HUMAN DIGNITY AT TRIAL: HARD CASES AND BROAD CONCEPTS IN INTERNATIONAL CRIMINAL LAW

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ABSTRACT

Broad and indeterminate invocations of human dignity play a sporadic but powerful role in the adjudication of international criminal law. Drawing on detailed case studies, I argue that the concept of dignity enables courts to fill gaps in the substantive criminal law, justify expansive interpretations, resolve conflicts between competing rights and values, and potentially overcome the requirements of strict legality. These features enable judges to reach important and sometimes morally compelling conclusions. But, expansive uses of human dignity come into tension with rule-of-law principles and challenge the self-understanding of ICL as a regime of limited subject-matter jurisdiction. This paper addresses these difficulties. In addition, I lay the groundwork for a more robust and well-defined concept of human dignity by connecting recent case law to older notions of dignity related to rank or status.

As the International Criminal Court enters its second decade and the ad hoc tribunals wind down their work, we enter a new era in the history of ICL institutions. The prospect of permanent adjudication of ICL at the international level calls for sustained consideration of the theoretical difficulties at the heart of the regime. This paper constitutes a contribution to this effort.

I. INTRODUCTION

A. “They Are a Species of Bad People”*: Dignity and Hate Speech in Rwanda

On April 3, 1994, Noël Hitimana, one of the most well-known and well-respected broadcasters at Radio Télévision Libre de Mille

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1. LINDA MELVERN, CONSPIRACY TO MURDER 211 (rev. ed. 2006) (quoting a broadcast of Georges Ruggiu).

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Collines (RTLM), issued a chilling warning to the Tutsi population:

The people are the actual shield. They are the truly powerful army... On the day when people rise up and don’t want you [Tutsi] anymore, when they hate you as one and from the bottom of their hearts, when you’ll make them feel sick, I wonder how you will escape."

In the months leading up to the 1994 Rwanda genocide, every RTLM broadcaster had contributed to the station’s efforts to sow ethnic division, hatred, and fear among the population, and to portray Hutus as the overwhelming majority and rightful national leaders. Hitimana’s invective came just three days before the assassination of Rwanda’s president, an event which sparked “the fastest, most efficient killing spree of the twentieth century.”

This atrocity was characterized by the meticulous planning of zealous leaders and by the widespread participation of average citizens, manipulated through a careful strategy of coercion, deception, and propaganda. The role of the radio in the genocide was acknowledged even as the atrocities raged, with politicians and activists calling for Western countries to assist in jamming RTLM broadcasts. In the years following the genocide, a consensus developed that the radio and newspaper were essential to the orchestration of atrocities, not only by naming specific targets on...
air, but also by constructing the ethnic divisions that tore the country apart in 1994.8

The prosecution of Ferdinand Nahimana, the publisher and founder of RTLM, however, posed difficult legal problems. There certainly were substantive criminal norms to cover the conduct of Nahimana’s broadcasters—the International Criminal Tribunal for Rwanda (ICTR) statute clearly criminalized “direct and public incitement to genocide.”9 The problem was that, on the one hand, the RTLM broadcasters made maximum use of context and subtext, speaking in innuendo and double-talk; their meanings were often open to interpretation, thereby making it difficult to find “direct” incitement in all instances.10 On the other hand, the rubric of “incitement” simply did not capture the manner in which this debasing speech pervaded the entire country of Rwanda, creating an atmosphere of malice and terror.11 It was not the connection with violence that made this speech so offensive, but the content of the speech itself.12 In the absence of clear legal tools to deal with this phenomenon, the Nahimana Trial Chamber became creative, expanding traditional notions of incitement, finding that hate speech could amount to persecution (a crime against humanity), and holding that the broadcasts and newspapers themselves could constitute acts of genocide.13

8. See Nahimana, Trial Judgment and Sentence, ¶¶ 368–69, 396, 409 (citing instances where Tutsi are described as engaging in trickery, cunning, or deceit); Chrétien, supra note 3, at 59–60 (noting that the media cast the Hutu as the victimized minority and the Tutsi as the privileged oppressors, thus allowing the atrocities of 1994 to masquerade as the democratic will of the people). But see Scott Straus, What Is the Relationship Between Hate Radio and Violence? Rethinking Rwanda’s “Radio Machete”, 35 POL. & SOC. 609, 611 (2007) (challenging the conventional wisdom and arguing that radio alone “cannot account for either the onset of most of the genocidal violence or the participation of most perpetrators”).


10. See, e.g., Nahimana, Trial Judgment and Sentence, ¶ 1022 (grappling with the role of context in incitement); Li, supra note 2, at 102–03.

11. Cf. Dallaire, supra note 7, at 12 (“[RTLM was] literally part of the genocide. The genocidaires used the media like a weapon.”).

12. For one of the most egregious examples, see Nahimana, Trial Judgment and Sentence, ¶ 179 (quoting the 1993 Kangura article, A Cockroach Cannot Give Birth to a Butterfly). It should be noted that this article was held to fall outside the jurisdiction rationae temporis of the tribunal. Id. at ¶ 311.

In rolling back the Trial Chamber’s more creative innovations, the ICTR Appeals Chamber in *Nahimana* introduced a subtle novelty of its own—the concept of human dignity. Citing the preamble of the Universal Declaration of Human Rights, the Appeals Chamber found that “hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity of the members of the targeted group as human beings,” and it suggested that such speech might form the sole basis for a persecution conviction. The judgment remains a unique and powerful precedent in the field of international criminal law (ICL), invoking the broad preambular language of the Universal Declaration of Human Rights to justify a novel legal claim in the face of strong opposition.

**B. “A Grave Violation” of the Right to Human Dignity**

Despite the extensive commentary on the intersection between free speech and international criminal law in *Nahimana*, the role of human dignity in this context has not been thoroughly discussed. The result in the *Nahimana* case suggests that the concept of human dignity, unmoored from its usual associations with torture, degrading treatment, and the conditions of confinement, could assist the outward expansion of ICL, allowing judges to address new situations and criminalize new forms of conduct. Expansive notions of human dignity have arisen in other difficult cases. This Article examines these cases, studies the extent of this
outward reach, and assesses its drawbacks. I argue that such expansive notions of dignity might spur judicial creativity, but will also create friction with the principle of legality and threaten to undermine the understanding of ICL as a jurisdictionally limited regime.

This investigation does not endeavor to take a position on the wide range of issues implicated by the use of human dignity in international criminal jurisprudence. Human dignity arises in connection with deep questions of legal interpretation, legality and the rule of law, and the appropriate resolution of rights conflicts. To take a stand on each of the substantive and methodological issues raised in these cases would be beyond the scope of any single paper. Rather, the argument presented here clarifies the stakes of introducing expansive uses of human dignity into the jurisprudence of international criminal tribunals.

The legal consequences of dignity-based reasoning reveal tensions between various interpretive logics in ICL, offering a snapshot of what Darryl Robinson has called the regime’s “identity crisis.” In short, ICL today has come to be seen as something of an enforcement arm for human rights abuses and violations of the laws of war. This causes problems because the interpretive principles of human rights and liberal criminal law tend to pull in opposite directions; human rights favors teleological interpretation for maximum protection while criminal law emphasizes the principle of strict legality.


Not only does the concept of human dignity pull into indeterminate space, it also tends to demand solutions to important value conflicts that might best be resolved or contested in other fora. These results might be consistent with a rationale based on maximum protection, but they exist in tension with the strict, rule-based approaches of domestic criminal law. At the same time, more restrained approaches similar to domestic criminal procedure might sanction “envelope-pushing” and gaming by savvy war criminals. A serious analysis of the concept of human dignity may help clarify the various choices courts have for resolving conflicts between these divergent logics.

This Article investigates the role and functions of expansive uses of human dignity in ICL, and argues that such uses, although important to addressing novel forms of cruelty, add unpredictable and destabilizing elements into the structure of ICL. The Article proceeds in three Parts, which are, in turn, analytical, critical, and constructive. Part II explains in greater detail what “expansive” use of dignity means and explores three such uses in-depth. This discussion highlights the multiplicity of functions that dignity may perform in any criminal case. Part III takes a critical posture, noting that the multifaceted nature of human dignity, as well as the concept’s indeterminacy, causes problems from the perspective of legality and the substantive limits of ICL.

Part IV begins the work of reconstructing a limited and intelligible concept of injuries to human dignity and suggests that such injuries might be understood as attempts at social re-stratification by drawing on notions that connect human dignity to older notions of rank and social status. This reconstructed concept simultaneously deciphers much of the existing case law and provides a blueprint for applying human dignity to future problems. Part V concludes by emphasizing the limitations of this reconstruction and urging caution in the employment of human dignity.

At its core, this Article proceeds with few data points and only a handful of cases. Expansive uses of human dignity are not regularly employed in today’s highly juridified environment of ICL. But, when these situations do arise, they point to tensions that

23. See discussion infra Part III.A–B.
24. See discussion infra Part III.C.
26. The first judgment of the International Criminal Court convicting Thomas Lubanga Dyilo of recruiting child soldiers does not mention the concept. See generally Pros-
remain in the regime. These tools remain available to judges and prosecutors who wish to encourage greater creativity on the part of courts applying ICL. ICL stands at a point of transition, as the International Criminal Court (ICC) marks its tenth anniversary and first judgment and as the ad hoc tribunals plan to wrap up their work. It is my hope that reasoned elaboration of the forms and functions that human dignity may take in the ICL context will help bring these consequences into relief and foster further discussion at this important moment.

II. HUMAN DIGNITY IN THE COURTS: GENERAL PRINCIPLE AND SUBSTANTIVE CRIME

This Article proposes to study “expansive” uses of human dignity in ICL. This category of expansive uses is designed to exclude the specific, relatively narrow criminal provisions that require courts to acknowledge injuries to human dignity. Contemporary ICL does this by prohibiting “outrages upon personal dignity” in armed conflicts, inhumane conditions of detention, and torture and inhuman treatment. Expansive uses, by contrast, draw on broad references to the concept of dignity, and they are unfettered by ties to any particular context, legal doctrine, or relationship between perpetrator and victim. The crucial distinction is not whether the conception of dignity at issue is reflected in the text of a particular treaty; as will be shown, international conventions may contain both expansive and narrow references to the concept. Instead, the difference is one of context. Narrow uses, such as the prohibition against outrages upon personal dignity in the Geneva Conventions,


29. E.g., Rome Statute, supra note 27, arts. 7(1)(f), 8(2)(a)(ii), 8(2)(c)(i).

make reference to human dignity in a specific legal and factual context.

I have defended at length the distinction between narrow and expansive uses of dignity elsewhere, and I will not repeat that argument here. It should suffice to note that narrow uses, which apply explicitly to a context of torture, detainee treatment, or similar conduct, are sufficiently bounded to generate a robust interpretive practice that can effectively guide behavior. In spite of the recent efforts to create indeterminacy in the rules prohibiting torture, these rules are no less determinate and no less important than other basic provisions of the laws of war affording judicial guarantees, non-combatant immunity, and access to humanitarian assistance. The invocations of dignity with which I am concerned take the shape of “general principles,” comparable to the broad pronouncements more commonly found in constitutional provisions.

This Section identifies three expansive uses of dignity in ICL jurisprudence. First, violations of the right to respect for human
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Human dignity may form the grounds for a persecution conviction. Second, human dignity has sometimes served as a guiding value in elaborating the residual category of “other inhumane acts,” another crime against humanity. Third, human dignity performs an interpretative role in expanding the contours of international crimes. It may do this as a “general principle” of international law or as an identified “object and purpose” of a court statute, treaty, or regime. The final Part of this Section synthesizes the implications of these case studies.

A. Persecution and the Fundamental Right to Human Dignity

The most expansive, and certainly the most contestable, use of human dignity came largely as a response to the role of the media in the 1994 Rwanda genocide. In 2000, the ICTR opened proceedings against three prominent media figures. Ferdinand Nahimana was the founder of Radio Mille Collines and a professor of history. Jean-Bosco Barayagwiza was a high-ranking board member of RTLM, as well as a founding member of the Coalition for the Defense of the Republic. Hassan Ngeze was the editor-in-chief of Kangura. All three were convicted of genocide, incitement to genocide, and persecution on the basis of statements made in the media. In 2007, an appeals judgment reversed all convictions for

37. On the ambiguous role of general principles of international law in the Rome Statute, see Margaret McAuliffe deGuzman, Applicable Law, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701 (Otto Triffterer ed., 2d. ed. 2008) [hereinafter TRIFFTERER COMMENTARY].
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genocide that were based on media statements, but upheld convictions for incitement and persecution.\footnote{43}{This Part describes the role of dignity in these convictions, after giving a brief, synthetic account of the crime of persecution, which is one of the knottier crimes in international law.\footnote{44}{1. Persecution Generally

Although the crime of persecution requires several difficult mental and contextual elements, this discussion will focus on the crime’s \textit{actus reus}.\footnote{45}{The act requires three major components. First, the prosecution must show a “gross or blatant denial . . . of a fundamental right laid down in international customary or treaty law.”\footnote{46}{Second, the \textit{ad hoc} international tribunals have required that the “underlying acts of persecution” or the deprivations be “of a gravity equal” to the enumerated crimes against humanity.\footnote{47}{Third, the act must be based on discriminatory grounds.\footnote{48}{In the \textit{Nahimana} case, the Appeals Chamber was able to bring in the pre-amble of the Universal Declaration of Human Rights through the


\footnote{44}{See \textit{Nahimana}, Appeals Judgment, Partly Dissenting Opinion of Judge Meron, ¶ 8 (observing that persecution is “one of the most indeterminate” international crimes).

\footnote{45}{Most formulations of the crime require that the acts be committed with intent to discriminate on proscribed grounds. See, e.g., \textit{Nahimana}, Appeals Judgment, ¶ 985. Like all crimes against humanity, persecution must be committed in connection with a “widespread or systematic attack,” which does not necessarily mean armed conflict or armed force. E.g., Rome Statute, \textit{supra} note 27, art. 7(1), (2)(a); ICTR Statute, \textit{supra} note 9, art. 3; Prosecutor v. Kunarač, Case No. IT-96-23, Appeal Judgment, ¶ 86 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002) (on the definition of “attack”). The Rome Statute of the International Criminal Court (Rome Statute) imposes additional contextual requirements on crimes against humanity, and specifically on persecution. See Rome Statute, \textit{supra} note 27, art. 7.

\footnote{46}{Though not defined in the relevant statutes, this is the common definition developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and ICTR. Prosecutor v. Kupreskić, Case No. IT-95-16-T, Trial Judgment, ¶ 621 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000). The Rome Statute refers to a “severe deprivation of fundamental rights.” Rome Statute, \textit{supra} note 27, art. 7(2)(g). The deviations in the definitions here are not widely considered to be material. William J. Fenrick, \textit{The Crime Against Humanity of Persecution in the Jurisprudence of the ICTY}, 32 NETH. Y.B. INT’L L. 81, 95–96 (2001).


\footnote{48}{Originally, such proscribed bases were limited to “political, racial or religious” grounds. Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, 56 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]. The Rome Statute has broadened the list of impermissible grounds. Rome Statute, \textit{supra} note 27, art. 7(h).}
first of these components: the concept of “a fundamental right” laid down in international law.

The term “fundamental right” remains undefined. The ad hoc tribunals have correctly noted that “there is no list of established fundamental rights,” and they have regularly held that the determining the existence of a violation of fundamental rights is best undertaken “on a case by case basis.” The commission of any other crime within a tribunal’s jurisdiction generally constitutes a deprivation of a fundamental right. In addition, the tribunals have convicted defendants for a number of acts involving political and economic rights, including the right to employment, the right to security of person, the right to privacy, the right to own


51. Id.; see also Kupreski, Trial Judgment, ¶ 623 (“The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing.”); Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Judgment, ¶ 707 (May 7, 1997) (“[P]ersecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present.”).

52. This is a kind of “per se” rule—acts such as murder, torture, etc., are per se sufficient to form the basis for a persecution conviction. The International Criminal Court’s (ICC) prosecutions of persecution have thus far been limited to such acts. See, e.g., Prosecutor v. Harun & Ali Kushayb, Case No. ICC-02/05-01/07, Pre-Trial Chamber I, Decision on Application for Summons to Appear, ¶ 74 (Apr. 27, 2007).


55. Krajišnik, Trial Judgment, ¶¶ 736, 741 (through arbitrary searches of homes).
and dispose of property, freedom of movement, the right to judicial process, prohibitions on religious worship, and the right to proper medical care. When deciding on the underlying acts of persecution, the trial chambers generally provide some textual basis for these “fundamental rights,” usually by reference to international or regional treaties or the Universal Declaration of Human Rights.

By referencing a particular treaty provision in justifying a persecution conviction, a tribunal implicitly invokes a deep tissue of drafting history, interpretation, contestation, and application. Though human rights are naturally expressed in expansive terms, some concepts enjoy a clear and well-defined sphere of application, while others are more open-ended in nature. This is particularly important in the case of human dignity, where a court may rely either on the explicit prohibitions on cruel, inhuman, and degrading treatment, or on the more expansive notions of human dignity that provide the normative background for contemporary human rights law. The following discussion focuses on the hate-speech decisions of the ICTR to show how the court moved from invoking the former concept to the latter more expansive version, and it explains the reasons for this conceptual shift. Following Sections tease out the implications and challenges of this approach.

56. Prosecutor v. Gotovina, Case No. IT-06-90-T, Trial Judgment, ¶ 1846 (Apr. 15, 2011) (holding that discriminatory laws regarding housing and property may constitute persecution); Blagojević & Jokić, Trial Judgment, ¶¶ 594, 620 (finding that the taking and burning of personal property could constitute a persecutory act, but only if the items destroyed were “indispensable to their owners,” a threshold that was not met in this case); Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgment, ¶¶ 144–49 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

57. Borić, Trial Judgment, ¶¶ 1042–43 (finding this violation through discriminatory application of checkpoints, curfews, and other departure procedures); see also Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Trial Judgment, ¶¶ 297, 381 (July 26, 2010).

58. Borić, Trial Judgment, ¶¶ 1044–45.


61. See, e.g., Blagojević & Jokić, Trial Judgment, ¶ 592 (“[T]he Trial Chamber observes that the exposure to terror is a denial of the fundamental right to security of person which is recognised in all national systems and is contained in Article 9 of the ICCPR and Article 5 of the ECHR. Accordingly, the Trial Chamber finds that terrorization violates a fundamental right laid down in international customary and treaty law.”).

62. Cf. Cass Sunstein, Rights and Their Critics, 70 Notre Dame L. Rev. 727, 742 (1995) (noting the critique that rights are too abstract to be useful, and arguing that, at least in constitutional systems, most rights “generally are specified”). The problem, in Sunstein’s view, “lies in the use of general claims of right to resolve cases in which the specification has not yet occurred.” Id.
2. Operationalizing Human Dignity: Prosecutor v. Nahimana

In the Rwanda hate-speech case, although there was little doubt that at least some statements by RTLM and Kangura constituted incitement to genocide, the charge of persecution presented prosecutors with an opportunity to address a wider range of speech. Specifically, the defendants were tried for hate speech itself, which, in the view of the Trial Chamber, did not need to include a specific call to action, as incitement does. This was important for at least two reasons. First, the prosecution hoped to convict the defendants for speech that took place before the genocide began on April 6, 1994. Tactically, these allegations were important because the newspaper Kangura did not publish after the genocide began, and because the defendants’ control over RTLM became attenuated after April 6. Second, the effort to punish a broader range of speech seemed important for reasons of closure, in order to accurately portray the kind of violence that was perpetrated on the Rwandan people.

Dignity did not fully enter the picture until the appellate stage. The Trial Chamber, relying on an earlier judgment accepting the guilty plea of Georges Ruggiu, found that the vitriolic broadcasts of RTLM violated the fundamental rights “to life, liberty and basic humanity enjoyed by members of wider society.” Introducing the idea that hate speech actually attacks the rights to life and liberty also made it easier for the Trial Chamber to conclude that the speech itself constituted part of a widespread and systematic attack on civilians, which is a contextual element required of all crimes against humanity. The Trial Chamber’s conclusion included an important discussion of the ways in which hate speech destroys...
human dignity, and the right to “basic humanity” invoked by the court may be roughly equivalent to the right to respect for dignity.

But this approach did not stand. The Appeals Chamber argued that hate speech itself could not violate the right to life, liberty, or physical integrity, because speech alone “cannot, in itself, directly kill members of a group, imprison or physically injure them.” The Appeals Chamber also rejected the contention that a widespread, systematic attack existed before April 6, 1994. As a result, certain persecution convictions were set aside altogether, and the court refused to find Nahimana guilty for broadcasts that took place before April 6.

The Appeals Chamber upheld the persecution conviction of Ferdinand Nahimana, however, by employing a dignity-based theory. The court found that the RTLM broadcasts violated the right to security of person as well as “the right to respect for the dignity of the members of the targeted group as human beings,” and that such violations were sufficiently grave. The court indicated that only speech that incites a population to violence may violate the right to security, while the application of human dignity may be much broader, criminalizing speech that does not amount to incitement.

The majority opinion stated that it would not rule on the question of whether hate speech alone can constitute an underlying act of persecution, but this apparent restraint undersells the transformative potential of this judgment. The Appeals Chamber considers acts of hate speech “jointly” with incitement and other acts

72. Id. ¶ 1072 (“Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack.”).
73. It seems that one judge would have upheld this approach. See Nahimana, Appeal Judgment, Partly Dissenting Opinion of Judge Shahabuddeen, ¶¶ 7–20.
75. Id. ¶ 992–33.
76. In particular, the court found that Ngce, the newspaper editor, could not be convicted of persecution because Kangura was not published during the genocide and because “it is difficult to see how Kangura articles published between 1 January and 6 April 1994 can be regarded as forming part of a widespread and systematic attack, even if they may have prepared the ground for it.” Id. ¶ 1013. The court set aside Barayagwiza’s persecution conviction for RTLM broadcasts (but not for other activities) on the ground that he had no control of the station after April 6. Id. ¶ 997.
77. Id. ¶¶ 995–94, 996.
78. Id. ¶¶ 986–87.
79. Id. ¶ 986.
80. Id.
81. Id. ¶ 987.
to establish persecution, to and Judge Meron in his dissent notes
that hate speech was “an important and decisive factor” in the conviction. Moreover, at least one judge would have explicitly ruled
that hate speech alone was sufficient to constitute persecution. Thus, the Nahimana case supports the proposition that hate speech
not rising to the level of incitement can constitute an act of persecution. Even more definitively, the case holds that violations of
the preamble to the Universal Declaration of Human Rights may constitute the basis for a persecution conviction.

The novel approach taken in this case merits attention for at least two reasons. This case study concludes by noting the connections
between expansive and narrow uses of dignity in ICL, and between dignity and notions of a “hierarchy” of human rights.

a. Expanding the Reach of Common Article 3

First, the tribunal’s ruling in Nahimana could serve to expand
notions of dignity that appear elsewhere in international law, such as the prohibition against “outrages upon personal dignity” found
in Common Article 3 of the Geneva Conventions. This possibility
becomes more notable in light of the interpretation that the Nahimana Appeals Chamber gives to an earlier case from the Interna-
tional Criminal Tribunal for the former Yugoslavia (ICTY). “[I]t
should be noted,” the court wrote in a footnote, “that, according to
the [Kvoˇcka appeal judgment], violations of human dignity (such as
harassment, humiliation and psychological abuses) can, if suffi-
ciently serious, constitute acts of persecution.”

While technically true, this reading elides the fact that the con-
duct at issue in Kvoˇcka fell squarely within the ambit of Common
Article 3, and did not once invoke the broader notions of dignity in the Universal Declaration of Human Rights, or any comparable

82. Id. ¶ 988.
85. Cf. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND
CONTEMPORARY APPLICATION 403 (2011) (describing the way in which hate speech might constitute a crime against humanity).
86. Nahimana, Appeal Judgment, ¶ 986 & n.2256 (locating the “right to respect for . . . dignity” in the preamble to the Universal Declaration on Human Rights).
88. Nahimana, Appeal Judgment, n.2257 (citing Prosecutor v. Kvoˇcka, Case No. IT-98-
30/1-A, Appeal Judgment, ¶¶ 325–25 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005)).
Common Article 3 was unavailable to punish the actions of Nahimana and the other journalists because there was no precedent for such an expansive interpretation. But to the extent that courts and tribunals take the Nahimana court’s claim seriously, the case’s connection to Kvočka provides an avenue for expansive interpretation of Common Article 3 and related provisions by reference to broader understandings of human dignity.

b. Dignity and a Hierarchy of Human Rights

Second, the tribunal’s reasoning could bolster efforts to establish a hierarchy of rights, with dignity at the top. When stating that hate speech violates the right to respect for dignity, the court made little reference to the source or content of this right, except for one footnote, which is strikingly broad in its reach: “On the content of this right,” the Appeals Chamber stated, “see for example the Universal Declaration on [sic] Human Rights, the Preamble of which expressly refers to the recognition of dignity inherent to all human beings, while the Articles set out its various aspects.”

Following Sections will expand on the problems associated with the indeterminacy of such a statement. For now, it is sufficient to note the following implication: the rights enumerated in the Universal Declaration of Human Rights are all aspects of the fundamental right to respect for human dignity. In one sense, this is not a new claim; the idea that all rights stem from the basic dignity of humanity is common in human rights theory, and the preambles

89. Mirosalv Kvočka was a policeman in Omarska who served in “various security . . . provisions” inside the Omarska detention camp, or “collection centre.” Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Trial Judgment, ¶¶ 1–7 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001). The Trial Judgment describes the camps with a litany of horrors, noting that detainees would be beaten if they tried to use the few toilets in the facilities and were forced to relieve themselves in their clothing and forced to beg for water. See id. ¶¶ 45–108. In deciding that humiliating treatment of detainees may constitute a basis for detention, the Trial and Appeals Chambers relied on the protections of personal dignity in international humanitarian law. See, e.g., Kvočka, Appeal Judgment, ¶ 323.

90. The Appeal Chamber’s claim in Nahimana that the Kvočka Appeal Judgment provided authority for its claim probably had more to do with the tribunal’s need to overcome competing precedent from the ICTY Trial Chamber, which had stated that hate speech cannot, itself, constitute a basis for a criminal conviction. See Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2-T, Trial Judgment, ¶ 209 & nn.271–72 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (holding that hate speech not rising to the level of incitement cannot be the basis for a persecution conviction).


92. Id. n.2256 (emphasis added).

93. See infra Part III.A.2.

94. See Carozza, supra note 33, at 937.
to the United Nations covenants state that “these rights derive from the inherent dignity of the human person.”

But this brief statement from the court can also be read provocatively. It invites the argument that any particular right enumerated in the declaration, such as freedom of expression, will be protected only to the extent that such protection comports with the fundamental value of human dignity. This represents a “strong” form of dignity-based reasoning that is only one of many possible inferences available from language such as that found in the International Covenant on Civil and Political Rights preamble. Perhaps this strong form of reasoning was essential to the Nahimana court’s conclusions, because it would have allowed the tribunal to avoid balancing the right to free expression and the right to dignity. Indeed, in the Appellate Chamber’s discussion, we find none of the deep consideration of the notion of “protected speech,” which appears in the dissent and in other cases. Thus, one reading of the Nahimana court’s use of dignity suggests that the violation of the right to dignity may be used as a “trump” to secure convictions even at the expense of limiting other rights.

B. Other Inhumane Acts (Which Severely Damage Human Dignity)

The residual category of “other inhumane acts” provides an example of a potentially expansive use of “human dignity” whose

96. The idea that rights are based in dignity and thus provide protections only to the extent consistent with dignity is the mainstream in some legal cultures, while hotly debated in places such as the United States. On skepticism in the United States, see Frederick Schauer, Speaking of Dignity, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 178 (Michael J. Meyer & W.A. Parent eds., 1992) [hereinafter CONSTITUTION OF RIGHTS].
98. There is no reason why this kind of reasoning would not be equally applicable to rights in the Universal Declaration of Human Rights other than free speech. This strong form of reasoning points to a general tension in the use of human dignity. On the one hand, positing dignity as the ground for human rights (or for a particular right) suggests that such rights might be limited by “greater” concerns for human dignity. See Guy Carmi, Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification, 9 U. Pa. J. CONST. L. 957, 959 (2007) (“[H]uman dignity may be used as a justification for both protecting speech and restricting it.”). On the other hand, dignity in constitutions and human rights instruments serves as an incompletely theorized agreement, allowing the drafters to leave philosophical debates about the nature of rights undecided. Shultziner, supra note 34.
role in practice has actually been rather limited.\textsuperscript{99} This “catchall” category appeared first in the London Charter of the International Military Tribunal (IMT).\textsuperscript{100} The reference to human dignity first arose in the catchall provision as codified by the International Law Commission, which referred to “[o]ther inhumane acts which severely damage mental or physical integrity, health or human dignity, such as mutilation and severe bodily harm.”\textsuperscript{101} The ad hoc tribunals have employed similar formulations,\textsuperscript{102} although the tribunals’ statutes referred simply to “other inhumane acts.”\textsuperscript{103} The Rome Statute of the International Criminal Court (Rome Statute) retains much of the International Law Commission’s language but leaves out any reference to human dignity.\textsuperscript{104}

The open-textured nature of this provision has caused significant nervousness among judges and states parties to the Rome Statute,\textsuperscript{105} which has seemingly led courts to downplay the human dignity aspect of this provision. Courts and tribunals have worked to simultaneously control the scope of this provision and preserve its value as a residual clause by invoking the principle of legality and the human rights of defendants to read “other inhumane acts” narrowly.\textsuperscript{106} In the process, the scope of “other inhumane acts” has come to be roughly coextensive with, or even “identical to,” the war crimes of cruel or inhuman treatment.\textsuperscript{107} Examples of “other

\textsuperscript{99}. See Terhi Jyrkkiä, ‘Other Inhumane Acts’ as Crimes Against Humanity, 1 Helsinki L. Rev. 183, 190 (2011).

\textsuperscript{100}. IMT Charter, \textit{supra} note 48, art. 6(c).

\textsuperscript{101}. Draft Code of Crimes, \textit{supra} note 36, art. 18(k).

\textsuperscript{102}. \textit{E.g.}, Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Trial Judgment, ¶ 234 (Nov. 29, 2002), \textit{aff’d}, Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Appeal Judgment, ¶ 165 (Feb. 25, 2004) (“The elements to be proved are: (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.”).

\textsuperscript{103}. ICTR Statute, \textit{supra} note 9, art. 3(i); Statute of the International Criminal Tribunal for the former Yugoslavia art. 5(i), S.C. Res. 827, Annex, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

\textsuperscript{104}. Rome Statute, \textit{supra} note 27, art. 7(1)(k).


\textsuperscript{107}. GIDEON BOAS ET AL., 2 INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY 100 (2009).
inhumane acts” include attempted murder, forced marriage, acts committed against corpses, severe beatings, and human experimentation. Later tribunal decisions have followed the lead of the Rome Statute in eschewing any direct reference to human dignity as an element of the crime, and some observers have inferred that there is no material difference between injury to dignity and physical or mental suffering.

The residual category of “other inhumane acts” has nonetheless been important in identifying new types of harm and helping courts deal with novel innovations in cruelty. This category was essential to expanding the types of sexual violations subject to international criminal jurisdiction at a time when only rape was expressly prohibited. In addition, the concept of human dignity has been important in convicting defendants who had urged the defilement of corpses. Finally, the Iraqi High Tribunal used concepts of honor and dignity to classify the razing of orchards as “other inhumane acts,” arguably taking this category a step too far.

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108. Vasiljevic, Trial Judgment, ¶¶ 239–40 (finding that attempted murder both attacked human dignity and caused severe mental suffering).


111. Robinson, supra note 105, at 56 (reporting the understandings of some states parties in the drafting of the Rome Statute).

112. See id.


114. See generally Jyrkkiä, supra note 99.

115. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 688 (Sept. 2, 1998) (“Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.”).


117. Dujail Judgment, supra note 19, at 218 (“When the fruit trees, some of which were dozens of years old, were chopped down, it is as if those who carried out the razing or supervised such acts or gave orders to raze these orchards were actually slaying those victims who were the owners of those orchards or the children of those victims. They looted their most precious assets, their lives and the lives of their children, along with their orchards, and they also robbed them of their honor, freedom and dignity.”).

118. Nehal Bhuta, Fatal Errors: The Trial and Appeal Judgments in the Dujail Case, 6 J. INT’L CRIM. JUST., 39, 53–54 (2008) (arguing that the judgment may have violated the principle of legality).
C. Human Dignity as a General Principle of International Law

Human dignity has also been recognized as a general principle of international law, both within and outside ICL. General principles may be used to interpret ambiguous positive norms, and in international criminal jurisprudence they interact uncomfortably with the principle of legality. This Section explains the role of human dignity as a general principle and how this understanding may contribute to the development of international law generally. These cases merit serious attention, as they may enhance the ripple effect brought about by the *Nahimana* decision.

General principles operate differently in ICL than they do in international law generally. The ICTY has identified three to four types of general principles: (i) general principles of international criminal law; (ii) general principles of international law; (iii) "general principles of criminal law common to the major legal systems of the world"; and (iv) general principles "consonant with the basic requirements of international justice." The second category—general principles of international law—includes, among others, the general principle of respect for human rights. As in general international law, these general principles may be used as gap-fillers to determine the content of procedural and substantive norms when the statute of the relevant tribunal, other treaties, and

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121. See *deGuzman*, *supra* note 37, at 702.


123. See, e.g., *Prosecutor v. Kupreskić*, Case No. IT-95-16-T, Trial Judgment, ¶ 591 (Jan. 14, 2000) (referring to general principles of international criminal law (ICL), principles of criminal law, and "general principles of law consonant with the basic requirements of international justice"); *Rome Statute*, *supra* note 27, art. 21(1) (referring to "principles and rules of international law" as well as "general principles of law derived . . . from national laws"). *See generally Antonio Cassese, International Criminal Law* 14–15, 20–25 (2d ed. 2008).

124. *Id*. at 15.
customary law fail to provide a definitive answer. In addition to the gap-filling and interpretive functions of general principles, courts can also arguably employ these general principles to bring additional force to a particular legal argument. It is unclear what place the Rome Statute affords to these principles.

The judgment of the ICTY Trial Chamber in the Furundžija case is well known for its suggestion that human dignity constitutes an applicable general principle of international law. After investigating national laws, the Trial Chamber found no consensus among states on the question of whether forced oral penetration could constitute rape. The court thus resorted to the principle of human dignity, holding that:

The general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliation and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

125. See id.


127. See Rome Statute, supra note 27, art. 21(1) (creating a hierarchy of sources, which includes “the principles and rules of international law, including the established principles of [international humanitarian law]”). Commentators are split on whether this allows the court to consider general principles such as the respect for human dignity or for human rights. See Alain Pellet, Applicable Law, in 2 The Rome Statute of the International Criminal Court: A Commentary (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (suggesting that the reference to principles is a “verbal tic” and should stand for nothing more than customary international law); deGuzman, supra note 37, at 702 (discussing this debate).


129. Furundžija, Trial Judgment, ¶ 182.

130. Id. ¶ 183. It is not clear from where the court draws its textual basis for human dignity in this context. The court invokes the need to protect against “outrages” against dignity, seemingly referencing the language of Common Article 3 of the Geneva Conventions. Id. However, elsewhere, the court speaks broadly:

The parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights
Furundžija is an ad hoc tribunal’s most explicit use of human dignity as a general principle. But there are other instances of tribunals using the protection of dignity to interpret the vague terms of their statute. The ICTR in Akayesu also appeared to reference the concept of dignity, albeit in a more oblique way, when it developed its competing and much broader definition of rape: “Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture [under certain circumstances].” The Special Court for Sierra Leone referenced dignity in holding that the amnesties contained in the Lomé Agreement were inapplicable to those international crimes that are subject to universal jurisdiction. It stated that “the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation erga omnes,” and, therefore, states could not sweep “into oblivion and forgetfulness” conduct that is covered by this obligation.

The tribunal in Furundžija added a second wrinkle in its discussion of legality (nullum crimen sine lege). It found that this extension of the crime of rape did not violate the principle of legality, providing a narrow and a broad ground for this determination. Narrowly, the chamber held that because forced oral penetration would have been criminal under a different name (sexual assault), this shift in categorization was not a violation of the principle of

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131. See Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 64 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 12, 2002).

132. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 597 (Sept. 2, 1998). The trial chamber in this case developed a much more contextual definition of rape that eschewed the Furundžija court’s narrow focus on body parts. Id. ¶ 598. This approach was rejected in Furundžija and is not reflected in the Rome Statute, which was drafted some months before this decision. See Rome Statute, supra note 27.


134. Id. For analysis, see Simon M. Miesenberg, Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone, 86 INT’L REV. RED CROSS 837 (2004).

135. The “principle of legality” may describe a set of ideals that are enforced more or less strictly across various legal systems. These include the general requirements that criminal offences be published in advance, that they must be as specific and clear as possible, that they may not be retroactive (the prohibition on ex post facto laws), and that resort to analogy in securing convictions is prohibited. See Cassese, supra note 123, at 37–38. Contemporary international criminal law provides for each of these principles in some measure. Id. at 41–52. I use the standard phrase nullum crimen sine lege (“no crime without law”) to capture these essential requirements, though I sometimes refer to nullum crimen, the “principle of legality,” or the “requirements of legality.”
legality.\textsuperscript{136} But the tribunal’s statement that dignity “amply out-
weighed” any concerns related to the principle of legality in this case also 
suggests a broader ground.\textsuperscript{137} The tribunal reasoned that
the only potential harm to the defendant was the “greater stigma” 
associated with rape compared to sexual assault, that any such 
increased stigma is “questionable,” and that such concerns must 
fall to the overriding duty to protect dignity.\textsuperscript{138} Thus, the tribunal 
suggests that the principle of dignity is not only an interpretive 
tool, but also a value that can be weighed \textit{against} concerns related 
to legality.

The \textit{Furundjiža} approach remains an outlier, and its methodol-
gy is the source of some controversy\textsuperscript{139} even though few would 
disagree with the substantive result reached in that case. This 
trouble arises from the \textit{dual purpose} acquired by dignity in this con-
text. On the one hand, as in the \textit{Nahimana} case, human dignity 
can form the conceptual basis for the outward expansion of inter-
national crimes. At the same time, human dignity provides the 
response to objections founded on the fundamental principle of 
\textit{nullum crimen sine lege}. The import of this second purpose is 
addressed in the following Section.

\section*{D. Interim Conclusions: Four Roles for Human Dignity}

From the above case studies, we can distill four legal effects of 
expansive invocations of human dignity in ICL.\textsuperscript{140} First, and per-
haps most importantly, broad uses of dignity perform a substantive 
gap-filling function in hard cases, providing a justification for tribu-
nals to extend the law to cover novel forms of cruelty. This might 
have been the case in the \textit{Akayesu} trial judgment, which extended 
the definition of rape to cover the heinous forms of sexual violence 
at issue in that case,\textsuperscript{141} and dignity certainly played a crucial role in 
upholding the conviction of radio station owner Ferdinand 
Nahimana for persecutory speech.\textsuperscript{142} It might also help the court

\begin{itemize}
\item \textsuperscript{136} \textit{Furundjiža}, Trial Judgment, ¶ 184.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{See, e.g., Cassese, supra note 123, at 21 & n.24 (suggesting that the Kupreskic Trial 
Chamber, where Judge Cassese presided, had a “more compelling approach” to applying general 
principles); Bantekas, supra note 128, at 127 (“International tribunals have in such 
cases abused their power to ascertain the law in an objective manner and have made a 
strenuous effort to distil general principles from nowhere.”).}
\item \textsuperscript{140} These effects are explored with more elaboration in Heath, supra note 30.
\item \textsuperscript{141} Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 597–98 (Sept. 2, 
1998).
\item \textsuperscript{142} \textit{See supra} text accompanying notes 78–86.
\end{itemize}
recognize novel forms of cruelty—such as forced marriage or widespread hate speech—but this second claim should not be taken too far.143

Second, dignity appears to play a motivating role, in that it tends to push outward, covering increasing amounts of conduct and addressing novel forms of cruelty. This has been important in addressing serious gaps in tribunal statutes, whether relating to sexual violence, forced marriage, or hate speech.144

Third, the Rwanda hate-speech judgment suggests that dignity concerns might trump competing rights claims. As noted above, this argument is not made explicit in the tribunal’s judgment, but the Appeals Chamber dispensed with Judge Meron’s vociferous dissent invoking speech protections by simply stating in a footnote that it was not “convinced by the argument that mere hate speech cannot constitute an underlying act of persecution because discourse of this kind is protected under international law.”145

Fourth, some of the language in these cases suggests that dignity might be used explicitly or implicitly to overcome the requirements of legality, specifically the maxim of “no crime without law.” The Furundžija case suggests that dignity based concerns might be “weighed” against the principle of legality in certain cases.146 Meanwhile, the Rwanda tribunal largely avoided the question of legality, offering only the self-justifying statement that its findings do not violate the principle “as the crime of persecution is itself sufficiently well defined in international law.”147 Problems associated with legality are discussed more fully below.

It should be borne in mind that dignity is employed quite rarely, and it does not seem to have worked the same transformative effects in the jurisprudence of the ICC. This latter fact likely has less to do with the structural differences of the ICC and instead

143. The Furundžija court’s use of dignity to reach a formalistic definition of rape should render dubious any claim that dignity necessarily inspires progressive thinking. For a critique of the Furundžija definition, see CATHERINE A. MACKINNON, ARE WOMEN HUMAN? 239–41 (2006).
144. See supra text accompanying notes 64–86 (on hate speech) and notes 128–139 (on sexual violence), as well as the sources cited therein. On the question of forced marriage, see Prosecutor v. Brima, Case No. SCSL-2004-16-A, Appeal Judgment, ¶ 202 (Feb. 22, 2008). The Brima case notably grappled with the problem that forced marriage was not addressed in the court’s statute, but it did not employ dignity-based reasoning. See id. ¶¶ 175–203.
146. Furundžija, Trial Judgment, ¶ 184.
reflects a young court’s efforts to establish its legitimacy. Given the foregoing discussion, it is safe to say that the broad concept of human dignity tends to arise in judicial reasoning in response to an acknowledged gap in the law. In the early days of the ICC, we may be witnessing an effort by the court and the prosecutor to pitch ICL as a determinate and systemically coherent set of norms, rather than as a system in urgent need of development.

The possibilities presented by these cases remain available, however, and await a time when the ICC is drawn to bolder and more creative interpretations. In light of this possibility, the following Section reflects upon the conceptual and normative problems associated with expansive notions of human dignity.

III. Trouble with Dignity

The preceding Section demonstrates the ways in which the concept of human dignity may be employed expansively in ICL, both as the substantive basis for a crime and as an interpretive tool in expanding the definitions of other crimes. This discussion shows the power of the concept, but it does not tell us how to react to these developments. Here, I argue that these developments present a normative problem for criminal law insofar as the use of human dignity in this way threatens both defendants’ rights and the legitimacy of the international criminal system.

Section A argues that the concept of human dignity in international law suffers four interrelated problems: contestability, indeterminacy, malleability, and adaptability with respect to its function. This conclusion is then applied in Sections B and C to two critiques that have plagued ICL: the critique from legality and the critique from pluralism. The purpose of this criticism is to recognize the challenges caused by importing a contested concept into international criminal jurisprudence. This is particularly important if the legitimacy of ICL institutions “comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments.”


149. See id. at 318–20 (noting systemic coherence and determinacy as important criteria for courts); Thomas M. Franck, Fairness in International Law and Institutions 30–34, 38–41 (1995) (discussing the relevance of determinacy and coherence to legitimacy).

A. Problems with Human Dignity in International Law and Legal Theory

It is important to recall that this Article addresses human dignity “writ large,” not simply the references to dignity and degradation in anti-torture provisions and similar rules. This broad concept refers in some sense to the existential, ontological, or metaphysical notion of humanness\textsuperscript{151} considered so precious by the Universal Declaration of Human Rights and other such instruments. This consideration of dignity is not simply a concept that features a “penumbra” of unclear meaning surrounding a “core” of clarity. Instead, it is a concept pervaded with uncertainty, and it may be repurposed for various causes, at varying levels of abstraction, and with varying intensity.\textsuperscript{152}

Here, I propose that the discomfort with operationalizing human dignity can be attributed to four features of the concept\textsuperscript{153}: specifically, human dignity is contested across domestic legal systems; it is indeterminate at the international level; it is malleable to serve a broad and unpredictable array of situations; and it may be adapted to an impressive array of functions, including specific rights, ground for all human rights, and an interpretive principle for existing provisions.

Before embarking on a discussion about dignity’s indeterminacy, it should be acknowledged that the concept might be said to have some minimum content. Inspired by the work of Gerald Neuman,\textsuperscript{154} Christopher McCrudden identifies three aspects of a “minimum core” of human dignity: the “intrinsic worth” of every human being; the idea that such worth should be “recognized and respected”; and the requirement that “the state should be seen to exist for the sake of the individual human being, and not vice versa.”\textsuperscript{155} If non-Western conceptions of dignity are to fit within

\textsuperscript{151} On the value of thinking of dignity as an existential quality, see George Kateb, Human Dignity 1–27 (2010).
\textsuperscript{152} See generally Shultziner, supra note 34 (arguing that various “thick” meanings of dignity exist, which “encapsulates a whole moral worldview,” and may differ significantly across cultures).
\textsuperscript{153} See generally Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 EUR. J. INT’L L. 655 (2008) (noting many of these problems in the human rights context, though not necessarily conforming to the four-pronged framework outlined here).
\textsuperscript{155} McCrudden, supra note 153, at 679.
this minimum core, then this third claim (the “limited-state” claim) must be taken at a very high level of abstraction because rights-based conceptions of state-limitation are but one approach and are not shared by many societies.\(^1\)

1. Contestability

Although dignity is widely recognized,\(^2\) it is contested in the sense that the principle takes very different shapes across varying legal systems.\(^3\) Although dignity may be important across cultures, non-Western conceptions of human dignity arguably are much less likely to grant a place of prominence to human rights, in the liberal sense of the term.\(^4\) Even among European countries, which are generally thought to be the most protective of human dignity,\(^5\) there remains substantial disagreement about the content of dignity, both at the conceptual and the practical levels.\(^6\)

Conceptually, jurisdictions vary according to the extent to which dignity is perceived as a principle emphasizing individualism and autonomy versus communitarian ties.\(^7\) At a more grounded level, there is debate within Europe regarding the role that dignity plays in abortion, bioethics, privacy, and social assistance programs.\(^8\) When the United States is included in this picture, the extent of contestation increases dramatically, because U.S. courts have been reluctant to place dignity at the center of debates over privacy, free expression, and the right to government assistance.\(^9\)

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\(^1\) For example, it may be argued that while Islamic law holds that “it is the state’s duty to enhance human dignity and alleviate conditions that hinder individuals in their efforts to achieve happiness,” this is accomplished through divine commands and duties that are “in no way equivalent to a concern for, or a recognition of, human rights.” Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AM. POL. SCI. REV. 303, 307 (1982) (citing Abdul Aziz Said, *Human Rights in Islamic Perspectives*, in *Human Rights: Cultural and Ideological Perspectives* 86, 87 (Adamanita Pollis & Peter Schwab eds., 1980)).


\(^3\) See generally McCrudden, *supra* note 153, at 699–705.


\(^5\) For example, the Russian Federation’s constitution guarantees both human dignity and human rights.


\(^7\) McCrudden, *supra* note 153, at 699–701.


\(^9\) *Id.* at 99–103. Schauer, *supra* note 96, provides an overview of this debate.
ing approaches taken to hate speech in Europe and the U.S. provide one particularly relevant example. This level of disagreement—even within Western states—indicates that there is little consensus as to the content and scope of human dignity, although there may be agreement as to its importance.

2. Indeterminacy in International Law

At the international level, human dignity remains deeply indeterminate in the major human rights instruments. Historically, while the concept occasionally appears in the international legal thought of the early modern period, its use in contemporary legal practice and jurisprudence can be traced to its inclusion in the 1948 Universal Declaration of Human Rights. But, as Christopher McCrudden details, the concept operated as something of a “placeholder” in the Universal Declaration of Human Rights. “Dignity was included in that part of any discussion or text where the absence of a theory of human rights would have been embarrassing,” McCrudden writes. “Everyone could agree that human dignity was central, but not why or how.”


166. See, e.g., SAMUEL PUFFENDORF, OF THE LAW OF NATURE AND NATIONS, bk. 2, ch. 1, § 5 (1672) (Basil Kennett trans., 3d ed. 1717) (“The Dignity of Man, and his excellency above all other Parts of the Animal World, made it require that his Actions should be squared by some Rule; without which no Order, no Decorum, no Beauty can be conceived.”).

167. The term dignity appears five times in that document. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. It arises twice in the preamble, recognizing the “inherent dignity and . . . equal and inalienable rights” of all persons, and recalling the U.N. Charter’s affirmation of this dignity. Id. pmbl. Article 1 holds that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Id. art. 1. The provisions concerning economic and social rights, as well as just remuneration, also reference the concept. Id. arts. 22–23.

168. McCrudden, supra note 153, at 678.

169. Id.
Where human dignity is included in a specific provision of a human rights or humanitarian law instrument, its implications and contours have since been elaborated by cases and commentary.\(^\text{170}\) This is most common with dignity provisions relating to torture and cruel treatment.\(^\text{171}\) But it is difficult to identify any particular content of human dignity writ large, beyond the minimum core discussed above.\(^\text{172}\)

3. Malleability

This indeterminacy poses a further consequence, in that human dignity is malleable and may be used to serve an impressive variety of situations. Dignity may be adapted to serve liberal and individualist conceptions of human rights, or it may be invoked to emphasize self-determination of peoples and communitarian values. Relatedly, dignity may be a value that celebrates pluralism, or it may refer to an overarching conception of right that transcends national and cultural boundaries. Robust respect for the inherent dignity of persons may entail\(^\text{173}\): teaching tolerance of other races, ethnic groups, or religions\(^\text{174}\); non-discrimination\(^\text{175}\); awareness-raising to combat stereotyping\(^\text{176}\); providing opportunities for maintaining family life and familial connections\(^\text{177}\); educational and employment opportunities\(^\text{178}\); democratic self-governance\(^\text{179}\); ensuring basic humane living conditions even in disasters\(^\text{180}\);
“informed consent” in medical treatment\(^{181}\); respect for human remains\(^{182}\); proportionality in criminal punishment\(^{183}\); protection of civilian lives in armed conflict and defense against terrorism\(^{184}\); and, of course, prohibitions on hate speech. It will also appear on both sides of debates in bioethics,\(^{185}\) abortion,\(^{186}\) physician-assisted suicide,\(^{187}\) and prostitution.\(^{188}\) The most remarkable aspect of this list is not its breadth, but the fact that all of these applications of dignity seem to make intuitive sense, in light of the “minimum core” identified by Gerald Neuman and McCrudden and in light of colloquial uses of the term. This indicates that dignity’s adaptability is somehow central to its meaning and linguistic utility.

4. Adaptability

The previous Section already established that human dignity is a multi-functional concept.\(^{189}\) Dignity may serve simply as a bar to certain forms of humiliation and cruel treatment or as an expansive right that covers a wider range of civil, political, economic, and

\(^{181}\) World Medical Ass’n, World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects, ¶¶ 11–30 (June 1964).

\(^{182}\) The ICC, for example, holds that the war crime of “outrages upon personal dignity” may be committed against the dead. Elements of Crimes of the International Criminal Court, in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York 3–10 September, 2002, U.N. Sales No. E.03.V.2, part II-B, n.49 [hereinafter Elements of Crimes].

\(^{183}\) E.g., Trop v. Dulles, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

\(^{184}\) The most rigid statement comes from the German Constitutional Court. See Aerial Security Law, Budesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 115 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118 (Ger.).

\(^{185}\) See generally President’s Council on Bioethics, Human Dignity and Bioethics (2008).

\(^{186}\) See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (stating that matters relating to family and reproduction are “choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment”); Gonzales v. Carhart, 550 U.S. 124, 157 (2007) (arguing that a statute prohibiting a certain method of abortion “expresses respect for the dignity of human life”). See generally Kateb, supra note 151, at 75 (arguing that human dignity favors a right to abortion, while morality in some cases will be injured by the exercise of that right); Reva Siegel, Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart, 117 Yale L.J. 1694 (2008).

\(^{187}\) Ronald Dworkin, Life’s Dominion 238–40 (1993) (“We care intensely about what other people do about abortion and euthanasia, and with good reason, because those decisions express a view about the intrinsic value of all life and therefore bear on our own dignity as well.”).

\(^{188}\) See generally Jordan & Others v. State 2002 (6) SA 642 (S. Afr.) (addressing a challenge to a legal prohibition against prostitution, on the grounds that it violated human dignity, among other constitutional guarantees).

\(^{189}\) See supra Part II, especially text accompanying notes 140–147.
social rights. As the purported “ground” of human rights, it may also serve as a kind of “meta-right” that supersedes the guarantees in any one particular provision of human rights law, or defines the outer boundaries of specific rights. Relatedly, it serves as an interpretive principle for expanding existing legal provisions. As a general principle, it may even demand expansive interpretations.

B. Dignity and Legality in International Criminal Law

When a legal concept or rule proves to be indeterminate, this immediately raises concerns of legality. This concern is particularly important in the context of criminal law, where most states and major human rights treaties work with a strong notion of nullum crimen sine lege. Antonio Cassese describes legality as comprising four general requirements of national criminal systems: clarity, written rules, non-retroactivity, and the prohibition against reasoning by analogy. To this list may be added the principle of lenity (in dubio pro reo), the practice of construing ambiguous law in favor of the accused.

Without oversimplifying a complicated discussion, the nullum crimen principle is generally thought to stand for some requirement of notice or “fair warning”; “the Criminal Code is the criminal’s Magna Charta. It certifies his right to be punished only in accordance with the statutory requirements and only within the statutory

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190. One may refer to “thick” and “thin” accounts, Shultziner, supra note 34, or “expansive” and “narrow,” Heath, supra note 30.


192. For U.S. law on point, see U.S. CONST. art. I, § 9, cl. 3; Calder v. Bull, 3 U.S. 386, 399–400 (1798) (holding that the constitutional prohibition on ex post facto laws extends only to criminal laws). International human rights instruments also contain versions of this principle. See UDHR, supra note 167, art. 11(2); ICCPR, supra note 28, art. 15. For early origins of this concept, see PAUL J.A. RITTER VON FEUERBACH, 1 LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS [TEXTBOOK OF THE PENAL LAW GENERALLY APPLIED IN GERMANY] §§ 8–20 (11th ed. 1832), excerpted in The Foundations of Criminal Law and the Nullum Crimen Principle, 5 INT’L J. CRIM. JUST. 1005 (Iain L. Fraser trans., 2007).

193. CASSESE, supra note 123, at 37–38. On the extent to which these have been located in the international criminal system, see Claus Kress, Nulla poena nullum crimen sine lege, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 21 (2011).

194. As Daryl Robinson notes, “[i]n many legal systems, the term in dubio pro reo is used only in relation to determination of facts, whereas in some other systems the term is used for both questions of fact and law. It is as yet undecided how ICL uses the term.” Robinson, supra note 20, 934 n.37 (citing Prosecutor v. Limaj, Case No. IT-03-66-A, Appeal Judgment, Declarations of Judge Shahabuddeen and Judge Schomburg (Sept. 17, 2007)).

limits.”196 This notion of legality has dogged the institution of ICL since its founding moments at Nuremberg.197 International criminal lawyers and judges have worked to craft a jurisprudence that maintains a delicate balance between the fight against impunity and the need to safeguard the defendant’s rights—a balance which the concept of dignity threatens to destabilize. This Section assesses expansive uses of human dignity first in light of the concept of legality developed by the ad hoc tribunals, and second against the principle of fair warning.

1. Legality as an Increasingly Salient Concern in ICL

Today’s nuanced understanding of legality in ICL arises out of decades-long attempts to reconcile the substantive aims of criminal justice with important formal and procedural guarantees.198 It would be overly simplistic to suggest that a provision violates the principle of legality because it lacks the precision of a domestic criminal code. Likewise, the answer given at Nuremberg—that nullum crimen is a “principle of justice” that must give way in light of weightier considerations199—is also too crude to satisfy the


198. Beth Van Schaack gives a developmental account of ICL in which the Nuremberg judges “sacrificed the strict application of [nullum crimen] to fashion the moral universe for the future international order,” while the contemporary landscape is characterized by stricter codifications of these early innovations, thus allowing “the full complement of the principle of legality [to] take root.” Beth Van Schaack, Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals, 97 GEO. L.J. 119, 189–92 (2008).

199. In a famous passage, the International Military Tribunal (IMT) responded to the defense’s charges of ex post facto lawmaking:

[I]t is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.
demands of a more highly legalized system. Today, many observers suggest that judicial creativity will be constrained by a robust principle of legality in the law of the ICC. But compared with national systems, ICL still takes a relatively relaxed approach to legality, as a balance must be struck between strict legality and the need for judges to respond to innovations in cruelty and repression.

In light of this background, the principle of legality within ICL today is taken seriously even while “subject to a number of significant qualifications.” The ad hoc tribunals have drawn heavily upon the jurisprudence of the European Court of Human Rights in balancing the need to expand and adapt the law with the requirements of legality. Under this framework, extension of the “legal ingredients of the actus reus” is permissible, provided that it: (i) is in keeping with the “essence of the offense”; (ii) implements and actualizes “fundamental principles” of international criminal law; and (iii) was reasonably foreseeable, such that notice of the impending change would have been accessible to the accused, perhaps with assistance of counsel. In addition, it is generally accepted that the nullum crimen maxim “cannot surreptitiously gut the concept of interpretation of all meaning.”


On legalization, see generally Kenneth W. Abbott et al., The Concept of Legalization, 54 INT’L ORG. 17 (2000). “Legalization” in this sense occurs along three axes: obligation, precision, and delegation. Id. at 20. On legalization and the ICC, see id. at 22.


Van Schaack identifies “a willingness to overlook legalisms that would lead to impunity in an effort to jumpstart a system of greater accountability.” Van Schaack, supra note 198, at 147.

On expansive adaptation, see Shahabuddeen, supra note 201, at 1013.

court’s interpretations must remain within the bounds of “gradual clarification,”208 spelling out the relevant principle and its reasonable implications.209 “It is in the penumbra left by law around [a broad] definition that the adaptation may be carried out.”210

2. Dignity Against Legality: A Two-Pronged Problem

The problem with human dignity in this context is twofold. First, interpreting what it means to violate the “right to respect for human dignity” is not necessarily a matter of “core” and “penumbra”; rather, it is a case where contestation drives straight to the heart of the concept.

Certainly there are many cases (such as torture) where all would agree that a person’s dignity was grossly violated. But this is part of the problem. As noted above,211 we can list an impressive array of instances where we would think that a person’s dignity is violated, from insults to hate speech and from shoving in the street to murder. In cases involving speech, biology, or sex, dignity often appears on both sides of the debate.212 It may be that none of these can be easily identified as existing at the “core” of human dignity. In this situation, positive law, such as the Common Article 3 provisions, serves an important ordering function by providing the necessary context and boundaries to invocations of human dignity.213

Second, this problem is compounded by the fact that dignity, while remaining indeterminate, also serves as a general principle that animates, and possibly even demands, creative interpretation. In furundžija and similar cases, international tribunals have identified the protection of human dignity as the raison d’être of ICL and related disciplines.214 Recall also that, under the legality frame-
work developed by the international criminal tribunals, expansive adaptation must actualize the purposes of the regime.\textsuperscript{215} Together these propositions recall the compulsion in human rights law to maximize the protection of human dignity by expansively interpreting the relevant legal provisions.\textsuperscript{216} Thus, when a court feels that a lacuna in the law threatens human dignity, it may feel compelled to expansively adapt old criminal norms to fit this new situation.

In this scenario, human dignity, even in its indeterminacy, plays both a motivating and a juris-generative role in shaping the outcomes of cases, and it does so in a way that presses against legality. Dignity motivates the expansion of criminal norms by demanding that the law develop to meet perceived indignities. At the same time, the concept is employed to generate new legal content to cover the particular case. Moreover, courts tend to do so without making an effort to elucidate the meaning of human dignity or explain its contours and limits. Though few would find the result in \textit{Furundžija} problematic, the \textit{Nahimana} case suggests that the results of this line of reasoning can be quite divisive.\textsuperscript{217}

These problems also frustrate one of the underlying purposes of legality, which is to ensure that potential defendants have “notice” of the criminal nature of their actions.\textsuperscript{218} It is often argued that, even where courts and tribunals engage in \textit{post facto} expansion of ICL, the “notice” function of \textit{nullum crimen sine lege} is not frustrated when “the deed is morally outrageous.”\textsuperscript{219} All of the conduct discussed in this Article is morally outrageous. But, as the \textit{Nahimana} v. Aleksovski, Case No. IT-95-14/1-T, Trial Judgment, ¶ 54 (Int’l Crim. Trib. for the Former Yugoslavia June 25, 1999) (“[T]he entire edifice of international human rights law, and of the evolution of international humanitarian law, rests on this founding principle [of respect for human dignity and personality].”).

\begin{itemize}
\item \textsuperscript{215} \textit{Cassese, supra} note 123, at 46; cf. Prosecutor v. Delali, Case No. IT-96-21-T, Trial Judgment, ¶ 412 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (“The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.”).
\item \textsuperscript{216} On the problematic role of this impulse in the development of ICL, see generally \textit{Robinson, supra} note 20.
\item \textsuperscript{217} See, e.g., Orentlicher, \textit{supra} note 22 (criticizing the \textit{Nahimana} Trial Chamber’s decision to wade into a contested discussion on hate speech); Joel Simon, \textit{Murder by Media: Why the Rwandan Genocide Tribunal Went Too Far}, SLATE (Dec. 11, 2003), http://www.slate.com/id/2092372.
\item \textsuperscript{218} \textit{See Bassiouni, supra} note 85, at 300.
\item \textsuperscript{219} \textit{Luban, supra} note 25, at 584; \textit{see also} Hans Kelsen, \textit{Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals}, 31 CAL. L. REV. 550, 544 (1943); Jordan J. Paust, \textit{It’s No Defense: Nullum Crimen, International Crime}

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case suggests, human dignity is capable of pulling ICL into contested areas where the morally reprehensible meets fundamental freedom and where a defendant might have had no “notice” of the criminal nature of her conduct, even if she were aware of its immorality.

The use of human dignity in this manner thus adds an element of Nuremberg substantive justice to contemporary international criminal jurisprudence. In reacting to the trend toward strict legality in ICL, human dignity pulls courts into new legal terrain where existing norms are vague, conflicted, or non-existent, and judges must decide cases according to ethical theories or moral intuition. Perhaps this strand in ICL reflects a continuing reaction that is correcting for over-legalization and ensuring some equilibrium between legality and substantive justice. Or perhaps it is a legal-philosophical instantiation of the tendency of institutions to expand their own sphere of influence, and thus represents a process that could play out indefinitely. In either case, this development might be welcome in spite of its threat to legality. The following Section addresses this issue.

C. Dignity and Value Pluralism in International Criminal Law

Among the many reasons for laying aside fears about legality is the importance of reaching a greater understanding about the role of dignity internationally. Through iterated, reasoned discussion of the principle of human dignity, one might argue, courts applying ICL are contributing to a deeper understanding of our common values.220 On this view, the position advanced above improperly emphasizes a “rule-book” conception of the rule of law,
thus overlooking the important role of courts in developing and elaborating the moral principles at the core of the international community’s value structure.221

This Section refutes these arguments through two individual but related responses. First, to the extent dignity-based rationales serve as an implicit or explicit response to legality concerns, they may hinder rather than deepen our understanding of the appropriate role that rule-of-law values and procedural protections play in the international system. Second, the inexorable force of dignity-focused reasoning continually pulls ICL into unmapped territory, leading international legal norms to colonize areas that were heretofore characterized by important inter- and intra-jurisdictional contestation about rights and values.

In today’s international legal climate, it is more important than ever to give meaningful content to the principle of legality, because the individual is subject to a range of conflicting regulatory regimes, be they state or non-state, legal or quasi-legal, public, private, or hybrid.222 Unfortunately, human dignity tends to undermine this discussion as it is applied by international criminal tribunals. This is due to the multi-functional role of human dignity, in which it serves at once as a ground for all human rights, as a substantive right at issue in the particular case, and as a basis for legality.223 This may lead to the suggestion that legality concerns should fall in the face of overwhelming injuries to dignity.224 This kind of reasoning would be self-justifying; because international criminal tribunals are charged with prosecuting only the most serious crimes, the conduct at issue will almost always involve a grave threat to someone’s conception of human dignity.

It does not have to be this way. Any deep consideration and elaboration of the principle of nullum crimen requires developing a more robust understanding of the relationship between dignity and legality.225 But the problematic tendencies in some cases appear to stem from a conceptual error. Specifically, to say that


222. For a recent exploration of this general development, see Jacob Katz Cogan, The Regulatory Turn in International Law, 52 HARV. J. INT’L L. 321 (2011).

223. This latter function may be the same as saying that dignity is a ground for all human rights, or it may be different, depending on one’s view of legality.

224. I discuss this possibility supra text accompanying note 147.

225. On the connection between these concepts, see generally FULLER, supra note 191, at 162–66; PUFFENDORF, supra note 166, bk. 2, ch. 1, § 5.
certain legal principles, such as legality, are necessary to or derived from human dignity is not equivalent to saying that these principles must yield in the pursuit of human dignity. If legality is necessary to preserving human dignity, the important questions to ask are how legality serves this function and under what conditions excessive focus on the principle of legality frustrates the purpose of the principle itself.

The second problem with conceptualizing ICL as a mode for elaborating human dignity is that the institution may be ill suited to this purpose. Certainly courts adjudicating human and civil rights claims continually engage in conceptual elaboration of human dignity as a basic principle. This process is ongoing and quite robust in Germany,226 Israel,227 and Hungary228 among others, and dignity remains an important constitutional principle in several jurisdictions, either explicitly in the written text229 or implicitly.230 As McCrudden points out, however, this multi-jurisdictional elaboration has not lead to a broad consensus on the contours of the concept.231 Even if this ongoing transnational dialectic is important to understanding the normative underpinnings of constitutional rights, ICL may hinder this dialogue by cutting short the conversation in a particularly dramatic way.

This problem is exemplified by the tension between universality and pluralism at the heart of ICL. ICL represents an attempt to enforce the values most basic to the community through the threat of real sanctions against individual perpetrators. However, through mechanisms such as complimentarity, national enforcement, and the principle of legality, the regime attempts to accom-

226. See generally Eckart Klein, Human Dignity in German Law, in THE CONCEPT OF DIGNITY IN HUMAN RIGHTS DISCOURSE 145 (David Kretzmer & Eckard Klein eds., 2002) [hereinafter CONCEPT OF DIGNITY].


228. See Catherine Dupré, The Right to Human Dignity in Hungarian Constitutional Case-Law, in Respect for Human Dignity, supra note 34.


moderate the varying values and principles of the wide range of cultures situated within the international legal order. Ultimately, there may be no firm ground between these poles. ICCL should be more than simply “apologist,” in that it must represent a set of values that is more robust than a bargain-basement account of the norms held in common by every national legal system, including the most atrocious. But it also endeavors to avoid totalizing tendencies, in the sense that ICCL institutions must do something less ambitious than legislate a unified morality for the globe. Working out the proper balance between these goals is less a function of finding the “right” place to stand, and more a process of contestation and reflexive revision over time.

We can, however, say two important things about this tension. First, in the majority of cases, the defendant will be accused of heinous actions for which she should have been expected to be held to account, even if international law was vague as to the acts’ legality at the time of commission. In these circumstances, the concern for legality is not so pressing, and concerns for value pluralism hold little weight in cases where the defendants burned cities, tortured prisoners, or engaged in genocide. But, second, we must also pay attention to the remainder of cases in which a court addresses an issue that is deeply contested.

Speech proves a helpful example of this second kind of contestation. Disagreement may take place at a conceptual level where various theoretical approaches to issues of free speech, libel, privacy, and personality can generate varying substantive responses to hard cases across jurisdictions. Generally, dignity-based approaches to freedom of expression are thought to be incompatible with the protection that hate speech enjoys in jurisdictions such as the United States, although there is contestation at this level.

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233. Examples of such actions may include forced oral penetration and reprisals against civilians in internal armed conflicts.
234. See Brad R. Roth, Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice, 8 Santa Clara J. Int’l L. 231, 236 (2010) (emphasizing that “[t]he real issues lie at the margins”). One need not buy into Roth’s framework of sovereign equality, or into the broader global pluralist literature, to understand the value in this insight.
as well. “Practical” reasons, not unconnected to these deeper theoretical debates, may also lead to wider variation of speech regulations. In societies recovering from atrocity or coping with the great crimes committed by national leaders, there may be strong reasons for supporting stricter regulations on forms of hate speech. On the other hand, in the same post-conflict societies, prohibitions on hate speech or teaching “genocide ideology” may become a cover for the persecution of political opponents. The outward pull of human dignity into these territories of conceptual and pragmatic contestation tends to stifle this dialectic, as it did in the Nahimana case.

D. Interim Conclusions

Human dignity is operating as a Nuremberg-era concept in a twenty-first-century regime. Dignity works much as considerations of “justice” did in the IMT cases, not only to impose an element of natural law or ethical reasoning but also to push the law out into new territory. But we must remember that this is not 1945. The Nuremberg jurisprudence represented a moment in which universalist values standing for the revulsion of the international community were operationalized in the crucible of trial. Much of today’s positive ICL is built on this utopian achievement. But today’s legal environment, whatever its debt to the past, is characterized by definitions of crimes, demanding provisions regarding legality and nullum crimen sine lege, and an ever-growing body of jurisprudence interpreting once-vague criminal laws. In this context, we must take legality and limits on subject-matter jurisdiction seriously.

236. Consider Ronald Dworkin, Foreword, in EXTREME SPEECH AND DEMOCRACY (Ivan Hare & James Weinstein eds., 2009).
238. Anthony Lewis admits as much in his otherwise spirited defense of robust speech protection. ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE 166 (2007); see also S.K.B. Assante, Nation Building and Human Rights in Emergent African Nations, 2 CORNELL INT’L L.J. 72, 97 (1969) (suggesting that emergent nations cannot withstand the strain caused by robust speech protections of the kind found in the United States).
239. This point was made forcefully by the Open Society Institute in its amicus brief to the appellate chamber of the ICTR, and Judge Meron repeated these concerns in his dissent. Nahimana, Appeal Judgment, Partly Dissenting Opinion of Judge Meron, ¶¶ 10–12. The arrest in Rwanda of Peter Erlinder, an ICTR defense lawyer who had also contributed to an Alien Tort Statute claim against Paul Kagame on charges of genocide denial, provides further grounds for concern. See, e.g., Rwanda Arrests U.S. Lawyer Erlinder for Genocide Denial, BBC News (May 28, 2010), http://www.bbc.co.uk/news/10187580.
240. See generally Nahimana, Appeal Judgment.
It may be said that the above two arguments, legality and pluralism, exist in tension. After all, legality tends to demand constancy across time and place, and uniformity of interpretation; it is a demand to “treat like cases alike.” Meanwhile, the argument for value pluralism touts diversity, conflict, and disunity. Some scholars do indeed argue for a “pluralist” conception of ICL that resists the temptation to value uniformity over difference and takes seriously the variances in national laws, even at the expense of strict legality. It is not necessary to adopt that argument here. My limited argument for value pluralism suggests that ICL should respect its own limits on subject-matter jurisdiction, namely the crimes elaborated in Articles 6–8 of the Rome Statute. The principle of legality, by forbidding reasoning from analogy and retroactive application, works to enforce these limitations and prevent the regime from overreaching. In this way, legality and pluralism work together as two sides of the same idea. This Article explains that the concept of human dignity tends to push ICL outward into continually new territory, upsetting whatever balance between positive legalism and universalism that may have otherwise been achieved.

IV. UNDERSTANDING DIGNITY

The technical nature of this discussion distracts from the terrifying facts of the cases at issue. Any time spent perusing the transcripts of RTLM makes painfully clear why the court felt it important to punish the broadcasters’ speech itself, and not just those portions that met the technical definition of “incitement.” Indeed, Part II noted that human dignity might make a crucial positive contribution, because it helps courts capture new forms of injury that might fall between the cracks of existing legal categories, as it did in the sexual violence cases. This Section begins to reconstruct the role of dignity by investigating the way in which it was employed by the Rwanda case and its predecessors. What follows lays the groundwork for what must be a longer argument.

This Section works to develop a deeper understanding of such expansive uses of dignity. As a starting point I assume the kind of reasoning employed by the Nahimana Appeals Chamber, in which the broad reference to dignity in the preamble to the Universal Declaration of Human Rights was interpreted as guaranteeing an


independent, substantive right. But that decision provided little guidance as to the appropriate contours and limits of any independent fundamental right to dignity. The challenge here, therefore, is to provide a view that both explains the Rwanda judgment and generates intelligible limitations on the concept. Drawing on theories of dignity as a kind of rank or social status, I argue here for a view of dignity that focuses on attempts to “re-stratify” societies. This proceeds in two parts, first laying the conceptual groundwork, which requires a brief intervention into some philosophical debates, and second, linking theory to the relevant case law.

A. Capacity, Rank, and the Single-Status Society: Dignitary Harm as a Status Injury

Philosophy and legal theory continue to offer a range of competing conceptions to fit the broad idea of human dignity. The most common formulation in international human rights law and European constitutional law might be a Kantian “theory of object,” which posits that the dignity of man requires that he not be treated as a mere object, or a mere means. Another potentially conflicting view connects human dignity to the basic goods required to lead a distinctively human existence.

I begin instead with the more formal understanding of Joel Feinberg, which is often lumped in with “structural” or “conceptual” understandings of rights and dignity rather than “substantive” ones. Feinberg suggests that “what is called human dignity may simply be the recognizable capacity to assert claims. To respect a person then . . . simply is to think of him as a potential maker of

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243. See supra Part II.A. This assumption thus departs from the logic of the previous Sections, which implicitly take the Nahimana holding to be contestable. I do this so as to offer a conception that clarifies and stabilizes the reasoning in that case.

244. For surveys, see Bognetti, supra note 161; McCrudden, supra note 153; Hubert Cancik, ‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero: De Officiis, in Concept of Dignity, supra note 226, at 105–07.

245. Immanuel Kant, Groundwork of the Metaphysics of Morals 38 (1785) (Mary Gregor ed., 1997); see also Klein, supra note 226, at 150 (noting the salience of this principle in German law); Eyal Benvenisti, Human Dignity in Combat: The Duty to Spare Enemy Civilians, Isr. L. Rev., Summer 2006, at 81, 85–90 (drawing on this conception).


247. Cf. James Griffin, First Steps in an Account of Human Rights, 9 Eur. J. Phil. 306, 307–08 (2001). While not addressing Feinberg’s view of dignity per se, Griffin sets aside the former’s account of rights as claims as a “structural” one. Id. at 307. I think this misses the connection between rights and dignity that Feinberg explores.
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some ways comparable to that enjoyed by hereditary nobilities of the past.\footnote{255}

This view contravenes the conventional wisdom that ancient notions of \textit{dignitas} as a form of status are incommensurate with contemporary dignity talk associated with human rights.\footnote{256} Dignity and rights, on this view, do not \textit{arise} from some ability to “stand up like men” and demand the treatment we are due. Rather, dignity is valuable because it \textit{enables} us to stand up in this way. In a dignity-based, or single-status society, our claims will be valid against anyone who violates our rights, no matter what the violator’s station or position of authority.\footnote{257} This single-status concept may be “groundless” in the sense that it is socially constructed,\footnote{258} but it is nonetheless rooted in a powerful transformation of social ordering.\footnote{259}

What substance then, does human dignity guarantee independently of any particular human rights that may be attached to it? Generally, it is the chance to occupy the same status or the same social standing as any other individual within society. More concretely, it is the guarantee that one will be able to make claims—in a moral rather than legal sense—against her peers to enforce her rights. It is the sense that one can petition for equal treatment on equal terms from her peers, and that she will not be forced to grovel or beg an audience for protection. Ideas such as access to courts and equal treatment are specific examples of this broader


\footnote{256. For a view urging the strict separation of historical invocations of dignity, such as those found in Kant, Cicero, and Pico Della Mirandola, from contemporary usage in human rights discourse, see Oliver Sensen, \textit{Human Dignity in Historical Perspective}, 10 Eur. J. Pol. Theory 71 (2011). Michael Meyer suggests that the concept of dignity that emerged among Enlightenment thinkers—such as Paine, Wollstonecraft, and Kant—constituted a dramatically different concept than the one earlier associated with rank. Michael J. Meyer, \textit{Introduction}, in \textit{Constitution of Rights}, supra note 96, at 1, 4–5; Michael J. Meyer, \textit{Kant’s Concept of Dignity and Modern Political Thought}, 8 Hist. Eur. Ideas 319 (1987).}


\footnote{258. I think this best explains the point in Feinberg, supra note 254, at 93–94.}

\footnote{259. This view is deeply indebted to Jeremy Waldron, \textit{Dignity, Rank, and Rights: The 2009 Tanner Lectures at U.C. Berkeley} (N.Y. Univ. Sch. of Law, Pub. Law Research Paper No. 09-50, 2009) [hereinafter Waldron, \textit{Dignity, Rank, and Rights}], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220. To the extent dignity is a social construct in this way, it does not supply a universally valid principle for all times and all societies. Cf. Gewirth, supra note 249, at 16. Since this investigation takes place within a framework where human dignity \textit{is} the guiding principle, however, I feel no need in this Article to respond to this objection.}
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concept, as are the prohibitions against humiliation and degradation, but this idea focuses on the general position of the victim or victims in relation to her peers. Shunning, outcasting, and subordination are antonymic to this understanding of human dignity.

At the same time, the concept of rank connects more easily than the concept of equality to the idea that dignity stands at the foundation of all human rights. As Jeremy Waldron argues, equality mainly does “negative work” by denying the validity of any “sortal-status” distinctions in contemporary society. Elsewhere, Waldron suggests that, by universalizing the privileges historically associated with high rank, we might come to a better understanding of the human rights and guarantees we take to be fundamental. Thus, dignity as equal social status might connect to the fundamental right to equality, but at the same time affirmatively generate a richer understanding of other rights.

B. Dignity in International Criminal Law

This view of dignity appears to be well suited to the practice of ICL. It defines an injury, a loss of status, that is distinct from psychological and physical harm. “Grave” dignitary harm can be distinguished from less severe acts, a crucial dimension of persecution and other crimes, by asking whether the victims have merely been insulted or whether they have truly been lowered to a lesser status, something less than “human.” Under the rubric of human dignity, we are searching for a kind of social re-stratification: an action that worked to re-order society and to re-define what it meant to be a full-fledged human being entitled to the respect of the dominant social order. As will be shown, this approach helps

261. See Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth and humiliation: A Comparative Legal-Psychological Approach*, 18 PSYCH., PUB. POL. & L. 1 (2011) (understanding the broad concept of dignity through a focus on its “antonym,” humiliation); Waldron, *Dignity, Rank, and Rights*, supra note 259 (noting that outrages upon personal dignity are to the broader concept of human dignity as contempt of court is to the broader dignity of the judicial position).
262. Indeed the ideal type of anti-dignity punishment might be the “outcasting” that Hathaway and Shapiro describe in medieval Iceland. See Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 282–90 (2011).
265. The need to do this is implied by some of the substance in ICL. For example, if human dignity in some of the formulations of “other inhumane acts” is to do any real work, dignitary harm must be different from physical and psychological harm.
266. See supra note 47 and accompanying text.
understand the work of the Rwanda tribunal and may have important connections to other case law.

The key passage in both the Trial and Appeal judgments of the Rwanda hate speech case suggest viewing dignitary injury as a status-based harm. In a passage cited favorably on appeal, the Nahimana Trial Chamber addressed hate speech this way:

'Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.'

The court explained the mechanics of this denigration by reference to the Streicher judgment of the IMT, in which a newspaper editor was convicted of persecution and executed for hateful and inflammatory writings toward Jews. The IMT noted that Streicher’s writings acted as a poison “injected in to the minds of thousands of Germans which caused them to follow the National Socialists’ policy of Jewish persecution and extermination.” The Trial Chamber employed this “poison” metaphor in justifying its conclusion that the RTLM broadcast accusing all Tutsi of cunning and trickery amounted to persecution.

Two inferences can be made from this line of reasoning. First, though the Trial Chamber referred simply to “hate speech,” it seems to have a more specific idea of the kind of harm involved. The court seems less directly concerned with the bilateral relationship of insulter–insulted, in which the speaker personally assaults the dignity of the subject of his vituperative speech. Rather, the Trial Chamber here describes a kind of environmental harm in which the terms of social relations themselves are altered by the pervasive hate speech from Rwandan media outlets.
This leads to the second important point about the case, which is that the Trial Chamber saw the injury as one of social status.\textsuperscript{274} Indeed, the striking and disturbing feature of the radio broadcasts was that they worked to create a \textit{second status} in Rwandan society in which Tutsis and anyone who helped them were seen as vermin-like, treacherous, scheming, and dishonorable people who had no place in Rwandan society.\textsuperscript{275} This view connects some older uses of dignity such as the trial of Arthur Greiser, who was convicted of crimes against humanity for, \textit{inter alia}, insulting Polish “national dignity” during the Nazi occupation.\textsuperscript{276} Orders forbidding sexual relations between Germans and Poles, or punishing men who “smile . . . ironically” at or fail to tip their hat to a German soldier, constitute another type of status injury which may be captured by this status-based conception of dignity.\textsuperscript{277}

The divergent outcomes in the early international criminal cases against journalists may be distinguished using this conception of dignity. Julius Streicher and Hans Fritzsche were the two Nazi journalists tried by the IMT at Nuremberg.\textsuperscript{278} For the vitriol published in his newspaper, \textit{Der Stürmer}, Streicher was convicted of crimes against humanity by the tribunal and executed.\textsuperscript{279} By contrast, Fritzsche, a radio propagandist, was acquitted on all counts.\textsuperscript{280} The difference between these two cases thus may prove important for understanding the status of hate speech in ICL, and lawyers involved in the \textit{Nahimana} case have argued that the material distinction in the Nuremberg judgment was that Streicher directly incited the extermination of Jews, whereas Fritzsche did not.\textsuperscript{281}

\begin{footnotesize}
\begin{itemize}
\item 274. \textit{See supra} text accompanying note 268.
\item 275. \textit{See, e.g.}, \textit{Nahimana}, Trial Judgment, ¶ 1078 (noting broadcasts emphasizing Tutsi cunning and trickery).
\item 277. \textit{Id.} at 89–90. Note that this analogy is only indirect; the Supreme National Tribunal referred directly to the older concept of “national dignity,” and not to human dignity. \textit{See id.} at 88–90. Moreover, the court’s reasoning was unclear as to the basis for its conviction.
\item 278. IMT Judgment, \textit{supra} note 199, at 301–04, 336–38.
\item 279. \textit{Id.} at 304.
\item 280. \textit{Id.} at 338.
\item 281. Diane F. Orentlicher, \textit{Criminalizing Hate Speech in the Crucible of Trial: Prosecutor v. Nahimana}, 12 \textit{NEW ENG. J. INT’L & COMP. L.} 17, 38–42 (2005); Jean-Marie Biju-Duval, \textit{‘Hate Media’—Crimes Against Humanity and the Genocide: Opportunities Missed by the International Criminal Tribunal for Rwanda, in Media and Genocide, supra note 2, at 343, 347; see also IMT Judgment, \textit{supra} note 199, at 338 (“But the Tribunal is not prepared to hold that [Fritzsche’s broadcasts] were intended to incite the German People to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged.”).}
\end{itemize}
\end{footnotesize}
Therefore, it is argued, the Nuremberg precedent should be read to support only convictions for direct incitement, and not for other forms of hate speech.\textsuperscript{282} In other words, expressive activity should be the basis for a persecution conviction only when it urges violent action. Without attempting to revise this historical understanding of Nuremberg, I suggest here that the dignity principle elaborated above provides an alternative basis for distinguishing the two cases.

Our focus on dignity as re-stratification points toward a second important difference between Streicher and Fritzche, at least on the facts as they are recounted in the Nuremberg judgment.\textsuperscript{283} The portion of the judgment convicting Julius Streicher constitutes a catalog of grievous status injuries.\textsuperscript{284} Though Streicher’s conduct cannot be divorced from his frequent calls for extermination of the Jews,\textsuperscript{285} his writings are also striking in their systematic attempts to accuse the Jewish people of lies and deception, to reduce them to vermin or to a virus, and to publish weekly “lewd and disgusting” portrayals of Jews.\textsuperscript{286}

Fritzche, a Nazi propagandist, generally worked to support the war effort.\textsuperscript{287} But, the IMT stated, his speeches “did not urge persecution or extermination” of the Jews.\textsuperscript{288} There is plenty of evidence to suggest that Fritzche’s anti-Semitic rants were far worse than the Nuremberg judgment made it seem.\textsuperscript{289} The judgment, however, makes it clear that the tribunal acquitted Fritzche not only because he refrained from inciting violence, but also because he seemed more removed from the denigration and dehumanization of the Jewish people.\textsuperscript{290} In other words, it might be argued that Julius Streicher was more deeply implicated in the re-stratification.

\textsuperscript{282} Orentlicher, supra note 281, at 39.
\textsuperscript{283} What follows, then, is a reading of the cases themselves, and not a historical investigation into the actual practices of the two defendants.
\textsuperscript{284} IMT Judgment, supra note 199, at 302–04.
\textsuperscript{285} See id. at 302 (noting twenty-three articles urging extermination of the Jews “root and branch”).
\textsuperscript{286} Id. at 302–03.
\textsuperscript{287} Id. at 338.
\textsuperscript{288} Id.
\textsuperscript{289} Many of the more chilling speeches are repeated in the proceedings of the IMT. See 6 Trial of the Major War Criminals Before the International Military Tribunal: Proceedings 62–67 (1947).
\textsuperscript{290} The key paragraph is not a model of clarity as to the most important facts in Fritzche’s defense. On the one hand, the tribunal notes that the defendant did display anti-Semitism, but did not urge the extermination of the Jews. IMT Judgment, supra note 199, at 338. This rationale is consistent with a view that the crucial distinction between Streicher and Fritzche turned on actual incitement to violence. However, the IMT also notes that Fritzche twice tried to suppress Streicher’s newspaper, and that he also did not urge the “persecution” of the Jews. Id. Furthermore, the IMT expresses the belief that
tation of German society. At the very least, it is unclear what the IMT would have done with a defendant who engaged in the systematic racial hatred found in Streicher’s paper, but sanitized of all calls to violence and extermination.291 There is thus a potential gap between these cases, where a re-stratification theory would pull toward conviction even though the defendant did not directly incite atrocities.

This concept of dignity as status dovetails with other concepts in international human rights law, such as equality and non-discrimination, in a way that compliments those concepts rather than competes with them. It emphasizes “single-status” conceptions of human rights, an idea that lies at the core of many human rights instruments and thus might enjoy broad acceptability. In addition, re-stratification itself is a limited concept; it does not purport to develop a system of rights as many conceptions of human dignity do. Instead, re-stratification points us toward a particular kind of harm, focusing our attention on the environment created by hostile speech or other acts.292 This concept therefore might be capable of application in predictable ways to future cases and may present a useful way forward for thinking about human dignity in ICL.

But there is much that this concept does not do. It does not embrace the interpretive role of human dignity that threatens to push international criminal tribunals further into contested and uncharted legal territory. It does not necessarily provide a stronger role for legality and nullum crimen sine lege, nor does it explain how dignity should work in conflict with other important values such as

Fritzsche’s speech was mainly intended “to arouse popular sentiment in support of Hitler and the German war effort.” Id.

291. Cf. Mark Thompson, *Incitement, Prevention, and Media Rights, in Confronting Genocide* 97, 99 (René Prevost ed., 2010) (arguing that effective hate speech techniques can be much more oblique and insidious than the more blatant calls to violence engaged in by RTLM and Streicher).

292. Another area where this kind of reasoning might have been helpful is the crime of “forced marriage.” The Special Court for Sierra Leone dealt with a case where women were forced to become the “bush wives” of rebel soldiers, a status that “resulted in them being ostracised from their communities.” Prosecutor v. Brima, Case No. SCSL-2004-16-A, Appeal Judgment, ¶ 199 (Feb. 22, 2008). The court struggled with the question of whether forced marriage could be charged as an “other inhumane act” in addition to being charged as sexual violence. Id. ¶ 197. The trial chamber found that it could not, partly because the harm of forced marriage was adequately covered by the crime of sexual violence. Id. ¶¶ 187–93. The appeals chamber reversed, in large measure because it found that such forced marriages could lead to significant mental and even physical harm. Id. ¶ 195. While this is no doubt true, this conclusion may have been more easily reached by employing a status-based conception of dignity, as the status of “bush wife” amounted to a substantial denigration.
freedom of expression or conceptions of “group” or “community” rights. Finally, it does not respond to the “practical” argument put forward by Judge Meron in the Rwanda case: leaders in fragile and post-conflict societies are likely to use hate speech laws to target political opponents, and the punishment of hate speech by criminal tribunals tends to legitimize this practice.293

V. CONCLUSION

It serves to conclude on a cautionary note. This Article has shown that human dignity can be a powerful and multi-sided tool, even as it remains deeply contested and indeterminate. In Part IV, I attempted to respond to the legality and pluralist critiques of human dignity by offering a clear and limited conception that is based in historical uses of dignity and that might be both acceptable across cultures and useful in dealing with the kind of injuries presented in the Rwanda case. But this conception alone is not sufficient to control the more expansive and unpredictable uses of human dignity.

There will come a point in the life of ICL in which the regime’s inability to convict in a novel or difficult case will not reflect the law’s adolescence, incompleteness, or underdevelopment. Rather, at some point, acquittal of an admittedly bad person will reflect the regime’s self-awareness of its own natural limitations. In other words, a finding of “not guilty” is not a finding of non liquet,294 or even recognition of innocence, but rather an acknowledgement of appropriate boundaries for a regime that is meant to deal with the worst crimes facing humanity. When these cases arise, the principle of human dignity as currently understood will pull for conviction and extension of the law. The claims presented by the dignity principle should be taken seriously, but they should not be accepted uncritically.

293. Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Appeal Judgment, Partly Dissenting Opinion of Judge Meron, ¶ 10 (Nov. 28, 2007) (“The threat of criminal prosecution for legitimate dissent is disturbingly common, and officials in some countries have explicitly cited the example of RTLM in order to quell criticism of the governing regimes.”).

294. This term refers to a finding that the applicable law cannot provide a conclusive answer to a legal question. On the “allergy” of international courts to findings of non liquet, see Prosper Weil, “The Court Cannot Conclude Definitively . . .”: Non Liquet Revisited, 36 COLUM. J. TRANSNAT’L L. 109 (1997).