15 *Ibid*., p. 38. Such practice was conducted pursuant to superior orders, in the hierarchy of power; cf. *ibid*., pp. 38-39.
16 *Ibid*., p. 39.

> depuis son arrivée au pouvoir en juin 1982 jusqu'en novembre 1990, date de sa fuite, un grand nombre de Tchadiens étaient persécutés pour leur prise de position tendant à modifier sa politique autocratique. C'est pourquoi des familles entières ont été interpellées et détenues sans aucune forme de procès, ou tout simplement traquées et exterminées. (…)
>
> Les personnes arrêtées par la DDS ont très peu de chance de sortir vivantes. Cette triste réalité est connue de tous les Tchadiens. Aussi, les détenus meurent généralement de deux façons: soit la mort lente qui survient après quelques jours ou quelques mois, soit la mort expéditive donnée par les bourreaux de Hissein Habré dès les premiers jours suivant l'arrestation. (…) Certains mouraient d'épuisement physique dû aux conditions inhumaines de détention (...). D'autres par contre meurent par asphyxie. Entassés dans de minuscules cellules (…), les détenus s'éteignent les uns après les autres. (…)
>
> Les enlèvements de nuit et les exécutions extra-judiciaires sont pratiqués régulièrement par les agents de la DDS sur les détenus. Ce sont généralement les agents les plus sanguinaires (…) qui procèdent aux sélections des prisonniers destinés à l'abattoir situé aux alentours de N'Djamena. Ces actes odieux et barbares visent une certaine catégorie de détenus[17].

3. The Intentionality of Extermination of Those Who Allegedly Opposed the Regime

In its remaining parts, the *Report* of the Chadian Truth Commission addressed aggravating circumstances of the oppression of the regime Habré, mainly the *intentionality* of the atrocities perpetrated. In its own words,

> Le régime de Hissein Habré a été une véritable hécatombe pour le peuple tchadien; des milliers de personnes ont trouvé la mort, des milliers d'autres ont souffert dans leur âme et dans leur corps et continuent d'en souffrir. Tout au long de ce sombre règne, à N'Djamena comme dans le reste du pays, la répression systématique était la règle pour tous les opposants ou supposés opposants au régime. Les biens des personnes arrêtées ou recherchées étaient pillés et leurs parents persécutés. Des familles entières avaient été ainsi décimées.

17 *Ibid*., pp. 51 and 54.

> À l'intérieur du pays, des villages ont été complètement brûlés et leurs populations massacrées. Rien n'échappait à cette folie meurtrière et le pays tout entier était soumis à la terreur. (…)
>
> (...) Jamais dans l'histoire du Tchad il n'y a eu autant de morts. Jamais il n'y a eu autant de victimes innocentes. Au début de ses travaux, la Commission d'Enquête pensait avoir affaire, au pire des cas, à des massacres, mais plus elle avançait dans ses investigations, plus l'étendue du désastre s'agrandissait pour aboutir finalement au constat qu'il s'agissait plutôt d'une extermination. Aucun groupe ethnique, aucune tribu, aucune famille n'a été épargnée, exceptés les Goranes et leurs alliés. La machine à tuer ne faisait aucune différence entre hommes, femmes et enfants. (...) À N'Djamena comme en province, les arrestations étaient effectuées à un rythme frénétique. L'on était arrêté pour n'importe quel motif et même sans aucun motif. (...) Les chiffres des détenus politiques recensés par la Commission d'Enquête pour la période de 1982 à 1990 ainsi que ceux des personnes mortes pendant la même période défient toute imagination[18].

The *Report* of the Chadian Truth Commission, published in 1993, was in fact concluded on 07.05.1992, with a series of recommendations[19]. Its over-all assessment was quite somber. In its own words,

> Le bilan de huit ans de règne qu'a laissés Habré est terrifiant. (...) En récapitulant le mal qu'il a fait contre ses concitoyens, le bilan est lourd et bien sombre; il se chiffre à:
>
> - plus de 40.000 victimes;
>
> - plus de 80.000 orphelins;
>
> - plus de 30.000 veuves;
>
> - plus de 200.000 personnes se trouvant, du fait de cette répression, sans soutien moral et matériel.
>
> Ajouter à cela les biens meubles et immeubles pillés et confisqués chez de paisibles citoyens, évalués à 1 milliard de francs CFA chaque année. (...)
>
> Huit ans de règne, huit ans de tyrannie (…)[20].

18 *Ibid*., pp. 68-69.
19 Cf. *ibid*., pp. 98-99.
20 *Ibid*., p. 97.

IV. THE DECISION OF MAY 2006 OF THE U.N. COMMITTEE AGAINST TORTURE

On 18.04.2001, a group of persons who claimed to be victims of torture during the regime Habré in Chad lodged a complaint with the U.N. Committee against Torture, supervisory organ of the U.N. Convention against Torture (CAT Convention). They did so under Article 22 of the CAT Convention, in the exercise of the right of individual complaint or petition[21]. The Committee then proceeded to the examination of the case of *Souleymane Guengueng et alii versus Senegal*. It should not pass unnoticed, at this stage, that the Committee was enabled to pronounce on this matter due to the exercise, by the individuals concerned, of their right of complaint or petition at international level.

Half a decade later, on 19.05.2006, the Committee against Torture adopted a decision, under Article 22 of the CAT Convention, on the case *Souleymane Guengueng et alii*, concerning the complaints of Chadian nationals living in Chad, who claimed to be victims of a breach by Senegal of Articles 5(2) and 7 of the CAT Convention[22]. The Committee did so taking into account the submissions of the complainants and of the respondent State, bearing in mind the factual background of the case as contained in the *Report* (of May 1992) of the National Commission of Inquiry of the Chadian Ministry of Justice[23]. In their complaint lodged with the U.N. Committee against Torture, the complainants claimed, as to the facts, that, between 1982 and 1990, they were tortured by agents of Chad who answered directly to Mr. H. Habré, the then President of Chad during the period at issue.

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21 Article 22 of the CAT Convention has been accepted by both Senegal (on 16.10.1996) and Belgium (on 25.07.1999). Up to date, 64 of the 150 States Parties to the CAT Convention have accepted this optional clause of recognition of the competence of the U.N. Committee against Torture. For an up-dated digest of the consideration of complaints under Article 22 of the CAT Convention, cf. U.N., *Report of the Committee against Torture*, 45th-46th Sessions (2010-2011), U.N. doc. A/66/44, pp. 150-203.

22 Paras. 1.1-1.3. The Committee (acting under Article 108(9) of its Rules of Procedure) requested Senegal, as an interim measure, not to expel Mr. H. Habré and to take all necessary measures to prevent him from leaving the country (other than an extradition), - a request to which Senegal acceded.

23 Para. 2.1.

The Committee referred to the aforementioned *Report* by the National Commission of Inquiry established by the Chadian Ministry of Justice (cf. *supra*), giving account of 40.000 "political murders" and "systematic acts of torture" allegedly committed during the H. Habré regime. The Committee recalled that, after being ousted by Mr. Idriss Déby in December 1990, Mr. H. Habré took refuge in Senegal, where he has been living ever since. The Committee further recalled the initiatives of legal action (from 2000 onwards) against Mr. H. Habré, in Senegal and in Belgium. The Committee then found the communication admissible and considered that the principle of universal jurisdiction enunciated in Articles 5(2) and 7 of the CAT Convention implies that the jurisdiction of States Parties "must extend to *potential* complainants in circumstances similar to the complainants'"[24].

As to the merits of the communication in the case *Souleymane Guengueng et alii*, the Committee, after reviewing the arguments of the parties as to the alleged violations of the relevant provisions of the CAT Convention, noted that Senegal had not contested the fact that it had not taken "such measures as may be necessary" under Article 5(2). The Committee found that Senegal had not fulfilled its obligations under that provision[25]. In reaching this decision, the Committee deemed it fit to warn, in its decision of 19.05.2006, that

> the reasonable time-frame within which the State Party should have complied with this obligation [under Article 5(2) of the CAT Convention] has been considerably exceeded[26].

As to the alleged breach of Article 7 of the CAT Convention, the Committee noted that "the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition"; it further observed that the objective of Article 7 is "to prevent any act of torture from going unpunished"[27]. The Committee also pondered that Senegal or any other State Party "cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with [its] obligations under the Convention"[28]. The Committee found

24 Para. 6.4, and cf. paras. 6.1-6.5.
25 Paras. 9.1-9.6.
26 Para. 9.5.
27 Para. 9.7.
28 Para. 9.8.

that Senegal was under an obligation to prosecute Mr. H. Habré for alleged acts of torture, unless it could demonstrate that there was not sufficient evidence to prosecute (at the time of the complainants' submission of their original complaint of January 2000).

The Committee recalled that the decision of March 2001 by the Court of Cassation had put an end to any possibility of prosecuting Mr. H. Habré in Senegal, and added that since Belgium's request of extradition of September 2005, Senegal also had the choice to extradite Mr. H. Habré. As Senegal decided neither to prosecute nor to extradite him, the Committee found that it had failed to perform its obligations under Article 7 of the CAT Convention[29]. The Committee then concluded that Senegal had violated Articles 5(2) and 7 of the CAT Convention; it added that its decision in no way influenced the possibility of "the complainants' obtaining compensation through the domestic courts for the State Party's failure to comply with its obligations under the Convention"[30]. This decision of the Committee against Torture is, in my view, of particular relevance to the present case before this Cou[31].

IV. THE CASE BEFORE THE ICJ: RESPONSES TO QUESTIONS PUT TO THE CONTENDING PARTIES

1. Questions Put to Both Parties

At the end of the public hearings before this Court, I deemed it fit to put to the two contenting parties, on 16.03.2012, the following questions:

> (…) First question:
>
> *1. As to the facts* which lie at the historical origins of this case, taking into account the alleged or eventual projected costs of the trial of Mr. Habré in Senegal, what in your view would be the probatory value of the Report of the National Commission of Inquiry of the Chadian Ministry of Justice?
>
> Second question:

29 Paras. 9.7-9.12.
30 Paras. 9.12 and 10.
31 Cf. also section XV, *infra*.

2. *As to the law*:

a) Pursuant to Article 7(1) of the United Nations Convention against Torture, how is the obligation to 'submit the case to its competent authorities for the purpose of prosecution' to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill the obligation under Article 7(1) of the United Nations Convention against Torture?

b) According to Article 6(2) of the United Nations Convention against Torture, a State Party wherein a person alleged to have committed an offence (pursuant to Article 4) is present, `shall immediately make a preliminary inquiry into the facts'. How is this obligation to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill its obligation under this provision of the United Nations Convention against Torture?[32].

2. Reponses by Belgium

Concerning the *first* question I posed, Belgium gave its response on the basis of the relevant rules of Belgian law, and invited Senegal to elaborate on the rules applicable under Senegalese law. Belgium contended that Belgian law espouses the principle of "*liberté de la preuve*" in criminal contexts, which, according to Belgium, entails, first, the free choice of evidence and, secondly, allows the trial judge to have discretion to assess its probative value. Belgium pointed out that the Belgian Court of Cassation has upheld this principle many times[33]. Belgium further argued that the corollary of the principle of "*liberté de la preuve*" is that of firm conviction, whereby the judge can only uphold the charges in case all the evidence submitted to him by the prosecutor warrants the firm conviction that the individual has committed the offence he is charged with.

Belgium contended, in addition, that, essentially, any type of evidence is thus admissible, as long as it is rational and recognized, by reason and experience, as capable of convincing the judge; any evidence taken into account by the judge in a criminal case must be subjected to adversarial argument. Belgium contended that the judge in a criminal case may take into consideration all the evidence

32 ICJ, document CR 2012/5, of 16.03.2012, pp. 42-43 [original in French, translated into English].

33 ICJ, document CR 2012/6, of 19.03.2012, p. 21.

which has been gathered abroad and which has been transmitted to the Belgian authorities, such as, a copy of the *Repor*t of the National Commission of Inquiry of the Chadian Ministry of Justice (hereinafter: "the *Report*"), as long as that evidence does not violate the right to a fair trial[34].

As to the *second* question I posed[35], Belgium argued that there were three steps to be taken pursuant to Article 6 of the Convention against Torture (CAT Convention): "*first*, to secure the offender's presence; *second*, to conduct, immediately, a preliminary inquiry; and, *third*, to notify, immediately, certain States what is going on, including in particular reporting to them its findings following the preliminary inquiry and indicating whether it intends to exercise jurisdiction". As to the first requirement of Article 6, Belgium argued that it never contested that Senegal fulfilled this first step, even though from time to time, Belgium has had serious concerns about Senegal's continuing commitment to this obligation, given certain statements by high-level officials of Senegal.

As concerns Article 6(2), Belgium argued that Senegal's counsel did not make arguments in this regard during the oral hearings. Belgium claimed that Article 6 is a common provision in Conventions containing *aut dedere aut judicare* clauses (as, e.g., in the Hague and Montreal Conventions concerning Civil Aviation), and referred to the United Nations Study of such clauses, to the effect that the preliminary steps set out in the Conventions, including

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34 ICJ, document CR 2012/6, of 19.03.2012, p. 21. Belgium further claimed that when the international arrest warrant against Mr. Habré was issued, the Belgian investigating judge took account, in particular, of the evidence contained in the *Report*. Thus, - to conclude, - Belgium argued that, while keeping in mind that it is for the trial judge to rule on the probative value of the *Report* at issue, it could certainly be used as evidence in proceedings against Mr. Habré. Belgium added that the use of the *Report* could save a considerable amount of time and money in pursuit of the obligation to prosecute, even if - and Belgium referred to Senegal's arguments in this regard - it is not possible to point to "lack of funds or difficulties in establishing a special budget as exonerating factors" concerning the responsibility of the State which is obliged to prosecute or, failing that, to extradite. ICJ, document CR 2012/6, of 19.03.2012, p. 22.

35 Namely: - "According to Article 6(2) of the United Nations Convention against Torture, a State Party wherein a person alleged to have committed an offence (pursuant to Article 4) is present, 'shall immediately make a preliminary inquiry into the facts'. How is this obligation to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill its obligation under this provision of the United Nations Convention against Torture?"

"measures (...) to investigate relevant facts", are indispensable to allow the proper operation of the mechanism for the punishment of offenders in the relevant conventions. Belgium went on to argue that, from the structure of the *aut dedere aut judicare* provisions of the Convention against Torture, the reference to a preliminary inquiry in Article 6(2), is of the kind of preliminary investigation which precedes the submission of the matter to the prosecuting authorities[36]. In Belgium's submission, "[t]he preliminary inquiry referred to in Article 6, paragraph 2, thus requires the gathering of first pieces of evidence and information, sufficient to permit an informed decision by the competent authorities of the territorial State whether a person should be charged with a serious criminal offence and brought to justice"[37]. Belgium concluded by claiming that there is no information before the Court speaking to any preliminary inquiry on the part of Senegal.

As to my question concerning the *interpretation of Article 7*[38], Belgium first argued that the obligation under Article 7(1) is closely related to the obligations under Articles 5(2), and 6(2) of the CAT Convention, - which in its view Senegal has also violated, - and Belgium further claimed in this regard that "the breach of Article 7 flowed from the breach of the other two provisions". Belgium explained that "[t]he absence of the necessary legislation, in clear breach of Article 5, paragraph 2, until 2007/2008 meant that Senegal's prosecutorial efforts were doomed to failure. So the

36 Belgium claimed that Article 6(4) made it clear that the preliminary inquiry should lead to findings, and that the main purpose of the inquiry is to enable the State in whose territory the alleged offender is present, to take a decision on whether it intends to take jurisdiction, and to report its findings to other interested States so that they may take a decision whether or not to seek extradition.

37 ICJ, document CR 2012/6, of 19.03.2012, pp. 42-44. Belgium also cites the *Commentary*, by Nowak and McArthur, in this sense: "[s]uch criminal investigation is based on the information made available by the victims and other sources as indicated in Article 6 (1) and includes active measures of gathering evidence, such as interrogation of the alleged torturer, taking witness testimonies, inquiries on the spot, searching for documentary evidence, etc."; M. Nowak, E. McArthur *et alii*, *The United Nations Convention Against Torture - A Commentary*, Oxford, Oxford University Press, 2008, p. 340.

38 Namely: - "Pursuant to Article 7(1) of the United Nations Convention against Torture, how is the obligation to 'submit the case to its competent authorities for the purpose of prosecution' to be interpreted? In your view, are the steps that Senegal alleges to have taken to date, sufficient to fulfill the obligation under Article 7(1) of the United Nations Convention against Torture?"

prosecutorial efforts undertaken in 2000 and 2001 cannot be seen as fulfilling the obligation laid down in Article 7, paragraph 1, of the Convention"[39].

Belgium claimed that the obligation in Article 7 of the CAT Convention "to submit the case to the competent authorities for the purpose of prosecution" is carefully worded as it would not seem realistic "*to prosecute whenever allegations are made*". In this regard, Belgium argued that:

> What can be required is that the case is submitted to the prosecuting authorities for the purpose of prosecution; and that those authorities `shall take their decision in the same manner as the case of any ordinary offence of a serious nature' - in paragraph 2 of Article 7, with which paragraph 1 should be read, provides. What is at issue here, in particular, is the need for the prosecuting authorities to decide whether the available evidence is sufficient for a prosecution[40].

Belgium then referred to the negotiating history of Article 7 and argued that the same language is now found in many of the *aut dedere aut judicare* clauses that follow the Hague Convention[41] model, including the CAT Convention. Referring to the *travaux préparatoires* of the latter, Belgium argued that it was decided that the language should follow the "well-established language" of the Hague Convention[42]. Belgium also claimed that "the fact that there is no absolute requirement to prosecute does not mean that the prosecuting authorities have total discretion, and that a State may simply do nothing", and contended that, like any other international obligation, it must be performed in good faith.

Belgium referred to the object and purpose of the CAT Convention stated in its concluding preambular paragraph - "to make more effective the struggle against torture" - which means, in its view, that the prosecuting authorities start "a prosecution if there is sufficient evidence, and that they do so in a timely fashion". After referring to expert writing on the *travaux préparatoires* of the Hague Convention, for guidance in the interpretation of Article

39 ICJ, document CR 2012/6, of 19.03.2012, p. 46.
40 *Ibid*., p. 46.
41 Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16.12.1970, *U.N. Treaty Series*, vol. 860, p. 105 (I-12325).
42 ICJ, document CR 2012/6, of 19.03.2012, pp. 46-47.

7 of the CAT Convention[43], Belgium concluded that Senegal is in breach of its obligation under Article 7 of the CAT Convention, notwithstanding the fact that the prosecuting authorities acted in the year 2000, without success, which in its view was not sufficient to fulfill its obligations under the CAT Convention[44].

3. Responses by Senegal

In respect of my *first* question (*supra*), Senegal pointed out, as far as the pertinent provisions of domestic law in force in Senegal are concerned, that the *Report* of the Chadian Truth Commission "can only be used for information purposes and is not binding on the investigating judge who, in the course of his investigations conducted by means of an international letter rogatory, may endorse or disregard it". Senegal added that the *Report* is not binding on the trial judge examining the merits of the case, and thus the value of the *Report* is "entirely relative"[45].

As to my *second* question (*supra*), Senegal argued that, even before it adhered to the CAT Convention, it had already endeavoured to punish torture, and as such it had established its jurisdiction in relation to Article 5 (3) of the Convention, on the basis of which Mr. Habré was indicted in 2000 by the senior investigating judge when the competent Senegalese authorities had been seised with complaints. Senegal further claimed that, pursuant to Article 7(3) of the Convention, Mr. Habré "was able to avail himself of the means of redress made available by Senegalese law to any individual implicated in proceedings before criminal courts, without distinction of nationality, on the same basis as the civil parties"[46]. Senegal also added that, further to the judgment of 20.03.2001 of the Court of Cassation, and the mission of the Committee against Torture in

43 *Ibid*., pp. 46-48.

44 Belgium further contended that, since 2000-2001, Senegal has taken no action to submit any of the allegations against Mr. H. Habré to the prosecuting authorities, a fact which Belgium submitted to be a "matter of particular concern given that the allegations against Mr. H. Habré were renewed in the Belgian extradition request of 2005, and in the further complaint laid in Senegal in 2008, not to speak of the information now publicly available concerning the crimes that have been committed when Hissène Habré was in power in Chad, and for which he allegedly bears responsibility"; *ibid*., p. 48.

45 ICJ, document CR 2012/7, of 21.03.2012, p. 32.

46 *Ibid*., pp. 32-33.

2009, Senegal adapted its legislation to the other provisions of the CAT Convention[47].

Senegal further claimed that the CAT Convention does not contain a "general obligation to combat impunity" as a legal obligation with the effect of requiring universal jurisdiction to be established and that an obligation of result is not in question, "since the fight against impunity is a process having prosecution or extradition as possible aims under the said Convention". Senegal questioned the purpose of establishing universal jurisdiction in the case of a State which already has a legal entitlement to exercise territorial jurisdiction, which, in its view is the most obvious principle in cases of competing jurisdiction. Senegal recalled that, in 2009, it established its jurisdiction concerning offences covered by the CAT Convention. Senegal further recalled the Court's Order on the request for provisional measures of 2009 to the effect that the Parties seemed to differ on the "time frame within which the obligations provided for in Article 7 must be fulfilled or [on the] circumstances (financial, legal or other difficulties)". Senegal argued that the obligation *aut dedere aut judicare* remains an obligation either to extradite or, in the alternative, to prosecute, given that international law does not appear to "give priority to either alternative course of action".[48]

Senegal contended, moreover, that "[t]he obligation to try, on account of which Senegal has been brought before the Court, cannot be conceived as an obligation of result" but rather an obligation of means, where "the requirement of wrongfulness is fulfilled only if the State to which the source of the obligation is attributable has not deployed all the means or endeavours that could legitimately be expected of it in order to achieve the results expected by the authors of the rule". Senegal referred to [some] international jurisprudence and argued that international law does not impose obligations of result on member States. Senegal concluded by arguing that the measures it has taken thus far are largely sufficient and satisfy the obligations laid down in Articles 6(2) and 7(1) of the CAT Convention. Senegal

47 Senegal further claimed that the investigating judge, in criminal proceedings, may be seised either by a complaint with civil-party application or by an application from the Public Prosecutor to open an investigation. Concerning the preliminary inquiry, Senegal claimed that its aim is to establish the basic facts and that it does not necessarily lead to prosecution, as the prosecutor may, upon review of the results of the inquiry, decide that there are no grounds for further proceedings; *ibid*., p. 33.
48 *Ibid*., p. 34.

thus argued that once it "undertook major reforms to allow the trial to be held, including constitutional reforms, it may be considered to have satisfied its obligation of means or of 'best efforts', so as not to give the appearance of a State heedless and not desirous of implementing its conventional obligations. It may not have done this to a sufficient extent, but it has made sufficient progress in terms of acting to achieve such a result"[49].

4. General Assessment

In the light of the aforementioned, it is significant that, for the arrest warrant against Mr. Habré, the evidence contained in the *Report* of the Chadian Truth Commission was taken into account by the Belgian investigating judge. Furthermore, - as also pointed out by Belgium, - that *Report* can certainly be taken into account as evidence in legal proceedings against Mr. H. Habré, it being for the trial judge or the tribunal to rule on its probative value. Senegal itself acknowledged that the *Report* at issue can be taken into account for information purposes, without being "binding" on the investigating judge; it is for the judge (or the tribunal) to rule on it.

There thus seemed to be a disagreement between Belgium and Senegal as to the consideration of the evidence considered in the *Report*. In any case, the *Report* cannot be simply overlooked or ignored, it cannot be examined without care. It is to be examined together with all other pieces of evidence that the investigating judge or the tribunal succeeds in having produced before him/it, for the purpose of ruling on the matter at issue. The present case concerns ultimately a considerable total of victims, those murdered, or arbitrarily detained and tortured, during the Habré regime in Chad (1982-1990). As to the answers provided by the contending parties to my questions addressed to them, whether in their view the steps that Senegal alleges to have taken to date, were sufficient to fulfill its obligations under Articles 6(2) and 7(1) of the U.N. Convention against Torture, an assessment of such answers ensues from the consideration of the doctrinal debate on the dichotomy between alleged obligations of means or conduct, and obligations of result. I am of the view that the obligations under a treaty of the nature of the U.N. Convention against Torture are not, as the respondent State argues, simple obligations of means or conduct: they are

49 *Ibid*., pp. 35-36.

obligations of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*. I feel obliged to expand on the foundations of my personal position on this matter.

V. PEREMPTORY NORMS OF INTERNATIONAL LAW (*JUS COGENS*): THE CORRESPONDING OBLIGATIONS OF RESULT, AND NOT OF SIMPLE CONDUCT

In my understanding, the State obligations, - under Conventions for the protection of the human person, - of prevention, investigation and sanction of grave violations of human rights and of International Humanitarian Law, are not simple obligations of conduct, but rather obligations of result[50]. It cannot be otherwise, when we are in face of peremptory norms of international law, safeguarding the fundamental rights of the human person. Obligations of simple conduct may prove insufficient; they may exhaust themselves, for example, in unsatisfactory legislative measures. In the domain of *jus cogens*, such as the absolute prohibition of torture, the State obligations are of due diligence and of result. The examination of the proposed distinction between obligations of conduct and obligations of result has tended to take place at a purely theoretical level, assuming variations in the conduct of the State, and even a succession of acts on the part of this latter[51], and without taking sufficient and due account of a situation which causes irreparable harm to the fundamental rights of the human person.

If the corresponding obligations of the State in such a situation were not of result, but of mere conduct, the doors would then be left open to impunity. The handling of the case of Mr. Hissène Habré to date serves as a warning in this regard. Over three decades ago, when the then *rapporteur* of the U.N. International Law Commission (ILC) on the International Responsibility of the State, Roberto Ago, proposed the distinction between obligations of conduct and of result, some members of the ILC expressed doubts as to the viability

50 Cf., to this effect: IACtHR, case of the *Dismissed Employees of the Congress versus Peru* (Interpretation of Judgment of 30.11.2007), Dissenting Opinion of Judge Cançado Trindade, paras. 13-29; IACtHR, case of the *Indigenous Community Sawhoyamaxa versus Paraguay* (Judgment of 29.03.2006), Separate Opinion of Judge Cançado Trindade, para. 23; IACtHR, case *Baldeón García versus Peru* (Judgment of 06.04.2006), Separate Opinion of Judge Cançado Trindade, paras. 11-12.

51 A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato* (...), *op. cit. infra* n. (55), pp. 50-55 and 128-135.

of distinguishing between the two types of obligation; after all, in order to achieve a given result, the State ought to assume a given behaviour[52]. In any case, obligations of result admitted the initial free choice by the State of the means to comply with them, of obtaining the results due.

The aforementioned distinction between the two kinds of obligations introduced a certain hermeticism into the classic doctrine on the matter, generating some confusion, and not appearing much helpful in the domain of the international protection of human rights. Despite references to a couple of human rights treaties, the essence of R. Ago's reasoning, developed in his dense and substantial *Reports* on the International Responsibility of the State, had in mind above all the framework of essentially inter-State relations. The ILC itself, in the *Report* of 1977 on its work, at last reckoned that a State Party to a human rights treaty has obligations of *result*, and, if it does not abide by them, it cannot excuse itself by alleging that it has done all that it could to comply with them, that it has behaved in the best way to comply with them; on the contrary, such State has the duty to attain the *result* required of it by the conventional obligations of protection of the human person.

Such binding obligations of *result* (under human rights treaties) are much more common in international law than in domestic law. The confusion generated by the dichotomy of obligations of conduct and of result has been attributed to the undue transposition into international law of a distinction proper to civil law (*droit des obligations*); rather than "importing" inadequately distinctions from other branches of Law or other domains of legal theory, in my view one should rather seek to ensure that the behaviour of States is such that it will abide by the required result, of securing protection to human beings under their respective jurisdictions. Human rights treaties have not had in mind the dichotomy at issue, which is vague, imprecise, and without practical effect.

It is thus not surprising to find that the distinction between so-called obligations of conduct and of result was discarded from the approved 2001 draft of the ILC on the International Responsibility

52 Report reproduced *in*: Appendix I: *Obligations of Result and Obligations of Means*, *in* I. Brownlie, *State Responsibility - Part I*, Oxford, Clarendon Press, 2001 [reprint], pp. 241-276, esp. pp. 243 and 245.

of States, and was met with criticism in expert writing[53]. Moreover, it failed to have any significant impact on international case-law. The ECtHR, for example, held in the case of *Colozza and Rubinat versus Italy* (Judgment of 12.02.1985), that the obligation under Article 6(1) of the European Convention of Human Rights was one of result. For its part, the ICJ, in the case of the *Hostages (U.S. Diplomatic and Consular Staff) in Tehran* (Judgment of 24.05.1980), ordered the respondent State to comply promptly with its obligations, which were "not merely contractual", but rather imposed by general international law (para. 62); the ICJ singled out "the imperative character of the legal obligations" incumbent upon the respondent State (para. 88), and added that

> Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights (para. 91).

One of such principles is that of respect of the dignity of the human person. Thus, in so far as the safeguard of the fundamental rights of the human person is concerned, the obligations of the State - conventional and of general international law - are of *result*, and not of simple conduct, so as to secure the effective protection of those rights. The absolute prohibition of grave violations of human rights (such as torture) entails obligations which can only be of *result*, endowed with a necessarily objective character, and the whole conceptual universe of the law of the international responsibility of the State has to be reassessed in the framework of the international protection of human rights[54], encompassing the origin as well as the

53 Cf., e.g., I. Bronwlie, *State Responsibility - Part I*, *op. cit supra* n. (53), pp. 241, 250-251, 255-259, 262, 269-270 and 276; J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", *in Mélanges offerts à P. Reuter - Le droit international: unité et diversité*, Paris, Pédone, 1981, pp. 190, 198 and 200-204; P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", 188 *Recueil des Cours de l'Académie de Droit International de La Haye* (1984), pp. 47-49; and cf. also P.-M. Dupuy, "Reviewing the Difficulties of Codification: On Ago´s Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", 10 *European Journal of International Law* (1999), pp. 376-377.

54 A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali*, Milano, Giuffrè Ed., 2003, pp. 166-171;

implementation of State responsibility, with the consequent and indispensable duty of reparation.

In the framework of the International Law of Human Rights, - wherein the U.N. Convention against Torture is situated, - it is not the result that is conditioned by the conduct of the State, but, quite on the contrary, *it is the conduct of the State that is conditioned by the attainment of the result aimed at by the norms of protection of the human person*. The conduct of the State ought to be the one which is conducive to compliance with the obligations of result (in the *cas d'espèce*, the proscription of torture). The State cannot allege that, despite its good conduct, insufficiencies or difficulties of domestic law rendered it impossible the full compliance with its obligation (to outlaw torture and to prosecute perpetrators of it); and the Court cannot consider a case terminated, given the allegedly "good conduct" of the State concerned.

This would be inadmissible; we are here in before obligations of *result*. To argue otherwise would amount to an exercise of legal formalism, devoid of any meaning, that would lead to a juridical absurdity, rendering dead letter the norms of protection of the human person. In sum and conclusion on this point, the absolute prohibition of torture is, as already seen, one of *jus cogens*; in an imperative law, conformed by the *corpus juris* of the international protection of the fundamental rights of the human person, the corresponding obligations of the State are ineluctable, imposing themselves *per se*, as obligations necessarily of *result*.

VI. THE EVERLASTING QUEST FOR THE REALIZATION OF JUSTICE IN THE PRESENT CASE

With these clarifications in mind, it would be helpful to proceed, at this stage, to a brief view of the long-standing endeavours, throughout several years, to have justice done, in relation to the grave breaches of human rights and International Humanitarian Law reported to have occurred during the Habré regime (1982-1990).

F. Urioste Braga, *Responsabilidad Internacional de los Estados en los Derechos Humanos*, Montevideo, Edit. B de F, 2002, pp. 1-115 and 139-203; L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht, Nijhoff, 1995, pp. 141-142 and 149, and cf. pp. 145, 150-152 and 156.

Those endeavours comprise legal actions in domestic courts[55], requests of extradition (at inter-State level)[56], some other initiatives at international level[57] (including those of the *rapporteur* of the CAT

55 On 25-26.01.2000 the first complaints were lodged by Chadian nationals in Dakar, Senegal, against Mr. Hissène Habré, accusing him of the practice of torture (crimes against humanity). On 03.02.2000 a Senegalese judge, after hearing the victims, indicted Mr. H. Habré, and placed him under house arrest. But on 04.07.2000 the Dakar Appeals Court dismissed the indictment, ruling that Senegalese courts had no jurisdiction to pursue the charges because the crimes were not committed in Senegal. - On 30.11.2000, new complaints were filed against Mr. H. Habré, this time in Brussels, by Chadian victims living in Belgium. On 20.03.2001, Senegal's Appeals Court stood by its view, in ruling that Mr. H. Habré could not stand trial because the alleged crimes were not committed in Senegal. In 2002 (26 February to 07 March), a Belgian investigating judge (*juge d'instruction*), in a visit to Chad, interviewed victims and former accomplices of Mr. H. Habré, visited detention centres and mass graves, and took custody of DDS documents. At the end of a four-year investigation, on 19.09.2005, he issued an international arrest warrant *in absentia* in respect of Mr. H. Habré. Senegal, however, refused to extradite him to Belgium. Parallel to new developments, - at international level, - from the end of 2005 to date, at domestic level new complaints were filed, on 16.09.2008, against Mr. H. Habré in Senegal, accusing him again of the practice of torture (crimes against humanity). Earlier on, on 31.01.2007, Senegal's National Assembly adopted a law allowing Senegalese courts to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when committed outside of Senegal (thus removing a previous legal obstacle); it later amended its constitution.

56 Four requests by Belgium to date, of extradition of Mr. H. Habré, are to be added. As to the first Belgian request of extradition, of 22.05.2005, the Dakar Appeals Court decided, on 25.11.2005, that it lacked jurisdiction to deal with it. On 15.03.2011, Belgium presented a second extradition request, declared inadmissible by the Dakar Appeals Court in its decision of 18.08.2011. Later on, a third extradition request by Belgium, of 05.09.2011, was again declared inadmissible by the Dakar Appeals Courts in its decision of 10.01.2012. Belgium promptly lodged a fourth extradition request (same date). To those requests for extradition, one could add the whole of the diplomatic correspondence exchanged between Belgium and Senegal, reproduced in the dossier of the present case before this Court.

57 E.g., on 24.01.2006 the African Union (A.U.), meeting in Khartoum, set up a "Committee of Eminent African Jurists", to examine the H. Habré case and the options for his trial. In its following session, after hearing the report of that Committee, the A.U., on 02.07.2006, asked Senegal to prosecute H. Habré "on behalf of Africa". In the meantime, on 18.05.2006, the U.N. Committee against Torture found, in the *Souleymane Guengueng et alii* case (*supra*), that Senegal violated the CAT Convention and called on Senegal to prosecute or to extradite Mr. H. Habré. Shortly after the ICJ´s Order of 28.05.2009 in the present case opposing Belgium to Senegal, the President and another member of the U.N. Committee against Torture embarked on an unprecedented visit *in situ* to Senegal, from 04 to 07.08.2009, to seek the application of the Committee´s own decision of May 2006 in the *cas d´espèce*. – In the meantime, on 11.08.2008, a Chadian national residing in

Convention and of the U.N. High Commissioner for Human Rights [OHCHR], as well as of entities of the African civil society).

Thus, on 24.11.2011, the *rapporteur* of the CAT Convention on the follow-up of communications (or petitions) sent a letter to the Permanent Mission of Senegal to the United Nations, reminding it of its obligation *aut dedere aut judicare* under the Convention, and took note of the fact that, until then, no proceedings had been initiated by Senegal against Mr. H. Habré. Earlier on, on 12.01.2011, the same *rapporteur* had sent another letter to Senegal's Permanent Mission to the U.N., recalling the State Party's obligation under Article 7(1) of the CAT Convention, now that the full funding for the trial of Mr. H. Habré had been secured (*supra*).

For its part, the OHCHR also expressed its concern with the delays in opening up the trial of Mr. H. Habré; on 18.03.2011, the OHCHR urged Senegal to comply with its duty of prosecution[58]. Later on, the OHCHR requested Senegal not to extradite (as then announced) Mr. H. Habré to Chad (where he had already been sentenced to death *in absentia*), pondering that "[j]ustice and accountability are of paramount importance and must be attained through a fair process and in accordance with human rights law"[59]. Shortly afterwards, the OHCHR warned, on 12.07.2011, that Mr. H. Habré was

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Switzerland (Mr. Michelot Yogogombaye) lodged an application against Senegal before the African Court on Human and Peoples' Rights (AfCtHPRP) with a view to suspend the "ongoing proceedings" aiming to "charge, try and sentence" Mr. Hissène Habré. On 15.12.2009, the AfCtHPR decided that it had no jurisdiction to entertain the application at issue, since Senegal had not made a declaration accepting the jurisdiction of the AfCtHPR to hear such applications, pursuant to Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights (on the establishment of the AfCtHPR). - In the period 2008-2010, moreover, given Senegal's refusal to prepare for the trial of Mr. H. Habré unless it received full funding for it, the European Union and the A.U. sent successive delegations to negotiate on the issue with Senegal. In the meantime, on 18.11.2010, the ECOWAS Court of Justice ruled that Senegal ought to try Mr. H. Habré by a special jurisdiction or an *ad hoc* tribunal, to be created for that purpose. On 24.11.2010, a donors' international roundtable held in Dakar secured the full funding to cover all the estimated costs of the proceedings of the trial of Mr. H. Habré. Shortly afterwards, on 31.01.2011, the A.U. called for the "expeditious" start of the trial of Mr. H. Habré, on the basis of the ECOWAS Court decision (cf. *infra*).

58 U.N./OHCHR, www.ohchr.org/news, of 18.03.2011, p. 1.

59 U.N./OHCHR, "Senegal Must Review Its Decision to Extradite Hissène Habré to Chad", www.ohchr.org/news, of 10.07.2011, p. 1.

> continuing to live with impunity in Senegal, as he has done for the past 20 years. It is important that rapid and concrete progress is made by Senegal to prosecute or extradite Habré to a country willing to conduct a fair trial. This has been the High Commissioner's position all along. It is also the position of the African Union (A.U.), as well as of much of the rest of the international community. It is a violation of international law to shelter a person who has committed torture or other crimes against humanity, without prosecuting or extraditing him[60].

In addition to these exhortations (of the U.N. Committee against against Torture itself, the African Union, and the *rapporteur* of the CAT Convention), on 21.07.2010, Nobel Peace Prize winners Archbishop Desmond Tutu and Shirin Ebadi *el alii*, as well as 117 African human rights groups from 25 African countries, likewise called upon Senegal to move forward with the trial of Mr. H. Habré, for political killings and the systematic practice of torture, after more than 20 years of alleged difficulties to the detriment of the victims[61].

In their call for the fair trial of Mr. H. Habré, Archbishop D. Tutu and the other signatories stated:

> We, the undersigned NGOs and individuals urge Senegal rapidly to begin legal proceedings against the exiled former Chadian dictator Hissène Habré, who is accused of thousands of political killings and systematic torture from 1982 to 1990.
>
> The victims of Mr. Habré´s regime have been working tirelessly for 20 years to bring him to justice, and many of the survivors have already died. (…) Instead of justice, the victims have been treated to an interminable political and legal soap opera (…)[62].

After recalling the facts of the victims´ quest for justice, they stated that a fair trial for Mr. H. Habré in Senegal "should be a milestone" in the fight to hold "the perpetrators of atrocities (…) accountable for their crimes". They added that this would moreover show that "African courts are sovereign and capable of providing

60 U.N./OHCHR, www.ohchr.org/news, of 12.07.2011, p. 1.

61 Cf. Human Rights Watch (HRW), "Senegal/Chad: Nobel Winners, African Activists Seek Progress in Habré Trial", www.hrw.org/news, of 21.07.2010, p. 1; HRW, "U.N.: Senegal Must Prosecute or Extradite Hissène Habré", www.hrw.org/news, of 18.01.2001, p. 1.

62 FIDH [Fédération internationale des ligues des droits de l´homme], "Appeal […] for the Fair Trial of Hissène Habré", www.fidh.org/news, of 21.07.2010, p. 1.

justice for African victims for crimes committed in Africa". They thus urged the authorities "to choose justice, not impunity, and to move quickly towards the trial of Hissène Habré"[63].

Reference is also to be made to further initiatives and endeavours, this time of the African Union (reflected in the *Decisions* adopted by its Assembly), in the same search for justice in the *Hissène Habré* case. Thus, at its 6th ordinary session, held in Khartoum, Sudan, the Assembly of the African Union adopted its Decision 103(VI), on 24.01.2006, wherein it decided to establish a Committee of Eminent African Jurists "to consider all aspects and implications of the Hissène Habré case as well as the options available for his trial"[64]. It requested the aforementioned Committee to submit a report at the following Ordinary Session in July 2006. At its 7th ordinary session, held in Banjul, Gambia, the Assembly of the African Union adopted its Decision 127(VII), on 02.07.2006, whereby it took note of the report presented by the Committee of Eminent African Jurists. It noted that, pursuant to Articles 3(h), 4(h) and 4(o) of the Constitutive Act of the African Union, "the crimes of which Hissène Habré is accused fall within the competence of the African Union". Furthermore, the Assembly of the African Union mandated the Republic of Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial".

At its 8th ordinary session, held in Addis Ababa, Ethiopia, the Assembly of the African Union adopted Decision 157(VIII), on 30.01.2007, whereby the African Union commended Senegal for its efforts on "the implementation of the Banjul Decision", encouraged it "to pursue its initiatives to accomplish the mandate entrusted to it", and appealed to the international community to mobilize the financial resources required for the trial. Two years later, at its 12th ordinary session, held again in Addis Ababa, from 01 to 03.02.2009, the Assembly of the African Union adopted Decision 240(XII), whereby it called on "all Member States of the African Union, the European Union and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to the African Union Commission".

63 *Ibid*., p. 1.

64 It further took note of the briefing by President Wade of Senegal and President Obasanjo, the outgoing Chairperson of the African Union, on the *Hissène Habré* case.

At its following 13th ordinary session, held in Sirte, Libya, from 01 to 03.07.2009, the Assembly of the African Union adopted Decision 246(XIII), whereby it reiterated its "appeal to all Member States to contribute to the budget of the trial and extend the necessary support to the Government of Senegal in the execution of the AU mandate to prosecute and try Hissène Habré"[65]. Next, at its 14th ordinary session, held in Addis Ababa, Ethiopia, from 31.01 to 02.02.2010, the Assembly of the African Union adopted Decision 272(XIV), wherein it requested "the Government of Senegal, the Commission and Partners, particularly the European Union to continue with consultations with the view to ensuring the holding of the Donors' Round Table as soon as possible". At its 15th ordinary session, held in Kampala, Uganda, the Assembly of the African Union adopted Decision 297(XV), on 27.07.2010, to the same effect.

At its 16th ordinary session, held in Addis Ababa, Ethiopia, on 30-31.01. 2011, the Assembly of the African Union adopted Decision 340 (XVI), whereby it confirmed "the mandate given by the African Union (AU) to Senegal to try Hissène Habré". Furthermore, it welcomed the conclusions of the Donors Round Table concerning the funding of Mr. Habré's trial and called on Member States, all partner countries and relevant institutions to disburse the funds pledged at the Donors Round Table. Moreover, the Assembly requested the "Commission to undertake consultations with the Government of Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré through a special tribunal with an international character".

At its 17th ordinary session, held in Malabo, Equatorial Guinea, the Assembly of the African Union adopted Decision 371(XVII), on 01.07.2011, whereby it reiterated its decision (of January 2011) "confirming the mandate given to Senegal to try Hissène Habré on behalf of Africa". The Assembly of the African Union urged Senegal

> to carry out its legal responsibility in accordance with the United Nations Convention against Torture, the decision of the United Nations (U.N.) Committee against Torture, as well as the said mandate to put Hissène Habré on trial expeditiously or extradite him to any other country willing to put him on trial.

65 It also invited the partner countries and institutions to take part in the Donors Round Table, scheduled to be held in Dakar, Senegal.

Next, at its 18th ordinary session, held in Addis Ababa, Ethiopia, on 29-30 January 2012, the Assembly of the African Union adopted Decision 401(XVIII), whereby it requested the "Commission to continue consultations with partner countries and institutions and the Republic of Senegal and subsequently with the Republic of Rwanda with a view to ensuring the expeditious trial of Hissène Habre and to consider the practical modalities as well as the legal and financial implications of the trial".

As it can be apprehended from the aforementioned Decisions, the African Union has been giving attention to the *Hissène Habré* case on a consistent basis, since 2006. Although the African Union does not have adjudicatory powers, it has felt obliged to assist Senegal in the pursuit of its obligation to bring Mr. H. Habré to justice; it thus appears to give its own contribution, as an international organization, to the rule of law (at national and international levels) and to the corresponding struggle against impunity. One can note that, as time progressed, the language of the Decisions of the Assembly of the African Union has gradually strengthened.

This is evidenced, in particular, by the language utilized in its Decision 371(XVII), adopted on 01.07.2011, wherein the Assembly of the African Union reiterated its previous decision "confirming the mandate given to Senegal to try Hissène Habré on behalf of Africa", and *urged* Senegal "to carry out its legal responsibility" in accordance with the U.N. Convention against Torture, the decision adopted by the U.N. Committee against Torture, as well as "the said *mandate to put Hissène Habré on trial expeditiously* or extradite him to any other country willing to put him on trial"[66]. The emphasis shifted from the collection of funds for the projected trial of Mr. H. Habré to the *urgency* of Senegal's compliance with its duty of prosecution, in conformity with the relevant provisions of the U.N. Convention against Torture.

VII. URGENCY AND THE NEEDED PROVISIONAL MEASURES OF PROTECTION

In the period which followed the ICJ decision (Order of 28.05.2009) not to order provisional measures, Senegal's pledge before the Court to keep Mr. H. Habré under house surveillance and not to

66 [Emphasis added].

allow him to leave Senegal pending its much-awaited trial seemed at times to have been overlooked, if not forgotten. First, concrete moves towards the trial were not made, amidst allegations of lack of full funding (which was secured on 24.11.2010). Next, in early July 2011, Senegal announced that Mr. H. Habré would be returned to Chad on 11.07.2011 (where he had been sentenced to death *in absentia* by a court for allegedly planning to overthrow the government).

In its Order of 28.05.2009, the ICJ had refrained from indicating the provisional measures of protection, given Senegal's assurance that it would not permit Mr. H. Habré to leave the country before the ICJ had given its final decision on the case (para. 71 of the Order); the ICJ then found that there was not "any urgency" to order provisional measures in the present case (para. 73). Yet, on 08.07.2011, the then President of Senegal (Mr. A. Wade) wrote to the government of Chad and to the African Union to announce the imminent expulsion of Mr. H. Habré back to Chad, scheduled for 11.07.20111 (*supra*). On the eve of that date, Senegal officially retracted its decision, on 10.07.2011, given the international outcry that promptly followed, including from the U.N. High Commissioner for Human Rights[67].

Had the return of Mr. H. Habré to Chad been effected by Senegal in such circumstances, it would have been carried out in breach of the principle of good faith (*bona fides*). The fact that it was seriously considered, and only cancelled in the last minute under public pressure, is sufficient reason for serious concern. There is one lesson to be extracted from all that has happened in the present case since the Court's unfortunate Order of 28.05.2009: I was quite right in casting a solitary and extensive Dissenting Opinion appended to it, sustaining the need for the ordering or indication of provisional measures of protection, given the *urgency* of the situation, and the possibility of irreparable harm (which were evident to me, already at that time).

A promise of a government (any government, of any State anywhere in the world) does not suffice to efface the urgency of a situation, particularly when fundamental rights of the human person (such as the right to the realization of justice) are at stake. The ordering of provisional measures of protection has the additional effect of dissuading a State not to incur into a breach of treaty. It thus serves the prevalence of the rule of law at international level. The present case

67 HRW, "*Habré* Case: Questions and Answers on *Belgium versus Senegal*", www.hrw.org/news, of 29.03.2012, p. 5.

leaves a lesson: the ordering of provisional measures of protection, guaranteeing the rule of law, may well dissuade governmental behaviour to avoid further incongruencies and not to incur into what might become additional breaches of international law.

In my extensive Dissenting Opinion appended to the Court's Order of 28.05.2009, I insisted on the issuance of provisional measures of protection, given the manifest urgency of the situation affecting the surviving victims of torture (or their close relatives) during the Habré regime in Chad (paras. 50-59), and the probability of irreparable damage ensuing from the breach of the right to the realization of justice (paras. 60-65). After all, the present case had been lodged with the Court under the U.N. Convention against Torture. Ever since, I have never seen any persuasive argument in support of the decision not to order provisional measures in the present case. All that has been said so far evolves around an empty *petitio principii*: the Court's decision was the right one, as was taken by a large majority (the traditional argument of authority, the *Diktat*).

The fact is that majorities, however large they happen to be, at times also incur into mistakes, and this is why I am more inclined to abide by the authority of the argument, rather than *vice-versa*. My position is that the Court should have ordered the provisional measures of protection in its decision of 28.05.2009, having thus assumed the role of *guarantee* of the relevant norms of the U.N. Convention against Torture. It should have gone beyond the short-sighted inter-State outlook, so as to behold the fundamental rights of the human person that were (and are) at stake in the present case, under the U.N. Convention against Torture.

Unilateral acts of States - such as, *inter alia*, that of promise - were conceptualized in the traditional framework of the inter-State relations, so as to extract their legal effects, given the "decentralization" of the international legal order. Here, in the present case, we are in an entirely distinct context, that of *objective* obligations established under a normative Convention - one of the most important of the United Nations, in the domain of the international protection of human rights, embodying an absolute prohibition of *jus cogens*, - the U.N. Convention against Torture. In the ambit of these obligations, a pledge or promise made in the course of legal proceedings before the Court does not remove the prerequisites (of urgency and of

probability of irreparable damage) for the indication of provisional measures by the Court.

This is what I strongly upheld in my aforementioned Dissenting Opinion of 28.05.2009 (para. 78), and what successive facts ever since leave as a lesson. When the prerequisites of provisional measures are present, – as they in my view already were in May 2009, as confirmed by the successive facts, – such measures are to be ordered by the Court, to the benefit of the subjects of rights to be preserved and protected (such as the right to the realization of justice). Accordingly, in my Dissenting Opinion I deemed it fit to ponder that:

> (…) A decision of the ICJ indicating provisional measures in the present case, as I herein sustain, would have set up a remarkable precedent in the long search for justice in the theory and practice of international law. After all, this is the first case lodged with the ICJ on the basis of the 1984 U.N. Convention against Torture (…).
>
> (…) [T]he prerequisites of urgency and the probability of irreparable harm were and remain in my view present in this case (...), requiring from it the indication of provisional measures. Moreover, there subsist, at this stage, – and without prejudice to the merits of the case, – uncertainties which surround the matter at issue before the Court, despite the amendment in February 2007 of the Senegalese Penal Code and Code of Criminal Procedure.
>
> Examples are provided by the prolonged delays apparently due to the alleged high costs of holding the trial of Mr. H. Habré, added to pre-trial measures still to be taken, and the lack of definition of the time still to be consumed before that trial takes place (if it does at all). Despite all that, as the Court's majority did not find it necessary to indicate provisional measures, the Court can now only hope for the best.
>
> This is all the more serious in the light of the nature of the aforementioned *obligations* of the States Parties to the U.N. Convention against Torture. (…)
>
> This Court should in my view have remained seized of the matter at stake. It should not have relinquished its jurisdiction in the matter of provisional measures, on the ground of its reliance on what may have appeared the professed intentions

> of the parties, placing itself in a position more akin to that of a conciliator, if not an expectator. Had the Court done so, it would have assumed the role of the guarantor of the compliance, in the *cas d'espèce*, of the conventional obligations by the States Parties to the U.N. Convention against Torture in pursuance of the principle *aut dedere aut judicare* (paras. 80, 82-84 and 88).

This point is not to pass unnoticed here. Fortunately, - for the sake of the realization of justice in the light of the integrity of the obligations enshrined into the U.N. Convention against Torture, - Mr. H. Habré did not escape from his house surveillance in Dakar, nor was he expelled from Senegal. The acknowledgment of the urgency of the situation was at last made by the ICJ: it underlies its present Judgment on the merits of the case, which it has just adopted today, 20 July 2012, wherein it determined that Senegal has breached Articles 6(2) and 7(1) of the U.N. Convention against Torture, and is under the duty to take "without further delay" the necessary measures to submit the case against Mr. H. Habré to its competent authorities for the purpose of prosecution (para. 121 and resolutory point 6 of the *dispositif*).

VIII. THE ABSOLUTE PROHIBITION OF TORTURE IN THE REALM OF *COGENS*

The victims' everlasting ordeal in their quest for the realization of justice in the present case becomes even more regrettable if one bears in mind that the invocation of the relevant provisions of the U.N. Convention against Torture (Articles 5-7) in the present case takes place in connection with the absolute prohibition of torture, a prohibition which brings us into the domain of *jus cogens*. One would have thought that, in face of such an absolute prohibition, the *justiciables* would hardly face so many obstacles in their search for the realization of justice. This would be so in a world where justice prevailed, which is not ours. The time of human justice is not the time of human beings; ours is a world where one has to learn soon how to live with the surrounding irrationality, in order perhaps to live a bit longer.

1. The International Legal Regime against Torture

Yet, despite of the difficulties arisen in the *cas d'espèce*, the truth is that there is today an international legal regime of absolute

prohibition of all forms of torture, both physical and psychological, - a prohibition which falls under the domain of *jus cogens*. Such international legal regime has found judicial recognition; thus, in the case of *Cantoral Benavides versus Peru* (merits, Judgment of 18.08.2000), for example, the Inter-American Court of Human Rights (IACtHR) stated that

> a true international legal regime has been established of absolute prohibition of all forms of torture (para. 103).

Such absolute prohibition of torture finds expression at both *normative* and *jurisprudential* levels. The basic principle of humanity, rooted in the human conscience, has arisen and stood against torture. In effect, in our times, the *jus cogens* prohibition of torture emanates ultimately from the universal juridical conscience, and finds expression in the *corpus juris gentium*. Torture is thus clearly prohibited, as a grave violation of the International Law of Human Rights and of International Humanitarian Law, as well as of International Criminal Law. There is here a normative convergence to this effect; this is a definitive achievement of civilization, one that admits no regression.

In the domain of the International Law of Human Rights, the international legal regime of absolute prohibition of torture encompasses the United Nations Convention (of 1984, and its Protocol of 2002) and the Inter-American (1985) and European (1987) Conventions against torture, in addition to the Special *Rapporteur* against Torture (since 1985) of the former U.N. Human Rights Commission (HRC) and the Working Group on Arbitrary Detention (since 1991) also of the former HRC (which pays special attention to the *prevention* of torture)[68]. The three aforementioned co-existing Conventions to combat torture are basically complementary *ratione materiae*[69]. Moreover, in the domain of International Criminal Law, Article 7 of the 1998 Rome Statute of the International Criminal Court (ICC) includes the crime of torture within the ICC's jurisdiction. Torture is in fact prohibited in any circumstances.

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68 In addition to these mechanisms, there is the U.N. Voluntary Contributions Fund for Victims of Torture (since 1983).

69 Cf., in this regard, A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 345-352.

As the IACtHR rightly warned, in its Judgments in the case of the *Gómez Paquiyauri Brothers versus Peru* (of 08.07.2004, paras. 111-112), as well as of *Tibi versus Ecuador* (of 07.09.2004, para. 143), and of *Baldeón García versus Peru* (of 06.04.2006, para. 117), the

> Prohibition of torture is complete and non-revocable, even under the most difficult circumstances, such as war, 'the struggle against terrorism' and any other crimes, states of siege or of emergency, of civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies.

The IACtHR was quite clear in asserting, e.g., in its Judgment in the case of *Maritza Urrutia versus Guatemala* (of 27.11.2003, para. 92), and reiterating in its Judgments in the cases of *Tibi versus Ecuador* (of 07.09.2004, para. 143), of the *Brothers Gómez Paquiyauri versus Peru* (of 08.07.2004, para. 112), and of *Baldeón García versus Peru* (of 06.04.2006, para. 117), that

> There exists an international legal regime of absolute prohibition of all forms of torture, both physical and psychological, a regime which belongs today to the domain of *jus cogens*.

Likewise, in the case of *Caesar versus Trinidad and Tobago* (Judgment of 11.03.2005), the IACtHR found that the conditions of detention to which the complainant had been subjected (damaging his health - his physical, psychological and moral integrity) amount to an inhuman and degrading treatment, in breach of Article 5(1) and (2) of the American Convention on Human Rights, which "enshrines precepts of *jus cogens*" (para. 100). And later on, in the case of *Goiburú et al. versus Paraguay* (Judgment of 22.09.2006), the IACtHR reasserted the absolute prohibition of torture and enforced disappearance of persons, in the realm of *jus cogens*, and acknowledged the duty to fight impunity with regard to those grave violations (with the due investigation of the occurrences), so as to honour the memory of the victims and to guarantee the non-repetition of those facts (para. 93).

The IACtHR and the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY) are the two contemporary international tribunals which have most contributed so far to the jurisprudential construction of the absolute prohibition of torture,

in the realm of *jus cogens*[70]. For its part, the ICTFY, in the same line of reasoning, held, in its Judgment (Trial Chamber, of 10.12.1998) in the *Furundzija* case, that torture is "prohibited by a peremptory norm of international law", it is a prohibition of *jus cogens* (paras. 153 and 155). Likewise, in its Judgment (Trial Chamber, of 16.11.1998) in the *Delalic et al.* case, the ICTFY asserted that the prohibition of torture is of conventional and customary international law, and is a norm of *jus cogens* (paras. 453-454).

This view was reiterated by the ICTFY in its Judgment (Trial Chamber, of 22.02.2001) in the *Kunarac* case, wherein it stated that

> Torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus cogens*" (para. 466). Other statements of the kind by the ICTFY, as to the *jus cogens* prohibition of torture, are found in its Judgment (Appeals Chamber, of 20.02.2001) in the *Delalic et al*. case (para. 172 n. 225), as well as in its Judgment (Trial Chamber, of 31.03.2003) in the *Naletilic et. al*. case, wherein it affirmed that
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> Various judgments of the Tribunal have considered charges of torture as a grave breach of the Geneva Conventions of 1949, a violation of the laws and customs of war and as a crime against humanity. The *Celebici* Trial Judgment stated that the prohibition of torture is a norm of customary international law and *jus cogens* (para. 336).

The *ad hoc* International Criminal Tribunal for Rwanda (ICTR), in turn, contributed to the normative convergence of International Human Rights Law and contemporary International Criminal Law as to the absolute prohibition of torture, in interpreting, in its decision (Chamber I) of 02.09.1998 in the case of *J.-P. Akayesu*, the term "torture" as set forth in Article 3(f) of its Statute, in accordance with the definition of torture set forth in Article 1(1) of the U.N. Convention against Torture, namely,

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70 Cf., recently, A.A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law", *in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2008*, Washington D.C., General Secretariat of the OAS, 2009, pp. 3-29.

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act that he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (para. 681).

The European Court of Human Rights (ECtHR), for its part, has also pronounced on the matter at issue, to the same effect. Thus, in its Judgment (Grand Chamber) of 12.11.2008, on the *Demir and Baykara versus Turkey* case, it held that the prohibition of torture has "attained the status of a peremptory norm of international law, or *jus cogens*", and added that this finding was "incorporated into its case-law in this sphere" (para. 73). In a broader context, of prohibition of inhuman and degrading treatment (encompassing mental suffering), the reasoning developed by the ECtHR in its Judgment of 02.03.2010, in the *Al-Saadoon and Mufdhi versus United Kingdom* case, leaves room to infer an acknowledgment of a normative hierarchy in international law, giving pride of place to the norms that safeguard the dignity of the human person.

The aforementioned development conducive to the current absolute (*jus cogens*) prohibition of torture has taken place with the awareness of the horror and the inhumanity of the practice of torture. Testimonies of victims of torture - as in the proceedings of contemporary international human rights tribunals - give account of that. Even before the present era, some historical testimonies did the same. One of such testimonies, - a penetrating one, - is that of Jean Améry, himself a victim of it. In his own words,

> (...) torture is the most horrible event a human being can retain within himself. (…) Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected. (...) The person who has survived torture and whose pains are starting to subside (…) experiences an ephemeral peace that is conducive to thinking. (...) If from the experience of torture any knowledge at all remains that goes beyond the plain nightmarish, it is that of a great amazement and a foreignness in the world that cannot be compensated by

> any sort of subsequent human communication. (...) Whoever has succumbed to torture can no longer feel at home in the world. (...) The shame of destruction cannot be erased. Trust in the world, which already collapsed in part at the first blow, but in the end, under torture, fully will not be regained. (…) One who was martyred is a defenseless prisoner of fear. It is fear that henceforth reigns over him. Fear - and also what is called resentments. They remain (…)[71].

The present Judgment of the ICJ in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* contributes decisively to the consolidation of the international legal regime against torture. To this effect, the Court significantly states that

> In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).
>
> That prohibition is grounded on a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims, the International Covenant on Civil and Political Rights of 1966, General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora (para. 99).

One of the features of the present-day international legal regime against torture is the establishment of a mechanism of continuous monitoring of a *preventive* character. This is illustrated by the 2002 Optional Protocol of the 1984 U.N. Convention against Torture, as well as the preventive inspections under the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Article 2). In this regard, I deemed it fit to point out, in my Concurring Opinion in the case of *Maritza Urrutia*

71 Jean Améry, *Par-delà le crime et le châtiment*, Arles, Babel/Actes Sud, 2005 [reed.], pp. 61, 83-84, 92 and 94-96; Jean Améry, *At the Mind´s Limits*, Bloomington, Indiana Univ. Press, 1980 [reed.], pp. 22, 34 and 38-40.

versus Guatemala (IACtHR, Judgment of 27.11.2003), that such development has

> put an end to one of the remaining strongholds of State sovereignty, in permiting scrutiny of the *sancta sanctorum* of the State – its prisons and detention establishments, police stations, military prisons, detention centers for foreigners, psychiatric institutions, among others, - of its administrative practices and legislative measures, to determine their compatibility or not with the international standards of human rights. This has been achieved in the name of superior common values, consubstantiated in the prevalence of the fundamental rights inherent to the human person (para. 11).

2. Fundamental Human Values Underlying that Prohibition

Human conscience has awoken to the pressing need for decisively putting an end to the scourges of arbitrary detention and torture. The general principles of the law, and the fundamental human values underlying them, play a quite significant and crucial role here. Such fundamental values have counted on judicial recognition in our times. Thus, the ECtHR, for example, asserted, in the *Soering versus the United Kingdom* case (Judgment of 07.07.1989), that the absolute prohibition of torture (even in times of war and other national emergencies) expresses one of the "fundamental values of [contemporary] democratic societies" (para. 88). Subsequently, in the *Kalashnikov versus Russia* case (Judgment of 15.07.2002), the ECtHR stated that Article 3 of the European Convention on Human Rights

> enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior (para. 95).

In the *Selmouni versus France* case (Judgment of 28.07.1999), the ECtHR categorically reiterated that Article 3 of the European Convention

> enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention

> prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols ns. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation (...) (para. 95).

In that same Judgment, the European Court expressed its understanding that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (para. 101)[72].

Like the ECtHR, also the IACtHR singled out the fundamental human values underlying the absolute prohibition of torture. Thus, in the case of *Cantoral Benavides versus Peru* (merits, Judgment of 18.08.2000), pondered that certain acts which were formerly classified as inhuman or degrading treatment, should from now on be classified distinctly, as torture, given the "growing demands" for the protection of fundamental human rights (para. 99). This, in the understanding of the IACtHR, required a more vigorous response in facing "infractions to the basic values of democratic societies" (para. 99). In the *Cantoral Benavides* case, the IACtHR, with its reasoning, thus purported to address the consequences of the absolute prohibition of torture.

In effect, the practice of torture, in all its perversion, is not limited to the physical injuries inflicted on the victim; it seeks to annihilate the victim's identity and integrity. It causes chronic psychological disturbances that continue indefinitely, making the victim unable to continue living normally as before. Expert opinions rendered before international tribunals consistently indicate that torture aggravates the victim's vulnerability, causing nightmares, loss of trust in others, hypertension, and depression; a person tortured in prison or detention loses the spatial dimension and even that of time itself[73].

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72 In the *cas d'espèce*, the ECtHR found the respondent State responsible for the torture inflicted on Selmouni (paras. 105-106). - A similar line of reasoning can be found, e.g., in the Judgment (of 07.09.2004) of the IACtHR in the case of *Tibi versus Ecuador* (para. 143), wherein it likewise found the respondent State responsible for the torture inflicted on the victim (para. 165).

73 IACtHR, case *Tibi versus Ecuador* (Judgment of 07.09.2004), Separate Opinion of Judge Cançado Trindade, para. 21.

As to the devastating consequences of the (prohibited) practice of torture, and the irreparable damage caused by it, I pondered, in my Separate Opinion in the case *Tibi versus Ecuador* (IACtHR, Judgment of 07.09.2004), that

> (...) [T]he practice of torture (whether to obtain a confession or information or to cause social fear) generates a disintegrating emotional burden that is transmitted to the next of kin of the victim, who in turn project it toward the persons they live with. The widespread practice of torture, even though it takes place within jails, ultimately contaminates all the social fabric. The practice of torture has sequels not only for its victims, but also for broad sectors of the social milieu affected by it. Torture generates psychosocial damage and, under certain circumstances, it can lead to actual social breakdown. (…)
>
> The practice of torture is a hellish threat to civilization itself. One of the infallible criteria of civilization is precisely the treatment given by public authorities of any country to detainees or incarcerated persons. F.M. Dostoyevsky warned about this in his aforementioned *Memoirs from the House of the Dead* (1862); for him, the degree of civilization attained by any social milieu can be assessed by entering its jails and detention centers[74]. Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim, undermining his or her physical or mental resistance; thus, it treats the victim as a "mere means" (in general to obtain a confession), flagrantly violating the basic principle of the dignity of the human person (which expresses the Kantian concept of the human being as an "end in himself"), degrading him, in a perverse and cruel manner[75], and causing him truly irreparable damage (paras. 22 and 24).

For its part, the ICTFY stated, in the aforementioned 1998 Judgment in the *Furundzija* case, that

> Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international

74 Cf. F.M. Dostoyevski, *Souvenirs de la maison des morts* [1862], Paris, Gallimard, 1977 (reed.), pp. 35-416.

75 J.L. de la Cuesta Arzamendi, *El Delito de Tortura*, Barcelona, Bosch, 1990, pp. 27-28 and 70.

> community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate (para. 154).

Another pertinent decision of the ICTFY disclosing the close attention it dispensed to fundamental human values is its Judgment (Trial Chamber II, of 17.10.2002) in the *Simic* case, wherein, in singling out the "substantial gravity" of torture, it pondered that

> (…) The right not to be subjected to torture is recognized in customary and conventional international law and as a norm of *jus cogens*. It cannot be tolerated. It is an absolute assault on the personal human dignity, security and mental being of the victims. As noted in *Krnojelac*, torture `constitutes one of the most serious attacks upon a person's mental or physical integrity. The purpose and the seriousness of the attack upon the victim sets torture apart from other forms of mistreatment' (para. 34).

One decade ago, within the IACtHR, I upheld the view, which I reiterate herein, that *jus cogens* is not a closed juridical category, but rather one that evolves and expands[76]. An ineluctable consequence of the assertion and the very existence of *peremptory* norms of International Law is their not being limited to the conventional norms, to the law of treaties, and their encompassing every and any juridical act, and extending themselves to general international law. *Jus cogens* being, in my understanding, an open category, it expands itself in response to the necessity to protect the rights inherent to each human being in every and any situation. The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the realm of the international *jus cogens*[77]. It is in the domain of international responsibility that *jus cogens* reveals its wide and profound dimension, encompassing all juridical acts (including the

76 IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, Concurring Opinion of Judge Cançado Trindade, paras. 65-73.

77 *Ibid*., paras. 68-69.

unilateral ones), and having an incidence - even beyond that - on the very *foundations* of a truly universal international law[78].

> The jurisprudence of distinct international tribunals is, thus, perfectly clear in stating the reaction of *ratione materiae* Law, regarding absolute prohibition of torture, in all its forms, under any and all circumstances, - a prohibition that, in our days, falls under international *jus cogens,* with all its juridical consequences for the States responsible. In rightly doing so, it has remained attentive to the underlying fundamental human values that have inspired and guided it. This is a development which cannot be overlooked, and is to continue, in our days.

IX. OBLIGATIONS *ERGA OMNES PARTES* UNDER THE U.N. CONVENTION AGAINST TORTURE

The CAT Convention sets forth the absolute prohibition of torture, belonging to the domain of *jus cogens* (*supra*). Obligations *erga omnes partes* ensue therefrom. Significantly, this has been expressly acknowledged by the two contending parties, Belgium and Senegal, in the proceedings before the Court. They have done so in response to a question I put to them, in the public sitting of the Court of 08.04.2009, at the earlier stage of provisional measures of protection in the *cas d'espèce*. The question I deemed it fit to put to both of them was as follows:

> Dans ces audiences publiques il y a eu des références expresses de la part de deux délégations aux droits des Etats ainsi qu'aux droits des individus. J'ai alors une question à poser aux deux Parties. Je la poserai en anglais pour maintenir l'équilibre linguistique de la Cour. La question est la suivante: - For the purposes of a proper understanding of the *rights* to be preserved (under Article 41 of the Statute of the Court), are there rights corresponding to the obligations set forth in Article 7, paragraph 1, in combination with Article 5, paragraph 2, of the 1984 United Nations Convention Against Torture and, if so, what are their *legal nature, content and effects?* Who are the *subjects* of those rights, States having nationals affected, or all States Parties to the aforementioned Convention? Whom are such

78 *Ibid*., para. 70.

> rights opposable to, only the States concerned in a concrete case, or any State Party to the aforementioned Convention?[79].

In response to my question, Belgium began by recalling the obligation to prosecute or extradite, incumbent upon States Parties to the CAT Convention, under Articles 5(2) and 7(1), and pointing out that

> where there is an obligation of one State to other States, those States have a corresponding right to performance of that obligation[80].

The obligation set out in Articles 5(2) and 7(1) "gives rise to a correlative right" (of States Parties) to secure compliance with it[81]. This right, - Belgium proceeded, - has a "conventional character", being founded on a treaty, and "[t]he rule *pacta sunt servanda* applies in this respect"[82].

Thus, - it went on, - all States Parties to the CAT Convention are entitled to seek ensuring compliance with the conventional obligations, - in accordance with the rule *pacta sunt servanda*, - undertaken by each State Party in relation to all other States Parties to the CAT Convention[83]. Belgium then added:

> In the case *Goiburú et al. versus Paraguay* [2006], the Inter-American Court of Human Rights observed that all the States Parties to the American Convention on Human Rights should collaborate in good faith in the obligation to extradite or prosecute the perpetrators of crimes relating to human rights; it is interesting to note that, in order to illustrate this obligation, the Court refers to the 1984 Convention (...):
>
> The Court therefore deems it pertinent to declare that the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, based

79 ICJ, document CR 2009/11, of 08.04.2009, p. 25.

80 ICJ, *Response of Belgium to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009*, doc. BS 2009/15, of 15.04.2009, p. 2, paras. 4-5.

81 *Ibid*., p. 2, para. 7.

82 *Ibid*., p. 3, para. 8.

83 *Ibid*., p. 3, para. 11.

> on these principles, a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts of this case on their territory[3][84].
>
> In sum, - as Belgium put it, - the rights set forth in the 1984 U.N. Convention against Torture "are therefore opposable to *all* the States Parties to that Convention"[85].

For its part, Senegal began its response to my question by likewise recalling the obligation to prosecute or extradite under Articles 5(2) and 7(1) of the CAT Convention[86], and added:

> The *nature* of the international obligation to prohibit torture has undergone a major change. From being a conventional obligation of relative effect, it has had an *erga omnes* effect attributed to it[87].

Senegal then expressly acknowledged "the existence of indivisible obligations *erga omnes*", as restated by the ICJ on a number of occasions from 1970 onwards[88]. Next, Senegal reckoned that States Parties to the CAT Convention have "the right to secure compliance with the obligation" set forth in Articles 5(2) and 7(1)[89].

From the responses given by Belgium and Senegal to my question, it became clear that they both shared a proper understanding of the *nature* of the obligations incumbent upon them under the CAT

84 [3] Inter-American Court of Human Rights, Judgment of 22.09.2006, para. 132, and in particular note n. 87, which provides a full list of the relevant universal instruments, including the 1984 Convention; cf. also the Separate Opinion of Judge Cançado Trindade, paras. 67-68.

85 ICJ, *Response of Belgium to the Question…*, *op. cit. supra* n. (81), p. 5, para. 14.

86 ICJ, *Response of Senegal to the Question Put by Judge Cançado Trindade at the End of the Public Sitting of 8 April 2009*, doc. BS 2009/16, of 15.04.2009, p. 1, para. 1.

87 *Ibid*., p. 1, para. 2.

88 *Ibid*., p. 2, paras. 3-4.

89 *Ibid*., p. 2, paras. 5-6.

Convention. Such obligations grow in importance in face of the *gravity* of breaches (*infra*) of the absolute prohibition of torture. They conform the *collective guarantee* of the rights protected thereunder. If those breaches are followed by the perpetrators' impunity, this latter, instead of covering them up, adds further gravity to the wrongful situation: to the original breaches (the acts of torture), the subsequent victims' lack of access to justice (denial of justice) constitutes an additional violation of the protected rights. For years, within the IACtHR, I insisted on the jurisprudential construction of the material expansion of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their two dimensions, the horizontal (*vis-à-vis* the international community as a whole) as well as the vertical (projection into the domestic law regulation of relations mainly between the individuals and the public power of the State)[90]; I then reiterated my position in the present case concerning *Questions Relating to the Obligation to Prosecute or Extradite*, decided by the ICJ in its recent Judgment of 20.07.2012.

X. THE GRAVITY OF THE HUMAN RIGHTS VIOLATIONS AND THE COMPELLING STRUGGLE AGAINST IMPUNITY

1. Human Cruelty at the Threshold of Gravity

In effect, in addition to its horizontal expansion, *jus cogens* also projects itself on a vertical dimension, i.e., that of the interaction between the international and national legal systems in the current domain of protection (*supra*). The effect of *jus cogens*, on this second (vertical) dimension, is to invalidate any and all legislative, administrative or judicial measures that, under the States' domestic law, attempt to authorize or tolerate torture[91]. The absolute prohibition of torture, as a reaction of *ratione materiae* Law as here envisaged, in both the horizontal and the vertical dimensions, has implications regarding the longstanding struggle against impunity and the award of reparations due to the victims. As to the first (horizontal) dimension, in my understanding, the "*intérêt pour agir*" of States Parties to the CAT Convention grows in importance, in the

90 Cf., in this sense, IACtHR, case *La Cantuta versus Peru* (Judgment of 29.11.2006), Separate Opinion of Judge Cançado Trindade, paras. 51 and 60.

91 Cf. E. de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law", 15 *European Journal of International Law* (2004), pp. 98-99.

light of the gravity of the breaches under that Convention. It would be a mistake to attempt to "bilateralize" contentious matters under the CAT Convention (like in traditional inter-State disputes), which propounds a distinct outlook of initiatives thereunder, to prevent torture and to struggle against it.

Even in a wider horizon, this trend was already discernible in the years following the adoption of the CAT Convention in 1984. Thus, in 1988, the Senegalese jurist Kéba Mbaye, in his thematic course at The Hague Academy of International Law, rightly observed that a State's "*intérêt pour agir*" goes beyond a simple interest, in that it is a concept of procedural law. And, in the present stage of evolution of international law, it is widely reckoned that States can exercise their "*intérêt pour agir*" not only in pursuance of their own interests, but also of common and superior values, and, under some U.N. Conventions, in pursuance of shared fundamental values by means of an "objective control"[92]. This is what I refer to as the *collective guarantee* of human rights treaties, by the States Parties themselves. This is notably the case of the U.N. Convention against Torture; the "*intérêt pour agir*" thereunder is fully justified given the *gravity* of the breaches at issue, acts of torture in all its forms.

The cruelty of the systematic practice of torture cannot possibly be forgotten, neither by the victims and their next-of-kin, nor by their social *milieu* at large. In this connection, I have already reviewed the findings of the 1992 *Report* of the Chadian Commission of Inquiry[93]. The Truth Commission's *Report* gives a sinister account of the methods of torture utilized during the Habré regime, with illustrations[94], in addition to pictures of the mass graves[95]. The findings of the Chadian Truth Commission have been corroborated by humanitarian fact-finding by non-governmental organizations (NGOs). Although the *Association des Victimes de Crimes et Répressions Politiques au Tchad* (AVCRP) was established in N'djamena on 12.12.1991, the files of the archives of the "political

92 Kéba Mbaye, "L´intérêt pour agir devant la Cour Internationale de Justice", 209 *Recueil des Cours de l´Académie de Droit International de La Haye* (1988), pp. 257 and 271.

93 Cf. section II, *supra*.

94 Cf. Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices - Rapport de la Commission d'enquête nationale...*, *op. cit. supra*, n. (5), pp. 111-123, 137-146 and 148-149.

95 Cf. *ibid.*, pp. 150-154.

police" (the DDS) of the Habré regime were reported to have been discovered in N'Djaména only one decade later, in May 2001, by Human Rights Watch (HRW)[96].

In another report, of the same year 2001, Amnesty International (A.I.) stated that, in addition to the information contained in the Chadian Truth Commission's *Report* (*supra*), most of the information in its own possession came from accounts of surviving victims of torture themselves, or from other detainees. According to such sources, the Chadian government of Hissène Habré

> applied a deliberate policy of terror in order to discourage opposition of any kind. Actual and suspected opponents and their families were victims of serious violations of their rights. Civilian populations were the victims of extrajudicial executions, committed in retaliation for armed opposition groups' actions on the basis of purely ethnic or geographical criteria. Thousands of people suspected of not supporting the government were arrested and held in secret by the DDS. Thousands of people died on DDS premises - killed by torture, by the inhuman conditions in which they were detained or by a lack of food or medical care[97].

The 2001 report by A.I. proceeded that, during the Hissène Habré regime in Chad,

> the practice of torture was, by all accounts, an `institutional practice' used to extract confessions, to punish or to instil fear. (...) According to survivors, Hissein Habré personally gave the order for certain people to be tortured. Other sources say that he was often present during torture sessions. (...) Political prisoners were interrogated as a rule by members of the security service at DDS headquarters in N'Djaména. In some cases, they were interrogated and held at the presidential palace after being tortured. (...)
>
> According to survivors, some of the most common forms of torture were electric shocks, near-asphyxia, cigarette burns and having gas squirted into the eyes. Sometimes, the torturers

96 Cf. UNHCR, "African Union: Press Senegal on Habré Trial", www.unhcr.org/news, of 28.01.2009, p. 1; HRW, *Chad: The Victims of Hissène Habré Still Awaiting Justice*, vol. 17, July 2005, n. 10(A), p. 5; and cf. S. Guengueng, *Prisonnier de Hissène Habré...*, *op. cit. infra* n. (102), pp. 135 and 153.

97 A.I., [Report:] *The Habré Legacy*, AI Index AFR-20/004/2001, of October 2001, p. 10, and cf. p. 26.

> would place the exhaust pipe of a vehicle in their victim's mouth, then start the engine. Some detainees were placed in a room with decomposing bodies, others suspended by their hands or feet, others bound hand and foot. Two other common techniques consisted of gripping the victim's head between two small sticks joined by cords, which were twisted progressively (...). Some prisoners were subjected to particularly brutal beatings during their interrogation. (...)[98].

In a subsequent report, of 2006, A.I. added that many detainees were held at the prison of the *Camp des Martyrs*, not far from the so-called "*piscine*" (a former swimming pool that had been covered over with concrete and divided into several cells below ground level), wherein they were "subjected to torture". A form of torture that became sadly well-known as practiced in the Habré regime in Chad was the "*arbatachar*", which consisted of "choking the prisoner by tying his wrists to his ankles from behind"[99], up to a point of stopping the blood circulation and causing paralysis[100]. Moreover, in the personal account of a surviving victim, - complainant before the U.N. Committee against Torture, - very recently published in 2012,

> La DDS prenait plaisir à créer des situations pour rendre les prisonniers malades ou pour provoquer l'épidémie comme la malaria, l'oedème pulmonaire, etc., afin de faire mourir très vite, et à la fois beaucoup de prisonniers.
>
> Selon mes constats, pendant les deux ans et cinq mois que j'ai eu à vivre dans les quatre différentes prisons de la DDS, cette police politique avait tous les moyens de sauver la vie aux détenus. Comme leur mission était de terroriser et d'exterminer le peuple tchadien, ils faisaient donc tout pour faire mourir les prisonniers. (...) Les responsables et tout comme les agents de la DDS, n'éprouvaient aucun sentiment humanitaire vis-à-vis des détenus[101].

98 *Ibid*., pp. 26-27.

99 A.I., [Report:] *Chad: Voices of Habré´s Victims*, AI Index AFR-20/009/2006, of August 2006, p. 6.

100 Cf. Ministère Tchadien de la Justice, *Les crimes et détournements de l'ex-Président Habré et de ses complices - Rapport de la Commission d'enquête nationale*..., op. cit. supra, n. (5), p. 42; S. Guengueng, *Prisonnier de Hissène Habré*..., *op. cit. infra* n. (102), p. 121.

101 Souleymane Guengueng, *Prisonnier de Hissène Habré - L´expérience d´un survivant des geôles tchadiennes et sa quête de justice*, Paris, L´Harmattan, 2012, pp. 79-80.

1. The Inadmissibility of Impunity of the Perpetrators

It is in no way surprising that the reparations due to victims in cases of torture have revealed a dimension that is both individual and collective or social. Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or handling with indifference the consequences of criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The practice of torture, aggravated by the impunity of the perpetrators, contaminates the whole social *milieu* wherein it took place.

As I deemed it fit to warn in the IACtHR, in my Separate Opinion in the case of the *"Street Children"* (*Villagrán Morales et al. versus Guatemala*, Reparations, Judgment of 26.05.2001),

> Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others (para. 22).

The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered. This is still an evolving matter, but the right of those victims to fair and adequate reparation is addressed today on the basis of recognition of the central role of the integrity of said victims, of the human person. Realization of justice, with due reparations, helps to reorganize human relations and restructure the psyche of victims. Realization of justice must take place from the standpoint of the integral nature of the personality of the victims. Reparations at least mitigate or soothe the suffering of the victims, in conveying to them the sense of the realization of justice.

Such reparations cannot be disrupted by undue invocations of State sovereignty or State immunity, as I have pointed out in two

recent cases adjudicated by this Court[102]. Likewise, the struggle against impunity for grave violations of human rights and of International Humanitarian Law cannot be dismantled by undue invocations of State sovereignty or State immunity. The hope has been expressed of advances in this respect:

> (…) Progressivement, l'idée d'irresponsabilité, sous couvert de souveraineté ou d'immunité, recule, tout au moins pour une série d'actes atroces désormais qualifiés de `crimes internationaux'. Cela constitue une source d'espoir considérable pour tous les mouvements citoyens et de défense des droits humains, pour tous les oubliés de la Terre[103].

In the case *Bulacio versus Argentina* (Judgment of 18.09.2003), the IACtHR held as "inadmissible" any measure of domestic law intended to hinder the investigation and sanction of those responsible for violations of human rights (para. 116), thus leading to impunity. In my Separate Opinion in the case *Bulacio*, I pondered *inter alia* that

> *Reparatio* does not put an end to what occurred, to the violation of human rights. The wrong was already committed[104]; *reparatio* avoids the aggravation of its consequences (by the indifference of the social *milieu*, by the impunity, by the oblivion). (…) *Reparatio* disposes again, order in the life of the surviving victims, but it cannot eliminate the pain that is already ineluctably incorporated into their daily existence. The loss is, from this angle, rigorously irreparable. (…) *Reparatio* is a reaction, in the realm of Law, to human cruelty, manifested in the most diverse forms: violence in dealing with fellow human beings, the impunity of those responsible on the part of the public power, the indifference and the oblivion of the social *milieu*.

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102 ICJ, case concerning the *Jurisdictional Immunities of States* (Germany *versus* Italy, Greece intervening; Judgment of 03.02.2012), Dissenting Opinion of Judge Cançado Trindade, paras. 1-316; ICJ, case *A.S. Diallo* (Guinea *versus* D.R. Congo, Reparations, Judgment of 19.06.2012), Separate Opinion of Judge Cançado Trindade, paras. 1-101.

103 L. Joinet (dir.), *Lutter contre l´impunité*, Paris, Éds. La Découverte, 2002, p. 125.

104 Human capacity to promote good and to commit evil has not ceased to attract the attention of human thinking throughout the centuries; cf. F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Gedisa Edit., 1988, pp. 9-196; A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier, 1949, pp. 5-412.

> This reaction of the breached legal order (the *substratum* of which is precisely the observance of human rights) is ultimately moved by the spirit of human solidarity. This latter, in turn, teaches that the oblivion is inadmissible, by the absence it implies of any solidarity whatsoever of the living with their deceased. (…) Death has over centuries been linked to what is supposed to be the revelation of destiny, and it is especially in facing death that each person becomes aware of his or her individuality[105]. (…) The rejection of the indifference and the oblivion, and the guarantee of non-repetition of the violations, are manifestations of the links of solidarity between those victimized and potential victims, in the violent world, empty of values, wherein we live. It is, ultimately, an eloquent expression of the links of solidarity that unite the living to their deceased[106]. Or, more precisely, of the links of solidarity that unite the deceased to those who survive them (…) (paras. 37-40).

As to the present case before this Court concerning *Questions Relating to the Obligation to Prosecute or Extradite*, the facts speak for themselves. As I deemed it fit to warn in my earlier Dissenting Opinion in the Court's Order of 28.05.2009 (not indicating provisional measures of protection) in the *cas d'espèce*,

> The several years of impunity following the pattern of systematic State-planified crimes, perpetrated - according to the Chadian Truth Commission - by State agents in Chad in 1982-1990, render the situation, in my view, endowed with the elements of gravity and urgency (…). The passing of time with impunity renders the gravity of the situation even greater, and stresses more forcefully the urgency to make justice to prevail (para. 60).

In the recent Judgment on the merits in the present case opposing Belgium to Senegal, the Court has recalled the *ratio legis* of the CAT Convention. After recalling the sixth preambular paragraph of the CAT Convention[107], the Court has stated that

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105 Ph. Ariès, *Morir en Occidente - desde la Edad Media hasta Nuestros Días*, Buenos Aires, A. Hidalgo Ed., 2000, pp. 87, 165, 199, 213, 217, 239 and 251.

106 On these links of solidarity, cf. my Separate Opinions in the case *Bámaca Velásquez versus Guatemala* (IACtHR, Judgments on the merits, of 25.11.2000, and on reparations, of 22.02.2002).

107 Which expresses the desire "to make more effective the struggle against torture (…) throughout the world". Article 2(1) of the CAT Convention adds that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".

> The States Parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. The obligations of a State Party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offences occurred. All the other States Parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present (para. 68).

The Court has here captured the *rationale* of the CAT Convention, with the latter's denationalization of protection, and assertion of the principle of universal jurisdiction. Yet, in doing so, the Court did not resist the temptation to quote itself, rescuing its own language of years or decades ago, such as the invocation of "legal interest" (in the *célèbre obiter dictum* in the *Barcelona Traction* case of 1970), or "common interest" (expressions used in the past in different contexts). In order to reflect in an entirely faithful way the *rationale* of the CAT Convention, the Court, in my understanding, should have gone a bit further: more than a "common interest", States Parties to the CAT Convention have a *common engagement* to give *effet utile* to the relevant provisions of the Convention; they have agreed to exercise its *collective guarantee*, in order to put an end to the impunity of the perpetrators of torture, so as to rid the world of this heinous crime. *We are here in the domain of obligations, rather than interests*. These obligations emanate from the *jus cogens* prohibition of torture.

In sum, as to this particular point, the development, in recent years, - acknowledged also in expert writing, - leading to the formation and consolidation of a true international legal regime against torture (cf. *supra*), has contributed to the growing awareness as to the pressing need and the compelling duty to put an end to impunity. In effect, the response to the diversification of sources of human rights violations, and the struggle against the impunity of its perpetrators[108], are challenges which call for the enhancement of

108 Cf. J.A. Carrillo Salcedo, *Dignidad frente a Barbarie - La Declaración Universal de Derechos Humanos Cincuenta Años Después*, Madrid, Ed. Trotta, 1999, pp. 105-145; N. Rodley, *The Treatment of Prisoners under International Law*, Paris/Oxford,

the existing mechanisms of protection and the devising of new forms of protection. Impunity, besides being an evil which corrodes the trust in public institutions, remains an obstacle which international supervisory organs have not yet succeeded to overcome fully.

However, some of the Truth Commissions, established in recent years in certain countries, with distinct mandates and varying results of investigations, have constituted a positive initiative in the struggle against that evil[109]. Another positive initiative is represented by the recent endeavours, within the United Nations, towards the establishment of an international penal jurisdiction of permanent character; they have resulted in the creation (by the U.N. Security Council), in 1993 and 1994, of the two *ad hoc* international criminal tribunals, for ex-Yugoslavia and Rwanda, respectively, - followed by the adoption (by the U.N. Conference of Rome) of the 1998 Statute of the International Criminal Court (ICC), followed by the adoption of the first permanent international criminal jurisdiction. Attentions turn now to the evolving position of the individual victims before the ICC, opening up what appears to be a new chapter in the longstanding history of restorative justice[110].

UNESCO/Clarendon Press, 1987, pp. 17-143. Cf. also N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford, Oxford University Press, 1995, pp. 3-381; S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1997, pp. 3-303; Kai Ambos, *Impunidad y Derecho Penal Internacional*, Medellín, Found. K. Adenauer et alii, 1997, pp. 25-451; Y. Beigbeder, *International Justice against Impunity – Progress and New Challenges*, Leiden, Nijhoff, 2005, pp. 45-235; [Various Authors,] *Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 1-330; N.S. Rodley, "Impunity and Human Rights", *in Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* (Proceedings of the Siracusa Conference, September 1998, ed. C.C. Joyner), Ramonville St.-Agne, Érès, 1998, pp. 71-78.

109 Cf., *inter alia*, [Various Authors,] "Humanitarian Debate: Truth and Reconciliation Commissions", 88 *International Review of the Red Cross* (2006) n. 862, pp. 225-373; P.B. Hayner, *Unspeakable Truths - Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., N.Y,/London, Routledge, 2011, pp. 1-337; A. Bisset, *Truth Commissions and Criminal Courts*, Cambridge, Cambridge University Press, 2012, pp. 1-199; P.B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", 16 *Human Rights Quarterly* (1994), pp. 598-634; [Various Authors,] *Truth Commissions: A Comparative Assessment* (Seminar of the Harvard Law School, of May 1996), Cambridge/Mass., Harvard Law School, 1997, pp. 16-81.

110 Cf. section XV, *infra*.

1. The Position of Chad against Impunity

There is another element to be here taken into account: the records of the present case concerning *Questions Relating to the Obligation to Prosecute or Extradite* give account of Chad's position against impunity. References in this regard include: a) official pronouncements by Chad concerning the trial of Mr. H. Habré, in connection with the right of victims to the realization of justice and the need to fight against impunity[111]; b) Chad's decision to lift Mr. H. Habré's immunity in 1993, as confirmed in 2002[112]; c) claims that Chad joined in efforts to gather the financial resources for the trial of Mr. H. Habré in Senegal[113]; and d) Chad's recent statements in support of the extradition of Mr. H. Habré to Belgium[114].

In this respect, Belgium has referred, in its *Memorial*, to the fact that, in 1993, Chad had, in so far as it was necessary, "lifted the immunities which Mr. Habré may have sought to claim"[115]. In the same vein, Belgium has submitted a letter addressed by the Minister of Justice of Chad to the Belgian *Juge d'instruction*, dated 07.10.2002, confirming the lifting of any immunity of Mr. H. Habré[116]. Furthermore, it stems from the records of the present case that Chad, among other States, reportedly agreed to assist financially Senegal in the trial of Mr. H. Habré[117]. Belgium has claimed, in this regard, that,

> despite the gestures of support of the European Union, the African Union and other States - including Belgium and Chad - in particular for the funding of the Hissène Habré trial in Senegal, the latter has not yet performed the obligations incumbent on it under international law in respect of the fight against impunity for the crimes concerned[118].

111 Cf. ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43 (citing "*Communiqué de presse du Ministère des affaires étrangères du Tchad*", of 22.07.2011).

112 Cf. *Memorial of Belgium*, of 01.07.2010, p. 10, para. 1.29, and p. 57, para. 4.44, and Annex C.5; ICJ, document CR 2012/2, of 12.03.2012, p. 23, para. 21; and ICJ, document CR 2012/3, of 13.03.2012, p. 21, para. 41.

113 ICJ, document CR 2012/2, of 12.03.2012, pp. 47-48.

114 Given its view that a trial of Mr. H. Habré in Africa would seem difficult to realize; cf. ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43 (citing "*Communiqué de presse du Ministère des affaires étrangères du Tchad*", of 22.07.2011).

115 ICJ, *Memorial of Belgium*, of 01.07.2010, p. 10, para. 1.29.

116 Cf. *ibid*., Annex C.5.

117 ICJ, document CR 2012/2, of 12.03.2012, p. 47, para. 20.

118 Cf. *ibid*., p. 48, para. 21(3).

Moreover, as to Belgium's request for extradition, and in light of Senegal's failure to prosecute Mr. H. Habré so far, it also appears from the records of the present case that Chad has not opposed the extradition of Mr. H. Habré to Belgium[119]. In fact, on 22.07.2011, the Ministry of Foreign Affairs, African Integration and International Co-operation of Chad stated that:

> Despite the many national, continental and international initiatives, it appears increasingly unlikely that the former dictator will be tried under the circumstances preferred by the AU [African Union]. Recent developments confirm this impression. It seems more difficult than ever to fulfil the conditions, in particular the legal conditions, for the trial of Mr. Hissène Habré to be held on African soil. In light of this situation, and given the victims' legitimate right to justice and the principle of rejection of impunity enshrined in the Constitutive Act of the African Union, the Government of Chad requests that preference should be given to the option of extraditing Mr. Habré to Belgium for trial. This option, which was explicitly considered among others by the African Union, is the most suitable under the circumstances[120].

In sum and conclusion, as it can be perceived from the aforementioned, the records of the present case demonstrate that Chad has been consistently supporting the imperative of the fight against impunity, in so far as the case of Mr. H. Habré is concerned. The records of the case make Chad's position clear, to the effect that Mr. H. Habré must be brought to justice, in Senegal or elsewhere[121]. Last but not least, the position of Chad is further confirmed by its statement before the U.N. Human Rights Committee, - the supervisory organ of the U.N. Covenant on Civil and Political Rights, - on the occasion of the consideration of Chad's initial report on measures undertaken to implement the provisions of the Covenant. In responding to questions put to it, the Delegation of Chad, stressing its commitment to the struggle against impunity, declared, on 17.07.2009, that

> sous le régime de Hissène Habré, rien n'a été fait pour rétablir l'état du droit, puisque c'était une dictature. (…) Toutefois, le

119 ICJ, document CR 2012/6, of 19.03.2012, pp. 24-25.
120 *Ibid*., p. 25, para. 43.
121 Cf., e.g., ICJ, document CR 2012/6, of 19.03.2012, p. 25, para. 43.

> gouvernement actuel veut faire avancer les choses, et surtout combattre l'impunité, à tous les niveaux (…). Lutter contre l'impunité politique est une entreprise de longue haleine, mais le Gouvernement travaille activement dans ce sens. Le Tchad demande haut et fort que Hissène Habré soit jugé, mais le Sénégal, à qui incombe cette tâche, invoque des difficultés financières. (…)[122].

1. The Struggle against Impunity in the Law of the United Nations

The final document of the II World Conference of Human Rights (Vienna, 1993), - of which I keep vivid memories[123], - the *Vienna Declaration and Programme of Action*, cared to include, in its part II, two paragraphs (60 and 91) on the compelling struggle against impunity (of perpetrators of torture), which read as follows:

> States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture, and prosecute such violations, thereby providing a firm basis for the rule of law. (…)
>
> The [II] World Conference on Human Rights views with concern the issue of impunity of perpetrators of human rights violations, and supports the efforts of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to examine all aspects of the issue.

In pursuance to the call of the 1993 World Conference of the United Nations, the [former] U.N. Commission on Human Rights, and its [former] Sub-Commission on the Promotion and Protection of Human Rights, engaged themselves in producing, in 1997, a *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (restated by the Commission in 2005)[124].

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122 U.N./Comité des Droits de l´Homme, 96ème. session - 2636e. séance (of 17.07.2009), document CCPR/C/SR.2636, of 25.09.2009, p. 5, paras. 15-16. And cf. also: U.N. Human Rights Committee, "Human Rights Committee Considers Report of Chad", www.unog.ch/news, of 17.07.2009, p. 9.

123 A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2nd. ed., vol. I, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 1-640; A.A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994), pp. 9-57.

124 Cf. U.N. document E/CN.4/Sub.2/1997/20/Rev.1, Annex II, of 02.10.1997, pp. 13-25; and cf. U.N./CHR, resolution 1998/53, of 17.04.1998. Cf., more recently,

Later on, also in pursuance of the aforementioned call of the II World Conference on Human Rights, the [former] U.N. Commission on Human Rights adopted its resolution 2003/72, of 25.04.2003, wherein it deemed it fit to emphasize "the importance of combating impunity to the prevention of violations of international human rights and humanitarian law" as well as "the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law" (paras. 1-2). The resolution urged States to "give necessary attention" to the matter (para. 1), and recognized that "crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law, and (…) perpetrators of such crimes should be prosecuted or extradited by States (…)" (para. 10). The resolution further urged "all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes" (para. 10).

Moreover, the *dossier* of the present case before the ICJ contained other pertinent elements which could not have passed unnoticed herein. Belgium's *Memorial*, for example, refers to numerous resolutions of the U.N. General Assembly and Security Council urging States to combat impunity in connection with grave violations of human rights[125], - a point reiterated in its oral arguments[126]. The U.N. Human Rights Committee (supervisory organ of the U.N. Covenant on Civil and Political Rights), in its *general comment n. 31* (of 2004), asserted, in connection with violations of the Covenant rights, that

> States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant (para. 18).

U.N./CHR, document E/CN.4/2005/102/Add.1, Annex, of 08.02.2005, pp. 5-19. And cf. also L. Joinet (*rapporteur*), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Civiles y Políticos) - Informe Final*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/20, of 26.06.1997, pp. 1-34; and, for the economic, social and cultural rights, cf. El Hadji Guissé (special *rapporteur*), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Económicos, Sociales y Culturales) - Informe Final*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/8, of 23.06.1997, pp. 1-43.

125 ICJ, *Memorial of Belgium*, of 01.07.2010, vol. I, pp. 63-66, paras. 4.69-4.70.

126 ICJ, document CR 2012/3, of 13.03.2012, pp. 24-26.

After singling out, as particularly grave violations, the crimes of torture, of summary and arbitrary executions, and enforced disappearances of persons, the Human Rights Committee warned that "the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations" (para. 18). The Committee further warned as to the need "to avoid continuing violations" (para. 19), and drew attention to the "special vulnerability of certain categories" of victims (para. 15).

XI. OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW: A PRECISION AS TO THE COURT'S JURISDICTION

I turn now to another issue, dealt with in the ICJ Judgment of 20.07.2012, in relation to which my reasoning has been distinct from that of the Court. May I begin by recalling the fundamental human values underlying the absolute prohibition of torture, which I have already referred to (cf. *supra*). May I add, at this stage, that such prohibition is one of both *conventional* as well as *customary* international law. And it could not be otherwise, being a prohibition of *jus cogens*. In this sense, the 2005 study on *Customary International Humanitarian Law* undertaken by the International Committee of the Red Cross (ICRC) sustains that:

> Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited (Rule 90)[127].

And it goes on to summarize, on the basis of an extensive research, that

> State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts[128].

Likewise, in its *general comment n. 2* (of 2008), focused on the implementation by States Parties of Article 2 of the CAT

127 ICRC, *Customary International Humanitarian Law* - vol. I: *Rules*, Cambridge, Cambridge University Press, 2005 [reprint 2009], p. 315.
128 *Ibid*., vol. I: *Rules*, p. 315, and cf. pp. 316-319; and cf. also ICRC, *Customary International Humanitarian Law* - vol. II: *Practice* - Part 1, Cambridge, Cambridge University Press, 2005, pp. 2106-2160.

Convention[129], the U.N. Committee against Torture acknowledged the Convention's absolute (*jus cogens*) prohibition of torture as being also one of customary international law. It ensues from the *jus cogens* character of this prohibition that States Parties are under the duty to remove any obstacles that impede the eradication of torture; they are bound to take "positive effective measures" to ensure that (para. 4), and "*no exceptional circumstances whatsoever* may be invoked" by them to attempt to justify acts of torture (para. 5). Stressing the CAT Convention's "overarching aim of preventing torture and ill-treatment" (para. 11), *general comment n. 2* of the Committee against Torture further stated that each State Party "should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control" (para. 15), and then drew attention to the needed protection for individuals and groups made vulnerable by discrimination or marginalization (paras. 20-24).

Having voted in favour of the conclusions reached by the Court in its Judgment of 20.07.2012 in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), I have felt, however, obliged to lay down in my Separate Opinion appended thereto my understanding, distinct from the Court's reasoning, corresponding to operative paragraph (2) of the *dispositif* of that Judgment. I therein recalled, at first, that, in the *cas d'espèce*, Belgium had requested the Court to declare that Senegal breached an obligation under customary international law for its failure to bring criminal proceedings against Mr. H. Habré concerning core international crimes[130]. In this respect, the Court concluded, in paragraph 55 of its Judgment, that

> at the time of the filing of the Application, the dispute between the Parties did not relate to breaches of obligations under customary international law and that it thus has no jurisdiction to decide on Belgium's claims related thereto.

The Court then went on to consider whether it had jurisdiction on the basis of Article 30(1) of the Convention against Torture (CAT Convention). In operative paragraph (2) of the *dispositif*, the Court found that it had "no jurisdiction" to entertain Belgium's claims relating to Senegal's "alleged breaches" of "obligations under

129 U.N. document CAT/C/GC/2, of 24.01.2008, pp. 1-8, paras. 1-27.

130 Cf. *Memorial of Belgium*, of 01.07.2010, p. 83, Submission 1(b); *Final Submissions of Belgium*, of 19.03.2012, Submission 1(b).

customary international law". It is important to be clear as to why the Court did not entertain Belgium's claim that Senegal breached certain obligations under customary international law. The Court first proceeded to determine, on the basis of the facts of the *cas d'espèce*, whether there was a dispute between the contending parties concerning Senegal's alleged violations of customary international law obligations, - a question which turned on factual considerations.

The question pertained to whether, on the basis of the factual framework of the present case, a dispute existed between the parties, at the time of the filing of the application, concerning Senegal's obligation under customary international law to take action with regard to core international crimes[131]. As the Court noted (para. 45 of its Judgment), "the existence of a dispute is a condition of its jurisdictions under both bases of jurisdiction invoked by Belgium". It has long been established that "a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons"[132]. In this context, the Court's *jurisprudence constante*, as recalled in the Judgment of 20.07.2012, is to the effect that the Court's determination of the existence of a dispute "must turn on an examination of the facts" (para. 46)[133].

It became clear that, in the *cas d'espèce*, the Court's determination of whether there was a dispute on this question, rested on purely factual considerations of the case at issue[134]. This appeared,

131 Its determination is based upon the consideration of the circumstances of the present case (and particularly on the fact that, in the diplomatic correspondence between the parties, Belgium did not refer to its claim that Senegal has an obligation under customary international law to prosecute those accused of the perpetration of core international crimes).

132 PCIJ, *Mavrommatis Palestine Concessions* case, Judgment n. 2, Series A, 1924, p. 11.

133 The Court considers whether there is a dispute by examining, *inter alia*, the position of the contending parties (including their exchanges), as disclosed in the records of the case.

134 The Court considered the facts (as they were presented to it) in order to decide whether there was a dispute between the contending parties concerning the claims that Senegal had breached obligations under customary international law. It found that the diplomatic exchanges between the parties, prior to Belgium's institution of the present proceedings, disclosed that Belgium did not refer to Senegal's alleged obligations under customary international law to take action against Mr. H. Habré for core international crimes. It followed that there could not have existed a disagreement (or a difference of opinion) between the parties, as to Senegal's alleged obligations under customary international law in relation to the prosecution of

in my view, *distinct from an examination by the Court of whether there is a legal basis of jurisdiction* over claims of alleged breaches of customary international law obligations. The Court's consideration of Belgium's claim that Senegal allegedly breached obligations under customary international law, as well as its conclusion thereon, stood in stark contrast to its examination of whether it has jurisdiction under the terms of Article 30(1) of the CAT Convention. As to the latter, the Court has considered the *legal* conditions pursuant to Article 30(1) of the Convention in order to assess whether there was a *legal basis of jurisdiction* according to the terms of that provision.

Contrastingly, with regard to the claim of alleged breaches of customary international law obligations, the Court's analysis has hinged on *factual* considerations of the present case (cf. para. 55). In my perception, paragraph 55 and operative paragraph (2) of the *dispositif* of the ICJ Judgment are not to be understood as meaning that the Court lacked jurisdiction to entertain claims of breaches of a State's alleged obligations under customary international law (e.g., to prosecute perpetrators of core international crimes, such as raised in this case). As in the circumstances of the *cas d'espèce* the dispute between the Parties - at the time of the filing of the application - did not include claims of alleged breaches by Senegal of obligations under customary international law, the Court improperly stated that it did not have jurisdiction to dwell upon those alleged breaches.

The Court, in my view, did not express itself well. The proper understanding of paragraph 55, in combination with operative paragraph (2) of the *dispositif* of its Judgment, is, in my understanding, that the determination that the facts of the present case did not disclose a dispute between the parties as to Senegal's alleged breach of obligations under customary international law, is not the same as the finding that the Court presumably did not have jurisdiction to entertain the claims of alleged breaches of obligations under customary international law. What the Court really wished to say, in my perception, was that *there was no material object for the exercise of its jurisdiction* in respect of obligations under customary international law, rather than a lack of its own jurisdiction *per se*[135].

Mr. H. Habré for the commission of core international crimes, at the time when Belgium filed the application.

135 As already pointed out, the Court's finding concerning Belgium's claim that Senegal breached certain obligations under customary international law was based on the specific factual background of the present case, and particularly on the fact

The finding that, in the circumstances of the present case, a dispute did not exist between the contending parties as to the matter at issue, *does not necessarily mean that, as a matter of law, the Court would automatically lack jurisdiction*, to be exercised in relation to the determination of the existence of a dispute concerning breaches of alleged obligations under customary international law.

XII. A Recurring Issue: The Time of Human Justice and the Time of Human Beings

1. An Unfortunate *Décalage* to Be Bridged

Already in my earlier Dissenting Opinion in the Court's Order of 28.05.2009 (not indicating provisional measures of protection) in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), I deemed it fit to address the *décalage* to be bridged between the brief time of human beings (*vita brevis*) and the often prolonged time of human justice (paras. 46-64). I stressed the crucial importance of the incidence of the time element, - to the effect of avoiding undue delays, - for the realization of justice in the present case (paras. 74-84). In this respect, in that Dissenting Opinion I deemed it fit to warn that

> (…) As to the obligations corresponding to that right to be preserved, the segment *aut judicare* of the enunciation of the principle of universal jurisdiction, *aut dedere aut judicare*, forbids undue delays in the realization of justice. Such undue delays bring about an irreparable damage to those who seek justice in vain; furthermore, they frustrate and obstruct the fulfillment of the object and purpose of the U.N. Convention against Torture, to the point of conforming a breach of this latter[136].
>
> (…) It is the gravity of human rights violations, of the crimes perpetrated, that admits no prolonged extension in time of the impunity of the perpetrators, so as to honour the memory of the fatal victims and to bring relief to the surviving ones and their relatives. In my understanding, even more significant than

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that Belgium did not refer, in its diplomatic correspondence or otherwise, to such obligations.

136 Cf., to this effect, A. Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement*, The Hague, Nijhoff, 1999, p. 227.

> retribution is the judicial recognition of human suffering[137], and only the realization of justice can *alleviate* the suffering of the victims caused by the irreparable damage of torture. (…) [W]ith the persistence of impunity in the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, the *passing* of time will continue hurting people, much more than it normally does, in particular those victimized by the absence of human justice. The time of this latter is not the time of human beings.
>
> (...) This is all the more serious in the light of the nature of the aforementioned *obligations* of the States Parties to the U.N. Convention against Torture. (...) (paras. 63, 75, 77 and 84).

The often prolonged delays in the operation of human justice seem to disclose an indifference to the brevity of human existence, to the time of human beings. But this is not the only means whereby the administration of human justice, in its handling of the time factor, seems to operate against the expectation of justice on the part of human beings. One example is found in the undue invocation of non-retroactivity in relation to *continuing* wrongful situations of obstruction of access to justice extending themselves in time (cf. *infra*). Another example is afforded by the undue invocation of prescription in situations of the kind. Whether we look forth, or else back in time, we are faced with injustice in the handling of the time factor, making abstraction of the *gravity* of the breaches of Law, to the detriment of victimized human beings.

In the present case concerning Mr. H. Habré, prescription has already been duly discarded by the 2006 *Report* of the A.U. Committee of Eminent African Jurists (para. 14). And, in my view, the invocation is likewise to be discarded in the present case, for the reasons that I lay down in section XIII, *infra*, of my Separate Opinion. One cannot lose sight of the fact that those who claim to have been victimized by the reported atrocities of the Habré regime in Chad (1982-1990) have been waiting for justice for over two decades, and it would add further injustice to them to prolong further their ordeal by raising new obstacles to be surmounted[138]. One has to bridge the

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137 The right to be herein preserved, the right to justice, is inextricably linked to [non-pecuniary] reparation.

138 HRW, *The Trial of Hissène Habré: Time is Running Out for the Victims*, vol. 19, January 2007, n. 2, pp. 1, 14 and 19.

unfortunate *décalage* between the time of human justice and the time of human beings.

The time factor cannot be handled in a way that leads to injustice. Certain conceptions, which took shape a long time ago in a historical context entirely distinct from the one with which we are confronted in the present case, cannot be mechanically applied herein. It should, moreover, be kept in mind that the passing of time does not heal the profound scars in human dignity inflicted by torture. Such scars can even be transmitted from one generation to another. Victims of such a grave breach of their inherent rights (as torture), who furthermore have no access to justice (*lato sensu*, i.e., no realization of justice), are victims also of a *continuing* violation (denial of justice), to be taken into account as a whole, - without the imposition of time-limits decharacterizing the continuing breach[139], - until that violation ceases.

The passing of time cannot lead to subsequent impunity either; oblivion cannot be imposed, even less so in face of such a grave breach of human rights and of International Humanitarian Law as torture. The imperative of the preservation of the integrity of human dignity stands well above pleas of non-retroactivity and/or prescription. It is high time to bridge the unfortunate *décalage* between the time of human justice and the time of human beings. Articles 5(2), 6(2) and 7(1) – interrelated as they are - of the CAT Convention forbid undue delays; if, despite the requirements contained therein, undue delays occur, there are breaches of those provisions of the CAT Convention. This is clearly what has happened in the present case, in so far as Articles 6(2) and 7(1) of the CAT Convention are concerned, as rightly upheld by the ICJ[140].

It has already been pointed out that, in its decision of 19.05.2006 in the *S. Guengueng et alii versus Senegal* case, the U.N. Committee against Torture found that the "reasonable time-frame" for the State concerned to take the necessary measures, in pursuance of the principle of universal jurisdiction, under Article 5(2) of the CAT Convention, had been, already by then, "considerably exceeded". With such a prolonged delay, the same applied in respect of Article

139 On the notion of "continuing situation" in international legal thinking, cf. ICJ, case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Counter-Claim, Order of 06.07.2010), Dissenting Opinion of Judge Cançado Trindade, paras. 55-94.

140 Operative paragraphs (4) and (5) of the *dispositif* of the present Judgment.

6(2) of the CAT Convention, which expressly determines that the State Party concerned "shall *immediately*[141] make a preliminary inquiry into the facts". This has not been done to date. And the same also applies to the measure, - submission of the case to the competent authorities for the purpose of prosecution, - also in pursuance of the principle of universal jurisdiction, under Article 7(1) of the CAT Convention. This has not been done to date either.

Although the breach of Article 5(2) ceased in 2007, with the adoption by Senegal of legislative reforms to bring its domestic law into conformity with Article 5(2) of the CAT Convention, the other continuing breaches of Articles 6(2) and 7(1) of the CAT Convention persist to date. These provisions of the CAT Convention are meant, - as I perceive them, - *to bridge the unfortunate gap between the time of human justice and the time of human beings*, by purporting to avoid, and not to allow, undue delays. Non-compliance with such provisions, as in the present case so far, perpetuates the unfortunate gap between the time of human justice and the time of human beings.

This is even more regrettable, bearing in mind that everyone lives within time, - the existential time of each one. The irreversible passing of time not only leaves its marks in the aging body, but also marks its flow in one's conscience. Each person is ineluctably linked more to her own existential time (which cannot be changed) than to the space where she lives (which can be changed). Each person lives inevitably within her own time, *conscious* that it will come to an end. If one's life-time is marked by injustice and impunity, one is left with the impression that, after the occurrence of all the atrocities, nothing seems to have happened at all[142].

To live within time can thus at times be particularly painful, the more one is conscious of the brevity of one's lifetime. Even if nothing wrongful had happened, to live within one's time, and to accept the effect of its implacable passing upon oneself, up to the end of one's existence, is already difficult. To feel the existential time pass with injustice prevailing, and surrounded by indifference, is all the more painful; the passing of time in such circumstances is on the verge of becoming truly unbearable. Prolonged and definitive injustice

141 [Emphasis added].

142 Cf. Jean Améry, *Levantar la Mano sobre Uno Mismo - Discurso sobre la Muerte Voluntaria* [*Hand an sich legen - Diskurs über den Freitod, 1976*], Valencia, Pre-Textos, 2005 (reed.), pp. 67, 91-92 and 143.

may lead - and not seldom has led - victims of grave violations of human rights into despair. The graver the violation, the greater the likelihood of this to happen. Impunity is an additional violation of human rights.

2. Making Time Work *Pro Victima*

In the domain of the International Law of Human Rights, which is essentially victim-oriented, the time factor is to be made to operate *pro victima*. As to the principle *aut dedere aut judicare* set forth in Article 7(1), it has already been indicated that *aut judicare* is ineluctably associated with the requirement of absence of undue delays. For its part, extradition, largely dependent upon the existence of treaties and the interpretation given to them in the circumstances of each case, is bound to remain largely discretionary. What comes promptly into the fore in the *cas d'espèce* is the requirement of expeditious inquiry into the facts for the purpose of prosecution, - a duty incumbent upon States Parties to the CAT Convention. The duty of prosecution is further singled out by the requirement, under Article 4 of the CAT Convention, of criminalization of all acts of torture under domestic law, taking into account "their grave nature". Extradition comes into the picture only in case of the absence of prosecution.

In this connection, the recent Judgment (of 2010) of the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice), cannot be seen as an obstacle to Senegal's compliance with its obligations under Article 7 of the CAT Convention. In fact, it can at first be argued, as Belgium has done[143], that Senegal has been in non-compliance with its obligations under the CAT Convention (such as those under Article 7) for years, well before the Judgment of the ECOWAS Court was delivered in 2010[144].

143 ICJ, document CR 2012/3, of 13.03.2012, p. 17.

144 Thus, from the start it did not seem reasonable to rely on this recent ECOWAS Judgment to attempt to justify that continuing non-compliance, largely predating the latter Judgment. Moreover, Senegal's continuing non-compliance with the obligation *aut dedere aut judicare*, enshrined in Article 7 of the CAT Convention, has created a situation whereby Mr. H. Habré has been in house surveillance for an extended period of time, - according to the pleadings of the Parties since 2000; cf. ICJ, document CR 2012/4, of 15.03.2012, p. 21, para. 7. Cf. also ICJ, *Counter-Memorial of Senegal*, p. 3. - It may thus be argued that the delay in prosecuting (or extraditing) him, while still keeping him under house surveillance (amounting to a preventive detention), is contrary to his right to be tried without undue delay; furthermore, at present this calls into question whether Senegal has truly intended

In this connection, I have found Senegal's reiterated contentions (in its *Counter-Memorial*[145] and oral arguments[146]) of alleged difficulties ensuing from the Judgment of the ECOWAS Court of Justice of 2010 unpersuasive. They do not - cannot - bear an impact on compliance with its obligations under the CAT Convention.

Likewise, they cannot be invoked in a way that generates further delays in the realization of justice. A supervening decision of an international tribunal (the ECOWAS Court of Justice) cannot encroach upon the current exercise of the judicial function of another international tribunal (the ICJ), performing its duty to pronounce on the interpretation and application of the CAT Convention, - one of the "core Conventions" of the United Nations in the domain of human rights, - in order to make sure that justice is done. As the ICJ has rightly stated in its Judgment of 20.07.2012,

> The Court considers that Senegal's duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice (para. 111).

It is my view that coexisting international tribunals perform a *common mission* of imparting justice, of contributing to the common goal of the *realization of justice*. The decision of any international tribunal is to be properly regarded as contributing to that goal, and not as disseminating discord[147]. There is here a convergence, rather

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so far to prosecute Mr. H. Habré. In addition, arguments as to the question of non-retroactivity seem hardly convincing; for criticisms, cf., e.g., V. Spiga, "Non-Retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga", 9 *Journal of International Criminal Justice* (2011), pp. 5-23**;** A.D. Olinga, "Les droits de l´homme peuvent-ils soustraire un ex-dictateur à la justice? L´affaire *Hissène Habré* devant la Cour de Justice de la CEDEAO", 22 *Revue trimestrielle des droits de l´homme* (2011) n. 87, pp. 735-746; K. Neldjingaye, "The Trial of Hissène Habré in Senegal and Its Contribution to International Criminal Law", *in Prosecuting International Crimes in Africa* (eds. C. Murungu and J. Biegon), Pretoria/South Africa, Pretoria University Law Press (PULP), 2011, pp. 185-196.

145 ICJ, *Counter-Memorial* of Senegal, vol. I, paras. 67-70, 77, 85, 115-119, 176 and 241.

146 ICJ, document CR 2012/4, of 15.03.2012, paras. 22, 42-43, 47, 51-53, 55-56, 58-59, 65, 69 and 71; ICJ, document CR 2012/5, of 16.03.2012, paras. 12.22, 16.16-18 and 20-21, and 27.11-12; ICJ, document CR 2012/7, of 21.03.2012, paras. 14.26, 17.8 and 24.25-26.

147 Accordingly, it should not pass unnoticed, in this connection, that Mr. H. Habré has been in custody (under house surveillance) for some years (ICJ, document CR 2012/5, of 16.03.2012, p. 21). The submission of the case for purpose of prosecution without undue delay would thus avoid what amounts to a preventive detention

than a divergence, of the *corpus juris* of the International Law of Human Rights and of International Criminal Law, for the correct interpretation and application by international tribunals.

XIII. THE TIME FACTOR: A REBUTTAL OF A REGRESSIVE INTERPRETATION OF THE CONVENTION AGAINST TORTURE

Paragraph 99 of the Court's Judgment of 20.07.2012, expressly acknowledging that "the prohibition of torture is part of customary international law and has become a peremptory norm (*jus cogens*)", is in my view one of the most significant passages of its recent Judgment. My satisfaction would have been greater if the Court had dwelt further upon it, and had developed its reasoning on this particular issue, as it could and should, thus fostering the progressive development of international law. The Court, however, promptly turned around in the following paragraph, and started treading on troubled waters, embarking - to my regret - on a regressive interpretation of the relevant provision (Article 7(1)) of the CAT Convention.

In any case, up to now, the Court has not shown much familiarity with, nor strong disposition to, elaborate on *jus cogens*; it has taken more than six decades for it to acknowledge its existence *tout court*, in spite of its being one of the central features of contemporary international law. In effect, immediately after identifying the manifestation of *jus cogens* in the customary international law prohibition of torture (para. 99), the Court has indulged into a consideration, *sponte sua*, of non-retroactivity of treaty provisions. The Court has done so (paras. 100 to 104) adding an unnecessary - if not contradictory - element of confusion to its own reasoning.

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for an excessively prolonged period of time, without trial; A. Boulesbaa, *The U.N. Convention on Torture...*, *op. cit. supra* n. (137), p. 225, and cf. pp. 226-227, on the question of pre-trial detention and its impact on the rights of the accused. In the present case, the undue delay in submitting the case to prosecution has thus also caused unreasonable delay in Mr. H. Habré's preventive detention, and that is contrary to basic postulates proper to the International Law of Human Rights; cf., e.g., Article 14(3) of the U.N. Covenant on Civil and Political Rights, providing for the right "to be tried without undue delay". - Moreover, the principle *aut dedere aut judicare* (in particular the obligation *aut judicare*), set forth in Article 7(1) of the CAT Convention, forbids undue delays, which would militate against the object and purpose of the Convention; cf., to this effect, J.H. Burgers and H. Danelius, *The United Nations Convention against Torture*, Dordrecht, Nijhoff, 1988, p. 137, and cf. also n. (137), *supra*.

It has done so, *sponte sua*, without having been asked to pronounce itself on this point, - alien to the CAT Convention, - neither by Belgium nor by Senegal. It has done so despite the fact that the CAT Convention, unlike other treaties, does not provide for, nor contains, any temporal limitation or express indication on non-retroactivity. It did so by picking out one older decision (of 1989) of the U.N. Committee against Torture that suited its argument, and at the same time overlooking or not properly valuing more recent decisions of the Committee *a contrario sensu*, wherein the Committee overruled its previous decision relied upon by the Court in its reasoning.

The Court has referred approvingly to (para. 101) an earlier decision of the Committee against Torture (of 23.11.1989) in the case *O.R. et al. versus Argentina*, whereby the Committee found that the CAT Convention did not apply to acts of torture allegedly committed before the entry into force of the Convention in Argentina[148]. Yet, the Committee has, ever since, adopted a different approach, as illustrated in two subsequent cases. Thus, in 2003, in the case of *Bouabdallah Ltaief versus Tunisia*, the Committee considered allegations of acts of torture allegedly committed in 1987, notwithstanding the fact that the Convention entered into force for Tunisia in 1988[149]. In other words, the Committee did not distinguish between acts allegedly committed before the entry into force of the CAT Convention for Tunisia and those allegedly perpetrated thereafter.

Similarly, more recently, in 2006, in the case of *Suleymane Guengueng et al. versus Senegal*[150], - which pertains to a similar factual background as the present case before this Court, - the Committee again did not make any distinction between the facts that are reported to have taken place *before* the entry into force of the Convention for Senegal and those alleged to have occurred *afterwards*. Thus, it can be considered that the more recent approach of the Committee, as illustrated by these two decisions of 2003 and of 2006, has been

148 CAT, case *O.R. et al. versus Argentina*, communications ns. 1/1988, 2/1988 and 3/1988, Decision of 23.11.1989, para. 7.3, *Official Records of the General Assembly*, 45th Session, Supplement n. 44 (doc. A/45/44), Annex V, p. 108, paras. 7.2-7.4 and 8.

149 CAT, case *Bouabdallah Ltaief versus Tunisia*, communication n. 189/2001, Decision of 14.11.2003, *Official Records of the General Assembly*, 59th Session, Supplement n. 44 (doc. A/59/44), Annex VII, p. 207, paras. 1.2, 2.1 and 10.1-10.9.

150 CAT, case *Suleymane Guengueng et al. versus Senegal*, communication n. 181/2001, U.N. Convention against Torture - doc. C/36/D/181/2001, Decision of 19.05.2006). And cf. section III, *supra*.

to apply the CAT Convention without distinguishing between acts alleged to have occurred *before* the Convention entered into force for the respondent State, and those alleged to have occurred *thereafter*.

The fact is that the more recent decisions of the Committee against Torture provide no support to the reasoning of the Court on this particular point. Moreover, the Court has overlooked, or not valued properly, the responses given by the contending parties to a question put to them from the bench, in a public sitting of the Court. In its response, Belgium recalled the object and purpose of the CAT Convention and the two more recent cases decided by the Committee against Torture (in the *B. Ltaief* and the *S. Guengueng* cases, *supra*), and contended, as to the procedural obligations under Article 7 of the CAT Convention, that

> There is nothing unusual in applying such procedural obligations to crimes that occurred before the procedural provisions came into effect. There is nothing in the text of the Convention, or in the rules of treaty interpretation, that would require that Article 7 not apply to alleged offenders who are present in the territory of a State Party after the entry into force of the Convention for that State, simply because the offences took place before that date. Such an interpretation would run counter to the object and purpose of the Convention. (…) [T]he procedural obligations owed by Senegal are not conditioned *ratione temporis* by the date of the alleged acts of torture. (…) That does not involve a retroactive application of the Convention to the omissions of Senegal. All these omissions took place after both States, Belgium and Senegal, became Parties to the Convention and became mutually bound by the procedural obligations contained therein[151].

Likewise, in its response, Senegal, much to its credit, acknowledged the importance of the obligations, "binding on all States", pertaining to the "punishment of serious crimes under International Humanitarian Law", such as those in breach of the prohibition of torture. Turning to the procedural obligations under Article 7(1) of the CAT Convention, Senegal added that

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151 ICJ, *Questions Put to the Parties by Members of the Court at the Close of the Public Hearing Held on 16 March 2012: Compilation of the Oral and Written Replies and the Written Comments on Those Replies*, doc. BS-2012/39, of 17.04.2012, pp. 50-52, paras. 49 and 52.

> it does not deny that the obligation provided for in the Convention can be applied to the offences allegedly committed before 26 June 1987, when the Convention entered into force for Senegal[152].

The Court, notwithstanding, has proceeded to impose a temporal limitation *contra legem* to the obligation to prosecute under Article 7(1) of the CAT Convention (para. 100, *in fine*). There were other points overlooked by the Court in this respect. For example, it has not taken into account that occurrences of systematic practice of torture conform *continuing situations* in breach of the CAT Convention[153], to be considered as a whole, without temporal limitations decharacterizing it, until they cease. Nor has it taken into account the distinct approaches of domestic criminal law and contemporary international criminal law, with regard to pleas of non-retroactivity.

And nor has the Court taken into account that such pleas of non-retroactivity become a moot question wherever the crimes of torture had already been prohibited by customary international law (as in the present case) at the time of their repeated or systematic commission. Ultimately, - and summing up, - the Court has pursued, on this particular issue, a characteristic voluntarist reasoning, focused on the will of States within the confines of the strict and static inter-State dimension. But it so happens that the CAT Convention (the applicable law in the *cas d'espèce*) is rather focused on the victimized human beings, who stand in need of protection. It is further concerned to guarantee the non-repetition of crimes of torture, and to that end it enhances the struggle against impunity. Human conscience stands above the will of States.

The Court has pursued a negative or self-restricted approach to its jurisdiction. In respect of Article 5(2) of the CAT Convention, what does not exist here is the *object* of a dispute over which to exercise its jurisdiction; the Court, in my understanding, remains endowed with jurisdiction, with its authority or aptitude to say what the Law is (to do justice), to pronounce on the CAT Convention, and to determine, *inter alia*, that the dispute concerning Article

152 *Ibid.*, p. 52.

153 On the notion of *continuing situation* in international legal thinking, cf. ICJ, case concerning the *Jurisdictional Immunities of the State* (Germany *versus* Italy; counter-claim), Order of 06.07.2010, Dissenting Opinion of Judge Cançado Trindade, paras. 60-94.

5(2) has ceased, but it will nevertheless take into account - as it has done (cf. para. 48) - its *effects* in relation to its determination of the breaches by the respondent State of Articles 6(2) and 7(1) of the CAT Convention. The three aforementioned provisions of the CAT Convention are ineluctably interrelated. By the same token, the Court retains its jurisdiction to pronounce upon the corresponding customary international law prohibition of torture. This is a point which requires clarification.

Accordingly, it would seem inconsistent with the object and purpose of the CAT Convention if alleged perpetrators of torture could escape its application when found in a State in respect of which the Convention entered into force only *after* the alleged criminal acts occurred (as a result of the temporal limitation which the Court regrettably beheld in Article 7(1)). Worse still, although the present Judgment rightly recognizes that the prohibition of torture has attained the status of *jus cogens* norm (para. 99), it promptly afterwards fails to draw the necessary consequences of its own finding, in unduly limiting the temporal scope of application of the CAT Convention. The Court has insisted on overlooking or ignoring the persistence of a *continuing situation* in breach of *jus cogens*.

XIV. A NEW CHAPTER IN RESTORATIVE JUSTICE?

This brings me to my remaining line of considerations. In our days, there is a growing awareness of, and a growing attention shifted to, the sufferings of victims of grave breaches of the rights inherent to them, as well as to the corresponding duty to provide reparation to them. This has at present become a legitimate concern of the international community, envisaging the individual victims as members of humankind as a whole. The International Law of Human Rights has much contributed to this growing consciousness. And contemporary International Criminal Law also draws further attention to the duty to provide reparation for those sufferings in the quest for the realization of justice.

Much has been written on restorative justice, and it is not my intention to review herein the distinct trends of opinion on the matter. Yet, the issue cannot pass unnoticed here, and there is in my view one point to be made. In historical perspective, there are traces of restorative justice in the presence, from ancient to modern legal and cultural traditions, of the provision of compensation due to

victims of wrongful acts, attentive to their rehabilitation but also to avoid reprisals or private revenge. As administration of justice was gradually brought under centralized State control (during the Middle Ages), there was a gradual shift from the provision of compensation into retributive justice, a tendency which came to prevail in the XVIIIth century, with the multiplication of criminal law codes, turning attention to the punishment of offenders rather than the redress to individual victims[154].

By then, restorative justice may have faded, but did not vanish. By the mid-XXth century (from the sixties onwards), with the emergence of victimology[155], restorative justice began again to attract greater attention and to gain in importance. Throughout the second half of the XXth century, the considerable evolution of the *corpus juris* of the International Law of Human Rights, being essentially *victim-oriented*, fostered the new stream of restorative justice, attentive to the needed rehabilitation of the victims (of torture). Its unprecedented projection nowadays into the domain of international criminal justice - in cases of core international crimes - makes us wonder whether we would be in face of the conformation of a new chapter in restorative justice.

If so, given the gravity of those core international crimes such as the one of torture, one would likely be facing, nowadays, a coexistence of elements proper to both restorative and retributive justice, in reaction to particularly grave and systematic violations of their rights suffered by the victims. The realization of justice appears, after all, as a form of reparation itself, rehabilitating - to the extent possible – victims (of torture). May I just point out that I do not conceive restorative justice as necessarily linked to reconciliation; this latter can hardly be imposed upon victims of torture, it can only come spontaneously from them[156], and each of them has a unique psyche, reacting differently from others. There is no room here for generalizations. I consider restorative justice as necessarily centred

154 I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 13-24, and cf. pp. 25, 27 and 35-38.

155 Cf. IACtHR, case *Tibi versus Ecuador* (Judgment of 07.09.2004), Separate Opinion of Judge A.A. Cançado Trindade, paras. 16-17.

156 A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, Belo Horizonte/ Brazil, Edit. Del Rey, 2011, Annex II: "Responsabilidad, Perdón y Justicia como Manifestaciones de la Conciencia Jurídica Universal", pp. 267-288.

on the rehabilitation of the victims of torture, so as to render it possible to them to find bearable to keep on relating with fellow human beings, and, ultimately, to keep on living in this world.

Restorative justice grows in importance in cases of grave and systematic violations of human rights, of the integrity of human beings, such as the abominable practice of torture. Reparation to the victims naturally envisages their rehabilitation. The [former] U.N. Commission on Human Rights itself recognized, in its resolution 2003/72 (of 25.04.2003), that, for the victims of grave violations of human rights, "public knowledge of their suffering and the truth about the perpetrators" (including their accomplices) of those violations, are "essential steps" towards their rehabilitation (para. 8). It should be kept in mind that the restorative nature of redress to victims is nowadays acknowledged in the domain not only of the International Law of Human Rights, but also of contemporary International Criminal Law (the Rome Statute of the ICC). Yet, the matter at issue is susceptible of further development, bearing in mind the vulnerability of the victims and the gravity of the harm they suffered. In so far as the recent case adjudicated by the ICJ is concerned, the central position is that of the human person, the victimized one, rather than of the State.

XV. CONCLUDING REFLECTIONS

The factual background of the present case discloses a considerable total of victims, - according to the fact-finding already undertaken, - among those murdered, or arbitrarily detained and tortured, during the Habré regime in Chad (1982-1990). The absolute prohibition of torture being one of *jus cogens*, - as reckoned by the ICJ itself in the recent Judgment of 20.07.2012, - the obligations under a "core human rights Convention" of the United Nations such as the Convention against Torture are not simple obligations of means or conduct: they are, in my understanding, obligations necessarily of result, as we are here in the domain of peremptory norms of international law, of *jus cogens*, generating obligations *erga omnes partes* under the Convention against Torture.

To the original *grave* violations of human rights, there follows an additional violation: the *continuing situation* of the alleged victims' lack of access to justice and the impunity of the perpetrators of torture (and their accomplices). This wrongful continuing situation

is in breach of the U.N. Convention against Torture as well as of the customary international law prohibition of torture. I dare to nourish the hope that the Judgment of the ICJ of 20.07.2012, establishing violations of Articles 6(2) and 7(1) of the Convention against Torture, and asserting the duty of prosecution thereunder, will contribute to bridge the unfortunate gap between the time of human justice and the time of human beings. It is about time that this should happen. Time is to be made to work *pro persona humana*, *pro victima*.

In this second decade of the XXIst century, - after a far too long a history, - the principle of universal jurisdiction, as set forth in the CAT Convention (Articles 5(2) and 7(1)), appears nourished by the ideal of a universal justice, without limits in time (past or future) or in space (being transfrontier). Furthermore, it transcends the inter-State dimension, as it purports to safeguard not the interests of individual States, but rather the fundamental values shared by the international community as a whole. There is nothing extraordinary in this, if we keep in mind that, in historical perspective, international law itself precedes the inter-State dimension, and even the States themselves. What stands above all is the imperative of universal justice. This is in line with jusnaturalist thinking[157]. The contemporary understanding of the principle of universal jurisdiction discloses a new, wider horizon.

In it, we can behold the universalist international law, the new universal *jus gentium* of our times[158], - remindful of the *totus orbis* of Francisco de Vitoria and the *societas generis humani* of Hugo Grotius. *Jus cogens* marks its presence therein, in the absolute prohibition of torture. It is imperative to prosecute and judge cases of international crimes - like torture - that shock the conscience of mankind. Torture is, after all, reckoned in our times as a grave breach of International Human Rights Law and International Humanitarian Law, prohibited by conventional and customary international law; when systematically practiced, it is a crime against humanity. This transcends the old paradigm of State sovereignty: individual victims

157 On the influence of natural law doctrines, cf., inter alia, e.g., M. Henzelin, *Le principe de l´universalité en droit pénal international - Droit et obligation pour les États de poursuivre et juger selon de principe de l´universalité*, Bâle/Genève/Munich/Bruxelles, Helbing & Lichtenhahn/Faculté de Droit de Genève/Bruylant, 2000, pp. 81-119, 349-350 and 450.

158 Cf. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part I", 316 *Recueil des Cours de l'Académie de Droit International de La Haye* (2005), pp. 432-439.

are kept in mind as belonging to humankind; this latter reacts, shocked by the perversity and inhumanity of torture.

The advent of the International Law of Human Rights has fostered the expansion of international legal personality and responsibility, and the evolution of the domain of reparations (in their distinct forms) due to the victims of human rights violations. I have addressed this significant development - which I refer to herein - in my recent Separate Opinion (paras. 1-118) appended to the Court's Advisory Opinion on *Judgment n. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development* (of 01.02.2012). This development has a direct bearing on reparations due to victims of torture.

Here, the suffering and the needs of those victims are to be kept in mind. The continuing situation of prevailing injustice, prolonged in time, leaves the victims of grave violations of their fundamental rights (such as torture) in a state of helplessness, if not hopelessness and despair. Only though their access to justice *lato sensu* (as a matter of *jus cogens*) are the victims likely to recover their faith in human justice[159]. The realization of justice as a form of redress is, thus, essential to the rehabilitation of the victims. Such rehabilitation plays an important role here, bringing to the fore a renewed vision of restorative justice.

In effect, restorative justice, with its ancient roots (going back in time for some millennia, and having manifested itself in earlier legal and cultural traditions around the world), seems to have reflourished again in our times. This is due, in my perception, to the recognition that: a) a crime such as torture, systematically practiced, has profound effects not only on the victims and their next-of-kin, but also on the social *milieu* concerned; b) punishment of the perpetrators cannot be dissociated from rehabilitation of the victims; c) it becomes of the utmost importance to seek to heal the damage done to the victims; d) in the hierarchy of values, making good the harm done stands above punishment alone; and e) the central place in the juridical process is occupied by the victim, the human person, rather than by the State (with its monopoly of sanction).

We look here beyond the traditional inter-State outlook, ascribing a central position to the individual victims, rather than to their

159 Cf. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236.

States. Had the inter-State dimension not been surmounted, not much development would have taken place in the present domain. The struggle against impunity is accompanied by the endeavours towards the rehabilitation of the victims. The realization of justice, with the judicial recognition of the sufferings of the victims, is a form of the reparation due to them. This is imperative, we have here moved from *jus dispositivum* to *jus cogens*.

Identified with general principles of law 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. In prohibiting torture in any circumstances whatsoever, *jus cogens* exists indeed to the benefit of human beings, and ultimately of humankind. Torture is absolutely prohibited in all its forms, whichever misleading and deleterious neologisms are invented and resorted to, to attempt to circumvent this prohibition.

In the aforementioned move from *jus dispositivum* to *jus cogens*, this absolute prohibition knows no limits in time or space: it contains no temporal limitations (being a prohibition also of customary international law), and it ensues from a peremptory norm of a *universalist* international law. *Jus cogens* flourished and asserted itself, and has had its material content expanded, due to the awakening of the universal juridical conscience, and the firm support it has received from a lucid trend of international legal thinking. This latter has promptly discarded the limitations and shortsightedness (in space and time) of legal positivism, and has further dismissed the myopia and fallacy of so-called "realism".

Last but not least, the emancipation of the individual from his own State is, in my understanding, the greatest legacy of the consolidation of the International Law of Human Rights - and indeed of international legal thinking - in the second half of the XXth century, amounting to a true and reassuring juridical revolution. Contemporary International Criminal Law takes that emancipation into account, focusing attention on the individuals (victimizers and their victims). Not only individual rights, but also the corresponding State duties (of protection, investigation, prosecution, sanction and reparation) emanate directly from international law. Of capital importance here are the *prima principia* (the general principles of law), amongst which the principles of humanity, and of respect for

the inherent dignity of the human person. This latter is recalled by the U.N. Convention against Torture[160]. An ethical content is thus rescued and at last ascribed to the *jus gentium* of our times.

160 Second preambular paragraph.

HUMAN DIGNITY, BIOETHICS AND HUMAN RIGHTS

Audrey R. Chapman

Ph.D.; holds the Healey Endowed Chair in Medical Ethics and Humanities; Professor in the Department of Community Medicine and Healthcare at the University of Connecticut School of Medicine in Farmington, Connecticut (U.S.A.); Faculty Affiliate of the Human Rights Institute at the University of Connecticut.

INTRODUCTION

Commitment to human dignity is a widely shared value. Concepts of human dignity reach back to the seminal writings of Immanuel Kant and arguably to the Stoic tradition in ancient Greece and Rome as well. Appeals to human dignity are common in bioethics, philosophy, and legal discourse. Human dignity also serves as the grounding for human rights. In recent years, protection of human dignity has also emerged as a central criterion for the evaluation of controversial technologies, like cloning and embryonic stem cells.

While human dignity is a powerfully evocative and widely affirmed concept, it is elusive as to its precise meaning and requirements. For some people dignity refers to the essential and inalienable core of human nature, but there is disagreement as to what the distinguishing feature of human nature is and sometimes whether it is the source of dignity. For human rights theorists, human dignity refers to the intrinsic worth of all human beings and the requirement that all human beings be treated with appropriate respect, but work on human rights has not yet defined the contents and requirements of that human dignity. Others use the concept of human dignity to ground the ethical obligations owed to the human person, and again there are varying interpretations as to the scope of these duties as well as the identification of the duty-bearer(s). Given this situation, there is the distinct possibility that not only may the term human dignity convey a multiplicity of understandings; it may even be referring to different things.

A recent collection of essays commissioned by the (U.S.) President's Council on Bioethics, *Human Dignity and Bioethics* begins with an important question: is human dignity a useful concept in bioethics that sheds important light on a wide range of bioethical issues or, on the contrary, is a useless concept or at best a vague substitute for other more precise notions.[1] That question can also be asked more broadly; for example for human rights, as well. Disappointingly, neither the introductory essay to the volume, which raises the issues, nor the volume as a whole provides answers. The 19 essays and commentaries, which follow them, put forward the author's perspective on human dignity, and in the process attest to the wide range of views on human dignity, but they do not resolve the question put forward in the introduction. The closest the volume comes is the comment that the march of scientific progress that promises to give us manipulative power over human nature that will eventually compel us to take a stand on the meaning of human dignity.[2]

Drawing from the literature on bioethics and human rights, this article will address the question as to whether human dignity is or could be a useful concept for bioethics and human rights. It begins with a discussion of the under-conceptualization of human dignity. The next two sections identify the diversity in conceptual approaches to human dignity in bioethics and human rights. The following section considers some of the problems with using human dignity as an evaluative standard. The article then proposes initial developmental steps to enable the concept to be applied in a more precise and meaningful way based on Martha Nussbaum's capabilities approach.

UNDER-CONCEPTUALIZATION OF HUMAN DIGNITY

Writings using a dignitarian standard rarely provide an explicit definition of the term or criteria to apply. Dignity's intrinsic meaning in such documents is often left to an intuitive understanding or an assumed shared understanding. However, in a pluralistic society groups and communities hold a diversity of worldviews, social and religious values, and cultural understandings that inform and

1 A. Schulman, "Bioethics and the Question of Human Dignity", in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (Washington, D.C.: Government Printer, 2008), p. 3.

2 Ibid, p. 17.

shape their interpretation of human dignity. Referencing human dignity without further explication implies a level of social or ethical consensus that simply does not exist.[3]

A lack of clarity about human dignity can relegate the concept to be used as little more than rhetorical dressing. A recent analysis I conducted of discussions of human dignity in the literature on reproductive technologies is a case in point. The majority of authors surveyed using human dignity in their ethical evaluations of reproductive technologies neglected to conceptualize dignity. References to human dignity in those publications frequently were offered in passing, perhaps intended as reinforcement of the viewpoints put forward based on other defining ethical considerations.[4] For example, a 2002 report by the (U.S.) President's Council on Bioethics with the title *Human Cloning and Human Dignity: an Ethical Inquiry* [5] fails to conceptualize human dignity or address the specific ways in which human cloning may impinge on human dignity. The reference to human dignity appears to be used to convey a sense of general social unease, but with little explanation of how, exactly, cloning threatens human dignity.

The same problem of under-conceptualization characterizes the human rights instruments that so frequently reference human dignity. According to the Universal Declaration on Human Rights "all human being are born free and equal in dignity and rights."[6] Because human rights are predicated on the intrinsic value and worth of all human beings, they are considered to be universal, vested in all persons regardless of their country of origin, gender, race, nationality, age, economic status, or social position. This insistence on the universality of human dignity is one of the significant contributions of the human rights paradigm. However, from the text of the Universal Declaration of Human Rights onwards the drafters of

3 T. Caulfield & A. Chapman, "Human Dignity as a Criterion for Science Policy", *PLOS Medicine* 2 (2005): 0736-0737

4 A. Chapman, "Human Dignity and New Reproductive Technologies", in *Human Dignity in Bioethics: From Worldviews to the Public Square*, N.J. Palpant & S.C. Dilley, Eds., New York and London: Routledge, 2013.

5 President's Council on Bioethics, *Human Cloning and Human Dignity: an Ethical Inquiry*, Washington, D.C.: Government Printer, 2002.

6 Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly Resolution 217A(III), on 10 December 1948, Article 1.

human rights instruments have chosen not to identify the source(s) of human dignity or to explicitly define it.

Apparently, the drafters of the Universal Declaration on Human Rights realized they could achieve a consensus around the statement that all human beings are born equal in dignity and rights but not about its grounding and implications. In addition, the goal at that point in history was to reach a political agreement that atrocities inflicted on large populations, as had occurred during World War II, would not be tolerated by the international community.[7] Or to put it another way, the goal in enshrining "the inviolability of human dignity" was to prevent a second Holocaust and not to offer a comprehensive philosophical justification.[8] Subsequently, the lack of fixed content associated with human dignity facilitated formulating specific rights and duties that ought to be legislated in the name of human dignity because doing so did not require compromising varying basic beliefs. The right and duties enumerated in each human rights instrument reflect the needs identified and the political agreement achieved at that time unrelated to an underlying conception of human dignity.[9]

This may work up to a point when human dignity serves as the symbolic grounding for specific rights, but it can be problematic when human dignity is put forward as a standard to evaluate conduct or policies. For example, the Universal Declaration on the Human Genome and Human Rights, prepared by UNESCO and then adopted by the U.N. General Assembly in 1999, emphasizes that genetic research and applications should fully respect human dignity, freedom, and rights and prohibits all forms of discrimination based on genetic characteristics. Article 2 states that "Everyone has a right to respect for their dignity and for their rights regardless of genetic characteristics."[10]

Parties to a 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, the result of five years of discussions and negotiations between member states of the Council of Europe, make a commitment to protect the dignity and identity of all human beings and to guarantee respect for their fundamental freedoms with regard

7 D. Shultziner, "Human dignity".
8 Schulman, ibid, p. b13.
9 Shultziner, ibid, p. 5.
10 Universal Declaration on the Human Genome and Human Rights, Art. 2, available at http://www.unesco.org/ibc/uk/genome/project/index.htr.

to the application of biology and medicine.[11] Recognizing the need for medical research on humans, the Convention stipulates limitations to protect human dignity, particularly the types of permissible interventions altering the human genome,[12] and prohibits the creation of human embryos for research purposes.[13] Again, the rationale and connection with the protection of human dignity is unclear.

PHILOSOPHICAL AND THEOLOGICAL CONCEPTIONS OF HUMAN DIGNITY

In his overview of the uses of human dignity in bioethics, Adam Schulman attributes at least some of the confusion and disagreement as to its meaning to the disparate sources of the idea of human dignity He identifies four strands or sources: (1) the classical notion of dignity as something rare and exceptional and therefore worthy for honor and esteem; (2) the biblical account of persons as "made in the image of God" and therefore possessing an inherent and inalienable dignity; (3) Kantian moral philosophy's identification of human dignity with rational autonomy with its emphasis on equal respect for all persons and never treating another person as a means to an end; and (4) 20th century constitutions and international human rights declarations that cite human dignity as the supreme value on which all human rights and duties are said to depend. Each of these approaches has strengths and limitations as well as approximate modern analogues and applications.

The word "dignity" comes from the Latin *dingus* and *dignitas* meaning something like "worthiness for honor and esteem." The classical or Stoical notion of dignity as something rare and exceptional has aristocratic implications in a democratic and egalitarian age. As Schulman observes, this notion of human dignity lends itself to invidious distinctions between one human being and another.[14] It also raises questions as to what it is about particular people that warrants special admiration.[15]

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11 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 1997, European Treaty Series, No. 164, reprinted in Journal of Medicine and Philosophy 25 (2000): 259 -266.

12 Idem, Art. 13.

13 Idem, Art. 18 (2).

14 Idem, p. 7.

15 Schulman, ibid, p. 6.

An aristocratic conception of human dignity has contemporary analogues in the interpretation of human dignity held by the transhumanists and more broadly others who advocate human enhancement. Nick Bostrom, a leading transhumanist theorist, puts forward the idea of dignity "as a quality, a kind of excellence admitting of degrees and applicable to entities both within and without the human realm."[16] For Bolstrom, dignity as a quality in human beings (or for that matter intelligent machines) functions as a virtue or an ideal which can be cultivated, fostered, respected, admired, or promoted.[17] The transhumanist project advocates the enhancement of human beings, including introducing or attaching non-biological entities. Their agenda advocates that individuals should have the right to transform their own bodies as they wish and that parents should have the right to decide which technologies to use when deciding to have children (2010). In contrast, those holding human rights or other universalist perspectives on human dignity, like myself, anticipate that the use of human enhancement technologies could undermine our humanness or our dignity as humans. Another consideration is that access to any of these technologies is likely to be limited depending on financial means and their availability, with the result that benefits would not be widely shared and this would likely introduce even greater inequalities within and between societies. Enhancement interventions might also introduce invidious distinctions between persons who are "improved" and those in a natural or "unimproved" state thus violating the fundamental human rights principle of non-discrimination and non-stigmatization.[18]

Biblical religion, Schulman's second strand, contributes the Judo-Christian scriptural reference to man (humans) "as made in the image of God." The implication is that human beings thereby possess an inherent and inalienable dignity. One dimension of that dignity, as portrayed in the Book of Genesis, is the special position of human beings in the order of creation: humans are given stewardship or dominion over all things. Schulman's interpretation of this central passage points in another and humbler direction: its reminder that

16 N. Bolstrom, "Dignity and Enhancement", in *Human Dignity and Bioethics*, Washington, D.C.: Government Printer, 2008, p. 173.

17 Idem, p. 175.

18 Some of these concerns are developed in the essays A.R. Chapman and M.S. Frankel, eds., *Designing Our Descendants: The Promises and Perils of Genetic Modifications*, Baltimore: Johns Hopkins University Press, 2003.

while humans are made in God's image, we are not ourselves divine; we are creatures, not creators.[19] Gilbert Meilaender tries to capture something of this dichotomy when he characterizes the human being as "neither beast nor God" and links human dignity with the acceptance of this in between state.[20]

Several recent books argue that the human rights movement is impoverished by its lack of attention to the religious foundations for human rights and seek to compensate for this deficit.[21] This literature explores perspectives in a very diverse sampling or religions, including some, like Islam, that are often erroneously assumed to be doctrinally hostile to human rights. The dilemma is that there is no common ground. Predictably, these books show that there are a wide variety of interpretations and perspectives on human rights even within the same tradition and certainly across traditions.

Schulman proposes that the biblical conception of dignity could provide ethical guidance in answering the question of what we owe to others at the very beginning and end of life, to those with severe disability or dementia, and even to tiny embryos: "Seeing human beings as created in the image of God means, in some sense, valuing other human beings in the way a loving God would value them."[22] There are several problems however with doing so. First, as Schulman himself recognizes, we live in a secular society in which many people, among them secular bioethicists, are uncomfortable with citing religious texts and fear the imposition of religious dogma.[23] Second, given the brevity of the references and the differences in the nature of the biblical societies with our own, the implications of the biblical account of human dignity are ambiguous, as for example in the controversies over cloning and stem cell research. Does it mean that every stage of human life is sacred and therefore cannot be destroyed

19 Schulman, ibid, p. 8.

20 G. Meilaender, *Neither Beast Nor God: The Dignity of the Human Person*. New York and London: New Atlantis Books, 2009, p. 5.

21 E.M. Bucar & B. Barnett, eds., *Does Human Rights Need God?* Grand Rapids, Michigan: Eerdmans, 2005; E.D. Reed, *The Ethics of Human Rights: Contested Doctrinal and Moral Issues*; I. Oh, *The Rights of God: Islam, Human Rights, and Comparative Ethics*, Washington, D.C.: Georgetown University Press, 2007. N. Arnison has a perceptive review of the books in Journal of the Society of Christian Ethics 30 (Fall/Winter 2010): 209-213.

22 Schulman, ibid, 9.

23 Idem.

or is it a mandate to do whatever is necessary to heal the brokenness of creation, including engaging in a fundamental reengineering of life?

Kantian moral philosophy constitutes Schulman's third strand singular contribution is conceptualizing dignity as the intrinsic worth that belongs to all human beings and therefore requires equal respect for all persons. His various formulations of the "categorical imperative" require treating all persons as an end and never merely as a means to one's own ends. Kant, however, located human dignity entirely in rational autonomy, i.e. the capacity to make moral decisions, thereby denying any significance to other aspects of our humanity. His exclusive emphasis on rational autonomy also raises questions as to the status of human beings who do not yet have the powers of rational autonomy (infants and children), who can never obtain them (those with cognitive mental impairment) or who have lost them (those with dementia).[24] Another problem that Schulman points out is that the doctrine of rational autonomy can be difficult to apply, especially in a biomedical context.[25] Schulman also faults Kant's moral philosophy with bequeathing a "deplorable Legacy" in the form of rigid distinctions between a morality of absolute imperatives (deontology) as Kant advocated and one that considers the results of our actions (consequentialism).[26] As noted below, there are many prominent Kantians in contemporary philosophical and legal circles writing on human dignity.

Schulman's fourth strand is the frequent use of human dignity in national constitutions and international declarations. He comments that because of its "formal and indeterminate" character the notion of human dignity put forward in these documents "does not offer clear and unambiguous guidance in bioethical controversies."[27] Two relatively recent human rights documents show this ambiguity as to the meaning of human dignity and the problem it imposes on using human dignity for guidance in bioethical controversies.

The Universal Declaration on the Human Genome and Human Rights, prepared by UNESCO and then adopted by the U.N. General Assembly in 1999, emphasizes that genetic research and applications should fully respect human dignity, freedom, and rights and prohibits

24 Idem, p. 11.
25 Idem.
26 Idem.
27 Idem, p. 13.

all forms of discrimination based on genetic characteristics. Article 2 states that "Everyone has a right to respect for their dignity and for their rights regardless of genetic characteristics." [28] The Declaration affirms freedom of research related to the genome, which is necessary for the progress of knowledge and freedom of thought,[29] but with the caveat that researchers respect principles of caution, intellectual honesty and integrity in the conduct of research and the presentation and utilization of their findings.[30] The document assigns responsibility to states to take appropriate measures to foster the intellectual and material conditions to guarantee freedom in the conduct of research on the human genome and to safeguard respect for human rights in the process.[31] The Declaration further stipulates that practices that are contrary to human dignity, such as reproductive cloning of humans, should not be permitted, but it does not illuminate how such practices can be identified.[32]

A 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, the result of five years of discussions and negotiations between member states of the Council of Europe, constitutes another effort to address technological developments relevant to health from a human dignity perspective. Parties to this Convention make a commitment to protect the dignity and identity of all human beings and to guarantee respect for their fundamental freedoms with regard to the application of biology and medicine.[33] A central principle of the Convention is that the interests and welfare of persons shall prevail over the interest of society or science.[34] Recognizing the need for medical research on humans, the Convention specifies a series of conditions to protect research subjects.[35] It also stipulates limitations to protect human dignity, particularly the types of permissible

28 Art. 2, "Universal declaration on the Human Genome and Human Rights," http://www.unesco.org/ibc/uk/genome/project/index.htr.

29 Ibid, Art. 12b.

30 Ibid, Art. 13.

31 Ibid, Arts. 14-16.

32 Ibid, Art. 11.

33 Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 1997, European Treaty Series, No. 164, reprinted in Journal of Medicine and Philosophy 25 (2000): 259 -266.

34 Ibid, Art. 2.

35 Ibid, Arts. 16 and 17.

interventions altering the human genome.[36] But again it does not explain the criteria to identify limitations to protect human dignity.

Adding further complexity, the concept of human dignity in human rights documents is used for a variety of purposes that may be inconsistent with one another. For example, in human rights law human dignity serves as the source or grounding for all rights. At the same time, it is assumed that the specific rights enumerated in the various human rights covenants together comprise the requirements of human dignity. This fundamental tautology has grounded human rights over the past sixty plus years. In addition, the preservation of human dignity is sometimes treated as a right in itself. The constitutions of several countries, including South Africa, Israel, and Germany, articulate substantive rights to dignity.[37]

LEGAL AND HUMAN RIGHTS CONCEPTIONS OF HUMAN DIGNITY

Steven Malby identifies three strands of human dignity with particular relevance to philosophical and legal literature interpreting human rights law. The first or Kantian strand associates human dignity with an individual's autonomous capacity to make moral judgments. This notion of agency is featured in the writings of Alan Gewirth.[38] Deryck Beyleveld and Roger Brownsword build on the capacity for autonomous moral choice and link it with the ability to perceive the possibility of being harmed to constitute the basis of human dignity.[39] A major problem with the Kanitian interpretation, however, as Malby and other analysts, including Schulman, have noted, is that it strips human dignity from the most vulnerable members of the human community, those human beings who are incapable of autonomous moral choice, such as young children or individuals with mental impairment.[40]

A second strand Malby identifies considers dignity as inherent to all human beings, as for example, in the grounding of the various human rights instruments. Moreover, where strand one is primarily concerned with experiential losses of dignity, strand two recognizes

36 Ibid, Art. 13.
37 S. Malby, "Human Dignity and Human Reproductive Cloning," *Health and Human Rights* 6 (2002), p. 107.
38 A. Gewirth, *Reason and Morality*, Chicago: University of Chicago Press, 1978.
39 D. Beyleveld and R. Browsword, *Human Dignity in Bioethics and Biolaw,* Oxford and New York: Oxford University Press, 2001.
40 S. Malby, ibid, 108.

that dignity can have both subjective and objective requirements.[41] Strand two also contributes the important notion that under some restricted circumstances it may be legitimate to put constraints on the autonomous choices of individuals in order to protect the dignity of other individuals and communities.[42]

In the third strand, dignity becomes public, collective, and prescribed by social norms. Borrowing from Rhoda Howard's work,[43] Malby notes that under this conception of dignity, human dignity is not a claim that an individual asserts against society. Rather it becomes collective and prescribed by social norms. This approach can therefore lead to a claim that a group of persons may possess a form of dignity closely identified with its collective way of life, as for example in relationship to the dignity and rights of indigenous peoples.[44] He also points out that while this approach to human dignity may seem alien to the individualist orientation of international human rights law Article 29 (1) of the Universal Declaration of Human Rights states that "everyone has duties to the community in which alone the free and full development of his personality is possible."[45]

PROBLEMS WITH APPLYING HUMAN DIGNITY AS AN EVALUATIVE STANDARD

The concept of human dignity is being increasingly used in debates about controversial biotechnologies. In a 2006 article published in *Nature,* Timothy Caulfield and Roger Brownsword document how the concept of human dignity has emerged as a key point of reference for the regulation of science and technology.[46] Given the limitations discussed of the ambiguity as to the meaning of human dignity and absence of content or criteria, it is difficult to evaluate how human worth might be degraded or supported by a given technology or scientific activity. This has not discouraged both

41 Idem, 109.
42 Idem, 11.
43 R. E. Howard, "Dignity, Community, and Human Rights" in A.A. An-Naim (Ed), *Human Rights in Cross-Cultural Perspectives*, Philadelphia: University of Pennsylvania Press, 1986.
44 Malby, Ibid, p. 112.
45 Idem.
46 T. Caulfield and R. Brownsword, "Human dignity: a guide to policy making in the biotechnology era?", *Nature* 7 (January 2006): 72-76.

proponents and opponents of specific developments and technologies from trying to use the mantle of human dignity.

An 18-month international seminar on this topic, which I co-organized, found that discussions about the impact of scientific discoveries and new technologies on human dignity frequently take one of these two approaches.[47] In the first, human dignity is used in a conventional legal and ethical manner to emphasize the right of individuals to make autonomous choices. This conception treats human dignity as a means of empowerment. Some scholars have gone so far as to suggest that this is the only appropriate normative use of the idea of dignity.[48]

Alternatively, dignity may reflect a broad social or moral position that a particular type of activity is contrary to public morality or the collective good. Statements that a particular technology infringes human dignity convey a sense of general social unease. It may also register concerns about activities that seem to threaten "those parts of the human condition that are familiar and reassuringly human," without detailed explanation of why and how the activities are troubling.[49] The UNESCO statement about human cloning cited above stands as a good example of such a use. Likewise, in the area of stem cell research, dignity is used as a rationale for limiting research on human embryos. When used in this manner, dignity is meant to reflect a broad social or moral position and as a justification for a policy response, usually a policy that is intended to curtail a given activity. Caulfield and Brownsworth see such a trend emerging in the rhetoric of human dignity in debates about biotechnology policies.[50]

An article I coauthored with Timothy Caulfield noted that when used in this vague manner, dignity can silence open debate and may serve to blur an understanding of the real policy concerns behind a given technological innovation or scientific development.[51] Moreover, without a clearer conception of human dignity and its requirements, it is not possible to evaluate technological innovation or scientific developments in the service of protecting human dignity.

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47 The next few paragraphs are based on Caulfield and Chapman, ibid.

48 R. Macklin, "Dignity is a Useless Concept," *BMJ* 327 (2003); 1419-1420.

49 R. Brownsword, "Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the Dignitarian Alliance", *Notre Dame Journal of Law, Ethics and Public Policy* 17 (2003): 15.

50 Caulfield and Brownsworth, Ibid.

51 Caulfield and Chapman, ibid.

In more extreme circumstances, it could involve "intolerant voices (whether of the majority or of an influential minority) expressing negative attitudes about certain practices, which attitudes are then translated into restrictions ostensibly in the interest of respect for human dignity."[52]

TOWARD A MORE MEANINGFUL CONCEPT

There is an obvious need to develop a meaningful concept of human dignity, one preferably with specific criteria that could be used for evaluative purposes. Of the current interpretations of human dignity, Martha Nussbaum's capabilities approach holds promise on both those counts.[53] Her theory combines human need and dignity across cultural differences into a concept she refers to as "capabilities." She conceptualizes human capabilities as "what people are actually able to do and to be" and as a measure of the extent they can live a life that is worthy of the dignity of the human being. Nussbaum is a "universalist" in two ways. She seeks to cross philosophical, gender, religious, and cultural barriers in her evidence and formulations, and she holds that all persons possess full and equal human dignity by virtue of their common humanity, including a wide range of children and adults with severe mental disabilities.

Nussbaum usefully distinguishes between the human dignity inherent in all persons and respect for that dignity. She argues that the absence of opportunities for the development and exercise of major human capacities can result in a life unworthy of human dignity.[54] Although human beings have a worth that is inalienable because of their capacities for various forms of activity and striving, these capabilities must be nurtured for their full development and their conversion into actual functioning. According to Nussbaum, the equal worth of all persons confers political entitlements for the development of their capabilities. These political entitlements

52 D. Beyleveld & R. Brownsword, *Human Dignity in Bioethics and Biolaw*, Oxford: Oxford University Press, 2001, p. 288.

53 M.C. Nussbaum, *Women and Human Development: The Capabilities Approach*, Cambridge and New York: Cambridge University Press, 2000; *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, MA, and London: Harvard University Press, 2006; "Human Dignity and Political Entitlements", in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics*, Washington, D.C.: Government Printer, 2008, pp. 351-380.

54 Idem, 2008, p. 359.

constitute the basic social minimum governments should provide for their citizens.[55] The social goal should be understood in terms of the government getting citizens above the capability threshold needed for a meaningful life.[56] In the case of individuals who cannot attain the capabilities on her list because of a disability, she insists that they still have these capabilities, for example the right to vote, but may have to exercise them in a relationship with a guardian.[57]

Nussbaum identifies a list of ten central human capabilities. The advantage of her list is that it does not ascribe human dignity to any single characteristic or basic capability, as for example rationality, which would have the disadvantage of excluding from human dignity many human beings with severe mental disabilities.[58] Her list of capabilities captures wide dimensions of human needs and behavior, more so than the political rights enumerated in the various human rights instruments as governmental obligations. Her list goes beyond human rights to reference such things as senses, imagination, and thought; emotions; affiliation; and relationships with other species that are necessary for human flourishing

Nussbaum's delineation of central human functional capabilities includes the following:

> (1) *Life:* being able to live to the end of a human life of normal length, i.e., not dying prematurely or having a life so reduced as to be not worth living;
>
> 2) *Bodily health:* being able to have good health, including reproductive health, to be adequately nourished; and to have adequate shelter;
>
> (3) *Bodily integrity:* being able to move freely from place to place; to be secure against assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for reproductive choice;
>
> (4) *Senses, imagination, and thought:* being able to use the senses, to imagine, think, and reason informed and cultivated by adequate education, including in experiencing and producing self-expressive works; being able to use one mind protected by guarantees of freedom of expression with respect to political

55 Nussbaum, ibid, 2006, p. 5.
56 Idem, pp. 67-71.
57 Nussbaum, ibid. 2008, p. 364.
58 Idem, p. 362.

and artistic speech and religious exercise; being able to search for the ultimate meaning of life;

(5)) *Emotions:* being able to have attachments to things and people outside ourselves; to love those who love and care for us; in general, to love, grieve, experience longing, gratitude; and justifiable anger;

(6) *Practical reason:* being able to form a conception of the good and to engage in critical reflection about the planning of one's life;

(7) *Affiliations:* being able to live with and toward others, to recognize and show concern for other human beings, to engage in a variety of forms of social interaction; to have the social bases of self-respect and be able to be treated as a dignified being whose worth is equal to that of others.

(8) *Other species:* being able to live in relationship with and with concern for animals, plants, and the world of nature;

(9) *Play:* being able to laugh, play, and enjoy recreational activities;

(10) *Control over one's environment:* on a political level being able to participate effectively in political choices that govern ones' life, including protection of free speech and association; on a material level, being able to hold property, seek employment, and freedom from unwarranted search and seizure all on an equal basis with others.[59]

CONCLUSION

Is human dignity a useful concept? My sense is that human dignity has great symbolic power and is a *potentially* useful concept. Moreover, human dignity is too important a concept with too rich a heritage to be allowed to be languish on the trash heap of useless concepts. In addition, I agree with Adam Schulman's comment,[60] mentioned earlier, that issues being raised about the impact of scientific discoveries and new technologies on human dignity make it imperative to gain greater understanding about the meaning and requirements of this significant but elusive concept. Otherwise,

59 Nussbaum, ibid, 2002, pp. 78-80.
60 Schulman, ibid, p. 17.

references to human dignity in debates about controversial biotechnologies and policy issues will likely be ineffectual and potentially even exacerbate divisions. Moreover, the one goal that all interpreters and groups may agree upon, the protection of human dignity, will never be achieved.

So the issue at hand is how do we make human dignity a more meaningful and precise a concept. A helpful starting point would be for all users to be specific about the conception of human dignity being applied and to delineate its implications. This will doubtlessly encourage further intellectual development or perhaps reduce inappropriate applications. Optimally, it would be beneficial to work towards a better conceptualized notion of human dignity that might achieve broad consensus and that can also offer specific criteria to use for evaluative purposes. This article has put forward Martha Nussbaum's conception of capabilities as a potential source. Until there is greater clarity about the meaning and implications of human dignity, there is a need to be circumspect about using human dignity as an evaluative standard.

HUMAN RIGHTS AND THE RESPECT FOR HUMAN DIGNITY IN THE CONTEXT OF THE RESTORATIVE JUSTICE PRINCIPLES

César Barros Leal

State Attorney of the State of Ceará; Retired professor from the Law School of the Federal University of Ceará; Doctor of Law (UNAM); Post-doctor in Latin American Studies (College of Political and Social Sciences of UNAM); Post-Doctor of Law (Federal University of Santa Catarina); President of the Brazilian Institute of Human Rights; Member of the General Assembly and the Board of Directors of the Inter-American Institute of Human Rights.

Many are the principles of Restorative Justice, and some are confused among themselves and with the ones from mediation, its *privileged instrument*. The observance of those principles– among which stands out the human DIGNITY – is essential as a safeguard against deviations that may compromise the essence of the process and put it at risk. They are identified as follows:

1. ASSUMPTION OF RESPONSIBILITY

The offender must admit his responsibility for the offense committed, something considered essential in restorative practices, including the mediation.

The Preamble of the Appendix (Basic Principles for the Application of Restorative Justice Programs in Criminal Issues) to Resolution No. 2002/12 from the Economic and Social Council of the United Nations states that the restorative approach allows the offender to better understand the causes and effects of his behavior and take *genuine responsibility*.

This attitude on the part of the offender (adolescent or adult) is the basic premise to resolve the conflict and rebuild the broken ties, especially between the offender and the victim.

2. GOOD FAITH

The restorative process is unable to advance without its participants demonstrating good faith, and thus deserving the trust of others.

It is vital that the actors of the process act with honest intentions, that they are moved by sincerity, and do not use, for example, lingering strategies to favor one of the parties.

The facilitator shall be aware of gestures or behaviors that may represent bad faith, by considering, where appropriate, the meeting to be finished.

I refer to a beautiful lesson on *bona fide*: "Good faith (just as bad faith) is as old as man. It is like 'truth' and 'lie'. By acting with 'good faith', the own acts shall identify the purpose. By telling the 'truth', it will be repeated as many times as necessary, in several ways, even in other words. By acting with 'bad faith', sooner or later, the addiction shall be discovered, and the author shall be liable for the consequences. By telling a 'lie', the author shall tell it ninety-nine other times in order to support it. Acting with good faith means to act with honesty, without any offense to the law, without intention, to be honest." [1]

3. CELERITY/REASONABLE LENGTH

Without the locks of the traditional justice (widely criticized for its bureaucracy, its notorious slowness), restorative procedures are quick and effective, because the procedure is simple and oral, and its duration, which depends on the characteristics, nature, and complexity of each case, is defined by the parties.

Take into account the American Convention on Human Rights (Pact of San José), which provides in its Article 25: (1) Everyone has the right to simple and *prompt* recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

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1 PEDROTTI, Irineu Antonio, PEDROTTI, William Antonio and CARLETTI, Amilcare. *Máximas Latinas no Direito Comentadas*. Campinas, SP: Servanda Publishing Company, 2010, p. 155.

According to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Everyone has the right to have his cause heard equitably, publicly and *within a reasonable time* by an independent and impartial court established by law, which shall decide the dispute on their civilian rights and duties or on the foundation of any criminal charge brought against him. Based on the same line of ideas, Constitutional Amendment No. 45/2004 (Reform of the Judiciary Power) was written, which included a new item (LXXVIII) to Article 5 of the Brazilian Federal Constitution, which guarantees everyone, in a judicial and administrative setting, the reasonable duration of the proceedings and the means to ensure the celerity of its processing.

In his reasoned vote, in the Mack Chang Case (Inter-American Court of Human Rights, November 15, 2003), demand against Guatemala, for violation of Articles 4, 8 and 25 (right to life, right to a fair trial, and right to judicial protection, respectively) of the American Convention on Human Rights, to the detriment of the anthropologist executed extra-judicially on September 11, 1990, stated Judge Sergio García Ramírez:

> The excessive delay in the enforcement of justice is, somehow, the denial of justice. "Delayed justice means denied justice", reads an old saying, invoked frequently. The demand to observe a reasonable period for the settlement of disputes related to the issue of human rights has several projections within this same context. In the first hypothesis, it is applied to the time for the development of a process against any person. That is how the Court has indicated that the "reasonable time principle", which is mentioned in Articles 7.5 and 8.1 of the Convention, aims to prevent the accused to remain under a charge for a long time, and ensure that such accusation is decided promptly.

One has to be careful not to confuse celerity with a hasty composition, which results in an inadequate or unsatisfactory agreement.

4. COMPLEMENTARITY

Restorative Justice does not intend to replace common justice. It has been said that the two kinds of justice complement each other, by applying, whenever possible, restorative practices that are able,

for example, to offer milder and/or alternate sanctions, that is, to present advantages to those involved in the crime.

Nothing hinders the possibility that the benefits of Restorative Justice may amalgamate with the requirements of classical penal system. As an example: "instead of an effective sentence of twenty-five years in prison, the defendant may receive a fifteen-year penalty, provided he has retracted before the victims, has strived to repair them or if he has been predisposed to provide volunteer work for his own community or of those victims, in prison, or, when possible, outside." In less severe cases, particularly in "private or semi-public" criminal segments, nothing prevents "the complementation between judicial and informal methods in solving concrete problems arising with the offense. The parties may, for example, reach an agreement on certain points, by giving up or resigning the prosecution, but lacking a civil or arbitral tutelage to resolve the remaining points. For situations of pending criminal proceedings, the possibility that the parties may apply to the competent judicial authority shall be legally provided, until the publication of the first sentence judgment, the suspension of such instance and, concomitantly, the prescription time limits, while the mediation initiatives follow their course. Therefore, one might talk about a double complementarity between the 'official' justice system and the Restorative Justice mechanisms." If in general terms – he concludes –both must coexist as instruments of prevention and conflict management, in a concrete case, in turn, nothing prevents them from moving forward at the same time, and in order to *meet the public and private interests* that arise from the same offense.[2]

5. CONFIDENTIALITY

What is the object of the meetings, behind the doors, shall be confidential (facts, statements, suggestions, documents presented), demanding, in some places and cases, a confidentiality agreement to be signed in order to ensure secrecy (*pacta sunt servanda*). That allows a more fluid, natural, sincere dialogue, favored by the orality of the restorative process. In case of withdrawal or failure, nothing is transmitted to the common justice, and the participation of the offender may not be used as a proof of admission of guilt in future legal proceedings, either civil or criminal.

2 FERREIRA, Francisco Amado, *op. cit.*, pp. 39-40.

The principle of confidentiality, which seeks the protection of privacy and private life of the parties, is provided in the single paragraph of Article 9 of Bill No. 7006/2006.

Article 10 of the Penal Restorative Justice of the State of Durango, Mexico, from 2009, provides that among the duties of the specialized personnel, there is the one to preserve the confidentiality, as a professional secrecy, of the matters they are aware of due to the tenure of their position.

What is required for a mediation to be successful? That mainly depends on the "security both parties have concerning the privacy that will guide the process. The mediator is bound to secrecy related to the demonstrations, documentation, and reports they may use during the development of mediation. This duty of confidentiality is due to the parties between themselves, and also to third parties."[3] In this sense: "In any case, this idea of confidentiality must not only be understood as due to the mediator, the victim, and the victimizer, otherwise, in his case and when possible, with respect to how many people might have had some participation in the mediation procedure, through the corresponding demand of liability in the event of its breach by any of them", the need to "demand such confidentiality from attorneys from the parties that may have been aware of what happened in the mediation" shall be underlined."Thus, such principle becomes one of the nodal points of *viability and efficiency* of mediation[4].

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3 CAVALLI, María Cristina and AVELLANEDA, Liliana Graciella Quinteros. *Introducción a la Gestión no Adversarial de Conflictos*. Madrid: Reus Publishing Company, 2010, p. 139. Cf. MAGRO, Vicente, HERNÁNDEZ, Carmelo and CUÉLLAR, J. Pablo: "The mediation process is confidential, because it is materialized in an agreement signed by the mediated, which sets the rules to be complied together, by ensuring that nothing materialized there can be extrapolated in any sense, outside the exclusive context that determines intrinsically the own process of mediation. The mediator can neither reproduce anything said in the process nor be called as a witness, because the professional secrecy supports him." (*op. cit*., p. 11)

4 VILAR, Silvia Barona. *Mediación Penal: Fundamento, Fines y Régimen Jurídico.* Valencia: Tirant lo Blanch Publishing Company, 2011, p. 276. Confidentiality is one of the fundamental principles that should govern the behavior of mediators, along with the competence, impartiality, neutrality, independence and autonomy, respect for public policy and laws in force in accordance with Resolution 125 of the National Council of Justice.

Indeed, some believe there may be exceptions when, for example, such information represents a future threat to the participants and to others.

6. CONSENSUS

The Parties agree to hold a restorative meeting, respecting its rules, such as confidentiality, and propose to fulfill the agreement.

The restitutive processes shall only be used when there is sufficient evidence to accuse the offender, and they may not disregard his consent, as well as the victim's. Both of them may withdraw their consent at any point in the process.

The Council of Europe (Recommendation No. R [99] from the Committee of Ministers to Member States concerning mediation in criminal matters) recommends that such mediation shall only be done if the victim and the offender consent totally free (freely consent).

According to Damásio Evangelista de Jesus, restorative practices presuppose *a free and fully aware Agreement between the parties involved*, since, without such a consensus, there shall be no other alternative than the traditional procedure.[5]

7. COOPERATION

Cooperation is essential to the quality of the restorative approach. Those involved shall collaborate according to their possibilities, aware of the advantages to reach a beneficial *erga omnes* agreement.

The offender, aware of the losses resulting from his crime, shall seek to repair or compensate them, with the help from the victim and others.

In fact, we are facing a process of pure cooperation, precisely because a convergence of interests is observed, which allows the achievement of a favorable outcome to everyone participating in the restoration meeting.

8. HUMAN DIGNITY OR HUMANITY

Under the Restorative Justice, the human dignity of those involved in the procedures shall be respected and preserved,

5 JESÚS, Damásio de, "Justiça Restaurativa no Brasil", in *Revista do Conselho Nacional de Política Criminal e Penitenciária*, vol. 1, nº 21, CNPCP, Brasília, 2008, p. 18.

"a quality inseparably united to the own being of the person"[6], an absolute, central, and inviolable principle, from which derive other principles as the image, the right to privacy and intimacy, honor, moral integrity, and freedom.

Defined as the *raised floor* by the German philosopher Ernst Bloch, the human dignity, the most universal of all principles, was raised as the foundation of the Republic through Article 1 of the Constitution, according to which the Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, is a Democratic State of Law and has among its foundations, beyond sovereignty, citizenship, the social values of labor and free enterprise, and political pluralism, *the dignity of the human being*.

For Lúcia Barros Freitas de Alvarenga, it is conceived as a "constitutional reference unifying all fundamental rights"[7], and for Rizzato Nunes, it is a constitutional supra principle that "illuminates all the other principles and constitutional and infra-constitutional norms."[8] The Spanish Constitution from 1978, Article 10.1 reads as follows: The dignity of the person, the inviolable rights which are inherent to him/her, the free development of personality, the respect to law and to the rights of others are the foundations of the political order and social peace. The claim that freedom, justice, and peace are based on the recognition of the intrinsic dignity, and the equal and inalienable rights of all members of the human family is in the Preamble of the Universal Declaration of Human Rights.

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6 IPIÑA, Antonio Beristain. *La Dignidad de las Macrovíctimas Transforma la Justicia y la Convivencia (In Tenebris, Lux)*.Madrid: Dykinson Publishing Company, 2010, p. 44.

7 ALVARENGA, Lúcia Barros Freitas de. *Direitos Humanos, Dignidade e Erradicação da Pobreza: Uma Dimensão Hermenêutica para a Realização Constitucional*. Brasília: Brasília Jurídica Publishing Company, 1998, p. 223.

8 NUNES, Rizzato. *O princípio Constitucional da Dignidade da Pessoa Humana*. São Paulo: Saraiva Publishing Company, 2002, p. 50. Rogério Greco, Prosecutor of the State of Minas Gerais, tells us of the Criminal Law of Balance, "which tries to resolve social conflicts seriously, seeking only to protect the most important and necessary assets to live in society. Therefore, it preserves the constitutional principle of human dignity, since it only intervenes in the right of freedom of its citizens in strictly necessary cases, since without such intervention social chaos would take place." (in *Direito Penal do Equilíbrio: Uma Visão Minimalista do Direito Penal*. Niterói, RJ: Impetus Publishing Company, 2014, p. 177)

Humanitas or the dignity of the human being, his centrality as a person, the respect due to his essence, "is a perpetual search on the right that comes from Roman law and goes through the whole history of our knowledge, having suffered multiple vicissitudes, which could never hide the permanent reciprocal demand: law always claims *humanitas*, just because legal knowledge is nothing more than an instrument for the achievement of the human being, and therefore, has no compass when moves away from the basic anthropology that makes him a person to convert into a thing, to reduce him to one more thing among several other things." [9]

This thought is shared by Professor José Ignacio Subijana Zunzunegui, from the University of the Basque Country (UPV), for whom the paradigm of humanity "shall impregnate justice both when responding to a hetero-compositive structure – in which the judge settles a dispute between confronting parties- and when resting in an auto-compositive model - in which the judge approves the solution given to the conflict by the parties originally in dispute –. In the hetero-compositive formula, the potentiation of the judgment stands out as a space in which individuals issue the reports through which they shape their experiences, and the relevance of the transfer of a response to them, when founded in acceptable and understandable reasons, it provides a message that carries a high communication quality. In the auto-compositive model, the construction of a dialogue landmark is prioritized, which is fed by respect, listening, understanding, and joint recreation of what has been damaged." [10]

In this perspective, the mediators internalize the perception that they shall treat the parties with absolute decorum, and assume that those parties act likewise, striving to cope with the conflict in the best way.

When alluding the participation of a facilitator in the restorative process, the Manual of Restorative Practices for Conciliators in Equity,

9 ZAFARRONI, Eugenio Raúl. *El Humanismo en el Derecho Penal*. Mexico: Ubijus Publishing Company/Vocational Empowerment Institute, 2009, p. 7. Vid: "...all that historical and formal proclamation to be the human being bearer of an 'innate' dignity is the own Law to acknowledge the following: the humanity that *lies* in each one of us is in itself the rationale or evidence of legitimacy of such dignity. There is no other role for Law, another role than that of declaring it." (BRITTO, Carlos Aires. *O Humanismo como Categoria Constitucional*. Belo Horizonte: Fórum Publishing Company, 2010, p. 25)

10 ZUNZUNEGUI, Ignacio José Subijana. *El Paradigma de Humanidad en la Justicia Restaurativa*, article extracted from the web.

within the framework of the Strengthening Project of the Justice Sector towards the Reduction of Impunity[11] in Colombia, clarifies that the facilitator shall contribute so that, nowise, either party may be treated, at some point, dishonorably, by respecting, on the contrary, the dignity equivalent to the equality of everyone involved, in order to facilitate the understanding and social harmony.[12]

9. DISCIPLINE

The respect for discipline is important for everyone involved in the process aiming the establishment of an agreement and its continuity. And certainly, we are not talking only about the offender and the victim, but also about the representatives from civil society and mainly about those who are exercising the role of mediating the conflict.

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11 On impunity: "... it has devastating effects for the victims of violations. Impunity not only creates a huge sense of frustration and disillusionment among victims and their relatives, but it also assumes an obstacle to the repairment), since, in part, the reparation also has to do with the trial and punishment of those responsible. The reflections of Theo van Boven are very illustrative of this close relationship between justice and reparation when he points out that 'in some countries, inaction with regard to investigation and punishment goes along with inaction regarding the reparation for the victims. Victims may find themselves deprived of important evidences that are necessary to support their reparation demands.'" (ISA, Felipe Gómez. The text, taken from an updated version of the introduction [p. 34] which appears in the book coordinated by the author [El *Derecho a la Memoria*. Zarauz, Spain: Pedro Arrupe Institute of Human Rights, 2006] is available on the ILSA website – Latin American Institute for an Alternative Society and an Alternative Law, with main office in the city of Bogota D.C., Colombia). See: Set of Principles updated for the Protection and Promotion of Human Rights through the Fight against Impunity, Report from Diane Orentlicher, United Nations, Economic and Social Council (February 8, 2005): Principle 33: Special procedures that allow victims to exercise their right to reparation shall be the object of the broadest publicity as possible, including the private media. Such dissemination shall be ensured both within the country and abroad, including the consular channels, especially in those countries where many victims had to be exiled. Principle 34: The right to seek reparation shall cover all the damages and losses suffered by the victims; it shall encompass the restitution, compensation, rehabilitation, and satisfaction measures, as governed by international law.

12 ALMEIDA, German Vallejo and CASTILLO, Maribel Arguello. *Manual de Prácticas Restaurativas para Conciliadores en Equidad*. Bogota: Ministry of Interior and Justice of the Republic of Colombia and the European Union, 2008, p. 21.

Without discipline, without being subject to the rules that guide the restorative procedures, there is no way to move towards a satisfactory closing and obtain the results pursued.

10. COST SAVINGS

Among the innumerable advantages of the Restorative Justice there is the shortening of costs, intrinsic to practices that do not require the formalism and a heavy material and personal structure.[13] Such reduction applies to the State and the parties involved.

As for mediation, it is unquestionable that "the mediator, as a professional, is entitled to be paid for his services to the parties. This is the economic move with the biggest impact on mediation, within, in fact, the restraint and moderation of how much this possibility of conflict resolution implies. It may not be the only one, when it produces the participation of third parties (experts), who shall also be rewarded ... Another series of expenses related to (postal) notifications, quotes, use of premises, offices or rooms for meetings, and so on may be produced… In any case, mediation is characterized by expenditure restraint, and an important economic moderation in its 'final cost' to cover the disbursements required by a legal proceeding."[14] In short, regardless of the amount of expenses that may rise from more complex cases, it will always be lower than the punitive, selective, excluding model, and shall benefit the administration of justice and the parties accordingly.

With respect to the economy in legal costs, it is pertinent the lesson from Elías Neuman that a simple minor offense "involves the police, justice, prison administration, in an astonishing expense and without any further sense... Large sums of money are used in courts in order to investigate conflicts, when the use of consensus models,

13 This is a process "without the weight and the solemn ritual of the judicial scenario architecture." (SILVA, Eliezer Gomes da and SALIBA, Marcelo Gonçalves, Restorative Justice, Criminal System, Law and Democracy – Ethical-Discursive Intersections, Proceedings of the National CONPEDI Congress held in Brasilia, on November 20-28 of 2008. Available on the website).

14 DIZ, Fernando Martín. *La Mediación: Sistema Complementario de Administración de Justicia*. Madrid: Consejo General del Poder Judicial, 2009, pp. 153-154. The author adds that the lowest economic cost is one of the major *paradigmatic advantages* of mediation.

such as a previous penal mediation to or within the process, would deeply reduce the bitter economic brokenness of the system." [15]

Terra dos Homens Association has estimated the cost of restorative juvenile justice in Peru. The program costs 115 dollars monthly per adolescent, while the deprivation of freedom, in correctional centers, costs 417 dollars a month.

The resulting social economy from a model that shows lower recidivism rates is also significant, which necessarily implies the reduction of costs to confront crime.

11. EQUITY

Founder and former president of the Observatory of Prisons of Arequipa (Peru), when lecturing in the First World Congress of Juvenile Restorative Justice (Lima, 2009), the Belgian Bruno Van der Maat mentioned a text found in the tomb of a pharaonic judge from the Eleventh Dynasty (Totnakht-ânkh): I judged a case according to equity, so that both parties left with a pacified heart.

In the case that concerns us, the term *equity* (*aequitas*) consists of treating each party in the meeting with impartiality so that they receive what corresponds to them based on their merits and conditions, which is fair and appropriate in each case or circumstance, without benefitting one over the other.

The important thing is to avoid making decisions that may be inequitable and break the balance that must be preserved in the process.

When dealing with alternate means of dispute resolution (techniques of mediation, conciliation, facilitation committees, Restorative Justice and other forms of negotiation) before the Center of Alternative Criminal Justice, the Law of Alternative Criminal Justice of the State of Chihuahua, Mexico, points out that those means are governed by several principles, among which is equity, since they provide balance conditions between the parties, allowing the composition of mutually satisfactory and lasting agreements.

From the Basic Principles for the application of Restorative Justice Programs in Criminal Matters (Resolution No. 2002/12) the following can be extracted: (13) In restitutive justice programs and, in

15 NEUMAN, Elías. *Mediación y Conciliación Penal*. Buenos Aires: Depalma Editions, 1997, p. 31.

particular, in restitutive processes, basic safeguards should be applied on procedures to ensure *equity* for both the offender and the victim: a) with the observance of the provisions in the national legislation, the victim and the offender shall have the right to consult with a legal counselor regarding the restitutive process and, if necessary, translation or interpretation services. Minors, moreover, shall be entitled to the assistance from their parents or guardian; b) before giving their consent to participate in restitutive processes, the parties should be fully informed of their rights, the nature of the process, and the possible consequences of their decision; c) neither the victim nor the offender shall be coerced to participate in restitutive processes or accept restitutive results, nor should they be induced to do so by unfair means.

The following note is from Luigi Ferrajoli, when he refers to the current contraposition between legality and equity: "According to a scholastic definition that usually dates back to Aristotle, equity is 'the justice of the concrete case'. More precisely, Aristotle, when analyzing the relations of *legality* and *equity* with justice in *Nicomachean Ethics*, wrote that 'although equity is fair, it is not according to the law, but a correction of legal justice. The reason for that is that every law is universal, and there are cases where it is not possible to treat things righteously in a universal way. In those cases, therefore, where it is necessary to speak in a universal way, not being able to do it uprightly, the law accepts what is more current, without ignoring that there is some error. Equity would, therefore, serve to bridge the distance between the abstraction of the typical legal presupposition and the concretion of the *res judicata*; 'Such is the nature of equity: a correction of the law to the extent that its universality leaves it incomplete.' Indeed, Aristotle adds, 'when the law presents a universal case, and circumstances that are out of the universal formula come upon, then it is fine, to the extent that the legislator omits and fails when simplifying, and may such omission be corrected, for the same legislator would have made that correction if he had been present and would have legislated that way if he had known. Therefore, equity is fair and better than some justice class, not the absolute justice, but better than the error emanating from its absolute character." [16]

16 FERRAJOLI, Luigi. *Derecho y Razón: Teoría del Garantismo Penal*. Madrid: Trotta Publishing Company, 2011, p. 156. Article 38 of the Statute of the

12. INFORMALITY

No prior definition of forms or procedures (except for agendas and parameters of general character) gag restorative practices, exempted from existing rituals in common justice.

The lack of (ritualistic) formalism of Restorative Justice, seen as a valuable tool in the service of promptness and effectiveness, cannot be identified as the absence or moderation of care, guarantees, and commitment to the seriousness and responsible search for justice.

Countries where the Restorative Justice shows the best results (in some, more than 90% of the cases finished with reparation agreements), such as Australia, New Zealand, and Canada, are among the ones that most preserve the principle of informality.

13. MUTUAL RESPECT

The restorative process requires reciprocal respect among all its participants, inexcusable to ensure the confidence and making consensus decisions afterwards.

In the aforementioned Resolution No. 2002/12, it is said that it is up to the facilitators to perform their functions impartially, with due respect to the DIGNITY of the parties and, therefore, they shall watch for the parties to behave with *mutual respect*, and do everything possible to find a relevant solution among themselves.

Article 2 of the Declaration of Costa Rica states that restorative assumptions are based on principles and values that not only guarantee the full exercise of human rights and the observance of DIGNITY of everyone involved, but they also favor the mutual respect among the participants of the procedures.

14. VOLUNTARINESS

The parties must demonstrate their willingness to participate in the process (which is also highlighted by the Council of Europe, committed to Restorative Justice), without impositions, aware of their rights and duties, the particularities of the procedures adopted, and the consequences of a possible agreement. The offender shall

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International Court of Justice in The Hague authorizes the use of the *ex aequo et bono* principle (because it is equitable and good) in the decision of an interstate dispute when there is agreement between the parties.

seek to mitigate the effects of his shameful act, and he is expected to make a commitment to not relapse.

In this line of thought, it should be considered that "The devaluation of the voluntariness to participate is one of the risks of mediation. Therefore, to intervene in the mediation process, the manifestation of the will must be guaranteed. Neither the victim nor the accused can be obliged to initiate mediation, or keep it, or adopt agreements that are harmful to their interests. For those purposes, the mediator shall inform the parties about the rights, duties, and consequences of their participation, as well as their freedom to start or abandon the process at any time, without causing juridical consequences... On the other hand, freedom of participation is directly related to the procedural guarantees. Neither the victim nor the accused may suffer juridical consequences restrictive of rights by the initiation or abandonment of the mediation process. With respect to the victim, there is no special juridical damage in the event if one decides not to start the mediation process or abandon it because the criminal proceeding is oriented towards the formal determination of facts suffered, for the imposition of a sentence to the accused, and the satisfaction of their economic interests affected by the damage. The abandonment of the process by the victim may have consequences only on the emotional level. However, with respect to the accused, the question is different, not only for the juridical consequences that may be generated, but also for the damage to the fundamental rights."[17]

Despite the relevance of voluntariness in the traditional Restorative Justice model, however, there are those who say, as Nils Christie, that offenders may be required to take part in such practices; that is, there will be times (according to the maximalist system of Restorative Justice) in which such justice can only be achieved by coercion, something unacceptable to those who understand, such as McCold, that would mean a return to the punitive model.

Coercion shall not be confused with the invitation or stimulus to participation in a restorative approach (no matter it may come from institutions or individuals). That is why we speak of voluntariness and not spontaneity.

17 MARTÍN, Julián Carlos Ríos, ESCAMILLA, Margarita Martínez, BERNABÉ, José Luis Segovia, DÍAZ, Manuel Gallego, CABRERA, Pedro and ARBELO, Montserrat Jiménez, *op. cit.*, pp. 43-44. Available on the internet.

15. OTHER PRINCIPLES

The principles presented do not constitute *numerus clausus*. Of course, others may be cited (some also coincide with those of mediation) such as bilaterality, credibility, diligence, gratuity, flexibility, honesty or probity, equality between the parties, impartiality or neutrality, interdisciplinary, orality, proportionality, protagonism, reasonableness, and safety of those involved, besides the ones present in the criminal law such as culpability, legality, minimum intervention, and presumption of innocence.[1818]

In June 2005, participants of the International Conference "Access to Justice through Alternative Means of Conflict Resolution", in Brasília, based on the Letter written in Araçatuba - SP, in April of the same year, during the First Brazilian Symposium on Restorative

18 Fragment of concurrent reasoned vote from Sergio García Ramírez, who followed the Judgment on preliminary exceptions, fund and reparations in the Tibi Case vs. Ecuador, issued by the Inter-American Court of Human Rights on September 7, 2004: The idea of a "presumption of innocence" – or perhaps, better for the benefit of the one who objects the "presumptive" character of such concept, of a "principle of innocence or non-culpability" – has two centuries of insecure life. There would hardly be a principle that kept greater congruence with the democratic criminal justice that imposes the prosecuting State to prove the charges and the judging State to decide upon them. Our American Convention holds the principle: "Every person accused of an offense has the right to be presumed innocent until his culpability is not legally established." (Article 8.2) The Inter-American Court affirmed in the sentence of the *Suárez Rosero* case, from November 12, 1987, and reiterates in the sentence of this case, that the presumption of innocence principle is the basis of juridical guarantees. Indeed, they are organized around the idea of innocence, which does not block the criminal prosecution, but rationalizes and directs it. The historical experience militates in this sense. Further: an opinion expressed by the author, as a member of the National Council on Criminal and Penitentiary Policy from the Ministry of Justice about a bill that dealt with heinous crimes, then in course in the National Congress, I affirmed: Steeped in a spiral of violence and manipulated by the media and law and order movements, the frightened and panicked society, without knowing what to do, is induced to not think about the roots of the problem, the possibility of facing it in its origins, and simply demand more repression, more criminal types, more prisons (in this case, whether an enforceable formal sentence exists or not, even because the *presumption of innocence* is a concept violated at all times by the police and the media, under the generalized applause from the ones who see ostentatious actions or uncommitted headlines in the search for truth, the signal of an effective response) and that it ensures the permanence of a vicious circle, advocating instead of preventive measures (short, medium and long term), revenge, punishment, particularly imprisonment, in the naive illusion that, this way, it can restrain the rise of crime. (BARROS LEAL, César. *Pareceres Reunidos*. Fortaleza: Expressão Gráfica, 2006, pp. 43-44)

Justice, concluded that restorative practices should be guided by principles and values such as: autonomy and voluntariness when participating in restorative practices, in all its phases; mutual respect among the participants of the meeting; community involvement, guided by the principles of solidarity and cooperation; unrestricted guarantee of human rights and the right to DIGNITY of the participants; and promotion of equitable and non-hierarchical relations.

• Fragment of the book "Restorative Justice – Dawn of an Era – Application in Prisons and Correctional Centers of Adolescent Offenders", published by Juruá Publishing Company in 2015.

HUMAN DIGNITY AND THE PRINCIPLE OF HUMANITY IN INTERNATIONAL LAW[1]

Diego Valadares Vasconcelos Neto

Ph.D. on Political Science candidate, Federal University of Minas Gerais (UFMG, since '2015); Master of Advanced Studies on International Humanitarian Law, Geneva Academy of International Humanitarian Law and Human Rights (2011); Bachelor of Law, UFMG, 2008). Currently working as a consultant to UNESCO in a joint project with the Brazilian Presidency Secretariat of Human Rights (since 2015).

1. THE CONCEPT OF HUMANITY

Law emanates from non-legal sources *i.e.* facts situated *dehors* law itself. Some schools tried to identify the origins of law in normative facts, such as hypothetical[2] or dogmatic[3] norms. As a response, other theories have convincingly endeavored to explain that in fact the primary norms (labeled either as customary law or general principles of law) have their origins outside the law. These extra-legal origins were explained as religious impulsions, moral or rational exigencies, particularities of each society, the influence of certain events[4], or social institutions crystallized through historical processes[5]. Other schools will identify this factual origin of the law in

1 This paper is a revised and updated version of chapter 2 of the author's LL.M. thesis 'The Principle of Humanity as a General Principle of Law and its Constitutional Functions in Public International Law' (2011) in Geneva.

2 Kelsen's 'Pure Theory of Law'. *See* KELSEN, Hans. *Teoria Pura do Direito*. 7ª ed. Trad. BAPTISTA MACHADO João. (Martins Fontes, São Paulo, 2006).

3 Perassi's Dogmatic Theory. *See* PERASSI Tomaso, "Teoria dommatica delle fonti di norme giuridiche in diritto intemazionale", in *Rivista di diritto Internazionale*", Vol. XI, (1917).

4 Ago's Spontaneous Theory. *See* AGO Roberto, *Science juridique et droit international*, (*RCADI*, No. 090, The Hague 1956).

5 Romano's Institutional Theory. *See* ROMANO Santi, *Corso di diritto Internazionale*, 3 éd. (CEDAM, Padova 1933).

a natural biological[6] and moral solidarity[7] which bind all individuals from society. This solidarity at the same time natural instinctive and biological, as well as moral and rational, between all human beings existent, is that what we shall denominate as humanity. As stressed by Prof. Cançado Trindade, humanity's existence is global and extends itself in a temporal dimension, as it establishes bonds between present, past and future generations[8].

The idea of humanity as solidarity would have three different aspects: first, a feeling/idea in each one that s/he is a part of a collectivity or union (humanity as a society); second, the consequential idea/realization by each individual that every other is an equal part of this collectivity (humanity as human dignity); and last a positive feeling of promoting the good of other members of this collectivity (humanity as *humaneness*).

1.1 Humanity as a society

As already affirmed by Francisco Suarez in the sixteen hundreds:

> However divided into different peoples and kingdoms it may be, mankind has nevertheless always possessed a certain unity, not only as a species, but also, as it were, as a moral and political unity, called for by the natural precept of mutual love and mercy, which applies to all, even to the foreigners of any nation.[9]

Humanity as a collectivity is an idea or a feeling that each of us is part of a group, a society that embraces all human individuals. This has been defined as a spiritual state which binds all individuals by a borderless feeling that each individual is a part of a whole, an

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6 Scelle's 'Natural Biological Law' Theory. *See* SCELLE Georges, *Règles générales du droit de la paix*, (*RCADI*, No. 046, The Hague 1933).

7 Verdross' Interantional Constitutionalism, *See* VERDROSS Alfred von, *Les Principes Généraux du droit dans la jurisprudence internationale* (*RCADI*, No. 052, La Haye 1935).

8 Cançado Trindade differentiates between "humanity" (as the feeling of humaneness and human dignity) from "humankind" to designate this collectivity. CANÇADO TRINDADE, Antônio Augusto, *International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law (I)*, (*RCADI*, No. 316, The Hague 2005), p. 325.

9 SUAREZ Franscisco de, *De legibus ac Deo legislatore,* (1613), lib. II, cap. XIX, para.9 translation in SIMMA Bruno, "The Contribution of Alfred Verdross to the Theory of International Law" in *EJIL* (1995), vol. 6/1, p. 39.

oceanic feeling. This sentiment would be at the root of religions and much of the various philosophical thoughts[10].

Humanity as a collectivity is not an *a priori* concept. The feeling has a gradual expansion as groups enhance their awareness of a whole. Hence, the collectivity for the individual is first his family, his tribe, his ethnic or religious group, his province, his country, and so on. As interactions and mutual dependence between larger groups intensify, the collectivity expands. The expansion and consolidation of society to embrace all human beings is given different philosophical and religious explanations. This expansion of humanity is not linear, having emerged in a wider or lower degree in different societies in all continents throughout the ages, experiencing periods of sudden acceleration, of stagnation, and of setbacks in its journey through history[11]. From a social perspective, this sentiment is catalyzed by the emergence of a *lingua franca* (or various), the advent of modern means of transportation, exponential expansion of trade, the development of weapons of mass destruction, and other factors that make distance between groups even more relative, reinforcing their mutual solidarity. Added to these innovations, other technological breakthroughs *e.g.* scientific researches tracing back a mitochondrial Eve and a Y-chromosomal Adam enhance the rational argument of a common origin, and hence of an identity between human beings amounting to a collectivity. Some social factors provoke setbacks in the construction of the collectivity. The reemergence of nationalisms in particular when followed by xenophobic theories and policies, the banalization of human suffering, and the over institutionalization of human relations are some of the major factors imposing hurdles for its development. However, regardless of the factors impeding the consolidation of humanity, or of the scientific, religious, philosophical explanation, the existence of a society embracing the whole of humanity is demonstrated with the resulting law emerging from this

10 ROLLAND Ramain, *Un beau visage à tous sens*, (Albin Michel, Paris, 1967), pp. 264–266: *Mais j'aurais aimé à vous voir faire l'analyse du sentiment religieux spontané ou, plus exactement, de la sensation religieuse qui est (...) le fait simple et direct de la sensation de l'éternel (qui peut très bien n'être pas éternel, mais simplement sans bornes perceptibles, et comme océanique)*.

11 For a brief but comprehensive overview of the development of humanitarian thought and practice in the history of mankind *see* PICTET Jean, *Development and Principles of International Humanitarian Law*, (Henry Dunant Institute, Geneva 1985), pp. 5-27.

universal human society (*ubi homo ibi societas; ubi societas, ibi jus*) that is verified empirically and will be discussed below[12].

1.2 Humanity as human dignity

An immediate consequence of this recognition of a collective solidarity of humankind is the recognition by each of its members of the equal essential human attributes of other individuals and of the potential/capacity of each individual which these attributes entail *i.e.* human dignity. On a universal level these attributes should be separated of relative values which vary with the difference of culture[13]. What matters here is the essence, the common core shared by all humans which creates a common bound. This feeling is verified by the natural repulsion to acts directed against those in which the observer finds an equal. For example: torture, inhuman treatment, the killing of innocent, all create a sense of frustration and revolt since, after recognizing the other as part of the same group, these acts are considered almost as inflicted upon the observer him or herself[14]. In a sentiment of solidarity the observer reacts against these acts. It is the realization of human dignity, from which the principle of humanity as a right to human dignity emanates. Human dignity and worth of the human person "is recognized as the cardinal unit of value in the global society of the future".[15]

1.3 Humanity as humaneness

From a passive process of identification of humanity as a collectivity and the materialization and recognition of the essential attributes, individuals react with a positive feeling of assisting the other. This impulse aims at the cessation of the exclusion or destruction of part of this collectivity, or at the cessation of the deprivation of human beings of these essential attributes. This

12 *See infra* section 2.

13 KANT Immanuel, *Fundamental Principles of the Metaphysic of Morals*, (translated by ABBOT Thomas Kingsmill) (Bilio Bazaar, Charleston 2007), pp. 54-55.

14 KOSKENNIEMI Martti, "Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons", in *LJIL* (1997) vol.10, pp.137-162, at pp.166-167.

15 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep. 1996, p.226 [*Legality of Nuclear Weapons*]Dissenting Opinion of Judge Weeramantry, at 442.

impulse reflects the notions of charity, cooperation, promotion of development and active protection.

From these three aspects of Humanity as a societal fact/impulse/demand, various elementary considerations can be drawn which are the 'elementary considerations of humanity'[16]. Such 'elementary considerations' are a series of factual inferences of these primary concepts of humanity. From the notions of humanity and inferences there from, basic principles of international law accrue, in particular the principle of humanity as a general principle of law.

2. THE PRINCIPLE OF HUMANITY

Similar to other principles of international law[17], the principle of humanity is not limited to one aspect but is multi-faceted. This paper intends to discuss the principle of humanity as a three-dimensional principle reflecting in international law the three concepts of humanity. The first dimension of this principle is the perception of humanity as a legal collectivity. The second dimension is what is also called the principle of human dignity or of respect for the human dignity. Finally, the third dimension of the principle is the obligation to take pro-active measures in cases of jeopardizing of the two previous dimensions.

2.1 Humanity as a principle informing subjects of international law

The expansion of the notion of solidarity encompassing the whole of humanity (as a group) gives rise to a legal collectivity. This legal collectivity originates, on its turn, two separate sub-principles

16 The International Court of Justice referred to 'elementary considerations of humanity' as "general and well-recognized principles" in *Corfu Channel Case* (UK v Albania) (Merits) [1949] ICJ Rep.4. p. 22. However, it seems to us that 'considerations' would not be yet a normative concept but rather a factual finding from which basic principles emanate. The Court would in that case be using a metonymy, substituting the principles from the group of considerations from which they emanate. A more precise use of the expression 'basic considerations' for example was done by the Court for deriving principles from facts such as 'the close dependence of the territorial sea upon the land domain', 'the more or less close relationship existing between certain areas and the surrounding land' and 'certain economic interests peculiar to a region'. *Fisheries case* (United Kingdom v Norway) Judgment of December 18, I95I ICJ Rep.1951, p.116, at p.133.

17 *See* for example the principle of sustainable development discussed in SANDS Philippe, *Principles of International Environmental Law*, 2nd Edn (Cambridge University Press, Cambridge 2003), pp. 561-566.

which found their way through history even though facing several setbacks. The first is that the universe of subjects of law encompasses all individuals. The second is that this collectivity itself has become a subject of international law bearer of rights.

Before proceeding to the analysis of this principle, a note should be made about the propriety of including this first dimension in the realm of general principles of law. It could be argued that this dimension of what we define as the principle of humanity belongs to the study of the subjects of international law. Although this is true, the delimitation of subjects is itself based on fundamental principles that can be expressed in normative formulations. As shall be demonstrated, the principle of humanity could be described as establishing that international law *shall* have amongst its subjects all individual human beings and humanity as a whole for a great number of purposes. This dimension of the general principle of international law is a constitutional one *par excellence* since it amounts to the delimitation of the personal scope of application of the law[18].

2.1.1. A legal community encompassing all human beings

The process of the formation of an international community encompassing all human beings can be understood from the vertical and horizontal perspectives.

2.1.1.1. Vertical expansion of subjects of international law

The traditional (often called *Westphalian*[19]) approach to modern international law identified States as the sole subjects of international law. In practical terms, this meant mostly European and Western States accompanied by few exceptions. Though the philosophical notion of humanity as a collectivity was already established, international law was perceived as being the law governing a society of States only. This monopoly was already broken with the emergence

18 ROSENFELD Michael, *The identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge, New York 2010), pp. 65-70.

19 *See e.g.* GROSS Leo, "The Peace of Westphalia, 1648-1948", *AJIL*, vol.42 (1948), pp.20-40; CANÇADO TRINDADE, Antônio Augusto, *International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law (II)*, (*RCADI*, No. 317, The Hague 2005), p.27. SIMMA Bruno, *From bilateralism to community interest in international law* (*RCADI*, No. 250, The Hague 1994), p.257; MANI V.S., *Humanitarian intervention today*, (*RCADI*, No. 313, The Hague 2005), p.133.

of other organizations[20] which would have their juridical personality under international law recognized as *e.g.* the United Nations[21] and the International Committee of the Red Cross[22]. The individual, however, had a slower (re)insertion into the realm of subjects of international law.

The perception that international law covered only the relations between States was at odds with the *substratum* which founded modern international law on the view of its first thinkers. These pioneers identified international law as a law to govern the relations within humanity as a collectivity[23]. Nevertheless, the European concert of powers, later allied with the predominance of the positivist thinking, successfully excluded individuals from international law in main stream doctrine[24], despite various dissenting voices[25].

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20 CANÇADO TRINDADE Antônio Augusto, *Direito das Organizações Internacionais*, 3rd Edn. (Del Rey, Belo Horizonte 2003), pp. 659-668.

21 *Reparations for injuries suffered in the service of the United Nations* (Advisory Opinion), ICJ Rep.1949, p.174, at pp. 178-179.

22 *See* Statutes of the International Committee of the Red Cross, available at http://www.icrc.org/web/eng/siteeng0.nsf/html/icrc-statutes-080503#a1, last visited at 25 September 2010, Art.2.

23 Before the rise of the positivist doctrine, the individual had already been considered directly as a subject of law beyond the borders of the State. These views were expressed in ancient civilizations and in the views of some of the founding fathers of international law, as Francisco de Vitoria, Francisco Suárez, Alberico Gentili and Hugo Grotius. CANÇADO TRINDADE (2005-I), supra note 7, pp. 252-257.

24 Amongst the authors adopting this view are Triepel, Anzilotti, Strupp, Kaufmann and Redslob.

25 Already in 1886 Chao Phya Aphay Raja (then main adviser to King Rama V of Thailand), was of the view that in his days "*les progrès de la conscience publique nous permettent d'affirmer comme une vérité incontestable que le développement et, par conséquent, la liberté rationnelle de l'être humain forment le but principal et légitime de tout droit, national ou international*" cited in SUCHARITKUL Sompong, "L'humanité en tant qu'élément contribuant au développement progressif du droit international contemporain", in DUPUY René Jean (ed) *L'avenir du droit international dans un monde multiculturel / The Future of International Law in a Multicultural World* (Nijhoff, La Haye 1984), pp. 415-444, at pp. 418-419. *See* also POLITIS Nicolas-Socrate, *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux*, (*RCADI,* No. 006, La Haye 1925), in particular pp.5-24; SPIROPOULOS Jean, *L'individu et le droit international*, (*RCADI,* No. 030, La Haye 1929).

The notion of the State as the subject *par excellence* of international law started to be developed with Vattel[26]. Subsequently Hegelian philosophy reflected in international law a belief on the part of mainstream authors that the State is a supreme ideal, an end on itself, a power that is bound to its 'will' only[27]. Hence, only States could create a law binding on themselves, through bilateral relations with their peers, in a strictly contractual relation[28].

It is true that this moment of predominance of States had its merits for the development of international law. The focus on States' mutual relations on sovereign equality had its climax during the years when the *jus contra bellum* was consolidating itself. It certainly played an important contribution in the limitation on the use of force. As international law thinking was focused on the principle of non-intervention, the development and crystallization of the latter gradually consolidated the prohibition of use of force[29].

On the other hand, the predominance of States as subjects of international law overshadowed humanity as its ultimate aim. Human beings became distant objects, which international law was powerless to protect, as they were a reserved domain of the State[30]. In this context massacres, colonial exploitation, mass persecutions, and the holocaust were carried out shielded by the Hegelian sovereignty from international scrutiny.

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26 BEAULAC Stéphane, "Emer de Vattel and the Externalization of Sovereignty", in *JHIL*, vol. 05 (2003), pp. 237-292.

27 SPIROPOULOS (1929), supra note 24, p. 258.

28 STRUPP Karl, *Les règles générales du droit de la paix* (*RCADI,* No. 047, La Haye 1934), pp. 304-307.

29 At that time, international law itself often referred to the Law of Peace, though the prohibition of use of force was still being crystallized. *See e.g.* STRUPP (1934), supra note 27, pp. 491-522; and KAUFMANN Erich, *Règles générales du droit de la paix* (*RCADI,* No. 054, 1935), pp. 574-305.

30 However, already in the beginning of the 20th century some steps were given for the protection of individuals through, in particular, the emergence of refugee law and rights of minorities, especially in Europe. On the origins of refugee law *see* HATHAWAY James, "The Evolution of Refugee Status in International Law: 1920-1950", in *ICLQ*, Vol.33/2 (1984), pp. 348-380. The Permanent Court of International Justice (PCIJ) was called to decide cases related to rights of minorities in *Rights of Minorities in Upper Silesia (Minority Schools)* (Germany v Poland) [1928], (PCIJ Series A., No. 15); *Access to German Minority Schools in Upper Silesia* (Advisory Opinion) [1927] (PCIJ, Series A./B., No. 40); *Case concerning the Polish Agrarian Reform and the German Minority* (Germany v Poland) [1933] (PCIJ, Series A./B., No. 58 and No. 60); *Minority Schools in Albania* [1935] (Advisory Opinion) (PCIJ Series A./B., No. 64).

After the Second World War a final blow to the monopoly of the State is given. The individual is raised to a subject bearer of rights and duties in international law. Human rights law is consolidated in the global level with the Universal Declaration of Human Rights. International criminal law is substantially developed by the Nuremberg and Tokyo Tribunals. Together with this movement, humanity itself as a subject of international law accrues, as illustrated by the jurisprudence of these tribunals and the emergence of treaties spelling out this collective universal subject of international law, as will be seen further[31].

2.1.1.2. The horizontal expansion of the subjects of international law

Human solidarity has had a gradual horizontal growth through the ages, creating different 'international laws'. In its first stages, the development of human solidarity is verified, in the religious sense between peoples united by the same faith, and in a laic sense between peoples united by reason. These initial stages are necessary to develop the idea of a common law to a humanity progressively expanded on the eyes of each people, which are followed by the expansion of the first formulations of international law[32].

The same occurs with modern international law. From the 1870s to the eve of the Second World War, roughly 60 countries existed and participated in the international society. Others were seen as non-self governing peoples, non parties of the civilized world. International law was essentially a European construction for European and Europeanized cultures. While it was possible to recognize rights of minorities in Europe and cases of refugees who were protected,[33] the

31 Section 2.1.2.2.

32 PREISER Wolfgang, KOLB Robert, *Le Droit International Public des Anciennes Cultures Extra-Europeennes: Amérique précolombienne, Iles polynésiennes, Afrique noire, Sous-continent indien, Chine et ses régions limitrophes* (Pedone, Paris 2010), p. 2.

33 In the beginning of the 20th century some steps were given for the protection of individuals through, in particular, the emergence of refugee law and rights of minorities, especially in Europe. On the origins of refugee law *see* HATHAWAY James, "The Evolution of Refugee Status in International Law: 1920-1950", in *ICLQ*, Vol.33/2 (1984), pp.348-380. The PCIJ was called to decide cases related to rights of minorities in *Rights of Minorities in Upper Silesia (Minority Schools)* (Germany v Poland) [1928], (PCIJ Series A., No. 15); *Access to German Minority Schools in Upper Silesia* (Advisory Opinion) [1927] (PCIJ, Series A./B., No. 40);

individual from the Asian-Pacific colonies were still barely treated as subjects of law. The opinion of these inhabitants also weighted little to the formation of an *opinio juris communis* in the eyes and words of mainstream scholars.

With the emancipation of new States, the emergence of communism and of the Third World, the 'geography of international law' changed and brought to the international law-making new (and ancient) values and demands that originated a more pluralistic perspective of the law[34].

The equal is no longer just the European or the Europeanized, the 'civilized', but the whole of humanity. As different countries are included in the global system, so are their different cultures, values, needs and demands. The universal juridical conscience is finally truly universal, as it embraces all peoples of the world. This reflects on the shaping of the law. Self-determination, the indivisibility of all human rights (civil political and economic, social and cultural rights), the rights of indigenous peoples, international environmental law, are some of the fruits of this new multicultural dimension of humanity as a legal collectivity.

The universalization of international law allows for a horizontal universalization of humanity as a legal collectivity, making all individuals subjects of the construction of this new international law.

This expansion does not mean, though, that humanity establishes a unique set of rights and obligations for all individuals. Differences in cultures, economic systems, political regimes, entail that humanity shall also include alterity, *i.e.*, respect to others identity. The universality of humanity by no means implies the pasteurization of the different identities, but a search and identification of what is

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Case concerning the Polish Agrarian Reform and the German Minority (Germany v Poland) [1933] (PCIJ, Series A./B., No. 58 and No. 60); *Minority Schools in Albania* [1935] (Advisory Opinion) (PCIJ Series A./B., No. 64)

34 *See* MANI (2005), supra note 18, pp.29-30, where referencing Radha Binod Pal, the author states that "(…) the geography of international law" has changed, with the large-scale emergence into independence of countries of Asia, Africa and Latin America. Although they are known as "new States", many of them are in fact ancient societies, representing ancient civilizations which existed at a time when what has come to be recognized as the European civilization had not even germinated. They have brought on to the world stage their ancient values of human welfare, indeed a diversity of core social and cultural values."

common and should be preserved, respected and protected[35]. That which is shared by all the members of humanity makes humanity as a collectivity an independent subject itself of international law as will be seen in the next topic.

2.1.2. Humanity as an independent subject of international law

As humanity gradually consolidated as a legal collectivity it became itself a separate subject of international law. This subjectivity includes lawmaking capacity and bearer of rights.

2.1.2.1. Humanity as a lawmaking subject

As affirmed by the new natural law scholars, international law emanates from material facts reflected in the *status conscientae* of humanity, which is translated as general principles of law[36]. The consolidation of humanity understood as a universal legal collectivity of individuals gives rise to an expanded notion of *status conscientae*, the universal juridical conscience. The juridical conscience of the human collectivity makes it, and not the States, the lawmaking subject *par excellence* of general international law. In face of the recognition of the universal juridical conscience, to consider the State as the sole subject of international law would be *mutatis mutandis* tantamount to consider parliamentarians as the sole subjects of domestic law, and not the people itself. This does not mean that Humanity replaces States as the sole lawmaking subject of international law, but simply evidences that there is in fact a plurality of subjects contributing to lawmaking processes.

This was recognized in the preamble of the United Nations Charter which declares "We the Peoples of the United Nations" "thereby showing that all that ensues is the will of the peoples of the world" and that weigh should be given to global public opinion, as the opinion of community of human beings and not of States.[37]

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35 YASUAKI Onuma, *A Transcivilizational Perspective on International Law: Questioning Prevalent Cognitive Frameworks in the Emerging Multi-Polar and Multi-Civilizational World of the Twenty-First Century* (*RCADI*, No. 342, The Hague 2009), p. 95 and pp.100-150.

36 *E.g.* Verdross and, more recently, Cançado Trindade.

37 *Legality of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, at 441.

This will is not of a single predominant culture which imposes itself upon all others. A true quest for the *status conscientae* of humanity has to take into account what is common and what differs from the different cultures who participate in the construction of humanity as a collectivity extracting their common core and its developments in legal conscience through time[38].

2.1.2.2. Humanity as a subject of rights

The principle of humanity can be "invoked by reference to humankind as a whole, in relation to matters of common, general and direct interest to it."[39]

As the notion of human solidarity expanded, humanity starts to appear in legal documents as a subject itself of rights through the statement of the principle of humanity. In this sense humanity was gradually seen as 'a victim of' or 'the value violated' by acts of depriving whole groups of individual of their existence or subjectivity. More recently humanity has become a subject entitled to property or some kind of ownership over some goods considered to be its shared heritages.

In 1815, European powers had already declared the traffic of slaves as an abhorrent act against the principles of humanity and of universal morals[40]. This was a first step of the growing perception that the dehumanization of whole groups was not to be tolerated and would later be considered international crimes. One hundred years later, in face of mass killings and deportations of Armenians, the allied British, French and Russian Governments affirmed that such acts were 'crimes against humanity and civilization' The initial proposed statement suggested to the use of 'crime against Christianity', however, it was pondered that what was affected by such acts was not only Christianity but humanity as a whole (including Muslims

38 *See e.g.* the reasoning of Judge Weeramantry in his dissenting opinion to the *Legality of Nuclear Weapons* case where he draws the concepts of international humanitarian law from Hinduism, Buddhism, different Chinese schools of thought, Christianity, Islam and African traditional laws (para.478-482); In the same sense *see* PICTET (1985), supra note 10, pp. 1-25. In a more general perspective *see* YASUAKI (2009), supra note 34.

39 CANÇADO TRINDADE (2005-I), supra note 7, in particular p. 323.

40 Declaration of the Powers on the Abolition of the traffic of Negros, of February 8, 1815; Annex to the Final Act of the International Peace Conference. The Hague, July 29, 1899

themselves)[41]. Though the reasons for such change might have been political, by coining the expression 'crimes against humanity', the new term reverberated in the international community acquiring a meaning of its own, and contributing to consolidate the perception that the practice of such crimes was an attack against humanity itself. After the first world war there was an attempt to criminalize and prosecute what was considered as crimes against humanity, but then it prevailed the view that the laws and 'principles of humanity' were not certain "varying with time, place and circumstance", and the project was paralyzed[42].

At the time of the Second World War, the State sovereignty centered international law had criminalized violations of international humanitarian law against protected persons. The concept of protected persons was restricted and did not include, for example, own nationals and nationals of allied States[43]. Many of the most heinous acts perpetrated during the conflict were committed exactly against those excluded from international protection, such as nationals from Germany and its allies who were from persecuted minorities including Jews and Romani peoples. After that an international tribunal sitting in Nuremberg would prosecute major war criminals from Germany. By the suggestion of Professor Hersch Lauterpacht[44] certain inhumane acts against any civilian population in connection to other international crimes were included as 'crimes against humanity' in the list of crimes under the jurisdiction of the Court. Regardless of the controversies relating to criminal law principles, the fact is that the incorporation of this crime to an international instrument further crystallized the notion that the dehumanization of individuals was no longer accepted by the collective juridical conscience of that time. Crimes against humanity were re-stated in

41 *See* CASSESE, *International Criminal Law*, 2nd ed. (Oxford University Press, Oxford 2008), p. 101-102.

42 *Report presented to the preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and the War and on the Enforcement of Penalties*, in Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Violations of the Laws and Customs of War, Report of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919 (Clarendon Press, Oxford 1919), pp. 25-26.

43 *See e.g.* Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929, Art.1

44 KOSKENNIEMI Martti, "Hersch Lauterpacht and the Development of International Criminal Law", in *JCIL* (2004) Vol.2, pp. 810-825, at p. 811.

later instruments concerning the *Ad Hoc* international tribunals and the International Criminal Court[45]. Case law developed from these explains that humanity itself is the victim of such acts.

> Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.[46]

The list of crimes which has humanity as a passive subject or victim was enlarged with the Genocide Convention[47] and the Apartheid Convention[48]. The legal value affected by these international crimes does not belong only to the victims themselves but to the whole of humanity. The preamble of the Genocide Convention, for example, reads: "Recognizing that at all periods of history genocide has inflicted great losses on humanity; Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required" (emphasis added). The text makes it clear that the subject of international law affected by Genocide is not only the direct victim group, but humanity/ mankind as a whole. This is confirmed by the International Court of Justice in the *Reservations* case where it affirms that:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as

45 Rome Statute Rome Statute of the International Criminal Court, circulated as UN Doc. A/CONF.183/9 of 17 July 1998, Art.7; Statute of the International Tribunal for the Former Yugoslavia, Adopted by UNSC Res. 827 of 25 May 1993, Art.5; Statute of the International Criminal Tribunal for Rwanda, Adopted by UNSC Res. 955 of 8 November 1994, Art. 3.

46 *Prosecutor v Dražen Erdemović* (ICTY, IT-96-22-A, Judgment, 07 October 1997), para.14, para.28 (emphasis added). The individual dimension of humanity will be discussed *infra* at 2.2.

47 Convention on the Prevention and Punishment of the Crime of Genocide, entered into force Jan. 12, 1951 UNTS, vol. 78, p. 277

48 International Convention on the Suppression and Punishment of the Crime of Apartheid, Adopted by the General Assembly of the United Nations on 30 November 1973, (1976) UNTS, vol.1015, p. 243

> "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946).[49]

In the celebrated Barcelona Traction case *obiter dictum*, it was affirmed that:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[50]

It is true that the concept of the international community as a whole as in "the obligations of State towards the international community, as a whole" mentioned in this passage is not to be confused with 'humanity' as a subject of international law. It refers to the community of States. However, the examples provided of *erga omnes* obligations clearly encompass acts that harm not the States as such but humanity itself (slavery, genocide, racial discrimination). The international community (understood as the community of States) and its member States have a legal interest in

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49 *Reservations to the Convention on Genocide* (Advisory Opinion) ICJ Rep. 1951, p. 15, p. 23 [emphasis added].

50 *Barcelona Traction, Light and Power Company, Limited* (Belgium v Spain) ICJ Rep. 970, p. 3, paras.33-34. This *dictum* appears to have been issued with the aim of erasing the position decided four years earlier in the controversial Second phase of the *South West Africa dispute* when the Court adopted the much criticized position by casting vote to dismiss the case for lack of legitimacy of the parties. *See* ADEDE Andronico Oduogo, "Judicial Settlement in Perspective", in MULLER Sam., RAIC David THURÁNSZKY Hanna. (Eds.) *The International Court of Justice: Its future role after fifty years* (Kluwer Law International, The Hague 1997), pp. 47-81, at pp. 51-55.

relation to such obligations *erga omnes* only insofar representatives of humanity itself[51].

By consecrating humanity as an autonomous subject of international law the principle of humanity does not restrict this subjectivity to a passive role of victim of international crimes. The principle of humanity makes of 'humanity as humankind' a dynamic subject exercising various roles in international law, in particular, recognizing it as entitled to property and other legal interests.

Outer space exploration inaugurated as a legal concept of a common heritage of mankind[52], part of what would develop as the principle of commonage, which spread through other areas of international law as the Law of the Seas[53] and International Environmental Law[54], becoming the basis to the UNESCO World Heritage Convention[55]. The principle of commonage, in particular

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51 As explained by Sucharitkul: "L'humanité n'est pas identifiée avec la communauté internationale qui est devenue institutionnalisée, tandis que l'humanité en tant que telle est composée de ses éléments humains, et ainsi constituée par la totalité ou l'entier des espèces humaines de toutes les races et civilisations. Ceci ne veut pas dire ou contredire que l'humanité ne pourrait être représentée par la communauté internationale. C'est bien la communauté mondiale qui devrait représenter l'humanité dans toute son étendue, dans toute son ampleur et dans toutes ses manifestations. Par conséquent, les deux notions, ces deux expressions ne sont ni identiques ni remplaçables, car l'humanité en tant que telle est un élément constitutif de la communauté internationale et mondiale ou de la colectivité interétatique, et cette dernière n'est investie que du caractère représentatif de l'humanité, et ne pouvant agir qu'en tant que représentant de l'humme parmi ses autres qualités représentatives." SUCHARITKUL (1984), supra note 24, pp. 419-420.

52 Outer Space Treaty, which established *inter alia* shared benefits from outer space exploration to all States (Art.1), the prohibition of national appropriation of celestial bodies (Art.2) and the exclusive peaceful use of outer space (Art.3).

53 In the same year the Outer Space Treaty was opened for signature, the Maltese diplomat, Arvid Pardo, proposed the expression of the 'common heritage of mankind' to designate similar principles BUCK Susan J., *The Global Commons: An Introduction* (Island press, Washington D.C. 1998 *Note verbale*, 17 August 1967, Permanent Mission of Malta to the UN Secretary General, UN Doc. A/6095; *See also* Pardo's speech of 1 November 1967, UN. Secretary General, UN Doc. A/C.1/PV.1515. The principle established itself gradually in the Law of the Seas, finding its way as a 'constitutional principle' governing the 'Area' (or the seabed beyond national jurisdiction) UN Convention on the Law of the Sea [UNCLOS], UN Doc. A/CONF.62/122, entered into force 16 November 1994, Arts. 1.1(1), 136-149.

54 *See* BUCK Susan J., *The Global Commons: An Introduction* (Island press, Washington D.C. 1998).

55 Convention Concerning the Protection of the World Cultural and Natural Heritage, Adopted in 16 November 1972, UNTS, vol.1037, p.151.

in its original formulation of 'common heritage of mankind', confers the ownership of certain resources to humanity itself. Humankind acquires legal personality and becomes a subject of law, not in relation to a similar collectivity, but in relation to any 'partial person' who intends to affirm its particular right as exclusive over domains that are declared as common.[56] This dimension of the principle also extends through time as informed by the principles of sustainable development and inter-generational equity according to which today's humanity may not deprive the generations to come of the benefits of this shared goods[57].

Also, humanity is the primary interested in the limitation of weapons of mass destruction, as the collective impact of these weapons makes as their victims not only enemy armies, but has a much wider object. Since these weapons are capable of destroying all life in the planet, they imperil all that humanity ever stood for, and humanity itself[58]. Hence, the duty to cooperate for a permanent elimination of weapons of mass destruction would not be owed to other States only by a treaty provision, but to the international community as a whole and to humanity itself [59].

2.2 Dignity of the Human Person

The principle of humanity as human dignity is one of the most established principles of law existent; however, only with the expansion of humanity (as a collectivity) could it transcend the national State border and be applied as a legal principle to the whole of humankind.

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56 LEGAZ Y LACAMBRA Luis, "La Humanidad, Sujeto de Derecho" in *Estudios de Derecho Internacional Publico y Privado: Homenaje al Profesor Luis Sela Sampil, Vol. II* (Universidad de Oviedo, Oviedo 1970) pp.549-559, at pp. 557-558.

57 KISS Alexandre Charles, *La notion de patrimoine commun de l'hummanité* (*RCADI*, No. 175, La Haye, 1982), p.243.

58 *Legality of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry, at p.447.

59 The duty negotiate in good faith the nuclear disarmament is the subject of the case pending before the International Court of Justice. See ICJ Press Release, *The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament*, Press Release No. 2014/18 of 25 April 2014, available at http://www.icj-cij.org/presscom/files/0/18300.pdf, last visited 15 April 2015.

The principle of humanity accrues from the concept of human dignity and the natural reaction provoked by the impact of its deprivation in the universal juridical conscience. According to this principle, every human being has the right to have her/his human nature recognized as well as essential attributes, potentials and capacities that this nature entails.

In the words of Judge Weeramantry "the fundamental principle of the dignity and worth of the human person" is the principle "on which all law depends"[60], and is a "cardinal principle to international law".

The principle of humanity as human dignity materializes, first in the absolute prohibition of acts that dehumanize individuals, in particular the prohibitions of torture, inhuman or degrading treatment, and the arbitrary deprivation of life; and second, it entails that every human being should have the means to realize its own potentials, in particular should have the 'right to the law' and to basic conditions to live in dignity.

2.2.1. The prohibition of dehumanizing acts

The prohibition of dehumanizing acts has its origins in the conscience of the unity of humankind and the equality of its members.

Arbitrary killings, torture, inhuman treatment find their prohibitions in ancient cultures and legal systems[61]. In modern times, the movement for prohibition of slavery takes a first contribution by declaring that this was an act against humanity[62]. It was reflecting about times of war, where many of the most heinous acts are committed, that modern international legal thinking started to codify prohibitions of acts that dehumanize the human being in a more systematic manner. The European age of Enlightenment had already emphasized that members of enemy armies were opposed to each other as soldiers only, and not as human beings[63], and hence even members of enemy forces were to be entitled to protection and respect when no longer exercising such function. The acknowledgement that

60 *Legality of Nuclear Weapons*, Dissenting Opinion of Judge Weeramantry at p. 433.

61 *See e.g.* JAYATILLEKE, Kulatissa Nanda, *The principles of international law in Buddhist doctrine*, (*RCADI*, No. 120, The Hague, 1967), pp. 514-515.

62 *See supra* section 2.1.2.2.

63 ROUSSEAU, Jean-Jacques, *Du Contrat Social ou principes du droit politique* (Metalibri, São Paulo 2008), p. 6.

even enemy soldiers were equals in humanity led to instruments guaranteeing their protection and respect. From this the prohibition of unnecessary harm and superfluous injury emerged, and was first codified in the Saint-Petersburg Declaration[64]. Through what became known as the Martens Clause, international humanitarian law guaranteed that even where a situation was not covered by the codified law, every person remained "under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[65] In its more modern formulation the clause refers to the principles of humanity (instead of laws of humanity), which implies the respect for human dignity and its corollary of prohibition of acts that dehumanize the individual. With the 1949 Geneva Conventions, the minimum core of the obligations enshrining the prohibitions to dehumanize the individual is codified in common Art.3 of the conventions which States:

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out

64 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868. The relevant part of the preamble reads: *Considering: That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity;* [emphasis added].

65 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, 9th perambulatory clause.

> of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for.[66]

The essence of these obligations was codified also in human rights instruments as the prohibition of arbitrary deprivation of life and of torture, inhuman or degrading treatment[67]. These core obligations can be seen as the crystallization of the principle of humanity as human dignity which prohibits dehumanizing acts.

2.2.2 The basic right to the law without discrimination

Human dignity is not only a defense against acts which dehumanize the individual, but also includes the basic right of the individual to access to the law in equality of conditions with other human beings. This aspect of the principle of humanity was declared of foundational value in the first preambulatory clause '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'[68]. Human dignity can be understood not only by the prohibition of acts against the individual, but also requires the right of the individual to access a legal system to assure these rights are protected, and therefore be able to safeguard their human dignity. This aspect of the principle of humanity was recognized for example in the Inter-American Court of Human Rights *Undocumented Migrants case*[69].

Certain rights and remedies can be restricted to citizens and certain categories of persons, varying from country to country according to local morals, societal demands and values. On the other

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66 1949 Geneva Conventions' | Common Art.3; Though according to the text provision it is only applicable to non-international armed conflicts, as recognized by the International Court of Justice these provisions constituted a minimum yardstick. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, ICJ Rep. 1984, p. 392, para. 218.

67 ICCPR, Arts.6(1) and 9(1); American Convention on Human Rights, Arts.4(1) and 7(3); African Charter on Human and Peoples' Rights, Arts. 4 and 6;

68 Universal Declaration of Human Rights, UNGA Res. 217(III), UN Doc. A/810 (1948).

69 *Juridical Condition and Rights of the Undocumented Migrants* (IACtHR Advisory Opinion OC-18/03 of September 17, 2003), paras. 79-110.

hand, the rights enshrining directly from the principle of humanity as human dignity are to be guaranteed to all individuals without any discrimination, including through the provision of legal remedies to safeguard them. As stated by judge Cançado Trindade, then president of the Inter-American Court, in his concurring opinion to the abovementioned case:

> The safeguard and prevalence of the principle of respect of the dignity of the human person are identified with the end itself of Law, of the legal order both national and international. By virtue of this fundamental principle, every person ought to be respected by the simple fact of belonging to the humankind, independently of her condition, of her statute of citizenship, or any other circumstance. The principle of the inalienability of the rights inherent to the human being, in its turn, is identified with a basic premise of the construction of the whole *corpus juris* of the International Law of Human Rights[70].

Hence, this core of rights enshrining from humanity as human dignity has as a corollary remedies indispensible for them to be always assured and protected.

2.2.3. The right to basic conditions to live in dignity

Human dignity goes beyond prohibiting dehumanizing acts and assuring the right to the law, but also demands the provisions of minimum conditions of exercising the human potential, including freedom from hunger, freedom from ignorance (or the right to basic education), basic social rights and the right to work. By not providing basic conditions for populations to emancipate themselves from basic needs, human potential cannot be minimally achieved. The passive omission in face of basic deprivations is almost as shocking as acts dehumanizing the individual. The necessity of achieving these minimum demands alerts for the pressing need for a legal dimension imposing a duty to act towards the other. This need is materialized in the next dimension of the principle of humanity, or humanity as humaneness.

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70 *Undocumented Migrants case*, Concurring Opinion Judge Cançado Trindade, para.56. *See also* MAURER Béatrice, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme* (CERIC/Univ. d'Aix-Marseille, Paris 1999), p. 18.

2.3 Humaneness – Humanity as obligation to humankind

The notions of humanity as humaneness towards others accrue from notions of charity, mutual assistance, but essentially from the idea of solidarity between humans itself, which transcends all religions and cultural heritages. This dimension of the principle is equivalent to the principle of humanity as defined as a fundamental principle of the Red Cross:

> The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity– to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.[71]

This idea is materialized in the legal realm as obligations to all subjects of international law of mutual assistance reflecting in the duty to cooperate in the realization of human dignity, to ensure respect to rights accruing from the principle of humanity, and from the various doctrines relating to "humanitarian" intervention, more recently redefined and limited as the responsibility to protect.

2.3.1. Humanity as a principle demanding action and cooperation in assisting the other

The preamble of the UN Charter declares that "[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." This aspect of humanity is a general principle of law foreseen in the most various systems of law.

In religious systems this can be seen in the Hinduist *Dana*, the Jewish *Tzedakah*, the Chiristian *Charity,* or the muslim *Zakat*. The imposition by States domestically of social security systems, the special treatment for those in most need and poverty reduction mechanisms are example of legal measures which find their validity in this principle. The "tax payers' money" or the social security taxes paid by a part of the population economically active of a State pays for the necessities of the other part of the population or for shared

71 PICTET Jean, *The Fundamental Principles of the Red Cross: commentary* (ICRC, Geneva 1979), Part I.

goods. All these measures, religious or legal, are aimed towards assisting the other whose situation of need is such that his human dignity might be affected and unattainable without positive action from his peers, the local community or the State.

This aspect of the principle of humanity is also present in international law as a general principle which informs other sub-principles and rules.

In the WTO system, for example, the principle of special and differentiated treatment for developing countries is foreseen[72], and exceptions for the granting of subsidies are made for the financing of underdeveloped regions[73]. The ultimate aim of these norms providing for these exceptions to general free trade rules can be said to rest not on the economic development of the measures themselves, but on promoting the minimum standards for local populations to provide their own needs and allow the basic material conditions for the exercise of human dignity.

Another example of the translation of this sub-dimension of the principle of humanity can be found in the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) which sets as objectives, *inter alia*, to "[e]stablish a legal framework for preventing internal displacement, and protecting and assisting internally displaced persons in Africa"[74]; and also to "[e]stablish a legal framework for solidarity, cooperation, promotion of durable solutions and mutual support between the States Parties in order to combat displacement and address its consequences"[75]. The Kampala Convention also provides obligations enshrining the principle of humanity as acting for providing a minimum, *inter alia*, by establishing obligations to:

> Ensure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid

72 KECK Alexander & LOW Patrick, *Special and Differential Treatment in the WTO: Why, When and How?* World Trade Organization Economic Research and Statistics Division, Staff Working Paper ERSD-2004-03, May, 2004. Available at www.wto.org/english/res_e/reser_e/ersd200403_e.doc. last on 31 August 2010.

73 The WTO Agreement on Subsidies and Countervailing Measures, Art. 8.2 (b).

74 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa [Kampala Convention], Adopted on the 22 October 2009, Art. 2.b.

75 Kampala Convention, Art.2.c.

and unimpeded access by humanitarian organizations and personnel[76].

Promote self-reliance and sustainable livelihoods amongst internally displaced persons, provided that such measures shall not be used as a basis for neglecting the protection of and assistance to internally displaced persons, without prejudice to other means of assistance[77].

A cycle of Word Conferences of the United Nations, initiated in the 1990s brought to the center of the international agenda the human person and their minimum demands for a life in dignity. From these demands a duty to cooperate towards the implementation of minimum rights relating to the exercise of human dignity accrued. Amongst these world conferences convened by the United Nations are, *inter alia*, those on: Environment and Development, 1992; Human Rights, 1993; Population and Development, 1994; Social Development, 1995; Women, 1995; Habitat-II, 1996; International Criminal Jurisdiction, Rome, 1998; Struggle against Racism, Durban, 2001[78]. In September 2000, the Millennium Summit was convened in New York, and adopted a new 'global partnership' known as Millennium Development Goals. Through these instruments a commitment was agreed amongst all States to *inter alia* end poverty and hunger, universal education, gender equality, maternal health and combat of HIV/Aids[79]. All of these goals can be seen as conditions *sine qua non* for the universal exercise of human dignity. Though of a programmatical nature, these goals can be considered as having a legal dimension on the obligation to cooperate in good faith for their materialization.

Hence, the principle of humanity, informed by a common societal demand of "action in a spirit of brotherhood", gives rise to a series of legal obligations having various reflections in international law.

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76 Kampala Convention, Art.3.j.

77 Kampala Convention, Art.3.k.

78 For a discussion on the role of these conferences in the humanization of international law *see* CANÇADO TRINDADE (2005-II), supra note 18, pp. 247-268.

79 United Nations Millennium Declaration, UNGA Res. A/55/2 of 18 September 2000.

2.3.2 The Duty to ensure respect

In Common Art.1 of the Geneva Conventions, "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". The duty to 'ensure respect' was interpreted by the ICRC commentaries as not only meaning a duty to ensure the respect by all those over whom each party has authority and the representatives of this authority, but would also refer to the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention"[80]. In this way, the humanitarian obligations that these conventions enshrine were seen as an *erga omnes* obligation, in which the compliance with them became a shared responsibility of international community towards humanity. Therefore, the duty to ensure respect is a materialization of the principle of humanity as humaneness.

The 'duty to ensure respect' formula was repeated with some slight variations in other instruments for the protection of the human person[81], though circumscribed within jurisdiction limitations of instruments of human rights. The European Convention of Human Rights establish the duty to "secure to everyone within their jurisdiction the rights and freedoms" of the convention[82]. The ICCPR establishes that each State party to the Covenant "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" in the instrument[83]. The American Convention on Human Rights establishes in its Art.1:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

80 PICTET Jean (coord.), *Commentary to the Geneva Conventions of 12 August 1949*, vol. I, (ICRC, Geneva 1952), pp. 25-26.
81 *E.g.* Protocol (I) Additional to the Geneva Conventions, Art. 1.1.
82 European Convention for the Protection of Human Rights and Fundamental Freedoms, UNTS, vol. 213, p. 222, Art. 1.
83 ICCPR, Art. 2.

> 2. For the purposes of this Convention, "person" means every human being.

With some variation the formula is also repeated in the African Charter of Human and People's Rights[84] and in the Arab Charter of Human Rights[85].

The jurisdictional limitation in human rights instruments is natural since not all human rights consecrated in regional systems are universal, some being adapted to regional values. However, a universal extraterritorial approach to the obligation to ensure respect has been recently developed through the UN Human Rights body reform[86]. The Universal Periodic Review, for example, enables States to peer review each others' human rights records[87]. The comments made by each State to the reports presented by their peers though not binding, contribute for the universal respect to human rights and the exposure of possible violations.

The duty to ensure respect can be seen also as a basis for the *dictum* of the ICJ in the Namibia Advisory opinion where it states that:

> As to the general consequences resulting from the illegal presence of South Africa in Namibia, all States should bear in mind that the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.[88]

The passage was clearly directed to all States, even those who are not a party to the United Nations. Hence, even beyond the 'sacred trust' system, the consequences attacking the dignity of the people of Namibia were to be tackled by the whole of the international community, who should ensure that South Africa would respect these basic rights.

Therefore, in what concerns basic rights of the human person affecting the exercise of its dignity, the principle of humanity as

84 African Charter, Art.1.

85 Arab Charter on Human Rights, May 22, 2004, reprinted in (2005) IHRR, Vol.12, p. 893, Art.3.

86 UNGA Res.60/251 of 3 April 2006.

87 *Idem*, para.5 (e) and 9.

88 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) ICJ Rep.1971, para.127.

humaneness impose an obligation on all States to ensure respect, including of third States, to these obligations. The principle is a general one, and there remains a reasonable margin of appreciation on what measures should be taken for ensuring respect.

2.3.3. From Humanitarian Intervention to the Responsibility to protect and the Responsibility while protecting

From ancient times until the prohibition of resorting to the use of force in the 20th century, various philosophies have justified the intervention in other political entities for humanitarian purposes including Hinduism, Buddhism, Confucianism, Taoism, Islamic and Christian traditions and the Enlightenment thinkers[89]. During the late 1800s and early 1900s several authors advocated the right of third States to intervene in a State which committed abuses and inhuman actions by governments against their own citizens[90]. Stowell identified persecution, oppression (violation of rights of minorities), barbarous methods of warfare, injustices and rights of individuals as possible basis for humanitarian interventions[91].

Even at the time of predominance of the voluntary approach which tended to recognize the right of intervention, some dissenting voices were already expressed[92]. The doctrine of humanitarian intervention became more difficult to sustain in face of often hypocritical manner in which it was resorted to and the emerging prohibition of the use of force. In the first section of the International Law Commission, some of its members argued in the direction that the supposed right for humanitarian intervention was in fact an opportunist doctrine incorporated by some major powers[93].

With the emergence of the United Nations and the general prohibition of the use of force gaining institutional contours the power to use or authorize the use of force was concentrated in the Security

89 MANI (2005), supra note 18, pp. 34-112.

90 An overview of authors defending the position *see* STOWELL Ellery C., *La théorie et la pratique de l'intervention*, (*RCADI*, No. 040, La Haye, 1932), pp.138-140.

91 *Ibidem*, pp.141-144.

92 *E.g.* CALVO Carlos, *Le droit international théorique et pratique*, Vol.I, 5th edn. (Arthur Rousseau, Paris 1896), at pp. 266-267. The Argentinean professor emphasizes the inconsistent practice of non-intervention between European powers, and intervention by Europeans against Turkey and Latin American (pp. 348-351).

93 ILC, *Yearbook of the International Law Commission*, 1949, Vol. I, *e.g.* Vladimir M. Koretsky at pp. 70-71 and Jesus Maria Yepes at pp. 91-92.

Council[94]. The humanitarian argument for armed intervention faded away or was relegated to a mere tool of rhetoric to gain public support for operations. This is because the Charter only foresaw the authorization of use of force in the case of self-defense or as authorized by the Security Council to guarantee international peace and security. Even when other interests were on the table, the official argument of States for the use of force was always one of these two: threat to peace or self-defense. Intervention itself was also prohibited to the organization by the Charter's Article 2.7. Non-use of force and non-intervention were acknowledged by the ICJ as principles of general international law transcending the Charter obligations[95]. At times the humanitarian argument was advanced for justifying interventions, as in the case between United States and Nicaragua where the former argued that its intervention in Nicaragua consisted of a 'humanitarian assistance'. The argument was rejected by the ICJ for, *inter alia*, a clear lack of impartiality, violating the spirit of the principle of humanity[96].

In the 1990s the humanitarian argument for armed intervention re-accrued. The Security Council, which is supposed to deal with issues relating to international peace and security, issued resolutions calling for the halt of violations of human rights in *e.g.* Iraq, Somalia, Haiti and Former Yugoslavia[97]. *Ad hoc* international criminal tribunal were established or acknowledged by its resolutions in order to prosecute crimes in cases of serious violations of human rights and humanitarian law (war crimes, crimes against humanity and genocide)[98]. Some powers re-invoked humanitarian intervention as a justification (or excuse) for actions in Iraq and Kosovo, despite

94 UN Charter, art. 2.4 and chapter VII.

95 *Nicaragua case* (Merits), para. 99-110.

96 *Nicaragua case* (Merits), para. 242-242, where the court cited the principle of humanity as formulated in the ICRC's fundamental principles.

97 *E.g.* on Iraq *see* UNSC Res. 688, UN Doc. S/RES/688 of 5 April 1991; on Somalia *see* UNSC Res.794, UN Doc. S/RES/794 of 3 December 1992; on Haiti *see* UNSC Res.940, UN Doc. S/INF/50 of 15 December 1994; on the Former Yugoslavia *see* UNSC Res.770, UN Doc. S/RES/770 of 13 August 1992 and UNSC Res.816, UN Doc. S/RES/816 of 31 March 1993.

98 Establishing the ICTY, UNSC Res.827, UN Doc. S/RES/827 of 25 May 1993; establishing the ICTR, UNSC Res.955, UN Doc. S/RES/955 of 8 November 1994; relating to the Special Court for Sierra Leone, UNSC Res.1315, UNSC Doc. S/RES/1315 of 14 August 2000; relating to the establishment of the Special Tribunal for Lebanon, UNSC Res.1664, UNSC Doc. S/RES/1664 of 29 March 2006 and UNSC Res. 1757, UN Doc. S/RES/1757 of 30 May 2007.

the lack of authorization (or of clear authorization) of the Security Council.

Despite the criticism that can be made to the return of abusive unilateral use of force, the tendency of bringing essential demands of human dignity of entire populations to the mechanisms of maintenance of international peace and security was irreversible. The last decades saw a gradual emergence of growing notion of collective action against possible abuses.

Examples of this emergence in the regional and global level can be cited. The Constitutive Act of the African Union of 2000 establishes as a fundamental principle of the organization "[t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity"[99]. In 2001 a commission of distinguished persons published a study entitled the Responsibility to Protect, arguing as basic principles that:

> A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
>
> B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect[100].

The concept of responsibility to protect was recognized universally in the 2005 World Summit declaration[101]. Although there are still controversies on its scope and legitimate authority, the responsibility to protect is now an established guiding principle for the law governing the use of force and collective armed action by the international community, having its basis in the principle of humanity as humanness.

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99 Constitutive Act of the African Union, Adopted on 11 July 2000, UNTS, vol.2158, p. 3, Art.4(h).

100 ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, (International Development Research Centre, Ottawa 2001), p. XI.

101 2005 World Summit Outcome, UNGA Res. A/60/1, paras.138-140.

More recently, in face of new episodes of use of force[102], supposedly for humanitarian purposes, but in the end actively pursuing regime change – and many times resulting in humanitarian turmoil, some countries have advocated that there is not only a 'Responsibility to Protect', but also a 'Responsibility while Protecting'. According to the argument, even when engaging in measures aimed at protecting groups against international crimes, States should, *inter alia* fully uphold their obligations International 'Humanitarian Law, Human Rights Law and other general principles of law, and the "use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent"[103]. The proposal recalls that the dimension of 'humanness' cannot be dissociated of the dimension of 'human dignity' of the principle of humanity.

3. CONCLUSIONS

The principle of humanity is a manifold principle, which emerges from humanity as a society, as human dignity and as humanness. The principle of humanity can have its aspects grouped in a principle informing subjects of international law (a legal community encompassing all human beings or an independent subject of international law), a principle protecting human dignity (enshrined in the prohibition of dehumanizing acts, in the basic right to the law without discrimination and in the right to access to basic conditions to live in dignity), and humanity as humaneness (an obligation of acting in cooperation and brotherhood, the duty to ensure respect and the responsibility to protect). This multiple and foundational principle is essentially a constitutional principle exercising various functions on International Law[104].

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102 In particular, the international bombing campaign against the forces of Colonel Muammar Gaddafi in Libya, in 2011. For a short but sharp criticism on the R2P doctrine application in Libya see RIEFF, David, "R2P, R.I.P.", *The New York Times,* 07 November 2011, available at http://www.nytimes.com/2011/11/08/opinion/r2p-rip.html?_r=0, last visited 15 April 2015.

103 *Concept Paper: Responsibility While Protecting,* Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, UNGA Doc. A/66/551–S/2011/701.

104 These functions are discussed in VALADARES VASCONCELOS Neto, Diego, *The Principle of Humanity as a General Principle of Law: And its Constitutional Functions in Public International Law* (LAP Lambert, Saarbrücken, 2014), Chapter 3.

In recent years, the International Court of Justice has failed to apply the principle of humanity as an interpretative guide to the law. In the *Legality of Nuclear Weapons* advisory opinion, its decision by casting vote failed to declare all its uses as illegal[105], falling short from applying the dimensions of the principle of humanity it had upheld in the same decision[106]. In the case of *Jurisdictional Immunities case*, the court disregarded the human being as the subject *par excellence* of International Law, and the consequential right to a remedy for international crimes[107]. In the 2015 *Genocide Case (Croatia v. Serbia)*, the Court imposed an extremely high burden of proof for demonstrating international crimes committed by States, and again prevented it from giving effect to the principle of humanity in its final decision[108]. In all these cases, strong dissenting opinions were made based on what we have here defined as the principle of humanity: in the former by judge Weeramantry, in the latter two by judge Cançado Trindade.

Despite these recent decisions of the ICJ, a broader analysis of international law practice shows, as we have briefly demonstrated here, that the principle of humanity is today a cornerstone of an international law that goes beyond the "ruins of Westphalia" towards a construction of a new *jus gentium* placing once again the human being and humanity as the goal and the gravitational center of the law.

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105 *Legality of Nuclear Weapons,* para.105.e.

106 *Legality of Nuclear Weapons,* para.35. For a comment on such contradiction, see DAVID, Eric, The Opinion of the International Court of Justice on the legality of the use of nuclear weapons, in *IRRC*, No. 316, 1997.

107 *Jurisdictional Immunities of the State (Germany v. Italy),* Counter-Claim, Order of 6 July 2010, ICJ Reports 2010, p.310; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p. 99. Discussing the state centric approach of the court see VALADARES VASCONCELOS Neto, Diego, "O Caso sobre imunidades de jurisdição do Estado perante a Corte Internacional de Justiça", in *RIBDH*, vol.13, 2013, pp. 327-339; and ALEIXO, Letícia S.P. & JAYME, Fernando G., "O caso sobre Imunidades Jurisdicionais de Estado: Na dissidência, a razão", in *RIBDH*, vol.13, 2013, pp. 341-350.

108 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Judgment, ICJ Reports 2015.

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HUMAN DIGNITY TRUMPS COMPLIANCE WITH THE ICJ? REFLECTIONS ON JUDGMENT 238/2014 OF THE ITALIAN CONSTITUTIONAL COURT

Giulia Pinzauti

PhD (European University Institute); former Associate Appeals Counsel with the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Mechanism for International Criminal Tribunals (MICT).

1. INTRODUCTION

In a groundbreaking decision rendered in October 2014,[1] the Italian Constitutional Court ordered Italian courts not to comply with the 2012 Judgment of the International Court of Justice (ICJ) in the *Jurisdictional Immunities* case.[2] As is well known, this Judgment obliged Italian courts to bring their actions in line with international law by recognizing the sovereign immunity of Germany. Instead, the Constitutional Court held that the Italian legal order does not conform to the customary rule – as ascertained by the ICJ in the *Jurisdictional Immunities* case – on the jurisdictional immunity of foreign States that have committed war crimes and crimes against humanity on the territory of the forum State.

If one wonders what prompted the Constitutional Court to take such a bold step, the answer is: respect for human dignity. The Constitutional Court held that the immunity rule described above clashes with the fundamental principle of respect for human dignity and the right to access to justice. These are cardinal principles of the Italian constitutional order and constitute "counter-limits" to Italy's adaptation to international law. Thus, the Constitutional Court chose respect for human dignity and the right of access to justice

1 Italy, Constitutional Court, Judgment No. 238, 22 October 2014, English translation available online at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (henceforth "Judgment 238/ 2014").

2 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, ICJ Reports 2012, p. 99.

under Italian constitutional law over compliance with a binding ICJ judgment.

It is hardly surprising, then, that legal scholars who have commented on the decision are divided between praise and criticism.[3] Of the many legal issues raised by the judgment, I will

3 For example, the decision was praised by C. Pinelli, "Decision no. 238/2014 of the Constitutional Court: Between undue fiction and respect for constitutional principles", *Questions of international law*, 2014 (available at: "http://www.qil-qdi.org/prova-2-4/"); L. Gradoni, "Un giudizio mostruoso. Quarta istantanea della sentenza 238/2014 della Corte costituzionale italiana", *Sidiblog*, 2014 (available at: "http://www.sidi-isil.org/sidiblog/?p=1216"); A. Pin, "Tearing Down Sovereign Immunity's Fence - The Italian Constitutional Cour, the International Court of Justice, and the German War Crimes", *Opinio Juris*, 2014 (available at: "www.opniojuris.org"); F. Würkert, "No custom restricting state immunity for grave breaches – well why not?", *Völkerrechtsblog*, 2014 (available at: "http://voelkerrechtsblog.com/category/felix-wurkert/"). More critical authors include: C. Tomuschat, "The National Constitution Trumps International Law", 6 *Italian Journal of Public Law* (2014) 189; R. Kolb, "The relationship between the international and the municipal legal order: reflections on the decision no 238/2014 of the Italian Constitutional Court", *Questions of international law*, 2014 (available at: "http://www.qil-qdi.org/relationship-international-municipal-legal-order-reflections-decision-no-2382014-italian-constitutional-court/"); P. Palchetti, "Judgment No. 238/2014 of the Italian Constitutional Court: In search for the way out", *Questions of international law*, 2014 (available at: "http://www.qil-qdi.org/prova-3/"); A. Tanzi, "Sulla sentenza Cost. 238/2014: cui prodest?", *Forum costituzionale*, 2014 (available at: "http://www.forumcostituzionale.it/wordpress/wp-content/uploads/2014/12/nota_238_2014_tanzi.pdf"); F. Fontanelli, "Damage-assessment on the Building of International Law after the Italian Constitutional Court's Decision No. 238 of 2014: No Structural Damage, Just Wear and Tear", 2014 (available at: "http://www.verfassungsblog.de"); Idem, "I know it's wrong but I just can't do right: First impressions on judgment no. 238 of 2014 of the Italian Constitutional Court", 2014 (available at: "http://www.verfassungsblog.de"). For other comments see: P. De Sena, "The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law", *Questions of international law*, 2014 (available at: "http://www.qil-qdi.org/judgment-italian-constitutional-court-state-immunity-cases-serious-violations-human-rights-humanitarian-law-tentative-analysis-international-law/"; Idem, "Spunti di riflessione sulla sentenza 238/2014 della Corte Costituzionale", *Sidiblog*, 2014 (available at: "http://www.sidi-isil.org/sidiblog/?p=1108"); A. Peters, "Let Not Triepel Triumph – How To Make the Best Out of Sentenza No. 238 of the Italian Constitutional Court for a Global Legal Order", *EJIL Talk!*, 2014 (available at: "http://www.ejiltalk.org/let-not-triepel-triumph-how-to-make-the-best-out-of-sentenza-no-238-of-the-italian-constitutional-court-for-a-global-legal-order-part-i/"); T. Schilling, "The Dust Has Not Yet Settled: The Italian Constitutional Court Disagrees with the International Court of Justice, Sort of", *EJIL: Talk!*, 2014 (available at: "http://www.ejiltalk.org/the-dust-has-not-yet-settled-the-italian-constitutional-court-disagrees-with-the-international-court-of-justice-sort-of/"); C. Tams, "Let the Games Continue: Immunity for War Crimes before the Italian

focus my remarks on two main aspects that closely relate to the topic of this book: first, on the steps that could have been taken to protect victims' rights in compliance with the ICJ Judgment; and second, on the potential impact of the decision on the evolution of customary international law. Before addressing those issues, I will briefly recall the background to the Constitutional Court's ruling, and then the gist of its reasoning.

II. BACKGROUND: THE UPS AND DOWNS OF GERMANY'S SOVEREIGN IMMUNITY IN ITALY

A. The *Ferrini* Judgment, a bolt from the blue

> Judgment No. 238 is the last act of a judicial saga that started over ten years ago with a series of pronouncements of the Italian Supreme Court (*Corte di Cassazione*) rejecting the immunity of Germany in civil claims brought by victims of Nazi atrocities perpetrated during World War II.
>
> In 2004, in a seminal decision in the *Ferrini* case, the Italian Supreme Court affirmed that Italian courts had jurisdiction over reparation claims for acts *jure imperii* (that is, in the exercise of a State's sovereign powers) carried out by foreign States on Italy's territory in breach of peremptory norms of international law.[4]
>
> Mr Ferrini is one of hundreds of thousands of Italian nationals who, after the armistice in 1943, were arrested by members of the German armed forces and deported to Germany, where they were forced to serve the Reich war industry. In the late 1990s, Mr Ferrini initiated proceedings against Germany before Italian courts; he sought compensation for the material and moral injuries that he had suffered at the hands of the German armed forces. Before turning to Italian courts, he had unsuccessfully tried to obtain reparation in Germany.[5] After a

Constitutional Court", *EJIL: Talk!*, 2014 (available at: "http://www.ejiltalk.org/let-the-games-continue-immunity-for-war-crimes-before-the-italian-supreme-court/").

4 Italy, Supreme Court (Joint Civil Sections), *Ferrini v. Federal Republic of Germany*, 11 March 2004, No. 5044, 87 *Rivista di diritto internazionale* (2004) 539 (henceforth "*Ferrini*").

5 In 2000, Germany adopted a federal law establishing a national compensation scheme for victims of forced labour in the German Reich. However, this scheme excluded claims brought by former prisoners of war (POWs), as the detaining power (Germany) had a right to put them to work. The so-called "Italian Military

protracted legal process before Italian courts (that had declined to exercise jurisdiction), his case ended up before the Italian Supreme Court.[6]

Rather than holding that Italian courts lacked jurisdiction over Mr Ferrini's claim, as most people would have expected, the Supreme Court held the exact opposite.

In ruling that Italian courts should set aside the sovereign immunity of Germany, the Supreme Court's reasoning followed a two-prong strategy. First, it held that the rule on jurisdictional immunity does not cover acts breaching *jus cogens* rules, even if those acts were *jure imperii*.[7] The Supreme Court recognized that the rule on sovereign immunity is a well-established norm of customary international law to which the Italian legal system conforms.[8] However, in the Supreme Court's view, the rule on jurisdictional immunity is not absolute. Its *ratio* does not persist any more when the State in question has violated universal human values, such as freedom and human dignity.[9] Those values, which form "an integral part" of the Italian legal system, are regarded as imperative.[10] Thus,

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Internees" (IMIs) –individuals who had been deported to Germany and required either to enlist or to work for German factories as "civilian workers"– were denied reparation because they had a "legal entitlement" to POW status, although they were never treated as such at the time of their internment. Some IMIs attempted to challenge the decision excluding them from reparation before German courts, without success. The German Constitutional Court confirmed the decisions of the lower courts. A group of former IMIs then brought an application against Germany before the European Court of Human Rights (ECtHR). However, the ECtHR declared the application inadmissible (*Associazione nazionale reduci dalla prigionia, dall'internamento e dalla guerra di liberazione and Others v. Germany*, App. No. 45563/04, 4 September 2007). On the case of the IMIs, see *Jurisdictional Immunities*, para. 26; J.C. Barker, "Negotiating the Complex Interface Between State Immunity and Human Rights: an Analysis of the International Court of Justice Decision in *Germany* v. *Italy*", 15 *International Community Law Review* (2013) 415, at 425.

6 On 23 September 1998, Mr Ferrini lodged a complaint with the Court of Arezzo (*Tribunale di Arezzo*). The Court declared the claim inadmissible because Germany enjoyed immunity from jurisdiction before Italian Courts. The Florence Court of Appeal (*Corte d'appello di Firenze*) confirmed the lower court's decision (Judgment of 16 November 2001).

7 *Ferrini*, paras. 7, 9, 9.1

8 *Ferrini*, para. 5.

9 *Ferrini*, para. 7.1.

10 *Ferrini*, para. 7.1.

when a contrast arises between *jus cogens* rules and the immunity rule, the higher-ranking provisions must prevail.[11]

Second, the Court relied on the so-called tort exception, according to which immunity does not apply to tortious acts committed in the State of the forum. In this case, the crimes at issue had been committed (at least partly) on Italian territory at the hands of Nazi officers. Thus, Italian courts could exercise jurisdiction over Germany.[12]

Following *Ferrini*, more than 200 claimants introduced civil actions against Germany before Italian courts to obtain compensation for the wrongs suffered.[13] Greek claimants also applied to Italian courts to enforce in Italy the judgment of the Hellenic Supreme Court (*Areios Pagos*) that ordered Germany to pay compensation to the successors of the victims of a massacre perpetrated by German forces in the Greek village of Distomo in June 1944.[14]

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11 *Ferrini*, para. 9.1.

12 *Ferrini*, para. 10. For a more extensive commentary on the case, see e.g. M. Iovane, "The *Ferrini* Judgment of the Italian Supreme Court: Opening up Domestic Courts to Claims of Reparation for Victims of Serious Violations of Fundamental Human Rights", 14 *Italian Yearbook of International Law* (2004) 165; P. De Sena and F. De Vittor, "State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case", 16 *European Journal of International Law* (2005) 89.

13 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Application instituting proceedings, 23 December 2008, para. 12.

14 Greece, Supreme Civil and Criminal Court (*Areios Pagos*), *Germany v. Prefecture of Voiotia, Representing 118 Persons from Distomo Village*, 4 May 2000, English translation at Oxford Reports on International Law in Domestic Courts. The judgment could not be enforced in Greece as the Minister of Justice did not grant authorization to do so. Under Greek law, such authorization is required to enforce a judgment against a foreign State, such as Germany. The plaintiffs thus turned to the ECtHR. The Court, however, rejected the application, holding that international law does not yet allow the non-applicability of the rules on state immunity to civil actions for damages for the commission of crimes against humanity. ECtHR, *Kalogeropoulou and Others v. Greece and Germany*, App. No. 59021/00, Judgment, 12 December 2002. The claimants sought to enforce the judgment of the *Areios Pagos* in Germany, but the German Federal Supreme Court held that the decision of the Greek courts could not be recognized within the German legal order because it had been rendered in violation of Germany's entitlement to immunity.
It should be noted that the *Areios Pagos*'s findings on the existence of a territorial exception to the rule on the jurisdictional immunity of foreign States were later overturned by the Greek Special Supreme Court in *Margellos*, which concerned the burning of the Greek village of Lidoriki by German occupation forces in 1944 (Special Supreme Court, *Federal Republic of Germany v. Margellos*, Petition for cassation, Judgment No. 6/2002, 129 *International Law Reports* (2007) 525).

The Italian Supreme Court confirmed that the judgment of the Greek courts was enforceable in Italy.[15] It further confirmed its reasoning in *Ferrini* in the context of criminal proceedings against former *Wehrmacht* sergeant Max Josef Milde.[16] Mr Milde was charged with participating in the massacre of 203 civilians which was carried out by Nazi soldiers in June 1944 in the towns of Civitella, Cornia and San Pancrazio, in central Italy.[17] He was convicted *in absentia* to life imprisonment. In addition, the Rome Military Court of Appeal ordered Mr Milde and Germany, jointly and severally, to pay compensation to the victims' relatives. Germany then turned to the Supreme Court, invoking its right to sovereign immunity. However, in October 2008, the Italian Supreme Court upheld the decision of the Rome Military Court of Appeal.[18]

B. The ICJ Judgment on Jurisdictional Immunities of the State

The progressive attitude of Italian courts with respect to Germany's jurisdictional immunity was short lived. In December 2008, Germany instituted proceedings against Italy before the ICJ. It alleged that Italian courts had repeatedly disregarded the jurisdictional immunity of Germany by allowing the bringing of civil

15 In a decision date 6 May 2008, the Supreme Court confirmed the judgment of the Florence Court of Appeal that had declared the Greek judgment enforceable in Italy. Supreme Court (Joint Civil Sections), *Federal Republic of Germany v. Prefecture of Voiotia*, 6 May 2008, No. 14199, 92 *Rivista di diritto internazionale* (2009) 594. The Greek judgment, however, was ultimately not enforced in Italy. The Italian government issued a decree that suspended (with retroactive effects) all enforcement measures against property of foreign States pending resolution of any controversies about the immunity of the foreign State before the ICJ. *See* A. Gattini, "The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?", 24 *Leiden Journal of International Law* (2011) 173, at 177.

16 Italy, Supreme Court, *Federal Republic of Germany v. Milde*, 21 October 2008, No. 1072, 92 *Rivista di diritto internazionale* (2009) 618 (henceforth "*Milde*").

17 The massacre of Italian civilians (including women, children and elderly) was carried out in reprisal for the killing of four German soldiers by members of the resistance movement. See the description of the facts of the case in *Milde*, para. 2.

18 In this decision, one can see a development in the Supreme Court's reasoning, which no longer refers to the tort exception. The Court justified the lifting of immunity relying solely on the higher hierarchical level of *jus cogens*. This notwithstanding, in this decision the Supreme Court confirmed by and large its reasoning in *Ferrini*. For a commentary to *Milde* see M. Frulli, "La 'derogabilità' della norma sull'immunità degli Stati dalla giurisdizione in caso di crimini internazionali: la decisione della Corte di Cassazione sulla strage di Civitella della Chiana", 3 *Diritti umani e diritto internazionale* (2009).

claims for violations of international humanitarian law (IHL) and human rights law (IHRL) that were committed by the German Reich during World War II.[19]

The ICJ upheld the application. In its judgment of 3 February 2012, the ICJ held that Italy had violated its international obligation to respect the sovereign immunity of Germany by allowing its courts both to exercise jurisdiction against Germany, and to declare enforceable in Italy judgments rendered by Greek courts in *Distomo*.[20]

Three considerations are prominent in the ICJ's reasoning. First, the Court held that under customary international law there is no territorial tort exception to the immunity rule. Thus, States are entitled to immunity in proceedings for torts committed on the territory of another State by their armed forces during an armed conflict.[21] Second, the ICJ affirmed that States enjoy immunity from jurisdiction even when they are accused of having committed serious violations of IHL and IHRL.[22] The *jus cogens* character of the rule breached does not override immunity. This is because, in the ICJ's view, there is no normative conflict between the two sets of rules. The immunity rule is merely procedural and has no bearing on the lawfulness of the conduct giving rise to the proceedings. In contrast, the rules on international crimes are substantive.[23] A domestic court will have to determine whether it has jurisdiction over a foreign State before hearing the merits of the case; therefore, the question of immunity will be settled at a preliminary stage.[24] Third, the ICJ rejected the notion that a State is entitled to lift the immunity of a foreign State as a last resort measure to obtain reparation for the wrong suffered by its nationals.[25] According to the ICJ, there is no support for the proposition (advanced by Italy) that a State responsible for serious violations of IHL and IHRL is entitled to immunity only if there are effective alternative means of securing redress for the victims.[26]

As a consequence of the breach, the ICJ called upon Italy to restore the *status quo ante*. In particular, the Court held that Italy

19 See *supra*, fn. 13.
20 *Jurisdictional Immunities*, para. 139.
21 *Jurisdictional Immunities*, paras. 78-79.
22 *Jurisdictional Immunities*, para. 91.
23 *Jurisdictional Immunities*, para. 93.
24 *Jurisdictional Immunities*, para. 82.
25 *Jurisdictional Immunities*, para. 101.
26 *Jurisdictional Immunities*, para. 101.

must, by means of its choosing, remove the effects of the decisions of its courts infringing the immunity of Germany under international law. [27] This sent a clear message to Italian courts: in all ongoing proceedings where no decision has become final, they are under an obligation to find that they lack jurisdiction. In addition, Italian authorities must deal with decisions that have acquired the force of *res judicata* and remove their effects.[28]

In addition, and having regard to its determination that the conduct of Italian courts breached Germany's immunity, the ICJ declined to rule on the issue raised in Italy's counterclaim: whether individual victims of IHL violations have a directly enforceable right to claim compensation under international law.[29]

C. The lull before the storm: Life after the *Jurisdictional Immunities* Judgment

At first, Italy faithfully complied with the ICJ Judgment. Domestic courts dismissed reparation claims either for lack of jurisdiction,[30] or on the merits.[31] The Supreme Court likewise bent

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27 *Jurisdictional Immunities*, para. 139(4) (holding that "the Italian Republic must, by enacting appropriate legislation, or by resorting to other methods of its choosing, ensure that the decisions of its courts and those of other judicial authorities infringing the immunity which the Federal Republic of Germany enjoys under international law cease to have effect").

28 On the enforcement of the *Jurisdictional Immunities* Judgment in Italian domestic law see M. Sossai, "Are Italian Courts Bound to Give Effect to the *Jurisdictional Immunities* Judgment?", 21 *Italian Yearbook of International Law* (2011) 175; M.L. Padelletti, "L'esecuzione della sentenza della Corte internazionale di giustizia sulle immunità dalla giurisdizione nel caso *Germania c. Italia*. Una strada in salita?", 95 *Rivista di diritto internazionale* (2012) 444; F.M. Palombino, "Italy's Compliance with ICJ Decisions vs. Constitutional Guarantees: does the "Counter-limits" Doctrine Matter?", 22 *The Italian Yearbook of International Law* (2013) 185; G. Cataldi, "The Implementation of the ICJ's Decision in the *Jurisdictional Immunities of the State* case in the Italian Domestic Order: What Balance Should Be Made between Fundamental Human Rights and International Obligations?", *ESIL Reflections*, 2013 (available at: "http://www.esil-sedi.eu/node/281").

29 *Jurisdictional Immunities*, paras. 48, 108.

30 Court of Florence (*Tribunale di Firenze*), *Manfredi v. Federal Republic of Germany (Italy intervening)*, 28 March 2012, 95 *Rivista di diritto internazionale* (2012) 583. The Court considered the ICJ Judgment as *jus superveniens* and declared the claim inadmissible. For a commentary to this decision see Palombino, "Italy's Compliance with ICJ Decisions", at 194-196.

31 Turin Court of Appeal (*Corte d'appello di Torino*), *Federal Republic of Germany v. De Guglielmi and Italian Presidency of the Council of Ministers*, 14 May 2012,

to the ICJ's authority. In August 2012, in a ruling in *Albers* – a case concerning the massacre of 350 civilians perpetrated by members of the German armed forces in Tuscany in 1944 – the Supreme Court decided to follow the ICJ judgment rather than its *Ferrini* precedent. It thus quashed without remand the judgment of the lower court that had condemned Germany to pay compensation to the relatives of the victims.[32] This change in the Supreme Court's case-law was not done meekly. The Supreme Court heavily criticized the ICJ ruling for holding that Germany's breach of *jus cogens* rules had no bearing on its entitlement to immunity, which was procedural in character. In the Supreme Court's view, this led to Germany's impunity for those serious violations and undermined the enforcement of *jus cogens*.[33] The Supreme Court further reaffirmed the validity of its reasoning in *Ferrini* but conceded that there was not (yet) sufficient consensus around it to justify its application in further cases.[34]

To dispel all uncertainties on the implementation of the *Jurisdictional Immunities* Judgment, in January 2013 the Italian Parliament enacted Law 5/2013.[35] In addition to ratifying the Convention on the Jurisdictional Immunities of States and their Property, this law provided a statutory basis for the enforcement of the ICJ judgment. Pursuant to Article 3 of the statute, domestic courts are required to decline jurisdiction in pending proceedings when the ICJ ordered them to do so. This Article also introduced a further ground (other than those provided for in the Code of Civil Procedure) for revision of civil judgments having the authority of *res judicata* that were rendered in violation of a foreign State's sovereign immunity.

No. 941, 22 *Italian Yearbook of International Law* (2012) 383. In this case, the Court of Appeal held that the duty to comply with the *Jurisdictional Immunities* Judgment could not imply a dismissal of the case for lack of jurisdiction as the matter had already been settled by the Supreme Court and the judgment was *res judicata*. However, the Court declined to examine the case on the merits as this would run contrary to the ICJ decision. For a commentary on this case see Sossai, "Effects of the ICJ Judgment in Italian Law", at 186-187.

32 Italy, Supreme Court (First Criminal Section), *Federal Republic of Germany v. Rome Military Court of Appeal*, 9 August 2012, No. 32139, 95 *Rivista di diritto internazionale* (2012) 1196 ("*Albers*").

33 *Albers*, para. 5.

34 *Albers*, para. 6.

35 *Gazzetta ufficiale della Repubblica Italiana*, Serie generale, No. 24, 29 January 2013.

If on the one hand this statute brought Italy in line with *the Jurisdictional Immunities* Judgment, on the other it raised delicate issues from the viewpoint of Italian constitutional law. Not only did the legislator interfere with the administration of justice, it also did so with retroactive effects, challenging the certainty and stability of *res judicata*.[36]

III. THE CONSTITUTIONAL COURT'S HOLDING

Against this backdrop, a constitutional challenge to Law 5/2013 was not unexpected. Indeed, some legal scholars had previously anticipated the existence of constitutional obstacles to Italy's implementation of the ICJ Judgment.[37]

The constitutionality question was raised in January 2014 by the court of Florence. The court was seized with three civil claims against Germany for the recovery of damages for crimes[38] committed against Italian nationals during World War II. The judge, who should have declared that the court lacked jurisdiction pursuant to the

36 See Sossai, "Effects of the ICJ Judgment in Italian Law", at 185; F. Francioni, "From Utopia to Disenchantment: the Ill Fate of 'Moderate Monism' in the ICJ Judgment on The *Jurisdictional Immunities of the State*", 23 *European Journal of International Law* (2012) 1125 (both commenting on the potential problematic consequences of the adoption of such a statute, even before it was actually adopted by Parliament); Palombino, "Italy's Compliance with ICJ Decisions", at 197-199.

37 See e.g. Francioni, "From Utopia to Disenchantment" (arguing that "[a]n international judgment in which the rule of state immunity is uncompromisingly upheld, even in the face of a repeated and prolonged denial of access to justice and of remedial process to victims of egregious violations of human rights may raise serious issues of constitutionality. In the case of Italy such issues arise in relation to Article 24 of the Constitution"); Cataldi (holding that "[t]he theory of counter-limits seems applicable to this particular case: that is, a case involving a demand for compensation for damage caused by heinous crimes, in which there is the real risk that no court will render a decision"); F. Fontanelli, "Criminal Proceedings against Albers", 107 *The American Journal of International Law* (2013) 632, at 638 ("If international *jus cogens* cannot trump sovereign immunity, one could try to invoke domestic peremptory safeguards to escape compliance with detestable international obligations, as in the *Kadi* case"); Palombino, "Italy's Compliance with ICJ Decisions", at 199-200 (calling for Italian courts to apply the doctrine of counter-limits). See also, in relation to the tension between recognition of immunity of foreign States and Article 24 of the Constitution, Gattini, "The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?", at 199-200.

38 Deportation, unlawful labour and murder.

Jurisdictional Immunities Judgment and Law 5/2013, questioned the constitutionality of the relevant norms instead.

In Judgment No. 238/2014, the Constitutional Court held that the incorporation of international customary rules into Italian law pursuant to Article 10 of the Constitution[39] does not apply to customs that breach fundamental principles of the Italian constitutional order and inviolable rights.[40] The Constitutional Court thus applied the so-called doctrine of "counter-limits", according to which:

> the fundamental principles of the constitutional order and inalienable human rights constitute a 'limit to the introduction (…) of generally recognized norms of international law, to which the Italian legal order conforms' (…) and serve as 'counter-limits' to the entry of European Union law.[41]

The doctrine of counter-limits was developed by the Italian and the German Constitutional Courts to limit the application of European Union law into their respective domestic legal orders.[42] In this case, the Constitutional Court found that Articles 2[43] and 24[44] of the Constitution – which guarantee, respectively, the inviolability of fundamental rights, including human dignity, and the right of access to justice – prevented the incorporation into the Italian legal system of the customary rule on the immunity of foreign states for war crimes and crimes against humanity committed on the territory of the forum State.[45]

The Constitutional Court further struck down Article 1 of the law executing the UN Charter,[46] insofar as it implemented Article 94

39 Article 10(1) of the Constitution provides that: "The Italian legal system conforms to the generally recognised principles of international law."

40 Judgment No. 238/2014, para. 3.4, referring to the Constitutional Court's earlier Judgment No. 311/2209. All references to Judgment 238/2014 are to its conclusions in point of law.

41 Judgment No. 238/2014, para. 3.2.

42 On the doctrine of counter-limits see Palombino, "Italy's Compliance with ICJ Decisions", at 189-190; Peters, "Let Not Triepel Triumph".

43 Article 2 of the Italian Constitution provides that: "The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled."

44 Article 24 provides: "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law."

45 Judgment No. 238/2014, para. 3.5.

46 Law No. 848 of 17 August 1957.

of the Charter,[47] which obliges Italy to comply with the ICJ Judgment in the *Jurisdictional Immunities* case.[48]

Finally, the Constitutional Court declared the unconstitutionality of Article 3 of Law No. 5/2013, which, as discussed above, obliged domestic courts to implement the *Jurisdictional Immunities* Judgment.[49]

The Constitutional Court did not take issue with the way in which the ICJ had ascertained customary international law.[50] Instead, although it accepted the ICJ's conclusions regarding the content of customary international law, the Constitutional Court simply excluded from the Italian legal order those customary rules that are fundamentally incompatible with its constituent principles.[51] This result was only possible by embracing a rigid dualistic conception of the interplay between the domestic and the international legal orders.

In its reasoning, the Constitutional Court dropped the *jus cogens* argument that was so prominent in the Supreme Court's reasoning in *Ferrini*. Instead, it balanced the value protected by the immunity rule (the integrity of international relations) with the principle of respect for human dignity and the right of access to justice. It should be noted that such a balancing exercise *per se* flatly contradicts the ICJ's holding that "[i]mmunity cannot … be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case".[52] But the Constitutional Court went further. It found that recognition of the principle of absolute immunity deprives individuals of the right of access to justice. In the Constitutional Court's view, this is not justifiable in the case of a State's commission

47 Article 94(1) of the UN Charter provides that: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

48 Judgment No. 238/2014, para. 4.1. Italy complies with the UN Charter and the judgments of the ICJ on the strength of Article 11 of the Constitution. This Article provides, in relevant part: "Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends."

49 Judgment No. 238/2014, para. 5.1.

50 Judgment No. 238/2014, para. 3.1.

51 Judgment No. 238/2014, paras. 3.4-3.5.

52 *Jurisdictional Immunities*, para. 106.

of international crimes, which are not acts *jure imperii*.[53] Indeed, the right of access to justice is a fundamental guarantee of the Italian Constitutional order; it is even more so when this right is exercised to obtain redress for the violation of fundamental rights.[54]

IV. Does the End Justify the Means? Some Reflections on the Constitutional Court's non-compliance with the ICJ

A. The cost of non-compliance

Judgment 238/20014 is a brave pronouncement that stands forcefully on victims' side. But it comes with a cost, too. Notably, it exposes Italy to international responsibility. If domestic courts were to assert jurisdiction over Germany, they would breach Italy's obligations under international law to respect the jurisdictional immunities of foreign States, as ascertained by the ICJ in the *Jurisdictional Immunities* case. Thus, Germany could institute new proceedings against Italy,[55] or resort to the UN Security Council to seek implementation of the ICJ Judgment, as provided for in Article 94(2) of the UN Charter.[56]

Those considerations are extraneous to the Constitutional Court's reasoning. In other words, in balancing the conflicting interests at stake in this case, the Constitutional Court did not apparently take into account another relevant (and constitutionally protected) value, namely compliance with international law.[57]

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53 Judgment No. 238/2014, para. 3.4. The same view had been advocated by Judge Cançado Trindade in his dissenting opinion. See *Jurisdictional Immunities*, Dissenting Opinion of Judge Cançado Trindade, paras. 184-198, 308.

54 Judgment No. 238/2014, para. 3.4.

55 It should be noted that shortly after the issue of Judgment 238/2014, Italy made a declaration recognizing the jurisdiction of the ICJ pursuant to Article 36(2) of the ICJ Statute. On the options available to Germany to react to Judgment 238/20014 see Peters, "Let Not Triepel Triumph".

56 Article 94(2) of the UN Charter provides as follows: "If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

57 De Sena, "The judgment of the Italian Constitutional Court", at 23-25. According to this author, this fact invalidates the balancing conducted by the Constitutional Court. On the costs of the judgment in terms of Italy's compliance with international law, see Palchetti, "Judgment No. 238/2014".

The absence of reasoning is not, however, always inadvertent. Even if those considerations are not expressly mentioned in the judgment, it seems implausible that the constitutional judges were not well aware of the consequences of their ruling.[58] They deliberately chose non-compliance, in the interest of values which they considered to be supreme. The very essence of the judgment is in the bedrock importance it gave to the protection of human dignity, even above other legal considerations.

B. Italy's failure to act in diplomatic protection

The courage shown by the Constitutional Court does not, however, mean that its showdown with the ICJ necessarily had to arise in the first place. In its judgment, although the ICJ did not leave any leeway to domestic courts, it did identify a course of action by which the Italian and German Governments could solve the dispute. It held:

> the claims arising from the treatment of the Italian military internees… together with other claims of Italian nationals which have allegedly not been settled… could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue.[59]

Some scholars criticized the Constitutional Court's ruling for not considering alternative forms of protection, such as the prospects of a diplomatic settlement.[60] However, two and half years after the *Jurisdictional Immunities* Judgment, the Italian authorities did not appear to have given effective consideration to the rights of the victims in implementing the ICJ Judgment. Given that a constitutional challenge was on the horizon – at least, legal scholars

58 *Contra* R. Kolb, "The relationship between the international and the municipal legal order", at 13.

59 *Jurisdictional Immunities*, para. 104. Judge Bennouna, who voted with the majority, appears to have attached great weight to the circumstance that Italy "may still espouse the cause of its nationals by exercising diplomatic protection on their behalf." He further held that "immunity … could not be justified if it would ultimately pose an obstacle to the requirements of the justice owed to victims" (*Jurisdictional Immunities*, Separate Opinion of Judge Bennouna, paras. 30-31).

60 See e.g. L. Gradoni, "Corte Costituzionale italiana e Corte internazionale di giustizia in rotta di collisione sull'immunità dello Stato straniero dalla giurisdizione civile", *Sidiblog*, 2014 (available at: "http://www.sidi-isil.org/sidiblog/?p=1101").

had seen it coming[61] – one wonders why the Italian Government did not take adequate steps to avert that risk.[62]

Arguably, Italy did not think it had an obligation under international law to act in diplomatic protection of its nationals, or that it was appropriate to do so in the circumstances of the case. This is regrettable, given that the individuals concerned had suffered a grave injury and action by their State of nationality was the only means of securing redress. It is true that, in modern international law, States retain a discretionary power to decide whether to act in diplomatic protection, and in what form. However, there is growing support for the proposition that that State have some "limited" duties to afford diplomatic protection to nationals subjected to serious human rights violations.[63] In this area of international law,

61 See *supra*, fn. 37.

62 Note, however, that in response to a parliamentary question introduced in the Senate after the ICJ Judgment, on 12 April 2012 the then Minister of Foreign Affairs stated that on 4 February 2012 he "wrote to his Colleague Westerwelle [the German Ministry of Foreign Affairs] to confirm that the Italian Government is ready to start bilateral negotiations for solving the unsettled issues. On 7 February, the Minister commenced consultations with the organizations representing the victims, with the view of carrying out negotiations with Germany in a spirit of dialogue and of questing justice for the victims and their families" (cited in "Correspondents' Reports - Italy", 15 *Yearbook of International Humanitarian Law* (2012), at 3-4).

63 International Law Commission ("ILC"), Draft Articles on Diplomatic Protection, *Yearbook of the International Law Commission* (2006), Vol. 2, part II, A/61/10, Commentary to Article 2, para. 3. For those reasons, in the codification process of the law on diplomatic protection, the ILC has recommended to States that they "*should* … give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred" (Article 19 ILC Draft Articles on Diplomatic Protection). In the final draft, the ILC rejected the proposals for the recognition of an obligation of States to exercise diplomatic protection at least in the limited circumstances where their nationals: (i) suffered damage for the violation of international rules having peremptory character, and (ii) had no other remedy before national or international judicial organs. That was the original proposal of the Special Rapporteur John Dugard in 2000, which was later taken on – ironically – by the Italian Government, unfortunately to no avail. See R. Pisillo Mazzeschi, "Impact on the Law of Diplomatic Protection", in M.T. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law*, Oxford, 2009, 211, at 225; A. Gattini, "Alcune osservazioni sulla tutela degli interessi individuali nei progetti di codificazione della Commissione del diritto internazionale sulla responsabilità internazionale e sulla protezione diplomatica", in M. Spinedi, *et al.* (eds), *La codificazione della responsabilità internazionale degli stati alla prova dei fatti. Problemi e spunti di riflessione*, Milan, 2006, 431, at 456. According to Special Rapporteur Dugard, the duty of States to act in diplomatic protection would arise under domestic administrative and constitutional rules

there has clearly been a shift from the traditional conception that diplomatic protection is an exclusive right of the State[64] to a more modern view that it is also a right of the individual concerned.[65] The ICJ has also confirmed that diplomatic protection is a vehicle for the protection of individuals' fundamental rights and not just

rather than international law. J. DUGARD, "Diplomatic Protection", in, *Max Planck Encyclopedia of Public International Law*, 2009, para. 14.

64 See e.g. the holding of the Permanent Court of International Justice in the *Mavrommatis* case (*The Mavrommatis Palestine Concessions (Jurisdiction)*, 30 August 1924, Ser. A, No. 2), at 12: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law." The ICJ later endorsed this approach in the *Nottebohm* case (*Nottebohm Case (Liechtenstein v. Guatemala), Second Phase*, 6 April 1955, ICJ Reports 1955, p. 4, at 24, holding that: "[d]iplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of rights of the State") and in *Barcelona Traction* (where the Court held, with respect to the right to diplomatic protection that "it is its own right that the state is asserting". *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 4 July 1970, ICJ Reports 1970, p. 3, para. 78).

65 In 1999, in a pioneering Advisory Opinion, the Inter-American Court of Human Rights held unanimously that Article 36 of the Vienna Convention on Consular Relations (on the right to consular assistance for foreigners under detention, which is one of the mechanisms of diplomatic protection) "is part of the body of human rights law" (*The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, OC-16/99, 1 October 1999, Series A No.16, para. 161). Two years later, the ICJ in *LaGrand* expressed a similar view. It recognized for the first time that Article 36(1)(b) of the Vienna Convention on Consular Relations *creates individual rights*, although it did not go so far as to state that the right of a detained person to be notified of his right to consular assistance forms part of the body of human rights law (*LaGrand Case (Germany v. United States of America)*, 27 June 2001, ICJ Reports 2001, p. 466, para. 77). This holding was reaffirmed a few years later in the *Avena* case (*Avena and Other Mexican Nationals (Mexico v. United States of America)*, 31 March 2004, ICJ Reports 2004, p. 12, para. 124). Finally, in *Diallo* the Court endorsed the definition of diplomatic protection in Article 1 of the ILC Draft Articles on Diplomatic Protection as reflecting customary international law ("diplomatic protection consists of the invocation by a State, through diplomatic action … of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility"). This suggests that the Court adhered to the view that a State acting in diplomatic protection does so to defend the rights of its national(s) under international law, including for violations of "internationally guaranteed human rights". *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment*, ICJ Reports 2007, p. 582, para. 39.

the minimum standard for the treatment of aliens.[66] This evolution has occurred as a result of the impact of human rights law on public international law.[67] The development, however, did not go so far as to impose on the national State of the victims the obligation proper to act in diplomatic protection.[68] Thus, States have an obligation, subject to judicial review, to do something to assist their nationals, which may include an obligation to give due consideration to the possibility of exercising diplomatic protection.[69] Italy's conduct, however, may have fallen short even of this loose standard.

To overcome these shortcomings and render individuals' rights more effective, some legal scholars have suggested that Italy could undertake the obligation to exercise diplomatic protection under domestic law by legislating to that effect.[70] This practice is not new, as it has already been adopted by some States.[71] In this way, the decision of the State not to exercise diplomatic or judicial protection would be subject to judicial review, and the injured individuals would at least be informed of the reasons of the refusal.[72]

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66 This is apparent in the *Diallo* case, which concerned a claim brought by Guinea for the violation of Mr Diallo's fundamental rights by the Democratic Republic of the Congo. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment*, ICJ Reports 2010, p. 639, paras. 87, 161, 165. For a commentary to the case, see A. Vermeer-Künzli, "Diallo: Between Diplomatic Protection and Human Rights", 4 *Journal of International Dispute Settlement* (2013) 487.

67 On the progressive humanization process of international law, see generally A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 2nd ed., Leiden, 2013; M.T. Kamminga and M. Scheinin (eds), *The Impact of Human Rights Law on General International Law*, Oxford, 2009; A. Cassese, *International Law*, 2nd ed., Oxford, 2005, at 396. On the developments in the specific field of consular law, see A.A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice", 6 *Chinese Journal of International Law* (2007) 1.

68 ILC, Draft Articles on Diplomatic Protection, Commentary to Article 2, para. 2; Dugard, "Diplomatic Protection", para. 13.

69 ILC, Draft Articles on Diplomatic Protection, Commentary to Article 19, para. 3.

70 Palchetti, "Judgment No. 238/2014", para. 5.

71 See First Report of the Special Rapporteur on Diplomatic Protection, A/CN.4/506, p. 30.

72 See e.g. the *Abbasi* case (England and Wales Court of Appeal (Civil Division), *Abbasi and Others v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, [2002] EWCA Civ 1598), which was brought before UK courts by the mother of a British national detained at the military base of Guantànamo Bay by the United States. The applicant tried to prompt the

Until then, it remains to be hoped that the prospect of individual lawsuits and international responsibility may prompt the Italian Government to resuscitate negotiations with Germany to reach an agreement to the victims' benefit. For example, something similar occurred in Germany in connection to the *Princz* case.[73] Mr Princz, a US citizen of Czechoslovak origin, sued Germany before US courts for the recovery of damages on account of forced labour he had to perform for the German Reich. The plaintiff had not benefited from any of the reparation programmes set up in Germany after the World War II. In the end, the Federal Republic of Germany concluded a special compensation agreement with the United States, given the existence of plans in the US Congress to open the gates of US courts to similar claims.[74]

C. Pushing for a change in international law

One may agree or disagree with the Constitutional Court's reasoning and conclusion, but its aim was arguably a noble one. Clearly, the current state of international law as ascertained by the ICJ is unsatisfactory for victims of gross violations of IHL and IHRL. Not only have they no means to enforce their right to diplomatic protection, they are also not allowed to bring a claim for reparation

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British government to claim the violation of the rights of one of its subjects before the US diplomatic officials, and to give the reasons for inaction. In a different case, *Kaunda*, the South African Constitutional Court held that: [t]here may be a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human right norms. A request to government for assistance in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible to refuse. It is unlikely that such a request would ever be refused by government, but if it were, the decision would be justiciable and a court would order the government to take appropriate action.
Kaunda v. President of the Republic of South Africa, 4 August 2004, para. 69, cited in ILC Draft Articles on Diplomatic Protection, Commentary to Article 19, para. 3. Another case on point is Germany, Federal Constitutional Court, *Rudolph Hess*, 90 *International Law Reports* (1992) 387, at 392 (where the court accepted that Germany was under a constitutional duty to provide diplomatic protection but emphasized that the government enjoyed a "wide discretion").

73 US District Court for the District of Columbia, *Princz v. Federal Republic of Germany* [1992] F. Supp. 22, 813.

74 C. Tomuschat, "State Responsibility and the Individual Right to Compensation before National Courts", in A. Clapham and P. Gaeta (eds), *The Handbook of International Humanitarian Law*, Oxford, 2014, 811, at 826.

in those "residual" cases where their national State did not exercise diplomatic protection and no compensation agreement was concluded between the States concerned. With Judgment 238/2014, the Constitutional Court is pushing for a change in international law in at least two ways. One is very open; the second one more subtle.

First, it is clear that in limiting the scope of the immunity rule, albeit within the domestic legal order only, the Court wishes for this limitation to contribute to "a desirable – and desired by many – evolution of international law itself."[75] Some legal scholars, however, have questioned the ruling's ability to have an actual impact on the customary rule on State immunity. This is because the Constitutional Court did not challenge the ICJ ruling, but accepted the status of customary international law as ascertained by the World Court.[76] However, even so, the core of the Court's reasoning on the need to balance State immunity with the right of access to justice could still influence the case law of other national courts, and of the ECtHR.[77] In any event, if the domestic courts of other States were to follow the Constitutional Court's approach, a new exception to the immunity rule could eventually develop, along the lines of what happened in the early 20th century with the distinction between *acta jure imperii* and *acta jure gestionis*.[78]

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75 Judgment No. 238/2014, para. 3.3. On this point see e.g. Pin, "Tearing Down Sovereign Immunity's Fence".

76 Fontanelli, "Damage-assessment".

77 In its most recent judgment on the relationship between immunity and human rights violations, *Jones*, the ECtHR tried to harmonise the rule on jurisdictional immunities with the right of access to justice. The case concerned an application brought by British nationals who alleged they had been tortured in Saudi Arabia. The House of Lords had decided to grant immunity to Saudi Arabia and Saudi Arabian officials in civil proceedings brought against them by the victims. The Court found that the dismissal of the case by UK courts did not violate Article 6 of the Convention (on the right of access to justice). On the question of State immunity, the ECtHR held that it must be satisfied that the limitations applied on the right of access to court "do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired" (*Jones and Others v. The United Kingdom*, Apps. No. 34356/06 and 40528/06, 14 January 2014, Reports of Judgments and Decisions 2014 ("*Jones*"), para. 186). However, in applying this principle to the case at bar, the Court simply followed the ICJ precedent in the *Jurisdictional Immunities* case and held that the application of the immunity rule does not impose disproportionate restrictions to the right of access to justice (para. 198).

78 *Acta jure gestionis* are private or commercial acts, which can be subject to jurisdiction.

There is a further aspect that deserves consideration. By allowing the bringing of individual claims for reparation against foreign States for serious violations of IHL and IHRL committed on the territory of the forum State, Judgment 238/2014 represents a building block in the emergence of an individual right to reparation for IHL violations.

There is widespread consensus that IHL violations entail State responsibility but do not give rise to individual reparation claims.[79] States have thus far resisted the capacity of individuals to bring reparation claims before domestic courts, especially (but not exclusively) in cases where the passing of a judgment implied lifting the immunity of a foreign State. On a policy level, judicial channels are considered to be unsuitable for gross violations of IHL occurring in armed conflict, perhaps with the limited exception of claims for property loss.[80] In addition, it is argued that opening the gates of judicial process to individual claimants, thereby discarding the well-established principle of jurisdictional immunity of foreign States, would disrupt diplomatic relations between States.

The Constitutional Court's judgment opens Italian domestic courts to the bringing of individual complaints for serious violations of IHL and IHRL.[81] On the theoretical level, this implies recognizing that those rules are not only addressed to States, but also to individuals, to whom they confer rights (and obligations).[82] This conception finds support in the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which leave open the possibility that States infringing obligations *erga omnes* may bear responsibility vis-à-vis subjects other than States.[83] It is also consistent with

79 See, with specific regard to the facts at issue in the *Jurisdictional Immunities* Judgment, Separate Opinion of Judge Koroma, para. 9; Tomuschat, "The National Constitution", at 10.

80 Tomuschat, "State Responsibility before National Courts", at 825.

81 It should be noted, however, that the question of reparation for crimes committed by Germany's armed forces during World War II concerns serious violations of IHL and IHRL committed on Italy's territory, where the claimants are Italian nationals.

82 That the rules of IHL impose obligations directly on individuals is uncontroversial in light of the developments in international criminal law.

83 Articles 33 and 48(1)(b) of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts do not expressly admit, nor exclude, the existence of an individual right to reparation. In particular, Article 33 of the Draft Articles on State Responsibility seems to suggest that secondary obligations may be owed not only to States but also to private parties. Even though the foregoing Article is only a saving clause, it clearly envisages the possibility that some person or entity other than a State may be entitled to claim reparation. See A. Nollkaemper,

the practice of UN organs, such as the General Assembly,[84] the International Commission of Inquiry on Darfur[85] and the ICJ,[86] which have recognized (albeit sometimes only implicitly) individuals' right to reparation for IHL violations. Finally, it is consistent with relevant soft law instruments.[87] An exhaustive consideration of this complex subject goes beyond the scope of the present inquiry.[88]

"Internationally Wrongful Acts in Domestic Courts", 101 *The American Journal of International Law* (2007) 760, at 780; J. Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect", 96 *The American Journal of International Law* (2002) 874, at 887; E. Cannizzaro, "Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the *Jurisdictional Immunities* Case", in D. Alland, *et al.* (eds), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy*, Leiden, 2014, 495-502, at 496.

84 In 2005, the General Assembly adopted the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (UN GA Res. 60/147, 16 December 2005).

85 In its Report to the UN Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004, The International Commission of Inquiry on Darfur recognized that victims of serious IHL violation have a right to reparation (para. 597).

86 In the *Wall* Advisory Opinion, the ICJ repeatedly identified individuals as the beneficiaries of Israel's obligation to make reparation (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports 2004, paras. 152-153). It is true that the ICJ did not fully articulate that natural persons injured by the construction of the wall had a right to reparation *under IHL* (it will be recalled that in the Court's view the construction of the separation fence ran contrary to several rules of international law, including the principle of self-determination, and IHRL). However, it can still be inferred from the Court's reasoning that it intended to hold that Israel's obligation to repair stemmed from all the infringed international rules, including the rules of IHL on belligerent occupation. See e.g. P. Gaeta, "Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?", in O. Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, 2010, 305, at 321. For a more critical view on the significance of the ICJ's Opinion for the affirmation of a right to reparation pertaining to individuals see Tomuschat, "State Responsibility before National Courts", at 825.

87 For example, the Chicago Principles on Post-Conflict Justice, adopted by the International Human Rights Law Institute in 2008. Drawing on the UN Basic Principles and the Chicago Principles on Post-Conflict Justice, the ILA Committee on Reparation for Victims of Armed Conflict elaborated a Draft Declaration on International Law Principles on Reparation for Victims of Armed Conflict, which was adopted by the 2010 Conference at The Hague.

88 For a more thorough consideration of this topic, see G. Pinzauti, "Good Time for a Change: Recognizing Individuals' Rights under the Rules of International

For the purposes of this paper, it suffices to draw attention to this important question, which echoes in the *Jurisdictional Immunities* Judgment although the Court avoided tackling it.

Recognizing an individual right to reparation for IHL violations also raises the question of monetary compensation for the victims. Before anyone pushes the panic button, it is worth emphasising that legal scholars have not yet explored the content of State responsibility towards individuals for violations of IHL. Arguably, it may differ from the content of traditional State-to-State responsibility. For example, in a typical inter-State reparation scheme, international law mandates the wrongdoing State to provide *full* reparation to the injured State. This may not be the case with respect to State responsibility arising towards individuals for gross violations of IHL. A standard of "adequate reparation", to be determined on the facts of the case, may prove more appropriate. Likewise, forms of reparation other than monetary compensation, including restitution, rehabilitation and satisfaction, may be considered.

V. CONCLUDING REMARKS

The case of Italy's non-compliance with the *Jurisdictional Immunities* Judgment shows that the tension between the protection of human rights values, on the one hand, and State immunity for international crimes, on the other, is at breaking point. When the recognition of immunity is coupled with the wrongdoing State's failure to make reparation for the harm caused, there must be other ways for victims to obtain redress for the wrong suffered. If that is not the case, immunity does mean impunity. But that is not what the immunity rule was meant to achieve.

The State of nationality of the victims can and should act in diplomatic protection to obtain reparation in the interest of the injured individuals, particularly if there are no other means of redress. The practice of those States that have undertaken this obligation under domestic law shows some positive results.

Absent diplomatic action by the State of nationality of the victims, it seems implausible to stop victims from bringing reparation claims before domestic courts. This is an area of international law

Humanitarian Law on the Conduct of Hostilities", in A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford, 2012, 571.

that is subject to change, as was recognized by the ECtHR in *Jones*.[89] Domestic courts are, as they have been in the past, the driving force behind the change. Only time will tell whether Judgment 238/2014 will remain an isolated occurrence, or whether other courts will follow. Finally, it should be noted that even though the Constitutional Court drew its standards of review from the Italian Constitution, the underlying protected values – respect for human dignity and the right of access to justice – are common to all democratic States and the international legal order. The Constitutional Court need not stand alone in championing human dignity.

89 After upholding the compatibility of State immunity for international crimes with Article 6 of the European Convention, the ECtHR held *in fine* that "in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States" (*Jones*, para. 215).

HUMAN DIGNITY AND THE JEWISH TRADITION

Hershey H. Friedman

Professor of Business, Department of Finance and Business Management,
School of Business, Brooklyn College.

INTRODUCTION

The concept of human dignity is crucial to all of mankind. The General Assembly of the United Nations adopted "The Universal Declaration of Human Rights" on December 10, 1948. Article 1 of the Declaration states: "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." René Samuel Cassin, one of the major architects of this declaration, won the Nobel Peace Prize in 1968. He did not hide the fact that the idea of human dignity and rights came from the Scriptures (see his essay "From the Ten Commandments to the Rights of Man" available at: http://www.udhr.org/history/tencomms.htm). Human dignity is inextricably linked with human rights and belief in the brotherhood of all humankind.

Aramesh (2007) asserts that human dignity is a key concept in all theistic religions. In Catholicism, for example, it has its roots in the belief that humanity was created in the image of God (*Imago Dei*). Aramesh (2007) notes that human dignity is "one of the most emphasized themes in Islamic theology" and can be used by Moslems to resolve ethical questions in the area of bioethics and health care.

This paper will demonstrate how central human dignity (*kvod habriot* in Hebrew) is to Judaism. Rakover (1998: pp. 29-30) cites Maimonides, Yaakov Emden, and other sources to show that *kvod habriot* applies to gentiles as well as to Jews (*briot* means creations); it also applies to the deceased as well as to the living. Hertz (1959: p. 265) declares: "The belief in the unity of the human race is the natural corollary of the unity of God, since One God must be the God of the whole of humanity…Through Hebrew monotheism alone was it possible to teach the Brotherhood of Man."

There is a classic argument between Rabbi Akiva and Ben Azzai (Jerusalem Talmud, Nedarim 9:4) as to which is the fundamental principle that summarizes the entire Torah. Rabbi Akiva believed that it was the verse (Leviticus 19:18) "You shall love your fellow as yourself." Ben Azzai disagreed and felt that it was the verse (Genesis 5:1) "This is the book of the generations of Adam. On the day that God created man, He made him in the likeness of God." From the principle of loving your fellow human being as yourself, one can deduce "that which is hateful to you, do not do to others." This is Hillel the Elder's version of the Golden Rule (Babylonian Talmud, Shabbat 31a). A lofty ideal, but problematic if one does not much care about his or her own dignity. One who accepts the view that all of mankind was made in the likeness of God must respect all people, regardless of how s/he feels about her/himself (Pnei Moshe, see also Torah Temimah on Genesis 5:1). Indeed, Rabbi Joseph Soloveitchik, one of the great rabbinical leaders of the twentieth century, makes the point that human dignity and social justice "are implicit in the biblical concept that man was created in God's image" (Besdin, 1979: 190). Clearly, the importance of human dignity is linked to the belief that God created man. In fact, Amsel (1994) quotes the Midrash (Genesis Rabbah 24:7) that maintains when you insult another person you have insulted his Creator, because man was created in the image of God.

Maimonides (Mishneh Torah, Laws of Shmittah 13:13) makes a powerful statement that demonstrates the spiritual foundation of universal brotherhood.

> Not only the tribe of Levi, but every single man of all the inhabitants of the world whose spirit and wisdom have inspired him to stand before God, to serve Him, to revere Him, to know God and to walk uprightly the way God made him; and he removed from his neck the yoke of the numerous calculations that people seek; this individual becomes sanctified, a Holy of Holies, and God shall be his lot and portion forever and ever…

If any inhabitant of the world has the potential of being a "Holy of Holies," one can understand why *kvod habriot* is so essential. The Talmud (Babylonian Talmud, Bava Kama 83b) makes a similar statement in a discussion dealing with the amount one must pay in damages for causing someone embarrassment (*bosheth*). The Talmud avers that damages depend on the status of the humiliator

and of the humiliated. In other words, if a low- status individual insults a high-status individual more has to be paid in damages than in the opposite case. One opinion cited in the Talmud (ibid. 86a), however, is that "they are all the children of Abraham, Isaac, and Jacob." All have status.

In some cases where there is a question as to what is the law, the Talmud (e.g., Babylonian Talmud, Berachot 45a, Eruvin 14b) states: "Go out and see how the people are accustomed to act." Scholars can learn the law by observing how ordinary individuals behave. After all, they are the children of Abraham, Isaac, and Jacob.

Human dignity is of utmost significance in Jewish law. It is, however, of lesser importance than honoring and showing obedience to God. The Midrash (Midrash Genesis Rabbah, 90:2; Midrash Leviticus Rabbah 24:9) states that "My [God's] greatness will be higher than your [humankind's] greatness" and "My holiness is above your holiness." The point of this Midrash is to emphasize the prominence of humanity yet recognize that the principle of human dignity should not be used to disregard the laws of God. The Babylonian Talmud (Berachot 19b-20a), as we shall see, uses a verse from Proverbs (21:30) to derive the principle that "when there is a desecration of God's Name, no respect is paid [even] to one's teacher." Similarly, the Jerusalem Talmud (Chagigah 2:1; Midrash Genesis Rabbah 1:5) states: "One who gains honor through the degradation of his fellow human has no share in the World to Come. All the more so if one gains honor at the expense of the honor of the Eternal One." The Talmud is making it clear that the honor of God takes precedence over the honor of mortals. Linking human dignity with God's honor may be a good way to ensure that humankind respects both.

People can never become as great as God; however, they can achieve godliness by engaging in such acts as helping the poor, healing the sick, and improving the world. The Talmud (Babylonian Talmud, Sotah 14a) derives the principle that humankind has the obligation to emulate the attributes of God from the verse (Deuteronomy 13:5): "You shall walk after the Lord your God." The Talmud notes that God made clothing for Adam and Eve, visited Abraham when he was ill, comforted Isaac after Abraham died, and buried Moses. Therefore, people have the obligation to perform acts of kindness such as clothing the poor, visiting the sick, comforting the mourners, and burying the dead. The following verse in Leviticus (19:2): "You

shall be holy for I the Lord your God am holy," is also used to derive the principle that mortals have an obligation to imitate God.

HUMAN DIGNITY IN TALMUDIC LAW

The classic discussion regarding human dignity appears in the Babylonian Talmud (Berachot 19b-20a) where it states "The value of human dignity is so great that it supersedes a negative commandment of the Torah." The Babylonian Talmud concludes that human dignity overrides Rabbinic law and precepts of the Torah where the person is not actively engaged in a violation but is rather sitting and refraining from performing the commandment. In Jewish law, this is referred to as "*shev v'al taaseh*" (literally, sit and do not act). The opposite of a *shev v'al taaseh* is a *kum aseh* (literally, stand and act) an active transgression of Jewish law.

The Jerusalem Talmud has a somewhat different version of the above (Jerusalem Talmud, Berachot 3:1): "The dignity of the public (the term used is *kvod harrabim* which means the dignity of the many) is so great that it supersedes a negative commandment of the Torah for one hour (i.e., temporarily)." Normally, the Torah (Leviticus 21: 1-3) does not permit the priest (*kohen)* to make himself ritually impure by coming into contact with a dead person (thus, he is not permitted to go into a cemetery) except for very close relatives. However, in certain cases involving human dignity, Torah law is superseded and the *kohen* is permitted to contaminate himself. The case discussed in the Jerusalem Talmud is one where the priest is part of a larger group that is going to do a good deed (e.g., redeeming a captive) and the group has a choice of two roads. The closer road passes over a place such as a cemetery, which would make the priest ritually impure. According to many commentaries, this sort of impurity would be forbidden by the Torah. Even so, since it would be disrespectful of the group for the priest to leave, he is permitted to accompany them.

Wearing a Forbidden Garment

The Talmud (Babylonian Talmud, Berachot 19b) discusses the case where someone finds that he is wearing *kilayim*, i.e., *shatnez* (*kilayim* is a forbidden mixture; in the case of a garment it is one made of wool and linen –referred to as *shatnez* – and wearing it is a violation of a Torah precept) in public. The Talmud concludes

that he must remove the garment even if he is standing in the marketplace and it will result in a loss of dignity since he has to walk home without his garment. The reason given is a quote from Proverbs (21:30): "There is no wisdom, nor understanding, nor counsel against the Lord." The Talmud interprets this verse to mean that when there is a desecration of God's Name, no respect is paid [even] to one's teacher. This verse demonstrates that the honor of God overrides all human concerns, even that of human dignity. If an individual wears *shatnez* in public, s/he is desecrating God's name.

Maimonides (Mishneh Torah, Hilchot Kilayim 10:29) had a slightly different version of the above Talmudic text. Maimonides' Talmudic text did not have the word *ba-bigdo* (on his own garment). Thus, Maimonides states that if an individual sees *another* person wearing *shatnez* that is prohibited from the Torah, even if the person is in the marketplace, he is obligated to tear the garment off this individual immediately, even if the person is his teacher who taught him Torah. As noted above, when it comes to desecration of God's Name, even the respect of one's teacher is ignored. Thus, according to Maimonides, the obligation to remove *shatnez* in a public place applies both to one's self and even to others. Maimonides notes that human dignity does not supersede a prohibition that is explicit in the Torah. However, if the person is wearing *shatnez* that is rabbinically prohibited, then human dignity overrides Rabbinical law and one can wait until the wearer of the forbidden garment gets home before tearing it off. However, not all authorities agree with Maimonides; some believe (e.g., Rosh) that one is under no obligation to say anything when another party is wearing a forbidden garment and can wait until the other person gets home.

Priests Becoming Impure

As noted above, Jewish law prohibits a *kohen* (priest) from becoming ritually impure (the Hebrew word for this is *tamei*) by coming into contact with a corpse or even going into a cemetery. The Talmud describes the following case. A funeral procession is returning from a burial and the mourners take a road which was *tamei* (ritually impure, i.e., it passed over a grave). Out of respect for the mourner, the procession, even if it includes a priest (*kohen*) who as noted above is not permitted to become impure (*tamei*), may accompany the mourner. The Talmud (Babylonian Talmud, Berachot 19b) concludes

that this case refers to a field where a grave has been plowed up so the bones are scattered about *(beis hapras)*, where the prohibition against becoming impure is Rabbinic, and not a violation of Torah law. Normally, when one is permitted to walk through the field that contains a grave that has been plowed up (e.g., to offer the Passover sacrifice), he must blow on the ground in front of himself to blow the small bones that might be there. The Passover sacrifice –eaten by all Jews including non-priests– had to be eaten in ritual purity. In the above case, blowing on the ground is not necessary since it would be undignified in a funeral procession (Tosafot, Bechoros 29a).

The Jerusalem Talmud (Berochos 3:1) discussed previously disagrees with the Babylonian Talmud and states that human dignity supersedes the law prohibiting a priest from becoming impure in the case of the dignity of the public even if it is a contamination prohibited from the Torah. However, the Torah law is only superseded for a short period of time.

In another case involving priests, Rabbi Elazar b. Tzadok, who was a priest, stated that "we used to leap over coffins containing dead people in order to greet the kings of Israel. The Talmud adds that this is permitted even to greet Gentile kings so that if he is privileged to live in the times of the Messiah, he will be able to see the difference between the honor given to Jewish kings in Messianic times and Gentile kings (Babylonian Talmud, Berachot 19b). The Talmud concludes that climbing over a coffin is not a problem for a priest with regards to Torah law since coffins have a hollow space of a handbreadth and this serves to act as a barrier against the impurity of the corpse. Thus, it is only a violation of rabbinic law and human dignity overrides it.

Returning a Lost Object

The Torah requires that an individual return a found object to the rightful owner. The Torah (Deuteronomy 22:1) explicitly states: "You shall not see the ox of your brother or his sheep wandering and hide yourself from them." The Talmud (Babylonian Talmud, Berachot 19b) observes that there are exceptions to this rule requiring that one return a lost object. One exception is an elderly person where it is beneath his dignity to deal with the lost object (it has very little value and he would not bother with it even if it were his own); he is permitted to ignore it. This is clearly a case

where human dignity overrides a Torah law. The Talmud indicates that the reason we cannot generalize from here that human dignity always overrides Torah law is that returning a lost object is monetary law; monetary law is not as stringent as prohibitory law. The Meiri, a major commentary, notes that this is not a situation where the individual is actively violating Jewish law; rather, the individual is passive and refraining from performing the mitzvah of returning a lost object. The Talmud, however, prefers using the reason making the distinction between monetary law and prohibitory law. This implies that human dignity overrides Torah law if it deals with money, rather than prohibitory law.

Burying the Dead

There is a special law regarding a *meth mitzvah*, the burial of an unattended corpse (e.g., if a body is found in a lonely place and there is no one to take care of it). According to the Torah, even a priest or *nazir* is obligated to bury the *meth mitzvah*. A *nazir* (see Numbers 6: 1-21) is an individual who consecrates himself by taking a special vow. The *nazir* was not permitted to drink wine, cut his/her hair, or come into contact with a corpse. Thus, if a priest or *nazir* is traveling and sees an unattended corpse on the side of the road and there is no one else to take care of it, he is obligated to bury it. Of course, this makes the priest impure and disqualified from priestly functions until he becomes purified. This is a case where human dignity (leaving a corpse unattended is an embarrassment for the deceased) overrides Torah law. Moreover, burying a corpse is not a passive case of sitting and not acting; after all, the priest is burying the deceased and is most certainly engaged in an act.

Many of the commentaries deal with this question as to why we do not use the case of the unattended corpse to derive a general principle that human dignity overrides Jewish law even in a case where the individual must actively violate a precept. Rashi's (Babylonian Talmud, Berachot 20a) answer is that the Torah law that a *nazir* or priest may not make himself impure by coming into contact with a corpse never included the *meth mitzvah*. Thus, human dignity does not override a Torah law; rather, this law never included a *meth mitzvah*. Tosafot rejects Rashi's answer and has a different explanation. The law of not becoming impure applies only to priests and does not apply to all Jews (it is a *lav she'ein shaveh ba'kol*); thus,

one cannot make generalizations from it. The concept of *lav she'ein shaveh ba'kol* is used by other commentaries, not only Tosafot (see Meiri Berachot 19b who discusses this). The end result is that one cannot derive a general principle from the case of *meth mitzvah* that human dignity allows one to actively override Torah law.

The Talmud (Babylonian Talmud, Megilla 3b) demonstrates the importance of *meth mitzvah* by making it clear that if one has to choose between reading the Book of Esther (*Megilla*) on Purim – a rabbinical obligation – or burying the *meth mitzvah*, the individual must bury the dead person. *Meth mitzvah* is so important that even the High Priest (*kohen gadol*) must bury the unattended corpse.

The Talmud (Babylonian Talmud, Berachot 19b) notes that the obligation to bury a *meth mitzvah* overrides the law of offering the Paschal lamb (a positive precept of the Torah which cannot be performed by someone who has become unclean because of contact with a corpse) and the law to circumcise a son. Thus, an individual who is on his way to slaughter the Paschal lamb and encounters an unattended corpse will be obligated to bury the corpse even though this means that he will not be able to perform the *mitzvah* of eating the Passover sacrifice that year. Human dignity overrides Torah law in a case where there is a *shev v'al taaseh* (sit and do not act), i.e., the individual is passive and not performing the *mitzvah*, but not where the individual actively violates the Torah law. Not performing the commandment of offering the Paschal lamb is not the same as actively violating the prohibition against wearing *shatnez*.

Violating the Sabbath

In ancient times, people cleaned themselves with stones after defecating. The Talmud (Babylonian Talmud, Shabbat 81b) concludes that one may carry the stones and use them for cleaning purposes on the Shabbat because of human dignity. This is a case where a rabbinical prohibition (there is an argument between two commentaries, Rashi and Tosafot, as to which rabbinical law has been violated by using the stones) is superseded by the concern for human dignity.

A *karmelit* is an area that cannot be classified as either a public domain (*reshuth harabim*) or a private domain (*reshuth hayachid*). It is rabbinically prohibited to carry in a *karmelit* on the Sabbath. The Talmud (Babylonian Talmud, Shabbat 94b) discusses an incident

where a corpse was lying in the town of Dakura and Rabbi Nachman b. Yitzchak permitted it to be moved into a *Karmelit* because of human dignity (Rashi speculates that the corpse may have been in the sun and there was a fear that it would rot or that the body was lying in a degrading place). Moving the corpse from a private domain to a *karmelit* on the Sabbath is a violation of rabbinic law which is superseded by human dignity considerations.

If it is the Sabbath and one is wearing a garment with *tzizit* (fringes) and one of the fringes tears, the individual must remove the garment. Since the *tzizit* are not valid anymore, he would be considered in violation of the prohibition against carrying. If the individual is in a *karmelit* (where the prohibition against carrying is rabbinical), he can walk home and wearing the garment; he is not obligated to remove his garment and walk home undressed. This is because human dignity overrides rabbinic law (Babylonian Talmud, Menachot 38a).

Undeserved Goodwill

Geneivat da'at (literally, stealing another's thoughts) is a term used in Jewish law to indicate creating a false impression and acquiring undeserved goodwill. It is prohibited and, according to most authorities, is a violation of Torah law. The Talmud (Babylonian Talmud, Chullin 94a) also states that one should not go to a mourner's house with a bottle of wine that is only partially full since this would be *geneivat da'at*. Apparently, in Talmudic times, comforters would bring bottles of wine for the mourners. An individual could easily bring a bottle that was nearly empty and strategically place it among the other bottles in a way so that the mourners would assume that the reason the bottle was empty was that people had drunk from it (see Maharsha). Nor should one fill the partially empty wine bottle with water since he deceives the mourner. This is also a case of *geneivat da'at* since the mourner will think he is being given a full bottle of wine. The Talmud adds that if there is a big assembly of people at the mourner's house and the comforter wants to show respect for the mourner (but cannot afford to bring a full bottle of wine), he is permitted the above deception. Clearly, if the purpose of the *geneivat da'at* is not to receive undeserved gratitude but to show honor or pay tribute to another person, it is permitted. Human dignity supersedes the prohibition against *geneivat da'at*.

Mourning Laws

An individual is being shaved and in the middle is told that his father died. He is permitted to have the job finished (Jerusalem Talmud, Shabbat 1:2). As a mourner for a parent he would not be permitted to take a haircut or shave his beard until his friends scold him for his unkempt appearance. However, walking around half-shaven or with half of a haircut would be very embarrassing and undignified. Therefore, because of *kvod habriot*, he is permitted to have the job completed (see Shulchan Aruch, Yoreh Deah 390:2).

Taking on a Stringency in Law

Dratch (2006) relates the following law to human dignity. The Talmud (Jerusalem Talmud, Berachot 2:9) permits even an ordinary person to adopt a *chumra* –legal strictness exceeding the normal requirements of the law– when it involves pain (e.g., fasting on certain days). However, it should be done privately; otherwise, it may cause embarrassment for others who do not act beyond the requirements of the law.

REGULATIONS PASSED IN ORDER NOT TO SHAME THOSE OF LIMITED MEANS

Because human dignity is so important, the Talmud describes numerous enactments and laws that were passed in order to ensure that poor people were not embarrassed.

Charity, ideally, should be given in secret so that the two parties, the giver and the receiver, do not know each other (Babylonian Talmud, Chagigah 5a; Maimonides, Hilchot Matnot Aniyim 10: 7 -14). Maimonides lists eight levels of charity: There is only one level above completely anonymous charity – providing a poor person with employment. Providing a job to a pauper or giving him money in secret are the two best ways to preserve his dignity.

The Talmud (Babylonian Talmud, Moed Katan 27a-27b) notes that the following changes were enacted in the funeral ceremony in order not to embarrass the impecunious.

> Our Rabbis taught: Formerly, they would bring food to the house of mourners in following manner: to the rich, in baskets of gold and silver and to the poor in wicker baskets made of peeled willows. And the poor people were ashamed.

> The sages, therefore, instituted that all should be provided with food in wicker baskets made of peeled willows out of deference to the poor.
>
> Our Rabbis taught: Formerly, they would provide drinks to the house of mourners in the following manner: to the rich, in white glass [which was very expensive] and to the poor in colored glass. And the poor people were ashamed. The sages therefore instituted that all should be provided with drinks in colored glass out of deference to the poor.
>
> Formerly, they would uncover the face of the rich [corpse] and cover the face of the poor because their face became blackened by famine. And the poor people were ashamed. The sages therefore instituted that all faces should be covered out of deference to the poor.
>
> Formerly, they would carry out the rich [corpse] in a state bed and the poor on a common bier. And the poor people were ashamed. The sages therefore instituted that all should be carried out on a common bier out of deference to the poor…
>
> Formerly, the expense of carrying out the dead was harder on the family than the death itself; the family therefore abandoned the corpse and fled. Until Rabban Gamliel [President of the Sanhedrin] disregarded his own dignity, and had his body carried out in flaxen shrouds. Afterwards, all the people followed his lead and had themselves carried out in flaxen shrouds. Rabbi Papa stated: And nowadays, all follow the practice of being carried out even in a canvas shroud that costs but a *zuz*.

Friedman (2003) discusses the halachic issues involved in living an ostentatious lifestyle. Judaism is concerned about any behaviors that will shame those of limited means. This was the rationale for many sumptuary laws that were passed by Jewish communities throughout history.

The Talmud (Babylonian Talmud, Pesachim 82a) discusses why an individual was not permitted to burn a Paschal lamb that became ritually unclean in front of the Temple with his own wood. Rabbi Yosef offers the following reason: The sages did not want to embarrass the poor people who did not have their own wood so they, therefore, enacted that everyone had to use the altar wood that belonged to the Temple.

Regulations Passed in Order Not to Shame the Ignorant

The *Mishna* (Bikkurim 3:7) relates that at first those who knew how to recite the prayer of gratitude to God (in Hebrew) – said when bringing the *bikkurim* (first fruits) to the Temple (see Deuteronomy 26: 1-12) – would recite them; those that could not would repeat the words of the prayer after hearing the priest say them. This caused a great deal of embarrassment for those that were ignorant so they refrained from bringing the first fruits. The rabbis therefore enacted that both the person who knew how to recite the blessings and one who did not know would repeat the words.

HUMAN DIGNITY IN POST-TALMUDIC JEWISH LAW

The principle of human dignity was not only an issue in Talmudic times. Many modern questions that come up in Jewish law are decided upon using this principle. This is only a sample of legal questions that have used the principle that human dignity is so great that it supersedes a negative commandment of the Torah.

I. The Cheating Spouse

The Noda Be-Yehuda (Orech Chaim, Responsa 35) deals with a fascinating case. A young student had an affair with his hostess, a married woman, for several years. Subsequently, he married her daughter. In Jewish law, if a married woman commits adultery, she is prohibited from having intercourse again with both her husband and the adulterer (even after she is divorced). The young student decided to do *teshuvah* (penance) for his sin and wanted to know whether he was obligated to tell his father-in-law about his affair. The question was whether *kvod habriot* was a good enough reason to permit the penitent son-in-law to "sit and not act" and not inform his father-in-law of what he had done. The fear was that making the adultery public would cause a great deal of embarrassment for the entire family, including the children who were very respected. The Noda Be-Yehuda related this question to the above-mentioned argument between Rambam and the Rosh. Rambam, who stated that one must tear off *shatnez* worn by another in the marketplace, would believe that the adulterer should tell his father-in-law what he had done. The Rosh, whose opinion is that one is not obligated to tell another party that he is wearing *shatnez*, would feel that the

son-in-law may "sit and not act" and not say anything. The Noda Be-Yehuda discusses other issues (the reader is urged to go to the original source) and concludes that the son-in-law must tell his father-in-law in private what he had done. This will ensure that the father-in-law will believe him since the truth has a way of making itself known. Otherwise, the father-in-law might continue to have sexual relations with his wife and, as noted above, she is no longer permitted to him. Since the father-in-law was an older man and would not remarry anyway, the Noda Be-Yehuda was able to come up with a solution that would not cause a public embarrassment. He states that the husband is under no obligation to divorce his wife; he is simply not permitted to have relations with her. Thus, they may remain married and continue to live together in the same house but never again have sexual relations. Of course, the public and family would not know about the wife's infidelity since the couple would continue to be married. This would spare the family from being embarrassed.

The Divrei Chaim (She'elot U'Teshuvot Divrei Chaim, Orech Chaim 35), on the other hand, felt that since the prohibition against living with a wife who has committed adultery is not explicitly stated in the Torah, the adulterer should keep the affair secret because of *kvod habriot*.

A similar case is that of a woman who was promiscuous when she was younger and had an abortion. Later on she changed her ways, married, and gave birth to a son. Once a woman has an abortion, there is no longer an obligation to perform the ritual of *pidyon haben* (redemption) on a first-born son; after all, the child is not the first born. However, since no one knew of the women's past, it would be very embarrassing for the family not to have a *pidyon haben*. Permitting the *pidyon haben*, on the other hand, means that unnecessary blessings will be made. Indeed, the entire ceremony would be a sham. Feldman mentions this problem and provides sources that discuss this question in detail (2005: p. 203).

II. Human Dignity and the Sabbath Hearing Aids and Electric Wheelchairs

To understand this case, one must be aware of the law of *muktzeh*. The rabbis prohibited moving certain objects on the Sabbath as a preventive measure. By avoiding *muktzeh* objects (e.g., money), one is less likely to violate the Sabbath. A hearing aid is *muktzeh* as

are almost all electrical devices and machines. Rabbi Eliezer Yehuda Waldenberg (Sheilot U'Teshuvot Tzitz Eliezer 6:6) states that a deaf person may wear a hearing aid on Shabbat since the principle of human dignity overrides the problem of *muktzeh*. After all, it is extremely embarrassing for a person to go to the synagogue and not be able to respond to people who talk to him. In addition, there is a great deal of mental anguish for a person to go to a synagogue and be unable to listen to the reading of the Torah, pray along with others, and perform other *mitzvot*. Rabbi Waldenberg compares this to the case of using stones for cleansing oneself. Human dignity supersedes the rabbinic law not permitting one to use something that is *muktzeh* on Shabbat.

Closely related to this issue is the problem of an electric wheelchair on Shabbat or Yom Tov. The Zomet Institute in Israel designed an electric wheelchair for Shabbat use that does not involve the violation of any Torah laws. The source of the electricity in such a wheelchair is a battery; a battery releases power stored from before the Shabbat and does not generate power. The development of such a wheelchair was encouraged by Rabbi Shlomo Zalman Auerbach, a well-known religious authority, who felt that being forced to stay at home for several days results in a loss of human dignity and self-worth. Therefore, *kvod habriot* overrides any problems with *muktzeh* and other rabbinic violations (Meir, 1990).

Meir (1990) quotes the *Kalkelet HaShabbat* who permits the opening an umbrella on Shabbat in special cases where human dignity is involved. As far as insisting that a person remain indoors all Shabbat, "there is no greater anguish than that" (based on Tosafot, Shabbat 50b, s.v. "*bishvil*"). Tosafot explicitly states that there is no greater pain than being ashamed to go out among people (and thus having to stay indoors).

Getting Married on the Sabbath

One is not permitted to get married on Shabbat. This is rabbinically prohibited because of a fear that one may come to accidentally write something; writing on the Shabbat is a violation of Torah law. There was a custom in many communities to get married on Friday afternoon. What is the law if the financial/dowry arrangements take very long and it is nightfall, i.e., the beginning of Shabbat: may the wedding be permitted? According to the Remah

(Shulchan Aruch, Orech Chaim 339:4), we permit the wedding to take place on the Shabbat. Since the wedding meal is already prepared and it would be very embarrassing for the bride and groom not to get married, we use the principle of human dignity to allow the wedding to take place.

Medications on the Sabbath

There are opinions that allow one to take medications on Shabbat if there is concern for *kvod habriot*. For example, if one has a very bad runny nose s/he may be permitted to take medicine for this since it is undignified to walk around like this. The same may be true for allergy medications and antacids if the person is afraid that not taking the medication may result in some embarrassment (Jachter, 2001).

Tearing Toilet Paper

What is someone supposed to do on Shabbat if he finds himself in the bathroom and there is no pre-torn toilet paper or tissues? Many authorities feel that tearing toilet paper on Shabbat is a violation of Torah law since it is being torn for a constructive purpose (see Mishna Berurah 340:41). If it is prohibited from the Torah, the solution is to tear it with a *shinui* (a way that is different than the usual way, e.g., holding the toilet roll in place with an elbow and tearing off the paper with the other hand). Tearing with a *shinui* lowers the prohibition to a violation of Rabbinic law which is set aside for *kvod habriot* (see Shmirat Shabbat K'hilchata 23:16).

Closely related to the above is the law that one is permitted to build on Shabbat a temporary toilet made out of stones to sit on when relieving oneself. Building a temporary structure on Shabbat would be a violation of Rabbinic law but is permitted because of *kvod habriot* (Shulchan Aruch, Orech Chaim 312:9). Also, a case discussed by Rabbi Abraham Weinfeld (Lev Avraham, 1: 52) regarding washing and scrubbing one's beard on Shabbat if it has become filthy. He permits the scrubbing of the beard –not only simply making it wet– if there is a question of *kvod habriot* and there is no other way to get the beard clean.

Wearing a Handkerchief on the Sabbath

The Levushei Mordechai (Sheilot V'Teshuvot Levushei Mordechai, Orech Chaim 2: 133) discusses the problem of wearing a handkerchief around one's neck on Shabbat where there is no *eruv*. It is obvious to everyone that the handkerchief is not being worn as a scarf, particularly when the weather is not cold. Indeed, it is very obvious if the handkerchief is worn on top of a scarf. Clearly, it is a noticeable legal fiction to get around the law (*haaramah*) and should not be permitted. He, however, notes that the Chatam Sofer wore a handkerchief around his hand. It is permissible because taking something outside the *eruv* in an unusual manner (*hotza'ah shelo k'darko*) is Rabbinically prohibited. *Kvod habriot* supersedes rabbinical law; it is embarrassing for someone with a runny nose to walk around without a handkerchief.

Colostomy Bags

Some individuals have to wear a colostomy bag under their clothing after surgery. This can be a problem on Shabbat in a public domain (*reshuth harabim*) where there is no *eruv*. This question relates to an issue that is discussed in the Shulchan Aruch (Orech Chaim 301:13) regarding the *zav* (individual suffering from venereal discharges) who wears a pouch under his clothing to protect them from becoming soiled. One may not go into a *reshuth harabim* with the pouch since its only purpose is to protect the garments from becoming besmirched. Wearing something in order to protect one's clothing from being soiled does not give the worn item *halachic* status as a garment (*malbush*); thus using it constitutes carrying. The same is true of a woman who wears something under her clothing to protect them when she is menstruating. However, if something is being worn to reduce pain, it is permitted. The issue of wearing a colostomy bag and going into a *reshuth harabim* is discussed by Rabbi Abraham Weinfeld (Lev Avraham, 1: 46) and he uses the principle of *kvod habriot* to permit going outside with the bag. He also relies on the above-mentioned Tosafot (Babylonian Talmud, Shabbat 50b, s.v. "*bishvil*") and avers that the psychological pain of shame is no worse than physical pain.

III. Getting Called up to the Torah

Normally, one is called up to the Torah using one's name followed by "son of (*ben*) father's name, e.g., Shimon ben Yaakov. What happens if one's father was a heretic and it is an embarrassment for the son to be called up using his name? The Remah (Shulchan Aruch, Orech

Chaim 139:3) allows the person to be called up using the grandfather's name. If the son was an adult and was accustomed to be called up using his father's name and now his father has become a heretic, we continue to use the father's name. It would be embarrassing to make a change in the name; a change would draw attention to the fact that the father is a heretic. These laws were established because of human dignity, we do whatever is possible to minimize the embarrassment of the person being called up to the Torah.

Closely related to the above case is the situation where a woman does not know the name of her father. This causes problems with her *kethubah* (marriage contract), since a name must be mentioned. What makes it even more complicated is that the *kethubah* is read out loud for all the wedding guests to hear and we do not want to embarrass the couple. One solution is to write the bride's name in such a manner: Rachel, who is called Rachel daughter of Jacob, (Rochel bas Yaakov), if she was raised by Jacob. Of course, this is a giveaway that Rachel is not really Jacob's daughter. Therefore, when the *kethubah* is read out loud, we either skip the words "Rachel who is called" or say it quickly so those words are not heard (Sheilot V'Teshuvot Minchas Yitzchak 5:44).

IV. Cases involving a Priest (Kohen)

As noted above, a *kohen* (priest) is not permitted to make himself *tamei* (impure) by coming into contact with a corpse. Thus, if there is a dead person in a room, a *kohen* should not enter the room. Suppose a priest is sleeping in a room and is naked and someone dies in the room. There is no question that he must leave the room as soon as he is aware that there is a corpse there. Is he permitted to get dressed? This is a question that is discussed by many commentaries. The Remah (Yoreh Deah 372) says the priest must leave the room immediately and is not permitted to spend even a moment getting dressed. Others disagree with the Remah and consider spending a few seconds getting dressed as a shev *v'al taaseh* (passive) prohibition, which is superseded by human dignity. They allow the priest to put on enough clothing to maintain his dignity (e.g., a robe), but not to get completely dressed (Panim Me'irot 2:27).

Rabbi Shlomo Kluger (Teshuvot Tuv Taam Vedaat 3:2:211) discusses the case where a *kohen* is leading the services on Yom Kippur and an individual dies in a room next door. He concludes that

it is a great embarrassment for the *shliach tzibbur* (individual leading the prayer or cantor) to interrupt the prayers and leave the reader's desk (*tayvah*) empty. Therefore, we do not inform the *shliach tzibbur* that someone has died and allow him to finish the prayer services.

The following question concerns a *kohen* whose finger was accidentally cut off so it was hanging and the surgeon would first have to remove it totally before reattaching it. The problem is that once the surgeon removes the finger it is an organ from a living creature and will contaminate the *kohen* (make him *tamei*). As discussed above, a *kohen* is not permitted to contaminate himself. Rabbi Sternbuch (Teshuvot V'Hanhagot, 4: 262) uses the argument that *kvod habriot* enables us to supersede the prohibition against becoming ritually impure (*tamei*), even where there is an active transgression (*kum aseh*) of Jewish law. It is certainly quite embarrassing to walk around with a partially attached finger. He does, however, recommend using a gentile surgeon and putting the *kohen* to sleep so he does not assist in any way.

V. Having an Abortion

Rabbi Eliezer Yehuda Waldenberg (Sheilot U'Teshuvot Tzitz Eliezer 9:51:3) states that abortion is permitted in the following situation: If a married woman either had an affair (then repents) or was raped and she has become pregnant. This is a case where there is great embarrassment for the family; therefore, we allow the abortion because of human dignity. Jewish law considers psychological factors as well as physical factors in deciding whether or not an abortion is permitted. It should be noted, however, that even when abortion is permitted, Jewish law makes distinctions between early-stage and late-stage abortions. (Those interested in knowing more about abortion and Jewish law may be interested in reading Dr. Daniel Eisenberg's article at: http://www.aish.com/societyWork/sciencenature/Abortion_in_Jewish_Law.asp)

VI. Dyeing one's Beard

The Torah (Deuteronomy 22:5) prohibits a man from wearing women's clothing (and vice versa). The Talmud includes under this prohibition men who groom themselves the way women do, e.g., shaving underarm hair (Babylonian Talmud, Nazir 59a) or plucking out white hairs (Babylonian Talmud, Shabbat 94b). This law would

also apply to a man who wishes to dye his hair or beard for grooming purposes. An interesting question arose when half of the beard of a young person mysteriously turned white and he was embarrassed with it. He asked whether he would be permitted to dye his beard black. He was permitted to dye his beard because of human dignity (Sheilot U'Teshuvot Shoel U'Meishiv 1:1: 210).

VII. Playing Music on the Second Day of Yom Tov to Honor the King

Rabbi Meir Simcha Cohen of Dvinsk (Ohr Someach, Hilchot Yom Tov 6:14) permits musicians to play music on the second day of Yom Tov in order to honor the king. Celebrating the second day of Yom Tov outside of Israel nowadays is a *minhag* (custom) and is superseded by *kvod habriot*. The Ohr Someach relates this case to the one above dealing with leaping over coffins in order to greet kings.

The Ohr Someach also discusses another issue: May one make garments on Chol Hamoed for a *brith milah* (circumcision) for a child that was born on the first or second day of Sukkot because of *kvod habriot*? This is a question that is discussed in the Rivash (1: 226). The Rivash feels that it is not much of an embarrassment for the father if the infant does not wear new clothing. The Ohr Someach also does not permit it. He states that we use the principal of *kvod habriot* if the *mitzvah* that will be superseded and the embarrassment occur simultaneously; the act of not doing the mitzvah removes the embarrassment. For instance, allowing the *Kohen* to bury the unattended corpse (and thereby becoming *tamei*) eliminates the embarrassment of having an unburied body. In this case, while the garment is being sewn, the person is not being saved from any embarrassment. The embarrassment will occur in the future at the *brith* ceremony and the family does not have nice clothing to wear.

VIII. Mourning a Person Who Committed Suicide

Suicide is a serious transgression in Jewish law (Babylonian Talmud, Bava Kama 91b), since one's life belongs to God. One who commits suicide is not entitled to mourning rites (i.e., sitting *shiva* and rending of clothes) or supposed to be eulogized. Only rites that are for the honor of the survivor, e.g., lining up at the conclusion of the burial, should be performed (Shulchan Aruch, Yoreh Deah 345:1). There are, however, some situations where the family is permitted to mourn the

person who committed suicide. This is the case when it will cause the family a considerable amount of embarrassment that a member committed suicide, we allow the family to mourn. The Chatam Sofer (Sheilot V'Teshuvot, Yoreh Deah 326) adds that when it comes to the embarrassment of the family (*pegam mishpacha*), we do not follow any view that is lenient with the dignity of the children of Abraham, Isaac, and Jacob. The law discussed above regarding one who commits suicide is referring to one who did it with a clear head and had no regrets while committing the act. If this is the case, he has to be buried in a special part of the cemetery away from the Jewish graves. In most all cases, the assumption is that the person who committed suicide was not totally rational so the deceased is treated like any Jew (Weiss, 1991: 81-82). The fact that we make the assumption that the person who committed suicide was temporarily insane and treat the deceased like any other Jew probably has a great deal to do with the fact that we wish to spare the family additional pain.

IX. Resisting the Urge to Eliminate

It is not clear whether or not the prohibition against holding back the urge to eliminate is Biblical or Rabbinic (Shaarei Teshuva, Shulchan Aruch, Orech Chaim 17). The Talmud (Babylonian Talmud, Maakot 15b) derives the prohibition from the verse (Leviticus 11:43): "You shall not make yourself abominable..." This may, however, be an *asmakhta* (the verse hints at the prohibition and provides support for it, but it is not biblical). Regardless, if one has the urge, because of *kvod habriot*, s/he may wait until an appropriate, private place is found (Pri Megadim, Orech Chaim, Mishbetzot Zahav 3:7:13).

If the individual leading the services (*shliach tzibbur*) discovers he has the urge to relieve himself in the middle of the *tefilla* (prayers), he may complete them because of *kvod habriot* (Magen Avraham, Shulcahn Aruch, Orech Chaim 92:2).

X. Town with one Etrog (citron)

Rakover (1998) discusses a query in a *sefer* by Rabbi Dovid Pardo (Sheilot V'teshuvot Michtam L'Dovid, Orech Chaim 6). A town had only one *etrog* (citron) and was asked by an emissary of another town that did not have any *etrogim* to give it to them so that they could do the *mitzvah* during *chol hamoed.* The people of the first town had already performed the *mitzvah* during the first two days of Sukkot.

Rabbinical law, however, requires that the four *minim* be used during *chol hamoed*. Rabbi Pardo used the argument of *kvod habriot* – the town without the *etrog* would suffer greatly if they could not perform the mitzvah at all – and said that the town with the *etrog* should give it to the other town. After all, they sent a messenger with the hope that he would bring back an *etrog* for them. Were he to return empty-handed, it would cause them great sorrow. There is no greater *kvod habriot* than allowing the people from the other town to have an *etrog*, even if this means that the people of the first town will not be able to do the mitzvah during *chol hamoed.*

XI. Humiliation of a debtor

Not paying a debt is a violation of Torah law. The Talmud (Babylonian Talmud, Bava Kama 11b) states that the creditor has the right to take "even the cloak off the shoulder of the debtor." Tosafot, however, notes that this is only true if the debtor possesses more than one cloak or if the debtor owns a very expensive cloak. In the latter case, we force the debtor to exchange it for a less expensive garment.

Rakover (1998: p. 139) cites sources such as the Maharam (Teshuvos Maharam 400) that clearly make the point that because of human dignity we do not allow a creditor to take the only garment of the debtor. This is the law despite the fact that it is a *mitzvah* (commandment) from the Torah to pay one's debts.

The Shulchan Aruch (Choshen Mishpat 97:2) emphasizes that a creditor should try to avoid being seen by the debtor if he knows that latter does not have the means to repay the debt because a person who owes money and cannot pay back will be ashamed.

CONCLUSION

Malachi said (2:10): "Have we not all one father? Has not one God created us? Why do we deal treacherously every man against his brother…?" Human dignity is based on the belief that we were all created in the image of God. Prejudice, racism, and sexism are totally inconsistent with Torah ideals

It is hoped that this paper sheds some light on why the Meiri (Babylonian Talmud, Berachot 19b) proclaims that the attribute of *kvod habriot* is very precious and there is no virtue more beloved than it.

What this paper has attempted to demonstrate is how fundamental human dignity is to Jewish law. What is especially interesting is how a theistic religion in which love and fear of God is paramount, does not minimize the importance of human dignity. In many cases, human dignity trumps even divine law.

As we all know, it is very easy to ignore human dignity in the name of a supposedly higher cause. The failure of many political, religious, and economic systems may be partially due to the total disregard of the importance of human dignity. For example, many communist regimes claimed that they were concerned about the rights of labor; they even renamed their countries "People's Republic." With time it became clear that human dignity was not valued by these regimes. Democratic countries have also made mistakes when it came to human dignity. In the United States, the rights of Japanese-Americans were disregarded during World War II by placing them in detention camps. More recently, human dignity has been disregarded in several American military detention centers. Weintraub (2005) uses the concept of human dignity in Jewish sources to demonstrate that the degradation of human beings in military custody cannot be justified even if we are at war. Shermer (2008) feels that Enron became corrupt because CEO Jeff Skilling created a corporate culture where human dignity was irrelevant. Skilling was a social Darwinist and wanted to set up a firm where there was "survival of the fittest." All employees were ranked on a scale of 1 to 5; 20% of those ranked 5 had to be fired. These rankings were on a website along with pictures of the employee. Humiliation was to be used as a way of motivating employees. As Shermer notes: "Once you set up an environment like that, people begin violating rules."

Radical Islam will ultimately fail because of the low value placed on human dignity. Capitalism and democracy, on the other hand, will thrive only as long as they continue to respect the importance of human dignity.

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DIGNITY OF THE PERSON AND THE RIGHTS OF INDIGENOUS PEOPLES

Julian Burger

PhD; Visiting Professor at the Human Rights Centre, University of Essex and the Universidad de Alcala de Henares and a fellow at the Human Rights Consortium, School of Advanced Study, University of London where he also teaches. For more than 20 years he headed the programme on indigenous peoples and minorities at the Office of the United Nations High Commissioner for Human Rights, Geneva.

I. INTRODUCTION

Article 1 of the Universal Declaration on Human Rights states: "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." The notion of dignity is presented as distinct from rights in article 1 thus prompting the question of what is meant by dignity. For the purposes of the present article, we will understand this to be a recognition that all human beings have the right to be valued, respected and treated equally and with humanity. From this fundamental acknowledgement flows a series of inherent rights including the right to life, the right not to be subjected to slavery and the other fundamental rights that make up the corpus of human rights. Article 1 of the Universal Declaration of Human Rights is a recognition that human beings are conscious, thinking and moral individuals worthy of respect and for this reason are entitled to rights.

A reference to dignity of the person appears in other instruments. In recognition of the preeminence of the concept of dignity in the view of the drafters of the Charter of Fundamental Rights of the European Union, it is placed as its first article before the right to life.[1] As one author has proposed in connection with the German Constitution adopted in 1949, which in its article 1 also states that human dignity should be inviolable, the right to dignity establishes

1 Article 1 of the Charter reads: "Human dignity is inviolable. It must be respected and protected."

the right to have rights.[2] The idea that the right to dignity of the human person is the foundation for human rights will be the starting point for the present article.

If the right to dignity has universal recognition as an underlying principle in international human rights law, how might it be understood when it is applied collectively? Does not the collective right to dignity signify that peoples should be valued, respected and treated with equality? How should we understand the right to dignity of indigenous peoples? Does not this mean that indigenous peoples are composed of conscious, thinking and moral individuals worthy of respect? If the right to dignity of indigenous peoples is an underlying principle, what rights flow from that understanding? Finally, notwithstanding the progress in establishing international norms related to indigenous peoples, how is the dignity of indigenous peoples being threatened or even denied today?

II. INDIGENOUS PEOPLES – WHAT DO WE MEAN?

The term "indigenous peoples" is used by the United Nations and was given universal recognition through the adoption in 2007 by the General Assembly of the UN Declaration on the Rights of Indigenous Peoples. For much of the UN's history, at least that part during which indigenous peoples issues were on the agenda, the preferred term was "indigenous populations" or "indigenous people" at the insistence of states. For example, the first study by the United Nations on indigenous peoples was entitled "Study on the problem of discrimination against indigenous populations".[3] During the lengthy negotiations – from 1995 to 2006 – on the Indigenous Declaration under the aegis of the UN Commission on Human Rights (the predecessor of the Human Rights Council), some states insisted that the use of the term "indigenous peoples" should be explained as not having any implications in international law. The ILO in its Convention 169 on Indigenous and Tribal Peoples adopted in 1987 includes its own qualification of the term "indigenous peoples" through the addition of the following explanation: "The use of the term peoples in this Convention shall not be construed as having

2 See Christoph Enders, "A right to have rights – the German Constitutional concept of human dignity", National University of Juridical Sciences (NUJS) Law Review, July to September 2010.

3 UN Document E/CN.4/Sub.2/1983/21.

any implications as regards the rights which may attach to the term under international law" (article 1 (3)).

For those governments objecting to the term "indigenous peoples" the concern arose because common article 1 of the two human rights covenants recognizes the right to self-determination of peoples.[4] The avoidance of the term "indigenous peoples" was also a device to deny the collective rights of indigenous peoples.[5] For such governments, "population" or "indigenous people" in the singular were preferred.

But for indigenous peoples, the denial of the recognition that they are peoples is discriminatory and demeaning. It suggests that indigenous peoples are merely aggregates of individuals and of course denies them their common heritage and history particularly as independent, self-governing entities.[6] Indeed, the very notion of indigenous population seeks to deny indignous peoples an identity as peoples with a common language, history, ancestral homeland or territory, distinctive forms of social organization, customs and beliefs and political and legal systems. In sum, to deny that indigenous peoples are people is to deny them all rights flowing from the right to self-determination.

Of course, the term "indigenous peoples" is a bureaucratic invention adopted by the UN to avoid other terms that may be construed as inappropriate, demeaning or even derogatory. It underlines what unites the several thousand distinctive ethno-linguistic groups that can be put under this category rather than their diversity and distinctiveness from one another. It is a term that

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4 Common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".

5 For example, a number of states during the discussions wanted to replace the term indigenous peoples with the formulation "persons belonging to indigenous peoples".

6 During the discussions on indigenous peoples at the World Conference on Human Rights held in Vienna in 1993, indigenous participants and their supporters held up bright orange posters with the single letter "s" signifying that they wanted an "s" added to the term "indigenous people" thereby acknowledging their peoplehood and of course the right to self-determination. It should be noted that the terms "indigenous people" and "indigenous population" were translated officially in Spanish as "poblacion indigena".

seeks to simplify but can often obfuscate. For example, some Asian and African governments do not find it easy to accept the idea that certain parts of the population are more indigenous than others in the sense that is very clear in the Americas or Australia and New Zealand. To anticipate this objection, the ILO in its Convention 169 also identifies tribal peoples as being within the mandate of the law, thereby incorporating into the ambit of the Convention peoples with cultures and ways of life that are distinct from the mainstream.

Certain states that do not recognize that there are indigenous peoples in their country will have other designations that for the purposes of the United Nations are often included within the notion of indigenous peoples. For example, the Constitution of India recognizes "Adivasis" or scheduled tribes requiring affirmative action to address their disadvantage although the Government does not accept that these are indigenous groups.[7] The African Commission on Human and Peoples Rights, in response to misgivings among in some African states, has described how it understands the concept of indigenous peoples in the region and identified a number of peoples on the continent whose way of life distinguishes them from the national society and in particularly recognizes their vulnerability.[8]

The underlying principle now universally accepted for determining who is and who is not an indigenous person draws on the right of indigenous individuals to determine for themselves their identity. This is coupled with the need for the indigenous people itself to recognize and accept the individual as a member of the community.[9] Thus, the focus is on the right of self-identification. For this reason, article 33 of the Declaration on the Rights of Indigenous Peoples states that "[I]ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions." In addition to the principle of self-identification, there are some generally accepted objective criteria set out in the UN Study referred to earlier. The study proposes that:

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7 India is a signatory to the earlier 1957 ILO Convention 107 on indigenous and tribal populations although it is resolutely against ratifying the up-dated ILO Convention 169.

8 See Report of the Working Group of Experts on Indigenous Populations/ Communities, African Commission on Human and Peoples Rights, 2005.

9 According to the United Nations, there are an estimated 370 million indigenous persons living in some 90 countries in all regions of the world. See "State of the world's indigenous peoples", UN Permanent Forum on Indigenous Issues, 2009.

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of the society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[10]

Historically, indigenous peoples were categorised by the colonizing powers who took over their territories and given collective identities that took no account either of the diversity within the group or their own names for themselves. Inuit in Canada were called Eskimos, Saami in the Nordic countries were called Lapps and everyone in the Americas was an Indian. Colonial powers often determined whether an individual would be recognized as indigenous based on various and quite arbitrary and ultimately racist calculations based on parentage or blood quotient, giving rise to such derogatory terms as "half-breed" and "quarter-breed".

To deny a people a collective identity, to prevent it from determining its members and to assign it a name that is not theirs and may be derogatory was a means of diminishing and humiliating a people. It has, of course, a rationale in the eyes of the colonizer and that is to reduce the group to something other, to a lesser category, lower in the hierarchy of cultures and peoples, and thereby justifying exploitative or even genocidal policies. To take away the dignity of the conquered or subdued people is both a pre-condition and consequence of the colonial project.

III. INDIGENOUS PEOPLES – THE HISTORICAL LEGACY

If we are to understand how the dignity of indigenous peoples has been denied, it is necessary to speak of the past. For indigenous peoples, the past is very much alive in the present. Indigenous peoples see their situation as a continuum of injustice that began with the process of colonisation, continued notwithstanding the ups and downs of politics – struggles for independence, dictatorships,

10 José Martínez Cobo, Study of the problem of discrimination against indigenous populations, E/CN.4/Sub.2/1983/21/Add.8, §379.

revolutions and democratic interludes - and remains the reality today even in states with fully-fledged democracies and strong constitutional guarantees of human rights.

In the preamble to the Indigenous Declaration, the relevance of the past to the present-day condition of indigenous peoples is recognized in the following paragraph:

> *Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.

The recognition of a history that includes acts of genocide, slavery, conquest and forced dispossession of lands and resources, is not just to acknowledge a distant past but to affirm the continuing relevance of these experiences to indigenous peoples today. When Brazil hosted the Earth Summit in Rio de Janeiro in June 1992, a conference that set in motion international commitments to address climate change and biodiversity loss, indigenous peoples on the continent were mourning 500 years of colonial occupation, denouncing the continuing pillage of their lands and resources, and calling for alternatives to what they saw as environmentally destructive economic policies.[11] Memories of the past were very much present in this manifestation of protest to the 500 years of history since the first landfall of Christopher Columbus.

The conquest and genocide of the indigenous peoples of the Americas is well-known and universally acknowledged. From the Papal Bulls that provided a *carte blanche* to the conquering Spanish "to capture, vanquish and subdue the pagans and other enemies of Christ and put them into perpetual slavery and take their possessions and their property"[12] to the post-Independence struggles to build national unity by subduing or even eliminating the indigenous

11 The World Conference on Environment and Development, Rio de Janeiro, June 1992, resulted in two important conventions: the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change. The Conference was also the first occasion when an indigenous representative addressed an international intergovernmental high-level conference. During 1992, indigenous peoples of the hemisphere actively promoted a pan-indigenous movement to raise their concerns internationally.

12 The Diversus Bull of 1452 addressed the fate set aside for the Saracens but together with subsequent Bulls provided the rationale for occupation by Spain and

populations in order to take ownership of their lands, indigenous peoples and their lands and resources were inexorably oppressed.[13]

In the United States of America, the rationale was not based on Papal Bulls and the right of the European Christian nations to extirpate indigenous peoples' cultures, beliefs and livelihoods but on the notion of "manifest destiny". This was the idea that the European peoples of North America had an entitlement to take over the lands of the indigenous inhabitants because they, their institutions and their God were inherently superior and destined to civilize the lands and peoples they encountered in their expansion westwards. As a consequence entire peoples were removed from their homelands. The 1830 Indian Removal Act affected large numbers of indigenous peoples who were relocated far from their native territories. Most notoriously, the removal of the Choctaw people to modern-day Oklahoma on the so-called "trail of tears" resulted in more than 3,000 deaths. All this to make way for a society that deemed itself more worthy than those it replaced.

This idea of a civilizing mission was present in the colonizing ventures of the British and French. In the case of Britain, the disadvantaged situation of indigenous peoples in the Commonwealth countries today is linked to its actions both as a colonial power, in the ensuing processes of decolonisation and in the legacy it inadvertently left behind. Independence was won with considerable resistance from the mother country and left wounds that fester still. Colonialism promoted an ideology of social hierarchy and cultural superiority. At the core of the colonial enterprise was the extraction of resources and exploitation of labour and eventually a willing and malleable market that served the interests of the home country. The economic model that the colonialists imposed was presented as rational, superior and even necessary and the indigenous peoples own self-sustaining economies were deemed obstructive, impractical and inefficient. Inevitably the self-determination of indigenous peoples was challenged and ultimately revoked as being unfit for the modernising colonial project.

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its treatment of the indigenous peoples. In 1493, Pope Alexander VI issued a law granting Spain dominion over all the lands discovered by Columbus.

13 Perhaps the most infamous case of post-Independence nation-building at the expense of the indigenous peoples was the so-called conquest of the desert under the Argentinian general Julio Argentino Roca in the 1870s that indigenous peoples in the region characterise as genocide.

In Australia the doctrine of "terra nullius" became the legal pretext for depriving Aboriginal peoples of their lands. Accordingly, it was argued, the indigenous peoples had no sovereign rights over the land as they were not using it for any economic purpose that the colonial powers could understand. Furthermore, in the case of Australia, the indigenous peoples had no discernible leadership with which to negotiate as was the case, for example, among the native peoples of Canada. Associated with the concept of "terra nullius" is the Western notion of civilization. While it could not be denied that there were indigenous people living on the land, they were seen as lesser peoples not capable of valuing or deserving to possess the territories they lived on. The fact that the Aboriginal people had no formal decision-making bodies and took decisions in a broadly consensual manner meant that the colonizing powers assumed, conveniently, that they were incapable of having political institutions and entering into agreements with a civilized modern state.

It is important to note the colonial adventure was one of violence against indigenous peoples. This was particularly so in the Americas where Spain ruled but there were deadly consequences where Britain imposed its authority. In Australia a population estimated to number some 500,000 at the time of impact in the late 18th century was reduced to 50,000 by 1900. In New Zealand, there was fierce armed resistance by Maoris and a series of land wars to protect their lands from settlers from the early 1800s until 1872. In Canada, the dispossession of the lands and resources of the native peoples was accompanied by policies aimed at destroying indigenous cultures such as that undertaken through the residential schools programme.[14] The efforts to assimilate indigenous peoples through education was begun under British rule and carried on by the settler states that followed. The Royal Commissions that investigated these programmes in both Australia and Canada found high death rates in the schools, sexual abuse, cases of psychological and physical mistreatment and torture, indoctrination into the Christian religion and strict regimes aimed at eliminating the language and cultural practices of their charges. Genocide, which is defined in the Convention as any act committed to destroy, in whole or in part, a national, ethnic, racial or religious

14 See for Australia the Human Rights and Equality Commission report "Bringing them home", April 1997 and for Canada, see the work of the Indigenous Residential Schools Truth and Reconciliation Committee available at http://www.trc.ca/websites/trcinstitution/index.php?p=3.

group, is how many indigenous peoples in these countries describe the residential school programme initiated under British rule and maintained by settler states and is seen as contributing to cultural genocide in both its intent and outcome.[15]

The prospect of long drawn-out conflicts with indigenous peoples led the British eventually to enter into negotiations with the Maori in New Zealand and Aboriginal peoples in Canada resulting in a series of treaties. On the British side sovereignty was a fait accompli assured by their armed presence and the treaty was a means of negotiating other concessions and peaceful access to lands and resources. But for indigenous peoples, the various treaties signed with the Crown in Canada or the 1840 Waitangi Treaty in New Zealand were never understood to mean that they had given up sovereignty over their ancestral lands. They define them as nation to nation agreements.[16]

Many Maori maintain that the chiefs signing the Waitangi Treaty did not believe they were giving up their right to run their own affairs or sovereignty over their lands and resources ("taonga" or valued possessions). In the case of the indigenous peoples of Canada, treaties were signed from 1871 onwards with the reigning British monarch and these were ratified by the Government of Canada. Indigenous peoples maintain, however, that they did not give up their sovereignty and their rights over their lands and resources. For those indigenous peoples not included in the treaty-making process, because they were more distant from centres of colonial power, the discovery that their lands had been incorporated into a country of which they had no knowledge and with which they had no prior contact must have seemed an extraordinary arrogance.

It would be a mistake to think that these practices are a thing of the past. In living memory, indigenous peoples have faced deliberate governmental policies to eliminate them as peoples and communities or suffered other atrocities. In Guatemala, the Commission for

15 The Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948 and came into force in 1951. It defines genocide, inter alia, as any act "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.".

16 This was largely the conclusion of the UN study prepared by the expert Miguel Alfonso Martinez, See Study on treaties, agreements and other constructive arrangements between States and indigenous populations, UN document E/CN.4/Sub.2/1999/20.

Historical Clarification found that "agents of the state committed acts of genocide against groups of Mayan peoples".[17] In Bolivia, the existence of debt bondage and forced labour considered contemporary forms of slavery, among the Guarani indigenous people was denounced as recently as 2013 by the United Nations and the Inter-American Commission on Human Rights and acknowledged by the government.[18] In Brazil, a report prepared in the 1960s on the role of Brazilian governmental officials in the murder, torture and other atrocities perpetrated against indigenous peoples came to light after being suppressed for more than half a century.[19] The so-called Figueiredo report was made available to the Brazil's National truth Commission established in 2011 and identifies acts of genocide.

IV. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AS A MEANS TO RESTORE DIGNITY TO INDIGENOUS PEOPLES

The continuing acts of land dispossession, the discrimination faced by many indigenous peoples and the non-recognition of indigenous peoples in the countries in which they live, were among the reasons that indigenous peoples began in the late 1970s and 1980s to request action by the United Nations. This was a time when one of the central themes in human rights was the continuing Apartheid regime in South Africa. The United Nations, recognizing the indignity of Apartheid rule, had launched a first Decade to Combat Racism and Racial Discrimination (1973 to 1982) and a series of studies on discrimination including against indigenous populations

17 See "Guatemala – memory of silence: Report of the National Commission for Historical Clarification, Conclusions and Recommendations", para. 122.

18 UN permanent Forum on Indigenous Issues, Mission to Bolivia, 2009 and "Captive communities: situation of the Guarani indigenous people and contemporary forms of slavery in the Bolivian Chaco", report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II, 24 December 2009. The Government of Bolivia has also undertaken measures to address the slavery-like conditions of the Guarani in the eastern part of the country including through a grant of 38,000 hectares of land – see Reuters March 14, 2009.

19 In 1967, a report on the Indian Protection Service by the public prosecutor Jader de Figueiredo Correia was sent to the government and provided extensive information about abuses. After being re-discovered, the report was submitted to the National Truth Commission which examined human rights violations during the dictatorship in Brazil. The Commission has since declared that 8,300 Indians were killed during the dictatorship and notes that the Figueiredo report speaks of genocide against indigenous peoples – see View Larger Image Relatoria de Comissao da Verdade, Volume II, p. 209.

and eventually established a working group of experts to review the human rights situation of indigenous peoples and consider the need for new human rights standards for their protection.[20]

The newly established Working Group on Indigenous Populations, composed of human rights experts and not governments, met in 1982 and 10 years later presented a draft declaration to its governmental parent body, the Commission on Human Rights. A further 11 years was to pass involving hundreds, probably thousands of indigenous representatives, in often difficult and contentious negotiations with governments before finally a text was approved by the member states of the United Nations in 2007.

The Declaration sets out a series of rights aimed at addressing the historic disadvantage of and discrimination suffered by indigenous peoples. To do so, it requires states to adopt measures to ensure that indigenous peoples are treated equally and without discrimination, sometimes through affirmative action and in ways that are culturally appropriate and acceptable to the peoples concerned. The Declaration goes further though. It seeks to ensure a future for indigenous peoples as distinct peoples with unique cultures through recognition of their right to self-determination and all that the term implies in international law.

These rights have an historic base since the first action taken by the colonising States was to dismantle indigenous peoples' political, economic and spiritual authorities and effectively deny them their right to self-determination. The second action was to assimilate indigenous peoples, deny them equal treatment and reduce them to dependency. The legacy of this colonial approach continues to be present in practice today in many parts of the world. The Declaration thus seeks to address the desire of indigenous peoples to maintain and strengthen their institutions, cultures and traditions in accordance with their aspirations and needs.[21] It also requires states to ensure non-discrimination of indigenous peoples in areas such as health, housing, education and employment, discrimination which is manifest in nearly all socio-economic data available.[22]

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20 For the study see footnote 11. The UN Working Group on Indigenous Populations was established in 1982 and met until 2006 when it was replaced by the Expert Mechanism on the Rights of Indigenous Peoples.

21 See preambular para 10.

22 An eloquent example of the disparities between indigenous peoples and broader society can be found in the report of Australia's Aboriginal and Torres Strait Islander

Given that large numbers of indigenous peoples still live on their traditional lands with varying degrees of de facto autonomy and access to resources, the exercise of self-determination can be implemented by consolidating and enhancing their control over and ownership of their lands, territories and resources and through recognition in law and in practice of their self-governing institutions.

However, there are also significant numbers of indigenous peoples–more than 50 per cent in some countries–living in urban environments for whom the problem of discrimination remains a daily reality. In such cases, the exercise of the right to self-determination calls for other mechanisms, which may take the form of decision-making with regard to the kinds of services that are delivered to the communities and to the resources that are necessary for their functioning.

In general, socio-economic data on indigenous peoples demonstrates that in all areas–whether it is health, education, employment, housing or life expectancy–indigenous peoples are disproportionately disadvantaged. One of the principal objectives of the Declaration is to set out measures to address that discrimination and ensure that indigenous peoples have equal rights to others and that their material conditions improve accordingly.

V. SELF-DETERMINATION – A PREREQUISITE FOR INDIGENOUS PEOPLES' RIGHTS

A number of the world's indigenous peoples enjoy some form of self-determination either because there is formal 'devolution' of competences to the communities through national legislation or de facto, because the communities themselves continue to take a large range of decisions, including notably in the administration of justice, at the community level and in accordance with their traditions and cultures. Far from being a divisive element, the discussions around the practical application of the right to self-determination need to be placed much more within the debates about how to broaden

Commissioner of 2 July 2009 entitled *Overcoming Indigenous Disadvantage*, which shows that the long-standing gap in living standards has worsened in some areas. The report examined data in 50 key areas and found no improvement in 80% of them. In some cases the situation had worsened. For example, in 2008 indigenous adults were 13 times more likely to be imprisoned than non-indigenous adults, compared to 10 times in 2000.

'democratic' processes and improve social justice and equity for all citizens of a given country. [23]

Indeed there are sufficient examples of indigenous peoples' self-determination to offer a diversity of templates to governments entering into agreements with their own indigenous peoples. Greenland provides an example of self-rule as close to complete political independence as is possible, but there are also statutory advisory bodies such as the Saami Parliaments in the Nordic countries or even the 'Comarca' autonomous region of the Kuna in Panama established in the 1920s that suggest that there are as many solutions as there are indigenous peoples.[24] In countries where indigenous peoples are geographically dispersed, such as Australia, the setting up of indigenous-run governmental departments to deliver services may be seen as one means of exercising the right of self-determination, provided, of course, that they emerge from discussions between the parties.[25]

The Declaration (Article 4) recognises indigenous peoples' right to 'autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions' as one means of exercising the right to self-determination. Article 18 elaborates further by acknowledging the right of indigenous peoples to 'participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain their own decision-making institutions'. The implementation of these rights is in line with other measures that might be taken to ensure

23 Until its 1988 Constitution, Brazilian policy towards indigenous peoples was assimilationist in intent. The country's civil code considered indigenous peoples "relatively incompetent" and "under the guardianship" of the Indian agency FUNAI

24 Greenland is a self-governing region within the Danish realm, having held a referendum in November 2008 to increase its authority. According to the Act on Greenland Self-Government of 2009, the country can declare its independence whenever it decides to do so. The Saami people are represented by three Saami Parliaments, in Sweden, Norway and Finland. The Parliaments work as elected bodies representing Saami interests. The Comarca of the Kuna of Panama is an early example of the exercise of self-determination and dates from the 1920s.

25 In Australia, the Labour Government established the Aboriginal and Torres Strait Islander Commission in 1995 as an elected body composed of elected indigenous commissioners with the mandate to determine allocations of budgets for services and oversee implementation. ATSIC came under criticism from both the Government and Aboriginal peoples themselves for not living up to its commitments. It was abolished in 2005.

greater public participation in a democratic society. There is no special privilege being bestowed on indigenous peoples because they are given the right to decide upon policies, programmes and activities that impact upon their communities in a way that complies with their traditions. In practice, however, these institutions are not given either the recognition or the authority they require or as envisaged in the Declaration. Furthermore, as may be seen from the very low level of indigenous representation, in general, in national parliaments and local authorities, mechanisms are not in place in many countries to allow for good faith and effective participation of indigenous peoples in decision-making affecting them.

Implementation of the right to self-determination revolves around discussions over the competences that will be afforded indigenous peoples' institutions as well as agreement on ways and means of participating in national, regional and local decision-making. While the Declaration establishes the right of indigenous peoples to maintain and develop their own institutions, it also underlines the right of indigenous peoples to participate fully in the political, economic, social and cultural life of the State (Article 5).

VI. RIGHT TO PARTICIPATION AND THE PRINCIPLE OF FREE, PRIOR AND INFORMED CONSENT

The question of participation of indigenous peoples is not a new one. A number of States have established formal mechanisms for indigenous participation in political life, most notably through reserved seats in parliament or posts in government service. This is the case, for example, in Colombia, New Zealand, and India for its scheduled tribes, as well as Burundi whose Constitution guarantees three seats for its indigenous peoples the Batwa in both chambers of the National Assembly.[26] Access to education, housing, employment, health and other socio-economic benefits are facilitated by some States through special measures, such as educational scholarships for indigenous peoples, subventions for cultural activities, housing or dedicated health clinics. The implementation of the general principle of participation

26 As early as 1867, four parliamentary seats were established for Maori in New Zealand (today there are seven designated Maori seats) and in India the scheduled tribes have reserved positions in government departments and services and separate constituencies to ensure their political participation. By contrast, Australia technically denied the vote to Aboriginal peoples until 1967.

of indigenous peoples, however, is generally quite absent in most contexts given that historically such peoples were marginalised and held little economic and political power. The inclusion of indigenous peoples in decision-making represents a cultural challenge as much as a legislative one.[27] It may require changing habits that are founded on prejudices and privileges which themselves can only be modified by education and awareness-building. Nowhere is this more evident than in Guatemala, where the majority Mayan population is almost entirely absent from Congress, the upper reaches of business, higher education and senior governmental positions. Until the election of Evo Morales in 2006 as the first indigenous Head of State of Bolivia, a similar absence of indigenous representation prevailed in a country where two-thirds of the population is composed of Aymara, Quechua or other indigenous descendants.

The Declaration is focused emphatically on the application of the right of indigenous peoples to participate. Article 38 notes, for example, that States 'in consultation and cooperation with indigenous peoples' shall take measures to achieve the ends of the Declaration. Similar rights are contained in Article 17 relating to labour laws, Articles 14 and 15 on education and public information, Articles 11 and 12 on intellectual property and spiritual and religious traditions, as well as various other articles. The insistence in the Declaration on the right to be consulted on all relevant matters stems from the tragic experience of colonisation, including such modern forms of colonisation as land and resource expropriation in the name of development, in which indigenous peoples were and often continue to be ignored and at worst seen as impediments to progress.[28]

The Declaration focuses in several articles on the rights participation, consultation and consent. Indigenous peoples observed that governments and others often paid lip-service to consultation, hosting meetings where information was cursory and the decisions taken in advance. To address this concern, the ILO in its Convention

27 Involving indigenous peoples in the formulation, implementation and evaluation of programmes affecting them has also been acknowledged to be a challenge for the UN system. In order to encourage UN staff to consult with indigenous peoples fully, guidelines were produced by the United Nations Development Group, which coordinates the world body's development activities -www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf.

28 See for example J Mander and V Tauli-Corpuz (eds), *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (California, Sierra Club, 2006).

169 commented that consultations should be undertaken 'in good faith and in a form appropriate to the circumstances, with the objective of achieving the agreement or consent to the proposed measure'.[29] In the case of relocations of indigenous peoples, the ILO requires that relocation 'take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public enquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.'[30] The ILO, thus, establishes as many constraints as it can on the arbitrary action of governments and provides specific procedures to give indigenous peoples every opportunity to resist a measure that it might find contrary to their interests.

The Declaration also includes the principle of free, prior and informed consent. Article 19 of the Declaration requires States to consult and cooperate in good faith with indigenous peoples 'in order to obtain their free, prior and informed consent before implementing legislative or administrative measures that may affect them'. On the critical issue of development, Article 32 uses the same formulation in relation to 'the approval of any project affecting indigenous peoples' lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'.

The practical application of this important principle faces at least two important obstacles. The first relates to the processes that may need to be established to bring about an agreement. Mechanisms for full and good faith consultations with indigenous peoples are largely not in place in many States, neither on the government side nor on that of indigenous peoples themselves. Establishing formal spaces for dialogue between States and indigenous peoples is certainly one of the principal challenges, and one whose implementation will determine whether or not the Declaration serves to advance the well-being of indigenous peoples.[31]

29 Art 2.

30 Art 16(2).

31 Several Latin American governments are in the process of preparing regulations on how consultation with indigenous peoples should be undertaken in practice. In the case of Peru such a law was adopted in 2011 although it has been opposed by indigenous organizations because it gives governments the last word on projects

The Declaration together with ILO Convention 169 sets out a framework for successful negotiations, and as such these two instruments contribute to conflict prevention. Both texts insist that the consultations need to be with indigenous peoples' own representative institutions using appropriate and therefore culturally sensitive procedures. The purpose of the use of the formulation 'free' is to ensure that no coercion or manipulation is used in the course of negotiations, an admonition that unfortunately is often absent in the discussions between unequal partners. The eventual inclusion of the term 'prior' acknowledges the importance of allowing time to indigenous peoples to fully review proposals respecting the time required for achieving consensus in many indigenous communities. It also anticipates the reality that decisions, especially those relating to major investments in development, are often taken in advance of discussions with indigenous peoples and other local communities. This would not be in keeping with the commitments set out in the Declaration. Finally, the notion of 'informed' consent reflects the growing acceptance that environmental and social impact assessments are a pre-requisite for any negotiation process and allow all parties to make balanced decisions.[32]

There is, however, a second obstacle to the implementation of the principle of free, prior and informed consent, and it is one observed by the first Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. He points to many factors that contribute to an 'implementation gap', including inconsistencies between laws within States and between international law and domestic legislation.[33] In certain respects, conflicts between the rights established for indigenous peoples and laws on a wide range of other matters such as mines, environment, water and forest management or even finance constitute structural

affecting their lands. Ecuador and Colombia are both in discussions about a regulation on consultation.

32 A fuller discussion of the principle of free, prior and informed consent can be found in the report of the former Working Group on Indigenous Populations (E/CN.4/Sub.2/AC.4/2003/3) and of the Permanent Forum on Indigenous Issues (E/C.19/2005/3).

33 See Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN document E/CN.4/2006/78, particularly paras 14–79. Similar observations have been made by subsequent Special Rapporteurs.

impediments to the realisation of the provisions of the Declaration. Many contemporary disputes revolve around these ambiguities.

External human rights monitoring bodies and sometimes constitutional and domestic courts will consider that the commitment made by States with regard to human rights should prevail.[34] Indeed, judgments of these bodies have been generally supportive of indigenous peoples' rights and were referred to as relevant jurisprudence during negotiations on the Declaration. But obtaining positive recommendations, judgments or decisions from human rights monitoring bodies or even domestic courts is not in itself a guarantee that indigenous peoples' rights will be implemented. In the case of the Inter-American Court of Human Rights decision in the *Awas Tingni* vs Nicaragua case which recognized indigenous peoples collective right to their ancestral lands thereby interpreting progressively article 21 of the American Convention on Human Rights on the right to property, it took some six years before indigenous lands were titled. This is not to say that such monitoring and judicial procedures do not have a critical role to play, but rather to observe that effective promotion of indigenous peoples' rights requires strong national legislation, effective administrative procedures for its implementation, adequate financing and independent bodies that inspire confidence to adjudicate disputes.

VII. RIGHTS TO LANDS, TERRITORIES AND RESOURCES

The Declaration refers extensively to the right to lands, territories and resources. Articles recognise indigenous peoples' spiritual attachment to their lands and resources, provide a right of ownership and use, identify processes for recognition and adjudication in relation to lands and resources, address restitution and compensation in cases of loss of lands, give indigenous peoples rights over conservation of

34 There are a number of examples of the human rights treaty bodies taking this position. In 2001, for example, the UN Committee on Economic, Social and Cultural Rights urged Colombia to 'consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or sub-soil mining projects or on any public policy affecting them' (E7/C.12/1/Add.74, §33). The Inter-American Court of Human Rights has ruled on a number of cases relating to indigenous peoples' lands, most notably that of the Mayanga (Sumo) Awas Tingni of Nicaragua; see *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Series C No 79) [2001] IACHR 9 (31 August 2001).

their lands, limit military activities, and give indigenous peoples the right to determine development priorities.

In addition to these specific articles, other provisions of the Declaration address critical issues related to land. Article 8(b) calls on States to provide effective mechanisms for prevention of and redress for any action that has the aim or effect of dispossessing indigenous peoples of their lands, territories or resources. Article 10 states that indigenous peoples shall not be forcibly removed from their lands or territories and that no relocation should take place without the free, prior and informed consent of the peoples concerned. Article 12 protects indigenous peoples' right to have access to their religious and cultural sites. Article 20 guarantees indigenous peoples' enjoyment of their own means of subsistence and development and to engage freely in their traditional and other economic activities. Article 24, referring to traditional health, protects the conservation of vital medicinal plants, animals and minerals. Article 36 gives indigenous peoples rights to maintain activities across borders with traditional lands that traverse modern frontiers. Finally, Articles 3, 4, 5, 18 and 19 provide rights relating to self-determination, participation, consultation and consent that are fundamental to ensuring that indigenous peoples are free to participate in and take decisions affecting their lands and resources. In all, 19 of the 46 Articles of the Declaration relate to the question of land rights, underlining the huge importance of the question for the survival of indigenous peoples and its manifold manifestations.

Articles 25–30 and 32 reflect to a high degree Articles 13–19 of ILO Convention 169, although there are elements of difference that are worth identifying insofar as they underline the value of treating the two documents in a complementary and mutually-reinforcing fashion. The ILO Convention, in Article 15, addresses the question of sub-surface resources that, it notes, may be owned by States. In cases where mineral exploration and exploitation on indigenous peoples' lands is under consideration, States are required to establish procedures of consultation to evaluate impacts and determine benefits and compensation for the community. Many States, including all States in the Latin America region, retain ownership over mineral resources and it is not difficult to infer that, while the Declaration makes no specific reference to ownership of sub-surface resources, it does clearly state that States have obligations towards indigenous

peoples in such cases. Article 32 of the Declaration, as noted earlier, calls upon States to seek to obtain the free, prior and informed consent of the indigenous peoples concerned prior to the approval of any project affecting indigenous peoples' lands or territories and other resources, 'particularly in connection with the development, utilization or exploitation of mineral, water or other resources'. Article 7 of the ILO Convention guarantees that indigenous peoples shall 'exercise control, to the extent possible, over their own economic, social and cultural development'. 'In addition,' the article goes on, indigenous peoples have the right to 'participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them.' Although the article appears less constraining on governments than the relevant article in the Declaration, it should be noted that Article 7(2) of the Convention gives an understanding of how its provisions relating to consultation should be understood and specifically states that consultations should be held 'in good faith' and have 'the objective of achieving agreement or consent to the proposed measures', making the two instruments complementary on this point.

Respect for the relevant provisions relating to land rights appears to clash at times with the realities confronting States and what they consider to be their development needs. When Alan Garcia, former President of Peru, met resistance in granting exploration rights to oil and logging companies in the Amazon region in May 2009, he put it like this: 'We have to understand [that] when there are resources like oil, gas and timber they don't belong to the people that had the good fortune to be born there.'[35] In the neighbouring country of Ecuador, which has what is seen as a popular government, indigenous Kichwa peoples of Sarayaku learnt in May 2009 that the Ministry of Mines and Petrol had re-authorised exploration and exploitation of hydrocarbons on their lands, despite the country's ratification of ILO Convention 169, its support for the Declaration, and decisions in favour of indigenous peoples given by the Inter-American Court of Human Rights and Ecuador's own Constitutional Tribunal. In such cases, national development plans based on resource extraction often prevail over indigenous peoples' rights however well entrenched in domestic and international law.

35 Reported by the BBC on 17 May 2009.

In this fundamental area of indigenous peoples' rights to lands and resources, there has been a marked evolution in the attitudes and practice of States. Whereas in the 1980s invoking national development to ride roughshod over indigenous peoples' land rights went relatively unremarked except by indigenous peoples themselves and a handful of campaigning organisations, today indigenous peoples find support from formal international, regional and national juridical bodies and can draw upon much stronger national legislation. Pronouncements of the human rights treaty bodies and judgments of the Inter-American Court of Human Rights, in particular, strongly indicate that the articles of the Declaration relating to land and resources need to be understood as State obligations, not mere guidelines. Sometimes companies that have engaged in activities impacting indigenous peoples may even find themselves facing litigation and compensation claims in domestic courts.[36]

VIII. CONCLUSION

The present article has argued that there is a collective dimension to the notion of dignity of the person. In the case of indigenous peoples this encompasses such core human rights as the right to life, the right to physical and mental integrity, the prohibition of torture and inhuman or degrading treatment or punishment and the prohibition of slavery and slavery-like practices. In the case of indigenous peoples, these rights have been violated whenever they have come into contact with colonizing powers. Historically, indigenous peoples as a group have been categorized as savages, less than human, or minors unfitted to run their own affairs. They have faced discrimination simply because they are indigenous peoples.

The international community, by adopting the Declaration on the Rights of Indigenous Peoples has taken an important step by giving a universal framework for rectifying past injustices and their continuing legacy. A central feature of that process of reconciliation is the recognition of indigenous peoples' rights to self-determination – their right to decide their development priorities and futures for their communities. This requires not only the implementation of the provisions of the Declaration in law and in practice but also a fundamental change of attitude of decision-makers. In a world

36 There have been several cases of companies being taken to court including Shell in the case of Nigeria, Trafigura in Cote d'Ivoire and BP in Colombia.

in which there is often a very unequal confrontation between governments and indigenous peoples and between self-sustaining communities and global economic interests, the Declaration stands as a reminder that the prevailing model of development should not be imposed to the detriment of the indigenous peoples and the further destruction of the world's cultural and biological diversity.

PROTECTING HUMAN DIGNITY IN THE DIGITAL AGE

Marc Rotenberg

Executive Director (Electronic Privacy Information Center).

1. PRESENT SITUATION

The Universal Declaration of Human Rights (1948) set out two principles that bear directly on the protection of dignity in the digital age. Article 12 of the UDHR states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks." Article 19 further says "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

New technology offers opportunities both to expand and to limit the freedom to communicate and the opportunity to protect private life. For example, new digital networks can provide a high level of security and privacy through the incorporation of such techniques as encryption. The Secure Socket Layer in Internet browser software enables the secure transfer of credit card numbers and reduces the risk that "sniffer" programs will capture credit card numbers. But encryption is not widely used for personal email. As a result, it is relatively easy to capture private messages sent over the Internet.

New technology can also enable anonymous transactions over the Internet so that individuals can obtain access to information and purchase products without disclosing actual identity. Some object to online anonymity and say that it could be a cloak for criminal conduct. But the question could fairly be asked why individuals should be required to disclose identity when such requirements did not exist in traditional information environments, such as the print world of newspapers and books or the broadcast world or radio and television.

Similar questions arise with the protocols for electronic mail services. Strong encryption products could ensure that individuals

could exchange private messages with little concern that third parties would gain access to private messages. But slight modifications in these protocols, though such methods as "key escrow" or "key recovery" could enable the routine interception of personal communications.

Filtering techniques incorporated in the architecture of the Internet also raise far-reaching questions about the character and impact of the new communication services. These programs allow government and private enterprises to restrict access to information that is otherwise available. Such methods could limit access to a wide range of important cultural, medical, and scientific information. Already these techniques have been used to limit access to public information.

Just as these new technologies are emerging that could significantly influence the future of human dignity on the digital age, technical organizations are playing an increasingly significant role in the policy world. Simultaneously, international organizations are playing an increasingly important role in shaping the policies for the Internet.

2. MAIN CHALLENGES

New technology has always presented opportunities and risks. Industrialization promoted productivity and increased the standard of living in many parts of the world. Industrialization also caused enormous damage to the physical environment. Information technology also presents opportunity and risk. But the main challenges to human dignity in the digital age is not in the nature of the technology itself but in the capacity of individuals acting through democratic institutions to respond effectively to these new challenges.

These new challenges include the commercialization of the Internet, the growth of law enforcement authority, and the globalization of decision-making authority. There is also a critical need to understand the appropriate relationship between the two central interests of privacy and free expression.

2.1. The Commercialization of the Internet

Since the development of the World Wide Web in 1993, the character of the Internet has changed. The graphical interface has made it easier for many organizations to take advantage of global

computer networks, to establish an online presence and to exchange information and ideas in the digital world. Educational institutions, cultural associations, scientific societies and others have all benefited from the dramatic growth of network communications. The web has also made possible the rapid development of new commercial applications that include both business to business services and business to consumer services.

Commercialization of the Internet also poses the threat that rights which would otherwise be protected in the political sphere will be turned over to the marketplace and individuals will be forced to pay for services that might otherwise be routinely provided. A critical example is the confidentiality of correspondence. By tradition, communication services have assured the privacy of personal correspondence and personal communication. But commercial forces have found that the records of communications and the transactions generated in the interactive environment are valuable for marketing purposes. Moreover, in the absence of legislation clearly establishing the privacy of new electronic communications, service providers may choose to offers communication services without assurance of confidentiality.

Citizens may then be required to purchase confidentiality for routine personal communication or to forgo privacy for commercial benefit. Two classes of Internet users may emerge: the "privacy haves" and the "privacy have-nots." Inherent in the provision of new communications services should be that confidentiality will be protected in law.

Commercialization of the Internet may pose a different challenge to freedom of expression. Here the concern is that market concentration and the consolidation of commercial power could transform the decentralized character of the Internet and reduce the number of voices and the opportunities for non-commercial speakers to participate in the Digital Age, It is therefore appropriate to ensure

There is a third challenge to the principles of Article 12 and 19 brought about by commercialization and that is the prospect that new techniques to track the use of copyright works in the digital environment, Copyright Management Systems, will be used to track the interests of Internet users. Such systems should be developed so as to permit compensation of copyright holders without the compelled disclosure of the identity of Internet users. In this context, anonymity protects both privacy and free expression.

2.2. The Growth of Law Enforcement Authority

Concerns about cybercrime and child pornography on the Internet have led to increased calls for government regulation and police investigation of the Internet. While there is a clear need to protect public safety and investigate and prosecute criminal wrongdoing, it is vitally important that public concerns not lead to expansive new police powers that diminish procedural rights established in national law. Unrestricted government authority or government authority coupled with too little public accountability poses threats to the rights and freedoms of citizens in the age of the Internet.

For example, the Council of Europe has urged the adoption of a new convention on Cyber Crime. According to the Global Internet Liberty Campaign the proposal "is contrary to well established norms for the protection of the individual, that it improperly extends the police authority of national governments, that it will undermine the development of network security techniques, and that it will reduce government accountability in future law enforcement conduct."

2.3. Globalization of decision-making

The growth of the Internet has encouraged the rise of electronic commerce and the expansion of the global economy. As a consequence, international organizations, such as the World Trade Organization and the World Intellectual Property Organization have gained greater prominence in setting public policy for the digital age.

These developments pose specific challenges to human dignity, as these international organizations tend to emphasize commercial interests and do not generally recognize the broader values of cultural, social, political, or artistic activities, Individuals may also face the specific threat that rights accorded under national law may not be recognized by these international organizations.

To date most of the objection to globalization have focused on concerns about environmental protection and labor standards. But it may soon be the case that similar objections will be made when decisions concerning privacy and free expression are made by international organizations.

2.4. The Complimentary Roles of Privacy and Free Expression in the Digital Age

The final challenge to the protection of human dignity, and in particular privacy and free expression, is to understand that these two interests are complimentary and should be pursued jointly particularly as issues considering the design of new information technologies and new network architectures are considered. Consider for example the question of whether web sites should routinely collect information about Internet users. This practice is at odds with both the protection of privacy and the promotion of free expression. Better practices will promote anonymity and enable individuals to receive information and ideas without the requirement of routine tracking and surveillance.

Therefore it is a mistake to argue for a "balance" of privacy and free expression. Both interests should be protection in the Digital Age. Free expression is not possible without the protection of private life.

3. SUGGESTED SOLUTIONS

In response to the challenges above, it is necessary to reaffirm support for the UDHR, promote Fair Information Practices and genuine Privacy Enhancing Technologies, remove barriers to the free flow of information, and strengthen public voice NGOs.

3.1. Reaffirm support for UDHR

It is critically important that the fundamental human rights articulated at the end of the second world war and the beginning of the age of computers are not lost as a result of rapid developments in technologies, the commercialization of the Internet, or the increase of globalization. Efforts should be made to promote public awareness of Article 12 and Article 19 and specific research on the application of these two key principles to communications and the digital age should be pursued.

International educational efforts to promote understanding and awareness of the UDHR and particularly Articles 12 and 19 should continue even though the fiftieth anniversary was recently celebrated. Significant decisions concerning the rights of privacy and free expression will be made by governments in the next few years.

3.2. Promote Fair Information Practices and genuine Privacy Enhancing Technologies

In the area of privacy protection, the primary goal should be to ensure adoption and enforcement of "Fair Information Practices" that are the basis for privacy protection around these world. These principles of data collection appropriately place obligations on organizations that collect personal information and grant rights to citizens and consumers who become the subjects or automated records and profiles. Fair Information practices

The United States and Europe have recently taken steps to adopt a "Safe Harbor." It remains to be seen whether this is an effective means to protest privacy where trans-border data flows occur. Consumer organizations have urged the development and adoption of an international convention on privacy as a more appropriate method to safeguard the interests of citizens.

It is also appropriate to encourage adoption of "Privacy Enhancing Technologies," but it is critical to assess these techniques to determine whether in fact they protect the interests of the citizen in the digital age. Encryption can be used both to protect the privacy of personal communication and to compel the disclosure of identity. Research should go forward on techniques that minimize or eliminate the collection of personally identifiable information but still allow for secure and verifiable transactions in the digital age. Such "clean" information technologies are critical to the design of networks that promote privacy and not surveillance.

It is also important to address the concern of unlawful police surveillance that takes place around the globe. The right of journalists, human rights organizers, and political surveillance should be protected against unlawful intrusions into private life. Efforts to report on the state of privacy, such as the annual report of Privacy International, should continue.

3.3. Remove Barriers to the Free Flow of Information and Preserve the Openness of the Internet

Efforts should go forward in the policy, commercial, and standard-setting realm to promote the free exchange of information and to maintain the openness of the Internet. The Internet continues to offer extraordinary opportunities to expand human knowledge,

to strengthen human understanding, and to promote cooperation across borders. It is vitally important for civil society to encourage the continued exchange of information and ideas made possible by the new communications technology.

Efforts by government to restrict access to information on the Internet or to limit the distribution of information on the Internet, particularly information that is political, cultural or artistic should be opposed.

Standard-setting organization should promote open, non-proprietary standards that enable competition and discourage the development of "bottlenecks" in the communications infrastructure. These organizations should also discourage the adoption of network-based techniques that "filter" information, which is more accurately described as "digital censorship." While individual users may choose to use software that limits access to certain information, the use of these techniques at the network level is a direct threat to freedom of expression in the digital world.

3.4. Strengthen Public Voice NGOs

Central to the protection of human dignity in the digital age is the active participation of civil society organizations in decisions concerning the future of the Internet. Fortunately, the growth of the Internet has also witnessed the growth of a new type of Non-Governmental Organizations (NGOs). These NGOs are easily identified by their ".org" suffix. They are independent of the government (.gov) and business organizations (.com). They focus on the social issues arising from the impact of information technology, such as privacy and free expression, but they also use the Internet for public education, organizing, and public action. Typically, they maintain a web site, publish an electronic newsletter, organize public campaigns, issue reports, and host conferences.

The organizations are involved in decisions made by national government, international organizations, such as the OECD, the UN, and the European Union, as well as technical standards bodies, such as the IETF and the W3C. The organizations bring a "public voice" (civil society) perspective to emerging digital age issues based on international human rights norms, such as the Universal Declaration of Human Rights. Although the groups are relatively

small and informal, they are already having a significant impact on Internet policy.

Their work should be encouraged. Governments engaged in Internet policy, particularly at the international level, must ensure that the "Public Voice" is sufficiently represented in all decision-making activities. Successful policies for the Internet must include the voices of consumers and citizens.

4. CONCLUSION

To safeguard the rights of privacy and freedom of expression in the digital age, it is necessary to reaffirm support for the Universal Declaration of Human Rights, particularly Article 12 and Article 19; promote the implementation of "Fair Information Practices" and the development of genuine Privacy Enhancing Technologies; remove barriers to the free flow of information; and encourage the participation of "Public Voice" NGOs in decisions concerning the future of the Internet society.

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Global Internet Liberty Campaign
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Internet Democracy Project
http://www.internetdemocracy.net

Internet Free Expression Alliance
http://www.ifea.net

Privacy International
http://www.privacyinternational.org

TransAtlantic Consumer Dialogue
http://www.tacd.org

The Public Voice
http://www.thepublicvoice.org

UNESCO Observatory on the Information Society
http://www.unesco.org/webworld/observatory/index.shtml

STRENGTHENING THE PREVENTION OF GENOCIDE IN INTERNATIONAL LAW - THE NEED TO FILL THE NORMATIVE GAPS OF THE U.N. CONVENTION ON GENOCIDE, FOR THE SAKE OF HUMAN DIGNITY

Márcia Canário de Oliveira[1]

Brazilian diplomat and Professor of International Human Rights at the Rio Branco Institute (the Brazilian Diplomatic Academy); Master Degree in Political Science and a Diploma in Human Rights and Democratization Process.

> It always bothers me when I hear Rwanda's genocide described as the product of "ancient tribal hatreds". I think this is an easy way for Westerners to dismiss the whole thing as a regrettable but pointless bloodbath that happens to primitive brown people. (…) Nothing could be further from the truth. (...)
>
> Make no mistake: There was a method to the madness. And it was about power.
>
> Paul Rusesabagina[2]

I. INTRODUCTION

Genocide is nothing new in human history. Throughout centuries, massive killings, forced displacement, famine and other destructive forms of treatment of targeted groups were repeatedly employed by armies and despotic governments as a means to punish defeated or nonconformist peoples or simply to eliminate dissent. Such acts were perpetrated not only during wars or armed conflicts,

1 The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the Ministry of External Relations of Brazil. Responsibility for the information and views expressed therein lies entirely with the author.

2 RUSESABAGINA, Paul. *An Ordinary Man – An Autobiography*. New York: Penguim Books, 2006, p. 53. Paul Rusesabagina was the manager of the Hotel Mille Collines when the genocide in Rwanda began. His experience inspired the film "Hotel Rwanda".

but also in peace times, in the context of the struggle for power and hegemony within certain territories.

Despite its long history, it was only after the atrocities perpetrated during the Second World War were disclosed that the international community engaged in serious multilateral efforts to outlaw genocide and to establish an international regime to prevent and punish such a heinous crime. Until then, the destruction of a group, as such, and the horrific acts that materialize that intent, compounded "a crime without a name", as expressed by Winston Churchill in reference to the violence committed by the Nazis during the invasion of Russia in 1941[3].

Finally, on 9 December 1948, the General Assembly of the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide[4] (*Resolution 260 (III) A*), which provided the first internationally recognized concept of genocide and clearly enshrined state responsibility to prevent and punish it. The text of the Convention focused mainly on domestic and international criminalization, probably on the understanding that eliminating impunity would provide a dissuasive effect that could suffice in preventing mass atrocity events.

Unfortunately, though, the subsequent decades would prove otherwise. The international community witnessed – terrified but almost inert – dramatic massacres and famine in Cambodia, China and the Soviet Union. In addition, as is widely known, the fall of the Berlin Wall and the dismantlement of the Soviet Union at the beginning of 1990s triggered a wave of internal conflicts in some former client states, as local actors fought for internal supremacy in a changing world order. Those conflicts displayed increasingly ethnic and sectarian characters and paved the way for horrific massacres, hunger and, ultimately, genocide, such as in Rwanda (1994) and in the Balkans (1991-2001).

3 On August 24, 1941, British Prime Minister Winston Churchill delivered a live broadcast during which he described the barbarity of the German occupation in Russia: "(…) whole districts are being exterminated. (…) Since the Mongol invasions of Europe in the Sixteenth Century, there has never been methodical, merciless butchery on such a scale, or approaching such a scale. (…) We are in the presence of a crime without a name." (see: http://www.preventgenocide.org/genocide/crimewithoutaname.htm).

4 The Convention against Genocide is now considered a norm of customary international law, being mandatory for all States regardless of whether they have ratified the Convention.

In the aftermath of those shameful events, the international community took significant steps to ensure that such atrocities were not met with impunity. The Security Council rapidly created the Ad-Hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 and the Ad-Hoc International Criminal Tribunal for Rwanda (ICTR) in 1994.

Within a few more years, the Rome Statute of the International Criminal Court was adopted in 1998 and entered into force in 2002.

Notwithstanding the importance of the repressive approach and recent developments to ensure that perpetrators are brought to international justice and held accountable for their acts, I should argue in this article that the Convention Against Genocide has proven to be insufficient and, in certain aspects, inadequate to tackle the challenges posed by the recurrent occasions of mass murder that have distressed the consciousness of humankind in the last few decades.

I contend that there still remains a normative gap regarding the international obligation of states to adopt preventive measures, other than criminalization, prior to the emergence of genocidal events. The Convention fails to (i) provide a comprehensive concept of the crime; (ii) set specific obligations of each State Party concerning prevention inside its own territory; and (iii) to establish a permanent monitoring mechanism that could evaluate risky situations, clarify normative standards, issue recommendations and serve as a reference to international cooperation and other diplomatic efforts to prevent and halt genocide.

In an attempt to fill such a gap, the then United Nations Secretary-General Kofi Annan created the Office of the Special Advisor on the Prevention of Genocide in 2004, whose mission is to "act as a catalyst to raise awareness of the causes and dynamics of genocide, to alert relevant actors where there is a risk of genocide, and to advocate and mobilize for appropriate action"[5]. In 2010, following the World Summit Declaration, the new UN Secretary-General, Ban Ki Moon, appointed an Adviser on the Responsibility to Protect, "charged with the development and refinement of the concept of the Responsibility to Protect concept and with continuing a political dialogue with Member States and other stakeholders on further steps toward implementation"[6]. Both Special Advisors have worked together

5 http://www.un.org/en/preventgenocide/adviser/, viewed on April 16th, 2015.
6 Idem.

to develop a Framework of Analysis of Mass Atrocity Crimes[7]. Those initiatives will be further investigated later in this article.

In the following sections, I will first examine the shortcomings of the Convention against Genocide and what I understand to be an inadequacy to provide an enhanced framework for the prevention of genocide. I will next address the emergence of a new conceptual framework – namely, the responsibility to protect doctrine – whose advocates seem to consider, in the absence of a conventional framework on the subject, the reference for preventive and reactive actions related to genocide and other mass atrocities. I will finally turn to the examination of aspects that could be considered if the international community were to address the need to fill the aforementioned normative gap in relation to the prevention of genocide.

II. THE U.N. CONVENTION ON GENOCIDE: CONCEPTUAL FRAMEWORK AND ITS IMPACT ON PREVENTIVE EFFORTS

One of the very first treaties adopted in the moment of the reconstruction of the international system after the World War II, the UN Convention against Genocide, represents a landmark in the struggle against mass atrocities. As the first human rights treaty approved by the United Nations, it also marked the beginning of a process that would lead to the establishment of a comprehensive system of protection of human beings against arbitrary violence committed by States.

As a result of the general outrage for the brutality and industrial scale of mass murders practiced by the Nazis, as well as of an intense campaign led by the Polish Lawyer Raphael Lemkin (1900-59), who coined the term "genocide" and advocated for its prohibition in international law, the Convention was adopted even before the Universal Declaration of Human Rights. Despite its many virtues, it is widely recognized that the Convention embraced a rather controversial concept of genocide, which has created persistent difficulties to its application. The text approved in 1948 also failed to set specific obligations of States Parties concerning the implementation of preventive measures and did not establish a permanent monitoring body, which could serve as an early warning mechanism.

7 Available at: http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf.

In this section, I will initially address two of the main shortcomings of the concept of genocide adopted by the Convention: the requirement of "intent to destroy" and the limited scope of protected groups. Afterwards I will turn to other abovementioned aspects.

> The first three articles of the Convention read as follows:
>
> Article 1
> The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish.
>
> Article 2
> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.
>
> Article 3
> The following acts shall be punishable:
> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.

The first problematic feature of the concept is the subjective element of "intent to destroy". As the International Criminal Tribunal for Rwanda has pointed out, "intent is a mental factor which is difficult, even impossible to determine"[8]. It seems to be clear, though, that such an element was included in the text of the Convention in order to establish the non-fortuitous character of

8 Trial Judgment of Jean Paul Akayesu, p. 523. Available at http://www.unictr.org/en/cases/ictr-96-4.

genocides, which are manifestly a result of coordinated, deliberate and purposeful actions conducive to the violent disappearance of a certain group or of part of it.

Due to its special nature as a human rights treaty, it is imperative that any attempt to interpret the Convention takes into consideration the spirit and purpose of the treaty and its crucial role for the protection of vulnerable groups threatened by or subject to genocidal events. It would prove disastrous, therefore, to interpret the idea of "intent to destroy" in a restrictive manner, so as to unduly limit the scope of the Convention.

The jurisprudence of the ad-hoc international criminal tribunals have dealt with the issue and adopted a comprehensive approach that emphasizes that "intent" should be inferred by the circumstances of the facts and by the pattern of conduct of perpetrators. As stressed by Judge Cançado Trindade, in his Dissenting Opinion on the case concerning the *Application of the Convention on Genocide* (Croatia vs. Serbia) of the International Court of Justice, "requiring direct or explicit evidence of genocidal intent in all cases is neither in line with the case-law of international criminal tribunals nor is it practical or realistic"[9]. The Dissenting Opinion criticizes the standard of proof set by the ICJ as to the determination of State responsibility in cases of genocide, which is deemed as unjustifiably high.

The honourable Judge opposes the majority of the Court on the entire reasoning and conclusions points of the Judgment issued on February 3rd, 2015, particularly the dismissal of any responsibility of Serbia for alleged genocide in Croatia and the resulting dismissal of any obligation to provide redress to Croatian victims. The Judge sets the foundation of his opposition on the principle of humanity and considerations about the case-law of the international criminal tribunals for Rwanda and Yugoslavia, which have largely based their decisions on the idea that intent can be inferred from the material evidence of a number of facts, including general context of violence, consistent pattern of conduct, scale of atrocities, among others.

The viewpoint of Judge Cançado Trindade is in line with the jurisprudential contributions of the Inter-American Court of Human Rights and the European Court of Human Rights. Decisions issued by both tribunals are coherent with the idea that the standard of proof

9 Dissenting Opinion of Judge A.A. Cançado Trindade, p. 125. Available at http://www.icj-cij.org/docket/files/118/18432.pdf.

for the determination of the responsibility of states should be less rigorous than the high requirements usually set for the determination of responsibility of individuals in criminal proceedings. It is easy to understand, since the consequences of the former are of a civil nature and entail the obligation of the state concerned to provide redress to the victims of atrocities and/or to implement some administrative and institutional measures. The individual that is found culpable in a criminal proceeding, on the contrary, may even be deprived of his/her liberty. It seems that the present situation of the international jurisprudence is, regrettably, the opposite and the standard of proof for the determination of the responsibility of States in relation to genocide, as set by the International Court of Justice, appears to be higher than that of the international criminal tribunals.

The difficulties posed by the criteria of "intent" have also severe implications to the preventive role of the Convention, for they complicate the very determination of whether or not an unfolding situation of mass murders may be considered as genocide. The golden rule established by the case-law of international criminal tribunals – to infer the genocidal intent by the circumstances – is a useful tool for the determination of facts and responsibilities *a posteriori*, when it is imperative to count the corpses, collect evidence and provide some kind of recognition and redress to surviving victims. Lamentably, it is not sufficient as a means to sustain the decision-making process that could prompt timely action by the international community to halt genocidal acts before they happen or while they are taking place.

Another aspect of the concept that may be quite problematic is the strict enumeration of protected groups: "national, ethnic, racial or religious groups". Such limitation fails to acknowledge that genocide is essentially a political event, in which strategic interests may be disguised as nationalism, racial or ethnic hatred or religious intolerance. Sometimes, though, the process of dehumanization is clearly directed against political or social groups, such as oppositionists, dissidents, or intellectuals, who are perceived as a major threat to incumbent leaders.

The International Criminal Tribunal for Rwanda has dealt with this issue. During 100 bloody days, more than 800.000 people died in Rwanda, most of them Tutsis, but also moderate Hutus and people opposing the government or non-compliant with the mass killings were eliminated. The slaughter was significant, widespread

and systematic and, even then, it was not straightforward to define it as genocide, at least according to the terms of the Convention, since it is debatable whether the Tutsis may be considered a distinct ethnic or racial group. Tutsis were clearly a distinct "social group", identified as such by governmental records and official identity cards since the colonial Belgium rule, but not of separate ethnicity. As Adam Jones clarifies[10]:

As with the Balkan genocide, foreign observers tended to view the Rwandan conflict as an expression of 'ancient tribal hatreds'. Until the twentieth century, however, 'Hutus' and 'Tutsis' did not constitute separate nations. It is hard even to describe them as distinct ethnicities, since they share the same language, territory, and religion. Rather, the two groups in the pre-colonial period may be viewed as *social castes*, based on material wealth. Broadly speaking, Tutsis were those who owned cattle; Hutus tilled the land and provided labor to the Tutsis.

In order to avoid dismissing the shameful events in Rwanda as crimes against humanity or any other, the ICTR dealt with the issue on several occasions, including at *Prosecutor vs. Rutaganda*[11], in which the Trial Chamber "affirm[ed] the general conclusion that ethnic groups should be *relatively* stable and permanent" and "retained the fundamental principle that the self or other-identification of an ethnic group may suffice to satisfy Article 2's requirement in this regard – even if anthropologists, for example, would not describe the two groups as distinct ethnic groups in a purely scientific, objective sense (as is true in the case of the Tutsis and Hutus)"[12].

The limited list of protected groups renders the Convention inadequate to address dramatic situations in which massive violations of the right to life are directed against purely political, ideological or social groups, among others. For instance, from a strictly juridical point of view, the deaths of more than 35 million Chinese people during Mao Zedong's rule (1949-1976) would not amount to genocide; neither would the carnage that whipped out one quarter

10 JONES, Adam. *Genocide – A Comprehensive Introduction*. Canada: Routledge, 2nd Edition, 2011, p. 348.

11 Available at: www.unictr.org/sites/unictr.org/files/case-documents/ictr-96-3/trial-judgements/en/991206.pdf.

12 See: GIORGETTI, Chiara. *The Rules, Practice, and Jurisprudence of International Courts and Tribunals*. The Netherlands: Martinus Nijhoff Publishers, 2012, pp. 272-4.

of the Cambodian population under the Khmer Rouge regime (1975-1979). The main victims of both episodes were political dissidents, urban professionals, intellectuals and other people perceived as enemies of the then incumbent governments.

Even if the concept of genocide is problematic, it is still one of the greatest contributions of the Convention, which also established a clear obligation of States Parties to outlaw and punish perpetrators of such a crime (Articles 4, 5 and 6), no matter their political *status*. Genocide is now a crime under international law, prohibited and punishable either by the national jurisdiction of affected states or by international justice. In order to prevent impunity, the treaty even anticipates the creation of a permanent international penal tribunal, which would become effective only after more than fifty years after the Convention against Genocide entered into force, in 1951.

> Article 4
>
> Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.
>
> Article 5
>
> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.
>
> Article 6
>
> Persons charged with genocide or any of the other acts enumerated in Article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

However, besides the clear mandate to repress the crime of genocide and related acts and the general obligation to "enact (...) the necessary legislation to give effect to the provisions" of the Convention, the document is silent over specific obligations of

States Parties regarding the prevention of genocide through the implementation of domestic and international measures to enhance the resilience of societies against such a crime, for instance: inclusive education, transparency in the administration of justice, redress for the victims of past atrocities and, when applicable, national reconciliation process, and others.

Another grave omission of the Convention consists in the non-establishment of a permanent body to monitor its implementation and foster international cooperation in a preventive and sustainable manner. Differently from other core human rights treaties, there is still no treaty body[13] specifically in charge of overseeing, making recommendations or even guiding States Parties on how to fulfil – individually or collectively – their obligations under the scope of the Convention.

The Convention fails, therefore, to provide a treaty-based framework for the establishment of a multilateral early warning mechanism that could collect and impart relevant information, identify risky factors in advance, and make recommendations on how to mitigate them on a case-by-case basis. As past experiences have consistently demonstrated, such a normative gap has left the United Nations unprepared to deal with unfolding crises in a legitimate, coordinated and effective way, before mass slaughtering begins.

And experience shows that disturbing mass slaughtering has repeatedly begun on many occasions before the eyes of a disoriented international community, causing horror and shame for the inability to adopt collective action in a timely and life-saving

13 The core human rights treaties adopted in the subsequent decades have established technical bodies in charge of monitoring their implementation. Those treaty bodies are usually composed of independent experts of recognized competence in human rights, who are nominated and elected for fixed renewable terms by State parties. Nine treaty-bodies monitor the following treaties: International Covenant on Civil and Political Rights (1966) and its optional protocols; International Covenant on Economic, Social and Cultural Rights (1966); International Convention on the Elimination of All Forms of Racial Discrimination (1965); Convention on the Elimination of All Forms of Discrimination against Women (1979) and its optional protocol (1999); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); Convention on the Rights of the Child (1989) and its optional protocols (2000); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); International Convention on the Rights of Persons with Disabilities (2006); International Convention for the Protection of All Persons from Enforced Disappearance (2006); and the Optional Protocol of the Convention against Torture (2002).

manner. Therefore, the Convention against Genocide has proven to be insufficient and inadequate to properly address the challenges posed by the need to protect vulnerable groups from the scourge of genocide, at least from a preventive perspective.

III. THE EMERGENCE OF THE RESPONSIBILITY TO PROTECT DOCTRINE

The outcry and solemn promises to *never* allow the patterns of destruction that took place in Rwanda and Srebrenica to happen again have motivated some stakeholders to embrace the idea of military intervention, under Chapter VII of the Charter of United Nations, as a response to mass violations of international human rights and international humanitarian law, supposedly on humanitarian grounds.

Such an idea has always been met with resistance and distrust by most developing countries, out of concerns about the risks of misuse of any breach to State sovereignty and independence. Actually, it seems worth noting that advocates of the legitimacy of the so-called "humanitarian intervention" have gained support mainly among representatives of developed countries, including some that usually apply a firmly realist approach to their foreign relations, sometimes in complete disregard for multilateralism, international law (including human rights and IHL), and many other peaceful and negotiated means for the settlement of international disputes and conflicts.

As former Brazilian Minister of Foreign Affairs, Ambassador Antonio Patriota, once wrote[14]:

> The poles constituted by the idealism of those who wished to engage the [mechanisms of] collective security in highly moral causes and the absolute realism contrary to multilateralism ultimately, seem to have become allies – mindfully or not – (…) weakening what could be described as a more balanced attitude. (Translation by the author)[15]

14 PATRIOTA, Antonio de Aguiar. *O Conselho de Segurança após a Guerra do Golfo*. Brasília: FUNAG, 2009, p. 52.

15 *Os pólos constituídos pelo idealismo dos que desejariam pôr a segurança coletiva a serviço de causas moralmente elevadas e o do realismo absoluto, contrário, em* última *análise, ao multilateralismo, parece haverem-se aliado – advertidamente ou não – (...) em detrimento do que poderia ser descrita como uma atitude mais equidistante (...).*

Indeed, a balanced approach is necessary if the rights of vulnerable groups and peoples are to be of primary concern to international policy-makers. On the one hand, there is increasing consensus that sovereignty is not an absolute license for governments to act as they please and that it entails primary responsibility for the promotion and protection of human rights in a certain territory. On the other hand, exaggerate disregard for state sovereignty would open the Pandora box of foreign domination in clear violation of the right to self-determination of peoples, which would be reminiscent of colonialism and post-colonialist policies that hampered development – and human rights – in so many regions of the world for centuries.

In light of such a complex debate, it is worth noting that, at the beginning of the 21st Century, the idea that a multilateral organization had the "right" to intervene to halt mass atrocities was first enshrined in an international treaty by the developing countries of Africa. In 11 July 2000, 53 African States approved the Constitutive Act of the African Union, which included among its principles:

> Article 4
>
> (…)
>
> (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.
>
> (…)
>
> (j) the right of Member States to request intervention from the Union in order to restore peace and security.

Conscious of the sensitivity of the matter, as well as of the institutional weakness of the United Nations to deal with it, former UNSG Kofi Annan created the Office of the Special Adviser on the Prevention of Genocide in 2004, in a clear attempt to reduce the normative and institutional gap related to prevention of mass atrocities.

In addition, in what can be considered an unprecedented rapid development, the Outcome Document of the World Summit (2005) enshrined a consensus on the new concept of the *responsibility to protect* (R2P), as advanced by the Report of the International Commission on Intervention and State Sovereignty (ICISS),

established by the government of Canada in 2001. According to the Chair of the ICISS, Gareth Evans, "the commission's hope, above all, was that using 'responsibility to protect' rather than 'right to intervene' language would enable entrenched opponents to find new ground on which to more constructively engage"[16]. Evans further clarifies the standpoint of the members of the ICISS[17]:

> The second big conceptual contribution of the ICISS commissioners, very much linked with the first, was to insist upon a new way of talking about sovereignty itself (…). The starting point is that any state has the primary responsibility to protect the individuals within it. But that is not the finishing point: where the state is unable or unwilling to meet its own responsibility, through either incapacity or ill will, a secondary responsibility to protect falls on the wider international community to step in, by whatever means is appropriate to the particular situation. Most of the subsequent discussion of R2P has focused on the second of these two elements, external engagement. But the first – the emphasis on the state's own responsibility to protect its own people – is equally important.

The conceptual framework developed by the ICISS Report was eventually incorporated into the Outcome Document of the World Summit (2005) and reads as follows[18]:

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (…) The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

16 EVANS, Gareth. *The Responsibility to Protect – Ending Mass Atrocities Once and For All*. Washington: Brookings Institution, 2008, p. 42.

17 Idem.

18 The SGNU summarizes the three pillars of the Responsibility to Protect as follows: (1) The state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; (2) The international community has a responsibility to encourage and assist states in fulfilling this; (3) The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a state is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.

> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. (…) In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis (…).

The drafters of the ICISS Report seem to have been well aware of the risks posed by the misuse of the ideas they advanced, for they systematically reiterated the preference for a preventive approach and the need to apply a rigorous set of criteria of analysis and methodology to determine (i) whether or not a state is failing to uphold its responsibility to protect, (ii) when external action is required and (iii) what kind of action would better fit the objective of protection.

> 3.1. This commission strongly believes that the responsibility to protect implies an accompanying responsibility to prevent. (…) The need to do much better on prevention, and to exhaust prevention options before rushing to embrace intervention, were constantly recurring themes in our worldwide consultations, and ones we wholeheartedly endorse.
>
> (…)
>
> 3.4. By showing a commitment to helping local efforts to address both the root causes of problems and their more immediate triggers, broader international efforts gain added credibility, domestically, regionally, and globally. The credibility is especially important when international action must go beyond prevention to reaction, and especially when that reaction necessarily involves coercive measures, and ultimately the use of armed force. (…) even when [preventive efforts] have not succeeded in preventing conflict or catastrophe, they are a necessary precondition for responding effectively to it.

At this point, it is worth reflecting upon two aspects of the issue: (i) from the point of view of vulnerable groups, preventive efforts that preclude the use of coercive armed force may, on certain occasions, not only be the preferable course of action, but also the only one that would stand a chance of improving their risky situation; and (ii)

given the institutional arrangement of the UN Security Council and the inequalities in the distribution of military, political and economic power among nations, it is highly implausible to believe that there would be no incentive to misuse the humanitarian discourse of R2P as a disguise to advance strategic interests, sometimes causing even more plight and violations.

In regard to the first aspect, "[o]verwhelmingly, (…) the evidence points to military and economic interventions as factors that tend to increase the duration of civil wars" [19], which tends also to, in practice, worsen the situation of vulnerable groups. The longer the conflict lasts, the more destruction and violations of human rights and humanitarian law tend to become widespread and generalized.

On the contrary, peaceful engagement, such as the mediation efforts of external stakeholders, are more likely to contribute to a faster and more sustainable settlement of armed conflicts, since they foster trust and confidence, and provide a means to exchange information and enhance constructive dialogue among contending parties[20]:

> The role of an outside actor is central to peaceful settlement given two main problems confronting the civil war parties: (1) the difficulty in signaling one's strength, resolve, and preferences to the opponent and (2) the civil parties' inability to identify a mutually acceptable solution to their disagreements and make a credible commitment to this position without being vulnerable in the postconflict period. (…) Absent the transfer of information that reduces uncertainty over the distribution of power, relative resolve, and the preferences of the opponent, adversaries are unable to identify a mutually agreeable solution (…). To be effective, third parties need to take action in the course of the conflict that transform the conflict by influencing the information and structure and facilitating communication between the adversaries.

As for the second aspect (the possibility of misuse of the concept to advance strategic interests), one should bear in mind that an external military involvement that does not take into consideration the importance of enhancing dialogue among warring parties is more prone to aggravate the level of violence on the ground, sometimes

19 REGAN, Patrick M. & AYDIN, Aysegul. *Diplomacy and Other Forms of Intervention in Civil Wars*. Journal of Conflict Resolution, 2006, p. 738. Available at: http://jcr.sagepub.com/cgi/content/refs/50/5/736.

20 Idem.

prompting devastating consequences to be supported by the very population that such an intervention was supposed to protect[21]. Cunningan[22] adds that, when external intervention has a separate agenda, even if it is not clearly stated, then the intervention will probably become an additional factor to impede the settlement of the conflict, rather than resolve it. Besides, the external actor usually has few incentives to compromise and positively contribute to a negotiated peace agreement[23]:

> (…) in many cases it will actually be more difficult to induce external states to exit the conflict short of fully achieving their goals because of differences between external states and internal combatants in the attractiveness of negotiation.
>
> (…) in addition to facing lower costs from fighting, external states are likely to perceive a lower benefit from negotiation than domestic groups.

Empirical evidence, therefore, highlight the need for a balanced and cautious attitude towards the implementation of the third pillar of the R2P doctrine, even when collective action is duly authorized by the UN Security Council and comply with the criteria of legality.

As members of the ICISS would probably agree, early and properly funded preventive actions that enhance the first two pillars of the R2P have a much higher prospect of being effective and credible and of contributing to sustainable peace and protection of vulnerable groups than coercive armed action. More than that: sometimes that is the only course of action that can really be life-saving.

It should be noted in this regard that the Joint Office of the Special Advisor on the Prevention of Genocide and the Special Advisor on the Responsibility to Protect recently launched the Framework of Analysis of Mass Atrocities Crimes[24]. The document has identified eight common risky factors and six specific risky factors that may render

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21 "A potential explanation for the deleterious consequences of military or economic interventions is that these third-party strategies increase the ability of one or both sides to resort to violence but do not help the adversaries to overcome their distrust and misperceptions of one another." (Idem, p.739-40)

22 CUNNINGHAM, David E. *Blocking resolution: How external States can prolong civil wars.* Journal of Peace Research 2010, p. 118-9.
Available at: http: jpr.sagepub.com/cgi/content/refs/47/2/115.

23 Idem.

24 Op. cit.

societies vulnerable to genocide and other massive violations of human rights and humanitarian law. The main objective of the publication is clearly to pave the way for the adoption of early and effective national, regional and global measures to reduce the probability of the emergence of new crises and, also, to improve the preparedness of international community to deal with them in case they unfold.

Before closing this session, it is worth underlining that the development of the R2P doctrine does not whatsoever solve the normative gap created by the omission of the Convention against Genocide in clearly setting specific obligations to States Parties regarding the implementation of domestic measures to prevent genocide. Nor has it established a legitimate and credible early warning and/or monitoring mechanism on the issue.

The whole R2P doctrine has developed on the fringes of abiding international law, international human rights law and international humanitarian law and this is still its main weakness. In the absence of a recognized and negotiated legal framework, the conceptual contributions provided by the idea of R2P can be more easily distorted and put to serve strategic rather than humanitarian objectives.

IV. CONCLUDING REMARKS

Even before the word was ever spoken, the spectrum of genocide terrified many societies. This crime has a rather long and sad history, at least since the Roman Army turned the disarmed and mercantile Carthage into ashes and reduced its few surviving inhabitants to slavery in 146 BC. Since then until the end of WW II, *génocidaires* were usually met with impunity or even glory, whenever their crimes assured them rampant military victories.

In this context, the adoption of the UN Convention on the Prevention and Punishment of the Crime of Genocide in 1948 represents a landmark in the international struggle to put an end to mass atrocities. For the first time in human history, international community undertook to prosecute and hold accountable the ones responsible for such heinous crime, even despite their political *status* in their country of origin.

Almost seventy years later, though, it is high time the international community take a step forward and endeavour the necessary efforts to fill the gaps left aside by the pioneers of the Convention, particularly in terms of specific obligations to adopt preventive measures, but also

in the establishment of a permanent multilateral body in charge of monitoring the implementation of the treaty.

Recent developments in the field, especially the creation of the UN Office of the Special Advisor on the Prevention of Genocide and the Special Advisor on the Responsibility to Protect have contributed to clarify important and sensitive aspects on the issue, especially concerning the responsibilities inherent to sovereignty. They must not, however, carry the burden of being the substitute for a multilaterally negotiated and abiding commitment, which could finally reduce or eliminate the existing normative gap in relation to specific preventive measures to be implemented by all states concerned.

I should conclude this article by asserting my total agreement with the clear defence of the superiority of preventive measures over any other initiatives, as enshrined in the Framework of Analyses for Atrocity Crimes, launched by the abovementioned Special Rapporteurs:

> The first and most compelling reason for this focus is the imperative to preserve human life. Atrocity crimes are, for the most part, large-scale events that, if prevented, will avoid significant loss of human life, as well as physical, psychosocial and psychological damages and trauma.
>
> However, there are also other significant reasons to focus on prevention. Atrocity crimes tend to occur in countries with some level of instability or crisis. Consequently, measures taken to prevent these crimes are likely to contribute to national peace and stability. Prevention also serves the larger agenda of regional and international peace and stability. Atrocity crimes and their consequences can spill over into neighbouring countries by, for example, creating or reinforcing tensions between groups that are defined along religious or ethnic lines rather than by national borders

Focusing on prevention is, therefore, an imperative of humanity, efficiency and security. It is also the only safe way to ensure that the cloud of mass murder policies will never haunt vulnerable populations again.

HUMAN DIGNITY AND THE MANIPULATION OF THE SENSE OF HAPPINESS; FROM THE VIEWPOINT OF BIOETHICS AND PHILOSOPHY OF LIFE (*)

Masahiro Morioka

Professor, College of Sustainable System Sciences, Osaka Prefecture University.

1. INTRODUCTION

Happiness has long been regarded as one of the highest goals in human life. If our sense of happiness is closely connected to brain functions, future methods may allow us to control happiness through refined, effective brain manipulation.[1] Can we regard such happiness as true happiness? In this paper I will make some remarks on the manipulation of the sense of happiness and illuminate the relationship between human dignity and happiness.

Philosophers have attributed two aspects to happiness: subjective happiness and objective happiness. Most of us tend to interpret happiness as a subjective mental state, or a sense of happiness. We can see a typical example of this line of thought in J. S. Mill's *Utilitarianism*:

> By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure.[2]

Mill describes happiness as an inner mental state defined by pleasure or pain. What he means here is the sense of happiness. In contrast, Aristotle and other philosophers argue that happiness consists not only of inner states, but also of outer contexts which are shaped by our relationships with loved ones, our career, lucky events in our lives, etc. Aristotle writes in *Nicomachean Ethics* that

1 Recent developments in imaging technologies applied to human brains have discovered the correlation between the actions of drugs in the brain and their effects on inner mental states, for example, drug-induced euphoria. See Fowler et al. (2007).
2 Mill (1972), p. 7.

"happiness ... is something final and self-sufficient, and is the end of action."[3] And he concludes:

> Why then should we not say that he is happy who is active in accordance with complete virtue and is sufficiently equipped with external goods, not for some chance period but throughout a complete life?[4]

According to Aristotle, happiness (*eudaimonia*) is "action itself" that is in accordance with complete virtue throughout a complete life, and the sense of happiness (pleasure), is an accompaniment to this action.[5]

In this paper I am going to shed light on subjective happiness, that is to say, the sense of happiness, because when we use the word "happiness" today we mean "the sense of happiness", in most cases. And also because it is considered to be the "sense of happiness" that could be influenced by brain manipulations.[6]

2. A THOUGHT EXPERIMENT ON A HAPPINESS DRUG

The President's Council on Bioethics's 2003 report *Beyond Therapy* includes an extensive discussion of the morality of mood-improvement drugs such as SSRIs (Selective Serotonin Reuptake Inhibitors). The report argues that while SSRIs can help patients live a better life by inducing calm, providing a background of well-being, and changing personality,[7] such drugs create some fundamental ethical problems. First, one might come to "feel happy for no good reason at all, or happy even when there remains much in one's life to be truly unhappy about."[8] Second, "SSRIs may generally dull our capacity to feel [psychic pain], rendering us less capable of experiencing and learning from misfortune or tragedy or empathizing with the miseries of others."[9] And third, those drugs "might shrink our capacity for true human flourishing."[10] To conclude, the report

3 Aristotle (1941), p. 942 (1097b:20).
4 Ibid., p. 948 (1101a:15).
5 Ibid., p. 945 (1099a:10-20).
6 At the end of this paper, readers may notice that the author's idea of happiness is rather close to that of Aristotle.
7 President's Council on Bioethics (2003), p. 250.
8 Ibid., p. 255.
9 Ibid., p. 259.
10 Ibid., p. 260.

recommends those drugs be "sparingly" used so that we "are able to feel joy at joyous events and sadness at sad ones."[11]

The Council's argument was made from the perspective of conservative or communitarian ethics, and it has been harshly criticized by proponents of technological advances as being overly sentimental. I do not think such criticisms are completely off the mark; however, their report was stimulating for me because it contained an interesting and fundamental discussion about why the extreme pursuit of a sense of happiness should be restrained. This can be found particularly where the report talks about feeling happy for no good reason at all, and about feeling joy at joyous events and sadness at sad ones.

In order to further develop their argument, here I would like to make a thought experiment. Suppose we have a perfect happiness drug without any side effects, and, having taken that drug, the user is filled with a sense of happiness for a couple of days regardless of his or her experiences. Imagine a parent is walking on the street with his or her little child. Suddenly a runaway car crushes the child to death. The parent becomes severely shocked and panicked. The ambulance crew checks out the parent's mental condition and lets the parent take a perfect happiness drug. The heart of the parent soon becomes filled with a sense of happiness. The parent says, "Today my child was killed, but how happy I am now!" and smiles back to the crew.

Although the parent claims he/she is happy, we would all agree that something strange is happening. This is a typical example of *Beyond Therapy*'s case in which a person feels "happy when there remains much in one's life to be truly unhappy about." I believe this case is problematic because the parent is totally under the control of a perfect happiness drug and is deprived of his/her "freedom to feel unhappiness" at such a sad event. Even in this situation the parent may still have a rational capacity to judge that, for ordinary people, this situation would be a tragedy, but since the parent's emotion is dominated by a feeling of happiness caused by the drug, there are no choices but to keep on enjoying happiness for a couple of days. The parent might hope to continue to take the drug every other day to experience everlasting, drug-induced happiness and avoid the harsh realities she would normally be faced with.

11 Ibid., p. 265.

3. HUMAN DIGNITY AND THE SENSE OF HAPPINESS

Don C. Des Jarlais, while talking about "externally induced pleasure," writes that the Puritan tradition includes "the belief that the pleasure will be so intense that the individual will not be able to control the desire to repeat the sensation and will become enslaved to it."[12] Can this kind of enslavement actually be found in the case of "externally induced happiness" described above? I argue "yes."

Immanuel Kant clearly distinguishes "the principle of morality" from "the principle of happiness" and gives the former the first priority. Allen Wood interprets Kant's idea of happiness as a combination of "pleasure, contentment with one's state and desire-satisfaction."[13] According to my interpretation of Kant, the state of drug-induced happiness should not be considered a primary end for humans because it lacks a fundamental moral duty, the duty to cultivate one's own perfection.[14]

Let us take another example. Imagine that a woman who has been forcibly injected with a perfect happiness drug is raped, or a man who has been forcibly injected with a drug is tortured. The most brutal of human deeds are being forced on them, but during those periods they feel tremendous happiness caused by the drug. In these cases no one would say, "They are happy, so there is no problem." Most people would feel that an extraordinary humiliation is being committed against them. In these cases, they are deprived of their "freedom to feel unhappiness," and they are deprived of something that cannot be described except by the term "human dignity" in exchange for drug-induced happiness.[15]

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12 Don C. Des Jarlais (2000), p. 336.

13 Wood (2001), p. 267. Kant defines happiness as "satisfaction with one's state, so long as one is assured of its lasting." (Kant (1996), p. 151). Kant regards the pursuit of happiness as a typical example of human inclinations when it is pursued for oneself. On the contrary, he thinks that the pursuit of the happiness of others should be our duty and end as far as it does not override others' autonomy.

14 Kant (1996), p. 154. This is a very important point because from ancient times many philosophers have thought that true happiness ought to contain some morality. Wood says that "classical theories typically identify either happiness itself or its dominant component with either the possession or exercise of moral virtue." (Wood (2011), p. 262).

15 We will have to explore why this should be considered something that cannot be described except the term "human dignity." Although I present my idea of "human dignity" at the end of this paper, this problem remains yet to be solved. This is a subject of my future research.

Leon R. Kass suggests that when we are in a state of drug-induced euphoria we are deprived of "human dignity", but he does not clarify the relationship between human dignity and happiness.[16] If my intuition is correct, the central problem of drug-induced happiness lies in the deprivation of human dignity in exchange for happiness. Then, what is human dignity?[17]

It is Kant who examined human dignity most deeply in terms of philosophy. Kant defines dignity as "an absolute inner worth" that exists inside every rational person, and no one is allowed to destroy it. According to Kant, we have the duty to pay mutual respect to each other's human dignity. We must not deprive others of the inner freedom that is the endowment of every rational person.[18]

> [A human being's duty] consists, therefore, in a prohibition against depriving himself of the *prerogative* of a moral being, that of acting in accordance with principles, that is, inner freedom, and so making himself a plaything of the mere inclinations and hence a thing.[19]

Kant says that one's duty to oneself consists in a prohibition against making oneself a plaything of mere inclinations. This is a truly persuasive argument regarding human dignity, because the essence of human dignity must be considered to be never to deal with a person as a thing. Thus, it seems that the domination of a person by drug-induced happiness should be regarded as a clear violation of human dignity, because it is equal to debasing a person to a plaything of inclinations. Hence, in the above case, human dignity in Kant's sense is considered to have been taken from them in exchange for a sense of happiness induced by a drug.

Let us go on further. In the above case, those people are deprived of the "freedom to feel unhappiness" and are degraded to a plaything of mere inclinations; hence, they are considered to be devoid of "human

16 Kass (2006). Kass (2008).

17 Adam Schulman writes that the concept of human dignity has at least four historical sources: classical antiquity, Biblical religion, Kantian moral philosophy, and 20th-century constitutions and international declarations. Schulman (2008), pp. 6-15.

18 Kant (1996), p. 186. "…. for as a person (homo noumenon) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world."

19 Kant (1996), p. 175. Italic in the original text.

dignity". This means that a life with dignity necessarily requires that one's "freedom to feel unhappiness" be totally guaranteed in one's actual life. "A life with dignity" means a life that is not dominated by the sense of happiness.

A life with dignity has two characteristics:

First, as has already been discussed above, a life with dignity is free from domination by a sense of happiness, regardless of whether or not it is acquired by means of drugs. Moreover, a life with dignity should also be free from domination by our own strong desire to experience that kind of happiness. The former domination comes from the outside and the latter originates from inside oneself. Although mentioning the latter desires might sound too ascetic in the case of tobacco or alcohol, I believe one important essence of a life with dignity should exist here.

Second, a life with dignity is free from domination by the sense of unhappiness.[20] This idea is more familiar to us than the first. A life with dignity should be free from the domination of negative thoughts about one's existence or one's own value. People sometimes fall victim to this kind of self-negation when experiencing such hardships as severe and repeated abuse, the death of loved ones, or devastating disasters. In these cases, human dignity means the belief that whatever their suffering and hardships, all human beings have a possibility to escape from domination by the sense of unhappiness and to regain the sense of self-affirmation at some point in their future life. Hence, it might be allowed to use SSRIs to medically support this recovery process for a limited period of time, paying special attention to the danger of domination by a sense of happiness. We share the same conclusion with the President's Council Report on this point.

I would like to make a close examination of this issue. In the thought experiment discussed before, the heart of a person who was in the depths of despair is filled with a sense of happiness caused by a perfect happiness drug. As a result, a drug-induced happiness dominates the person, and he/she is deprived of a life with dignity. Then what should we think about giving that person another drug that is not as strong as a perfect happiness drug, removing despair

20 The relationship between the sense of unhappiness and the sense of self-negation has yet to be discussed. The same is true of the relationship between the sense of happiness and the sense of self-affirmation.

and the sense of unhappiness from the person, and creating a mental state that is kept away from both unhappiness and happiness?

My answer is that such medication has both an affirmative aspect and a negative aspect that need further examination. With regard to the former, a person who was dominated by despair and the sense of unhappiness becomes able to escape from that mental state and to begin an effort to regain the sense of self-affirmation. If such medication can provide the person with an opportunity to explore his/her life with a sense of affirmation, it should be considered good news. This is not deprivation of human dignity, because it enables that person to escape from the domination of the sense of unhappiness. Hence, I do not claim that the use of existing psychoactive drugs such as SSRIs immediately deprives us of human dignity, or that its use ought to be prohibited. What I raise an alarm over is the use of a hypothetical perfect happiness drug that could fill our heart with complete happiness, and what I have done so far has been a philosophical investigation of the relationship between human dignity and the manipulation of the sense of happiness, using a perfect happiness drug as an example.

The negative aspect that needs further examination concerns the dependency of drug users on that imperfect happiness drug. Once refraining from using that drug, that person would fall into the depths of despair and unhappiness again. This shows that the person cannot stand on his/her own legs without depending upon the medication. This leads us to the question whether this should really be considered a life with dignity. I am going to think about this at the end of the paper.

From our discussion so far, I conclude that one important aspect of human dignity can be explained in relation to the sense of happiness and unhappiness. A life with dignity means a life free from the domination of both the sense of happiness and the sense of unhappiness.

We could even go on to argue that a life with dignity means a life in which the author of one's own life is never dominated by the desires of outside people or by desires inside one's own body and mind. And a life with dignity as interpreted above can serve as a firm ground on which one can survive one's whole life with self-affirmation and without regret, whatever else may be brutally

destroyed. (I once called it "the central axis".[21]) To summarize, a life with dignity means a life free from domination by the sense of happiness or unhappiness and free from domination by any kinds of desire inside and outside oneself; in other words, a life through which we can keep away from domination by the sense of happiness, the sense of unhappiness, or desires. Here, Kantian ideas seem to meet Asian Buddhist traditions.[22]

I agree with Kant that humans have an inevitable inclination to promote our own happiness. We must remember that we live in a pleasure-seeking civilization, urged on by advanced scientific technologies that did not exist in Kant's time. In such a civilization, what we really have to accomplish is not to pursue the promotion of happiness by increasing the amount of pleasure, but to pursue a life with dignity that is not controlled by our desire to seek pleasure and a sense of happiness.[23]

Some might argue that people ought to have the freedom to choose a life dominated by a sense of happiness, even if it is achieved through happiness drugs. This is an argument in favor of the freedom to choose a life deprived of human dignity.[24] Some might further ask, "What is 'wrong' with drug-induced happiness if that state of mind can last indefinitely without any side effects and without any harm to others? You may say it is a life deprived of human dignity, but I prefer a life filled with continuous happiness."

I am inclined to say yes to this argument because I believe we have a right to do foolish things insofar as it does not harm others. At the same time, ironically, this reminds me of J.S. Mill: "It is better

21 Morioka (2003, 2005).

22 These desires I have just mentioned include desires for a variety of enhancements, so the ultimate freedom in the age of enhancement is the freedom of being liberated from the obsessive desire for enhancement. This is again where contemporary bioethics meets Buddhist thoughts.

23 This sentiment is also discussed from a different angle in my book *Painless Civilization*. In this book I called our pleasure-seeking civilization "painless civilization." The problem of desire discussed above is very important for our discussion, however, it goes beyond the scope of this paper; hence I would like to leave it to our future research.

24 However, although "the freedom to choose a life dominated by a sense of happiness" seems similar to "the freedom to feel unhappiness," there is a significant difference between them in that, while the former is exercised to escape from a life with dignity, the latter is exercised to acquire it against the domination of the sense of happiness.

to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied."[25] Mill would probably comment that the above choice has to be guaranteed as freedom but it does not lead to a superior life.

My argument resembles that of conservative bioethics because both stress the importance of human dignity in the discussion of bioethics. However, with regard to freedom, conservative bioethicists would be reluctant to agree with me in terms of my discussions of the freedom to choose a life dominated by the sense of happiness and the freedom to become unhappy.

4. A THOUGHT EXPERIMENT ON A HAPPINESS DEVICE

So far I have presupposed that "having the freedom to feel unhappiness" and "being free from domination by a sense of happiness" mean the same thing in our context, but is this correct? Here I would like to make another thought experiment. Imagine that a small device that can achieve the same effect as a perfect happiness drug is placed inside the human brain. The person has a switch on his/her hand, and when this person turns on the switch he/she is forcibly filled with a sense of happiness, and when this person turns off the switch he/she comes back to a normal mental state. We can say this person has the freedom to turn the switch both on and off, that is to say, freedom to experience a sense of machine-made happiness and freedom to stop experiencing it.

What happens when this person turns on the switch when raped or tortured? After turning it on, this person is suddenly filled with tremendous happiness, and the happiness is so great that this person might never come to think of turning off the switch. The person might hope to keep enjoying machine-made happiness forever, and might never intend to come back to the original mental state. In this case, this person maintains a freedom to turn it off, but he/she never wishes to exercise that freedom.[26] We could say in this case that this person suffers from a kind of addiction to this device.

In the case of a perfect happiness drug, the person is forced to experience drug-induced happiness and has no alternative but to

25 Mill (1972), p. 10.

26 In addition to this case we should imagine other cases in which the person simply turns on the switch in normal settings. I would like to discuss it in another paper.

continue experiencing it for a couple of days. However, in the case of a happiness device, the person has the freedom to turn off the switch and escape from machine-made happiness anytime, so the situation looks completely different.

I am inclined to think that in the latter case, although the person has a "formal freedom" to turn off the switch, he/she is under the domination of overwhelming machine-made happiness, and therefore is deprived of a "substantive freedom" to turn it off; hence, the person is considered to be deprived of human dignity. The former is the case in which both freedom and human dignity are taken away, and the latter is the case in which "formal freedom" exists but "substantive freedom" and "human dignity" are taken away.

This analysis suggests that in order to protect our human dignity it is necessary to be "free from domination by a sense of happiness", and that in order to be free from its domination, not only "having a formal freedom to feel unhappiness", but also "having a substantive freedom to feel unhappiness" ought to be guaranteed. What would Kant think about this? Let us cite his argument again: "[A human being's duty] consists, therefore, in a prohibition against depriving himself of the prerogative of a moral being, that of acting in accordance with principles, that is, inner freedom, and so making himself a plaything of the mere inclinations and hence a thing." Reading his words, it seems to me that he regards the inner freedom to act in accordance with principles not just as formal freedom but also as substantive freedom. Therefore, I suspect that Kant would also claim that in order to protect human dignity "substantive freedom to feel unhappiness" ought to be guaranteed.

Let us further examine the cases in which there exists formal freedom but not substantive freedom. In the second thought experiment, a freedom both to switch on and off was given to the person. However, once the person turns the switch on, he/she is forced to be in a situation in which he/she is never going to turn the switch off again. Here we have a strange system that works in such a way that only the ON button is always going to be chosen, although every time there remains the other alternative. In this system the switch and the human brain are directly connected. This is a system in which, before turning it on, the formal freedom to choose whether to switch on or off is being given to the person, but once it is turned on, the substantive freedom to switch off is lost to that person forever.

The most similar phenomenon to this system would be "addiction." Taking the example of tobacco, a person who has never experienced it has a substantive freedom to choose whether or not to begin to smoke. However, once beginning to smoke and getting addicted to tobacco, that person loses the substantive freedom to quit smoking through his/her own efforts. Actually, tobacco has the function of producing pleasure substances in the brain; it looks similar to the happiness drug in the first thought experiment. A heavy smoker lights cigarettes one after another incessantly. This is just like continually turning on the switch of a happiness device. The most perfectly working machine in this way would be a happiness device such as that presented in our second thought experiment. I would like to call a system in which the substantive freedom to turn off the switch is lost after turning it on an "addictive system." The problem of the relationship between "domination by the sense of happiness caused by drugs or devices" and "human dignity" is closely connected with the question "What is an addictive system?"

An addictive system has an imperfect stage and a perfect stage. The imperfect stage is a stage in which a person sometimes wants to escape from the addiction but is unable to find a way to do that. It is just like the case in which a person wants to quit smoking but cannot. On the other hand, the perfect stage is one in which a person in addiction never thinks of escaping from his/her condition anymore. It is just like the case in which a person never thinks of quitting tobacco, whatever bad effects he/she might suffer from. A perfect happiness drug or a happiness device has the capacity to lead people to this stage immediately.

I have previously discussed the possibility of giving a person a drug that is not as strong as a perfect happiness drug, which removes despair and the sense of unhappiness from the person, and creates a mental state that is kept away from both unhappiness and happiness. In that discussion I have pointed out that there is a negative aspect that needs further examination, and this negative aspect is the problem of addiction. A person who has been keeping away from continuous unhappiness thanks to drugs might fall into the depths of despair again after using up the medication. Thinking of such devastation, that person would probably become unable to dispense with the medication, and as a result, would effectively become addicted to it. What should we think about this?

A life that is dominated by the sense of unhappiness or self-negation is never a life with dignity.[27] It is not wrong to escape from such a mental state by using drugs. Of course, we have to say that a person suffers from addiction to a drug if his/her mental state of being kept away from both unhappiness and happiness cannot be maintained without it. Nevertheless, in this case, thanks to the drug, that person is given the capability to proceed to live his/her whole life without regret; hence, this addiction is not considered to deprive him/her of human dignity. My conclusion is that this is nothing but an addiction, but human dignity is protected in this case.

Then what about replacing this drug with a perfect happiness drug and putting that person under the domination of the sense of happiness? I do not think it is a life with dignity, because that person is under the control of the sense of happiness, has no alternative but to affirm the status quo, and loses the motivation to explore his/her own life filled with ups and downs without regret. *A life with dignity means a life in which we are able to explore our own life, equipped with both happiness and unhappiness, without regret, through relationships with others, without being exploited by the desires of anyone, and without being dominated by our own desires.* This is the idea of "human dignity" I have found after examining Kant's idea of dignity and the manipulation of the sense of happiness.

In this paper I started with Kant's idea of human dignity, and through the examination of a happiness drug and a happiness device, I have discovered a new idea of human dignity just mentioned above. By this, I think, we have reached a solid ground on which we can think about "human dignity" in the age of biotechnology in a way a little different from Kant.

5. CONCLUSION

As a conclusion, I would like to write the following things. First, "human dignity" can be defined as being free from the domination of the sense of happiness, the sense of unhappiness, or desires. Second, with regard to happiness caused by drugs or devices, 1) we do not have to reject it if it can save people from the depths of despair and help create the ground on which they can live their own life without regret, and 2) we have to reject it if the happiness caused by drugs

27 However, we should keep in mind that a life without dignity does not lose any of its value as a human life. I will discuss this topic in another paper.

or devices dominates our hearts. A human completely filled with happiness appears to be in the greatest fortune at first sight, but to be filled with the sense of happiness to the extent that the person cannot turn off the switch, overwhelmed by tremendous happiness, is nothing but the theft of human dignity from that person. I believe one of the reasons why we have a vague anxiety about the development of happiness drugs is that we intuitively anticipate that such a kind of disappearance of human dignity will be inevitably awaiting us in the future of advanced biotechnology.

I would like also to stress that the topic discussed in this paper is one of the central issues in the philosophy of life as a discipline that we have proposed since the establishment of *Journal of Philosophy of Life* in 2011.[28] The relationship between happiness and human dignity in the age of advanced technology would not be able to be fully investigated without the comprehensive perspective that is given by the discipline of philosophy of life. It is time to create in contemporary philosophy a new research field, the philosophy of life.[29]

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28 www.philosophyoflife.org.

29 With regard to the philosophy of life as a discipline, please visit the website of *Journal of Philosophy of Life* (www.philosophyoflife.org) or my website on the philosophy of life (www.lifestudies.org).

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INTERNATIONAL CRIMINAL JUSTICE AND REPARATIONS FOR VICTIMS IN THE LIGHT OF HUMAN DIGNITY: THE ROLE OF DOMESTIC MECHANISMS

Miriam Cohen

Assistant Professor, Bora Laskin Faculty of Law, Lakehead University, Canada.

In the wake of international crimes and human rights violations, international justice stands on two pillars in relation to the prosecution[1] and award of reparation[2] in respect of international crimes: it has an international dimension, performed by international courts and mechanisms, as well as a national dimension, played by domestic courts.

Bearing in mind the principle of respect for human dignity, legal responses to the conflict in the Balkans illustrates this dichotomy between international and domestic mechanisms. In addition to outrage and violence, the war was characterised by a campaign of sexual violence crimes[3], and the conflict took many lives and left

1 The present article will focus on the question of the role of domestic courts and mechanisms in the award of *reparation* for victims of international crimes. In relation to domestic *prosecutions* of international crimes, many studies have addressed this question in detail. See e.g.: Robert Cryer, *Prosecuting international crimes: selectivity and the international criminal law regime*, Cambridge University Press, 2005; Damien Vandermeersch, "Prosecuting International Crimes in Belgium", *Journal of International Criminal Justice* 3.2 (2005): 400-421.

2 I take the definition of reparations from the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. Thus, reparation in the present chapter includes the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

3 Concerning studies of sexual violence during the war, see e.g. Kelly D. Askin, "Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: Current status", *American Journal of International Law* (1999), 97-123; Colette Donadio, "Gender Based Violence: Justice and Reparation in Bosnia And Herzegovina", *Mediterranean Journal of Social Sciences* 5.16 (2014), 692. Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*. Antwerp, Oxford: Intersentia, 2005; Courtney Ginn, "Ensuring the effective prosecution of

hundreds of thousands of victims[4]. The surviving victims of sexual violence during the war not only deserve reparation but also *need* reparation to continue to survive with the consequences of their rapes and sexual crimes[5]. For instance, unwanted pregnancies, internal injuries and mutilations, and contraction of HIV, require care, and are lasting marks of the conflict, which reparation will not completely wipe out, but only alleviate.

In countries like Bosnia and Herzegovina, devastated by war, and counting numerous victims in the aftermath of the conflict, the harm caused can never be fully repaired; yet, there must be efforts towards reconciliation and lasting peace; and reparation is part of a sense of justice for victims[6].

The pursuit of respect for human dignity, which is the focus of the present volume, includes the quest for reparation for victims. Bringing civil claims before domestic mechanisms offers a potential for addressing international wrongs[7], including international crimes. This chapter dwells upon the possibilities and challenges for domestic courts and mechanisms to provide an avenue for civil claims from

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sexually violent crimes in the Bosnian War Crimes Chamber: Applying lessons from the ICTY", *Emory International Law Review,* 2013. See also reports by Amnesty International concerning sexual violence during the conflict: "Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces", 1993; "'Whose Justice?' - The Women of Bosnia and Herzegovina Are Still Waiting", 2009; "Public Statement - Bosnia and Herzegovina: Amnesty International calls for justice and reparation for survivors of war crimes of sexual violence", 2010; "Old Crimes, Same Suffering: No justice for Survivors of Wartime Rape in North-East Bosnia and Herzegovina", 2012.

4 Concerning official background information of the conflict see the ICTY website: http://www.icty.org

5 Concerning sexual violence crimes and rapes during the war in Bosnia and Herzegovina, see Helsinki Watch, Human Rights Watch, "War Crimes in Bosnia-Herzegovina", 1992; *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights,* U.N. ESCOR, 49th Sess., Annex, Agenda Item 27, U.N. Doc. E/CN.4/1993/50 (1993); see also Yolanda S. WU, "Genocidal Rape in Bosnia: Redress in United States Courts Under the Alien Tort Claims Act", *UCLA Women's Law Journal*, 4(1) 1993.

6 Manfred Nowak, "Reparation by the Human Rights Chamber for Bosnia and Herzegovina", in *Out of the Ashes: Reparations for Victims of Gross Human Rights Violations*, Intersentia, 2005, p. 245.

7 Cf. Jaykumar A. Menon, "The Low Road: Promoting Civil Redress for International Wrongs", in *Realizing Utopia: The Future of International Law*, 2012 Oxford University Press, Chapter 47.

victims of international crimes, using as a case study the efforts in the aftermath of the conflict in Bosnia and Herzegovina.

In this perspective, in examining the principle of respect for human dignity, this chapter focuses on reparations in Bosnia and Herzegovina[8] for victims of international crimes committed during the war in the former Yugoslavia. The case study of the conflict is relevant since victims in Bosnia and Herzegovina did not have the possibility of participating in international criminal proceedings and claiming reparations directly from the accused, or from another entity, in the course of international proceedings[9]. I also discuss the road ahead and propose a framework to further strengthen the role of domestic courts in the reparative process in the aftermath of international crimes. My argument is that domestic courts ought to play a substantial role in the reparation process for victims of international crimes[10].

I. THE AFTERMATH OF THE BALKANS WAR: REPARATIONS IN BOSNIA AND HERZEGOVINA[11]

In addition to the instances at the international level concerning prosecution of perpetrators by the International Criminal Tribunal

8 I am thankful for detailed and meticulous studies which enlightened me and were instrumental to the preparation of the present chapter: Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014 and Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009.

9 For example, there is no equivalent of a Trust Fund for Victims, similar to the one that exists at the International Criminal Court.

10 While reparations for international crimes often involve questions of State responsibility, such issues are outside the scope of the present study, which focuses solely on individual responsibility and reparations from an international criminal law perspective, leaving out questions of State responsibility for international crimes. For a review of this question and related issues, see generally: Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* (2002), 833-856; André Nollkaemper, "Concurrence between individual responsibility and state responsibility in international law", *International and Comparative Law Quarterly* 52, no. 3 (2003), 615-640; Lorna McGregor, "State Immunity and Jus Cogens", *The International and Comparative Law Quarterly* 55, no. 2 (2006), 437-445.

11 Many pieces in the literature review efforts at the international and national levels concerning reparation for victims of international crimes committed during the Balkan wars. I rely on some account in detail in this section of the present

for the former Yugoslavia ("ICTY"), there were also initiatives at the domestic level in relation to reparation for victims. As Frederiek de Vlaming and Kate Clark have reviewed with great detail, victims have claimed reparation in relation to the war in various different fora[12]. In this section, I examine a myriad of different domestic mechanisms aimed at addressing the question of reparation for victims of Bosnia and Herzegovina.

A) Mechanisms set up by the Dayton Peace Agreement

In December 1995, the Dayton Peace Agreement (the "Agreement") was signed, which put a formal end to the conflict. In its Annex 6, the Agreement provided for the establishment of a Commission on Human Rights and a Human Rights Chamber[13]. Annex 7 established a Commission for Real Property Claims of Displaced Persons and Refugees ("CRPC"). The Peace Agreement thus provided for distinct fora for dealing with reparations for victims. The study of these two mechanisms which are rather *sui generis,* in the sense that they are quasi-international mechanisms set up by a peace agreement, shed light on some possible avenues for mechanisms for reparation implemented domestically.

According to Chapter 2 of Annex 6 of the Dayton Peace Agreement, the Human Rights Chamber was modelled on the basis of the European Court of Human Rights and was set up to examine allegations of human rights violations of one of the Parties to the Dayton Peace Agreement (that is, the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the

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chapter, see references *supra*. Interesting works include: Timothy Cornell Abazovic, and Lance Salisbury, "The importance of civil law in the transition to peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina", *Cornell International Law Journal* 35:389–426. Lara J. Nettlefield, *Courting democracy in Bosnia and Herzegovina, The Hague tribunal's impact in a postwar state*, Cambridge University Press, 2010. David Yeager, "The Human Rights Chamber for Bosnia and Herzegovina: A case study in transitional justice", 14 *International Legal Perspectives* 44:46.

12 Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, pp. 163-185.

13 Concerning the work of the Human Rights Chamber, see David Yeager, "The Human Rights Chamber for Bosnia and Herzegovina: A case study in transitional justice", 2004 14 *International Legal Perspectives* 44:46.

Republika Sprska)[14]. The Chamber only could hear claims that had occurred after the entry into force of the Dayton Peace Agreement dated 14 December 1995[15].

The Chamber was constituted of 14 members and heard hundreds of cases concerning human rights abuses during the war in Bosnia and Herzegovina. It was set up to be a court of last instance[16]. Naturally, for such a kind of mechanism in a society devastated by war, which left many victims, the Chamber had a busy docket and established some practice which aided in dealing with the high volume of cases. Such practices included, for example, relying on ICTY cases to set the historical record of a given case[17]. The Chamber entertained applications from victims or legal entities in relation to allegations of human rights violations by the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the *Republika Sprska.*

The cases decided by the Human Rights Chamber were wide-ranging. In terms of reparations for international crimes committed during the war, it is worth mentioning that the Chamber ordered innovative and varied forms of reparation, and had a significant impact on victims and society[18]. The Chamber dealt with important cases such as cases concerning enforced disappearances, which was an important problem during the war[19] and repossession of property.

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14 Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, p. 486.

15 *Ibid.*

16 *Ibid.*, pp. 487-488.

17 See e.g. *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and Merits, 7 March 2003, where the Human Rights Chamber stated: "As the *Krstić* judgment contains a comprehensive description of the historical context and underlying facts of the Srebrenica events, established after long adversarial proceedings conducted by a reputable international court, the Chamber will utilise this judgment to set forth the historical context and underlying facts important for a full understanding of the applications considered in the present decision", cited in Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, p. 489.

18 Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, p. 491.

19 To the extent that the Chamber deemed that the violation of enforced disappearance was a continuous violation after the entry into force of the Dayton Peace Agreements, such cases were admissible, see: *Palic v. Republika Srpska*, Case No. CH/99/3196,

In regard to the latter, the case-law of the Human Rights Chamber played a role in reviewing the laws, policies and practices which related to the return of property[20].

The CRPC established pursuant to Article XI of Annex 7 of the Dayton Peace Agreement was a quasi-judicial organ whose activities were described as follows: "hundreds of thousands of claims in a short period of time, the Commission developed a stream-lined approach aimed at maximising efficiency, and its operating procedures bore greater resemblance to a mass arbitration or claims process"[21].

The CRPC faced a few challenges[22] in dealing with property claims, but together with the Human Rights Chamber, provided a domestic mechanism where victims had a forum to claim varied types of reparations[23]. Many of the challenges referred to the poor state of property books and the impact of these in deciding property claims; the handling of property transfers; and the enforcement of decisions. It is reported that, at the end of the mandate of the Commission, local authorities in Bosnia and Herzegovina had decided and closed approximately 93% of all claims[24]. Although a thorough review of the mandate of the Commission is outside the scope of the present chapter, it is useful to refer to its activities for purposes of illustrating the operation of domestic mechanisms of reparation.

Decision on admissibility and merits of 11 January 2001; *Unkovic v. Federation of Bosnia and Herzogovina*, Case No. CH/99/2150, Decision on admissibility and merits of 9 November 2001; *Josip, Bozana and Tomislav Matanovic v. the Republika Srpska* (Case No. CH/96/01), decision on admissibility 13 September 1996, decision on the merits 6 August 1997, decisions on admissibility and merits, March 1996–December 1997; *Ferida Selimović et al. v. the Republika Srpska*, CH/01/8365 et. al, Decision on Admissibility and the Merits, 7 March 2003.

20 Examples of such cases relating to repossession of property: *Rasim Jusufović v. the Republika Srpska*, decision on admissibility and merits, Case no. CH/98/698 of 9 June 2000; *Ivica Kevesevic v. the Federation of Bosnia and Herzegovina*, Case No. CH/97/46, 10 September 1998.

21 Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, p. 502.

22 *Ibid.*, pp. 507-511.

23 *Ibid*.

24 UNDP Access to Justice, 2009-2011, unknown year of publication, cited in Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, p. 511.

To conclude on the institutions set up by the Dayton Peace Agreement in regards to international crimes committed in Bosnia and Herzegovina, it may be pondered that court proceedings, which I will review next, is only one of the many types of domestic mechanisms that can address reparation claims for international crimes and human rights violations.

Interestingly for the purpose of this study, it can be said that these domestic mechanisms created by the Dayton Peace Agreement served not only to provide an avenue for victims to seek reparation domestically for international crimes they suffered, but also to cross-fertilise other institutions. In this sense, it has been argued that:

> In many ways, therefore, the Human Rights Chamber was a training ground for the Entities of *Republika Srpska* and the Federation of Bosnia and Herzegovina and State level institutions to bring their laws and practices in line with the European Convention[25].

In addition to the domestic mechanisms created by the Dayton Peace Agreement, reviewed above, one should also look at the national laws and proceedings in Bosnia and Herzegovina. Currently, there does not exist in Bosnia and Herzegovina a governmental reparation system for victims of war crimes committed during the Balkans war: as Popic and Panjeta rightly summarize, Bosnia and Herzegovina count on "a complex array of on-going payments to people who suffered war-related personal harms"[26].

In this light, I turn attention to the activities of Bosnian national courts concerning proceedings on reparation. The following discussion of domestic court decisions is relevant in light of the overall aim of the chapter, i.e. assessing the current and potential role of domestic mechanisms concerning reparations for victims of international crimes. It is also relevant to address how national courts of States where there are international crimes victims may fill

25 Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, p. 511.

26 Linda Popic, and Belma Panjeta, "Compensation, transitional justice and conditional international credit in Bosnia and Herzegovina", 2010 Independent Research Publication. http://www.justice-report.com/en/file/show//Documents/Publications/Linda_Popic_ENG.pdf .

in the gaps left by international courts, as it was the case with the ICTY and the victims of the Balkan wars[27].

B) Proceedings before domestic courts in Bosnia and Herzegovina

As a starting point of the analysis of national court proceedings, it is important to bear in mind the broader context regarding reparations in Bosnia and Herzegovina: on the one hand, at the international level, the ICTY (dealing with individual criminal responsibility) and the ICJ (dealing with State responsibility of Serbia)[28] have left victims without a significant form of redress; on the other, at the national level, the mechanisms devised by the Dayton Peace Agreement (the Human Rights Chamber and the CRPC) have halted activities in 2004.

In light of this background, numerous victims initiated court suits to try to obtain reparations for international crimes allegedly committed during the conflict[29]. In this section, I will focus on an overview of some court cases.

Most court cases were filed on behalf of collectives of victims, such as former detainees. Usually, the overall goal was to achieve changes from authorities and recognition of harm caused, a reestablishment of the rule of law. Many former detainees were unsuccessful in obtaining compensation from the governmental authorities as they did not fall under the scope of the domestic governmental war victims reparation scheme described above, and thus they filed suits before national courts in Bosnia and Herzegovina[30].

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27 The ICTY does not pursue a reparative justice mandate and thus victims cannot request reparations from the perpetrators, see e.g. Chanté Lasco, "Repairing the Irreparable: Current and Future Approaches to Reparations", *Human Rights Brief* 10.2 (2003), p. 19.

28 Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, *I.C.J. Reports 2007*, Judgment of 26 February 2007.

29 For a detailed analysis of case studies, see Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, pp. 179-182.

30 UNDP, "Access to justice, Facing the Past and Building Confidence for the Future (2009–2011)", p. 10–12; Selma Boracic, "Bosnia War Victims' Compensation Struggle", *International War and Peace Reporting* (IWPR) 3 August 2011, cited in Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 182.

In summary, Bosnian courts have awarded compensation in a limited number of cases and were not uniform in terms of the amount; it is reported that the actual sums of compensation were not yet paid to victims[31].

While some claims for reparation were brought before national courts in Bosnia and Herzegovina, it is suggested that the gaps left by the international courts (ICTY and ICJ), as well as from the scheme set up by the Dayton Peace Accords, could have been ultimately filled by domestic courts. However the practical difficulties, Bosnian courts could have played (and could still play) a more active role, in post-war reparation, and thus assist in the process of healing and allowing communities to move forward.

C) Proceedings in national courts of foreign States[32]

In addition to cases brought before domestic courts and mechanisms in the Balkans reviewed above, domestic courts outside Bosnia and Herzegovina have also heard reparation claims of victims of the crimes perpetrated during the war[33]. Interestingly, such suits were mainly brought against alleged individual perpetrators.

31 Denis Dzidic, "Bosnian ex-camp detainees join forces", 2012 *Balkan Transitional Justice*; see also, Selma Boracic, " Bosnia War Victims' Compensation Sttruggle", cited in Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 182.

32 These cases are examined in detail in the chapter by Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, pp. 167-175.

33 See Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, pp. 484-485.

In the United States Courts[34], there were two judgments against Radovan Karadzić, which concluded in default judgments[35]. These cases concerned civil suits brought by two individuals who claimed to be victims of the crimes allegedly perpetrated by R. Karadzić. The alleged crimes for which compensation was being sought included: "genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death"[36]. In the first instance district Court, the claims were dismissed on the basis of lack of jurisdiction under the *Alien Tort Claims Act*[37] (which the plaintiffs used as a basis of their action).

Nevertheless, the Second District Court reversed the decision of the first instance Court and found that there was subject-matter jurisdiction under the *Alien Tort Claims Act* for a violation of the law of nations committed by a non-state actor, such as the defendant, Mr. Karadzić. The Court thus decided that individual non-state actors could be held liable for crimes such as genocide and war crimes[38] and that individuals could bring a suit against the perpetrator for redress for such violation. Given the decision of the Court, the jury awarded a total of US$ 745 million to the 14 plaintiffs (US$ 265 million compensatory damages and US$ 480 million punitive damages)[39].

Similarly, in 1998, a case was brought before a US court by four Bosnian Muslim plaintiffs against NikolaVucković, a Bosnian

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34 Commentators have affirmed that "[. . . it] appears these cases, when taken together with other anti-impunity efforts around the world, are also helping to create a climate of deterrence and [to] catalyze efforts in several countries to prosecute their own human rights abusers': Sandra Coliver, Jennie Green, and Paul Hoffman, "Holding human rights violators accountable by using international law in U.S. courts: Advocacy efforts and complementary strategies", 2005 *Emory International Law Review* 19 (1): 174-175. For a commentary from the representative of some of the victims, see Catherine MacKinnon, "Remedies for war crimes at the national level", 1998 *The Journal of the International Institute* 6. http://hdl.handle.net/2027/spo.4750978.0006.103 Accessed on 12 February 2015.

35 *Kadic v. Karadzic*, 70 F.3d 232 (2d. Circ. 1995), cert. denied, 518 US 1005 (1996). For a commentary, see David P. Kunstle, "Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under the Alien Tort Claims Act?", 6 *Duke Journal of Comparative & International Law* 319-346 (1996).

36 Cf. *Kadic v. Karadzic*, 70 F.3d 232.

37 28 U.S.C.A. § 1350.

38 *Kadic v. Karadzic*, 70 F.3d, 70 F.3d at 241-43.

39 *Kadic v. Karadžic*, No. 93 Civ. 1163, judgment (S.D.N.Y. August 16, 2000).

Serb soldier[40]. The claimants sought compensation and punitive damages for allegations of crimes committed against them during the course of the conflict. The claimants argued they were victims of arbitrary detention, torture and abuse allegedly committed against Bosnian Muslims and Croats, and claimed the forced relocation of Bosnian Muslim and Croat families living in the municipality of Bosanski Samac in Bosnia and Herzegovina. The Court found for the claimants and awarded US$ 10 million each in compensatory damages and US$ 25 million each in punitive damages[41].

In addition to cases brought before the United States Courts, there were also other cases brought before courts in Europe.

In Europe, the first case in relation to the Balkan wars, in courts outside the region, took place in France, before the *Tribunal de Grande Instance*. The case concerned allegations of crimes committed during the Bosnian war by Bosnian Serb defendants, Radovan Karadzić and Biljana Plavsić. The Court ordered R. Karadzić and B. Plavsić to pay € 200,000 as reparation to the victims[42].

Another case was brought before Norway courts, in a series of decisions from the District Court of Oslo (lower court), culminating with the 2010 decision of the Supreme Court of Norway. The case concerned a former member of the Croatian Armed Forces, Mirsad Repak, who was a guard in the Dretelj detention camp in Bosnia and Herzegovina, and had been allegedly involved in the arrest and unlawful detention of civilian non-combatants, including allegations of torture. The defendant was found guilty and sentenced to

40 *Mehinovic, Kemal, et al, 2009 v Nikola Vuckovic*, Civil Section 1:98-cv-2470-MHS US District Court, Northern District of Georgia, 29 July 2009.

41 *Mehinovic, Kemal, et al, 2009 v Nikola Vuckovic*, Civil Section 1:98-cv-2470-MHS US District Court, Northern District of Georgia, 29 July 2009.

42 See Ann Riley, 2011, "France court awards Bosnia civil war victims damages for injuries", *Jurist*, 14 March. http://jurist.org/paperchase/2011/03/france-court-awards-bosnia-civil-war-victimsdamages-for-injuries.php, and Irwin, Rachel. 2011. Civil actions offer some closure for Bosnia victims. Institute for War and Peace Reporting (IWPR), 26 April. http://iwpr.net/report-news/civil-actions-offersome-closure-bosnia-victims, cited in Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 170.

imprisonment, and the victims were awarded compensation ranging from € 4.000-12.000[43].

Commenting on the series of decisions in Norway, Frederiek de Vlaming and Kate Clark rightly posited that:

> The case against Repak was the first of its kind in Norway. It demonstrates how judicial reasoning succeeded in weaving together domestic and international legal provisions that came into being at different times but were nonetheless aimed at protecting the same interests. Moreover, the extensive investigations that led to the indictment were done by the Norwegian prosecutor in cooperation with the Serbian war crimes prosecutor, and they involved the statements of at least 211 former detainees of the Detelj camp, almost all the prisoners who were detained in the camp at the time. The above points taken together show once again that the criminal prosecution of individual war crimes perpetrators can bring benefits to more than the small group of witnesses/victims involved in the case: They can help facilitate the intermeshing of national and international law to achieve broader jurisdiction over war criminals, and such cooperation between national and foreign prosecutors signals that crossing a border may no longer be enough to save a war criminal from prosecution[44].

Similarly to the Norwegian decisions, in Sweden, a district Court of Stockholm convicted another Dretelj camp officer, Mr Ahmet Makitan, of participation in the abuse of 21 Serb civilian prisoners; he was sentenced to 5 years in prison. In addition to the prison sentence, the defendant was also ordered to pay Krona 1.5 million (approximately € 170,000) in the form of compensation to victims[45].

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43 For all judgments, see: *The Public Prosecuting Authority vs Mirsad Repak*, Oslo District Court case no: 08-018985MEDOTIR/08, 2 December 2008; Borgarting Lagmannsretten, Court of Appeal, Judgement of 12 April 2010 (case summary at International Red Cross database on Humanitarian Law available at: http://www.icrc.org/customaryihl/eng/docs/v2_cou_no_rule99. Supreme Court of Norway Judgement, case no. 2010/934, 3 December 2010.

44 Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 171.

45 Stockholms Tingsrätt (Stockholm District Court), case no. B 382-10, 8 April 2011. See also, International Review of the Red Cross, Volume 93, Number 883, September 2011, English language summary, available at: http://www.icrc.org/eng/assets/files/review/2011/irrc-883-reportsdocuments.pdf.

There was also another suit brought most recently in the Netherlands whereby families of Srebrenica victims brought claims against the United Nations and the Dutch Government[46]. This case was initiated by the relatives of four Bosnian Muslim men who were killed in Srebrenica in 1995, and the aim was to have the Netherlands found liable for the Dutch military's conduct on the UN premises that led to the death of the victims. The decision was confirmed by the Dutch Supreme Court in September 2013. While the case does not concern specifically reparations for the individual victims, it is relevant to mention at this juncture as it can be expected that some sort of reparation from the Dutch Government may follow[47].

These examples of cases across the United States and Europe demonstrate that domestic courts, even in States outside the region, have indeed played a role in the adjudication and award of reparations for victims in the aftermath of the Balkans war. It is also interesting to note that victims often turned to courts of foreign States only after it had become clear that they would not be able to settle their case with the authorities[48].

II. FOSTERING CIVIL REDRESS FOR INTERNATIONAL CRIMES IN DOMESTIC COURTS: RATIONALES AND CHALLENGES

The review above of different initiatives and mechanisms that were put in place after the war in Bosnia and Herzegovina demonstrate that there are advantages but also many challenges contouring the award of reparations for international crimes in the context of domestic proceedings, especially in war torn countries. This section addresses the rationales for fostering an active role of domestic courts and mechanisms in the award of reparations for international crimes, and some of the obvious challenges of domestic adjudication of such claims. It is not intended to address exhaustively the challenges of bringing reparation claims in domestic courts, but

46 For a commentary see Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, p. 485.

47 Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 172.

48 *Ibid.*, p. 174.

rather paint a broad picture of some important hurdles victims may face in domestic court proceedings.

The main rationale for fostering a greater role for domestic courts relates to the current scarcity of appropriate international mechanisms or their limited scope of activities (due to limited jurisdiction or temporal limitations).

Furthermore, national courts are already in place – i.e. they do not need to be devised to deal specifically with cases of reparations for victims of international crimes. The domestic judicial machinery is already in place and, in some form, some kind of civil recovery for wrongful conduct already exists under domestic laws, thus sparing the time and resources to devise and create a special apparatus to deal with reparation claims.

Another advantage refers to logistical considerations for the conduct of proceedings, for example in relation to witnesses and collection of evidence. National courts in the areas where international crimes were committed, *in theory*, could be in a privileged position to deal with claims for reparations: they are the closest forum for victims.

Be that as it may, it is not always straight-forward to use national courts for purposes of reparation for international crimes. The first important challenge relates to the lack of political will and functioning judicial institutions capable of entertaining reparation claims. The lack of political will may be connected, among other things, to the involvement of political authorities in the criminal conduct, which is the object of the proceedings. For example, in the Bosnian case study, victims often requested reparations directly from official authorities, and only once unsuccessful in this enterprise, would they revert to national courts.

Often, in post-war societies, the judicial machinery is broken, making not only prosecutions but also civil redress difficult to obtain in domestic courts. Without domestic institutions able to address the (international) criminal conduct and the corresponding civil liability, victims are left with no domestic avenue to pursue.

Another challenge relates to practical difficulties such as enforcement of decisions when the accused is outside the countries where crimes were committed or when his/her assets are outside the country.

Thus, while it may seem that national courts would be the most natural path for reparation, in practice there are many challenges

which victims face in order to settle their grief domestically. In this light, the next section examines the road ahead.

III. THE ROAD AHEAD: HOW INTERNATIONAL CRIMINAL LAW AT THE INTERNATIONAL LEVEL CAN INFORM REPARATION CLAIMS AT THE DOMESTIC LEVEL

Civil claims in national courts may provide an avenue for victims to obtain redress for the crimes they have suffered. Additionally, in cases where bringing a civil suit is not possible or desirable, in many civil law countries victims may participate in prosecutions as *parties civiles* and seek reparation within the criminal proceedings, if the defendant is convicted[49]. Nevertheless, more needs to be done in this respect for victims to be able to truly benefit from national claims and proceedings in countries torn by war, as discussed previously.

My claim is that international criminal proceedings and international mechanisms should make an effort to foster the role of national courts and mechanisms. Justice for international crimes should not be fragmented where international and domestic proceedings and mechanisms operate in a dissociated and parallel manner. I argue that they should feed off each other, and work in conjunction. In this sense, international criminal justice mechanisms should foster national proceedings capabilities for adjudicating civil redress claims. In this sense, Professor Noelkaemper has posited,

> For one thing, international institutions can develop creative incentives for domestic actors to provide for reparation schemes; for instance, by the prospect that absence of proper domestic reparation will lead to top-down obligations by human rights courts. International institutions also can provide critical knowledge to attorneys, who will have the prime responsibility to raise such issues before the courts and other actors. They also may help to provide financial and material means to actually deliver reparation.[50]

49 See in general, Mireille Delmas-Martry and John Spencer, *European Criminal Procedures*, Cambridge University Press, 2002. Victims may also in some cases seek reparation from a civil fund, as for example, in France, where victims of some violent crimes may obtain compensation from the State through a solidarity fund where offenders do not have the necessary funds, Criminal code of France, Arts. 706-3.

50 André Noelkamper, "The Contribution of International Institutions to Domestic Reparation for International Crimes", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 103 (March 25-28, 2009), pp. 203-207, p. 205.

I further argue that a way in which international mechanisms can foster domestic initiatives is by means of implementing legislation. For example, States Parties to the International Criminal Court ("ICC"), in implementing the Rome Statute may well institute in their own legislation procedures for victims to seek redress for international crimes. This would counter the practical difficulty of victims who cannot turn to their own domestic courts for reparation claims because victims' redress is not available in the domestic legal system, whether for lack of legislation or legal tools, or for lack of political will in relation to reparation requests.

Countries may also obtain inspiration from international mechanisms in relation to reparation awards, for example, by the ICC, and in light of the (yet to be fully developed) ICC principles of reparation. This has been the case for example with the European Court of Human Rights, in the *Dogan* case[51]. In this case, Kurdish plaintiffs initiated a claim against Turkey in relation to counter-terrorism activities of the Turkish armed forces. The Court decided against the respondent State and ordered the payment of compensation. Inspired by the reasoning and principles laid down by the Court, Turkey adopted a new Law (Compensation Law) which would enable it to allow compensation at the domestic level[52].

IV. CONCLUSION

Bearing in mind the principle of respect for human dignity, having discussed the case study of domestic mechanisms for reparations for victims in Bosnia and Herzegovina, and the rationales and challenges of the adjudication of reparation claims by national courts, this chapter argues that international mechanisms and domestic court systems should feed off each other, and in this sense, international mechanisms should influence and inform domestic practice. After all, there can be no human dignity in the absence of a comprehensive and holistic reparation system for victims of international crimes.

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51 *Dogˇan and others v. Turkey*, App. Nos. 2203-8811/02, 8813/02and8815-8819/02, Judgment (June29, 2004). 12 *Dogˇan and others v. Turkey*, App. Nos. 2203-8811/02, 8813/02and8815-8819/02, Judgment (Just Satisfaction) (July 13, 2006).

52 See discussion in André Noelkamper, "The Contribution of International Institutions to Domestic Reparation for International Crimes", *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 103 (March 25-28, 2009), pp. 203-207, p. 206.

HUMAN DIGNITY AND DEPRIVATION OF LIBERTY THROUGH REGIONAL HUMAN RIGHTS COURTS INTERPRETATION

Rosmerlin Estupiñan-Silva

Doctor in Law (Spain, 2011); LL. M in Public Law and Human Rights (France, 2010); 'LL.M international Law and International Relations (Spain, 2007); Lawyer (Colombia, 2000); Post-doctoral researcher at the University of Paris 1, Panthéon-Sorbonne, Studies Group of International and Latin-American Law (GEDILAS-IREDIES) under the supervision of Prof. Dr. Laurence Burgorgue-Larsen.

"All prisoners shall be treated with the respect due to their inherent dignity and value as human beings." Basic Principles for the Treatment of Prisoners (United Nations, A/RES/45/111, 14 December 1990).

1. INTRODUCTION

In the human being, there is a dignity that must be recognized and respected in all cases, regardless of legal, political, economic, social, or whatever the prevailing values in the historic community.

Indeed, the notion of human dignity was intended to protect the human being of the most serious attacks. Human dignity, according to Dworkin, supposes self-respect and a coherent narrative of life which entails three duties: a personal ethics in order to live well, the enforcements of individual rights against their political community and moral duties towards others.[1] Dignity aims to protect basic human rights, including individual freedom. According to Kant, every human being has an inalienable dignity of an absolute value and "as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others, or even to his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute inner worth) by which he exacts

1 R. Dworkin, *Justice for Hedgehogs* (Boston, Belknap Press, 2011), 528 pp., p. 219-231. See also: K.W. Simons, "Dworkin's Two Principles of Dignity: An Unsatisfactory Non-consequentialist Account of Interpersonal Moral Duties" 90 *Boston University Law Review* (2010), pp.110-121.

respect for himself from other rational being in the word."[2] Going even further Cicero defines *dignitas* not only as a status, reputation or privileges (*dignatoritas*) but as a worth of human beings, thus "justice (*iustitia*) is a disposition of mind which accords to each his worth (*dignitatem*) while preserving the common interest (*communi utilitate*)."[3] The principle of dignity of the human person has several *corollaires* such as the primacy of the human person and the respect for the human integrity. Human dignity protects at least its "building blocks": its physical reality, its psychological and moral aspects.

While legal texts have marks of dignity's concept, they are not uniform[4] and it was only after the II World War that such a unification has taken place.

During the 20th century human dignity became a transversal concept in international law. Preamble of the United Nations Charter (1945) reaffirms "faith in fundamental human rights, in the dignity and worth of the human person". The Universal Declaration of Human Rights (1948) states in its preamble 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." The International Covenant on Civil and Political Rights (CCPR) (1966) and the International Covenant on Economic, Social and Cultural Rights (CESCR) (1979), both state that "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," and recognize

2 E. Kant, *The Metaphysics of Morals*, translated by Mary J. Gregor, (Cambridge, Cambridge University Press, 1996), p. 435.

3 Quoted by: N. Wood, *Cicero's Social and Political Thought* (California, University of California Press, 1991), 301 pp., p. 149.

4 The English Bill of Rights of 1689, for instance, refers only to royal dignity, as a right of personality and status owed to the Crown. Not so far, the concept of human dignity was widely recognized by the French Republic since the Declaration of the Rights of Man and Citizen of 1789 in which the individual is the basis of society and the protection of his rights is the ultimate's goal of government (Article 2). Currently, the French constitution of 1958 in its direct reference to the preamble of the constitution of 1946, implicitly refers to dignity and human dignity was erected as a constitutional standard by the French Constitutional Council in 1994. Human dignity as a complex right is widely enshrined in French law including Article 16 of the Civil Code (Act No. 94-653, July 29, 1994) that states: "The law ensures the primacy of the person, prohibits any assault on his dignity and guarantees the protection of the human person in his physical and moral integrity." See also: French Constitutional Council, 27 July 1994, *Decision n°94-343-344DC*, rec, p.100.

that "all human rights derive from the inherent dignity of the human person". Article 10.1 to the CCPR also stipulates that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", and Article 13 to the CESCR indicates "that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms." Several preambles of international treaties recognize in the same way of thinking that human rights derive from the inherent dignity of the human person, for instance the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989). Some treaties include besides human dignity as an essential element of specific rights regarding individuals in specific vulnerable situations, as for instance, Article 19.2 on personal information and Article 24(c) on reparation, both to the International Convention for the Protection of All Persons from Enforced Disappearance (2006). The same happens in Article 23.1 (children with disabilities), Article 28.2 (children into school) and Articles 37, 39 and 40 (children deprived of liberty), all of them part of the Convention on the Rights of the Child (1989).[5] Human dignity is also a backdrop of jurisprudence of the International Court of Justice (ICJ). Even if this court has never used the concept of human dignity, the ICJ has mentioned, for instance, the "conscience of mankind... moral law and the spirit and aims of the United Nations " in the *Reservations to the Genocide Convention case*[6], and also since 1949 in the *Corfu Channel case* mentioned "well-recognized principles, namely: elementary considerations of humanity"[7].

5 We do not forget several Unesco treaties regarding human genome and genetic research. Nevertheless we have decided not to mention them in order to avoid dispersion regarding to the central subject of deprivation of liberty. For further analysis on that matter, see: Unesco, *Human Dignity and Human Rights*, Bioethics Core Curriculum Casebook Series, No. 1, (Paris, Unesco, 2011), 144 pp.

6 ICJ, (Advisory Opinion) May 28, 1951, *Reservations to the Genocide Convention*, p. 23.

7 ICJ, (Judgment on Merits) April 9, 1949, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, p. 22.

Human dignity is a milestone principle of human rights in Europe[8], America[9] and Africa[10] and a polysemous concept as I will explain in **(2)**. Dignity shall be analyzed by reference to a quality related to the very being of every human, which explains that it is the same for everyone and it does not admit any degree. It is an infinite value of the human person unique and therefore priceless. Every man deserves unconditional respect whatever the age, sex, physical or mental health, and regardless circumstances. Dignity is also associated with concept such as respect, self-esteem, social satisfaction and happiness. The identification of elements that configure dignity as a principle of the rule of modern law, is a logical inference, namely: the conditions of protection and the individual exercise limits of the rights that guarantee permanently dignity as relational founding principle of each society. Also, in the context of arguments related to the protection of human dignity, it is to define which treatments are not compatible with human dignity in detention situations, to determine which limits have the state power, for instance, regarding deprivation of liberty. This is not to question the punitive power of the State, but to make it compatible with the founding principles of democratic societies, including human dignity.

Thus, the main purpose of this contribution is to reach a principled explanation of boundaries of dignity in contexts of deprivation of liberty, taking as inputs regional court rulings in human rights matters. Without excluding the relevance of political and philosophical debate regarding the balance between dignity

8 Regarding the role of human dignity in the European countries as foundational principle, source of democracy or still source of human rights, we suggest for instance: M-L. Pavia & T. Revet (eds.), *La dignité de la personne humaine*, (Paris, Economica 1999), 555 pp.; C. McCrudden, «Human Dignity and Judicial Interpretation of Human Rights», 19 *European Journal of International Law* 4 (2008), pp. 655-724; L. Burgorgue-Larsen (dir.), *La dignité saisie par les juges en Europe*, (Bruxelles, Bruylant/Nemesis, 2010), 260 pp.; X. Bioy, *Droit fondamentaux et libertés publiques* (Paris, Montchrestien, 2011), pp. 377-391.

9 See, for instance: L. Amezcua, "Algunos puntos relevantes sobre la dignidad humana en la Jurisprudencia de la Corte Interamericana de Derechos Humanos", *Revista Iberoamericana de Derecho Procesal Constitucional* 8 (2007), pp. 339-355; R. Glensy, "The right to dignity", in 43 *Columbia Human Rights Law Review* 1 (2011), pp. 65-142.

10 See, for instance: G. Emezue, I. Kosch, M. Kangel (eds.), *Justice and Human Dignity in Africa*, Collection of Essays in Honor of Professor Austin Chukwu, (New York, IRCHSSA, 2014), 737 pp.; A. Hughes, *Human dignity and fundamental rights in South Africa and Ireland*, (Pretoria, Pretoria University Law Press, 2014), 603 pp.

and criminal punishment, I shall prefer to elucidate how dignity has also come to be used extensively in the international judicial interpretation. I will not claim a comprehensive analysis but a comparative one between regional human rights systems, and the state of the art in court rulings as of 2015. Therefore, I shall draw on examples at regional level in Europe, America and Africa to illustrate the range of this judicial dignity language when refers to deprivation of liberty, its proceedings and conditions.

I maintain that regional courts of human rights have convergences and divergences in matters of dignity and deprivation of liberty. For starters (2), I expect (2.1) to establish the limits of the punitive state power through applicable law and jurisprudence in each system and, (2.2) to explain which court rulings develop further analysis regarding persons under detention as vulnerable individuals or vulnerable group. In pursuing the next part (3), I expect (3.1) to contribute to the development of an interpretation model that uses the dignity principle as an amplifier standard of intangible rights, and (3.2) to further develop the human dignity value as a mean for conciliating state needs and obligations. Finally (4), I will argue that judges, in particular human rights judges, are arbiters of interests and priorities. Also, I will point out how human rights case law operates as a vector of harmonization towards an intermediate dialogue with national courts of the Member States of each system regarding human dignity in detention situations.

2. HUMAN DIGNITY AS STRUCTURAL BOUNDARY OF PUNITIVE POWER

Human rights violations and criminal offences have long been punished but most prosecution cases have taken place in domestic courts. Extreme human rights breaches have pushed States to regulate themselves through international jurisdictions. These specialised human rights jurisdictions illustrate the fast emergence of an international community of values through law where justice and human dignity have a principal place (**2.1**). An international human rights jurisdiction aims to protect individual and peoples against the unlawful acts of States on their territory, and remains open in terms of sources and tools for the protection of victims. This fact implies an obvious consequence: regional courts of human rights remain more concerned by the victims, regardless if they are accused or even

convicted before the domestic law of the Defendant State. This fact can be appreciated through the growing notion of detainees' vulnerability and the interpretation that derives from it **(2.2)**.

2.1. Premises: conciliation of great principles

The three existing regional courts on human rights have great similarities in nature and profound differences in context.

Firstly, all three are human rights judicial institutions. Nonetheless their structure, functioning and means differ largely. The European Court of Human Rights (hereinafter: ECtHR or European Court), opened in 1959 with a two-tier structure comprising the Court and the Commission on Human Rights, sitting a few days per month. Thus, in 1998 Protocol No. 11 replaced this structure by a single full-time Court, putting an end to the Commission's filtering function, and enabling applicants to bring their cases directly before the Court. Protocol No. 14 in 2010 also introduced new judicial formations for the simplest cases, established a new admissibility criterion and extended the judges' term of office to 9 years (not renewable)[11]. ECtHR is the oldest and biggest regional Court (with 47 judges, one for each Member State) dealing with thousands of applications yearly. Only during 2014 were decided 86,063 applications through a judgment, decision or inadmissibility and were delivered 891 judgments concerning 2,388 applications, mostly filled against the Russian Federation, Turkey and Romania[12]. The African Court is both the newest and the least consolidated among human rights courts. The African Court of Human and Peoples' Rights Justice (hereinafter: ACtHPRJ or African Court) has entry into service in 2008 with 15 States Members under its jurisdiction. The Court is composed of eleven full-time judges

11 Other important reforms adopted can be mentioned, for instance, Protocol No. 15 of 2013, which inserts a reference to the principle of subsidiarity and the doctrine of the margin of appreciation into the Convention's preamble and reduces from 6 to 4 months the time within which an application must be lodged with the Court after a final national decision. Besides, in 2013 Protocol No. 16 allows the highest domestic courts and tribunals to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16 is optional. See: http://www.echr.coe.int/Pages/home.aspx?p=court&c=

12 ECtHR, *European Court in facts and figures* (Strasburg, ECtHR, 2015), pp. 3-5.

and so far has ruled on merits only once in 2013[13]. Lack of budget, political instability and lack of commitment are among the reasons of this absence of dynamism which is, to some extent, offset by the African Commission of Human and Peoples' Rights (ACommHPR) whose communications' accuracy and relevance take into account the state of the art of international human rights. For its part, the Inter-American Court of Human Rights (hereinafter: IACtHR or Inter-American Court) rules since 1986 under the ACHR[14] with 20 States are under jurisdiction as of 2015. This Court is composed of seven judges not permanently in session, nevertheless, only during 2014 the IACtHR delivered sixteen judgments (13 on merits and 3 on interpretation)[15]. Contrast in means and quantitative results between courts is also visible in subject matters under their jurisdiction. Even if all regional courts rule on the same fundamental rights, the European Court is seized mostly of a wide number of illicit acts or individual transgressions, while the Inter-American and African courts are actually dealing with facts that could constitute international crimes as serious human rights violations. [16]

13 The Protocol on the Statute of the ACtHPRJ was adopted on July 1, 2008 (Protocol of Sharm-El-Sheikh). This Protocol is the result of the merger of two other protocols that had created two separate regional courts. Article 1 abolishes the Protocol of Ouagadougou of June 10, 1998, establishing the African Court on Human and Peoples' Rights (ACHPR) and Maputo Protocol of January 25, 2003, which established the Court of Justice of the African Union (CJAU). Ouagadougou Protocol should remain into force for a transitional period decided by the Assembly of the African Union, following the entry into force of the Protocol of Sharm-El-Sheikh (Article 7). The ACtHPRJ came into session in August 2008, after obtaining the minimum of 15 ratifications indicated by Article 9 of that Protocol. From then until 2015, the Court AJDH has been governed by the Protocol annexed to Sharm-El-Sheikh Statute and the provisional rules of procedure adopted in Arusha (Tanzania) on June 20, 2008. Its rulings has been essentially on admissibility matters (19 of 20 cases as of 2015). See: http://www.african-court.org/en/

14 Adopted in 1968, the ACHR entered into force in 1978. As of February 2014, the ACHR was ratified by 25 States and denounced by two of them (Trinidad and Tobago in 1998 and Venezuela in 2012). From 23 States currently part to the ACHR only 20 have accepted the jurisdiction of the IACtHR. Those 20 Member States are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haití, Honduras, México, Nicaragua, Panama, Paraguay, Peru, Surinam and Uruguay.

15 See: IACtHR, *Annual Report 2014*, p. 25. In: http://www.corteidh.or.cr/tablas/ia2014/ingles/index.html#32

16 Authors such as Michael Reisman used these categories in 1998 to study the types of cases that were filed with the European and inter-American human rights systems, respectively, v. M. Reisman, Compensation for Human Rights Violations:

Secondly, regional human rights courts are complementary international jurisdictions which depend (in different ways) on a founding treaty and have quite a different scope as defined by their Member States.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (1951) of the Council of Europe[17] (hereinafter: ECHR), contains no mention to human dignity but insists on the fact that the governments of European countries are "likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". Thus far the ECtHR, based on this "common heritage", has introduced human dignity as a foundational value of democratic societies.[18] Besides, 27 of 47 States under ECtHR jurisdiction are party of the European Union framework[19], and are bounded by the

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The Practice of the Past Decade in the Americas, in A. Randelzhofer & C. Tomuschat (eds.) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, (The Hague, Martinus Nijhoff Publishers, 1999), pp. 63-108, p. 66.

17 The Council of Europe, based in Strasbourg (France), brings together till 2015, with its 47 member countries, almost all of the European continent with the exception of Belarus. Created on May 5, 1949 by 10 founding states, the Council of Europe is organized around the European Convention on Human Rights of 1951 and other reference texts on the protection of the individual. "Europe" in this article refers to all countries that are part of the Council of Europe, therefore, the signatories of the Convention and subject to the jurisdiction of the European Court of Human Rights. Other allusions involving only the European Union will be pointed out if necessary, including when it comes to mention the case law of the Court of Justice of the European Union or the Charter of Fundamental Rights of the Union.

18 Nonetheless, its Protocol No. 13 (2002) concerning the abolition of the death penalty in all circumstances, establishes in its preamble that "… everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings."

19 The European Union includes all 27 states of the Western Europe. His judicial body is the Court of Justice, which can be brought to rule on human rights in the context of its founding Treaty of 1992, as amended by the Lisbon Treaty of 2007, and the Charter of Fundamental Rights. In any case, section II-52, paragraph 3 of the said Charter states that the rights guaranteed by it, when are also provided by the European Convention, have the same meaning, unless the Charter is more protective. See: Treaty on the European Union (Maastricht Treaty) of February 7, 1992, OJ C 191 of July 29, 1992; Charter of Fundamental Rights of the European Union, OJ C 364/1 of December 18, 2000; European Union Lisbon Treaty of December 13, 2007, OJ C 306 of December 17, 2007.

Charter of Fundamental Rights of the European Union (2000). This Charter declares in its preamble that "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity" and its Article 1 establishes that "Human dignity is inviolable. It must be respected and protected."[20]

Dignity is a cornerstone of the African Charter of Human and Peoples' Rights, the "Banjul Charter" (1981) (hereinafter: ACHPR), from its preamble which declares that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples" to Article 5 which stipulates that "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status".

The Inter-American Human Rights System is neither the last nor the least clear regarding dignity. The American Convention on Human Rights (hereinafter: ACHR) contains three mentions of dignity in Articles 5 (Right to Humane Treatment), 6 (Freedom from Slavery) and Article 11 (Right to Privacy). Article 5 enhances the dignity principle regarding persons deprived of their liberty, establishing that they "shall be treated with respect for the inherent dignity of the human person." Article 6 stipulates that even if forced labor is legally established as a complementary penalty for certain crimes, such labor "shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner." Article 11 enforces that "Everyone has the right to have his honor respected and his dignity recognized".[21]

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20 In addition, in *Netherlands vs. Parliament and Council*, the European Union confirmed that "it is for the Court of Justice, in its review of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is observed. See: ECJ, October 9, 2001, Judgment, *Netherlands vs. Parliament and Council*, Case C-377/98, para 70. See also: ECJ, October 14, 2004, Judgment (First Chamber) *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (Germany)*, Case C-36/02, in which it has ruled: "Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity."

21 Additional approaches of human dignity has been considered, for example, in the *Bámaca Velásquez* case and the *Plan de Sanchez Massacre* case both against Guatemala, when Judge Antônio Cançado Trindade makes an extensive and important reference to the "inherent rights of the human person," and the close relation between the living and the dead as inherent components of the right to

As it has been mentioned above, the ECHR for the ECtHR, the ACHPR for the ACtHPRJ and the ACHR for the IACtHR, are all the principal instruments of applicable law. The founding treaties also contain or authorize specific methods of judicial interpretation that give different scope to the power of judges and distinct scope to the human dignity as a principle (common value). Those are areas where judicial interpretation depends on it as I will develop in **(2.1)**. I intend to analyse how those argumentative methods are used to strengthen rights and protections in contexts of deprivation of liberty **(3)**. Transjudicial communication between regional courts could also improve an intermediated dialogue (with national courts) between continents. I will identify the role of judges in this process of cross-fertilization.

2.2. Application: instrument of regulation of government power through judicial interpretation

Courts dealing with human rights matters recur often to the international quotation as a proof of an accurate reasoning (*probative importation*). Sometimes, courts make comparative reasoning of compatible and effective interpretive solutions abroad (*scanning the horizon*) or build two poles between which the interpretation oscillates (*setting two extremes*) in different contexts[22]. These approaches are all tools of transjudicial communication and aim to make a systemic compatibility test on human rights at the international scale.

Regional courts interact with national courts within their framework whilst looking for legitimacy and effectiveness in terms of cooperation in the absence of coercive powers. [23] Regional human

life, as well as the human solidarity as an inherent component of certain traditional communities. See: IACtHR, (Merits) November 25, 2000, *Bámaca Velásquez v. Guatemala*, separate opinion of Judge Antonio Cançado Trindade; IACtHR, (Merits) April 29, 2004, *Plan de Sanchez Massacre v. Guatemala*, separate opinion of Judge Antonio Cançado Trindade, paras 9, 16, 23.

22 See, for instance: A. Lollini, "The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law", 8(2) *Utrecht Law Review* (2012), p. 69; A-M. Slaughter, "A Typology of Transjudicial Communication", 29 *Richmond Law Review* (1994), pp. 101-122.

23 Vertical communication takes place between the regional court as a supranational court and the national courts of its States Parties. Otherwise, horizontal communication takes place between one court and others of the same status as, for example, between regional human rights courts. For Slaughter, transjudicial communication arises from the need to persuade or convince by arguments, seeking

rights courts also have horizontal communication between them and with the *ad hoc* tribunals, the International Criminal Court and other international human rights bodies.[24] For the IACtHR as well as in the African tradition (i.e. ACommHPR), transjudicial dialogue occupies an essential place in the jurisprudence. The IACtHR uses vertical communication (by direct dialogue) as a channel among Member States to spread national legal rules, principles and practices (by national jurisprudence) whilst looking for regional consensus in several matters[25]. Certainly, IACtHR is a pioneer which uses a mixed (vertical and horizontal) communication to disseminate common human rights principles in national and international tribunals whilst looking for a more extended international consensus.[26] For the

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to strengthen the own position or transform the internal jurisprudence and they vary enormously in form (vertical, horizontal, mixed), function (legitimacy, effectiveness, acceptance of international obligations, cross-fertilization, collective deliberation), and degree of reciprocal engagement (direct dialogue, monologue, intermediate dialogue). A-M. Slaughter, "A Typology of Transjudicial Communication", 29 *Richmond Law Review* (1994), pp. 101-122. Although there are several (and more recent) doctrine on the subject, Slaughter remains the clearest and most accurate in her phenomenological approach of transjudicial communication. See also: A-M. Slaughter, "A Global Community of Courts", 44 *Harvard International Law Journal* 191 (2003); R. Bustos Gisbert, "XV proposiciones generales para una teoría de los diálogos judiciales". 95 *Revista Española de Derecho Constitucional* (2012), p. 20; L. Burgorgue-Larsen, *El diálogo judicial. Máximo desafío de los tiempos modernos* (México, Porrúa 2013).

24 The IACtHR has quoted the European Court of Human Rights since 1987; it quotes often the *ad hoc* tribunals in cases involving armed conflict and, in addition, it often uses quotations from treaty bodies as the United Nations' Human Rights committees, among others. For an extensive analysis of this subject regarding the human rights tribunals see, for example, the recent publication: L. Burgorgue-Larsen, *El diálogo judicial. Máximo desafío de los tiempos modernos* (México, Porrúa 2013), 315 p.

25 For Jacobs cross-fertilization engenders mutual transformations. F. Jacobs, "Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice", 38 *Texas International Law Journal* (2002), p. 547.

26 In my opinion, some regional consensus has been built through the vertical transjudicial communication of the IACtHR. Besides, currently it aims to be reinforced through the "control of conventionality". The imprescriptibility of serious violations of human rights and the *jus cogens* character regarding the prohibition of forced disappearances can be interpreted as the first historical outcomes of such consensus and further we can analyze several points regarding criminal matters. For a comprehensive analysis of transjudicial communication between the IACtHR and the International Criminal Court, see: R. Estupiñan Silva, "The Inter-American Court and the International Criminal Court: Transjudicial Communication, boundaries and opportunities", in Y. Dir. Haeck (dir.), *35 Years of Inter-American*

ECHR, transjudicial dialogue is not a goal in itself but transjudicial communication (by monologue) remains an important way to achieve legitimacy, harmonization and dissemination of human rights principles.

The exercise of reasoning through comparison finds all its justification when it comes to human dignity and the just balance between foundational values, where confrontation beyond comparison cannot be avoided. Firstly, human dignity has become a component of public order and from approaching public order, human dignity allows even the *protection against himself* in a clear confrontation with individual freedom, since the dignity proper to the human being cannot be contaminated by any of its members and is seen as not being subject to conciliation.[27] Secondly, human dignity is not a substitute for other pillars but it acts as a cover. This function may be noted, for instance, in the common expression "equal dignity" which reminds that equity has no other source than the dignity of all mankind. Therefore, in order to obtain balance between common values, judges act in context in a case-by-case basis and, have built the notion of detainees' vulnerability as a mean to protect human dignity in extreme situations.

Thus, detainees are considered by the ECtHR as vulnerable individuals and as vulnerable group. Indeed, vulnerability lowers the level of severity necessary to qualify of inhuman or degrading treatment or even torture within the meaning of Article 3 ECHR. Among the procedural functions, vulnerability of detainees is a facilitator of admissibility of individual applications to the European Court, a basis for extension of the ECtHR's power of cognition and a trigger for a reversal of the burden of proof before it[28]. Indeed, since

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Court of Human Rights: theory and practice, present and future (Cambridge: Intersentia Publishers), pp. 705-727.

27 See, for instance: UN, Human Rights Committee, 15 July 2002, *Manuel Wackenheim v. France*, Communication No. 854/1999, Prohibition of "dwarf tossing".

28 ECtHR, (Judgment) Grand Chamber, December 18, 1996, *Aksoy v. Turkey*, para. 98; ECtHR, (Judgment) Grand Chamber, November 25, 1997, *Aydin v. Turkey*, para. 82; ECtHR, (Judgment) Grand Chamber, June 27, 2000, *Salman v. Turkey*, para 99; See also: S. Besson, "La vulnérabilité et la structure des droits de l'homme – L'exemple de la jurisprudence de la Cour européenne des droits de l'homme" in L. Burgorgue-Larsen (dir.), *La vulnérabilité saisie par les juges en Europe*, (Paris: Pedone, 2014), pp. 59-85; A. Timmer, "A Quiet Revolution: Vulnerability in the European Court of Human Rights", in M. Fineman & A. Grear (eds.), *Vulnerability:*

1978, the European Court regards human dignity as underpinning the right to a fair hearing, the right not to be punished in the absence of a legal prohibition, the prohibition of torture, and the right to private life, among others[29].

The same reasoning has been adopted by the IACtHR, which has established that detainees are vulnerable30, in particular when are unlawfully detained and, that "any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person"31. Inter-American Court position is clearer because it is based on the foundational treaty itself. Moreover, foreign detainees are another group of detainees more vulnerable, since they are in a different legal and social environment and sometimes are confronted to a language other than their own. The same attempt to human dignity operates when indigenous people under detention are not allowed to use their mother tongue.32 Therefore, States have a duty of reinforced guarantee regarding access to the action of consular protection and assistance33. The specific situation of vulnerability is also reinforced

Reflections on a New Ethical Foundation for Law and Politics (Strasbourg, Ashgate, 2013), pp. 147-170.

29 ECtHR, (Judgment) Chamber, April 25, 1978, *Tyrer v. United Kingdom*, para 30.

30 See R. Estupiñan-Silva, "La vulnérabilité dans la jurisprudence de la Cour interaméricaine des droits de l'homme: esquisse d'une typologie" in L. Burgorgue-Larsen (dir.), *La vulnérabilité saisie par les juges en Europe*, (Paris: Pedone, 2014), pp. 89-113. Also published in Spanish and Portuguese as: R. Estupiñan Silva, "La vulnerabilidad en la jurisprudencia de la Corte Interamericana de Derechos Humanos: esbozo de una tipología" in L. Bourgorgue-Larsen, A. Maues & B.E. Sanchez Mojica (eds.) et al (coords.) *Derechos humanos y políticas públicas* (Barcelona, Edo-Serveis, 2014), pp. 193-231; M. Briceño-Donn,"Personas privadas de libertad: una aproximación de la Corte Interamericana de derechos humanos", in M. Revenga Sánchez & A. Viana Garcés (eds.), *Tendencias jurisprudenciales de la Corte Interameriacana y el Tribunal Europeo de Derechos Humanos* (Valencia, Tirant lo Blanch, 2008) pp. 159-202.

31 IACtHR, (Merits) January 19, 1995, *Neira Alegría and others v. Perú*, para 60; IACtHR, (Merits) September 17, 1997, *Loayza Tamayo v. Peru*, para 57; IACtHR, (Merits) November 27, 2003, *Maritza Urrutia v. Guatemala*, para 87; IACtHR, (Merits) July 8, 2004, *Goméz Paquiyauri Brothers v. Peru*, para 108; IACtHR, (Objections & Merits) September 7, 2004, *Tibi v. Ecuador*, para 147; IACtHR, (Objections & Merits) November 26, 2006, *Juan Humberto Sánchez v. Honduras*, para 96.

32 IACtHR, (Merits) February 1, 2006, *López Álvarez v. Honduras*, paras 110, 169.

33 IACtHR, (Merits) July 8, 2004, *Goméz Paquiyauri Brothers v. Peru*, para 93; IACtHR, (Merits) September 18, 2003, *Bulacio v. Argentina*, para 130; IACtHR, (Advisory Opinion) October 1, 1999, *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, OC-16/99, para

by the combination of personal conditions, *inter alia*, children in detention[34] or sick detainees[35] African Commission has also founded that consular assistance is an inherent part of procedural safeguards related to arrest and detentions of foreigners.[36]

Vulnerable contexts improve needs of international protection in human rights matters. Detention situations are such a vulnerable context. But human rights are not always absolutes and the strengthening of rights in contexts of deprivation of liberty is often conditioned by state needs and values **(3)**.

3. STRENGTHENING OF RIGHTS AND PROTECTIONS IN CONTEXTS OF DEPRIVATION OF LIBERTY

In the presence of intangible rights such as life, prohibition of torture and inhuman or degrading treatment, the prohibition of slavery, involuntary servitude and forced labor, the call to dignity seems both obvious and unnecessary given their primacy. But this conclusion should focus only on the hierarchy of rights, forgetting that rights promotion depends entirely on contexts **(3.1)**. In the presence of rights, such as privacy and family life, freedom of expression and fair trial, the appeal to dignity may surprise because they are not valued by an inviolability system and they do not seem to articulate fundamental values. Nevertheless, nothing could exclude from those rights the possibility to transcribe fundamental values. This applies for instance, to a fair trial which is a pillar of the rule of law, to cultural identity which is basis of pluralism, to freedom of expression which is the foundation of democratic societies. Dignity has a role to play once more through rights promotion in vulnerable contexts such as detention **(3.2)**.

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106 and separate opinion of judge Antonio Cançado Trindade, para 23; IACtHR, (Objections & Merits) September 7, 2004, *Tibi v. Ecuador*, para 112; IACtHR, (Merits) Juny 24, 2005, *Acosta Calderón v. Ecuador*, paras 56, 125; IACtHR, (Objections & Merits), November 21, 2007, *Chaparro* Álvarez *and Lapo* Íñiguez *v. Ecuador*, paras 51, 164.

34 IACtHR, (Advisory Opinion) August 19, 2014, *Rights and guarantees of children in the context of migration and/or in needs of international protection*, OC-21/14, paras 88 and 172.

35 IACtHR, (Merits) November 25, 2004, *Lori Berenson Mejia v. Peru*, para 101; IACtHR, (Merits) November 25, 2006, *Miguel Castro Castro Prison v. Peru*, para 314; IACtHR, (Objections & Merits) May 19, 2011, *Vera Vera v. Ecuador*, paras 76-77.

36 ACommHPR, Communication 379/09, 2009, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, paras 104, 106.

3.1. Human dignity as an amplifier standard of conventional rights

The firsts subjects where the notion of human dignity reinforces the rights of persons deprived of freedom are deportations and extraditions, detention conditions, treatment of mentally ill and life sentences. Consequently, according to the European Court's case law, the expulsion measures involving a known risk of torture or inhuman or degrading treatment are declared unconventional, sometimes solely on the basis of intangible rights[37] and sometimes relying on human dignity[38].

Regarding proceedings and conditions of detention in Europe, the *Kudla v. Poland*[39] leads the way by indicating that they must be compatible with human dignity. That ruling was confirmed in the case of illegal CIA detentions[40] or in the many cases concerning poor detention conditions in France[41], although the European Court sometimes shows sensitive to public security and citizen protection arguments, disregarding considerations of dignity especially on the use of force or disciplinary measures.[42] Meanwhile, the Inter-American Court has a well-established policy in that matter. *Suárez Rosero* v. Ecuador, for instance, allowed the Court to recall two founding principles of democracy in terms of arrests: the requirement of a warrant issued by the competent judicial authority in the absence of flagrante delicto, and the requirement of appropriate remedies, that is, the possibility to obtain without delay a decision on the legality of the detention. [43] For its part, under Article 4 of the African Charter, "Human beings are inviolable", however, one of the peculiarities of the African Charter is that it does not include any general limitation clause. On one hand, the spirit behind the general declaration must be understood as the desire to avoid abusive restriction of rights,

37 ECtHR, (Judgment) July 7, 1989, *Soering v. United Kingdom*; ECtHR, (Judgment) January 17, 2012, *Othman (Abu Qatada) v. United Kingdom*; ECtHR, (Judgment) April 16, 2013, *Aswat v. United Kingdom*.

38 ECtHR, (Judgment) April 10, 2012, *Babar Ahmad et al v. United Kingdom.*

39 ECtHR, (Judgment) Grand Chamber, October 26, 2000, *Kudla v. Poland.*

40 ECtHR, (Judgment) Grand Chamber, December 13, 2012, *El Masri v. ex-République yougoslave de Macédoine.*

41 ECtHR, (Judgment) Fifth Section, October 2, 2014, *Fakailo (Safoka) and others v. France*.

42 ECtHR, (Decision) Fifth Section, October 1, 2013, *Christophe Khider v. France*; ECtHR, (Judgment) Fifth Section, October 31, 2013, *Jetzen v. Luxembourg*.

43 IACtHR, (Merits) November 12, 1997, *Suárez Rosero v. Ecuador*, paras 44, and 63-65.

a restriction which will be applied only under very limited and legally circumscribed conditions, on the other hand, the legality of the violation of the right to life through the imposition of the death penalty cannot be considered as an absolute restriction so far. The proportionality and the necessity of the limitation are often recalled by the African Commission.[44]

Regarding the confinement of suspects apprehended at sea until they return to the mainland, the ECtHR reiterates, in the framework of Article 5 ECHR, that liberty and security are rights of the highest importance "in a democratic society". Thus, where the "lawfulness" of detention is in issue everything is inextricably connected to the protection of human dignity, including the question whether "a procedure prescribed by law" has been followed, and which requires that any deprivation of liberty be compatible with the purpose of protect the individual from arbitrariness. Thus, judicial control must satisfy the following requirements: promptness, automatic nature and competent legal authority.[45] The ECtHR has an established reasoning which applies to all types of detention, including provisional detention[46], for the detention of the foreigner in his pending deportation[47], or for the monitoring of detention conditions in the jails of the Tribunal, before the hearing[48].

Not in the sea, but in detention facilities for aliens, through advisory opinions and case law, the IACtHR has established that due process derives from the inherent human dignity and that when foreign nationals face criminal proceedings the right to contact their consular agent acts as a guarantee that "the proceedings conducted in the respective cases, including the police investigations, are more likely to be carried out in accord with the law and with respect for

44 ACommHPR, (Communications 105.93, 128/94, 130/94 and 152/96, 2000, *Media Rights Agenda and Others v. Nigeria,* paras 64-71); ACommHPR, (Communications 48/90, 50/91, 52/91 and 89/93, 2000, *Amnesty International and Others v. Sudan,* paras 50, 80, 82.

45 Article 5(3) ECHR is structurally concerned with two separate matters: the early stages following an arrest and the period pending any trial before a criminal court. See: ECtHR, Grand Chamber, March 29, 2010, *Medvedyev and others v. France*, paras 76, 79. See, also: ECtHR, June 18, 1971, *De Wilde, Ooms and Versyp v. Belgium*, para 65; ECtHR, October 24, 1979, *Winterwerp v. the Netherlands*, para 37.

46 ECtHR, (Judgment) Third Section, July 1, 2014, *Mihailescu c. Romania.*

47 ECtHR, (Judgment) Grand Chamber, July 3, 2014, *Georgia v. Russia (I)*.

48 ECtHR, (Judgment) Third Section, June 17, 2014, *Zamfirachi c. Romania*.

the dignity of the human person".[49] The Inter-American Court has also stressed on the verification of a person's age as a crucial matter regarding alleged children and has established that "if it is appropriate, an assessment must be conducted in a scientific and safe manner, respecting human dignity that is gender-based and culturally appropriate".[50] The IACtHR also has often reiterated the special position of guarantor assumed by the State with regard to persons who are in their custody or care, to whom it should provide, as a positive obligation, the necessary conditions for a decent life and to receive human treatment consistent with personal dignity.[51]

According to ECtHR case law, physical security of an individual under detention, must be understood within three particular scopes: the exhaustive nature of the exceptions justifying such detention, the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law, and the importance of the promptness of the required judicial controls under Article 5(3) and 5(4) ECHR. The automatic and expedited judicial scrutiny provides an important measure of protection against arbitrary behavior, incommunicado detention and ill-treatment.[52] Meanwhile, since the *Suarez Rosero* case, the IACtHR has been precise concerning the State's obligation to provide adequate facilities for preventive detention and has pointed out that measures such an incommunicado detention must be compatible with human dignity, therefore, the measure must be "an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary

49 IACtHR, (Advisory Opinion) October 1, 1999, *Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, OC-16/99, paras 116 and 121.

50 IACtHR, (Advisory Opinion) August 19, 2014, *Rights and guarantees of children in the context of migration and/or in needs of international protection*, OC-21/14, paras 88 and 172.

51 IACtHR, (Merits), September 18, 2003, *Bulacio v. Argentina*, paras. 126 and 138; IACtHR, (Objections & Merits), September 2, 2004, *Juvenile Reeducation Institute v. Paraguay*, para 151; IACtHR, (Merits), July 4, 2006, *Ximenes Lopes v. Brazil*, para 138.

52 ECtHR, (Judgment) Grand Chamber, March 29, 2010, *Medvedyev and others v. France*, paras 177-223.

acts in prisons." [53] Regarding incommunicado death threats, denial of access to medical care and adequate toilet facilities, the African Commission has observed that "holding a person in detention under conditions that are not in keeping with his dignity and pose a threat to his health amounts to cruel, inhuman and degrading treatment or punishment."[54]

Human dignity in vulnerable contexts is present in the automatic nature of the review which prevents against dissimulation of persons subjected to ill-treatment and incapables of lodging an application asking for a judge to review their detention. The same might also be true in situation such as the mental disability or the situation of foreigners ignorant of the language of the judicial officer. The requirement of the judicial officer to consider the merits of the detention is both procedural and substantive: the judicial officer must be in contact with the detained person and accordingly must be able of examining lawfulness issues and whether there is a reasonable detention or if it is unlawful, the judicial officer must have the power to release. [55] The scope of conventional rights as interpreted by courts through human dignity no longer contains only an obligation for States to abstain but multiple positive obligations. Thus, regional courts impose on States the positive obligation to protect the physical and mental integrity of people and to accomplish the necessary procedures for this purpose. The IACtHR, for instance, has highlighted the positive obligations imposed on the State to ensure, *inter alia*, the right to legal representation (legal defense), to judicial immediate and personal control and to reasonable time.[56] Regional judges not only perform a check on compliance with the substance of the right, but also a check on the implementation procedure and the modalities of decision-making of national authorities. In this sense, the ECtHR in the judgment of *El-Masri v. Macedonia* recalled the obligation to initiate effective official investigations regarding

53 IACtHR, (Merits) November 12, 1997, *Suárez Rosero v. Ecuador*, paras 46 and 88-90.

54 ACommHPR, (Communication 368/09) 2009, *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, para 74.

55 ECtHR, (Judgment) Grand Chamber, 29 March 2010, *Medvedyev and others v. France*, para 125.

56 IACtHR, (Objections & Merits) September 7, 2004, *Tibi* v. Ecuador, paras 108, 118, 120.

possible violations of the rights of persons under state custody.[57] The African Commission has also confirmed the same obligation to investigate any disrespect to human dignity when committed against persons under state custody,[58] and has declared that "the violation of any right contained in the Charter is also a violation of Article 1 in that it shows the failure by a State Party to take the necessary measures for the enjoyment of this right".[59]

The ECtHR has well established that even in contexts as such investigations of terrorist offences or drug trafficking, difficulties and issues regarding security do not mean "however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions"[60]. The same had been said also by the IACtHR in the case of *Tibi v. Ecuador*, where the IACtHR reiterates that "a person deprived of his or her liberty has the right to live in a detention situation that is compatible with his or her personal dignity". Then, even under drug trafficking charges, states have obligation of guarantee the inmates' conditions that safeguard their rights. Indeed, in the Inter-American case law, the *Tibi* case has contributed largely to the definition of aggravated vulnerability suffered by detainees. The IACtHR stated in this regard that detention aggravates the true risk of the violation of other rights such as the right to physical integrity and to be treated with dignity, also adding that this situation creates a reinforced state duty to be responsible for detention facilities and to ensure the existence of conditions that leave intact the rights of detainees. [61]

As it has been established, intangible rights –such as the right to life, the right to human treatment, freedom of religion and the right to due process– cannot be restricted under any circumstances

57 ECtHR, (Judgment) Grand Chamber, December 13, 2012, *El-Masri v. The Former Yugoslav Republic of Macedonia*, para. 182.

58 ACommHPR, (Communication 368/09) 2009, *Abdel Hadi, Ali Radi & Others v Republic of Sudan,* para 45.

59 ACommHPR, (Communication 147/85-149/96) 2000, *Sir Dawda K. Jawara v. Gambia*, para 31-32.

60 ECtHR, (Judgment) Grand Chamber, March 29, 2010, *Medvedyev and others v. France*, para 126. ECtHR, (Judgment) Grand Chamber, May 12, 2005, Öcalan *v. Turkey*, para 104.

61 IACtHR, (Objections & Merits) September 7, 2004, *Tibi v. Ecuador*, paras 149, 150.

and any such restriction is prohibited by international law.[62] By contrast, this rule is less strict in certain matters where state conditions, priorities and contexts allow the courts to agree in intermediate arrangements (**3.2**).

3.2. Human dignity as a factor in conciliating state requirements and obligations

Prisons are primary domain of human dignity. In general, the vulnerability of detainees and their entire situation of dependence *vis-à-vis* the public authorities imposes some restrictions regarding private life and family life but, no restriction of a human right is justifiable in a democratic society unless necessary for the general welfare. The characterization of a level of humiliation or degradation exceeding the "inevitable element of suffering and humiliation connected with the detention" is a central reasoning of regional courts. Therefore, each alleged inhuman and degrading treatment must be studied through a double standard: a concrete assessment of the facts of the case, and a subjective assessment of the personality of the individual and the lack of conditions which are compatible with respect for human dignity.[63] These premises are not without conflict when it comes to conciliate prisoners' rights and general state obligations in public service.[64]

Regarding practices related to the treatment of prisoners considered most dangerous, the European judge recognized,

62 IACtHR, (Objections & Merits), September 2, 2004, *Juvenile Reeducation Institute v. Paraguay*, para 155.

63 ECtHR, (Judgment) Chamber, April 25, 1978, *Tyrer v. United Kingdom*, para 30; IACtHR, (Objections & Merits), September 2, 2004, *Juvenile Reeducation Institute v. Paraguay*, para 154; IACtHR, (Merits) November 27, 2003, *Maritza Urrutia v. Guatemala*, para 87; ACommHPR, (Communication 368/09) 2009, *Abdel Hadi, Ali Radi & Others v Republic of Sudan,* para 79, ACommHPR, (Communication 241/01) 2003, *Purohit v. Gambia,* para 64, 65.

64 For example: The Grenoble Administrative Court had judged on November 7, 2013, that the prison of Saint-Quentin-Fallavier (Isère) must serve regularly halal food for Muslim inmates inspired by Article 9 of the European Convention (see: TA Grenoble, Application No. 1302502). The Administrative Court of Appeal of Lyon has finally reversed the decision on July 22, 2014, considering that "given the opportunity for inmates to receive meals without pork ... a fair balance was struck between the needs of the public service and the rights of persons detained in religious matters." The French State Council had already pointed out the real problem of such a measure, that is, its high financial and organizational costs, considering a just balance between prisons and other state obligations.

for instance, that the systematic strip searches, which could be justified for security reasons, had to be proportionate with regard to requirements implied to the maintenance of security and good order in prisons, prevention of recidivism and protection of the interests of victims. [65] In these contexts the Inter-American Court seems more protective, possibly because of the large tradition of serious breaches of human rights in Latin American Prisons.[66] In that matter, the IACtHR has stated that Article 7.2 ACHR stipulates strictly the allowed restrictions of liberty and Article 7.3 ACHR rules out the conventionality of methods that even being legal may be inconsistent with the fundamental rights for being unreasonable, unforeseeable or disproportionate[67]. The IACtHR has also stipulated that qualifying adjectives such as "terrorists criminals" or "prisoners for terrorism" implies an insult to the honor, dignity, and reputation of the inmates who had not been convicted at the time of the facts, since they were perceived by society as "terrorists" with all the negative consequences this implies[68]. The African Commission for its part, has established that the right to equal protection and respect of human dignity envisaged under Articles 3 and 5 of the African Charter in matters of execution of death sentences may be observed when the justice system affords "a condemned person an opportunity to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best as he can, to face his ultimate ordeal".[69]

The European Court is not very demanding vis-à-vis the affliction generated by the relative isolation. However, it can be declared as a violation of Article 3 ECtHR because of its excessive affliction, when accompanied by body-search contrary to human

65 ECtHR (Judgment) Chamber, 12 June 2007, *Frérot v. France*. See also: French Council of State, (Decision) Section, 6 December 2013, M.A-B (Application No. 363290).

66 E. Carranza, "Situación penitenciaria en América Latina y el Caribe ¿Qué hacer?", *Anuario de Derechos Humanos de Chile* (2012), pp. 31-66.

67 IACtHR, (Objections & Merits) September 7, 2004, *Tibi* v. Ecuador, para 98.

68 IACtHR, (Merits) November 25, 2006, *Miguel Castro Castro Prison v. Peru*, paras 358, 359.

69 ACommHPR, (Communication 277/03) 2003, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, para 176; ACommHPR, (Communication 240/01) 2001, *Interights et al. (on behalf of Bosch) v. Botswana*, para 41.

dignity[70] or any other material indignity in isolation, such as lack of toilets[71]. For its part, the IACtHR remains extremely cautious about respect of human dignity in incommunicado detentions[72]. In particular, the Inter-American Court has stressed that states have a duty to provide free medical services, independent, adequate and permanent to people under detention and that the absence of a system of classification between the accused and convicted aggravates the vulnerability.[73] Similarly, the African Commission is of the opinion that the presence of an infirmary in the detention institution cannot, on its own, be sufficient to guarantee to persons detained, the right of access to the appropriate medical care.[74]

Due process of law and procedural matters can be also under the scope of human dignity (through vulnerability) in contexts of deprivation of liberty, even if the cases are not extremely usual. In the judgment *A.T v. Luxembourg*, the European Court reiterates, for instance, that the notion of fair trial (Article 6 ECHR) may be relevant, in context, from the moment of the detention regarding the lack of access to counsel. Indeed, access to counsel contributes to the respect for the right of an accused not to incriminate himself, and such lack of access may seriously compromise the fairness of the trial, given the particular vulnerability of the accused.[75] Restricting this access can sometimes be justified by reasons of public order, nonetheless this restriction can never be systematic.[76]

Through assessment of the injury to dignity, the European Court has also condemned the excessive use of handcuffs against

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70 ECtHR, Third Section, July 24, 2012, *Ciupercescu v. Romania (2)*; ECtHR, Fourth Section, November 27, 2012, *Savics v. Latvia*.

71 ECtHR, (Judgment) First Section, March 9, 2006, *Cenbauer v. Croatia*.

72 IACtHR, (Merits) November 12, 1997, *Suárez Rosero v. Ecuador*, paras 46 and 88-90.

73 IACtHR, (Objections & Merits) September 7, 2004, *Tibi* v. Ecuador, paras. 149, 156, 158.

74 ACommHPR, (Communication 287/04) 2004, *Titanji Duga Ernest (on behalf of Cheonumu Martin et al) v. Cameroun*, para 57.

75 ECtHR, (Judgment) Fifth Section, April 9, 2015, *A. T. v. Luxembourg*, paras 62-63. See also: ECtHR, (Judgment) First Section, April 1, 2010, *Pavlenko v. Russia*, para 101; ECtHR, (Judgment) First Section, December 11, 2008, *Panovits v. Cyprus*, para 64

76 ECtHR, (Decision) Second Section, August 28, 2012, *Simons v. Belgium*, para 31; ECtHR, (Judgment) First Section, October 24, 2013, *Navone and others v. Monaco*, para 80.

the detainee as breach of Article 3, in absence of necessity[77]. Nevertheless, it is required a high threshold to sanction handcuffing, and the ECtHR often rejects cases, despite the formulation of doubts about "necessity", in view of the lack of evidence regarding the impact of this measure on the detainee's psyche and in view of the short duration of the public use of handcuffs.[78] The same analysis on balance between personal dignity of accused and public security and freedom of information has been applied regarding information furnished by the authorities to the mass media in criminal cases[79]. In the context of serious human rights violations in prison, the IACtHR has determined that submission to nudity during prolonged period of time violates personal dignity and such a measure has a particular impact on women[80].

But the most abundant litigation on detention conditions concerns dilapidated detention centers and prison overcrowding. Indeed, prison overcrowding is an independent criterion for the test of human dignity regarding the material conditions of detention. Nonetheless, the evolving jurisprudence of the regional courts is intended to reconcile the management of available resources of the public authority with the principle of human dignity, through negotiated solutions that could offset overcrowding in order to avoid massive litigation in the future. Thus, in the framework of the ECtHR, besides pilot-judgments in the matter[81], the European

77 ECtHR, (Judgment) Chamber, December 16, 1997, *Raninen v. Finland*.

78 ECtHR, (Judgment) Third Section, June 17, 2014, *Zamfirachi v. Romania*, paras 50-51.

79 ECtHR, (Judgment) First Section, May 29, 2012, *Shuvalov v. Estonia*, paras 79-82.

80 IACtHR, (Merits) November 25, 2006, *Miguel Castro Prison v. Peru*, paras 305, 306.

81 The proliferation of applications based on state structural problems related to violations of dignity by the material conditions of detention and prison overcrowding has led the Court to use very often pilot-judgment as a means to reconcile the European prisons' standard. The Court has issued pilots-judgments for: Bulgaria [ECtHR, Fourth Section, January 27, 2015, *Neshkov and others v. Bulgaria*], Italy [ECtHR, Second Section, January 8, 2013, *Torreggiani and others v. Italy*], Russia [ECrHR, First Section, January 10, 2012, *Ananyev and others v. Russia*] Poland [ECtHR, Fourth Section, October 22, 2009, *Sikorski v. Poland*] and Hungary [ECtHR, Second Section, March 10, 2015, *Varga and others v. Bulgaria*]. The use of countervailing measures to lack of space and the limitation of the use of pretrial detention [*Varga and others v. Hungary*, para 104] are among the indicative measures reported by the Court, in the discretion of the States.

judges have already found that "the freedom of movement allowed to inmates in a facility and unobstructed access to natural light and air have served as sufficient compensation for the scarce allocation of space"[82], when assessing in particular the conditions of post-trial detention. Dignity may be mentioned also for states members, for instance, to urge the administration to eradicate nuisance animals from prisons in the framework of health care obligations[83].

Thus far the Inter-American Court has stated in that regard that "imprisonment in overcrowded conditions, isolation in a reduced cell, with lack of ventilation and natural light, without a bed to lie in or adequate hygiene condition, and solitary confinement or unnecessary restrictions to visitation regimens constitute a violation to the right to human treatment" and that "as responsible for the detention establishments, the State must guarantee inmates conditions that respect their fundamental rights and protect their dignity."[84] The IACtHR has also deepened on poor practice of medical services provided to people in detention, in the framework of Articles 4 (life) and 5 (integrity) ACHR. Through the *Vera Vera* case, the IACtHR has recalled the special state duties of protection based on personal conditions or specific situations. The Inter-American judges have remembered that medical negligence may constitute cruel, inhuman and degrading treatment, according to the emergency situation and exposure to severe or prolonged pain as a result of negligence or excessive security conditions despite the state of health of the detainee.[85]

The ECtHR has also recalled the obligation to conduct a periodic review of life sentences, although in the framework of national margin

82 ECtHR, (Judgment) First Section, March 12, 2015, *Mursic v. Croatia*, para 52, 55.

83 See, for instance: French State Council, December 22, 2012, case of *Baumettes Prison in Marseille* (EC DSB., French Section of the International Observatory of Prisons OIP, Application No. 364584).

84 IACtHR, (Merits) February 1, 2006, *López* Álvarez *v. Honduras*, paras 105-106; IACtHR, (Objections & Merits) November 25, 2005, *García Asto and Ramírez Rojas v. Peru*, para. 221; IACtHR, (Merits) September 15, 2005, *Raxcacó Reyes v. Guatemala*, para. 95; IACtHR, (Merits) November 25, 2006, *Miguel Castro Castro Prison v. Peru*, paras 315.

85 IACtHR, (Preliminary Objections & Merits) May 19, 2011, *Vera Vera v. Ecuador*, paras. 42, 76-77.

of appreciation[86]. The European Court refuses to perform the control of penalties in principle, except in cases of gross disproportionality, and in this context the Court has already condemned penalties insufficiently severe in view of the state's positive obligation to protect the dignity of victims.[87] The African Commission in its own has established that "the gravity of the sentences handed down may render the availability of a second hearing necessary for an efficient administration of justice. This applies therefore to instances where the court judgment is the death penalty or life imprisonment" and "that access is still more urgent in cases where international standards to which the State has an obligation exempt some categories of persons – particularly children and pregnant women – from the imposition or execution of these sentences"[88]. According to the African practice in that matter, review of life sentences and death penalties requires the exhaustion of remedies which is required are mainly judicial or jurisdictional and do not include discretionary remedies as such a National Pardon.[89]

As can be seen from the above, according to the promotion of any specific right or if the social extension of another is considered important or not, the human dignity is evoked. Regional courts of human rights are far from systematic regarding human dignity because its use is related to the "consensus" whose construction is always delicate and permanent. However, where the courts find such a consensus, they make use of dignity to strengthen its legitimacy.[90]

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86 ECtHR, (Judgment) Grand Chamber, July 9, 2013, *Vinter* and others v. United Kingdom, paras 119-122.

87 ECtHR, (Judgment) Fifth Section, December 20, 2007, *Nikolova and Velichkova v. Bulgaria*, para 237.

88 ACommHPR, (Communication 243/2001) 2004, *Women's Legal Aid Center (on behalf of Moto) v. Tanzania*, para 47; ACommHPR, (Communications 137/94, 139/94, 154/96 and 161/97) 2000, *International Pen and Others (pon behalf of Saro-Wiwa) v. Nigeria*, paras 88, 91-93.

89 ACommHPR, Communication 259/02, 2002, *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, paras 74-75; ACommHPR, (Communication 221/98) 2000, *Cudjoe v. Ghana*, para 13.

90 The European Court does not hesitate to mention human dignity in other subjects, such as the prohibition of marital rape, for example: ECtHR, (Judgment) Chamber, November 22, 1995, *SW v United Kingdom*. However, avoids ruling on the testing of the dignity of the Roma people during deportation orders, for example: ECtHR, (Judgment) Fifth Section, October 17, 2013, *Winterstein v. France*. Indeed, C. Grewe notes in this regard that the random or unpredictable evocation of dignity creates some tensions related to the legal certainty, consistency and jurisprudential

4. FINAL REMARKS

A court differs from another depending on the tools available and the contexts where it must "state the law". Conventional framework referred to each one of the regional courts (2) sets up a whole system of values whose dignity as one element, more or less important depending on whether appointed or unnamed. Each court must then decide between this regional set of values, taking care not to break the balance of the value system, as singular and unique, of the Defendant State and the Member States as a whole. In the European context the judges' tools are well represented by the proportionality test, the test of legality and necessity, the margin of appreciation and the European standards. In the inter-American system, apart from the praetorian tools such as the interpretation methods, positive obligations (Articles 1 and 2 ACHR) and pro homine principle (Article 29 ACHR) through conventionality control are advantageous assets. The African system for now appealed to the will of States and expects case-law developments which will strengthen the doctrine of the Commission.

It is not strange that each court prefers to speak of a specific right in question rather than of human dignity as a holistic concept. Knowing that the goal of regional courts on human rights is the promotion and strengthening of the rule of law through respect for human rights, judges will seek conciliation and consensus. The judges therefore are faced with a delicate "watchmaker" mission: firstly, the regional courts' starting point is that domestic law corresponds to the demands of its society. That presumption is reinforced by their complementary or subsidiary role vis-à-vis domestic justice. Through international law commitments, respect for human dignity is a premise of all three courts' Member States (1), and there is no reason to oppose this presumption. What follows is the fact that the role of regional judge of human rights is no longer assert the rule but to report and correct deviations. On the other hand, however, the judge has an active role which leads to evolve principles in order to bring them in tune with the times and, in fulfilling this role, the judge of human rights goes beyond the strict conventionality control.

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concept of dignity. See: C. Grewe, «La dignité humaine dans la jurisprudence de la Cour européenne des droits de l'homme», *Intervention à la 7ème conférence-débat du Centre de droit public comparé, Université Panthéon-Assas Paris II*, 30 octobre 2014.

Currently, regional courts act often less as preservative agents and more as cross-fertilization agents of national rights, analyzing contexts, patterns and differences in a case-by-case basis. "Think globally, judge locally" seems to be the watchword of regional human rights systems, namely, general principles in international law need to be put in context in order to respect diversity in a globalized world and hopefully human dignity may act as a measure of minimum standards in democratic societies.

ANNEX

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

(adopted by the United Nations General Assembly
on 10 December 1948)

PREAMBLE

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,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

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 and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective

recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

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.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each state

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief,

and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

(1) Everyone has the right to freedom of peaceful assembly and association.

(2) No one may be compelled to belong to an association.

Article 21

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.