

WHAT DOES IT MEAN TO BE HUMAN? INTERROGATING THE ETHICS OF HUMAN RIGHTS

NSONGURUA UDOMBANA*

Abstract

Human rights are duty-imposing entitlements that humans possess based on their humanity. Drawing on a broad epistemology—philosophy, theology, law, sociology, literature, and history—this paper explores the essence of this humanity and the ethics that ground human rights. It examines the ethics of natural law as the basis for universal human rights. It addresses cultural and state-centric counter-arguments but asserts that those cannot support the principle of universality of rights. It submits that the concept of human rights is engraved in the universal conscience, revealing the enduring force of natural law. The paper also examines the ethics of dignity, demonstrating how it is the *raison d'être* and legislative spirit of human rights. It interrogates, with case-law and other sources, acts that degrade our common humanity—including historical injustices and coloniality—and calls for a decolonized international order that advances dignity for all nations and peoples.

*Ode to the human, odes to the man/Who amidst the wheat,
amidst the sea/Walks, doubts, and loves, and constructs/His own
heart, his own pain. We are the fruit of chance and darkness/Of the
uncertain, the desperate/And the kiss that suddenly ignites/The burn-
ing flame of our existence.¹*

* © 2025: LLM (Lagos), LLD (UNISA); FC Arb; of the Nigerian Bar; professor of public international law. Professor Udombana has taught in universities in Africa, Europe, and North America. He presently oversees the Human Rights Institute of the National Human Rights Commission, Abuja. He also consults for the African regional human rights mechanisms, including as External Expert to two Working Groups of the African Commission on Human and Peoples Rights and an external expert to the Working Group on Implementation of Decisions of the African Committee of Experts on the Rights and Welfare of the Child. He may be reached at udombanan@gmail.com; ORCID: <https://orcid.org/0000-0002-2070-9880>.

¹ Pablo Neruda, *Ode to the Human* (1954) (celebrating the beauty, diversity, and

2 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]*Introduction*

The human rights idea is one of the most revolutionary in history, with a profound effect on modern life.² It is perhaps the most important legal accomplishment of the 20th century for its recognition of individuals as subjects of international law.³ The Universal Declaration of Human Rights (“UDHR”) provides that everyone has the right to be recognized as a person before the law.⁴ Beyond empowering individuals to enforce their rights before international judicial and quasi-judicial bodies, legal identity is essential for accessing healthcare, education, voting, crossing international borders, opening a bank account, and owning property.⁵ Children without legal identity are vulnerable to gross abuses, including trafficking, labor and sexual exploitation, forced marriage, or involuntary military service.⁶ Thus construed, human rights serve both constitutive and instrumental goals: they are ends in themselves, and means to realize other desired ends.⁷

Human rights demand legal recognition and protection because they stem from the inherent quality of human beings.⁸ But what

complexity of human existence; embracing our contradictions, hopes, and struggles).

² CARLOS NINO, *THE ETHICS OF HUMAN RIGHTS* 1 (1991); *see generally* LOUISE ARBOUR, *HUMAN RIGHTS IN THE 21ST CENTURY* (2007) (reflecting on the evolution of human rights and their challenges and opportunities in the modern world).

³ *Legal Status and Rights of Undocumented Workers*, Advisory Opinion, Inter-Am. Ct. H.R.I, OC-18/03 ¶ 10 (Judge Trindade conc.) (Sept. 17, 2003) (hereinafter “*Undocumented Migrants* case”).

⁴ U.N. Doc. A/Res/810 at 71, art. 6 (Dec. 10, 1948) (hereinafter “UDHR”); *cf.* International Covenant on Civil and Political Rights, U.N. Doc. A/6316, art. 16 (Dec. 16, 1996), 999 U.N.T.S. 171 (hereinafter “ICCPR”) (providing: “Everyone shall have the right to recognition everywhere as a person before the law.”).

⁵ CARRIE WALLING, *HUMAN RIGHTS AND JUSTICE FOR ALL: DEMANDING DIGNITY IN THE UNITED STATES AND AROUND THE WORLD* 12 (2022).

⁶ *Id.*

⁷ Eric Engle, *Universal Human Rights: A Generational History*, 12 ANN. SURV. INT’L & COMP. L. 219, 237 (2006).

⁸ Org. of African Unity [OAU], African Charter on Human and Peoples’ Rights, OAU Doc. OAU/CAB/LEG/67/3/Rev.5, pmbl. (Jun. 27, 1981) (hereinafter “African Charter”).

does it mean to be human? The search for what is natural to human is as old as history. The search takes different forms in different periods, but the essence remains the same; only the accidents change. In like manner, exploring what it means to be human generates a wide range of perspectives, among them social and political structures, the fight for justice and equality, and the way we value and prioritize individual needs.⁹ It implicates on ethical systems, which deal with the methodical or systematic evaluations and interpretations of moral experiences. In this paper, I argue that human rights belong to the objective order and are inseparable from our ontology and anthropology. They have intrinsic validity because they are rooted in the human condition and nurtured by some objective values. These values include respect for the sanctity and dignity of life, tolerance of difference, desire for liberty, order, fairness, prosperity, stability, and concern for others.

The paper proceeds on three main tracks. The first explores humanity's essence and shared aspirations that ground the universal principle of equality. It shows that being *human* encompasses unique traits that set us apart as *homo sapiens* and inform our drive toward self-fulfillment. Following this exploratory discourse, the second track examines the ethics of natural law and implications on human rights and responsibilities. It upholds the universality of human rights anchored on natural law principles. The third track examines the ethics of dignity, which is the *raison d'être* for human rights. It deploys primary and secondary sources to interrogate acts that degrade our common humanity, including historical injustices and coloniality.

No single worldview can capture in full the objective reality of being human. The paper draws on a broad epistemology—philosophy, theology, law, sociology, literature, and history—to shed light on our human essence and the ethics of human rights. The literature is ancient and modern for three reasons. First, diverse outlooks sharpen the picture and give it a higher resolution. Second, the essential arguments in

⁹ Mark Goodale, *The Power of Right(s): Tracking Empires of Law and New Modes of Social Resistance in Bolivia (and Elsewhere)*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 130, 133 n.2 (Mark Goodale & Sally Merry eds., 2007) (stressing that discourses on human rights should necessarily broaden the referent beyond international law).

4 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

this paper are timeless. And third, ideas should not be dismissed because of their age or the era in which they arose.¹⁰ As Lewis points out, “our own age is also ‘a period’ and certainly has, like all periods, its own illusions.”¹¹ Besides, the more “up-to-date” an idea is, the sooner it will be dated.

Our Human Essence

In Shelley’s *Frankenstein*,¹² the creature has a troubling appearance that belies his notable human-like qualities. Like the modern-day Artificial Intelligence (AI), he could learn and understand human language and behavior. He experiences a wide range of emotions, such as love, empathy, desire, and loneliness. He even assists a group of impoverished peasants and rescues a girl from drowning, heroic acts that demonstrate a capacity for kindness. But he also exhibits a sense of loss and remorse, which drives him to learn from his experiences and strive for self-improvement. These qualities have fueled debates for centuries whether our humanity can be reduced to a mere physical appearance. What is our essence? Are we mere material beings or evolved organisms programed to operate like robots? Or are we also parts of the objective reality? These questions have implications on what it means to be human, which this part interrogates.

A. Our Being, Capabilities, and Possibilities

The terms “nature” and “human nature” are relevant to an understanding of human essence. “Nature” refers to the inherent characteristics, traits, and attributes that distinguish an object from other things. It is the *essence* of a thing in contrast to its accidental or chance components.¹³ Donnelly defines “human nature” as a moral account of human potential, emphasizing capabilities and possibilities.¹⁴ Seen from a biological standpoint, human nature denotes human behavior,

¹⁰ Cf. C.S. LEWIS, *SURPRISED BY JOY* 207 (1955).

¹¹ *Id.* at 208.

¹² MARY SHELLEY, *FRANKENSTEIN* (1818).

¹³ OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/nature_n?tl=true.

¹⁴ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 14 (2003).

thought, and emotion.¹⁵ This section interrogates our human essence through the lens of philosophy, theology, humanities, and law.

1. *Our Ontology and Anthropology*

One of the ontological questions is why something exists. The Aristotelian concept of *telos* posits that all beings have an inherent purpose or goal that shapes their existence and ultimate destiny.¹⁶ Also known as the “final cause,” *telos* is the ultimate reason for a thing’s existence. A knife is used for cutting, notwithstanding any secondary use. That is its *telos*. So what does it mean to be human? What is our purpose? Answering these ontological questions demands an epistemology, that is, an explanation of reality or theory of knowledge. In Kant’s epistemology, it is impossible to think without conceiving of some law-like governing structures for the world of the phenomena: “There can be in us no modes of knowledge, no connection or unity of one mode of knowledge with another, without that unity of consciousness which precedes all data of intuitions, and by relation to which representation of objects is alone possible.”¹⁷

Reflecting on the nature of the universe, Einstein, the great 20th century scientific genius, said that “[t]t is enough for me to contemplate the mystery of conscious life perpetuating itself through all eternity; to reflect upon the marvelous structure of the universe, which we can dimly perceive, and to try humbly to comprehend even an infinitesimal part of the intelligence manifested in nature.”¹⁸ In the Judeo-Christian theology, Einstein’s “intelligence manifested in nature” is not less than the natural universe itself, if not more. He is a

¹⁵ MICHAEL FREEMAN, HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH 74 (2011) (hereinafter “FREEMAN, HUMAN RIGHTS”) (noting, however, that human nature from an evolutionary biology does not grant human rights).

¹⁶ ARISTOTLE, NICOMACHEAN ETHICS 1094a (W.D. Ross trans., 2009) (hereinafter “ARISTOTLE, ETHICS”) (introducing the concept of *telos* and its relevance to understanding natural purposes and final causes).

¹⁷ IMMANUEL KANT, CRITIQUE OF PURE REASON 136 (Norman Kemp trans., 1965) (originally published 1781) (hereinafter “KANT, CRITIQUE”).

¹⁸ RADHA S.S. BEAS, A SPIRITUAL PRIMER 8 (1997) (quoting Albert Einstein).

6 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

self-existent Being,¹⁹ Aristotle's "First Cause."²⁰ This Being exists in the "realm of objective facts—hard, determinate facts, not to be constructed *a priori*, and not to be dissolved into maxims, ideals, values, and the like."²¹ He is a necessary condition for human life. He creates humans in His own image (*imago dei*)²² and projects His reality into them, making them divine reflections in the world.

Under this theology, humans are placed somewhere between beasts and the divine: "Man is made of two natures, one corporeal and terrestrial, the other divine and celestial; in the one he resembles beasts, in the other those immaterial substances which turns the heavens."²³ To illustrate, we observe various animals in our environment—sheep, dogs, cats, lions, elephants, gorillas, rats, lizards, birds, earthworms, and nebulae. Are we like them? In some ways, yes. We are warm-blooded mammals and share some basic biological functions. We eat, sleep, grow, reproduce, and die. We are "wholly animal,"²⁴ but not solely. We are *persons* with unique essences.²⁵ Some passages in the Bible suggest that personhood includes the fetus;²⁶ this view might have influenced the American Convention on Human Rights' definition of life,²⁷ perhaps motivated by Latin America's strong Catholic orientation.

¹⁹ C.S. LEWIS, LETTERS TO MALCOLM: CHIEFLY ON PRAYER 136 (1964) (hereinafter "LEWIS, LETTERS TO MALCOLM") (writing: "One cannot conceive a more completely 'given' . . . fact than the existence of God as *causa sui*."); and generally, JOHN HICK, THE EXISTENCE OF GOD (1964) (containing many of the great ontological debates, ancient and modern).

²⁰ ARISTOTLE, METAPHYSICS 333-347 (John Warrington trans., 1956) (asserting the existence of a First Cause who is the Unmoved Mover of all things).

²¹ LEWIS, LETTERS TO MALCOLM, *supra* note 19, at 135-36.

²² HOLY BIBLE, Gen. 1:26&27; 9:6; James 3:9 (humans are created in God's image).

²³ G.-B. GELLI, LA CIRCE bk. vii (1549).

²⁴ BLAISE PASCAL, PENSEES 214 ¶ 664 (A.J. Krailsheimer trans., 1995).

²⁵ HOLY BIBLE, Matt. 6:26; 10:31.

²⁶ *Id.* Ps. 139:13-16; Jer. 1:5 (suggesting a strong connection between God's knowledge and creation of a person from the womb, implying value and personhood from the earliest stages of development).

²⁷ American Convention on Human Rights: "Pact of San José Costa Rica," art. 4, Nov. 22, 1969, OATS No. 36, 1144 U.N.T.S. 123 (hereinafter "ACHR") (including a fetus in its right to life guarantee).

Our complex biological composition, including 46 chromosomes divided into 23 pairs in each cell, is a testament to the marvel of nature.²⁸ Besides our tangible humanity, we are also conscious beings—“living souls.”²⁹ The “soul” is Trinitarian, consisting of mind, will, and emotions that make up our personality.³⁰ Humans are the essential link between the world of sense and that of intellect. We can apprehend universal truths with our senses. The saying “I think, therefore I am”³¹ highlights our capacity for rationality.

On the opposite spectrum is humanism, which insists that humans are the measure of all things and can perfect the good life by the light of reason and experience alone.³² This secular philosophy denies any reality outside of physics. These ontological explanations ground our anthropology, including human rights ideas. But secular humanism lacks the metaphysical foundation to advance human rights or uphold human dignity. Augustine criticizes secular society’s self-love as diminishing the common good for personal gain.³³ Secularism leads to the subjugation of the so-called undesirable or the physically challenged. Darwin’s “survival of the fittest” is illustrative; it establishes a single planetary class interest that ignores human wellbeing. Nie-

²⁸ EDWARD WILSON, *CONSILIENCE: THE UNITY OF KNOWLEDGE* (1998) (exploring the connections between biology, psychology, and culture).

²⁹ HOLY BIBLE, Gen. 2:7 (stating that “man became a living soul” after God formed and breathed into his nostrils) (KJV); *cf.* ARISTOTLE, *DE ANIMA* [ON THE SOUL] (350 BCE) (arguing that the soul is the essence or form that imbues life).

³⁰ CARL JUNG, *THE PSYCHOLOGICAL TYPES* (1921) (highlighting the diversity and complexity of human psychology and emphasizing the individual differences in emotions, thoughts, and cognitive abilities that shape our personalities and individuality).

³¹ RENÉ DESCARTES, *MEDITATIONS ON FIRST PHILOSOPHY* (1641) (distinguishing between humans and other living beings and attributing to the former a unique capacity for thought, reason, and self-awareness).

³² CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 102 (1932); *see generally* MARTIN HEIDDEGGER, *BEING AND TIME* (1927) (emphasizing the importance of individual experiences, choices, and actions in shaping human existence); JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (1943) (dealing with questions of existence, consciousness, and the nature of freedom).

³³ CHARLES NORIS COCHRANE, *CHRISTIANITY AND CLASSICAL CULTURE* 489 (1957) (quoting ST. AUGUSTINE, *ON NATURE AND GRACE* (415 AD)).

8 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

tzsche's *Übermensch* ("Superman") is the "surviving fittest," a symbol of strength who overcomes all obstacles to achieve his goal. He is at liberty to exercise and increase his power and authority over his inferiors even if the norms are against it.³⁴ Nietzscheanism is a morality for winners.

Rationality, too, has its limits, as Dante illustrates in his *Divine Comedy*.³⁵ In that classic, the Roman poet Virgil guides Dante through *Inferno* and *Purgatory*, representing human reason in leading the soul away from sin towards self-awareness. But Virgil cannot enter *Paradise*, symbolizing the belief that reason alone cannot attain divine understanding without faith. The two world wars of the 20th century and their barbarous acts,³⁶ not to mention the history of genocide,³⁷ further demonstrate that humans are not as rational as humanists assume. The Auschwitz Concentration Camp, with its fortified walls, barbed wires, barracks, gallows, gas chambers, and cremation ovens is a sore reminder of humanity's capacity for "radical evil."³⁸

I hold the view that humans live between subjective sense perception and objective reality. The "nature of things" manifests itself in certain human tendencies, among them the desire for peace and satisfaction of basic needs such as food, clothing, and shelter. We face common challenges which, in the modern world, include global health crises, terrorism, conflicts, displacement, poverty, economic inequal-

³⁴ FRIEDRICH NIETZSCHE, *THE WILL TO POWER* (Anthony Ludovici trans., 2019).

³⁵ DANTE ALIGHIERI, *THE DIVINE COMEDY* (Mark Musa trans., 1971) (originally published 1321).

³⁶ Cf. Charter of the United Nations (U.N.) 1945, pmbl., 1 U.N.T.S. XVI (hereinafter "U.N. Charter") (determined "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.").

³⁷ LEO KUPER, *GENOCIDE: ITS POLITICAL USAGE IN THE TWENTIETH CENTURY* 11 (1981) (recalling ancient examples of "horrificing genocidal massacres, such as the terror of Assyrian warfare in the eighth and seventh centuries B.C., when many cities were razed to the ground and whole populations carried off or brutally exterminated."); cf. Jean-Paul Sartre, *On Genocide*, in *CRIMES OF WAR* 534, 534 (Richard Falk et al. eds., 1971) ("The fact of genocide is as old as humanity.").

³⁸ See generally RICHARD BERNSTEIN, *RADICAL EVIL: A PHILOSOPHICAL INTERROGATION* (2002) (examining genocide's unique moral gravity).

ity, climate change, and resource depletion. We form networks to confront these challenges, suggesting that we experience life through relationships.³⁹ We use our skills as tools to solve problems, demonstrating how we are *homo faber* (“human the creator”).⁴⁰ We ask questions, seek answers, and make choices that influence our lives and others. We develop our inert capacities for empathy and love.

As humans, we exhibit self-awareness, possess a sense of history, and appreciate beauty. The beauties of nature—blue sky, stars, sunrise, trees, flowers, water, hills, and valleys—are perhaps divine secrets shared only with us. We even find pleasure in what MacDonald calls “harmonious confusion,”⁴¹ as in “the most varied and artistic arrangement of wood and river, lawn and wild forest, garden and shrubbery, rocky hill and luxurious vale, in living creatures wild and tame, in gorgeous birds, scattered fountains, little streams, and reedy lakes.”⁴² The “truth”—the perfect meaning—of a thing is that for which it is made. The truth of a flower is its blossom, as that of a cornfield is its production of food for humanity. It is for these reasons that all matter matters. We are caretakers of the earth’s garden. The beautiful rose flower depends on chemistry and climate and is vulnerable to insects. We are divinely set apart and empowered to communicate love and justice to all creation, including our pets.⁴³ To be created is to be an agent.

But humanity transcends physics. There is a non-physical side of life. We experience ideas that exist on their own. The things that we perceive with our senses—the *particulars*—are copies of eternal archetypes (the *universals*) which in some ways have brought them into being. When we use particular words like “goodness,” “fairness,” or

³⁹ EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* (1895) (highlighting the importance of social connections and collective identity in shaping human experience).

⁴⁰ ANDRÉ LEROI-GOURHAN, *MAN AND MATTER* (1943) (highlighting the significance of tool use and problem-solving in humans).

⁴¹ GEORGE MACDONALD, *PHANTASTES: A FAERIE ROMANCE* 73 (2000) (1st published 1858).

⁴² *Id.* at 71-72.

⁴³ *Cf.* HOLY BIBLE, Prov. 12:10 (“A good man takes care of the needs of his pets.”) (TPT); *id.* Prov. 27:23 (“Know the state of your flocks and put your heart into caring for your herds.”) (GNT).

even “human rights,” we implicitly acknowledge their *universals*, what Plato calls “Forms”—eternal, perfect, and abstract representations of, or principle behind, the physical reality. Plato’s highest Form is the *Good*; the particulars exist to participate in it.⁴⁴ Like Plato, Kant distinguishes between “essence” and “existence.”⁴⁵ “Essence” represents the intrinsic and indispensable characteristics that define a thing beyond sensory perception. It is the ideal, the perfect, and the true. “Existence” refers to the actual being or reality of a thing, imperfect and fleeting.

2. *Human Essence Expressed in Art and Literature*

Life often finds its deepest expressions in literary and artistic imaginations. Something in our human nature and conditions makes many stories similar even when each may be original. Art imitates life, promotes creativity, and reveals transcendental truths.⁴⁶ Michelangelo’s *Pietà*, a marble statue depicting the Virgin Mary holding the body of Jesus after his crucifixion, is one of the greatest Renaissance arts.⁴⁷ It embodies universal feelings of grief and compassion. Beethoven’s *Symphony No. 9*,⁴⁸ composed in D minor and considered one of the most iconic and influential works in classical music, resonates with Enlightenment ideals of brotherhood and joy. It also reflects our desire for equality.

Literature affirms our rational capacities through its appeal to imagination. Poetry captures our human intricacies and conditions. “Ode to the Human” highlights our capacities for love, doubt, and resilience.⁴⁹ It emphasizes our inherent dignity and acknowledges our inner conflict between virtue and vice, hope and despair. It draws our attention to the natural world with which we are connected and the

⁴⁴ PLATO, *PHAEDO* (Greece) translated in Gwenda-lin Grewal (2018) (originally written in 360 BCE) (laying out the theory of ‘Forms’ and asserting that the physical realm is a shadow or image of the ultimate reality).

⁴⁵ Kant’s concept of *essencia* (“essence”) is a fundamental notion in his philosophical outlook. See generally KANT, *CRITIQUE*, *supra* note 17.

⁴⁶ Cf. G.K. CHESTERTON, *THE EVERLASTING MAN* 107 (1925).

⁴⁷ Michelangelo Buonarroti’s *Pietà* was sculpted between 1498 and 1500.

⁴⁸ Beethoven’s *Symphony No. 9* was composed between 1817 and 1824.

⁴⁹ Neruda, *supra* note 1 (used as an epigram in this paper).

2025] WHAT DOES IT MEAN TO BE HUMAN? 11

need to recognize our shared humanity and thus promote solidarity across cultures and geographies. Keats' lines "Charm'd magic casements, opening on the foam/Of perilous seas, in faery lands forlorn"⁵⁰ expresses the poet's desire to escape reality and enter a world of imagination. It illustrates our precarious position in the universe and the constant tension between the real and the ideal.

Drama and novels express our human essence, though they also mirror democratic and other societies. Shakespeare's works have had a lasting impact because they view human nature in its broadest terms and imitate life "not only of man in relation to society, but also in relation to himself and to the larger forces by which he feels himself controlled."⁵¹ In *A Midsummer Night's Dream*,⁵² Shakespeare observes human nature through characters like Bottom and his companions. He dramatizes the complexities of love that sometimes lead to conflict but resolved harmoniously. In *Hamlet*,⁵³ Shakespeare explores the effects of treachery and murder. He pictures man as he should be—bright, orderly, and optimistic—and as he is. The natural man is full of darkness and chaos. The purest efforts that our will can muster cannot prevent us from wronging our neighbor. Like the damned in Dante's *Inferno*, we often abuse, insult, and harm one another. Our moral failures are parts of our humanity. In *Hamlet*, evil appears full-fledged and takes on a universal and symbolic meaning, like the heinous crimes in our day.

In *Song of Solomon*,⁵⁴ Morrison probes how family, history, and identity influence personal and communal understanding. In *Be-loved*,⁵⁵ Morrison confronts the scars of slavery and its effects on filial and community relationships. In *So Long a Letter*,⁵⁶ Ba examines the

⁵⁰ John Keats, *Ode to a Nightingale*, in JOHN KEATS, ANNALS OF THE FINE ARTS (1819).

⁵¹ THEODORE SPENSER, SHAKESPEARE AND THE NATURE OF MAN 209 (1949).

⁵² WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM (1600).

⁵³ WILLIAM SHAKESPEARE, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK (1603).

⁵⁴ TONI MORRISON, SONG OF SOLOMON (1977).

⁵⁵ TONI MORRISON, BELOVED (1987).

⁵⁶ MARIAMA BAS, SO LONG A LETTER (1980).

12 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

life of Ramatoulaye, a Senegalese widow navigating societal expectations. The story highlights women's resilience against patriarchal oppression and the enduring bonds of female solidarity. In *A Man of the People*,⁵⁷ Achebe satirizes the endemic corruption in African politics. He also examines the tension that exists between tradition and modernity in postcolonial contexts. Odili, the protagonist, represents the push for modernization and reform. Chief Nanga, the "Big Man" who clings to traditional power structures, exploits those beneath him. For him, power is an end. It is similar to O'Brien's chilling explanation in Orwell's *1984* that "The Party seeks power entirely for its own sake."⁵⁸ In totalitarian and other undemocratic regimes, the object of power is *power*. It is for these reasons that human rights matter.

B. Contemplating a Better Future

To be human is to envision, and strive for, a better future. Our shared aspirations often unite us in pursuit of a brighter tomorrow. Though we sometimes fall short of fully realizing them, the interplay of the ideal and reality shapes our collective journey toward progress. This section explores how this tension between desire and fulfillment is an aspect of our human experience.

1. Universal Quest for Fulfilment

Universal aspirations unite humanity. We desire a fulfilling life, free from fear and want. The "highest aspirations of the common people" is "the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed."⁵⁹ These aspirations constitute the modern notion of "human security," defined as "the security of the individual in terms of satisfaction of his/her basic needs."⁶⁰ We long for happiness and

⁵⁷ CHINUA ACHEBE, *A MAN OF THE PEOPLE* (1966) (hereinafter "ACHEBE, *A MAN OF THE PEOPLE*").

⁵⁸ GEORGE ORWELL, 1984 173 (1949) (adding: "We are not interested in the good of others; we are interested solely in power."); *id.*

⁵⁹ UDHR, *supra* note 4, pmb.

⁶⁰ AU Non-Aggression and Common Defense Pact, AU Doc. Assembly/AU/Dec.71(IV), art. 1(k) (2005) (adding that "human security" entails "the creation of social, economic, political, environmental and cultural conditions necessary

beauty. We long to live and to feel alive. We long to nourish our bodies, minds, and spirits. We desire an environment that is free from pollution, where humanity lives in harmony with nature.⁶¹ We seek freedom to pursue our passions, earn a dignified living, and accept mortality with dignity when it comes.⁶²

We often imagine a world that surpasses our current limitations, a future where justice, equality, and peace replace hatred, wars, crimes, hunger, diseases, and homelessness. We can imagine a world where laws are applied in fair and equal manner. We imagine a society where we coexist in harmony like an orchestra, listening to and respecting each other's perspectives. We can imagine a future where racial and other forms of discrimination are a distant memory. In his famous "I Have a Dream" speech of 1963, Dr. King dreamt of a day his four children would live in "a nation where they will not be judged by the color of their skin but by the content of their character."⁶³ Our desire for order, beauty, and structured environment extends to our subconscious. We sometimes admire lovely cities in our dreams. Such experiences reflect our capacity for idealism and creativity.

The utopian philosophy captures these desires. It pictures a society that meets the highest aspirations of our collective potential. In *Utopia*,⁶⁴ More describes Utopians living according to principles of natural law and holding all possessions in common, reminiscent of the first century Christians.⁶⁵ It was from More that we had the noun "utopia," denoting "a place, state, or condition ideally perfect in respect of

for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee for each individual of opportunities and choices for his/her full development."); *id.*

⁶¹ Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/26 (Vol. 1), Principle 1 (Jun. 1992).

⁶² *Cf.* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 105 (1986).

⁶³ Martin Luther King, Jr., *I Have a Dream*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING JR. 217 at 219 (James Washington ed., 1986) (hereinafter "A TESTAMENT OF HOPE").

⁶⁴ See THOMAS MORE, UTOPIA (1997) (originally published 1516).

⁶⁵ HOLY BIBLE, Acts 2: 44&45 ("And all that believed were together, and had all things common; and sold their possessions and goods, and parted them to all men, as every man had need.") (KJV).

14 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

politics, laws, customs, and conditions” as well as “an impossibly ideal scheme, especially for social improvement.”⁶⁶ In *Looking Backward*,⁶⁷ Bellamy describes an imaginary island society organized according to principles of natural law and reason. He depicts a future society that transcends present limitations, where advanced technology, free education and healthcare, and the absence of poverty and crime create a socialist utopia. These novels had significant influence on the Utopian Movement of the late 19th and early 20th centuries.

2. *Utility of the Utopian Vision*

In the real world, we often struggle to achieve our desires. There is a gulf between utopia and reality. Notwithstanding, the utopian vision has inspired generations to strive for a better, more peaceful, and more sustainable world. It fuels our collective efforts and inspires international initiatives on disarmament, climate action, and sustainable development. It drives our desire for education to equip us with skills to realize our imagined future. It motivates us to work together to address the multifarious challenges facing the global community.

Humanity’s capacity to envision a better future has spawned countless initiatives in the modern era. An example is the United Nations (U.N.) Framework for Climate Change Convention (UNFCCC), signed during the 1992 Rio Earth Summit.⁶⁸ The UNFCCC commits its state parties to prevent dangerous anthropogenic interference with Earth’s climate system by reducing atmospheric concentrations of greenhouse gases. Bringing together different actors across time and space to perform such multiple policy tasks was an important achievement in the growing effort to protect the ecosystem.⁶⁹

Another initiative is the 2030 Agenda with its 17 Sustainable

⁶⁶ Mishtooni Bose, *Introduction to UTOPIA*, *supra* note 64, at vii (quoting H.G. Wells).

⁶⁷ EDWARD BELLAMY, *LOOKING BACKWARD* (1888).

⁶⁸ Adopted May 9, 1992, 1771 U.N.T.S. 107.

⁶⁹ See generally Eva Lovbrand et al., *Making Climate Governance Global: How UN Climate Summitry Comes to Matter in a Complex Climate Regime*, 26(4) ENV’T. POL’Y 580 (2017).

Development Goals (SDGs) and 169 targets.⁷⁰ The SDGs seeks to “end poverty in all its forms everywhere,”⁷¹ “end hunger, achieve food security and improved nutrition and promote sustainable agriculture,”⁷² and “ensure healthy lives and promote well-being for all at all ages.”⁷³ It also seeks to promote “sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all,”⁷⁴ build “resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation,”⁷⁵ and reduce “inequality within and among countries.”⁷⁶

Regional Africa has its own Agenda 2063,⁷⁷ which outlines a collective vision and development roadmap for five decades. These efforts testify to the enduring power of utopian thinking. They drive us towards a more just, equitable, and peaceful world where we all can thrive, not just survive. It is for these reasons that human rights matter.

Human Rights and Natural Law Ethics

Objects always obey the laws that govern them. Natural law is the law of our human nature. Lewis writes that “just as all bodies are governed by the law of gravitation and organisms by biological laws, so the creature called man also ha[s] his law,” with this difference: though “a body could not choose whether it obeyed the law of gravitation or not . . . a man could choose either to obey the Law of Human Nature or to disobey it.”⁷⁸ It is in this sense that natural law stands as

⁷⁰ G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, Sept. 15, 2015.

⁷¹ *Id.* Goal 1.

⁷² *Id.* Goal 2.

⁷³ *Id.* Goal 3.

⁷⁴ *Id.* Goal 8.

⁷⁵ *Id.* Goal 9.

⁷⁶ *Id.* Goal 10; see generally Owen Gaffney, *Sustainable Development Goals: Improving Human and Planetary Wellbeing*, GLOB. CHANGE, May 2014, 20; Marina Ermolina et al., *Climate Change and the UN 2030 Agenda for Sustainable Development*, in PROCEEDINGS OF TOPICAL ISSUES IN INTERNATIONAL POLITICAL GEOGRAPHY 226 (Radomir Bolgov et al. eds., 2021).

⁷⁷ Agenda 2063: The Africa We Want, AU Doc. Assembly/AU/Dec.565 (XXIV) (Jan. 2015).

⁷⁸ C.S. LEWIS, MERE CHRISTIANITY 4 (1952).

a singular phenomenon. Its principles—truth, justice, love, compassion, et cetera—are universal despite cultural differences.⁷⁹ The first law of nature is to do good and avoid evil.⁸⁰ It is from natural law that we derive the ethics of right and wrong, of good faith, and of our special duties to parents, elders, children, and the vulnerable, and equal liberty of all.⁸¹ Every human being has a sacred, natural expectation that good and not evil will be done to him.⁸² Nothing is sacred except the good and what pertains to it.⁸³ Evil is a parasite, a deprivation of the good. Just as blindness presupposes sight, and darkness light, so evil reveals a standard of goodness, of which it falls short. Slavery in whatever form is evil, as is genocide, massacre, mutilation, starvation or organized famine, all forms of discrimination, torture, rape, hate speech, or whatever else that is contrary to human well-being.

This part examines how natural-law ethics ground human rights. It examines the evolution of natural rights ideas down to the UDHR, the dialectics on universality, and the nature of obligations arising from natural rights. It concludes with a brief note on the African philosophy on rights and duties.

A. The Roots of a Manifestation

In 1915, Maine wrote that “the greatest function of the “law of nature” was discharged in giving birth to modern international law.”⁸⁴ Natural law philosophy supports various international protection trends, including humanitarian, human rights, criminal, and refugee laws.⁸⁵ It provided the “mystical inspiration” for the human rights

⁷⁹ THOMAS AQUINAS, *SUMMA THEOLOGIAE* I-II, Q. 94, art. 2 (1274) (discussing natural law in relation to human nature and reason, especially regarding moral principles).

⁸⁰ *Id.*

⁸¹ C.S. Lewis, *On Ethics*, in C.S. LEWIS, *CHRISTIAN REFLECTIONS* 65, 74 (Walter Hooper ed., 1980) (hereinafter “Lewis, *On Ethics*”).

⁸² SIMONE WEIL, *AN ANTHOLOGY* 1 (Sian Miles ed., 2005) (hereinafter “WEIL, *ANTHOLOGY*”).

⁸³ *Id.* at 72 (“The good is the only source of the sacred.”).

⁸⁴ HENRY S. MAINE, *INTERNATIONAL LAW* (1888) (quoted in S.K. VERMA, *AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 11 (1998)).

⁸⁵ HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 115 (1950) (hereinafter “LAUTERPACHT, *INT’L LAW AND HUMAN RIGHTS*”).

quest in the 20th century. Lauterpacht speaks of human rights in terms of the “majestic stream of the law of nature.”⁸⁶ This section sketches the evolution of natural law ideas about human rights.

1. *Natural Law and Natural Rights*

The human rights concept gestated long before international law. Writing on the evolution of international human rights, Lauren notes that visionaries across time and geography envisioned a world where humankind enjoys basic rights simply because they are human.⁸⁷ From this perspective, human rights may be defined as duty-imposing claims that inhere in individuals because of their humanity.⁸⁸ The term “inhere” connotes something “intrinsic” or “inborn.”⁸⁹ Thus, personal agency and capacity are not criteria for acknowledging human rights. The rights are not based on age, physical strength, or mental wellness.⁹⁰ They apply to all persons regardless of nationality,⁹¹ except for those termed political,⁹² denoting universality. All dimensions—civil, political, economic, social, cultural, and collective—are

⁸⁶ *Id.* at 79 n.15.

⁸⁷ PAUL G. LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 1 (3rd ed. 2003); cf. René Capitant, *La Crise et la Reforme du Parlementarisme en France*, 23 *JAHRBUCH DES ÖFFENTLICHEN RECHTS* 14 (1936) (“There exists an irreducible minimum of individual liberty that proceeds from the very essence of man and the demands of human dignity.”).

⁸⁸ Cf. JOHN RAWLS, *THE LAW OF PEOPLES* (1993) (arguing that human rights are a special class of universal moral rights that all persons possess by virtue of their humanity); Louis Henkin, *Human Rights*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* VOL. 1, 886 (Rudolf Bernhardt ed., 1992) (defining human rights as claims that individuals make on the society on account of their humanity); Alan Gewirth, *The Epistemology of Human Rights*, in *HUMAN RIGHTS* 1 (Fred D. Miller et al. eds., 1984) (defining human rights circularly as “rights which all persons equally have simply insofar as they are human.”).

⁸⁹ Cf. Vienna Declaration and Program of Action, U.N. Doc. A/Conf.157/23 ¶ 1 (Jul. 12, 1993) (hereinafter “Vienna Declaration”) (viewing human rights as our “birthrights.”).

⁹⁰ *Purohit and Moore v. Gambia*, ACHPR Comm. No. 241/2001 ¶ 57, (2003) AHRLR 96 (hereinafter “*Purohit Case*”).

⁹¹ Organization of American States, American Declaration of the Rights and Duties of Man pmbl., May 2, 1948 (affirming that human rights are not derived from nationality or citizenship but from the attributes of human personality).

⁹² See, e.g., ICCPR, *supra* note 4, art. 25 (restricting the right to participate in

18 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

integral to human dignity and well-being, denoting indivisibility. The state cannot limit them except in exacting circumstances, denoting inalienability.

Throughout history, questions of morality and individuals' relationship with society have for the most part revolved around human rights concepts, revealing shared human values and experiences.⁹³ The world's ethical systems—Aristotelian, Judeo-Christian, Stoic, Kantian, Confucian, Utilitarian, et cetera—have some common threads despite their diverse theories.⁹⁴ These theories, once formed, direct us towards virtuous conduct and the common good. The “Golden Rule”—do to others as you want to be done by⁹⁵—expresses a Judeo-Christian ethic that makes duty a self-transcending concept. This ethic emphasizes “loving-kindness” that incorporates burden sharing,⁹⁶ loving one's neighbor,⁹⁷ and showing generosity to those in need.⁹⁸ To the Romans, “Men were brought into existence for the sake of men that they might do one another good.”⁹⁹ The Ancient Chinese put this positive law of beneficence thus: “When the people have multiplied, what next should be done for them? The Master said, enrich them. Jan Ch'iu said, when one has enriched them, what next should be done for them? The Master said, instruct them.”¹⁰⁰

The human inclination towards self-preservation is the pivot for the universalist notion of human rights.¹⁰¹ Locke wrote that “[b]y

the conduct of public affairs, and to vote and be voted for, only to “[e]very citizen.”); African Charter, *supra* note 8, art. 13.

⁹³ LAUREN, *supra* note 87, at 12.

⁹⁴ J. Clifford, *Equality*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS* 420, 425 (Dinah Shelton ed., 2013).

⁹⁵ HOLY BIBLE, Matt. 7:12; Lk. 6:31.

⁹⁶ *Id.* Gal. 6:2.

⁹⁷ *Id.* Mk. 12:31.

⁹⁸ *Id.* Lk. 12:33; James 1:27 (stressing that genuine religion is demonstrated by caring for the vulnerable, such as orphans and widows).

⁹⁹ MARCUS TULLIUS CICERO, *DE OFFICIIS* [On Duties], I.VII § 22 (44 BCE).

¹⁰⁰ CONFUCIUS, *ANALECTS* XIII.9 (D.C. Lau trans., 1979). (Original published circa 551-479 BCE).

¹⁰¹ See generally Olalekan Moyosore & Nsongurua Udombana, *Universality and Particularity: Why Universalism Should be the Standard for Human Rights*, 9(1)

the fundamental Law of Nature Man [is] to be preserved as much as possible.”¹⁰² All legal traditions recognize the sanctity of human life as a foundational norm.¹⁰³ The Convention on the Rights of the Child (CRC), which enjoys a near universal ratification, sees the right to life as “inherent.”¹⁰⁴ This right is both a customary norm and the fulcrum of all human rights;¹⁰⁵ thus, any arbitrary killing is seen as a matter of utmost gravity.

Natural law legitimized the “Rights of Man.”¹⁰⁶ It formed the basis for the Social Contract Theory,¹⁰⁷ supporting popular revolution to overthrow governments that failed to safeguard natural rights. Locke proposed natural law as the moral groundwork of civil society. He posited that individuals within a state surrender their personal interests to the “general will,” which exercises popular sovereignty—political power—for the common good. The state loses legitimacy when it fails to advance the common good.¹⁰⁸ Locke’s ideas inspired the American Declaration of Independence, which proclaimed as a “self-evident” truth that “all men are created equal” and endowed by their Creator with “certain unalienable Rights.”¹⁰⁹ The Declaration and others—like the French Declaration of the Rights of Man and the

LEG. ISSUES J. 15 (2022) (arguing, with empirical evidence, that the universality notion of human rights has a better operational value than the particularity perspective as the former encourages a convergence of purpose which makes for determinable standards in the international legal system).

¹⁰² JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, ch. III § 3 (1689).

¹⁰³ African Commission on Human and Peoples’ Rights, General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4) ¶ 1 (2015), <https://achpr.au.int/en/node/851> (hereinafter “ACHPR, General Comment No. 3”) (adding that the preservation of human life is “rooted in widely shared communal values . . . according to which the value of one person’s life is tied to the value of the lives of others.”); *id.* ¶ 3

¹⁰⁴ G.A. Res. 44/25 (VI), art. 6(1) (Nov. 20, 1989) (hereinafter “CRC”).

¹⁰⁵ ACHPR, General Comment No. 3, *supra* note 103, ¶ 5.

¹⁰⁶ THOMAS PAINE, RIGHTS OF MAN: BEING AN ANSWER TO MR. BURKE’S ATTACK ON THE FRENCH REVOLUTION (6th ed. 1791).

¹⁰⁷ The leading social contractarians were Thomas Hobbes, Jean-Jacques Rousseau, and John Locke.

¹⁰⁸ JOHN LOCKE, THE SECOND TREATIES OF GOVERNMENT (C.B. Macpherson ed., 1980).

¹⁰⁹ Declaration of Independence (U.S. 1776).

20 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

Citizen of 1789¹¹⁰—were presented as statements of objective truths. They enunciated the political philosophy that the will of the people is the true source of power.

Some commentators dismiss these early natural rights documents outright,¹¹¹ for good reasons. For example, the “high and noble words” of the American Declaration have been contradicted in every syllable by the U.S. treatment of its Black population. Its rhetoric has been contradicted by the harsh realities and well-documented history of slavery and racism that many of its signatories and their progenies perpetuated.¹¹² As Douglas rhetorically asked, “What to the Slave is the Fourth of July?”¹¹³ Under the U.S. Constitution, a slave—meaning a Black American—was equal to “three fifth” of a person.¹¹⁴ Thus, “just as the Preamble excluded those in bondage from the blessings of liberty, so Article I made large compromises at slaves’ expense.”¹¹⁵ Even the U.S. Supreme Court, the supposed guarantor of constitutional liberty, diminished its ranking by legitimating racial discrimination. In *Dred Scott v. Sanford*, Chief Justice Taney reasoned that, at the time of America’s Founding, slaves “had no rights which the white

¹¹⁰ DECLARATION OF THE RIGHTS OF MAN (Fr. 1789).

¹¹¹ David Beetham, *What Future for Economic and Social Rights?*, 43 POL. STUD. 41, 42 (Mar. 1995).

¹¹² Although enslaved people fought hard for American Independence, the Declaration did not end the struggle for true equality. It took a devastating civil war for Black people to be acknowledged as part of the “all men” deserving equal rights. Even then, racial equality remained a mirage in the “homeland of the free.” RICHARD CARWARDINE, *LINCOLN: A LIFE OF PURPOSE AND POWER* 192 (2006); STEWART BURNS, *TO THE MOUNTAIN TOP: MARTIN LUTHER KING JR.’S SACRED MISSION TO SAVE AMERICA: 1955-1968* 161 (2003).

¹¹³ FREDERICK DOUGLAS, *WHAT TO THE SLAVE IS THE FOURTH OF JULY?* (1852) (a scathing speech at a meeting organized by the Rochester Ladies Anti-Slavery Society in 1852 that included the line: “This Fourth of July is yours, not mine, you may rejoice, I must mourn.”).

¹¹⁴ U.S. Constitution, signed Sept. 17, 1787, ratified in 1788, § 1(2) (commanding that “Representatives and direct Taxes shall be apportioned among the several States . . . by adding to the whole Number of free Persons . . . *three fifths of all other Persons.*”) (emphasis supplied).

¹¹⁵ AKHIL R. AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 57 (2005); see also *id.* 90 (stressing that “the Constitution as drafted and ratified committed the new nation to perpetually credit slavery in the apportionment process.”).

2025] WHAT DOES IT MEAN TO BE HUMAN? 21

man was bound to respect.”¹¹⁶ It took a constitutional amendment to overturn that perverse ruling,¹¹⁷ which Bork regards as “the worst constitutional decision of the nineteenth century.”¹¹⁸

As late as the 1940s, the U.S. resisted China’s proposal to include a statement on racial equality in the draft U.N. Charter.¹¹⁹ For our present purpose, it is immaterial that that effort failed. A few years later, Du Bois appealed to the U.N. General Assembly (UNGA) to pay attention to the persistent racism in the U.S. He stressed that “[n]o nation is so great that the world can afford to let it continue to be deliberately unjust, cruel and unfair toward its own citizens.”¹²⁰ Myrdal coined the “American Dilemma” to explain this moral contradiction of upholding equality in principle and denying it to Black Americans in practice.¹²¹ Despite its democratic and human rights pretensions, the U.S. is a deeply flawed nation with no moral shame.

Modern discourses on natural rights reiterate the state’s primary responsibility to secure its citizens’ welfare.¹²² International and domestic legal instruments enshrine this enduring principle, among them the Charter of Economic Rights and Duties of States.¹²³ This re-

¹¹⁶ 60 U.S. 393, 407 (1857).

¹¹⁷ The 13th and 14th Amendments abolished slavery and established birth-right citizenship for all persons born in the country.

¹¹⁸ ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 28 (1990) (continuing: “Speaking only of the constitutional legitimacy of the decision, and not of its morality, this case remained unchallenged as the worst in our history until the twentieth century provided rivals for that title.”); *id.*

¹¹⁹ LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007), *extracted in* MICHAEL FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 1309 (2014).

¹²⁰ *An Appeal to the World: A Statement of Denial of Human Rights to Minorities in the Case of Citizens of Negro Descent in the United States of America and an Appeal to the United Nations for Redress*, given before the General Assembly (Oct. 23, 1947), https://www.crmvet.org/info/470000_naacp_appeal_un-r.pdf (equating democracy with peace and equality).

¹²¹ GUNNAR MYRDAL, *THE AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 581 (1944).

¹²² *See* C. BEITZ, *THE IDEA OF HUMAN RIGHTS* 108-12 (2009).

¹²³ U.N. Doc. A/Res/3281 (XXIX), art. 7 (Dec. 12, 1974) (providing that the state bears the primary responsibility for economic, social, and cultural development); *cf.* Declaration on Social Progress and Development 1969, U.N. Doc.

22 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

sponsibility is founded on two apparent irreconcilable principles: sovereignty and the right of people to dignity and self-determination. According to the International Court of Justice (ICJ), “the State’s territorial integrity goes hand in hand with the State’s respect of, and guarantee of respect for, the human integrity of all those human beings under its jurisdiction.”¹²⁴ Finnis argues that just laws and governance systems should aim to achieve essential human goods like life, knowledge, and social participation. These goods are common to all societies.¹²⁵ In the *Frontier Dispute* case, the ICJ noted that states exist to serve human purposes or common good within their jurisdiction.¹²⁶ In *Njoya and Others v. Attorney-General and Others*, the High Court of Kenya ruled that governance derives from the will of the people and that state power should advance public welfare, uphold justice, and protect human dignity.¹²⁷

2. *Natural Law and the UDHR*

The year 1945 was both a desolating conclusion and a glorious beginning: it marked an end to the gruesome World War II and saw the adoption of the U.N. Charter. The Charter was the founding document of the post-war international order. It places human rights “on the enduring foundations of the law of nature.”¹²⁸ Among other things

A/Res/24/2542, art. 5 (1969); Nigeria Const. 1999, § 14(2)(b) (providing that “the security and welfare of the people shall be the primary purpose of governments.”); Sierra Leone Const., § 5(2)(b) (similarly worded).

¹²⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 523, 609 ¶ 217 (hereinafter “*Accordance with International Law* case”); see also *id.* ¶ 207 (asserting that territorial integrity “is an entitlement of States which act truly like States, and not like machines of destruction of human beings, of their lives and of their spirit.”).

¹²⁵ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 154-57 (1980); cf. David Lyons, *Utility and Rights*, in *RIGHTS, WELFARE, AND MILL’S MORAL THEORY* 147, 152 (David Lyons ed., 1994); and generally JOHN FINNIS, *HUMAN RIGHTS AND COMMON GOOD: COLLECTED ESSAYS VOL. III* (2011).

¹²⁶ *Frontier Dispute (Burkina Faso v. Niger)*, Judgment, 2013 I.C.J. 97, 133 ¶ 105 (Judge Trindade sep. op.).

¹²⁷ (2004) AHRLR 157 ¶ 29.

¹²⁸ LAUTERPACHT, *INT’L LAW AND HUMAN RIGHTS*, *supra* note 85, at 145 (stressing that natural law philosophy drove the response to totalitarianism disregarded fundamental freedoms in a blatant manner in the 20th century); *id.* at 112.

the Charter reaffirms faith in fundamental human rights,¹²⁹ invokes “principles of justice”¹³⁰ and aims to secure “universal peace.”¹³¹ It mandates the U.N. to promote and encourage “respect for human rights and for fundamental freedoms for all.”¹³² U.N. members also pledge themselves to “take joint and separate action in cooperation with the Organization for the achievement of the [human rights] purposes set out in Article 55.”¹³³ The word “pledge” implies some form of legal obligation, albeit a weak one.¹³⁴ Three years later, UNGA proclaimed the UDHR as “a common standard of achievement for all peoples and all nations.”¹³⁵ The Declaration is “an expository interpretation of the Charter’s very general human rights provisions”¹³⁶ and the cornerstone of contemporary human rights superstructure.¹³⁷ Like in the U.N. Charter, states pledge themselves “to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.”¹³⁸

The UDHR is more a codification of natural law principles than an exercise in creative law-making.¹³⁹ It speaks of our “inherent

¹²⁹ U.N. Charter, *supra* note 36, pmbl.

¹³⁰ *Id.* art. 1(1).

¹³¹ *Id.* art. 1(2).

¹³² *Id.* art. 1(3).

¹³³ *Id.* art. 56.

¹³⁴ See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16 (hereinafter “*South West Africa case*”) (maintaining that Articles 55 and 56 constitute sources of legal obligations).

¹³⁵ UDHR, *supra* note 4, pmbl.

¹³⁶ GERHARD VON GLAHN & JAMES TAULBEE, *LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW* 487 (2017).

¹³⁷ See generally MARY GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001) (on UDHR’s creation and its significance in world history); and Nsongurua Udombana, *Mission Accomplished? An Impact Assessment of the UDHR in Africa*, 30(1) *HAMLINE J. PUB. L. & POL’Y* 335 (2008).

¹³⁸ UDHR, *supra* note 4, pmbl.

¹³⁹ JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: DRAFTING, ORIGINS & INTENT* 309 (1999) (noting: “The initial presumption is that the Universal Declaration reflects some sort of natural rights view of human rights.”); and generally Johannes Morsink, *The Philosophy of the Universal Declaration*, 6 *HUM. RTS. Q.* 309 (1984).

24 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

dignity” and the “inalienable rights of all members of the human family.”¹⁴⁰ It notes how “disregard and contempt for human rights have resulted in barbarous acts which have outraged the *conscience of mankind*.”¹⁴¹ It declares that “[a]ll human beings are . . . endowed with *reason and conscience*.”¹⁴² References to “reason” and “conscience” reaffirm our rationality and moral agency. (A moral agent is one capable of discerning right from wrong and who could be held accountable for his actions.) As the eyes respond to light in the physical world, so our conscience alerts us to our inner morality without the need for explicit teaching. Of course, this inherent moral disposition can be refined by external influences such as education and culture.¹⁴³

The UDHR reflects an overlapping consensus that attests to its legitimacy.¹⁴⁴ It provides a basis for its shared heritage by recognizing the unity of humankind and incorporating natural rights traditions.¹⁴⁵ Some authorities suggest that the UDHR “does not of its own force impose obligations as a matter of international law.”¹⁴⁶ But there is no doubt that some of its guarantees—such as the right to life, non-discrimination, and freedom from torture and slavery—constitute norms of customary law.¹⁴⁷ Even its indirect legal effect cannot be underestimated. Crawford notes that “[t]he Declaration is a good example of

¹⁴⁰ UDHR, *supra* note 4, pmb., *cf.* African Youth Charter, AU Doc. Assembly/AU/Dec.121 (VII), pmb. (Jul. 2, 2006) (hereinafter “African Youth Charter”) (similarly worded).

¹⁴¹ UDHR, *supra* note 4, pmb. (emphasis supplied).

¹⁴² *Id.* art. 1 (emphasis supplied).

¹⁴³ *Cf.* C.S. LEWIS, *THE ABOLITION OF MAN* 11 (2014) (hereinafter “LEWIS, *ABOLITION OF MAN*”) (Writing: “It still remains true that no justification of virtue will enable a man to be virtuous. Without the aid of trained emotions, the intellect is powerless against the animal organism.”).

¹⁴⁴ Susan Waltz, *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights*, 23(3) *THIRD WORLD Q.* 438, 447 (2002).

¹⁴⁵ See MORSINK, *supra* note 139, at 281 (describing the first sentence of Article 1 as “a virtual rewrite” of Article 1 of the French Declaration).

¹⁴⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

¹⁴⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (holding that the prohibition of torture, as guaranteed in the UDHR and other international instruments, is part of customary law); *cf.* *Omary & Ors. v. Tanzania*, ACtHPR App. No. 001/2012 ¶ 73 (maintaining that though the UDHR “is not a treaty that should be ratified by States for it to enter into force, it has attained the status of customary

an informal prescription given legal significance by actions of authoritative decision-makers.”¹⁴⁸ It inspires hope in times of political and social turmoil, providing humanity with a powerful shield, if not weapon, against oppression. Its adoption opened a cleft in the pitiless walls of the world.

The UDHR remains the basis for U.N. standard setting, evidenced by legions of subsequent human rights instruments, including the Human Rights Covenants. Various judicial bodies draw common inspiration from the Declaration in interpreting disparate treaty and constitutional texts.¹⁴⁹ Thanks to the UDHR and its progenies, human rights and the rule of law are today embedded in our collective consciousness. To ignore these concrete gains is like noticing the beauty of the rain but failing to see that it has enriched the soil. The significance of these achievements also becomes clear if we consider a world where unchecked power and unprotected freedoms prevail.

B. The Jus Commune of Human Rights

Despite progress in enunciating human rights standards across the globe, criticisms of the principle of universality persist. This section articulates, and respond to, some of these criticisms. It contends that whatever else may be true, it is emphatically not true that human rights derive their legitimacy from self-contained cultural norms or positive laws. Addressing humanity’s common challenges in an effective manner requires acknowledging the importance of universal norms, and less deference to state susceptibilities or cultural norms

international law and a *grundnorm*.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. L. INST. 1995) 2 at 161 ¶¶ 701-2 (1987); and THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY INTERNATIONAL LAW 93 (1989).

¹⁴⁸ JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 612 (2019) (noting, for example, that the UDHR “was used as an agreed point of reference in the Helsinki Final Act, the second of the non-binding instruments which have been of considerable importance in practice.”); *id.*

¹⁴⁹ See generally Nsongurua Udombana, *Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies*, 5 AFR. HUM. RTS. L.J. 47 (2005); A.-M. Slaughter, *A Global Community of Courts*, 44 HARV. L. REV. 191 (2003).

that vary from one social milieu to another.¹⁵⁰

1. Addressing Challenges to Universality

Some critics challenge the sufficiency of natural law as a ground for all rights listed in the UDHR and its progenies. Freeman points out the impracticality of certain rights for specific groups, such as the right to political participation for children.¹⁵¹ Critics also question the relevance of natural law in reflecting human diversity and cultural specificity. They argue that grounding human rights on natural law could overlook the varied social, cultural, and historical contexts that shape human experiences and needs. Such an outlook could marginalize communities whose rights are culturally contingent.¹⁵²

Secular relativists deny moral absolutes or objective standards. They argue that truth is shaped by individual perspectives, linguistic frameworks, and cultural backgrounds, than being a reflection of an objective reality. They argue against the universality of “metanarratives”—the overarching, simplifying stories or theories that we use to explain knowledge and history. These grand narratives have lost their credibility and legitimacy in the postmodern world. Its collapse leads to an acknowledgment of the plurality of truths—Nietzsche’s perspectivism.¹⁵³ It legitimizes *petit récits*, or smaller, localized narratives specific to particular groups.¹⁵⁴

Positivists posit that human rights need democratic legitimization beyond mere philosophical justification. They stress that political

¹⁵⁰ See generally A.A. CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND — TOWARDS A NEW JUS GENTIUM* (2020).

¹⁵¹ FREEMAN, *HUMAN RIGHTS*, *supra* note 15, at 67.

¹⁵² See JANE K. COWAN, *CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 15-20* (2001) (discussing the complex relationships between culture, rights, and universalism).

¹⁵³ See generally FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* (1886).

¹⁵⁴ See generally RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979) (arguing for a concept of truth founded on consensus among communities rather than on correspondence to a reality external to human descriptions); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1979); MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1969) (illustrating how power and knowledge interact to create regimes of truth that are accepted as objective reality in various epochs).

processes should define and protect rights.¹⁵⁵ Waldron argues that it is states, as political entities, that grant rights and craft laws. His position aligns with Bentham, who long argued that rights are fruits of the law, that there are no rights without law, no rights contrary to law, and no rights anterior to law.¹⁵⁶

These criticisms of universalism warrant vigorous rejoinders as they represent partial truths. In the first place, age or capacity is not an essential element in conceptualizing human rights. A right can inhere in the individual even if its full manifestation is delayed or the right-holder is incapable of actualizing it personally. That a three-month old baby cannot eat by herself does not negate her claim to nutrition as a human being. Minors lack the capacity to make certain claims, but the law often permits legal representatives to act on their behalf.¹⁵⁷ Old people with diminished mental capacity fall into this category. The outcome of claims made their behalf are not less binding.

Rights are admittedly context dependent. The human rights corpus acknowledges cultural and practical variations. For example, the CRC acknowledges that cultural values vary across different societies.¹⁵⁸ It permits states to consider these differences when imple-

¹⁵⁵ Larry Alexander, *Constitutionalism*, in THE BLACKWELL GUIDE TO THE LEGAL PHILOSOPHY OF LAW AND LEGAL THEORY 248, 256 (Martin Golding & William Edmundson eds., 2005) (explaining Jeremy Waldron's critique of rights as trumps).

¹⁵⁶ NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 46, 53 (Jeremy Waldron ed., 1987).

¹⁵⁷ See, e.g., *CRC v. Italy*, CRC/C/OPAC/ITA/1 (Sept. 22, 2009) (holding that children have the right to bring judicial proceedings, either directly or through a representative, to enforce their rights under the CRC); *A.S. v. Hungary*, ECtHR App. No. 39358/12 (May 31, 2013) (ruling that a minor's right to access to court can be exercised through a legal representative); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (holding that a minor's rights can be asserted by a guardian or next friend).

¹⁵⁸ CRC, *supra* note 104, pmbl. (taking "due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child."); cf. *G.A. Res. 61/295*, Declaration on the Rights of Indigenous Peoples, pmbl., Sept. 13, 2007 (hereinafter "Declaration on the Rights of Indigenous Peoples") (recognizing "the right of indigenous families and communities

menting the treaty, subject to the overriding principle of the “best interest of the child.”¹⁵⁹ Clearly, different legal systems approach human rights differently, shaped by political, policy, or other considerations.¹⁶⁰ Universality does not fail on this score. Universalists contend that while cultural variations exist, a common teleology ensures the generality or catholicity of core elements. Baxi rightly notes that “the global human rights culture, far from being a culture of no cultures, is a culture of many cultures.”¹⁶¹ Despite variations in their enunciation, “their conception marks presence in all cultures, and in the history of human thinking of all peoples.”¹⁶² According to Bisaz, “the concept of rights stays the same if you change from the law of one state to another; only the content of rights changes.”¹⁶³ Besides, the global and regional human rights systems are complementary; one is centrifugal, and the other is centripetal in design.

The concept of human rights is engraved in the universal conscience, revealing the enduring force of natural law. If there are no universal ethics, the idea of “universal human rights” becomes a self-contradictory idiom. Without a conceptual coherence, human rights stand doomed by culture war skirmishes. Even doctrines like “international minimum standards” in the law of diplomatic and investment protection or the treatment of aliens¹⁶⁴ become meaningless. Life in an

for the upbringing, training, education and well-being of their children, consistent with the rights of the child.”).

¹⁵⁹ See Committee on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the CRC arts. 4, 42 and 44 ¶ 6, Nov. 2003, U.N. Doc. CRC/GC/2003/527.

¹⁶⁰ Cf. Declaration on the Rights of Indigenous Peoples, *supra* note 158, pmbl. (“Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration.”).

¹⁶¹ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 22 (2007).

¹⁶² *Accordance with International Law* case, *supra* note 124, at 603 ¶ 199.

¹⁶³ CORSIN BISAZ, *THE CONCEPT OF GROUP RIGHTS IN INTERNATIONAL LAW: GROUPS AS CONTESTED RIGHT-HOLDERS, SUBJECTS AND LEGAL PERSONS* 17-18 (2012); cf. FREEMAN, *HUMAN RIGHTS*, *supra* note 15, at 11 (writing: “It is a mistake . . . to believe that the legalization of human rights takes the concept out of politics.”).

¹⁶⁴ *L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States*, 3 ILR 213

ethical void is an existential wasteland—Sartre’s *Nausea*.¹⁶⁵

There is a moral order built into the universe. Truths exist objectively; only lies are invented. If there is no ultimate basis for justice, there is no ultimate basis for ethics; and if there is no ultimate basis for ethics, all of life becomes subject to individual preferences. If truths are products of individual preferences, the idea of universal obligations is the nearest to absurdity. If nothing is *certainly* wrong, why are the eyes of the universe eternally fixed on Hitler with loathing astonishment? If rape is not wrong everywhere, nothing is wrong anywhere. A dogmatic belief in objective moral principles is “necessary to the very idea of a rule which is not tyranny or an obedience which is not slavery.”¹⁶⁶ Power or sanction alone cannot compel obedience: “to obey out of fear may indeed count as prudential behavior, but it does not count as moral behavior.”¹⁶⁷

The view that individuals possess rights granted only by positive law is untrue. Human rights precede the formation of states.¹⁶⁸ They are neither products of civilization nor conceded by public power.¹⁶⁹ They transcend political constructs. A constitution does not create human rights either—any more than the hood makes the monk—but represents a legal order crystallizing antecedent rights.¹⁷⁰

(1926) (stating: “[T]he propriety of governmental acts should be put to the test of international standards . . . the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”).

¹⁶⁵ JEAN PAUL SARTRE, *NAUSEA* (1938) (asserting that human existence is meaningless, and that we must take responsibility to create our own meaning in life).

¹⁶⁶ LEWIS, *ABOLITION OF MAN*, *supra* note 143, at 37.

¹⁶⁷ CRAIG BOYD, *A SHARED MORALITY: A NARRATIVE DEFENSE OF NATURAL LAW ETHICS* 153 (2007).

¹⁶⁸ *Accordance with International Law* case, *supra* note 124, at 606 ¶ 198 (holding that rights inherent to the human person possess universality and timelessness); see generally Sandy Hall, *The Persistent Spectre: Natural Law, International Order, and the Limits of Legal Positivism*, 12 EUR. J. INT’L L. 269 (2001).

¹⁶⁹ Cf. SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 32-33 (James Strachey trans., 2002) (originally published 1930) (asserting that individual liberty existed before the emergence of civilization).

¹⁷⁰ Edward Corwin, *The Constitution as Instrument and as Symbol*, 30(6) AM.

30 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

Of course, each state has the sovereign right to decide which moral claims it recognizes through positive law. However, those claims persist even when the state fails to recognize them.¹⁷¹ By their nature, some claims will forever remain in the moral realm, for example a child's right to be loved. Affection cannot be legislated.¹⁷² The next sub-section further cross-examines the state-centric theory of rights.

2. *Human Rights as Jus Cogens*

Logical positivism is grounded on the Verification Principle, which states that a statement is meaningful and true only if it can be verified in the same manner that scientific hypotheses are tested through experiments.¹⁷³ But positivism veils the practical realities of life. Life is a struggle. Ours is a world of hopes and anxieties, where the unexpected is the only certainty. Where there is a need there is also an obligation. Law evolved from practical experience and the need to aid individuals in their daily struggles for survival. It becomes pathology when it is concerned more with syllogism than in enriching lives. Humanity is not abstract, and reality is not found in logic. In 1881, Holmes wrote that "[t]he life of the law has not been logic: it has been experience."¹⁷⁴

Recta ratio ("right reasoning in acting") is the foundation of

POL. SC. REV. 1071-1073 (1936) (quoting Alf Landon, the former governor of Kansas).

¹⁷¹ WIKTOR OSIATYNSKI, HUMAN RIGHTS AND THEIR LIMITS 105 (2009).

¹⁷² Cf. MARTIN LUTHER KING JR., WHERE DO WE GO FROM HERE? CHAOS OR COMMUNITY 189 (2010) (originally published 1967) ("It may be true that *the law cannot make a man love me*, but it can keep him from lynching me, and I think that is pretty important.") (italics supplied); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that the state cannot force expression of loyalty, thus affirming the limits of law in governing internal sentiments).

¹⁷³ A.J. AYER, LANGUAGE, TRUTH AND LOGIC 35 (1936).

¹⁷⁴ OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1881) (continuing: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."); *id.*

the law of nations, reflecting natural law precepts that founders of international law like Suárez long emphasized.¹⁷⁵ These precepts include the principle of humanity. Under international humanitarian law (IHL), the principle of humanity demands that belligerents should draw a distinction between military objectives and civilian objects.¹⁷⁶ It forbids inflicting suffering, injury, or destruction that is not necessary to achieve a legitimate military purpose.¹⁷⁷ But the principle of humanity is not limited to IHL; it guides the international legal system as a whole, including human rights, criminal, and refugee laws.¹⁷⁸ The U.N. Charter provisions on human rights have sometimes served as legal bases for considerations of humanity.¹⁷⁹ The Statute of the International Criminal Court¹⁸⁰ forbids ‘crimes against humanity’ and holds perpetrators accountable regardless of nationality, local laws, or customs.¹⁸¹ Although international responsibilities for such *delicts jure gentium* (“wrongs against the law of nations”) rest on treaties, that is positive law, they are rooted in principles of practical reason. These principles serve as *concepts* for positive laws’ *conceptions* of justice in particular cases.¹⁸²

¹⁷⁵ Francisco Suárez, *The Eternal Law, the Natural Law, and the Jus Gentium*, in *TRACTATUS DE LEGIBUS*, AC DEO LEGISLATORE bk. II (1612) (upholding the unity of humankind); cf. MARK VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 665 (2009) (stating that “[e]arly international law based on natural law envisaged a *jus strictum* setting limits to be respected by States under all circumstances.”).

¹⁷⁶ Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 48, Aug. 15, 1977, 16 I.L.M. 1391 (hereinafter “API”). For a definition of “military objectives,” see *id.* art. 52.

¹⁷⁷ *Id.* art. 35(2); *Prosecutor v. Stanislav Galić* ¶¶ 58–60 & 87–90, Case No. IT-98-29-T, Trial Chamber Judgment, Dec. 5, 2003 (discussing the illegality of attacks that cause excessive harm to civilians or civilian objects in relation to the anticipated military advantage); *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Chamber Judgment, Dec. 12, 2007.

¹⁷⁸ Cf. *Corfu Channel Case*, merits, 1949 I.C.J. 4 at 22 (holding that “elementary considerations of humanity [are] even more exacting in peace than in war.”).

¹⁷⁹ *South West Africa Case*, *supra* note 134, at 252–3 & 270 (Judge Tanaka, diss.).

¹⁸⁰ U.N. Doc. A/CONF.183/9 (July 17, 1998) (hereinafter “ICC Statute”).

¹⁸¹ *Id.* arts. 5 & 7.

¹⁸² Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 135 (1978) (hereinafter

32 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

International law becomes sterile when it personifies the will of states,¹⁸³ accords them “*a priori* standing in international scheme of things,”¹⁸⁴ while undermining natural law. Natural law principles—principles of practical reason—drive a legal order’s search for justice.¹⁸⁵ They also “operate in the interstitial spaces of coordination between the moral and legal spheres of conduct,”¹⁸⁶ revealing a truth that is higher than either, differing from both, but opposed to none. Such a shared normativity makes sense only on the assumption of what Kelsen calls the *Grundnorm* (“basic norm”)¹⁸⁷—a foundational, presupposed principle that validates subordinate norms. It is striking that Kelsen, a positivist, rooted his initial formulation of the *Grundnorm* in the *pacta sunt servanda* rule¹⁸⁸—the application of the good faith principle to the law of treaties.¹⁸⁹ Good faith, or *bona fides*, is based

“DWORKIN, TAKING RIGHTS SERIOUSLY”) (writing that “[w]hen I appeal to the concept of fairness I appeal to what fairness means . . . [but] when I lay down my conception of fairness I try to answer it.”).

¹⁸³ See, e.g., *Lotus Case*, P.C.I.J. (ser. A) No. 10, 18 (1927) (holding that “the rules of law binding upon states . . . emanate from their own free will . . . restrictions upon the independence of states cannot therefore be presumed.”); cf. JOHN O’BRIEN, *INTERNATIONAL LAW* 49 (2001) (arguing that “[p]ositivism as a theory has always been favored by those states seeking freedom of action in all spheres save those where voluntary restraints have been accepted.”).

¹⁸⁴ Maxwel Miyawa, *African Approaches to International Law: A Communitarian Ethic as a Cultural Critique of the Western Understanding of the Human Rights Corpus*, in *EXPLORING AFRICAN APPROACHES TO INTERNATIONAL LAW: ESSAYS IN HONOUR OF KEBA MBAYE* 145, 153 (Frans Viljoen, Humphrey Sipalla & Foluso Adegale eds., 2022) (continuing: “In terms of this view, the state doubles as the norm-giver, the subject, and the addressee of international law.”); *id.*

¹⁸⁵ See *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the 1944 International Air Services Transit Agreement* (Bahrain, Egypt, Saudi Arabia, and United Arab Emirates v. Qatar), Judgment (2020) I.C.J. ¶ 73 (Judge Trindade sep. op.) (Jul. 14, 2020); cf. *Atkins v. Virginia*, 536 U.S. 304 (2002) (speaking of “the evolving standards of decency that mark the progress of a maturing society”—standards from which the Eighth Amendment is said to “draw its meaning.”); *id.* at 311-12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

¹⁸⁶ JANELLE MARIE DILLER, *SECURING DIGNITY AND FREEDOM THROUGH HUMAN RIGHTS* 88 n.275 (2012).

¹⁸⁷ HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 553 (1966).

¹⁸⁸ HANS Kelsen, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* 217 (1928).

¹⁸⁹ Vienna Convention on the Law of Treaties (VCLT), adopted May 23, 1969,

on the equitable idea that simple promises should be kept to avoid frustrating legitimate expectations.¹⁹⁰ The principle pervades the entire legal order. The U.N. Charter enjoins all its members to “fulfil in good faith the obligations assumed by them,” a necessary condition for ensuring to them “the rights and benefits resulting from membership.”¹⁹¹

Villiger traces the roots of the *pacta sunt servanda* rule to the Roman law *jus publicum privatorum pactis mutari non potest* (“a public right cannot be altered by the agreements of private persons”). He noted how it was accepted in the 19th century that “treaties had to have an object that was *physically and morally possible*.”¹⁹² Clearly, the *pacta sunt servanda* rule positivizes natural law.¹⁹³ There is also a judicial authority to assert that the “general principles of law,” enshrined in the ICJ Statute of 1945,¹⁹⁴ contains natural law elements.¹⁹⁵ Kant’s Categorical Imperative, which he formulates as the supreme principle for determining the morality of actions—the sense of “oughtness” or duty—also rests on natural law.¹⁹⁶ Both the *Grundnorm* and the Cate-

art. 26, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (hereinafter “VCLT”) (providing that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”). The *pacta sunt servanda* rule is universally recognized as customary law. *Id.* pmb., see generally I. Lukashuk, *The Principle pacta sunt servanda and the Nature of Obligation under International Law*, 83 AM. J. INT’L L. 513 (1989).

¹⁹⁰ See generally J.F. O’CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991) (examining the origin and development of good faith in legal theory and its role as a fundamental principle in international law).

¹⁹¹ U.N. Charter, *supra* note 36, art. 2(2).

¹⁹² VILLIGER, *supra* note 175, at 665 (italics supplied).

¹⁹³ See generally W.P. Gormley, *The Codification of pacta sunt servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith*, 14 ST. LOUIS UNIV. L.J. 367 (1970).

¹⁹⁴ ICJ Statute, Jun. 26, 1945, art. 38(1)(c), 59 Stat. 1055, 3 Bevans 1179 (hereinafter “ICJ Statute”).

¹⁹⁵ *South West Africa Cases*, *supra* note 134, at 298.

¹⁹⁶ See generally IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS (Christine M. Korsgaard trans., 2012) (originally published 1785) (hereinafter “KANT, GROUNDWORK”).

gorical Imperative are analogous to the *jus cogens* doctrine—peremptory, non-derogable norms of international law.¹⁹⁷ *Jus cogens* are exceptions to the general rule of state consent.¹⁹⁸ No state is permitted to opt out of their constraints.¹⁹⁹

In his persuasive dissent in the *South West Africa* cases, Judge Tanaka asserted that “the law concerning the protection of human rights may be considered to belong to the *jus cogens*.”²⁰⁰ The VCLT supports this view; it exempts humanitarian treaties from the principle that a material breach by one party allows the other to terminate or suspend the treaty.²⁰¹ Such treaties do not confer reciprocal obligations;²⁰² they protect and promote basic values and common interests of all states, giving rise to obligations *erga omnes* (“towards all”).²⁰³ In the *Legality of Nuclear Weapons* case, the ICJ notes that “a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’” that they are “*to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international*

¹⁹⁷ VCLT, *supra* note 189, art. 53 (invalidating any treaty that conflicts with a peremptory norm); cf. Hersch Lauterpacht (Special Rapporteur), *Report on the Law of Treaties*, II YRBK ILC 106 (1953) (defining *jus cogens* as “overriding principles of international law.”).

¹⁹⁸ See VILLIGER, *supra* note 175, at 665.

¹⁹⁹ See *Yousuf v. Samantar*, 699 F.3d 763, 775-78 (4th Cir. 2012) (denying a former government official foreign sovereign immunity for “torture, extrajudicial killings and prolonged arbitrary imprisonment of political and ethnically disfavored groups” because such acts violated *jus cogens*).

²⁰⁰ *South West Africa Cases*, *supra* note 134, at 298.

²⁰¹ VCLT, *supra* note 189, art. 60(5).

²⁰² See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 19 (May 28, 1951); cf. *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*, HUMAN RIGHTS COMMITTEE GENERAL COMMENT NO. 24 ¶ 17 (1994).

²⁰³ See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5) (drawing a distinction between inter-state bilateral obligations and those “towards the international community as a whole”); cf. *East Timor (Portugal v. Australia)*, 1995 I.C.J. 90, 102 (June 30).

customary law.”²⁰⁴

Dworkin regards rights as “trumps over some background justification for political decisions that states a goal for the community as a whole.”²⁰⁵ Long before him, Bluntschli argued that sovereignty was always limited by the obligation to guarantee human rights of citizens and non-citizens.²⁰⁶ In *Velásquez Rodríguez v. Honduras*, Judgment the Inter-American Court of Human Rights (I-ACtHR) held that the exercise of public authority has inherent limits, that the state is subject to moral and legal accountability, and that its actions must align with imperatives of human dignity.²⁰⁷ In *Undocumented Migrants* case, the same Court held that human rights are “superior to the power of the State, whatever its political structure.”²⁰⁸ And in *The Word ‘Laws’* case,²⁰⁹ Judge Trindade maintained that certain spheres of individual life lie beyond the reach of state authority or are subject to only limited intervention.²¹⁰

²⁰⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 257 ¶ 79 (July 8) (emphasis supplied); cf. U.N. Doc. S/RES/1674 ¶ 4 (Apr. 8, 2006) (“reaffirming the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility [of the international community] to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”).

²⁰⁵ Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 152, 153 (Jeremy Waldron ed., 1984) (arguing that rights function as “trumps over some background justification for political decisions that states a goal for the community as a whole.”).

²⁰⁶ JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIERTEN STAATEN ALS RECHTSBUCH DARGESTELLT [The Modern International Law of Civilized States Presented as a Legal Book] 20 (1867); cf. CRAWFORD, *supra* note 148, at 421 (arguing that “[t]o regard a population, in the normal case, as related to particular areas of territory, is . . . to recognize a human and political reality which underlies modern territorial settlements. Sovereignty denotes responsibility, and a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at its discretion.”).

²⁰⁷ Inter-Am. Ct. H.R., (ser. C) No. 4, ¶¶ 154, 165 (Jul. 29, 1988).

²⁰⁸ *Undocumented Migrants* Case, *supra* note 3, ¶ 73 (Judge Trindade conc.).

²⁰⁹ *The Word ‘Laws’ in Article 30 of the American Convention on Human Rights*, Advisory Opinion, OC-6/86, Inter-Am. Ct. H.R., (ser. A) No. 6 (May 9, 1986).

²¹⁰ *Id.* ¶ 21.

C. Thoughts on Duties

A right is not effectual by itself, but in relation to the obligation to which it corresponds.²¹¹ This fact explains why human rights treaties often require state parties to adopt legislative and other domestic measures to fulfill their *pacta sunt servanda* obligations.²¹² This section examines how positive law effectuate natural rights and whether human rights obligations extend to individuals as such. It also provides an Afrocentric portrait on duties vis-à-vis human and peoples' rights.

1. Natural Rights and Positive Obligations

The effectiveness of human rights depends on their enforcement. Natural rights are limited in this regard.²¹³ Individuals can appeal to public opinion or historical judgment, but those “do not constitute a formalized way to seek and receive relief or compensation for the underlying moral transgression.”²¹⁴ The state remains the protective mechanism for the freedoms that natural law upholds.²¹⁵ Most bills of rights are framed with phrases like “the State shall guarantee”—as in the Ecuador Constitution,²¹⁶ Cameroon Constitution,²¹⁷ and even the regional African Charter on Democracy, Elections and Governance.²¹⁸ The obligation is imperative. The UDHR also emphasizes the importance of protecting human rights through the rule of law.²¹⁹ The rule of law restrains power. Though not a certainty, positivizing rights establishes strong safeguards against infringements by state and non-state entities. It makes the rights justiciable, meaning

²¹¹ WEIL, ANTHOLOGY, *supra* note 82, at 106.

²¹² ICCPR, *supra* note 4, art. 2(1); African Charter, *supra* note 8, art. 1.

²¹³ FREUD, *supra* note 169, at 33.

²¹⁴ OSIATYNSKI, *supra* note 171, at 105.

²¹⁵ Cf. MARTTI KOSKENNIEMI, THE GENTLE CIVILISER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 396 (2001).

²¹⁶ Ecuador Const. (2008) §§ 29, 32, 33 & 34.

²¹⁷ Cameroon Const. (1972, rev. 2008) §§ 18 & 25.

²¹⁸ African Charter on Democracy, Elections and Governance, A.U. DOC. Assembly/AU/Dec.147 (VIII), art. 19 (Jan. 30, 2007).

²¹⁹ UDHR, *supra* note 4, pmbl., cf. WALLING, *supra* note 5, at 18 (noting that “human rights cannot be protected in societies without a strong rule of law”).

that courts can adjudicate and offer remedies.²²⁰ And it provides a potent tool to address justice issues.

The question whether natural law also imposes correlative duties on individuals raises philosophical debates. Liberal philosophy insists that individuals have complete freedom to choose their actions and create their own meaning in life, unencumbered by external determinants.²²¹ Mill defines liberty as independence—freedom from another’s control.²²² Conversely, communitarians argue that living in a society requires balancing individual freedoms with collective responsibilities; in other words, that it is legitimate to sacrifice some personal autonomy for a greater common good. According to Stammer, “Good social conditions cannot be achieved by merely aggregating individual interests; a more nuanced understanding of the collective good is necessary.”²²³ Communitarians further argue that an overemphasis on individual autonomy neglects the importance of community and social responsibility. Such a neglect could lead to a fragmented human experience.²²⁴

The perceived conflict between libertarianism and communitarianism is exaggerated. Both worldviews complement each other—like diverse instruments blending in a symphony. Each of us is something that the other is not, and knows something which no one else knows; thus, it is everyone’s business to give his portion to the rest. Recognizing this shared humanity and interdependence means that we can nurture a society that at once values personal autonomy and social responsibility. Several international instruments embody this shared

²²⁰ Cf. Francesca Bignami & Carla Spivack, *Social and Economic Rights as Fundamental Rights*, 62 AM. J. COMP. L. 561 (2014) (“In both civil law and common law, to say that a right is justiciable means that an individual has a right to go to court and sue to enforce that right.”).

²²¹ See, e.g., JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* (1943) (dealing with questions of existence, consciousness, and the nature of freedom).

²²² JOHN STUART MILL, *ON LIBERTY* (1859); cf. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969) (emphasizing the importance of negative liberty).

²²³ RUDOLF STAMMLER, *LEBRUCH DER RECHTSPHILOSOPHIE* 880 (1923).

²²⁴ HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* (1964); see also MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982) (critiquing Rawls’ liberalism).

responsibility. The UDHR emphasizes social duties in addition to individual rights, and the necessity for personal freedoms to contribute to society's overall welfare.²²⁵ It enjoins us to "act towards one another in a spirit of brotherhood."²²⁶ The Declaration on Social Progress and Development 1969 emphasizes that all individuals have the right to live in dignity and freedom and to contribute to, and enjoy, the benefits of social progress.²²⁷

The Universal Declaration of Human Responsibilities of 1997 balances individual freedom with responsibility.²²⁸ It encourages individuals to embrace the "freedom of involvement" by supporting vulnerable populations, including the needy, disabled, and victims of discrimination.²²⁹ It recognizes that humans are social creatures whose personalities and behaviors are shaped by communal interactions. A community is like a family where individuals develop shared values, norms, and practices that influence their behavior and communication.

2. *An Afrocentric Perspective on Duties*

Some neoliberal scholars contest the idea that human rights concept existed in pre-colonial Africa.²³⁰ Among others, they argue that "rights holders" and "duty bearers" were not delineated in a clear manner. But rights and duties are not separate in African anthropology. Both complement each other.²³¹ According to Senghor, "[r]ights in Africa assume the form of rite which must be obeyed because it commands. It cannot be separated from the obligations due to the family and other communities."²³² In one of its Reports to the African

²²⁵ UDHR, *supra* note 4, art. 29.

²²⁶ *Id.* art. 1.

²²⁷ U.N. Doc. A/7630, art. 1 (1969) (italics supplied).

²²⁸ InterAction Council, *A Universal Declaration of Human Responsibilities*, pmbl. (Sept. 1, 1997), <https://www.interactioncouncil.org/publications/universal-declaration-human-responsibilities>.

²²⁹ *Id.* art. 10.

²³⁰ *See, e.g.,* DONNELLY, *supra* note 14, at 32-33.

²³¹ Preliminary Draft of the African Charter, Dakar Meeting of Experts (1979), OAU Doc. CAB/LEG/67/3/Rev.1, Introduction.

²³² Leopold Senghor, Address Delivered at the Opening of the Meeting of African Experts Preparing the Draft African Charter in Dakar, (Nov. 28–Dec. 8, 1979); *reprinted in* ISSA SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 121 (1989).

2025] WHAT DOES IT MEAN TO BE HUMAN? 39

Commission on Human and Peoples' Rights pursuant to Article 62 of the African Charter, Seychelles stressed that rights and duties are not "self-existent categories apart from each other and from human behavior in general, therefore the only possible way to guarantee human rights is the establishment of duties also."²³³

In like manner, there is no opposition between the individual and the community in Africa. The reason is that closely-knit societies make possible the reciprocity of obligations. According to Nanjira,

a person belongs to a community or society, and he/she is governed by social rules of existence and behavior, better known as the extended African family codes. A person is an integral member of a group animated by a spirit of African solidarity. His/her individual rights must conform to community or peoples' rights.²³⁴

Even in many postcolonial African societies, members of a particular community contribute to train individuals through college, just to cite one sector. Such communal support systems influence the beneficiaries' subsequent behavior and interactions with their community and extended family members. And since obligations come before rights, "[t]here is nothing scandalous in the subordination of the person to the collectivity."²³⁵ The whole is always greater than the sum of its parts, though not of a different character. Achebe puts it thus: "No man however great is greater than his community."²³⁶

This communitarian philosophy explains the African Charter's insistence that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."²³⁷ The duties inure to

²³³ Seychelles' Report to the ACHPR, pursuant to Article 62 of the African Charter, 1994–2004 (Jan. 1, 2004), www.achpr.org.

²³⁴ Daniel Don Nanjira, *The Protection of Human Rights in Africa: The African Charter on Human and Peoples' Rights*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 213, 222 (Janusz Symonides ed., 2003).

²³⁵ WEIL, ANTHOLOGY, *supra* note 82, at 76 (adding that this subordination "is a mechanical fact of the same order as the inferiority of a gram to a kilogram on the scales."); *id.* at 76–77.

²³⁶ CHINUA ACHEBE, ANTHILLS OF THE SAVANNAH 133 (1987).

²³⁷ African Charter, *supra* note 8. pmbl., African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/TSG/Rev. 1, pmbl. (Jul. 11, 1990)

the family, community, state, and the international community.²³⁸ This harmonious blending of individual rights and duties represents Africa's unique human rights fingerprint.²³⁹ The concept of *Ubuntu* also reflects this communitarian philosophy. It emphasizes communal interconnectedness and the responsibility that flows from it.²⁴⁰ Tutu explains that:

In Africa when you ask someone "How are you?" the reply you get is in the plural even when you are speaking to one person. A man would say, "We are well" or "We are not well." He himself may be quite well, but his grandmother is not well and so he is not well either. Our humanity we know is caught up in one another's. The solitary, isolated human being is a contradiction in terms.²⁴¹

Other traditional concepts stress the same communitarian philosophy. The *Ujamaa* (Swahili for "familyhood") prioritizes collective well-being and social harmony.²⁴² The Senegalese proverb "*Nit moodi garage u nit*" ("man is man's remedy") highlights our responsibility

(hereinafter "African Children Charter"); African Youth Charter, *supra* note 140, pmb.

²³⁸ African Charter, *supra* note 8, Arts. 27-29; African Children Charter, *supra* note 237, art. 31; African Youth Charter, *supra* note 140, art. 12. Some national constitutions are similarly framed, e.g., Nigeria Const. 1999, § 24.

²³⁹ See generally Makau Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VIRGINIA J. INT'L L. 339 (1995); Miyawa, *supra* note 184, (identifying an African human rights fingerprint that emphasizes a communal conception of rights and advances the notion of individual duties); Nsongurua Udombana, *Arise O Compatriot: An Analysis of Duties of Citizens in the Nigerian Constitution*, 34 ZAMBIA L.J. 24 (2002).

²⁴⁰ See generally RICHARD BELL, UNDERSTANDING AFRICAN PHILOSOPHY: A CROSS-CULTURAL APPROACH TO CLASSICAL AND CONTEMPORARY ISSUES 89 (2002); MOGOBE RAMOSE, AFRICAN PHILOSOPHY THROUGH UBUNTU (1999).

²⁴¹ DESMOND TUTU, GOD HAS A DREAM: A VISION OF HOPE FOR OUR TIME 25 (2004).

²⁴² The *Ujamaa* philosophy, which formed the basis of the Arusha Declaration in 1967, is attributed to Tanzania's Julius Nyerere. See generally Marie-Aude Fouere, *Julius Nyerere, Ujamaa, and Political Morality in Contemporary Tanzania*, 57(1) AFR. STUD. REV. 1 (2014) (exploring how and why a shared historical memory of Nyerere is being built or contested to define, mediate, and construct Tanzanian conceptions of morality, belonging, and citizenship).

to support one another.²⁴³ Mbiti sums up this mutual affirmation and communal responsiveness in his famous statement: “I am because we are; and since we are, therefore I am.”²⁴⁴

A caveat is warranted. An undue stress on community interest could result in collective authoritarianism and an overshadowing of individuals’ vital roles in the society. In like manner, an excessive focus on individual rights could harm communal well-being. In adjudicating rights, judicial mechanisms in Africa must maintain a healthy balance between communal well-being and individual rights.

Human Rights and the Ethics of Dignity

The most egregious historical crimes have roots in a lopsided characterization of human worth. The legacies of slavery and racism demonstrate how harmful concepts like “white supremacy” and “racial hierarchies” could be used to justify oppression.²⁴⁵ Language shapes our actions and power is efficacious when clothed in ideas. The Nazis understood this, so they adopted the early 20th century racially biased, unscientific doctrine of eugenics to preserve the so-called pure Aryan blood. That experiment led to unimaginable atrocities. In mass atrocities, the dehumanization of the victims often precedes their extermination. When Bach Zelewski, a Nuremberg trial witness, was asked how Ohlendorf could admit to the murder of 90,000 people, he replied: “I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable.”²⁴⁶

²⁴³ Quoted in Leopold Senghor, Address Delivered at the Opening of the Meeting of African Experts Preparing the Draft African Charter in Dakar, Nov. 28—Dec. 8, 1979, *reprinted in* ISSA SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 121 (1989); cf. ACHEBE, *A MAN OF THE PEOPLE*, *supra* note 57, at 2 (“An animal rubs its itching flank against a tree, but a man asks his kinsman to scratch him.”).

²⁴⁴ JOHN MBITI, *AFRICAN RELIGIONS AND PHILOSOPHY* 141 (1970) (2d ed. 1990).

²⁴⁵ See generally EQUAL JUSTICE INITIATIVE, *THE LEGACY MUSEUM: FROM ENSLAVEMENT TO MASS INCARCERATION* (2018)).

²⁴⁶ International Military Tribunal at Nuremberg, *Judgment*, 75 (Oct. 1, 1946), *reprinted in* 41 AM. J. INT’L L. 172 (1947).

42 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

Prior to the 1994 Rwanda genocide, extremist Hutu groups incited hatred against Tutsis by severally referring to them as “cockroaches” on Radio Rwanda.²⁴⁷ By giving a dog a bad name, it becomes easier to condemn it; as Goodheart states, “[t]here is no guilt for disposing an object, a thing, a piece of garbage.”²⁴⁸ But humans are not cockroaches. Dignity is our common denominator. Its collective longing permeates every aspect of life: politics, law, societal values, and personal choices. Dignity also provides the ethical foundation for human rights.²⁴⁹ This part interrogates this fundamental value and its relation to human rights and collective autonomy.

A. Our Common Denominator

There are good empirical reasons to assert that the things common to all humans are greater than what is peculiar to any human. That all humans deserve dignity is a self-evident truth. Havel writes that “[t]he essential aims of life are present naturally in every person. In everyone there is some longing for humanity’s rightful dignity, for moral integrity, for free expression of being and a sense of transcendence over the world of existence.”²⁵⁰ This subsection explores the concept, value, and manifestations of dignity.

1. The Concept of Dignity

The term “dignity” is derived from the Latin word *dignitas*, meaning “worth.” The term was first linked to status or hierarchy, denoting “the honor, the privileges and the deference due to rank or office.”²⁵¹ But its modern notion “involves an upward equalization of rank, so that we now try to accord every human being something of

²⁴⁷ See generally ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999) (providing a detailed account of this rhetoric).

²⁴⁸ Eugene Goodheart, *Reflections on Our Murderous Century*, in *LITERARY RESPONSES TO MASS VIOLENCE* 125, 127 (Peter Scott ed., 2004).

²⁴⁹ CONWAY HENDERSON, *UNDERSTANDING INTERNATIONAL LAW* 288 (2010) (writing that “[t]he enjoyment of rights involves a moral entitlement and calls for a recognition of human dignity, meaning that every person has honor and worth.”).

²⁵⁰ VACLAV HAVEL, *THE POWER OF THE POWERLESS: CITIZENS AGAINST THE STATE IN CENTRAL-EASTERN EUROPE* 23 (1985).

²⁵¹ JEREMY WALDRON, *DIGNITY, RANK, & RIGHTS* 30 (2012).

the dignity, rank, and expectation of respect that was formerly accorded to nobility.”²⁵² Bedi defines dignity as “the fundamental innate worth of the human person.”²⁵³ Cicero’s *humanitas* views dignity as recognition of one’s self-worth.

The concept of human dignity is traceable in varying forms across civilizations, religions, and cultures.²⁵⁴ Renaissance humanists link dignity to Greek democracy, but that connection has more to do with the revival of classical ideals. Bruni, a Florentine humanist who translated Greek texts, praised Athenian democracy’s emphasis on active citizenship.²⁵⁵ But ancient Greece did not recognize the inherent dignity of every individual.²⁵⁶ They had no conception of rights; indeed, “[t]hey had no words to express it.”²⁵⁷ Greek citizenship excluded many. Its democracy excluded women and slaves, a fact overlooked by humanists. Greek democracies were short-lived, often lasting a few decades before descending into mob rule. Plato witnessed this firsthand through the social disorder that resulted in Socrates’ execution. For this, he regarded pure democracy as the most flawed and dangerous form of government.²⁵⁸

Ancient Rome derived its understanding of the human person from pagan interpretations. Only a subsection of humanity—the king—was afforded dignity. Such an interpretation led to practices as

²⁵² *Id.* at 33.

²⁵³ SHIV BEDI, *THE DEVELOPMENT OF HUMAN RIGHTS LAW BY THE JUDGES OF THE INTERNATIONAL COURT OF JUSTICE* 171 (2007).

²⁵⁴ See generally Milton Lewis, *A Brief History of Human Dignity: Idea and Application*, in *PERSPECTIVES ON HUMAN DIGNITY: A CONVERSATION* (Jeff Malps & Norelle Lickiss, eds., 2007) (surveying Judeo-Christian, Graeco-Roman, Islamic, Buddhist, and Hindu roots of human dignity).

²⁵⁵ See, e.g., LEONARDO BRUNI, *IN PRAISE OF FLORENCE: THE PANEGYRIC OF THE CITY OF FLORENCE* (1400) (introducing ideas that were central to the Italian Renaissance).

²⁵⁶ VISHAL MANGALWADI, *THE BOOK THAT MADE YOUR WORLD: HOW THE BIBLE CREATED THE SOUL OF WESTERN CIVILIZATION* 59-60 (2011).

²⁵⁷ WEIL, *ANTHOLOGY*, *supra* note 82, at 82 (adding, “the notion of rights is alien to the Greek mind.”); *id.* at 83.

²⁵⁸ MANGALWADI, *supra* note 256, at 336; see generally DAVID GRESS, *FROM PLATO TO NATO* ch. 1 (1998) (exposing the myth that pre-Christian Greece was the source of Western democracy).

crucifixion, gladiatorial infighting, and infant abandonment.²⁵⁹ The Judeo-Christian notion of dignity emerged in response to such egregious practices, similar to the 20th century atrocities that birthed the modern human rights movement. In Judeo-Christian theology, all humans are endowed with dignity.²⁶⁰ The Biblical declaration “I am fearfully and wonderfully made”²⁶¹ highlights our intrinsic worth.²⁶² Though each soul has a secret signature—a unique DNA—humanity in general shares “an imaginary divinity.”²⁶³ We are equal before God,²⁶⁴ an idea that has wider implications on justice and human rights. We should value all persons alike without ignoring their unique situations.

The *Ubuntu* concept, highlighted earlier, embodies the African idea of human dignity. It recognizes human worth and respect for the dignity of every person.²⁶⁵ Naming ceremonies play a vital role in recognizing a child’s dignity and social identity. Symbolic items are often bestowed on the child during such ceremonies.²⁶⁶ The Igbos of Nigeria give water, wine, and honey—respectively representing purity, resilience, and sweetness in life. Elders offer prayers for blessings, conferring dignity and expressing collective hopes for the child’s future.²⁶⁷ These customs recognize children’s inherent worth and expectations

²⁵⁹ James Mumford, *The Foundations of Human Dignity: A Framework for Rights*, ARC RESEARCH PAPER, <https://www.arc-research.org/research-papers/foundations-of-human-dignity>.

²⁶⁰ HOLY BIBLE, Ps. 8:4-5.

²⁶¹ *Id.* Ps. 139:14; *cf. id.* Jer. 1:5 (our uniqueness and purpose from conception).

²⁶² Donald Bloesch, *The Doctrines of Humanity and Sin*, in *THE PORTABLE SEMINARY* 160, 163 (David Horton ed., 2006).

²⁶³ SIMONE WEIL, *WAITING ON GOD* 114 (1950).

²⁶⁴ HOLY BIBLE, Job 34:19 (indicating that God shows no partiality to princes and does not favor the rich over the poor); *id.* Acts 10:34 (“God shows no partiality.” ESV/NIV); *id.* Rom. 2: 11 & Eph. 6:9 (both emphasizing that God does not show favoritism).

²⁶⁵ *Hoffmann v. South African Airways*, CCT 17/00, (2001) AHRLR 186 ¶ 38 n31 (SACC) (hereinafter “*Hoffmann case*”).

²⁶⁶ See generally K. GYEKYE, *AFRICAN CULTURAL VALUES: AN INTRODUCTION* (1996).

²⁶⁷ See Clement Okafor, *Igbo Cosmology and Social Values*, 3(1) J. AFR. REL. & PHIL. 45 (1992) (exploring Igbo cultural practices, including naming ceremonies, and explaining the significance of symbolic items and prayers offered by elders).

that they will make meaningful contribution to communal life.²⁶⁸ The African Children Charter indicates that these values can be inculcated. It provides that the child's education shall be directed to preparation "for responsible life in a free society, in the spirit of understanding, tolerance, dialogue, mutual respect and friendship among all peoples[,] ethnic, tribal and religious groups."²⁶⁹

2. *A Supreme Value*

Augustine defines virtue as *ordo amoris* ("order of love"). It is the ordinate condition in which every object is accorded that degree of affection appropriate to it. In further developing this idea, the German philosopher Scheler argues that humans have a unique capacity for emotional intuition. This intuition enables them to perceive and respond to different values in their hierarchical importance.²⁷⁰ I submit that dignity is primordial in the *ordo amoris* for several reasons. First, dignity is a supreme value, the intrinsic worth embedded in our human nature. Second, it elevates humans above the non-human world.²⁷¹ Third, it is the common thread that holds humanity together. Fourth, it forms the cornerstone of any civilization. Fifth, life without dignity has no meaning or purpose.²⁷² Sixth, it remains a beacon even if its attainment sometimes seems elusive.

Societies may differ in ways of construing certain values, but

²⁶⁸ For a balance, mention should be made of some traditional harmful practices that debase human dignity, like female genital mutilation. In precolonial Africa, particularly in what later became Southeastern Nigeria, twins were killed after birth because of the erroneous belief that they represented evil or a bad omen. It took great campaigns by some Christian missionaries like Mary Slessor—the modern equivalent of human rights activists—to end the heinous act. *See generally* E.A. AYANDELE, *THE MISSIONARY IMPACT ON MODERN NIGERIA* (1966) (analyzing missionary influence, including abolition of harmful practices); W.P. LIVINGSTONE, *MAY SLESSOR OF CALABAR: PIONEER MISSIONARY* (1916) (containing letters and firsthand accounts).

²⁶⁹ African Children Charter, *supra* note 237, art. 11(2)(d); *cf.* African Youth Charter, *supra* note 140, art. 13(3)(c) (similarly worded).

²⁷⁰ *See generally* MAX SCHELER, *THE NATURE OF SYMPATHY* (Peter Heath, trans., 1913).

²⁷¹ JOHN TASIIOULAS, *HUMAN DIGNITY AND THE FOUNDATIONS OF HUMAN RIGHTS* 294 (Christopher McCrudden ed., 2013).

²⁷² RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 423 (2011).

moral human communities “recognize that human beings are, by virtue of being human, entitled to dignity and respect.”²⁷³ If every human being embodies inherent self-worth, then horrendous political communities such as the Third Reich, an apartheid state, or even hitherto European colonizing societies cannot qualify as *moral* societies.²⁷⁴ For the same reason, the so-called Indian untouchables, the *Romas* in Europe, or the *Osus* in Eastern Nigeria²⁷⁵ can claim dignity against the dominant structures of social exclusion. Those declared as stateless, refugees, and internally displaced persons also deserve to live in dignity for the simple reason that they exist.²⁷⁶

Dignity is grounded in practical reason. It is the impersonal sacred element in our humanity.²⁷⁷ It resides in the individual as the ultimate source of moral value. It is unrestricted by citizenship or legal status.²⁷⁸ Dignity is so fundamental that it remains unaltered even in the presence of mental disability.²⁷⁹ It is unlike power, which seeks to

²⁷³ BAXI, *supra* note 161, at 162.

²⁷⁴ *Id.*

²⁷⁵ The *Osu* caste system originated in the 14th century, when the Igbo people of Eastern Nigeria were organized into a decentralized, village-based society. The *Osus* were considered the lowest caste, often referred to as “slaves” or “outcastes.” They faced significant social exclusion, including restrictions on access to certain lands and interactions (including marriage) with members of the higher castes. Although the system has been officially abolished—through the *Osu Edict* of 1956—economic and other disparities remain. See generally CHUKWUEMEKA ANYANWU, *OSU: THE CASTE SYSTEM IN NIGERIA* (2015) (examining the effects of the *Osu* caste system on individuals and communities and efforts to eradicate it).

²⁷⁶ See generally Fatima Khan, *Does the Right to Dignity Extend Equally to Refugees in South Africa?* 20 AFR. HUM. RTS. L.J. 261 (2020) (using a human rights approach to explore the denial of dignity to refugees through their lived experiences in South Africa).

²⁷⁷ WEIL, *ANTHOLOGY*, *supra* note 82, at 74 (asserting that “[e]verything which is impersonal in man is sacred, and nothing else.”).

²⁷⁸ See ANTONIO CASSESE, *INTERNATIONAL LAW* 373 (2001) (“CASSESE, *INTERNATIONAL LAW*”) (writing that “the dignity of human beings is a basic value that every State should try to protect, regardless of considerations of nationality, race, colour, gender, etc.”).

²⁷⁹ *Purohit Case*, *supra* note 90, ¶ 59; cf. U.N. Convention on the Rights of Persons with Disabilities, art. 3(a), Dec. 13, 2006, 2515 U.N.T.S. 3 (hereinafter “Disabilities Convention”) (guaranteeing to persons with disability the respect for their inherent dignity).

control. It is like reason, truth, or beauty: a finality that transcends external objectives. Some see dignity as an end rather than a means to something else. Kant describes dignity as a “good will”—inertly good regardless of its accomplishments.²⁸⁰ For him, “[h]umanity itself is a dignity; for man cannot be used merely as a means by any man (either by others or even by himself) but must always be treated at the same time as an end.”²⁸¹ Sadly, Kant’s timeless formula “stood at odds with [his] own espousal, for most of his career, of scientific racism and of his ignorance of how such views precisely denied dignity to countless people.”²⁸²

Dignity is the sole foundation for the universal duty to respect all human beings.²⁸³ Respect is not a matter of degrees, but demands acknowledging a shared intrinsic value that transcends superficial differences.²⁸⁴ Genuine respect requires more than a passive sentiment. It is a practical commitment—*observantia aliis praestanda*—that tempers one’s self-esteem in favor of others.²⁸⁵ It imposes a duty on everyone to honor it. Our innate sense of dignity is offended when we feel disrespected, underscoring its significance in our human nature. What is an inherent part of our being has a right to be preserved, cherished, and protected. Thus, our shared humanity repels, and rebels against

²⁸⁰ KANT, GROUNDWORK, *supra* note 196, ¶ 394; cf. Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS 10, 12 (Meyer Michael & Parent William eds., 1992) (hereinafter “Gewirth, *Human Dignity*”) (writing that “[i]nherent dignity signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human.”) (italics in the original).

²⁸¹ IMMANUEL KANT, THE DOCTRINE OF VIRTUE 116 ¶ 38 (M.J. Gregor trans., 1964) (hereinafter “KANT, DOCTRINE OF VIRTUE”).

²⁸² Frederick Hauke, *What Germany’s Quest to Define Dignity – Both Before and After 1945 – Tells Us About Society*, THE CONVERSATION, Jul. 21, 2023, <https://theconversation.com>.

²⁸³ See Gewirth, *Human Dignity*, *supra* note 280, at 11.

²⁸⁴ SIMONE WEIL, GATEWAY TO GOD 40 (1974) [“WEIL, GATEWAY TO GOD”].

²⁸⁵ KANT, DOCTRINE OF VIRTUE, *supra* note 282, at 116 ¶ 25 (prioritizing moral laws and duties, such as treating others with compassion and respect); cf. HOLY BIBLE, Phil. 2:3 (“Instead of being motivated by selfish ambition or vanity, each of you should, in humility, be moved to treat one another as more important than yourself.”) (NET).

bullying, harassment, and other forms of inhumane treatment. We condemn such violations on impulse even where we do not know the victims.

The pursuit of equality, at its core, is also rooted in a psychological need for respect—Dworkin’s “right to equal concern and respect.”²⁸⁶ Brugger observes that “no one may pretend to stand above other human beings because all persons as persons have the same dignity and worth.”²⁸⁷ West also argues that “[e]ach and every one of us as everyday people is unique and distinctive, singular and irreducible, and therefore of equal value.”²⁸⁸

3. *Legal Principles on Dignity*

Dignity underpins ideas like reasonableness and justice aimed at realizing individual autonomy, potential, and self-development. Humaneness and dignity are the hallmarks of civilized laws. The tort law of defamation protects dignity, like human rights law. This law balances the right to free speech with the protection of individual reputation. In *Handyside v. United Kingdom*, the European Court of Human Rights (ECtHR) held that a person’s reputation is protected under the right to private life in Article 8 of the European Convention on Human Rights.²⁸⁹ In *Tolstoy Miloslavsky v. United Kingdom*, the ECtHR held that a person’s reputation may be harmed even when he is not the direct target of the defamatory statement.²⁹⁰

Criminal law also protects dignity. It presumes an accused person innocent throughout all phases of a criminal proceeding—from the preliminary investigation to the prosecution, and until his guilt is established at law beyond any reasonable doubt.²⁹¹ The ICC Statute stipulates that an accused person “[s]hall not be subjected to any form of

²⁸⁶ DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 182, at xii (arguing that this is the “most fundamental or rights.”); *id.*

²⁸⁷ Wilfried Brugger, *The Image of the Person in the Human Rights Concept*, 18 HUM. RTS. Q. 594, 603 (1996).

²⁸⁸ Cornel West, *A Grand Tradition of Struggle*, ENG. J. 39, 41 (2020).

²⁸⁹ *Handyside v. United Kingdom*, 1 Eur. Ct. H.R. 5 (1976).

²⁹⁰ *Tolstoy Miloslavsky v. United Kingdom*, 20 Eur. Ct. H.R. 39 (1995).

²⁹¹ *Pan African Lawyers Union*, Advisory Opinion, App. No. 001/2018 ¶ 89, 4 Afr. Ct. Rep., 874, 894 (Afr. Ct. H.P.R. 2020) (hereinafter “PALU Case”).

coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment.”²⁹² This prohibition embodies broad and idealistic notions of dignity, humanity, and decency. Even a convict serving a prison sentence must be treated humanely.²⁹³

The common Article 3 to the four Geneva Conventions of 1949 prescribes humane treatment of war victims and civilians. It prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment.”²⁹⁴ The Additional Protocol II enshrines this prohibition as a fundamental guarantee.²⁹⁵ In *Prosecutor v. Zlatko Aleksovski*, the International Criminal Tribunal for the Former Yugoslavia stated that “[a] reading of paragraph (1) of common Article 3 reveals that its purpose is to uphold and protect the inherent human dignity of the individual.”²⁹⁶ The Third Geneva Convention guarantees to prisoners of war (POW) humane treatment and respect for their person and honor in all circumstances.²⁹⁷ Even those who, for some reasons, are deprived of POW status are guaranteed respect for their persons.²⁹⁸ The API also prohibits “practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.”²⁹⁹

The U.N. stresses the necessity to observe the value of dignity

²⁹² ICC Statute, *supra* note 180, art. 55(1)(b).

²⁹³ ICCPR, *supra* note 4, art. 10(1); *cf.* Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/Res/43/173, Principle 1 (Dec. 9, 1988) (providing: “All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.”).

²⁹⁴ *E.g.* Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(c), Aug. 12, 1949, 75 U.N.T.S. 135 (hereinafter “GC III”).

²⁹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4(2)(e), Jun. 8, 1977, 1125 U.N.T.S. 609; *cf.* API, *supra* note 176, art. 75.

²⁹⁶ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, ¶ 49, Judgement, Int’l Crim. Trib. for the Former Yugoslavia, Jun. 25, 1999.

²⁹⁷ GC III, *supra* note 294, arts. 13&14.

²⁹⁸ API, *supra* note 176, art. 75.

²⁹⁹ *Id.* art. 85.

in counter-terrorism operations.³⁰⁰ The Yogyakarta Principles emphasize the importance of respecting and protecting human dignity in the context of sexual orientation and gender identity.³⁰¹ During natural disasters, the international community is under a “duty to cooperate” to respect and protect human dignity.³⁰² This obligation rests on the principle that human suffering must be addressed wherever it is found, with particular attention to the most vulnerable population.³⁰³

B. Dignity as the Raison d’Être for Human Rights

Human dignity is the foundational principle, moral anchor, and normative basis for human rights.³⁰⁴ It is the explicit and implicit presupposition of every article in human rights instruments.³⁰⁵ This unity of dignity and rights stems from the inherent worth of individuals. Donnelly argues that “[w]e have human rights not to the requisite for health but to those things ‘needed’ for a life worthy of a human being.”³⁰⁶ This section examines how dignity serves as the legislative spirit in all human rights instruments and the essence of every human right. It also illustrates some dignity-infringing acts.

³⁰⁰ G.A. Res. 53/144, U.N. Doc. A/Res/53/144 (Dec. 9, 1998).

³⁰¹ Int’l Comm’n of Jurists & Int’l Service for Hum. Rts., Yogyakarta Principles, Principle 1 (Nov. 2006), <https://yogyakartaprinciples.org/>.

³⁰² Int’l Law Comm’n, Third Report on the Protection of Persons in the Event of Disasters, by Mr. Eduardo Valencia-Ospina, Special Rapporteur, U.N. Doc. A/CN.4/629, Draft art. 7 (2010).

³⁰³ Cf. Council of the International Institute of Humanitarian Law, Guiding Principles on the Right to Humanitarian Assistance, Principle 3(a) (1993).

³⁰⁴ *Minister of Home Affairs and Others v. Watchenuka*, (2004) (4) SA 326; Gewirth, *Human Dignity*, *supra* note 280, at 13 (arguing that “inherent dignity . . . serves as the ground of human rights”); and generally TASIOLAS, *supra* note 271; PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW (2010); Christopher McCrudden, *Human Dignity and the Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008); Arthur Chaskalson, *Human Dignity as a Foundational Value of Our Constitutional Order*, 16 S.A. J. HUM. RTS. 193 (2000).

³⁰⁵ Cf. BEDI, *supra* note 253, at 171 (writing that “[h]uman dignity is a symbiotic concept at the centre of the ethical system comprising the social values that are the essence of human rights. . . . All the values that give rise to specific concepts of principles of human rights emerge from this core concept.”).

³⁰⁶ DONNELLY, *supra* note 14, at 14.

1. *The Legislative Spirit in Human Rights Instruments*

Human dignity is the legislative spirit in all human rights instruments.³⁰⁷ At the regional level, the ACHR provides that dignity is inherent in the human person,³⁰⁸ and that “[e]veryone has the right to have his honor respected and his dignity recognized.”³⁰⁹ The I-ACtHR re-affirmed this principle in the *Undocumented Migrants* case, holding that all persons possess inherent attributes of dignity that confer inalienable rights.³¹⁰ The European Union (EU) Charter of Fundamental Rights provides that human dignity is inviolable. It mandates all authorities to respect and protect it.³¹¹ In *Kingdom of the Netherlands v. European Parliament and Council of the European Union*, the European Court of Justice held that dignity is an integral part of EU law.³¹²

The Nazi regime’s dehumanization of individuals during World War II created an imperative to enshrine human dignity in the German Basic Law.³¹³ It declares that: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”³¹⁴ In the *Socialist Reich Party* case, the Federal Constitutional Court of Germany stressed the state’s obligation in safeguarding this fundamental value, by ensuring each person’s inherent worth and protection within society.³¹⁵ The Basic Law of Israel similarly provides that human dignity and liberty are the bases of the country’s human rights protection,³¹⁶ which makes sense in a state that was born after the Holocaust.

³⁰⁷ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 670 (2008) (arguing that international human rights instruments “adopted dignity as foundational . . . to human rights in general.”).

³⁰⁸ ACHR, *supra* note 27, art. 5(2).

³⁰⁹ *Id.* art. 11(1).

³¹⁰ *Undocumented Migrants Case*, *supra* note 3, ¶ 73.

³¹¹ Charter of Fundamental Rights of the European Union art. 1, Dec. 14, 2007, O.J., C 303/17,

³¹² Case C-377/98, 2001 E.C.R. I-07079 ¶¶ 70-77.

³¹³ Hauke, *supra* note 282.

³¹⁴ Basic Law for the Federal Republic of Germany art. 1, May 8, 1949.

³¹⁵ *Socialist Reich Party Case*, 2 BVerfGE 1, 1952.

³¹⁶ Basic Law: Human Dignity and Liberty 1992, § 1(A).

52 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

Dignity also permeates Africa's human rights system in multiple ways. The African Charter vests on every individual "the right to the respect of the dignity inherent in a human being."³¹⁷ The African Children Charter provides that "a child who is subjected to school or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child."³¹⁸ Many national constitutions enshrine dignity as a core human value, as in Kenya,³¹⁹ Cape Verde,³²⁰ Equatorial Guinea,³²¹ and Malawi.³²² The Namibia Constitution protects the dignity of all persons,³²³ portraying "the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past."³²⁴

Dignity is a central pillar of the post-apartheid South African Constitution. The Constitution "affirms the democratic values of human dignity, equality, and freedom."³²⁵ It provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."³²⁶ In *S v. Makwanyane and Another*, the South African Constitutional Court (SACC) emphasized the centrality of this value in the constitution and its role in invalidating the death penalty:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights . . . By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does,

³¹⁷ African Charter, *supra* note 8, pmbl.

³¹⁸ African Children Charter, *supra* note 237, art. 11(5).

³¹⁹ Kenya Const. 2010, § 19(2).

³²⁰ Cape Verde Const. 1992, pmbl.

³²¹ Equatorial Guinea Const. 1991, § 5.

³²² Malawi Const., § 12.

³²³ Namibia Const. 1990, § 8(1).

³²⁴ *State v. Tcoeib*, (2001) AHRLR 158 ¶ 20 (NASC 1996) (hereinafter "*Tcoeib Case*").

³²⁵ South Africa Const. 1996, pmbl., §§ 1 & 7(1).

³²⁶ *Id.* § 10.

including the way it punishes criminals.³²⁷

2. *The Essence of Every Human Right*

Dignity is at the core of the UDHR's outlook, though it did not recognize this value as foundational. The Declaration ranks dignity on par with "equal and inalienable rights."³²⁸ It was the International Pact of Human Rights of 1966 that categorically stated that human rights "derive from the inherent dignity of the human person."³²⁹ In that same year, the Human Rights Covenants reaffirmed that all their enumerated rights "derive from the inherent dignity of the human person."³³⁰ Subsequent U.N. instruments reaffirm this principle, including the Vienna Declaration.³³¹ Although the UDHR did not provide dignity as the origin of rights, it articulates this value in terms that resonate across legal and cultural traditions. It unequivocally provides that "[a]ll human beings are born free and equal in dignity and rights."³³² There is no doubt that the Declaration establishes "a universal principle of practical reasonableness."³³³

Each category of rights serves dignity in different ways. This value fortifies the fundamental principles of equality and non-discrimination. Both principles are like conjoined twins: one is an explicit guarantee of the other.³³⁴ They flow from our common humanity and aim at ensuring that all human beings can live in dignity and peace

³²⁷ *S. v. Makwanyane and Anor.* 1995 (6) BCLR 665, 706 ¶ 144 (CC) (hereinafter "*Makwanyane Case*").

³²⁸ UDHR, *supra* note 4, pmbl.

³²⁹ OSIATYNSKI, *supra* note 171, at 190-1.

³³⁰ International Covenant on Economic, Social and Cultural Rights, pmbl. (Dec. 16, 1966), 993 U.N.T.S. 3 (hereinafter "ICESCR"); ICCPR, *supra* note 4, pmbl.

³³¹ Vienna Declaration, *supra* note 89, pmbl., *cf.* Promoting Mutually Beneficial Cooperation in the Field of Human Rights, U.N. Doc. A/HRC/43/21, pmbl. (Jun. 22, 2020).

³³² UDHR, *supra* note 4, art. 1.

³³³ CAPPS, *supra* note 304, at 107 (adding that "the Declaration requires that it governs *all* practical action.") (italics in the original).

³³⁴ *PALU Case*, *supra* note 291, ¶ 66 (noting that the scope of 'equality' extends beyond the right to equal treatment before the law).

54 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

with one another.³³⁵ Besides, a nation's greatness is measured, in part, by its capacity to ensure that justice is served to all its citizens, regardless of their status. Bodenheimer argues that "[w]here persons deeming themselves equal to others receive unequal treatment at the hands of the law, they will have a feeling of degradation, of disrespect for their personality and common humanity."³³⁶

Equality and non-discrimination permeate all human rights instruments. The U.N. Charter requires its member states to "reaffirm faith in . . . the dignity and worth of the human person, and in the equal rights of men and women."³³⁷ It stresses the importance of equal respect to the worth of all regardless of race, sex, language, or religion.³³⁸ The UDHR asserts that "[e]veryone is entitled to the rights and freedoms set forth in the Declaration, without distinction of any kind."³³⁹ Non-discrimination is a foundational guarantee in the ICCPR,³⁴⁰ ICESCR,³⁴¹ European Convention on Human Rights,³⁴² ACHR,³⁴³ and African Charter.³⁴⁴

Under the UDHR, a dignified life vision requires a degree of liberty and a measure of well-being. The Declaration provides that everyone "is entitled to realization . . . of economic, social and cultural rights indispensable for his dignity and the free development of his personality."³⁴⁵ This provision requires a comprehensive implementation of economic, social, and cultural rights to fulfill their dual purpose: safeguarding human dignity and ensuring the opportunity for

³³⁵ Nsongurua Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13(1) *TULSA J. INT'L & COMP. L.* 1, 22 (2005).

³³⁶ EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF LAW* 232 (1974).

³³⁷ U.N. Charter, *supra* note 36, pmbl.

³³⁸ *Id.* Arts. 1(3), 13(1)(b), 55(c) & 76(c).

³³⁹ UDHR, *supra* note 4, art. 2.

³⁴⁰ ICCPR, *supra* note 4, art. 2(1).

³⁴¹ ICESCR, *supra* note 330, art. 2(2).

³⁴² European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 5, art. 14 (Nov. 4, 1950), 213 U.N.T.S. 221.

³⁴³ ACHR, *supra* note 27, art. 1(1).

³⁴⁴ African Charter, *supra* note 8, arts. 2 & 3.

³⁴⁵ UDHR, *supra* note 4, art. 22.

free personal development.³⁴⁶ The UDHR further provides that “[e]veryone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity.”³⁴⁷ The implied right to food under the African Charter is also linked to human dignity. This right is “essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.”³⁴⁸

A dignity perspective “compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth.”³⁴⁹ It places a responsibility on states to tackle socially-created obstacles that work against such persons.³⁵⁰ It obligates states to provide such persons with an inclusive education that supports lifelong learning to fully develop their personality, talents, creativity, and mental and physical abilities.³⁵¹ In summary, governments have positive duties to uphold human dignity and to induce in citizens a belief in their worthiness and hope in their future. Advancing this value is in a society’s greater interests. It promotes social justice and unlocks human potential in key areas such as education, health, and labor.

3. *Dignity-Infringing Acts*

Dignity-infringing acts run counter to a society’s notion of its values and purposes.³⁵² Such acts encompass a broad range of transgressions.³⁵³ Since dignity is the *raison d’être* of human rights, and since no provision in any instrument is inferior or superior to the other, it stands to reason that every violation offends it. For an illustrative

³⁴⁶ Diller, *supra* note 186, at 199.

³⁴⁷ UDHR, *supra* note 4, art. 23(3); ICESCR, *supra* note 330, art. 7.

³⁴⁸ *Social and Economic Rights Action Centre & Anor. v. Nigeria*, ACHPR Comm. No. 155/96 ¶ 65, (2001) AHRLR 60.

³⁴⁹ Michael Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 106 (2007).

³⁵⁰ G. QUINN & T. DEGENER, HUMAN RIGHTS AND DISABILITY: THE CURRENT USE AND FUTURE POTENTIAL OF UNITED NATIONS HUMAN RIGHTS INSTRUMENT IN THE CONTEXT OF DISABILITY 14 (2002).

³⁵¹ Disabilities Convention, *supra* note 279, art. 24.

³⁵² DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 182, at 198; *cf.* BEDI, *supra* note 253, at 171-2.

³⁵³ See *PALU Case*, *supra* note 291, ¶ 77 (maintaining that “personal suffering and indignity can take various forms”).

56 *INTERCULTURAL HUMAN RIGHTS LAW REVIEW* [Vol. 20]

purpose, this segment highlights some forms of inhumane treatment, suffering, and deprivation that have been declared as incompatible with the value of human dignity. These include slavery, forced labor, and unlawful punishment as well as discrimination against a person on the basis of his disability.³⁵⁴ Apartheid or racial discrimination violates human dignity;³⁵⁵ likewise singling out a racial group for different treatment, which has been held to constitute cruel, inhuman, or degrading treatment or punishment.³⁵⁶ Sexual abuse degrades human dignity;³⁵⁷ likewise branding women as prostitutes,³⁵⁸ or mentally ill persons as “lunatics” or “idiots.”³⁵⁹ The murder of street children by state officials has been held to violate their dignity;³⁶⁰ likewise labeling individuals as “vagrants,” “vagabonds,” “rogues” or any other derogatory term, and relocating them to other areas by force.³⁶¹

An individual’s deportation to a “no man’s land,” exposing him to personal suffering with no prospect of family support, has been held to offend human dignity.³⁶² Lack of due process in criminal proceedings has been held to violate dignity;³⁶³ likewise the failure to provide prison inmates with food, water, adequate ventilation, an environment free from disease, and adequate healthcare.³⁶⁴ The SACC has

³⁵⁴ Disabilities Convention, *supra* note 279, pmb1.

³⁵⁵ *South West Africa Case*, *supra* note 134.

³⁵⁶ *East African Asians v. United Kingdom*, ECHR decision on admissibility, 13 YRBK. 999 (Oct. 10, 1970).

³⁵⁷ See Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, AU Doc. Assembly/AU/Dec.19 (II), Arts. 22(b) & 23(b) (Jul. 11, 2003).

³⁵⁸ *Dorothy Njemanze & Ors. v. Nigeria*, ECOWAS CCJ (2019), http://prod.courtecowas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_08_17-1.pdf (holding that such branding is a form of verbal abuse).

³⁵⁹ *Purohit Case*, *supra* note 90, ¶ 59.

³⁶⁰ *Villagrán-Morales et al. v. Guatemala*, Judgement, Inter-Am. Comm’n H.R. (ser. C) No. 63, Nov. 19, 1999.

³⁶¹ *PALU Case*, *supra* note 291, ¶ 81 (finding that vagrancy laws of many African countries violate several provisions of the African Charter, including Article 5).

³⁶² *Modise v. Botswana*, Comm. No. 97/113 ¶ 32, Afr. Comm’n H.P.R. (Nov. 6, 2000).

³⁶³ *Avena & Ors. (Mex. v. U.S.)*, Judgment, 2004 I.C.J. 32 (March 31).

³⁶⁴ *Mugesera v. Rwanda*, Judgement, ACtHPR App. No. 012/2017 ¶ 103, 4

held that the death penalty degrades and dehumanizes human dignity.³⁶⁵ The Namibia Supreme Court even maintains that a sentence of life imprisonment cannot be sustained under the Constitution “if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner’s natural life as if he was a ‘thing’ instead of a person without any continuing duty to respect his dignity.”³⁶⁶

Unremunerated work has been held to constitute a sacrilege as it degrades labor.³⁶⁷ In the *Hoffmann* case, the SACC held that employment discrimination of an applicant based on his health status “impaired his dignity.”³⁶⁸ All forms of economic and social deprivations assault human dignity.³⁶⁹ Poverty is evil because it is contrary to human well-being. It is many things, all of them bad. It is material deprivation and desperation. It is exposure to risk and high costs for thin comforts. It is inequality materialized.³⁷⁰ Poverty causes fear and anxiety, deepens despair, and makes life a tortuous voyage. It diminishes its victims and forces them to wander aimlessly on the road of the world or turn to crime or prostitution to escape destitution.³⁷¹ Extreme poverty inhibits the full enjoyment of all human rights and full

Afr. Ct. L. Rep. 834 (2020) (finding a violation of Article 5 of the African Charter).

³⁶⁵ *Makwanyane Case*, *supra* note 327, at 706-708; *cf. S. v. Williams* 1995 (7) BCLR 861 ¶ 39 (SACC) (noting the “growing consensus in the international community” that judicially imposed whipping “offends society’s notions of decency and is a direct invasion of the right which every person has to human dignity.”).

³⁶⁶ *Tcoeib Case*, *supra* note 324, ¶ 22, *per* Justice Mahomed.

³⁶⁷ *Malawi African Ass’n v. Mauritania*, ACHPR Comm. Nos. 54/91, 61/91, 98/93, 164-196/97 & 210/98 ¶ 135, (2000) AHRLR 149 (hereinafter “*Mauritania case*”).

³⁶⁸ *Hoffmann Case*, *supra* note 265, ¶ 40.

³⁶⁹ G.A. Res. 64/172, The Right to Development, pmbl., Dec. 18, 2009 (hereinafter “Resolution on the RTD”).

³⁷⁰ Arjun Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in *CULTURE AND PUBLIC ACTION* 59, 64 (V. Rao & M. Walton eds., 2004).

³⁷¹ *Cf. OSIATYNSKI*, *supra* note 171, at 192 (writing, “[d]eprived of minimal nutrition, shelter and means to face the risks posed by life, one can rarely defy the temptation to use oneself as the means to other people’s ends or to stop others from using one as such means.”).

participation in community life.³⁷² It leads to social exclusion.³⁷³

A just social order must minister to human needs. Systems of government do not exist in the abstract, but in their consequences on peoples. In the final analysis, human civilization is measured by the degree to which a society frees its people from hunger and meet other basic needs: housing, clothing, and medical necessities. If a state fails to lift its people out of poverty, then its constitution, laws, policies, elections, budgets, or even development agendas are mere buildings with wood, hay, and stubble.

C. Dignity and Autonomy

Freedom is a cherished ideal. It is everyone's birthright. It connotes autonomy or sovereignty.³⁷⁴ According to Fanon, "a free people living in dignity is a sovereign people."³⁷⁵ To claim is to assert dignity and independence.³⁷⁶ In the Kantian epistemology, individual autonomy, freedom, and inherent worth are non-negotiable aspects of human moral status. His epistemology contrasts with utilitarian or instrumentalist views that might justify using individuals for collective benefit or efficiency without regard for their personal agency. Such views have been used to justify slavery and colonialism. For the black race, freedom is not always synonymous with autonomy and dignity. A brief reconnaissance on some historical crimes is necessary; for as Kundera reminds us, the struggle of man against power is the struggle of memory against forgetting.³⁷⁷

³⁷² Vienna Declaration, *supra* note 89, ¶¶ 14 & 25.

³⁷³ Cf. HOLY BIBLE, Prov. 14:20 ("The poor are shunned even by their neighbors.").

³⁷⁴ See U.N. Doc. A/Res/61/106, annex I, art. 3 (establishing, as a general principle, the "inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons"); and generally M. Donnelly, *From Autonomy to Dignity: Treatment for Mental Disorders and the Focus for Patient Rights*, 26 L. CONTEXT 37 (2008) (arguing that the rights to autonomy and dignity must be contextualized together).

³⁷⁵ FRANTZ FANON, *THE WRETCHED OF THE EARTH* 158 (1968).

³⁷⁶ OSIATYNSKI, *supra* note 171, at 189.

³⁷⁷ MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 3 (Michael Heim trans., 1981).

1. *Indignities of Historical Injustices*

The pernicious fantasy and self-deceptive ideology of white supremacy drove the race-based, life-long, chattel slavery established through kidnapping. The imperialists used resource exploitation as an excuse for the trans-Atlantic slave trade.³⁷⁸ About 13 million Africans were kidnapped without warrant and transported from the shores of West Africa to the Western Hemisphere. Of this number, about 11.3 million were delivered to the New World as human chattels. The rest perished *en route* “due to the inhuman conditions in which they were transported, and the violent suppression of any on-board resistance.”³⁷⁹ Those who survived the hellish journey were “auctioned naked in the marketplace to planters who would work them to death on their Caribbean plantations.”³⁸⁰

Slavery was a condition of absolute “rightlessness.” A slave was not a “person” in law or at all.³⁸¹ He was a verb, not a noun; or, to vary the metaphor, he was a “passive voice”—a prepositional phrase instead of a subject. The American civil rights icon, Dr. King, notes that a slave was considered “a thing to be used, not a person to be respected. He was merely a depersonalized cog in a vast plantation machine.”³⁸² He was a victim of jungle law, treated as a commodity with no right against his master or anyone else. The slavers allowed

³⁷⁸ See African Youth Charter, *supra* note 140, pmbl. (“Recalling the historic injustices imposed on Africa such as slavery, colonisation, [and] *depletion of natural resources*.”) (italics added); and generally Nsongurua Udombana, *The Past as Prologue: Slavery, Colonialism, and Modern Human Rights*, 31(2) AFR. J. INT’L & COMP. L. 275 (2023).

³⁷⁹ Hakim Adi, *Africa and the Transatlantic Slave Trade*, BBC (Oct. 05, 2012), http://www.bbc.co.uk/history/british/abolition/africa_article_01.shtml; see also David Eltis, *A Brief Overview of the Trans-Atlantic Slave Trade*, TRANS-ATLANTIC SLAVE TRADE DATABASE (2007), <http://www.slavevoyages.org/assessment/essays#>; see also HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440-1870*, 404-5 (1997).

³⁸⁰ CHARLES COLSON, *KINGDOMS IN CONFLICT* 140 (1987).

³⁸¹ Roman law probably influenced the legal regime on slavery. It looked upon a slave as a *res* (‘thing’) and applied to him the same rules applicable to domestic animals. See LORD DENNING, *LANDMARKS IN THE LAW* 215 (1984) (referencing MOYLE, *IMPERATORIS JUSTINIANI INSTITUTIONES* 109 (1923)).

³⁸² Martin Luther King Jr., *Nonviolence and Racial Justice*, in *A TESTAMENT OF HOPE*, *supra* note 63, at 5-6.

only one “right” to their victims: a dog-like devotion and obedience.

Colonial imperialism replaced slavery in the 18th century, in what became the “Scramble for Africa.”³⁸³ The white immigrants, who entered Africa illegally, used sanctified phrases like “civilization” to justify their “Scramble.”³⁸⁴ They drew an imaginary distinction between the “civilized” and the “uncivilized” based on dissimilarities in social, political, and cultural systems. They used racist and degrading slurs like “barbarians,” “primitives,” and “savages” on indigenous peoples whom they met. Civilizing those “savage natives” became the “White Man’s Burden,” a self-appointed duty of the superior towards the inferior.³⁸⁵ To achieve this end, the colonizers first denigrated almost everything African, rejecting the evidence of their eyes and ears. They then supplanted traditional education and cultural systems with Western models. Many in the colonized enclaves were forced to learn fictitious histories where “white” represented everything good and beautiful while “black” represented everything bad and ugly.³⁸⁶ For “Table Manners,” colonized kids were taught to use fork and knife to eat *garri*, *fufu*, *amala*, or similar traditional delicacies.³⁸⁷ From the col-

³⁸³ See generally THOMAS PAKENHAM, *THE SCRAMBLE FOR AFRICA* (1991) (a detailed and engaging account of the complex historical events that shaped Africa’s colonial past and its lasting impact in post-independence states).

³⁸⁴ MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA* 72 (2012) (noting that the Berlin Conference of 1884-5, called to map-out European imperialism, was “filled with talk of civilizing mission as a rationale for legitimizing control over Africans.”); cf. NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FROM GLOBAL POWER* 236 (2003) (noting that the delegates at the Berlin Conference were to “aim at instructing the natives and bringing home to them the blessings of civilization”).

³⁸⁵ AIME CESAIRE, *DISCOURSE ON COLONIALISM* 8-9 (1972) (describing colonialism as the colonizer’s attempt to civilize the colonized).

³⁸⁶ See generally FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (1952) (hereinafter “FANON, *BLACK SKIN*”) (discussing how colonized people are made to see European culture as superior).

³⁸⁷ These Nigerian delicacies are made from cassava and yam flour. Each is eaten by taking a small amount with washed hands, shaping it with fingers into a ball or lump, and dipping into one’s favorite soup or stew. Eating with hands is a cultural practice in many African societies, which should be respected!

onizer's perspective, "[t]he colonized is elevated above his jungle status in proportion to the mother country's cultural standards."³⁸⁸ They set up a coercive apparatus to punish dissent, creating a netherworld of despair even beyond their so-called civilized laws.³⁸⁹

Colonial international law also codified racial hierarchies. Indigenous treaties dealing with territories could not transfer title. The reasoning was that "[c]olonial title was always original and never derivative; it followed from European law's qualification of the acts of European powers, not from native cession."³⁹⁰ In 1894—the year Britain annexed Uganda and formally began empire—Westlake wrote that "[i]nternational law has to treat natives as uncivilized. It regulates, for the mutual benefit of the civilized states, the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded."³⁹¹ Before Westlake's specious assertion, Salomon acknowledged that civilization and statehood existed on a spectrum, with infinite degrees and forms.³⁹² Stories of travelers also suggested that "there existed in the heart of Africa Negro communities that offered practically all the characteristics of a State."³⁹³

³⁸⁸ FANON, *BLACK SKIN*, *supra* note 386, at 18.

³⁸⁹ See MAMDANI, MAHMOOD, *CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM* ch. 2 (1996) (analyzing the colonial state's administrative apparatus, including its coercive mechanisms for punishing dissent).

³⁹⁰ KOSKENNIEMI, *supra* note 215, at 128; *cf.* Antonio de Luna, 1(2) YBILC 142 ¶ 7 (1966) ("In the period of colonial imperialism, European writers considered that international law governed only the relations between those States which they described as 'civilized nations' . . . [T]reaties obtained by means of corruption were considered perfectly valid in the relations with States outside the club of 'civilized nations.'").

³⁹¹ JOHN WESTLAKE, *CHAPTERS IN THE PRINCIPLES OF INTERNATIONAL LAW* 143 (1894).

³⁹² CHARLES SALOMON, *L'OCCUPATION DES TERRITOIRES SANS MAÎTRE. ÉTUDE DE DROIT INTERNATIONAL* 208 (1889).

³⁹³ *Id.* To illustrate, the Kingdom of Kongo (now the Democratic Republic of Congo) was "a highly centralized polity" by 1483 when the Portuguese mariner Diogo Cau first visited. Its capital Mbanza "had a population of sixty thousand, which made it about the same size as the Portuguese capital of Lisbon and larger than London, which had a population of about fifty thousand in 1500." DARON ACEMOGLU

Slavery and colonialism were vicious and vicarious humiliations of a whole racial group. They “contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparity, instability and insecurity that affect many people in [formerly colonized] parts of the world.”³⁹⁴ There is everywhere a crisis of social disintegration and a breakdown of tribal customs, “a deepening structural malfunction – between an impoverished countryside and an indigent ‘urbanism.’”³⁹⁵ At independence, many states in the Global South adopted colonial languages as their *lingua franca*, which violate the inherent rights of indigenous peoples to use and promote their own mediums of communication.³⁹⁶ African states are divided into Anglophone, Francophone, Lusophone, and other “phony” characterizations that remind citizens of their perpetual subjugation to alien culture.

Post-colonial literature has been the site of struggles against Western hegemony. Laye’s *L’Enfant Moir*, set in French Guinea, is an autobiographical story of sacred traditions struggling against the encroachment of the modern world.³⁹⁷ In his classic *Things Fall Apart*, set in British Nigeria, Achebe addresses the intrusion of white missionaries and colonial government into the tribal Igbo society and the cultural disintegration resulting from it.³⁹⁸ In *Decolonizing the Mind*, Wa Thiong’o explores how colonialism suppressed traditional systems through imposed Western languages and cultures.³⁹⁹ In *Une Vie de Boy*, Oyono criticizes the French policy of assimilation by which Africans could theoretically achieve acceptance as French citizens.⁴⁰⁰

& JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 58 (2012).

³⁹⁴ Resolution on the RTD, *supra* note 369, pmbl. The literature on adverse effects of imperialism is legion, but see generally WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1972); EDWARD SAID, *ORIENTALISM* (1972).

³⁹⁵ BASIL DAVIDSON, *THE BLACK MAN’S BURDEN: AFRICA AND CURSE OF NATION-STATE* 191 (1992).

³⁹⁶ Declaration on the Rights of Indigenous Peoples, *supra* note 158, art. 13(1).

³⁹⁷ CAMARA LAYE, *L’ENFANT MOIR* (1954).

³⁹⁸ CHINUA ACHEBE, *THINGS FALL APART* (1959) (recreating the dignity and integrity of the Igbo culture).

³⁹⁹ NGUGI WA THIONG’O, *DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* (1986).

⁴⁰⁰ FERDINAND OYONO, *UNE VIE DE BOY* (appearing in English as *BOY!* 1956).

“Endoracism”—“a feeling and attitude of prejudice towards oneself and one’s culture, extreme form of low self-esteem, self-loathing, alienation and identity crisis”⁴⁰¹—results from centuries and decades of stereotypes, invisibilities, prejudices, and marginalization. African states have a derisory self-image in the comity of nations. Their leaders behave as if they are under a divine mandate to always submit to Western tutelage. All of this raises some serious, searching albeit rhetorical questions: How could a people be free if they are not free to be themselves? And how could a people find dignity if they are ashamed of their identity or cultural heritage?

2. *Indignities of Coloniality*

The lessons of history reside more in the logic than in the facts of the events. The logic or, more correctly, illogic of race superiority sustained slavery and colonialism. In contrast, the logic of equality and human dignity sustained the anti-imperialist struggles. There are no inferior races. As the Declaration on the Rights of Indigenous Peoples affirm, “all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”⁴⁰²

The anti-imperialist struggles crystallized into the right to self-determination—the inherent right of a people to self-governance unencumbered by external domination.⁴⁰³ Self-determination—anti-colonial or anti-racial—touches on the inner structure of the legal legitimation of subjects on the international plane.⁴⁰⁴ True to type, the West vehemently opposed anti-colonial self-determination; like the anti-slavery movement, its recognition was a contest between terror and resistance. By later recognizing this right,⁴⁰⁵ now well-established as

⁴⁰¹ Ferd-Harris Odimegwu, *Globalisation and African Identity*, in *PHILOSOPHY AND PRAXIS IN AFRICA* 309, 317 (Martin Asiegbu & Joseph Agbakoba eds., 2006).

⁴⁰² Declaration on the Rights of Indigenous Peoples, *supra* note 158, pmbl.

⁴⁰³ Cf. African Charter, *supra* note 8, art. 19 (providing that “[n]othing shall justify the domination of a people by another.”).

⁴⁰⁴ CASSESE, *INTERNATIONAL LAW*, *supra* note 278, at 106.

⁴⁰⁵ See U.N. Charter, *supra* note 36, arts. 1(2) & 55; ICCPR, *supra* note 4, art. 1; ICESCR, *supra* note 330, art. 1; African Charter, *supra* note 8, art. 20(1).

a peremptory norm,⁴⁰⁶ international law became both an oppressive tool and a potential means of redress.⁴⁰⁷

The collapse of colonialism did not end “coloniality”—attitudes, values, and power structures that Western societies uphold as normative. The current global governance beatifies imperialism and marginalizes weak states. Although international law equates equality with statehood,⁴⁰⁸ often expressed as “dignity and respect,” it remains an oppressive tool by advancing inequality.⁴⁰⁹ To illustrate, principles of *res communis* (shared ownership of global commons) and of the Common Heritage of Mankind (CHM) aim to promote joint sovereignty over trans-border resources. The International Seabed Authority (ISA) was established to manage such resources. However, ambiguous legal frameworks⁴¹⁰ allow some players to rig the game. The feudal princesses of modernity—U.S., China, Japan, Germany, et cetera—monopolize exploitation with their advanced technologies, excluding poorer countries.⁴¹¹ To add insult to injury, the “odious

⁴⁰⁶ See *East Timor (Portugal v. Australia)*, 1995 I.C.J. 90, 102; CRAWFORD, *supra* note 148, at 583.

⁴⁰⁷ See generally Carsten Stahn, *Reckoning with Colonial Injustice: International Law as Culprit and as Remedy?* 33(4) LEIDEN J. INT’L L. 823 (2020) (examining the dual role of international law as both perpetuating and addressing colonial injustices).

⁴⁰⁸ See Vattel, *LE DROIT DES GENS* I, Prelim, § 18 (1758).

⁴⁰⁹ See generally Jack Goldsmith & Eric Posner, *The Limits of International Law*, 115 HARV. L. REV. 1787 (2002) (critiquing the effectiveness of international law in the face of state power).

⁴¹⁰ See, e.g., Convention on the Law of the Sea, U.N. Doc. A/Conf.62/122 (1982); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, U.N. Doc. A/2222 (XXI) Annex, (Dec. 19, 1966).

⁴¹¹ DAVID FREESTONE, *INTERNATIONAL LAW AND THE COMMON HERITAGE OF MANKIND* 110-113 (2021). The ISA has granted exploration licenses to corporations in China and Germany for polymetallic nodules rich in cobalt and nickel. They retain most profits while revenue-sharing mechanisms for the Global South remain underdeveloped. See KEMAL BASLAR, *THE CONCEPT OF THE COMMON HERITAGE OF MANKIND IN INTERNATIONAL LAW* (1998) (critiquing ISA’s governance as favoring technologically privileged states and undermining CHM’s equity goals); see generally PETER POYOGO, *CRISIS OF THE SEA: WORLD INEQUALITY, SUSTAINABLE DEVELOPMENT AND THE COMMON HERITAGE OF HUMANITY* (1997) (emphasizing the crucial role that the concept of common heritage of humanity may play in dealing

rights of capitalism”⁴¹² perpetuate exploitation of the Global South’s resources, often aided by corrupt local collaborators.⁴¹³ Africa epitomizes the “resource curse,” where vast natural wealth impoverishes its people.⁴¹⁴

The indignities of historical injustices and coloniality explain why many in the Global South were late converts to the neoliberal conceptions of international law, including human rights. How could enslaved, colonized, and marginalized peoples reconcile the West’s glaring hypocrisy in proclaiming universal human rights while deeming international law inapplicable in “non-civilized” territories? As late as 1945, framers of the ICJ Statute inserted a perverse formulation of “general principles of law recognized by *civilized nations*,”⁴¹⁵ a colonialist phrase that sought to exclude non-Western legal traditions. In its famous critique of the draft UDHR, the American Anthropological Association stated that the doctrines of ‘the white man’s Burden’

. . . have been employed to implement economic exploitation and to deny the right to control their own affairs to millions of peoples over the world, where the expansion of Europe and America has meant . . . the literal extermination of the whole populations. Rationalized in terms of ascribing cultural inferiority to the peoples, or in conceptions of backwardness in development of their ‘primitive mentality,’ that justified their being held in the tutelage of their superiors, the history of the western world has been marked by demoraliza-

with world inequality and promoting sustainable development); C.C. Joyner, *Governing the Commons: Cyberspace and the International Community*, 26(1) YALE J. INT’L L. 131 (2001).

⁴¹² UNGA Third Committee, U.N. Doc. A/C.3/AR.1405 ¶ 157 (Oct. 27, 1966).

⁴¹³ *Id.* ¶ 159.

⁴¹⁴ See generally Graham Davis & John Tilton, *The Resource Curse*, 29(3) NAT. RES. F. 233 (2005) (exploring the possible reasons behind the disappointing performance of many mineral producing countries); SAMIR AMIN, *DELINKING: TOWARDS A POLYCENTRIC WORLD* (1990) (arguing that Third World countries cannot improve their economies by sheepishly following trends set by the global capitalist system).

⁴¹⁵ ICJ Statute, *supra* note 194, art. 38(1)(c) (emphasis supplied).

tion of human personality and the disintegration of human rights among the people over whom hegemony has been established.⁴¹⁶

It is for these reasons that the Third World Approaches to International Law (TWAIL) confronts what Baxi calls the “imperialism, racism, and patriarchy of the global hegemon.”⁴¹⁷ TWAIL challenges mainstream narratives of international-law neutrality, focusing on the Global South’s experiences, struggles, and perspectives. To TWAIL publicists, international law is a product of colonial violence and inequality. It maintains hierarchies established during the colonial encounter.⁴¹⁸ History has not yet ended. The past is always with us. The TWAIL project aligns with the Decolonial Theory, which seeks to decolonize knowledge by acknowledging other sources, elevating marginalized voices, confronting colonial histories, and creating new templates that reflect today’s global diversities.⁴¹⁹

These antitheses constitute the unfinished struggle for a genuine self-determination. The dialectics should lead to a synthesis: a dismantling of the deceptive Western doctrinal systems and the Janus-faced international order and the establishment of an equitable order anchored on freedom, dignity, equality, and justice. These principles are essential to advancing the legitimate aspirations and dignity of all nations and peoples. Unequal treatment of equals is an indignity and a

⁴¹⁶ AMERICAN ANTHROPOLOGICAL ASSOCIATION, STATEMENT ON HUMAN RIGHTS (1947), <https://humanrights.americananthro.org/1947-statement-on-human-rights/> (adding: “The values of the ways of life of these peoples have been consistently misunderstood and decried.”); *id.*

⁴¹⁷ BAXI, *supra* note 161, at 144.

⁴¹⁸ See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (emphasizing that international law is not a neutral tool); B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (2nd ed. 2017) (highlighting how historical and economic power dynamics shape international legal structures, often marginalizing the Global South and reinforcing colonial legacies); Makau Mutua, *What Is TWAIL?* 94 ASIL PROC. 31, 38 (2000); Craig Murphy, *What the Third World Wants: An Interpretation of Development and Meaning of the New International Economic Order Ideology*, in *THE POLITICS OF GLOBAL GOVERNANCE: INTERNATIONAL ORGANIZATIONS IN AN INTERDEPENDENT WORLD* 201 (Paul Diehl ed., 1997).

⁴¹⁹ See generally José-Manuel Barreto, *Decolonial Strategies and Dialogue in the Human Rights Field: A Manifesto*, 4(1) TRANSN’L LEG. THEORY 1 (2013).

moral crime that offends human conscience.⁴²⁰

Conclusion

This paper explored what it means to be human as a context to interrogating the ethics of human rights. It examined how the ethics of natural law and human dignity have shaped the human rights narratives throughout history. Both ethics embody the practical reasonableness for protecting individuals from state absolutism, among other ends. The UDHR and the Human Rights Covenants—the International Bill of Rights—embody these ethics. They constitute the sacred canons for the human rights faith community, setting governance standards that transcend political and cultural differences. They give individuals unprecedented access to accountability mechanisms and motivate generations to strive for justice and equality.

The ethics of natural law and human dignity will continue to shape the 21st century politics. As our understanding of humanity grows, we can draw from the strategic game of chess to suggest how the human rights movement should tackle future challenges. Key strategies include reaffirming universal principles to maintain focus, involving new stakeholders like businesses and technology companies to broaden support, addressing modern threats like AI and climate change to safeguard core values, and experimenting with innovative approaches to adapt effectively. To amplify these analogies, the U.N. and other stakeholders should integrate diverse traditions, including indigenous justice systems, into the human rights agenda. Development initiatives like the SDGs should prioritize collective responsibility alongside individual rights. Regional and national human rights mechanisms should adopt dignity-centered approaches that reflect local contexts. Strengthening human rights enforcement mechanisms, enhancing human rights education, and supporting those who expose abuses are also crucial to translating ethical principles into concrete realities. Such collective efforts will advance human dignity, justice, respect, and equality, which are the true essences of what it means to be human.

⁴²⁰ Cf. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 182, at 199.