Jus Cogens (2022) 4:207–236
https://doi.org/10.1007/s42439-022-00063-8

ORIGINAL ARTICLE

Toward a Dignity-Based Account of International law

Eric Scarffe[1]

Accepted: 15 June 2022 / Published online: 4 July 2022

Abstract

Once limited to issues in maritime and trade law, today, the most recognizable examples of international law govern issues such as human rights, intellectual property, crimes against humanity, and international armed conflicts. In many ways, this proliferation has been a welcomed development. However, when coupled with international law's decentralized structure, this rapid proliferation has also posed problems for how we (and in particular judges) identify if, when, and where international law exists. This article puts forward a novel, dignity-based account for how we answer this question: arguing that an international law exists if and only if it is consistent with respecting dignity. The upshot of this account is twofold. First, it explains many features of international law that other theories leave unaccounted for or under-explained. And second, my dignity-based account provides for a mechanism through which the system can continue to be developed and improved.

Keywords Dignity · Jus Cogens · Human rights · State consent · International law making

Since the end of World War II, there has been a rapid proliferation of international law and international legal institutions. Once limited to issues in maritime and trade law, today, the most recognizable examples of international law govern issues such as human rights, intellectual property, crimes against humanity, and international armed conflicts. In many ways, this proliferation has been a welcomed development. However, when coupled with international law's decentralized structure, this rapid proliferation has also posed problems for how we (and in particular judges) identify if, when, and where international law exists. This article proposes a new approach to answering this question: arguing an international law exists if and only if such a law is consistent with respecting dignity. Section 1 begins by laying out how scholars typically determine whether an international law exists, and shows how this approach leaves many features of international law unaccounted for

✉ Eric Scarffe
escarffe@fiu.edu

[1] Department of Philosophy, Florida International University, Miami, FL, USA

or under-explained. Section 2 then puts forward a novel, dignity-based account of international law that succeeds where the typical account fails. Finally, Section 3 responds to some prominent objections to other dignity-based accounts of international law in effort to further clarify my view and to distinguish my account from others on offer in the literature.

1 Consent-Based Accounts and Why They Fail

So, how do we identify the existence of international law? In answering this question (hereafter, international law's "existential question"), it is important to remember that for much of the twentieth century, it was a live debate as to whether international law was really "law" at all (Dworkin, 2013). Indeed, H.L.A. Hart (2012), undoubtedly one of the most influential philosophers of law of the past century, famously answered the question in the negative. According to Hart, law is best understood as a union of primary and secondary rules, and while international law may contain many recognizable primary rules (such as treaty law), it lacked the relevant institutions, rules of interpretation and adjudication, and a unifying "rule of recognition," necessary to bestow the full title of law upon the international system.[1]

For some, Hart's rejection of international law came too quickly. And scholars such as Jeremy Waldron (2013) contend that, even at the time Hart was writing, the necessary conditions existed that should have led Hart to the opposite conclusion. Nevertheless, subsequent theorists, judges, and lawyers have eagerly moved beyond Hart's tempered conclusion, arguing that an international rule of recognition can be located in the principle of state consent (Dworkin, 2013, at p. 5). In short, such theorists argue that state consent provides for the existence of international law's status as law, properly so-called. Put slightly differently, many have come to accept what I call the "consent-based account" of international law: namely, that an international law exists if and only if the state has consented to it.[2] Of course, states can have other obligations (e.g., moral obligations)—and in this sense, the existence of an international law does not settle the question about what states *should* do—but there appears to be nothing to suggest this feature is something unique to international law in particular.[3]

The consent-based account of international law has garnered an impressive amount of support by scholars interested in identifying the existence of international law. This includes an apparent endorsement by the *Restatement on the Foreign Relations Law of the United States* (1987 at p. 18), a variety of legal theorists who

[1] In various places, Hart (2012) calls international law a "borderline example of law" and often discusses it in connection with other examples of "primitive law" (pp. 79, 156). Thus, although it appears Hart avoids making Austin's (1831) stronger claim that the word "law" does not properly extend to "international law," nevertheless, he concludes international law does not constitute a proper legal system.

[2] Recently, David Lefkowitz (2020) has called this view Orthodox International Legal Positivism (OILP). As Lefkowitz describes it, OILP "holds that states are legally bound only by those standards to which they have explicitly or tacitly consented" (p. 54).

[3] For more on the nature of legal obligations, see Raz (2009), pp. 233–249.

unequivocally embrace consent-based theories (ranging from Louis Henkin[4] to Stephen Neff[5]), as well as some surprising endorsements by scholars who are famously supportive of international human rights, including Jack Donnelly (2013),[6] Thomas Christiano (2010, 2015), and José Alvarez (2018) .

At the same time, consent-based accounts have also attracted some persistent objectors.[7] For instance, Samantha Besson (2016) argues that while (democratic) state consent should remain central to international law and international law making, state consent is neither a necessary nor sufficient condition for identifying the existence of international law as such. Similarly, Allen Buchanan (2010) has argued that consent-based accounts are insufficient because (1) they fail to recognize the growing contributions of global governance institutions (e.g., the appellate body of the World Trade Organization) to international law making, and (2) mere consent is not sufficient for generating a binding legal obligation upon a state (e.g., consent given by an illegitimate official or under the threat of the use of force is not binding). The takeaway from such critiques, however, is not that we have arrived at a consensus regarding how to identify the existence of international law; rather, these critiques highlight a growing recognition that the existing theories of international law are in need of refinement.

But is this a disagreement without a difference? Indeed, Thomas Frank (1998) has long contended that international law has "entered its post-ontological era," and that the answer to international law's existential question is no more than a semantic disagreement (p. 6). However, note that the consent-based account of international law is not simply accepted by a group of academics, but it has increasingly been affirmed by and (more significantly) built into, the international legal system and its constitutive institutions. For example, the idea that international law finds its foundation in the consent of states is often claimed to be affirmed by Article 38 of the *Statute of the International Court of Justice* (1945), despite the fact that the language itself remains ambiguous on this question. In addition, lawyers and judges often refer to some of the International Court of Justice's (ICJ) court rulings, such *Nicaragua v. United States* (1986),[8] as providing unequivocal proof that State consent is the litmus test for determining when and where international law exists. The disagreement about the answer to international law's existential question, therefore,

[4] Henkin (1995), somewhat famously, has claimed that "State consent is the foundation of international law" (p. 27).

[5] Recently, Neff (2019) has articulated a more nuanced position which distinguishes between different "levels" of state consent in an effort to explain the increasingly large role international bodies such as the World Trade Organization play in international law-making.

[6] In the third edition of his seminal book, despite acknowledging that human dignity plays a "quasi foundational" role in International Human Rights Law (Donnelly, 2013, p. 121), Donnelly goes on to claim that "international law can be seen as a body of restrictions on sovereignty that have been accepted by states through the mechanisms of custom or treat" (p. 212).

[7] Among them, of course, are natural law theorists such as John Finnis, but this paper will largely set these sorts of objections aside (see Finnis 2011).

[8] See also *Belgium v. Spain* (1970) and the ruling in *France v. Turkey* (1927) from the ICJ's predecessor court the Permanent Court of International Justice (especially paragraph 35).

is not merely a semantic one, but has significant consequences for the practice of international law by determining which issues are justiciable.

Herein arises the problem: leaving international law's existential question unanswered has not resulted in a general agnosticism about its answer. Rather, the international legal system has proceeded by assuming the consent-based account is correct and has increasingly built out the rapidly proliferating body of international law and its institutions in its image. The problem with this approach, unfortunately, is that although consent-based accounts appear to readily explain many features of international law (such as treaty law),[9] they leave other features unaccounted for or unexplained. These features include (1) the language and practice of International Human Rights Law (IHRL), (2) the character *jus cogens*, and (3) the continued primacy of states and state consent for international law and international law-making. Below, I consider the problems consent-based theories have in explaining each one of these features in turn.

1.1 International human rights law

First, it is hard to reconcile the consent-based account with the language found in many of the treaties that make up the content and framework of IHRL. For instance, in building up their own dignity-based accounts, Patrick Capps (2009) and Paul Tiedemann (2020) have independently observed that the preambles of both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), state that "these rights derive from the inherent dignity of the human person" rather than some fact about state consent. Coupled with the fact that the content of the rights described therein (e.g., the prohibition against slavery) bear such a strong connection with many intuitive and philosophical understandings of dignity, it seems like a relatively small step to claim that (at the very least) "human dignity" serves as the foundation for IHRL.

In addition to the language and content of IHRL bearing an apparent relationship to some conception of dignity, state practices surrounding IHRL appear to flout the consent-based account as well. As Goldsmith and Posner (2005) observe, states routinely criticize other states that fail to abide by the standards and rules codified in human rights treaties, regardless of whether the state in question has consented to the treaty or not (p. 130).[10] This is not a knock-down drag-out argument against the consent-based view. Indeed, with some imagination, a consent-based story of IHRL can be told as well. However, it still highlights that the language, content, and practice of IHRL appears to be in tension with consent-based accounts of how we identify the existence of international law. *Ceteris paribus*; therefore, if an account of international law were to alleviate this tension, that would be a reason to prefer it.

[9] I return to this point in Section 3.

[10] For a similar observation, see also Buchanan (2008).

1.2 Jus cogens

The second feature consent-based views leave unexplained, *jus cogens*, may be less familiar to philosophers primarily interested in state-based law. On the received view, *jus cogens* are a (special) species of customary international law (Parker 1989). To begin with the general phenomenon, a norm is said to rise to the level of customary international law when (1) there exists a widespread and repeated practice by the international community of states (i.e., the state practice requirement), (2) it is determined that states follow the practice out of a sense of legal obligation (i.e., the *opinio juris* requirement), and (3) the state in question does not persistently object (i.e., the persistent objector rule).

With some imagination, a consent-based account of international law appears mostly adequate to explain customary international law, at least insofar as we take *opinio juris* and the persistent objector rule to function as the relevant markers of state consent.[11] However, *jus cogens* break with this basic framework in a way that makes consent-based accounts of international law unsalvageable. To understand why, let us begin by considering the description of *jus cogens* as defined by Article 53 of the *Vienna Convention on the Law of Treaties* (VCLT). According to the VCLT, a *jus cogens*, or a peremptory norm, is:

> a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

On the one hand, this description of *jus cogens* may have a *prima facie* consent-based explanation. Similar to other norms of customary international law, *jus cogens* must be accepted and recognized by states as legally binding (*opinio juris*) in order for these norms to have the status of law. On the other hand, however, there are important differences between the account of the legal character of *jus cogens* and other norms of customary international law that make no such explanation sustainable.

The first difference is the state practice requirement (or, rather, the lack thereof). Consider, for example, the customary international law which recognized the territorial waters of a state to extend 3 miles from its shores (hereafter, the '3-mile rule').[12] Although there is some debate about its precise origins (Kent 1954), it is generally agreed that a necessary condition for identifying the existence of this law was to establish that there was a widespread practice of states recognizing such a boundary.

[11] Goldsmith and Posner (2005) argue there are considerable problems with the consent-based account even for commonly accepted norms of customary international law, including the 3-mile rule (23–43). See also D'Amato (1971).

[12] Of course, the 3-mile rule has subsequently been replaced by the United Nations Convention on the Law of the Sea (1982), but this is beside the point. My intention here is merely to illustrate the traditional story for identifying the conditions under which customary international law emerges.

So, insofar as most states abided by something like the 3-mile rule, it can be said that the state practice condition is satisfied.

In contrast, *jus cogens* have no similar demand for the existence of a (relatively uniform) state practice. Consider, for example, the prohibition against the use of force, which the ICJ said constituted a *jus cogens* in *Nicaragua v. United States* (1986). If history has borne witness to any consistent practice among states, the practice of refraining from the use of force has certainly not been among them. And other examples of *jus cogens*, such as the prohibition on executing juveniles (*Michael Domingues v. United States* (2002)), similarly flout the state practice requirement regularly. Of course, by itself, this would do little to undercut the core claim of consent-based accounts—for so long as states must consent to such norms, the consent-based account appears to be left fully intact. The difference which shows the inadequacy of consent-based accounts, therefore, is that *jus cogens* neither (i) require the satisfaction of the *opinio juris* criteria nor (ii) allow for exemptions when states persistently object to being bound by such a law, as was confirmed by the Inter-American Commission on Human Rights in *Domingues v. United States* (2002).

Recall that in all other instances, customary international law requires states to independently fulfill the *opinio juris* criterion. For instance, historically, in order for a state to be bound by the 3-mile rule, it would have to be determined that the state in question consistently abided by this rule out of a sense of legal obligation. In contrast, the VCLT suggests that a *jus cogens* exists when it is recognized by "the international community of states as a whole." Again, on the face of it, this appears to be a minor modification: in which the legal character of *jus cogens* rests on a threshold account of *opinio juris*. Indeed, in arguing for the existence of "a new sovereignty regime" taking shape in international law, Jean Cohen (2010) argues for something like this threshold or consensus view of *jus cogens*, noting that "States no longer have the monopoly on the production of international/global law, and consensus operates on key levels of this system (*jus cogens* and within the UN organs based on forms of majority voting)" (p. 262). The idea, therefore, seems to be that, similar to other instances of binding international law that can be generated through majority voting (e.g., amendments to the Montreal Protocol (1987)), we can know *jus cogens* exist when there exists some rough consensus among states that a particular norm both exists, and it is a *jus cogens*.

Unfortunately, such "threshold" or "consensus" accounts of *jus cogens* fail for at least three reasons. First, the threshold account fails to explain why the maintenance of such a rough consensus is not necessary for the continued existence of a norm. Second, this explanation does not explain why state consent is not sufficient for *changing* a state's legal obligations (i.e., *jus cogens* cannot be overridden or changed through treaty law the way other customarily law can). Finally, this account provides no explanation of the relevant difference between *jus cogens* and other norms of customary international law (i.e., why do not all examples of customary international law share these characteristics). This last point is particularly important, insofar as the result is that the standard consent-based account for identifying the existence of customary international law not only fails to explain the characteristic features of *jus cogens*, but it also fails to give us criteria that would allow us (and more importantly

judges) to identify *jus cogens* and distinguish them from other norms of customary international law.[13]

1.3 The primacy of states and state consent

The last feature that consent-based accounts of international law leave unexplained is perhaps more fundamental, namely, consent-based accounts cannot explain the primacy of states and state consent in international law and international law making. That is, such theorists might *claim* state consent furnishes an international rule of recognition; however, the rise of transnational law and other examples of the law made and applied outside of the state-based context (e.g., Facebook's "Supreme Court")[14] demonstrates that the officials and participants within the international legal system no longer recognize it as such. Thus, while consent-based accounts such as Stephen Neff's (2019) may fair better than others at accounting for the growing contribution of global institutions (such as the Appellate Body of the World Trade Organization or UN Security Council) to the practice of international law, nevertheless, they still have trouble explaining the continued primacy of states and state consent within their theories.

Any contemporary theory of international law, therefore, must grapple with the emergence of these new forms of law in the same way the positivistic theories of Austin and Hart were pushed to account for the existence of international law. This is not to assume theoretical unity where there is none to be found, and perhaps some would prefer to jettison examples such as IHRL and transnational law from the relevant set of phenomena a theory of international law must seek to explain. However, if such a unified picture can be offered, it seems advantageous to adopt the theory with greater explanatory power rather than less.

2 A Dignity-Based Alternative

This discussion has glossed over differences between consent-based accounts on offer in the literature. However, the main claim of this article is that any approach to international law that bottoms out in state consent will have trouble accounting for the above-mentioned features of international law. The differences between these theories that arise further downstream, therefore, can be set aside as tangential to our purposes here. Importantly, the proposal in this article does not suggest state consent is an unimportant feature of international law and international law making—such a proposal would be a non-starter for any theory that seeks to explain the practice of international law. Rather, my proposal entails that we shift our understanding of how we identify the existence of international law from a consent-based approach,

[13] Even the *International Law Commission* admitted, after it released the draft article for *jus cogens* under the VCLT, that "there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*" (2 Yearbook of the ILC (1966)). See also, G. Danilenko (1991).

[14] For more on examples of transnational law, see Ovide (2021) as well as Giudice and Scarffe (2021).

to a dignity-based one: where an international law exists if and only if it is consistent with respecting dignity. The dignity-based approach, I argue, both readily explains garden-variety examples of international law (such as treaty law) as well as many of the features listed above that consent-based theories struggle with. In this section, I provide some evidence for thinking some conception of "dignity" really does serve as this criterion in the practice of international law: moving from examples of international law which seem to straightforwardly have their basis in dignity (e.g., IHRL and *jus cogens*), toward cases which appear less obvious (e.g., transnational law and treaty law).

2.1 International human rights law

The first feature my dignity-based account readily explains is IHRL. Recall, what is not controversial about IHRL is that scholars, lawyers, politicians, and judges all believe IHRL is a genuine example of international law. What is controversial, however, is that consent-based accounts seem at odds with (1) the language we use to talk about IHRL, (2) the content of IHRL itself, and (3) the way states treat IHRL in practice.

To begin with the language, in addition to the ICCPR and the ICSCER both claiming in their preambles that the rights therein "derive" from dignity, we also find multiple references to the concept in the *Universal Declaration of Human Rights* (UDHR) (1948) . Indeed, reiterating similar language found in the *UN Charter* (1945), the language in the preamble of the UDHR does not discuss introducing a new concept into the body of international law, but rather claims that the "the peoples of the United Nations have in the Charter *reaffirmed* their faith in fundamental human rights, in the dignity and worth of the human person" (emphasis mine).[15] The minimal claim, therefore, is that the language of IHRL invokes dignity as a principle which grounds the subsequent legal rights described in the Charter. In addition, it seems noteworthy that the specific rights articulated therein (such as the right to life or the right not to be subjected to torture) bear a substantial relationship to common understandings of "human dignity."[16] Ultimately, this article will defend a legal conception of dignity that may be importantly different than other philosophic, or common, conceptions of human dignity. Nevertheless, I discuss these difference and similarities in more detail in the remainder of this section as well as Section 3.

Dignity-based accounts also explain why states criticize other states for failing to uphold human rights, even when the offending state has not consented to the relevant agreement. That is, such complaints can be understood as claims that these rights do not depend on state consent for their legal character because they are necessary for respecting dignity. Of course, in practice, it seems obvious that not all IHRL rises to this level. However, there are at least two reasons for thinking a

[15] For other examples of references to "human dignity" found in human rights documents (e.g., the *Universal Declaration on Bioethics and Human Rights* (2005)), see Roger Brownsword (2014).

[16] For an excellent article summarizing some of these relationships, as well as various understanding of dignity, see Beitz (2013).

dignity-based account need not be committed to such a conclusion. First, as argued by John Tasioulas (2013), it is not the case that the only moral consideration is of the consequentialist variety, and therefore, state consent may not be wholly irrelevant to all obligations incurred under IHRL. As Tasioulas argues by analogy: match makers may better identify suitable partners on the whole, but deferring such judgments to match makers would be at the cost of allowing individuals to make and pursue such decisions on their own. As such, even a natural law–inspired view which considers human rights to be those "objectively true propositions of morality" would not necessarily be committed to the view that state consent is *never* relevant (morally speaking) to establishing the existence an international law (Tasioulas 2013, p. 5).

The second reason for thinking a dignity-based account need not be committed to the conclusion that all human rights represent legal obligations that do not depend on the consent of states is that identifying violations of dignity sets a higher bar than simply some violation of morality, justice, or autonomy. Indeed, Adam Etinson (2020) has recently made a similar point about the moral case: noting that we can draw an important distinction between "ordinary moral wrongs" and "violations of dignity." Similarly, and against scholars such as Ruth Macklin (2003) who claim that dignity is an unnecessarily obscure placeholder for "autonomy," one reason for thinking a legal conception dignity is not reducible to "autonomy" is that it would render the concept useless in most moral and legal cases. For insofar as *all* law seems to violate autonomy (at least in some way), it must be the case that violating dignity requires a greater satisfaction condition than a mere violation of autonomy if it is going to determine if, when, and where state consent is or is not required for generating an obligation under IHRL.

As such, while some moralized accounts of international law might claim state consent to be wholly irrelevant to IHRL, a dignity-based account need not be similarly committed to such a claim.[17] This is not to say that only some IHRL is really law; rather, the claim is that whereas some IHRL (such as the right to be free from torture) rises to the level where its legal character does not depend on the consent of states, the same cannot be said for other important human rights (such as the right to paid vacation). A dignity-based account not only fits with the behavior of states and the practice of international law more generally, but it has the upshot of providing us with some resources for intelligently assessing when, where, how, and why discrepancies exist between the human rights obligations of different states.

Nevertheless, perhaps there is good reason not to take the language found in these treaties too seriously. And the skeptic might argue that while countries gravitate toward these sorts of aspirational statements and proclamations, we should not infer anything about the relationship between such statements and a state's beliefs about whether it is legally bound to abide by such standards. Indeed, Goldsmith and Posner (2005) argue that when states and NGOs criticize non-consenting states for failing to uphold the standards codified by these treaties, we should keep in mind that it is "the moral quality of the abusive acts, not their legal quality, that leads to human rights criticism" (p. 125). And even some avid defenders of human rights, such as

[17] For instance, Louis Sohn (1982) claims that the whole of the ICCPR rose to the level of *jus cogens*.

Buchanan, note that despite the fact human rights have "become embedded in the very structure of the international order," we must be cognizant of the important differences between "moral human rights" and legal ones (Buchanan 2013, p. 1 & 5). In short, in response to my claims here, some argue that although the language, content, and practice of IHRL may *appear* in tension with consent-based accounts of international law, the status of human rights as law may still be better explained by states consenting to be bound by such obligations.

Criticisms such as these reveal a problem with other dignity-based account of international law which places too much weight on the language of IHRL, namely, one might simply dismiss the language as aspirational or unnecessary for grounding the practice of IHRL.[18] Fortunately, the argument for a dignity-based account of international law need not rely on features of IHRL alone for support, as evidence for dignity being a principle in international law can be found in the structural features of international law itself.

2.2 Jus cogens

The first structural feature which fits with a dignity-based account of international law is the existence and character of *jus cogens*. Recall that Article 53 of the VCLT defines *jus cogens* as:

> A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In order to account for basic structural features of international law such as *jus cogens*, therefore, we need to posit something other than state consent as the source of international legal obligations, and it seems we have good reason to think some conception of dignity best explains the existence and character of such norms.

Building on the above explanation of IHRL, in the same way a dignity-based account of international law can explain why some IHRL may not depend on state consent, it can also give us a ready explanation for the non-consensual nature of *jus cogens*. On this account, *jus cogens* simply represent those legal obligations that fulfill the second half of the bi-conditional, namely, *jus cogens* are legal obligations which are necessary for respecting dignity. This fittingness is lent further plausibility when one considers that the standard list of legal obligations generally thought to rise to the level of *jus cogens* bears a strikingly close resemblance to those obligations which would be necessary to protect against the most egregious and paradigmatic violations of dignity (such as the prohibition against genocide, the prohibition on executing minors, or the prohibition against human trafficking).

[18] I note that Buchanan believes the International Human Rights Regime is not grounded in a strictly voluntarist, or consent-based, justification. Nevertheless, he argues that many of the functional features of the IHRL can be explained without reference to "human dignity." See A. Buchanan (2013) 98–106.

Now, one might object that while *jus cogens* have generated substantial debate, ultimately, judges have not applied a dignity test for determining the existence of international law, or even for determining the existence of *jus cogens*. In Belgium v. Senegal (2012), for instance, the ICJ wrote that:

> [i]n the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens). That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. (para. 99.)

In practice, therefore, the Court seems to identify the existence of *jus cogens* by applying the test used to identify other instances of customary international law, that is, by establishing the existence of widespread international practice and *opinion juris*.

However, this test is ultimately insufficient as (1) not all *jus cogens* have had a widespread practice among states, and (2) on pain of arbitrariness, there needs to be some principled way of distinguishing between garden-variety examples of customary international law and *jus cogens*. In claiming that the existence of *jus cogens* fits with a dignity-based account of international law, therefore, I am in part claiming that a dignity-based account fills the gap of what would otherwise be a mysterious part of international law.

This line of argument reveals something methodologically important about the argument of this paper and its understanding of dignity. Indeed, following scholars such as Jeremy Waldron (2012), David Luban (2015), and Adeno Addis (2019), the methodology of this paper does not to start with a moral concept of dignity, against which it evaluates practice of international law; rather, it seeks to exhume a legal concept of dignity that is already at play in the practice, but has (to-date) gone unnoticed or underappreciated. Taking dignity as a legal concept thus distinguishes my account methodologically from a cluster of dignity-based accounts independently put forward by James Griffin (2008), John Tasioulas (2013), Paul Tiedemann (2020), and others.[19] For instance, although Tasioulas's (2013) claim that the "most promising way of understanding human dignity" is as the recognition of our equal moral status of human persons appears to be well-aligned with my view, in many ways, my method is antithetical (p. 6). That is, whereas Tasioulas sets out to develop a moral concept of human dignity (against which they test the moral legitimacy and value of the international human rights regime), this paper argues for a legal concept of dignity already found within the structure and content of international law.[20] One advantage of my strategy, therefore, is that my task is not to persuade scholars, judges, or states about what the foundation of international law *should be*. Rather, my task is to show that a conception of dignity already functions as the foundational principle in international law, and we can better understand this principle by

[19] See also M. Nussbaum (2001); R. Dworkin (2011); M. Lagon and Arend A. (2014).

[20] Tiedemann (2020) puts this perhaps most plainly, writing that: "[w]e do not want to derive the principle of human dignity from human rights. Instead we search for the opportunity to derive human rights from the principle of human dignity" (73).

examining the structure, content, and legal decisions that make up the body of international law *as a whole* (not just IHRL).[21]

This line of argument also reveals a more general commitment about the nature of law which this paper takes for granted. That is, in addition to Hart's primary and secondary rules, this paper is committed to the claim that we can also speak of legal principles.[22] Unlike legal rules, testing for the existence of a legal principle does not involve tracing its pedigree to some prior rule or decision enacted by a legislature or court; rather, it involves demonstrating its fittingness within the general body of law and legal decisions that have been developed over time. As Dworkin (1977) puts it,

> if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle (even better if the principle was cited in the preamble of the statute, or in the committee reports or other legislative documents that accompanied it […] (pg. 40).

Legal principles, therefore, are not simply the stuff of fairy tales or borrowed from morality. They are created, understood, and shaped through law, and we can test for their existence by demonstrating their fittingness within the body of law as a whole.

But how do we understand what a "legal principle" is committed to without turning to moral or social understandings? Like other legal concepts, one way we come to better understandings of legal principles is through stipulative definitions laid out in advance, which may or may not overlap with their moral or social usages.[23] For instance, Article 2 of the VCLT defines legal conceptions of terms such as "ratification," "acceptance," and "approval" that are importantly distinct from some of the moral or social understandings of these terms, but nevertheless govern the way courts and other international legal bodies understand these concepts.

However, this sort of stipulative definition is not the only method of establishing the contours of legal concepts and principles. The consent-based view, for instance, takes state consent to be a legal principle which grounds all subsequent international law. This principle is undoubtedly informed by the explicit definitions found in documents such as the VCLT, but it would get the story the wrong way around to say that the definitions found in these documents exhaust our understanding of the legal concept. If that were the case, international law would indeed seem paradoxical: with state consent at once both being wholly defined by the body of treaties, agreements, and written court decisions, while at the same time being a necessary condition to bring such entities into existence. Thus, consent-based views themselves are

[21] This last point also distinguishes my method from Capps (2009), who more narrowly derives an understanding of dignity from the framework of IHRL.

[22] See R. Dworkin (1977), in particular "Model of Rules I". See also R. Dworkin (1986), *Law's Empire* and J. Waldron (2012), p. 15.

[23] For a detailed analysis of the history of the separation thesis in legal positivism, see M. Giudice and E. Scarffe (2021).

not only committed to the existence of legal principles as such, but they must also be committed to the view that these principles are properly understood to be shaped and defined by something other than stipulative legal definitions.

In summary, a core part of the argument in this paper is that we have evidence of fittingness of a dignity-based account of international law not just from language and practice of IHRL, but from the structure of international law itself. This makes objections that the language found in IHRL is merely aspirational insufficient for denying that something other than the consent of states grounds international law, as there are at least some structural features which require an alternative set of criteria. That said, recently, Thomas Christiano (2010) has offered an alternative explanation for *jus cogens* within a consent-based framework that may appear to also fit this picture. That is, insofar as violating prohibitions against things such as genocide, slavery, or torture cannot be understood to be in the interests of the people states are said to represent, *jus cogens* represent an internal limit on any consent-based system (p. 124). A dignity-based account, therefore, must not only show that it can explain features such as *jus cogens*, it must also show that explanations such as the one Christiano has offered are insufficient. It is to this task we turn to now.

2.3 The continued importance of states and state consent

The second structural feature which demonstrates the fittingness between a dignity-based account and the body of international law is the continued importance of states and state consent in international law and international law-making. Indeed, it is the appreciation of this structural feature which puts the spotlight on one of the unique features of my account. That is, my account can accommodate the fact that international law recognizes more than just natural persons as having dignity. This represents the most substantive break (rather than just methodological) between my account and other dignity-based accounts of international law, and it has the explanatory advantage of (1) bringing the practice of international law under one theoretical umbrella and (2) showing why explanations such as the one offered by Christiano fall flat despite bearing significant resemblances to the one I prefer. To proceed, let us first rehearse a standard argument for the importance of states and state consent and show some of the problems with it. Then, drawing on some of the philosophical/legal literatures that make the connection between the "dignity of states" and the "dignity of persons,"[24] I build up two distinct strategies a dignity-based account could take on for answering this question.

Recall that according to consent-based accounts, the apparent answer for the continued importance of states and state consent in international law is that it is a historical/social fact. For instance, Article 3 of the UN Charter stipulates that "[t]he original Members of the United Nations shall be the states which […] sign the present Charter." Or, as it continues in Article 4, the Charter leaves membership in the UN "open to all other peace-loving states which accept the obligations contained

[24] Including, but not limited to, L.M. Henry (2011), E. Daly (2011), M. Rosen (2012), and J. Waldron (2012).

in the present Charter and […] are able and willing to carry out these obligations." According to scholars such as Goldsmith and Posner (2005), therefore, the main reason for treating states as having a "starring role" in our theories of international law and international law making may simply be because these are the entities international legal obligations (e.g., treaty law) are addressed to (p. 5).

However, if we take this to be the reason upon which we ground the role of states in international law, there would be no overriding reason why this role could not be subject to change. That is, simply because states and state consent *have had* a special role in international law, this does not provide us with evidence that this continues (or will continue) to be the case. Indeed, the rapid proliferation of transnational law makes such historical contingency an unstable foundation upon which to rest such an important element for identifying international law—for just as it is a historical fact that these institutions built-in the idea that states and state consent have a particularly important role in international law, new and emerging examples of international and transnational law (e.g., the Tuna Courts in Japan) recognize no such special status. The problem with this answer for consent-based accounts, therefore, is that it lacks the resources to help us identify new and emerging instances of international law: be it customary international law, or examples of transnational law which originate from (and are primarily directed toward) non-state actors.

One option here would be to simply abandon the claim, and adopt a theory of international law that no longer privileges states and state consent as having a particularly important role. However, there are two objections to this strategy. First, adopting such an approach would abandon the consent-based account in its entirety: so those who would find such a strategy appealing are (at the very least) in agreement that the consent-based approach ultimately should be abandoned. Second, abandoning the important role of states and state consent would also come with significant explanatory costs. It is true that the rapid proliferation of transnational law necessitates a revision to prevailing theories of law, but it would overstate the case to claim that states and state consent have no role whatsoever in the practices of international law. Thus, the cost of abandoning the claim that states and state consent have a particularly important role in international law and international law making may simply confuse the situation further—blinding us from being able to identify international law where and when it exists.

Fortunately, a dignity-based account demands no similar extremism—and offers many resources that can explain how these two parts of the practice can be held together under one theoretical umbrella. That is, (1) it provides an explanation for when and where states and state consent continue to be of particular importance for international law and international law making, and (2) it makes room for law that either does not depend on the consent of states (e.g., *jus cogens*), or is made by non-state actors (e.g., transnational law). Providing an explanation for when and where states and state consent have a particularly important role in international law and international law making is no easy task, but the dignity-based account of international law provides us with some resources for answering this question.

To begin, evidence that dignity has been thought to justify the existence, as well as determine the limits, of the special role assigned to states and state consent in international law is found in historical and contemporary court rulings, as well as

in the writings of various theorists and scholars who have written on the issue. For example, in *The Schooner Exchange v. McFaddon* (1812), the US Supreme Court considered whether a French official's claim to immunity from suit in the federal courts of the USA prohibited them from being sued for the return of a private vessel that was captured off the coast of France (and subsequently was converted into a naval vessel). Seemingly reasoning out from first principles, Chief Justice Marshall concludes that the French official's right to immunity from suit was absolute. To quote the Chief Justice at some length, he writes that:

> The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade *the dignity of his nation*, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory under an express license, or in the confidence that the immunities belonging to his independent sovereign station […] are reserved by implication, and will be extended to him. (Emphasis mine.)

What we see here is Chief Justice Marshall connecting a particular understanding of state sovereignty and the law of foreign sovereign immunity (at the time recognized by customary international law), as somehow being derivative of the state's dignity.[25] That is, insofar as it would degrade the dignity of the nation of France to allow a government official to be sued in a US Federal court, sovereign immunity must protect these officials against all suits in foreign courts.

This understanding of sovereignty and the law of foreign sovereign immunity may strike the modern reader as outlandish or outdated. However, it is important to recall that as the world gradually rejected the understanding of sovereigns being divinely ordained, or as having a particularly elevated status inherent to them (*dignitas*), the "special status" of states and their sovereign officials has largely remained in place. Indeed, Pope Leo XIII famously criticized notions of popular sovereignty on exactly these grounds. As Leo (1881) notes,

> It is plain, moreover, that the pact which they allege is openly a falsehood and a fiction, and that it has no authority to confer on political power such great force, dignity, and firmness as the safety of the State and the common good of the citizens require. Then only will the government have all those ornaments and guarantees, when it is understood to emanate from God as its august and most sacred source. (p. 12).

[25] A few lines later, we also get a reference to the dignity of the sovereign *qua* state official, with the Court noting that the armed ship "constitutes part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. His many powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting *his power and his dignity*" (emphasis mine).

According to Leo, therefore, the problem with revolutionary notions of popular sovereignty was it undermined the ground upon which the state and its officials derived their authority. States had authority insofar as the sovereign was divinely ordained and had dignity' conferred upon them by God. Popular sovereignty, in contrast, conferred no such force, dignity, and firmness onto political power, and therefore could not be said to have authority.

Of course, there has been considerable development in the law of foreign sovereign immunity since the early nineteenth century, with most judges and lawyers agreeing that we have moved from an absolute conception of foreign sovereign immunity to a restrictive one. On the restrictive conception of foreign sovereign immunity, the immunity of state officials applies only to the domain of acts which have to do with their role as sovereign (*jure imperii*). Notably, however, even with the ratification of the *Vienna Convention on Diplomatic Relations* (1961) and the *Foreign Sovereign Immunities Act* (1976), it is still underspecified what, exactly, the limits of foreign sovereign immunity are.[26] Furthermore, in many cases where US Courts have sought to understand the scope and limits of sovereign immunity under the Eleventh Amendment, justices of all political stripes have found the language of dignity to be particularly instructive.[27]

Cases such as these exemplify that while our understanding of sovereignty, or the special status afforded to states and their officials, has shifted, the dignity of states continues to function as an explanandum of the source and limits of this special status. Yes—officials and judges within the system of international law have increasingly abandoned the idea that it is something about the sovereign official's individual personhood that grants them (and subsequently their state) this special status. However, it appears that when pushed to offer explanations regarding the source and limits of this authority, the dignity of states continues to play an important role in identifying what the law actually is.

Others have documented the history of such appeals more thoroughly, with scholars such as Judith Resnik and Julie Chi-hye Suk (2003) correctly noting that of the more than 900 opinions issued by the US Supreme Court that mention dignity, it was not until Justice Murphy's dissent in *in re Yamashita* (1946) that the Court applied the term to describe individuals.[28] Indeed, in an impressive empirical review of these cases, Leslie Henry (2011) identifies at least five conceptions of dignity deployed by the US Supreme Court, including (1) dignity as an institutional status, (2) dignity as equality, (3) dignity as liberty, (4) dignity as personal integrity, and (5) dignity as collective virtue (p. 169–70).[29] Furthermore, outside of the US context, Christopher McCrudden (2008) has noted that the English Bill of Rights of 1689

[26] To see evidence of this ambiguity, see Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992); Saudi Arabia v. Nelson, 507 U.S. 349 (1993); and EM LTD., Plaintiff-Appellant v. Republic of Argentina 473 F.3d 463 (2007).

[27] *Hess v. Port Authority Trans-Hudson Corporation*, 513 US 30, 115 S. Ct. 394, 130 L. Ed. 2d 245 (1994); *Alden v. Maine*, 527 US 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999); *Federal Maritime Commission v. South Carolina State Ports Authority* 535 US 743 (2002).

[28] For more on this case in particular, see V. Jackson (2004).

[29] See also E. Daly (2011); M. Rosen (2012); and J. Waldron (2012).

referred to "the Crown and royal dignity," and that the Declaration of the Rights of Man and of Citizen (1789) can be understood as extending "to every citizen" the "dignities" previously reserved for aristocrats noblemen (p. 657, 660). In Section 3, I will return to these different conceptions of dignity and argue that they share deep connections in the domain of international law. For now, however, I elect to leave this line of evidence here as my modest claim is that understanding the special status of states and state consent in international law to be derived from their dignity fits with this long tradition, both within law and political philosophy, of the way scholars and judges have talked about it.

However, at this point, one might object by saying this relationship between dignity and the special status of states and state consent is merely stipulative. That is, despite the fact that judges and scholars have talked about dignity being relevant to the special status of states in international law, the concept of dignity does no real work in judges rendering their decisions. As such, it is important to the argument that a dignity-based account of international law not only fits with what some judges and scholars have *said* about international law, but it also justifies the continued (albeit limited) importance of states and state consent in identifying the existence of international law as such. To this end, there are at least two strategies a dignity-based account might take up to justify the continued importance of states and state consent. Notably, both strategies argue that states and state consent have this particularly important role in international law and international law making because it is necessary for respecting the dignity of states. Where they differ, however, is in what characteristic they identify as relevant for attributing this status.

2.3.1 Dignity as autonomy

The first strategy—analogous (in some ways) to understandings of dignity put forward by scholars such as Griffin (2008) as well as Feinberg and Narveson (1970)—would be to claim that in the same way human beings derive their dignity from some fact about their rational agency or autonomy, so too do states. Indeed, scholars such as Timothy Endicott (2010) embrace analogies such as this as helpful for an explanation of state sovereignty: straightforwardly claiming "sovereignty […] is the autonomy of states" (p. 258). The argument, therefore, would appear to be something like this: if state sovereignty is grounded in the dignity of states (which in turn is grounded in a state's autonomy), and state sovereignty requires us to recognize a particularly important role of states and state consent in international law and international law making, then, by transitivity, dignity requires us to recognize such a role as well.

Unfortunately, adopting this strategy has a troubling implication for the status of other aggregate actors (such corporations and international organizations)—for if we understand states as having a particularly important role in international law making because of their autonomy, then it is unclear on what grounds these other agents are not afforded a similar status as well.[30] The latter claim is entailed insofar

[30] To his credit, Endicott appears to be aware of this problem and attempts to buttress his account by appealing to something like Christiano's and Besson's constituency account (discussed momentarily). As Endicott (2010) writes, "International organizations are radically subsidiary, because unlike the British

as actors such as individuals, corporations, and international organizations would appear to have an even greater claim to agency and autonomy than state actors. And therefore, by the argument above, there would be no principled reason not to afford these actors a similarly special status within international law and international law-making—a distinction that is necessary to draw if our theory of international law is going to fit with the practice and body of international law as a whole.

The first strategy, therefore, not only appears to be a non-starter for justifying the continued importance of states and state consent in international law, but it may also tell us something important about why we ought to resist the temptation to reduce dignity *qua* human dignity to denoting something like "rational agency" or autonomy, even in the case of IHRL. Indeed, not only would such a reduction fail to capture many human beings who do not satisfy such a high threshold condition (e.g., infants or unconscious persons), such a criterion would capture too much for the purposes of law—for insofar as *all* law seems to violate autonomy in some way, then a dignity-based account of international law that understands dignity as no more than autonomy would seemingly invalidate *all* international law.[31]

2.3.2 Dignity as a relational status

The second strategy a dignity-based account could take up for grounding the importance of states and state consent in international law mirrors the first. The key difference, however, is that the second strategy rejects the (quasi-Kantian) idea that the dignity of states is reducible to, or derives from, their autonomy[32] and embraces the understanding of dignity as a particular kind of relational status. The objective for a successful dignity-based account of international law which adopts this strategy, therefore, is to identify the key features which make states importantly different from other actors in the international legal system and thus appropriately grounds this corresponding legal status.

So, what about states makes them importantly different than other agents in international law? Importantly, although neither scholar frames their discussion in terms of dignity, I think scholars such as Christiano and Besson are correct (at least in part). That is, what distinguishes states from other agents in international law is something about the relationship they bear to natural persons. As Besson (2009) puts this point:

> because the relationship between those subjects is one of constituency […] when a state is bound by an international legal norm, its institutions and citi-

Footnote 30 (continued)
government, they do not have a general claim to act directly *for* the people of [Britain] in respect of any of their concerns" (p. 256).

[31] For a similar argument about the role of dignity in interpreting the 14th amendment of the US Constitution, see E. Scarffe (2022).

[32] Although Killmister ultimately advances a more sophisticated understanding of dignity, she appears to tacitly endorse the (*quasi* Kantian) relationship between dignity and autonomy as the one being relevant to international human rights law. See Killmister (2009) 160. See also S. Killmister (2017).

> zens are bound at the same time, whether directly or indirectly, and this must necessarily affect in return the way in which a state can be bound. (p. 350).

Like Christiano, therefore, Besson argues the relevant part of the relationship which gives states this important status in international law and international law-making is the constituency relation states bear to their citizens.[33]

The upshot of accounts such as these is it appears they can readily acknowledge and explain some non-consensual features of international law, and thus represent a significant step forward in the literature. Unfortunately, however, relying on "constituency" as the relevant relationship to ground the role of states in international law and international law making both sets the bar too high and too low all at once—at least if we are going to offer an explanation that fits the practice of international law as it currently stands. Indeed, as Buchanan (2004) has previously observed, although democratic governments are not in principle constrained to only act in the interests of their citizens, nor are they required to protect the interests of non-citizens (pp. 98–105). Thus, the constituency account sets the bar too low insofar as it is unclear it could ground the non-consensual obligations which limit the ways states treat other states or non-citizens (e.g., international humanitarian law).

Furthermore, making the special status of states contingent on a constituency relationship sets the bar too high insofar as it implies (minimally) that only democratic states possess such a status. More problematically, this requirement may even suggest that currently existing democratic states (such as Canada or the USA) could fail to meet the requisite constituency requirement based upon some evaluation of whether its officials continue to serve this function. Some might consider this outcome to be a happy one, with the constituency requirement helping to ensure a state's consent is worthy of our respect. However, I take such an explanation to be problematic insofar as it appears to be radically out of step with the practice as it currently stands—for it is not just democratic states which are said to play a particularly important role in international law and international law making, but all states. In addition, this outcome might not even be morally desirable insofar as we take part of the object and purpose of IHRL to be to hold states legally accountable when they fail to uphold certain standards in the treatment of those under its dominion. Given the aim of holding states *legally* accountable, it would undermine the object and purpose of such laws to strip states which fail to represent the interests of its people of the relevant status which makes them capable of being bound by international law in the first place.[34]

Fortunately, there is another part of the relationship between natural persons and sates which could ground their special status, namely, the fact that natural persons exist in compelled relationships with them. By "compelled relationship," I mean natural persons do not on their own volition (at least, not for the most part) choose to become citizens of a particular state; rather, citizenship is thrust upon

[33] Christiano discusses this as a "representative relationship"; nevertheless, I treat these independently derived accounts as substantively similar here. See T. Christiano (2010).

[34] Tasioulas makes a similar critique against attempts to ground human rights in political legitimacy more broadly. See J. Tasioulas (2013) p. 9.

them in virtue of an accident of birth. Benjamin Boudreaux (2014) has rightly pointed out that because there are no uniform criteria by which natural persons are granted citizenship at birth (with states recognizing either *jus sanguinis*, *jus soli*, or some combination of both), this can create "gaps" which leave some individuals stateless. I am sympathetic to some of Boudreaux's proposals to address this problem, and recently, Roger Brownsword (2021) has put forward a compelling dignity-based argument for the duties states owe to migrants. Nevertheless, this paper need not take a stand on these issues as my point is simply to observe the brute social fact that, in virtue of the way states and their surrounding institutions are arranged, natural persons exist in a compelled relationship with one or more of them from the moment of their birth.

To be sure, the compelled relationship individuals bear to states is a historically contingent fact—states are but one of the many ways people could have organized themselves, and there is no necessity that the relation between states and their citizens continues to look this way in the future. Nevertheless, given this form of political organization, the fact remains that natural persons are in compelled relationships with states, and I argue that paying attention to this characteristic of states' agential qualities matters for thinking about what it means to respect their dignity. One consequence is that the status of states in international law and international law making is not merely that of one actor among many but is vested with particular importance and concern. Furthermore, acknowledging states have dignity need not commit us to a metaphysical claim about the nature and value of states; rather, it merely reflects the fact that states have a particular kind of legal status thrust upon them. In this way, I take my account to bear many similarities to the "fiduciary account" put forward by Criddle and Fox-Decent (2009), where *jus cogens* are understood not as "exceptions to state sovereignty (as is often supposed) but constitutive of it" (p. 360).

In short, it is from the observation that international law recognizes states as having dignity that we derive a deeper level of explanation for what is otherwise a seemingly arbitrary feature of international law and international law-making. That is, because of the kind of relationship human beings happen to have with states (a compelled relationship), states have a particular kind of agency and status that is not shared by other entities (such as non-governmental organizations, multi-national organizations, or even natural persons). As a result, by paying close attention to the kind of actors states are, we can come to understand and appreciate *why* the role of states is different than that of other actors. Furthermore, an important upshot from this account is that we can also see the beginnings of an explanation for the emergence of transnational law (i.e., law made by non-state actors) that Criddle and Fox-Decent's account left unaddressed. That is, as the kinds of relationships multi-national corporations (e.g., Google) bear to individuals increasingly resemble the compulsory relationship individuals bear to states, so too does the role these entities play in international law and international law making shift as well. Thus, while a full description of transnational law is beyond the scope of this paper, I take it to be a significant advantage that my dignity-based account has the resources to begin to make sense of the binding nature (and limits) of transnational legal phenomena.

3 Objections and Replies

The first section of this paper argued that although consent-based theories remain popular among many lawyers, judges, and scholars, they have many issues explaining and identifying some basic features of international law, including IHRL, *jus cogens*, and the continued importance of states and state consent in international law and international law-making. In the second section, I showed how a dignity-based account can succeed where consent-based accounts fail: giving us reason to think dignity, not state consent, is ultimately foundational to answering international law's existential question. In this last section, I respond to some potential objections to the argument laid out thus far.

3.1 What about a pluralism?

One objection to the argument thus far is that it assumes a theoretical unity where there may be none to be had. If the rapidly proliferating practice of international law has had any unifying theme or lesson, it is that its structure is fragmented. So it should be of little surprise that we find not one answer to international law's existential question, but many—with legal phenomena (such as IHRL, *jus cogens*, and transnational law) having different explanations and sources than that of garden-variety treaty law made by the consent of states.[35]

In response, it is important to recall that while consent-based views may appear to be well-suited to explaining the existence of treaty law, the reality is far more tenuous. For example, Dworkin (2013) has argued that consent-based approaches to treaty law must either "break out of the circle somewhere," or admit that international law is binding only insofar as the state continues to treat it as binding (p. 9). The problem with the former is this abandons the consent-based approach. The problem with the latter is that, unlike contract law, there would appear to be no legal obligation for states to continue to abide by or fulfill the treaties they have signed. As Dworkin writes, "what domestic law creates it can destroy: a state would not be bound by international law if it were free, through its domestic legal processes, to unbind itself" (*ibid*, p. 10). As a result, although consent-based accounts may appear to readily explain treaty law as just another form of contract law, in reality, it is not clear that such accounts can explain even these most basic phenomena in international law without resorting to something more than state consent.[36]

In addition to these difficulties, it is significant to note that the limits of state consent explicitly laid out in the international legal system are better explained by a dignity-based account. Recall that a dignity-based account would hold that an international law exists if and only if it is consistent with respecting dignity. It follows from this biconditional that (1) a purported law that violates dignity is invalid, and

[35] Thank you to an anonymous reviewer for raising this important objection to a previous draft of this paper.

[36] Recently, Gordley and Jiang (2020) have argued that this problem is persistent within contract law in general, not just at the level of international law.

(2) a legal obligation that is necessary for respecting dignity exists even if states have not consented to it. Cases that fall under the scope of (1) would include examples such as *jus cogens* and parts of IHRL, but it would also include instances where a state's consent to a particular treaty is illegitimate. This feature of a dignity-based account also aligns with the practice of international law, and Section 2 of the VCLT extensively lays out conditions which would invalidate a treaty even with a state's expressed consent: including (but not limited to) fraud (Article 49), coercion (Article 50), and corruption of a state representative (Article 51). My account thus fits with body of international law as a whole insofar as it does not deny that state consent is necessary for generating some international legal obligations; rather, it explains why this is not always the case, and helps us to identify cases where it is not.

3.2 Are these merely equivocal uses of dignity?

Another objection is that the evidence compiled thus far plays on equivocal uses of the word dignity, and not a single unified conception. Indeed, Steven Pinker (2008) famously leveled this charge broadly at all appeals to dignity, arguing that dignity is an inherently contradictory concept that is used to cover up otherwise vague and emotional objections. Furthermore, scholars such as Aharon Barak (2015) argue that despite a plethora of appeals to dignity in US Constitutional law (e.g., *Schooner Exchange v. Mcfadden* (1812), Rochin v. California (1952), Miranda v. Arizona (1966), *Planned Parenthood v. Casey* (1992),) the "dignity of the state and the dignity of the individual are two different things," and that he has "serious doubts" that it is possible to learn anything about one from the other (p. 193).

I think both these views are mistaken. Homonyms, such as the river "bank" and the central bank, are frequent enough in the English language, but (*contra* Pinker) there is no reason to suppose those who appeal to dignity must necessarily trade in equivocation, or that the "dignity of individuals" and the dignity of states are one such pernicious example. Indeed, in the US context, Daly (2011) has argued that given the reluctance of the US Supreme Court to put forward a rigid definition for the dignity of individuals, it would do well to pillage the resources from an issue area it has shown itself to be more comfortable, namely, the dignity of states (p. 420).[37] In addition, Tribe (2015–2016) has argued that the rapid development of jurisprudence on gay rights in the USA weaves these conceptions of dignity together so closely that there is simply "no significant gap" between the conception of the dignity of institutions and the dignity of individuals (p. 22).[38]

But what, exactly, is the relationship between these conceptions of dignity? First, it is important to recall that, on my view, in the domain of international law, dignity is primarily a legal status. Indeed, despite all the references to dignity in the

[37] For other thorough accounts of the development of an understanding of the "dignity of states" in the USA, see J. Resnik and J. Chi-hye Suk (2003), A. Althouse (2000), P.J. Smith (2003), and J.L. Greenblatt (2008).

[38] See also Cooper, E.B. (2015) and Scarffe (2022).

international human rights regime, David Luban (2009) correctly notes that nowhere in these documents is a particular conception (or theory) of dignity endorsed. For Luban, this leads him to investigate a "characteristically Jewish notion of human dignity" where dignity is primarily "a property of relations between human beings […]" and respecting dignity quite simply means "not humiliating people" (p. 214). Again, I think there are many ways in which accounts such as the one Luban offers and my own overlap, and connecting dignity back to historical understandings of status and humiliation is important for understanding the conception of dignity found in international law. Where Luban and I may disagree, however, is I do not think it is necessary to turn outside of the domain of international law in order to appreciate this connection.[39] Below, I elaborate on this connection in more detail. For now, however, I want to emphasize that at least one way in which the dignity of individuals and the dignity of states are connected in international law is that they are primarily a legal status—as appreciating this similarity can help us resist the temptation to go searching for extra-legal understandings of these terms.

This brings us to another relationship between these conceptions of dignity, namely, that in the same way the justification for the special status of states in international law and international law making can be traced back to the compelled relationship they are in with natural persons, I think the value of individual autonomy in international law is best explained in a similar way. That is, in the same way the dignity of individuals justifies the special status attributable to states (i.e., the dignity of states), so too does the dignity of individuals justify the importance of individual autonomy in IHRL. On my account, therefore, both the dignity of states and the value of individual autonomy are emergent values from this more basic principle. Of course, it does not follow from this fact that these values are unimportant or irrelevant to identifying the existence of international law; rather, it shows how both these values may be rooted in the same foundational principle.

Finally, there are significant structural similarities between our understanding of what it means to respect the dignity of individuals and the dignity of states in international law that should not be overlooked. For instance, respecting the dignity of states would evidently seem to include respecting their sovereignty. This would entail broad respect for the territorially integrity of states, the duty to refrain from the use of aggressive force against other states, and (presumably) broad respect for the choices of states in general (even when we might disagree with their choices for personal or cultural reasons). This does not entail that all choices should be respected, or that respecting the consent of states is the only criterion relevant to respecting their dignity, but it does provide us with a powerful argument for why state consent is often important.

Much the same can be said in the case of natural persons. Respecting the dignity of individuals seems (minimally) to include respect for their bodily integrity, the

[39] Notably, in a later paper, Luban (2015) explicitly rejects the "mirroring view": where IHRL must necessarily mirror moral human rights. As such, Luban and I almost certainly agree more than we disagree on these issues, but nevertheless, I do not believe we must turn outside of the practices of international law to appreciate the connection between dignity and "humiliation."

broad duty to refrain from the use of aggressive force against other persons, and a broad respect for the choices of individuals in general (even when we might disagree with their choices for personal or cultural reasons). Indeed, mirroring the law of foreign sovereign immunity, this does not mean that all choices either are (or should be) protected under the law, but there certainly is a set of individual choices that deserve this special protection. My minimal claim, therefore, is that there are many structural similarities in the way international law contemplates respecting the dignity of states and the dignity of individuals. Somewhat more speculatively, given the contested nature of discussions about human dignity specifically, I follow Daly (2011) in thinking that it might be advantageous to lean into the connections between these concepts as a way of moving the debate forward and sharpening our understanding of each.

For these reasons, although the dignity of individuals and the dignity of states may have important differences, they also share many structural and metaphysical similarities in international law that I think should not be overlooked. Furthermore, notice that even if it were the case that the dignity of states was radically different than the dignity of individuals, this would not necessarily undermine the broad argument made in this paper. Yes, the dignity-based account would no longer trace international law's existential question to a single conception of dignity, but admitting a pluralism of different sorts of dignity is relevant to the different domains of international law could be taken as a welcomed amendment to the theory.

3.3 What is dignity anyway?

The final objection considered here is whether dignity is simply too "squishy and subjective" to do the kind of important work a dignity-based theory assigns to it (Pinker 2008). The objection, in short, would argue that if judges and international institutions were tasked with determining when and where international laws were consistent (or in conflict) with "respecting dignity," would not this throw the international legal system into chaos and make international law unpalatably subjective?

One response to this objection is that it is not clear whether even if there continues to be no firm agreement on what understanding of dignity international law is concerned with, acknowledging dignity as fundamental to answering international law's existential question really would make the international legal system more subjective or chaotic than it already is. For instance, in considering whether a law requiring imported shrimp to be caught using Turtle Excluding Devices (TEDs) fell under an Article XX exception, the WTO appellate body had to settle questions such as whether the meaning of "exhaustible natural resources" included biological material (such as Turtles and Shrimp) or merely finite resources (such as minerals).[40] As the Appellate Body notes, interpreting a generic term such as "'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather 'by definition, evolutionary' […]" and must be interpreted in light of "modern international

[40] United States — Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R/(1998).

conventions and declarations."[41] The point here is a familiar one, namely, all laws are, to some degree, ambiguous and require interpretation. The objection, therefore, that a dignity-based approach to international law is paralyzingly subjective because it might require judges to engage in robust interpretative analysis is misplaced insofar as it underappreciates both the depth of Hart's observation about the "penumbras of uncertainty" in law (Hart 2012), as well as arguments made more recently by feminist philosophers of science which conclude that the "value-free" ideal is nothing but a fiction (Longino 1996; Dupré 2007).

Indeed, after painstakingly illuminating divergent uses of dignity by courts around the world, McCrudden (2008) cautions "not to claim too much" from the line of evidence he puts forward, urging his readers not to set the bar "too high in judging whether there is a judicial consensus on a common conception of dignity beyond the minimum core" (p. 711). As applied to the dignity-based account of international law articulated here, one might also note that the evidence McCrudden compiles for the "divergence thesis" may only implicate thicker conceptions of dignity than the one imagined here as the basis for international law. Furthermore, even if my dignity-based account requires judges to utilize some discretion in identifying the existence of international law, it is noteworthy that the constitutive views put forward by Besson and Christiano are similarly situated in this regard—with judges being tasked with making some kind of substantive evaluation about whether states are truly representing their constituents. So, at the very least, my dignity-based view is no more burdensome than some of the more plausible alternatives already on offer in the literature.

Another response to the objection that dignity is too subjective, or that there is not enough of a sufficient consensus on what dignity is for it to serve this role, is that law may actually be better suited to overcoming latent uncertainty and subjectivity than other domains. Indeed, Cass Sunstein (2018) has convincingly argued that there can often be widespread agreement in law on a general principle (e.g., free speech), without a similar level of agreement on the most general theory that accounts for that principle. Thus, it may be possible to proceed with our analysis by identifying some paradigmatic violations of the legal concept of dignity in international law, and then subsequently building out our criteria for identifying other such instances. This latter step is necessary if we are going to avoid leaving our legal concept of dignity wholly to an intuitive understanding[42] and will help guide our reasoning in future cases as well as protect again pernicious applications or uses.

One reason for thinking this is true is that, unlike ordinary moral reasoning, legal reasoning has the virtues of both being written down (for the most part) and taking place in public forums with people who have (again, for the most part) a shared understanding of its basic methods and goals. Legal reasoning can take place across generations, and its understanding can be shared, developed, and even amended by several distinct individuals. In contrast, although the publishing practices of

[41] *Ibid*. paragraph 130.

[42] This final step distinguishes my view from Oscar Schachter (1983) who argues that dignity is best left to an intuitive understanding.

professional philosophy may help to correct for some of these defects, Kristen Hessler and Allen Buchanan (2021) have rightly pointed out that often similar discussions in moral/political philosophy take place absent many of the relevant stakeholders and with an astonishing lack of diversity among its key participants. The point, in short, is that while some might sneer at the suggestion that the practice of international law may be *more effective* at developing a conception of dignity than our moral/philosophical efforts, there appears to exist the relevant institutions and structures within international law that may very well support this conclusion.

Nevertheless, a more troubling version of this criticism might be that while some understandings of dignity may be relevant to the identification of international law, others are not. As such, if these irrelevant understandings of dignity were to take hold, would not it be possible this undermines my dignity-based approach to identifying international law? In response, it is important to recall that, unlike many other dignity-based approaches on offer in the literature, this paper has sought to exhume an understanding of dignity from inside the practice of international law itself. Our task, therefore, is not to persuade lawyers, scholars, and judges to adopt a particular conception of dignity (e.g., a Kantian conception) to serve as a foundational principle in international; rather, it is to show some conception of dignity already serves this role, and this conception is of particular importance for identifying where and when international law exists. In conclusion, the mere existence of different understandings of dignity neither entails that the conception of dignity articulated here is too subjective to serve as the foundation of international law, nor does it justify abandoning a dignity-based account wholesale. Rather, it emphasizes the need for a more sustained analysis by the actors and institutions within the international legal system to develop criteria for what it means to "respect dignity," and for determining when dignity has been violated.

4 Conclusion

The dignity-based account articulated here is but one alternative to consent-based accounts of international law, and more needs to be said about how such an account applies to particular cases. That said, there are at least three reasons why I elect to leave my analysis here. The first reason is that a consideration of particular cases is tangential to the purpose of this paper, which is to show how dignity is already a principle serving this important function in international law. As with paradigm shifts in other domains (e.g., moving from a caloric theory of heat to a kinetic one), some parts of the practice of international law undoubtedly would have to be reshaped in response to embracing a dignity-based account. That said, while a comprehensive list of international laws that follow from this account will undoubtedly be informed by the work of many moral/political philosophers as well as legal scholars and judges, such a list remains well beyond my ambitions here.

The second reason is that it reflects my belief that international law remains incompletely theorized and is still nascent in its development. This echoes the claims of many prominent scholars whose work has been informative to the arguments

here, but it is worthy of repetition.[43] That is, a dignity-based account of international law reflects the fact that international law continues to be in the process of its development, and it builds into the method of its identification a process by which the legitimacy of international law and its surrounding institutions can gradually be increased.

Finally, even if my account is incomplete, I have shown a dignity-based account offers many advantages compared with consent-based alternatives. In this regard, this paper adds another voice to the growing call to move beyond consent-based accounts of international law and brings together some evidence for thinking that dignity need not be narrowly cabined to explanations of IHRL and *jus cogens*. Ultimately, the goal has not been to upheave or clutter an already complicated, decentralized network of international legal institutions and laws. Rather, it has been to articulate a relevant standard by which judges can determine whether an international law exists—if, when, and where such questions arise.

Data Availability Data sharing is not applicable to this article. Relevant materials and sources are provided in the references below.

Declarations

Conflict of Interest The authors declare no competing interests.

References

Addis A (2019) Dignity, integrity, and the concept of a person. ICL J 13(4):323–372. https://doi.org/10.1515/icl-2019-0015

Alden v. Maine (1999) 527 US 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636

Althouse A (2000) On dignity and deference: the Supreme Court's new federalism, 68 U. CIN. L. REV. 245, 250–56, 265. HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/ucinlr68&i=255

Alvarez J (2018) The human right of property. University of Miami Law Review 72(3), p. 705. https://repository.law.miami.edu/umlr/vol72/iss3/3

D'Amato A (1971) The concept of custom in international law. Cornell University Press, Ithaca

Austin J (1831) The province of jurisprudence determined, reprinted as The Providence of Jurisprudence Determined (2009). In: Rumble W (ed) Cambridge University Press. https://doi.org/10.1017/CBO9780511521546

Barak A (2015) Human dignity: the constitutional value and the constitutional right. Cambridge University Press, Cambridge. https://doi.org/10.1017/CBO9781316106327

Beitz CR (2013) Human dignity in the theory of human rights: nothing but a phrase? Philos Public Aff 41(3):259–290. https://doi.org/10.1111/papa.12017

Belgium v. Senegal (2012) ICJ. Rep 422

Belgium v. Spain. Barcelona Traction, Light and Power Company Limited (1970) 2nd Phase. ICJ

Besson S (2009) The authority of international law: lifting the state veil. Sydney Law Rev 31(3):343–380

[43] In several places, both Buchanan and Besson endorse a similar understanding of international law as incompletely theorized. For instance, in defending IHRL, Buchanan (2008) argues that a "more accurate description of the current state of affairs is that the existing normative structure for the international legal order is incomplete […]" (p. 52). See also Besson (2016) p. 313.

Besson S (2016) State consent and disagreement in international law-making. Dissolving the Paradox. Leiden J Int Law 29:289–316. https://doi.org/10.1017/S0922156516000030
Boudreaux B (2014) Statelessness, sovereignty, and international law: promoting the 'right to have rights. In: DeGioia J (ed) Human dignity and the future of global institutions. Georgetown University Press, United States
Brownsword R (2014) Human dignity from a legal perspective. In: Duwell M et al (eds) Cambridge handbook of human dignity. Cambridge University Press, Cambridge, pp 1–22. https://doi.org/10.1017/CBO9780511979033
Brownsword R (2021) Migrants, state responsibilities, and human dignity. Ratio Juris 34(1):6–28. https://doi.org/10.1111/raju.12303
Buchanan A (2004) Justice legitimacy, and self-determination: moral foundations for international law. Oxford University Press, Oxford. https://doi.org/10.1093/0198295359.001.0001
Buchanan A (2008) Human rights and the legitimacy of the international order. Leg Theory 14:39–70. https://doi.org/10.1017/S1352325208080038
Buchanan A (2010) Legitimacy of international law. In: Besson S, Tasioulas J (ed) The Philosophy of International Law. Oxford University Press, Oxford
Buchanan A (2013) The heart of human rights. Oxford University Press.https://doi.org/10.1093/acprof:oso/9780199325382.001.0001
Capps P (2009) Human dignity and the foundations of international law. Hart Publishing, Oxford. https://doi.org/10.5040/9781472564788
Christiano T (2010) Democratic legitimacy and international institutions. In: Besson S, Tasioulas J (ed) The philosophy of international law. Oxford University Press, Oxford.
Christiano T (2015) Legitimacy and the international trade regime, San Diego law Review (52)5. HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/sanlr52&i=1019
Cohen J (2010) Sovereignty in the context of globalization: a constitutional pluralist perspective. In: Besson S, Tasioulas J (ed) The Philosophy of International Law. Oxford University Press, Oxford
Cooper EB (2015) The power of dignity, Fordham L. Rev., 84(3). HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/flr84&i=11
Criddle EJ, Fox-Decent E (2009) A fiduciary theory of jus cogens, Yale J. Int'l L. (34). HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/yjil34&i=335
Danilenko G (1991) International jus cogens: issues of law-making European Journal of International Law, 2(1), p. 52–65. HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/eurint2&i=58
Daly E (2011) Human dignity in the Roberts Court: story of inchoate institutions, autonomous individuals, and the reluctant recognition of a right, Ohio Northern University Law Review, 37(20), 381–428. HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/onulr37&i=385
Declaration of the Rights of Man and of Citizen (1789), https://hdl.loc.gov/loc.wdl/wdl.14430
Donnelly J (2013) Universal human rights in theory and practice, 3rd edn. Cornell University Press, Ithaca. https://doi.org/10.7591/9780801467493
Dupré J (2007) Fact and value in Value-Free Science?: Ideals and Illusions. In: Harold Kincaid et al (ed) Oxford University Press. https://doi.org/10.1093/acprof:oso/9780195308969.003.0003
Dworkin R (1977) Taking rights seriously. Harvard University Press, Cambridge
Dworkin R (1986) Law's empire. Harvard University Press, Cambridge
Dworkin R (2011) Justice for hedgehogs. Harvard University Press, Cambridge. https://doi.org/10.4159/9780674059337
Dworkin R (2013) A new philosophy for international law 41:1 Phil & Pub Affairs, 2. https://doi.org/10.1111/papa.12008
EM LTD., Plaintiff-Appellant v. Republic of Argentina (2007) 473 F.3d 463
Endicott T (2010) The logic of freedom and power. In: Besson S, Tasioulas J (ed) The Philosophy of International Law. Oxford University Press, Oxford
Etinson A (2020) What's so special about human dignity? Philos Public Aff 48(4):353–381. https://doi.org/10.1111/papa.12175
Federal Maritime Commission v. South Carolina State Ports Authority (2002) 535 US 743
Finnis J (2011) Natural law & natural rights. 2nd edn. Oxford University Press, Oxford
Foreign Sovereign Immunities Act (1976) https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg2891.pdf
France v. Turkey (1927) PCIJ (ser. A) 10
Frank T (1998) Fairness in international law and institutions. Clarendon Press, Oxford. https://doi.org/10.1093/acprof:oso/9780198267850.001.0001

Goldsmith J, Posner E (2005) The limits of international law. Oxford University Press, Oxford
Greenblatt JL (2008) What's dignity got to do with it?: using anti-commandeering principles to preserve state sovereign immunity 45 CAL W.L. REV. HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/cwlr45&i=3
Griffin J (2008) On human rights. Oxford University Press, Oxford. https://doi.org/10.1093/acprof:oso/9780199238781.001.0001
Giudice M, Scarffe E (2021) Transnational law and legal positivism in the Oxford Handbook of Transnational Law. Oxford University Press, New York. https://doi.org/10.1093/oxfordhb/9780197547410.013.44
Gordley J, Jiang H (2020) Contract as voluntary commutative justice. Tulane Public Law Research Paper, (19–3). HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/mslr2020&i=769
Hart HLA (2012) The concept of law. In: Bulloch P, Raz J (ed) with Introduction and Notes by Leslie Green, 3rd edn. Oxford University Press, Oxford
Henkin L (1995) International law: politics and values. Developments in International Law, 18, 288. Retrieved from https://www.proquest.com/scholarly-journals/international-law-politics-values/docview/1308695847/se-2?accountid=29116
Henry LM (2011) The jurisprudence of dignity, University of Pennsylvania Law Review. HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/pnlr160&i=171
Hess v. Port Authority Trans-Hudson Corporation, (1994) 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245
Hessler K, Buchanan A (2021) Learning through law, American Philosophical Association, Central Division Meeting
In re Yamashita (1946) 327 US 1
Jackson V (2004) Constitutional dialogue and human dignity: states and transnational constitutional discourse, Montana Law Review 65(16). HeinOnline: https://heinonline.org/HOL/P?h=hein.journals/montlr65&i=21
Kent H (1954) The historical origins of the three-mile limit. Am J Int Law 48(4):537–553. https://doi.org/10.2307/2195021
Killmister S (2010) Dignity: not such a useless concept. J Med Ethics 36:160-164. https://doi.org/10.1136/jme.2009.031393
Killmister S (2017) Dignity: personal, social, human. Philos Stud 174(8):2063–2082. https://doi.org/10.1007/s11098-016-0788-y
Lagon M, Arend A (2014) Introduction: human dignity in a non medieval world. In: Lagon M, Arend A (ed) Human Dignity and the Future of Global Institutions. Georgetown University Press, United States
Lefkowitz D (2020) Philosophy and international law: a critical introduction. Cambridge University Press, Cambridge. https://doi.org/10.1017/9781316481653
Leo XIII (1881) *Diuturnum*, Encyclical of Pope Leo XIII, On the origins of civil power. https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_29061881_diuturnum.html
Longino H (1996) Cognitive and non-cognitive values in science: rethinking the dichotomy. In: Feminism, science, and the philosophy of science. Springer, Dordrecht, pp 39–58. https://doi.org/10.1007/978-94-009-1742-2_3
Luban D (2009) Human dignity, humiliation, and torture. Kennedy Inst Ethics J 19(3):211–230. https://doi.org/10.1353/ken.0.0292
Luban D (2015) Human rights pragmatism and human dignity. In: Renzo M, Cruft R, Liao M (ed) Philosophical foundations of human rights. Oxford University Press, Oxford. https://doi.org/10.1093/acprof:oso/9780199688623.003.0015
Macklin R (2003) Dignity is a useless concept. BMJ 327:1419–1420. https://doi.org/10.1136/bmj.327.7429.1419
Montreal Protocol (1987) https://treaties.un.org/doc/publication/unts/volume%201522/volume-1522-i-26369-english.pdf
McCrudden C (2008) Human dignity and judicial interpretation of human rights. Eur J Int Law 19(4):655–724. https://doi.org/10.1093/ejil/chn043
Miranda v. Arizona (1966) US, Supreme Court. 384: 436
Neff S (2019) Consent. In: d'Aspremont J, Singh S (ed) Concepts for international law. Edward Elgar Publishing, Northampton. https://doi.org/10.4337/9781783474684.00014
Nicaragua v. United States (1986) ICJ
Nussbaum M (2001) Women and human development: the capabilities approach, vol 3. Cambridge University Press, Cambridge. https://doi.org/10.1017/CBO9780511841286

Ovide S (2021). The limits of Facebook's 'Supreme Court, in the New York Times. https://www.nytimes.com/2021/05/05/technology/facebook-oversight-board-trump.html?smid=url-share
Parker K (1989) Jus cogens: compelling the law of human rights Hastings Int'l & Comp L Rev 12(2), 411. https://heinonline.org/HOL/P?h=hein.journals/hasint12&i=427
Pinker S (2008) The stupidity of dignity. The New Republic 28.05.2008, pp.28–31
Planned Parenthood of Southeastern Pa. v. Casey, (1992). US, Supreme Court. 505: 833
Raz J (2009) The obligation to obey the law, in The Authority of Law: Essays on Law and Morality, 2nd edn. Oxford University Press, Oxford. https://doi.org/10.1093/acprof:oso/9780198253457.003.0012
Resnik J, Chi-hye Suk J (2003) Adding insult to injury: questioning the role of dignity in conceptions of sovereignty. Stanford Law Review: 1921–1962. https://www.jstor.org/stable/1229568
Republic of Argentina v. Weltover, Inc., (1992) 504 US 607
Restatement of the Law, Third Edition, The Foreign Relations Law of the United States (1987), Vols. 1 and 2, American Law Institute Publishers, St. Paul, MN
Rochin v. California, (1952). US, Supreme Court. 342: 165
Rosen M (2012) Dignity: its history and meaning. Harvard University Press, Cambridge. https://doi.org/10.4159/harvard.9780674065512
Saudi Arabia v. Nelson (1993) 507 US 349
Scarffe E (2022) Dignitary harms and abortion law. Am J Bioeth. https://doi.org/10.1080/15265161.2022.2089273
Smith PJ (2003) States as nations: dignity in cross-doctrinal perspective, 89 Virginia Law Review, p. 1–107. https://doi.org/10.2307/3202386
Sohn L (1982) The new international law: protection of the rights of individuals rather than states, American University Law Review 1(14). https://heinonline.org/HOL/P?h=hein.journals/aulr32&i=11
Statute of the International Court of Justice (1945), https://www.icj-cij.org/en/statute
Sunstein C (2018) Legal reasoning and political conflict 2nd edn. Oxford University Press, New York
Tasioulas J (2013) Human rights, legitimacy, and international law. Am J Jurisprud 58(1):1–25. https://doi.org/10.1093/ajj/aut001
The Michael Domingues Case: report of the Inter-American Commission on Human Rights, Report No. 62/02, (2002) Case 12.285
The Schooner Exchange v. McFaddon (1812)11 US (7 Cranch) 116
Tiedemann P (2020) Philosophical foundations of human rights. Springer Textbooks in Law, Cham, Switzerland. https://doi.org/10.1007/978-3-030-42262-2
Tribe LH (2015–2016) Equal dignity: speaking its name, Harv. L. Rev., 129. https://heinonline.org/HOL/P?h=hein.journals/forharoc129&i=16
United Nations Charter (1945). https://www.un.org/en/about-us/un-charter
United Nations Convention on the Law of the Sea (1982). https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
United States — import prohibition of certain shrimp and shrimp products (1998) WT/DS58/AB/R/.
Universal Declaration on Bioethics and Human Rights (2005) United Nations Educational, Scientific, and Cultural Organization. https://unesdoc.unesco.org/ark:/48223/pf0000146180
Universal Declaration of Human Rights (1948) United Nations General Assembly. https://www.un.org/en/about-us/universal-declaration-of-human-rights
Vienna Convention on Diplomatic Relations (1961) 500 UNTS 95, Arts 22, 29
Waldron J (2012) Dignity, rank, and rights. Oxford University Press, New York. https://doi.org/10.1093/acprof:oso/9780199915439.001.0001
Waldron J (2013) International law: 'a relatively small and unimportant' part of jurisprudence? In: D'Almeida L et al (ed) Reading H.L.A. Hart's The Concept of Law. Hart Publishing. https://doi.org/10.2139/ssrn.2326758
Yearbook of the International Law Commission (1966) Volume II, International Law Commission. https://doi.org/10.18356/91cc8d73-en