Autonomous Weapon Systems, Human Dignity and International Law

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Chapter Three

The Sources of International Law and the 'Place' of Human Dignity

I. Introduction

Formal sources of international law include international conventions, customary international law (as evidence of a general practice of states accepted as law), general principles of law, and, as a subsidiary means for determining rules of law, judicial decisions and the writings of respected publicists.[1] This chapter will discuss the three primary sources as well as the concept of *jus cogens* (I refer to judicial decisions and the writings of prominent commentators throughout this dissertation). The particular status in international law awarded to the concept of human dignity can be traced, arguably, to treaty obligations, customary law, general principles of law, and even peremptory norms. Nevertheless, I demonstrate that human dignity is a treaty-based legal starting point, a guiding concept emanating from the United Nations Charter that states must use to operationalise the norms, values and rules that underlie their existence as independent societies.[2] Lastly, I explain that, in the context of international law, dignity consists of two components: respect for human rights and the development and maintenance of personal autonomy.

II. Treaties, Customary Law, General Principles and Jus Cogens

A. International Conventions or Treaties

A 'treaty' or 'convention' is an 'international agreement concluded between states in written form and governed by international law, ….'[3] The right to enter into international

[1] Art. 38 (1), Statute of the International Court of Justice.
[2] Some jurists also include 'natural law' theory as a source of human dignity in international law. For example, Judge Cançado Trincade argues that '[e]very human person has the right to respect for his or her dignity, as part of the humankind.' Therefore, human dignity and the rights inherent to the human person precede, and are superior to, the State. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion: Separate Opinion) ICJ Reports 2010, paras. 197 and 198.
[3] Art. 1 (a), Vienna Convention on the Law of Treaties, 23 May 1969.

agreements 'is an attribute of state sovereignty.'[4] Accordingly, the law of treaties is grounded in two essential principles. First, as a corollary to the notion of state sovereignty, treaties must be based on the free consent of state parties.[5] Second, parties to a treaty in force must perform in good faith.[6] Thus, it follows, that states have a duty to act consistently with their treaty obligations[7] and must refrain from acts which would defeat the object and purpose of the treaty.[8] State parties, therefore, must interpret treaties in good faith in accordance with the ordinary meaning to be given to the terms of the convention in their context and in light of the document's object and purpose.[9] Finally, treaties need not be static. Drafters can design treaties, such as the Convention on Certain Conventional Weapons, that provide for the addition of protocols, annexes or further covenants.[10]

B. Customary International Law

The creation of customary international law requires a combination of state practice and opinio juris.[11] The first element, which can be demonstrated by a range of sources, must reveal consistent and uniform state actions over time.[12] The second, subjective element is proven by evidence that states act out of a belief that the law obliges them to do so.[13] The required number of instances of state practice, the space of time in which they should occur,

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[4] *Case of the S.S. Wimbledon* (Judgement) Permanent Court of International Justice 1923, p. 25.
[5] J Klabbers, *International Law* (Cambridge University Press, 2013), pp. 42 – 43. See *The Case of the S.S. Lotus* (Judgement) Permanent Court of International Justice Series A No. 10 1927, p. 18 (holding that the rules of law binding upon states emanate, inter alia, from their own free will as expressed in conventions). Preamble, Vienna Convention on the Law of Treaties.
[6] 'Pacta sunt Servanda,' art. 26, Vienna Convention on the Law of Treaties.
[7] Klabbers, International Law, p. 30.
[8] Art. 18, Vienna Convention on the Law of Treaties.
[9] Art. 31, Vienna Convention on the Law of Treaties. Together with the context of the agreement, parties shall also take into account: 1) subsequent agreements between the states regarding the interpretation of the treaty or the application of its provisions, 2) subsequent practice in the application of the treaty that demonstrates the agreement of the parties concerning its interpretation; and 3) relevant rules of international law applicable to the relations between the parties. *Ibid.*
[10] A Boyle & C. Chinkin, *The Making of International Law* (Oxford University Press, 2007), p. 241.
[11] *North Sea Continental Shelf* (Judgment) ICJ Reports 1969, paras. 77 – 78.
[12] H Charlesworth, 'Law-making and Sources,' in J Crawford and M Koskenniemi (eds.) *The Cambridge Companion to International Law* (Cambridge University Press, 2012), p. 193.
[13] *Ibid.*

and the characteristics of the countries which exhibit practice combined with opinio juris, will depend on the particular activities and states involved.[14]

Professor Talmon observes that '[t]here are probably few topics in international law that are more over-theorised than the creation and determination of custom.'[15] Scholars typically refer to the 'traditional' and 'modern' (or 'contemporary') doctrines.[16] 'Traditional custom' focuses primarily on state practice whilst opinio juris is a secondary consideration.[17] Traditional customary law develops through an 'evolutionary' process whereby, through inductive reasoning, general custom is derived from specific examples of state practice.[18] This process, however, has evolved 'in adapting itself to changes in the way of international life.'[19] Thus, modern customary law, by contrast, emphasises statements of opino juris rather than state practice.[20] Modern custom develops more rapidly than traditional customary law because it is deduced from multilateral treaties and the statements of international bodies such

[14] For example, in its Judgment in North Sea Continental Shelf, the International Court of Justice noted, with respect to the creation of customary international law, that 'even without the passage of any considerable period of time, a very widespread and representative participation' in a form of activity 'might suffice of itself,' to form new customary law, provided it included participation of states whose interests were specially affected. Para. 73. In some circumstances, expressions of governments and their officials can serve to illustrate both state practice and opinio juris. *The Paquette Habana*, 175 U.S. 677, 686 – 708 (1900). The majority ruled that customary international law prohibited one belligerent state from seizing the fishing vessels of an enemy state during wartime, unless the vessel was used in connection with the hostilities.

[15] S Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion', 26 *European Journal of International Law* 2 (2015), 417, 429. Discussions of this body of law 'fill volumes of treatises.' J Goldsmith & E Posner, *The Limits of International Law* (Oxford University Press, 2005), p. 45.

[16] Charlesworth, 'Law-making and Sources,' pp, 192 – 194.

[17] A Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation,' 95 *American Journal of International Law* (2001), 757, 758.

[18] *Ibid.*

[19] *South West Africa Case, Second Phase*, Judgment, Dissenting Opinion of Judge Tanaka) ICJ Reports 1966, p. 291.

[20] Strong statements of opinio juris are important because they illustrate normative considerations about existing customs, emerging customs and can generate new customs. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation,' 788. Professor (and Judge) Meron, for example, supports the modern method of identifying customary international humanitarian law through the practice of state incorporation of provisions of the 1977 Additional Protocols into the military manuals of their armed forces. T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Press, 1989), p. 78.

as the United Nations General Assembly.[21] Judges of the International Court of Justice have recognized this 'acceleration in the process of formation of customary international law.'[22]

Scholars have criticized both the inductive and deductive methods of formation and identification of customary law. Professor Talmon, for example, describes both forms of reasoning as 'subjective, unpredictable and prone to law creation' by the International Court of Justice.[23] Professors Alston and Simma preferred the slower but 'hard and solid' customary laws derived from inductive reasoning to the 'self-contained exercise in rhetoric;' the phrase they used to describe the faster, deductive process.[24] The risk Simma and Alston perceived was the creation of 'a sort of "instant" customary international law of dubious relationship to the actual behavior and interests of states.'[25] The late Jonathan Charney, however, defended the modern method as more suitable for contemporary international society, given the existence of multilateral forums permitting state expressions regarding new international law.[26] In this sense, Charney appeared to view modern forms of customary law-

[21] Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation,' 758. See, for example, the Judgment of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, where the Court opined, without a discussion of the requirement of state practice, that it could deduce opinio juris, and therefore customary international law, from the attitude of states towards 'certain General Assembly resolutions.' *Nicaragua v United States of America* (Merits) 1986, paras. 188 - 194. Confusingly, the Court reverted to a more traditional analysis later in its judgment: '[t]he existence in the opinio juris of states of the principle of non-intervention is backed by established and substantial practice,' paras. 202 and 205 – 207.

[22] R Higgins, 'Fundamentals of International Law', in *Themes & Theories: Selected Essays, Speeches, and Writings [of Rosalyn Higgins] in International Law* (Oxford University Press, 2009), p. 122; South West Africa, Second Phase, Dissenting Opinion of Judge Tanaka, p. 291.

[23] Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion,' 432.

[24] B Simma & P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles,' 12 *Australian Yearbook of International Law* (1988 – 1989), 89.

[25] *Ibid*, 97 (citing the Committee on the Formation of Customary International Law, American Branch of the International Law Association: 'The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law', 19 January 1989, p. 7). Similarly, Professor Roberts observes that the strongest 'criticism of modern custom is that it is descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct.' Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation,' 769.

[26] 'Universal International Law,' 87 *American Journal of International Law*, 4 (October 1993), 529, 543 – 548. As the deductive method of law creation that he supported reduced the reliance on state practice common to the inductive process, Charney proposed to label this new modern law 'general international law' rather than customary international law. *Ibid*, 546.

making as more democratic, given that, from his perspective, customary law traditionally was made by a few interested states for all.[27]

Furthermore, Professor Talmon recently identified a third method used by the International Court of Justice for the creation of customary law: the simple *assertion* that a particular rule exists in international law, with little or no reasoning or supporting evidence.[28] Talmon provides the example of the Arrest Warrant Case, where a majority of the judges conclude, without reference to any supporting state practice and/or opinio juris:

> The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other states, both civil and criminal.[29]

Finally, it is important to remember that the development of international treaty and customary law are not mutually exclusive. For example, the ratification of a treaty may demonstrate opinio juris for the purpose of the creation of customary law.[30] Treaty provisions can obtain the status of customary law[31] and thus, rules codified in treaties may bind non-state parties as a duty of customary international law.[32]

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[27] *Ibid*, 536 – 538.

[28] Talmon, 'Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion,' 434 – 443.

[29] *Ibid*, 436, citing *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belguim)*, Judgment ICJ Reports 2002, para. 51. Another example offered of the Court's 'assertion' of customary law is the practice of making 'ex cathedra' pronouncements that a treaty provision reflects customary international law. Talmon, Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion,' 437 (citing *Questions Relating to the Obligation to Prosecute or Extradite (Belguim v Senegal)* Judgment, ICJ Reports 2012, para. 100 (holding that art. 28 of the Vienna Convention on the Law of Treaties reflects customary law)).

[30] *Prosecutor v Blagoje Simić et. al*, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, IT-95-9 27 July 1999 para. 74.

[31] For example, most provisions of the Geneva Conventions are considered to be declaratory of customary international humanitarian law. *Ibid*, para. 48.

[32] Art. 38, Vienna Convention on the Law of Treaties, North Sea Continental Shelf, para. 71; ICRC Introduction to *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, <https://www.icrc.org/ihl/INTRO/150?OpenDocument>; J Kellenberger, 'Foreword' to J Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law:* Volume I: Rules,' (Cambridge University Press, 2009) p. x.

C. General Principles of Law

Article 38 of the Statute of the International Court of Justice refers to 'the general principles of law recognized by civilized nations' as a source of international law.[33] General principles of law are broad and general notions within legal systems that underlie the various rules of law and can be applied to a variety of circumstances.[34] They extend to the fundamental concepts of all branches of law, 'as well as to law in general,' so far as the community of states recognizes these principles.[35]

The notion of 'general principles of law' inherently includes elements of natural law.[36] These principles of law, therefore, do not depend upon positivist forms of law and may or may not be accepted de facto, or practiced, within a particular legal system.[37] When a principle is accepted, however, it does not remain at the margins 'but constitutes an intrinsic element which must be harmonized and adapted along with the other "general principles" of the system.'[38] We will consider this dynamic with respect to the general principle of human dignity below.

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[33] Art. 38, Statute of the International Court of Justice, <http://www.icj-cij.org/documents/?p1=4&p2=2>. The old-fashioned (and condescending) term 'civilized' commonly is interpreted to refer to the 'community of nations,' or at least those that possess a mature legal system. G Boas, *Public International Law: Contemporary Principles and Perspectives* (Cheltenham: Edward Elgar, 2012), p. 105.

[34] B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens & Sons Limited, 1953), p. 24; J. Klabbers, International Law, p. 34.

[35] *South West Africa Case*, Second Phase, Dissenting Opinion of Judge Tanaka, pp. 295 – 298 (observing that the concept of human rights and their protection falls within the category of 'general principles of law' for the purpose of art. 38 (1) (c) of the Statute of the International Court of Justice). Hersch Lauterpacht called the general principles of law 'a modern version of the laws of nature.' An International Bill of the Rights of Man (1945) (Oxford University Press, 2013), p. 42.

[36] *Ibid*, 298. Hersch Lauterpacht called the general principles of law 'a modern version of the laws of nature.' *An International Bill of the Rights of Man* (1945) (Oxford University Press, 2013), p. 42.

[37] *Ibid*; G Del Vecchio, *General Principles of Law*, F Forte (trans.) (Boston University Press, 1956), p. 50. Thus, general principles of law are not limited to national statutory provisions. Indeed, some of the more abstract general principles that form part of international law ('good faith,' 'freedom of the seas,' etc.), 'have been accepted for so long and so generally as no longer to be *directly* connected to state practice.' J Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford University Press, 2012), p. 37 (emphasis in original).

[38] Del Vecchio, *General Principles of Law*, p. 50.

'General principles' of law are a recognized part of international humanitarian law,[39] international human rights law[40] and international criminal law.[41] Thus, for example, law of war principles (discussed in chapter five) assist practitioners to interpret and apply specific treaty and customary rules, provide general guidelines for behaviour during armed conflict when no specific rule applies, and serve as interdependent and reinforcing parts of a coherent system.[42] Conversely, when many international conventions express a particular rule, '… it can be deemed an incontestable principle of law at least among enlightened nations.'[43] Similarly, state parties to international treaties accept the important principles expressed and implied therein.[44]

D. Jus Cogens Norms

These peremptory norms of international law are norms accepted and recognized by the international community as a whole as a norm from which no derogation is permitted and which only can be modified by a subsequent norm of international law possessing the same

[39] *Department of Defense Law of War Manual*, Office of General Counsel, U.S. Department of Defense, June 2015, paras. 2.1.1 and 2.1.2, <http://www.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>.

[40] *Case of Khaled El Masri v Federal Yugoslav Republic of Macedonia*, Judgment, European Court of Human Rights ('ECtHR'), 13 December 2012, para. 106 (referring to case law of the Court of Appeal of England and Wales holding that arbitrary detention of persons at Guantánamo Bay contravened fundamental principles of international law).

[41] For example, the broad legal principle of the 'presumption of innocence' imposes more specific obligations on criminal proceedings, such as laying the burden of proof upon the prosecution to prove guilt beyond a reasonable doubt and the right of the accused to remain silent. W Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge University Press, 2011), p. 216. Professor Werle argues that the Rome Statute of the International Criminal Court represents 'the high point of efforts at codification of general principles of international criminal law.' *Principles of International Criminal Law*, 2nd ed. (The Hague: T.M.C. Asser Press, 2009), para. 365.

[42] Department of Defense Law of War Manual, paras. 2.1.2. Emmanuel Voyiakis argues that the distinction between customary international law and general principles of law is not very consequential. In his view, general principles of law constitute a distinct source of international law only in the sense that they extend 'the database of existing legal material' used by international lawyers in support of their claims about international law. 'Do General Principles Fill "Gaps" in International Law,' in G Loibl & S Wittich (eds.) 14 *Austrian Review of International European Law* (2009) (Leiden: Martinus Nijhoff Publishers, 2013), p. 254.

[43] The Paquete Habana, 707 (citing Ignacio de Megrin, *Elementary Treatise on Maritime International Law* (1873)).

[44] For example, the International Criminal Tribunal for the Former Yugoslavia held that 'the parties [to the Geneva Conventions] must be taken as having accepted the fundamental principles on which the ICRC operates, that is impartiality, neutrality and confidentiality, and in particular as having accepted that confidentiality is necessary for the effective performance by the ICRC of its functions.' Prosecutor v. Blagoje Simić, et. al., Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, para. 73.

character.[45] Peremptory norms create fundamental obligations for states.[46] Moreover, since *jus cogens* norms 'constitute the pinnacle of the hierarchy of sources of international law,' … 'they bind states whether or not they have consented to them.'[47] Professor Bianchi observes that *jus cogens* norms reflect 'the inner moral aspiration'[48] of international law.[49] Given their special status, a comparatively small number of norms qualify as peremptory.[50]

III. Locating the Concept of Human Dignity Within the Sources of International Law

In this section, I argue that a legal obligation to protect and preserve human dignity arises from human dignity's special role as a point of departure for the formation and interpretation of international law. The legal basis of this guiding role is most evident in treaty and custom as opposed to other sources of international law.

A. Human Dignity As an Obligation of Treaty Law

The preamble to the United Nations Charter (the 'Charter'), 'sets forth the declared common intentions' of the member states.[51] In the preamble, the member states specifically reaffirmed their 'faith in fundamental human rights, [and] in the dignity and worth of the

[45] Art. 53, Vienna Convention on the Law of Treaties ('VCLT'), 23 May 1969. David Bederman describes *jus cogens* (rather glibly) as 'simply entrenched customary international law'). *Custom As a Source of Law* (Cambridge University Press, 2010), p. 159.

[46] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), Commentary to Chapter III, para. (7), <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>. In its Nicaragua Judgment, a majority of the International Court of Justice cited to authority that described jus cogens norms as fundamental or cardinal principles of customary law. Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Judgment, para. 190, <http://www.icj-cij.org/docket/files/70/6503.pdf>. The Court expressly recognized the concept of peremptory norms in its Judgment in *Armed Activities on the Territory of the Congo* (New Application (2002) *(Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) ICJ Reports 2006, p. 52.

[47] A Boyle & C Chinkin, The Making of International Law, p. 114.

[48] A Bianchi, 'Human Rights and the Magic of Jus Cogens,' 19 *European Journal of International Law* (2008) 3, 491, 495.

[49] *Ibid*, 491 and 495. This is because 'human rights peremptory norms form the social identity of the group as well as one of the main ordering factors of social relations.' *Ibid*, 497.

[50] International Law Commission, Commentary to art. 40, paras. 4 – 7. Examples would include the prohibitions of aggression, slavery, discrimination and torture, and the right to self-determination.

[51] Department of Public Information, *Yearbook of the United Nations (1946 – 1947*) (Lake Success, New York: United Nations Publications, 1947), p. 17 (citing Drafting Committee I/1).

human person, ….'[52] Article 2 (4) of the Charter requires states to comply with the purposes of the United Nations.[53] These purposes encompass respect for human rights and the dignity and worth of the human person.[54]

Thus, as early as 1948, Professor Jessup concluded that: '[i]t is already the law, at least for Members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties. The expansion of this duty, its translation into specific rules, requires further steps of a legislative character.'[55] The obligation to protect human dignity, therefore, constitutes 'fundamental Charter law.'[56]

In the years since the drafting of the United Nations Charter, the realization of human dignity has informed the objectives of numerous bilateral[57] and multilateral treaties.[58] For example, during the drafting conference of the Convention on the Prevention and Punishment

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[52] Done at San Francisco, 26 June 1945. Entered into force on 24 October 1945, <http://www.un.org/en/sections/un-charter/preamble/index.html>.

[53] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, Dissenting Opinion of Judge Weeramantry, ICJ Reports 1996, p. 434, <http://www.icj-cij.org/docket/files/95/7521.pdf>.

[54] *Ibid.* Indeed, the dignity and worth of the human person is 'the cardinal unit of value in global society.' *Ibid,* 442.

[55] P Jessup, *A Modern Law of Nations* (New York: The MacMillan Company, 1948), p. 91. Similarly, in the South West Africa Case, Judge Tanaka observed that the provisions of the United Nations Charter referring to 'human rights and fundamental freedoms' imply that states bear an obligation to respect human rights and fundamental freedoms. (Dissenting Opinion: Second Phase) ICJ Reports 1966, p. 289.

[56] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, Dissenting Opinion of Judge Weeramantry, p. 507.

[57] See the Maipú Treaty for Integration and Cooperation Between the Argentine Republic and the Republic of Chile, Buenos Aires, 15 June 2007 (declaring that this treaty is 'an instrument honouring the commitment to raise the quality of life and dignity of their inhabitants'); the Framework Agreement on Cooperation in the Field of Immigration Between the Kingdom of Spain and the Republic of Mali, Madrid, 23 January 2007 (recognizing that illegal migration 'must be fought effectively while ensuring full respect for the human rights and personal dignity of emigrants'); the Treaty Concerning Friendly Cooperation and Partnership in Europe Between Romania and the Federal Republic of Germany, Bucharest, 21 April 1992 (affirming that the parties 'shall place the human person, with his or her dignity and rights, … at the centre of their policy'); the Treaty Between Romania and the Italian Republic on Friendship and Collaboration, Bucharest, 23 July 1991 (agreeing that Romania and Italy shall develop their relations on the basis of trust, collaboration and mutual respect in keeping with, inter alia, the principle of human dignity).

[58] Indeed, soon after the Charter entered into force, and before Professor Jessup made this observation, the state parties to the United Nations Educational, Scientific and Cultural Organization ('UNESCO') recalled that 'the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfill in a spirit of mutual assistance and concern.'
Constitution of UNESCO, London, 16 November 1945, in The Royal Institute of International Affairs', *United Nations Documents, 1941 – 1945* (Oxford University Press, 1947), p. 225

of the Crime of Genocide, Mr. De L'A Tournelle, the French representative to the General Assembly, 'on behalf of Europe,' warned against making a mockery of the preamble to the Charter and the language affirming 'faith in fundamental human rights, and the dignity and worth of the human person.'[59] France was determined, Mr. De L'A Tournelle affirmed, to make 'the greatest efforts to speed the progress of international law in a sphere which touches so nearly on the destinies and dignity of human society.'[60] Similarly, Mr. Katz-Suchy, the Polish representative, to the United Nations Economic and Social Council ('ECOSOC'), argued that a prohibition of the crimes of genocide 'was only part of the great struggle for human dignity ….'[61]

Indeed, the protection and preservation of human dignity provides the foundation for much of international law, in particular treaty law:

> 'The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'etre of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person.'[62]

Thus, the principle of human dignity applies to every person, 'even during combat and conflict.'[63] Consequently, Common Article Three of the Four Geneva Conventions of 12 April 1949, prohibits, inter alia, 'outrages upon personal dignity, in particular, humiliating and

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[59] A/PV.123, 21 November 1947, General Assembly Hall, Flushing Meadow, New York, in H Abtahi & P Webb, *The Genocide Convention: The Travaux Préparatoires* (Leiden: Martinus Nijhoff Publishers, 2008), p. 449.

[60] *Ibid*, p. 450.

[61] E/SR.218, General Statements on Draft Convention on the Crime of Genocide, 218th Meeting of ECOSOC, Paleis de Nations, Geneva, 26 August 1948, in Abtahi & Webb, The Genocide Convention: The Travaux Préparatoires, p. 1234.

[62] *Prosecutor v Anto Furundija* (Judgment) IT-95-17/1-T (10 December 1998) para. 183, <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>. 'No other ideal seems so clearly accepted as a universal social good.' O Schachter, 'Human Dignity As a Normative Concept', 77 *American Journal of International Law* (1983), 848, 849.

[63] *The Public Committee Against Torture in Israel v The Government of Israel* (Judgment: Separate Opinion of Vice President E. Rubin) HCJ 769/02 (11 December 2005) para. 5.

degrading treatment.'[64] Article 75 (2) of Additional Protocol 1 to the Four Geneva Conventions and Article 4 (2) of Additional Protocol II contain the same admonition.[65]

Moreover, the notion of human dignity is separate from,[66] and indispensable for, the defence of human rights,[67] 'which derive from the inherent dignity of the human person.'[68] The European Court of Human Rights observes that '[a] person should not be treated in a way that causes a loss of dignity, as 'the very essence of the Convention is respect for human dignity and human freedom.'[69] Human dignity then, serves as a thread connecting all human rights recognized in international law.[70] For example, all contemporary international human rights instruments prohibit states from using torture as well as inhuman or degrading treatment or punishment.[71] Judgments of regional human rights courts and commissions invoke human dignity as a basis for redress for victims of myriad forms of state human rights violations, such as poor detention conditions,[72] forced body cavity searches of family

[64] International Committee of the Red Cross, Geneva Conventions and Commentaries <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.
[65] *Ibid*.
[66] For example, the Preamble to the Charter of the United Nations begins: '[w]e the Peoples of the United Nations Determined … to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, …'
[67] G Kateb, *Human Dignity* (Cambridge: Harvard University Press, 2011), p. 42. In *Pretty v United Kingdom*, the European Court of Human Rights held that '[w]here treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3.' Judgment, Application No 2346/02 (ECtHR, 2002) para. 52 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448>.
[68] Preamble, International Covenant on Economic, Social and Cultural Rights, 16 December 1966; c.f. Preamble, International Covenant on Civil and Political Rights, 19 December 1966.
[69] *Case of Husayn (Abu Zubaydah) v Poland*, Judgment, European Court of Human Rights, ECtHR, Application No. 7511/13, 24 July 2014, para. 532 (citing Pretty v the United Kingdom, Judgment, paras. 61 and 65).

[70] D Feldman, 'Human Dignity As a Legal Value: Part 2,' *Public Law* (2000), 5.
[71] Preamble, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984; Art 7, International Covenant on Civil and Political Rights, 16 December 1966; Art. 3, European Convention on Human Rights; Art. 5, African Charter for Human and Peoples' Rights. Article 5 (2) of the American Convention on Human Rights creates a positive duty for states to treat all detained persons 'with respect for the inherent dignity of the human person;' Art. 5, Universal Declaration of Human Rights, 10 December 1948 (The Universal Declaration of Human Rights is an 'aspirational' document rather than a treaty); Art. 1, UNESCO Convention Against Discrimination in Education, Paris, 14 December 1960.
[72] *Case of M.S.S. v Belguim and Greece*, Judgment, EctHR, Application No. 30696/09, 21 January 2011, paras. 233, 253 and 263, (holding that conditions of detention for an asylum seeker in Greece damaged the victim's dignity and that official indifference to an applicant's circumstances can constitute a lack of respect for her dignity); *Case of Kuznetsov v Ukraine*, Judgment, EctHR, Application No 39042/97, 29 April 2003, para. 126 (holding that conditions of detention for a convicted murderer diminished his human dignity);

members of detainees,[73] discrimination against transsexuals,[74] failure to protect an indigenous community's right to property,[75] and racial violence.[76]

Thus, modern human rights and humanitarian law conventions follow the principles of protection that emanate from the inherent dignity of persons; that is, from the foundation of the Charter.[77] In that sense, the creation of the Permanent International Criminal Court ('ICC') was a 'logical sequel' to the 1949 Geneva Conventions and the 1977 Additional Protocols.[78] Indeed, during the drafting process of the Rome Statute of the ICC, representatives of several states emphasized the nexus between the establishment of the Court and respect for human dignity.[79]

Furthermore, the state parties to the (aptly named) 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, pledge to, inter alia, protect

[73] *Ms X v Argentina* Case 10.506 Report No. 38/96 OEA/Ser.L/V/II.95 Doc 7. Rev at 50, Inter-American Court of Human Rights ('Inter-Am. Ct. H.R.'), 1997, paras. 93, 96 and 100 (holding that requirement of vaginal searches of mother and daughter each time they visited their imprisoned relative violated their rights to dignity, privacy, honour and family life).

[74] *Case of Christine Goodwin v The United Kingdom* Judgement, ECtHR, Application No. 28957/95, 11 July 2002, para. 91 (holding that states can tolerate some inconvenience to enable persons to live in dignity in accordance with the sexual identity chosen by them).

[75] *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Judgement, Inter-Am. Ct. H.R, 31 August 2001, para. 140 (f) (citing the argument of the Inter-American Commission for Human Rights, 4 June 1998, that the Community's land and resources are protected by, inter alia, the rights to dignity and property and the State must adopt measures to fully guarantee the Communit's rights to its lands and resources).

[76] *Case of Nachova and Others v Bulgaria* Judgement, ECtHR, Application No. 43577/98, 5 July 2005, para. 145 (holding that racial violence – a violation of the prohibition of discrimination – is a particular affront to human dignity).

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*) (Separate Opinion of Judge Weeramantry) ICJ Reports 2007, p. 645. On a smaller scale, in 2002, Argentina, Brazil, Paraguay and Uruguay signed an 'Agreement Regarding the Residence of Nationals of the States Parties to MERCOSUR.' The accord was motivated, in part, by the importance of combating human trafficking in persons, to reduce the incidence of 'situations involving denial of their human dignity, ….' *Treaty Series: Treaties and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations*, Vol. 2541, United Nations, 2008, p. 118.

[78] Mr. Dubouloz (Observer for the International Humanitarian Fact-Finding Commission), Statement to Plenary Meeting, 17 June 1998, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, Vol. II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, New York, United Nations, 2002, p. 95.

[79] *Ibid*, Statements of Archbishop Martino (Holy See), 16 and 18 June 1998, pp. 73 and 128; Statement of Ms. Nagel Berger (Costa Rica), 16 June 1998, p. 77; Statement of Mr. Gómez (Chile), 16 June 1998, p. 88; Statement of Mr. Alhadi (Sudan), 18 June 1998, p. 126. Art. 68 of the Statute obliges the Court to protect the dignity of victims and witnesses.

the dignity and identity of all human beings.[80] The 2006 Convention on the Rights of Persons with Disabilities and Optional Protocol refers to the protection and promotion of the dignity of disabled persons nine times.[81] The parties to the 2008 Convention on Cluster Munitions recognize 'the inherent dignity' of the victims of these weapons and resolve to do their utmost to assist them.[82] The Charter of Fundamental Rights of the European Union ('EU Charter') provides that '[h]uman dignity is inviolable. It must be respected and protected.'[83]

This narrative of human dignity in international treaties illustrates state recognition, grounded in the Charter, that they bear a duty to prioritize human dignity in their treatment of citizens. Obviously the Charter preamble's expressed determination to reaffirm faith in, inter alia, the dignity and worth of the human person, is different from the more specific rules and agreements usually expressed in a treaty.[84] Indeed, fifty years ago, in its majority decision in the second phase of the South West Africa case, the International Court of Justice held that the preambular sections of the Charter constitute 'the moral and political basis' for the specific legal rules set out in the treaty.[85] But the border between law and morality is indeterminate at best and certain concepts, such as human dignity, rest in both systems.[86] Simply put, it would be illogical to reject the normative legal power of a value incorporated

[80] 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, Oviedo, 4 April 1997.
[81] Convention on the Rights of Persons with Disabilities and Optional Protocol, A/RES/61/106, 2006.
[82] Done at Dublin on 30 May 2008. Entered into force on 1 August 2010, CCM/77, 30 May 2008.
[83] The provisions of the EU Charter apply to national authorities only when they are implementing EU law. Art. 1, European Union Charter, 2012/3 326/02.
[84] It is important not to assume that all treaty 'rules' are necessarily specific. Indeed, less-than-precise language may serve as the best possible common denominator. As Philip Allott observed, a treaty 'is a disagreement reduced to writing.' 'The Concept of International Law,' 10 *European Journal of International Law* (1999) 31, para. 35.
[85] South West Africa Case, Second Phase, para. 50.
[86] In 1946, for example, the United Nations General Assembly declared that the crime of Genocide is contrary to 'moral law….' 'The Crime of Genocide,' Resolution 96 (I), Fifty-fifth Plenary Meeting, 11 December 1946. Indeed, it is impossible to separate law strictly from morality, politics and culture. S Marks, et. al., 'Responsibility for Violations of Human Rights Obligations: International Mechanisms,' in J Crawford, el. al. (eds.) *The Law of International Responsibility*, (Oxford University Press, 2010), p. 736. 'Law' is a synonym for the phrase 'moral rules.' Macmillan Dictionary, <http://www.macmillandictionary.com/thesaurus-category/british/moral-rules-and-rules-of-behaviour>.

into numerous international covenants, including operative articles of those conventions (as well as the vast majority of national legal systems, which I will discuss below).

B. Human Dignity and Customary International Law

In addition to the commitments of states to promote and protect human dignity expressed in treaty law, a majority of nations have expressly incorporated the value of human dignity into their constitutions. For example, research by Shultziner and Carmi reveals that, as of 2012, nearly 85% of countries use the term 'human dignity' in their constitutions.[87] Every one of the 49 constitutions enacted between 2003 and 2012 include the term, whether in the preamble, in sections containing 'fundamental principles,' in specific articles, or in some combination.[88] Whilst the use of 'human dignity' in preambles and fundamental principles may take the form of broad, overarching expressions of human dignity as a value,[89] its inclusion in operative constitutional articles serves to guide the implementation of those provisions.[90] For example, specific articles may protect the dignity of persons imprisoned or detained,[91] address the dignity of labor conditions and compensation,[92] use dignity as a guide

[87] D Shultziner & G Carmi, 'Human Dignity in National Constitutions: Functions, Promises and Dangers,' 2 and related data. Draft paper in author's possession.

[88] *Ibid*, 7 and 18 - 28. Several South American Constitutions refer to human dignity as a foundational norm, value or purpose of the state itself. Art. 1, (iii), 1998 Constitution of Brazil (Rev 2014), <https://www.constituteproject.org/constitution/Brazil_2014.pdf>; Art. 1, 1991 Constitution of Colombia (Rev 2005), <https://www.constituteproject.org/constitution/Colombia_2005.pdf>; Art. 1, 1992 Constitution of Paraguay (Rev 2011), <https://www.constituteproject.org/constitution/Paraguay_2011.pdf?lang=en>; Art. (9) (2), 2009 Constitution of Plurinational State of Bolivia, <https://www.constituteproject.org/constitution/Bolivia_2009.pdf>. According to the Charter of Fundamental Rights of the European Union, the Union is founded, inter alia, on the universal value of human dignity. 2000/C 364/01.

[89] By enshrining human dignity in a 'prime position,' such as the preamble or set of fundamental principles, states make this concept the normative and theoretical source of all other constitutional rights, or, a kind of 'mother right.' C Dupre, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Hart Publishing), 2015, p. 71.

[90] Shultziner & Carmi, 'Human Dignity in National Constitutions: Functions, Promises and Dangers,' 22 – 23.

[91] Art. 5, Constitution of New Zealand of 1852 (with revisions through 2014), <https://www.constituteproject.org/constitution/New_Zealand_2014.pdf?lang=en>.

[92] Art. 32 (3), Constitution of South Korea of 1948, <https://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/aba339f342ad7493c1256bc8004c2772/$file/constitution%20-%20korea%20-%20en.pdf>.

for guarantees concerning vulnerable groups such as the elderly, children and persons with disabilities,[93] etc.

When the term 'human dignity' is absent from the text of a national constitution, the concept still can imbue legal reasoning of the courts of that state. Whilst the United States 'Bill of Rights,' for example, does not specifically refer to 'human dignity,' its use in U.S. jurisprudence is 'intuitive.'[94] Accordingly, fundamental liberties enumerated in the 'Bill of Rights' extend to personal choices central to individual dignity and autonomy, such as decisions concerning marriage or the use of contraceptives.[95] Similarly, although the Canadian Charter of Rights and Freedoms does not mention the value expressly, the specific rights guaranteed therein 'are inextricably tied to the concept of human dignity.'[96] Hence, the majority of modern domestic legal systems expressly or implicitly mandate respect for human dignity.[97]

In spite of these national commitments, it is trite to observe that no consistent state practice protecting and respecting human dignity exists; on the contrary, examples of serious violations of human dignity around the world are common. Thus, under the traditional analysis of customary law development, certainly no rule of customary law obliging respect for human dignity exists.

Adherents to the 'modern' view of customary law formation, however, might argue that respect for human dignity has become a duty of customary international law, given the many state expressions, in national constitutions,[98] of the necessity to protect and promote this

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[93] Arts. 54 and 57, Constitution of Kenya (Revised 2010), <http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Kenya_19_2010_Constitution.pdf>.
[94] A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press, 2015), p. 206.
[95] *Obergefell v Hodges*, 576 U.S. ____, (2015), 10, 13, 21 and 28.
[96] *R v Morgentaler*, [1988] 1 SCR 30, 164.
[97] Del Vecchio, General Principles of Law, pp. 52 and 54.
[98] For example, in Germany, '[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Art. 1, Bundesministerium der Justiz, "Basic Law for the Federal Republic of Germany in

value. Widespread state ratification of international treaties and other documents that acknowledge the importance of human dignity constitute additional evidence of opinio juris. The validity of this claim, however, depends on whether interested parties accept the modern, deductive method of customary law formation. Indeed, any assertion that a rule of customary law exists is problematic when that claim turns solely on choices between diverging doctrinal perspectives.

Yet, the discussion should not end there because state practice and opinio juris *do* demonstrate a more nuanced rule of customary law concerning human dignity. The overwhelming international and domestic practice of states, and their expressions of obligation, evidence a minimal legal duty *to commit themselves* de jure to the protection and promotion of human dignity. Customary international law has evolved to this point; anything less would contradict the principle that the 'rights inherent to the human person precede, and are superior to, the State.'[99]

Finally, even absent a rule of customary international law pertaining to the protection of human dignity, courts (and other national institutions) may still look to this concept for

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the revised version published in the Federal Law Gazette Part III", classification no. 100-1, as amended by the Act of 21st July 2010 (Federal Law Gazette I), 944, <http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0014>; Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, <http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html>. Article 1 of the Constitution of Brazil states that Brazil is founded on, inter alia, 'the dignity of the human person.' <http://www.wipo.int/wipolex/en/text.jsp?file_id=218270>. The preamble to the Constitution of India assures the 'dignity of the individual.', <http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(3).pdf>. In Iran, the dignity of the individual is inviolate, except in cases sanctioned by law. Art. 22, Constitution of Islamic Republic of Iran, <http://www.iranonline.com/iran/iran-info/government/constitution-3.html>. In Kenya, one of the national values and principles of governance is human dignity. Art. 10 (b), Constitution of Kenya [Rev 2010], <https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>. In Nigeria, every 'individual is entitled to respect for the dignity of his person.' Art. 34 (1), Constitution of the Federal Republic of Nigeria, <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm#Chapter_4>. According to Article 7 of the Swiss Constitution, '[h]uman dignity must be respected and protected.',< http://www.legislationline.org/documents/section/constitutions)>.

[99] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo Separate Opinion of Judge Cançado Trindade, para. 198.

assistance in interpretation and application of domestic law.[100] Barriers exist 'that democracy cannot pass, even if the purpose that is being sought is a proper one.'[101] Human dignity, as a legal point of departure, is a constant reminder that rights, to be meaningful, must be respected.

C. Human Dignity and General Principles of Law

In the mid-twentieth century, Professor del Vecchio argued strongly that an obligation to protect human dignity exists as a 'general principle' of international law. Professor Del Vecchio argued that in an effective legal system, 'directive ideas and the informative principles of the entire system take precedence over the particular rules.'[102] The most important legal principles are those that give expression and respect 'to the absolute import of the human personality,'[103] i.e. dignity. Concurrently, the general principle of respect for human dignity cannot be divorced from other logically complementary principles; a dynamic that requires the coordinated application of legal precepts in a single regime.[104] Justice, for example, is an essential, complementary obligation for governments that strive to preserve human dignity amongst its constituents.[105]

Whilst, from a progressive perspective, Professor Del Vecchio's ideas may seem compelling, his interpretation appears to 'force' the broad concept of human dignity into the same, smaller box of more precise, and more consistently defined, general legal principles

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[100] Meron, Human Rights and Humanitarian Norms as Customary Law, p. 9; E Cameron, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection,' in Christopher McCrudden (ed.) *Understanding Human Dignity* (Oxford University Press, 2013), p. 474.
[101] *Adalah v Minister of Defence*, Judgment, President (Emeritus) A. Barak, HCJ 8276/05 [2006] (2) IsrLR 352, p. 377.
[102] Del Vecchio, General Principles of Law, pp. 24 – 25.
[103] *Ibid*, pp. 52 and 54.
[104] *Ibid*, p. 54.
[105] N Schrijver & L van den Herik, *Leiden Policy Recommendations on Counter-terrorism and International Law*, Grotius Centre for International Legal Studies, 1 April 2010, para. 6. Similarly, early in the nineteenth century, the United States Supreme Court observed that international law is in part unwritten and in part conventional; to 'ascertain what is unwritten we resort to the great principles of reason and justice, ….' *Thirty Hogsheads of Sugar v Boyle*, 13 U.S. 191, 198 (1815).

incorporated by states, such as the presumption of innocence or nullem crimen nulla poena sine lege.[106] Essentially, however, '[h]uman dignity is based upon a generality.'[107] If the development and respect for human dignity bears 'absolute import,' it would seem to enjoy a higher and wider power than the norms commonly considered 'general principles of law.' Indeed, South African courts recognize the notion of human dignity as a 'supreme'[108] and 'foundational'[109] value' that inspires and grounds the more specific rights enumerated in the South African 'Bill of Rights.'[110] It does a disservice to the importance and scope of human dignity if we attempt to clothe it with the label of a 'mere' general principle of law accepted by states.[111]

D. Human Dignity and Jus Cogens

Similar problems arise when we try to fit human dignity within the realm of preemptory or jus cogens norms. The concept of human dignity is much broader than individual preemptory norms and the breach of a preemptory norm actually constitutes an attack on the foundational value of human dignity, which underlies and reinforces the norm. For example, 'human trafficking' 'is a new form of slavery that violates the value of human

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[106] This norm prohibits prosecution of crimes that were not recognised as such at the time they were committed. W Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge University Press, 2011), p. 73.

[107] Barak, Adalah v Minister of Defence, Judgment, p.159.

[108] See *S v Makwanyane*, Case No. CCT/3/94, Constitutional Court of South Africa, 6 June 1995, para. 57, citing with approval Justice Brennan's concurring opinion in *Furman v Georgia*, 408 U.S. 238 (1972), p. 296, ('… the dignity of the individual is the supreme value ….'). Similarly, human dignity is the supreme value of the state of Israel.

[109] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, Case No. CCT 10/99, Constitutional Court of South Africa, 2 December 1999, para. 42. 'It is a value that informs the interpretation of many, possibly all other rights.' *Dawood v Minister of Home Affairs*, Case No. CCT 35/99, Constitutional Court of South Africa, 7 June 2000, para. 35.

[110] *The Minister of Home Affairs v Watchenuka*, Case No. 10/2003, Supreme Court of Appeal of South Africa, 28 November 2003, para. 26.

[111] The drafters of the International Covenant on Civil and Political Rights ('ICCPR') appeared to share this view that the concept of human dignity falls outside the scope of general principles of law. The drafters explained that the preamble of each human rights covenant 'sets forth general principles *relating to* the inherent dignity of the human person ….' 'Commission on Human Rights, 8th Session (1952), A/2929, Chap. III, Sec. 1' in M. Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987), p. 3 (emphasis added). What does constitute a 'general principle' is the notion that human dignity is one of the foundations of freedom, justice and peace. *Ibid*, Sec. 4, p. 4.

dignity.'[112] Thus, many of these preemptory norms – such as the prohibitions on slavery, torture and aggression -- are more susceptible to precise definitions (and obligations) then the foundational notion of human dignity.[113] Indeed, the real value of preemptory norms is their ethical power as norms for the *recognition* of human dignity.[114]

E. The Unique Place of Human Dignity

That leaves the almost universally accepted,[115] broad concept of human dignity with a different role in international (and domestic) law. Essentially, human dignity serves as a *guiding* legal concept for the creation and application of more specific legal norms and rules.[116] This analysis illustrates that human dignity is a starting point rather than a precise treaty or customary rule, a general principle of law, or a peremptory norm reasonably susceptible to (consistent) definition.[117] Yet it is an overarching legal point of departure, based in treaty and customary law, from which the majority of the world's governments navigate the conflicting interests, rights, beliefs and values inherent to communities and societies.[118] For at least the past seventy years, human dignity has constituted an obligatory

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[112] 2010 Report on the Application of the EU Charter of Fundamental Rights, European Commission, p. 24, <http://ec.europa.eu/justice/fundamental-rights/files/annual_report_2010_en.pdf>.

[113] Most jus cogens norms refer to factual situations or actions rather than to claims under international law. S Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?' in C Tomuschat & J MTheuvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff, 2006), p. 104.

[114] S Schmahl, 'An Example of Jus Cogens: The Status of Prisoners of War,' in Tomuschat & Theuvenin, p. 56.

[115] Professor Schmahl argues that the 'achieved "common conscience of values" in the modern international legal order, especially regarding human dignity and the inherent and equal value of every human being, is not disputed anymore.' *Ibid.*

[116] Professor Tomuschat describes how the concept of human dignity, in addition, to a moral value, serves as a tool for legal analysis because the notion helps us to construe legal rules and to balance common interests against the rights and interests of individuals. C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2014), p. 89.

[117] Shultziner & Carmi, 'Human Dignity in National Constitutions: Functions, Promises and Dangers,' 23. "[I]t is necessary not to confuse the moral ideal with the legal rule intended to give it effect.' South West Africa Case, Second Phase, para. 52.

[118] It would be wrong, however, to view human dignity as an absolute value; some (state) actions may violate human dignity but still be justifiable. D Kretzmer, 'Human Dignity in Israeli Jurisprudence,' in D Kretzmer & E Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002), p. 171.

starting point for the evolution of the legal conscience of the community of nations.[119] Human dignity must, therefore, serve as the starting point for the design and use of autonomous weapon systems as the community of states attempts to clarify the application of more precise rules of international law to these weapon systems.[120]

IV. A Modern Definition of Human Dignity in International Law

This section develops a definition of human dignity for application in modern international law.[121] I argue that human dignity comprises two components: the enjoyment of respect for one's human rights and personal autonomy.

Finding a consensus on a single, accepted concept of dignity is more difficult than mapping its presence in international law.[122] Michael Walzer, without mentioning the phrase 'human dignity,' succeeds as well as any modern thinker to capture its essence:

> 'Individual rights (to life and liberty) underlie the most important judgments that we make about war. How these rights are themselves founded I cannot try to explain here. *It is enough to say that they are somehow entailed in our sense of what it means*

[119] *Reservations to the Convention on Genocide*, Advisory Opinion, Dissenting Opinion of Judge Alvarez, ICJ Reports (191), p. 51, (describing the 'new international law reflecting the new orientation of the legal conscience of the nations').

[120] Jan Klabber argues that normative expressions should be presumed to have legal force, unless and until the opposite is proven. International Law, p. 39

[121] 'Dignity' derives from the Latin word *dingus* 'which means worthy of esteem and honor, due a certain respect, of weighty importance.' J Aguas, 'The Notions of the Human Person and Human Dignity in Aquinas and Wojtyla', 3 *Kritike*, 1 (June 2009), 40 - 41, note 5, <http://www.kritike.org/journal/issue_5/aguas_june2009.pdf>.

[122] Early considerations of human dignity and its relationship to law can be traced to Aristotle, who wrote of law that 'is based on nature.' Aristotle, Book I – Chapter 13, *On Rhetoric: A Theory of Civic Discourse*, G Kennedy (trans.), 2nd ed. (New York: Oxford University Press, 2007), p. 97. Aristotle observed that 'there is in nature a common principle of the just and unjust that all people in some way divine, even if they have no association or commerce with each other….' *Ibid.* Writing at the border of the middle ages and the renaissance, Thomas Aquinas believed that 'it is proper to justice, as compared with the other virtues, to direct man in his relations with others because it denotes a kind of equality …. Hence it is evident that right is the object of justice.' *The Summa Theologica*, II-II, Question 57, Art. 1, <http://dhspriory.org/thomas/summa/SS/SS057.html#SSQ57OUTP1>. For Aquinas, nothing in human affairs should violate 'natural justice' which emanates from the 'Divine right,' i.e. *human rights* bestowed by God: 'For the Divine Law commands certain things because they are good, and forbid others, because they are evil, while others are good because they are prescribed, and others evil because they are forbidden.' *Ibid.*

to be a human being. If they are not natural, then we have invented them, but natural or invented, they are a palpable feature of our moral world.'[123]

Unsurprisingly, notions of human dignity vary dramatically across societies[124] and critics of international law's reliance on 'human dignity' argue that it is a vague and vacuous term lacking a stable definition.[125] Others see it as an aspiration rather than a right.[126] It is true that a precise, scientific and universally accepted explanation of the scope and contours of human dignity may be beyond the skills of lawyers and philosophers. Nevertheless, it represents an ideal that serves as the foundation of many decades of progress in international law and international relations. While the definition of human dignity may vary, the reliance of statesmen-and-women on this principle to forge bridges between different peoples and cultures suggests that it is very real. As a starting point and guiding principle, human dignity plays two important roles: it helps define what humanity is and it creates the opportunity for a discussion on the limits of human power.[127] Human dignity's very strength lies in its interpretive capacities within a changing world.[128]

Thus, dignity is 'a flexible concept'[129] and multiple definitions of the concept exist.[130] For Michael Rosen, dignity arises from the 'unconditional and intrinsic moral value'[131]

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[123] M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 54 (emphasis added).

[124] R Howard & J Donnelly, 'Human Dignity, Human Rights, and Political Regimes,' 80 *American Political Science Review*, 3 (September 1986), 801 - 802.

[125] P Carozza, 'Human Dignity,' in D Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press, 2013), p. 1. However, in defence of the utility of the concept of human dignity, Carozza explains that the 'capaciousness of the word "dignity" allows it to represent an affirmation belonging to a wide array of different traditions, ….' *Ibid*, 3.

[126] Feldman, 'Human Dignity As a Legal Value,' Part 1. Feldman offers a particularly opaque definition of dignity: 'an expression of an attitude to life which we as humans should value when we see it in others as an expression of something which give particular point and poignancy to the human condition.' *Ibid*, 3.

[127] C Byk, 'Is Human Dignity a Useless Concept? Legal Perspectives,' in M Düwell et. al. (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014), p. 364.

[128] *Ibid*.

[129] O Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act', 7 *German Law Journal* 9 (2006), 770 (citing D Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994), p. 315.

[130] 'Human dignity will not necessarily have the same meaning in every legal system.' D Grimm, 'Dignity in a Legal Context and As an Absolute Right', in Christopher McCrudden (ed.), *Understanding Human Dignity*, (Oxford: Oxford University Press, 2013), p. 385.

possessed by every human as a moral agent. Hannah Arendt described a man's human dignity as 'his essential quality as man,'[132] realized through respect for human rights. John Finnis takes a broader view, describing the core of the notion of human dignity as 'unwavering recognition of the literally immeasurable value of human personality in each of its basic aspects.'[133] In this perspective, identity and autonomy play an important role in the construction of each person's dignity: '[i]ndividuals can only be selves--i.e. have the "dignity" of being "responsible agents" -- if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a lifetime.'[134] Thus, in totalitarian societies, realization of human dignity will be difficult, if not impossible, as 'the self-coercion of totalitarian logic destroys man's capacity for experience and thought just as certainly as his capacity for action.'[135]

Rhoda Howard argues that human dignity is not private, individual or autonomous but rather public, collective and governed by social norms.[136] Consequently, Howard defines human dignity 'as the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society.'[137] Indigenous groups, for example, may prioritise the realization of their collective dignity – affirmation of the value of

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[131] M Rosen, *Dignity: Its History and Meaning* (Cambridge, Massachusetts: Harvard University Press, 2012), p. 36.
[132] H Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1968), p. 297.
[133] J Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), p. 225.
[134] *Ibid*, 272. Similarly, in Latin America, twentieth century Catholic doctrine contained references to human initiative and responsibility as aspects of the concept of 'the dignity of man.' 'In our continent, millions of men find themselves marginalized from society and impeded from achieving their true destiny, whether due to the existence of inadequate and unjust structures or due to other factors such as selfishness and insensitivity.' 'Conclusions,' *The Church in the Actual Transformation of Latin America in Light of the Council*, II, Bogota, General Secretariat of Episcopal Conference of Latin America, 1968, p. 217, citing Paul VI, Enc. Populorum progressio, No. 30. Dignity, in this sense, arises from self-direction and freedom from certain forms of control and manipulation. Finnis, Natural Law and Natural Rights, p. 273.
[135] H Arendt, *The Origins of Totalitarianism*, p. 474.
[136] 'Dignity, Community and Human Rights,' in A An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992), p. 84. For example, non-liberal social systems (such as communism and fascism) rest on competing views of human dignity, all of which deny the centrality of the individual in society and the human rights of persons to make, and have enforced, claims against the state. R Howard & J Donnelly, 'Human Dignity, Human Rights, and Political Regimes', 80 *American Political Science Review*, 3 (September 1986), 801, 816.
[137] Howard, 'Dignity, Community, and Human Rights,' 81 *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992), 83.

their way of life – over the desires of individuals.[138] Similarly, in *Manual Wackenheim v. France*, the Human Rights Committee concluded that society's need to preserve public order (as a consideration of human dignity) can trump an individual's wish to obtain particular kinds of employment.[139]

Professor Peter Asaro describes dignity in the context of respect for human rights. He argues that if human rights are understood as *duties* of other persons to respect those rights, the term 'dignity' implies respect.[140] This argument is consistent with an observation made by Michael Rosen: '[t]o respect someone's dignity by treating them with dignity requires that one *shows* them respect, either positively, by acting toward them in a way that gives expression to one's respect, or, at least, negatively, by refraining from behaviour that would show disrespect.'[141]

Asaro and Rosen's concept of 'dignity' as the respectful treatment of the human person and their fundamental rights is simple and elegant and consistent with the development of international law starting with the United Nations Charter.[142] As described above, the value of human dignity finds expression in international treaty and customary law, in particular international human rights law and international humanitarian law. Indeed, during the drafting process of the Universal Declaration of Human Rights, the drafters included a

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[138] *Ibid*, 83.
[139] Communication No 854/1999, U.N.Doc. CCPR/C/75/D/854/1999, 2002.
[140] P Asaro, 'Human Dignity and Autonomous Weapon Systems,' Presentation to *Autonomous Weapon Systems – Law, Ethics, Policy*, Conference at European University Institute, 24 April 2015; Professor Myles McDougal observed that the 'contemporary image of man as capable of respecting himself and others, and of constructively participating in the shaping and sharing of all human dignity values, is the culmination of many different trends in thought, secular as well as religious ….' M McDougal, et al., *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven: Yale University Press, 1980), p. 376.
[141] Rosen, Dignity: Its History and Meaning, p. 58 (emphasis added). Similarly, Judge Christian Byk argues that 'dignity is the founding value of respect due to each human person, whatever his or her biological or social condition may be.' 'Is Human Dignity a Useless Concept? Legal Perspectives,' p. 363. Human beings, wrote Kant, possess a dignity (an absolute inner worth) by which they exact respect for themselves from all other rational beings in the world. I Kant, *The Metaphysics of Morals*, M Gregor (ed.) (Cambridge University Press, 2005), p. 186. Every human being is, in turn, bound to respect every other. *Ibid*, 209.
[142] 'Human dignity is the basis of all fundamental rights.' 2010 Report on the Application of the EU Charter of Fundamental Rights, p. 21.

reference to 'dignity' in Article 1 'in order to emphasize that every human being is worthy of respect.'[143] Thus, Article 1 refers to dignity, as opposed to specific rights, because it is intended to explain *why* persons have rights to begin with.[144] Similarly, the preambles of subsequent human rights covenants recognize that the rights contained in the treaties 'derive from the inherent dignity of the human person.'[145] Logically, this 'inherent dignity' has meaning only if it signifies and encompasses respect for the precise human rights emanating from it.[146]

In addition, a definition of human dignity that requires respect for human rights is sensible and effective regardless of whether the rights at stake are 'individual,' 'group,' 'civil and political,' social or economic,' etc. In divergent legal traditions, the concept of human dignity denotes the requirement of respect for persons.[147] The crux of the matter, therefore, is whether those rights accepted by a society are respected, not the form of the rights.

In addition to the importance of respect for human rights, the importance of personal autonomy is the second component of human dignity.[148] The concepts of 'respect for rights' and 'personal autonomy' are related but not necessarily synonymous. If we continue to interpret human dignity as the enjoyment of respect for human rights, it would be the antithesis of respect and a violation of human dignity to create structures that encourage the delegation of responsibility for the exercise of these rights. 'Responsibilities, as well as

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[143] M Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2002), p. 146.

[144] *Ibid.* Therefore, without the commitment to the idea of human dignity, modern human rights law would not exist. P Carozza, 'Human Rights, Human Dignity and Human Experience,' p. 620.

[145] International Covenant on Civil and Political Rights, 16 December 1966; International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

[146] If human dignity is a 'normative status,' then 'many human rights may be understood as incidents of that status.' J Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012), p. 18.

[147] Carozza, 'Human Rights, Human Dignity and Human Experience,' p. 616.

[148] Judge García-Ramírez described the concept of 'personal autonomy' as the broad capacity of every human being to conduct her own life, 'to choose the best means to do it, to use the means and tools that serve to that end, selected and used with autonomy as a sign of maturity and a condition of freedom – and to legitimately resist or reject undue influence and agression.' *Case of Ximenes-Lopes v Brazil*, Separate Opinion, Inter-Am. Ct. H.R., 4 July 2006, para. 10.

rights, enhance the dignity and integrity of the person'[149] and the fulfillment of responsibilities deepens our belief in our own dignity. Importantly for this dissertation, an individual bears 'judgmental responsibility' for an act or omission if it is appropriate to appraise her conduct against standards of performance.[150] The development of this form of responsibility, however, is a process without end as persons attempt to integrate their life experiences and their moral, ethical and political values.[151]

Thus, the dignity of right-holders arises from the acknowledgement of the capacity and autonomy of the person to bear the responsibility implicit in the right.[152] In democratic societies, for example, political leaders assume personal responsibility for their actions and omissions. They cannot transfer this responsibility.[153] Similarly, in a number of countries all citizens must, under the law, exercise their duty to vote in elections.[154]

Indeed, it is significant that history is replete with examples of collective efforts to secure greater human responsibilities, rather than initiatives to discard them.[155] That is

[149] *United States v Windsor*, 579 U.S. ____ (2013), p. 22.
[150] R Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Harvard University Press, 2011), p. 223.
[151] *Ibid*, pp. 107, 119 and 192 – 193.
[152] J Waldron, 'Dignity, Rights and Responsibilities' (New York University Public Law and Legal Theory Working Papers, 2010), p. 17, <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1245&context=nyu_plltwp>.
[153] *Ibid*, 14.
[154] For example, Australia, Commonwealth Electoral Act 1918 – Sect 245 (1), 'Compulsory Voting,' <http://www.austlii.edu.au/au/legis/cth/consol_act/cea1918233/s245.html>; Argentina, Codigo Electoral Nacional, Ley No. 19,495, Capítulo 1, 'Deber a Votar,' Artículo 12, <http://infoleg.mecon.govar/infolegInternet/anexos/15000-19999/19442/texact.htm>; Peru, Ley Orgánica de Elecciones, 'Ejercício del Derecho al Voto,' Artículo 7, <http://pdba.georgetown.edu/Electoral/Peru/leyelecciones.pdf>. The United States Supreme Court has held that '[o]ther rights, even the most basic, are illusory if the right to vote is undermined.' *Wesberry v Sander*, 376 U.S. 1 (1964), p. 17.
[155] For example, the seeds of the eighteenth century war of independence fought by the North American colonies against British rule lay in the principle of 'no taxation without representation,' i.e. without some measure of responsibility in the process of governance. D McCullough, *John Adams* (New York: Simon & Schuster, 2001), p. 61. After extensive campaigns, women were granted the right to vote in the United States in 1920 and in the United Kingdom in 1928. Nineteenth Amendment to Constitution of the United States, <https://www.congress.gov/constitution-annotated>, 'Equal Franchise Act 1928', <http://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/womenvote/parliamentary-collectionsdelete/equal-franchise-act-1928/>. During the twentieth century, national liberation movements in countries such as Vietnam and Mozambique sought to wrest political control from colonial powers. M Ishay, *The History of Human Rights: from Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), p. 338; The 1993 Interim Constitution of South Africa for the first time accorded black citizens all duties, obligations and *responsibilities* of South African citizenship. Constitution of the Republic of South Africa

because the ultimate objective of a democratic state is to make persons free to develop their abilities.[156] Thus, 'the greatest menace to freedom [and dignity] is an inert people'[157] and governments that arbitrarily restrict the rights of their citizens to make free choices, form their identities and develop their autonomy as persons violate human dignity.[158]

Conversely, dignity carries an obligation for individuals to retain their personal autonomy.[159] This implies a duty of self-respect: '[e]ach person must take his own life seriously; he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity.'[160] Anything less would render human dignity a dead letter.

With regard to particular rights, such as, for example, freedom of expression, individuals 'have a right, an indisputable, *unalienable, indefeasible* …' right to knowledge.[161] The right to thought, i.e. to think, must accompany this right to knowledge because '[t]rue knowledge is knowledge of why things are as they are, not merely what they are; ….'[162] The human capacity to think and reason, in particular about matters involving values and judgment, is a fundamental part of human identity and autonomy, and thus, human dignity.[163] Indeed, Professor Dworkin described 'judgmental responsibility' as 'the weft of all moral

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Act 200 of 1993, Chapter 2 (5), <http://www.govza/documents/constitution/constitution-republic-south-africa-act-200-1993#Citizenship and Franchise>.

[156] *Whitney v California* (Brandeis J. Concurring) 274 U.S. 357 (1927), p. 375.

[157] *Ibid.* Indeed, 'there are many truths of which the full meaning *cannot* be realized until personal experience has brought it home.' J Mill, 'On the Liberty of Thought and Discussion,' in *The Basic Writings of John Stuart Mill* (New York: The Modern Library, 2002), p. 44 (emphasis in original).

[158] Carroza, 'Human Rights, Human Dignity and Human Experience,' p. 618.

[159] Waldron, Dignity, Rank and Rights, pp. 140 – 141.

[160] R Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Harvard University Press, 2011), p. 203.

[161] J Adams, *A Dissertation on the Canon and Feudal Law* (1765), <http://grahamteach.com/wp-content/uploads/2012/08/A-Dissertation-on-the-Canon-and-Feudal-Law1.pdf> (emphasis added).

[162] I Berlin, 'My Intellectual Path', in H Hardy (ed.), *The Power of Ideas* (Princeton University Press, 2000), p. 7.

[163] See Schachter, 'Human Dignity As a Normative Concept,' 851 (concluding that human dignity 'includes recognition of a distinct personal identity, reflecting individual autonomy and responsibility'). George Kateb observes that 'when we speak of human dignity as the status of the individual or the stature of the human species, we are reaching for another sense of dignity, *the dignity of what is uniquely human in its identity.*' G Kateb, *Human Dignity* (Cambridge, Massachusetts: Harvard University Press, 2011), p.18 (emphasis added). Dignity, therefore, is an existential value that acknowledges the personal identity of every human being. *Ibid*, 10.

fabric.'[164] Over time, our powers of reason[165] evolve and provide new alternatives for addressing complex problems, demonstrating qualitative changes in human thought.[166]

Thus, the ability to exercise our autonomy contributes to our dignity.[167] The creation and protection of conditions necessary for humans to live an autonomous life become a 'normative priority' as part of a broader commitment to human dignity.[168] Phrased differently, a 'basic good' of life is the ability to 'bring one's own intelligence to bear effectively on the problems of choosing one's actions and lifestyle and shaping one's own character.'[169]

Indeed, the modern system of public international law is not a mere body of rigid rules, but a whole decision-making process.[170] The value of personal autonomy, consequently, is an important principle utilised by courts to interpret international human rights law.[171] In the context of treatment of persons suffering from mental illness, for example, human dignity demands 'the respect for the intimacy and autonomy of persons' receiving psychiatric treatment.[172] Accordingly, the inclusion of personal autonomy as the second component of human dignity is consistent with the development of international law since the drafting of the United Nations Charter.

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[164] Justice for Hedgehogs, p. 224.
[165] John Locke described the human mind's ability to reason about ideas as a 'great power.' 'Of Complex Ideas,' in *An Essay Concerning Human Understanding*,' (1690), Chapter XII, para. 2, <ftp://ftp.dca.fee.unicamp.br/pub/docs/ia005/humanund.pdf>.
[166] H Simon, *Reason in Human Affairs* (Stanford University Press, 1983), p. 106.
[167] See *Obergefell v Hodges*, 12 – 14 (holding that decisions about the rights to personal choices in matters such as marriage implicate concepts of individual autonomy and dignity).
[168] M Düwell, 'Human Dignity and Future Generations', in M Düwell et. al. (eds.), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press, 2014), p. 556.
[169] J Finnis, *Natural* Law and Natural Rights, p. 88 and pp. 100 – 101.
[170] M McDougal & N Schlei, 'The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security,' 64 *Yale Law Journal* (1955), 656.
[171] Case of Pretty v the United Kingdom, Judgement, para. 61. In Pretty, a terminally ill applicant challenged a U.K. law prohibiting the practice of 'assisted suicide.' The European Court of Human Rights held that, particularly in cases where the potential for serious harm existed, states may balance 'considerations of public health and safety against the countervailing principle of personal autonomy.' *Ibid*, para. 74. In *S.W. v the United Kingdom*, the Court noted the 'progressive development' of recognition that women enjoyed autonomy over their bodies. Judgment, EctHR, Application No. 20166/92, 22 November 1995, para. 40.
[172] Case of Ximenes-Lopes v Brazil, Judgement, para. 130. The Court concluded that mental illness 'should not be understood as a disability for determination' and that mental health providers should operate on the assumption that mental patients are capable of expressing their will, i.e. their autonomy. *Ibid*.

In the next chapter, I will demonstrate why the use of autonomous weapon systems, in some circumstances, will violate the human dignity of the groups and persons who operate them. In chapters five, six and seven, we examine how the value of human dignity informs the application of the principles and rules of international humanitarian law, international human rights law and international criminal law to the design and employment of autonomous weapons. In the last chapter, we will examine how the concept of human dignity should guide the assessment of the responsibility of states and arms manufacturers for the design and use of autonomous weapon systems, as well as the harm caused by them.

V. Conclusions

The perception of human dignity as a treaty based, legal point of departure enables international and domestic legal systems to resort to this principle in order to define more precise rights and obligations in specific circumstances. A definition of human dignity that encompasses both respect for human rights and the realization of personal autonomy reflects the development of modern international law. If, as I have argued, the function of law is to adjust the rights between persons and between individuals and the state, the notion of human dignity plays a dual role: 1) to help to define those rights and 2) to determine their proper scope. Thus, the starting point of human dignity helps to make law and also provides a barrier against the abuse of law.[173] Therefore, in the forthcoming chapters on the relationship between autonomous weapons and human dignity, international humanitarian law, international human rights law, international criminal law, and state responsibility, I will describe how the concept of human dignity speaks to the lawful design and use of autonomous weapon systems.

[173] For a discussion of how laws may lack the 'essential requirement of justice' and the perversion of law under the Nazi regime, see G Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (1946), 26 *Oxford Journal of Legal Studies* 1 (2006), 1 – 11.