HUMAN DIGNITY ACCORDING TO INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS

LA DIGNIDAD HUMANA SEGÚN LOS INSTRUMENTOS INTERNACIONALES SOBRE DERECHOS HUMANOS

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ABSTRACT: According to international instruments on human rights, the dignity of the human person is the foundation of human rights, and both human dignity and human rights are inherent to the human being, universal and inviolable. This understanding of human dignity is not a fruitless truism, but the solid foundation on which to build a world community under the rule of the new *ius gentium*: the International Law for Humankind. Moreover, it is the clue to answer many questions raised by the new world of globalization and of the exponential growth of international rules.Consequently, there is a need to a common doctrine on a notion of human dignity which will allow the implementation and adjudication of the aforementioned instruments, at the service of the human person and in conformity with the juridical conscience which they reflect. Philosophy of Law concepts which can be traced back to Aristotle provide that notion. According to these concepts, the demanding nature of "human dignity" sustains the notion of "legal personhood", and both notions pertain to the realm of Law and Right, not of Morale and Values. Thus, human dignity and human rights are and must be, respectively, a basic principle and a necessary part of any Law system, including international law.

RESUMEN: *Según los instrumentos internacionales sobre derechos humanos, la dignidad de la persona humana es el fundamento de los derechos humanos, y tanto la dignidad humana como los derechos humanos son inherentes al ser humano, universales e inviolables. Este entendimiento de la dignidad humana no es una perogrullada estéril sino el sólido cimiento sobre el que edificar una comunidad mundial sometida al nuevo ius gentium: el Derecho Internacional para la Humanidad. Además, es la clave para responder a muchas cuestiones planteadas por el nuevo mundo de la globalización y del aumento exponencial de las normas internacionales. En consecuencia, se necesita una doctrina común sobre la noción de dignidad humana que haga posible el cumplimiento y aplicación judicial de los mencionados instrumentos, al servicio de la persona humana y conforme a la conciencia jurídica que*

Fecha de recepción del original: 1 de agosto de 2011. Fecha de aceptación de la versión final: 26 de octubre de 2011

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reflejan. Conceptos de Filosofía del Derecho que se remontan hasta Aristóteles proporcionan esa noción. Según esos conceptos, la naturaleza exigente de la "dignidad humana" sostiene la noción de "personalidad jurídica", y ambas nociones pertenecen al campo del Derecho y no de la Moral y de los Valores. Por tanto, la dignidad humana y los derechos humanos son y deben ser, respectivamente, un principio básico y parte necesaria de cualquier sistema jurídico, incluido el derecho internacional.

KEY WORDS: human dignity; legal personhood; human rights; international instruments on human rights; world community.

PALABRAS CLAVE: *dignidad humana; personalidad jurídica; derechos humanos; instrumentos internacionales sobre derechos humanos; comunidad mundial.*

I. INTRODUCTION

What is the question?

The reflections of this contribution have been unleashed by the message conveyed by Samantha Besson and John Tasioulas in a book edited by them last year: the urgent need to develop the studies of Philosophy of International Law [1].They find the cause of this need in two trends: the exponential growth of international law, and the lack of attention to that branch of Philosophy by the present renaissance of Philosophy of Law in the English speaking world[2].

It has been correctly diagnosed that the growth of international instruments was a response to "the ever intensifying demands from peoples everywhere for the greater production and wider sharing of human dignity values"[3]. Therefore, to make sure that the ongoing *avalanche* of international rules will, indeed, give people their rights and

[1] BESSON, S., AND TASIOULAS, J. (Editors), *The philosophy of International Law*, Oxford University Press, Oxford, 2010, 611 pp.

[2] Whether the lack of attention to Philosophy of International Law is true or not, specially in the rest of the world is a matter of opinion. Several General Courses of The Hague Academy of International Law have dealt with philosophical questions of that Law. Among others: Lord Walter G. F. Phillimore on *Droits et devoirs fondamentaux des Etats*, in 1923, or the ones of Rolando Quadri in 1952 about *Le fondement du caractère obligatoire du droit international public*. There is no lack of recent books under the title *Philosophy of International Law* or similar, such as the ones written by Fernando R. Tesón, Agnes Lejbowicz, Robert Kolb, Aaron Fichtelberg and others. Further, since the year 2000, *Iura Gentium*, of the University of Florence publishes a section on *Philosophy and History of International Law*. *Iura Gentium* is the magazine of the centre with the same name founded and directed by Danilo Zolo, one of the authors of the book published by Besson and Tasioulas; since 2006 the journal *Philosophy of International Law* is published by the University of Aberdeen. A similar undertaking as the one of Besson and Tasioulas was the *Symposium on Method in International Law* by the *American Journal of International Law* in 1999. There is absolutely no lack of Spanish and non Spanish speaking authors that have dealt with these philosophical questions, such as Antonio Truyol, Juan Antonio Carrillo and José Antonio Pastor (including General Courses of The Hague Academy of International Law relevant to philosophical questions in 1959 and 1981; 1996; and 1998 respectively), Charles de Visscher, Alfred Verdroos, Antonio CanÇado Trindade and many others, without forgetting Agustín Basave and his very complete *Filosofía del Derecho Internacional* (1989).

[3] MCDOUGAL, M. S., LASSWELL, H. D. AND CHEN, L-C, *Human Rights and World Public Order. The basic Policies of an International Law of Human Dignity*, Yale University Press, New Haven and London, 1980, p. XIX.

frame a just international order, we do need a solid rock foundation to serve the ultimate object of those rules, i.e., the human being.

There is no denying that the trends mentioned by Besson and Tasioulas are parallel to another one: the trend in international law to have not only States, but also persons as their direct object[4]. In the words of Judge Antonio Cançado Trindade: "The rescue of the condition of the human person as subject of international law is the most precious legacy of the international legal thinking of the second half of the twentieth century"[5].

The best expression of this third trend is the proliferation of human rights treaties. The authoritative voice of the Human Rights Committee of United Nations (UNHRC) has addressed this question many times, either stressing that it is the individuals who are entitle for human rights, or recalling the obligation of States to guarantee that individuals enjoy all human rights recognised by the Covenant on Civil and Political Rights[6].

The latest expressions of this protection are the mere acceptance of the principle of universal jurisdiction and the possibility of individuals to file personal complaints against States both at global and regional levels[7]. The European Union itself has made no bones to lay as a foundation of the Union the fundamental rights of the human person, whose respect is a *conditio sine qua non* to be a member of it[8]; those fundamental rights are also a general principle of the whole Union's Law[9].

Those opinions concur with the one of the founder of International Law, Francisco de Vitoria, when he stated in the XVI Century that "everything which is needed to govern and to keep the world pertains to Natural Law"[10]. *Nihil novum sub solem*.

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[4] *Cf.* TEITEL, R., *Humanity´s Law*, Oxford University Press, Oxford, 2010; TOMUSCHAT, CH., "International Law: Ensuring the survival of mankind on the eve of a New century, General Course of Public International Law", 1999-II, vo 281, pp. 149-155*;* CANÇADO TRINDADE, A.A."International Law for Humankind: Towards a new Ius Gentium", *RCADI*, 2005, vo. 316, pp. 285-318.

[5] *Op.cit*, vo 317, p.275.

[6] "General Comment No. 3: Art. 2 (Implementation at the national level), paragraph 1, HRI/GEN/1/Rev.9 (Vol. I)", p. 174. "General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant", HRI/GEN/1/Rev.9 (Vol. I)", paragraph 8, p. 212. "General Comment No. 26: Continuity of obligations", HRI/GEN/1/Rev.9 (Vol. I) paragraph 4, p. 223. "General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", HRI/GEN/1/Rev.9 (Vol. I), paragraphs 2 and 9, pp. 423 and 245.

[7] *Optional Protocol to the International Covenant on Civil and Political Rights*, 16th December 1966; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10th December 2008; *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome 4th November 1950, articles 34 and 35; *American Convention on Human Rights "Pact of San Jose, Costa Rica"*, 22nd November 1969, article 44; *Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights*, June 1998, articles 5 (3) and 34 (6).

[8] *Treaty of the European Union*, OJEU (2010/C 83/01) article 2: "The Union is founded on…respect for human rights…".

[9] *Idem*, article 6 3. : "Fundamental rights… shall constitute general principles of the Union's law".

[10] *De Iure Belli*, 19.

On the one hand, international instruments on human rights satisfy the need of Philosophy of International Law to rest on two aspects rightly identified by Kingsbury and Straumann in their contribution to the book edited by Besson and Tasioulas[11]: firstly, to respond to enduring questions, such as what is due in justice to any person anywhere; secondly, to be a reaction to individual historical circumstances. On the other hand, as Allen Buchanan points out correctly in the same book, there is a need to justify that the rights identified by those treaties are genuine universal human rights[12], in order to legitimise those treaties and the whole international order.

Similarly, concerning the questions raised by universal jurisdiction, Luis Jimena says that "these new profiles bring with themselves the need to deepen the development of the core values of the Political Constitution (human dignity)"[13].

The object of this contribution is, firstly, to address our attention to the fact that according to international instruments on human rights the ultimate foundation or principle of the latter is the dignity of the human person, and, secondly, to provide a possible understanding to the *opinion iuris* behind them.

I will frame my comments under just two points of reference: on the one hand, an exchange of views with the doctrine contained in the book edited by Besson and Tasioulas, on the other hand, international instruments on human rights themselves; by international instruments I mean not only international treaties, but other documents, such as the Charter on Human Rights. Surprising though it may seem, I will do it hand in hand with Hamlet (Act II, scene 2; Act III, scene 1).

Be aware that this short paper is not about the actual implementation and adjudication of international instruments on human rights *vis a vis* human dignity, and even less about national or international policies or practices on human rights. It is a contribution about doctrine on Philosophy of Law concepts, universal concepts useful to any branch of Law, which may help to decide and to judge such an adjudication, policies and practices. This is an academic task to be carried out before actually implementing those instruments.

II. THE DIGNITY OF HUMAN BEINGS

To *be* or *not to be*, that is the question.

The co-authors of the book edited by Besson and Tasioulas fail to analyze the concept of human dignity; further, the editors do not even mention it in the index. In the section

[11] KINGSBURY, B., AND STRAUMAN, B., "State of Nature versus commercial sociability as the basis of International Law", BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, p. 51.
[12] BUCHANAN, A., "The legitimacy of International Law", BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, pp. 79-96.
[13] JIMENA QUESADA, L., *Dignidad humana y justicia universal en España*, Thomson-Aranzadi, Pamplona, 2008, p. 233.

devoted to Human Rights, John Skorupski deems it unnecessary to study the foundation of human rights, provided they are protected by international law and are genuinely universal[14]. When Joseph Raz quotes John Tasioulas saying that "human rights are those possessed by virtue of being human"[15], he does not elaborate further, and when he studies the supposed lack of foundation of human rights, he does not take into account the classical tradition I will point out later; without denying that people have universal human rights because of their humanity alone, Raz argues that they have their origin in a variety of interests and contingencies of the current system of international relations. Similarly, Robert Howse and Ruti Teitel stop short at saying that human rights are premised on common humanity[16].

As an exception, James Griffin admits that "if the weight we attach to rights is not to be arbitrary, we must have a sufficiently rich understanding of the value that rights represent…a sufficiently rich understanding of the dignity, or worth, of the human person, whatever the proper understanding of that now widely used vague phrase is. A satisfactory account of human rights, therefore, must contain some adumbration of the term `human dignity´…in its role as a ground for human rights"[17]. But he does not follow that road.

Turning ourselves towards the International Bill on Human Rights, and to instruments on Human Rights in general, we note that almost all of them state literally that human dignity is the foundation of human rights.

This proclamation is usually made in the preambles of the best known instruments, including the Helsinki Final Act, though, in some cases, in articles as well[18].

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[14] "Human rights", BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, pp. 357-373.

[15] "Human Rights without foundations", BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, pp. 321-337.

[16] *Global Justice, poverty, and the International Economic Order*, BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, p. 449.

[17] GRIFFIN, J., "Human Rights and the autonomy of International Law", BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, pp. 341-342.

[18] *Charter of United Nations*, 26th June 1945, *Preamble*: "Determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...". *American Declaration of the Rights and Duties of Man*, Bogotá, Colombia, 2nd May 1948: "Whereas: The American peoples have acknowledged the dignity of the individual". *Universal Declaration of Human Rights*, 10th December 1948, *Preamble:* "Whereas recognition of the inherent dignity… of all members of the human family is the foundation… justice and peace in the world… Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person". *International Covenant on Civil and Political Rights*, 16th December 1966, *Preamble*: "Liberty, Justice and World peace have as foundation the recognition of the inherent dignity of all members of the human family; Recognizing that these rights derive from the inherent dignity of the human person." *International Covenant on Economic, Social and Cultural rights*, 16th December 1966, *Preamble*: "...in accordance with the principles…of the inherent dignity and of the equal and inalienable rights of all members of the human family…"; *Optional Protocol to International Covenant on Economic, Social and Cultural rights*, 10th December 2008, *Preamble*: "*Considering* that…recognition of the inherent dignity…of all members of the human family is the foundation of…justice…". *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10th December 1984, *Preamble*: "Recognizing that those rights derive from the inherent dignity of the human person..." *Convention on the Rights of the*

Other Conventions whose aim is the protection of certain groups of persons and the punishment of different crimes, such as the ones concerning traffic of persons or torture, also proclaim that they are based on the dignity of the human person[19].

The *Treaty of the European Union* considers dignity to be one of the values upon which the Union is founded and one of the principles which will guide its external action[20]; *Dignity* is the heading of the very first Title of the *Charter of Fundamental Rights of the European Union*, which declares the first five rights protected by it. As an exception, the *Convention for the Protection of Human Rights and Fundamental Freedoms,* Rome 4th November 1950, and the *Statute* of the Council of Europe, London 5th May 1949, do not mention dignity as the foundation of human rights.

The aforementioned UNHRC also mentions dignity explicitly as the foundation of human rights: "…the Committee believes that here the Covenant [on Civil and Political Rights] expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person…"[21].

Child, 20th November 1989, *Preamble:* "Considering that…recognition of the inherent dignity…of all members of the human family is the foundation of…justice…. ". *Final Act. Conference on Security and Cooperation in Europe*, Helsinki, 1st August 1975: "They will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development...". *Universal Declaration on the Human Genome and Human Rights*, Paris, 11th November 1997: "Recognizing that research on the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as a whole, but emphasizing that such research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics...A. Human dignity and the human genome..Article 1...The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity".
International Covenant on Economic, Social and Cultural rights, article 13: "Recognizing that these rights derive from the inherent dignity of the human person*; American Convention on Human Rights*, "*Pact of San José, Costa Rica*", 22nd November 1969, article 11 1.: "Everyone has the right to have his honour respected and his dignity recognize".

[19] *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* , AG 317 (IV), of 2 December 1949: "Whereas prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person" ; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, Adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956: "Mindful that the peoples of the United Nations reaffirmed in the Charter their faith in the dignity and worth of the human person…no one shall be held in slavery or servitude". *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, article 2: "Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights".

[20] Articles 2 and 21. 1.

[21] "General Comment No. 29: Article 4: Derogations during a State of Emergency", *HRI/GEN/1/Rev.9 (Vol. I)*, paragraph 13 (a) p. 238.

So is the case of the Committee on Economic, Social and Cultural rights, also of UN: after making an appeal to "the fundamental principles upon which the Covenant [on Economic, Social and Cultural Rights] is premised", the Committee refers to "`the inherent dignity of the human person´ from which the rights in the Covenant are said to derive"[22].

Equally, the Institut de Droit International adopted in Santiago de Compostela a resolution according to which *human rights are a direct expression of the dignity of the human person*[23]

In my opinion, this all but unanimous coincidence show us that "there is a widespread agreement about the essential role that the concept of human dignity plays as the rationale for human rights", as Mary Ellen O´Connell has said[24]. Such a widespread explicit mention of human dignity as the foundation of human rights cannot possibly be just a mere declaration of the obvious, or a superficial declaration of intents, but the tip of the iceberg of a *mens legislatoris*, of the will and ratio of the authors. Consequently, dignity may turn out to be a basic criterion for the interpretation and implementation of those instruments, and it may be the cornerstone of what Alfred Verdross called the "common juridical conscience of peoples".

As Professor Carrillo Salcedo has very well declared, the principle of human dignity is a constitutional principle of international law which gives binding character to the various declarations on human rights, and it is difficult to find a subject in which is more clear the universal *opinio iuris*[25].

This very conclusion seems to be shared by principle III of the *Declaration on the promotion among Youth of the Ideals of Peace, Mutual respect, and understanding between Peoples* which states that "young people shall be brought up in the knowledge of the dignity and equality of all men…" And principle VI ads: "A major aim in educating…to be deeply attached to be noble ideals of…the dignity and equality of all men"[26].

Being the foundation of Rights, human dignity is a principle of rights, an origin or source from which rights and also other secondary principles come from. Nobody will put into question that is one of those general principles of Law which the International Court of Justice should apply in its decisions, according to article 38 1. c) of its Statute.

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[22] "General comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)", *HRI/GEN/1/Rev.9 (Vol. I)* paragraph 7, p. 12.

[23] "The Protection of Human Rights and the Principle of Non intervention in Internal Affairs of States", Resolution 18th September 1989, *http://www.idi-iil.org/idiF/navig_chron1983.html*.

[24] "The Foundations of `Ius Cogens´: International Law, Natural Law, and the ´Imago Dei!`", *CTI Working Group on Theology and International Law*, Draft June 2009, p. 14.

[25] *Soberanía de los Estados y Derechos Humanos en el Derecho Internacional contemporáneo*, Tecnos, Madrid, 1995, pp.100-106 and 135.

[26] AG 2037 (XX) 7th December 1965.

Equally, the principle of human dignity is part of the *ius cogens* of article 53 of the Vienna Convention on the Law of Treaties and of paragraph 4.4.3. of the Guide to Practice on Reservations on Treaties of the International Law Commission[27].
As a consequence, it has a preeminent role in the international legal system. As cleverly Judge Kotaro Tanaka stated in his acclaimed dissident opinion in 1996: " If we accept the fact that convention and custom are generally the manifestation and concretization of already existing general principles, we are inclined to attribute to this third source of international law the primary position vis-à-vis the other two[28]".

III. THE CHARACTERISTICS OF HUMAN DIGNITY:

What a piece of work is a man! How Noble in Reason! In apprehension how like a god!

Joseph Raz, James Griffin and John Skorupski, in their above quoted articles in the book edited by Besson and Tasioulas, seem to focus rather on whether human rights are or not *recognized or enforced universally*, than on whether they *are* universal and inviolable. When Joseph Raz describes human rights as those "regarding which sovereignty-limiting measures are morally justified", he expresses just one of the consequences of the universality and inviolability of human dignity and human rights. Griffin reaches the conclusion that not all "moral rights" should be considered "human rights" and that the universality of the latter depends on their level of abstraction. Skorupski considers to be the characteristics of human rights: "universality" together with "cross-state demandability" and "efficacy"; according to him, a human right is "essentially universal" because it is a "moral right". The latter are "morally demanding", but not because a philosophical criterion, but because the community endorses them. Again, the characters of human rights depend on an external factor.

International instruments do not just mention the dignity of the human person as the foundation of human rights; they outline some characters of that dignity, as well. Indeed, they do mention that dignity is inherent to the person. They also say that rights which stem from that dignity, or at least the most important ones, are universal and inviolable. It goes without saying that international treaties do not elaborate on those concepts; very justly so: this is not the role of treaties but of scholars. International treaties are not and should not be writings on Philosophy of Law, as the present paper is. However, what the treaties say must be juridically accounted for because, as Judge Cançado Trindade would say, they reflect a juridical conscience which is the material source par excellence of international law[29].

So, it seems that the approaches of the contributions of the book edited by Besson and Tasioulas are unable to account for the conception of human dignity according to

[27] *http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_8_2011.pdf*
[28] South West Africa (Liberia vs. South Africa), Second phase, Judgement of 18th July 1966, Dissenting opinion of Judge Tanaka , ICJ, *Reports, 1966*, p.300
[29] *Op. cit.*, vo. 316, pp. 172-202.

human rights instruments. According to the latter, universal and inviolable human rights are founded on the dignity inherent to human beings, and not on external factors. To try to understand the treaties I have no alternative but to address myself to other quarters, so help me Shakespeare and my former professor, Javier Hervada[30] !

Let us take as the starting point the proclamation of dignity as **inherent** to the person. Most international instruments express the idea *expressis verbis*[31]; others mention unnamed characters of human personality[32].
To my understanding, *inherent* means that dignity pertains to the realm of the *to be*, not to the realm of the *to do* or the *to have*[33]. Therefore, it is not something that depends on what we *do*; neither on which are our virtues nor on the *goals* we are looking for; let alone on what we *have* or what our social or professional *position* is. It is not even something we are *born with*, but something we *are*. We *are* worthy whatever our life or circumstances, whatever judgments we deserve. Already Francisco de Vitoria stated that natural rights are enjoyed by everybody, whether Christian or not, good or bad[34].

Human beings *are* rational and free: this is the ultimate Philosophy of Law basis of human rights. It is noteworthy that even though Greek and Roman philosophers admitted this rationality, and, up to a point, human liberty, they did not grasp the notion of human dignity. This one was first recognised by Christian theologians, such as St Agustin or St Thomas Aquinas, based on the concept of men as images of God. The *Declaration of Independence of the United States of America*, 4th July 1776, also

[30] For a comprehensive study on human rights, *Vide*, HERVADA, J., *Lecciones prodopeúticas de Filosofía del Derecho*, 4ª edº, Eunsa, Pamplona, 2008, 647 pp.
[31] *International Covenant on Civil and Political Rights*: *Preamble*: "Recognizing that these rights derive from the inherent dignity of the human person" ; *International Covenant on Economic, Social and Cultural Rights*: article 13: "…Recognizing that these rights derive from the inherent dignity of the human person …"; *Convention on the Rights of Persons with Disabilities*, 13th December 2006, : *Preamble*: (h)" Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person;" *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:* Preamble, "Recognizing that those rights derive from the inherent dignity of the human person...";*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, 4th April 1977, Preamble: "...Convinced of the need to respect the human being both as an individual and as a member of the human species and recognising the importance of ensuring the dignity of the human being...Conscious that the misuse of biology and medicine may lead to acts endangering human dignity" ; *Council of Europe Convention on Action against Trafficking in Human Beings*, Warsaw, 16th Warsaw, 2005, *Preamble*: "…Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being...". *Universal Declaration on the Human Genome and Human Rights*, article 1: "The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity".
[32] *The American Declaration of the Rights and Duties of Man, Preamble*, Bogotá, 2nd may 1948: "The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality"; *American Convention on Human Rights, "Pact of San José, Costa Rica"*, 22nd November 1969: "Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality…".
[33] AQUINAS, T. St. , *Summa Theologiae,* I, q. 42, art. 4, ad. 2.
[34] *De Indiis*, I; III, 1.

grounds the ultimate foundation of rights in God: "We hold these truths to be self-evident, that all men...are endowed by their Creator with certain unalienable Rights…".

Thanks to reason we are able to be conscious of ourselves, to guide our conduct, to give unity and order to our being, to be the masters of ourselves and to relate with others socially. Thanks to freedom we are able to choose our own means in order to achieve what our reason discovers or chooses as an end. As a consequence, we are responsible for our conduct. This association of liberty with dignity and with responsibility has been highlighted by the Preamble of the *Declaración Americana de los Derechos y Deberes del Hombre*, 2nd May 1948, when saying that "duties express the dignity of that liberty". This sort of being is unique on Earth, the maximum way of being[35], not even other beings, such as animals, are either free or rational, so they cannot have dignity; much less in the case of vegetal or mineral beings. The question Joseph Raz puts: why "humanity alone" grounds universal human rights?[36], has one and clear answer: because they are the only rational and free beings on Earth, because human dignity is a unique feature of human beings.

Consequently, human dignity might be described as the expression of the excellence of being human. Needless to say, it is not the dignity which corresponds to a given position, such as the one of being a parent or a child, a monarch or a citizen, a diplomat or an ambassador.

Whatever the dependence of humans on Nature in general and on animals in particular, this dependence does not deny human beings their unique dignity. The reason why is that dependence is a link between something that is used and somebody who uses it. A piece of bread, a brush or a cow is not superior to a human being because he/she needs it to satisfy his/her material or spiritual needs; they are an object that humans consume, use, or enjoy. For human beings, they are means to an end, but not the other way round.

Being inherent also means that dignity is attributed to the human being as a unity, thus, only humans in their entirety are entitled to rights. This is the foundation of their interdependence and indivisibility.

So there is not a separate dignity of the body and of the spirit; there are not on the one hand rights of the spirit, and on the other one rights of the body. Because of the unity of the being and identity of humans, dignity is participated by their soul and all and every part of their body. The kidney is not just a piece of flesh but the kidney of a human being.

The unity between the dignity of the human body and human spirit has been grasped within the juridical system of the European Union. A Directive on biotechnological

[35] AQUINAS, T.St., *Op.Cit.*, I, q. 29 ad 2.
[36] *Ibid*., p. 334.

inventions recognized the need to safeguard human dignity and prohibited the patent of human bodies at any stage[37].

Further, the Advocate General of the Court of Justice has stated that "the principle of human dignity… must be applied not only to an existing human person, to a child who has been born, but also to the human body from the first stage in its development, i.e. from fertilization"[38]. This has been recently reconfirmed by the Court sentence in the Case C-34/10, Brüstle, according to which the human ovum "as soon as fertilized" is a "human embryo"[39], thus excluding their patentability according to the abovementioned Directive.

Being inherent to humans, dignity is also **universal**, and so can be deduced from the fact that human rights based on them are universal. All treaties on human rights enunciate *passim* these rights using words such as *all*, *everybody*, *every person* and so forth, and this is confirmed by the UNHRC[40].

Because dignity derives from the very being of humans, it is **inviolable,** i.e., it must be immune from any coercion. The European Union has expressed the idea quite neatly: "Human dignity is inviolable. It must be respected and protected".[41] Inviolability is

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[37] *Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions* (OJEU L 213, 30th July 1998): "(16): Whereas patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person; whereas it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented…". Article 5: "1. The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions".

[38] Court of Justice of the European Union, Opinion of the Advocate General in Case C-34/10, Brüstle v Greenpeace eV, , *Press Release No 18/11*, Luxembourg, 10 March 2011.

[39] *http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0034:ES:HTML*

[40] "General Comment No. 15: The position of aliens under the Covenant", *HRI/GEN/1/Rev.9 (Vol. I)* paragraph 1, p. 189: "…each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" (art. 2, para. 1). In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness". "General Comment No. 21: General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)", *HRI/GEN/1/Rev.9 (Vol. I)* Paragraphs 3 and 4, p. 202-203: "…respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons….Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". "General Comment No. 28: Article 3 (The equality of rights between men and women)", *HRI/GEN/1/Rev.9 (Vol. I)*, paragraphs 2 and 3, p. 228: "All human beings should enjoy the rights provided for in the Covenant [On Civil and Political Rights], on an equal basis and in their totality…The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that States parties take all necessary steps to enable every person to enjoy those rights".

[41] *Charter of fundamental rights of the European Union*, article 1.

tantamount to saying that human dignity is absolute, as St Thomas Aquinas stated in the XIII century[42].

According to that universality and inviolability, the UNHRC sustains that the denunciation of human rights treaties is not allowed[43]; it also affirms that the compatibility of a reservation to international human rights treaties must be established by reference to legal principles; must not depend on the will of the States and must meet a number of conditions; it also upholds that some rights do no admit reservations at all[44]. Equally, UNHRC upholds that there are "guarantees that States parties must respect, regardless of their legal traditions and their domestic law…"[45]; it also considers that "the protection of human rights becomes all the more important, particularly those rights from which no derogations can be made"[46].

The Guide to Practice on Reservation to Treaties 2011 of the International Law Commission (ILC) has very well distinguished between reservations to non-derogable rights when there is a matter of *ius cogens*, and non derogability when it is just a matter of the will of the States and the principles and object of a treaty. However, instead of prohibiting reservations to treaties which reflects a rule of *ius cogens*, it just states the obvious, which is, that the reservation does not affect the binding nature of that imperative norm which shall continue to apply as such to the reserving State [47]. Please note, that according to the Comments on that Guide, the prohibition of derogation applies not only to treaty relations but also to all legal acts, including unilateral acts[48].
I am unable to deal in this limited paper with the paramount question on whether the regulation of reservations in human rights treaties and the actual practice of States have been consistent with the universality and inviolability of human rights. The reason is that these lines refer to the *mens legislatoris* of international instruments on human rights, not to their implementation or adjudication. The ILC is continuing its efforts to give guidelines, and its aforementioned Commentaries for the Rules on Reservations has advocated for a specific paragraph on human rights treaties (3.1.12) taking into account the object and purpose of the treaty in question, the unity of these rights, the concrete importance of the right and the impact of the reservation[49].

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[42] *Loc. Cit.*
[43] "General comment No. 26: Continuity of obligations", *HRI/GEN/1/Rev.9 (Vol. I)*, pp.222-223.
[44] *Vide*, "General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant", *HRI/GEN/1/Rev.9 (Vol. I)* paragraph 18, pp. 210-217.
[45] "General comment No. 32: Right to equality before courts and tribunals and to a fair trial", *HRI/GEN/1/Rev.9 (Vol. I)*, paragraph 4, p. 248.
[46] "General Comment No. 05: Derogation of rights (Art. 4)", *HRI/GEN/1/Rev.9 (Vol. I*), paragraph 3, p. 176.
[47] Paragraphs 3.1.5, 3.1.5.4, and 4.4.3.
[48] "Text of the draft guidelines constituting the Guide to practice on reservation to treaties, with commentaries, as provisionally adopted by the International Law Commission", p. 466, http://www.un.org/law/ilc/
[49] Pp. 477-480.

For the moment, I will just concur with Professor Carrillo Salcedo on the need for specific rules tougher than the ones of the Vienna Conventions[50]. These could form the system of "objective determination" that Judge Cançado Trindade advocates for[51].

IV. THE DEMANDING NATURE OF HUMAN DIGNITY.

In the book edited by Besson and Tasiolulas, John Skorupski grasps that rights give rise to demands; yet, he fails to explain the reason of this demand: human dignity[52].

Yet, I would further pinpoint that, *strictu se*nsu, rights ***are*** the demands and that the origin of these demands is human dignity itself. Human dignity is able to be the foundation or principle of human rights because it **demands** from others to respect what belongs to our nature. What we are becomes a *must be*, a rule, for others. And whatever a human being *has* is called a *right*, so others must not take it from him or her, otherwise, they must give it back. This is the *ius*, the *suum* of Classical philosophy from Aristotle and Roman lawyers onwards [53].

The juridical expression of the demanding nature of the human being is the notion of **legal or juridical personhood**, or **personhood** *tout court*. It means that each and every human person **is** the subject of rights and obligations. Very accurately, article 6 of the Universal Declaration on Human Rights proclaims that "everyone has the right to recognition everywhere as a person before the law". The identification of human beings and human persons is also recognised in treaties concerning children[54]. Other international instruments are not so precise in this attribution of personhood to all and every human[55].

Admittedly, the identification of the notions of *human being* and *human person*, or the moment since a human being exists, are very controversial, decisive and divisive questions indeed. The aforementioned opinion of the Advocate General of the European Union recognized human dignity before childbirth, for the first time ever within the European Justice system and the already mentioned sentence in the Case C-34/10, Brüstle, confirm that as soon as there is fertilization there is a human embryo. Yet, both stop short from recognizing that unborn human beings are human persons. However, according to José Manuel Sobrino, the use of the concept of *human dignity* instead of the concept of *dignity of the human person* has it made possible the aforementioned

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[50] CARRILLO SALCEDO,J.A., "Droit international et souveraineté des états", *RCADI*, 1996, vo. 257, p.p.181-191.
[51] *Op.cit*, vo. 317, pp. 66-78.
[52] *Human rights*, BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, pp. 357 and ff..
[53] AQUINAS, T. St. , *Op.cit*., II-II, q.57, ad.1; II-II, q. 58, ad 1; and II-II, q. 62, ad. 1. *Vide*, HERVADA J., *¿Que es el Derecho?* 2nd edº, Eunsa, Pamplona, 2008, 216 pp.
[54] *Convention on the Rights of the Child*, article 1:"… a child means every human being below the age of eighteen years…" …; article 2: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind…".
[55] *African Charter on Human and Peoples´ Rights*, 17th June 1981, article 5: "Every individual shall have the right to...the recognition of his legal status…".

opinion of the EU Advocate General; further, it has also allowed the adoption of regulations and directives of the EU concerning human embryos, in spite of the different conceptions concerning embryos among member States.[56].

Nevertheless, it is my philosophical conviction that any human being is a person because it has reason and liberty, and, thus dignity; it is equally part of my philosophy that a human being exists once his genetical identity is established, i.e., from fertilization onwards[57].

Obviously, personhood is indivisible: you are or you are not subject of rights. Each and every human being, is, indeed, a subject of rights, of all the rights he/she actually has in a given moment, which are not always the same throughout his/her life. Before being a diplomat, I did not have the right to my salary, but I actually had other rights, such as the right to study to become a diplomat. Once I became a diplomat, my personhood allowed me to have the right to my salary as a diplomat; had I not been a person, I would never have had that right; yet, to have it I needed to be both a person and a diplomat.

From the above we are able to deduce that our rational and free nature, our dignity and personhood are the elements which make a *relation* a *juridical relation*, and s*omething* (what Romans called a *res*) a *right*. Right and Law are first and foremost about our nature, not about documents or forms.

Insofar as the demands of human dignity relate to ourselves or to God, they belong to the realm of Morale. Insofar as these demands relate to other persons, they belong to the realm of Right and Law[58]. Morale and Right are two different approaches to the same realities: human being, human dignity and human behavior. These same realities (objet *quod*) are approached from different angles (object *quo*), with different consequences in distinctive areas.

The failure to grasp these differences of approach is the very root of the confusion between Right and Morale and of the contradictory notion of *moral rights* which can be detected all throughout the book edited by Besson and Tasioulas, and in many other quarters, indeed. By contrast, this paper has a philosophical approach, not a moral approach. Accountability is not fundamentally a matter of individualistic morality, as Crisp Roger, another contributor to the aforementioned book, believes[59]; accountability, in this context, is a matter of Justice.

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[56] "Título I. Dignidad", MANGAS MARTÍN, A. (Dir) *Carta de los Derechos Fundamentales de la Unión Europea. Comentario artículo por artículo*, Fundación BBVA, Bilbao, 2008, pp. 124-125.

[57] As a step forward towards this recognition may be interpreted the above mentioned sentence of the Court of the European Union, Case C-34/10, Brüstle.

[58] AQUINAS, T.St., *Op.cit.*, I-II, q. 96, ad 3 ; q. 100, ad 2; and II-II, q. 58, ad 5.

[59] "Ethics and International Environmental Law", BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.* , pp. 474-475.

Consequently, is not the value of "moralisation" that gives a solid legal foundation to *ius cogens* or the notion of international crime, as professor Pastor suggests, but the inherent demands of the dignity of the human person[60].

Needless to say, the basic Law principle: *pacta sunt servanda* is the immediate expression of this *demandability* when two persons commit themselves reciprocally. It is the dignity of both that demands this *servanda,* not a paper or a ritual, though these may be the evidence of their will and rationale; it is their personhood which has made it possible to both to relate to each other juridically[61].

The Banjul Charter and the Charter of Fundamental Rights of the European Union consider dignity to be a right[62]. The respective articles 3 of the Geneva Conventions seem to mix the consideration of dignity both as a right and as a measure of rights, concept which I will deal with later. The consideration of dignity either as a right or as a basis of Human Rights was one of the more discussed issues about dignity in the European Convention that draw the aforementioned Charter[63]. Eventually dignity was considered both a right and a foundation of rights, as we have seen at the beginning of this paper. This makes it easier to appeal to dignity in the EU legal system. Nevertheless, I do not find it very accurate. Dignity is a dimension of human nature; consequently, any human being *is dignified* anyhow. On the contrary, a human being can be deprived by others or by him/her of the *respect* and *protection* which human dignity demands. Torture and humiliation do not deprive a person of its dignity: they are an offense to it.

Human dignity demands persons to respect "Nature" because it demands them to behave according to reason. Reason tells persons that they must behave according to "Nature" and persons are able to realize it; liberty makes them responsible for that behaviour. Consequently, it is not a dignity of animals or "Nature" that demands by itself a given behaviour from persons.

This idea is reflected in the conventions on animals of the Council of Europe: they never recognize any rights held by animals, but duties of persons and States to behave according to the nature of animals[64].

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[60] PASTOR, J.A., *Curso de Derecho Internacional Público y Organizaciones Internacionales***,** 14th edº Tecnos, Madrid 2011, p. 29; ÍDEM, « Le droit international à la veille du vingt et unième siècle : normes, faits et valeurs », *RCADI,* 1998-IV, vo. 274, , pp. 294 and ff.

[61] *Cf*., BASAVE FERNÁNDEZ DEL VALLE, A., *Op. cit.*, pp. 97-103.

[62] *African Charter on Human and Peoples´ Rights* adopted in Nairobi, June 27, 1981, article 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status…". *Charter of fundamental rights of the European Union,* article 1, puts dignity as the first right of a person.

[63] SOBRINO HEREDIA, J.M., *Op.Cit*., p. 121.

[64] *European Convention for the protection of animals for slaughter*, Strasbourg, 10th May 1979: "Considering that it is desirable to ensure the protection of animals which are to be slaughtered...Considering that slaughter methods which as far as possible spare animals suffering and pain should be uniformly applied in their countries...Considering that fear, distress, suffering and pain inflicted on an animal during slaughter may affect the quality of the meat..."; *European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes*, Strasbourg

By contrast, the *Earth Charter* is inconsistent when it "affirms [s] faith in the inherent dignity of all human beings" [I, 1. B] while at the same time proclaims in the *Preamble* that "Humanity is part of a vast evolving universe"; similarly, it may be misleading to say that "every form of life has value regardless of its worth to human beings" [I, 1. a][65].

As belonging to the *to be* of humans, human dignity exists independently of any written recognition by any law, whether international or internal. That is precisely the consensus of international instruments on human rights, as we have seen *supra*. Neither will it be contested that it is one of the "basics" of the so called *Ordre Public*, which must be respected by any written law and applied by any Court.

Consequently, rights directly derived from human dignity do not depend on any human written law or on any majority decision. As Judge Tanaka said: "The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society, which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element… A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory… Human rights have always existed with the human being. They existed independently of, and before, the States…Who can believe as a reasonable man, that the existence of human rights depends upon…legislative measures…of the State and that, accordingly, they can be validly abolished or modified by the will of the State?"[66].

Obviously, human rights immediately derived from human dignity are the paragon of human rights and, when incorporated to international treaties, they are non-derogable *per* se, as opposed to non-derogable rights because any given treaty has chosen to make them so.

The EU Charter, Title I, on *Dignity*, only includes the rights to life and to the integrity of the person, plus the prohibitions of torture and inhuman or degrading treatment or punishment and the prohibition of slavery and forced labor. The right to life is the most

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18th March 1986, *Preamble*: "Recognising that man has a moral obligation to respect all animals and to have due consideration for their capacity for suffering and memory". In even more precise terms the *European Convention for the protection of Pet Animals*, Strasbourg, 13. XI. 1987: "Recognising that man has a moral obligation to respect all living creatures and bearing in mind that pet animals have a special relationship with man...Considering the importance of pet animals in contributing to the quality of life and their consequent value to society...Considering the risks which are inherent in pet animal overpopulation for hygiene, health and safety of man and of other animals..." ; *European Convention on the Protection of Animals during International Transport (revised)*, Chisinau, 6th November 2003: "…Aware that every person has a moral obligation to respect all animals and to have due consideration for their capacity for suffering...". The text of the *European Convention for the Protection of Animals kept for Farming purposes*, Strasbourg, 10th March 1976, also reflects the idea of the duties of persons to behave according to the nature of animals.

[65] *http://www.earthcharterinaction.org/invent/images/uploads/echarter_english.pdf*

[66] *Op. cit*., pp. 297-298.

admitted example of non-derogable human right; recognizing it as the *conditio sine qua non* to enjoy any right, the UNHRC says: "... is the supreme right from which no derogation is permitted…The expression `inherent right to life´ cannot…be understood in a restrictive manner"[67]. Liberty of conscience is another example. It is the first basic right of human behavior, because it immediately relates to the basic operations of reason and free will: to judge and to decide. An immediate and necessary consequence of this right is the right to the objection of conscience. The right to political participation is another basic demand of human dignity, nowadays worldwide extended and rooted[68].

Precisely because of the arguments above, I do not feel comfortable with the use of the term "value" to refer to human dignity or it demands. "Values" depend on the market and may be purely subjective, while dignity is objective and it only depends on how the human being *is*. Similarly it is my conviction that international law needs a Natural Law approach which will put it into contact with natural principles rights rather than an axiological approach that will put it into contact with ideals and values, as professor Pastor proposed in the General Course at The Hague Academy of International Law mentioned before.

This conception of human rights reflected in international instruments coincides with the one of Aristotle: "Justice of the Polis is either Natural or Positive. Natural is what everywhere is equally binding and does not depend on the various opinions of people; positive, the one which, in principle, may be one way or the other"[69]. So, as Gaius said, all political and legal systems should respect natural rights and abide to them[70]. This is the conception of Roman law: "civilis ratio civilia iura corrumpere potest, naturalia vero non potest"[71]. For Aristotle, Natural Law -or Rights- are part of the law of the land, together with written law. This unity of Law is one of the most important, albeit apparently forgotten legacies of Classical Greek and Roman juridical traditions.

I completely adhere to professor Carrillo Salcedo when he says that the recognition of rights which the human person has on its own has not only enlarged the scope of international law but also modified its nature because now the legal links between citizens and political powers are also ruled by international law[72].

Of course, in my conception, I would stress that what professor Carrillo says is so by virtue of the dignity of the human person and the juridical character of human rights, and not only by virtue of the incorporation of human rights in positive international law. In that sense I would understand the aforementioned Resolution of 1989 of the Institut de Droit International when it says that the obligations of States to ensure the

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[67] "General Comment No. 06: The right to life (art. 6)", *HRI/GEN/1/Rev.9* (Vol. I), paragraphs 1 and 5, pp. 176 and 177.
[68] *Vide* my "El derecho de participación política*"*, *Humana Iura*, 1994, vo. 4, pp. 11-29.
[69] *Ethys*. V, 7, 1134 b); VIII, 13, 1162 b).
[70] GAIUS, *Inst*. I, 158; Idem, *Digesta*, 4, 5, 8.
[71] *Vide*, HERVADA, J., *Síntesis de la Historia de la Ciencia del Derecho Natural*, Pamplona, Eunsa, 2007, 136 pp.
[72] « Droit International et souveraineté des États», RCADI, 1981-IV, vo. 173, pp. 145-152.

observance of Human Rights derives from the recognition of human dignity, albeit it adds: *as proclaimed* in the Charter of United Nations and in the Universal Declaration of Human Rights.

As professor Antonio Truyol has highlighted, even the main theorists of the modern concept of sovereignty, recognized in the XVI century that there are laws and rights before and above sovereigns[73], so Jean Bodin: "all princes on earth are subject to the laws of God and Nature and to certain laws common to all peoples…absolute power…does not extend in any manner to the laws of God and Nature…[regarding contracts]…the prince is not above his subjects…no earthly prince has power to impose taxes on his subjects on his own will, neither to seize what does not belong to him…when I say honest, I mean honest according to Natural Law; in this case, it is obvious that all princes are subject to it because they are natural laws"[74].

It must be highlighted that Dignity is a reality in actual persons. In the book edited by Besson and Tasioulas, Danilo Zolo hits the nail on the head when he asserts that*:* "the doctrine of human rights cannot be conceived of as a utilitarian theory that values…people in an aggregate way…as if they were fungible and interchangeable"[75].

Indeed, human nature only exists in concrete human persons, as Boetius already said in the VI century, "persona est naturae rationalis individua substancia"[76]. Because of this, human dignity and the respect it demands can only be attributed to individuals. Thus, to respect human dignity, a theoretical or legal recognition is not enough; there is no escaping to an *hic et nunc* respect to individuals of body and flesh, who are unique in every possible sense. The Universal Declaration on the Human Genome and Human Rights seems to grasp this idea when saying in article 2 (b) that dignity makes it imperative to respect the uniqueness of the individual.

This individuality also means that persons are not a mere part of "Nature", or of society, or of a family or any other group, as animals are part of Nature. Each and every person is essentially different from other creatures. Consequently, persons cannot be just a means for anything or for anybody; they are an end in itself as Kant said. Persons live in society, interact with "Nature", and are members of a family or of a social group. However, they are not a sort of slice of them, as if their being would be shared with "Nature", with another person or with a group.

So, it is just not right to try to strike a balance between the human dignity of one person and the one of another person; or between the human dignity of one person and the public good of society. Everybody's human dignity must always be respected and protected.

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[73] TRUYOL Y SERRA, A., "Théorie du droit international public", RCADI, 1996, vo. 257, pp. 64-67.
[74] *Les six livres de la République*, I, VII and VIII. Cf., FRANKLIN, J.H., *Bodin. On sovereignty*, Cambridge University Press, Cambridge, 2004.
[75] "Humanitarian militarism?", BESSON, S., AND TASIOULAS, J. (Editors), *Op.cit.*, pp .559-560.
[76] *Liber de persona et duabus naturae*, III, PL, 64,1343.

International treaties on biotechnology are consistent with that approach when saying that "the interests and welfare of the human being shall prevail over the sole interest of society or science" [77], or when they consider that "the instrumentalisation of human beings through the deliberate creation of genetically identical human beings is contrary to human dignity and thus constitutes a misuse of biology and medicine"[78].

Human dignity is not a common good or part of it, precisely because of being real in actual persons. This is different from the fact that the concept of dignity is a common feature of the notion of person. Dignity is a good that **is** in the person, not a good to be shared by a group as a road, an idea or the air.

This is why I disagree with the opinion according to which a treaty, as any law, should respect dignity because it is a part of the common good. Any law must respect dignity because it is a *conditio sine qua non*, a *prius*, a principle which stands ahead and above any law.

What must be a common good is the *respect* and *protection* of human dignity; the conditions thanks to which everybody's dignity may be respected; and to promulgate and to apply rules according to human dignity. This is the reason why the Handbook of Human Rights for Parliamentarians of United Nations is very accurate when it says: "Human rights **are universal** because they are **based on *every* human** being's dignity"[79], not because human beings share an actual reality called dignity.

V. CONSEQUENCES:

In form and moving, how express and admirable!

As regards the application of rules concerning human rights and human dignity, the first consequence of the uniqueness of the dignity of the person is the application of those rules according to the principle of **non-discrimination,** and so is prescribed by international treaties[80].

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[77] *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, article 2 on the *Primacy of the human being*.

[78] *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*, Paris 12th January 1998, fifth Consideration.

[79] *http://www.ohchr.org/Documents/Publications/training13en.pdf* , p.4.

[80] *European Convention on the protection of Human Rights and Fundamental Freedoms*, article 14: "Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". *Convention against Discrimination in Education*, Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960: article 1 1.:"…`discrimination´ includes…inflicting on any person or group of persons conditions which are incompatible with the dignity of man" ; *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963,

This principle prescribes not to take into account any other thing than the title or cause of a right in order to give it or not to give it. The cause is that it is contrary to human dignity to have different levels of personhood[81].

As professor Javier Hervada would say, partiality is the most serious and first form of injustice because it directly and immediately denies the same dignity to everybody. Consequently, for the UNHRC "non-discrimination [is] a basic and general principle relating to the protection of human rights"[82]; equally, for the International Court of Justice it is a "flagrant violation of the purposes and principles" of the Charter of United Nations[83].

Non-discrimination applies to any juridical relation, whether natural or positive, private or public, internal or international, because is a principle derived from human nature. In that sense, the European Convention on Human Rights and its Protocol 12 complement each other very fittingly. The former protects against discrimination in the rights set forth in the Convention, the latter extends this protection to any right set forth by law or, even more generally, to acts of any public authority[84] .

I believe it useful to distinguish between the principle of non-discrimination and the wider principle of equality, though in the European Union Law they are used as synonyms[85]. The principle of non-discrimination means equality in the recognition of

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article 1*:* "Discrimination between human beings on the ground of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights,…."*; 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,*: "Article 1 –Purpose and object Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine" *; Protocol Nº 12,* to the ECHR, Rome, 4th November 2000, *article 1* "General prohibition of discrimination . The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. 2. .No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph".

[81] AQUINAS, T.St.., *Op.Cit*, II-II, q. 63.

[82] "General comment No. 28: Article 3 (The equality of rights between men and women)", *HRI/GEN/1/Rev.9* (Vol. I) paragraph 4, p. 228.

[83] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. *Reports*, 1971, p. 16.

[84] *European Convention on the protection of Human Rights and Fundamental Freedoms*, article 14: "Prohibition of discrimination. The enjoyment of the rights and freedoms set forth in this Convention…" *Protocol Nº 12*, to the *ECHR*, Rome, 4th November 2000, article 1: "General prohibition of discrimination. The enjoyment of any right set forth by law shall be secured without discrimination on any ground… 2. .No one shall be discriminated against by any public authority on any ground…". Cf. Edel, Fréderic, *The prohibition of discrimination under the European Convention on Human Rights*, Strasbourg, Council of Europe, 2010, pp. 35 and ff.

[85] *Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, article 2: "Concept of discrimination 1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin". Cf., Edel, Fréderic, *Op. cit*., *passim*.

the personhood or of the concrete right of any human being. The principle of equality has other manifold applications; it may pertain to the fitness between what is due and what is given, and this can be proportional or identical. It may pertain to the equality between the subjects of a relation; if there is not such an equality, there are power relations or other sort of relations (such as parental ones), but not Justice relations. Not to give equal salary for the same job is against the principle of equality, not to give equal salary to women or men for the same job is discrimination.

Dignity demands non-discrimination, but it also demands differentiation and specification in cases that are different and specific. Dignity demands equality in the recognition of personhood or of a concrete right, but it does not say that everybody has the same rights, neither that all rights are the same, or that everybody finds him or herself in the same circumstances. Rights are a case by case question; *right* is the actual *thing* that belongs to a particular person in particular circumstances and conditions[86].

The application or not of the principle of non-discrimination is different from the satisfaction or not of any concrete right. To give a very good salary to somebody because of his/her work and according to contract, is just and right, and may be very generous indeed. Not to give such salary is unjust, because is a violation of the contract; it is not discriminatory, because it does not deny personhood one way or the other. To make different contracts for the same job to black and whites is a violation of the principle of non-discrimination, even if both are very well paid off. Of course, discrimination is in the fact of making different contracts, even if the salaries exceed Justice to enter into the realm of Generosity.

Reservations to the principle of non-discrimination in international instruments are unacceptable, because they are directly in contradiction with the dignity of the human person. On the contrary, reservations in order to exclude a group of persons because the legislator wants different or specific rules for it may be a demand of justice, as explained above.

Human dignity is, in a sense, the basic criteria to **measure** human rights, and not only their foundation or principle. By *measure* I mean the way and circumstances a right is given or identified: the *how* to do it. For instance, how good education must be to satisfy the right to be educated. John Ruggie, UNSG Special Representative on the issue of human rights and transnational corporations and other business enterprises has put it very accurately: "The idea of human rights is as simple as it is powerful: treating people with dignity"[87].

The same idea is found in many international treaties[88] and in the General Comments of the UNHRC, also under the expression: "humane treatment"[89].

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[86] AQUINAS, T.St., *Op.Cit,* II-II, q. 63 ad 2.

[87] Draft Guiding principles for the implementation of the United Nations "Protect, respect and remedy" framework, 3, 22nd November 2010.

[88] *American Declaration of the Rights and Duties of Man*, article XXIII*; Universal Declaration on Human Rights,* article 23 3*; Convention for the Suppression of the Traffic in Persons and of the*

VI. CONCLUSIONS:

The beauty of the world!

To conclude this paper: international instruments recognize the inherent dignity of all human beings to be the foundation or principle of human rights. As a consequence, there is a need to have a notion as shared as possible of human dignity, however difficult the task might seem to be[90]. An evidence of this need is the fact that there are more reservations to Human Rights treaties and, secondly, to Codification treaties than to any other types of treaties[91].

So, the urgency to develop a Philosophy of International Law is not only due to the exponential growth of international law and the lack of attention to it by Philosophy of Law, as Besson and Tasioulas point out. Another cause is, to use the expression of Mary Ellen O'Connell, "the decline in understanding and acceptance" in too many quarters of human dignity as the foundation of international human rights instruments and international law at large, even though this is the *mens legislatoris* of international instruments.

A consensus of the notion of human dignity is the beginning of a common *lingua franca*. Of course, I am not referring to an "ethical lingua franca", as Tasioulas puts it, but to a juridical one. It is also the very starting point to reach the "common legal

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Exploitation of the Prostitution of Others, New York , 2nd December 1949, Preamble; *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20th November 1989, principle 2; *International Covenant on Civil and Political and Civil Rights*, article 10; *American Convention on Human Rights, "Pact of San José, Costa Rica"*, article 5 2.; article 6 2.; *Declaration on Social Progress and Development*, Proclaimed by General Assembly resolution 2542 (XXIV) of 11th December 1969, article1*; European Social Charter*, Strasbourg, 3rd May 1966, Part I, 26. *Universal Declaration on the Human Genome and Human Rights*, Paris 11th November 1997: articles 9, 10, 11, 12, 21 and 24.

[89] "General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)",*HRI/GEN/1/Rev.9* (Vol. I) paragraph 2, p. 200: "… The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual… The prohibition in article 7 is complemented by the positive requirements of article 10, paragraph 1, of the Covenant, which stipulates that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"…The text of article 7 allows of no limitation". "General comment No. 21: Article 10 (Humane treatment of persons deprived of their liberty)", *HRI/GEN/1/Rev.9* (Vol. I), paragraph 3, p. 202: "re spect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons." "General Comment No. 28: Equality of rights between men and women (article 3)", *HRI/GEN/1/Rev.9 (Vol. I)*, paragraph 15, p. 230: "Pregnant women who are deprived of their liberty should receive humane treatment and respect for their inherent dignity at all times". "General comment No. 29: Article 4: Derogations during a state of emergency", *HRI/GEN/1/Rev.9 (Vol. I*), paragraph 13 (a) p. 238: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

[90] MCDOUGAL, MYRS S., LASSWELL, HAROLD D. AND CHEN, LUNG-CHU , *Op. Cit*., pp. 376-377.

[91]*Text of the draft guidelines constituting the Guide to practice on reservation to treaties, with commentaries, as provisionally adopted by the International Law Commission* p. 390, http://www.un.org/law/ilc/

conscience" that Carl Friedrich von Savigny and José Ortega y Gasset sought for. This is how we may understand the common humanity which Robert Howse and Ruti Teitel refer to as the premises of Human Rights in the book edited by Besson and Tasioulas[92]. This common understanding may provide, as well, an exit to the different views on the acceptance or not of the otherwise controversial *ius cogens*. As Judge Tanaka would put it, if we recognise *ius cogens* we must recognise human dignity and human rights as a part of it[93]. It may also contribute to solve the conundrum of the so called "fragmentation of International Law".

It goes without saying that such an undertaking is based on the presumption *iuris et de iure* that the ratio and will of international instruments is to provide a just order of international relations which will serve to all and every human being on Earth, because any law is an *ordinatio rationis*.

The idea of a Global Community of Humankind is gaining ground because of the present importance of Human Rights and the proactive role of individuals in International Relations. Consequently, the billiard-ball model of International Relations based on the State is definitely gone and this is the time for a *new ius gentium* or International Law of Humankind, as brilliantly argued by Judge Antonio Augusto Cançado Trindade in his celebrated General Course of the The Hague Academy of International Law in 2005, some many times already quoted in this paper.

We are confronted to the revival of the "communitas totius orbis" which the School of Salamanca, also known as the Spanish School of International Law, framed in the XVI century in the wake of the discovery of America: "the whole world, which, in a sense, is a republic, has the power to give just and useful laws, such as the law of nations" [94]. The latter "has power enough to create rights and to be binding; as it does not derive always from Natural Law, it is enough with the consent of the majority of the whole world"[95].

Yet that global community exists because of human dignity and the fact that persons are social by nature[96]. The similarities between the juridical challenges posed in the XVI century by the discovery of the unity of the world thanks to the discovery of America, and the juridical challenges posed in the XXI century by the snowball growth and instantaneous character of international relations of all sorts are too obvious to be ignored. To study how the former were faced cannot but help to inspire how to face the present ones. To use the words of Judge Cançado Trindade, we should revive the conception of the *totius orbis* in the context of the contemporary international scenario to transmit a better world to our descendents. At least, as Professor Fernandez Liesa says, is possible to recognize that the traditional foundation of the *ius publicum europaeum* on the unity of humankind is a concept widely shared by different

[92] "Global Justice, Poverty and the International Economic Order", BESSON, S., AND TASIOULAS, J. (Editors), *Op. cit.*, pp. 437 and ff.
[93] *Op. Cit*., p.298.
[94] *Cf*. VITORIA, F. de, *De potestate civili*, 21; SUÁREZ, F., *De legibus*, II, 19, 5 and III, 2,5.
[95] VITORIA, F. de, *De Indiis*, III, 4.
[96] ARISTOTLE, *Pol*., I, 1, 1253 a; *Ethys*, I, 7, 1097 b). Cf. VITORIA, F. de , *De potestate civili*.

philosophies and religious conceptions and may still be useful to the development of the international order[97].

In my conception, this global community is as prior to the States, as human dignity and human rights are a *prius* as well. This is the reason why the International Court of Justice reminds us that "obligations of a State towards the international community as a whole...derive…also from the principles and rules concerning the basic rights of the human person"[98].

As the *opinio iuris* which underpins international instruments on human rights states, human dignity is the solid rock foundation needed to make the Rule of Law prevail in our Global Community. Only with such a foundation it is possible to build what has been called a "Public Order of Human Dignity"[99].
To use the wording of Judge Cançado Trindade, the principle of human dignity is a truly fundamental principle which permeates all areas of Law. It identifies with the very foundations of the legal system and with the end itself of Law; it conforms the substratum of Law and retains full validity in our days[100].

Let us recall that, at the end of the second Millennium AC, King Jigme Singye Wangchuk of Bhutan said that the first basic goal of his reign would be to increase the Gross National Happiness of his people. Yet, already 2,300 years ago, Aristotle had already concluded that the end of the *Polis* is the happiness of its citizens. We should not be ashamed to go back to the basics of human dignity once and again. Let us be open to what we are, because, beyond doubt: ***to be**, that is the question*.

[97] FERNANDEZ-LIESA, C.R., "Usos de la noción de Justicia en el Derecho Internacional", *Anuario Español de Derecho Internacional*, XXII, 2006, p.179.
[98] Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ. *Reports, 1970*, p. 33**.**
[99] Cf. MCDOUGAL, MYRS S., LASSWELL, HAROLD D. AND CHEN, LUNG-CHU, *Op.cit.*
[100] *Op.cit*., vo. 316, pp. 86-92.