

ARISTOTELES CONSTANTINIDES
(University of Cyprus, Nicosia)

Questioning the Universal Relevance of the Universal Declaration of Human Rights

I. ANNIVERSARIES OF THE UNIVERSAL DECLARATION: OCCASIONS FOR CELEBRATION AND CEREBRATION

The 60th anniversary of the Universal Declaration of Human Rights (UDHR) was deservedly celebrated worldwide on 10 December 2008 for the numerous achievements brought about in the field of human rights since the adoption by the United Nations (UN) General Assembly of this landmark document which paved the way for the development of an impressive body of legal instruments and for the mobilization of millions of people around the globe for the cause of human rights. The Declaration is beyond doubt a great inspirational document, a remarkable achievement, a worldwide referential document, and the one with the highest moral status.¹ It has been referred to in international and regional human rights instruments, numerous national constitutions and international and domestic jurisprudence.² Besides, human rights have been solemnly recognized as essential to international relations and –along with peace and security and development– as the pillars of the UN system and the foundations for collective security and well-being.³

However, despite the numerous achievements, billions of people are still living in dire conditions of (extreme) poverty,⁴ income and other inequality,⁵

¹ For a comprehensive analysis and commentary see Gudmundur Alfredsson & Asbjørn Eide (eds.): *The Universal Declaration of Human Rights – A Common Standard of Achievement*, Kluwer, The Hague, 1999.

² Nihal Jayawickrama: *The Judicial Application of Human Rights Law*, Cambridge University Press, Cambridge, 2002; Hurst Hannum: «The Status of the Universal Declaration of Human Rights in National and International Law», *Georgia Journal of International and Comparative Law* No. 25 (1995/96), pp. 287-397.

³ General Assembly Resolution A/RES/60/1 of 24 October 2005 adopting the World Summit Outcome concluded on 15 September 2005, para. 4.

⁴ The world's poor living on less than \$1.25 per day numbered 1.4 billion in 2005, down from 1.8 billion in 1990. Nearly all of this reduction was concentrated in China, whereas the absolute number of the poor increased in sub-Saharan Africa and South Asia. See UN

discrimination, deprivation, exclusion, fear, oppression, powerlessness, subordination; and millions are facing death,⁶ displacement,⁷ violence and other forms of insecurity within and outside armed conflicts involving governmental and/or non-state armed actors.⁸ At the same time, billions are being spent in military expenditure.⁹ The notions used above to describe the continuing plight of billions of people are by definition antithetical to the emancipatory and liberationist potential of human rights.¹⁰ Celebrations cannot afford and should not be allowed to degenerate into feelings of complacency and indulgence, especially among the wealthy and the powerful.

Concerted efforts by various actors to bring about peace and development and (improve) human rights –especially in the developing world– produce mixed outcomes.¹¹ Who is to blame for the failures? Is it only because of recalcitrant governments, bad governance and reigning corruption, undemocratic regimes and intolerant cultures that humans are suffering? Or is the developed world, including the human rights movement, also a «part of the problem»,¹² by benevolently ignoring, or ignorantly refusing to put in place certain norms and policies that are more prone to significantly improve the lives of millions worldwide?

Will it suffice if all states adhere to the standards of the Universal Declaration? Are these standards meaningful and relevant to all states, all peoples, all communities, all societies, all individuals, all situations, all harmful activities? Is the prevalence of the international human rights regime sufficient to address the

Department of Economic and Social Affairs: *World Economic and Social Survey 2010 – Retooling Global Development*, United Nations, New York, 2010, pp. 2-4.

⁵ Aggregate measures for global inequality, which combine income disparities within and between countries, show clearly increasing trends over the past decades. *Ibid*, p. 4.

⁶ The decline in numbers of armed conflicts since the early 1990s has not been matched by a global decline in homicide rates. See SIPRI: *SIPRI Yearbook 2010 – Summary*, Oxford University Press, Oxford, 2009, p. 4.

⁷ At least 26 million people were estimated to be internally displaced at the end of 2008 by conflict and human rights violations, while the total number of refugees who fled across borders from conflict and persecution had risen to 11.4 million by the end of 2007. See, respectively, Internal Displacement Monitoring Centre: *Internal Displacement: Global Overview of Trends and Developments in 2008*, IDMC, Geneva, 2009, p. 13; UN High Commissioner for Refugees: *2007 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons*, UNHCR, Geneva, 2008, p. 2.

⁸ See generally Human Security Report Project: *Human Security Report 2009/2010: The Causes of Peace and the Shrinking Costs of War*, HSRP, Vancouver (Canada), 2010.

⁹ Total global military expenditure in 2009 is estimated to have been \$1,531 billion. This represents an increase of six per cent in real terms compared to 2008, and of 49 per cent since 2000. See SIPRI, *supra* note 6, p. 10.

¹⁰ For the potential and actual uses of human rights as language of emancipation, see Boaventura de Sousa Santos: «Toward a Multicultural Conception of Human Rights», *Beyond Law* Vol. 9 (2002), p. 10.

¹¹ See generally United Nations: *The Millennium Development Goals Report 2010*, United Nations, New York, 2010, pp. 4-5.

¹² David Kennedy: «The International Human Rights Movement: Part of the Problem?», *Harvard Human Rights Journal* No. 15 (2000), pp. 101-125.

root causes of conflicts and end wars; prevent and address abuses by powerful non-state actors, be it armed groups or transnational corporations; stop domestic violence; hold perpetrators to account; enable poor countries to (exploit their rich natural resources and) become wealthier and distribute wealth equitably; reverse environmental degradation; recognize any rights to future generations; bring substantive equality to minorities and other disadvantaged groups; safeguard the way of life of indigenous peoples? Will individuals and communities within and across societies feel more solidarity and respect towards another? Will inequalities of all sorts be addressed and remedied? Will the world still be culturally diverse? Or are the above concerns not a matter for the UDHR, international human rights law and the human rights movement? If not, why not? Can the Universal Declaration of Human Rights, then, still be truly relevant universally? Or is the human rights regime that was built upon the UDHR the once-and-for-all universal truth even if it does not address the above concerns?

The purpose of this paper is not to dismiss the merits of the Universal Declaration nor deny the significant improvements in human life it has pioneered in many parts of the globe. The aim is, rather, to ponder on whether the international human rights regime indeed provides an all-inclusive approach to human rights best befitting all situations, cultures, societies, human beings; or whether other approaches to human rights are also available but are being ignored, silenced and discredited, thereby detracting from the truly universally relevant character of the Universal Declaration of Human Rights.

2. DEBATING THE MEANING(S) OF UNIVERSALITY

Universality is one of the most discussed topics in the human rights discourse. In dealing with the universality of human rights, one should bear in mind that it is less than fifty years since international law itself has become universal in terms of state membership and participation, as a result of the process of decolonization.¹³ Still, there is a great deal of conceptual confusion over the meaning of universality. Scholars have identified a variety of senses in which universality is understood and debated. They range from applicability and all-inclusiveness, formal acceptance and adherence, historical origin, formal origin and norm creation, to anthropological and philosophical acceptance, uniformity, indivisibility, legitimacy.¹⁴

¹³ Vladen S. Vereschetin: «Cultural and Ideological Pluralism and International Law: Revisited 20 Years on», in Sienho Yee & Jacques-Yvan Morin (eds.): *Multiculturalism and International Law: Essays in Honour of Edward McWhinney*, Martinus Nijhoff, Leiden and Boston, 2009, p. 120.

¹⁴ Eva Brems: *Human Rights: Universality and Diversity*, Kluwer, The Hague, 2001, pp. 3-16. For other typologies of universality see Jack Donnelly: «The Relative Universality of Human Rights», *Human Rights Quarterly* No. 29 (2007) pp. 281-306; Karin Mickelson: «How Universal is the Universal Declaration?», *University of New Brunswick Law Journal* No. 47 (1998), pp. 26-36.

The most heated and interesting debates revolve around the anthropological universality and the philosophical and historical origins of human rights. Universal acceptance in this sense is widely considered an essential precondition for universality. Many non-Western scholars have taken pains to demonstrate that the concept and foundations of human rights are universal in the sense that they have roots in all cultures and are the product of long discussions, controversies and negotiations among various nations with diverse civilizational backgrounds.¹⁵ Still, others assert that such arguments confuse the values of justice, fairness and humanity with practices which aim to realize those values, and maintain that most non-Western traditions had not developed conceptions of human rights in that sense.¹⁶

In this they seem to be in agreement with cultural relativists who have long emphasized the different rights concepts of different peoples and rejected the notion of universal human rights as an ethnocentrically Western construct with limited applicability.¹⁷ Claims to universality of human rights are thus often considered as claims to cultural hegemony in disguise.¹⁸ In fact, even though all cultures tend to define their ultimate values as the most widespread, only the Western culture tends to focus on universality.¹⁹ In reply, proponents of universality assert that human rights are grounded in human nature and are entitlements of all persons who appeal to them when they experience the need for their protection. Universality of human rights in this sense is hard to deny,²⁰ except for the postmodernist doubts about the universality of human nature itself.²¹

¹⁵ See, e.g., Yasuaki Onuma: «Toward an Intercivilizational Approach to Human Rights», in Joanne R. Bauer & Daniel A. Bell (eds.): *The East Asian Challenge for Human Rights*, Cambridge University Press, Cambridge, 1999, p. 122; Christopher G. Weeramantry: *Justice Without Frontiers: Furthering Human Rights*, Kluwer, The Hague, London and Boston, 1997, p. 6.

¹⁶ See, e.g., Jack Donnelly: «Human Rights and Human Dignity: An Analytical Critique of Non-Western Conceptions of Human Rights», *The American Political Science Review* No. 76 (1982), p. 303; Rhoda Howard: «Dignity, Community and Human Rights», in Abdullahi Ahmed An-Na'im (ed.): *Human Rights in Cross-Cultural Perspectives*, University of Pennsylvania Press, Philadelphia, Pa., 1992, p. 81.

¹⁷ American Anthropological Association: «Statement on Human Rights», *American Anthropologist* No. 49 (1947) p. 542; Adamantia Pollis & Peter Schwab: «Human Rights: A Western Construct with Limited Applicability», in Adamantia Pollis & Peter Schwab (eds.): *Human Rights: Cultural and Ideological Perspectives*, Praeger, New York, NY., 1980, pp. 1-18.

¹⁸ Cfr. Makau wa Mutua: «Savages, Victims, and Saviors: The Metaphor of Human Rights», *Harvard International Law Journal* No. 42 (2001), p. 219.

¹⁹ Boaventura de Sousa Santos: «Toward a Multicultural Conception of Human Rights», cit., p. 16.

²⁰ See also Eva Brems: *Human Rights: Universality and Diversity*, cit., p. 10.

²¹ Cfr. José A. Lindgren Alves: «The Declaration of Human Rights in Postmodernity», *Human Rights Quarterly* No. 22 (2000), p. 490.

In the era of globalization cultural relativism has gradually, but effectively, lost its import within anthropology.²² This resulted in the universality-versus-relativism debate losing prominence to the globalization's effects on human rights.²³ Interestingly, influential universalists have since become more sympathetic toward relativist arguments²⁴ and lay more emphasis on the social structural modernity of the human rights ideas and practices rather than on their Western origin.²⁵ In the meantime, the 1990s witnessed some serious critical rethinking of the basic assumptions of the international human rights regime.²⁶

Against this background, and without turning a blind eye on the salience and achievements of human rights since the adoption of the Universal Declaration, the present paper will focus on the silences of the predominant conceptualization of human rights, and will present an overview of the categories of rights, actors and activities which are left outside the scope of human rights due to historical, political, conceptual and other reasons. What is thus mainly questioned in the present paper is the all-inclusiveness of the particular conceptualization of human rights embodied in the UDHR.

3. A HISTORIC BUT HISTORICAL DOCUMENT

3.1 The Declaration's «birth defect»: still suffering from it (?)

The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948,²⁷ without a dissenting vote, but with eight states abstaining (Byelorussian SSR, Czechoslovakia, Poland, Saudi Arabia, Ukrainian SSR, USSR, Union of South Africa and Yugoslavia). Many commentators contend that the Declaration is the result of a confrontation and compromise between different cultural, moral and political traditions and does not mainly reflect Western values, since numerous non-European countries took part in the process leading to its adoption, as evidenced, inter alia, by the inclusion of

²² Ann-Belinda S. Preis: «Human Rights as Cultural Practice: An Anthropological Critique», *Human Rights Quarterly* No. 18 (1996), p. 288.

²³ Michael Goodhart: «Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization», *Human Rights Quarterly* No. 25 (2003), p. 936.

²⁴ See Jack Donnelly: «The Relative Universality of Human Rights», *Human Rights Quarterly* No. 29 (2007), p. 281 («anthropological and ontological universality are empirically, philosophically, or politically indefensible»).

²⁵ *Ibid.*, p. 287; See also Albert H. Y. Chen: «Conclusion: Comparative Reflections on Human Rights in Asia», in Randall Peerenboom, Carole J. Petersen & Albert H. Y. Chen (eds.): *Human Rights in Asia – A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA*, Routledge, London and New York, 2006, p. 506.

²⁶ See, e.g., Tony Evans (ed.): *Human Rights Fifty Years on: A Reappraisal*, Manchester University Press, Manchester, 1998.

²⁷ UNGA Res, 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc A/810 (1948).

economic and social rights upon the insistence of socialist and other non-Western states.²⁸

Although most of the above hold true, the Declaration suffers from a sort of «birth defect»,²⁹ having been formulated and accepted by only 56 states, i.e., less than one third of today's UN member states. UN membership at the time was limited and uneven. The world was still largely colonized. Participation from Asian and, especially, African countries was minimal; Egypt, Ethiopia, Liberia and (apartheid) South Africa were the only African UN member states at the time. One can only assume that if more African states had been present, they would have influenced the drafting of the Universal Declaration in a different direction.³⁰

Besides, the first and basic draft of the Declaration, which became the basis for all further amendments, was produced by the Canadian John Humphrey,³¹ who admitted that «the best of the texts from which [he] worked [and borrowed freely] was the one prepared by the American Law Institute»³² and the Inter-American Juridical Committee.³³ Thus, notwithstanding some involvement by non-Western states and the influence of the socialist ones (which, at the end, abstained), there should be no doubt about the Western origins and philosophical underpinnings of the UDHR.³⁴

It is often argued that this «birth defect» has since been remedied through the adherence to the Declaration by virtually all states, including African states.³⁵ In this sense, the UDHR and human rights are said to have been *universalized*,³⁶ most notably and solemnly since the adoption of the Vienna Declaration and

²⁸ See, e.g., Fernand de Varennes: «The Fallacies in the 'Universalism versus Cultural Relativism Debate' in Human Rights Law», *Asia-Pacific Journal on Human Rights and the Law* No. 1 (2006), pp. 71-72.

²⁹ Christian Tomuschat: *Human Rights Between Idealism and Realism*, Oxford University Press, Oxford, 2003, p. 63.

³⁰ Abdul G. Koroma: «International Law and Multiculturalism», in Sienho Yee & Jacques-Yvan Morin (eds.): *Multiculturalism and International Law...*, p. 81.

³¹ Johannes Morsink: *The Universal Declaration of Human Rights – Origins, Drafting, and Intent*, University of Pennsylvania Press, Philadelphia, 1999, p. 6.

³² John P. Humphrey: *Human Rights and the United Nations: A Great Adventure*, Transnational Publishers, Dobbs Ferry, NY., 1984, p. 32.

³³ *Ibid.*, p. 40.

³⁴ See, e.g., Rhoda E. Howard & Jack Donnelly: «Human Dignity, Human Rights and Political Regimes», in Jack Donnelly (ed.): *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, NY., 1989, p. 71 («the near-perfect fit between liberalism and the Universal Declaration reflects a deep and essential theoretical connection»); Sompong Sucharitkul: «A Multi-dimensional Concept of Human Rights in International Law», *Notre Dame Law Review* No. 62 (1987), p. 309 («the concept and principles of human rights as contained in the universal or global documents originated in Western civilizations»).

³⁵ See, e.g., Christian Tomuschat: *Human Rights Between Idealism and Realism*, p. 64; Cees Flinterman: «The Universal Declaration of African Human Rights and the Protection of Human Rights in Africa», *Africa Legal Aid Quarterly* (1998), p. 19.

³⁶ José A. Lindgren Alves: «The Declaration of Human Rights in Postmodernity», *cit.*, p. 498.

Programme of Action by consensus by the World Conference on Human Rights.³⁷ Even though this formalist approach has certainly some face value, it has been rightly observed that such «international legal universality»,³⁸ which is based on the reliance on the positions of states, is an insufficient method of establishing the universality of human rights.³⁹

Genuine participation of the major cultures, religions, ideologies and political systems in the development of the human rights regime is indispensable if universality of human rights is to have any meaningfulness. Indeed, human rights norms are unlikely to be respected in practice without strong legitimation within the national realm.⁴⁰ Even though diverse peoples across the globe have embraced the human rights corpus, those same people also seek to contribute to it, at times by radically reformulating it, at others by tinkering at the margins.⁴¹

3.2 Is the Universal Declaration the final truth about human rights?

The very existence of a long and on-going debate on the universality of human rights shows that there is widespread discontent with the idea that the particular human rights regime, as first formulated in the Universal Declaration, represents the once-and-for-all truth about human rights. Developments in human rights thinking and practice corroborate these challenges and suggest that there are alternative conceptualizations of human rights beyond the particular one that is reflected in the UDHR and the human rights regime. They all point to the fact that any discussion about rights cannot escape from the given time and the specific cultural and historical circumstances surrounding it. Thus, human rights norms should not be seen as frozen and fixed principles whose content and cultural relevance is unquestionable;⁴² «they are the product of civilization and not nature,

³⁷ *International Legal Materials* No. 32 (1993), pp. 1663 ff. See also para. 25 of the UN Millennium Declaration adopted by the General Assembly in Resolution 55/2 of 8 September 2000. Significantly, paragraph 5 of the Vienna Declaration confirmed the principle of universality but it also referred to the «significance of national and regional particularities and [the] various historical cultural and religious backgrounds». See Kevin Boyle: «Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1983», *Political Studies* No. XLIII (1995), pp. 86-88.

³⁸ The term is borrowed by Jack Donnelly: «The Relative Universality of Human Rights», p. 288.

³⁹ Eva Brems: *Human Rights: Universality and Diversity*, cit., p. 13; Koen de Feyter: *World Development Law – Sharing Responsibility for Development*, Intersentia, Antwerpen, Groningen & Oxford, 2001, p. 248.

⁴⁰ Abdullahi Ahmed An-Na'im: «Islam and Human Rights: Beyond the Universality Debate», *ASIL Proceedings* No. 94 (2000), p. 96.

⁴¹ Makau wa Mutua: «The Ideology of Human Rights», *Virginia Journal of International Law* No. 36 (1996), p. 653.

⁴² *Ibid*, p. 655.

because historical rights are changeable and therefore susceptible to transformation and growth». ⁴³

In sum, although there are a lot of interesting analogies to human rights ideas in various cultural traditions, the particular form these ideas are given in the international human rights regime is the product of a particular moment and place: post-enlightenment, rationalist, secular, Western, modern, capitalist. ⁴⁴ Such challenges to the dominant conceptualization of human rights are briefly portrayed in the following section. In a note of caution, however, it should be stressed that the possibility of alternative conceptualizations should not serve as cultural and political pretext for states and other self-interested powerful actors to pursue repressive policies with a view to consolidating their political and social power. ⁴⁵

4. UNIVERSAL ASPIRATIONS BUT PARTICULAR FORMS AND NARROW SCOPE

4.1 Promoting individualism: overemphasizing rights, ignoring duties

Emphasis on rights and individualism is associated with certain undesirable characteristics, including selfishness and indifference to others. It has been pointed out that «rights miss the “dimension of sociality”; they posit selfish, isolated individuals who assert what is theirs, rather than participating in communal life». ⁴⁶ In the same vein, overemphasis on rights essentially creates a situation where people do not think about their duties and/or responsibilities and blunts articulation of a shared life. The Universal Declaration’s emphasis on rights and disregard of duties reflects a liberal individualism prevalent in the West. ⁴⁷

This is, however, not the only possible conceptualization of the relationship between rights and duties in the context of human rights. For instance, the African Charter on Human and Peoples’ Rights ⁴⁸ attempts a comprehensive unification of the notions of community, individual rights, and duties to the family, the

⁴³ Norberto Bobbio: *The Age of Rights* (trans. Allan Cameron), Polity Press, Cambridge, 1996, p. 18.

⁴⁴ David Kennedy: «The International Human Rights Movement: Part of the Problem?», cit., p. 114.

⁴⁵ For an early criticism of this kind see Bertrand G. Ramcharan: «A Critique of the Third World Response to Violations of Human Rights», in Antonio Cassese (ed.): *UN Law/Fundamental Rights: Two Topics in International Law*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1979, pp. 249-258. See also, *inter alia*, Fred Halliday: «Relativism and Universalism in Human Rights: the Case of the Islamic Middle East», *Political Studies* No. XLIII (1995), pp. 152-167.

⁴⁶ Cass R. Sunstein: «Rights and their Critics», *Notre Dame Law Review* No. 70 (1995), p. 730.

⁴⁷ See, e.g., Adamantia Pollis & Peter Schwab: «Human Rights: A Western Construct with Limited Applicability», cit., p. 13.

⁴⁸ OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *International Legal Materials* No. 21 (1982), p. 59.

community, and the state.⁴⁹ In the Charter, specific references are made to the duty of the children to respect and provide maintenance to their parents and of the individual to defend national independence and integrity. It could be easily assumed that the Charter makes reference to the former duty, as it is unthinkable to abandon family members in need within the African cultural tradition and probably also because of the African economic hardships that do not allow for state-financed welfare policies for the elderly. The Charter is thus tailored to the communal model that most African societies have developed. People in Africa are not only entitled to the enjoyment of rights but they have duties and obligations too, a combination that ensures the cohesion of their societies.⁵⁰

Criticism to the individualistic way of life and the liberal paradigm associated with the West has also come from advocates of the so-called «Asian values». Even if this term is misleading in the sense that there are considerable variations in terms of both values and human rights performance within Asia,⁵¹ empirical evidence shows that most states in Asia continue to interpret and implement human rights in ways that differ in important respects from the Western liberal democracies.⁵² Indeed, central to this perspective is the emphasis on societal order, the centrality of the family and communitarianism, which result in deference to the state and require a strong central government. Thus, proponents of Asian values, in particular political leaders of Singapore and Malaysia,⁵³ have asserted that «the expansion of the right of the individual to behave and misbehave as he [sic] pleases has come at the expense of orderly society». ⁵⁴ Asian values stress that community comes first, duties come before rights and individual freedom is

⁴⁹ See generally U. Oji Umozurike: *The African Charter on Human and Peoples' Rights*, Martinus Nijhoff Publishers, The Hague, Boston, London, 1997, pp. 63-66. For an extensive discussion of duties in the African context see Fatsah Ouguergouz: *The African Charter on Human and Peoples' Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Kluwer, The Hague, 2003, pp. 377-422.

⁵⁰ Makau wa Mutua: «The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties», *Virginia Journal of International Law* No. 35 (1999) pp. 339-380.

⁵¹ For instance, the «Asian values» debate and the challenge to universality of human rights do not seem to resonate in the Philippines. See Raul C. Pangalangan: «The Philippines – The Persistence of Rights Discourse vis-à-vis Substantive Social Claims», in Randall Peerenboom, Carole J. Petersen & Albert H. Y. Chen (eds.): *Human Rights in Asia...*, cit., p. 360. Similarly, it is noteworthy that the Constitutional Court of Taiwan has frequently resorted to constitutional jurisprudence of influential Western states, such as the United States and Germany. See Frederick Chao-Chun Lin: «The Implementation of Human Rights Law in Taiwan», in Randall Peerenboom, Carole J. Petersen & Albert H. Y. Chen (eds.): *Human Rights in Asia...*, cit., p. 316.

⁵² Randall Peerenboom: «An Empirical Overview of Rights Performance in Asia, France and the USA», in Randall Peerenboom, Carole J. Petersen & Albert H. Y. Chen (eds.): *Human Rights in Asia...*, cit., pp. 1-39.

⁵³ Albert H. Y. Chen: «Conclusion: Comparative Reflections on Human Rights in Asia», in Randall Peerenboom, Carole J. Petersen & Albert H. Y. Chen (eds.): *Human Rights in Asia...*, cit., p. 508.

⁵⁴ Fareed Zakaria: «Culture is Destiny: A Conversation with Lee Kuan Yew», *Foreign Affairs* No. 73 (1994), p. 111.

less important than effective governance, social order, political stability and low crime rates.⁵⁵ This perception is depicted in the 1993 Bangkok Declaration.⁵⁶ Indeed, human duties are consistent with religious teachings in Hinduism, Islam, Confucianism and also in Buddhism.⁵⁷

4.2 Prioritizing individual rights over collective rights

The individualistic orientation of the Universal Declaration is also evident in the absence of group or collective rights, despite their relevance in most non-European traditions and despite the earlier recognition of minority group rights by the League of Nations. Although the conspicuous absence of the right of peoples to self-determination from the Universal Declaration was subsequently remedied by its inclusion in common Article 1 of the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, minority (group) rights have occupied only a marginal place in international human rights law. Article 27 of the Covenant on Civil and Political Rights provides merely that

«In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.»

While essential to the preservation of minority cultures, these guarantees obviously are inadequate to respond to economic and political demands expressed by many minority and indigenous communities and nations.⁵⁸

The only universal document addressing minority rights in a comprehensive way is the 1992 UN Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities.⁵⁹ Yet, even this non-binding instrument does not recognize collective rights to minorities. In the words of the UN Working Group on Minorities in the Commentary to the Declaration:

«The rights of persons belonging to minorities are individual rights [...] The rights of peoples, on the other hand, are collective rights. While the right of peoples to self-

⁵⁵ See, e.g., Randall Peerenboom, Carole J. Petersen & Albert H. Y. Chen (eds.): *Human Rights in Asia...*, cit., pp. 3, 13; Rhonda L. Callaway: «The Rhetoric of Asian Values», in Rhonda L. Callaway & Julie Harrelson-Stephens (eds.): *Exploring International Human Rights – Essential Readings*, Lynne Rienner Publishers, Boulder, Co., London, 2007, pp. 114-116.

⁵⁶ *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, UN Doc. A/CONF.157/ASRM/8-A/CONF.157/PC/59 (1993).

⁵⁷ Sompong Sucharitkul: «A Multi-dimensional Concept of Human Rights in International Law», cit., p. 313.

⁵⁸ See, e.g., Hurst Hannum, «Rethinking Self-determination», *Virginia Journal of International Law* No. 34 (1993), p. 61.

⁵⁹ G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, at 210, U.N. Doc. A/47/49 (1992).

determination is well established under international law [...] it does not apply to persons belonging to minorities.»⁶⁰

4.3 Vertical approach: ignoring abuses in the private sphere

The dominant conceptualization of human rights addresses only harms done by governments to individuals and leaves largely unaddressed abuses committed by non-state actors and private parties. Thus, widespread abuses at home or by market forces and other non-state actors are beyond the reach of international human rights law.⁶¹

Feminist scholars assert that the international law of human rights is inadequate as a response to the global position of women because it has been developed in a gendered way and largely excludes women's perspectives.⁶² The drafters of the UDHR had rejected feminist-oriented proposals of the UN Commission on the Status of Women aiming at substantive, rather than formal, equality.⁶³ Even though some of their concerns were addressed,⁶⁴ numerous articles in the Declaration use masculine pronouns,⁶⁵ while the particular uses of «motherhood», «childhood» and «widowhood» in Article 25 reproduce the image of women primarily as domestically-focused mothers and wives.⁶⁶ Furthermore, a major obstacle to promoting and protecting women's rights is the structural absence of international human rights law (due to the public/private dichotomy) from the private sphere, which is perhaps the most significant site for the oppression of women. Many also argue that the state no longer poses the principal threat to human rights. Instead, the processes of militarism, economic restructuring, and trade and financial liberalization are thought to be the primary causes of human rights abuses.⁶⁷

⁶⁰ UN Doc. E/CN.4/Sub.2/AC.5/2005/2, 4 April 2005, at 5, para. 15.

⁶¹ See generally Andrew Clapham: *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006.

⁶² Hilary Charlesworth and Christine Chinkin: *The Boundaries of International Law – A Feminist Analysis*, Manchester University Press, Manchester, 2000, p. 232.

⁶³ Dianne Otto: «Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law», in Doris Buss & Ambreena Manji (eds.): *International Law: Modern Feminist Approaches*, Hart, Oxford and Portland, Or., 2005, p. 112.

⁶⁴ The efforts of the Commission on the Status of Women resulted, *inter alia*, in retaining Article 6 (the right to a legal personality), in including references to equality in Article 21 (political participation) and Article 23 (enjoyment of just conditions of work including remuneration). See, extensively, Johannes Morsink: «Women's Rights in the Universal Declaration», *Human Rights Quarterly* No. 13 (1991), pp. 243, 250-255.

⁶⁵ See, e.g., Article 23, para. 3: «Everyone who works has the right to just and favourable remuneration ensuring for *himself and his family* an existence worthy of human dignity».

⁶⁶ Dianne Otto: «Disconcerting 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law», *cit.*, p. 114.

⁶⁷ See, e.g., Anne Orford: «Contesting Globalization: A Feminist Perspective on the Future of Human Rights», *Transnational Law and Contemporary Problems* No. 8 (1998), pp. 173-178.

By the same token, the human rights corpus disregards abuses by institutions and/or groups which have gathered immense political and financial power due to the globalization process. The exploitation of individuals, peoples and natural resources by multinational corporations do not currently fall within the reach of international human rights law, as they are largely not considered to be afflicted by a state-like structure.⁶⁸ In a globalized world, the role of international human rights law is thus limited to redressing some consequences of human rights violations, but is not equipped to address their causes.⁶⁹

5. SIGNIFICANT DIVERGENCES BETWEEN THE NORTH (RICH) AND THE SOUTH (POOR)

The Declaration devotes 22 articles to civil and political rights and only five articles to economic, social and cultural rights. As a result, civil liberties are heavily emphasized and privileged, while economic, social and cultural rights, albeit included, are given less attention. This imbalance is not accidental, but it is structural to the philosophy of human rights and to the conditions of political possibility that make human rights an emancipatory strategy.⁷⁰ Moreover, the conventional wisdom in most Western states is that economic and social rights are not (and should not be) justiciable,⁷¹ although they have been recognized as justiciable in the jurisprudence of a number of developing countries such as India and South Africa.⁷²

Besides, the understanding of individual rights often differs between Western and non-Western (legal) cultures. For instance, the Western conception of the right to life does not extend beyond the right to a risk-free environment where life will not be deprived by anybody. Nevertheless, the right to life and non-deprivation of life can have a host of meanings like the right to quality of life or the right to have access to adequate food and clean water so as to avoid starvation and life-threatening diseases. For example, the Supreme Court of India has repeatedly interpreted the right to life under article 21 of the Indian Constitution to include, inter alia, the right to food, the right to water, or the right to a clean

⁶⁸ See, e.g., Eric de Brabandere: «Human Rights and Transnational Corporations – State Responsibility and the Limits of Direct Corporate Responsibility», *Human Rights and International Legal Discourse* No. 4 (2010), pp. 66-88.

⁶⁹ See, e.g., Tony Evans: *The Politics of Human Rights – A Global Perspective*, Second Edition, Pluto Press, London, 2005, p. 53.

⁷⁰ David Kennedy: «The International Human Rights Movement: Part of the Problem?», cit., pp. 109-110.

⁷¹ Mark Tushnet: «Social Welfare Rights and the Forms of Judicial Review», *Texas Law Review* No. 82 (2004), p. 1896.

⁷² See David Bilchitz: *Poverty and Fundamental Rights – The Justification and Enforcement of Socio-Economic Rights*, Oxford University Press, Oxford, 2007, pp. 136-177, 236-261.

and healthy environment.⁷³ Similar approach has also been followed in the jurisprudence of the Supreme Courts of other developing countries.⁷⁴

In addition, neither the Universal Declaration nor the subsequent UN human rights treaties have recognized the right to development despite decades of Third World advocacy to that effect.⁷⁵ These efforts are still facing persistent conceptual and political objections by influential Western states⁷⁶ and scholars,⁷⁷ although the view is also supported that the right to development is now a well-established human right.⁷⁸

6. THE CHALLENGE AHEAD: RECAPTURING UNIVERSALITY THROUGH A GENUINE DIALOGUE WITHIN AND ACROSS CULTURES

The brief overview of select issues presented above emphasized the particularities and silences of the Universal Declaration and the dominant conceptualization of the human rights regime. This was not done with a view to dismissing their merits altogether but with a view to stressing the need to listen to the variety of approaches and conceptions that (should) inform a genuine debate on the universality of human rights. The underlying idea of the universalists –that the concept of human rights has universal validity– and the underlying idea of the relativists –that contexts count– can both hold true and are not incompatible.⁷⁹ Notwithstanding postmodern aversion for universality and the impossibility to

⁷³ Arjun K. Sengupta: «Indian Constitutional Jurisprudence on Human Rights: Creating National Conditions for Development», in Subrata Roy Chowdhury *et al.* (eds.): *The Right to Development in International Law*, Martinus Nijhoff, Dordrecht, Boston, London, 1992, p. 225.

⁷⁴ Eyal Benvenisti: «Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts», *American Journal of International Law* No. 102 (2008), pp. 258-260.

⁷⁵ Some of the most prominent proponents of the right to development include, *inter alia*, Keba M'Baye: «Le droit au développement comme un droit de l'homme», *Revue des Droits de l'Homme* No. 5 (1972), pp. 505-534, Hector Gros Espiell: «The Right to Development as a Human Right», *Texas International Law Journal* No. 16 (1981), pp. 189-205 and Christopher G. Weeramantry: «The Right to Development», *Indian Journal of International Law* No. 25 (1985), pp. 482-505.

⁷⁶ The General Assembly Declaration 41/128 on the right to development was adopted on 4 December 1986 by 146 votes in favour, one against (the United States) and eight abstentions (Denmark, Finland, Germany, Iceland, Israel, Japan, Sweden and the United Kingdom).

⁷⁷ See, e.g., Antonio Cassese: *International Law*, second edition, Oxford University Press, New York, 2005, p. 507 («audacious and far-reaching demands concerning the reshaping of international economic relations») and 508, n. 4 («on the whole, this and other similar texts were misguided»). See also Malcolm Shaw: *International Law*, 5th edition, Cambridge University Press, Cambridge, 2003, p. 281 («it is premature to talk in terms of a legal right in international law of groups or peoples or states to development»).

⁷⁸ See Koen de Feyter: *World Development Law...*, cit., p. 33.

⁷⁹ See to this effect Susan Marks & Andrew Clapham: «Universality», in Susan Marks & Andrew Clapham (eds.): *International Human Rights Lexicon*, Oxford University Press, Oxford, 2005, p. 397.

establish universality in the anthropological sense, the concept of human rights deserves and has acquired universal validity. What is more, the emancipatory and liberationist potential of human rights needs to be broadened and strengthened so as to become all-inclusive.

Indeed, if universality is to have any meaningfulness for all states, cultures and peoples of the world, it should not be identified with just one of them and ignore the input of others. If we want more than just the concept of human rights to be universal, it is essential to open up the human rights discourse to those whose aspirations it has always intended to embody, to incorporate and reflect the tremendous diversity within the international community.⁸⁰ In the words of ICJ Judge Abdul Koroma:

«The quest to define [universally applicable human rights norms] must begin in multiple legal traditions, for no culture can contain all the universal answers towards which all other cultures should aspire.»⁸¹

This would require a threefold endeavor. First, we should understand such (cultural and other) contexts not as static and predetermined ways of life, but as dimensions of difference, subject to constant change, negotiation and debate through a continuous open-ended process of internal dialogue and external interaction; a cross-fertilization of cultures if a (truly) universal human rights corpus is to emerge.⁸² For cultures to effectively shape and define the very personhood for which human rights were invented, they need to be reconfigured into less rigid and more contingent terms. Cultures are neither unified nor static; they are space and time conditioned.⁸³

An illustration of this point of how (perceptions about) cultures change with time within societies is a recent decision by the Supreme Court of Papua New Guinea, which interpreted the constitutional provision for the application of custom in the country as meaning «only good customs that do not go against the basic principles of humanity which values every human being».⁸⁴ The Court acknowledged that the custom of polygamy «did have its place and for good

⁸⁰ Karin Mickelson: «How Universal is the Universal Declaration?», cit., p. 47.

⁸¹ Abdul G. Koroma: «International Law and Multiculturalism», in Sienho Yee & Jacques-Yvan Morin (eds.): *Multiculturalism and International Law...*, cit., p. 84.

⁸² See to the same effect Ann-Belinda S. Preis: «Human Rights as Cultural Practice: An Anthropological Critique», cit., pp. 289-290; Susan Marks & Andrew Clapham: «Culture», cit., p. 40; Richard D. Schwartz: «Human Rights in an Evolving World Culture», in Abdullahi Ahmed An-Na'im & Francis M. Deng (eds.): *Human Rights in Africa: Cross-Cultural Perspectives*, The Brookings Institution, Washington, DC, 1990, p. 382.

⁸³ Albert H. Y. Chen: «Conclusion: Comparative Reflections on Human Rights in Asia», cit., p. 509; Samuel K. Murumba: «Cross-Cultural Dimensions of Human Rights in the Twenty-First Century», in Christopher G. Weeramantry, Antony Anghie & Garry Sturgess (eds.): *Legal visions of the 21st Century: Essays in Honour of Judge Christopher G. Weeramantry*, Kluwer, The Hague, 1998, p. 240.

⁸⁴ *Kumbamong v. State* [2008] PGSC 51; SC1017 (29 September 2008), para. 49.

reason» in the country in the past.⁸⁵ However, the Court went on to challenge the practice of polygamy in present day Papua New Guinea, which is «a cash base [sic] economy with the presence of a lot of medical establishments with a good number of doctors and other health workers, who have helped contribute to making infant mortality almost a something of the past». Significantly, the Court stressed that the nation was also premised upon –constitutionally-endorsed– Christian values, which are against polygamy and extra marital relations, along the «good traditional values».⁸⁶

Second, we should engage in such an internal dialogue and self-reflection ourselves in our respective cultural and societal contexts. This requires pondering on whether our own concept(ion)s and approaches are all indeed prone to human betterment. We should perhaps reconsider, for example, whether many of the evils in our societies are due to individualistic perceptions we consider as sacrosanct and which alienate many of us from the nuclei of family, community, society and other smaller or larger units of a shared life.

Our own internal/intracultural dialogue could then facilitate the process of an instructive cross/intercultural dialogue with a view to gaining valuable insights from other cultures that could foster mutual tolerance, sensitivity and solidarity;⁸⁷ a process that requires reciprocal recognition of the incompletenesses and weaknesses of all cultures⁸⁸ and could eventually bring about a «new universality of cosmopolitanism in a cross-cultural dialogue».⁸⁹ This «new universality» can be the challenge for the next decades; and, hopefully, a cause for celebration during future anniversaries of the Universal Declaration of Human Rights.

⁸⁵ *Ibid*, para. 49. The Court explained these reasons as follows: «[B]ig men with many customary and social obligations had a lot of land and was [sic] required to take a lot of leadership responsibilities, such as paying of compensation and other customary obligations. [...] He built houses for each of his wives and accommodated them and their children and kept them well fed. Another good reason was that, due to a lack of proper medical care, infant mortality was high even to the extent of even threatening the existence of even a whole tribe».

⁸⁶ *Ibid*, para. 50.

⁸⁷ See to the same effect David R. Penna & Patricia J. Campbell: «Human Rights and Culture: Beyond Universality and Relativism», *Third World Quarterly* Vol. 19 (1998) p. 22.

⁸⁸ Boaventura de Sousa Santos: «Toward a Multicultural Conception of Human Rights», *cit.*, p. 22.

⁸⁹ *Ibid*, pp. 26, 30.