

Introduction

DIGNITY AS A CONCEPTUAL BATTLEFRONT

On 14 February 1878, a Belgian vessel, en route from Ostend to Dover, ran into a storm and, as it approached Dover Bay, collided with the British steam-tug *Daring*. The ship, fittingly called *Parlement Belge*, was owned by the King of the Belgians, and it carried, in addition to mail, also passengers, merchandise and the King's royal pennon. Soon after the incident, the owners of the *Daring* instituted proceedings before the Admiralty Division of the UK High Court against Belgium on grounds of negligence and faulty navigation. The Belgian Attorney General took on the defence of the case and claimed sovereign immunity. The Admiralty Judge, Sir Robert Phillimore, overruled the objection and allowed the warrant to proceed.¹ On appeal, the Court of Appeal reversed the decision, on the ground that the *Parlement Belge* was, by virtue of the law of nations, immune from the jurisdiction of UK courts, as it was the public property of a foreign State. The relevant passage is worth-noting:

as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and *dignity of every other sovereign state*, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state.²

This case is significant because it was the first time the question of immunities of government ships other than warships was brought before the Court of Appeal in England. In the court's reasoning resonates the findings of an earlier

¹ *The Parlement Belge* (1879) LR4PD 129.

² *The Parlement Belge*, CA (1880) LR 5 PD 197, at 214–215. This case provides a detailed review of the legal authorities connecting sovereignty to dignity, including Blackstone, Vattel, Wheaton and others.

case, the *Schooner Exchange*, heard by the US Supreme Court in 1812.³ The relevance of these precedents is well known in the common law tradition. As noted in an early writing of Rosalyn Higgins, who would years later become the President of the International Court of Justice, the *Parlement Belge* case is one of the ‘most celebrated authorities’ in favour of the absolute theory of immunity followed and confirmed for a long time by the English Courts.⁴ Immunity was the logic corollary of sovereignty, itself understood as arising from the *dignity* owed by each State to every other State. Dignity was a shield ingrained as deep in the heart of international law as this body of law permitted, namely in the very concept of sovereignty.

And yet, a hundred years later, such dignity is hardly recognizable. From a shield protecting the legal position of States, dignity has been turned into a sword to cut through it in pursuit of higher values, which, in turn, are now at the very core of international law. On 24 March 1999, the majority of the members of the UK House of Lords converged in the conclusion that the UN Convention against Torture (CAT) had introduced a conventional exception to immunity from foreign criminal jurisdiction *ratione materiae*. It thus famously held that the former Chilean dictator Augusto Pinochet was not entitled to immunity in respect of charges of torture and conspiracy to commit torture for conduct falling under the UN CAT, in force in the UK from 8 December 1988 onwards.⁵ In the words of Lord Justice Millet,

the fundamental human rights of individuals, *deriving from the inherent dignity of the human person*, had become a commonplace of international law. Article 55 of the Charter of the United Nations was taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms. The trend was *clear*. [...] The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community. [...] By the

³ The *Exchange v. McFaddon*, 11 U.S. 116 (1812), at 123, ‘in the present case [...] the commander of the national vessel exercises a part of his sovereign power; and in such a case no consent to submit to the ordinary judicial tribunals of the country can be implied [...] it cannot be implied where the law of nations is unchanged – nor where the implication is destructive of the independence, the equality, and *dignity* of the sovereign’.

⁴ R Higgins, ‘Recent Developments in the Law of Sovereign Immunity in the United Kingdom’ [1977] 71(3) *AJIL* 423–437, 423.

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS Treaty Series, vol. 1465, p. 85, entry into force 26 June 1987 [CAT]. UK signed the CAT on 15 March 1985, entry into force in UK 8 December 1988.

time Senator Pinochet seized power, the international community had renounced the use of torture as an instrument of state policy.⁶

The regime of Pinochet was known for appalling acts of violence, such as torture, murder and the enforced disappearance of individuals, committed in Chile and elsewhere between 1974 and 1990. In 1999, even though the reasoning of the various members of the House of Lords shows profound differences of opinion, the majority agreed that the immunity to which Pinochet was entitled as a former head of State could not attach to acts of torture.⁷ The legal contribution of this decision, that is, the denial of immunity from criminal prosecutions of former heads of State for violations of the prohibition of torture in a State Party to the CAT, may appear as narrowly circumscribed. But its symbolic value is much deeper: the old conception of dignity as a shield was turned on its head and became the very sword through which a new conception was brought to a very specific and practical bearing.

The Pinochet case before the UK House of Lords is but one symbolically remarkable manifestation of a profound and fundamental trend that, by the late 1990s, was fully consolidated. It is a truism today to state that ‘humanity’ underpins much of international law, or that international law has been ‘humanized’ or, still, that dignity plays an important role within international law. More complex is to ascertain what conceptions of dignity have found expression in international law, when, through which specific legal concepts, and with what implications. The purpose of this study is to provide answers to these more granular questions, both theoretically and technically, through a study of the corpus of international legal theory and practice in the last one and a half centuries. These answers are, of necessity, tentative because they are the result of an interpretive exercise based on a substantial but unavoidably selective set of materials. Going back to the two cases briefly outlined in the previous paragraphs, although they are certainly different, they share a common feature. In their reasoning, the same concept is used in diametrically opposed meanings: *dignity* is associated with two distinct purposes. In the nineteenth century, *sovereign dignity* rules international legal affairs largely unchallenged. Only a minority voice introduces some dissonance, referring to the *dignity of the human being* to challenge the slave trade and subsequently

⁶ Judgment – *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* (On Appeal from a Divisional Court of the Queen’s Bench Division), House of Lords, 24 March 1999, Opinions of the Lords of Appeal for Judgment in the Cause, Lord Millet, 90.

⁷ *Ibid.*, Lord Hutton, 166e. For an analysis of the implications of this decision see A Bianchi, ‘Immunity v. Human Rights: The Pinochet Case’ [1999] 10 *EJIL* 237–277.

slavery itself or to call for restraints in the conduct of hostilities. Over time, this voice will become more and more assertive. The history of the twentieth century is that of the gravest encroachments on human dignity and, as a result, also of the greatest achievements in its international legal recognition. To borrow the words of the French luminary René Cassin, it is the very ‘protest of humanity’⁸ that will vindicate the legal recognition of human dignity in hard law. In the immediate aftermath of the Second World War, *human dignity* will be seen as the antidote of *sovereign dignity*. The dignity of the *human person* is placed above the writ of any individual State, curtailing State sovereignty and the legal implications of *sovereign dignity*. Yet, what is remarkable is the choice of the concept of ‘dignity’, out of so many other concepts, to assert the normative claim of a value against another. Even more remarkable is the fact that dignity has been progressively and, in many ways, sequentially at the root of State sovereignty and of the efforts to defend – against that sovereignty – the dignity of human beings.

Cassin’s words were proffered in a highly symbolic context. On 9 December 1948, the UN General Assembly was gathered in the *grande salle* of Palais de Chaillot in Paris. Only a few steps away, in 1940, Hitler had surveyed his new conquest. Eight years later, Cassin rose before the Assembly to offer his concluding remarks. What the delegates gathered in Paris were about to vote upon was, as Cassin put it:

the most vigorous, the most essential protest of humanity against the atrocities and the oppression which millions of human beings suffered through the centuries and in particular during and after the two world wars.⁹

Late at night, the Universal Declaration of Human Rights was put to the final vote. The Declaration crystallized the protection of human dignity in its very text, and it became the moral manifesto of the twentieth century, a refusal to condone what had just happened. Forty-eight countries voted in favour of the text; eight abstained. The just war had been won, and the wartime Alliance had voted on the first international instrument aiming at representing the basis of just peace.

This is where this research finds its territory. In its process of international legal recognition, human dignity came to nuance, then influence and, ultimately, fundamentally transform the very architecture of international law. This study examines when, where and how this development occurred and with

⁸ 382AP/128, dossier 3, ‘Discours de René Cassin, Délégué de la France à l’Assemblée Générale des Nations Unies à Paris’, 9 December 1948.

⁹ *Ibid.*

what implications. It explores the long and sinuous road followed by human dignity in international law. In a lapse of time of about a century and a half, important historical changes brought human dignity to the centre of international law and upset the rules governing relations between States, and, above all, between States and individuals. Human dignity entered international law by nuancing, reinterpreting and reformulating roles and principles that appeared to be immutable, transforming the architecture of international law from within. These changes occurred both at a slow or at a fast pace, in a peaceful or a tragic manner.

From sovereign to human dignity, the concept of dignity underlies the normative claims of two competing views of international law. From this perspective, this study explores the conceptual battlefront opened by the concept of human dignity. At the root of the modern conception of sovereignty lies the ancient idea of *dignitas* in its institutionalized expression of sovereignty. *Dignitas* conveyed a social stratification or, in other words, the different social importance attributed to classes or castes or strata of individuals.¹⁰ A term such as State ‘dignitaries’, as a synonym of high-rank State officials, still recalls the ancient use of *dignitas* and its links to social stratification. And it is against that stratification that the concept of dignity came to be used, in the Christian tradition, to affirm that all human beings are the holders of an inherent dignity, given to them by God.¹¹ The second conception of dignity thus challenges the distinction and/or the powers conferred by *dignitas*. This radically different understanding of dignity can, in turn, be conceptualized under two broad strands: first, a religious perspective, which looks at the concept as connected to the divine or to a metaphysical account;¹² second, what could be called a set of ‘secular’ accounts that have enabled the development of human rights.¹³ Both the religious and the secularized conceptions of human dignity entail significant limitations not only for the powers conferred by ‘sovereign dignity’ but, potentially, for its very recognition. The concept of human dignity assumes, in its entry into international law, a restraining role and, in a broader sense, a function of control over the first conception of *dignitas*, as applied to sovereigns and officials. Thus, what was originally an

¹⁰ H Spiegelberg, ‘Human Dignity: A Challenge to Contemporary Philosophy’ in *Steppingstones toward an Ethics for Fellow Existents* (Martinus Nijhoff 1986), 175–198.

¹¹ C Starck, ‘Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions’ in D Kretzmer and E Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Brill 2002), 180.

¹² A Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015).

¹³ S Moyn, *Christian Human Rights* (UPenn 2015).

analogy, once applied to human nature, developed into a limit to sovereign dignity. Human dignity, first in its religious and then in its secularized conceptions, was thus turned into a platform against sovereign dignity, a platform that would in time conquer, through a range of legal instruments, vast swathes of international law where sovereign dignity previously rule unchallenged.

This study provides a historical and legal investigation of human dignity as a normative value, the intellectual sources that drove and shaped its legal recognition, and the main legal instruments used to express it in international law. The analysis identifies the main vehicles through which human dignity finds expression across different fields of international law and the functions it performs. The historical dimension of the project unveils the roots of human dignity and situates it within the broader secularization process. Human dignity first entered the field of international law as a religious concept in the second half of the nineteenth century. It then underwent a transformation into a secularized concept, as a condition for its generalization after the Second World War. In both cases, however, it performed the function of placing limits to an older concept of dignity, which is still ingrained today in the very principle of sovereignty, with its many expressions. The study aims to provide a detailed topography of this tension in its complex legal manifestations across international law. However, the use of dignity as a platform has not come to an end with its extension to human dignity. As it will be shown in the last chapter of this study, an analogy can be made between, on the one hand, the use of human dignity to restrain sovereign dignity and, on the other hand, the growing references to the dignity of nature to put limits on the ‘species exceptionalism’ implied in a conception of international law based on human dignity. Indeed, the very assertion of human dignity to protect the individual against the powers of the State may in fact also lay the foundations for an over-exploitation of nature. This study sheds light on the first conceptual battlefield, namely that of human against sovereign dignity, but in unveiling the underlying logic at play in such conceptual antagonism, it discerns a no less important one that may unfold through this century, that between human dignity and the intrinsic value of nature.¹⁴

STRUCTURE OF THE STUDY

Valued human traits, such as intelligence, charm or strength, define us both in our own eyes and in those of others, setting a foundation for differential

¹⁴ G Le Moli, ‘Three Circles of Dignity’ [2019] 11 *JHRP* 1–13.

concerns in family, society and work.¹⁵ And yet, from a legal standpoint, such diversity does not provide grounds for a different treatment at the most basic level, as we are always due the same respect merely as persons. Our humanity, it is said, provides us with a status that deserves recognition from others. It seems, however, unclear what grounds this status. It is the idea of human dignity, it is argued, which sets the outer boundaries of what we may do to one another, applies to the same extent to every human being, and is rooted in our most distinctive human capabilities. It also provides the foundation for a set of individual human rights – which we possess by virtue of our humanity.¹⁶

This normative and secularized claim can explain why human dignity deserves recognition from a conceptual standpoint. But it does not tell us why it prevailed at specific points in history (the last century and a half), in specific contexts (international legal circles and, particularly, the circles that we associate today with international humanitarian law, human rights law, and criminal law), and with specific legal results (the recognition of principles, obligations, rights and even crimes). Thus, rather than starting from the assumption that human dignity demands recognition and looking for the implications of this statement, the aim of the study is to reconstruct when, where and how human dignity moved from a normative claim to a set of actionable legal concepts in international law and, later on, to an overall foundation of international law. This book therefore aims to understand the roots of the idea of dignity and, subsequently, reconceptualize it within the language of international law. To do so, it proceeds by induction, seeking to extract answers to the questions of *when, where and how* from a wide body of practice spanning one and a half centuries. From these answers, the study derives *implications* for the overall fabric of international law, and it projects such implications for a potential new conceptual battlefield, which is only identified but not fully investigated.

These more specific questions are necessary to render the broader research question, that is, the determination of the place of human dignity in international law, manageable. Indeed, human dignity is as pervasive as it is difficult to pin down in any concrete sense and, yet, this what this study attempts to do. Rather than a single answer, the investigation has led to several answers to each more specific question, which are brought together under a single analytical framework introduced in Chapter 1 and further developed

¹⁵ A Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Harvard University Press 2017), 1; see also J Waldron, *Dignity, Rank and Rights*, M Dan-Cohen (ed.) (Oxford University Press 2012).

¹⁶ See, for instance, G Vlastos, 'Justice and Equality' in J Waldron (ed.), *Theories of Rights* (Oxford University Press 1984), 141–176. See also Sangiovanni, *supra* n 15.

in subsequent chapters. In exploring, *when* human dignity transitioned from a normative claim to an actionable legal form, the book identifies different constitutive stages, understood as processes of progressive permeation of human dignity into the fabric of international law. These constitutive stages are analysed *where* they more clearly and powerfully permeated and indeed transformed international law, namely in the areas we call today international humanitarian law, international human rights law, and international criminal law. The analysis of these three areas seeks to induct patterns in the legal recognition of human dignity to understand *how* this process unfolded and through which legal instruments human dignity was given expression. Finally, the study pulls the different threads unwound in examining these more specific questions and offers a combined interpretation of the place of human dignity in international law. This analysis is organized in seven chapters.

Chapter 1 is devoted to the clarification of the methodological structure. It characterizes the analytical framework developed to study the place of human dignity in international law and, more specifically, it introduces its four main components: (i) the definition of the concept of dignity and of the main analytical distinctions used in the study; (ii) the characterization of the processes of progressive recognition of human dignity in international law, which are referred to in this study as ‘constitutive stages’; (iii) an analytical cartography of different legal instruments, understood as specific ways of formulating a norm (principles, rights, obligations, crimes), on which the analysis of the legal expression of human dignity in international law is subsequently conducted; and (iv) the main overall narrative and argument regarding the place of human dignity in international law developed in the study. This framework is an attempt at integrating three broader methodologies for the study of human dignity in international law, namely a historical or dynamic account of constitutive stages, a technical or positivist examination of legal instruments, and a conceptual analysis of dignity as a concept and of its overall place in international law. Components (i) to (iv) are each developed in one or more chapters of the study.

Chapter 2 focuses on the concept of dignity. It characterizes the two main competing conceptions subsequently analysed in the book, *sovereign* and *human* dignity. It begins by exploring the *intellectual origins* of the concept of dignity – with its religious and philosophical strands. Within human dignity, particular emphasis is laid on the Christian and Kantian (secularized) conceptions of human dignity due to their distinctive historical influence on the shaping of international law. The methodological approaches used here are therefore historical and philosophical in nature. On this basis, the first

component of the analytical framework is built, namely the conceptual categories of dignity that will, subsequently, be used to explore how dignity has found expression in international law. These two conceptions are a static component of the analytical framework that will be immersed in a dynamic perspective in Chapter 3. This conceptual clarification exercise is, however, necessary in order to trace the roots of the legal concept and to dispel one major challenge in providing an account of dignity in law, which is the tendency to see it everywhere.

Chapter 3 relies on these conceptions of dignity to examine the historical processes through which human dignity found expression in international law, narrating *when*, *why* and, most importantly, *which* conceptions of human dignity permeated international law. The primary objective of Chapter 3 is not to examine the emergence of human dignity in the international legal discourse in an exhaustive manner or to uncover its expressions in the various areas of law – which is analysed in detail in the following chapters of the book – but to demonstrate that those distinct conceptions of the past (sovereign and human dignity, the latter in its Christian and secularized strands) have permeated debates at the origins of international law, sometimes blending with – and blurring – each other. The concept of human dignity has been legally formalized in discernible historical stages, through the work of diplomats, scholars and humanitarian aid workers. More specifically, the study identifies three different *constitutive stages* in this formalization process in international law, specifically: (i) a first constitutive stage, spanning from 1850 until 1949 (when the main area of expression of human dignity is international humanitarian law); (ii) a second constitutive stage, from 1919 until 1966 (with rise of international human rights law); and (iii) a third constitutive stage, running from 1899 until 1998 (with the emergence and slow consolidation not only of international crimes but also of international criminal tribunals). These three constitutive stages of dignity are distinct but closely intertwined. The chronology of each of them is sufficiently distinct and recognizable and, very importantly, they each give expression to human dignity through different language and, specifically, by means of different legal instruments. The specificities of each process and area are discussed in separate chapters (Chapters 4–6), which discuss in detail the types of instruments most widely relied in each area to give expression to human dignity. Yet, the analysis in Chapters 4–6 relies on the combined application of the three components of the analytical framework (conceptions of dignity, constitutive stages, and legal instruments) and it reaches partial conclusions regarding the implications of human dignity for that specific area.

The emergence of international humanitarian law is viewed as the first constitutive stage. It begins in the second half of the nineteenth century, with human dignity's symbolic entrance into the fabric of international law with the adoption and entry into force of the Hague Law (Martens Clause, 1899 and 1907 Conventions).¹⁷ The process to impose legal restraints on the conduct of hostilities preceded the Martens Clause and the actual consolidation of this stage was only completed in the aftermath of the Second World War with the watershed represented by the adoption of the Four Geneva Conventions in 1949¹⁸ and, subsequently, the two Additional Protocols of 1977.¹⁹ Thus, the historical processes referred to in this study as constitutive stages extend over long periods of time, with a range of different legal manifestations which are singled out as key milestones.

The same applies to the origins and span of the second constitutive stage, characterized by the rise of international human rights law. Its first expressions in the 1920s (which echoed developments in connection with slave trade and slavery in the nineteenth century) and later in 1945 (with the UN Charter and the UNESCO Constitution²⁰) must be considered in the light of the decisive adoption of the Universal Declaration on Human Rights, in 1948,²¹ and the adoption of the Convention against Genocide²² later that year. But it is difficult to consider these entry points, however important, as sufficient for the consolidation of human dignity in the form of human 'rights'. In earnest, such consolidation cannot be said to have been completed until the adoption of the two human rights Covenants in 1966, the International Covenant on Civil and Political Rights

¹⁷ The Hague Conventions of 1899 (II) and 1907 (IV) respecting the Laws and Customs of War on Land.

¹⁸ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, Art. 63, 6 UST 3114, 75 UNTS 31; Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 UST 3217, 75 UNTS 85; Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3316, 75 UNTS 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287.

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

²⁰ Charter of the United Nations, 24 October 1945, 1 UNTS XVI (UN Charter); UNESCO Constitution, 16 November 1945, 3 Bevans 1311.

²¹ Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

²² Convention on the Prevention and Punishment of the Crime of Genocide, GA Res. 260 (III) A, 9 December 1948 (entered into force 12 January 1951).