

# HOW UNIVERSAL IS THE UNIVERSAL DECLARATION?

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All discourse on human rights is ... necessarily marked by the author's *position* ... . The first thing to do when confronted with such discourse is to situate it, to determine, as rigorously as possible, the place from which it is spoken: on this condition alone it can be understood, assimilated and, should circumstances require, demystified.<sup>1</sup>

Purporting to set forth “a common standard of achievement for all peoples and all nations” the General Assembly of the United Nations adopted the *Universal Declaration of Human Rights* in 1948, by a vote of 48-0, with 8 abstentions.<sup>2</sup> In the fifty years since that time, international human rights law has grown and developed enormously.<sup>3</sup> Nonetheless, the *Universal Declaration* itself continues to enjoy a unique status. Despite its lack of a formal legally binding quality at the time of its adoption,<sup>4</sup> many have argued that the Declaration has passed into the corpus of customary international law, and is thus binding upon all states.<sup>5</sup> Even more important, however, is the Declaration's quasi-mystical significance. When one author refers to it as the “gospel” of the human rights movement<sup>6</sup> he is only making explicit what many writers presuppose: that the Declaration is the normative foundation of international human

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<sup>1</sup>P. J. Hountondji, “The master's voice – remarks on the problem of human rights in Africa”, in *Philosophical Foundations of Human Rights* (Paris: UNESCO, 1986) 319 at 331.

<sup>2</sup>UNGA Res, 217(III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc A/810 (1948).

<sup>3</sup>Following the adoption of the *Universal Declaration* itself, efforts to develop a legally binding instrument embodying human rights norms resulted in two covenants, the *International Covenant on Civil and Political Rights* [(1966) 999 U.N.T.S. 171, 1976 Can. T.S. No. 47] and *International Covenant on Economic, Social and Cultural Rights* [(1966) 993 U.N.T.S. 3, 1976, 1976 Can. T.S. No. 46]. For a general and illuminating discussion of the development of the Declaration and the Covenants see J.P. Humphrey, *Human Rights and the United Nations* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984). International human rights law has also been developed through a large number of international agreements dealing either with specific rights (e.g. the prohibition of torture) or with the rights of specific groups (e.g. the rights of women). In addition to these various agreements of global scope, regional human rights instruments have been concluded in Europe, the Americas, and Africa.

<sup>4</sup>As a resolution of the General Assembly, the Declaration had no formal legal status. However, its significance was enhanced by the fact that it was intended to elaborate upon the commitment made in Article 1(3) of the United Nations Charter to achieve international cooperation in “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

<sup>5</sup>For a discussion of the status of the *Universal Declaration* as custom see L. B. Sohn, “The New International Law: Protection of the Rights of Individuals Rather Than States” (1982) 32 *American University Law Review* 1 at 17; Humphrey, *supra* note 3 at 65, 75-76.

<sup>6</sup>M. Mutua, “The Ideology of Human Rights” (1996) 36 *Virginia Journal of International Law* 589 at 589 footnote 1.

rights. As such, it is the centerpiece of a discourse that has come to occupy a dominant position in current thinking. As one writer recently asserted:

The past few decades have witnessed the inexorable rise of the application of international human rights law as well as the extension of a wider public discourse on human rights, to the point where human rights could be seen as one of the most globalised political values of our times. The language of liberal human rights has moved in to fill the vacuum left by the demise of grand political narratives in the aftermath of the Cold War. Notwithstanding disputes over their conceptualisation and application, human rights are among the few utopian ideals left, and there is a remarkable degree of consensus by governments on the principle at least that certain rights be protected under international law.<sup>7</sup>

The fact that the Declaration was adopted without any negative votes is frequently cited as an important factor in its subsequent evolution, and the importance of the eight absentions is downplayed. Needless to say, the debates regarding the Declaration had not been without controversy; for example, Canada, although it voted in favour at the General Assembly, had abstained during the vote in the Third Committee.<sup>8</sup> Nevertheless, the unwillingness of any state to vote against the Declaration is regarded as significant, because of the assumption that, while the Declaration itself might be flawed from some perspectives, the norms embodied therein were not rejected outright by any member of the international community. John Humphrey, the Canadian head of the Human Rights Commission generally credited with producing the first draft of the Declaration, notes that the Socialist bloc offered a variety of justifications for abstention, many revolving around the basic concern that the rights enumerated in the Declaration could not be guaranteed under socio-economic conditions existing at the time.<sup>9</sup> Saudi Arabia did not explain its abstention, but Humphrey points out that the Saudi representative in the Third Committee had expressed concern regarding the assertion in Article 18 that the right to freedom of thought, conscience and religion includes the freedom to change one's religion, arguing that this was inconsistent with Islamic law.<sup>10</sup> The only state that could be said to come close to rejection was South Africa, which abstained because of concerns about the potential legal significance of the Declaration.<sup>11</sup> From the point of view of human rights advocates, this abstention could almost be regarded as providential: the pariah exception that proves the rule.

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<sup>7</sup>R.A. Wilson, "Human Rights, Culture and Context: An Introduction" in R. A. Wilson, ed., *Human Rights, Culture and Context: Anthropological Perspectives* (London; Chicago: Pluto Press, 1997) 1-27 at 1.

<sup>8</sup>A position that Humphrey criticized sharply, *ibid.* at 71-72.

<sup>9</sup>Humphrey, *supra* note 3 at 72-73.

<sup>10</sup>*Ibid.* at 73. Humphrey also notes that this interpretation of Islamic law was not accepted by other Muslim participants in the debates.

<sup>11</sup>A concern that Humphrey regards as "from the point of view of the future of the Declaraton, most discerning": *ibid.*

In these discussions there appears to be only a hint of what would widely come to be regarded as a central controversy in international human rights law: the implications of differing cultural perceptions of human rights for the viability of international, let alone “universal”, standards. This has translated into an ongoing theoretical debate between advocates of the universality of international human rights norms and those who reject, or at least question, universality. The latter assert the lack of a transcultural consensus regarding either the values human rights are supposed to embody or the appropriateness of using the mechanism of “rights” as a means of protecting such values. This debate strikes at the heart of international human rights law, the origins of which are generally traced to a widespread desire to respond to Nazi atrocities, and to put in place a set of international standards to safeguard human dignity.<sup>12</sup>

This theoretical debate has obvious political and practical implications. Perhaps most notably, it is reflected in recent calls for a “review” of the *Universal Declaration*. In 1997, Prime Minister Mahathir Mohamad of Malaysia raised the hackles of the international human rights community by suggesting that as part of the upcoming commemoration of the fiftieth anniversary of the *Universal Declaration*, a review of the Declaration be undertaken.<sup>13</sup> He pointed out that at the time of the adoption of the Declaration, the United Nations had 56 member states. In the intervening decades, the membership of the organization has more than tripled, with the diversity of views represented undergoing a similar expansion. The Declaration should therefore be revisited to reflect this change and to make it truly representative of the views of the international community as a whole. Similarly, there have been proposals for the proclamation of a “Universal Declaration of Human Responsibilities”, intended to

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<sup>12</sup>See for example J. Morsink, “World War Two and the *Universal Declaration*” (1993) 15 *Human Rights Quarterly* 357. F. R. Teson, “International Human Rights and Cultural Relativism” (1985) 25 *Virginia Journal of International Law* 869 at 885 makes this connection in the strongest possible terms, stating,

From its inception at the end of World War II, the modern international law of human rights has been indissolubly linked with the moral concerns prompted by the Nazi horrors. The statesmen who drafted the U.N. Charter were motivated in part by the moral imperative to restore human dignity and give it legal status, and indeed that moral concern permeates the subsequent development of human rights law.

<sup>13</sup>See S. Sun, “Is the individual supreme? Or should country and community come first?”, *Asiaweek*, (31 October 1997) 24-28. For an example of the reaction from the human rights community, see the introduction to Human Rights Watch’s “World Report 1998” (released on 10 December 1997 in order to coincide with the beginning of the year-long celebrations of the fiftieth anniversary), available online at <<http://www/hrw.org/research/worldreport.html>>. After an assertion of the increasing marginalization of the so-called “Asian concept of human rights”, the Report bluntly states:

Malaysian Prime Minister Mahathir bin Mohamad provided the best explanation of the emptiness of the economic justification for repression. In July, he proposed a review of the *Universal Declaration of Human Rights*, as if the freedoms of expression and association that it guaranteed were inapplicable to Asia. By the end of the year, taking advantage of the diminished risk of contradiction that comes from the absence of free public debate, he deepened his country’s economic crisis by attempting to deflect blame for it to foreign currency speculators.

complement the existing Declaration by setting forth “the responsibilities that go along with human rights.”<sup>14</sup>

This article seeks to present a context within which to evaluate these challenges to the universality of the *Universal Declaration*. It begins with a consideration of the general bases for challenges to universality, proceeds to examine four representative positions taken within the scholarly debate concerning the universality of human rights,<sup>15</sup> and analyzes the controversy surrounding the debate and its political subtext. Alternative views that attempt to move beyond the impasse of the debate are then explored. The article concludes with a consideration of the implications for the *Universal Declaration*. It is argued that challenges to the Declaration must be understood and evaluated within a broader philosophical, political and historic context, and that the tendency to dismiss them out of hand is a misguided and counterproductive attempt to exclude dialogue and debate about human rights at the present time.

### **Challenges to universality: The context of the debate**

Universality as an ideal in the international system has been challenged from a number of different perspectives: what does such universality mean in a world characterized by philosophical skepticism and a plurality of cultures and states?

In the first place, there are philosophical challenges to the universality of human rights. The philosophical foundations of international human rights were the subject of considerable controversy even during the process leading up to the *Universal Declaration*: Delegations at the Human Rights Commission debated whether human rights should be grounded in a reference to transcendent “nature”, or to “God”.<sup>16</sup> A deliberate choice was made to avoid the controversy these references would trigger; instead, human rights were grounded in the seemingly uncontroversial notion of human dignity. The Preamble to the *Universal Declaration* refers to the “dignity and worth of the human person”; Article 1 proclaims, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” The status of human dignity as the source of human rights is made explicit in the International Covenants, both of which state that human rights “derive from the inherent dignity of the human person.”<sup>17</sup>

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<sup>14</sup>F. Ching, “Responsibilities and Rights” *Far Eastern Economic Review*, (13 November 1997) 38.

<sup>15</sup>It should be emphasized that this paper does not represent an attempt to undertake an exhaustive canvassing of the vast and complex literature in this area, but simply highlights the major themes and some of the prominent voices.

<sup>16</sup>Humphrey, *supra* note 3 at 67.

<sup>17</sup>Preambles to both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, *supra* note 3.

Characterizing human rights in terms of human dignity, while providing a conceptual foundation for this area, simply postponed the definitional dilemma to a later stage of inquiry. The question then becomes – what is “human dignity”? Can it be defined in a way that avoids essentialist assumptions about human beings, human nature, and human aspirations? While some scholars have attempted such a definition,<sup>18</sup> others have come to regard the enterprise as futile. Noting the growing disinclination “to take ‘theories of human nature’ seriously”,<sup>19</sup> for example, Richard Rorty implies that the search for foundations of human rights in an understanding of human nature that transcends culture, time and place is a misguided endeavour. Rorty does not think that this renders human rights themselves meaningless; instead, he feels that their justification must lie in the passionate conviction of human rights activists rather than any overarching and unassailable theoretical foundation.<sup>20</sup> However, such a conclusion leaves certain important questions unanswered, most notably the question of how a human rights advocate confronts an opponent who is equally committed to her own opposing point of view. Such an approach has also been criticized for leaving human rights with very flimsy support. As one writer puts it, “Rights without a metanarrative is like a car without seat-belts; on hitting the first moral bump with ontological implications, the passengers’ safety is jeopardised.”<sup>21</sup>

Another challenge to the notion of an uncontroversial understanding of human dignity has come from those who emphasize the impact of culture. The concern expressed is that there is no transcultural understanding of “human dignity”; in other words, that there is no “universal” understanding of what human dignity means outside of particular cultural and social contexts. In particular, commentators have expressed reservations about the tendency to “universalize” the highly individualistic orientation of modern, Western societies. As Jack Donnelly notes, “The very idea of human rights does entail a certain individualism. Each person, simply as an individual human being, is specially entitled to the treatment demanded by human rights.”<sup>22</sup> In part as a response to the perceived failures of the system of minority rights protection under the League of Nations system, the post-World War II preference was for safeguarding even cultural, religious and linguistic rights as pertaining to individual members of groups

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<sup>18</sup>For recent examples of such attempts see B.S. Turner, “Outline of a Theory of Human Rights” (1993) 27 *Sociology* 3:489-512 (formulating a theory of human rights grounded in a “sociology of the body” emphasizing human frailty); M. Freeman, “The Philosophical Foundations of Human Rights” (1994) 16 *Human Rights Quarterly* 491-514 (considering a number of different approaches to the problem and expressing a preference for an approach grounded in the notion of agency).

<sup>19</sup>Richard Rorty, “Human Rights, Rationality and Sentimentality” in S. Shute & S. Hurley, eds., *On Human Rights (The Oxford Amnesty Lectures 1993)* (New York: Basic Books, 1993) 111 at 115.

<sup>20</sup>As another commentator has noted, “The anti-foundationalist approach to human rights does not reject the validity of the human rights doctrine, but only the claim that its validity has a foundation deeper than the beliefs and values of human rights supporters.” Freeman, *supra* note 18 at 498.

<sup>21</sup>Wilson, *supra* note 7 at 8.

<sup>22</sup>J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989) at 90.

rather than the groups themselves.<sup>23</sup> In contrast, it is often argued that many if not most cultures balance the interests of the individual and society in the opposite way, placing greater importance on communitarian or societal values.<sup>24</sup>

The discipline of anthropology has been associated with emphasizing the dangers involved in assuming that notions of morality and ethics transcend culture, and in projecting the individualism characteristic of modern Western society onto other cultures. In the process leading up to the adoption of the *Universal Declaration* itself, for example, the American Anthropological Association submitted a “Statement on Human Rights” to the United Nations Human Rights Commission.<sup>25</sup> The statement represents an attempt to address the question, “How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?”<sup>26</sup> The Statement wastes no time in identifying the crux of the matter:

The problem is thus to formulate a statement of human rights that will do more than just phrase respect for the individual as an individual. It must also take into full account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably linked.<sup>27</sup>

In order for the proposed Declaration to avoid replicating these mistakes, the Statement proposes that it include three basic principles:

- 1) The individual realizes his personality through his culture, hence respect for individual differences entails a respect for cultural differences.<sup>28</sup>
- 2) Respect for differences between cultures is validated by the scientific fact that no technique of qualitatively evaluating cultures has been discovered.<sup>29</sup>

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<sup>23</sup>See for example Article 27 of the *International Covenant on Civil and Political Rights*, *supra* note 3.

<sup>24</sup>As one commentator notes, “According to other concepts ... the individual has a value as an integral part of a group, only as a part of the family, the tribe or even a larger group, or the individual has value only insofar as he serves God.” S. Sucharitkul, “A Multi-Dimensional Concept of Human Rights in International Law” (1987) 62 *Notre Dame Law Review* 305, at 306-307.

<sup>25</sup>American Anthropological Association, “Statement on Human Rights” (1947) 49 *American Anthropologist* 539.

<sup>26</sup>*Ibid.* at 539.

<sup>27</sup>*Ibid.*

<sup>28</sup>*Ibid.* at 541.

<sup>29</sup>*Ibid.* at 542.

- 3) Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.<sup>30</sup>

The Statement is a fascinating text. It is a scathing indictment of Western arrogance vis-à-vis non-Western cultures and, at the same time, an impassioned plea for tolerance of cultural diversity. While it has come under attack from a variety of sources,<sup>31</sup> it remains one of the clearest articulations of a pure “cultural relativist” stance vis-à-vis human rights.<sup>32</sup> The Statement does not reject the notion of a Declaration altogether, and even appears to regard the task of drafting such a document as a worthy, albeit difficult, endeavour. Its primary concern is that the Declaration be what it purports to be instead of a Western manifesto masquerading as a document of universal applicability: “The rights of Man in the Twentieth Century cannot be circumscribed by the standards of any single culture, or be dictated by the aspirations of any single people.”<sup>33</sup> To the extent that the Declaration fails to “embrace and recognize the validity of many different ways of life”, it fails to be a statement of human rights, and will instead “lead to frustration, not realization of the personalities of vast numbers of human beings.”<sup>34</sup>

Finally, the philosophical and cultural dimensions of arguments against universality must also be placed in the context of the existing international system, with its division into sovereign states. The classic argument regarding state sovereignty posits that human rights within states are beyond the realm of international scrutiny. In part because of the prevalence of this type of argument during the early years of the international human rights system, state sovereignty has come to play an important role in human rights discourse – it is blamed for a multitude of evils. In fact, sovereignty is sometimes portrayed as the antithesis of human rights. The latter is said to represent a set of internationally recognized standards, while the former is the last refuge of the scoundrel government. In fact, the extreme form of state sovereignty argument is rarely, if ever, invoked in current debates. Instead, concerns tend to be expressed about

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<sup>30</sup>*Ibid.*

<sup>31</sup>The Statement was criticized by contemporary commentators who argued that its emphasis on the “science” of human culture was misleading; see J. H. Steward, “Comments on the Statement on Human Rights” (1948) 50 *American Anthropologist* 351; H.G. Barnett, “On Science and Human Rights” (1948) 50 *American Anthropologist* 352.

<sup>32</sup>For a discussion of more recent anthropological literature regarding human rights, see the discussion in the text accompanying notes 136 to 148, *infra*. See also A.-B.S. Preis, “Human Rights as Cultural Practice: An Anthropological Critique” (1996) 18 *Human Rights Quarterly* 286.

<sup>33</sup>Statement on Human Rights, *supra* note 25 at 543.

<sup>34</sup>*Ibid.*

“politicization” of human rights and “conditionality” in relation to trade or development assistance. Moreover, there is considerable overlap between political concerns and concerns regarding culture, as will be explored below.

### **Universality vs. particularity: Positions within the human rights debate**

Against that preliminary backdrop, the various approaches to the issue of the universality of human rights norms can be separated into four broad categories:

- 1) **The concept of human rights is of Western origin, and cannot be simply transplanted outside of that unique cultural and philosophical context. Each culture has its own concept of human dignity and how it should best be protected; while there may be similarities between the various approaches, they cannot be reduced to a common foundation.**

A 1980 piece by Adamantia Pollis and Peter Schwab, “Human Rights: A Western Construct with Limited Applicability”,<sup>35</sup> is often cited as an articulation of this position. The authors espouse the view that conceptions of human dignity and social justice are defined within, and strongly influenced by, specific historical, cultural and ideological contexts. As Pollis has stated elsewhere, “Human rights, both in their philosophic and/or theoretical formulation and their practice, are rooted in the specifics of particular societies and civilizations.”<sup>36</sup> Pollis and Schwab argue that “in most states in the world, human rights as defined by the West are rejected or, more accurately, are meaningless.”<sup>37</sup> These authors have played an extremely important role in the universality debate; one might almost say that if Pollis and Schwab had not existed, the proponents of universality would have had to invent them. Unfortunately, the title of their article has come to have a great deal more visibility than their actual arguments, most of which have tended to be glossed over, and the most problematic of which have been subjected to merciless critique.

Pollis and Schwab begin by grounding their analysis in an attempt to account for the controversy surrounding the concept of human rights:

It is becoming increasingly evident that the Western political philosophy upon which the Charter and the Declaration are based provide only one particular interpretation of human rights, and that this Western notion may not be successfully applicable to non-Western areas for several reasons: ideological differences whereby economic rights are given priority over individual civil and political rights and cultural differences whereby

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<sup>35</sup>A. Pollis & P. Schwab, “Human Rights: A Western Construct with Limited Applicability” in A. Pollis and P. Schwab, eds., *Human Rights: Cultural and Ideological Perspectives*, (New York: Praeger, 1980) 1.

<sup>36</sup>A. Pollis, “Liberal, Socialist and Third World Perspectives on Human Rights”, in P. Schwab & A. Pollis, eds., *Towards a Human Rights Framework* (New York: Praeger, 1982) 1-26.

<sup>37</sup>Pollis & Schwab, *supra* note 35 at 13.



the philosophic underpinnings defining human nature and the relationship of individuals to others and to society are markedly at variance with Western individualism.<sup>38</sup>

They proceed to trace the roots of human rights theory to a particular historical period (seventeenth to twentieth centuries) and a particular geographical location (England, France and the United States).<sup>39</sup> They emphasize that the philosophical foundation of human rights, the notion of the “autonomous individual and his inherent rights”, was seen not only as explaining but as justifying the new social order emerging at that time, going on to become “part of the prevailing shared values of Western societies.”<sup>40</sup> Pollis and Schwab emphasize Western dominance of the international community when the United Nations was established, and point out that the *Universal Declaration* “was adopted at a time when most Third World countries were still under colonial rule.”<sup>41</sup> Given this, they bluntly assert that “to argue that human rights has a standing which is universal in character is to contradict historical reality.”<sup>42</sup> In particular, with respect to the *Universal Declaration*, they note:

[I]n essence the *Universal Declaration of Human Rights* is a document whose underlying values are democratic and libertarian, based on the notion of atomized individuals possessed of certain inalienable rights in nature. ... The Declaration is predicated on the assumption that Western values are paramount and ought to be extended to the non-Western world.<sup>43</sup>

Most states, in contrast, “do not have a cultural heritage of individualism, and the doctrines of inalienable human rights have been neither disseminated nor assimilated.”<sup>44</sup> Instead, the focus in most societies is on communitarian values. Moreover, in societies engaged in a process of modernization, the state itself takes on a central role: “the state — as a substitute for the traditional communal group — has become the embodiment of the people, and the individual has no rights or freedoms that are natural and outside the purview of the state.”<sup>45</sup> Thus:

The cultural patterns, ideological underpinnings, and developmental goals of non-Western and socialist states are markedly at variance with the prescriptions of the *Universal Declaration of Human Rights*. Efforts to impose the Declaration as it

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<sup>38</sup> *Ibid.* at 1.

<sup>39</sup> *Ibid.* at 2.

<sup>40</sup> *Ibid.* at 3.

<sup>41</sup> *Ibid.* at 4.

<sup>42</sup> *Ibid.* at 4.

<sup>43</sup> *Ibid.* at 8.

<sup>44</sup> *Ibid.* at 13.

<sup>45</sup> *Ibid.* Not surprisingly, this is regarded as one of the most controversial elements of Pollis & Schwab's analysis.

currently stands not only reflect a moral chauvinism and ethnocentric bias but are also bound to fail.<sup>46</sup>

Pollis and Schwab assert the need for a rethinking of human rights, based on a recognition of the particular historical circumstances in which the Western understanding of human rights evolved.<sup>47</sup> They argue:

[R]ather than focusing on additional legal mechanisms for imposing the West's philosophic doctrines of individual and inalienable human rights on the non-Western world, discussion of the issue of human rights should begin with the differing historical and contemporary circumstances of non-Western societies.<sup>48</sup>

These authors indicate that all societies have notions of human dignity and even human rights,<sup>49</sup> and it is clear that they do not reject the *possibility* of universality.<sup>50</sup> However, the focus of their argument is on destabilizing the presumption that such universality already exists, and that it conveniently overlaps with standard Western views of human rights. Instead, they argue, "If the notion of human rights is to be a viable universal concept it will be necessary to analyze the differing cultural and ideological conceptions of human rights and the impact of one on the other."<sup>51</sup> The problem with standard approaches to human rights is not only that they reflect a Western bias, but that "there has been a tendency to view human rights ahistorically and in isolation from their social, political and economic milieu."<sup>52</sup> Thus, according to Pollis and Schwab:

What is being advocated here is a rethinking of the conception of human rights that both takes into account the diversity in substance that exists and recognizes the need for extensive analysis of the relationship of human rights to the broader social context. Through this process it may become feasible to formulate human rights doctrines that are more validly universal than those currently propagated.<sup>53</sup>

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<sup>46</sup>*Ibid.* at 14.

<sup>47</sup>*Ibid.*

<sup>48</sup>*Ibid.*

<sup>49</sup>*Ibid.* at 15.

<sup>50</sup>*Ibid.* For example, they state, "Despite divergences in conceptions of what constitutes the conception of human dignity, there seem to be certain shared commonalities that warrant further investigation."

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.* at 17.

<sup>53</sup>*Ibid.*

- 2) **The concept of human rights is of Western origin, but is of universal applicability. It developed out of the unique set of historical and political circumstances, but constitutes an appropriate and essential set of safeguards for the individual living in a modern industrial society.**

Two well-known proponents of this view are Jack Donnelly and Rhoda Howard. Both argue that the development of the concept of human rights – that is, rights based exclusively on one's existence as a human being – is closely linked with the tradition of Western liberalism. They assert that “[t]he standard list of human rights in the *Universal Declaration of Human Rights* can be easily derived from the liberal conception of the individual and the state”<sup>54</sup> and that “the near-perfect fit between liberalism and the *Universal Declaration* reflects a deep and essential theoretical connection.”<sup>55</sup>

They recognize the importance of notions of human dignity in international human rights instruments, but insist that human dignity and human rights are quite distinct.<sup>56</sup> Intriguingly, they seem to place human dignity and human rights on opposite sides of the universality/particularity continuum:

Conceptions of human dignity, in their social and political aspects, express particular understandings of the inner (moral) nature and worth of the human person and his or her proper (political) relations with society. By contrast, human rights are the equal and inalienable rights (in the strong sense of entitlements that ground particularly powerful claims against the state) that each person has simply as a human being.<sup>57</sup>

Donnelly and Howard acknowledge that human rights “are a particular social practice that aims to realize a distinctive substantive conception of human dignity.”<sup>58</sup> However, that particular social practice is one of universal applicability. In contrast,

Conceptions of human dignity vary dramatically across societies, and most of these variations are incompatible with the values of equality and autonomy that underlie human rights. Most regimes, and their underlying social conceptions of human dignity, necessarily deny both the idea and the practice of human rights.<sup>59</sup>

Donnelly and Howard then go even further, arguing that a liberal regime is the only type of political regime that is consistent with human rights: “Other types of regimes, and the conceptions of human dignity on which they rest, may be defensible on other

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<sup>54</sup>R.E. Howard and J. Donnelly, “Human Dignity, Human Rights and Political Regimes”, in Donnelly, *supra* note 22, 66 at 71.

<sup>55</sup>*Ibid.*

<sup>56</sup>*Ibid.* at 66.

<sup>57</sup>*Ibid.* at 66-67.

<sup>58</sup>*Ibid.* at 67.

<sup>59</sup>*Ibid.*

moral or political grounds, but they will not stand up to scrutiny under the standard of human rights.”<sup>60</sup>

Donnelly is not unaware of the probability of attack from those who regard this view as Eurocentric. Perhaps that is part of the reason for his insistence on characterizing human rights as “a quintessentially modern phenomenon, a response to the creation of capitalist market economies and modern nation states”,<sup>61</sup> and thus lacking in traditional society, whether Western or non-Western. Donnelly argues that prior to modernization, “the problems that human rights seek to address, the particular violations of human dignity that they seek to prevent, either did not exist or were not widely perceived to be central social problems.”<sup>62</sup> To the extent that he considers the ways in which an embrace of human rights can lead to an erosion or shift in traditional values, he seems to regard such a process as inevitable, almost evolutionary:

Westernization, modernization, development, and underdevelopment – for better or worse, the dominant contemporary social and economic forces – have in most places significantly separated the individual from the small, supportive traditional community. Economic, social and cultural changes in and disruptions of traditional communities have often removed the support and protection that would “justify” or “compensate for” the absence of individual human rights ... . Society, which once protects a person's dignity and provided a place in the world, now appears, in the form of the modern state, the modern economy, and the modern city, as an oppressive, alien power that assaults people's dignity and that of their families. ... In such circumstances, human rights appear to be a “natural” response to changing conditions, a logical and necessary evolution of the means to realize human dignity.<sup>63</sup>

Donnelly goes so far as to draw an analogy between the problems associated with modernity to the seatbelt: “Seatbelts – human rights – first emerged in the West because that is where the cars first were. But once cars began to run amok on the streets in other parts of the world, they brought with them the need for seatbelts and all the rest.”<sup>64</sup> The analogy with seatbelts is telling: after all, who could object to a seatbelt, unless one were simply obstinately resistant to accepting protections for one's own personal safety? The argument is presented in a straightforward manner, without triumphalism. The process of modernization is upon us all; we might as well seek out the standards that will make it tolerable. Donnelly even raises the possibility that modern states and markets “may not be a good thing”, such that “the West can perhaps

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<sup>60</sup>*Ibid.*

<sup>61</sup>Donnelly, *supra* note 22 at 64. See also R.E. Howard, “Dignity, Community and Human Rights”, in A.A. An-Na'im, ed., *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 81.

<sup>62</sup>Donnelly, *Ibid.*

<sup>63</sup>*Ibid.* at 60.

<sup>64</sup>*Ibid.* at 64.

be *blamed*, rather than praised, for inventing (or, rather, having been forced to invent) human rights.”<sup>65</sup>

Notions of human dignity are somehow presented as static, unable to adapt to or to adequately address modern conditions of alienation. Perhaps even more importantly, according to Donnelly, “Alternative conceptions of human dignity amount to challenges to the idea of human rights.”<sup>66</sup> Donnelly argues that the attempt to equate notions of human dignity with human rights could have negative impacts both in countries with “established human rights practices”, (read: the West) and in other parts of the world (read: the Rest).<sup>67</sup> In the latter, “it would become easier for a repressive regime to cloak itself in the mantle of human rights while actually violating them, thereby turning ‘human rights’ into an instrument of oppression rather than liberation.”<sup>68</sup> In the former, “the conceptual bases of human rights are likely to be eroded, thereby weakening the practice.”<sup>69</sup>

**3) The concept of human rights is universal; each cultural tradition has analogous concepts, although the actual language of “rights” may not be used.**

A great deal of energy has been devoted to attempts to find analogies to ideas of human rights in various cultural and religious traditions. Many of the scholars who take this position focus not so much on the concept of rights themselves, but on the notion of human dignity which those rights are intended to protect and promote. The universality of notions of human dignity, according to this view, is sufficient to establish a transcultural foundation for human rights.

Paulin J. Hountondji, a Beninese philosopher, has noted that the “source” of human rights must be located not in some abstract theory but in the reality of human suffering, and in the struggle against it.<sup>70</sup> He asserts that, “Only by remaining silent about this commonly experienced fact, or by considerably reducing its implications, is it possible to make human rights an invention of Western culture.”<sup>71</sup> Hountondji is preoccupied with the irony of finding agreement between “certain local potentates trying, in the name of their peoples’ independence and cultural originality, to relativize the idea of ‘human rights’ ” and “the most insipid ideologists of Western superiority.”<sup>72</sup> He

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<sup>65</sup>*Ibid.* at 65.

<sup>66</sup>*Ibid.* at 50.

<sup>67</sup>*Ibid.* at 63.

<sup>68</sup>*Ibid.*

<sup>69</sup>*Ibid.*

<sup>70</sup>*Supra* note 1 at 319.

<sup>71</sup>*Ibid.* at 320.

<sup>72</sup>*Ibid.*

recognizes the undeniable historical linkage between modern doctrines of human rights and the West, but refuses to characterize it as exclusive. According to Hountondji, "Europe certainly did not invent human rights, any more than it invented human dignity."<sup>73</sup> Instead, the European innovation lies in taking the universal idea of human dignity and elaborating a "philosophy of human rights".<sup>74</sup> Values in general, and notions of human dignity and human rights in particular, cannot be accurately situated in one time and place. For that very reason, Hountondji insists, "it is impossible to apply total cultural relativism to values, to make them depend, not only for their artificial expression and determination but also for their ultimate basis, on fortuitous cultural factors."<sup>75</sup> He goes on to assert:

For the only foundation here are human beings: human beings who for millenia have suffered at the hands of human beings, in all countries, and throughout all cultures; human beings so often duped to the point of becoming the accomplices of their torturers and of the social systems that oppress them, but also human beings who can sometimes rebel or become indignant, expressing, by this act alone, their awareness of an irrepressible dignity. What varies, not only from one culture to another, as has already been stated, but also within one culture from one period to another and from one class or social group to another, are the forms of this indignation, the modes of expression of this universal demand for respect and, consequently, the details of the rights considered to be essential and inalienable. But in no society is awareness of dignity truly absent, perhaps because in no society, alas, has this dignity ever been fully respected.<sup>76</sup>

Hountondji considers and rejects the standard justification, raised by Pollis and Schwab, that states must sometimes repress rights in the short term in order to achieve development in the long term. He argues that even if development according to the Western model did require such sacrifices, there is no reason why the Third World in general, or Africa in particular, should follow the same model. He asserts, in fact, that if such repression was in fact required, that should be grounds for rejecting that path:

Who has decided that from now on, human history must reproduce everywhere the choices or, at best, the alternatives of European history, that these alternatives were the only ones imaginable and practicable, that the horizon of what was possible was henceforth limited, for all time, by the actual experience of today's industrialized countries? On the basis of a critique of known experience, putting to good use all available resources of knowledge and intelligence, why not seek new roads to 'development', forms of progress that respect both the legitimate demands of sovereignty and economic well-being, and the imprescriptible dignity of human beings?<sup>77</sup>

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<sup>73</sup>*Ibid.* at 323.

<sup>74</sup>*Ibid.*

<sup>75</sup>*Ibid.* at 324-5.

<sup>76</sup>*Ibid.* at 325.

<sup>77</sup>*Ibid.* at 326.

Hountondji goes on to ask why, instead of focusing on European history and models, more attention is not paid to the political history of pre-colonial Africa.<sup>78</sup> He does not take a romantic or idealized view of that past; instead, he ends his paper with a consideration of just how one might undertake the project of examining the status of human rights in “so-called traditional Africa”. He emphasizes that the expectations of such a study must be made clear. First, he insists that the study should not be seen as determining “the validity or non-validity of human rights here and now, in Africa today”.<sup>79</sup> Next, he argues that to search for African ideas of human rights must avoid the trap of “simply looking for indigenous counterparts, in our own cultures, of the cultural products which seem to us most remarkable in contemporary Western civilization, to wit, a ‘philosophy’ of human rights”.<sup>80</sup> He states:

Any anthropological project whose only purpose is to react to the provocations of Western chauvinism, and whose only ambition is to establish the comparability of our cultures with those of Europe – thereby continuing surreptitiously to transmit the very models it claims to challenge – is unacceptable because it is contradictory. It is for themselves and not for Europe, in themselves and not to refute Europe's views and blunders concerning them, that our cultures must be studied: to understand their logic and way of functioning, their internal contradictions, their evolution, their prospects, their grandeur and their limitations, in order better to appreciate and transform them.<sup>81</sup>

What Hountondji proposes is a rejection of the colonialist view of the static nature of “traditional African society”. He sees the need for “a critical history of repressive elements in our own culture, a history of the way in which this repression has been exercised, disapproved of, opposed, imposed, aggravated – in short, a critical history or the contradictions and struggles within our apparently immobile culture.”<sup>82</sup>

**4) The concept of human rights may not be universal, but there is sufficient cross-cultural commonality to be able to identify a core set of values that ought to be recognized and protected through human rights guarantees.**

Proponents of this view often speak of a concept of universality which encompasses only certain basic norms or principles. S.P. Sinha presents an argument in favor of a version of “limited universality” in a 1978 article entitled “Human rights philosophically”.<sup>83</sup> Taking issue with approaches to human rights which do not take into account the extent of differences between cultures, Sinha draws a distinction

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<sup>78</sup>*Ibid.*

<sup>79</sup>*Ibid.* at 331.

<sup>80</sup>*Ibid.*

<sup>81</sup>*Ibid.*

<sup>82</sup>*Ibid.*

<sup>83</sup>“Human rights philosophically” (1978) 18 *Indian Journal of International Law* 139.

between the “concept” of human rights and the “catalogue” of human rights. He argues that while the concept of human rights is universal, the catalogue of rights within any society is culture-based. According to Sinha, such a distinction permits a middle-ground between the extreme universalist and relativist positions.

Sinha delineates two “patterns” of human rights, the first involving “one comprehensive legal document of one particular society which is characterized by one predominant cultural [sic] and one predominant ideology”, the second involving setting out particular rights in a “treaty about which there has been a common agreement among the states party to the treaty”.<sup>84</sup> He portrays the modern human rights movement as having adopted the former approach, which he sees reflected in the *Universal Declaration*:

[The *Universal Declaration*] enumerates rights, intended to apply to the whole world, which have no claim to universality. It contains rights which are culturally, ideologically, and politically non-universal ... Thus, to the extent these kinds of rights are concerned, we have the scenario of one particular culture, or one particular ideology, or one particular political system claiming to be imposed upon the entire world.<sup>85</sup>

Sinha argues that at least part of the responsibility for the “frustration of human rights throughout the world” lies with the weaknesses of this single catalogue approach.<sup>86</sup> The primary weakness “lies in not distinguishing the concept of human rights from any particular catalogue of such rights.”<sup>87</sup> The notion that the individual should be treated justly, and be both protected “from privation by the powerful” and given a means of fulfilling his or her needs, according to Sinha, is “undoubtedly an ideal accepted in all societies.”<sup>88</sup> However, “[s]ince the world is pluralistic, composed of societies which are culturally, ideologically, and economically different, there can be no single, specific way of going about achieving that ideal.”<sup>89</sup> Sinha emphasizes differences in history, culture, ideology and economics among human beings, and insists that human rights theory must recognize these differences.<sup>90</sup>

On the other hand, Sinha rejects the view that the international movement for human rights is forestalled by the existence of cultural differences. He insists:

[W]hat is culturally variable is not the concept that the human being be protected from the excesses of the State organs and that just conditions be created for the fulfillment of

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<sup>84</sup> *Ibid.* at 144.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 143.

<sup>87</sup> *Ibid.* at 145.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*



his needs, but, instead, the catalogue or the specification as to how this is to be achieved in different cultures.<sup>91</sup>

However, the mandate of the human rights movement must be rethought:

Since different social systems, characterized by their own economic, cultural, and ideological particularity, have different ways of going about achieving the fulfillment of needs of those who compose their membership, the task of [the] human rights movement becomes the ensuring of justice in fulfillment of man's needs within the context of these different systems of economic, cultural and ideological particularities.<sup>92</sup>

Such an approach would “make it possible to develop particular catalogues of specific human rights for different social systems.”<sup>93</sup> Sinha does not deny that the catalogues might have considerable commonalities and overlap; parts of them might even be universal. However, he insists that it would be universality of a very different kind:

[This universality] would be a consequence of applying the human rights imperative to the different social systems and not an instance of the catalogue of one particular society being rammed down the throat of another under the crusadic disguise of human rights. It is self-defeating for the human-rights movement to take the latter approach ... and then – and here is the greatest danger of all – retire in the smug delusion that having done that, justice has thereby been achieved for the individual.<sup>94</sup>

Similarly, Alison Dundes Renteln has argued that we need to go beyond a “presumption” of universality in order to explore cross-cultural commonalities that will enable us to formulate a truly international understanding of human rights.<sup>95</sup> As an alternative, she proposes that the focus must be on the identification of those fundamental norms on which there can be true cross-cultural consensus:

In the end we must resist the temptation of believing that all people share a single moral conception. This is contrary to reality. But at the same time we need not abandon the search for universals. Diversity does not preclude the possibility that there may be convergence in the many moral systems of the world. The question which remains to be answered is what particular moral standards all societies hold in common. The presumption of universality, a common Western intuition, must be shed. The way will then be clear to discover cross-cultural universals. There remains hope that the ideals

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<sup>91</sup>*Ibid.* at 146.

<sup>92</sup>*Ibid.* at 159.

<sup>93</sup>*Ibid.*

<sup>94</sup>*Ibid.*

<sup>95</sup>A.D. Renteln “The Unanswered Challenge of Relativism and the Consequences for Human Rights” (1985) 7 *Human Rights Quarterly* 514; “Relativism and the search for human rights” (1988) 90 *American Anthropologist* 56-72 (“Relativism”); *International Human Rights: Universalism Versus Relativism* (Newbury Park, Ca.: Sage, 1990) (*International Human Rights*). Dundes Renteln takes issue with Sinha's approach, arguing that “while his theory is culturally sensitive, it cannot provide any universals. Hence it is no longer a theory of human rights but rather a theory of cultural rights.” Dundes Renteln, *International Human Rights*, *ibid.* at 54.

of all cultures contain some commonalities. Greater specificity is needed if we are to rescue human rights from their precarious position. It is my hope that by taking the approach set forth in this study we will come to know what moral principles are shared across the globe, and thereby what international human rights are possible.<sup>96</sup>

Dundes Renteln seeks to rescue relativism from the confusion created by both its proponents and its critics. The tendency has been to view the relativist position as dictating tolerance as a value; however, Dundes Renteln argues that “the theory of ethical relativism as descriptive hypothesis is not a value theory *but rather a theory about value judgments*.”<sup>97</sup> Thus, she emphasizes the need to confront the reality of cultural diversity, rather than advocating that diversity be embraced as a value in itself. The importance of relativism, according to her, is that it emphasizes the extent to which value judgments are inescapably ethnocentric. Nevertheless, the existence of differences among cultures and peoples does not mean that there is no convergence. She asserts, “The crucial point to understand is that just because there are discrete, separate, and competing moral systems does not necessarily mean that they do not overlap. The extent of their congruence remains to be seen.”<sup>98</sup>

### Universality vs. particularity: the politics

The differences between these various positions may appear to be based more on semantics than substance. What is important to bear in mind, however, is the intensely political subtext of many of these discussions. Largely for that reason, the universality/particularity debate is frequently characterized by vitriolic exchanges between proponents of the various positions.

Accusations of racism, ethnocentrism, and opportunism are frequently used in order to trivialize the concerns of advocates of cultural relativism or particularity. For example, in an article entitled “Cultural Absolutism and the Nostalgia for

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<sup>96</sup>*International Human Rights*, *ibid.* at 139-140. The approach taken by Dundes Renteln has not escaped criticism for its lack of consistency. As one writer noted,

Renteln is caught on the horns of her own contradictory stance: that is, she is a relativist who asserts the ethnocentric nature of any value judgments, yet she wants to build a universal conception of human rights through an empirical survey of local forms of justice. Put bluntly, we could say that if there is enough local evidence to build a universalistic foundation for human rights, then there must be enough evidence to cause subsidence in claims of moral incommensurability.

Wilson, *supra* note 7 at 7.

<sup>97</sup>*International Human Rights*, *supra* note 95 at 73.

<sup>98</sup>*Ibid.* at 64.

Community”,<sup>99</sup> Rhoda Howard expresses the view that cultural “relativism” is really cultural “absolutism”, which she defines as follows:

Cultural absolutism is a philosophical position that declares a society's culture to be of supreme ethical value. It advocates ethnocentric adherence to one's own cultural norms as an ethically correct attitude for everyone except loosely-defined “Westerners.” It thus posits particularist cultures as of more ethical value than any universal principle of justice. In the left-right/North-South debate that permeates today's ideological exchanges, cultural absolutists specifically argue that culture is of more value than the internationally-accepted (but Western in origin) principle of human rights.<sup>100</sup>

Howard concludes that “[c]ultural absolutism is the antithesis of human rights.”<sup>101</sup> Similarly, Fernando Teson condemns in scathing terms the view, which he sees as implicit in a relativist position, that only certain countries or cultures should benefit from human rights; he argues that “the theory is fundamentally immoral and replete with racist overtones.”<sup>102</sup> While acknowledging the impulse to respect cultural autonomy, he is generally dismissive of “well-intentioned proposals that are deferential to tyrannical governments and insufficiently concerned with human suffering”.<sup>103</sup>

While the so-called “relativist” approaches tend to reflect a much more nuanced critique of universality, their proponents often question the purity of motive of those who seek to impose a particular set of values on the international community. They invoke history to support their arguments. More than one scholar has put forward pointed reminders that presumptions of universality have been used in the past as dubious justifications for outside intervention. In relation to Latin America, for example, Francisco Miro Quesada has noted:

The process through which imperialist capital intervened in the internal politics of Latin American nations was generally based on the “ideology of the civilizing role”. This ideology was characteristic of Western domination over our countries. The West viewed itself as the source of civilization and spiritual forces. It had a historic mission: to civilize the rest of humanity. Nations would be civilized only if this mission was accomplished.<sup>104</sup>

He goes on to argue that “the West used a liberal and democratic ideology, proclaiming respect for human rights, in order to justify economic penetration.”<sup>105</sup> Similarly, the

<sup>99</sup>R. Howard, “Cultural Absolutism and the Nostalgia for Community” (1993) 15 *Human Rights Quarterly* 315.

<sup>100</sup>*Ibid.* at 315.

<sup>101</sup>*Ibid.* at 325.

<sup>102</sup>Teson, *supra* note 12 at 895.

<sup>103</sup>*Ibid.*

<sup>104</sup>F.M. Quesada, “Human Rights in Latin America”, in *Philosophical Foundations of Human Rights* (Paris: Unesco, 1986) 303 at 310.

<sup>105</sup>*Ibid.*

American Anthropological Association's 1948 "Statement on Human Rights" emphasizes that part of the importance in affirming the positive value of cultural difference lies in rejecting the West's historical tendency to treat cultural differences as a sign of inferiority, and thus disregard and obliterate them:

In the history of Western Europe and America ... economic expansion, control of armaments, and an evangelical religious tradition have translated the recognition of cultural differences into a summons to action. This has been emphasized by philosophical systems that have stressed absolutes in the realm of values and ends. Definitions of freedom, concepts of the nature of human rights, and the like, have thus been narrowly drawn. Alternatives have been decried, and suppressed where controls have been established over non-European people.<sup>106</sup>

The Statement goes on to detail the "disastrous" consequences of this point of view, an expansion of the West "marked by demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established."<sup>107</sup>

Perhaps the most important reason for the hostility towards relativists' positions is that their arguments can so easily be invoked by states more concerned with justification of their poor human rights records than with cultural authenticity. Thus, for example, Donnelly focuses on the potential for abuse of the relativist position, invoking the spectre of self-interested application of the doctrine:

[W]hile recognizing the legitimate claims of self-determination and cultural relativism, we must be alert to cynical manipulations of a dying, lost, or even mythical cultural past. We must not be misled by complaints of the inappropriateness of "Western" human rights made by repressive regimes whose practices have at best only the most tenuous connection to the indigenous culture; communitarian rhetoric too often cloaks the depredations of corrupt and often Westernized or deracinated elites.<sup>108</sup>

This concern, in fact, extends beyond the hard-core universalists. Even Adamantia Pollis, almost invariably cited as a proponent of the relativist position, has recently argued that invocations of cultural differences should be carefully scrutinized.<sup>109</sup> Others have been more blunt, characterizing invocations of cultural difference as an updated version of attempts to block external scrutiny of internal practices on the basis of state sovereignty.<sup>110</sup>

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<sup>106</sup>American Anthropological Association, *supra* note 25 at 540.

<sup>107</sup>*Ibid.* at 540-41. See also Pollis & Schwab, who argue, "While espousing and to a great extent implementing human rights doctrines domestically, the Western industrial states nonetheless denied them to peoples they controlled for generations." (*Supra* note 35 at 14.)

<sup>108</sup>Donnelly, *supra* note 22 at 119.

<sup>109</sup>A. Pollis, "Cultural Relativism Revisited: Through a State Prism" (1996) 18 *Human Rights Quarterly* 316..

<sup>110</sup>See for example A.F. Bayefsky, "Cultural sovereignty, relativism, and international human rights: new excuses for old strategies" (1996) 9 *Ratio Juris* 42-59.

What seems to be overlooked is that many of the so-called relativists do not entirely preclude the possibility of critique in general, or external critique in particular. Pollis and Schwab, for example, note that

What ought to be admitted by those who argue universality is that human rights as a Western concept based on natural right *should* become the standard upon all nations ought to agree, recognizing, however, that this is only one particular value system.<sup>111</sup>

Similarly, Dundes Renteln emphasizes that the inescapably ethnocentric nature of our ethical judgments does not preclude criticism of other cultures.

There is no reason why the relativist should be paralyzed, as critics have often asserted. But a relativist will acknowledge that the criticism is based on his own ethnocentric standards and realizes also that the condemnation may be a form of cultural imperialism. Under extreme circumstances, meaning that an action in another culture violates one of the relativist's most deeply held beliefs, the relativist may decide that criticism and even intervention are lesser evils than either ethnocentrism or cultural imperialism. Certainly the moral criticism loses some of its force if it no longer stems from universal standards. Nevertheless, the relativist is not prevented from offering criticism, and the force of his argument against a practice may not be unimportant. In an interdependent world, if culture A objects strenuously enough to a practice in culture B, culture B may fear a loss of foreign aid or other privileges. Thus, it is not obvious that acknowledging that a criticism is ethnocentric renders it impotent. *It is better to be honest about the local source of the criticism than to pretend that it is universal.*<sup>112</sup>

Even the American Anthropological Association's "Statement on Human Rights" does not contemplate a complete lack of vantage point from which to critique oppressive practices. Indeed, it asserts that "underlying" cultural values can be drawn upon to combat oppressive or imperialistic tendencies of governments.<sup>113</sup>

Proponents of the universalist position do not seem interested in these kinds of niceties. Universality, whether well-founded or not, provides a particularly comfortable vantage point from which to critique.<sup>114</sup> This may be why many view with alarm the trend on the part of traditionally recalcitrant states to stop rejecting human rights altogether. One writer has suggested that "interpretation of human rights norms may have replaced rejection by Asian states."<sup>115</sup> In other words, rather than denying the possibility of universality, these states may be shifting towards demanding a voice in defining it.

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<sup>111</sup>Pollis & Schwab, *supra* note 35 at 4.

<sup>112</sup>Dundes Renteln, "Relativism", *supra* note 95 at 63-64. [Emphasis added]

<sup>113</sup>Statement on Human Rights, *supra* note 25 at 543. This particular assertion has been a favorite target of criticism. See for example Dundes Renteln, "Relativism", *supra* note 95 at 67; Wilson, *supra* note 7 at 2.

<sup>114</sup>For a fascinating discussion of the refusal of the mainstream human rights movement to confront and accept its own ideological underpinnings, see Mutua, *supra* note 6.

<sup>115</sup>B. Kausikan, "Asia's Different Standard" (1993) 92 Foreign Policy 24 at 25.

Arguably, such a shift was apparent in the process leading up to the Second World Conference on Human Rights, held in Vienna, Austria, from 8-12 June 1993. At the Asian Regional Preparatory Committee meeting, held in Bangkok, the governments of a number of states advocated an approach to human rights protection that would be sensitive to cultural particularities and differences. The Bangkok Declaration, said to contain “the aspirations and commitments of the Asian region”, reflected these concerns. The Preamble included a recognition that “the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and imposition of incompatible values”. Paragraphs 7 and 8 provide that the Asian states:

Stress the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and politicization, and that no violation of human rights can be justified;

Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.<sup>116</sup>

The Declaration also expressed concern about the trend towards the “politicization” of human rights and the practice of tying aid to human rights concerns; Paragraph 4 provides that the Asian States “[d]iscourage any attempt to use human rights as a conditionality for extending development assistance.”<sup>117</sup>

Despite the ambiguity of the Bangkok Declaration, it has been interpreted as expressing continuing opposition to human rights.<sup>118</sup> Partly because of the results of the Bangkok meeting, many observers feared that the outcome of the World Conference would represent a retreat from the notions of universality of international human rights norms.<sup>119</sup> The position of a number of governments and almost all the

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<sup>116</sup>Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights (Bangkok Declaration) reprinted in (1993) 14 Human Rights Law Journal 367-371. See also the Tunis Declaration (Final Declaration of the Regional Meeting for Africa), Paragraph 5 of which provides:

The observance and promotion of human rights are undeniably a global concern and an objective to the realization of which all States, without exception, are called upon to contribute. However, no ready-made model can be prescribed at the universal level since the historical and cultural realities of each nation and the traditions, standards and values of each people cannot be disregarded.

<sup>117</sup>See also San Jose Declaration (Final Declaration of the Regional Meeting for Latin America and the Caribbean), paragraph 12 of which provides in part that “when democratic Governments are making determined efforts to resolve their human rights problems, such problems should not be used for political ends or as a condition for extending assistance or socio-economic cooperation.”

<sup>118</sup>See for example Wilson, *supra* note 7 at 15. Wilson cites the Bangkok Declaration as an example of “some postcolonial regimes’ opposition to human rights.”

<sup>119</sup>“States Limp Across the Finish Line”, Human Rights Tribune, Nov. 1993, at 20.

non-governmental organizations involved in the Conference process was that such a retreat was to be avoided at all costs. In the end, the Vienna Declaration and accompanying programme of action did include references to these basic principles:

The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfill their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. *The universal nature of these rights and freedoms is beyond question...*

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.

All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.<sup>120</sup>

However, the Vienna Declaration did not eliminate the pre-existing uncertainty regarding universality. According to one Asian commentator,

The West went to Vienna accusing Asia of trying to undermine the ideal of universality, and determined to blame Asia if the conference failed. The result after weeks of wrangling was a predictable diplomatic compromise ambiguous enough so all could live with it, but that settled very few things. There was no real dialogue between Asia and the West, no genuine attempt to address the issues or forge a meeting of the minds. If anything, the Vienna conference may only have hardened the deep skepticism with which many Asian countries regard Western posturing on human rights.<sup>121</sup>

### **Universality *and* particularity: beyond the impasse?**

Finger-pointing on all sides has rendered the debate in this area somewhat sterile; it seems that there is only so far one can go before the positions become entrenched in mutual distrust. As one scholar recently noted:

[T]he debate about the universality or relativity of human rights is not only highly antagonistic, but it also takes place at an extremely abstract level ... . [A]t this metagenereal level of analysis, almost all arguments become plausible, or equally true or false. One glosses over a multitude of cultural particularities such as those in Islam or traditional Africa, in a few pages, just for the sake of creating an argument about the presence or absence of human rights, an argument that can be contradicted the next

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<sup>120</sup>United Nations World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, reprinted in (1993) 14 Human Rights Law Journal 352.

<sup>121</sup>Kausikan, *supra* note 115 at 32.

moment with just as many convincing arguments... . When the debate on the universalism or relativism of human rights is so radically removed from the cultural "realities" it alleges to speak about, it hardly creates anything but its own impasse.<sup>122</sup>

Recent literature in the human rights area, which has explored areas such as the treatment of women's rights as human rights, the status of indigenous peoples and other minority groups, and the special vulnerability of children and persons with disabilities, has led to a heightened awareness of the complexities involved in any attempt to define "human dignity", and an acceptance of the need to contextualize such inquiries in order to see human beings in their multidimensionality. At the same time, there has been a marked reluctance to abandon the notion of universality without which, it is argued, no coherent conception of international human rights law can exist. Feminist analyses of international human rights law offer some important insights in this regard. Claims of cultural relativism have frequently been invoked to justify practices that are problematic from the perspective of gender equality. However, the response of women's rights advocates to the challenge posed by cultural relativism has been complicated by the fact that feminist scholarship has had to critique universality, by arguing that the abstract conceptualization of human rights reflects only the "human" experience of males, while at the same time maintaining some ground for making a cross-cultural critique of practices that have a negative impact on women.<sup>123</sup> Many writers who have taken the view that women's rights are universal have posited that the denial of those rights stems from oppressive systems that reflect male bias and are structured so as to marginalize and exclude women. Some writers have gone so far as to argue that a feminist approach to human rights can in fact sidestep the debate about relativism, because feminism offers a "multi-cultural response to the oppression of women."<sup>124</sup> Others have opted for an "instrumentalist" approach to universality, which simply views the concept as a useful strategic tool for achieving the protection of various rights.

However, despite its practical appeal such an approach is problematic. In an article entitled "Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies", Annie Bunting notes, "[S]trategic implementation of universal rights suppresses and devalues cultural diversity. Fundamental cultural conflicts are left unresolved, buried beneath presumptively universal norms."<sup>125</sup> Bunting takes a considerably more nuanced approach to the challenge posed by cultural relativism.

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<sup>122</sup>Preis, *supra* note 32 at 292-293.

<sup>123</sup>See in general E. Brems, "Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse" (1997) 19 Human Rights Quarterly 136.

<sup>124</sup>N. Kim, "Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism" (1993) 25 Columbia Human Rights Law Review 49 at 50.

<sup>125</sup>A. Bunting, "Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies" (1993) 20 Journal of Law and Society 6 at 10.



She emphasizes the dangers inherent in any attempt to understand either “female oppression” or “male domination” outside of specific cultural, historical, economic and political contexts. While recognizing that culture can construct and/or exacerbate gender inequality, Bunting refuses to posit a seemingly neutral or universal standpoint from which all cultures and societies can be judged, and which could lead to misleading oversimplification and generalization. She cautions against blanket condemnations of “patriarchy” and “male domination” that do little or nothing to account either for differences between cultures or for the particular kinds of oppression that women experience in their daily lives.

The concerns outlined above have provided an impetus to the development of approaches that attempt to overcome the stark dichotomy between universalism and relativism. Such an approach is reflected in the essays which make up a 1992 collection edited by Abdullahi A. An-Na'im, *Human Rights in Cross-Cultural Perspective: A Quest for Consensus*.<sup>126</sup> An-Na'im roots his approach firmly in the practical imperative of understanding and bridging the gulf between the theory and practice of human rights. He articulates the challenge facing international human rights scholars: “Current and foreseeable new human rights cannot be seen as truly universal unless they are conceived and articulated within the widest possible range of cultural traditions.”<sup>127</sup> At the same time, An-Na'im maintains a realistic view of the potential of this approach:

The proposed approach seeks to explore the possibilities of cultural reinterpretation and reconstruction through internal cultural discourse and cross-cultural dialogue, as a means to enhancing the universal legitimacy of human rights. This approach does not assume that sufficient cultural support for the full range of human rights is either already present or completely lacking in any given cultural tradition. Rather, more realistically, prevailing interpretations and perceptions of each cultural tradition can be expected to support some human rights while disagreeing with or even completely rejecting other human rights.<sup>128</sup>

The approach is particularly appealing because it avoids the antagonistic rhetoric that has characterized so much of the universality versus particularity debate. It attempts to find a middle ground within which human rights are seen as being defined by the interplay between international standards and particular cultural/societal values. In an essay in the same collection, Richard Falk criticizes the “all-or-nothing view of the relevance of culture” which has characterized many human rights scholars.<sup>129</sup> He argues:

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<sup>126</sup>A.A. An-Na'im, ed., *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992).

<sup>127</sup>“Introduction”, in *Human Rights in Cross-Cultural Perspective: A Quest for Consensus*, *ibid.*, 1-15 at 2.

<sup>128</sup>*Ibid.* at 3-4.

<sup>129</sup>“The Cultural Foundations for the International Protection of Human Rights”, in *ibid.* 44-64 at 44.

[B]oth of these polar positions on the relevance of culture should be rejected. If the field of human rights continues to be controlled by these interpretive perspectives in their various forms, the most probable result is a demeaning encounter between two forms of fundamentalism, the pitting of relentless secularists against hardened traditionalists.<sup>130</sup>

Falk asserts that we need to recognize the reality of cultural “penetration and overlapping”<sup>131</sup> that characterizes the modern world. He urges us to recognize “an intermediating relevance for both international law and cultural hermeneutics, above all seeking to reconcile cultural and global sources of authority by reference to a core concern for the minimum decencies of individual and group existence.”<sup>132</sup> The role of international human rights law, then, is to facilitate “dialogue about appropriate behavioral standards in an atmosphere of growing toleration for divergency arising from varying cultural traditions.”<sup>133</sup>

An-Na'im and Falk portray culture as a field of struggle, but seem to perceive it largely as an internal struggle. An-Na'im has pointed out the dangers involved in abandoning the religious or cultural domain to the tender mercies of fundamentalists who would like it to remain a bulwark against change.<sup>134</sup> Writing specifically on the intersection of women's rights and Islam, he makes important observations that are consistent with his overall approach to the intersection of international human rights norms and cultural or religious values. He points out that there is rarely, if ever, consensus within a given society about the implications of religious precepts. Culture and religion, far from being removed from the daily lives of men and women, constitute fora within which changing roles and values are debated. However, An-Na'im is careful to point out that the challenge of reinterpreting Islamic norms is one that is by definition limited to Muslims.<sup>135</sup> International standards can play an important role in providing focal points for discussion, but they cannot simply be imposed without sensitivity to cultural and historical specificity.

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<sup>130</sup>*Ibid.* at 45.

<sup>131</sup>*Ibid.* at 46.

<sup>132</sup>*Ibid.*

<sup>133</sup>*Ibid.*

<sup>134</sup>A. An-Na'im, “The Rights of Women and International Law in the Muslim Context” (1987) 9 Whittier Law Review 491 at 500.

<sup>135</sup>*Ibid.* at 514. An-Na'im recognizes that this division into “internal” and “external” realms can be problematic. What about the situation of those who hold a set of beliefs different from those of the majority within any given society? In an article on the rights of religious minorities, he asserts categorically that Muslims cannot rely on the provisions of Shari'ah law to justify discriminatory treatment of non-Muslims, and must instead “seek ways of reconciling Shari'ah with fundamental human rights”: “Religious Minorities under Islamic Law and the Limits of Cultural Relativism” (1987) 9 Human Rights Quarterly 1 at 18. Consistent with his overall approach, however, he emphasizes that “[t]he choice of the particular methodology for achieving this result must be left to the discretion of the Muslims themselves.”

On the other hand, there has recently been increased attention paid to the ways in which notions of human rights have in fact begun to interact and perhaps even merge with cultural understandings. For example, a recent collection entitled *Human Rights, Culture and Context: Anthropological Perspectives*<sup>136</sup> offers illuminating examples of the ways in which human rights discourse is deployed in local contexts, with a view to examining the “globalisation of human rights”.<sup>137</sup> In his introduction to the volume, Richard Wilson notes that universalism and relativism each offer some conceptual advantages, but that “the universalist/relativist polarity is too totalising in its conceptualisation.”<sup>138</sup> A more fruitful way of examining the problems posed by the debate, according to Wilson, is to engage in “more detailed studies of human rights according to the actions and intentions of social actors within wider historical constraints of institutionalised power.”<sup>139</sup> He criticizes the traditional cultural relativist approach for invoking a “misguided conception of culture”, one that constructs culture as “internally uniform and hermetically bounded”:<sup>140</sup>

‘Culture’ is seen as shared and normative, not as cross-cut by social differences (age, caste, gender, etc.), or characterised as contested, fragmented, contextualised and emergent. Culture is referred to as an entity, not as a process; as a noun, not a verb. For their doctrine to be coherent, cultural relativists seem to hold a nineteenth-century notion of culture as discrete and homogeneous, as the product of isolation, and as the basis of all difference and similarity between human beings. Their relativism is predicated upon bounded conceptions of linguistic and cultural systems, but it falls apart in contexts of hybridity, creolisation, intermixture and the overlapping of political traditions.<sup>141</sup>

Perhaps even more importantly, however, relativists have ignored the extent to which human rights have filtered into this “cultural” realm: “Despite the charges of some governments of ‘cultural imperialism’ in the application of international law, human rights doctrine has been adopted by many people to whom it was once foreign.”<sup>142</sup>

Wilson does not deny the dangers of ethnocentrism in the human rights context, but sees the universalist position as having increasing validity, and the relativist position as being increasingly undermined, through “the globalisation of cultural,

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<sup>136</sup>R.A. Wilson, ed. *Human Rights, Culture and Context: Anthropological Perspectives* (London; Chicago: Pluto Press, 1997).

<sup>137</sup>Wilson, *supra* note 7 at 3.

<sup>138</sup>*Ibid.* at 3.

<sup>139</sup>*Ibid.* at 4.

<sup>140</sup>*Ibid.* at 9.

<sup>141</sup>*Ibid.*

<sup>142</sup>*Ibid.* This presupposes that the notion of human rights is, indeed, “foreign” to these cultures. Elsewhere in his introduction, Wilson asserts that he agrees with Jack Donnelly’s assumption that human rights and notions of human dignity are quite different. *Ibid.* at 13-14.

economic and political processes.”<sup>143</sup> Indeed, Wilson suggests we may be moving into a ‘post-cultural’ world.<sup>144</sup> He is careful to qualify what he means by globalisation:

[G]lobalisation does not mean the same as westernisation, modernisation or standardisation ... [W]e should not adopt a diffusionist view of globalisation since it does not just imply a process of homogenisation and integration, but involves a proliferation of diversity as well. A diversity of normative orders may still prevail, and may even be exacerbated by global processes, but they are no longer predicated upon isolation. Rather, a sense of different is constructed out of relatedness, opposition and an awareness of plurality. Nor are moral differences as reliant on enclosed systems as before, but are more fragmented and susceptible to transnational flows of moral values, particularly through world religions. Just because a cultural form is global, it does not mean that everyone relates to it in the same way – its interpretation depends on local and individual value distinctions.<sup>145</sup>

To speak of the universality of human rights, then, “becomes a question of context, necessitating a situational analysis.”<sup>146</sup> Anticipating criticism that such a requirement drifts back into relativism, Wilson insists, “It is possible to have contextualisation without relativisation, since one can keep open the possibility, and in the dying embers of the twentieth century, the likelihood, that contexts are interlinked through a variety of processes”.<sup>147</sup> Moreover, he emphasizes, the attention to context requires far more than attention to cultural boundaries – specificity extends to a wide variety of factors:

Local interpretations of human rights doctrine draw on personal biographies, community histories, and on expressions of power relations between interest groups. Their relationship to formal, legal versions has to be discovered, not assumed. Just because an Asian or African human rights organisation uses the language of human rights, against its government, it should not be assumed that human rights are being invoked in an orthodox and positivist legal manner. This assumption ignores the degree to which human rights doctrine does get reworked and transformed in different contexts, whether the context is “non-Western” or not.<sup>148</sup>

Despite their differences, the approaches discussed in this section go beyond a static view of either culture or international human rights norms. The development of those norms is seen as an inherently dynamic process; the standards embodied in the *Universal Declaration* and other human rights instruments are constantly being recreated. Thus, rather than constituting two irreconcilable positions, universality and particularity are seen as poles between which our thinking about human rights must

<sup>143</sup>*Ibid.* at 10.

<sup>144</sup>*Ibid.*

<sup>145</sup>*Ibid.*

<sup>146</sup>*Ibid.*

<sup>147</sup>*Ibid.*

<sup>148</sup>*Ibid.*

constantly oscillate in order to capture the complexity and diversity of human experience.

### Implications for the *Universal Declaration*

What are the implications of these debates for the “universal” status of the *Universal Declaration*? One might choose to regard them as indicative of the contingent, tentative and ultimately ungrounded nature of the document. For those who regard the Declaration itself as a kind of “foundation”, a bedrock for international human rights law as a whole, such an approach offers little appeal: fluidity and dynamism may have their advantages, but surely leave something to be desired when it comes to an area of such fundamental importance. On the other hand, there is the choice of immunizing the Declaration from the contagion of theory by elevating its significance to mythic proportions, thus placing it beyond questioning and critique. Arguably, however, to do so is to lose sight of the Declaration itself, and to raise an idol in its place. Few scholars or activists would openly espouse such an alternative, but it is worth questioning the extent to which their unwillingness to engage with serious theoretical critiques amounts to much the same stance.

Perhaps one author captures it best when he notes:

The 1948 *Universal Declaration* was a *historic* document. It is rightly regarded as a key moment in shaping the post-war world. In the meantime, however, it has become also a *historical* document. It can now be seen to mirror the concerns of that time and to embody its asymmetry of political power.<sup>149</sup>

Historic *and* historical: this implies that the importance of the *Universal Declaration* as a landmark in the development of international human rights law should be celebrated but, at the same time, its context, specificity and limitations must also be acknowledged. This does not mean that we must discard the *Universal Declaration* and start all over again. The Declaration remains relevant and important, a testimony to a particular ethos at a particular historical juncture, but cannot be assumed to represent an eternal and exhaustive enumeration of the common aspirations of the international community.

For far too long, challenges to universality have been interpreted as rejections of human rights, cynical and self-interested invocations of ill-founded philosophical, cultural or political values. Perhaps one might instead welcome those challenges as presenting another historic opportunity: the opportunity to open up human rights discourse to those whose aspirations it has always been intended to embody, to incorporate and reflect the tremendous diversity within the international community.

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<sup>149</sup>John Clayton, “Religions and Rights: Local Values and *Universal Declarations*”, in A. A. An-Na'im *et al.*, eds, *Human Rights and Religious Values: An Uneasy Relationship?* (Amsterdam: Editions Rodopi, 1995) 259 at 264.

What better way, after all, to celebrate the fiftieth anniversary of the *Universal Declaration*?