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Deciding what is humane: towards a critical reading of humanity as a normative standard in international law

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"Humanity," as a normative standard, is an empty vessel that empowers humanitarian institutions and their expertise: such is the central argument of this chapter. It describes the connection between humanity and the notion of human dignity, and argues they are both legal concepts expressly designed to be void of any meaning – and thus to facilitate consensus among radically differing opinions. Such radical indeterminacy is instrumental in empowering international bureaucracies in the definition of humanity as a normative standard. Beyond the traditional realist insight, according to which states appropriate the discourse of humanity for the purposes of domination, this chapter proposes that humanity is an indeterminate standard that empowers bureaucrats with the last word on what humane behavior really is.

Contemporary uses of "humanity" as an international legal concept find their most early examples in international humanitarian law.[475] It

[475] Earlier scholars of international law had made reference to the concept. For example, see H. Grotius, *De Jure Belli ac Pacis* (Paris, 1625), 2nd edn (Amsterdam, 1631), vol. 3, chapter 11, paras. 9 and 10. English translation: R. Tuck (ed.), *The Rights of War and Peace* (Indianapolis, Ind.: Liberty Fund, 2005). However, this reference can be hardly understood as a legal concept in the current sense of the expression, but rather in the wider context of Grotius' own view a of thin form of sociability that we must rationally accept, even in a situation akin to a state of nature. See P. Capps, "Natural Law and the Law of Nations," in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Cheltenham: Edward Elgar, 2011), 61–72. In this specific context, Grotius can be said to accept the possibility of a contemporary "humanitarian intervention." On the latter point, see B. Kingsbury and B. Straumann, "State of Nature Versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes, and Pufendorf," in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, 2010), 33–52. In a similar vein, Ellen Hay's contribution to the present volume ties legal discourse invoking the

was with the Saint Petersburg Declaration of 1868, first, and then in the Preamble to Convention II with Respect to the Laws and Customs of War on Land, adopted by the First Hague Peace Conference in 1899, that the notion started appearing in international legal instruments. Thereafter, the notion appeared in Article 76 of the Lieber Code of April 24, 1863 and is also set forth in subparagraph (1)I of common Article 3 of the 1949 Geneva Conventions, as well as several other provisions of the conventions and their protocols, including: Article 12, first paragraph of the First Geneva Convention; Article 12, first paragraph of the Second Geneva Convention; Article 13 of the Third Geneva Convention, and Articles 5 and 27, first paragraph of the Fourth Geneva Convention. Moreover, it is recognized by Article 75(1) of Additional Protocol I, and Article 4(1) of Additional Protocol II.

Humanity has since then transcended the confines of the law of war. In its landmark decision in the *Corfu Channel Case* (Merits [1949]), the ICJ held that basic considerations of humanity underlie the rights of states. In the Court's words:

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VTII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war.[476]

This line was closely followed by the ICJ in the *Nicaragua Case* (Merits, 1986), where the ICJ confirmed that

> [Article 3] defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."[477]

interest of humanity in natural resources regimes with Grotius' own argument favoring freedom of fishing.

[476] International Court of Justice, *Corfu Channel Case* (*United Kingdom* v. *Albania*). Decision of April 9th 1949, 4 *ICJ Reports* [1949] at 22.

[477] International Court of Justice, *Military and Paramilitary Activities in and against* Nicaragua (*Nicaragua* v. *United States of America*) Judgment of 27 June 1986. 14 *ICJ Reports* (1986), para. 218.

This view shows a specific understanding of the notion of humanity. From this perspective, humanity is linked to the idea of "humane" treatment – be it of the ill or the wounded, of noncombatants, or of others whose protection is mandated by that normative standard. In this first sense of the expression, humanity is a standard that serves as a yardstick to evaluate a certain conduct. Does your conduct comply with the requirements of humanity? Is your behavior humane? Such a standard, in turn, gains legal status due to its inclusion in legal instruments, thus completing the usual formulation of humanity in international law: is your behavior inhumane, and therefore (for example) an international crime?

This view contrasts with a second possible understanding of the term. Humanity may also refer to "humankind," that is, to the group of men and women who form the human race. In this sense, the question of humanity is not one of a normative assessment of behavior but rather of a description: "humanity" is a group of living beings. This sense of the expression is also relevant for international law, as it describes the ultimate polity of such legal language. If anything else, we can all agree that international law is not made for anyone else but for the human race: international law is, in that sense, "humanity's law."[478]

International criminal law provides an illustration of the two senses of the expression. When discussing the underlying meaning of crimes against humanity, Christopher Macleod was able to identify at least seven senses in which a certain conduct (say, murder) can be considered to be *against humanity*, both in reference to humanity as "humankind" and as a normative standard of behavior.[479] In the first sense (humankind), a crime against humanity is such because it damages or threatens physically to affect human beings, because it endangers the public order of humankind, or because it shocks the conscience of humankind. In the second sense (normative standard), a crime against humanity may be considered as such because it is an action contrary to the human nature of the perpetrator, or because it targets the human nature of the victim, or even if, in ignoring the human nature of the victim, we would ourselves be acting contrary to human nature.

Neither of these definitions seems conclusive. Instead, they seem to interact and ultimately create a complex palimpsest that we end up

[478] See, generally, R. G. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011).
[479] C. Macleod, 'Towards a Philosophical Account of Crimes against Humanity', *European Journal of International Law* 21.2 (2010): 281–302.

calling "humanity." However, the claim here is not one of radical uncertainty. It is not that there is no correct meaning for "humanity" under international law but rather that all such meanings are correct in their way. This, of course, leads the concept of humanity to be easily captured for the agenda of either party in a given conflict. Such dangerous indeterminacy of "humanity" has been observed by biting critics of liberalism – Carl Schmitt among them, for whom

> When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress, and civilization in order to claim these as one's own and to deny the same to the enemy.
>
> The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat. To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.[480]

There are two sides to this critique, each connected to one of humanity's two definitions. On the one hand, Schmitt's critique refers to radical exclusion of the enemy as "inhuman," and is linked to the idea of humanity as humankind. In this context, when the enemy is defined as inhuman, he is considered (either literally or metaphorically) as outside the human group of men and women who compose the human race. No protection or consideration is therefore due to such entity, and it may be eliminated with impunity. Considerable scholarship has been produced exploring this line of critique, as international legal scholars have studied this move both within and without the context of the colonial encounter. For example, Anthony Anghie's work has shown how Vitoria's recognition of the Indian as being somehow "human" was really just a facade for presenting the conquest as a "just war."[481] Similarly, Brett Bowden has also argued that Vitoria was instrumental to the development of the

[480] C. Schmitt, *The Concept of the Political: Expanded Edition*, trans. George Schwab (University of Chicago Press, 2007), 54.

[481] A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

"classical standard of civilization," which defines who was admitted and who was excluded from the international community.[482] Beyond colonialism, Frédéric Mégret has also explored the discipline of inclusion/exclusion in the context of international humanitarian law.[483] Much less work has been done on the second line of critique implicit in Schmitt's assessment, which is connected to humanity's definition as a normative standard. In what follows, this chapter explores this line of critique, concluding that humanity is an empty notion that empowers humanitarian institutions and their expertise. In that sense, the argument made here could be read in parallel with Luigi Corrias's contribution to this volume, where the Schmittean challenge to the discourse of humanity is explored. To get there, though, we need to focus first on one prior issue: human dignity.

Human dignity as an expression of humanity

The connection between "humanity" and "human dignity" is fairly intuitive. Human beings have an inherent value (their "dignity"), which depends not on some sort of legal recognition but is rather a given – somehow pre-legal. Violating this essence, this "humanness," is then an action "against humanity." Such a connection is made evident in the interconnection between humanity and biogenetics. Indeed, Article 1 of UNESCO's 1997 Universal Declaration on the Human Genome and Human Rights establishes that the human genome underlies the "fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity." Moreover, the principle of humanity in international humanitarian law is also presented in terms of "dignity" of the human being: common Article 3(1)I of the 1949 Geneva Conventions prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment," Article 75 of Protocol I prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault," Article 85 of Protocol I prohibits "practices of apartheid and

[482] B. Bowden, 'The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization', *Journal of the History of International Law* 7.1 (2005): 1–24.

[483] F. Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'," in A. Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006).

other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination," and Article 4 of Protocol II prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."

The connection between humanity and dignity has also been developed in the context of international criminal law. In the *Alekovski Case* (1999), the International Criminal Tribunal for the former Yugoslavia made the move of understanding humanity in terms of dignity, and held:

> A reading of paragraph (1) of common Article 3 reveals that its purpose is to uphold and protect the inherent human dignity of the individual. It prescribes humane treatment without discrimination based on "race, color, religion or faith, sex, birth, or wealth, or any other similar criteria." Instead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of mistreatment that are without question incompatible with humane treatment. The Commentary to Geneva Convention IV explains that the delegations to the Diplomatic Conference of 1949 sought to adopt wording that allowed for flexibility, but, at the same time, was sufficiently precise without going into too much detail. For "the more specific and complete a list tries to be, the more restrictive it becomes." Hence, while there are four subparagraphs which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation, the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual qua human being and, therefore, it must safeguard the entitlements which flow there from.[484]

It is important to note that, despite its intuitiveness, the connection between humanity and dignity made in the instruments referred to above denotes in fact an important philosophical choice, which is better understood in reference to the matrix of human agency in the context of human rights (meaning here by "agency" the ability of humans to take action and influence the context in which they live).[485] Indeed, on the

[484] ICTY, *Alekovski Case*, Judgment, 25 June 1999, para. 218.

[485] The dichotomy of structure/agency is a common theme in sociology, and refers basically to the interaction between individuals (subjects, in general) and the social systems they live in. The basic problem is whether (and to what extent) it is possible for the individual to deploy agency within the social system she inhabits. For a useful introduction, see A. Giddens, *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis* (Berkeley, Calif.: University of California Press, 1979), 49. Not too much

one hand, there is the view according to which human agency is the necessary correlation of rights; that is (human) rights exist because they allow the rights bearer to achieve her vision of the good. This is Hart's "choice-theory" of natural rights.[486] Rights exist only inasmuch as they presuppose the only natural right: the right to liberty.[487] Others reject such a view, and argue that human rights derive from human dignity; that is, human rights exist inasmuch as they guarantee a basic threshold of dignity for the human being. Raz or MacCormick can be understood thus.[488] Human rights have nothing to do with human agency; instead, "an individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation)."[489]

As has been hinted, the idea of humanity as a normative standard heavily relies on the second (dignity), and not the first (agency), philosophical premise. A quick perusal of instruments and judicial practice shows that the common understanding today is that the protection of human beings is warranted by the inherent dignity of the human person.[490] The Preamble to the UN Charter, the Preamble to the 1948 UN Universal Declaration of Human Rights (UDHR), as well its Articles 1, 22 and 23(3), all refer to dignity.

should be read into this reference, though. There is much to learn from more recent sociological efforts to go beyond the agent/structure dichotomy; for instance, Pierre Bourdieu's notion of *habitus* is of great use in understanding the process of legal development. However, the notion of agency here is still useful in conveying the characteristics of the subject that are constituted by human rights law. While one could reasonably take the discussion further, and question whether this is *only* a problem of agency, the objective of this chapter is to present a reading of how this actually is a problem of agency. If this view is accepted, but it is still considered to need a balance ("this is a problem of agency, but *also* a problem of habitus"), then the goal of the text will have been achieved. For an introduction to Bourdieu's notion of *habitus*, and how it is an attempt to go beyond the agency/structure divide, see R. Jenkins, *Pierre Bourdieu* (London: Routledge, 2002), 74.

[486] H. L. A. Hart, "Are There Any Natural Rights?," *Philosophical Review* 64 (1955): 175–191.

[487] Ibid.

[488] See J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986). For a similar argument, see N. MacCormick, "Children's Rights: A Test-Case for Theories of Rights," in N. MacCormick (ed.), *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford: Clarendon Press, 1982), 154.

[489] Raz, *The Morality of Freedom*, 166.

[490] This research is based in part on my unpublished manuscript (on file with the author): R. Urueña, "Research Brief to the ILC Special Rapporteur on the Protection of Persons in the Event of Disasters, Third Report" (2009).

This choice of language can be explained. Dignity, as a philosophical premise, allows for a basic agreement that provides the political basis for human rights; however, it allows such basic understanding because it is empty of concrete meaning, thus allowing a formal agreement among people who, in fact, disagree. In this sense, it is enlightening to look at the history of the "dignity" language in Article 1 of the UDHR, which shows its role of dignity as a catch-all expression to replace other normative bases for human rights that proved too controversial among the delegates. It remains a mystery how the notion of dignity actually came to be included in the Preamble of the UN Charter, though several fingers point to South African General Jan Smuts as the driving force behind the idea.[491] Be that as it may, in the case of Article 1 of the UDHR, the main character was certainly René Cassin, who redrafted John Humphrey's proposal,[492] and included the reference to dignity in his own draft.[493] As the debate on the provision continued, the notion of dignity seemed to be useful to address a dual necessity: on the one hand, it was required to have some kind of normative basis for human rights; and yet, at the same time, the other options that delegates put forward (for example, "God," "Nature," and "Human Nature") were too controversial and rapidly rejected by other members.[494]

[491] See, for example, T. Lindholm, "Article 1: A New Beginning," in A. Eide and T. Swinehart (eds.), *The Universal Declaration of Human Rights: A Commentary* (London: Scandinavian University Press, 1992), 31–34. At the very least, Smuts's proposal did include a reference to the "ultimate value of human personality." See R. B. Russell, *A History of the United Nations Charter: The Role of the United States, 1940–1945* (Washington, DC: Brookings Institution, 1958), 911. For a very interesting reconstruction of Smuts's role in the drafting of the UN Charter, see Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009), 28.

[492] John Humphrey was a Canadian and a professor at McGill. His reluctance to include principled normative statements in his texts is well acknowledged: "I was no Thomas Jefferson," Humphrey writes in his autobiography, "if [philosophical statements] have any place in the instrument it is in the preamble." See John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, NY: Transnational Publishers, 1984), 44. The discussion of Humphrey's role in drafting the declaration, as opposed to Cassin, who won the 1961 Nobel Peace Prize for his part in the drafting, is one of the underlying tensions (and perhaps complaints) in his autobiography. The true origin of these tensions can be found in Phillip Alston's review of the book: P. Alston, "*Human Rights and the United Nations: A Great Adventure*, by John P. Humphrey," *Human Rights Quarterly* 6 (1984): 224.

[493] United Nations, *Yearbook on Human Rights for 1947* (New York, 1949), 495.

[494] For the evolution of the text in the drafting process, see Lindholm, "Article 1: A New Beginning," 33–50.

This approach has eminent contradictors. Jan Joerden's contribution to this volume starts off from the same methodological premise of the argument made here, in the sense that dignity and humanity should be explored as conceptually linked. However, from Joerden's perspective, an exploration of dignity reveals that there is, indeed, a core meaning to it: human autonomy, which cannot be infringed. Thus, while I propose that humanity's link to dignity has the effect of emptying the former of any significant substantive content, Joerden's argument is that it is precisely this link that provides humanity with its substantive value (namely, human autonomy). In my view, while this is the view in German constitutional law,[495] and is, in fact, also the view held in several Latin-American systems as well,[496] the same certainty cannot be proclaimed of the international legal system: in the absence of a global constitutional court that gives ultimate meaning to humanity, we shall remain tied to it as a watered-down consensus for a normative basis of human beings. Indeed, this role of dignity can be gleaned in several international instruments where the concept is invoked, be it the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, or the Convention on the Elimination of All Forms of Racial Discrimination, all of which refer to dignity in their Preambles as source and inspiration of the rights provided therein. The same can be said about the Preambles of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[497] Furthermore, dignity also appears in Articles 28, 37 and 40 of the Convention on the Rights of the Child, in Articles 1, 3, 16, 24 and 25 of the Convention on the Rights of Persons with Disabilities, and in Article 19 of the International Convention for

[495] The notion of dignity is quintessential for understanding German Basic Law and its influence on other constitutional tribunals. On the role of dignity in German Basic Law, see M. Mahlmann, "The Basic Law at 60 – Human Dignity and the Culture of Republicanism," *German Law Journal* 11 (2010): 9.

[496] For example, the idea of "dignidad humana" ("human dignity") is also quintessential to understand Colombian neoconstitutionalism; see, for example, Corte Constitucional de Colombia, Sentencia T-881 de 2002, MP: Eduardo Montealegre Lynett, "De otro lado al tener como punto de vista la funcionalidad del enunciado normativo 'dignidad humana', se han identificado tres lineamientos: (i) la dignidad humana entendida como principio fundante del ordenamiento jurídico y por tanto del Estado, y en este sentido la dignidad como valor. (ii) La dignidad humana entendida como principio constitucional. Y (iii) la dignidad humana entendida como derecho fundamental autónomo."

[497] See my "Research Brief to the ILC Special Rapporteur," 6.

the Protection of All Persons from Enforced Disappearance, among many others. And there are references to dignity in the Preambles of most regional human rights instruments, including the American Convention on Human Rights, the Inter-American Convention on Forced Disappearance of Persons, the 2004 Revised Arab Charter on Human Rights,[498] Protocol III to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union.[499] And the European Court of Human Rights has, in turn, also accepted the notion that human dignity is the ultimate source of the protection of human beings, even if confronted with the right to life.[500]

In all these instruments, dignity plays the role of a catch-all normative concept, devised to serve as the basis for the human being when such a basis was required, and useful in turn because of its being void of any actual substance. At the end of the day, as McCrudden has put it, "the significance of human dignity, at the time of the drafting of the UN Charter and the UDHR (and since then in the drafting of other human rights instruments), was that it supplied a theoretical basis for the human rights movement in the absence of any other basis for consensus."[501]

[498] English translation by M. Amin Al-Midani and M. Cabanettes, available at *Boston University International Law Journal*, 24 (2006): 147.

[499] I follow here the wonderful map of the different uses of dignity in international, regional and domestic settings in C. McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19 (2008): 655–724.

[500] European Court of Human Rights, *Pretty* v. *United Kingdom* (2002) 24 EHRR 42, para. 65: "The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity." The first ECHR case on dignity that I have been able to unearth is *Tyrer* v. *United Kingdom* (1978) 2 EHRR 1, where a given form of corporal punishment was deemed contrary to human dignity. Other cases include: *Bock* v. *Germany* (1990) 12 EHRR 247; *SW* v. *UK; CR* v. *UK* (1995) 21 EHRR 363; *Ribitsch* v. *Austria* (1995) 21 EHRR 573; *Goodwin* v. *United Kingdom* (2002) 35 EHRR 447. See C. McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19 (2008): 655–677.

[501] McCrudden, "Human Dignity and Judicial Interpretation."

The notion of dignity is exceptionally placed to be a plausible point of consensus, and still remain completely devoid of any substantive meaning. As Kretzmer and Klein put it, "[w]hile the concept of human dignity now plays a central role in the law of human rights, there is surprisingly little agreement on what the concept actually means."[502] Humanity as a normative standard relies on dignity because when it rejects the underlying logic of human agency it is left with a void in its definition of what humanity actually means, and it systematically relies on that void to reach consensus among radically different world views.

Humanity and the empowerment of humanitarian institutions

The default connection between humanity and dignity implies that humanity is something rather more important than the individual's own free will. Consider whether dignity can be waived by the concerned individual. For the German Constitutional Court, the answer is fairly straightforward: "human dignity means not only the individual dignity of the person but the dignity of man as a species. Dignity is therefore not at the disposal of the individual."[503] This means that the whole point of humanity as a normative standard is not human agency but the protection of the individual – even from herself.

It is in that context that one finds a new dimension to what David Kennedy said years ago: human rights generalize too much, because "to come into understanding of oneself as an instance of a pre-existing general – 'I am a "person with rights"' – exacts a cost, a loss of awareness of the unprecedented and plastic nature of experience, or a loss of a capacity to imagine and desire alternative futures. We could term this 'alienation'."[504] This "plastic nature experience" is defined by human agency: it is the way we experience life and our surroundings actively, and not as mere spectators. This perspective is lost in humanity as a normative standard: the individual here is a passive, helpless entity that requires protection: a human being in need of a mediator between her and the world.

[502] D. Kretzmer and E. Klein, "Foreword," in D. Kretzmer and E. Klein (eds.), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002).

[503] Quoted in E. Klein, "Human Dignity in German Law," in Kretzmer and Klein, *The Concept of Human Dignity*, 148.

[504] D. Kennedy, "The International Human Rights Movement: Part of the Problem?," *Harvard Human Rights Journal* 15 (2002): 111.

Humanity as a normative standard is an empty container, which is to be filled as desired whenever the political consensus so requires. That is perhaps one of its biggest assets. Instead of strict rules that tell us what is, or is not, appropriate in a given context, humanity allows a contextual assessment of situations, and permits flexibility while still invoking a certain normative authority.

Such indeterminate nature of human dignity empowers humanitarian institutions and bureaucracies in the process of defining the normative standard known as "humanity." Given the inconclusive nature of dignity, any effort to give a more concrete meaning to it will imply the empowerment of those who interpret it. Consider, for example, the debate on humanitarian intervention: the continuities between colonialism and the deployment of the "humanitarians" has become a staple in international legal scholarship,[505] while the absence of such continuity between contemporary humanitarianism and the Enlightenment has been explored forcefully by Alain Finkielkraut.[506] Ultimately, these contributions seem to suggest, humanity as a normative concept means whatever humanitarian institutions say humanity is. How does this effect come about? What remains of this chapter will explore the bureaucratization of humanitarianism and its impacts on the notion of humanity as a normative standard.

The bureaucratization of humanitarianism

Part of the ethos of humanitarianism is action. When everything fails, when the Security Council or the legal departments of Foreign Offices are entangled in discussion of vetoes, or arcane treaty provisions, the ethical imperative of humanity seems to trump all discussions. Humanity is *out there*, not in an office in Geneva or New York – but in Colombia, or Sudan, or some other place where the dignity of human beings needs to be protected by the international community as a whole.

And yet, this is hardly the case. The political battle over whether humanity is indeed a valid normative standard is over. Schmitt's doubts have been ignored. Humanitarianism is today the default approach to

[505] See, generally, Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003): Anghie, *Imperialism, Sovereignty and the Making of International Law*.

[506] Alain Finkielkraut, *In the Name of Humanity: Reflections on the Twentieth Century* (New York: Columbia University Press, 2000).

international policy. And this, as Jarna Petman has explained in the European context, has been

> both a blessing and a curse. It is a blessing because the anti-fascists have won. It is very hard, if not high nigh impossible, for any European State to try to turn into the kind of totalitarian order that inter-war fascist States were. It is a curse inasmuch it has abandoned the "human rightists" in a limbo, equipped with a language that was supposed to be revolutionary but which now in fact celebrates the most mundane and down to earth practices of their States and the institutions representing them at the international level.[507]

Inevitably, after the revolution, bureaucracy follows. As humanity becomes a normative standard akin to human rights, a whole culture of bureaucratic humanitarianism emerges. This includes, to be sure, the logistics machinery deployed in order to do "humanitarian work": thousands of people working in international organizations, international courts, nongovernmental organizations, whose work can be loosely defined as "humanitarian." However, it also implies a specific process by which humanitarianism becomes a specific field of expertise, expressed in legal language, whose main task is to define the meaning of "humanity" in a given context. Indeed, humanity as a normative standard triggers a specific process of bureaucratization in the Weberian sense of the expression.

Bureaucratization is linked to Weber's idea of rationalization in modern societies, the former being a symptom of the latter. Weber conceived an ideal type of bureaucracy, defined by (1) very strict distribution of competences (jurisdictions); (2) strong hierarchy; (3) management based in files or documents; (4) professional training; (5) full-time work of the officials; and (6) the existence of rules, which are more or less comprehensive and may be learned.[508] In what follows, this chapter will focus on the professional aspect of the bureaucrat (4), as it is through professional training that humanity as a normative standard empowers bureaucracies.

Although intimately related, Weber's account of professions has attracted much less attention than his ideas on bureaucracy; this due, perhaps, to the fact that the profession was not as neatly drawn through

[507] Jarna Petman, "Human Rights, Democracy and the Left," *Unbound: Harvard Journal of the Legal Left* 2 (2006): 63–90.

[508] See M. Weber, *Economy and Society: An Outline of Interpretative Sociology*, ed. G. Roth and C. Wittich (Berkeley, Calif.: University of California Press, 1978), 956.

an "ideal type" as was bureaucracy.[509] The idea of professions and professionalism is pivotal to the Weberian construct of bureaucracy. Weber understood the relation between rationalization and professions as one of multi-causation: the professional, the "man of vocation" (*Berufmensch*), was himself an example of Calvinist asceticism,[510] and contributed to the rationalization of bureaucracies, which in turn contributed to the development of professions.[511] The relation between professionals and bureaucracies is, thus, one of rationalization and the predictability of outcomes.

In this context, Weber takes a special interest in the legal profession, dedicating one section of the text that was posthumously published as *Economy and Society* to "The Role of Law Specialists."[512] Law specialists, according to Weber, play a crucial role in shaping the legal system where they act. Specifically, in Weber's account, it was their education as legal specialist that had that effect: professional legal specialists are formed by, and a rational legal system is tailored in, specialized schools where the law is taught through legal theory as "legal science," and where "concepts" are passed on to students. Ritzer argues that Weber went even further, and considered that legal professionals are *the* decisive factor in developing a rational legal system; that is, "where professionals are in a position to shape the development of law, that law is likely to be rationalized."[513] This impact should be then connected to the idea of bureaucracy presented above: if legal professionals are the determinant variable for rationalization of the law, then their role as professionals is the medium through which the law becomes subject to bureaucratic rationality. In other words, bureaucratization of adjudication implies legal professionalization, as it is legal professionals who create a rational legal system.[514] From Weber's perspective, bureaucratization is a way of formalization that permits predictability. The role of legal professionals is

[509] The following account is based largely on G. Ritzer, "Professionalization, Bureaucratization and Rationalization: The Views of Max Weber," *Social Forces* 53 (1975): 627.

[510] Weber, *Economy and Society*, 543 and also 1198.

[511] Ibid., 1164.

[512] Ibid., 775.

[513] Ritzer, "Professionalization, Bureaucratization and Rationalization," 629.

[514] Against this conclusion, some accounts see professionalization as the antithesis of bureaucratization, due to the fact that, when a professional is employed in a bureaucracy, he is confronted with conflict due to the basic differences between these two normative systems. This idea, present mainly in American sociology, is due, according to Ritzer, to an excessive focus of American sociology of professions in the study of medical doctors and does not consider Weber's point, in the sense discussed (see Ritzer, "Professionalization, Bureaucratization and Rationalization," 632).

to implement that predictability; hence, the importance of teaching law as a series of concepts, which are then applied uniformly to specific factual circumstances.

The problem is that in stark opposition to Weber's view the bureaucratization of humanitarianism actually occurs in the context of extreme deformalization; indeed, as we have seen, humanity as a normative standard is radically indeterminate, and fosters no predictability. This, in turn, opens a wide leeway for bureaucrats to have the final word in what, exactly, humanity means. Beyond Schmitt's critique that the notion of "humanity" is likely to be used by states for imperial purposes, the indeterminacy of the concept permits the empowerment of the humanitarian bureaucrat.

This move is illustrated in Edwin Bikundo's description of the politics of humanity at the International Criminal Court, also featured in this volume. From his perspective, humanity is instrumental to safeguard the collective that is affected by the international criminal. It is useful to point the finger at the criminal, as the individual who is responsible for inhuman behavior, thus saving the community where the criminal lived and acted from being subject to such assessment. This need, though, is not one of the community, and neither is it a need of the criminal: the need not to blame a whole community, a whole continent (in the case of Africa) is one that is felt by the humanitarian bureaucrat, who is deciding what humanity is – and seems ill at ease with the idea that his or her definition of humanity entails that a whole community/country/continent acts inhumanly.

The question, however, is not whether lawyers should have a lesser say in the definition of humanity. Humanity has been constructed as a legal concept, and it does not exist outside that framework – at least not for the purposes of human rights. Even if other professions would take the lawyers' place (say, for example, development experts) then those professionals would have to start thinking and arguing as lawyers – humanity and law have become inextricable partners.

Rediscovering humanity

Is there no limit to the definition of humanity? Does this mean that we should drop the concept for good? I believe not. There seems to be an interesting way forward, which is suggested by Bartha Knoppers and Vural Özdemir's study on biogenetics, included in this volume. One option is to hold our ground and defend the idea of humanity as

inherently normative, per se. To do this, we would focus on the inherent characteristics that make us human; that is, we would search for *objective* elements that may be found in all humans, which define the very essence shared by all of us. Biogenetics proves to be an important inspiration for such line of reasoning and, as Knoppers and Özdemir explain, providing the framework to think of bio-identity around three different axes: (1) membership in humanity (where dignity plays a crucial role), (2) genetic identity and (3) species integrity. Constructing the notion of humanity would require the interplay between each of these perspectives – all of them based on genetics.

The challenge, though, is that each of these perspectives needs to be interpreted and pondered in order to make it into the whole that the concept of humanity requires. Genetics will only get us so far: scientific developments that contribute to each of these perspectives pose a difficult ethical question to the person who is making the decision on humanity. Enter thus the problem of interpretation and expertise. When defining humanity, science in itself only provides the starting point to an exercise of expertise which is similar to that made by lawyers in the context of human rights and legal humanitarianism.

Knoppers and Özdemir propose that the discussion may be advanced if we turn to ethics – anticipatory ethics, in particular. The challenge, in their view, is that the ethical discourse in science has been reduced to react to new technologies, whereas ethics should anticipate such developments, and intervene:

> Anticipatory ethics is an emerging concept in the twenty-first century practice of science and technology wherein prospective engagement between science and society is actively pursued – with the intent of going beyond describing ethical and moral dilemmas – but also *intervening* to influence the development of new technologies or the innovation trajectory.

This point is well taken. Their call is for an a priori ethical intervention in the development of the very technologies that define humanity.

This turn to ethics could be extremely useful in the context of the bureaucratization of humanitarianism discussed above. Indeed, part of the challenge in the empty-vessel notion of humanity is that we lack a workable theory of the limits to such notion. In other words: if we accept that humanity is an empty vessel, does that mean that everything and anything that humanitarian experts say counts as "humanity"? Is there no limit? My proposal for a limit is to turn to those very experts, and unpack their expertise as a matter of ethics. Just as the question of science

is only the beginning of the discussion in the biogenetical implications of humanity, the question of expertise is only the beginning of the discussion of the definition of humanity in the context of bureaucratized humanitarianism. The issue is, therefore, not whether there are some inherent characteristics that define us as humans, but rather whether there are ethical limits to the definition of humanity by humanitarian bureaucrats.

How to start thinking about this challenge? It seems fairly well established that moral philosophers traditionally understand ethics in reference to two models.[515] The first is a deontological model, according to which morality is based on external values, applied to concrete circumstances. Kant's Categorical Imperative is the prime example. From this perspective, assessments of human action consist of contrasting acts with an external norm; in essence, if behavior fails to comply with the norm, it will be immoral. The second model is consequentialism, according to which behavior should be evaluated not in accordance with antecedent ready-made laws but by assessing social consequences.[516] Thus, if behavior fails to enhance the well-being of human beings, it cannot be considered moral.

Humanity as a normative standard falls short of providing a deontological threshold because, as we have discussed extensively, the very notion is an empty vessel that uses dignity as a proxy to obscure the radical disagreement that underlies it. Moreover, if the goal is to limit in some credible way the definition of humanity by experts, the project of developing a utilitarian definition of humanity seems self-defeating: after all, the standard of welfare (utility) in defining humanity will be in turn established by the very experts we are trying to control.

This is where the approach from biogenetics becomes valuable. It implies a way out of the ethical dichotomy of deontologic/consequentialist models, and opens the possibility of thinking along the lines of virtue ethics. Virtue ethics seeks to escape from the "law conception of ethics" that fails to make sense without a belief in divine commands.[517] Moreover, it features itself also as an alternative to consequentialism. The basic idea behind virtue may be perhaps be better grasped if one drops the label "virtue" (which is often misleading in contemporary language) and frames

[515] For a useful introduction, see R. Crisp and M. Slote, "Introduction" to R. Crisp and M. A. Slote (eds.), *Virtue Ethics* (New York: Oxford University Press, 1997), 1.
[516] J. Dewey, "Ethics in International Relations," *Foreign Affairs* 1 (1923): 90.
[517] See G. E. M Anscombe, "Modern Moral Philosophy," *Philosophy* 33 (1958): 1.

it as "*good-sense ethics*."[518] From that perspective, the question that needs to be answered is: has this person acted in good sense? And acting in good sense is fundamentally a matter of practical wisdom: how should one behave in a given context, to live in excellence?[519] This view helps us go beyond the language of rights and legal duty, and allows us better to unpack decision making as part of the human experience. We have to live with the fact that international law decided to invest all its capital in the empty vessel of humanity as a normative concept – there is no changing that. Perhaps turning to the good sense of those defining humanity is the only road left.

Conclusion

This chapter has explored the difficult challenge posed by the concept of humanity in international law. One of the main advantages of humanity as a normative standard is its flexibility, which in turn entails the downside of its indeterminacy. This, in turn, empowers bureaucracies that decide, within that framework, what humanity is. Such empowered humanitarian bureaucracies are formed by professionals: mainly legal professionals who, according to Weber, are pivotal for advancing formalization and predictability of the law. And yet, legal professionals in humanitarian bureaucracies are expected to do the exact opposite of the Weberian idea: they are expected to advance a deformalization agenda, and to use humanity as a flexible standard. They are indeed expected to undertake contextual, deformalized policy analysis in order to decide what is "humane."

Humanitarian bureaucracies do not lead to formal rules that would, as it were, "speak law to power." Humanity is far from being useful as a constitutional limit to global power, as some contemporary proponents argue,[520] but is rather instrumental to contextual assessments that define

[518] I take this idea from C. M Coope, "Modern Virue Ethics," in T. D. J. Chappell (ed.), *Values and Virtues: Aristotelianism in Contemporary Ethics* (Oxford: Clarendon Press, 2006), 21.

[519] For a notoriously convincing elaboration, see Alasdair C. MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd edn (University of Notre Dame Press, 2007).

[520] See, for example, E. De Wet, "The International Constitutional Order," *International and Comparative Law Quarterly* 55 (2006): 51. Also E. De Wet, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order," *Leiden Journal of International Law* 19 (2006): 611. Ruti Teitel's notion of humanity seems to go in that direction as well, a move that is most clear in Ruti Teitel and Robert Howse, "Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order," *New York University Journal of International Law and Politics* 41 (2009): 959.

what is humane in any given moment – taking, of course, into consideration the powers that be at that given moment. Such is the advantage of the humanitarian bureaucrat: to draw the line between humanity and inhumanity after knowing what is expected of her, after being able to perform a cost–benefit analysis of her decision. Humanity as a normative standard is not a "rationalized law," in Weberian terms, but a law that implements political goals.[521] The result is that humanitarian bureaucrats are empowered to influence global politics, and define a powerful normative standard to assess it, without any significant constraint. After all, if humanity is an empty vessel to be filled by humanitarian institutions, and such institutions are in turn defined by a paradoxical bureaucratization process where the result is even more deformalization, then one conclusion is that the power of such bureaucrats is the driving force behind humanity – a disturbing conclusion indeed. One possible way forward is to focus on the good sense (the "virtue") of those that are empowered by this move. By focusing on the expert and their ethical dimension, we may begin to develop the vocabulary to make humanity a platform for emancipation and justice, beyond its current form of an agreement to disagree.

[521] This idea is not just a matter of viewing law as an instrument. Law as a means to an end has been present in jurisprudence at least since Roscoe Pound, and has been subject to able analysis in recent literature, but does not cover the paradox I want to underscore. For a review on "instrumental law," see A. Riles, "Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage," *American Anthropologist* 108 (2004): 52–65.